United States Senate
Committee on the Judiciary

Questionnaire for Non-Judicial Nominees

Appendix 12(c)

WILLIAM PELHAM BARR
Nominee to be United States Attorney General

In my long career in the public and private sectors, there have been many instances in which I have testified, provided official statements, and made other communications relating to matters of public policy or legal interpretation to public bodies or public officials. I often have not kept records of many of these instances, and I lack any recollection of many of them. The following materials were compiled after a review of my own records and through searches of publicly available records by persons acting on my behalf. The materials include letters from my time at GTE Corporation and Verizon, during which time I signed my name on behalf of those corporations in numerous letters and communications with government entities. I did not keep copies of those documents. I have provided all such communications found through reviewing my own records, public records, and records requested from Verizon.

Letter to Deputy Attorney General Rod Rosenstein and Assistant Attorney General Steve Engel, June 8, 2018. Copy supplied.

In 2017, I wrote a letter of support to the Senate Committee on Commerce, Science, and Transportation, supporting the nomination of Steven Bradbury to be General Counsel for the Department of Transportation. I have searched public records and my own files but have been unable to locate a copy.

Letter to President Donald J. Trump, Feb. 23, 2017. Copy supplied.

Letter to Chairman Grassley and Ranking Member Feinstein, Dec. 5, 2016. Copy supplied.

Letter to Mitch McConnell and Harry Reid regarding Sentencing Reform and Corrections Act of 2015, Dec. 10, 2015. Copy supplied.

Letter to Majority Leader Reid and Minority Leader McConnell, May 12, 2014. Copy supplied.

Letter to Chief Judge Reade, Apr. 26, 2010. Copy supplied.

Letter to Chairman Leahy and Ranking Member Sessions, Mar. 4, 2010. Copy supplied.

Letter to Chairman Leahy and Senator Specter, Jan. 7, 2009. Copy supplied.

Letter to Chairman of Distinguished Graduate Award, Nov. 5, 2008. Copy supplied.

Letter to Ambassador Sobel, Nov. 2, 2006. Copy supplied.

Letter to Chairman Arlen Specter, May 5, 2006. Copy supplied.

Letter to Speaker DiMasi, Feb. 10, 2006. Copy supplied.

Letter to Chairman Specter and Senator Leahy, Jan. 4, 2006. Copy Supplied.

Letter to Senate Judiciary Committee, Sept. 2005. I wrote a letter to the Committee regarding Chief Justice Roberts's confirmation. I have searched public records and my own files but have been unable to locate a copy.

Review of Department of Defense Detention and Interrogation Policy and Operations in the Global War on Terrorism, 109th Cong. (July 14, 2005). Video available at: https://www.c-span.org/video/?187644-1/detention-policies-military-justice. Copy supplied.

Detainees, 109th Cong. (June 15, 2005). Video available at: https://www.c-span.org/video/?187193-1/guantanamo-detainees. Copy supplied.

Letter to Chairman Arlen Specter, May 10, 2005. Copy supplied.

Meeting Minutes, William and Mary Board of Visitors, Apr. 21-22, 2005. Copy supplied.

Letter to Congress in support of the USA Patriot Act, Sept. 23, 2004. Copy supplied.

Letter to Chairman Powell, June 28, 2004. Copy supplied.

Letter to Chairman Powell and Commissioner Abernathy, June 1, 2004. Copy supplied.

In February 2004, I wrote a letter of support to the Senate Judiciary Committee supporting the nomination of William G. Myers III to the U.S. Court of Appeals for the Ninth Circuit. I have searched public records and my own files but have been unable to locate a copy.

Letter to Chairman Powell, Jan. 7, 2004. Copy supplied.

Hearing of the National Commission on Terrorist Attacks upon the United States, Sixth Public Hearing, 108th Cong. (Dec. 8, 2003). Video available at: https://www.c-span.org/video/?179456-4/terrorism-domestic-intelligence. Copy supplied.

Securing Freedom and the Nation: Collecting Intelligence Under the Law, Constitutional and Public Policy Consideration, 108th Cong. (Oct. 30, 2003). Copy supplied.

Consumer Privacy and Government Technology Mandates in the Digital Media

Marketplace, 108th Cong. (Sept. 17, 2003). Copy supplied.

Pornography on the Internet, 108th Cong. (Sept. 9, 2003). Copy supplied.

The WorldCom Case: Looking at Bankruptcy and Competition Issues, 108th Cong. (July 22, 2003). Copy supplied.

In July 2003, I wrote a letter to the General Services Administration on behalf of Verizon regarding MCI's bankruptcy. I have searched public records and my own files but have been unable to locate a copy.

Letter to U.S. Attorney Comey, May 2, 2003. Copy supplied.

Letter to Chairman Donaldson, Mar. 19, 2003. Copy supplied.

Letter to Secretary Dortch, Feb. 6, 2003. Copy supplied.

Letter to Chairman Powell, Jan. 30, 2003. Copy supplied.

Letter to Chairman Powell, Jan. 17, 2003. Copy supplied.

Letters to Chairman Powell and Commissioners Abernathy, Adelstein, Copps, and Martin, Dec. 17, 2002.

Letter to Chairman Powell, Nov. 22, 2002. Copy supplied.

Letter to Chairman Powell, Oct. 16, 2002. Copy supplied.

Letter to Chairman Powell, July 16, 2002. Copy supplied.

Letter to Chairman Powell, Jan. 9, 2002. Copy supplied.

Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism, 107th Cong. (Nov. 28, 2001). Video available at: https://www.c-span.org/video/?167495-1/justice-department-civil-liberties. Copy supplied.

American Broadband Competition Act of 2001 and the Broadband Competition and Incentives Act of 2001, 107th Cong. (May 22, 2001). Copy supplied.

Letter to Secretary Salas, Apr. 3, 2000. Copy supplied.

In February 2000, I wrote a letter to Congressman Charles Canady regarding bail bonds. I have searched public records and my own files but have been unable to locate a copy.

Letter to Chairman Strom Thurmond, July 22, 1999. Copy supplied.

Internet Freedom Act and Internet Growth and Development Act of 1999, 106th Cong. (June 30, 1999). Video available at: https://www.c-span.org/video/?125922-1/internet-broadband-issues. Copy supplied.

Reauthorization of the Independent Counsel Statute, Part I, 106th Cong. (Mar. 10, 1999). Video available at: https://www.c-span.org/video/?121721-1/reauthorization-independent-counsel-law. Copy supplied.

Letter to Attorney General Janet Reno, May 25, 1998. Copy supplied.

The 1996 Telecom Act: An Antitrust Perspective, 105th Cong. (Sept. 17, 1997). Copy supplied.

Universal Service Part I of III, 105th Cong. (Mar. 12, 1997). Copy supplied.

Letter from Edwin Meese and William Barr to Newt Gingrich and Robert Dole, Dec. 29, 1996. Copy supplied.

Mergers and Competition in the Telecommunications Industry, 104th Cong. (Sept. 11, 1996). Copy supplied.

Restructuring Intelligence Agencies, Commission on the Roles and Capabilities of the United States Intelligence Community, Jan. 19, 1996. Video available at https://www.c-span.org/video/?69458-1/restructuring-intelligence-agencies-part-3.

Prison Reform: Enhancing the Effectiveness of Incarceration, 104th Cong. (July 27, 1995). Copy supplied.

International Terrorism: Threats and Responses, 104th Cong. (June 12, 1995). Copy supplied.

Combating Domestic Terrorism, 104th Cong. (Mar. 3, 1995). Copy supplied.

Balanced Budget Constitutional Amendment, 104th Cong. (Jan. 9, 1995). Copy supplied.

The Balanced-Budget Amendment, 104th Cong. (Jan. 5, 1995). Video available at https://www.c-span.org/video/?62572-1/balanced-budget-amendment-part-4. Copy supplied.

On February 10, 1994, I joined a letter to the Chair of the ABA Standing Committee on Ethics and Professional Responsibility regarding ethical concerns relating to contingency fees. I have searched public records and my own files but

have been unable to locate a copy.

Federal Mandatory Minimum Sentencing, 103rd Cong. (July 28, 1993). Copy supplied.

Letter to Director William Sessions, Jan. 15, 1993. Copy supplied.

In August 1992, I wrote a letter to the American Bar Association opposing their decision to take a position on abortion. I have searched public records and my own files but have been unable to locate a copy.

Letter to House Committee on the Judiciary, Aug. 10, 1992. Copy supplied.

Letter to the Committee on Labor and Human Resources, July 1, 1992. Copy supplied.

Oversight of the Department of Justice, 102nd Cong. (June 30, 1992). Video available at https://www.c-span.org/video/?26841-1/oversight-justice-department. Copy supplied.

Role of the Department of Justice and the Drug War, Weed and Seed, 102nd Cong. (May 20, 1992). Copy supplied.

Letter to Chairman Henry B. Gonzalez, May 15, 1992. Copy supplied.

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1993, 102nd Cong. (Mar. 19, 1992). Copy supplied.

Letter to Chairman Glenn, March 4, 1992. Copy supplied.

Letter to Congressman Henry J. Hyde, Mar. 2, 1992. Copy supplied.

In approximately February 1992, I wrote a letter to House Judiciary Committee regarding proposed legislation that would impose a moratorium on returning people to Haiti. I have searched public records and my own files but have been unable to locate a copy.

Letter to Congress, November 25, 1991. Copy supplied (as reproduced in the Congressional Record).

Confirmation Hearing before the Senate Committee on the Judiciary, 102nd Cong. (Nov. 12–13, 1991). The video of this two-day hearing is available at: https://www.c-span.org/video/?22668-1/barr-confirmation-hearing-day-1 and https://www.c-span.org/video/?22675-1/barr-confirmation-hearing-day-2. Written transcript attached.

Selected Crime Issues: Prevention and Punishment, 102nd Cong. (May 29, 1991). Copy supplied.

Letter to Senator Rudman, March 15, 1991. Copy supplied.

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1992, 102nd Cong. (Mar. 12, 1991). Copy supplied.

Letter to Speaker Thomas S. Foley, September 10, 1990. Copy supplied.

Letter to Richard G. Darman, Aug. 27, 1990. Copy supplied.

Letter to Sheldon Krantz, Aug. 2, 1990. Copy supplied.

Confirmation Hearing before the Senate Committee on the Judiciary, 101st Cong. (June 27, 1990). Copy supplied.

On May 11, 1990, I wrote a letter to Senator Arlen Specter regarding his request that a special prosecutor be appointed. I have searched public records and my own files but have been unable to locate a copy.

Oversight of the Operation of Inspector General Offices, 101st Cong. (Apr. 25, 1990). Copy supplied.

Federal Death Penalty Legislation, 101st Cong. (Mar. 14, 1990). Copy supplied.

Hearing Before the Committee on Rules and Administration Regarding S. 1727, The "Comprehensive Campaign Finance Reform Act of 1989," 101st Cong. (Feb. 27, 1990). Copy supplied.

Administrative Dispute Resolution Act, 101st Cong. (Jan. 31, 1990). Copy supplied.

FBI Authority to Seize Subjects Abroad, 101st Cong. (Nov. 8, 1989). Copy supplied.

Administrative Dispute Resolution Act of 1989, 101st Cong. (Sept. 19, 1989). Copy supplied.

Hearings on Measures to Protect the Physical Integrity of the American Flag, 101st Cong. (Aug. 1, 1989). Copy supplied.

H.R. 849, 101st Cong. (July 26, 1989). Copy supplied.

Statutory and Constitutional Responses to the Supreme Court Decision in Texas v.

Johnson, 101st Cong. (July 20, 1989). Copy supplied.

Confirmation Hearing before the Senate Committee on the Judiciary, 101st Cong. (April 5, 1989). Copy supplied.

In 1986, I wrote a letter to the Senate in support of the confirmation of Daniel Manion to the Seventh Circuit. I have searched public records and my own files but have been unable to locate a copy.

Office of Legal Counsel

The Attorney General has directed the Office of Legal Counsel ("Office") to publish selected opinions for the convenience of the Executive, Legislative, and Judicial Branches of the government, and of the professional bar and the general public. All of the opinions that the Office has determined to be appropriate for publication, including those that I authored, are available at https://www.justice.gov/olc/opinions-main.

The Office's remaining records are generally privileged. However, the Office sometimes waives privilege and releases additional records through FOIA or by other public disclosure. Although these records have been released to the public in some form, they have not been selected for official publication and thus they are not included among the Office's formal published opinions. The Office has identified three such opinions that I authored during my tenure as the Assistant Attorney General for the Office of Legal Counsel, which I have supplied.

Memorandum Opinion for C. Boyden Gray, *Transportation for Spouse of Cabinet Members*, Apr. 4, 1990. Copy supplied.

Memorandum for Edith E. Holiday, *Sequestration Exemption for the Resolution Funding Corporation*, Oct. 3, 1989. Copy supplied.

Memorandum for Martin L. Allday, *Payment of Interest on Awards of Back Pay in Employment Discrimination Claims Brought by Federal Employees*, Sept. 18, 1989. Copy supplied.

United States Senate
Committee on the Judiciary

Questionnaire for Non-Judicial Nominees

Attachments to Question 12(c)

WILLIAM PELHAM BARR
Nominee to be United States Attorney General

MEMORANDUM 8 June 2018

To: Deputy Attorney General Rod Rosenstein
Assistant Attorney General Steve Engel

From: Bill Barr

Re: Mueller's "Obstruction" Theory

I am writing as a former official deeply concerned with the institutions of the Presidency and the Department of Justice. I realize that I am in the dark about many facts, but I hope my views may be useful.

It appears Mueller's team is investigating a possible case of "obstruction" by the President predicated substantially on his expression of hope that the Comey could eventually "let...go" of its investigation of Flynn and his action in firing Comey. In pursuit of this obstruction theory, it appears that Mueller's team is demanding that the President submit to interrogation about these incidents, using the threat of subpoenas to coerce his submission.

Mueller should not be permitted to demand that the President submit to interrogation about alleged obstruction. Apart from whether Mueller a strong enough factual basis for doing so, Mueller's obstruction theory is fatally misconceived. As I understand it, his theory is premised on a novel and legally insupportable reading of the law. Moreover, in my view, if credited by the Department, it would have grave consequences far beyond the immediate confines of this case and would do lasting damage to the Presidency and to the administration of law within the Executive branch.

As things stand, obstruction laws do not criminalize just any act that can influence a "proceeding." Rather they are concerned with acts intended to have a *particular kind* of impact. A "proceeding" is a formalized process for finding the truth. In general, obstruction laws are meant to protect proceedings from actions designed subvert the integrity of their truth-finding function through compromising the honesty of decision-makers (*e.g.*, judge, jury) or impairing the integrity or availability of evidence – testimonial, documentary, or physical. Thus, obstruction laws prohibit a range of "bad acts" – such as tampering with a witness or juror; or destroying, altering, or falsifying evidence – all of which are inherently wrongful because, by their very nature, they are directed at depriving the proceeding of honest decision-makers or access to full and accurate evidence. In general, then, the *actus reus* of an obstruction offense is the inherently subversive "bad act" of impairing the integrity of a decision-maker or evidence. The requisite *mens rea* is simply intending the wrongful impairment that inexorably flows from the act.

Obviously, the President and any other official can commit obstruction in this classic sense of sabotaging a proceeding's truth-finding function. Thus, for example, if a President knowingly destroys or alters evidence, suborns perjury, or induces a witness to change testimony, or commits

any act deliberately impairing the integrity or availability of evidence, then he, like anyone else, commits the crime of obstruction. Indeed, the acts of obstruction alleged against Presidents Nixon and Clinton in their respective impeachments were all such "bad acts" involving the impairment of evidence. Enforcing these laws against the President in no way infringes on the President's plenary power over law enforcement because exercising this discretion – such as his complete authority to start or stop a law enforcement proceeding -- does not involve commission of any of these inherently wrongful, subversive acts.

The President, as far as I know, is not being accused of engaging in any wrongful act of evidence impairment. Instead, Mueller is proposing an unprecedented expansion of obstruction laws so as to reach facially-lawful actions taken by the President in exercising the discretion vested in him by the Constitution. It appears Mueller is relying on 18 U.S.C. §1512, which generally prohibits acts undermining the integrity of evidence or preventing its production. Section 1512 is relevant here because, unlike other obstruction statutes, it does not require that a proceeding be actually "pending" at the time of an obstruction, but only that a defendant have in mind an anticipated proceeding. Because there were seemingly no relevant proceedings pending when the President allegedly engaged in the alleged obstruction, I believe that Mueller's team is considering the "residual clause" in Section 1512 – subsection (c)(2) – as the potential basis for an obstruction case. Subsection (c) reads:

> (c) Whoever corruptly-- (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or (2) *otherwise* obstructs, influences, or impedes any official proceeding, or attempts to do so [is guilty of the crime of obstruction]. [emphasis added].

As I understand the theory, Mueller proposes to give clause (c)(2), which previously has been *exclusively* confined to acts of evidence impairment, a new unbounded interpretation. First, by reading clause (c)(2) in isolation, and glossing over key terms, he construes the clause as a free-standing, all-encompassing provision prohibiting *any act* influencing a proceeding if done with an improper motive. Second, in a further unprecedented step, Mueller would apply this sweeping prohibition to facially-lawful acts taken by public officials exercising of their discretionary powers if those acts influence a proceeding. Thus, under this theory, simply by exercising his Constitutional discretion in a facially-lawful way – for example, by removing or appointing an official; using his prosecutorial discretion to give direction on a case; or using his pardoning power – a President can be accused of committing a crime based solely on his subjective state of mind. As a result, any discretionary act by a President that influences a proceeding can become the subject of a criminal grand jury investigation, probing whether the President acted with an improper motive.

If embraced by the Department, this theory would have potentially disastrous implications, not just for the Presidency, but for the Executive branch as a whole and for the Department in particular. While Mueller's focus is the President's discretionary actions, his theory would apply to *all exercises of prosecutorial discretion* by the President's subordinates, from the Attorney General down to the most junior line prosecutor. Simply by giving direction on a case, or class of

cases, an official opens himself to the charge that he has acted with an "improper" motive and thus becomes subject to a criminal investigation. Moreover, the challenge to Comey's removal shows that not just prosecutorial decisions are at issue. Any personnel or management decisions taken by an official charged with supervising and conducting litigation and enforcement matters in the Executive branch can become grist for the criminal mill based solely on the official's subjective state of mind. All that is needed is a claim that a supervisor is acting with an improper purpose and any act arguably constraining a case – such as removing a U.S. Attorney -- could be cast as a crime of obstruction.

It is inconceivable to me that the Department could accept Mueller's interpretation of §1512(c)(2). It is untenable as a matter of law and cannot provide a legitimate basis for interrogating the President. I know you will agree that, if a DOJ investigation is going to take down a democratically-elected President, it is imperative to the health of our system and to our national cohesion that any claim of wrongdoing is solidly based on evidence of a *real* crime – not a debatable one. It is time to travel well-worn paths; not to veer into novel, unsettled or contested areas of the law; and not to indulge the fancies by overly-zealous prosecutors.

As elaborated on below, Mueller's theory should be rejected for the following reasons:

First, the sweeping interpretation being proposed for § 1512's residual clause is contrary to the statute's plain meaning and would directly contravene the Department's longstanding and consistent position that generally-worded statutes like § 1512 cannot be applied to the President's exercise of his constitutional powers in the absence of a "clear statement" in the statute that such an application was intended.

Second, Mueller's premise that, whenever an investigation touches on the President's own conduct, it is inherently "corrupt" under § 1512 for the President to influence that matter is insupportable. In granting plenary law enforcement powers to the President, the Constitution places no such limit on the President's supervisory authority. Moreover, such a limitation cannot be reconciled with the Department's longstanding position that the "conflict of interest" laws do not, and cannot, apply to the President, since to apply them would impermissibly "disempower" the President from supervising a class of cases that the Constitution grants him the authority to supervise.

Third, defining facially-lawful exercises of Executive discretion as potential crimes, based solely on subjective motive, would violate Article II of the Constitution by impermissibly burdening the exercise of core discretionary powers within the Executive branch.

Fourth, even if one were to indulge Mueller's obstruction theory, in the particular circumstances here, the President's motive in removing Comey and commenting on Flynn could not have been "corrupt" unless the President and his campaign were actually guilty of illegal collusion. Because the obstruction claim is entirely dependent on first finding collusion, Mueller should not be permitted to interrogate the President about obstruction until has enough evidence to establish collusion.

I. The Statute's Plain Meaning, and "the Clear Statement" Rule Long Adhered To By the Department, Preclude Its Application to Facially-Lawful Exercises of the President's Constitutional Discretion.

The unbounded construction Mueller would give §1512's residual clause is contrary to the provision's text, structure, and legislative history. By its terms, §1512 focuses exclusively on actions that subvert the truth-finding function of a proceeding by impairing the availability or integrity of evidence – testimonial, documentary, or physical. Thus, §1512 proscribes a litany of specifically-defined acts of obstruction, including killing a witness, threatening a witness to prevent or alter testimony, destroying or altering documentary or physical evidence, and harassing a witness to hinder testimony. All of these enumerated acts are "obstructive" in precisely the same way – they interfere with a proceeding's ability to gather complete and reliable evidence.

The question here is whether the phrase – "or corruptly otherwise obstructs" – in clause (c)(2) is divorced from the litany of the specific prohibitions in § 1512, and is thus a free-standing, all-encompassing prohibition reaching *any* act that influences a proceeding, or whether the clause's prohibition against "otherwise" obstructing is somehow tied to, and limited by, the character of all the other forms of obstruction listed in the statute. I think it is clear that use of the word "otherwise" in the residual clause expressly links the clause to the forms of obstruction specifically defined elsewhere in the provision. Unless it serves that purpose, the word "otherwise" does no work at all and is mere surplusage. Mueller's interpretation of the residual clause as covering *any and all acts* that influence a proceeding reads the word "otherwise" out of the statute altogether. But any proper interpretation of the clause must give effect to the word "otherwise;" it must do some work.

As the Supreme Court has suggested, *Begay v. United States,* 553 U.S. 137, 142-143 (2008), when Congress enumerates various specific acts constituting a crime and then follows that enumeration with a residual clause, introduced with the words "or otherwise," then the more general action referred to immediately after the word "otherwise" is most naturally understood to cover acts that cause a *similar kind* of result as the preceding listed examples, but cause those results in a *different manner*. In other words, the specific examples enumerated prior to the residual clause are typically read as refining or limiting in some way the broader catch-all term used in the residual clause. *See also Yates v. United States*, 135 S.Ct. 1074, 1085-87 (2015). As the *Begay* Court observed, if Congress meant the residual clause to be so all-encompassing that it subsumes all the preceding enumerated examples, "it is hard to see why it would have needed to include the examples at all." 553 U.S. at 142; *see McDonnell v. United States*, 136 S.Ct. 2355, 2369 (2016). An example suffices to make the point: If a statute prohibits "slapping, punching, kicking, biting, gouging eyes, or otherwise hurting" another person, the word "hurting" in the residual clause would naturally be understood as referring to the same *kind* of physical injury inflicted by the enumerated acts, but inflicted in a different way – *i.e.,* pulling hair. It normally would not be understood as referring to any kind of "hurting," such as hurting another's feelings, or hurting another's economic interests.

Consequently, under the statute's plain language and structure, the most natural and plausible reading of 1512(c)(2) is that it covers acts that have the *same kind of obstructive impact* as the listed forms of obstruction – *i.e.,* impairing the availability or integrity of evidence – but cause this impairment in a different way than the enumerated actions do. Under this construction,

then, the "catch all" language in clause (c)(2) encompasses any conduct, even if not specifically described in 1512, that is directed at undermining a proceeding's truth-finding function through actions impairing the integrity and availability of evidence. Indeed, this is how the residual clause has been applied. From a quick review of the cases, it appears all the cases have involved attempts to interfere with, or render false, the evidence that would become available to a proceeding. Even the more esoteric applications of clause (c)(2) have been directed against attempts to prevent the flow of evidence to a proceeding. *E.g., United States v. Volpendesto*, 746 F.3d 273 (7th Cir. 2014)(soliciting tips from corrupt cops to evade surveillance); *United States v. Phillips*, 583 F.3d 1261 (10th Cir. 2009)(disclosing identity of undercover agent to subject of grand jury drug investigation). As far as I can tell, no case has ever treated as an "obstruction" an official's exercise of prosecutorial discretion or an official's management or personnel actions collaterally affecting a proceeding.

Further, reading the residual clause as an all-encompassing proscription cannot be reconciled either with the other subsections of § 1512, or with the other obstruction provisions in Title 18 that must be read *in pari passu* with those in § 1512. Given Mueller's sweeping interpretation, clause (c)(2) would render all the specific terms in clause (c)(1) surplusage; moreover, it would swallow up all the specific prohibitions in the remainder of § 1512 -- subsections (a), (b), and (d). More than that, it would subsume virtually all other obstruction provisions in Title 18. For example, it would supervene the omnibus clause in § 1503, applicable to pending judicial proceedings, as well as the omnibus clause in § 1505, applicable to pending proceedings before agencies and Congress. Construing the residual clause in § 1512(c)(2) as supplanting these provisions would eliminate the restrictions Congress built into those provisions -- *i.e.*, the requirement that a proceeding be "pending" -- and would supplant the lower penalties in those provisions with the substantially higher penalties in § 1512(c). It is not too much of an exaggeration to say that, if § 1512(c)(2) can be read as broadly as being proposed, then virtually all Federal obstruction law could be reduced to this single clause.

Needless to say, it is highly implausible that such a revolution in obstruction law was intended, or would have gone uncommented upon, when (c)(2) was enacted. On the contrary, the legislative history makes plain that Congress had a more focused purpose when it enacted (c)(2). That subsection was enacted in 2002 as part of the Sarbanes-Oxley Act. That statute was prompted by Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen, had systematically destroyed potentially incriminating documents. Subsection (c) was added to Section 1512 explicitly as a "loophole" closer meant to address the fact that the existing section 1512(b) covers document destruction only where a defendant has induced another person to do it and does not address document destruction carried out by a defendant directly.

As reported to the Senate, the Corporate Fraud Accountability Act was expressly designed to "clarify and close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records." S. Rep. No. 107-146, at 14-15. Section 1512(c) did not exist as part of the original proposal. See S. 2010, 107th Cong. (2002). Instead, it was later introduced as an amendment by Senator Trent Lott in July 2002. 148 Cong. Rec. S6542 (daily ed. July 10, 2002). Senator Lott explained that, by adding new § 1512(c), his proposed amendment:

> would enact stronger laws against *document shredding*. Current law prohibits obstruction of justice by a defendant acting alone, but only if a proceeding is pending and a subpoena has been issued for the evidence that has been destroyed or altered .... [T]his section would allow the Government to charge obstruction against individuals who acted alone, even if the tampering took place prior to the issuance of a grand jury subpoena. I think this is something we need to make clear so we do not have a repeat of what we saw with the Enron matter earlier this year.

Id. at S6545 (statement of Sen. Lott) (emphasis supplied). Senator Orrin Hatch, in support of Senator Lott's amendment, explained that it would "close [] [the] loophole" created by the available obstruction statutes and hold criminally liable a person who, acting alone, destroys documents. Id. at S6550 (statement of Sen. Hatch). The legislative history thus confirms that § 1512(c) was not intended as a sweeping provision supplanting wide swathes of obstruction law, but rather as a targeted gap-filler designed to strengthen prohibitions on the impairment of evidence.

Not only is an all-encompassing reading of § 1512(c)(2) contrary to the language and manifest purpose of the statute, but it is precluded by a fundamental canon of statutory construction applicable to statutes of this sort. Statutes must be construed with reference to the constitutional framework within which they operate. *E.g., Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Reading § 1512(c)(2) broadly to criminalize the President's facially-lawful exercises of his removal authority and his prosecutorial discretion, based on probing his subjective state of mind for evidence of an "improper" motive, would obviously intrude deeply into core areas of the President's constitutional powers. It is well-settled that statutes that do not *expressly* apply to the President must be construed as not applying to the President if such application would involve a possible conflict with the President's constitutional prerogatives. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). OLC has long rigorously enforced this "clear statement" rule to limit the reach of broadly worded statutes so as to prevent undue intrusion into the President's exercise of his Constitutional discretion.

As OLC has explained, the "clear statement" rule has two sources. First, it arises from the long-recognized "cardinal principle" of statutory interpretation that statutes be construed to avoid raising serious constitutional questions. Second, the rule exists to protect the "usual constitutional balance" between the branches contemplated by the Framers by "requir[ing] an express statement by Congress before assuming it intended" to impinge upon Presidential authority. *Franklin*, 505 U.S. at 801; *see, e.g., Application of 28 U.S.C. §458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350 (1995).

This clear statement rule has been applied frequently by the Supreme Court as well as the Executive branch with respect to statutes that might otherwise, if one were to ignore the constitutional context, be susceptible of an application that would affect the President's constitutional prerogatives. For instance, in *Franklin* the Court was called upon to determine whether the Administrative Procedure Act ("APA"), 5 U.S.C §§ 701-706, authorized "abuse of discretion" review of final actions by the President. Even though the statute defined reviewable action in a way that facially could include the President, and did not list the President among the express exceptions to the APA, Justice O'Connor wrote for the Court:

> [t]he President is not [expressly] excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.

505 U.S. at 800-01. To amplify, she continued, "[a]s the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements." *Id.* at 801.

Similarly, in *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989), the Court held that the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. § 2, does not apply to the judicial recommendation panels of the American Bar Association because interpreting the statute as applying to them would raise serious constitutional questions relating to the President's constitutional appointment power. By its terms, FACA applied to any advisory committee used by an agency "in the interest of obtaining advice or recommendations for the President." 5 U.S.C. app. § 3(2(c). While acknowledging that a "straightforward reading" of the statute's language would seem to require its application to the ABA committee, *Public Citizen*, 491 U.S. at 453, the Court held that such a reading was precluded by the "cardinal principle" that a statute be interpreted to avoid serious constitutional question." *Id.* at 465-67. Notably, the majority stated, "[o]ur reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government," and "[t]hat construing FACA to apply to the Justice Department's consultations with the ABA Committee would present formidable constitutional difficulties is undeniable." *Id.* at 466.

> The Office of Legal Counsel has consistently "adhered to a plain statement rule: statutes that do not expressly apply to the President must be construed as not applying to the President, where applying the statute to the President would pose a significant question regarding the President's constitutional prerogatives." *E.g, The Constitutional Separation of Powers Between the President and Congress*, __ Op. O.L.C. 124, 178 (1996); *Application of 28 U.S.C. §458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350 (1995).

The Department has applied this principle to broadly-worded criminal statutes, like the one at issue here. Thus, in a closely analogous context, the Department has long held that the conflict-of-interest statute, 18 U.S.C § 208, does not apply to the President. That statute prohibits any "officer or employee of the executive branch" from "participat[ing] personally and substantially" in any particular matter in which he or she has a personal financial interest. *Id.* In the leading opinion on the matter, then-Deputy Attorney General Laurence Silberman determined that the legislative history disclosed no intention to cover the President and doing so would raise "serious questions as to the constitutionality" of the statute, because the effect of applying the statute to the President would "disempower" the President from performing his constitutionally-prescribed functions as to certain matters . See *Memorandum for Richard T. Burress, Office of the President,*

from Laurence H. Silberman, Deputy Attorney General, Re: Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution at 2, 5 (Aug. 28, 1974).

Similarly, OLC opined that the Anti-Lobbying Act, 18 U.S.C. § 1913, does not apply fully against the President. *See Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts*, 13 Op. O.L.C. 300, 304-06 (1989). The Anti-Lobbying Act prohibits any appropriated funds from being "used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress." 18 U.S.C. § 1913. The statute provided an exception for communications by executive branch officers and employees if the communication was made pursuant to a request by a member of Congress or was a request to Congress for legislation or appropriations. OLC concluded that applying the Act as broadly as its terms would otherwise allow would raise serious constitutional questions as an infringement of the President's Recommendations Clause power.

In addition to the "clear statement" rule, other canons of statutory construction preclude giving the residual clause in §1512(c)(2) the unbounded scope proposed by Mueller's obstruction theory. As elaborated on in the ensuing section, to read the residual clause as extending beyond evidence impairment, and to apply it to any that "corruptly" affects a proceeding, would raise serious Due Process issues. Once divorced from the concrete standard of evidence impairment, the residual clause defines neither the crime's *actus reus* (what conduct amounts to obstruction) nor its *mens rea* (what state of mind is "corrupt") "with sufficient definiteness that ordinary people can understand what conduct is prohibited," or "in a manner that does not encourage arbitrary and discriminatory enforcement." *See e.g. McDonnell v. United States*, 136 S.Ct. at 2373. This vagueness defect becomes even more pronounced when the statute is applied to a wide range of public officials whose normal duties involve the exercise of prosecutorial discretion and the conduct and management of official proceedings. The "cardinal rule" that a statute be interpreted to avoid serious constitutional questions mandates rejection of the sweeping interpretation of the residual clause proposed by Mueller.

Even if the statute's plain meaning, fortified by the "clear statement" rule, were not dispositive, the fact that § 1512 is a criminal statute dictates a narrower reading than Mueller's all-encompassing interpretation. Even if the scope of § 1512(c)(2) were ambiguous, under the "rule of lenity," that ambiguity must be resolved against the Government's broader reading. *See, e.g., United States v. Granderson*, 511 U.S. 39, 54 (1994) ("In these circumstances -- where text, structure, and history fail to establish that the Government's position is unambiguously correct -- we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor.")

In sum, the sweeping construction of § 1512(c)'s residual clause posited by Mueller's obstruction theory is novel and extravagant. It is contrary to the statute's plain language, structure, and legislative history. Such a broad reading would contravene the "clear statement" rule of statutory construction, which the Department has rigorously adhered to in interpreting statutes, like this one, that would otherwise intrude on Executive authority. By it terms, § 1512 is intended to protect the truth-finding function of a proceeding by prohibiting acts that would impair the availability or integrity of evidence. The cases applying the "residual clause" have fallen within this scope. The clause has never before been applied to facially-lawful discretionary acts of

Executive branch official. Mueller's overly-aggressive use of the obstruction laws should not be embraced by the Department and cannot support interrogation of the President to evaluate his subjective state of mind.

II. Applying §1512(c)(2) to Review Facially-Lawful Exercises of the President's Removal Authority and Prosecutorial Discretion Would Impermissibly Infringe on the President's Constitutional Authority and the Functioning of the Executive Branch.

This case implicates at least two broad discretionary powers vested by the Constitution exclusively in the President. First, in removing Comey as director of the FBI there is no question that the President was exercising one of his core authorities under the Constitution. Because the President has Constitutional responsibility for seeing that the laws are faithfully executed, it is settled that he has "illimitable" discretion to remove principal officers carrying out his Executive functions. *See Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S.Ct. 3138, 3152 (2010); *Myers v. United States*, 272 U.S. 52 (1926). Similarly, in commenting to Comey about Flynn's situation – to the extent it is taken as the President having placed his thumb on the scale in favor of lenity – the President was plainly within his plenary discretion over the prosecution function. The Constitution vests *all Federal law enforcement power*, and hence prosecutorial discretion, in the President. The President's discretion in these areas has long been considered "absolute," and his decisions exercising this discretion are presumed to be regular and are generally deemed non-reviewable. *See, e.g., United States v. Armstrong,* 517 U.S. 456, 464 (1996); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *see generally* S. Prakash, The Chief Prosecutor, 73 Geo. Wash. L. Rev. 521 (2005)

The central problem with Mueller's interpretation of §1512(c)(2) is that, instead of applying the statute to inherently wrongful acts of evidence impairment, he would now define the *actus reus* of obstruction as *any act,* including facially lawful acts, that influence a proceeding. However, the Constitution vests plenary authority over law enforcement proceedings in the President, and therefore one of the President's core constitutional authorities is precisely to make decisions "influencing" proceedings. In addition, the Constitution vests other discretionary powers in the President that can have a collateral influence on proceedings – including the power of appointment, removal, and pardon. The crux of Mueller's position is that, whenever the President exercises any of these discretionary powers and thereby "influences" a proceeding, he has completed the *actus reus* of the crime of obstruction. To establish guilt, all that remains is evaluation of the President's state of mind to divine whether he acted with a "corrupt" motive.

Construed in this manner, §1512(c)(2) would violate Article II of the Constitution in at least two respects:

First, Mueller's premise appears to be that, when a proceeding is looking into the President's own conduct, it would be "corrupt" within the meaning of §1512(c)(2) for the President to attempt to influence that proceeding. In other words, Mueller seems to be claiming that the obstruction statute effectively walls off the President from exercising Constitutional powers over cases in which his own conduct is being scrutinized. This premise is clearly wrong constitutionally. Nor can it be

reconciled with the Department's longstanding position that the "conflict of interest" laws do not, and cannot, apply to the President, since to apply them would impermissibly "disempower" the President from supervising a class of cases that the Constitution grants him the authority to supervise. Under the Constitution, the President's authority over law enforcement matters is necessarily all-encompassing, and Congress may not exscind certain matters from the scope of his responsibilities. The Framers' plan contemplates that the President's law enforcement powers extend to all matters, including those in which he had a personal stake, and that the proper mechanism for policing the President's faithful exercise of that discretion is the political process – that is, the People, acting either directly, or through their elected representatives in Congress.

Second, quite apart from this misbegotten effort to "disempower" the President from acting on matters in which he has an interest, defining facially-lawful exercises of Executive discretion as potential crimes, based solely on the President's subjective motive, would violate Article II of the Constitution by impermissibly burdening the exercise of core discretionary powers within the Executive branch. The prospect of criminal liability based solely on the official's state of mind, coupled with the indefinite standards of "improper motive" and "obstruction," would cast a pall over a wide range of Executive decision-making, chill the exercise of discretion, and expose to intrusive and free-ranging examination of the President's (and his subordinate's) subjective state of mind in exercising that discretion.

A. Section 1512(c)(2) May Not "Disempower" the President from Exercising His Law Enforcement Authority Over a Particular Class of Matters.

As discussed further below, a fatal flaw in Mueller's interpretation of §1512(c)(2) is that, while defining obstruction solely as acting "corruptly," Mueller offers no definition of what "corruptly" means. It appears, however, that Mueller has in mind particular circumstances that he feels may give rise to possible "corruptness" in the current matter. His tacit premise appears to be that, when an investigation is looking into the President's own conduct, it would be "corrupt" for the President to attempt to influence that investigation.

On a superficial level, this outlook is unsurprising: at first blush it accords with the old Roman maxim that a man should not be the judge in his own case and, because "conflict-of-interest" laws apply to all the President's subordinates, DOJ prosecutors are steeped in the notion that it is illegal for an official to touch a case in which he has a personal stake. But constitutionally, as applied to the President, this mindset is entirely misconceived: there is no *legal* prohibition – as opposed a political constraint -- against the President's acting on a matter in which he has a personal stake.

The Constitution itself places no limit on the President's authority to act on matters which concern him or his own conduct. On the contrary, the Constitution's grant of law enforcement power to the President is plenary. Constitutionally, it is wrong to conceive of the President as simply the highest officer within the Executive branch hierarchy. He alone *is* the Executive branch. As such, he is the sole repository of *all Executive powers* conferred by the Constitution. Thus, the full measure of law enforcement authority is placed in the President's hands, and no limit is placed on the kinds of cases subject to his control and supervision. While the President has subordinates --the Attorney General and DOJ lawyers -- who exercise prosecutorial discretion on

his behalf, they are merely "his hand," *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922) – the discretion they exercise is the President's discretion, and their decisions are legitimate precisely because they remain under his supervision, and he is still responsible and politically accountable for them.

Nor does any statute purport to restrict the President's authority over matters in which he has an interest. On the contrary, in 1974, the Department concluded that the conflict-of interest-laws cannot be construed as applying to the President, expressing "serious doubt as to the constitutionality" of a statute that sought "to disempower" the President from acting over particular matters. *Letter to Honorable Howard W. Cannon from Acting Attorney General Laurence H. Silberman*, dated September 20, 1974; and *Memorandum for Richard T. Burress, Office of the President, from Laurence H. Silberman, Deputy Attorney General, Re: Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution* at 2, 5 (Aug. 28, 1974). As far as I am aware, this is the only instance in which it has previously been suggested that a statute places a class of law enforcement cases "off limits" to the President's supervision based on his personal interest in the matters. The Department rejected that suggestion on the ground that Congress could not "disempower" the President from exercising his supervisory authority over such matters. For all the same reasons, Congress could not make it a crime for the President to exercise supervisory authority over cases in which his own conduct might be at issue.

The illimitable nature of the President's law enforcement discretion stems not just from the Constitution's plenary grant of those powers to the President, but also from the "unitary" character of the Executive branch itself. Because the President alone constitutes the Executive branch, the President cannot "recuse" himself. Just as Congress could not *en masse* recuse itself, leaving no source of the Legislative power, the President cannot take a holiday from his responsibilities. It is in the very nature of discretionary power that ultimate authority for making the choice must be vested in some final decision-maker. At the end of the day, there truly must be a desk at which "the buck stops." In the Executive, final responsibility must rest with the President. Thus, the President, "though able to delegate duties to others, cannot delegate ultimate responsibility or *the active obligation to supervise that goes with it.*" *Free Enterprise Fund v. Public Co. Acctg. Oversight Bd.*, 130 S. Ct. 3138, 3154 (2010) (*quoting Clinton v. Jones,* 520 U.S. 681, 712-713 (1997) (Breyer, J., concurring in judgment)) (emphasis added).

In framing a Constitution that entrusts broad discretion to the President, the Framers chose the means they thought best to police the exercise of that discretion. The Framers' idea was that, by placing all discretionary law enforcement authority in the hands of a single "Chief Magistrate" elected by all the People, and by making him politically accountable for all exercises of that discretion by himself or his agents, they were providing the best way of ensuring the "faithful exercise" of these powers. Every four years the people as a whole make a solemn national decision as to the person whom they trust to make these prudential judgments. In the interim, the people's representatives stand watch and have the tools to oversee, discipline, and, if they deem appropriate, remove the President from office. Thus, under the Framers' plan, the determination whether the President is making decisions based on "improper" motives or whether he is "faithfully" discharging his responsibilities is left to the People, through the election process, and the Congress, through the Impeachment process.

The Framers' idea of political accountability has proven remarkably successful, far more so than the disastrous experimentation with an "independent" counsel statute, which both parties agreed to purge from our system. By and large, fear of political retribution has ensured that, when confronted with serious allegations of misconduct within an Administration, Presidents have felt it necessary to take practical steps to assure the people that matters will be pursued with integrity. But the measures that Presidents have adopted are voluntary, dictated by political prudence, and adapted to the situation; they are not legally compelled. Moreover, Congress has usually been quick to respond to allegations of wrongdoing in the Executive and has shown itself more than willing to conduct investigations into such allegations. The fact that President is answerable for any abuses of discretion and is ultimately subject to the judgment of Congress through the impeachment process means that the President is *not* the judge in his own cause. *See Nixon v. Harlow*, 457 U.S. 731, 757-58 n.41 (1982)(" The remedy of impeachment demonstrates that the President remains accountable under law for his misdeeds in office.")

Mueller's core premise -- that the President acts "corruptly" if he attempts to influence a proceeding in which his own conduct is being scrutinized – is untenable. Because the Constitution, and the Department's own rulings, envision that the President may exercise his supervisory authority over cases dealing with his own interests, the President transgresses no legal limitation when he does so. For that reason, the President's exercise of supervisory authority over such a case does not amount to "corruption." It may be in some cases politically unwise; but it is not a crime. Moreover, it cannot be presumed that any decision the President reaches in a case in which he is interested is "improperly" affected by that personal interest. Implicit in the Constitution's grant of authority over such cases, and in the Department's position that the President cannot be "disempowered" from acting in such cases, is the recognition that Presidents have the capacity to decide such matters based on the public's long-term interest.

In today's world, Presidents are frequently accused of wrongdoing. Let us say that an outgoing administration – say, an incumbent U.S. Attorney -- launches a "investigation" of an incoming President. The new President knows it is bogus, is being conducted by political opponents, and is damaging his ability to establish his new Administration and to address urgent matters on behalf of the Nation. It would neither be "corrupt" nor a crime for the new President to terminate the matter and leave any further investigation to Congress. There is no legal principle that would insulate the matter from the President's supervisory authority and mandate that he passively submit while a bogus investigation runs its course.

At the end of the day, I believe Mueller's team would have to concede that a President does not act "corruptly" simply by acting on – even terminating – a matter that relates to his own conduct. But I suspect they would take the only logical fallback position from that – namely, that it would be "corrupt" if the President had actually engaged in unlawful conduct and then blocked an investigation to "cover up" the wrongdoing. In other words, the notion would be that, if an investigation was bogus, the President ultimately had legitimate grounds for exercising his supervisory powers to stop the matter. Conversely, if the President had really engaged in wrongdoing, a decision to stop the case would have been a corrupt cover up. But, in the latter case, the predicate for finding any corruption would be first finding that the President had engaged in the wrongdoing he was allegedly trying to cover up. Under the particular circumstances here, the

issue of obstruction only becomes ripe after the alleged collusion by the President or his campaign is established first. While the distinct crime of obstruction can frequently be committed even if the underlying crime under investigation is never established, that is true only where the obstruction is an act that is wrongful in itself -- such as threatening a witness, or destroying evidence. But here, the only basis for ascribing "wrongfulness" (*i.e.,* an improper motive) to the President's actions is the claim that he was attempting to block the uncovering of wrongdoing by himself or his campaign. Until Mueller can show that there was unlawful collusion, he cannot show that the President had an improper "cover up" motive.

For reasons discussed below, I do not subscribe to this notion. But here it is largely an academic question. Either the President and his campaign engaged in illegal collusion or they did not. If they did, then the issue of "obstruction" is a sideshow. However, if they did not, then the cover up theory is untenable. And, at a practical level, in the absence of some wrongful act of evidence destruction, the Department would have no business pursuing the President where it cannot show any collusion. Mueller should get on with the task at hand and reach a conclusion on collusion. In the meantime, pursuing a novel obstruction theory against the President is not only premature but – because it forces resolution of numerous constitutional issues – grossly irresponsible.

B. Using Obstruction Laws to Review the President's Motives for Making Facially-Lawful Discretionary Decisions Impermissibly Infringes on the President's Constitutional Powers.

The crux of Mueller's claim here is that, when the President performs a facially-lawful discretionary action that influences a proceeding, he may be criminally investigated to determine whether he acted with an improper motive. It is hard to imagine a more invasive encroachment on Executive authority.

1. The Constitution Vests Discretion in the President To Decide Whether To Prosecute Cases or To Remove Principal Executive Officers, and Those Decisions are Not Reviewable.

The authority to decide whether or not to bring prosecutions, as well as the authority to appoint and remove principal Executive officers, and to grant pardons, are quintessentially Executive in character and among the discretionary powers vested exclusively in the President by the Constitution. When the President exercises these discretionary powers, it is presumed he does so lawfully, and his decisions are generally non-reviewable.

The principle of non-reviewability inheres in the very reason for vesting these powers in the President in the first place. In governing any society certain choices must be made that cannot be determined by tidy legal standards but require prudential judgment. The imperative is that there must be some ultimate decision-maker who has the final, authoritative say -- at whose desk the "buck" truly does stop. Any system whereby other officials, not empowered to make the decision themselves, are permitted to review the "final" decision for "improper motives" is antithetical both to the exercise of discretion and its finality. And, even if review can censor a particular choice, it leaves unaddressed the fact that a choice still remains to be made, and the reviewers have no power to make it. The prospect of review itself undermines discretion. *Wayte v. United States,* 470 U. S.

598, 607- 608 (1985); *cf. Franklin v. Massachusetts*, 505 U.S. at 801. But any regime that proposes to review and *punish* decision-makers for "improper motives" ends up doing more harm than good by chilling the exercise of discretion, "dampen[ing] the ardor of all but the most resolute ...in the unflinching discharge of their duties." *Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (2d Cir. 1949)(Learned Hand). In the end, the prospect of punishment chills the exercise of discretion over a far broader range of decisions than the supposedly improper decision being remedied. *McDonnell,* 136 S.Ct. at 2373.

For these reasons, the law has erected an array of protections designed to prevent, or strictly limit, review of the exercise of the Executive discretionary powers. *See, e.g., Nixon v. Fitzgerald*, 457 US 731,749 (1982) (the President's unique discretionary powers require that he have absolute immunity from civil suit for his official acts). An especially strong set of rules has been put in place to insulate those who exercise prosecutorial discretion from second-guessing and the possibility of punishment. *See. e.g., Imbler v. Pachtman*, 424 U. S. 409 (1976); *Yaselli v. Goff*, 275 U. S. 503 (1927), *aff'g* 12 F. 2d 396 (2d Cir. 1926). Thus, "it is entirely clear that the refusal to prosecute cannot be the subject of judicial review." *See, e.g., ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 (1987); *United States v. Cox*, 342 F.2d 167, 171-72 (5th Cir. 1965) (The U.S. Attorney's decision not to prosecute even where there is probable cause is "a matter of executive discretion which cannot be coerced or reviewed by the courts."); *see also Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Even when there is a prosecutorial decision to proceed with a case, the law generally precludes review or, in the narrow circumstances where review is permitted, limits the extent to which the decision-makers' subjective motivations may be examined. Thus, a prosecutor's decision to bring a case is generally protected from civil liability by absolute immunity, even if the prosecutor had a malicious motive. *Yaselli v. Goff*, 275 U. S. 503 (1927), *aff'g* 12 F. 2d 396 (2d Cir. 1926). Even where some review is permitted, absent a claim of selective prosecution based on an impermissible classification, a court ordinarily will not look into the prosecutor's real motivations for bringing the case as long as probable cause existed to support prosecution. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). Further, even when there is a claim of selective prosecution based on an impermissible classification, courts do not permit the probing of the prosecutor's subjective state of mind until the plaintiff has first produced objective evidence that the policy under which he has been prosecuted had a discriminatory effect. *United States v. Armstrong*, 517 U.S. 456 (1996). The same considerations undergird the Department's current position in *Hawaii v. Trump*, where the Solicitor General is arguing that, in reviewing the President's travel ban, a court may not look into the President's subjective motivations when the government has stated a facially legitimate basis for the decision. (*SG's Merits Brief* at 61).

In short, the President's exercise of its Constitutional discretion is not subject to review for "improper motivations" by lesser officials or by the courts. The judiciary has no authority "to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made" in the courts. *Marbury v. Madison, 1 Cranch (5 U.S.) 137, 170 (1803).*

2. Threatening criminal liability for facially-lawful exercises of discretion, based solely on the subjective motive, would impermissibly burden the exercise of core Constitutional powers within the Executive branch..

Mueller is effectively proposing to use the criminal obstruction law as a means of reviewing discretionary acts taken by the President when those acts influence a proceeding. Mueller gets to this point in three steps. First, instead of confining §1512(c)(2) to inherently wrongful acts of evidence impairment, he would now define the *actus reus* of obstruction as *any act* that influences a proceeding. Second, he would include within that category the official discretionary actions taken by the President or other public officials carrying out their Constitutional duties, including their authority to control all law enforcement matters. The net effect of this is that, once the President or any subordinate takes any action that influences a proceeding, he has completed the *actus reus* of the crime of obstruction. To establish guilt, all that remains is evaluation of the President's or official's subjective state of mind to divine whether he acted with an improper motive.

Wielding §1512(c)(2) in this way preempts the Framers' plan of political accountability and violate Article II of the Constitution by impermissibly burdening the exercise of the core discretionary powers within the Executive branch. The prospect of criminal prosecution based solely on the President's state of mind, coupled with the indefinite standards of "improper motive" and "obstruction," would cast a pall over a wide range of Executive decision-making, chill the exercise of discretion, and expose to intrusive and free-ranging examination the President's (or his subordinate's) subjective state of mind in exercising that discretion

Any system that threatens to punish discretionary actions based on subjective motivation naturally has a substantial chilling effect on the exercise of discretion. But Mueller's proposed regime would mount an especially onerous and unprecedented intrusion on Executive authority. The sanction that is being threatened for improperly-motivated actions is the most severe possible – personal criminal liability. Inevitably, the prospect of being accused of criminal conduct, and possibly being investigated for such, would cause officials "to shrink" from making potentially controversial decisions and sap the vigor with which they perform their duties. *McDonnell v. United States*, 136 S.Ct. at 2372-73.

Further, the chilling effect is especially powerful where, as here, liability turns solely on the official's subjective state of mind. Because charges of official misconduct based on improper motive are "easy to allege and hard to disprove," *Hartman v. Moore*, 547 U.S. 250, 257-58 (2006), Mueller's regime substantially increases the likelihood of meritless claims, accompanied by the all the risks of defending against them. Moreover, the review contemplated here would be far more intrusive since it does not turn on an objective standard – such as the presence in the record of a reasonable basis for the decision – but rather requires probing to determine the President's actual subjective state of mind in reaching a decision. As the Supreme Court has observed, *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982), even when faced only with civil liability, such an inquiry is especially disruptive:

> [I]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of

> subjecting officials to the risks of trial — distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. ...[T]he judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables ...frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery .... Inquiries of this kind can be peculiarly disruptive of effective government.

Moreover, the encroachment on the Executive function is especially broad due to the wide range of actors and actions potentially covered. Because Mueller defines the *actus reus* of obstruction as any act that influences a proceeding, he is including not just exercises of prosecutorial discretion directly deciding whether a case will proceed or not, but also exercises of any other Presidential power that might collaterally affect a proceeding, such as a removal, appointment, or grant of pardon. And, while Mueller's immediate target is the President's exercise of his discretionary powers, his obstruction theory reaches all exercises of prosecutorial discretion by the President's subordinates, from the Attorney General, down the most junior line prosecutor. It also necessarily applies to all personnel, management, and operational decision by those who are responsible for supervising and conducting litigation and enforcement matters -- civil, criminal or administrative -- on the President's behalf.

A fatal flaw with Mueller's regime – and one that greatly exacerbates its chilling effect -- is that, while Mueller would criminalize any act "corruptly" influencing a proceeding, Mueller can offer no definition of "corruptly." What is the circumstance that would make an attempt by the President to influence a proceeding "corrupt?" Mueller would construe "corruptly" as referring to one's purpose in seeking to influence a proceeding. But Mueller provides no standard for determining what motives are legal and what motives are illegal. Is an attempt to influence a proceeding based on political motivations "corrupt?" Is an attempt based on self-interest? Based on personal career considerations? Based on partisan considerations? On friendship or personal affinity? Due process requires that the elements of a crime be defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited," or "in a manner that does not encourage arbitrary and discriminatory enforcement." *See McDonnell*, 136 S.Ct. at 2373. This, Mueller's construction of §1512(c)(2) utterly fails to do.

It is worth pausing on the word "corruptly," because courts have evinced a lot of confusion over it. It is an adverb, modifying the verbs "influence," "impede," etc. But few courts have deigned to analyze its precise adverbial mission. Does it refer to "how" the influence is accomplished – *i.e.,* the means used to influence? Or does it refer to the ultimate purpose behind the attempt to influence? As an original matter, I think it was clearly used to described the means used to influence. As the D.C. Circuit persuasively suggested, the word was likely used in its 19th century transitive sense, connoting the turning (or corrupting) of something from good and fit for its purpose into something bad and unfit for its purpose – hence, "corrupting" a magistrate; or "corrupting" evidence. *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir.1991). Understood this way, the ideas behind the obstruction laws come more clearly into focus. The thing that is

corrupt is the means being used to influence the proceeding. They are inherently wrong because they involve the corruption of decision-makers or evidence. The culpable intent does not relate to the actor's ultimate motive for using the corrupt means. The culpable state of mind is merely the intent that the corrupt means bring about their immediate purpose, which is to sabotage the proceeding's truth-finding function. The actor's ultimate purpose is irrelevant because the means, and their immediate purpose, are dishonest and malign. Further, if the actor uses lawful means of influencing a proceeding – such as asserting an evidentiary privilege, or bringing public opinion pressure to bear on the prosecutors – then his ultimate motives are likewise irrelevant. *See Arthur Anderson*, 544 U.S. at 703-707. Even if the actor is guilty of a crime and his only reason for acting is to escape justice, his use of lawful means to impede or influence a proceeding are perfectly legitimate.

Courts have gotten themselves into a box whenever they have suggested that "corruptly" is not confined to the use of wrongful means, but can also refer to someone's ultimate motive for using lawful means to influence a proceeding. The problem, however, is that, as the courts have consistently recognized, there is nothing inherently wrong with attempting to influence or impede a proceeding. Both the guilty and innocent have the right to use lawful means to do that. What is the motive that would make the use of lawful means to influence a proceeding "corrupt?" Courts have been thrown back on listing "synonyms" like "depraved, wicked, or bad." But that begs the question. What is depraved – the means or the motive? If the latter, what makes the motive depraved if the means are within one's legal rights? Fortunately for the courts, the cases invariably involve evidence impairment, and so, after stumbling around, they get to a workable conclusion. Congress has also taken this route. *Poindexter* struck down the omnibus clause of §1505 on the grounds that, as the sole definition of obstruction, the word "corruptly" was unconstitutionally vague. 951 F.2d at 377-86. Tellingly, when Congress sought to "clarify" the meaning of "corruptly" in the wake of *Poindexter*, it settled on even more vague language – "acting with an improper motive" – and then proceeded to qualify this definition further by adding, "including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." 18 U.S.C. §1515(b). The fact that Congress could not define "corruptly" except through a laundry list of acts of evidence impairment strongly confirms that, in the obstruction context, the word has no intrinsic meaning apart from its transitive sense of compromising the honesty of a decision-maker or impairing evidence.

At the end of the day then, as long as §1512 is read as it was intended to be read – *i.e.,* as prohibiting actions designed to sabotage a proceeding's access to complete and accurate evidence -- the term "corruptly" derives meaning from that context. But once the word "corruptly" is deracinated from that context, it becomes essentially meaningless as a standard. While Mueller's failure to define "corruptly" would be a Due Process violation in itself, his application of that "shapeless" prohibition on public officials engaged in the discharge of their duties impermissibly encroach on the Executive function by "cast[ing] the pall of potential prosecution" over a broad range of lawful exercises of Executive discretion. *McDonnell*, 136 S.Ct. at 2373-74.

The chilling effect is magnified still further because Mueller's approach fails to define the kind of impact an action must have to be considered an "obstruction." As long as the concept of obstruction is tied to evidence impairment, the nature of the actions being prohibited is discernable. But once taken out of this context, how does one differentiate between an unobjectionable

"influence" and an illegal "obstruction?" The actions being alleged as obstructions in this case illustrate the point. Assuming arguendo that the President had motives such that, under Mueller's theory, any direct order by him to terminate the investigation would be considered an obstruction, what action short of that would be impermissible? The removal of Comey is presumably being investigated as "obstructive" due to some *collateral* impact it could have on a proceeding. But removing an agency head does not have the natural and foreseeable consequence of obstructing any proceeding being handled by that agency. How does one gauge whether the collateral effects of one's actions could impermissibly affect a proceeding?

The same problem exists regarding the President's comments about Flynn. Even if the President's motives were such that, under Mueller's theory, he could not have ordered termination of an investigation, to what extent do comments short of that constitute obstruction? On their face, the President's comments to Comey about Flynn seem unobjectionable. He made the accurate observation that Flynn's call with the Russian Ambassador was perfectly proper and made the point that Flynn, who had now suffered public humiliation from losing his job, was a good man. Based on this, he expressed the "hope" that Comey could "see his way clear" to let the matter go. The formulation that Comey "see his way clear," explicitly leaves the decision with Comey. Most normal subordinates would not have found these comments obstructive. Would a superior's questioning the legal merit of a case be obstructive? Would pointing out some consequences of the subordinate's position be obstructive? Is something really an "obstruction" if it merely is pressure acting upon a prosecutor's psyche? Is the obstructiveness of pressure gauged objectively or by how a subordinate subjectively apprehends it?

The practical implications of Mueller's approach, especially in light of its "shapeless" concept of obstruction, are astounding. DOJ lawyers are always making decisions that invite the allegation that they are improperly concluding or constraining an investigation. And these allegations are frequently accompanied by a claim that the official is acting based on some nefarious motive. Under the theory now being advanced, any claim that an exercise of prosecutorial discretion was improperly motived could legitimately be presented as a potential criminal obstruction. The claim would be made that, unless the subjective motivations of the decision maker are thoroughly explored through a grand jury investigation, the putative "improper motive" could not be ruled out.

In an increasingly partisan environment, these concerns are by no means trivial. For decades, the Department has been routinely attacked both for its failure to pursue certain matters and for its decisions to move forward on others. Especially when a house of Congress is held by an opposing party, the Department is almost constantly being accused of deliberately scuttling enforcement in a particular class of cases, usually involving the environmental laws. There are claims that cases are not being brought, or are being brought, to appease an Administration's political constituency, or that the Department is failing to investigate a matter in order to cover up its own wrongdoing, or to protect the Administration. Department is bombarded with requests to name a special counsel to pursue this or that matter, and it is frequently claimed that his reluctance to do so is based on an improper motive. When a supervisor intervenes in a case, directing a course of action different from the one preferred by the subordinate, not infrequently there is a tendency for the subordinate to ascribe some nefarious motive. And when personnel changes are made – as

for example, removing a U.S. Attorney – there are sometimes claims that the move was intended to truncate some investigation.

While these controversies have heretofore been waged largely on the field of political combat, Mueller's sweeping obstruction theory would now open the way for the "criminalization" of these disputes. Predictably, challenges to the Department's decisions will be accompanied by claims that the Attorney General, or other supervisory officials, are "obstructing" justice because their directions are improperly motivated. Whenever the slightest colorable claim of a possible "improper motive" is advanced, there will be calls for a criminal investigation into possible "obstruction." The prospect of being accused of criminal conduct, and possibly being investigated for such, would inevitably cause officials "to shrink" from making potentially controversial decisions.

February 23, 2017

The Honorable Donald J. Trump
President of the United States
The White House
1600 Pennsylvania Avenue
Washingtom, DC 20500

Re: Sholom Rubashkin

Dear Mr. President:

We are more than one hundred former Attorneys General[1], Deputy Attorneys General, FBI Directors, Solicitors General, Federal Judges, United States Attorneys, State Attorneys General and law professors who are writing to urge you to use your executive clemency power to commute the patently unjust and draconian 27-year sentence imposed upon Sholom Rubashkin—a first time, non-violent offender and father of 10, including an acutely autistic child.

Essentially, Mr. Rubashkin was convicted of fraud offenses stemming from inflating collateral to obtain a higher line of credit for Agriprocessors, his father's kosher meat business, and for paying some cattle owners 11 days late. Mr. Rubashkin is a devoted husband and father, a deeply religious man who simply doesn't deserve a sentence of this length, or anything remotely close to it. Indeed, his sentence is far longer than the median sentences for murder, kidnapping, sexual abuse, child pornography and numerous other offenses exponentially more serious than his.

We remain deeply troubled by the manifest injustice in this case and the harm it has caused to Mr. Rubashkin, his family, and to public confidence in the ability of our Federal courts to fairly administer justice. More than 60 U.S. Congressmen and Senators, as well as over 100 former Federal Judges and high-ranking DOJ officials—including 9 former U.S. Attorneys General[1] and former New York City Mayor Rudy Giuliani—have signed letters expressing alarming concern regarding the length of this sentence and the manner in which it was obtained.

The clemency power is, of course, one of the oldest and most revered powers that belong to the President of the United States, and it is essential to America's system of checks and balances. Especially now that Mr. Rubashkin has already served more than 7 years of an excessively harsh sentence for a nonviolent first-time offender, we respectfully urge the President to commute this sentence and remedy this injustice. Mr. Rubashkin's youngest son, Uziel, only 4 years old when his father was incarcerated, will be celebrating his Bar Mitzvah on April 2nd. We pray that his pure and heartfelt prayers to have his father present at this milestone will be answered.

Please be assured that should you decide to grant clemency to Mr. Rubashkin, you will be joined by scores of legal and judicial experts nationwide who will both publicly and privately support and applaud your commitment to ensure that justice is finally achieved in this matter. In that regard, with his permission, we have enclosed the letter that Michael Mukasey sent to you on January 18, 2017 with respect to this matter.

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[1] We note with distinction four former Attorneys General who have signed previous letters/amici curia briefs expressing deep concern regarding the sentence imposed on Sholom Rubashkin: Attorneys General Janet Reno and Nicholas Katzenbach who have passed on and Attorneys General Ramsey Clark and Richard Thornburgh who could not review this letter due to health challenges.

Sincerely,

John D. Ashcroft
Attorney General of the United States 2001-2005
Attorney General of Missouri 1977-1984

William P. Barr
Attorney General of the United States 1991-1993

Alberto R. Gonzales
Attorney General of the United States 2005-2007

Edwin Meese, III
Attorney General of the United States 1985-1988

Mark R. Filip
Acting Attorney General of the United States 1999
Deputy Attorney General 2008-2009
United States District Court Judge, Northern District of Illinois 2004-2008

Stuart M. Gerson
Acting Attorney General of the United States 1993

Louis J. Freeh
Director, Federal Bureau of Investigation 1993-2001
United States District Judge, Southern District of New York 1991-1993

William F. Weld
Governor of Massachusetts 1991-1997
Assistant Attorney General of the United States 1986-1988
United States Attorney, District of Massachusetts 1981-1986

Jamie S. Gorelick
Deputy Attorney General of the United States 1994-1997

Philip B. Heymann
Deputy Attorney General of the United States 1993-1994
Professor of Law, Harvard Law School

Charles B. Renfrew
Deputy Attorney General of the United States 1980-1981
United States District Court Judge, Northern District of California 1972-1980

Larry D. Thompson
Deputy Attorney General 2001-2003
United States Attorney, Northern District of Georgia

Charles Fried
Solicitor General of the United States 1984-1989
Associate Justice of the Massachusetts Supreme Judicial Court 1995-1999

Seth P. Waxman
Solicitor General of the United States 1997-2001

Sanford M. Litvack
Assistant United States Attorney General 1979-1981
Robert A. McConnell
Assistant United States Attorney General 1981-1984

Michael R. Bromwich
Inspector General for the Department of Justice 1994-1999

Nathaniel R. Jones
United States Court of Appeals Judge, Sixth Circuit Court of Appeals 1979-1995

Timothy K. Lewis
United States Court of Appeals Judge, Third Circuit Court of Appeals 1992-1999
United States District Court Judge, Western District of Pennsylvania 1991-1992

William G. Bassler
United States District Court Judge, District of New Jersey 1991-2006
Professor of Law, Fordham Law School

Edward N. Cahn
United States District Court Judge, Eastern District of Pennsylvania 1974-1998
Professor of Law, University of Utah

Paul G. Cassell
United States District Court Judge, District of Utah 2002-2007
Associate Deputy Attorney General of the United States 1986-1988

U.W. Clemon
United States District Court Judge, Northern District of Alabama 1980-2009

David H Coar
United States District Court Judge, Northern District of Illinois 1994-2010
United States Bankruptcy Court Judge, Northern District of Illinois 1986-1994

David Folsom
United States District Court Judge, Eastern District of Texas 1995-2002

Frederick B. Lacey
United States District Court Judge, District of New Jersey 1971-1986
United States Attorney, District of New Jersey 1969-1971

Thomas D. Lambros
United States District Court Judge, Northern District of Ohio 1967-1995

John C. Lifland
United States District Court Judge, District of New Jersey 1988-2007

Howard A. Matz
United States District Court Judge, Central District of California 1997-2013

Frank H. McFadden
United States District Court Judge, Northern District of Alabama 1969-1982

Edward W. Nottingham
United States District Court Judge, District of Colorado 1989-2008

Stephen M. Orlofsky
United States District Court Judge, District of New Jersey 2005-2007

Layn R. Phillips
United States District Court Judge, Western District of Oklahoma 1987-1991
United States Attorney, Northern District of Oklahoma 1984-1987

Abraham D. Sofaer
United States District Court Judge, Southern District of New York 1979-1985

Herbert J. Stern
United States District Judge, District of New Jersey 1973-1987
United States Attorney, District of New Jersey 1971-1973

Dickran M. Tevrizian, Jr
United States District Judge, Central District of California 1985-2005

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United States District Court Judge, District of New Jersey 1988-2004

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United States Attorney, Northern District of Georgia 1994-1997

Robert L. Barr, Jr.
United States Attorney, Northern District of Georgia 1986-1990

A. Bates Butler III
United States Attorney, District of Arizona 1980-1981

Robert J. Cleary
United States Attorney, Southern District of Illinois 2002
United States Attorney, District of New Jersey 1999-2002

William B. Cummings
United States Attorney, Eastern District of Virginia 1975-1979

W. Thomas Dillard
United States Attorney, Northern District of Florida 1983-1987
United States Attorney, Eastern District of Tennessee 1981

Edward L. Dowd
United States Attorney, Eastern District of Missouri 1993-1999

George W. Proctor
United States Attorney, Eastern District of Arkansas 1979-1987

Robert B. Fiske, Jr
United States Attorney, Southern District of New York 1976-1980

David C. Iglesias
United States Attorney, District of New Mexico 2001-2007

A. Melvin McDonald
United States Attorney, District of Arizona 1981-1985
Maricopa County Superior Court Judge 1974-1981

Kenneth J. Mighell
United States Attorney, Northern District of Texas 1977-1981

Richard J. Pocker
United States Attorney, District of Nevada 1989-1990

Ira H. Raphaelson
Special Counsel for Financial Institutions, Department of Justice 1991-1993
United States Attorney, Northern District of Illinois 1989-1990

James H. Reynolds
United States Attorney, Northern District of Iowa 1976-1982

James G. Richmond
United States Attorney, Northern District of Indiana 1985-1991

Benito Romano
United States Attorney, Southern District of New York 1989

Donald K. Stern
United States Attorney, District of Massachusetts 1993-2001

F.L. Peter Stone
United States Attorney, District of Delaware 1969-1972

Peter F. Vaira
United States Attorney, Eastern District of Pennsylvania 1978-1983

John Shenefield
Associate Attorney General of the United States 1979-1981

Brett L. Tolman
United States Attorney, District of Utah 2006-2009

Stanley A. Twardy Jr.
United States Attorney, District of Connecticut 1985-1991

Atlee W. Wampler III
United States Attorney, Southern District of Florida 1980--1982
Attorney--In--Charge, Miami Strike Force, Organized Crime & Racketeering Section, Criminal Division, U.S. Department of Justice, 1975--1980

Dan K. Webb
United States Attorney, Northern District of Illinois 1981-1985

Robert Abrams
Attorney General of New York 1979-1993

John J. Easton, Jr
Attorney General of Vermont 1981-1985

Tyrone C. Fahner
Attorney General of Illinois 1980-1983

Troy R. King
Attorney General of Alabama 2004-2011

Clarine Nardi Riddle
Attorney General of Connecticut 1989-1991
Connecticut Superior Court Judge 1991-1993

John Van De Kamp
Attorney General of California 1983-1991

Aviva Abramovsky
Professor of Law, Syracuse University

Robert H. Aronson
Professor of Law, University of Washington

Lara Bazelon
Co-Chair of the American Bar Association's Ethics Committee

Douglas A. Berman
Professor of Law, Ohio State University

Sande Buhai
Professor of Law, Loyola Law School

Marjorie Cohn
Professor Emerita of Law, Thomas Jefferson School of Law

Nathan M. Crystal
Professor Emeritus of Law, University of South Carolina

Alan Dershowitz
Professor of Law, Harvard Law School

Fernand N. Dutile
Professor Emeritus of Law, Notre Dame Law School

Eric Freedman
Professor of Law, Hofstra University
Bennett L. Gershman
Professor of Law, Pace Law School

Julius G. Getman
Professor of Law, University of Texas at Austin

Malvina Halberstam
Professor of Law, Yeshiva University

Andrew Horwitz
Professor of Law, Roger Williams University School of Law

Sheri Lynn Johnson
Professor of Law, Cornell Law School

Brian Levin
Professor of Law

Peter Keane
Professor of Law, Golden Gate University

Daniel Kleinberger
Professor Emeritus of Law, Mitchell Hamline School of Law

Harold Krent
Dean and Professor of Law, Chicago-Kent College of Law

Evan Lee
Professor of Law, University of California Hastings

Mark Lee
Professor of Law, University of San Diego

Thomas M. McDonnell
Professor of Law, Pace Law School

Michael Meltsner
Professor of Law, Northeastern University

Marc L. Miller
Founding Editor, Emeritus, Federal Sentencing Reporter

Michael M. O'Hear
Professor of Law, Marquette University Law School

Charles J. Ogletree
Professor of Law, Harvard Law School

Jordan J. Paust
Professor of Law, University of Houston Law Center

Mark D. Rosen
Professor of Law, Chicago-Kent College of Law

Josephine Ross
Professor of Law, Howard University School of Law

Ronald D. Rotunda
Professor of Law, Chapman University

Ronald J. Rychlak
Professor of Law, University of Mississippi School of Law

Michelle S. Simon
Professor of Law, Pace University

Robert Steinbuch
Professor of Law

Michael B. Mukasey
1049 Park Avenue
Apartment 6C
New York, NY 10028

January 18, 2017

President-Elect Donald J. Trump
Trump Tower
725 Fifth Avenue
New York, NY 10022

Dear Mr. President-Elect:

In the years following the end of my service as Attorney General in 2009, I have become familiar with the federal criminal case of Sholom M. Rubashkin, and in particular with details surrounding the imposition on this first-time offender of a scandalously harsh 27-year sentence in a financial fraud case. That sentence – seven and one-half years of which already have been served -- and the prosecutorial abuses that led to it, have generated outrage from many former senior Justice Department officials and judges, including me, as reflected in the enclosed letter sent in April 2016 to the United States Attorney for the Northern District of Iowa, where the case was brought and the sentence imposed.

I am writing now in particular to urge that when you take office, you consider favorably the use in this case of the President's plenary power to grant clemency. Please know that I and others who have signed the enclosed letter will both bless and applaud you – in private and in public -- for granting Mr. Rubashkin the relief that the Constitution has empowered you to give.

With thanks for your attention to this matter, and with wishes for great success in your service to this country, I am

Respectfully yours,

Michael B. Mukasey

Enclosure

BILL CASSIDY, M.D.
6TH DISTRICT, LOUISIANA

COMMITTEE ON AGRICULTURE
SUBCOMMITTEE ON CONSERVATION, CREDIT, ENERGY, AND RESEARCH
SUBCOMMITTEE ON RURAL DEVELOPMENT, BIOTECHNOLOGY, SPECIALTY CROPS, AND FOREIGN AGRICULTURE

COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEE ON EARLY CHILDHOOD, ELEMENTARY AND SECONDARY EDUCATION
SUBCOMMITTEE ON HIGHER EDUCATION, LIFELONG LEARNING, AND COMPETITIVENESS

COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON INSULAR AFFAIRS, OCEANS AND WILDLIFE

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PHONE: (202) 225-3901
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BATON ROUGE, LA 70808
PHONE: (225) 929-7711
FAX: (225) 929-7688

http://cassidy.house.gov

Congress of the United States
House of Representatives
Washington, DC 20515

February 11, 2011

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Holder:

I write regarding the criminal case and sentencing of Sholom Rubashkin. Mr. Rubashkin was found guilty of bank fraud in November 2009 by a jury from the U.S. District Court for the Northern District of Iowa. He was sentenced to 27 years in prison.

After hearing about the sentence, I discussed the matter with lawyers and judges. The judges noted that the sentence is longer than that historically imposed on other white-collar defendants, including Enron executive Jeffrey Skilling.

While I defer to you as to the facts of the case and do not dispute Mr. Rubashkin's conviction, I ask that your office review the appropriateness of the sentence.

Thank you for your attention to this matter.

Sincerely,

Bill Cassidy

Bill Cassidy
Member of Congress

United States Senate
WASHINGTON, DC 20510

May 15, 2012

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: *United States v. Sholom Rubashkin*, 655 F.3d 849 (8th Cir. 2011)

Dear General Holder:

We are members of the United States Senate who wish to bring to your attention our concerns regarding the above-captioned decision. This decision sets a precedent unsupported by law and inconsistent with justice by adopting a standard for considering new evidence in a criminal case that would deny a new trial to a criminal defendant with clear evidence that he or she was denied the Constitution's guarantee of an impartial adjudicator, unless he or she could demonstrate factual innocence. That standard makes no sense. Nonetheless, we understand that the government procured this harsh rule by successfully advocating its application. We do not understand how this is consistent with the Justice Department's high standards or how the government could defend that standard in the Supreme Court. We ask for your careful review of this decision and urge the Department to effect its vacatur.

The defendant in this case, Mr. Sholom Rubashkin, was arrested following a United States Immigration and Customs Enforcement (ICE) raid on the Postville, Iowa, meatpacking plant he managed. A jury in the Northern District of Iowa convicted Mr. Rubashkin of a number of federal fraud-based charges. The trial judge then sentenced Mr. Rubashkin to a remarkable twenty-seven years in prison—two more years than the government sought.

After trial, Mr. Rubashkin learned, pursuant to a Freedom of Information Act request, that the trial judge in his case had extensively participated in *ex parte* pretrial discussions with ICE agents and attorneys from the United States Attorney's Office for the Northern District of Iowa regarding the raid on the plant that ultimately resulted in his arrest, trial, and conviction. The full extent of the trial judge's involvement had never before been divulged to Mr. Rubashkin. Based on this newly discovered evidence indicating the trial judge's lack of impartiality, Mr. Rubashkin filed a motion for a new trial. The trial judge refused to transfer the motion to another judge and simply denied the motion herself.

As troubling as these facts and the resulting sentence are, they are not the subject of this letter. Our concern focuses instead on the standard of law adopted by the Eighth

Circuit, which rendered any inquiry into the degree of the Judge's impartiality beside the point, absent a showing that the newly discovered evidence demonstrates factual innocence. Whatever the Department may be able to say about the facts of the case and the Judge's involvement in the raid, we do not understand how the Department can defend a standard that renders all of those details beside the point.

The Eighth Circuit affirmed the convictions and sentence. In so doing, it accepted an argument set forth by the government that Mr. Rubashkin was not entitled to a new trial because Federal Rule of Criminal Procedure 33, which governs motions for new trial, requires "that the newly discovered evidence *probably will result in an acquittal*." 655 F.3d at 858 (internal quotation marks omitted) (emphasis added). Mr. Rubashkin's newly discovered evidence raised concerns about the trial judge's lack of impartiality, but was not directed toward his guilt or innocence. Accordingly, under the standard advocated by the Department and accepted by the Eighth Circuit, the evidence of impartiality—no matter how strong—was rendered irrelevant.

In our view, the Eighth Circuit's decision is patently incorrect and cannot be squared with existing law or fundamental fairness. Nothing in Rule 33 commands that new trial motions based on newly discovered evidence may only succeed if the evidence "probably will result in an acquittal." While that test may make sense when the newly discovered evidence is relevant to the defendant's guilt or innocence, the application of that standard to newly discovered evidence of partiality is a complete non sequitur. When the newly discovered evidence goes to an issue of profound importance other than guilt or innocence, ignoring the evidence unless it probably will result in an acquittal makes no sense. Such a cramped interpretation is certainly not required by Rule 33. The plain language of the Rule amply allows for new trial motions based on other types of newly discovered evidence, such as that calling into question the fundamental fairness of the trial or other issues of law. Perhaps for that reason, other federal courts of appeals have consistently held that a criminal defendant need not demonstrate "probable acquittal" when seeking a new trial based on newly discovered evidence bearing not on guilt or innocence but, for example, whether the prosecution withheld material evidence or, as here, whether the trial judge was impartial.

The consequences of the Eighth Circuit's ill-advised decision are far-reaching. If it stands, criminal defendants could never obtain a new trial based on newly obtained evidence casting doubt upon the fundamental fairness of their trial. The decision creates the very real possibility that an individual could have evidence that he or she was denied an impartial adjudicator—one of the cornerstones of a fair trial—but lack any recourse, since that evidence, by its nature, would not directly bear on the individual's guilt or innocence. That is simply not tenable.

We find it troublesome that the Eighth Circuit ruled in this fashion. We find it even more troublesome, however, that its ruling was the product of an argument that the government explicitly set forth and urged the court to adopt. The rotunda outside your

office bears the worthy reminder that the government wins its point whenever justice is done to one of its citizens in court. We are at a loss as to understand how the rule the Department has procured from the Eighth Circuit is consistent with that principle or the finest traditions of the Department.

In light of the concerns we have articulated, we ask that you carefully review this decision, and we urge the Department to effect its vacatur.

Sincerely,

cc: Donald B. Verrilli, Jr., Solicitor General of the United States

UNITED STATES SENATE
WASHINGTON, D. C. 20510

ORRIN G. HATCH
UTAH

March 1, 2017

The President
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President:

For the last few years I have closely followed the case of Sholom Rubashkin. He is a 57-year-old father of ten, who, in June 2010, was sentenced to 27 years in federal prison for white-collar offenses. Frankly, I have looked closely at this case, and I—like so many others—was shocked by the sentence Mr. Rubashkin received. I do not believe that Mr. Rubashkin's punishment matches his crime.

Among the reasons this case is so troubling to me is that Mr. Rubashkin has an autistic son who is heavily dependent on him. Despite Mr. Rubashkin's busy schedule when he was vice president of his father's meatpacking plant, Mr. Rubashkin would take time every single day to have dinner with his son Moishe, one-on-one. They created a special bond, which made a positive impact on Moishe's behavior. Predictably, this extended separation between father and son has had an overwhelmingly negative effect on Moishe's wellbeing.

Mr. Rubashkin's behavior in the Otisville Federal Correctional Institute has been exceptional. I've been told that, during his more than seven years in prison, he has had no infractions. In fact, he works in the chapel and spends his time teaching, studying, and praying. I have received reports that he is enormously respected and liked by all.

Additionally, Mr. and Mrs. Rubashkin have a 12-year-old son, Uziel, who will be celebrating his Bar Mitzvah on April 2, 2017. Mr. Rubashkin has already missed the wedding of his daughter, the birth of numerous grandchildren and so many other special family occasions. It would truly be a tragedy should he miss the Bar Mitzvah as well.

Mr. Rubashkin has served his time and has long paid his dues to society. I believe he should now have the chance to be home where he belongs, with his beautiful family. His mother is 90 years old, and his father is 89 years old. They are too frail to visit their son and, as you can imagine, they miss him terribly.

Mr. President, the United States Constitution gives you the exclusive power of clemency. I respectfully ask that you commute Mr. Rubashkin's sentence before his son's Bar Mitzvah (April 2, 2017). I believe this is the right thing to do.

Thank you, again, for taking the time to consider this request.

Sincerely,

Orrin G. Hatch
United States Senator

YVETTE D. CLARKE
11TH DISTRICT, NEW YORK

1029 LONGWORTH HOUSE OFFICE BUILDING
(202) 225-6231

EDUCATION AND LABOR COMMITTEE

HOMELAND SECURITY COMMITTEE

SMALL BUSINESS COMMITTEE

Congress of the United States
House of Representatives
Washington, DC 20515-3211

HEALTH, EMPLOYMENT, LABOR, AND PENSIONS SUBCOMMITTEE

HEALTHY FAMILIES AND COMMUNITIES SUBCOMMITTEE

CHAIRWOMAN: EMERGING THREATS, CYBERSECURITY, AND SCIENCE AND TECHNOLOGY SUBCOMMITTEE

INTELLIGENCE, INFORMATION SHARING AND TERRORISM RISK ASSESSMENT SUBCOMMITTEE

CONTRACTING AND TECHNOLOGY SUBCOMMITTEE

RURAL DEVELOPMENT ENTREPRENEURSHIP AND TRADE SUBCOMMITTEE

November 29, 2010

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530-0001

Dear Mr. Holder:

I am contacting you regarding a case that has greatly impacted upon many of my Jewish constituents in New York's 11th Congressional District whom I have the privilege of representing. I am a firm believer that the American judicial system is the best in the world and that judges should be given discretion in sentencing. I have opposed mandatory minimums throughout my public life as they often times result in sentences that do not necessarily fit the crime. While our system is one of the best, unfortunately it does not always get it right.

The sentence of Sholom Rubashkin is an instance where I believe our system got it wrong and the punishment does not fit the crime. Sholom Rubashkin, whose family and supporters are constituents from the Orthodoxed Jewish communities of Brooklyn, was the former CEO/VP of Agriprocessors, a kosher meatpacking plant in Postville, Iowa, which was subject to a May 12, 2008 federal immigration raid. While the case began as an immigration raid, Mr. Rubashkin ended up facing a 163 count federal indictment that included 91 federal bank fraud charges. However, the government dropped the federal immigration charges and Mr. Rubashkin was found guilty of 86 of the 91 bank fraud charges, ruling that First Bank Business Capital of St. Louis was defrauded of $26 million. The presiding judge, the Honorable Linda Reade of the Northern District of Iowa, sentenced Mr. Rubashkin to 27 years in prison.

I believe that this unusually severe sentence is cause for concern for several reasons. First, Mr. Rubashkin was a first-time white-collar offender. At no time did the trial prove Mr. Rubashkin intended to inflict malicious harm to any individual working for, or associated with, Agriprocessors. Secondly, the prosecution in this case requested a 25-year sentence for Mr. Rubashkin. Before sentencing Mr. Rubashkin, Judge Reade was contacted by former Justice Department officials, as well as six of your predecessors, decrying the severity of a 25-year sentence as a misreading of federal white-collar sentencing guidelines. Judge Reade not only disregarded these overtures, but sentenced Mr. Rubashkin to two more years than the prosecution requested.

While these are all reasons for concern, the most troubling aspect of Mr. Rubashkin's sentence is how much more severe his sentence is in light of white-collar criminals whose crimes were far more severe in scope, monetary loss and effect.

- Former Tyco CEO Dennis Kozlowski and CFO Mark Swartz were convicted of stealing hundreds of millions of dollars and each received a sentence of only 8 1/3 - 25 years.

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- Former Enron CEO Jeffrey Skilling, who was convicted of orchestrating the largest corporate fraud in history resulting in the collapse of a company worth over $63 billion, only received a 24 year sentence.

- Bernie Ebbers, the former CEO of WorldCom, whose accounting fraud covered $11 billion, received 25 years.

These are just a few circumstances of individuals that received lesser sentences than Mr. Rubashkin, and whose damage upon the economy and American people were unquestionably more severe. The collapse of Enron not only resulted in the collapse Arthur Andersen, then-one of the largest accounting firms in the world, but wiped out the retirement savings of thousands of Americans. Tyco and Worldcom's fraud, while not as severe as Enron's, also had a major impact on a wide range of Americans. The fact that Mr. Rubashkin received a more severe sentence than any of those mentioned is troublesome and inconsistent with having the punishment fit the crime, and fairness. Therefore, on behalf of my constituents who have come to me seeking justice in this case, I am requesting that you launch a formal inquiry into the sentencing phase of this case.

If you have any questions and/or concerns regarding this matter, please feel free to reach out to me if I can be of any assistance. I thank you for your kind consideration of this matter and I look forward to hearing from your good offices.

Sincerely,

Yvette D. Clarke
Member of Congress

MIKE COFFMAN
6TH DISTRICT, COLORADO

ARMED SERVICES COMMITTEE

NATURAL RESOURCES COMMITTEE

SMALL BUSINESS COMMITTEE

Congress of the United States
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Washington, DC 20515–0606

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November 10, 2010

The Honorable Eric Holder
Attorney General of the United States
950 Pennsylvania Avenue, NW, Suite 5111
Washington, DC 20530

RE: U.S. v. Rubashkin, Case No. 2:08-CR-01324-LRR (NDIA)

Dear Attorney General Holder:

I recently became aware of some of the details regarding the federal prosecution and sentencing of Mr. Sholom Rubashkin through a conversation with one of my constituents. I understand you have previously heard from a number of my colleagues on this issue. As you are likely aware, Mr. Rubashkin was sentenced to twenty-seven years in prison for white collar crimes, including bank fraud, originating from an ICE raid at his meat packing plant in Iowa.

My review of the publicly available facts of this case leads me to some troubling questions. Why did the presiding judge engage in *ex parte* communications with the US Attorney's Office? Why didn't the judge disclose those communications in the course of the trial? Why didn't the judge recuse herself from Mr. Rubashkin's trial, in light of those previous communications? In what other ways, if any, did the judge give preferential treatment to the prosecutors?

Further, why did the judge sentence a first-time, non-violent offender to a term of 27 years, above both the requests of the prosecutor and defense attorney? Did the Court improperly apply the Sentencing Guidelines to arrive at an unjust and unnecessary result?

I am not suggesting I have all of the answers to these questions. Rather, I note them in order to request your personal review of the facts of this case. At the least, the questions deserve investigation at a level above the US Attorney's Office in Iowa, whose previous involvement in the case creates an appearance of partiality.

I believe that transparency is essential to the workings of our judicial system. Public confidence in the rule of law and the impartiality of the court must not be shaken by any improper actions by its officers. I would appreciate your full and fair review of the circumstances presented by this case to guarantee that Mr. Rubashkin received proper consideration and treatment, as is due all criminal defendants in our country.

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Thank you for your attention to this matter.

Sincerely,

Mike Coffman
Member of Congress

MC/jrc

MARIO DIAZ-BALART
25TH DISTRICT, FLORIDA

BUDGET COMMITTEE
TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
SUBCOMMITTEE:
RANKING MEMBER
ECONOMIC DEVELOPMENT, PUBLIC BUILDINGS AND EMERGENCY MANAGEMENT
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MEMBER, REPUBLICAN HOUSE POLICY COMMITTEE

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FAX: (239) 348–3569

December 14th, 2010

The Honorable Eric Holder
Attorney General of the United States
950 Pennsylvania Ave., NW
Suite 5111
Washington, DC 20530

IN RE: U.S. v. Rubashkin, Case No. 2:08-cr-01324-LRR (ND IA)

Dear Attorney General Holder:

I would like to call your attention to allegations of relevant information being withheld in the case against Mr. Sholom Rubashkin. It is my understanding that a Freedom of Information Act request revealed what might be considered improper communications between a federal judge, Chief Judge Linda R. Reade, federal prosecutors and investigators months prior to the arrest of Mr. Rubashkin.

Documents recently filed in the U.S. District Court for Northern District of Iowa (Case No. 2:08-cr-01324-LRR), allege that Chief Judge Reade was repeatedly consulted by law-enforcement agents and prosecutors from the U.S. Attorney's office during the several months preceding a May 2008 immigration raid on a kosher meatpacking plant in Iowa. It is my understanding from the information I have received, that the judge offered to "help in any way possible" with preparations for the raid.

I respectfully request, in accordance with all application laws and regulations, that you investigate these claims to make sure that the high standards of our judicial system are upheld and that all U.S. citizens are afforded a fair and impartial trial.

Sincerely,

Mario Diaz-Balart
Member of Congress

COMMITTEE ON
FOREIGN AFFAIRS
CHAIRMAN
WESTERN HEMISPHERE
SUBCOMMITTEE
OTHER SUBCOMMITTEES:
ASIA, THE PACIFIC, AND THE
GLOBAL ENVIRONMENT
MIDDLE EAST AND SOUTH ASIA
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ENERGY AND COMMERCE
SUBCOMMITTEES:
HEALTH
ENERGY AND ENVIRONMENT
ASSISTANT DEMOCRATIC WHIP

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17th DISTRICT, NEW YORK

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WEST NYACK, NY 10994
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WEBSITE: http://engel.house.gov

March 3, 2011

The Honorable Eric Holder
Attorney General of the United States
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Holder:

I write regarding the federal case against Sholom Rubashkin, whose kosher meatpacking plant in Postville, Iowa, was raided by federal agents in May 2008, and who was subsequently convicted of a number of federal crimes in November 2009. Several of my constituents have raised concerns about the handling of this case that should warrant your review.

Firstly, it is asserted that there may have been improper communications among the judge, the prosecutors, and the investigators in the months leading up to the arrest of Mr. Rubashkin.

Secondly, it appears that Mr. Rubashkin's sentence seems to be disproportionately harsh for his crimes.

Thirdly, it has been reported that the government opposed bail, stating that Mr. Rubashkin was a flight risk solely because, as a Jew, he was eligible for Israeli citizenship under that country's Law of Return. Such a position would reflect not only a misunderstanding of the Law of Return, but also a likely violation of the equal protection clause of the United States Constitution.

I believe that the health of our democracy depends on the unflinching truth that all federal prosecutions are conducted in a fair, even-handed, and above-all-else constitutional manner. I trust that you will consider the totality of the circumstances of this case to guarantee that the high standards of our judicial system are upheld, and to continue to ensure that all criminal defendants in this country receive the fair and impartial trial that they are due.

Thank you for your consideration.

Sincerely,

Eliot L. Engel

Eliot L. Engel

HON. LOUIE GOHMERT
FIRST DISTRICT, TEXAS

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COMMITTEES:
JUDICIARY
NATURAL RESOURCES
REPUBLICAN STUDY COMMITTEE
HOUSE POLICY COMMITTEE

Congress of the United States
House of Representatives
Washington, DC 20515

April 6 in the Year of our Lord 2011

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Holder:

I write about the criminal case and sentencing of Sholom Rubaskin. Mr. Rubaskin was found guilty by a jury in the U.S. District Court for the Northern District of Iowa on multiple counts of bank fraud. He was sentenced to 27 years in prison on June 21, 2010.

While I defer to you as to the full details of the case, news reports have raised two facts that warrant your investigation.

First, a Freedom of Information Act request by Mr. Rubaskin's attorney following sentencing disclosed that the trial judge was the same judge who participated in detailed ex-parte communications with prosecutors and federal agents on an immigration raid of the plant managed by Mr. Rubaskin. The raid led to the financial fraud charges on which Mr. Rubaskin was convicted. These discussions between the judge and federal officials were not disclosed during the Rubaskin trial.

Second, six former U.S. Attorneys General and a number of U.S. Attorneys have questioned whether the length of Mr. Rubaskin's sentence is consistent with the federal sentencing guidelines on white-collar crimes. The length of Mr. Rubaskin's sentence is longer than that of similar white-collar criminal defendants, including former Enron CEO Jeffrey Skilling.

In order to ensure that justice is being served, I respectfully request that you investigate Mr. Rubaskin's sentencing and the ex-parte discussions between the judge and government officials in preparation for the raid.

Thank you for your prompt attention and response in this matter.

Sincerely,

Louie Gohmert
Member of Congress

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STEVE KING
5TH DISTRICT, IOWA

COMMITTEES:
AGRICULTURE
JUDICIARY
POLICY
SMALL BUSINESS

Congress of the United States

House of Representatives

Washington, DC 20515–1505

December 23, 2010

The Honorable Eric H. Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Dear Attorney General Holder:

I write to you regarding Sholom Rubashkin, who was found guilty of bank fraud by a federal court jury in the Northern District of Iowa a little more than one year ago. Although he is a first-time offender and allegedly committed a non-violent crime, he was sentenced by Judge Linda Reade in June of this year to an outrageous and disparate sentence of 27 years, two years more than the prosecution requested. This case concerns me not only because it involves an Iowa businessman and a court in my home state; but even more important, because it indicates abuse in the federal judicial system, including within the Department of Justice.

I respectfully request that you formally inquire into these matters and take corrective action if, at the conclusion of a full inquiry, it appears that abuses have been committed.

I am certain you are aware of at least the general issues involving this case, but in my opinion, the most important aspects – those that clearly would seem to warrant your attention – relate to the following two problems:

First, internal Immigration and Customs Enforcement documents produced after the trial, establish there were numerous undisclosed meetings between the judge and Assistant United States Attorneys (and other government agents) in the months preceding the May 2008 raid on the Agriprocessors plant in Postville, Iowa (which was then managed by Mr. Rubashkin.) Neither Judge Reade nor the U.S. Attorney's office disclosed these meetings to Mr. Rubashkin's trial counsel before the trial, when they could have invoked these meetings as grounds to recuse Judge Reade. A Motion for a New Trial was filed promptly after these documents were produced to Mr. Rubashkin's counsel.

If the evidence in this case establishes that there were undisclosed and unrecorded *ex parte* meetings between a judge and prosecutors regarding the planning of a raid that led to criminal prosecution of the manager of the raided plant, the situation would, I believe, be comparable to that which led you to take the courageous step of terminating the

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WASHINGTON, D.C. OFFICE
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prosecution of the late Senator Ted Stevens. Both situations concern prosecutorial misconduct that threatens the fairness and credibility of our judicial system.
The second major area of concern that I believe warrants your personal attention is the use (and abuse) of the federal Sentencing Guidelines by the government and a judge, in order to arrive at and justify an outrageously long sentence - 27 years - for a first-time, white collar defendant. The sentencing judge ignored the factors prescribed by statute and calculated a prison term based entirely on an erroneous assertion of the lending bank's "loss." This so-called "loss," which was a major factor in significantly boosting Mr. Rubashkin's sentence, manifested itself only *after* the meat packing plant was forced into bankruptcy following the government's raid for alleged immigration violations.

Troubling also, is the fact that this entire prosecution was premised initially on alleged immigration law violations; but in fact every single immigration count in the indictment was dropped, following a series of seven superseding indictments. Moreover, when an Iowa state court last summer tried Mr. Rubashkin on 67 immigration-related counts (down from 9,113 misdemeanor counts that he knowingly hired under-age illegal workers at the plant), he was acquitted on every count.

Returning to the bankruptcy proceedings which resulted in a "loss" to the bank, during that process - at which time the federal government essentially controlled the assets and disposition of the Agriprocessors plant - significant restrictions were placed on the manner in which the assets could be purchased. This was how the government was able to claim a significant "loss" to the bank; a calculation readily adopted by the trial judge.

In fact, this loss would not have occurred had the government not drastically and unnecessarily restricted the eventual sale of the assets.

There are other problematic aspects of the manner in which Mr. Rubashkin was sentenced; but the bottom line, Mr. Attorney General, is that both the U.S. Attorney's office and the federal judge were able to manipulate the Guidelines based on circumstances under the government's control, so as to result in an outrageously long and disparate sentence for this man.

Like you and many other Americans, I am committed to see that justice is served fairly for all who come before our courts; this is one of the primary reasons I sit as a member of the Committee on the Judiciary. In the vast majority of cases, defendants are afforded fair process and, if found guilty, are sentenced fairly. But this is not always true; there are cases illustrating that injustices occur and unfairly disparate sentences sometimes imposed. Unfortunately, one such case - that of Sholom Rubashkin - occurred in my own state of Iowa.

It is my understanding that officials at the Department of Justice have thus far turned a deaf ear to these allegations; even to the extent of ignoring a letter signed by six of your predecessor Attorneys General. I believe you to be a man committed to fairness and justice, and that you would neither countenance nor practice the dismissive attitude

exhibited by others at the Department, when asked to look into these serious allegations of misconduct.

I therefore respectfully urge you to formally investigate the allegations of misconduct in the case of Sholom Rubashkin.

Sincerely yours,

Steve King
Member of Congress

JUDICIARY COMMITTEE
SUBCOMMITTEES:
CHAIRMAN
CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES
CRIME, TERRORISM AND HOMELAND SECURITY

TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
SUBCOMMITTEES:
HIGHWAYS AND TRANSIT
RAILROADS, PIPELINES AND HAZARDOUS MATERIALS

ASSISTANT WHIP

Congress of the United States
House of Representatives
Washington, DC 20515

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8TH DISTRICT, NEW YORK

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January 25, 2011

The Honorable Eric H. Holder, Jr.
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Holder:

I am writing to you about a series of events involving the Department of Justice (DOJ), stemming from a raid on the Agriprocessors, Inc. plant in Postville, Iowa, on May 12, 2008, the subsequent criminal prosecution of Sholom Rubashkin, and the criminal prosecutions and deportations of undocumented immigrants seized in the raid. Various reports concerning the conduct of DOJ personnel leading up to, during, and following the raid raise serious issues of potential misconduct or improper Department policy that I believe demand your careful review, consideration, and, where appropriate, remedial action. As the Ranking Democratic Member of the Subcommittee on the Constitution, I believe it is important that the Department of Justice respects the rights of persons in its custody, and persons accused of crimes.

The first issue involves what have been described as extensive *ex parte* communications between Chief Judge Linda Reade and DOJ. According to reports and court papers, Chief Judge Reade met with representatives of DOJ and Immigration and Customs Enforcement (ICE). Although characterized by DOJ as merely involving "logistical cooperation," these contacts were reportedly extensive and involved a broad range of matters. I have been informed that many of the details of these *ex parte* communications were not available to defense counsel in the trial of Sholom Rubashkin, and were only available to his appellate counsel through redacted documents obtained under the Freedom of Information Act.

I am concerned by the allegation that DOJ may have withheld from Mr. Rubashkin and his attorneys information pertaining to these contacts. Professor Stephen Gillers noted in his September 7, 2010 submission to the United Status District Court for the Northern District of Iowa,

> I conclude that U.S. lawyers violated rules governing ex parte contact with the judge who presided at the trial of Mr. Rubashkin and in failing to inform Mr. Rubashkin's defense counsel at the inception of the criminal proceeding against

> Mr. Rubashkin or, at the latest, before the deadline for filing a motion to recuse, of the number of, and the substance of communications in, the ex parte pretrial contacts with the judge prior to the raid on Agriprocessors ....
>
> The ethical prohibition against ex parte communications, as applied in criminal cases, and the prosecutorial disclosure duty, under both professional conduct rules and *Brady*, build on that constitutional mandate and are required by it. Just as a prosecutor cannot ethically or constitutionally conceal information that will impeach the credibility of a government witness, neither can she conceal information that provides the defense with a basis to argue that his constitutional and statutory rights to the fact and appearance of disinterested justice are compromised.

In the past you have reviewed serious allegations of prosecutorial misconduct, especially when it involved the withholding from defendants information pertinent to their defense, as was the case with the prosecution of Senator Ted Stevens. I believe that these allegations are sufficiently serious to warrant your review.

The second issue involves the conduct of the raid, and the handling of the cases of the undocumented immigrants seized in that raid.

The *ex parte* communications with Judge Reade in question were apparently initiated by DOJ as part of the planning of a raid by DOJ and ICE on the Agriprocessors plant during which 389 undocumented immigrants working at the plant were taken into custody.

As a result of the meetings, arrangements were made to move some of the court's judges and other personnel to the National Cattle Congress in Waterloo, Iowa, to facilitate the processing of undocumented immigrants taken into custody.

Details of the process, as uncovered at a July 24, 2008 hearing by the House Judiciary Committee's Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, are deeply troubling. As part of this process, individuals detained were reportedly rushed though a criminal proceeding in which, as part of a plea agreement, they had to waive their rights to an administrative removal hearing, regardless of whether they may have had a right to valid immigration relief, such as asylum, a claim under the Violence Against Women Act, or approved family- or employment-based immigrant petitions.

Instead of placing these individuals into the normal administrative removal proceedings, 302 of the 389 workers arrested were criminally charged with identity theft, use of a false ID and/or Social Security number, and illegally reentering the United States following deportation. They were told that they faced a minimum of two years in prison, but were offered a uniform plea agreement in which the government would withdraw the heavier charge of aggravated identity theft, the defendants would serve five months in jail, receive three years of supervised release, and be deported without a hearing.

According to testimony presented by Deborah Rhodes, Senior Associate Deputy Attorney General, at the July 24, 2008 hearing, "[d]efendants who were charged with the same offense and offered the same plea agreement typically were arranged in groups of 10." She further testified that "271 defendants were sentenced to five months in prison and three years of supervised release .... Two defendants were sentenced to 12 months and a day in prison and three years of supervised release ...." These cases were disposed of within 10 days. Only 18 criminal defense lawyers were appointed by the federal court to represent hundreds of defendants; every attorney represented 17 defendants on average.

The third issue involves statements made by United States Attorney Stephanie Rose in an interview published in the December 27, 2010 issue of the Gazette. In that interview, Ms. Rose states that "[t]he goal of this case was to prevent future crimes like this, as well as to punish Rubashkin ... This case was important for those that are taking advantage of and employing illegal immigrants but all of that got lost with this other stuff. We are hoping the appeal process will correct some of that." I do not believe that either the law or Department policy permit an individual to be sentenced for an offence that was neither charged nor decided by the jury.

The final issue involves the position reportedly taken by DOJ at Mr. Rubashkin's bail hearing. It has been reported that the government opposed bail stating that Mr. Rubashkin was a flight risk solely because, as a Jew, he was eligible for Israeli citizenship under that country's Law of Return. I hope that it is not the position of the Department of Justice that a defendant's religion, in the absence of any other evidence, would make him ineligible for bail. Please let me know the Department's position on the role of religion in bail proceedings, and what steps you are taking to ensure that defendants are treated fairly in our courts regardless of their religion.

While the facts of these cases, and the ultimate disposition of important questions of law, are more appropriately considered by the federal courts, there are serious issues of DOJ policy, and prosecutorial conduct arising from these cases that are appropriate for your review. I urge you to examine these questions and let me know how you intend to handle the serious issues raised by these cases.

Thank you for your attention to this matter.

Sincerely,

Jerrold Nadler
Ranking Member
Subcommittee on the Constitution

RICHARD E. NEAL
SECOND DISTRICT, MASSACHUSETTS

AT-LARGE WHIP

COMMITTEE ON WAYS AND MEANS
CHAIRMAN,
SUBCOMMITTEE ON SELECT
REVENUE MEASURES
CHAIRMAN, FRIENDS OF IRELAND

Congress of the United States
House of Representatives
Washington, DC 20515

November 4, 2010

The Honorable Eric Holder
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

IN RE: US v. Rubashkin, Case No. 2:08-cr-01324-LRR (ND IA)

Dear Attorney General Holder:

I write to you today to voice my concern over the sentencing of Mr. Sholom Rubashkin in November 2009. As you are now aware, several former Attorney's General and U.S. Attorney's have voiced their displeasure with the procedures leading to the sentencing of Mr. Rubashkin. After a full read of the facts, the outcome of this matter is quite troublesome.

The integrity of our judges, prosecutors and investigators are the cornerstone of the American legal system. Transparency of such cases, more specifically the Rubashkin case, is integral to the American public's belief in the judicial process. Should cases such as this be left to stand, without inquiry, would be devastating to both our legal system and the trust the public places in the officials it puts in place to impartially administrate the law.

I ask that you give full and fair consideration to the misconduct that occurred between the prosecutors and the presiding judge in this case. It calls into question the conduct of many actors, without whose direct influence, would have resulted in a vastly different outcome for Mr. Rubashkin. Please keep me informed of any developments in this matter. I look forward to your reply.

Sincerely,

Richard E. Neal
MEMBER OF CONGRESS

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Congress of the United States
House of Representatives
Washington, DC 20515-0504

COMMITTEE ON
NATURAL RESOURCES
SUBCOMMITTEE ON WATER AND POWER
RANKING MEMBER

SUBCOMMITTEE ON NATIONAL PARKS,
FORESTS, AND PUBLIC LANDS

COMMITTEE ON
EDUCATION AND LABOR
SUBCOMMITTEE ON EARLY CHILDHOOD,
ELEMENTARY AND SECONDARY EDUCATION

SUBCOMMITTEE ON HEALTH,
EMPLOYMENT, LABOR, AND PENSIONS

November 29, 2010

The Honorable Eric Holder
Attorney General of the United States
950 Pennsylvania Ave., NW
Suite 5111
Washington, D.C. 20530

RE: U.S. v. Rubashkin, Case No. 2:08-cr-01324-LRR

Dear Attorney General Holder:

I write regarding the case of Sholom Rubashkin, whose kosher meatpacking plant, Agriprocessors, was raided by federal agents in May 2008, and who was subsequently convicted of a number of federal crimes in November 2009.

A group of constituents, whom I trust and respect, recently brought this case to my attention and expressed concerns regarding allegations of misconduct by federal authorities in the prosecution of this case. Specifically, they are seeking assurance that the judge in this case was absolutely impartial and had no unauthorized or inappropriate contact with federal investigators or prosecutors before, during, or after the trial.

While I have no personal knowledge of the facts of this case, I respectfully request that the Justice Department thoroughly investigate the allegations of judicial misconduct surrounding this case and make public the result of that investigation. A thorough investigation of this matter is essential to maintaining the public's full trust in the efficacy and fairness of our judicial system. I look forward to hearing from the Justice Department regarding the initiation and progress of this investigation.

Thank you for your time and attention.

Sincerely,

Tom McClintock

TOM MARINO
10TH DISTRICT, PENNSYLVANIA

COMMITTEE ON THE JUDICIARY

COMMITTEE ON HOMELAND SECURITY

COMMITTEE ON FOREIGN AFFAIRS

www.marino.house.gov

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June 1, 2011

The Honorable Eric Holder
Attorney General of the United States
950 Pennsylvania Avenue, NW Suite 5111
Washington, D.C. 20530

IN RE: U.S. v. Rabshkin, Civil Action No. 2:08-CR-1324 LLR

Dear Attorney General Holder:

Today I write to you to ask that you review the case surrounding Sholom Rubaskin, who was found guilty of bank fraud over one year ago. Although I have not had the opportunity to review the entirety of the case, as a former U.S. Attorney and a Member of the House Judiciary Committee, the facts that have been brought to my attention have raised some serious questions.

As you may know, Sholom Rubaskin was arrested in DOJ raid on the Agriprocessors, Inc., a kosher meat packing plant, in Iowa in May of 2008. The immigration charges on which he was initially arrested were dropped; however he was eventually tried and convicted on bank fraud and various other white collar crimes. Mr. Rubaskin was sentenced to 27 years in prison—a sentence even longer than the prosecution had requested.

Also brought to my attention, were allegations of misconduct on behalf of Chief Judge Linda Reade and the DOJ. It is my understanding that there was an alleged *ex parte* communications between Judge Reade and members of the DOJ and the Immigration and Customs Enforcement (ICE). According to the information that was brought to my attention, the details of these communications were not available to Mr. Rubaskins' defense counsel during his trial, and his appellate counsel was only able to obtain redacted documents through a Freedom of Information Act request.

Like you, I am committed to seeing that justice is fairly served for all in the court system. Therefore, I respectfully request that you review the case of Mr. Rubaskin. Please feel free to contact me if you have any questions or need any further information. Thank you.

Sincerely,

Tom

Tom Marino
Member of Congress

CAROLYN B. MALONEY
14TH DISTRICT, NEW YORK

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March 31, 2011

The Honorable Eric H. Holder, Jr.
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Holder:

I write regarding the case of U.S. v. Rubashkin (Case No. 2:08-cr-01324-LRR). I have recently heard from a number of my constituents who have expressed concerns about the handling of this case by the Honorable Linda R. Reade, Chief Judge of the United States District Court in the Northern District of Iowa.

As you may know, Mr. Sholom Rubashkin is the former CEO of Agriprocessors in Postville, Iowa. Agriprocessors was the largest kosher meat packing and slaughterhouse in the United States. My constituents' concerns center around Judge Reade's alleged previous involvement in the planning of the May 2008 raid that led to Mr. Rubashkin's arrest. Mr. Rubashkin was found guilty in November 2009 of 86 accounts of financial fraud including bank fraud, mail and wire fraud and money laundering. In June 2010, he was sentenced to serve 27 years in prison, where he remains, in Otisville, New York. In January 2011 his lawyers filed an appeal for a new trial with the 8th Circuit Court of Appeals in St. Louis.

Thank you for your attention to this matter.

Please review and advise me as to your conclusions, consistent with all applicable rules and regulations.

Sincerely,

CAROLYN B. MALONEY
Member of Congress

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SUBCOMMITTEE ON EMERGENCY COMMUNICATIONS, PREPAREDNESS, AND RESPONSE
SUBCOMMITTEE ON MANAGEMENT, INVESTIGATIONS AND OVERSIGHT

November 1, 2010

The Honorable Eric Holder
Attorney General of the United States
950 Pennsylvania Ave N.W.
Suite 5111
Washington, D.C. 20530

RE: U.S. v. Rubashkin, Case No. 2:08-cr-01324-LRR (N.D. IA)

Dear Attorney General Holder:

I am writing you because allegations of impropriety in the case of Sholom Rubashkin (*U.S. V. Rubashkin*) have been brought to my attention and I would encourage your office to investigate this case.

Mr. Rubashkin is the former executive officer of Agriprocessors, a now-bankrupt slaughterhouse and meat packing plant in Postville, Iowa. He was indicted in U.S. District Court for the Northern District of Iowa on federal charges of harboring illegal immigrants, abetting aggravated identity theft, and separate counts of federal bank fraud. While the immigration-related charges were dismissed, Mr. Rubashkin was found guilty on the bank fraud charges and related white-collar crime charges.

My concerns arise out of two allegations that have come to light since Mr. Rubashkin's imprisonment. First, Mr. Rubashkin was given a 27 year sentence, which is effectively a life sentence for a 51 year-old man. This sentence seems overly harsh as compared to other similarly situated non-violent first-time offenders. Multiple former U.S Attorneys, senior Justice Department officials and a former U.S. Attorney General agreed that this sentence was disproportionately long. They proceeded to write Judge Reade a letter stating that this sentence should be re-examined because it was based on an incorrect interpretation of the sentencing guidelines.

Also concerning are the allegation that have come to light that Judge Reade had ex parte communications with the U.S. Attorneys prosecuting this case, prior to the raid on Agriprocessors. If ex parte communications occurred, and were not disclosed to the defendant, there may have been a miscarriage of justice.

Our judicial system is based on the notion that all defendants are given a fair trial, with transparency and accountability to ensure evenhandedness. Your office has consistently upheld those high standards. Examining this case, I believe that the allegations of harsh sentencing of Mr. Rubashkin, and the troubling information about non-disclosed ex parte communications, has created enough concern to warrant an investigation by the Department of Justice.

Thank you for your consideration of my request.

Sincerely,

Bill Pascrell, Jr.
Member of Congress

Nancy Pelosi
Democratic Leader

August 14, 2017

Mr. Gary Apfel, Esq.
Pepper Hamilton LLP
350 South Grand Avenue, Suite 3400
Los Angeles, California 90071

Dear Mr. Apfel:

Thank you for reaching out to my office regarding the case of Sholom Rubashkin. In recognition of the severity of Mr. Rubashkin's prison sentence, I am writing to strongly support a commutation to the time already served. In doing so, I join scores of leaders – Attorneys General, Deputy Attorneys General, United States Attorneys, federal appellate and district court judges, law enforcement officials, and legal scholars. Their letters are attached.

In addition to questions arising from Mr. Rubashkin's conviction and sentencing process, there is also the issue of the extreme sentencing disparity among defendants convicted of similar crimes where they received far less time than he did. By any equitable measure, Mr. Rubashkin's sentence is unduly harsh and does not meet the goals of our criminal justice system.

Because of the severity and injustice of Mr. Rubashkin's prison sentence, I have studied this issue carefully and therefore strongly reiterate my support for the commutation of his sentence to time served.

I hope that Mr. Rubashkin will soon be reunited with his family. Thank you.

sincerely,

Nancy Pelosi

NANCY PELOSI
House Democratic Leader

TED POE
2ND DISTRICT, TEXAS

COMMITTEES:
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FOUNDER OF CONGRESSIONAL
VICTIM'S RIGHTS CAUCUS

Congress of the United States
House of Representatives
Washington, DC 20515–4302

November 3, 2010

The Honorable Eric Holder
Attorney General of the United States
950 Pennsylvania Ave., NW Suite 5111
Washington, DC 20530

IN RE: U.S. v. Rubashkin, Cast No. 2:08-cr-01324-LRR (NDIA)

Dear Attorney General Holder:

I write to you today to ask that you examine the Federal criminal case against Sholom Rubaskin. While I am not privy to all of the details of the case, the facts that have been brought to my attention from my constituents are very troubling. At the very least, I would ask that you look at these facts, and that you personally review the cast to ensure that justice is being served.

As you may know, the case against Sholom Rubaskin began when his kosher meat packing plant in Postville, Iowa was raided by federal agents in May 2008. Mr. Rubaskin was initially arrested on immigration violations, although these charges were eventually dropped. Ultimately he was tried, and found guilty, of bank fraud and other white collar crimes. Mr. Rubaskin was sentenced to 27 years in jail for these crimes. This sentence was one year longer than the government recommended. For a 51-year old man, this sentence means that Mr. Rubaskin will spend the majority of his remaining life in prison for non-violent, white collar crimes.

Additionally, there are serious allegations of misconduct by the Judge and the U.S. Attorney's in this case. It is my understanding that the Judge who handled the case had detailed discussions with the United States Attorney and immigration officials who participated in the raid in the six months before the raid took place. These discussions were not disclosed during the Rubaskin trial. These facts were not discovered until after he was sentenced through a FOIA request made by his Attorney.

So far, all requests for inquiry to the Department of Justice related to the case have been referred to the U.S. Attorney's office for the Northern District of Iowa, the very office that allegedly took part in ex-parte meetings before the raid. In order to ensure that justice is being served, I request that you launch an inquiry into the sentencing of Mr. Rubaskin, and the ex-parte communications that occurred between the Judge and the government authorities who planned and participated in the raid.

I would appreciate you keeping me informed as to your action on this matter.

Sincerely,

TED POE
Member of Congress

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AND COMPETITIVENESS

HEALTHY FAMILIES AND COMMUNITIES

COMMITTEE ON RULES

COMMITTEE ON
SCIENCE AND TECHNOLOGY

STEERING AND POLICY

January 4th, 2011

The Honorable Eric Holder
Attorney General of the United States
950 Pennsylvania Avenue, N.W., Suite 5111
Washington, D.C. 20530

Dear Attorney General Holder:

I am writing to call to your attention the case of Sholom Rubashkin and some of the problematic circumstances surrounding it. Mr. Rubashkin is the former manager of the Agriprocessors kosher meatpacking plant in Postville, Iowa which was raided by federal agents in May 2008. In November 2009, Mr. Rubashkin was sentenced to 27 years of prison by Judge Linda Reade after being convicted of 86 counts of financial fraud.

Since the Department of Justice has been under your tenure, you have demonstrated a strong commitment to fairness and transparency, which I commend. However, I am concerned about questions that have arisen regarding the handling of this case. I have read that prior to the raid on the Agriprocessors plant, several federal agents who would subsequently take part on the raid had apparently improper communication with Judge Reade. It has been reported that this information was not disclosed to defense attorneys and they only learned about it from a FOIA inquiry after the sentence had already been delivered. While this might have been a routine and innocuous meeting, the fact that it was hidden creates the implication of impropriety.

I agree that in regards to immigration enforcement, we should be prosecuting unscrupulous employers who hire undocumented immigrants and not the immigrants themselves. If Mr. Rubashkin was guilty violating immigration law, he should have been punished to the full extent of the law. However, none of Mr. Rubashkin's charges were immigration-based. Whether or not Mr. Rubashkin's financial transgressions merit the sentence he received, the dubious actions between federal agents and the presiding judge certainly merit a close investigation.

It is imperative to strengthen transparency and fairness in our judicial system. The questionable actions that took place in this case have cast aspersions on the decision and deserve a thorough and careful investigation. I look forward to your reply and working together on this matter.

Yours truly,

Jared Polis
Member of Congress

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Mike Quigley
Congress of the United States
5th District, Illinois

Committee on The Judiciary
Subcommittee on Courts and Competition Policy
Subcommittee on Crime, Terrorism and Homeland Security

Committee on Oversight and Government Reform
Subcommittee on Government Management, Organization, and Procurement
Subcommittee on National Security and Foreign Affairs

December 13, 2010

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Holder:

I am writing to echo the concerns of many former Attorney Generals, US Attorneys, and senior Justice Department officials regarding the questionable circumstances surrounding the criminal prosecution and conviction of Sholom Rubashkin, the former manager of the Agriprocessors, the largest kosher meatpacking plant in the United States.

My concerns arise from case documents that suggest improper ex-parte communications. Documents indicate that the federal judge assigned to the case-the Honorable Linda Reade of the Northern District of Iowa-was repeatedly consulted by officials from the U.S. Attorney's Office during the months leading up to the raid on the kosher meatpacking plant, and further, that she offered to "help in any way possible" with preparations for the raid. If these contacts were in fact hidden from the defendant, the defendant would have been prevented from making a motion for recusal, giving rise to serious due process concerns and tainting the ultimate decision of the case.

Additionally, some judicial observers have posited that Mr. Rubashkin's sentence was excessive for the crimes committed.

I know that you are deeply committed to ensuring that all federal prosecutions are conducted in a fair and even-handed manner. Therefore, I request that you formally inquire into the adjudication of Mr. Rubashkin's case and the possible occurrence of judicial improprieties. I urge you to give these concerns your full and fair consideration.

Please keep me informed of developments in this matter. I look forward to your reply.

Sincerely,

Mike Quigley
Member of Congress

Printed with soy ink

TOM REED
29TH DISTRICT, NEW YORK

1037 LONGWORTH HOUSE OFFICE BUILDING
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(202) 225-3161

Congress of the United States
House of Representatives
Washington, DC 20515

The Honorable Eric H. Holder Jr.

Attorney General of the United States

950 Pennsylvania Ave., NW

Washington DC 20530

Dear Attorney General Holder,

I write to you because concerns have been presented to me regarding judicial action in the case of U.S. v. Rubashkin. (Case No. 2:08-cr-01324-LRR) There have been concerns presented to me regarding the actions of the presiding judge in the trial for that case. Anyone who is guilty of the severe charges that Mr. Rubashkin was convicted of should be punished accordingly and to the full extent of the law. My concern is only that the trial at which he was convicted was a fair one. The concern that has been presented to me is that the presiding judge had inappropriate knowledge and participation in the planning for the law enforcement raid during which much of the evidence for the subsequent trial was collected. One might worry that this knowledge might influence the judge at the later trial.

I know that you as Attorney General are as concerned as I am with the fairness of the proceedings in federal court and I know that you work every day to uphold that fairness. I do not request any leniency for Mr. Rubashkin. All I ask is that your office assures that the trial was fair. If in you determination it was fair then so be it, justice has been done. If it was not we as a lawful society need to make things right through a fair trial, the results of which should then stand no matter the verdict. I am confident that you will make the just determination in this case based on the facts which you have at hand, which are far greater than those I am privy to.

Respectfully yours,

Tom Reed

Member of Congress

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THOMAS J. ROONEY
16TH DISTRICT, FLORIDA

ARMED SERVICES

JUDICIARY

1529 LONGWORTH HOUSE OFFICE BUILDING
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Congress of the United States
House of Representatives
Washington, DC 20515-0916

February 2, 2011

The Honorable Eric Holder
Attorney General of the United States
950 Pennsylvania Ave., NW Suite 5111
Washington, DC 20530

IN RE: U.S. v. Rubashkin, Case No. 2:08-cr-01324-LRR (ND IA)

Dear Attorney General Holder:

I am writing to ask that you examine the Federal criminal case against Sholom Rubashkin, who was found guilty in November 2009 of 86 counts of bank fraud and related charges in the U.S. District Court for the Northern District of Iowa. While I am not privy to all of the details of the case, I am troubled by some details that indicate abuses in the federal judicial system.

First, it is my understanding that the Judge who handled the case engaged in detailed discussions with both prosecutors from the United States Attorney's office and law enforcement officials several months preceding the May 2008 raid on Mr. Rubashkin's kosher meat packing plant in Postville, Iowa. Neither the Judge nor the U.S. Attorney's office disclosed these meetings to Mr. Rubashkin's counsel before the trial, preventing his attorneys from invoking these meetings as grounds for recusal of the Judge. These facts were not discovered until a FOIA request was made by his Attorney after Mr. Rubashkin was sentenced.

Also troubling is the fact that the entire prosecution was premised initially on alleged immigration law violations; however, every single immigration count in the indictment was dropped. Ultimately, Mr. Rubashkin was tried, and found guilty, of bank fraud and other white collar crimes. He was sentenced to 27 years in jail – a harsher sentence than the US Attorney recommended.

Both situations concern prosecutorial misconduct that threatens the fairness and credibility of our judicial system. Thus far, all requests for inquiry to the Department of Justice have been referred to the U.S. Attorney's office for the Northern District of Iowa – the office that allegedly took part in meetings before the raid.

In order to ensure justice is being served, I respectfully request that you formally inquire into these matters and take corrective action if—at the conclusion of a full inquiry of his sentencing—it appears that abuses have been committed.

Sincerely,

Thomas J. Rooney
Member of Congress

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JOHN P. SARBANES
3RD DISTRICT, MARYLAND

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November 9, 2010

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Holder:

I am writing to call your attention to concerns raised by several of my constituents regarding the recent prosecution and conviction of Sholom Rubashkin, a former Chief Executive Officer of the defunct Agriprocessors, the largest kosher meatpacking plant in the United States. In November 2009, after being convicted of financial fraud, Mr. Rubashkin was sentenced to prison by Judge Linda Reade. I have enclosed correspondence signed by seven Rabbis in my district urging the Justice Department to initiate an inquiry into this matter.

I have enclosed additional background materials provided by my constituents, summarizing the federal investigation of Agriprocessesors and the arrest, indictment, trial and conviction of Shalom Rubashkin. As the enclosed documents indicate, the undersigned Rabbis believe that the Justice Department should initiate an inquiry into the circumstances surrounding the conviction of Mr. Rubashkin.

I trust that you will evaluate whether the decisions made by judges and prosecutors are worthy of an investigation by your department. I urge you to give such concerns your full and fair consideration. Please keep me informed of developments in this matter. I look forward to your reply.

Sincerely,

John P. Sarbanes
Member of Congress

JPS/mp

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JANICE D. SCHAKOWSKY
9TH DISTRICT, ILLINOIS

COMMITTEE ON ENERGY AND COMMERCE

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CHIEF DEPUTY WHIP

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December 1, 2010

The Honorable Eric Holder
Attorney General of the United States
950 Pennsylvania Avenue NW, Suite 5111
Washington, D.C. 20530

Re: U. S. v. Rubashkin, Case No. 2:08-cr-01324-LRR (N.D. IA)

Dear Attorney General Holder:

I know that you have received a number of letters from my colleagues raising concerns about the above case, concerning Sholom Rubashkin. I would like to join them in encouraging you to look into this case.

Mr. Rubashkin, who served as vice president of the Agriprocessors meat processing plant in Postville, Iowa, was convicted of bank fraud and related charges following the May 2008 raid on the Agriprocessors plant by federal authorities. Subsequently, Mr. Rubashkin was sentenced to 27 years in prison.

While I fully understand the seriousness of the charges themselves, I share my colleagues' concern about the length of the sentence and the involvement of the judge in the raid on Agriprocessors.

I have been told that, following a lawsuit for Freedom of Information Act information, it has been discovered that the judge who presided over the case, Judge Linda Reade, was herself involved in the planning of the raid and had "weekly" *ex-parte* meetings with the prosecutors and federal ICE agents prior to the raid. Moreover, according to those reports, she and the prosecutors did not disclose any of these meetings and her participation to the defense lawyers, as required by law.

Additionally, she sentenced Mr. Rubashkin to 27 years in prison, two years longer than the sentence recommended by the prosecutors. Some judicial experts have suggested that this sentence is too long and disproportionate to the crimes of which Mr. Rubashkin was convicted.

I join my colleagues in asking that you give every consideration to investigating the allegations about this case and the above issues, in keeping with applicable laws, rules and regulations. Thank you for your consideration.

Sincerely,

Jan Schakowsky
Member of Congress

DEBBIE WASSERMAN SCHULTZ
20TH DISTRICT, FLORIDA

CHIEF DEPUTY WHIP

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VICE CHAIR, FINANCIAL SERVICES AND GENERAL GOVERNMENT

SELECT INTELLIGENCE OVERSIGHT PANEL

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(305) 932–9864 (FAX)

December 23, 2010

The Honorable Eric Holder
Attorney General of the United States
950 Pennsylvania Avenue NW
Suite 5111
Washington, D.C. 20530

Dear Attorney General Holder:

I write to call your attention to the case of U.S. v. Rubashkin (Case No. 2:08-cr-01324-LRR). As you may know, the defendant, Sholom Rubashkin, was the chief executive officer of Agriprocessors, a kosher meatpacking company located in Postville, Iowa. Mr. Rubashkin was arrested after an immigration raid on the plant in May 2008. He was subsequently convicted on 86 counts of financial fraud and sentenced to 27 years in prison. A number of my constituents have expressed concern about serious allegations of judicial misconduct and unfair sentencing in this case. I respectfully request that you carefully review these allegations and take appropriate action to ensure that justice is served.

I understand that documents produced as a result of a Freedom of Information Act request by Mr. Rubashkin's defense attorneys suggest that the presiding federal judge, Linda Reade, participated in impermissible *ex parte* communications with prosecutors. Defense attorneys claim that Judge Reade's involvement in preparations for the May 2008 raid were not properly disclosed prior to the trial, and this prevented them from moving for her recusal. In addition, the 27 year sentence imposed by Judge Reade exceeded the request of prosecutors, while ignoring six former U.S. Attorneys General who have argued that this sentence is excessive and disproportionate. This apparent unfair treatment of Mr. Rubashkin has no place in our justice system, in which we must fiercely protect equal treatment under the law.

Thank you for your past commitment to upholding the highest standards of professionalism, integrity, and justice in our judicial system. The allegations of misconduct in this case are troubling, and I believe they warrant your careful review. I appreciate your prompt attention to this matter, and I look forward to your reply.

Sincerely,

Debbie Wasserman Schultz
Member of Congress

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BRAD SHERMAN
MEMBER OF CONGRESS

October 18, 2010

The Honorable Eric Holder
Attorney General of the United States
950 Pennsylvania Ave., NW
Suite 511
Washington, DC 20530

Re: *U.S. v. Rubashkin, Case No. 2:08-cr-01324-LRR (ND IA)*

Dear Attorney General Holder:

Thank you for your past commitment to ensuring that all criminal matters presented to the federal courts by the Department of Justice are handled in a just manner conforming to the highest of ethical and professional standards. In this spirit, I wanted to bring to your attention the criminal case of Sholom Rubashkin, which involves allegations of judicial impropriety and unduly harsh sentencing.

Until 2008, Mr. Rubashkin was a manager of the largest kosher meatpacking plant in the country, located in Postville, Iowa. The business – known as Agriprocessors – eventually went into bankruptcy following the massive federal immigration raid in May 2008. Mr. Rubashkin was indicted in seven superseding indictments and went to trial on numerous counts relating to financial transactions between Agriprocessors and a local bank and cattle vendors. Mr. Rubashkin was convicted on 86 counts of financial fraud in November 2009.

I would like to first express my serious concerns about the arguments proposed by the government with respect to Mr. Rubashkin's release on bail. Based on a press article:

> The prosecutors sought to revoke bail, alleging that Jews pose a unique flight risk as a consequence of the laws set up in Israel after World War II allowing Jews to go to Israel after their near extermination. At the time of the bail hearing, Rubashkin was 49 years old, married, the father of 10 and a citizen of the United States with no prior criminal record. Moreover, he is not an Israeli citizen; he has no bank accounts, property or assets in Israel; he does not have an Israeli passport or visa; and his wife, children and parents reside in the United States and are U.S. citizens.[1]

[1] Steinbuch, Robert and Brett Tolman. "Justice Denied." The National Law Journal. 16 Aug. 2010. 5 Oct. 2010.

Did the Department of Justice ever have a policy of arguing against bail for criminal defendants solely on account of their being Jewish? If so, does it still exist? Such a policy is highly discriminatory, and I request, if it is still in existence, that you publicly reverse it immediately and ensure that Department attorneys do not make such arguments in the future.

Secondly, documents produced via a FOIA request may show that Chief Judge Linda R. Reade, the federal judge overseeing Mr. Rubashkin's case, had a number of *ex parte* communications with federal prosecutors concerning the preparations for the May 2008 immigration raid on Agriprocessors. (See Case No. 2:08-cr-01324-LRR). According to allegations made by Mr. Rubashkin's attorneys, these communications were not disclosed to them, as they likely should have been under the law. And, without knowledge of these communications, Mr. Rubashkin was unable to move for a recusal of Chief Judge Reade, which should have been his right. I request that you review whether any federal prosecutor involved in the Rubashkin case violated his or her ethical and/or legal obligations with regard to these *ex parte* communications.

And lastly, I am in possession of a letter from six former United States Attorneys General, and others, to Chief Judge Reade concerning the Government's initial sentencing memorandum in Mr. Rubashkin's case. (Attached.) The letter notes that the Government's assertion that a guideline sentence was warranted for Mr. Rubashkin amounts to a "potentially severe injustice". I am particularly concerned about the letter's statement that the Government "erroneously suggests that a variance from the guideline sentence of life imprisonment would have to be supported by 'compelling grounds,' and never acknowledges [the] Court's fundamental obligation to make an 'individualized assessment based on the facts presented' of all the §3553(a) factors".

Mr. Rubashkin ultimately received a 27-year sentence from Chief Judge Reade, which added two additional years beyond the Government's requested 25-year sentence. As you know, sentences imposed for high-loss, white-collar offenses similar to or greater in severity than Mr. Rubashkin's charged offenses have been consistently below the guideline sentences, with some Judges imposing sentences as low as one year. While I fully respect your Department's discretion in recommending sentences for the criminal cases under its jurisdiction because of the particular severity and peculiarity of Mr. Rubashkin's sentence, I request that you determine whether the Government prosecutors in this case engaged in a fair deliberation and paid due respect to all relevant sentencing laws.

<http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202466286178&slreturn=1&hbxlogin=1>

Thank you for your attention to this matter. I know that you will do everything you can to make sure that Mr. Rubashkin, and every person prosecuted by the United States Government, receives fair treatment.

Sincerely,

BRAD SHERMAN
Member of Congress

ALBIO SIRES
13TH DISTRICT, NEW JERSEY

COMMITTEE ON FOREIGN AFFAIRS
SUBCOMMITTEES:
WESTERN HEMISPHERE
EUROPE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEES:
HIGHWAYS AND TRANSIT
RAILROADS, PIPELINES, AND HAZARDOUS MATERIALS

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PERTH AMBOY CITY HALL
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(732) 442-0610

December 2, 2010

The Honorable Eric Holder
Attorney General of the United States
950 Pennsylvania Ave. NW
Suite 511
Washington, DC 20530

Dear Attorney General Holder,

I am writing to you due to concerns that have been brought to my attention regarding the case of Sholom Rubashkin (U.S. v. Rubashkin). I request that the Department of Justice review this matter.

As you know, in May 2008, Immigration and Customs Enforcement (ICE) officers raided Agriprocessors, a meatpacking plant located in Postville, Iowa. Later that year, I visited Postville to investigate the raid that led to the detention of nearly 400 undocumented worker and the events surrounding it. Mr. Rubashkin, Agriprocessor's chief executive officer, was indicted on several charges as a result of the ICE raid, and ultimately he was convicted of bank fraud.

Since his conviction, allegations have arisen claiming misconduct during the U.S. v. Rubashkin case and questioning Mr. Rubashkin's sentencing. Mr. Rubashkin was convicted of financial crimes, and he was sentenced to 27 years in prison. For a 51 year-old man, this sentence essentially equates to a life sentence. Several lawyers, legal scholars, and former Attorney Generals have commented that this sentence length is unreasonable and disparate. Furthermore, information has been released stating that Judge Linda Reade, the judge presiding over Mr. Rubashkin's trial, had been involved with planning of the May 2008 raid, and her involvement was not disclosed to defense attorneys in the case.

I encourage the Department of Justice to review the allegations mentioned above. Thank you for your consideration of this request.

Sincerely,

Albio Sires
Member of Congress

CHRISTOPHER H. SMITH
4TH DISTRICT, NEW JERSEY

CONSTITUENT SERVICE CENTERS:
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Hamilton, NJ 08619-3828
(609) 585-7878
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(732) 350-2300

2373 Rayburn House Office Building
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Congress of the United States

House of Representatives

October 21, 2010

COMMITTEES:

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WESTERN HEMISPHERE SUBCOMMITTEE

COMMISSION ON SECURITY AND COOPERATION IN EUROPE
RANKING MEMBER

CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA
RANKING MEMBER

DEAN, **NEW JERSEY DELEGATION**

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
950 Pennsylvania Ave., NW
Suite 5111
Washington, D.C. 20530

PER FAX: 202-514-4482

Dear Mr. Attorney General:

I would like to bring to your attention my constituents' concern that the actions of a U.S. Attorney have called into question the fairness of our federal judicial system in matters touching on their Jewish faith. They and I strongly believe that it should be the policy of the U.S. government that U.S. Attorneys never treat Jewish Americans, solely or substantially because of their Jewish identity, as a "flight risk" so as to deny them bail.

My constituents brought this issue to my attention in connection with reports about the U.S. Attorney's actions in the case of *U.S. v. Rubashkin*, pending in the federal court system. In 2008 the U.S. Attorney for the Northern District of Iowa, based on evidence gained in connection with a raid on a kosher meatpacking plant, indicted Sholom Rubashkin on a number of counts relating to financial transactions between the plant and a local bank. The U.S. Attorney sought to deny bail on grounds which prominently included that Mr. Rubashkin, as a Jew, posed a flight risk to Israel. The magistrate judge did in fact deny Mr. Rubashkin bail, though after Mr. Rubashkin spent over seventy days in jail, the district judge reversed this decision.

While I am not writing to request relief for Mr. Rubashkin, since his case is still pending, I urge you to take decisive action, consistent with your authority as Attorney General, to ensure that U.S. Attorneys do not treat Jewish Americans, solely or substantially because of their Jewish identity, as a "flight risk" so as to deny them their right to bail or any other right. As you know, the 8th amendment to the Constitution has long been understood to imply that criminal defendants have a right to bail, at least in the absence of extraordinary circumstances – and the very notion that one's religion could be such an extraordinary circumstance is profoundly repugnant to our country's traditions and to fundamental justice. I also urge you to take all proper actions,

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consistent with U.S. law and regulations, to ensure that U.S. Attorneys handle all matters presented to courts, including sentencing and ex parte contacts, in a fair, even-handed, open, and uniform manner, completely free of religious bias. The fairness of our federal justice system depends not only on the decisions of judges but also on the actions of U.S. prosecuting attorneys.

I appreciate your attention to this matter.

Sincerely,

CHRISTOPHER H. SMITH
Member of Congress

COMMITTEE ON SMALL BUSINESS
RANKING DEMOCRATIC MEMBER

COMMITTEE ON FINANCIAL SERVICES
SUBCOMMITTEE ON INSURANCE, HOUSING AND COMMUNITY OPPORTUNITY

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND CONSUMER CREDIT

Congress of the United States
House of Representatives
Washington, DC 20515

NYDIA M. VELAZQUEZ
12TH DISTRICT, NEW YORK

CONGRESSIONAL HISPANIC CAUCUS

CONGRESSIONAL CAUCUS FOR WOMEN'S ISSUES

CONGRESSIONAL PROGRESSIVE CAUCUS

OLDER AMERICANS CAUCUS

CONGRESSIONAL CHILDREN'S CAUCUS

June 5, 2012

The Honorable Eric H. Holder, Jr.Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

RE: United States v. Sholom Rubashkin (N.D. IA)

Dear Mr. Holder:

As a member of Congress, I am committed to see that justice is served fairly for all who come before our courts, In the vast majority of cases, defendants are afforded fair process and, if found guilty, are sentenced fairly, But this is not always true, one particular case that has come to my attention illustrates clearly and tragically that injustice happens, and that disparate sentences are sometimes imposed, the prosecution of Sholom Rubashkin.

Rubashkin is the former manager of the Agriprocessors kosher meatpacking plant in Postville, Iowa raided by the government in May 2008.

Although initially arrested on immigration-law violations, all such charges were subsequently dismissed by the government, and Rubashkin was tried and found guilty of bank fraud and related white-collar crimes in November 2009. He was sentenced in June 2010 to 27 years in prison, two years beyond what even the government recommended.

This case raises very serious issues of judicial and prosecutorial misconduct, resulting in an unfair and disparate sentence, I believe these allegations are sufficiently serious to warrant an investigation by you.

Rubashkin's harsh, 27-year sentence raises a number of troubling concerns. He is a first-time offender and was found guilty of white-collar violations with no hint of violence or physical harm to anyone. The federal Judge gave what amounts to a life sentence for a 51-year-old man. The sentence has been criticized by many lawyers and legal scholars, including six of your predecessors who publicly called on the trial judge to impose a fair sentence consistent with other, similar cases. Instead, the judge imposed a sentence greater than many sentences imposed on other defendants convicted of far more serious white-collar crimes.

The process by which the government and judge arrived at sentence is troubling as well.

For example, after the Agriprocessors firm went into bankruptcy as a result of the May 2008 raid, the government deliberately hampered the ability of the trustee to sell the company's considerable assets at a fair price in order to minimize any loss to the Iowa bank that had extended credit to the company. The government trustee further lowered the value of Agriprocessors by mishandling inventory at the Postville plant. Moreover, the government unnecessarily included a forfeiture clause in the initial, immigration-based indictment; further reducing the marketability of the plant's considerable assets. The resulting decrease in the value of Agriprocessors significantly inflated the "loss" for Sentencing Guidelines purposes.

In short, these steps by the government had the effect of significantly boosting Rubashkin's Sentencing Guideline numbers; which in turn provided justification for the judge to impose an excessive and disproportionate sentence.

There are other troubling aspects of this case, such as the fact that the federal judge who presided over the trial of Rubashkin improperly engaged in numerous and detailed, ex parte discussions in the six months preceding the May 2008 raid with the Office of the United States Attorney and immigration officials. None of this was disclosed by either the judge or the prosecutors to the lawyers representing Rubashkin. They discovered it only after reviewing a large quantity of documents received post sentencing as a result of an earlier FOIA inquiry.

To date, however, the Department of Justice has been unwilling to inquire into the Iowa prosecutors' handling of the Rubashkin case, Lanny Breuer, Assistant Attorney General for the Criminal Division,has responded to requests to engage the Department in reviewing these allegations, by referring the matter to the U.S. Attorney's office for the Northern District of Iowa.

You have recently and publicly expressed a desire to ensure that all federal prosecutions and sentencing procedures are conducted in a fair and even-handed manner.

I therefore request that you expressly and formally inquire into the manner in which Sholom Rubashkin was sentenced, and into what appears to have been a tainted and secret relationship between the trial judge and the government leading to the prosecution of Rubashkin.

Thank You,

Nydia M. Velazquez
Member of Congress

December 5, 2016

The Honorable Charles E. Grassley
United States Senate Committee on the Judiciary
Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Diane G. Feinstein
United States Senate Committee on the Judiciary
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

The signers of this letter served in the Department of Justice in the positions listed next to their names and, in connection with that service, came to know Senator Jeff Sessions through his oversight of the Department as a member of the Judiciary Committee or in his work as U.S. Attorney for the Southern District of Alabama. All of us worked with him; several of us testified before him during his service on your Committee. All of us know him as a person of honesty and integrity, who has held himself to the highest ethical standards throughout his career, and is guided always by a deep and abiding sense of duty to this nation and its founding charter.

Based on our collective and extensive experience, we also know him to be a person of unwavering dedication to the mission of the Department—to assure that our country is governed by the fair and even-handed rule of law. For example, Senator Sessions has been intimately involved in assuring that even as the Department combats the scourge of illegal drugs, the penalties imposed on defendants do not unfairly impact minority communities. He has worked diligently to empower the Department to do its part in defending the nation against those intent on destroying our way of life, adhering throughout to bedrock legal principles and common sense.

Senator Sessions' career as a federal prosecutor also has provided him with the necessary institutional knowledge, expertise, and deep familiarity with the issues that confront the Department, insofar as it is an army in the field. As the United States Attorney for the Southern District of Alabama, Senator Sessions worked hard to protect vulnerable victims, particularly children. He carried this commitment to the Senate, where he championed legislation to provide the Department with the tools it needs to fight online child pornography, to close rogue internet pharmacies that have contributed to the opioid epidemic, and to end sexual assault in prison.

Senator Sessions' career, both as a United States Attorney and as a Senator, well prepares him for the role of Attorney General. In sum, Senator Sessions is superbly qualified by temperament,

intellect, and experience, to serve as this nation's chief law enforcement officer. We urge his swift confirmation.

Sincerely,

John D. Ashcroft
Attorney General, 2001-2005

William P. Barr
Attorney General, 1991-1993
Deputy Attorney General, 1990-91

Alberto R. Gonzales
Attorney General, 2005-2007

Edwin Meese, III
Attorney General, 1985-1988

Michael B. Mukasey
Attorney General, 2007-2009

Mark R. Filip
Deputy Attorney General 2008-2009

Craig S. Morford
Deputy Attorney General, 2007-2008 (Acting)

Paul J. McNulty
Deputy Attorney General 2006-2007

George J. Terwilliger III
Deputy Attorney General 1991-1993

Larry D. Thompson
Deputy Attorney General, 2001-2003

CC: Members of the U.S. Senate Committee on the Judiciary

The Honorable Mitch McConnell
317 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Charles E. Schumer
322 Hart Senate Office Building
Washington, D.C. 20510

December 10, 2015

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Harry Reid
Minority Leader
United States Senate
Washington, DC 20510

Re: Sentencing Reform and Corrections Act of 2015, S. 2123

Dear Leaders McConnell and Reid:

As you determine whether to bring the above-referenced sentencing and corrections legislation before the Senate for full consideration, we write to express our serious concerns over the significant risks to public safety that such legislation will create. The bill will prospectively and retroactively release significant numbers of dangerous criminals from federal prison and realign our sentencing structure in profound ways. Its application of lighter penalties retroactively to already-convicted and sentenced prisoners will turn the finality of thousands of judicial decisions on their head, undermine public expectations about justice and cost millions of dollars. These consequences are undeniably harmful to the interests of public safety and justice. Now is not the time to deny law enforcement authorities the essential tools they need to fight crime and terrorism here at home.

We, the undersigned, are former government officials who were responsible for the preservation of public safety and the pursuit of justice. We know firsthand the value of tough, mandatory minimum sentences. We especially recognize the value of penalties established against drug trafficking, as well as those by the Armed Career Criminal Act on felons in possession of a firearm. While we believe in the hope of rehabilitation, we also believe our current determinate sentencing structure strikes the right balance between Congressional direction in the establishment of sentencing levels and the preservation of public safety.

Our system of justice is not broken. Mandatory minimums and proactive law enforcement measures have caused a dramatic reduction in crime over the past 25 years, an achievement we cannot afford to give back. As FBI Director James Comey recently noted, "… [W]e have hit historic lows for violent crime recently, and if we let it slide back, we will need to explain to those who come after us what we did or didn't do to let that happen." We share that outlook and oppose proposals that erase those hard-fought gains and compromise public safety through lighter penalties for drug trafficking, including those in violation of gun crime statutes.

The reduction of mandatory minimums and the retroactivity provisions of the Sentencing Reform and Corrections Act cause us the greatest concern. The bill will reduce penalties for armed career criminals, reduce penalties for serial armed violent criminals (like

carjackers, bank robbers and kidnappers), reduce penalties for repeat high-level drug traffickers and weaken the tools used by federal prosecutors to dismantle drug trafficking organizations. Worse, the bill will apply those changes retroactively to thousands of armed career criminals, serial armed violent offenders and repeat drug traffickers already in prison, making them eligible for early release.

The retroactive application of the major provisions of the bill will benefit dangerous criminals who have violated clearly established laws, have already pled guilty or been convicted by juries, have been sentenced by judges, appealed their cases to our appellate courts and received the full measure of due process afforded by our Constitution. There are legitimate concerns, based upon our own experience, whether the thousands of likely motions for retroactive application will receive the rigorous scrutiny they deserve, whether by the Justice Department, law enforcement, or the courts, recognizing that the underlying events transpired years and even decades ago in cases that were likely pled, amid potential state and federal charges that were not pursued.

Our concerns are compounded by federal initiatives that already have dramatically recalibrated our sentencing structure. Changes by the U.S. Sentencing Commission in the federal sentencing guidelines have already resulted in early release orders for over 24,000 convicted drug dealers, many without regard to their histories of violence, ties to gangs or drug cartels, or the quantity of drugs distributed. And the most recent retroactive reduction of guidelines established last year by the U.S. Sentencing Commission will cause the release of approximately 46,000 additional criminals from federal prison, including early release of over 14,000 over the next year.

Unfortunately, the risk of recidivism by drug traffickers is high. According to the U.S. Sentencing Commission, the recidivism rate for crack cocaine traffickers whose sentences were retroactively reduced by the 2007 crack cocaine amendment was 43.3%; the recidivism rate of crack cocaine traffickers who served their full sentence prior to 2007 was 47.8%. Recidivism climbed steadily during the five-year monitoring period of both offender populations. Even more alarming, a recent Bureau of Justice Statistics study of drug offenders released from state prison in 30 states found overall recidivism rates among offenders at nearly 77 percent. This is not the time to lose sight of these perils. We are in the midst of a raging heroin and opioid epidemic, a national nightmare that *Time* magazine has described as “the worst addiction crisis the country has ever seen.” Heroin addiction is spawned by heroin traffickers -- the same population that will receive lighter penalties under the bill and will receive earlier releases.

The legislation also will make it harder for federal agents and prosecutors to build cases against the leaders of narcotics organizations and gangs, leaders who direct violent and socially destructive organizations that harm people throughout the United States. We know from experience the value of current mandatory minimum penalties as an essential tool to encourage cooperation to break down drug conspiracies, large criminal organizations and violent gangs. The significant expansion of the safety valve under the bill will turn it into a gaping hole, and the creation of a second safety valve under the bill will significantly undercut the 10-year mandatory minimum for drug trafficking crimes. While we recognize

the value of judicial discretion, the latitude made available by the bill will undermine the original purpose of the safety valve. The safety valve was created to allow first-time drug traffickers to avoid a mandatory minimum sentence if they met specified criteria and agreed to disclose all related information known to them. Expansion of the safety valve and the creation of an additional safety valve will allow many defendants, who could otherwise provide substantial assistance, to avoid that outcome. This will discourage, rather than encourage, cooperation, an activity that the Supreme Court has rightly recognized as a "deeply rooted social obligation". *Roberts v. United States*, 445 U.S. 552, 553-54, 557-58 (1980).

This is not the time for Congress to disrupt a sentencing regime that strikes the right balance between all interests and has contributed to significant gains in reducing crime. We urge Congress to await the results of the significant federal sentencing initiatives that are already underway and to rigorously assess their impact before opening the doors of our federal prisons further through proposals like the Sentencing Reform and Corrections Act.

Sincerely yours,

John Ashcroft
Former United States Attorney General
Former United States Senator
Former Governor of Missouri

William Barr
Former United States Attorney General

Rudolph W. Giuliani
Former Associate Attorney General, U.S. Department of Justice
Former United States Attorney, Southern District of New York
Former Mayor, New York City

William Bradford Reynolds
Former United States Assistant Attorney General
Former Counselor to the United States Attorney General

Samuel K. Skinner
Former United States Attorney, Northern District of Illinois
Former Vice Chairman, President's Commission on Organized Crime
Former White House Chief of Staff

William J. Bennett
Former Director of the White House Office of National Drug Control Policy

John P. Walters
Former Director of the White House Office of National Drug Control Policy

William G. Otis
Former Special Counsel to the President
Former Counselor to the Administrator, U.S. Drug Enforcement Administration

Peter Bensinger
Former Administrator, U.S. Drug Enforcement Administration

Michele M. Leonhart
Former Administrator, U.S. Drug Enforcement Administration

Karen Tandy
Former Administrator, U.S. Drug Enforcement Administration

John C. “Jack” Lawn
Former Administrator, U.S. Drug Enforcement Administration

Robert C. Bonner
Former Administrator, U.S. Drug Enforcement Administration
Former Commissioner, U.S. Customs and Border Protection
Former U.S. District Judge, Central District of California

Stephen H. Greene
Former Deputy Administrator, U.S. Drug Enforcement Administration

Michael A. Braun
Former Assistant Administrator and Chief of Operations, U.S. Drug Enforcement Administration

James L. Capra
Former Assistant Administrator and Chief of Operations, U.S. Drug Enforcement Administration

David L. Westrate
Former Assistant Administrator for Operations, U.S. Drug Enforcement Administration

William B. Simpkins
Former Assistant Administrator, U.S. Drug Enforcement Administration

Alfred Regnery
Former Deputy Assistant Attorney General, U.S. Department of Justice
Former Administrator, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice

Thomas J. Pickard
Former Deputy Director, Federal Bureau of Investigation

Bruce J. Gebhardt
Former Deputy Director, Federal Bureau of Investigation

Anthony E. Daniels
Former Assistant Director, Federal Bureau of Investigation

Ronald Hosko, Former Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation

Daniel D. Roberts
Former Assistant Director, Federal Bureau of Investigation

James K. Kallstrom
Former Assistant Director, Federal Bureau of Investigation

John Burke
Former Deputy Assistant Director, Federal Bureau of Investigation

Bill Gavin
Former Assistant Director-In-Charge, Federal Bureau of Investigation

Pasquale J. D'Amuro
Former Assistant Director-In-Charge, Federal Bureau of Investigation

Louis Grever
Former Executive Assistant Director, Federal Bureau of Investigation

Shawn Henry
Former Executive Assistant Director, Federal Bureau of Investigation

Alice H. Martin
Former United States Attorney, Northern District of Alabama

Daniel G. Knauss
Former United States Attorney, District of Arizona

Kenneth W. Sukhia
Former United States Attorney, Northern District of Florida

Michael J. Sullivan
Former United States Attorney District of Massachusetts
Former, Acting Director for the Bureau of Alcohol, Tobacco, Firearms and Explosives

Don Svet
Former United States Attorney, District of New Mexico

J. Douglas McCullough
Former Acting United States Attorney, Eastern District of North Carolina
Judge, North Carolina Court of Appeals

Eric Evenson
Former Assistant United States Attorney, Eastern District of North Carolina, Chief Prosecutor, Organized Crime Drug Enforcement Task Force

John W. Gill, Jr.,
Former United States Attorney, Eastern District of Tennessee

James R. "Russ" Dedrick
Former United States Attorney, Eastern District of Tennessee
Former United States Attorney, Eastern District of North Carolina

Wayne A. Rich. Jr.
Former United States Attorney, Southern District of West Virginia

May 12, 2014

The Honorable Harry Reid
Majority Leader

The Honorable Mitch McConnell
Minority Leader

United States Senate
Washington, DC 20510

Re: Federal Criminal Sentencing Reform

Dear Majority Leader Reid and Minority Leader McConnell:

As former government officials who served in the war on drugs, we care deeply about our nation's system of justice. During our tenure, we labored to see that justice was well served, the guilty punished and the innocent protected. We recognize the ongoing need to continue to improve how the nation deals with crime.

Significant components of our statutory framework for sentencing lie at the heart of our nation's success in confronting crime. Collectively, these sentencing measures have helped substantially to reduce crime throughout our nation over the past thirty years. A series of laws, beginning with the Sentencing Reform Act of 1984, have dramatically lessened the financial and human toll of crime on Americans. Critical to these laws has been the role of mandatory minimum sentencing and the exercise by Congress of its Constitutional prerogative to establish the minimum of years of detention served by a federal offender. While federal judges are properly entrusted with great discretion, strong mandatory minimums are needed to insure both that there is a degree of consistency from judge to judge, and that differing judicial ideologies and temperaments do not produce excessively lenient sentences. In addition, and of central importance, prosecutors use strong mandatory minimums, along with safety-valves built into the current system, to induce cooperation from so-called "smaller fish," to build cases against kingpins and leaders of criminal organizations.

Because the Senate is now considering revisiting the subject of mandatory minimum penalties for federal drug trafficking offenses, we take this opportunity to express our personal concerns over pending legislative proposals. We are concerned specifically by proposals that would slash current mandatory minimum penalties over federal drug trafficking offenses -- by asmuch as fifty percent. We are deeply concerned about the impact of sentencing reductions of this magnitude on public safety. We believe the American people will be ill-served by the significant reduction of sentences for federal drug trafficking crimes that involve the sale and distribution of dangerous drugs like heroin, methamphetamines and PCP. We are aware of little public support for lowering the minimum required sentences for these extremely dangerous and sometimes lethal drugs. In addition, we fear that lowering the minimums will make it harder for prosecutors to build cases against the leaders of narcotics organizations and gangs -- leaders who often direct violent and socially destructive organizations that harm people throughout the United States.

Many of us once served on the front lines of justice. We have witnessed the focus of federal law enforcement upon drug trafficking - not drug possession offenses - and the value of mandatory minimum sentences aimed at drug trafficking offenses.

Existing law already provides escape hatches for deserving defendants facing a mandatory minimum sentence. Often, they can plea bargain their way to a lesser charge; such bargaining is overwhelmingly the way federal cases are resolved. Even if convicted under a mandatory minimum charge, however, the judge on his own can sidestep the sentence if the defendant has a minor criminal

history, has not engaged in violence, was not a big-time player, and cooperates with federal authorities. This "safety valve," as it's known, has been in the law for almost 20 years. Prosecutors correctly regard this as an essential tool in encouraging cooperation and, thus, breaking down drug conspiracies, large criminal organizations and violent gangs.

We believe our current sentencing regimen strikes the right balance between Congressional direction in the establishment of sentencing levels, due regard for appropriate judicial direction, and the preservation of public safety. We have made great gains in reducing crime. Our current sentencing framework has kept us safe and should be preserved.

Sincerely yours,

William P. Barr
Former United States Attorney General

Michael B. Mukasey
Former United States Attorney General

Samuel K. Skinner
Former White House Chief of Staff and Former United States Attorney, Northern District of Illinois

William Bennett
Former Director of the White House Office of National Drug Control Policy

John P. Walters
Former Director of the White House Office of National Drug Control Policy

Mark Filip
Former United States Deputy Attorney General

Paul J. McNulty
Former United States Deputy Attorney General and Former United States Attorney, Eastern District of Virginia

George J. Terwilliger III
Former United States Deputy Attorney General and Former United States Attorney, District of Vermont

Larry D. Thompson
Former United States Deputy Attorney General and Former United States Attorney, Northern District of Georgia

Peter Bensinger
Former Administrator, Drug Enforcement Administration

Jack Lawn
Former Administrator, Drug Enforcement Administration

Karen Tandy
Former Administrator, Drug Enforcement Administration

Greg Brower
Former United States Attorney, District of Nevada

A. Bates Butler III
Former United States Attorney, District of Arizona

Richard Cullen
Former United States Attorney, Eastern District, Virginia

James R. "Russ" Dedrick, Former United States Attorney, Eastern District, Tennessee and Eastern District, North Carolina

Troy A. Eid
Former United States Attorney, District of Colorado

Gregory J. Fouratt
Former United States Attorney, District of New Mexico

John W. Gill, Jr.
Former United States Attorney, Eastern District, Tennessee

John F. Hoehner
Former United States Attorney, Northern District, Indiana

Tim Johnson
Former United States Attorney, Southern District, Texas

Gregory G. Lockhart
Former United States Attorney, Southern District, Ohio

Alice H. Martin
Former United States Attorney, Northern District, Alabama

James A. McDevitt
Former United States Attorney, Eastern District of Washington

Patrick Molloy
Former United States Attorney, Eastern District, Kentucky

A. John Pappalardo
Former United States Attorney, Massachusetts

Wayne A. Rich. Jr
Former United States Attorney, Southern District, West Virginia

Kenneth W. Sukhia
Former United States Attorney, Northern District of Florida

Ronald Woods
Former United States Attorney, Southern District, Texas

April 26, 2010

BY HAND DELIVERY

The Honorable Linda R. Reade
Chief Judge of the U.S. District Court
for the Northern District of Iowa
4200 C Street SW
Cedar Rapids, Iowa 52404

RE: Concerns about the Application of the Sentencing Guidelines in the Upcoming Sentencing of Sholom Rubashkin

Dear Chief Judge Reade:

As Your Honor prepares for the upcoming sentencing hearing regarding Sholom Rubashkin, we respectfully write, as former members of the U.S. Department of Justice, to express concerns about the Government's sentencing contentions and about how the federal sentencing guidelines may be deployed in this unique case.[1] We appreciate the challenges Your Honor faces in determining what sentence for Mr. Rubashkin would be consistent with the parsimonious precepts of 18 U.S.C. §3553(a), and feel compelled to write to express our concerns with the problematic guidance that the guidelines (and the Government) are providing as this Court assesses what sentence for Mr. Rubashkin would be "sufficient, but not greater than necessary, to comply with" Congress's sentencing purposes.

As Your Honor is aware, the Supreme Court has repeatedly stressed that a district court cannot and must not presume that a sentence within the applicable guidelines range is reasonable. *See Nelson v. United States*, 129 S. Ct. 890, 892 (2009); *Rita v. United States*, 551 U.S. 338, 351 (2007); *Gall v. United States*, 552 U.S. 38, 50 (2007). Rather, as the Supreme Court has explained, the guidelines now just are "one factor among several courts must consider in determining an appropriate sentence" that is compliant

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[1] We have not undertaken any independent effort to investigate the accuracy of the factual statements made by the parties in their sentencing submissions to the Court. The Court is, of course, is the best position to determine the factual accuracy of these assertions. Our concern is with the application of the appropriate principles of sentencing which should be applied to those determinations.

with "§3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necessary' to accomplish the sentencing goals advanced in § 3553(a)(2)." *Kimbrough v. United States*, 552 U.S. 85, 90, 111 (2007).

In accord with these principles, the Eighth Circuit has recently emphasized that to "fashion[] a sentence 'sufficient, but not greater than necessary,' 18 U.S.C. § 3553(a), district courts are not only permitted, but required, to consider 'the history and characteristics of the defendant.'" *United States v. Chase*, 560 F.3d 828, 830-31 (8th Cir. 2009); *see also United States v. White*, 506 F.3d 635, 644 (8th Cir. 2007). Consequently, any sentencing determination in this case that were to place undue weight on the guidelines or that does not give sufficient attention to Mr. Rubashkin's unique personal circumstances and other mitigating factors would be unreasonable. *See United States v. Feemster*, 572 F.3d 455 (8th Cir. 2009) (en banc).

These fundamental post-*Booker* sentencing principles are especially important in the sentencing of white-collar offenders like Mr. Rubashkin. As a number of courts and commentators have noted, the fraud and money laundering guidelines, because they have numerous overlapping enhancements and give undue significance to the sometime-amorphous concept of loss, can often produce advisory sentencing ranges that are indisputably far "greater than necessary" and lack any common sentencing wisdom. *See United States v. Parris*, 573 F. Supp. 2d 744, 754 (E.D.N.Y. 2008) (noting that "the Sentencing Guidelines for white-collar crimes [can produce] a black stain on common sense"); *United States v. Adelson*, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006) (lamenting "the utter travesty of justice that sometimes results from the guidelines' fetish with absolute arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense"), *aff'd* 237 Fed. Appx. 713 (2d Cir. 2008); *see also* Frank Bowman, *Sacrificial Felon*, AMERICAN LAWYER, Jan. 2007, at 63 (former federal prosecutor complaining that the "rules governing high-end federal white-collar sentences are now completely untethered from both criminal law theory and simple common sense"); Andrew Weissmann & Joshua Block, *White-Collar Defendants and White-Collar Crimes*, 116 YALE L.J. POCKET PART 286 (2007) (former federal prosecutors asserting that "the current Federal Sentencing Guidelines for fraud and other white-collar offences are too severe" and are greater than "necessary to satisfy the traditional sentencing goals of specific and general deterrence — or even retribution").

The potential absurdity of the sentencing guidelines are on full display in this case because, at least according to the government's proposed calculations, the advisory sentencing guidelines here recommend a life sentence for Mr. Rubashkin. We cannot fathom how truly sound and sensible sentencing rules could call for a life sentence -- or anything close to it -- for Mr. Rubashkin, a 51-year-old, first-time, non-violent offender whose case involves many mitigating factors and whose personal history and extraordinary family circumstances suggest that a sentence of a modest number of years could and would be more than sufficient to serve any and all applicable sentencing purposes. To our knowledge, there is no empirical or other social science research to support the notion that life sentences or even long prison terms are necessary for, or even effective at, deterring white-collar offenses. In fact, there is research suggesting that even

a short term of incarceration may sufficient to achieve specific and general deterrence for white-collar offenses. *See* A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. Leg. Stud. 1, 12 (1999); *see also* Peter J. Henning, *White Collar Crime Sentences After* Booker*: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 McGeorge L. Rev. 757 (2006). Even the Sentencing Commission itself has recognized that a "short but definite period of confinement" can achieve the twin goals and just punishment and deterrence. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* (November 2004), *available at* www.ussc.gov/15_year/15year.htm.

Against this backdrop, we find it troubling that the Government's initial sentencing memorandum in this case not only suggests strongly that a guideline sentence is warranted for Mr. Rubashkin, but further claims that even if a downward variance were warranted, upward departures from the guidelines (which presumably would minimize if not nullify the effect of any variance) would be justified. In this context, we find it telling that the Government's massive sentencing submission barely mentions §3553(a) at all, erroneously suggests that a variance from the guideline sentence of life imprisonment would have to be supported by "compelling grounds," and never acknowledges this Court's fundamental obligation to make an "individualized assessment based on the facts presented" of all the §3553(a) factors, *Gall*, 552 U.S. at 50, and to independently assess what sentence in this unique case would be "sufficient, but not greater than necessary to accomplish the sentencing goals advanced in § 3553(a)(2)." *Kimbrough*, 552 U.S. at 111. Indeed, the Attorney General of the United States has personally emphasized that "[t]he desire to have an almost mechanical system of sentencing has led us away from individualized, fact-based determinations that I believe, within reason, should be our goal." *Remarks of the Honorable Eric H. Holder, Jr. for the Charles Hamilton Houston Institute for Race and Justice* (June 24, 2009), *available at* http://www.justice.gov/ag/speeches/2009/ag-speech-0906241.html.

The Government's position is especially disconcerting given that district and circuit courts around the country, recognizing that they are poorly served by the sentencing guidelines for high-loss white-collar offenses, consistently impose and approve below-guideline sentences in such cases. *See, e.g., United States v. Ferguson et al.* No. 3:06-cr-00137-CFD (D. Conn.) (imposing sentences ranging from one year and one day to four years on five defendants convicted of fraud leading to over $500 million in loss, and whose guideline ranges were life imprisonment); *United States v. Treacy*, No. 08 Cr. 366 (S.D.N.Y.) (imposing two-year sentence on former President of Monster Worldwide Inc. convicted of fraud, where government's initial guideline calculation was 27 to 34 years imprisonment); *Adelson*, *supra*, 441 F. Supp. 2d 506 (imposing 42-month sentence on former President of public company convicted of fraud leading to more than $50 million of loss, and whose guideline range was life imprisonment); *United States v. Bradley Stein*, No. 07-CR-00113 (NG) (E.D.N.Y.) (imposing 12-year sentence on former CEO of public company convicted of fraud leading to more than $100 million in loss, and whose guideline range was life imprisonment); *United States v. John and Timothy Rigas*, No. 02-Cr.-1236 (S.D.N.Y.) (twelve-year and 17-year sentences for former CEO and CFO

convicted of fraud leading to the financial collapse of Adelphia Corporation). Indeed, as one leading commentator has noted, "since *Booker*, virtually every judge faced with a top-level corporate fraud defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high. This near unanimity suggests that the judiciary sees a consistent disjunction between the sentences prescribed by the Guidelines [in fraud cases] and the fundamental requirement of Section 3553(a) that judges imposes sentences 'sufficient, but not greater than necessary' to comply with its objectives." Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 FED. SENT'G REP. 167, 169 (Feb. 2008).

The statutory mandate that this Court consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. §3553(a)(6), heightens the importance and significance of district and circuit courts around the nation consistently imposing and approving below-guideline sentences for defendants whose crimes and harms were far worse than Mr. Rubashkin. A guideline life-sentence or even a decades-long sentence for Mr. Rubashkin would not only be inconsistent with the traditional purposes of punishment set forth in §3553(a)(2), but also would produce a gross disparity in treatment that countermands the commands of §3553(a)(6) and undermines the congressional goal of fairness and proportionality in federal sentencing. Indeed, given that defendant Mark Turkcan, President of First Bank Mortgage of St. Louis, who misapplied $35 million in loans resulting in a loss of approximately $25 million, recently received a sentence of only one year and one day of imprisonment, this Court's statutory obligation to "avoid unwarranted sentence disparities" demands imposition of a sentence far closer to Mr. Turkcan's than what the Government appears to suggest.

In sum, we respectfully urge the Court to note and consider the peculiarity and potentially severe injustice of the applicable sentencing guidelines and of the Government's extreme sentencing position in this case. And we hope this letter is appreciated and understood in the context in which it is conveyed --- namely, as a genuine effort to aid this Court as it confronts the challenge of assessing all the factors set forth at 18 U.S.C. § 3553(a) to tailor a sentence for Mr. Rubashkin that complies with the statutory purposes of sentencing set forth by Congress.

Most respectfully yours,

Nicholas Katzenbach
Attorney General of the United States (1965-66)

Ramsey Clark
Attorney General of the United States (1967-69)

Edwin Meese III
Attorney General of the United States (1985-88)

Richard Thornburgh
Attorney General of the United States (1988-91)

William Barr
Attorney General of the United States (1991-93)

Janet Reno
Attorney General of the United States (1993-2001)

Jamie Gorelick
Deputy Attorney General of the United States (1994-97)

Larry D. Thompson
Deputy Attorney General of the United States (2001-03)
United States Attorney, Northern District of Georgia (1982-86)

Seth Waxman
Solicitor General of the United States (1997-2001)

A. Bates Butler III
United States Attorney
District of Arizona (1980-81)

Robert Cleary
United States Attorney
District of New Jersey (1999-2002)
Southern District of Illinois (2002)

Kendall Coffey
United States Attorney
Southern District of Florida (1993-96)

Robert DelTufo
United States Attorney
District of New Jersey (1976-80)

W. Thomas Dillard
United States Attorney
Eastern District of Tennessee (1981)
Northern District of Florida (1983-87)

Leon Kellner
United States Attorney
Southern District of Florida (1985-88)

James Martin
United States Attorney
Eastern District of Missouri (2004-05)

Charles Redding Pitt
United States Attorney
Middle District of Alabama (1994-1998)

James H. Reynolds
United States Attorney
Northern District of Iowa (1977-82)

Benito Romano
United States Attorney
Southern District of New York (1989)

John W. Stokes Jr.
United States Attorney
Northern District of Georgia (1969-77)

Brett Tolman
United States Attorney
District of Utah (2006-09)

Stanley A. Twardy, Jr.
United States Attorney
District of Connecticut (1985-91)

Alan Vinegrad
United States Attorney
Eastern District of New York (2001-02)

cc (by facsimile):

Peter E. Deegan, Jr., Esq.
Attorney for the United States

Alan Ellis, Esq.
Guy R. Cook, Esq.
F. Montgomery Brown, Esq.
Attorneys for Sholom Rubashkin

March 4, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

We have in common that we have all served as senior leaders of the Department of Justice, although we have served in the administrations of different parties. What we also have in common, and what is particularly relevant at the moment, is that we all benefited during our tenures from the wise counsel and good judgment of David Margolis. His advice is informed by his long experience and delivered with utter lack of partisan bias or any other distorting prejudice. We greatly admire and appreciate the unique role he has played in the Department over many years.

While we do not comment here on the merits of the decision regarding the discipline of John Yoo and Jay Bybee, we are certain that it was reached conscientiously and wholly without partisan purposes. Obviously, Congress has the right to explore this decision with the Department, as this Committee did in hearing from the Acting Deputy Attorney General last Friday, but we write to emphasize that we have no doubts at all about the honesty and integrity of David Margolis's decision in this matter.

As those who have benefited from David Margolis's counsel, we know he remains a great asset to the Department and the country for the present and future.

Sincerely,

John D. Ashcroft
Attorney General
2001-2005

William P. Barr
Attorney General
1991-1993

Benjamin R. Civiletti
Attorney General
1979-1981

James B. Comey
Deputy Attorney General
2003-2005

Mark R. Filip
Deputy Attorney General
2008-2009

Alberto R. Gonzales
Attorney General
2005-2007

Jamie S. Gorelick
Deputy Attorney General
1994-1997

Jo Ann Harris
Assistant Attorney General,
Criminal Division
1993-1995

Philip B. Heymann
Deputy Attorney General
1993-1994

Paul J. McNulty
Deputy Attorney General
2005-2007

Craig S. Morford
Acting Deputy Attorney General
2007-2008

Michael B. Mukasey
Attorney General
2007-2009

David W. Ogden
Deputy Attorney General
2009-2010

Janet W. Reno
Attorney General
1993-2001

James K. Robinson
Assistant Attorney General,
Criminal Division
1998-2001

George J. Terwilliger III
Deputy Attorney General
1992-1993

January 7, 2009

The Honorable Patrick J. Leahy, Chairman
The Honorable Arlen Specter, Ranking Member
Senate Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Mr. Chairman and Senator Specter:

We are pleased to be able to write in support of Eric Holder, a man who stands with the most qualified who have been privileged to be nominated to be Attorney General of the United States. President-Elect Obama's nomination of Eric as the historic appointment of our first African-American Attorney General should be hailed as a milestone. He is an extraordinary lawyer and an even better person. We would hope that Eric would be confirmed swiftly as a key component of the President's National Security Team.

Eric Holder has a lifetime of public service to this country. His 30 year professional career has been consistently characterized by unfailing integrity and a commitment to political independence. Eric began his career as a federal prosecutor in the Public Integrity Section of the U.S. Department of Justice. There he tried many cases and prosecuted successfully widely heralded public corruption cases against officials from both political parties. Thereafter, Eric was appointed a D.C. Superior Court Judge by President Reagan and served with distinction on the Bench for five years. As a Judge, Eric had a sterling reputation for being both tough on crime but fair to all litigants. He was then appointed the United States Attorney for the District of Columbia in 1993. As Washington, D.C.'s U.S. Attorney Eric ran one of the largest and most important prosecutorial offices in the country from 1993-1997. While U.S. Attorney he oversaw the prosecution and conviction of ex-Congressman Dan Rostenkowski (D. Ill.) among other substantial achievements. Once again, his reputation was tough on crime but always fair and professional. From 1997 to 2001 Eric served as Deputy Attorney General, the critically important number two job at the Department of Justice. There he gained invaluable experience for his current nomination and developed a bipartisan reputation, making difficult decisions such as recommending that Kenneth Starr's investigation of a sitting Democratic President be expanded.

From 2001 to the present Eric has practiced law as a Partner in the prestigious Washington, D.C. law firm of Covington & Burling. There he has experienced our criminal justice system from the other side of the fence as one of Washington's leading white collar defense counsel. While at Covington Eric also represented major companies and executives in a wide variety of complex litigation and internal investigations.

While everyone seems to agree with us that Eric is extraordinarily well qualified to be Attorney General, some have raised questions about certain Presidential pardons issued by President Clinton on the day before he left office. Mentioned most prominently was the Marc Rich pardon. The short answer to any and all of these questions is that the power to issue a Presidential Pardon is a clear plenary power of any President. It is his or hers alone to execute and justify. A Presidential

pardon is then unreviewable. Virtually no one disputes that Eric was an outstanding Deputy Attorney General in every respect, President Clinton's pardons notwithstanding.

Due to his character and experience, Eric today enjoys the endorsement of literally thousands of law enforcement officials from across the country, including NAPO (National Association of Police Organizations), NDAA (National District Attorneys Association), PERF (Police Executive Research Forum), NSA (National Sheriffs' Association), NAAUSA (National Association of Assistant U.S. Attorneys) and NOBLE (National Organization of Black Law Enforcement Executives). From his experience Eric fully understands and appreciates the constant threat posed by Al Qaeda and Islamic extremists. As former federal prosecutors and senior officials of the Department of Justice we are profoundly aware of the challenges that the Department and the country are facing. Eric Holder is the right man at the right time to protect our citizens in the critical years ahead.

In closing, we note that not only is Eric superbly qualified to be Attorney General, but he is a truly good man. He is the father of three children and the devoted husband of Dr. Sharon Malone. As a kid from New York City's public schools who made it to and through Columbia University and its Law School, Eric is indeed another great American success story. We urge his rapid confirmation as our next Attorney General of the United States.

Sincerely,

William P. Barr
Former General Counsel, Verizon Corp.
Former Attorney General of the United States

Joseph E. diGenova
diGenova & Toensing
Former United States Attorney for the District of Columbia

Manus M. Cooney
President, The TCH Group
Former Chief Counsel, Senate Judiciary Committee

Stuart M. Gerson
Epstein Becker & Green, P.C.
Former Acting Attorney General and Assistant Attorney General of the United States

Makan Delrahim
Brownstein Hyatt & Farber Schreck, LLP
Former Staff Director Senate Judiciary Committee and
Former Deputy Assistant Attorney General of the United States

Michael J. Madigan
Orrick, Herrington & Sutcliffe LLP
Former Federal Prosecutor and Chief Counsel, Senate Special Investigation, Committee on Governmental Affairs

Michael O'Neill
George Mason University
Former Chief Counsel and Staff Director,
Senate Committee on the Judiciary
Former Commissioner, United States
Sentencing Commission

Victoria Toensing
diGenova & Toensing
Former Deputy Assistant Attorney General of
the United States and
Chief Counsel, Senate Intelligence Committee

George J. Terwilliger III
White & Case
Former United States Attorney for the
District of Vermont
Former Deputy Attorney General of the
United States

Charles R. Work
McDermott Will & Emery
Former Federal Prosecutor and
Former President, District of Columbia Bar

cc: Judiciary Committee Members

William P. Barr
Executive Vice President
and General Counsel

140 West Street, Floor 29th
New York, NY 10007

November 5, 2008

Chairman
Distinguished Graduate Award
West Point Association of Graduates
698 Mills Road
West Point, NY 10996

Dear Mr. Chairman:

I am writing to support the nomination of the Honorable Robert Kimmitt for the Academy's Distinguished Graduate Award.

Bob and I became close friends 31 years ago when we served as law clerks together on the United States Circuit Court for the District of Columbia Circuit, both having just completed night law school in Washington -- he while serving on the National Security Council staff; I while working for the CIA. We both served in the Reagan White House together, and he went on to serve as General Counsel of the Treasury Department. We both served together in the Administration of President George H.W. Bush – he as Undersecretary of State and Ambassador to Germany; I as Deputy Attorney General and as Attorney General of the United States. We worked closely together on the Deputies Committee of the National Security Council. Later in the private sector, when I was general counsel of a telecom company and he a partner at a major national law firm, I entrusted him with some of my company's most important work. He has returned to government to serve with distinction as Deputy Secretary of the Treasury.

While our professional lives have been closely intertwined, I have no closer friend. He is godfather to one of my children, and I to one of his; my wife and I designated Bob in our will as guardian to our children if we died while they were minors.

There is no one I respect more. He has led a life of service to his country, serving with distinction in the many offices he has held. In whatever he does, he excels as a leader. More than that, he is a man of the highest personal integrity and character, firmly and constantly devoted to his family, his God and his friends. Simply put, Bob is a "Rock." He can always be counted on to do the right thing. I am fortunate to have him as a friend.

Sincerely,

WPBarr

William P. Barr

William P. Barr
Executive Vice President
and General Counsel

140 West Street, Floor 29th
New York, NY 10007

Phone 212 395-1689

November 2, 2006

The Honorable Clifford M. Sobel
U.S. Embassy, Brazil
Unit 3500
APO AA 34030-3500
Brasil

Dear Mr. Ambassador:

While we have not met, I am the General Counsel of Verizon, and I am writing about an immigration matter. I know these issues can be nettlesome – I frequently had to deal this kind of thing when I served as Attorney General under "Bush 41." The matter is pending in the Consulate at Rio de Janeiro and is the source of great hardship to one of my senior American attorneys and his family. It seems they are caught in a Catch-22, whereby a waiver application is peremptorily rejected without ever considering the merits. I am writing simply to ask that an appropriate officer at the Consulate consider the merits of the application.

The facts in brief are these. The senior attorney on my staff is named Frederic Tauber. His wife, Giovanna, was born in Brazil and is now a permanent U.S. resident. Mr. Tauber's mother-in-law, Maria das Gracas Ferreira Barbosa, a native and citizen of Brazil, entered the U.S. in May 2001 as a visitor with B-1B/-2 status to care for her daughter who was pregnant with the Tauber's first child at the time and was suffering from depression and panic disorder. To care for her daughter, whose conditioned worsened after giving birth, and the newborn, she stayed on past her visa expiration date. After her daughter's condition stabilized, Ms. Barbosa left the U.S. to return to her home and family in Brazil. Later, in April 2003, when Ms. Barbosa tried to visit her daughter and granddaughter, she was denied entry and advised she was subject to a ten year bar

Since then, Ms. Barbosa, pursuant to INA Sec. 212 (d) (3), has twice submitted at the Consulate in Rio de Janeiro applications for a B-1B/-2 Nonimmigrant Visa and a Waiver of Inadmissibility. That Section provides for discretionary relief from the kind of bar at issue here. In seeking a waiver of inadmissibility, Ms Barbosa submitted substantial documentation showing that she overstayed her earlier visa due to extenuating circumstances surrounding the wellbeing of her daughter and granddaughter; that she clearly did not have an intent to permanently remain in the U.S., since, as the mother of a naturalized U.S. citizen son at that time, she could have lawfully effectuated that result if she had wanted to stay; that she has continuing ties in Brazil that manifest an intent to remain resident there; and that the continuing bar on admission is imposing substantial hardship on her daughter a permanent U.S. resident, and her granddaughter and

son-in-law, U.S. citizens. On both occasions, her applications for waiver of inadmissibility were not even accepted for review; they were pushed back at her, summarily rejected without consideration of their content on the grounds that she was inadmissible.

This matter has become more acute because Mr.Tauber has just given birth to her second child, his wife is having difficulties again, and his mother-in-law is the only family member who can help. He is simply seeking a review of Ms. Barbosa's application and consideration for the relief being sought under the circumstances. It is my understanding that INA Sec 212(d)(3) was enacted so as to provide relief by a waiver of inadmissibility to non-immigrants that are inadmissible due to overstaying a visa such as in the case of Ms. Barbosa. While relief is discretionary, it seems to me Mr. Tauber is presenting a compelling set of facts.

I would be most grateful if some further consideration might be given to the situation.

Respectfully yours,

William P. Barr

May 5, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

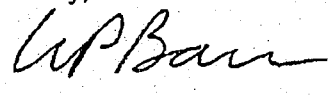
Dear Chairman Specter:

As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. Our past experiences as Attorneys General include extensive involvement in the selection of judges combined with a comprehensive knowledge of and familiarity with our federal court system. From that vantage point, we can each state with certainty that Mr. Kavanaugh is an outstanding nominee to the federal bench.

Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. His academic credentials are superlative, having graduated from Yale University and from Yale Law School. He followed these achievements by clerking for Supreme Court Justice Anthony Kennedy. Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table—namely a warm personality, a strong work ethic, and a good character.

We believe that Mr. Kavanaugh possesses each characteristic of an outstanding nominee to the U.S. Court of Appeals for the D.C. Circuit, including academic and professional credentials and integrity. We therefore urge this Committee and the Senate to move quickly to confirm Mr. Kavanaugh to the federal bench. America would be well served by Mr. Kavanaugh's prompt confirmation.

Sincerely,



William P. Barr, Attorney General under
President George H.W. Bush, 1991-1993

On behalf of:

Griffin B. Bell, Attorney General under
President Carter, 1977-1979

Edwin Meese, III, Attorney General under
President Reagan, 1985-1988

Dick Thornburgh, Attorney General under
Presidents Ronald Reagan and George H. W. Bush,
1988-1991

John Ashcroft, Attorney General under
President George W. Bush, 2001-2005

cc: The Honorable Patrick J. Leahy

February 10, 2006

The Honorable Salvatore F. DiMasi
Speaker of the House
State House, Room 356
Boston, Massachusetts 02133

Dear Speaker DiMasi:

As counsel to some of the state's leading corporations and institutions, we are writing to urge your support for an increase in funding for the Massachusetts Legal Assistance Corporation in the FY07 budget. An appropriation of $12,066,799 in line item 0321-1600 will provide critical funds to the Commonwealth's twelve civil legal aid programs.

Businesses rely on the smooth functioning of our legal system, and access to justice is fundamental to the operation of that system. The day-to-day work of civil legal aid programs helps to maintain the equities that hold together our democratic society and our Commonwealth. It is clear to us, as corporate and institutional attorneys, that unless everyone has access to the courts, the perception of bias can erode confidence in our justice system and our government.

Currently, local legal aid programs are forced to turn away a majority of eligible callers because of a lack of resources. The aftermath of Hurricane Katrina has increased awareness of the plight of invisible communities in the United States: low-income people turned away from legal aid programs in Massachusetts represent our invisible communities.

As you consider the budget for the coming fiscal year, we ask that you increase funding for civil legal aid to ensure that low-income residents with serious civil legal problems can get the assistance they need.

Thank you for considering our request. We deeply appreciate your support and leadership for these critical services.

Very truly yours,

Garry B. Watzke
General Counsel
Iron Mountain Incorporated

Frank D. Burt
General Counsel
Boston Properties, Inc.

Quentin J. Greeley
General Counsel
Cambridge Savings Bank

Lena G. Goldberg
General Counsel
FMR Corporation

Christopher C. Mansfield
General Counsel
Liberty Mutual Insurance Company

Thomas J. DesRosier
General Counsel
Genzyme Corporation

Charles J. Gray
General Counsel
Sonus Networks, Inc.

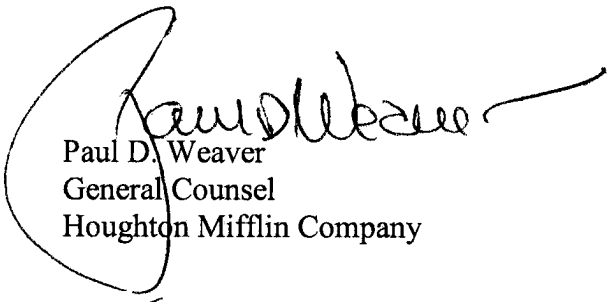
Jody Acford
General Counsel
Charles River Laboratories, Inc.

Vivian Tseng
General Counsel
Welch Foods Inc., A Cooperative

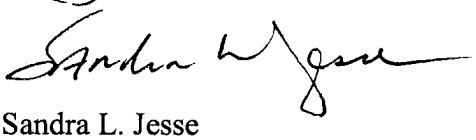
Edward H. Seksay
General Counsel
Rockland Trust Company

Holly H. Stratford
General Counsel
Solid Works Corporation

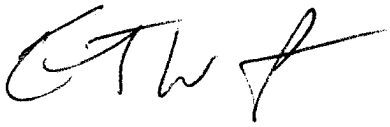
Eileen Casal
General Counsel
Teradyne, Inc.



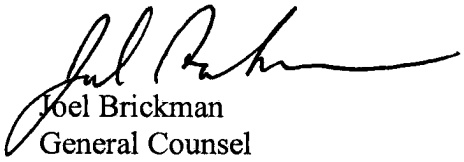
Paul D. Weaver
General Counsel
Houghton Mifflin Company



Sandra L. Jesse
General Counsel
Blue Cross and Blue Shield
of Massachusetts



Ernest Cloutier
General Counsel
Digitas Inc.



Joel Brickman
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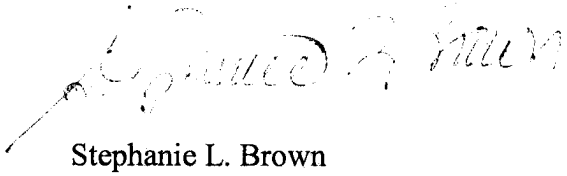
Citizens Financial Group, Inc.



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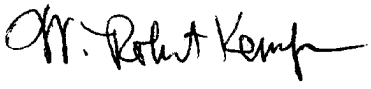

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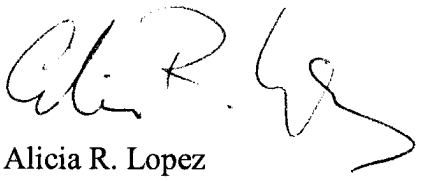

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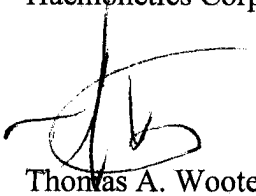

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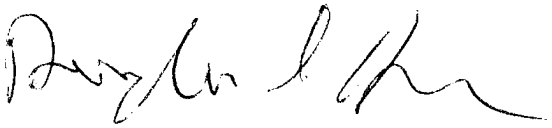

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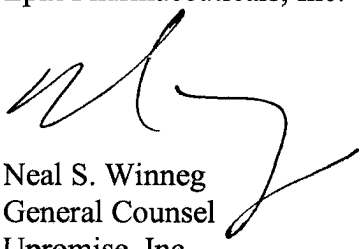

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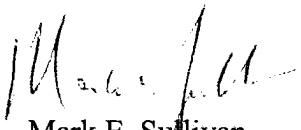

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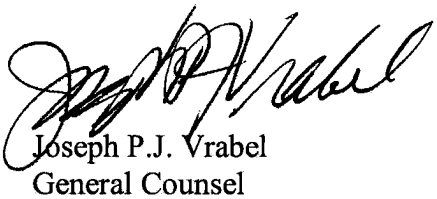

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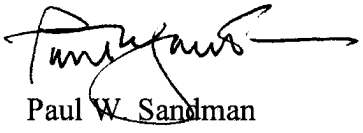

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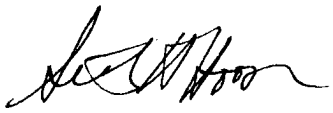

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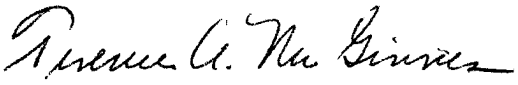

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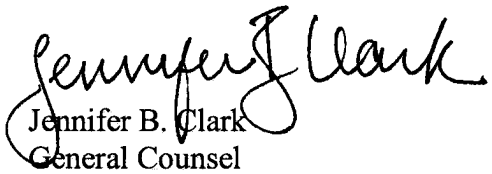

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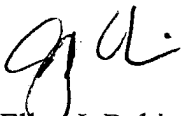

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Susan F. Brand
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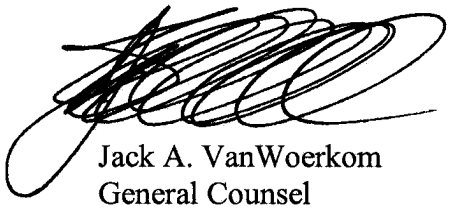

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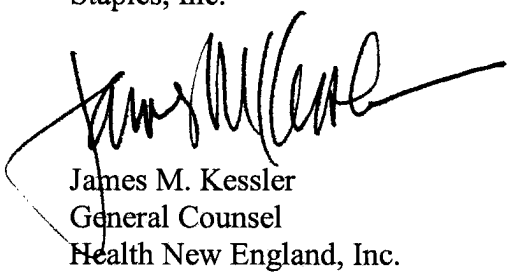

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January 4, 2006

The Honorable Arlen Specter
Chairman,
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member,
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Senator Leahy:

We write in support of the nomination of Judge Samuel A. Alito, Jr. to the United States Supreme Court. Each of us has devoted a significant portion of our legal practice or research to appellate matters. Although we reflect a broad range of political, policy and legal views, we all agree that Judge Alito should be confirmed by the Senate. Judge Alito has a well-deserved reputation as an outstanding jurist. He is, in every sense of the term, a "judge's judge." His opinions are fair, thoughtful and rigorous. Those of us who have appeared before Judge Alito appreciate his preparation for argument, his temperament on the bench and the quality and incisiveness of the questions he asks. Those of us who have worked with Judge Alito respect his legal skills, his integrity and his modesty. In short, Judge Alito has the attributes that we believe are essential to being an outstanding Supreme Court justice and therefore should be confirmed. Thank you for considering our views.

Sincerely,

Arlin M. Adams,	Schnader Harrison Segal & Lewis LLP; Judge, U.S. Court of Appeals for the Third Circuit 1969-87
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the ideas that have been thrown out today. We appreciate your effort and we will also appreciate any continuing advice and counsel that you might be able to provide us.

Senator GRAHAM. Thank you. We'll have the next panel. Thank you. [Recess.]

Thank you all for being patient. I apologize. The Senate on a good day is a hard place to run. We have had five back to back votes, and you have been very patient. Our first panel was terrific. Thank you all for coming and helping this committee with a very difficult series of decisions to make. You are all well-known and respected. Senator Nelson, would you like to——

Senator BEN NELSON. No, Mr. Chairman, I think we would like to go right to the panel. Thank you very much. I do want to thank the panel, though.

Senator GRAHAM. Mr. Barr.

STATEMENT OF HON. WILLIAM P. BARR, FORMER ATTORNEY GENERAL OF THE UNITED STATES

Mr. BARR. Thank you, Mr. Chairman. Let me say that I think your opening statement was one of the most cogent explanations of where we are and I really agree with everything you said. I think the administration's policies are justified and lawful and that they are fully in accord with the law of war, and I think frankly, Senator, the thing that makes it appear messy is not because of anything the administration or our military is doing. I think the really——

Senator GRAHAM. Could I interrupt here? I don't mean messy as a blame term. It's just a legal situation that's hard to deal with, no one is at fault. I think we did a good job defining enemy combatant status and military tribunals but the courts are now in play. What has made it messy is habeas and is the worst way imaginable in my opinion to deal with the legal problems that we face. I just wanted to interject that it's not because anybody did anything wrong. It's just the nature of the legal situation we find ourselves in.

Mr. BARR. That's right, and you made that clear, Senator. I fully agree with that. I think the confusion arises from several different sources. One is the tendency for people at large, and for judges, to confuse war with, law enforcement activities which are totally different from a constitutional standpoint. Another is, I think we would all recognize that over the past 30 years there has been expansion of judicial power. Judges are more and more willing to try to sort of second-guess and make decisions that heretofore they have relied on accountable political officials to make. That's now carrying over into the war area, unfortunately. I think there's also been, since Watergate, a depreciation of the importance of executive power. Executive power to our framers really meant something, they viewed it as a distinctive kind of power to deal with exigent circumstances that really weren't amenable to setting all the rules out in advance, which is what the legislature does, or through the judicial method, which is to try to apply absolute objective standards and then weigh the evidence to see whether something is in or out.

Now, in our war, as opposed to our law enforcement, there are two important attributes that I think we have to recognize. One is it that it is subject to the laws of war, and the other is that fundamental decisions that have to be made in war are executive in nature. The framers did not give the commander in chief authority to the President because they played enie-meanie-miney-mo or flipped a coin; they felt that the President, that the executive, had to make the kinds of decisions that came up, who was to be approached as the enemy, what force was to be—yes.

Senator MCCAIN. The Constitution says very clearly, "to declare war, grant letters of marque and reprisal and make rules concerning captures on land and water." So I don't understand your logic there, that it's all up to the executive.

Mr. BARR. No, I'm saying that the executive is the Commander in Chief.

Senator MCCAIN. The executive is Commander in Chief, but the Constitution says Congress shall make rules concerning captures on land and water.

Mr. BARR. Okay, well, let's discuss that provision, Senator.

Senator MCCAIN. Let's discuss it. Yes.

Mr. BARR. In the 18th century and at the time of the framing of the Constitution there was a concept that when a state of war existed, all the citizens of the two communities could engage in hostilities against each other, willy-nilly, and the concern was under international law and the evolution of that law was the countries should give specific license to who was going to wage combat on behalf of a society through regular means. That's why reprisals, letters of marque and making the rules governing captures were established. It was who is going to fight on behalf of the Republic. That's what that provision deals with. But you don't find many statutes to try to anticipate in advance and set forth in codification how we are going to fight a particular war. That's the point I'm making. It's very hard to make these rules in a statutory straitjacket, that sort of says how we're going to fight or define with precision every category.

Turning to the situation in Guantanamo, these are people being held as detainees. There is no due process requirement as far as foreign persons are concerned to have adversary hearings to determine whether someone is or is not a detainee. However, in this case, because of the nature of this war, we have provided these individuals with more process than any set of prisoners in wartime has ever received, through annual reviews, through multilevel battlefield and theater reviews, and now through CSRT, which is a hearing procedure.

Senator MCCAIN. Not one is going to be tried.

Mr. BARR. Excuse me?

Senator MCCAIN. Not one is going to trial.

Mr. BARR. I'm sympathetic with the notion we should start trying these people. But the fact of the matter is from a legal standpoint, we did catch Hess in 1939, I believe; we tried him in 1946. If people are being held as detainees, there is no immediate need to try them for war crimes if they are detained anyway as detainees. Now, I think it's largely a prudential judgment as to when we

bring charges against these people and I'm sympathetic to the notion we that should proceed with that.

I'd like to get a little bit into this issue. I'd like to open up a can of worms and get into this issue of interrogation. Because we frequently hear a lot of people criticize the administration, but it seems to me that when an enemy is operating as these people are, they are committing two horrific crimes against humanity.

One is they are disguising themselves as civilians and hiding out among civilians. That in itself is an atrocity, because it increases the vulnerability of civilians, and because you have to sort out who is the enemy and who isn't. Second, they are carrying out deliberate attacks against civilians. So these are two grave crimes.

When you are fighting that kind of an enemy, as opposed to enemy that is fighting by the laws of war, it seems to me critical and a moral imperative that you take every step you can to figure out who is the enemy and who isn't the enemy. I don't know of any organization like this that has ever been counteracted without that coercive interrogation, by capturing an individual and then figuring out who else is involved and who they're reporting to and who else is in the cell. This is really the main intelligence means you have of defeating an organization like this.

Now, I can understand if someone wants to say there is no right to coercive interrogation. I disagree with that as a moral matter, but I have not heard the critics saying that. If you can use coercion in interrogation, the question is where you draw the line. This administration says they're not going to engage in torture, but they will engage in coercive interrogation, and I'm not sure if it would be helpful for Congress to try to figure out what exactly constitutes torture and what's coercion under the circumstances.

Finally, let me just say I'm not sure the definition of enemy combatant is really the problem here. Like any rule that deals with a complicated area, it has to be necessarily framed in general terms and applied to meet the circumstances. You said, Mr. Chairman, at the beginning, war is fluid; the enemy adapts; we have to adapt. Now we are dealing with an enemy that is consciously trying to avoid these categories and organize themselves in a way, not only to avoid detection, but so they have cover stories for whatever they do. So, there are some areas like fraud, for example, where we prohibit fraud. Fraud is a general term. It's very hard to codify that and think of all the instances that could be considered fraud, and I think the definition of combatant is that kind of definition and it has two components. One, you are either part of the armed force of the enemy or you are providing direct support to the military operations, or hostilities and normally, when you are fighting an army that's a regular army, that's easy to discern. But when you are fighting a guerrilla army it is sometimes hard. I'm worried that if we try to codify, and think of all the different instances where someone could be providing that kind of support, we'll leave things out, or we'll create mischief.

So those are some opening thoughts, Mr. Chairman, I'd be glad to answer any questions you have.

[The prepared statement of Attorney General Barr follows:]

PREPARED STATEMENT BY WILLIAM P. BARR

Mr. Chairman, and members of the subcommittee, I am pleased to provide my views on the important issues surrounding our response as a Nation to attacks against our homeland and the continuing national security threat posed by al Qaeda. By way of background, I have previously served as Assistant Attorney General for the Office of Legal Counsel, the Deputy Attorney General, and the Attorney General of the United States. I have also served on the White House staff and at the Central Intelligence Agency (CIA). The views I express today are my own.

My remarks today focus on the detention of foreign enemy combatants captured during our military campaign against the Taliban and al Qaeda and, specifically, on the adequacy of the procedures governing their continued detention as enemy combatants and, in the cases of some detainees, their prosecution before military commissions for violations of the laws of war.

In my view, the criticisms of the administration's detention policies are without substance. The administration's detention measures are squarely in accord with the time-honored principles of the law of war and supported by over 230 years of unbroken legal and historical precedent.

It is important to understand that the United States is taking three different levels of action with respect to the detainees. These are frequently confused in the popular media.

First, as a threshold matter, the United States is detaining all these individuals simply by virtue of their status as enemy combatants. It is well established under the laws of war that enemy forces are subject to capture and detention, not as a form of punishment, but to incapacitate the enemy by eliminating their forces from the battlefield. Captured enemy forces are normally detained for as long as the enemy continues the fight.

The determination that a particular foreign person seized on the battlefield is an enemy combatant has always been recognized as a matter committed to the sound judgment of the Commander in Chief and his military forces. There has never been a requirement that our military engage in evidentiary proceedings to establish that each individual captured is, in fact, an enemy combatant. Nevertheless, in the case of the detainees at Guantanamo, the Deputy Secretary of Defense and the Secretary of the Navy have established Combatant Status Review Tribunals (CSRTs) to permit each detainee a fact-based review of whether they are properly classified as enemy combatants and an opportunity to contest such designation.

As to the detention of enemy combatants, World War II provides a dramatic example. During that war, we held hundreds of thousands of German and Italian prisoners in detention camps within the United States. These foreign prisoners were not charged with anything; they were not entitled to lawyers; they were not given access to U.S. courts; and the American military was not required to engage in evidentiary proceedings to establish that each was a combatant. They were held until victory was achieved, at which time they were repatriated. The detainees at Guantanamo are being held under the same principles, except, unlike the Germans and Italians, they are actually being afforded an opportunity to contest their designation as enemy combatants.

Second, once hostile forces are captured, the subsidiary question arises whether they belonged to an Armed Force covered by the protections of the Geneva Conventions and hence entitled to prisoner of war (POW) status? If the answer is yes, then the captives are held as prisoners of war entitled to be treated in accord with the various "privileges" of the Convention. If the answer is no, then the captives are held under humane conditions according to the common law of war, though not covered by the various requirements of the Convention. The threshold determination in deciding whether the Convention applies is a "group" decision, not an individualized decision. The question is whether the military formation to which the detainee belonged was covered by the Convention. This requires that the military force be that of a signatory power and that it also comply with the basic requirements of Article 4 of the Treaty, e.g., the militia must wear distinguishing uniforms, retain a military command structure, and so forth. Here, the President determined that neither al Qaeda nor Taliban forces qualified under the Treaty, and he was obviously correct in that decision.

The third kind of action we are taking goes beyond simply holding an individual as an enemy combatant. It applies so far only to a subset of the detainees and is punitive in nature. In some cases, we are taking the further step of charging an individual with violations of the laws of war. This involves individualized findings of guilt. Throughout our history we have used military tribunals to try enemy forces accused of engaging in war crimes. These tribunals are sanctioned by the laws of war. Shortly after the attacks of September 11, the President established military

commissions to address war crimes committed by members of al Qaeda and their Taliban supporters.

Again, our experience in World War II provides a useful analog. While the vast majority of Axis prisoners were simply held as enemy combatants, military commissions were convened at various times during the war, and in its immediate aftermath, to try particular Axis prisoners for war crimes. One notorious example was the massacre of American troops at Malmedy during the Battle of the Bulge. The German troops responsible for these violations were tried before military courts.

I would like to address each of these matters, but before doing so I would like to discuss briefly the legal and Constitutional framework that governs our activities.

I. THE CONSTITUTIONAL FRAMEWORK

Most of the carping and criticism I have heard over the administration's policies are based on a completely false premise—that our operations against al Qaeda are in the nature of law enforcement activities and therefore that, when our forces seize someone, the government is subject to all the constraints, process-requirements and rules that apply in the criminal justice context. This is a dangerous misconception. This is not "Hawaii Five-0." We are not "booking them, Danno." This is a war—not in a figurative, but in a very literal, real sense. We are in an armed conflict with foreign enemy forces who are trying to kill us.

There is a clear and critical distinction between the role the government plays when it is enforcing our domestic laws against members of our body politic, and the role it plays when it is defending the body politic from armed assault by an external enemy. This distinction is critically important because the scope of the government's power and the restrictions we place on the government differ fundamentally depending on which function the government is performing.

When the government enforces law within the community by seeking to discipline an errant member, the Constitution is concerned with dividing, diluting, and weakening the government, which it does both by hemming it in with restrictions and by investing those against whom it is acting with "rights"—creating, in a sense, a level playing field as between the government and the individuals it is seeking to discipline. But when the government is defending the community against armed attacks by a foreign enemy, the Constitution seeks to unify and strengthen the power of the government. It does not grant rights to our foreign enemies. It is concerned with one thing—preserving the freedom of our political community by destroying the external threat.

To gain a better appreciation of this dichotomy, it is useful to "go back to basics." What is a Constitution? It is the fundamental agreement by which a certain people bind themselves together as a separate and distinct political community. It sets forth the internal rules by which the particular body politic will govern itself. Our Constitution was not written to govern the world as a whole. It was written for "the people"—the American people

There were two chief reasons why the American people decided to establish a Federal Government—to "ensure domestic Tranquillity" and to "provide for the common defence." To achieve the first purpose, the Federal Government is given its domestic law enforcement functions; to achieve the second purpose, the Federal Government is given its warfighting or national defense powers.

When the government acts in its law enforcement capacity, the government's role is disciplinary. It preserves "domestic Tranquillity" by punishing an errant member of society for transgressing the internal rules of the body politic. However, the Framers recognized that in the name of maintaining domestic order an overzealous government could oppress the very body politic it is meant to protect. The government itself could become an oppressor of "the people."

Thus our Constitution makes the fundamental decision to sacrifice efficiency in the realm of law enforcement by guaranteeing that no punishment can be meted out in the absence of virtual certainty of individual guilt. Both the original Constitution and the Bill of Rights contain a number of specific constraints on the executive's law enforcement powers, many of which expressly provide for a judicial role as a neutral arbiter or "check" on executive power. In this realm, the executive's subjective judgments are irrelevant; it must gather and present objective evidence of guilt satisfying specific constitutional standards at each stage of a criminal proceeding. The underlying premise in this realm is that it is better for society to suffer the cost of the guilty going free than mistakenly to deprive an innocent person of life or liberty.

The situation is entirely different in armed conflict where the entire nation faces an external threat. In armed conflict, the body politic is not using its domestic disciplinary powers to sanction an errant member, rather it is exercising its national

defense powers to neutralize the external threat and preserve the very foundation of all our civil liberties. Here, the Constitution is not concerned with handicapping the government to preserve other values. The Constitution does not confer "rights" on foreign persons confronted in the course of military operations, nor does the judicial branch sit as a "neutral arbiter" as between our society and our foreign enemies, or a second-guesser of military decisions. Rather, the Constitution is designed to maximize the government's efficiency to achieve victory—even at the cost of "collateral damage" that would be unacceptable in the domestic realm.

What is this Constitutional framework for fighting a war? In framing the Constitution, the Founders did something that was unimaginable just a dozen years before the Convention. They created a single powerful Chief Executive, vested in that office all "The Executive power," and conferred on that official the power as "Commander in Chief." They did this for two reasons. First, from bitter experience in fighting the Revolution, they concluded that, when fighting a foreign war, the Nation's military power had to be maximized by putting directive authority into a single set of hands. Second, they understood that the kinds of decisions involved in war are inherently "executive" in character. Like all the classical philosophers, the founders viewed executive power as a distinctive type of power quite different from either judicial or legislative power. They understood that contingencies arise that are simply not amenable to being handled by a set of hard-and-fast, adopted in advanced by a legislature or applied after-the-fact by judges.

The pre-eminent example is military decision making, which calls for judgments that cannot be reduced to neat objective tests, but rather requires the exercise of prudential judgment. Warfare requires that certain decisions be made on an ongoing basis: how, and against whom, should military power be applied to achieve the military and political objectives of the campaign. The Framers created one office—a President, elected by all the people of the country and alone accountable to all the people—to make these decisions. If the concept of a commander in chief means anything, it must mean that the office holds the final and conclusive authority to direct how force is to be used.

It is simply inarguable that, in confronting al Qaeda, the United States is fighting a war. Al Qaeda is a highly organized foreign force that has openly declared war on the United States and launched a series of carefully coordinated attacks, here and abroad, for the purpose of imposing its will on our country. These are organized armed attacks to achieve political objectives. That is the very essence of war. The fact that al Qaeda does not formally control a nation state does not make our contest with them any less a war. We have fought foreign political factions before. The fact that al Qaeda seeks to operate in secret, disguising itself among civilians, and striking out in violation of the laws of war, does not change the essential character of their acts. We have fought irregular enemies before.

I think the American people fully understand that this is a real war. We can apply a common sense test to see that this is so. Suppose that tomorrow we were to determine that we had located Osama bin Laden in his hideout. Would the American people think it legitimate for us to peremptorily drop a bomb on the location to kill him? Or do you think that the American people would think that Osama bin Laden (as he sits in his lair) has rights under our Constitution and that we would have to give warning and try to capture him alive for trial? Do we really think that we could only deal with Osama bin Laden as a criminal suspect and could only use lethal force to the extent permitted against such suspects? The overwhelming majority of Americans clearly understand that, when we locate them, it would be perfectly appropriate for us to use peremptory force against Osama bin Laden and his associates solely for the purpose of destroying them. That is because they understand this is a war.

I hear a lot of hand-wringing about civil liberties in connection with the Guantanamo detainees. I fail to see how our holding of those detainees raises legitimate civil liberties issues. It seems to me there are two respects in which fighting a war against a foreign enemy can be said to raise "civil liberties" concerns, and neither apply to the Guantanamo detainees. First, even where the government is using military power only against foreign persons who have no connection with the United States, there is the danger that, the government might impose domestic security measures that trench upon the liberties of our own people. For example, the government might assert rights of censorship, rationing, or broader search powers. The government's claim in such cases is not that the people are the "enemy," but that the exigencies of war require greater imposition on the people. This is allegedly the kind of issue raised by the Patriot Act. But this is not what we are discussing today.

The second type of civil liberty concern arises where the government directs its military power against its own people. In many of our foreign wars, there have been American citizens who have fought with the enemy. In World War II, for example,

there were hundreds who did so, including some natural born citizens. As the Supreme Court recently ruled in the *Hamdi* case, the government can legitimately use military power against citizens who are part of enemy forces and can detain them as "enemy combatants." But, in such cases involving our own citizens, civil liberties concerns naturally arise. In theory, there is a risk that the government might oppress the body politic, and bypass law enforcement procedures, simply be using war as a pretext for labeling innocent citizens as enemies. Thus, the administration has always acknowledged that citizens have the right to habeas corpus and that some level of judicial scrutiny is required to ensure that the government is not just acting pretextually. Thus, as the *Hamdi* court ruled, some unspecified due process rights may apply when the government seeks to hold its own citizens as foreign enemies. None of this applies here, however. As far as I am aware, none of the detainees at Guantanamo are American citizens.

II. THE PROPRIETY OF THE ADMINISTRATION'S DETERMINATIONS

With foregoing basic principles in mind, let us turn to the various issues that have been raised—namely: (1) whether the detainees at Guantanamo can be held without greater process than they are already being afforded; (2) whether these al Qaeda or Taliban forces are entitled to the protections of the Geneva Convention; and (3) whether some of the detainees may be tried for war crimes before the military commissions established by the President.

A. The Detention of the Guantanamo Captives as "Enemy Combatants"

As I stated at the outset, and as the Supreme Court just reaffirmed in *Hamdi*, an inherent part of war is capturing and holding enemy forces for the duration of hostilities. While *Hamdi* teaches that American citizens cannot be so held without some process, there has never been a requirement that our military engage in evidentiary proceedings to establish that each foreign person captured is, in fact, an enemy combatant. On the contrary, the determination that a particular foreign person is an enemy combatant has always been recognized as a matter committed to the sound judgment of the commander in chief and his military forces.

Now obviously the military has procedures for reviewing whether persons being detained deserve to be held as "enemy combatants." In the case of the Guantanamo detainees, their status has been reviewed and re-reviewed within the executive branch and the military command structure. Nevertheless, the argument is being advanced that foreign persons captured by American forces in the course of military operations have a due process right under the fifth amendment to an evidentiary hearing to fully litigate whether they are, in fact, enemy combatants. We have taken and held prisoners in war for over 230 years, and the suggestion that, as a legal matter, we owed each foreign detainee a trial is just preposterous.

Now the easy and short answer to this particular criticism about the Guantanamo detainees is that the claim has been totally mooted by the military's voluntary use of the CSRT process. Under these procedures, each detainee is given the opportunity to contest his status as an enemy combatant. To my knowledge, we have provided more "process" for these detainees than for any group of wartime prisoners in our history. While clearly not required by the Constitution, these measures were adopted by the military as a prudential matter. They were modeled on those that the *Hamdi* decision indicated would be sufficient for holding an American citizen as an enemy combatant.[1] Obviously, if these procedures are sufficient for American citizens, they are more than enough for foreign detainees who have no colorable claim to due process rights.

Indeed, most of the process embodied in the CSRT parallel and even surpass the rights guaranteed to American citizens who wish to challenge their classification as enemy combatants. The Supreme Court has indicated that hearings conducted to determine a detainee's prisoner-of-war status, pursuant to the Geneva Convention,[2] could satisfy the core procedural guarantees owed to an American citizen.[3] In certain respects, the protocols established in the CSRTs closely resemble a status hearing, as both allow all detainees to attend open proceedings, to use an interpreter, to call and question witnesses, and to testify or not testify before the panel.[4] Furthermore, the United States has voluntarily given all detainees rights that are not found in any prisoner-of-war status hearing, including procedures to ensure the

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[1] Hamdi v. Rumsfeld, 124. S.Ct. 2633 (2004).

[2] The procedures are created under Army Regulation 190–8. Opening Brief for the United States, *Odah v. United States,* at 31.

[3] *Hamdi,* 124 S.Ct. at 2651.

[4] Opening Brief in *Odah* at 33–34.

independence of panel members and the right to a personal representative to help the detainee prepare his case.[5]

Nevertheless, there appear to be courts and critics who continue to claim that the Due Process Clause applies and that the CSRT process does not go far enough. I believe these assertions are frivolous.

I am aware of no legal precedent that supports the proposition that foreign persons confronted by U.S. troops in military operations have fifth amendment rights that they can assert against the American troops. On the contrary, there are at least three reasons why the fifth amendment has no applicability to such a situation. First, as the Supreme Court has consistently held, the fifth amendment does not have extra-territorial application to foreign persons outside the United States.[6] As Justice Kennedy has observed, "[T]he Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of non-citizens who are beyond our territory."[7] Moreover, as far as I am aware, prior to their capture, none of the detainees had taken any voluntary act to place themselves under the protection of our laws; their only connection with the United States is that they confronted U.S. troops on the battlefield. Finally, the nature of the power being used against these individuals is not the domestic law enforcement power—we are not seeking to subject these individuals to the obligations and sanctions of our domestic laws—rather, we are waging war against them as foreign enemies. As I have already explained, this is a context in which the concept of due process is inapposite.

In society today, we see a tendency to impose the judicial model on virtually every field of decisionmaking. The notion is that the propriety of any decision can be judged by determining whether it satisfies some objective standard of proof and that such a judgment must be made by a "neutral" arbiter based on an adversarial evidentiary hearing. What we are seeing today is an extreme manifestation of this—an effort to take the judicial rules and standard applicable in the domestic law enforcement context and extend them to the fighting of wars. In my view, nothing could be more farcical, or more dangerous.

Let us make no mistake about it. Any extension of due process rights to foreign adversaries in war would effectuate probably the most profound shift in power in our Constitutional history. Any decision that affected the life or liberty of the foreign persons being confronted by our Armed Forces would be subject to judicial review. Either before or after military actions are taken, judges, purporting to balance all the competing interests, would pronounce whether the actions passed legal muster. This would make the judges the ultimate decision makers. For the first time in our history, judges would be in charge of superintending the fighting of wars.

These are not the "Men in Black" we should want to see in charge of fighting our wars. A moment's reflection should tell us that courts and judges lack both the institutional capacity and the political accountability for making these types of decisions. As I observed above, at the heart of a commander's military decisions is the judgment of what constitutes a threat or potential threat and what level of coercive force should be employed to deal with these dangers. These decisions cannot be reduced to tidy evidentiary standards, some predicate threshold, that must be satisfied as a condition of the President ordering the use of military force against a particular individual. What would that standard be? Reasonable suspicion, probable cause, substantial evidence, preponderance of the evidence, or beyond a reasonable doubt? Does anyone really believe that the Constitution prohibits the President from using coercive military force against a foreign person—detaining him—unless he can satisfy a particular objective standard of evidentiary proof?

Let me posit a battlefield scenario. American troops are pinned down by sniper fire from a village. As the troops advance, they see two men running from a building from which the troops believe they had received sniper fire. The troops believe they are probably a sniper team. Is it really being suggested that the Constitution vests these men with due process rights as against the American soldiers? When do these rights arise? If the troops shoot and kill them—i.e., deprive them of life—could it be a violation of due process? Suppose they are wounded and it turns out they were not enemy forces. Does this give rise to *Bivens* Constitutional tort actions for viola-

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[5] *Id.* at 34–35.

[6] Johnson v. Eisentrager, 339 U.S. 763 (1950); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (explaining that "we have rejected the claim that aliens are entitled to fifth amendment rights outside the sovereign territory of the United States"); Zadvydas v. Davis, 533 U.S. 678 (2001) (citing Eisentrager and Verdugo for the proposition that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders").

[7] Verdugo-Urquidez, 494 U.S. at 275 (Kennedy, J., concurring).

tion of due process? Alternatively, suppose the fleeing men are captured and held as enemy combatants. Does the due process clause really mean that they have to be released unless the military can prove they were enemy combatants? Does the Due Process Clause mean that the American military must divert its energies and resources from fighting the war and dedicate them to investigating the claims of innocence of these two men?

This illustrates why military decisions are not susceptible to judicial administration and supervision. There are simply no judicially-manageable standards to either govern or evaluate military operational judgments. Such decisions inevitably involve the weighing of risks. One can easily imagine situations in which there is an appreciable risk that someone is an enemy combatant, but significant uncertainty and not a preponderance of evidence. Nevertheless, the circumstances may be such that the President makes a judgment that prudence dictates treating such a person as hostile in order to avoid an unacceptable risk to our military operations. By their nature, these military judgments must rest upon a broad range of information, opinion, prediction, and even surmise. The President's assessment may include reports from his military and diplomatic advisors, field commanders, intelligence sources, or sometimes just the opinion of frontline troops. He must decide what weight to give each of these sources. He must evaluate risks in light of the present state of the conflict and the overall military and political objectives of the campaign.

Furthermore, extension of due process concepts as a basis for judicial supervision of our military operations would be fundamentally incompatible with the power to wage war itself, so altering and degrading that capacity as to negate the Constitution's grant of that power to the President.

First, the imposition of such procedures would radically alter the character and mission of our combat troops. To the extent that the decisions to detain persons as enemy combatants are based in part on the circumstances of the initial encounter on the battlefield, our frontline troops will have to concern themselves with developing and preserving evidence as to each individual they capture, at the same time as they confront enemy forces in the field. They would be diverted from their primary mission—the rapid destruction of the enemy by all means at their disposal—to taking notes on the conduct of particular individuals in the field of battle. Like policeman, they would also face the prospect of removal from the battlefield to give evidence at post-hoc proceedings.

Nor would the harm stop there. Under this due process theory, the military would have to take on the further burden of detailed investigation of detainees' factual claims once they are taken to the rear. Again, this would radically change the nature of the military enterprise. To establish the capacity to conduct individualized investigations and adversarial hearings as to every detained combatant would make the conduct of war—especially irregular warfare—vastly more cumbersome and expensive. For every platoon of combat troops, the United States would have to field three platoons of lawyers, investigators, and paralegals. Such a result would inject legal uncertainty into our military operations, divert resources from winning the war into demonstrating the individual "fault" of persons confronted in the field of battle, and thereby uniquely disadvantage our military vis-a-vis every other fighting force in the world.

Second, the introduction of an ultimate decisionmaker outside of the normal chain of command, or altogether outside the executive branch, would disrupt the unitary chain of command and undermine the confidence of frontline troops in their superior officers. The impartial tribunals could literally overrule command decisions regarding battlefield tactics and set free POWs whom American soldiers have risked or given their lives to capture. The effect of such a prospect on military discipline and morale is impossible to predict.

In sum, the claim that the Guantanamo detainees are not getting adequate process is totally without substance. As foreign persons confronted by U.S troops on the battlefield, they have no legal right to Constitutional due process. They are being properly held under the laws of war. They have, in fact, received the same process that American citizens would get under the circumstances.

I have heard some additional suggestion that it would be useful at this juncture for Congress to adopt a precise definition of the category of persons who can be detained as "enemy combatants." I disagree. The existing definition that is now part of the common law of war is fully adequate and sensible. Any attempt by Congress to codify a more specific definition is unnecessary and would end up unduly hamstringing our military forces. Moreover, trying to frame a more specific statutory definition would be incompatible with the law of war as an evolving body of "common law"—one that develops with experience and can adapt to meet new and changing circumstances. Especially given the state of affairs we face today and the

type of enemy we are confronting, I think trying to lock in any particular verbal formulation would be extremely unwise.

Certainly no legislative action is necessary to ensure that the President has adequate detention authority. The President's power does not come from Congress in the first place; it comes directly from Article II of the Constitution. After all, since the country's inception, our military forces have engaged in at least 10 major wars and literally hundreds of military expeditions in which we have faced a broad range of opposing forces, ranging from regular armies to irregular forces, including Barbary pirates, hostile Indians, Mexican guerillas, Chinese Boxers, Villa's banditti, Philippine Insurrectionists, and the Viet Cong, just to name a few.

No one has had the temerity to suggest that our forces in all these campaigns lacked authority to capture the enemy, or that they needed some carefully-crafted statute to do so. Nor, as far as I know, have we ever found it necessary or prudent to define in advance with any statutory detail the class of persons who could be detained in connection with our military operations. On the contrary, when Congress has authorized force—either in declarations of war or otherwise—it has done so in the most general terms in way that reinforces and augments the President's inherent war fighting powers, not in a way that seeks to curtail them.

In dealing with foreign persons, the proper scope of military detention authority is governed by the body of customary international law commonly referred to as "the law of war." This body of law is in the nature of a "common law" that reflects the usages of civilized nations. It is this "law of war" that has traditionally defined the class of persons that may be detained and held in connection with military operations. That traditional definition is perfectly serviceable and has proven neither too sweeping, nor too crabbed. There is simply no good reason to impose on our military any greater constraint than already exist under those time-honored law-of-war principles. There are obvious reasons why imposing greater limits on our Armed Forces would be foolhardy.

Under the traditional law of war, the core principle is that military authorities may capture and hold persons who are part of the enemy's forces, as well as those who directly support hostilities in aid of enemy forces. By necessity, that definition is cast in general terms. Even in classic warfare between regular armies, gray zones can arise at the margin in determining who is directly supporting hostilities in aid of enemy forces to a degree to make them subject to detention. Over time, those subject to detention has been found to include not only the actual armed fighters, but also "civil persons . . . in immediate connection with an army, such as clerks, telegraphists, aeronauts, teamsters, laborers, messengers, guides, scouts, and men employed on transport and military railways. . . ." W. Winthrop, Military Law and Precedents 789 (2nd ed. 1920) (emphasis added).

As with any effort to classify an area as complex as war, definitions must retain some generality. The fact that difficult judgment calls will inevitably arise on the margin does not mean that any more precise definition makes sense or that the general definition is faulty. These are not the kinds of activities that lend themselves to exhaustive codification in advance. The genius of a common law system is that it allows the law to develop guided by experience. I think any effort to codify "enemy combatant" status with greater specificity will simply create a new set of gray zones, arrest the rational development of the law of war based on real experience, and end up unwisely putting our military in a statutory straightjacket.

B. Determination of Status under the Geneva Convention

The President has determined that neither members of al Qaeda nor Taliban fighters are entitled to the protections of the Geneva Convention. While some lower courts and critics have carped about this decision, there can be no doubt that al Qaeda and the Taliban fail to meet the Geneva Convention's eligibility criteria.

It must be borne in mind that the choice here is not between applying the Geneva Convention versus applying no law at all. Under the common law of war, military detainees must be held under humane conditions—that is the general rule in the absence of specific treaty agreement. The Geneva Convention establishes an additional level of special "privileges" that are to be enjoyed by the forces of those countries that conduct their military operations in accord with civilized norms, and that agree to treat their own prisoners in like manner. The whole purpose for offering these "privileges" is to promote adherence to the laws of war by rewarding those countries that comply.

It is perverse to suggest that we should extend the privileges of the Geneva Convention to al Qaeda or Taliban fighters—groups who have flagrantly flouted all civilized norms and are among the most perfidious and vicious in history. As one leading treatises in this area notes, "the only effective sanction against perfidious attacks in civilian dress is deprivation of prisoner-of-war status." Rosas, The Legal

Status of Prisoners of War 344. In 1987, when the Reagan administration rejected a proposed protocol that would have extended POW rights to captured terrorists, his decision was almost universally hailed, with both the New York Times and the Washington Post weighing in with approving editorials.

If we did grant privileged status to al Qaeda and Taliban captives they would enjoy the right to be held in essentially the same billet conditions as the capturing country's own forces; the right to be immune from the full range of coercive interrogation that would otherwise be permissible under the laws of war; and, if tried for offenses, the right to be tried before the same kind of tribunal that would apply to the capturing country's own troops. Voluntarily granting these rights to al Qaeda operatives would make no sense; subvert the very goals the Conventions are intended to promote; and gravely impair our ability to break down al Qaeda as an organization and to collect the intelligence essential to accomplish this.

The Geneva Conventions award protected POW status only to members of "High Contracting parties."[8] Al Qaeda, a non-governmental terrorist organization, is not a high contracting party.[9] This places al Qaeda—as a "group"—outside the laws of war. Furthermore, al Qaeda and the Taliban fail to meet the eligibility criteria set forth in Article 4 of the Geneva Convention. To qualify for protected status, the entity must be commanded by a person responsible for his subordinates, be outfitted with a fixed distinctive sign, carry its arms openly, and conduct its operations in accordance with the laws of war.[10]

Al Qaeda and the Taliban fail to satisfy even one of these four bedrock requirements. These enemies our Armed Forces face on the battlefield today make no distinction between civilian and military targets and provide no quarter to their enemies. They have no organized command structure and no military commander who takes responsibility for the actions of his subordinates. Al Qaeda and the Taliban wear no distinctive sign or uniform and violate the laws of war as a matter of course. Consequently, these organizations do not qualify for the POW protections available under the Geneva Convention.

For these reasons, the President rightly concluded that al Qaeda and the Taliban do not qualify for POW status under Article 4 of the Geneva Convention.[11] The President's determination that the Geneva Convention does not apply to al Qaeda and Taliban members is conclusive. This determination was an exercise of the President's war powers and his plenary authority over foreign affairs,[12] and is binding on the courts.[13] Furthermore, the United States has made "group" determinations of captured enemy combatants in past conflicts.[14] Accordingly, "the accepted view" of Article 4 is that "if the group does not meet the first three criteria . . . the individual member cannot qualify for privileged status as a POW."[15]

As far as I can tell, none of the President's critics have advanced any set of facts that would call into question the merits of the President's decision. I have heard no serious argument that either al Qaeda or the Taliban fall within the requirements of Article 4 and thus are entitled to protection under the Convention. Instead, what we see is a lot of sharp "lawyer's" arguments that the President is somehow precluded from making a group decision and that the eligibility of detainees must be determined through individualized hearings before "competent tribunals." These arguments largely rest on a misreading of Article 5 of the Convention.

Article 5 of the Convention provides that:

> [t]he present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such per-

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[8] Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 2.

[9] See Memorandum for the Vice President, et al. from President, Re: Humane Treatment of al Qaeda and Taliban Detainees at 1.

[10] Id. at art. 4A(2).

[11] See Memorandum for the Vice President, et al. from President, Re: Humane Treatment of al Qaeda and Taliban Detainees at 1.

[12] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

[13] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964).

[14] See, e.g., Howard S. Levie, Prisoners of War in International Armed Conflict, 59Int'lStud. 1, 61 (1977); Adam Roberts, Counterterrorism, Armed Force, and the Laws of War, 44 Survival no. 1, 23–24 (Spring 2002).

[15] W. Thomas Mallison and Sally V. Mallison, The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict, 9 Case W. Res. J. Int'l 39, 62 (1977).

sons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[16]

There is nothing in this Article that forecloses the President from reaching a threshold decision that a particular military formation does satisfy the Treaty standards. Since the Convention's coverage depends, in the first instance, on whether a group in which the detainee participated has the requisite attributes, it necessarily calls for a "group" decision. Certainly, Article 5 does not mean that a group's eligibility can be relitigated through a series of individualized proceedings. By its terms, Article 5 applies only where an acknowledged belligerent raises a doubt whether he is qualifies for POW status. I am not aware that any detainee has raised any "doubt" as to his status. On the contrary, the principal argument of critics has been that a detainee can successfully raise doubt, within the meaning of Article 5, simply by asserting he is eligible. But the United States has expressly refused to adopt a modification of the Treaty that sought to establish that regime.

It seems to me that, once a particular organization has been found not to qualify under Article 4, no individualized inquiry under Article 5 is appropriate or necessary unless a detainee is raising a plausible claim that he belongs to another category that does qualify under Article 4. The classic example is the case of a pilot who, after conducting his mission, is shot down, sheds his uniform trying to escape, and is later apprehended and accused of sabotage. The evident purpose of Article 5 is to allow the pilot to make the claim that he is covered by the Geneva Convention because he carried out his belligerent acts as a member of the regular Armed Forces of a signatory power. Here, the detainees have raised no colorable claims that they are members of a force that falls within the categories set forth in Article 4.

C. The Propriety of Military Tribunals

I would like to turn, finally, to that group of detainees whom the United States is accusing of committing violations of the laws of war. The President has, by order, established military commissions to try these individuals for their offenses. While the law of war once permitted summary execution for certain war crimes, the use of military commissions has now emerged as the norm, affording a more regular mechanism by which military commanders can impose punishment on enemy forces. Ever since the Revolution, the United States has had a consistent practice of using military commissions to try members of foreign forces for violations of the laws of war.[17] Congress has long recognized the legitimacy of military commissions as a means to prosecute war criminals,[18] and the courts have specifically upheld their use.[19]

In one sense we seem to making progress. Originally, when the President promulgated his military tribunal order, there was a hue and cry in some quarters that this was an end run around Article III courts and that all proceedings belonged in out civilian court system. But at this stage there does not appear to be any real argument that these trials belong in civilian courts. It now seems to be widely conceded that military commissions are, in fact, the place where war crimes should be prosecuted.

Some have suggested that there is a need for Congress to expressly authorize the use of military commissions. There have also been suggestions that Congress should dictate the precise procedures to be used in military commissions, and that these should be required to mirror the process used in regular courts-martial. I disagree with both of these suggestions.

First, there is no need for Congress to authorize military commissions. The authority to establish military commissions is expressly granted to the President under Article II of the Constitution as an inherent part of his power as "Commander in Chief." It has long been recognized, both as a matter of legal theory and historical practice, that the power to punish enemy forces is integral to a commander's authority—it is one and the same with the commander's power to direct the killing or capturing of enemy forces. Military commissions are thus a military instrument—a means by which a commander attempts to control the conduct of enemy forces in

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[16] Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 5.

[17] William Winthrop, Military Law and Precedents, 464, 832 (2d ed. 1920); Major William Birkhimer, Military Government and Martial Law, 533–35 (3d ed. 1914).

[18] See, e.g., Act of March 3, 1863, § 30 (12 Stat. 731, 736).

[19] As the Court stated, "the detention and trial of [war criminals]—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." Ex Parte Quirin, 317 U.S. 1, 25 (1942).

the field by punishing, or threatening to punish, their forces for violations of certain civilized norms. As Abraham Lincoln's attorney general correctly observed, "The commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles." Undoubtedly, this is why military commissions have been so consistently used throughout our history.

Second, Congress has, in fact, already authorized the use of military commissions. In 1916 Congress revised the Articles of War to expand court-martial jurisdiction (i.e., jurisdiction over members of the U.S. military) to include offenses against the laws of war. Article 15 of this codification stated that the creation of statutory jurisdiction for courts martial does not "deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that . . . by the law of war may be tried by military commissions." In proposing this new article, the Army Judge Advocate General explained that it was meant to "save" the pre-existing jurisdiction of common law military commissions. In both the *Yamashita* and *Madsen* cases, the Supreme Court noted that Article 15 was intended to preserve non-statutory jurisdiction of military commissions established by the President or commanders in the field to try law-of-war violations.

In Quirin, the Supreme Court held that Article 15 constituted congressional authorization for the President to create military commissions. The Court noted that "Congress [in Article 15] has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases," and held that "Congress [in Article 15] has authorized trial of offenses against the law of war before such commissions." In 1950, Congress affirmed the Court's construction when, against the backdrop of the Court's decisions, it recodified Article 15 as Article 21, expressly indicating in the legislative history that it was aware of, and accepted, the Court's construction. See S. REP. 486, Establishing a Uniform Code of Military Justice, 81st Cong., 1st Sess., at 13 (June 10, 1949) ("The language of [Article of War] 15 has been preserved because it has been construed by the Supreme Court. (Ex Parte Quirin, 317 U.S. 1 (1942)"); H.R.REP. 491, Uniform Code of Military Justice, 81st Cong., 1st Sess., at 17 (April 28, 1949) (same).

The great advantage of military commissions, obviously, as common law courts, is that their procedures are flexible and can be tailored to meet military exigencies at any given time. Neither the Constitution nor the laws of war dictate any particular set of rules for trials before military commissions. Because these are executive courts, designed to aid the President in carrying out his Commander in Chief responsibilities, the President and his commanders can readily adapt their procedures to changing conditions. In selecting procedures, the President must balance the interests of fairness with the National security interests of the country and the practical exigencies of the particular military campaign. In recognition of this, Congress has, in Article 36, given the President broad authority to prescribe "[p]retrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in . . . military commissions and other military tribunals." 10 U.S.C. § 836. For this reason, I think it would be a mistake to set in statutory concrete any particular set of procedures or standards. Especially given the fluid threats we face today, it is essential to maintain the flexibility inherent in military commissions.

STATEMENT OF PROFESSOR STEPHEN A. SALTZBURG, WALLACE AND BEVERLEY WOODBURY UNIVERSITY PROFESSOR OF LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. SALTZBURG. Thank you, Mr. Chairman. It's a pleasure to be here today, and I'd like to say it's particularly delightful on this panel with Attorney General Barr, who is someone I have the greatest respect for, and Dean Hutson is also one of the great thinkers about military law. If we can help today, it's largely because of what they do, probably more than I.

I have given you an extensive written statement and I don't want to read it and I don't want to go through it in detail. It covers almost all of the issues that you have asked us to think about. But I do want to address several things that appear to have been important on your first panel.

First, Mr. Chairman, you asked a very important question, and I don't think you got a good answer to it, and that is if Congress acts and enacts legislation, will that improve, or will it bolster the executive's ability to defend actions in Federal court? The answer to that is clearly, yes. I was a little surprised that—it is well established, we teach this now in Constitutional Law 101—no one mentioned, Justice Jackson's opinion in Youngstown Steel, where he basically defined three categories of situations: the first is when the President, as General Barr said, acts alone invoking executive power; well, he has some. The courts will look at that and defer to some extent to the President. But where Congress acts and authorizes the President to act, and it's Congress plus the President, it's Article I and Article II of the Constitution together, the Article III courts give greatest deference. Of course, where Congress chooses to impose restrictions on the executive, that's when the courts believe the President's power is weakest.

So the real question I think is not whether it would be helpful to the President for Congress to act; it would. This is not something where it's Congress versus the administration. We are in this together. This is Congress trying to figure out how to enact legislation that will say to the world that this entire government stands behind what we are doing. The American people stand behind it. We have taken a careful look at it, and it's no coincidence I use the term AWOL to describe Congress in my written testimony. Mr. Chairman, I think you're exactly right in your opening statement. Congress has not shown sufficient interest in this. You funded everything, but haven't looked at it, and haven't tried to tailor it. You don't want to get into micromanaging, but there are certain issues that I think are on the table that need to be examined carefully.

Let's look at what they are. First, and you don't need just Youngstown Steel, by the way. If you want further modern recent evidence of the importance of Congressional action, just look at Hamdi, the plurality opinion by Justice O'Connor basically makes it clear, if you hadn't issued the joint resolution in September 2001, then the enemy combatant detention would have been in big trouble in the Supreme Court. It's because Congress acted and the President relied on Congress's authority that the President was upheld by, even there, by a divided court.

But what are the issues that have arisen? Well, first there is this question of who is an enemy combatant. Contrary to some of the things you heard this morning, that term is not one of those terms of art that has a clearly established meaning. The Geneva Conventions do define who is lawfully engaged in warfare and who is engaged in warfare unlawfully, but this term enemy combatant was one that was drawn from a Supreme Court opinion in Ex parte Quirin and it's one that hasn't been used that often. The question is who should be detained or eligible for detention? We have detained people in circumstances in which it's easy to defend what the executive has done. On the battlefield in Afghanistan. On the battlefield in Iraq, people fight us, they fight us unlawfully; we have the right to seize them and to detain them. In my opinion, whether a person is an American citizen as Yassir Hamdi was, if he is on the battlefield fighting against United States troops, he is just as subject to being detained as anybody else fighting for the

enemy. That's my view about it. That's not to say what process he should have, but just that he is eligible for detention.

More difficult is the case being readied for argument as we sit here, the Padilla case, where the President has claimed the right to detain as an enemy combatant a United States citizen seized in O'Hare Airport who was far from the battlefield, who is alleged to have been studying with al Qaeda, looking at bombing. But there is a question. Does that kind of person qualify? What does it mean to be a supporter of or someone in sympathy with al Qaeda or related or affiliated organizations?

The question is how far are we as a country willing to go to broaden the definition of what we ordinarily think of as a combatant, to cover people who are far, far removed but are offering some kind of support or cheerleading perhaps for things that we despise, and that pose dangers to us. That's one of the issues. Does it matter? I have laid out some of the questions I think Congress should ask. Does it matter whether we're dealing with American citizens? Does it matter whether people are captured on the battlefield or far removed from it? That's one set of issues.

A second set of issues is how long can we keep people without trial. Some people we want to try and I think one of the problems that, Mr. Chairman, you point out is by not bringing anyone to trial, we cast doubt on whether or not these people are such serious criminal elements as we have maintained. Because there is no public presentation of evidence, no one in the world is sure whether the people who were detained are really as bad as we say they are, and warrant the kind of trials that we say they warrant. So it is important to get this process moving.

As to the question about military commissions, I couldn't agree more with Attorney General Barr. Military commissions have been around since the Revolutionary War. They have a pedigree. They are used throughout the world. There is nothing to apologize about for military commissions. However, this is a unique use of them. We have not used military commissions before against groups like al Qaeda, because we have never had to fight this kind of battle. We have never had to set up a thing like Guantanamo, where we move people from around the world into our facilities for interrogation, for detention and now for prosecution. The question is, should we have procedures that recognize that this is in fact unique?

If we captured somebody—Senator McCain is a person that I should defer to on this—but if we captured somebody committing a war crime in Vietnam, and we being the United States, we would reserve the right to have a military commission and to prosecute that person and we would probably do it right there, in country, and the punishment would be right there. But that's because they were on the battlefield. We didn't have to worry so much about making a mistake about whether or not we had somebody that was really the enemy. When you reserve the right to seize people who were far removed from the battlefield, and you move them into a place like Guantanamo, additional issues arise. The question is what kind of procedures are we to have?

Now, the American Bar Association with whom I do a lot of work, but for whom I cannot speak completely today, has an operating policy which I strongly support, and that is that civilian

counsel should be welcomed in these military commissions. We have lawyers, fine lawyers who are there to make sure that due process is provided, and yet the military commission process has done a lot to discourage them, and to treat civilian counsel, who in Federal courts throughout the United States are deemed perfectly capable of handling classified information, as being threats. There is something wrong with that process, it's cast doubt on whether we have confidence in the legal system in the United States and the rule of law. I think that's an issue that your subcommittee and the entire committee needs to look at.

There is a question about, and I think it may have come up in the earlier panel; I think Senator McCain may have asked it. Why don't we have some kind of civilian review here? I spoke to an attorney general with one of our principal allies who has spent hours and hours and hours with the administration urging that if we had civilian review, appellate review of the commissions, that his country would be satisfied with the process. That that would provide a sense of fairness, a sense that this is not some kind of a criminal prosecution where the executive picks the judges, picks the jurors, picks the appellate tribunal, and therefore everything is kind of fixed in advance. Civilian review matters and I think that's something that this committee could consider. It could consider recommending, for example of a panel of Article III judges. It could consider giving jurisdiction to the United States Court of Appeals for the Armed Forces, an Article I court, but a court of five civilian judges who have extensive experience in military justice.

The American Bar Association urged the President and urged the executive when the commissions were being set up to follow the rules on court-martial as much as possible, and the decision was made not to do that. I think that undercut a sense of fairness. It's not the Federal Rules of Evidence, by the way, that people think perhaps should be used here. It's the military rules of evidence, which have been in effect for many years now. Those rules, modified to recognize the necessities of Guantanamo, would have been a much better place to start than the decision that all relevant evidence would be admissible, which again cast doubt on whether the same kind of fairness that we give our soldiers is going to be provided to the detainees who are actually put on trial.

So the question of what kinds of procedures, and who ought to be tried, these are questions that I think are very real and very important questions.

You heard a lot yesterday, and you've heard some today about the treatment of detainees. I have included a lot in the testimony that I've written on recommendations for what we should do to assure the fair treatment of detainees. I think that the point that was made and should be emphasized is, every time people in high positions of authority express doubt on whether the use of dogs, or whether the threats, or whether making people, men wear women's clothing or expose themselves naked to women interrogators—every time we express doubts about whether that's inhumane, or whether that's degrading, we invite the world to do that to our soldiers when they're captured. The Geneva Conventions and everything about them after World War II were to assure that we were setting standards that we were confident that we would apply, and

that we would demand would be applied to our soldiers. When we give on those things, when we weaken it, all we do is put the men and women who are out there at risk, we put them at greater risk. That's something we don't want to do.

I don't have a doubt in my mind that the Geneva Convention's prisoner of war provisions may not apply to al Qaeda, that may be a very reasonable judgment. There is a big debate in the international community about the Taliban and whether they can be denied prisoner of war status. I'll let the people who are better experts on the Geneva Conventions than I speak to that. But there is a very strong argument, and I think most people subscribe to it, that common Article 3 of the Geneva Conventions providing for humane treatment of prisoners applies to everybody, and that we're bound by that, even though we're dealing with people who are not themselves signatories.

Well, that's my opening remarks. I'd be happy to answer any questions that any of you might have.

[The prepared statement of Mr. Saltzburg follows:]

PREPARED STATEMENT BY STEPHEN A. SALTZBURG

I. INTRODUCTION

Senator Graham, and members of the subcommittee, I appreciate the opportunity to testify before you this morning. In 2001, shortly after the attacks on the World Trade Center and the Pentagon, the President of the American Bar Association (ABA) appointed a Task Force on Terrorism and the Law. That Task Force was succeeded by the American Bar Association Task Force on Enemy Combatants which continues to this day. I had the privilege of serving on both Task Forces and in participating in debates in the ABA House of Delegates on many of the issues this subcommittee is considering this morning. I draw upon ABA resolutions and Reports to the House of Delegates for much of this testimony. I shall identify ABA policy where it exists and also indicate some of my own views as I proceed.

For many years I have served as the General Counsel of the National Institute of Military Justice (NIMJ), a non-partisan entity designed to improve and educate the public about military justice. Although NIMJ has been involved in discussions about the issues I address, it has taken no position on those issues. Nothing I say here today should be viewed in any way as endorsed by NIMJ.

The horrific bombings of the London subway and bus last week remind not only those of us who reside in the United States but all those who reside in Western-style democracies throughout the world of the dangers posed by international terrorism. Since the unprecedented attacks suffered by the United States on September 11, 2001, the United States has devoted enormous resources to protecting the homeland against additional terrorism attacks. The President, the Department of Defense (DOD), the Department of Justice (DOJ), intelligence agencies and the relatively new Department of Homeland Security (DHS) have made eradicating terrorism one of the most important priorities of the United States.

The London bombings, following bombings in Madrid and elsewhere in the world, demonstrate that, while the United States may be the principal target of terrorists, it is not the exclusive target. It has become clearer and clearer that one nation acting alone cannot effectively respond to the terrorist threat. International cooperation is essential. Just as the world's sympathy was with Britain when its celebration over being awarded the 2012 Olympic games quickly turned to mourning the deaths of scores of innocent people and injuries to hundreds of others, the world's sympathy was with the United States following the attacks in New York and the Washington, DC, area on September 11. But, as time has passed, sympathy toward the United States has turned to dismay in many parts of the world as to the manner in which the United States has carried out its "war on terror."

In truth, we now understand, better than we ever have, that we have a new type of enemy and face novel challenges in seeking to defeat that enemy. Tools that might have seemed sensible, even necessary, in the immediate aftermath of September 11 need to be re-evaluated. We must be constantly aware of how our actions are perceived throughout the world, and how easy it is to turn trust into distrust as a result of missteps. We cannot win the war on terror alone, any more than Brit-

ain or Spain can win it alone. We need their help as they need ours. It is imperative, therefore, that the policies of the United States be seen throughout the world as just and fair responses to the clear and present dangers posed by international terrorism.

On September 18, 2001, Congress enacted a Joint Resolution (Public Law 107–40, 115 Stat. 224) authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." The Preamble to the resolution states that the acts of September 11 were attacks against the United States that "render it both necessary and appropriate that the United States exercise its right to self-defense."

The United Nations (U.N.) Security Council approved a resolution recognizing the United States' right to self-defense, see U.N.S.C.Res. 1368, and the North Atlantic Treaty Organization's (NATO) North Atlantic Council stated that it regarded the attack as an action implicating Article V of the Washington Treaty that "an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against all."

Congress's Joint resolution was bolstered by the actions of the U.N. and NATO. The international community understood the need for the United States to act. The President sent troops to Afghanistan, those troops removed the repressive Taliban regime from power, and there was widespread support for and understanding of the need to prevent a nation from providing territory for terrorist training camps and from harboring terrorist groups.

Questions about the plans of the United States to deal with terrorism began to arise in connection with the November 13, 2001 military order in which the President announced that certain non-citizens would be subject to detention and trial by military authorities. The order provides that non-citizens whom the President deems to be, or to have been, members of the al Qaeda organization or to have engaged in, aided or abetted, or conspired to commit acts of international terrorism that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States or its citizens, or to have knowingly harbored such individuals, are subject to detention by military authorities and trial before a military commission. The President's Military Order was cause for concern for a number of reasons. One of the most important was that it appeared to arrogate to the President complete authority to "deem" individuals to be members of al Qaeda or to have aided, abetted, or conspired to commit acts of terrorism and to prescribe procedures for prosecutions that lacked many of the hallmarks of American criminal justice that are associated with basic notions of due process and fundamental fairness.

The DOD has now adopted procedures for military commissions and has developed a non-exclusive list of war crimes that can be prosecuted before such commissions. The proposed use of military commissions, as opposed to civilian courts, has been controversial from the date the military order issued, and the controversy has become more rather than less heated over time. The procedures governing the commissions have generated much of the controversy.

In addition to prescribing military commissions to try unlawful combatants, the executive constructed the Guantanamo facility to hold unlawful combatants. Although the executive announced plans to put some of the combatants on trial for violations of the laws of war, it became clear that many would be held for long periods of time without any plan to try them. They were detained for security reasons, and in many parts of the world there were concerns about the legality of detaining, perhaps indefinitely, individuals without trial.

The executive also seized two Americans, one in Afghanistan, and another at the O'Hare airport in Chicago, and charged them as enemy combatants. Both were housed in the United States as their cases worked their way through Federal courts to the United States Supreme Court. One, Yaser Hamdi, has now been released and returned to Saudi Arabia following a Supreme Court decision recognizing his right to consult with counsel and to some procedural protections. *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004). The other, Jose Padilla, continues to seek his release in Federal court after the Supreme Court held that he had brought his habeas corpus challenge in the wrong Federal court. *Rumsfeld* v. *Padilla*, 542 U.S. 426 (2004).

As the controversy has mounted, some of our crucial allies have protested the use of or the procedures for military commissions and the prolonged detention of individuals without trial. Civil liberties groups have questioned the detention of American citizens as enemy combatants. Throughout it all, Congress has been silent. During the almost 4 years since Congress authorized the President to take action

against those responsible for the September 11 attacks, Congress has left to the President and the executive branch virtually unfettered discretion in conducting the war on terrorism. The executive's actions have been challenged in Federal courts. The United State Supreme Court held in Hamdi that the Constitution imposes some limits upon the ability of the President to hold "enemy combatants" in indefinite detention. The Court also held that Federal law permits those detained in Guantanamo to seek Federal habeas corpus review. *Rasul* v. *Bush*, 542 U.S. 466 (2004). Lower Federal courts have struggled to decide what constitutional protections are due individuals whom the government either plans to hold without trial or to prosecute in military commissions. While Federal courts have not welcomed having to second guess the President as to the balance that should be struck between protecting the Nation and preserving individual rights, they have recognized their duty to decide the cases brought before them. The courts could not and did not shirk their responsibility to assure that basic constitutional values are not lost in the executive's war on terrorism.

This duty is not the courts' alone; it is shared with Congress. Yet, while the courts have met their responsibilities, Congress has provided the courts with no more guidance than it has provided the President. Congress has been silent for too long. There is no evidence of congressional determination or courage to participate in the growing debate about how to combat terrorism without compromising the values for which the United States has long been proud to stand. Congress's potential to advise the President, to assist the executive by adopting legislation to deal with some of the knotty problems of substance and procedure that have arisen, and to demonstrate both to the American people and people throughout the world that the September 18, 2001, Joint Resolution was not a blank check from Congress to the President has gone unfulfilled.

II. CONGRESS AND THE PRESIDENT SHARE POWER OVER THE MILITARY, MILITARY COMMISSIONS, AND DETENTIONS

The Constitution of the United States unmistakably gives Congress as well as the President authority over military matters. Article I, Section 8, grants to Congress the powers: "To . . . provide for the common Defence" (clause 1); "To define and punish piracies on the high seas, and offenses against the Law of Nations; To declare war, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies ; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces" (clauses 10–14). Article II confers on the President the "executive Power" (Section 1) and makes him the "Commander in Chief of the Army and Navy" (Section 2).

Congress exercised its constitutional authority when it enacted the Uniform Code of Military Justice (UCMJ). Indeed, Congress provided in the Code for military commissions in Article 21 (10 U.S.C. § 821). That section provides:

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commission, provost court, or other military tribunals.

The history of the section indicates that Congress intended to preserve the option in some circumstances for the executive to choose between using military commissions or other tribunals such as court-martial. In Application of *Yamashita*, 327 U.S. 1 (1946), the Supreme Court explained that Article of War 15, which was substantially similar language to UCMJ Article 21, was adopted in 1916 in response to other amendments of the Articles of War that which granted jurisdiction to courts-martial to try offenses and offenders under the law of war. The Court found that the language was intended to preserve the traditional jurisdiction of military tribunals. In *Madsen* v. *Kinsella*, 343 U.S. 341, 346–47 (1952), the Court made the following statement about military commissions: "Since our Nation's earliest days, such [military] commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities relating to war. They have been called our common-law war courts."(Footnote omitted)

In Article 18 of the UCMJ, Congress provided that "[g]eneral courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." Thus, Congress has given the President and the military choices as to how to proceed against those who violate the law of war. Whether Congress should do more and provide clearer guidance as to the manner in which military commissions should be employed and what should happen when there is insufficient evidence to

prosecute individuals for violating the laws of war or there are other reasons why prosecution is impractical is a question that cries out for an answer.

Just as Congress had the power to authorize the continued use of military commissions and to prescribe court-martial jurisdiction, Congress has the constitutional authority to impose restraints and conditions upon the exercise of the power to prosecute. Congress also shares authority with the executive to define the conditions under which individuals may be detained. This includes the power to define when, how, and under what circumstances and procedures enemy combatants may be detained. Nevertheless, as the executive built the detention and interrogation facilities at Guantanamo, Congress provided the funds but no guidance, direction or control.

Congress did enact the USA Patriot Act in response to the war on terror. That statute, while controversial, expanded executive power in recognition of the increased dangers to the United States posed by terrorism. Because some provisions of the statute will expire this year unless reenacted, Congress now must examine the way in which the statute has been implemented. But, aside from examining the provisions of the Patriot Act that will otherwise sunset soon, Congress has been absent without leave (AWOL) in the war on terror for too long.

III. WHAT TO DO WITH ENEMY COMBATANTS?

One of the most controversial aspects of the war on terrorism has been the use of the term "enemy combatant" and the executive's claim that such combatants may be detained until the war on terrorism is over—which may be for life. Congress has not been heard on the question of how to treat such combatants, despite the fact that life imprisonment without trial is almost incredible to contemplate in a country devoted to due process and the rule of law.

The executive position had been that enemy combatants may not only be detained indefinitely, but also that while they are detained they have no right under the laws and customs of war or the Constitution to meet with counsel. The U.S. Supreme Court rejected the executive's position regarding counsel in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), but the executive continues to claim the power to detain such combatants for their entire lives.

Under any circumstances, the claim of power to detain indefinitely would be cause for concern. Under the circumstances of the war on terror, there is special reason for concern. Contrary to what might seem the case when the term is used again and again by executive officials, the term "enemy combatant" is not one that has been frequently used by the military or one that has a well-established meaning when the law of war is discussed.

The law of war generally assumes that states or quasi-states are warring, and the word "enemy" generally means the state against which another state is fighting. When there is no declaration of war that specifically dates the beginning of a war, one looks to whether the use of force has risen to such a level that a de facto state of war exists. Based on the September 18, 2001 Joint Resolution and the existence of United States forces on the ground in Afghanistan, it appears that the United States was at war in 2001. But, it is less clear precisely who the enemy was and is. Were we at war against Afghanistan? Or were we at war against al Qaeda (the party responsible for the September 11, 2001 attacks) and the Taliban (who harbored al Qaeda)? Whether or not our original effort was directed against the country or only against selected groups within the country, once Afghanistan had a new government, the American military effort was clearly directed at al Qaeda and the Taliban as well as other groups and individuals supporting them. Fighting a war against distinct groups as opposed to against a nation poses unique problems for any nation.

A "combatant" in the law of war is typically a member of an Armed Force, who is readily distinguishable from a civilian, because the combatant typically wears a uniform and carries a distinctive identification card or document. A combatant in the war on terrorism is not so readily identified, because he/she is unlikely to be in uniform or carrying an identification document showing his/her group membership. A combatant in the war on terror may attack his or her own country's soldiers as in Afghanistan and Iraq as well as soldiers from other countries.

The law of war applies to non-state actors, such as insurgents. See Common Article 3 of the 1949 Geneva Conventions, e.g., Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287. See also The 1977 Protocols Additional to the Geneva Conventions, 16 I.L.M. 1391 Although the U.S. has not ratified the 1977 Protocols, it recognizes that parts of them reflect customary law of war. The fact that the law of war applies to non-state actors does not mean, however, that nations prefer to apply that law as opposed to domestic criminal law when dealing with insurgencies. In fact, there is substantial

evidence that nations have resisted applying the law of war to internal conflicts. Their concern has been that treating insurgencies as wars might legitimate acts of violence carried out by non-state actors.

If, for example, Iraq and the United States are at war with insurgents, then the insurgents under the law of war may kill and engage in other acts of violence against legitimate targets. If, on the other hand, insurgencies are simply treated as criminal acts, the non-state insurgents may be prosecuted and punished for violence against both civilians and military forces as well as for destruction of property, and cannot claim a right to use deadly force against military or other targets.

There is no question that the United States and Britain have the right to prosecute those responsible for the September 11 attacks and the attacks in London last week for their homicidal and horribly destructive acts. The questions that have arisen for the United States are whether the United States may detain individuals as unlawful combatants and for how long, and what forum should be used for any prosecutions. The United States has chosen to refer to al Qaeda members, some Taliban fighters, and possibly others suspected of involvement in terrorist acts as "unlawful combatants" or "enemy combatants." The use of these terms is consistent with the executive's claim that we are at war, even though the war against terrorists is directed at groups that are not confined to a single nation.

If we are at war with al Qaeda, the Taliban, and/or the Iraqi insurgency, then members of those groups have the right to kill as long as they focus on military targets. This might suggest that denominating the struggle against terrorism as "war" is unwise, for it may legitimize some of the acts that otherwise would simply be criminal. This concern is largely theoretical, however, since there is no reason to believe that those who commit terrorist acts will refrain from doing so simply because we choose not to recognize their jihad as war. Moreover, terrorists show no respect for the laws of war and no allegiance to the principles underlying those laws. Terrorists engage in murder without regard to law the law of war or any other. Their disregard of the law of war does not immunize them, however, from responsibility for violating it. Terrorist acts may violate domestic criminal laws, and they also may violate the law of war. Under appropriate circumstances, terrorists may be prosecuted as ordinary criminals or as war criminals. Accordingly, the United States properly has reserved the right to prosecute terrorists for violations of the law of war and/or violations of domestic criminal law as the wise exercise of discretion dictates.

Once we decide that we are at war with terrorist groups and they are combatants who are acting unlawfully, all doubt disappears about whether we can prosecute members of these groups and punish those who are found guilty. What, however, are we to do with those members who are caught but as to whom there is insufficient evidence to prosecute or whose possible prosecutions are hindered by concerns about disclosing military secrets or classified information? Can we detain such persons as prisoners for as long as the war on terrorism continues? This might well mean incarceration for life. It is no wonder that such a prospect is disturbing to many people within the United States and around the world. If there is insufficient evidence to prosecute or it is impractical to prosecute, must there at least be sufficient or substantial evidence of group membership? Must the membership be active? Or is any connection, however attenuated, sufficient to warrant detention? Can an individual be detained as an enemy combatant if he or she has not committed any act that would violate the law of war?

Al Qaeda members, for example, may commit acts of war, but not every member of al Qaeda or an affiliated group necessarily will have committed an act that violates the law of war. If an individual is alleged to have "supported" or to be "associated" with al Qaeda, is this sufficient to support detention? Or, must there be evidence as to each that he or she actually engaged in combative acts to be so classified? Who decides whether a person's actions support detention? In what forum? Under what standards? How long can the person be detained?

There are no easy answers to these questions. But, they must be addressed by Congress as well as the executive. In the end, the judiciary might well have to measure the answers given by its co-equal branches against the requirements of the Constitution, but its work will be demonstrably easier if the other two branches of government have come to grips with the issues and have endeavored to resolve them in a responsible manner consistent with the values for which America stands and the international norms to which we have long been committed.

At its 2002 mid-winter meeting, the American Bar Association adopted a resolution urging the President and Congress to assure that the President's November 13, 2001 Military order should "[n]ot permit indefinite pretrial detention of persons subject to the order." Permanent detention of persons against whom there is insufficient

evidence to prosecute or as to whom prosecution is impractical is cause for much greater concern.

The ABA has not taken a position on what standards should be applicable if non-citizens captured outside the United States are to be detained as unlawful combatants. The question of whether a non-citizen can be detained without prosecution raises a host of difficult issues. There can be no denying their difficulty, but there can be no excuse for Congress not facing them.

The ABA adopted a resolution in August 2002 with respect to United States citizens and other persons lawfully in the United States who are detained as enemy combatants. The resolution called for meaningful judicial review and access to counsel in conjunction with the opportunity for such review. The resolution also called upon Congress, in coordination with the executive branch, to establish clear standards and procedures governing the designation and treatment of U.S. citizens and other person lawfully present in the United States as enemy combatants. The ABA also urged that Congress and the executive consider how the policies of the United States may affect the response of other nations to future acts of terrorism.

In my opinion, Congress should examine all the standards and procedures for detaining individuals as enemy combatants. In its examination, Congress should ask the following questions as it seeks to balance liberty and security interests:

1. Should the executive be permitted to detain individuals seized as enemy combatants for extended periods of time?
2. Does it make a difference whether a seized individual is an American citizen, whether a citizen was seized on foreign soil or in the United States, and/or whether a citizen is detained in the United States?
3. Who should make the initial determination that an individual is an enemy combatant?
4. What standard of proof should be used to make the determination? For example, should clear and convincing evidence be required to detain an individual to protect society (using the standard required for civil commitment of persons in the United States, *Addington* v. *Texas*, 441 U.S. 418 (1979))? Does the individual have a right to counsel when the initial determination is made?
5. Must an individual have committed a specific act in support of terrorism, or should it be sufficient that a person is found to be a member or supporter of a terrorist group? Should any act, no matter how minor, be sufficient? Or, must a showing be made that the person, if released, poses a genuine threat to the United States, its people or its property?
6. If the initial determination that an individual is an enemy combatant is not made by a court, should a detained person have an opportunity for judicial review? If so, in what court? Should Congress consider establishing a panel of Article III judges to review detention decisions, or giving jurisdiction to the United States Court of Appeals for the Armed Forces to review the decisions? What provision for counsel should be made in conjunction with judicial review?
7. How frequently should a detained person's status be reviewed to assure that continued detention is required?
8. If a person was seized as part of the Afghanistan or Iraqi military actions, when United States involvement in the hostilities in those countries ends, must the person be released? Does the war on terrorism justify continued detention when military action ends?
9. Should the tribunal that decides to detain an individual or a reviewing court be required to find that there are no alternatives to detention that would adequately protect the United States? If, for example, an individual is a citizen of a country that offers to receive and monitor that individual, should the person be released to that country unless a showing is made that release would not adequately protect the United States?
10. Should there be an outer limit on the length of detention without prosecution?

The Supreme Court began to address some of these questions in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), but that decision addressed the situation of an American citizen allegedly seized on the battlefield. The Court required some procedural protections for *Hamdi*, but was divided as to precisely what due process required. Because he was released from custody, we do not know what process ultimately would have been required. The fact that *Hamdi* provides only minimal guidance and that the Court avoided the merits in *Padilla* leave open issues that Congress should address. Ultimately, Federal courts will decide what standards and procedures are required by the Constitution, but the courts' task will be greatly eased if Congress

and the executive together can derive carefully tailored standards and procedures that recognize the danger associated with detaining individuals for lengthy periods without trial as well as the dangers of terrorism in the 21st century.

IV. MILITARY COMMISSIONS

The military commissions which the President authorized and for which the Department of Defense has planned have an historical pedigree. Military commissions have been used to prosecute violations of the law of war, and their use has been upheld by the United States Supreme Court.

Military commissions existed during the Revolutionary War and have continued to be used during various conflicts since. W.Winthrop, Military Law and Precedents, (2d Ed., 1920 reprint) at 832. George Washington ordered the trial of John Andre for spying by a "Board of Officers," which was a form of military commission. Id. The term "military commission" was used during the Mexican War, and by the time of the Civil War was well established. Id. The jurisdiction of military commissions has extended to trying individuals for violations of the law of war and for offenses committed in territory under military occupation

President Roosevelt authorized a military commission to try eight German soldiers for war crimes after they smuggled themselves into the country, hid their uniforms and planned sabotage. The Supreme Court upheld their convictions and death sentences for six defendants in In *Ex parte Quirin*, 317 U.S. 1 (1942). The Court specifically noted that "[b]y the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases." Id., at 28. The Court distinguished between lawful and unlawful combatants: "Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." Id. at 30–31 (footnotes omitted).

United States Army military commissions tried more than 1,600 individuals in Germany for war crimes after Germany surrendered. Similar commissions tried almost 1000 persons in the Far East. Military commissions also tried individuals, including U.S. citizens, for ordinary criminal activity in the occupied territories. The Supreme Court upheld the commissions' jurisdiction in these cases.

Citing *Quirin* in Application of *Yamashita*, 327 U.S. 1 (1946), the Court upheld the jurisdiction of a military commission to try Japanese General Yamashita for war crimes. The Court recognized that Congress had sanctioned the use of the commissions: "The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. Id. at 11.

Madsen v. *Kinsella*, 342 U.S. 341 (1952), upheld the jurisdiction of a military commission to try a civilian U.S. citizen for the murder of her U.S. serviceman husband in occupied Germany in 1950. The Court's opinion discussed the history of military commissions.

The Court did not decide in *Quirin* or in the other cases whether the President as Commander in Chief has inherent power to establish a military commission, since Congress had authorized such Commissions. The same remains true today. Congress has provided for military commissions in the Code of Military Justice. In Quirin and other cases, the Supreme Court had no occasion to decide what could be done with unlawful combatants who are not tried or who are tried and acquitted. Congress has taken no position on these issues either.

As noted above, if we are at war and war crimes are committed, Article 21 of the Code of Military Justice recognizes the authority of military commissions to prosecute those crimes. It is well established that a deliberate attack on noncombatant civilians violates the law of war. The customary law of war recognizes this principle and it is also reflected in several conventions, such as Common Article 3 of the Geneva Conventions of 1949, see, e.g., Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287.

The September 11 attacks were not the first by al Qaeda against the United States. Al Qaeda was responsible for several earlier attacks; the World Trade Center bombing in 1993: U.S. military barracks at Khobar, Saudi Arabia, in 1996: U.S. embassies in Kenya and Tanzania in 1998; and the U.S.S. *Cole* in 2000. Thus, if the United States is in armed conflict with al Qaeda, its use of military commissions

to prosecute violations of the law of war is consistent with the use of such commissions from the founding of the Nation.

There are questions, however, about how far military commissions can reach. The President's November 13, 2001 order applies to members of al Qaeda, to people complicit in acts of international terrorism, and to those who have harbored such persons. It is not clear that all of these individuals participated in or are responsible for violations of the law of war. Not all acts of international terrorism or support for such acts constitute violations of the law of war. Congress may wish to decide whether the jurisdiction of military commissions should be expanded. But, I would urge Congress to consider the 2002 resolution of the American Bar Association urging the President and Congress to assure that the President's November 13, 2001 Military order should "[n]ot be applicable to cases in which violations of Federal, State, or territorial laws, as opposed to violations of such law of war, are alleged."

In addition to examining the jurisdiction of military commissions, Congress needs to examine the procedures military commissions should use. The American Bar Association's 2002 resolution urged the President and Congress to assure that the President's November 13, 2001 Military order should "[r]equire that its procedures for trial and appeals be governed by the UCMJ except Article 32 and provide the rights afforded in courts-martial thereunder, including but not limited to, provision for certiorari review by the Supreme Court of the United States (in addition to the right to petition for a writ of habeas corpus), the presumption of innocence, proof beyond a reasonable doubt, and unanimous verdicts in capital cases."

The procedures adopted by the DOD depart from the UCMJ and provide fewer rights than are recognized in courts-martial. The exclusion of the defendant from portions of the trial, the reduced evidence standard set forth for the commissions, and the effort to limit judicial review are among the controversial procedural provisions.

For example, the President's Military Order provided that, as to individuals subject to it, "military tribunals shall have exclusive jurisdiction with respect to offenses by the individual"; and "the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding brought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nations, or (iii) any international tribunal." Notwithstanding the Order, the Supreme Court has recognized the right of those detained at Guantanamo to seek habeas corpus relief. *Rasul* v. *Bush*, 542 U.S. 466 (2004). This is not surprising, since the Court reviewed habeas corpus petitions in *Madsen, Yamashita,* and *Quirin*. The scope of habeas corpus review is not settled, however, since the Court in Rasul interpreted a Federal statute which Congress could modify. Although the Rasul Court distinguished the denial of habeas review of a military commission in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), it is unclear whether that decision remains good law as applied to defendants prosecuted for war crimes outside territory controlled by the United States. Congress has the opportunity to clarify and define the reach of the Great Writ to those detained as enemy combatants, whether or not they are prosecuted.

It is understandable why the President would find military commissions preferable to prosecutions in U.S. civilian courts. Security is the number one concern with two principal dimensions. The first is a concern for the safety of judges, witnesses and jurors (members). The second is a concern for protection of classified information. It is the latter concern that has resulted in the adoption of procedures for the tribunals that have led many to question its fairness.

Concerns about security have led the DOD to impose restrictions on civilian defense counsel in military tribunals that have made it difficult for them to play the full role in promoting justice they otherwise might. At its annual meeting on August 11–12, 2003, the ABA House of Delegates passed a resolution calling "upon Congress and the executive branch to ensure that all defendants in any military commission trials that may take place have the opportunity to receive the zealous and effective assistance of Civilian Defense Counsel (CDC), and opposes any qualification requirements or rules that would restrict the full participation of CDC who have received appropriate security clearances." The ABA further resolved that the government should not monitor attorney-client communications, should assure that CDC can be present at all stages of commission proceedings, and should ensure that CDC should be able to consult with and do research in preparation for proceedings and be able to speak publicly consistent with their obligations under the Model Rules of Professional Conduct and their duty to protect classified information. The ABA's resolution followed an August 2, 2003, unanimous decision by the Board or Directors of the National Association of Criminal Defense Lawyers (which cosponsored the ABA resolution) that it would be unethical for a criminal defense lawyer

to represent an accused before military commissions given the restrictions imposed upon defense counsel.

The decision to use military commissions to try individuals accused of violating the law of war would have been much less controversial if the ABA recommendations had been followed. If the procedure used in a court-martial (with any essential modifications that might be required) were used in military commissions, there would have been much more confidence in the fairness of the proceedings. If the rules of evidence used in a court-martial (with slight modification possible) were used in military commissions, there would have been more confidence in their fairness. If civilian judicial review were provided, the concern of several of our important allies would have been satisfied.

The fairness of military commissions is not an executive issue; it is a national issue. The credibility of the United States is at stake. The jurisdiction, procedures and judicial review issues should be a congressional concern. Congress, in consultation with the executive, is capable of providing a system of justice which fair-minded observers throughout the world will conclude is consistent with the highest standards of fairness as measured against our own traditions and those of the international community. The United States has seen itself as a shining example of a country committed to the rule of law and due process. The world watches to see what standards we set. As the ABA has noted, our actions "may affect the response of other nations to future acts of terrorism." We have protested the use of military tribunals to try our citizens in other countries. If the United States concludes that such commissions can be fairly conducted and provide due process to our enemies despite the fact that the accused is not given the same access to counsel as in a court-martial or criminal trial, the rules of evidence provide less protection than in a court-martial or criminal trial, and civilian review is denied or extremely limited we shall be hard pressed to argue that other countries are less capable or entitled than we to use such commissions and to adopt similar procedures.

Congress has an important role to play as we define through our actions for all the world to see what we think it means to do justice.

V. TREATMENT OF PRISONERS

No one event has called United States policy regarding and commitment to humane treatment of prisoners into question as much as the treatment of prisoners at Abu Ghraib prison in Iraq. Although there have been allegations of prisoner abuse in Afghanistan and a number of highly publicized allegations of alleged abuse of prisoners at Guantanamo, Cuba, it is the pictures of American soldiers abusing prisoners at Abu Ghraib that created an unmistakable impression on many that our country was willing to use torture and/or other degrading measures to interrogate and/or control prisoners within our custody. The graphic depictions of misconduct and disregard for human dignity requires a strong response by the United States to show the world that Abu Ghraib is an aberration which Americans profoundly regret.

On August 9, 2004, the American Bar Association adopted an extensive set of resolutions dealing with treatment of prisoners. I recommend each of these to Congress and hope that the subcommittee will give each serious consideration. The American Bar Association does the following:

1. condemns any use of torture or other cruel, inhuman, or degrading treatment or punishment upon persons within the custody or under the physical control of the United States Government (including its contractors) and any endorsement or authorization of such measures by government lawyers, officials and agents;

2. urges the United States Government to comply fully with the Constitution and laws of the United States and treaties to which the United States is a party, including the Geneva Conventions of August 12, 1949, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and related customary international law, including Article 75 of the 1977 Protocol I to the Geneva Conventions, to take all measures necessary to ensure that no person within the custody or under the physical control of the United States Government is subjected to torture or other cruel, inhuman or degrading treatment or punishment;

3. urges the United States Government to: (a) comply fully with the four Geneva Conventions of August 12, 1949, including timely compliance with all provisions that require access to protected persons by the International Committee of the Red Cross; (b) observe the minimum protections of their common Article 3 and related customary international law; and (c) enforce

such compliance through all applicable laws, including the War Crimes Act and the Uniform Code of Military Justice;

4. urges the United States Government to take all measures necessary to ensure that all foreign persons captured, detained, interned or otherwise held within the custody or under the physical control of the United States are treated in accordance with standards that the United States would consider lawful if employed with respect to an American captured by a foreign power;

5. urges the United States Government to take all measures necessary to ensure that no person within the custody or under the physical control of the United States is turned over to another government when the United States has substantial grounds to believe that such person will be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment;

6. urges that 18 U.S.C. §§ 2340(1) and 2340A be amended to encompass torture wherever committed, and regardless of the underlying motive or purpose;

7. urges the United States Government to pursue vigorously (1) the investigation of violations of law, including the War Crimes Act and the Uniform Code of Military Justice, with respect to the mistreatment or rendition of persons within the custody or under the physical control of the United States Government, and (2) appropriate proceedings against persons who may have committed, assisted, authorized, condoned, had command responsibility for, or otherwise participated in such violations;

8. urges the President and Congress, in addition to pending congressional investigations, to establish an independent, bipartisan commission with subpoena power to prepare a full account of detention and interrogation practices carried out by the United States, to make public findings, and to provide recommendations designed to ensure that such practices adhere faithfully to the Constitution and laws of the United States and treaties to which the United States is a party, including the Geneva Conventions, the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and related customary international law, including Article 75 of the 1977 Protocol I to the Geneva Conventions;

9. urges the United States Government to comply fully and in a timely manner with its reporting obligations as a State Party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

10. urges that, in establishing and executing national policy regarding the treatment of persons within the custody or under the physical control of the United States Government, Congress, and the executive branch should consider how United States practices may affect (a) the treatment of United States persons who may be captured and detained by other nations and (b) the credibility of objections by the United States to the use of torture or other cruel, inhuman or degrading treatment or punishment against United States persons.

I also recommend to you the Report accompanying these resolutions. It identifies the issues that first arose as a result of the DOD approving harsh questioning techniques in Guantanamo and the migration of those techniques to Iraq. The Report describes the legal justifications that were offered by the executive for its actions:

> As the DOD and the Central Intelligence Agency (CIA) were preparing and implementing their approach to interrogations, a series of memoranda were being prepared by various high-ranking legal officials in the executive branch which appear designed to provide a legal basis for going beyond established policies with regard to treatment of detainees. These memoranda set out a series of arguments for restrictive interpretation of the laws and treaties relevant to the subject, so as to greatly curb their effect. One example, in the August 1, 2002 memorandum from the Department of Justice Office of Legal Counsel to Alberto R. Gonzales, Counsel to the President (recently rescinded by the Justice Department) concluded that for an act to constitute torture as defined in 18 U.S.C. § 2340, "it must inflict pain that is difficult to endure", "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."
>
> Beyond their strained interpretation of the law, the memoranda attempted to craft an overall insulation from liability by arguing that the

> President has the authority to ignore any law or treaty that he believes interferes with the President's Article II power as Commander in Chief. In one such example, government lawyers argued that, for actions taken with respect to "the President's inherent constitutional authority to manage a military campaign, 18 U.S.C. § 2340A (the prohibition against torture) must be construed as inapplicable to interrogations undertaken pursuant to his Commander in Chief authority."
>
> These documents, which were released publicly after they were widely leaked, purported to provide authority for an aggressive effort to extract information from detainees using means not previously sanctioned. We do not construe the giving of good faith legal advice to constitute endorsement or authorization of torture. Moreover, it is unclear to what extent these memoranda represented or formed the basis for official policy. However, what does seem clear is that the memoranda and the decisions of high U.S. officials at the very least contributed to a culture in which prisoner abuse became widespread.
>
> The administration has acknowledged that the conduct that was featured in the Abu Ghraib tapes violated the law, and pledged that those who committed the violations would be brought to justice. In addition, at least six investigations are underway with regard to the abuse of detainees. It is important these investigations be thorough and timely, and that they be conducted by officers and agencies with the scope and authority to reach all those who should be held responsible.

Report 10B to House of Delegates at 3–4 (footnotes omitted).

I believe that the United States is as committed to the humane treatment of prisoners as any nation, and the actions of some soldiers, and perhaps even some commanders, are aberrational. But, there can be little question that the image of this country throughout the world has rarely been damaged more in a short period of time than by the photos and stories about the treatment of the Abu Ghraib prisoners.

It is time for Congress to act and to make clear that the Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment (CAT), to which the United States is a party, recognizes no exceptional circumstances in which torture may be used, and that the United States' ratification committed this country to reject cruel, inhuman or degrading treatment if such treatment is prohibited by the Fifth, Eighth or Fourteenth Amendments to the United States Constitution (which we provided as a reservation when ratifying CAT). Congress should make clear that it is a crime for an American soldier or a contractor to torture prisoners, and should amend 18 U.S.C. 2340A to encompass torture wherever committed and regardless of the underlying motive or purpose. At the current time, the UCMJ prohibits those covered from engaging in "cruelty and maltreatment" of prisoners whether or not the conduct violates CAT. 10 U.S.C. 893. There is no civilian parallel to the UCMJ provision. Although the ABA did not recommend it, Congress might consider making it a crime for any person to engage in "cruelty and maltreatment" of prisoners outside the United States.

There has been much debate—more heat than light in many instances—as to who is entitled to the protections of the Geneva Conventions. Much of the world believes that there are no gaps in the conventions and that all detainees are entitled to humane treatment under Common Article 3 of the Conventions. "Common Article 3" provides that detainees "shall in all circumstances be treated humanely" and prohibits the following acts "at any time and in any place whatsoever": "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;" and "outrages upon personal dignity, in particular humiliating or degrading treatment." Common Article 3 also provides that the "wounded and sick shall be collected and cared for." Article 75 of Additional Protocol I protects all detainees captured in situations of either international or internal armed conflict. Although the United States has not ratified the treaty (nor has Afghanistan), it is generally acknowledged that relevant sections of Protocol I constitute either binding customary international law or good practice, in particular the minimum safeguards guaranteed by Article 75(2). See Michael J. Matheson, Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, reprinted in The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 AM. U. J. INT'L L. & POL'Y 415, 425–6 (1987). Article 75 provides that "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions" "shall be treated humanely in all circumstances" and that each State Party

"shall respect the person, honour, convictions and religious practices of all such persons." Paragraph 2 of Article 75 prohibits, "at any time and in any place whatsoever, whether committed by civilian or military agents": "violence to the life, health, or physical or mental well-being of persons, in particular . . . torture of all kinds, whether physical or mental," "corporal punishment," and "mutilation"; "outrages upon personal dignity, in particular humiliating and degrading treatment . . . and any form of indecent assault"; and "threats to commit any of the foregoing acts."

The U.S. rejection of Additional Protocol I was explained in a presidential note to the Senate as follows: "Protocol I . . . would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations. . . ." See 1977 U.S.T. LEXIS 465. It is time for Congress to look at the standards set by and relied upon by other civilized nations and to provide that the United States will abide by the highest standards for treatment of prisoners.

VI. CONCLUSION

In this testimony, I have had the chance to address use of military commissions, detention of enemy combatants and treatment of detainees in United States custody. I urge Congress to raise its voice as to these issues. The executive has had little congressional guidance in its efforts to deal with terrorism. Congress shares authority with the executive when it comes to wars of all sorts, and it is time for Congress to exercise its authority in cooperation and consultation with the executive. It is not easy to fight any war, and the war on terror poses unique challenges. We struggle to arrive at appropriate responses to the challenges, and it is not surprising that we may make missteps or falter from time to time. But, we do not struggle alone. Terrorism has stricken Spain, England and other countries in addition to the United States. The international community must fight the battle together, and the United States must be a leader. To lead effectively, however, we need to show the power of our ideas and our principles as well as the power of our guns. We do this best when Congress is actively involved with the executive setting standards for the United States of which we and the world can be proud and holding us true to them.

Thank you.

STATEMENT OF JOHN D. HUTSON, PRESIDENT AND DEAN, FRANKLIN PIERCE LAW CENTER

Mr. HUTSON. Thank you, Mr. Chairman. Thank you for the opportunity to address the committee. I'll do what my colleagues have done and ask that my written statement be made a part of the record and try to bounce off what has already been said by colleagues here in this panel and also earlier today in the first panel.

I think we have a serious problem and you have the opportunity to fix it if you care to take it. I would agree that it is incumbent upon Congress to take this opportunity in its oversight capacity. If there is one thing that's come out clearly in the hearing today, the hearing yesterday and in the lead up to all of this, it is confusion. I'd go back to the word that you used at the very beginning, Mr. Chairman. I will bet that if you ask the Attorney General of the United States and Secretary Rumsfeld and Chairman of the Joint Chiefs and the judge advocates general and all the senior people who have worked on this issue to write down what their definition of a combatant is, what they think the rules are that apply, to whom they apply, where they apply, when they apply, you would come up with as many different answers as you would ask the question. If those people can't write it down, if they don't understand it clearly, you surely can't expect the colonels and the captains and the staff sergeants to understand that. If you can't expect

the staff sergeants to understand it, you're going to have the kind of problems that we have seen.

Whatever it is we do, it has to be foolproof. We have to keep it simple. We are talking about these issues in terms of legal niceties and that's fine for law school, that's fine for seasoned lawyers to try to do; it doesn't work on the battlefield. The other thing about the legality issues here, is I think that in many respects, it misses the more important issues.

I like to think of the United States as being above the law. Above the law in a sense that the law provides the floor. The law provides, and we are in the basement at this point in many respects, but the law provides the floor, and the United States should be above that. We should be considering these things not so much from a legal point of view as from a moral point of view, a diplomatic point of view, what is right militarily, what is right practically, what makes common sense, what is going to work not only in this war but in the next war and the war after that, because right now we are looking at it in a very shortsighted way. We are trying to deal with the very narrow immediate issue and not doing that very well, and we have completely lost sight of what is over the horizon. I think that's why the JAGs had a different point of view than the political appointees because the policymakers were looking immediately, the JAGs were looking over the horizon and trying to figure out what is going to be best for the United States, which is more forward deployed, past, frequent and future, than all other countries combined in terms of numbers of troops deployed, numbers of deployments and locations of the deployments.

We are the ones who are running the risks here. It protects U.S. troops now and in the future for us to come to some sort of understanding about what the rules are going to be. Parsing the convention against torture and the Geneva Conventions and your points about how you identify the Taliban and al Qaeda were right on the mark, Senator. It just don't work. It's absolutely necessary that we straighten this out. What we need to say is they may be terrorists, they may be evildoers, but they are human beings and we are Americans and we will treat them with the dignity and respect that Americans should always treat human beings, simply by virtue of their humanity.

Then in doing that, we can fix the military commission process. I was an early and ardent and vocal supporter of military commissions. I think they can be fixed. We can fix the interrogation policy, we can enact the Army field manual so that it applies to every person, every place, in every interrogation. We can do the things that are necessary for history, when they write the chapter, treatment of detainees in the book on the war on terrorism, the end of the chapter will be better than the beginning of the chapter. Thank you, Mr. Chairman. I look forward to your questions.

[The prepared statement of Mr. Hutson follows:]

PREPARED STATEMENT BY JOHN D. HUTSON

When historians write the book on the war on terrorism, there will be a chapter entitled "Treatment of Detainees." The first part of that chapter has already been written and it's not pretty. We don't yet know how that chapter will end. Fortunately, we have the opportunity—you have the opportunity—to write that ending.

At first blush, the issues are primarily legal in nature. Some have already been litigated and decided by courts. I believe that while the issues are legal in the first analysis, there are other ways to consider them, that in the end, are even more profound—moral, diplomatic, military and practical aspects must be considered. The legal analysis provides the floor, but the United States should strive for higher aspirations.

I want to make three points today. The first is to call for a limit on the duration of detention. The second is to urge that we either fix military commissions or use courts-martial to prosecute detainees. Finally, that we enact the provisions of the Army Field Manual relating to interrogation into law.

We have a very difficult problem with regard to the duration of the detention of those whom we have captured or who otherwise have been turned over to coalition forces. As has been often noted, this war won't end soon, and we may not even know when it's over. It likely will simply peter out someday and the end will be marked only by the passage of time. This uncertainty is exacerbated by the nature of the enemy. As has also been noted, he doesn't wear a uniform and isn't necessarily part of an army organized in a familiar manner. He is half civilian and half military and moves stealthily between those two worlds. He is not easy to identify. The flip side of this confusion is that true civilians can also be easily mistaken for enemy combatants.

This conundrum creates problems for detention policy. I believe we should place a reasonable time limit on the duration of confinement without a trial. If the war lasts 5, 10, or 20 years, we simply can't confine people for that long without a resolution to their confinement, especially if we aren't absolutely sure of their status. We haven't done that in prior wars, and we mustn't do it now in this war. Throughout history, the law of war has moved inexorably towards a higher level of civility. We can't be the Nation to take a step backwards.

At the end of that reasonable length of confinement, if they have not been prosecuted, they must be released to their country of origin absent a showing by the government that their continued detention is imperative. That showing could be based on their continued intelligence value or because of demonstrated threat to the security of the United States or our allies.

The government would bear a heavy burden. It would have to meet a high standard. A burden of proof such as beyond a reasonable doubt or, perhaps, by clear and convincing evidence, would have to be met. That standard would have to be achieved by articulable, specific evidence. Conjecture, opinion, rumor, or over-caution would not suffice.

I'm not sure about the forum. U.S. District Court or a specifically designated panel of jurists would work. There may be other alternatives. Whatever the duration of confinement, burden of proof, admissibility of evidence or forum, they must all be reasonably acceptable to the international community. If they are not, history will not be kind to us.

Now, turning to the prosecutions themselves. I was an early, ardent, and vocal supporter of military commissions as the appropriate forum. I still believe they can be fair, legal, and generally accepted by all but the most persistent naysayers. If done properly, they are historically founded, practical, and make sense. It is appropriate for military personnel to try their enemy by military commissions.

All of that said, although I don't necessarily agree with it, I understand the point of view of the critics who say that the commission process is now so flawed and maligned that we should simply start over. I should add, not quite as a parenthetical, that as a former Navy judge advocate for 28 years, I am pleased and proud, but not surprised by the strong advocacy of detailed military defense counsel in these cases. These are not popular cases, but they have served admirably.

For the success and viability of commissions, the devil is in the details. They aren't legal, they aren't appropriate, and they aren't practical, if they are done badly. They have to be accomplished reasonably promptly. The defense counsel must have reasonable access to their clients. Defense counsel must be able to confer with their clients in confidence. There must be a just review process. In summary, they must be fair and be perceived to be fair.

The Geneva Conventions require that military commissions approximate the same procedures by which we prosecute our own troops. That implicates the courts-martial system contained in the Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial.

Consistency is a virtue, but it can also be the hobgoblin of small minds. We're the United States of America. If we decide in our might and wisdom that we need to make a course correction, we can do that. Knowing what we now know, perhaps we might decide to use the UCMJ and MCM for prosecuting enemy combatants. It's a tried and true system. All we really would need to do is relax the rules of evidence.

a bit to accommodate the reality of battlefield operations, understanding that evidence is being gathered by soldiers, not police detectives.

Finally, let me speak briefly about interrogation policy. We are all patriots here. We wouldn't be here if we weren't. I don't mean to preach but some of these things can't be said too often. I like to think of America as being above the law. By that I mean that the law provides a floor below which no nation may descend. But the United States . . . the United States should soar above that. The law says we can't torture people. The law says we can't treat them cruelly, or inhumanely, or degrade them.

I say they may be terrorists, they may be evil, but they are human beings and we're Americans and we should treat them with the dignity and respect that Americans should always treat all human beings by virtue of their humanity. I urge you to put the Army Field Manual into law for all U.S. agencies.

I understand and appreciate the need for the enemy to not know the limits of interrogation techniques. On the other hand, and more importantly, Americans and the community of nations must have confidence that we won't abuse people in our custody no matter what their status.

Our greatest strength as a nation is not our military might, awesome as it is; it's not our strong economy, natural resources or even our historic individual spirit. Our greatest strength is the rightness of our cause. For generations, Americans have stood tall for the Rule of Law and in support of human rights. That's our strength; that's why other civilized nations look to us for leadership and then follow that lead. If we lose that, we will have lost our greatest weapon.

On the other hand, the enemy's only weapon is terrorism. The true object of that weapon isn't so much human life or undermining our will to resist, as much as it is an effort to make us more like them. We must resist that at all costs. If we let that happen we will have lost the war. We will have lost our National identity. We must not take that fateful step down the slippery slope from the high road to the low road.

The Army Field Manual stands as a bulwark against that temptation. By enacting into law the interrogation techniques found in the current Army Field Manual for all U.S. interrogators, we will take a huge step in the right direction. It won't make us weaker, it will confirm our power for all to see and protect U.S. troops now and in the future.

As I stated early in this testimony, the important issues are legal, to be sure. But they are more than that. They have profound moral, diplomatic, military, and practical implications. How we are viewed by history and the community of nations, how we feel about ourselves, and how history treats us may in large part be determined by what you do, or don't do, now.

In summary, I urge you to place a reasonable limit on the duration of detention for enemy combatants absent a specific showing for the need for continued confinement. I urge you to either fix the Military Commission process or ensure cases are referred to the equivalent of courts-martial. Finally, I urge you to enact the Army Field Manual for all interrogations, regardless of location, the interrogator, or who is being interrogated.

Senator GRAHAM. Excellent, each of you. Thank you very much. Now, I know why I didn't get a more definite answer to the question would statutory definitions have a preferred position in the court than the current situation. Because there is a political component to this. Mr. Barr, I know that every executive branch legal advisor and every representative of the executive branch is very cautious about ceding authority, particularly when it comes to matters of war, and I don't think anyone up here wants to micromanage this war. But it is unique and it has taken us to a place far beyond six saboteurs in World War II.

I have to completely buy into the idea that enemy combatant status with an indeterminate amount of time is a legally correct position, and will enhance our national security. The problem I have is that the enemy combatant status that we are currently using is in court, being challenged, with a never-ending process ahead. But it goes back to what you said, Mr. Hutson. We'll be stronger if we are together, and I do believe there is a willingness of Congress and I may be wrong, it may fall apart, for all of us to come together

working with the executive branch to define enemy combatant status in the most flexible way possible, but give it a congressional blessing.

Mr. Barr, do you believe that if we did that we would be stronger legally and be more united as a country?

Mr. BARR. In general, when Congress supports executive power and they're acting together, that does strengthen the hand of the Government, obviously, but as I said earlier the definition of military combatant is not the issue. The thing that's going to cause problems is the extension of *habeas corpus* to foreign prisoners of war. I believe American citizens should be treated differently and I believe that they do have the right of *habeas corpus*.

Senator GRAHAM. Statutorily could we address that problem and fix it?

Mr. BARR. Yes. That' s what Scalia was talking about.

Senator GRAHAM. That's what he's yelling at us to do.

Mr. BARR. The first time in history, Under British habeas corpus, the idea of using a writ of habeas corpus for a foreign prisoner of war was an absurdity, and it was never recognized. But the Supreme Court here said well, this statute sort of makes us do it. That's an area that I think should be addressed.

The second issue that's going to cause difficulty no matter how these definitions are made is whether or not the court is going to say for the first time in history that a foreign person outside the United States who has no connection with the United States other than they are confronted by our troops, has due process rights. That is contrary to the existing law and if they go that far, then no matter how we define these terms it's going to mean judges supervising this thing. Now the fact that one district court judge doesn't like the definition of military combatant, to me is irrelevant. There are so many district court judges now you can get anyone to say anything. I think the D.C. Circuit is going to rule on that, and I think it will be straightened out.

Senator GRAHAM. The bottom line, the habeas route, we are going into a situation where courts will have a great say about how to fight this war. Scalia is saying we are ill equipped to do that, would you please get involved and help us, Congress? That's what this is all about. The invitation is out there to the administration. I hope they will take us up on it because I believe, as Senator McCain has stated, that we have an affirmative duty to do so.

Now, when it comes to military tribunals, clearly everybody in the panel has bought off on this. Critics of military tribunals have their right to be critical, but there is a rich legal history that the military tribunal system works and is an acceptable manner of delivering justice. Do you believe that if the military tribunal system were codified, it would be an advantageous position for that system in our current Federal court system?

Mr. BARR. First, I believe military commissions as opposed to court-martials are common law courts that exist because they are supposed to be adaptive to the exigencies of the circumstance. That's why I think inherently they have to be flexible tools. So I would be concerned about anything that tries to lock in a particular set of rules.

Could I give one example? After a war, after we have won, it may be one thing to show classified information or provide for a right to confront all of the evidence against you, because we've won the war. We don't care if Speer finds out something about our military plans. But right now we are in the middle of this confrontation, and allowing people to see classified information is something we shouldn't accept.

Senator GRAHAM. All due respect, we have a military legal system, the UCMJ, which is statutory, and we have the Manual for Courts-Martial which is the implementing directive of the executive branch.

We deal with classified information in court martial proceedings all the time. I don't think that's a problem because no one here wants to use the military tribunal commission system to hurt the Nation's security.

All I'm suggesting is that the current attacks on the military commission that are now in court are never ending. One way to bring closure would be to give a statutory blessing to the concept, tweak it a bit. My question again is would that help in terms of the status of the military commission legally with Congress getting involved?

Mr. BARR. Well, I think you might be in a situation where judges might accept it more. But I don't think the executive would, unless it allowed the discretion to adapt proceedings to specific circumstances.

Again, the court martial system that we have applies to American troops, people that are part of our political community, and I have no problem with those procedures. But providing all the same protections to a member of a hostile force during the confrontation, it's just——

Senator GRAHAM. I'll take another stab at this. I understand what you're saying. But the current system is going to be in litigation for a while to come. General Hemingway gave a best case scenario. I think we're going to be months or years before we get this thing figured out about enemy combatant status. We're going to have a lot of judges speaking about what they like and don't like about military tribunals.

I'd like to close that down, come up with a system that is not a threat to the country, is not a Federal court system, is not UCMJ, but a hybrid that deals with realities of the war on terrorism. But it's codified, that will be more deferred to by the courts and we'll have two branchs of government, as you said. That's my goal.

I'm going to now turn it over to Senator Nelson, but you have been very helpful. The idea, I'll put this on the record, I have crossed the Rubicon in this regard. I do not believe it is responsible for this country, legally or politically, for Congress to sit this out. If we can come up with congressional involvement that makes it stronger, not weaker, that allows us to get good intelligence, it allows us to detain people who deserve to be detained for an indeterminate period of time, and allows people to be prosecuted in a way where it will stick.

The way to have that legal breakthrough occur soon rather than later is for Congress to get involved.

Senator McCain.

Senator MCCAIN. I thank you, Mr. Chairman. Very briefly and I appreciate you allowing me just to comment. Mr. Barr and Mr. Saltzburg, Mr. Hutson has suggested that the Army field manual apply to all detainees, is that correct?

Mr. HUTSON. Yes, it is.

Senator MCCAIN. Do you agree with that, Mr. Saltzburg?

Mr. SALTZBURG. I think so.

Senator MCCAIN. How about you, Mr. Barr?

Mr. BARR. I agree that we are bound to treat all detainees humanely.

Senator MCCAIN. Please, Mr. Barr——

Mr. BARR. Which as I understand——

Senator MCCAIN. If you say you don't want to answer the question, that's fine.

Mr. BARR. No, that's not what I'm saying.

Senator MCCAIN. The question is, should the Army field manual apply to all detainees or not?

Mr. BARR. Well, no, the Army field manual applies to people that are covered by the—given the privileges of the Third Geneva Convention, no. To the extent that it says that all detainees should be treated humanely, even if they're not covered by the Third Convention, I agree with that too.

Senator MCCAIN. Because you feel that part of the Constitution has become irrelevant as far as Congress is concerned is not something that I agree with. It still says make rules concerning captures on land and water. Until we amend the Constitution because of its irrelevancy, I will use that as a reason for Congressional involvement.

I guess my only other question, Mr. Hutson, you were one of the uniformed JAGs at the time that the initial set of rules were formulated, isn't that correct, which were later rescinded?

Mr. HUTSON. No, sir. I retired in 2000. I preceded that.

Senator MCCAIN. It was my understanding that the uniformed JAGs disagreed as, I think, Mr. Saltzburg mentioned in his opening comments. All the uniformed people disagreed with the civilian policy that was articulated, that was put into effect, is that correct, do you know?

Mr. HUTSON. I can't say that all of the uniformed people did, but I know that there was a great deal of disagreement between the two groups indeed. In fact, the uniformed people were struggling to find avenues to vent their disagreements.

Senator MCCAIN. I thank you. Mr. Saltzburg, it's a small point, but many of our American soldiers in Afghanistan that were fighting there were not wearing a uniform. So according to at least some interpretation of the treatment of these prisoners because they were not wearing a uniform then therefore they are not eligible for the Geneva Conventions. So I just say that as an aside.

I, like you, am very concerned about the next conflict in which American fighting men and women may become captive. Right now, I think it would be difficult for us to assert as we did vociferously—and by the way, Mr. Barr, we are still at war in Korea, there was a cease-fire, but we are still at war.

Mr. BARR. Cease-fire means you're not still at war.

Senator MCCAIN. Yes, we are, in a state of war.

Mr. BARR. But I disagree with you that we have soldiers in our military fighting out of uniform in Afghanistan.

Senator MCCAIN. You disagree we have soldiers fighting out of uniform in Afghanistan.

Mr. BARR. I think there may be intelligence operatives who are operating who are not wearing military uniforms, yes.

Senator MCCAIN. That's Special Forces. Wrong again. I'm sorry. Well, anyway. But I guess my point is that without the kinds of behavior that you articulate, Mr. Saltzburg, I'm afraid that it would give our enemies some excuses which they may or may not have had anyway to mistreat our American fighting men and women when they fall prey to them.

Again, we are still in a war in Korea, it's a cease-fire. If we are going to use that criteria, then I think many of our detainees would die of old age. I thank you, Mr. Chairman.

Senator BEN NELSON. Thank you, Mr. Chairman. Admiral Hutson, I think you probably heard the distinction between how we might deal with prisoners or detainees in Iraq and those that are taken just in the general war on terrorism.

In trying to deal with status and treatment, the question of duration of detention is significant. Obviously, I think we must deal with that. Is there any clarification that you might be able to provide for us on that?

Mr. HUTSON. I'm not sure I can clarify it. I would urge Congress and the administration to consider putting a termination on the duration of detention for most of the prisoners. I think that it's just not possible for the United States to hold people, and we are not talking about Speer or Hess particularly, we are talking about chauffeurs and people like that, indefinitely.

The war on terrorism is going to go on, as we have all agreed, and we all understand, for a long time. At some point, it's just going to sort of peter out and will end by the passage of time. There is going to be no surrender on the deck of the U.S.S. *Missouri* in the war on terrorism.

So that I think we have to decide how long we can reasonably detain people, if no charges have been brought. We have not prosecuted them. We are just holding on to them until the end of the war as Senator McCain points out. I think you have to have an out. I think that the administration has to be able to demonstrate that the continued detention of a particular individual is necessary because of the great intelligence value that they may continue to have or because they continued to be a threat to the United States or to our allies.

But that determination has to meet some sort of standard. I think that there are a number of ways you could do it, and the tribunal would certainly be one. A specially designated panel of judges. But there would have to be a standard. There would have to be evidence. It couldn't just be conjecture, rumor, innuendo, or over caution.

Senator BEN NELSON. But there is some value in detaining these individuals for some significant period of time if they represent a particular threat, if by releasing them they go back to do battle against us or to do further harm, or if they represent a fundamen-

tally important part of our intelligence gathering operation as an important source for intelligence information.

Mr. HUTSON. I couldn't agree more, Senator, that it would be incumbent upon us to continue to detain for as long as necessary people that fit into those categories that you enumerate. But that for a large number of people, I think I understood the testimony earlier today to be that the annual review boards had released four people. We have 13,000 detainees involved around the world right now.

We can't just hold them until 25 years from now we say, oh yes, remember the war on terrorism, I guess it's over.

Senator BEN NELSON. What would you do with those detainees if their country of citizenship doesn't want them back? What do we do there?

Mr. HUTSON. Good question.

Senator BEN NELSON. I thank you very much for your enlightenment. I think you're helping us go down the road to progress here, and we appreciate it very much.

Senator GRAHAM. I want to thank you all. I just want to wrap this up quickly. The current legal environment we have is we are on appeal now, I think the Court of Appeals, regarding the military tribunal system, that is correct?

Mr. BARR. Yes, Senator, *Hamdi*, which was a chauffeur.

Senator GRAHAM. You were right about Hess. We didn't prosecute him until after the war. But I think this is a different war. I think it is very important that this country send a signal to all wannabe terrorists, you are either going to get killed, or you are going to get captured, and be held accountable.

The quicker we get on with holding people accountable, I think the safer we'll be. Mr. Barr, worst case scenario, or best case scenario, how long do you think it will take the current legal situation to resolve itself regarding prosecution?

Mr. BARR. I think probably within a year we will be able to complete the first prosecution. If I could, Senator, that last line of questioning from Senator Nelson, as you recognize in your opening statement, there are two different issues here.

One issue is detaining someone, not punishing them, but just detaining them. The other issue is trying those people that we want to try before a commission for war crimes.

I agree with what you said about let's get on with that. But on the issue of detention, we shouldn't act as if there is not a process in place. For the first time in history, we are permitting adversary proceedings, legal representatives, a preponderance of the evidence standard for these people to have their day in court to be held. That's never been done before and that's a recognition of the kind of war we are fighting.

Senator GRAHAM. I'll be honest with you. I don't have a desire to fundamentally change things. I just want to get a statutory blessing to it, tweak it to make sure it does pass scrutiny. There will be some people who are not subject to prosecution for different reasons. Maybe you don't want to go through the exposure of a trial, maybe it's not exactly the venue for them. They should be kept for a long time, Mr. Hutson, because this war will go on for a long time.

But the due process involved is the check and balance. An enemy combatant legally can be held, I think, for an indeterminate period. Now, that decision has to be made in accordance with who we are as a people, and it has to be made in light of the fact that we are a rule of law nation.

I stand very firmly with the idea that holding enemy combatants for a long period of time is in this Nation's national self-interest. I just hope we can make the process more acceptable to our legal system and abroad. What about you, Mr. Saltzburg?

Mr. SALTZBURG. I actually think that if you enacted legislation, you would moot the *Hamdi* case.

Senator GRAHAM. I totally agree——

Mr. SALTZBURG. Otherwise, I think it's fairly likely that the Supreme Court would grant review. I mean, one of the things we should not lose sight of is that *Hamdi* was closely divided with a plurality plus two, the author of the plurality opinion has resigned or announced her resignation from the Court. We'll go through a replacement process. We know the Chief Justice is ill. We don't know what will happen. He was part of the plurality.

So that if you ask what the end result will be, even after a year is up, I agree with Attorney General Barr, a year may be a good estimate. Sometimes the Supreme Court gives us less certainty after it decides than before, which is part of the problem. I think *Hamdi*'s an example.

I'd just like to say one other thing if I could. That is, Senator Graham, you mentioned the third part of what we are really after here, the hearts and minds.

Senator GRAHAM. That's very important.

Mr. SALTZBURG. I would really urge the subcommittee and I'd urge the committee not to treat the decision about what processes are due and so on solely based on how the United States looks at this right now.

We are not in this alone. What happened a week ago in London reminds us that this al Qaeda threat, this terrorist threat, is not just against us, we are just the biggest target. It's against everything we stand for, and everything that western democracies believe in. I think this picks up Senator Nelson's question, it's a very serious matter of saying if we are going to release somebody, where?

I mean, the world has to look at this together; we need to know what our allies think about how long somebody should be detained, because they don't want us to be releasing these people. Then if we're going to release them, how? How is it to be done? I think some input from allies who are just as concerned as this country is, and they have reason to be, would actually benefit our thinking.

I don't think, by the way, you'd find them less supportive. I think you'd find that the shared concerns you've heard today are shared not just within our borders but they are shared around the world. I think we haven't reached out enough.

That's been part of our problem. That we, in winning the hearts and minds, we have to win the hearts and minds of the American people and persuade them that we're true to our own values. Because of some of the mistakes that have been made, because of Abu Ghraib, we have to do a better job of convincing the world—that

the standards that Dean Hutson said—that we are still committed to the highest standards, and that we are still the leader.

I think some contributions from some other countries that share problems with us about how we ought to go would probably not be a bad thing for this committee to really consider.

Senator GRAHAM. That's very well said. If you could get the executive, legislative, and judicial branches signing off on what is going on at Guantanamo Bay, and making it a very good place to detain people, to keep them off the battlefield, a place to get good intelligence, be aggressive, a place to prosecute the worst of the bunch, I think we are safer. I think it does change world opinion of that.

What is your belief, Mr. Hutson, about how long it will be before we get legal answers to these questions?

Mr. HUTSON. Predicting judicial speed is very dangerous. That's almost as bad as predicting what the jury's going to do. But I think that a year or 2, probably, depending on what the Supreme Court does or doesn't do.

Senator GRAHAM. Well, I will be working as diligently as I can with other members of the committee to come up with some statutory definitions that meet, I think, most of your goals, Mr. Barr. We may have a philosophical difference about how to do this, but your concerns are legitimate. We need not have statutes that lock us down. We need to have statutes that free us up, and let us really get on with fighting this war in the most effective way.

I think Guantanamo Bay's potential is not being reached from a national security perspective. I think we could do more with the place if we had more buy into it. I really do worry, gentlemen, about this war being managed by a series of legal decisions from different venues that will create stagnation and create image problems and the Court is not equipped to do this. I think they are telling us that.

Some judges will take us up on it, Mr. Barr, they will certainly take us up on it. If we are going to fight this war the way we need to fight it, the more elected official involvement, the better, and God bless. Thank you for coming. We will be back with each of you about how to do this. Thanks very much.

[Questions for the record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR JOHN MCCAIN

DETAINEE HEARINGS

1. Senator MCCAIN. Mr. Dell'Orto, Admiral McGarrah, and General Hemingway, I understand that, of 520 individuals at Guantanamo (Gitmo), just 12 have been deemed suitable for military commissions. I understand that we have the legal right to detain the rest of them until the end of hostilities, but since there is no foreseeable end to the war on terrorism, what is the plan for those not receiving a hearing before the military commission?

Mr. DELL'ORTO, Admiral MCGARRAH, and General HEMINGWAY. Although we anticipate that a significant number of enemy combatants held at Guantanamo will face trial by military commission, many will not. Among those who may not be tried by a military commission are individuals who are either providing actionable intelligence through interrogations, or are still considered a threat to U.S. forces on the battlefield. Some of them may not have committed law of war violations or other crimes. These individuals will be held until the end of the conflict or until they are determined no longer to be a threat to U.S. forces by the Designated Civilian Official, acting on a recommendation from an Administrative Review Board (ARB).

The ARBs were established in order to review the case of every detainee annually. The ARB assesses whether an enemy combatant should be released, transferred, or further detained.

During the review, each eligible enemy combatant is given the opportunity to appear in person before an ARB of three military officers and provide information to support his release. The enemy combatant is provided with a military officer to assist him. In addition to information provided by the enemy combatant, the ARB considers written information from the family and national government of the enemy combatant and information provided by DOD and other U.S. Government agencies. Based on all of the information provided, the ARB makes a recommendation to release, transfer, or continue to detain the individual.

The process to release a detainee is completed only after the U.S. Government receives appropriate assurances that the receiving government will not torture the detainee and will continue to treat the detainee humanely, consistent with the country's international legal obligations.

As of March 2006, 267 detainees have been released or transferred to their home countries: 187 have been released, and 80 have been transferred to the control of other governments (Denmark, Pakistan, Morocco, France, Russia, Saudi Arabia, Spain, Sweden, United Kingdom, Kuwait, Australia, and Belgium). In regard to Iraqi and Afghan nationals, we are working with other U.S. Government agencies to help Iraqi and Afghan authorities assume responsibility for detention operations in their countries.

DETAINEE APPEALS

2. Senator MCCAIN. Mr. Dell'Orto, Admiral McGarrah, and General Hemingway, under Department of Defense (DOD) rules for military commissions, defendants will lack an independent appeal—they can appeal up the chain of command within DOD but not to U.S. Federal courts or to the U.S. Court of Appeals for the Armed Forces (a civilian court independent of the executive branch that handles appeals from the courts martial). Could you explain the rationale behind this decision? Why not permit an appeal to the U.S. Court of Appeals for the Armed Forces? Please explain your answer fully.

Mr. DELL'ORTO, Admiral MCGARRAH, and General HEMINGWAY. The Review Panel process provides for an independent review of the decisions of the Military Commission. By design and implementation, the Review Panel is composed of senior jurists with impeccable credentials and judicial experience. The current group of panel members was specifically chosen for their proven track record of making difficult decisions on unique and difficult questions of law—the very kinds of questions that they will face when deciding Commission questions involving the interplay of the law of war, military law, and applicable international law .

Under the Detainee Treatment Act, the United States Court of Appeals for the District of Columbia Circuit has jurisdiction to determine the validity of any final decision of a Military Commission. Review is required in capital cases and cases in which the defendant is sentenced to a term of imprisonment of 10 years or more; in all other cases, review is at the discretion of the Court. The jurisdiction of the Court is limited to the consideration of (i) whether the final decision was consistent with the standards and procedures specified in the Military Commission Order No.1, and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision was consistent with the Constitution and laws of the United States.

The Court of Appeals for the Armed Forces is an Article I appellate court with jurisdiction limited to certain courts-martial cases with significant sentences. See Clinton v. Goldsmith, 526 U.S. 529, 540 (1999). Expanding the Court of Appeals for the Armed Forces' jurisdiction to include military commissions would blur important distinctions between courts-martial and military commissions.

The independence of military commissions and courts-martial is protected primarily by Article 37, UCMJ, 10 U.S.C. Sec. 837, which prohibits unlawful command influence with respect to courts-martial and other tribunals, such as military commissions. Violations of Article 37, UCMJ, are punishable under Article 98, 10 U.S.C. Sec. 898, by up to 5 years of confinement and a dishonorable discharge. See Weiss v. United States, 510 U.S. 163 (1994).

The military commission process was established by the President pursuant to the authority granted to him under the Constitution and the Authorization for Use of Military Force, Public Law 107–40, 115 Stat. 224. The decision on who is subject to trial by commission, the rules that govern the commissions, and the procedures

for review of commission decisions are an executive branch function performed pursuant to this authority.

UNIFORM CODE OF MILITARY JUSTICE

3. Senator MCCAIN. Mr. Dell'Orto, Admiral McGarrah, and General Hemingway, the Pentagon made a decision to start from scratch and develop an entirely new system of military commissions, one that has run afoul of the U.S. court system. One effect of this has been that we have yet to bring even one terrorist to trial, nearly 4 years after September 11. Would it not be simpler, easier, and better to use the Uniform Code of Military Justice (UCMJ)?

Mr. DELL'ORTO, Admiral MCGARRAH, and General HEMINGWAY. On November 13, 2001, the President directed the establishment of military commissions to conduct criminal trials of those suspected of having committed war crimes. It would not be simpler, easier, or better to use the court-martial process authorized by the HCMJ. Rather, as the President directed, military commissions, as recognized by the UCMJ, provide the appropriate forum for the disposition of the allegations of war crimes committed by enemy combatants arising from the Global War on Terrorism. There are many provisions of the UCMJ applicable to courts-martial that would be inappropriate or unacceptable to apply in military commission trials of detainees at Guantanamo Bay, Cuba, including, but not limited to, the speedy trial provision (Article 10), the criminal rights warning requirements (Article 31(b), the extensive pretrial investigation hearing process (Article 32), equal opportunity to obtain witnesses and evidence regardless of any pertinent security classifications (Article 46), and extensive post-trial review and appeal procedures (Articles 59–76).

Additionally, many UCMJ provisions have been interpreted by military and Federal courts to apply, with some exceptions, the full range of protections afforded persons under the Constitution of the United States. Such U.S. Constitutional safeguards should not be extended to the trials of enemy alien combatants for violations of the law of war.

Finally, the UCMJ (Article 36) provides for the use of rules of evidence in courts-martial that, so far as the President determines practicable, apply the principles of law and rules of evidence generally used in criminal trials in United States district courts. Courts-martial use Military Rules of Evidence that are modeled after the Federal Rules of Evidence. Both of these sets of evidentiary rules would have to be modified significantly for use in military commissions. For example, these rules do not permit the admission of hearsay evidence, unless an exception to the hearsay rule exists. Therefore, they do not address adequately the unique challenges presented by a battlefield environment that is fundamentally different from the traditional law enforcement rubric applicable during peacetime in the United States.

Throughout American military history, hearsay evidence has been admissible in military commissions. In the Seminole War, hearsay evidence was admitted in military commissions to try British subjects for inciting and aiding the Creek Indians in warring against the United States. See Louis Fisher, Congressional Research Service, Military Tribunals: Historical Patterns and Lessons, 8–11 (2004).

During the Civil War, a military commission admitted hearsay evidence in the trial of Captain Henry Wirz for the atrocities committed against Union prisoners of war at the. Andersonville prison. Lewis Laska & James Smith, "Hell and the Devil": Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865, 68 MIL. L. Rev. 77, 118 & n.128 (1975) (e.g., a witness who did not observe an alleged murder was permitted to testify that he heard another individual identify Captain Win as the gunman).

During World War II, hearsay evidence was admitted in the military commission. that tried Japanese General Yamashita for war crimes committed while defending the Philippine Islands. See In re Yamashita, 327 U.S. 1, 18–19 (1946). Similarly, the military commission that tried Japanese General Homma for war crimes related to the infamous Bataan Death March considered hearsay evidence. Major William H. Parks, Command Responsibility for War Crimes, 62 Mil. L. Rev. 1, 75 (1973); In re Homma, 327 U.S. 759, 760–61 & n.1 (1946).

Internationally, it is well settled in the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY/ICTR) that hearsay evidence is admissible. Rules 89(c) and 89(d) of the ICTY Rules of Procedure and Evidence (RPE), read together, provide guidelines for admissibility of evidence based on relevance and probativeness, subject to exclusion to ensure a fair trial. The ICTR has adopted similar provisions. See ICTR RPE 89 and 92.

In addition, the rules of evidence in courts-martial do not currently provide for the consideration of classified evidence by the finder of fact unless the defendant

is also provided access to that classified evidence. See the Classified Information Procedures Act, 18 U.S.C. Appendix III, §§ 1–16, and Military Rule of Evidence 505. These procedures work well when the defendant already has a security clearance, which has historically been true in criminal prosecutions concerning classified information. However, the procedures used in Article III courts and courts-martial are problematic when the defendant does not have a security clearance and does not qualify for one under security clearance procedures. Disclosure of classified information concerning sensitive intelligence sources and methods or military operational procedures would compromise that classified information and potentially endanger the lives of members of the U.S. Armed Forces engaged in the global war on terrorism. Trial before the conclusion of hostilities creates security concerns not present in prosecutions after the end of a conflict.

4. Senator MCCAIN. Mr. Dell'Orto, Admiral McGarrah, and General Hemingway, we have a world class system of military justice, one that is adapted for dealing with classified information, for trials that do not take place in the bright lights of the media. Precisely what is it about that system that makes it unusable here? Please explain your answer fully.

Mr. DELL'ORTO, Admiral MCGARRAH, and General HEMINGWAY. The rules of evidence in courts-martial do not currently provide for the consideration of classified evidence by the finder of fact unless the defendant is also provided access to that classified evidence. See the Classified Information Procedures Act, 18 U.S.C. Appendix III, §§ 1–16, and Military Rule of Evidence 505. These procedures work well when the defendant already has a security clearance, which has historically been true in criminal prosecutions concerning classified information. However, the procedures used in Article III courts and courts-martial are problematic when the defendant does not have a security clearance and does not qualify for one under security clearance procedures. Disclosure of classified information concerning sensitive intelligence sources and methods or military operational procedures would compromise that classified information and potentially endanger the lives of members of the U.S. Armed Forces engaged in the global war on terrorism. Trial before the conclusion of hostilities creates security concerns not present in prosecutions after the end of a conflict.

APPLICATION OF GENEVA CONVENTIONS

5. Senator MCCAIN. Mr. Dell'Orto, Admiral McGarrah, General Hemingway, and Mr. Hutson, what would have been different at the Gitmo detention facility had Secretary Powell's position prevailed—i.e., had the administration applied the Geneva Conventions to all detainees captured in Afghanistan (as we've done in all past wars), but then, in accordance with Geneva, denied the special privileges of prisoner of war (POW) status to the al Qaeda prisoners. Under Geneva, we still could have detained and interrogated the prisoners for the duration of the war against al Qaeda. What did we really gain by choosing not to apply the Geneva Conventions? Please explain your answer fully.

Mr. DELL'ORTO, Admiral MCGARRAH, and General HEMINGWAY. What was gained was a determination consistent with the law of war and applicable international law that provided the legally correct framework for the detention and interrogation of enemy combatants detained in the global war on terrorism. Since September 11, 2001, the United States and its coalition partners have been engaged in a war against al Qaeda, the Taliban, and their affiliates and supporters. There is no question that under the law of war, the United States has the authority to detain persons who have engaged in unlawful belligerence until the cessation of hostilities. The detention policy of the U.S. Government, including the responsibilities of the Department of Defense, was set forth in the President's Military Order of November 13, 2001 enclosed at TAB A.

The Department of Defense is complying with the guidance issued by the President in his February 7, 2002, memorandum.

The White House
President George W. Bush

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TAB A

For Immediate Release
Office of the Press Secretary
November 13, 2001

President Issues Military Order

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

Section 1. Findings.

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. Definition and Policy.

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant

times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit,

acts of international terrorism, or acts in preparation therefor,

that have caused, threaten to cause, or have as their aim to

cause, injury to or adverse effects on the United States, its

citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in

subparagraphs (i) or (ii) of subsection 2(a)(1) of this order;

and

(2) it is in the interest of the United States that such individual

be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Sec. 3. Detention Authority of the Secretary of Defense. Any individual subject to this order shall be --

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for --

(1) military commissions to sit at any time and any place, consistent

with such guidance regarding time and place as the Secretary of

Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

Sec. 5. Obligation of Other Agencies to Assist the Secretary of Defense.

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

Sec. 6. Additional Authorities of the Secretary of Defense.

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. Relationship to Other Law and Forums.

(a) Nothing in this order shall be construed to --

(1) authorize the disclosure of state secrets to any person not

otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the

Armed Forces or the power of the President to grant reprieves and

pardons; or

(3) limit the lawful authority of the Secretary of Defense, any

military commander, or any other officer or agent of the United States

or of any State to detain or try any person who is not an individual

subject to this order.

(b) With respect to any individual subject to this order --

(1) military tribunals shall have exclusive jurisdiction with respect

to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or

maintain any proceeding, directly or indirectly, or to have any such

remedy or proceeding sought on the individual's behalf, in (i) any

court of the United States, or any State thereof, (ii) any court of

any foreign nation, or (iii) any international tribunal.

(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

Sec. 8. Publication.

This order shall be published in the Federal Register.

GEORGE W. BUSH

THE WHITE HOUSE,

November 13, 2001.

# # #

Return to this article at:
http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html

Mr. HUTSON. Much of any answer is speculative but one thing is certain: We would have maintained the heretofore uninterrupted adherence to the Geneva Conventions by the United States since their inception in 1949. We also be in a much better position in the future to encourage other nations to do so when they may have preferred to ignore them, or at least to complain when they don't comply.

I speculate that the confusion that erupted in Afghanistan and Iraq about the applicability of the Geneva would not have occurred. Misguidedly, we parsed who was covered and who as not and decreed that all terrorists were not covered. Then the war in Iraq morphed into a war against terror; a fortiori, the enemy were terrorists and not protected. At that point, the consequences became virtually inevitable.

SCOPE OF ARMY FIELD MANUAL 34–52

6. Senator MCCAIN. Mr. Barr, in the hearing before the Senate Armed Services Committee on July 13, 2005, General Craddock asserted that the following interrogation techniques are approved in the Army Field Manual on Interrogation 34–52, under the approach called "Ego Down and Futility":

- forcing a man to wear a woman's bra and placing underwear on his head;
- tying a leash to the subject and leading him around the room, forcing him to perform dog tricks;
- standing naked for several minutes with female interrogators present; and
- pouring water over their heads.

Is it your opinion that the field manual authorizes or in some way allows these examples to be used during interrogations by Defense Department personnel? If it does, or implies that these techniques are okay, should the manual be changed? Please fully explain your answer.

Mr. BARR. As to whether the specific techniques cited are approved by the Army Field Manual, I defer to military authorities to interpret their own guidelines.

I would advise against changing the Manual to address specific techniques. The Manual should set forth general principles which should be applied prudentially in given circumstances. It should not seek to become a comprehensive code cast in minute detail.

While some techniques may never be justifiable, other particular techniques might be inappropriate in most circumstances, while justifiable in another. For example, in the case of a uniformed enemy, conducting war in accordance with the rules of war and held as a prisoner of war, I would think the scope of appropriate coercive interrogation should be quite narrow. Things may be different if our forces capture a terrorist—someone engaged in violating the rules of war by concealing himself among innocent civilians for the very purpose of slaughtering innocent civilians through surprise attacks. In such a case, if a military commander has reason to think that he can extract crucial information and save innocent lives by using an interrogation technique that involves neither significant pain nor injury, there may be more room for leeway.

More concretely, for example, if we captured Zarqawi's chief of operations and found that he had a particular horror of donning woman's lingerie (to use the technique mentioned in your question), would it really be immoral or improper to exploit that fear if it meant saving lives? In this regard, the term "degrading" is not self-defining. It can mean different things in different contexts. There are some things that a teacher might do to a pupil, or a boss to a secretary, or a policeman to a suspect, or a fraternity brother to a pledge, that we would consider "degrading"—perhaps even just calling a name; perhaps something demeaning or very embarrassing. And yet the same treatment might not be troublesome when employed on the battlefield against a terrorist captive. In judging what constitutes degrading treatment of terrorists captives under interrogation, it seems to me we should not apply the same standard we would apply to interactions in the classroom, the office, the precinct station, or the frat house.

INTERROGATION TECHNIQUES

7. Senator MCCAIN. General Romig, Admiral McPherson, General Sandkuhler, General Rives, and Mr. Hutson, the investigation by Lieutenant General Randall M. Schmidt, USA and Brigadier General John T. Furlow, USA, into the FBI's allegations of detainee abuse at the Gitmo detention facility substantiated several interrogation techniques. Does the Army Field Manual 34–52 permit the following interrogation techniques which were substantiated by the investigating General Officers to

have been used as interrogation techniques at Gitmo. Please answer yes or no. If longer answers are required, please provide additional responses:

General ROMIG. Military doctrine is defined as fundamental principles by which the military forces or elements thereof guide their actions in support of national objectives. Army Field Manuals, such as FM 34–52, contain doctrine and training principles with supporting tactics, techniques, and/or procedures and describe how the Army and its organizations function in terms of missions, organizations, personnel, and equipment. Field Manuals are differentiated from Army Regulations, which are directives that set forth missions, responsibilities, and policies, delegate authority, set objectives, and prescribe mandated procedures to ensure uniform compliance with those policies.

It is important to note that the Army Field Manual (Field Manual 34–52) reinforces "the stated policy of the U.S. Army that military operations will be conducted in accordance with the law of war obligations of the U.S." In doing so, however, it does not attempt to distinguish among the various "sources" in applying the interrogation doctrine set forth therein. The Army Field Manual lists as possible "sources" civilian internees, insurgents, EPWs, defectors, refugees, displaced persons, agents or suspected agents, and other non-U.S. personnel, but also makes it clear that all of these personnel "are entitled to PW protection until their precise status has been determined by competent authority." The policies and procedures for making such a determination are not set forth in the Army Field Manual.

Admiral MCPHERSON. As a preface for answering each of the questions below in the context of interrogations, it would be useful first to set forth a key portion of the guidance provided by the Army Field Manual 34–52 (FM). The FM provides the following two tests to determine if a contemplated approach or technique would be considered unlawful:

- Given all the surrounding facts and circumstances, would a reasonable person in the place of the person being interrogated believe that his rights, as guaranteed under both international and U.S. law, are being violated or withheld, or will be violated or withheld if he fails to cooperate?
- If your contemplated actions were perpetrated by the enemy against U.S. Prisoners of War, would you believe such actions violated international or U.S. law?

The FM continues, "[i]f the answer is yes to either of these tests, do not engage in the contemplated action." These tests will be the foundation for answering all of the committee's questions addressing the use of specific activities as interrogation techniques.

General SANDKUHLER. The Army Field Manual 34–52 (FM 34–52) sets forth as doctrine a highly protective standard for the interrogation of detainees. The Field Manual states: "The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the U.S. Government." The field manual also states "the use of force is a poor technique as it yields unreliable results." (FM 34–52, Chap. 1) Therefore, for both humane and operational reasons, it is far better for the interrogator to choose those techniques that suit the detainee's natural propensities and not those that attempt to overcome the will to resist. With these two principles in mind, the answer to all of the following questions would generally be "no."

General RIVES. Please note the following prefatory comment, which is applicable to all answers, that follow. Army Field Manual (FM) 34–52 explicitly states that it is Army policy that military operations will be conducted in accordance with the law of war obligations of the United States. It provides doctrinal guidance, techniques, and procedures, and it also cautions that limitations on the use of expressly prohibited methods should not be confused with psychological ploys, verbal trickery, or other nonviolent or noncoercive ruses. The Army Field Manual further states that the Geneva Conventions and U.S. policy prohibit acts of violence or intimidation, including physical or mental torture, threats, insults or exposure to inhumane treatment in interrogation. Finally, FM 34–52 advises that great care must be taken to avoid threatening or coercing a source as that would be a violation of the Geneva Convention on the treatment of enemy prisoners of war, Article 17.

A. Is the use of dogs during interrogations, muzzled or unmuzzled, consistent with the intent and the spirit of the Army Field Manual, which is consistent with Treaties on Human Rights, the Geneva Conventions, our International Obligations, and domestic law;

General ROMIG. The use of military working dogs as a security or control measure, when properly controlled by a trained dog handler, is not objectionable. The use of dogs as a method of interrogation (as distinguished from a security or control

measure) would not be consistent with the intent and spirit of the Army Field Manual.

Admiral MCPHERSON. No, this is not consistent with the intent and spirit of the FM. If a dog is used as part of an interrogation approach to harass, intimidate, threaten or coerce a detainee, the use is not consistent with the FM. Proper use of dogs for security purposes independent from interrogations is not inconsistent with the intent and spirit of the FM.

General SANDKUHLER. No, the use of dogs as an interrogation method intended to place the detainee in fear of death or injury would not be consistent with FM 34–52, which prohibits threats and exposure to unpleasant treatment. The use of military working dogs in their usual function of security and detection may be permissible, so long as they do not threaten the detainee.

General RIVES. No, this is not consistent with the intent and spirit of Army Field Manual 3452. The use of dogs for legitimate security, control, patrol and inspection functions is appropriate, but use of dogs as an interrogation approach or tactic is inconsistent with the intent and spirit of the Army Field Manual.

B. Is forcing a detainee to wear a woman's bra and thong placed on their head during the course of the interrogation consistent with the intent and the spirit of the Army Field Manual, which is consistent with Treaties on Human Rights, the Geneva Convention, our International Obligations, and domestic law;

General ROMIG. No. Forcing a detainee to wear a woman's bra and thong placed on his head during the course of the interrogation, in an attempt to humiliate or degrade the detainee, would not be consistent with the intent and the spirit of the Army Field Manual.

Admiral MCPHERSON. No, this is not consistent with the intent and spirit of the FM. The FM provides that the Geneva Conventions provisions concerning protected persons be strictly adhered to in the quest to identify legitimate threats and gain needed intelligence. Among those provisions are the prohibition on physical or moral coercion and the prohibition on subjecting individuals to humiliating or degrading treatment.

General SANDKUHLER. No, this is not consistent with FM 34–52, which prohibits insults and unpleasant treatment. Furthermore, the Geneva Conventions prohibit "outrages upon personal dignity, in particular humiliating and degrading treatment." (GC, Art. 3(1)(c))

General RIVES. No, forcing a detainee to wear a woman's bra and thong on his head as an interrogation tactic designed to humiliate or degrade the detainee is not consistent with the intent and spirit of the Army Field Manual.

C. Is telling a detainee that his mother and sister were whores consistent with the intent and the spirit of the Army Field Manual, which is consistent with Treaties on Human Rights, the Geneva Conventions, our International Obligations, and domestic law;

General ROMIG. No. Telling a detainee that his mother and sister are whores, thereby degrading him and his family, would not be consistent with the intent and the spirit of the Army Field Manual.

Admiral MCPHERSON. No, this is not consistent with the intent and spirit of the FM.

General SANDKUHLER. No, this is not consistent with FM 34–52, which prohibits insults.

General RIVES. No, telling a detainee that his mother and sister were whores as an interrogation tactic is not consistent with the intent and spirit of the Army Field Manual.

D. Is telling a detainee that he is a homosexual, had homosexual tendencies, and other detainees had found out about these tendencies consistent with the intent and the spirit of the Army Field Manual, which is consistent with Treaties on Human Rights, the Geneva Conventions, our International Obligations, and domestic law;

General ROMIG. No. Telling a detainee that he is a homosexual, had homosexual tendencies, and other detainees had found out about these tendencies, thereby humiliating and possibly endangering the detainee, would not be consistent with the spirit or intent of the Army Field Manual.

Admiral MCPHERSON. No, this is not consistent with the intent and spirit of the FM.

General SANDKUHLER. No, this is not consistent with FM 34–52 if it is meant to insult or threaten. The FM 34–52 also recommends "not inquiring into those private affairs which are beyond the scope of the interrogation." (FM 34–52, Chap. 1)

General RIVES. No, telling a detainee that he is a homosexual, had homosexual tendencies, and other detainees had found out about these tendencies as an interro-

gation tactic is not consistent with the intent. and the spirit of the Army Field Manual.

E. Is leading a detainee around the room on all fours and forcing him to perform a series of dog tricks consistent with the intent and the spirit of the Army Field Manual, which is consistent with Treaties on Human Rights, the Geneva Conventions, our International Obligations, and domestic law;

General ROMIG. No. Leading a detainee around the room on all fours and forcing him to perform a series of dog tricks, thereby humiliating or demeaning him, would not be consistent with the intent and the spirit of the Army Field Manual.

Admiral MCPHERSON. No, this is not consistent with the intent and spirit of the FM.

General SANDKUHLER. No, this is not consistent with FM 34–52, which prohibits insults and unpleasant treatment. Furthermore, the Geneva Conventions prohibit "outrages upon personal dignity, in particular humiliating and degrading treatment." (GC, Art. 3(1)(c)).

General RIVES. No, leading a detainee around the room on all fours and forcing him to perform a series of dog tricks is not consistent with the intent and the spirit of the Army Field Manual.

F. Is forcing a detainee to dance or touch an interrogator in a provocative fashion consistent with the intent and the spirit of the Army Field Manual, which is consistent with Treaties on Human Rights, the Geneva Conventions, our International Obligations, and domestic law;

General ROMIG. No. Forcing a detainee to dance or touch an interrogator in a provocative fashion, thereby humiliating or demeaning him, would not be consistent with the spirit and intent of the Army Field Manual.

Admiral MCPHERSON. No, this is not consistent with the intent and spirit of the FM.

General SANDKUHLER. No.

General RIVES. No, forcing a detainee to dance or touch an interrogator in a provocative fashion as an interrogation tactic is not consistent with the intent and the spirit of the Army Field Manual.

G. Is subjecting detainees to strip searches and forcing them to stand naked while females are present consistent with the intent and the spirit of the Army Field Manual, which is consistent with Treaties on Human Rights, the Geneva Conventions, our International Obligations, and domestic law;

General ROMIG. Use of strip searches for lawful safety and security purposes is not objectionable. Subjecting detainees to strip searches and forcing them to stand naked while females are present, as a method of interrogation, would not be consistent with the intent and the spirit of the Army Field Manual.

Admiral MCPHERSON. No, this is not consistent with the intent and spirit of the FM. Properly conducted strip searches for security purposes independent of interrogations are not inconsistent with the intent and spirit of the FM.

General SANDKUHLER. No, forcing a detainee to strip or to stand naked in front of the opposite sex as a means of interrogation is not consistent with the intent and spirit of FM 34–52. A strip search conducted in a respectful manner for security or law enforcement purposes may be permissible.

General RIVES. No, subjecting a detainee to strip searches and forcing him to stand naked while females are present as an interrogation tactic is not consistent with the intent andthe spirit of the Army Field Manual.

H. Is preventing detainees from praying and mishandling the Koran consistent with the intent and the spirit of the Army Field Manual, which is consistent with Treaties on Human Rights, the Geneva Convention, our International Obligations, and domestic law; and

General ROMIG. Mishandling the Koran in order to coerce cooperation by the detainee would not be consistent with the intent and the spirit of the Army Field Manual. Also, threatening to subject a detainee to disadvantageous treatment with respect to the exercise of religious duties, because of a failure to cooperate with interrogators, is a form of coercion and would not be consistent with the intent and spirit of the Army Field Manual.

With respect to religious practices, however, a balance must be found between a detainee's obligation to comply with the disciplinary routine prescribed by military authorities and the obligation of the authorities to afford latitude to prisoners in the reasonable exercise of their religious duties. For example, a detainee may not demand to attend prayer all day in order to avoid interrogation.

Admiral MCPHERSON. No, this is not consistent with the intent and spirit of the FM.

General SANDKUHLER. No, preventing detainees from praying and deliberate mishandling of the Koran is not consistent with the intent and spirit of FM 34–52. Furthermore, guards should be properly trained to avoid accidental mishandling of any items held sacred by detainee religious groups.

General RIVES. No, preventing detainees from praying, and mishandling the Koran is not consistent with the intent and the spirit of the Army Field Manual.

I. Is pouring cold water on detainees' head and water boarding consistent with the intent and the spirit of the Army Field Manual, which is consistent with Treaties on Human Rights, the Geneva Convention, our International Obligations, and domestic law?

General ROMIG. Water boarding would not be consistent with the intent and the spirit of the Army Field Manual. There may be valid health and safety reasons to pour cold water on a detainee's head in particular circumstances and, in those circumstances, such actions would not be inconsistent with the intent and the spirit of the Army Field Manual. Under other circumstances, however, pouring water on a detainee's head as a means of or aid to interrogation could be considered unlawful coercion and would not be consistent with the intent and the spirit of the Army Field Manual.

Admiral MCPHERSON. No, this is not consistent with the intent and spirit of the FM. Pouring cold water on a detainee's head in situations other than as an interrogation technique would not necessarily be inconsistent with the intent and spirit of the FM.

General SANDKUHLER. No. Water boarding, which I understand is intended to place the detainee in fear of drowning, and pouring cold water on a detainee's head, which I understand is intended to cause discomfort, would not be consistent with FM 34–52.

General RIVES. No, pouring cold water on detainee's head and water boarding is not consistent with the intent and the spirit of the Army Field Manual.

Mr. HUTSON. I would say "no" to all with the possible exception of "D." I would also add that in my opinion, if the answers were determined to be "yes" I would change the AFM to ensure no Americans engage in that type of behavior. It is not appropriate, it's demeaning to the interrogators, and it is not productive.

QUESTIONS SUBMITTED BY SENATOR CARL LEVIN

OFFICE OF LEGAL COUNSEL MEMORANDUM

8. Senator LEVIN. Mr. Dell'Orto, at the hearing you stated that the March 14, 2003, Office of Legal Counsel (OLC) memorandum from Deputy Assistant Attorney General John Yoo to Defense Department General Counsel William J. Haynes "was withdrawn as an operational document, and so it is no longer in effect and is no longer being considered as any precedent of any sort." You also stated that "It was certainly as recently as February of this year, but we were asked not to rely upon it going back to December 2003. I have not relied upon it since." Who directed you in December 2003 to no longer rely on the March 14, 2003 OLC memo and what led to that decision being taken at that time? Please provide the committee with the documents officially rescinding the March 14, 2003, OLC memo.

Mr. DELL'ORTO. Assistant Attorney General Goldsmith (See DOJ Office of Legal Counsel letter dated February 4, 2005, enclosed at Tab B). Although I was informed that the March 14, 2003. OLC memo was under review, I was not told what led to the decision to conduct that review.

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

February 4, 2005

Honorable William J. Haynes II
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, D.C. 20301-1600

Re: Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (March 14, 2003) ("March 2003 Memorandum")

Dear Jim:

In December 2003, then-Assistant Attorney General Jack Goldsmith advised you that the March 2003 Memorandum was under review by this Office and should not be relied upon for any purpose. Assistant Attorney General Goldsmith specifically advised, however, that the 24 interrogation techniques approved by the Secretary of Defense for use with al Qaeda and Taliban detainees at Guantanamo Bay Naval Base were authorized for continued use as noted below. I understand that, since that time, the Department of Defense has not relied on the March 2003 Memorandum for any purpose. I also understand that, to the extent that the March 2003 Memorandum was relied on from March 2003 to December 2003, policies based on the substance of that Memorandum have been reviewed and, as appropriate, modified to exclude such reliance. This letter will confirm that this Office has formally withdrawn the March 2003 Memorandum.

The March 2003 Memorandum has been superseded by subsequent legal analyses. The attached Testimony of Patrick F. Philbin before the House Permanent Select Committee on Intelligence, July 14, 2004, reflects a determination by the Department of Justice that the 24 interrogation techniques approved by the Secretary of Defense mentioned above are lawful when used in accordance with the limitations and safeguards specified by the Secretary. This also accurately reflects Assistant Attorney General Goldsmith's oral advice in December 2003. In addition, as I have previously informed you, this Office has recently issued a revised interpretation of the federal criminal prohibition against torture, codified at 18 U.S.C. §§ 2340-2340A, which constitutes the authoritative opinion of this Office as to the requirements of that statute. See Memorandum for Deputy Attorney General James B. Comey from Daniel Levin,

Acting Assistant Attorney General, Office of Legal Counsel, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004) (copy attached).

Please let us know if we can be of further assistance.

Sincerely,

Daniel Levin
Acting Assistant Attorney General

Attachments

9. Senator LEVIN. Mr. Dell'Orto, according to a recent news article (Washington Post, July 15, 2005), DOD General Counsel Haynes issued a memo earlier this year rescinding the Working Group Report on Detainee Interrogations in the global war on terrorism. Has the Working Group report been rescinded? If so, please provide the committee with a copy of the memo rescinding that report.

Mr. DELL'ORTO. The working group report on detainee interrogation was rescinded on March 17, 2005. The memorandum is enclosed at TAB C.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

GENERAL COUNSEL

MAR 17 2005

MEMORANDUM FOR THE JUDGE ADVOCATES GENERAL AND THE STAFF JUDGE ADVOCATE TO THE COMMANDANT

SUBJECT: Department of Defense Interrogation Policy

Thank you for your memorandum of January 18, 2005 and follow-on memorandum of January 31, 2005 (see attached). I agree that, in light of the Justice Department's modification of its earlier legal analysis, the legal portion of the 2003 DoD Working Group Report on Detainee Interrogations does not reflect now-settled executive branch views of the relevant law. As the DoD Working Group Report was never officially distributed (it was provided in final only to the Secretary of Defense), and as the operative Justice Department memorandum of December 30, 2004 has been distributed publicly as well as through command channels, one could reasonably conclude no further action is required.

Nevertheless, I determine that the Report of the Working Group on Detainee Interrogations is to be considered a historical document with no standing in policy, practice, or law to guide any activity of the Department of Defense. This determination should be disseminated throughout the Department of Defense, as appropriate.

Your proposed DoD interrogation policy attached to your January 31, 2005 memorandum is an excellent starting point for discussion and coordination with my staff and the General Counsels of the military departments. We must be mindful of the work of the Defense Intelligence Agency, the Joint Staff, the Office of Detainee Affairs, and others as they also are working to promulgate Department-wide interrogation policy. This is a profoundly important issue that must surely both comply with the law and incorporate appropriate consideration of operational, intelligence, and policy matters.

for William J. Haynes II

Attachment: As stated

cc: GCs of the Mil Depts

QUESTIONS SUBMITTED BY SENATOR EDWARD M. KENNEDY

AWARENESS OF FBI OBJECTIONS

10. Senator KENNEDY. Mr. Dell'Orto, a 2004 FBI e-mail indicated that the DOD was obtaining unreliable intelligence and was jeopardizing future prosecution of the detainees. The e-mail states that these concerns were raised in weekly meetings with high-ranking Criminal Division personnel at the Justice Department, including Deputy Assistant Attorney General Alice Fisher, and that all of them agreed the interrogation techniques would be an issue in trials by military commissions, since the statements were being coerced. According to the e-mail, the concerns were brought to the attention of the Office of General Counsel by Bruce Swartz.

A. When did you first become aware that the Federal Bureau of Investigations (FBI) was concerned about the effectiveness and reliability of the DOD interrogation techniques?

B. Who brought it to your attention?

C. What was the substance of the complaints?

D. What was your response?

E. How did General Counsel Haynes respond?

Mr. DELL'ORTO. As intelligence collection and criminal investigative activities involving detainees evolved from the inception of DOD detention operations at Guantanamo, there had been occasions when the professional and doctrinal approaches of intelligence collectors and criminal investigators led to disagreements in the field. From time to time, I had been made aware of such disagreements as reported by the responsible officials in the appropriate command or component. Discussions with Department of Justice officials focused on matters relating to the collection of evidence in criminal investigations and the collection of intelligence information critical to carrying out the global war on terrorism. My response and that of the DOD General Counsel have been to address these matters consistently within the requirements of U.S. law and consistent with U.S. policy concerning the humane treatment of detainees.

Differences in approaches toward interrogation between the military intelligence community and the law enforcement community were reported beginning relatively early in the evolution of DOD detention operations at Guantanamo. For example. the law enforcement community raised issues regarding the requirement to provide Miranda warnings to detainees. The military intelligence community was not obligated to provide such warnings. It also was reported on several occasions that the law enforcement community believed the most effective way to obtain information from a detainee was to build rapport with the detainee. I understood that the military intelligence community desired to pursue a course of interrogation that drew heavily on the techniques described in Army Field Manual 34–52. From time to time reports of these differences in approaches to interrogation came to our office from various sources. Some reports came from the military Intelligence Community at Guantanamo, and some came from Department of Justice attorneys who met with Department of Defense attorneys from time to time. Whenever Mr. Haynes learned of such reports, he directed inquiry through the Joint Staff to the chain of command to determine whether the differences between the communities reflected the historically different roles of the two communities or whether there were specific complaints about the interrogation of particular detainees and the specific techniques employed. To the best of my recollection, no specific complaints about abuse of detainees or any FBI concerns about interrogation of particular detainees or specific techniques were brought to our attention in any of these reports. As for concerns about the admissibility of statements obtained during interrogations and the possible effect that interrogation approaches might have on the admissibility of such statements, I was mindful of two factors that were counterweights to the DOJ concerns about admissibility as evidence; first, that the principal purpose for interrogations at Guantanamo was to acquire intelligence about current and future planned al Qaeda operations so as to thwart those operations and protect the United States and its citizens from future attacks, and second, that the military commission rules provided for greater latitude in the admissibility of such statements than was the case in Article III courts, the latter forum being the principal focus of the DOJ attorneys.

MEETINGS WITH THE FBI GENERAL COUNSEL

11. Senator KENNEDY. Mr. Dell'Orto, in a 2004 letter to major General Donald Ryder, FBI Deputy Assistant Director T. J. Harrington specifically referred to discussions between you and the FBI Office of General Counsel about the FBI concerns. What action did you take in response to those discussions?

Mr. DELL'ORTO. I did not meet with the FBI General Counselor any attorney from that office. My recollection is that I had a telephone conversation with an attorney from the FBI Office of General Counsel in the summer of 2003. During that telephone call, I ascertained that the time frame of the concerns being expressed was prior to January 2003, the month during which the Secretary of Defense responded to Mr. Haynes' reports about concerns brought to his attention by an official within the Department of Defense by suspending a number of the interrogation techniques being employed with respect to one detainee at Guantanamo. The FBI attorney did not report specific techniques or detainees to me or report any concerns about tech-

niques employed after January 15, 2003. I asked this attorney to provide me with any details or additional information if he later learned of any.

12. Senator KENNEDY. Mr. Dell'Orto, what did General Counsel Haynes instruct you to do?

Mr. DELL'ORTO. I do not recall discussing this telephone call with Mr. Haynes. In the absence of further specifics relating to the concerns expressed and the time frame of the interrogations that appeared to be the source of the FBI concerns, there was nothing more to be done since the Secretary had taken clear action in January 2003 to limit the types of lawful techniques to be used at Guantanamo and again in April 2003 to direct a new set of techniques for use at Guantanamo that also were well within the law and based on a solid policy foundation.

13. Senator KENNEDY. Mr. Dell'Orto, did you discuss DOD's response with the FBI and the Justice Department and if so, with whom and what information was communicated?

Mr. DELL'ORTO. I do not recall a subsequent conversation with the FBI or Department of Justice on this issue.

14. Senator KENNEDY. Mr. Dell'Orto, what techniques were the subject of the FBI's complaint?

Mr. DELL'ORTO. As far as I recall, the FBI attorney did not provide any specific techniques during. our telephone call and did not subsequently call with any further detail.

15. Senator KENNEDY. Mr. Dell'Orto, did you stop the techniques that were the cause of the FBI's concern?

Mr. DELL'ORTO. In the absence of any detailed information provided during the call I received in the summer of 2003 and given that the call referred only to the pre-January 2003 time frame, I took no further action. On January 15, 2003, the Secretary of Defense had suspended the use of any technique that was not included among those identified in Army Field Manual 34–52.

CONCERNS ABOUT DOD INTERVIEW METHODS

16. Senator KENNEDY. Mr. Dell'Orto, Alice Fisher told the Judiciary Committee that she recalled having general discussions about the effectiveness of the DOD's interview methods, including whether the FBI's methods were more effective in obtaining intelligence. Did you or anyone on the General Counsel's staff have knowledge of the substance of Ms. Fisher's concerns and if so, to whom were they communicated, and what were the concerns?

Mr. DELL'ORTO. Differences in approaches toward interrogation between the military intelligence community and the law enforcement community were reported beginning relatively early in the evolution of DOD detention operations at Guantanamo. For example, the law enforcement community raised issues regarding the requirement to provide Miranda warnings to detainees. The military intelligence community was not obligated to provide such warnings. It also was reported on several occasions that the law enforcement community believed the most effective way to obtain information from a detainee was to build rapport with the detainee. I understood that the military Intelligence Community desired to pursue a course of interrogation that drew heavily on the techniques described in Army Field Manual 34–52. From time to time reports of these differences in approaches. to interrogation came to our office from various sources. Some reports came from the military Intelligence Community at Guantanamo, and some came from Department of Justice attorneys who met with Department of Defense from time to time. To the best of my recollection, no specific complaints about abuse of detainees or any FBI concerns about interrogations of particular detainees or specific techniques were brought to our attention in any of these reports. As for concerns about the admissibility of statements obtained during interrogations and the possible effect that interrogation approaches might have on the admissibility of such statements, I was mindful of two factors that were counterweights to the DOJ concerns about admissibility as evidence; first, that the principal purpose for interrogations at Guantanamo was to acquire intelligence about current and future planned al Qaeda operations so as to thwart those operations and protect the United States and its citizens from future attacks, and second, that the military commission rules provided for greater latitude in the admissibility of such statements than was the case in Article III courts, the latter forum being the principal focus of the DOJ attorneys.

17. Senator KENNEDY. Mr. Dell'Orto, please describe any communication, either direct or indirect, which you or members of the DOD Office of the General Counsel had with then Assistant Attorney General Chertoff about the FBI's complaints of coercive interrogation tactics.

Mr. DELL'ORTO. I am not aware of any communication that I or any member of the Office of General Counsel had with then-Assistant Attorney General Chertoff about FBI complaints of coercive interrogation tactics.

OVERRIDING JUDGE ADVOCATE GENERAL INPUT

18. Senator KENNEDY. Mr. Dell'Orto, the DOD's Church Report reveals a disagreement primarily between military legal leadership on one side, and DOD General Counsel, the Department of Justice, and White House Counsel Alberto Gonzales on the other side, over interrogation tactics and what constitutes torture.

In response to requests from other government agencies, the Department of Justice produced the Bybee memo: a legal framework for interrogation guidance. Mr. Haynes then convened a Pentagon working group to look at interrogation policies, and wanted to adopt the Bybee memo. According to Admiral Church's report, many military lawyers and some civilian lawyers objected to the contents of the Bybee memo. At a Senate hearing in March, Admiral Church told us he concluded that DOD General Counsel William J. Haynes overrode the objections and imposed the Bybee analysis.

Why did Mr. Haynes decide to override the expert suggestions of the military lawyers in the Judge Advocate General (JAG) Corps?

Mr. DELL'ORTO. On January 15, 2003, the Secretary of Defense directed the DOD General Counsel. to establish a working group within the Department of Defense to assess the legal, policy and operational issues relating to the interrogation of detainees held by the United States Armed Forces in the global war on terrorism. On January 16, 2003; the DOD General Counsel asked the General Counsel of the Department of the Air Force to convene this working group, comprised of representatives of the Office of the Under Secretary of Defense (Policy), the Defense Intelligence Agency, the General Counsels of the Air Force, Army, and Navy, the Counsel to the Commandant of the Marine Corps, the Judge Advocates General of the Air Force, Army, and Navy, the Staff Judge Advocate to the Commandant of the Marine Corps, the Legal Counsel to the Chairman of the Joint Chiefs of Staff, and the Director of the Joint Staff. The working group was tasked to make recommendations concerning employment of particular interrogation techniques by DOD interrogators. The assessments and recommendations of this working group were considered carefully by senior DOD officials in their deliberations.

The deliberations of the working group were extensive, with vigorous exchanges of views and consultations, including among the senior legal advisors of DOD components, which the DOD General Counsel encouraged. The DOD General Counsel met with and listened to the views expressed by the Judge Advocates General, the Staff Judge Advocate to the Commandant, the General Counsels of the military departments, the Counsel to the Commandant of the Marine Corps, and the Legal Counsel to the Chairman of the Joint Chiefs of Staff individually and collectively. He offered to meet with any working group staff attorney who desired to discuss his or her views on the issues under review ,and did so on at least one occasion with multiple attorneys. The working group's assessment of the legal issues included the input of and consultation with Department of Justice representatives. The DOJ Office of Legal Counsel is the authoritative entity in the executive branch for interpretations of the law. In light of the complexity and significance of the issues presented for consideration by the working group, consultation with DOJ Office of Legal Counsel was especially prudent and desirable. The DOD General Counsel encouraged interaction and debate between the working group and the DOJ Office of Legal Counsel. This resulted in at least two meetings between DOJ Office of Legal Counsel attorneys and the working group and at least one meeting between a senior Office of Legal Counsel attorney and a Military Department General Counsel.

In my experience and consistent with my understanding of the role of the Office of Legal Counsel within the Department of Justice, legal opinions of the Office of Legal Counsel are considered to be authoritative within the executive branch. Mr. Haynes did not override the objections of the military lawyers in the Judge Advocate General's Corps. He communicated this longstanding executive branch policy. Nevertheless, although the Office of Legal Counsel legal opinion was considered to be authoritative with respect to the Department of Defense as to the opinion's analysis of the law it reviewed, there were other matters of law as well as considerations

of policy that the working group did address and incorporate into its report without reliance on the views of the Office of Legal Counsel. The Office of Legal Counsel properly left those other matters of law and considerations of policy solely to the working group. For instance, the Office of Legal Counsel deferred to the working group on the application of the Uniform Code of Military Justice. The policy arguments regarding reciprocity, among other things, that appear in the working group report were the product solely of the working group efforts. Indeed, the Office of Legal Counsel never suggested, nor did it opine on, any of the interrogation techniques considered by the working group or included in its report during the report's preparation. Mr. Haynes considered all aspects of the report, as did the Secretary of Defense when he approved, consistent with the recommendations of the Chairman of the Joint Chiefs of Staff, the Deputy Secretary of Defense, the Under Secretary of Defense for Policy, and Mr. Haynes, the 24 techniques for use at Guantanamo in April 2003. As was disclosed publicly in June 2004, these 24 techniques were a relatively small subset of the 35 techniques that the working group had recommended for consideration by the Secretary and included only 7 techniques that had not been reflected in earlier versions Army Field Manual 34–52. In sum, there is no basis for asserting that Mr. Haynes overrode the suggestions of anyone who participated in the working group process. Indeed he embraced those suggestions and communicated all views to the Secretary of Defense.

I note that no "Bybee memo" was shared with the working group. The Office of Legal Counsel opinion to which I refer above was not signed by Mr. Bybee, but rather by a senior Office of Legal Counsel attorney and dated March 14, 2003. This opinion, itself, was being drafted and reviewed during the period that the working group was performing its task and benefited from some of the discussion that members of the working group had with Office of Legal Counsel attorneys while they were reviewing and concluding the opinion.

I am not aware of any involvement by then-Counsel to the President Alberto Gonzales in this process as the question appears to suggest.

Addendum to answers provided previously. I request that you consider as part of the answers to both questions the attached July 19, 2005, letter that Michael Marchand, Major General , U.S. Army (retired) sent to Senators Specter and Leahy.

July 19, 2005

Senator Arlen Specter
Senator Patrick Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter and Senator Leahy:

On July 1, 2005, I retired as a Major General from the United States Army after 31 years service as a Judge Advocate. The last 12 years of my career were in the National Capitol Region in positions providing significant exposure to the various DOD General Counsels. In my most recent assignment as The Assistant Judge Advocate General of the Army – a position I held from October 2001 until my retirement – I was privileged to work with William J. Haynes in his capacity as General Counsel of the Department of Defense.

In light of much inaccurate reporting on Mr. Haynes' performance as general counsel during these last four years that our Country has been at war, I feel compelled to speak on the record on one important point.

In my experience, Mr. Haynes has been more inclusive of the Judge Advocates General and the senior service lawyers of the armed services than any General Counsel of the Department of Defense. He has consistently and repeatedly reached out to the senior lawyers of the Department of Defense on some of the most difficult legal issues to confront our armed services, our Department, and our Country. He has done so throughout my tenure in formal and informal ways. He has been respectful of our views, even on those occasions when he may not have agreed with one or more of us. The Department and its legal community – and the Country – have been well served.

I made this point recently to some members of the Judiciary Committee staff while presenting a briefing. Even so, I wanted to be sure that you understand my views on this matter.

With deep respect for your service to our Country, I am,

Sincerely,

Michael Marchand

Michael Marchand
Major General (ret.), U. S. Army

CONTENT OF JUDGE ADVOCATE GENERAL DISAGREEMENT

19. Senator KENNEDY. Mr. Dell'Orto, a January 2003 Air Force JAG memo for the record objects to the conditions that were seen on the ground at Gitmo. At our hearing, General Romig, General Rives, and General Sandkuhler all stated that they wrote memos and spoke in opposition to some of the determinations in the Bybee memo and the subsequent Working Group Report. Mr. Hutson, the former Navy JAG, said the Bybee legal framework "was shallow in its legal analysis, shortsighted in its implications, and altogether ill-advised. Frankly, it was just wrong." The Navy General Counsel said this legal analysis is questionable at best. Mr. Haynes overrode all their objections and decided the Bybee framework would apply. Why did Mr. Haynes convene a working group if he was going to ignore their expert opinions and go with the Bybee memo?

Mr. DELL'ORTO. Please refer to my answer to Question 18 above. In addition, and with respect to the matter of the various memoranda submitted by the Judge Advocates General duringthe working group process, a review of those memoranda demonstrates that much of their focus was on the applicability of the Uniform Code of Military Justice and on policy concerns. I believe that an objective reading of the

working group report leads to the conclusion that those issues are more than fairly addressed in the report. And, as I indicated in the answer to Question 18 above, in communicating his recommendation to the Secretary of Defense, Mr. Haynes embraced those suggestions and communicated all views to the Secretary.

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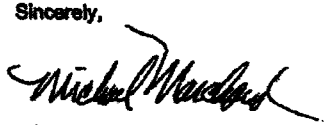

Michael Marchand
Major General (ret.), U. S. Army

20. Senator KENNEDY. Mr. Dell'Orto, was there an understanding that certain elements of the Bybee memo would not change under the working group?

Mr. DELL'ORTO. Drafts of what later emerged as the March 14, 2003, Office of Legal Counsel opinion were made available for review by and discussed with the working group as the opinion evolved. Upon finalization, the March 14, 2003, signed opinion was considered to be authoritative within the executive branch, including the Department of Defense, with respect to the matters of law it addressed. To the extent that the working group report addressed those areas of law that the Office of Legal Counsel opinion analyzed, the working group relied on that interpretation of the law. To the extent that the Office of Legal Counsel opinion did not address

other matters—for example, the applicability of the Uniform Code of Military Justice and the considerations of policy as discussed in the answer to Question 18 above—the Office of Legal Counsel deferred all review of those matters to the working group.

POLICY ON TREATMENT OF DETAINEES

21. Senator KENNEDY. Mr. Dell'Orto, the President's policy on treatment of detainees asserts that all detainees are to be treated humanely. What is the definition of "humanely" or "humane treatment" according to the DOD Office of the General Counsel?

Mr. DELL'ORTO. As outlined by the White House on February 7, 2002, U.S. policy, as determined by the President, is to treat an persons detained in the global war on terrorism "humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949. Even though th detainees are not entitled to POW privileges, they will be provided many POW privileges as a matter of policy." The White House Fact Sheet of February 7, 2002, identifies that all detainees are being provided:

- three meals a day that meet Muslim dietary laws;
- adequate shelter;
- water and medical care;
- clothing and shoes;
- showers;
- soap and hygiene items;
- foam sleeping pads and blankets;
- towels and washcloths;
- the opportunity to worship and reading materials;
- correspondence materials and the means to send mail:
- the ability to receive packages of food and clothing, subject to security screening.

In addition, the February 2002 Fact Sheet states that "The detainees will not be subjected to physical or mental abuse or cruel treatment. The International Committee of the Red Cross has visited and will continue to be able to visit the detainees privately. The detainees will be permitted to raise concerns about their conditions and we will attempt to address those concerns consistent with security."

Furthermore, in accordance with existing DOD regulations, including Army Regulation 190–8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees:

- "All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation."
- "The inhumane treatment of EPW, CI, RP is prohibited and is not justified by the stress of combat or with deep provocation."
- "All prisoners will receive humane treatment without regard to race, color, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment."
- "All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind. They will not be subjected to medical or scientific experiments."

22. Senator KENNEDY. Mr. Dell'Orto, the policy also calls for treatment in accordance with the principles of the Geneva Conventions, as long as it is consistent with "military necessity." Who determines when "military necessity" exists, and how is that term defined?

Mr. DELL'ORTO. The conditioning of certain rights under the law of war based upon the military necessity requirements of the detaining power is a fundamental concept within the law of war that is reflected within the Geneva Conventions of 1949. Throughout history, the need for the law of war to accommodate the security concerns of the detaining power has been recognized. Pictet's Commentary to the Third Geneva Convention of 1949, for example, states that limitations on access to prisoners of War for "reasons of imperative military necessity" were necessary: "Otherwise, [detaining powers] would sometimes have been put in a position where they

were faced with the choice of either violating the Conventions or harming their own military position. Here as elsewhere, humanitarian principles must take into account actual facts if they are to be applicable." (p.611).

DIFFERENCE BETWEEN TREATMENT OF DETAINEES

23. Senator KENNEDY. Mr. Dell'Orto, at the hearing you and the JAGs confirmed that the treatment of detainees in Iraq, who are covered by the Geneva Conventions, is subject to different guidelines than treatment of detainees in Gitmo. Part of the justification for approval of certain interrogation techniques at Gitmo, which would fall outside the Geneva Conventions, is that they are necessary to combat terrorism and save American lives of troops on the ground. Iraq is also currently a battleground for combating terrorism. Do you distinguish between individuals detained as terrorism suspects with links to al Qaeda or other jihadist organizations in Iraq, and those detained as non-jihadist Iraqi insurgents?

Mr. DELL'ORTO. From the outset in the conflict in Iraq, the administration position has been unequivocal that the Geneva Conventions applied to Operation Iraqi Freedom. The application of the Geneva Conventions to the conflict in Iraq, however, does not necessarily result in their protections applying to non-Iraqi, al Qaeda members who enter Iraq to conduct terrorist attacks against coalition forces. The facts of any such case would need to be carefully scrutinized, but significant al Qaeda figures cannot legitimize their terrorist activities in the global war on terrorism simply by entering Iraqi territory.

24. Senator KENNEDY. Mr. Dell'Orto, is the intelligence you obtain from terrorism suspects in Iraq superior to the intelligence you obtain from those detained in Gitmo?

Mr. DELL'ORTO. I am not in a position to compare the quality of intelligence obtained from detainees in Iraq and Guantanamo.

MILITARY INSIGNIA

25. Senator KENNEDY. Mr. Dell'Orto, part of the justification for not detaining the individuals at Gitmo in a manner consistent with the Geneva Conventions is that they were not wearing proper insignia on the battlefield. Are there American servicemembers on the ground not wearing military insignia? If so, where?

Mr. DELL'ORTO. DOD Directive 5100.77, DOD Law of War Program, December 9, 1998, provides that U.S. Armed Forces must comply with the law of war during all armed conflicts, however such conflicts are characterized. The law of war includes prohibitions on perfidy and requires combatants to distinguish themselves during combat operations.

The President determined that although the conflict with the Taliban is covered by the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (GPW), the Taliban detainees are not entitled to POW status under the terms of GPW Article 4. One aspect of this determination was based on the factual determination that the Taliban, as a force, failed to wear a fixed distinctive sign recognizable at a distance. The requirements for POW stat11s in Article 4 for Armed Forces, militias, and other volunteer corps refer to the actions of the collective forces, not individuals.

Standard U.S. military uniforms satisfy the requirements of GPW Article 4. Unlike the Taliban, U.S. Armed Forces operate in accordance with the generally accepted practice of States with respect to the wearing of uniforms by members of the Armed Forces. The requirements of Article 4 may, however, be satisfied by other than a standard military uniform, e.g., a partial uniform or a fixed, distinctive sign, provided that forces are recognizable as combatants. In limited, exceptional circumstances, a small number of U.S. forces may be authorized to operate in other than standard military uniforms, but in all cases are required to conduct their operations in accordance with the law of war.

26. Senator KENNEDY. Mr. Dell'Orto, if captured, would members of the U.S. military not wearing insignia receive the protections of the Geneva Conventions?

Mr. DELL'ORTO. As already noted, U.S. Armed Forces conduct their operations in accordance with the law of war. In an international armed conflict where the Geneva Conventions apply, captured U.S. forces would be entitled to, and should be provided, POW protections. Should there be doubt regarding whether a captured U.S. servicemember belongs to any of the categories enumerated in GPW Article 4, he

or she would be entitled to, and should enjoy, POW protections until such time as his or her status has been determined by a competent tribunal.

Regardless of whether the Geneva Conventions apply to a conflict, captured U.S. servicemembers should be provided appropriate care and humane treatment from the time they are captured until their ultimate release or repatriation, consistent with the law of war.

It should be noted in addressing this question in the context of a U.S. servicemember captured by the Taliban or al Qaeda that their forces have demonstrated repeatedly their absolute disregard for the law of war and any obligation to provide humanitarian care and treatment to persons they capture.

[Whereupon, at 12:47 p.m., the subcommittee adjourned.]

1993, and his now Executive Vice President and General Counsel for Verizon.

When the Department of Defense suggested former Attorney General Barr, I said excellent, he has got a lot of experience.

Thank you for joining us, Mr. Attorney General, and we look forward to your testimony.

STATEMENT OF WILLIAM P. BARR, FORMER ATTORNEY GENERAL OF THE UNITED STATES, AND EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, VERIZON CORPORATION, WASHINGTON, D.C.

Mr. BARR. Thank you, Mr. Chairman. It is good to see you and members of the Committee.

Rarely have I seen a controversy that has less substance behind it. Frankly, I think the various criticisms that have been leveled at the administration's detention policies are totally without foundation and unjustified.

I would like to distinguish between three different kinds of activity that are underway in Guantanamo. First, Guantanamo is a facility for holding enemy combatants are that are captured in the battle theater. We have been fighting wars for 230 years. As the Supreme Court recognized, fighting wars is about destroying the enemy's forces either by killing them or capturing them. And when you capture them, you detain them, and we have been holding enemy combatants, as I say, for 230 years in various facilities.

There is nothing punitive about it. This is not a legal proceeding. There is no need to bring charges. They are being held because they were identified on the battlefield as threats to our forces and to our military mission. That determination has already been treated as a military determination, and it is not one that gives foreigners who encounter our troops on the battlefield due process rights to hearings and evidentiary hearings as to whether they were, in fact, or not enemy combatants. There has never been a case to suggest that. In fact, the Supreme Court cases say that foreigners outside the United States with no connection to the United States do not have due process rights.

Now, I would like to analogize to World War II. We held over two million Axis prisoners during World War II. Over 400,000 were here in the United States, in camps, in Utah, Texas and Arkansas. And it wasn't cut and dry. As a matter of fact, there was a lot of confusion about who was who because we seized a lot of Eastern Europeans and Asians who had been fighting in the Soviet army, captured by the Germans and conscripted into forced labor battalions who were claiming, hey, I am a Soviet citizen, I am not an enemy combatant.

They didn't get into U.S. courts. They didn't get lawyers. They didn't get hearings as to are you a member of the Werhmarcht or not. They were detained until the end of hostilities. So there are no due process rights for foreigners encountered on the battlefield.

However, this should be a moot issue because the administration has provided—for the first time I am aware of in United States history, is providing an adversarial process to each of these individuals to contest whether or not they are, in fact, enemy combatants. This is the CSRT process, and that comports with the process al-

luded by the Supreme Court in *Hamdi* that should be followed for American citizens here in the United States. So they are getting whatever due process rights could theoretically exist, and I submit none do. They are getting more than ample process.

The second issues goes to the Geneva Convention. I hear a lot of pontificating about the Geneva Convention, but I don't see what the issue is. The Geneva Convention applies to signatory powers. Al Qaeda hasn't signed it. They are not covered by the Geneva Convention, period. With all this pontificating, I haven't heard anyone allege any set of facts that would change that.

The President absolutely correct in saying they are not entitled to protection. Does this mean they are without rights? No. If you are not covered by the Geneva Convention, then you are held in detention under the common law of war and you are treated humanely. But to say that terrorist like al Qaeda are entitled to protections of the Geneva Convention demeans international law, the Geneva Convention and our troops.

The third point I want to make is about military tribunals. I guess we have come a long way because when the President first put out his order on military tribunals, there was all this strum and drone and, gee, this is a big end run around Article III courts and the world is coming to an end and this is unprecedented and this is a big deal.

Well, the debate seems to have recentered a bit. I haven't heard any serious argument that these cases belong anywhere else than military tribunals. Now, military tribunals are different than this issue of whether you are an enemy combatant. As to some set of people in our custody, we will choose to bring prosecutions. That is a punitive action and we will try them for violations of the laws of war. Historically, that has always been done by military courts.

So, for example, in World War II when we tried German soldiers for atrocities like the massacre at Malmady, they were tried not in Article III courts here in the United States. They were tried by military courts. And the President has quite rightly, consistent with 230 years of history, set up military courts to try violations of the laws of war.

Part of what is going on here, I think, in this debate is a fundamental misapprehension between two different kinds of constitutional activity. One is law enforcement and the other is waging war. They are different, and it is fundamentally incompatible with our Constitution and constitutional principles to try to take the strictures on executive power that exist in the law enforcement arena and carry them over and try to apply them when the country is waging war against foreign foe.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Barr appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Barr.

Our next witness is Lieutenant Commander Charles Swift, who is defense counsel in the Office of Department of Defense Military Commissions. He is currently detailed to represent Salim Hamdan, who is facing trial by the military commission.

Lieutenant Commander Swift is a graduate of the United States Naval Academy and has a law degree from the University of Puget

Sound, graduating cum laude there. He has been affiliated with the Navy's Judge Advocate General Corps after returning to active service in 1994.

Thank you for your service, Commander Swift, and we look forward to your testimony.

STATEMENT OF LIEUTENANT COMMANDER CHARLES D. SWIFT, DEFENSE COUNSEL, OFFICE OF CHIEF JUSTICE COUNSEL, DEPARTMENT OF DEFENSE, WASHINGTON, D.C.

Commander SWIFT. Mr. Chairman, members of the Committee, as the Chairman stated, my name is Lieutenant Commander Charles Swift and I am with the Office of Military Commissions for the past 2 years and I represent Salim Ahmed Hamdan. I also was in line to represent Mr. Habib, until the press releases regarding his treatment caused his—or charges were not approved against him following those press releases.

My testimony today is made in my capacity as Mr. Hamdan's attorney. And, as such, it does not necessarily represent the opinions of the Department of Defense or the Department of the Navy.

I first got to Military Commissions in March of 2003. Prior to coming to the commissions, I had absolute respect for military justice. I had worked in it. I am extremely proud of our military justice system. So it was surprising to me to get to Military Commissions and during my in-brief be told Mr. Haynes, the general counsel, that Mr. Lloyd Cutler, who has participated in the Quirin Commission as a prosecutor, one of the junior people on it, considered that commission that only thing in his distinguished legal career of which he was not proud. I couldn't really put those two things together—military justice and not being proud. After 2 years at the Military Commissions, I regret to say I can.

I met Mr. Hamdan in December of 2003. I was detailed pursuant to an order or a request by the chief prosecutor. That request said that the purpose in detailing me was to negotiate a guilty plea. It also said that my access to Mr. Hamdan was contingent upon the fact that he engage in those negotiations toward a guilty plea and that if he didn't, then we wouldn't have access anymore. In my military career as an attorney, I had never been detailed to represent somebody under those circumstances.

When I met him, he had already been in solitary confinement for more than 45 days. I call it solitary confinement because Mr. Hamdan was by himself. He was in a windowless room where ventilation was provided only by an air conditioner and where there was no natural lighting. He exercised—and the guards confirmed this—only at night for about 30 minutes. He didn't see any other detainees at any other time, and he was already, in my observation—I am not a physician, but in my observation, under extreme mental stress.

I had to tell him that the only way I could guarantee that I would see him again was if he agreed that we were going to plead guilty to something. To do that ethically, I decided that the only way to do that was to tell him I can't guarantee you—I don't know what the Supreme Court is going to say, but if I am not allowed to see you—

Chairman SPECTER. This is a guilty plea to what?

Commander SWIFT. War crime unspecified, sir.

That if I am not allowed to see, I will file a habeas and a mandamus writ in Federal court on your behalf. I don't know that that would work, but that is what I will do.

I subsequently requested speedy trial. I had requested that in February of 2004. General Hemingway responded in March of the same year saying that—I requested it under the UCMJ because Congress had said in passing Article 36 for commissions that the standards would never be less than the UCMJ. So I felt that surely a speedy trial would be available. I was told no, and it wasn't until I filed a suit in Federal court that Mr. Hamdan got charges. In fact, it was only when the Supreme Court guaranteed that that option existed.

The problem with military commissions ultimately, sir, comes somewhat to what General Hemingway said, and I have the most respect for him. He said I am here on behalf of here on behalf of the Government. The problem is that General Hemingway advises General Altenburg, who is the ultimate judge. A military commission under the rules doesn't have the ability to make any final ruling. They have to send it to General Hemingway for legal review. But he is also here as the prosecutor; he has already made up his mind. We can't say that this is an independent and fair process. It is not befitting of America. If we had the judge also be the prosecutor, would that be an American process, sirs and ma'am?

Thank you. I yield the rest of my time and I would ask that you consider my written testimony.

[The prepared statement of Commander Swift appears as a submission for the record.]

Chairman SPECTER. Your full statement will be made part of the record, Commander Swift.

Our next witness and final witness on this panel is Professor Stephen Schulhofer, Professor of Law at New York University. He has authored some 50 scholarly articles and books, six books, and his recently published work goes to the core of the issues we have here today, called, quote, "The Enemy Within: Intelligence-Gathering, Law Enforcement and Civil Liberties in the Wake of 9/11."

Thank you very much for coming in today, Professor Schulhofer, and we look forward to your testimony.

STATEMENT OF STEPHEN J. SCHULHOFER, PROFESSOR, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NEW YORK

Mr. SCHULHOFER. Thank you, Senator Specter, members of the Committee.

The issues arising out of the Guantanamo detentions are enormously important to our National security because it is essential that we be able to convince the world that America is fighting for freedom and for human dignity. We can't defeat terrorism if we win battles at Tora Bora, but lose the cooperation and respect of the world's one billion law-abiding Muslim citizens. Guantanamo is hurting us very badly.

Senator Cornyn, nobody wants to turn loose the dangerous terrorists you describe; nobody does. Nobody wants to miss the chance to get life-saving intelligence, but we can't let our actions create

dozens of new terrorists for every terrorist we capture, and that is what now seems to be happening.

I have been asked to focus on solutions to this dilemma. That is a problem we have been studying carefully at the Brennan Center for the past 2 years. Global terrorism poses unique challenges, but when it comes to detention, interrogation and trial, we have found no reason to think that the traditional institutions used in all prior wars aren't up to the task. I should say that again because it is obviously not conventional wisdom. In matters of interrogation, detention and trial, we have found no reason to think that traditional institutions aren't up to the task.

The principles that should guide our response to Guantanamo are basically three. First, we should stick closely to the pre-9/11 procedures. Doing that will minimize start-up costs. And most important, it will give us the legitimacy that has been disastrously missing from our detentions at Guantanamo.

Second, our aim should not be to see how many safeguards we can avoid. That is the thinking that has brought us to where we are today. We must maximize transparency and accountability. We must do that even if the lawyers convince you that it is not legally required.

Third, Congress and the administration need to address these issues quickly, but there is no point in doing that in a way that will simply re-inflame world opinion. The point of acting quickly is to show that we are ready to embrace accountability and accept the rule of law, openly administered by independent tribunals. Courts and courts martial already can do that effectively, particularly with the tools provided by the Classified Information Procedures Act.

With that straightforward solution right at our fingertips, it is simply tragic that we are letting ourselves lose this propaganda war. It is tragic that we are letting hardened terrorists paint themselves as victims and elude the punishments that are long overdue, and it is not because defense counsel have had the audacity to file motions. That is not the cause of this delay. It is because the administration is trying to build an entirely new system from scratch.

In terms of intelligence, Admiral Jacoby has one view that you heard read into the record this morning, but let's be clear about this. No other country in the Western world claims that successful interrogation requires keeping terrorism suspects in isolation for years on end. Britain, when it faced a grave emergency in Northern Ireland, extended incommunicado detention from its normal period, which was 48 hours, to a maximum of 5 days—5 days, Mr. Chairman. For the Israelis, even in areas under military occupation, the detention of suspected terrorists before their first court hearing is limited to a maximum of 8 days.

How can we be surprised that the world doesn't buy into Admiral Jacoby's view? How can we be surprised that the world recoils at incommunicado detentions that are lasting for more than 3 years? Congress and the administration should move quickly to start cutting our losses. As I mentioned, there is no reason to think the traditional war-time procedures can't handle the issues. The details are in my written statement.

That said, some of the key facts are still obscure, and "trust us" is just not an answer that works beyond our own borders. So as

Senator Biden said, we do need a bipartisan study, this one focused on detention, interrogation and trials. I know Washington doesn't want another study commission, but there may be no other way to demonstrate our commitment to the rule of law. I think what is equally important is there may be no other way to be sure that our tough-minded practices aren't helping the enemy more than they are helping us. The stakes are very high and we have to get this right.

Thank you for your attention.

[The prepared statement of Mr. Schulhofer appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Schulhofer.

We now come to the questioning of the panel, and let me begin with you, Commander Swift. When your instructions to obtain a guilty plea did not work out, you then represented Mr. Hamdan in the habeas corpus proceedings in the United States District Court for the District of Columbia. Is that correct?

Commander SWIFT. Yes, sir.

Chairman SPECTER. And was there any limitation placed upon your representation of him there?

Commander SWIFT. No, sir, there wasn't. During this entire proceeding, I want to assure this panel, this Committee, that I have never felt any pressure from my seniors or from my bosses or anyone in the military—

Chairman SPECTER. So you just proceeded to do a lawyer's job?

Commander SWIFT. Sir?

Chairman SPECTER. You just proceeded to do a lawyer's job?

Commander SWIFT. Sir, I proceeded to do the job I believed to be as a lawyer and an officer in that situation required.

Chairman SPECTER. Is it customary, or are there many other cases where a detainee like Mr. Hamdan is provided counsel like you, well-trained and versed in the field, with experience and expertise?

Commander SWIFT. To my knowledge, two of the cases that were cited for commission's proposition are the Yamashida case and the Quirin case. In both of those, Colonel Royale brought that case to the Supreme Court, and the defense counsel, who will go unnamed in the Yamashida case, went so far as to fly their petition for habeas to the Supreme Court out on an airplane from the Philippines.

Chairman SPECTER. There has been testimony here today that counsel is available in these proceedings before the military commission. To what extent have you found that to be true?

Commander SWIFT. Well, there was counsel available at one time, sir. The problem is that that time has passed. At its height, the Office of Military Commissions and the defense counsel's office was six full-time attorneys. As of July 22nd, it will be down to one, unless reliefs are identified. I am no longer attached directly to the office, in that I went on to other orders. I continue to represent Mr. Hamdan.

Chairman SPECTER. Would the availability of defense counsel impede what Senator Kyl had spoken about here earlier today as the interrogation process which needs to be a continuum?

Commander SWIFT. I don't agree that it would, sir. After an immediate position, my experience—and I can only speak for my ex-

perience here, sir—is that more times than not, when my client has valuable information and there is an opportunity to benefit the Government and benefit himself, my immediate advice is let's give the information and get the benefit of it.

Chairman SPECTER. Let me turn to former Attorney General Barr. In the opinion which Judge Green handed down on a series of Guantanamo cases, she found deficiencies in the CSRT's failure to provide detainees with access to material evidence upon which the tribunal affirmed their, quote, "enemy combatant status," and the failure to permit the assistance of counsel to compensate for the Government's refusal to disclose classified information directly to the detainees.

Mr. Barr, to what extent is it realistic to give detainees access to classified information so that they are able to defend themselves? You made a comment about this is not an adversarial proceeding; the rights are limited. How do you balance that out, or is there no balance?

Mr. BARR. In my mind, it is a prudential judgment by the chief executive, the commander in chief, because it is preposterous to say that there is some kind of constitutional right that the foreign person seized on the battlefield has to look into American intelligence during a way.

I mean, just think about the enormity of that. You know, our troops make a judgment that someone is a hostile and then we have to have an adversary proceeding and then they get free rein into looking into classified material. It is ridiculous.

Chairman SPECTER. Let me turn to Mr. Margulies. My time is nearly expired.

Your representation of Mr. Habib certainly was successful. Was there any evidence to the extent that you feel free to comment about the substance of the Government's charges?

Mr. MARGULIES. What I can say is that I have reviewed the classified and the unclassified portions of the returns. I can only discuss the classified portions to the extent that it has become public. For instance, portions of it are discussed in Judge Green's decision. If the allegations against him were true, he wouldn't be home. If there were an atom's weight worth of true to them, he would still be in custody.

The Department of Defense does not disclose why it is it releases. What it does is puts them on a plane and sends them home. I am the only person who actually got to go home with him, and so we had advanced notice of it. But all we know is that they made very strong allegations against him and then the facts came out that it appears that those allegations were based on statements taken when he was in Egypt. And when that fact came out, he was released.

Chairman SPECTER. I am past time, which I don't like to be, but we are not going to have another round, so I want to follow up with you on just one further area, Mr. Margulies.

Your job as defense counsel is obviously to represent your client, to secure his release if you can. But you have heard the testimony and you know the circumstances of the problems of a terrorist attack and you know the difficulties of producing competent evidence

and giving detainees access to confidential information because of the security problems.

Can you take a step backward and give us a view as to how you would reconcile these differences?

Mr. MARGULIES. I can try.

Chairman SPECTER. That is too broad a question for now, but I will ask you to respond to it. But I would like to ask you to respond further when we work through these issues after this hearing is over today. This is just the start of a lot of hard work on the part of the Committee in trying to figure out what our constitutional duty is to establish these rules.

But what would you say on this tough issue of balance?

Mr. MARGULIES. Two things, Senator. One, my colleagues and I—and when I say my colleagues, that is the lawyers that I have been working with, and there is now a substantial number. I have to give a particular nod to the lawyers at the Center for Constitutional Rights who have been my colleagues in *Rasul* since the case began, and at Sherman and Sterling here in D.C. who have represented the companion case of Al-Odah. We stand ready to work with you and your colleagues in whatever capacity you want.

I know Professor Schulhofer can address this as well. Regarding your other question, the Federal courts of the United States are steeped in the procedures and statutes governing the use and dissemination of classified information. We have dealt with this problem for decades, and dealt with it successfully in terrorism trials.

We know how to create a process that both comports with the requirements of the law and protects national security classified information. We have an entire body of statutes—the Classified Information Protection Act, or CIPA—that can be imported into, either by legislation or by the habeas rules, to control the flow of information in habeas proceedings for the 540 people who are not going to be subject to military commissions.

The problem is that the CSRTs not only rely on classified information that is not shared with the prisoner, but do not share it with counsel. So he must rebut—in fact, the burden is on him to rebut secret information that is not shared with him that he doesn't know about. That is what collectively makes it an invalid process.

Chairman SPECTER. Okay, thank you very much, Mr. Margulies.

Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman. Thank you, all four of you, for being here.

Professor, let me ask you a question. I have sort of been thinking about this this morning. General Hemingway said one of the reasons it took 3 years to begin commissions was because they had to build a whole new judicial system.

Was it necessary to build a whole new judicial system?

Mr. SCHULHOFER. Senator, it was not necessary. For people who have been captured overseas on the battlefield, we have procedures—Army Regulation 190–8—for prompt determinations right on the battlefield of their status. We have procedures. If they are claimed to be unprivileged combatants, as General Barr claimed a minute ago, our own procedures require further process because treating them as unprivileged means that they don't have the

rights to communicate with their families and other principals under the Geneva Convention.

Senator LEAHY. Let me follow that up just a little bit further because you said if they are picked up on the battlefield. Have you heard, as I have, that some of the individuals picked up were not captured during combat, but were picked up far from any battlefield; I have been told in countries such as Bosnia? Does that raise a concern for you if that is so?

Mr. SCHULHOFER. Absolutely. We know for a fact—even though the Government has simply refused to give a direct answer to questions about this, we know for a fact that many of the people, even people seized in Afghanistan, were not seized by our own troops, which was the formulation General Barr mentioned. These are people who were seized by warlords in Afghanistan and literally sold to us under the claim that they had been fighting. That is just Afghanistan for a starter.

Then we know for a fact that some people were picked up in Bosnia. We know for a fact that some of the enemy combatants were arrested right here in the United States. One of them was arrested at O'Hare Airport in Chicago. One of them was arrested by the FBI in Peoria, Illinois. And these people have been determined to be enemy combatants on the theory that the entire world is a metaphorical battlefield. So we know for a fact that that is going on.

Senator LEAHY. It is interesting. I am not looking for answer to this, but if the entire world is a metaphorical battlefield and we know that we will be facing terrorists as long as anybody in this room lives, that gives you an awful lot of leeway if you follow these rules.

Lieutenant Commander Swift, you have been in the military for 18 years. You are obviously there as a career military officer. Defending suspected terrorists probably doesn't make you the most popular person at the officer's club, if I am correct.

Commander SWIFT. I was concerned about that, sir. To relate, though—I think that this is incredibly important to the military—I went back to my 20th reunion at the Naval Academy. One of the people I was kind of worried about seeing is a Marine Corps lieutenant colonel who has had an awful lot of combat time. He has been in every campaign. And he came up to me at the reunion and he looked at me and said, I go out there everyday to fight for our freedom on the battlefield; don't you do dare stop fighting in the courts.

Senator LEAHY. As the proud father of a former Marine, I am delighted to hear that response. When I was a prosecutor, I recall always arguing that we get the best defense attorney possible. The system works better.

You heard General Hemingway's testimony this morning about the military commissions. Is there anything you would like to add to his testimony, or disagree with his testimony?

Commander SWIFT. I would start principally with the idea of rights. The first thing we do is list rights, but they don't read you the last paragraph. The last paragraph says that nothing in the instruction that supposedly creates these rights actually creates a right in any court. Moreover, they are subject to change at any time and cannot be enforced by the accused.

Now, to me, a right is something you get to keep and you get to have unless due process takes it away from you, not a change in the instruction, and it can be enforced. So I think when we start with the entire process, when these have been listed as rights to you, they are not actually rights. They are the current processes and they can be changed at any time and they are unenforceable by the accused.

Senator LEAHY. I think I referred to this morning those pesky rights. Again, when I was a prosecutor—and Senator Specter had far more experience as a prosecutor—those rights oftentimes made our life more difficult, but I don't think either one of us would ever suggest that we not have them.

The administration has argued that if the Geneva Conventions apply to the war on terror, then members of al Qaeda would receive prisoner of war protections and we would not be able to interrogate them. One, is that correct? And, secondly, what advantages would there be for the U.S. to apply the Geneva Conventions to the war on terror?

Commander SWIFT. There would be one—just to relate from history, sir, the Japanese were certainly considered during World War II to be fanatical, willing to die rather than surrender. In fact, they had the precursor of suicide bombers, the kamikaze pilot.

Senator LEAHY. The battles of Mount Surabachi show that.

Commander SWIFT. Yes, sir. The most effective interrogations of the Japanese who were captured were conducted in accordance with the Geneva Conventions. They were conducted by a Marine colonel who was steeped in the Japanese language, their philosophy and understanding. By treating them kindly and humanely, he undercut the propaganda that they had been fed that the Americans were simply out to annihilate the Japanese. When they found that not to be true, they cooperated.

I would also say that as far as applying the Geneva Conventions to al Qaeda, I would harken back to what the Milliken court said. At the end of the court, it said it makes no sense to apply the pains of the law of war to those who cannot claim its protections.

Milliken was a terrorist presumably of his day. He was supposed to be supporting an insurrection in the north against—overthrow of the army behind enemy lines. They said if you are not going to apply the protections of the military to him, you can't apply the military law to him.

If we apply the Geneva Conventions and say we are holding ourselves under their accountability, then we can say we are going to hold you accountable, too. We cannot start this process by saying, well, the Geneva Conventions don't apply to you, you have no protections, we don't have to follow them, and now we are going to hold you accountable for violating them.

Senator LEAHY. Thank you, Commander. I am proud of your response and I think you reflect the feelings of many in the military. And I think you are fighting to make sure we have all of those rights, all of the military are, and I applaud you for upholding them.

I wonder, Mr. Chairman, could I ask Attorney General Barr one question?

Chairman SPECTER. Sure. Go ahead, Senator Leahy.

Senator LEAHY. It is always a pleasure to see Attorney General Barr here. He is no stranger to this Committee in good times and bad. I hope they are mostly good times.

John Walker Lindh was a U.S. citizen who fought alongside the Taliban. To begin with, I am not holding any brief for Mr. Lindh, but he was prosecuted in Federal court and he is now serving a 20-year sentence. Yasir Hamdi, who was another U.S. citizen, was captured in Afghanistan. He was designated an enemy combatant and he was held in a Navy brig for more than 2 years. He was not allowed access to either a lawyer or family.

The Supreme Court then said he was entitled to a fair hearing—hardly a radical ruling from hardly a radical Supreme Court. But the administration said, well, rather than give him the hearing, we will release him. So one minute, he is too dangerous to be allowed access to a lawyer. The next minute, all of a sudden he is free to go.

Quite a bit different, the treatment between Lindh and Hamdi. Which case had a better result?

Mr. BARR. Well, obviously, the Lindh case had a better result, but I think you are mixing up two different things here. One is the legal regime that applies to American citizens, and I think the administration has always taken the position and recognized that in any war you will find American citizens fighting in enemy forces. That has been the case.

That was the case in World War II. There were Americans fighting in the Werhmarcht, and we had captured some, and the administration took the position that they were always entitled to habeas corpus. They can get habeas corpus review of their detention, and the question is what standard applies; what is the showing that has to be made in habeas corpus review to justify continued detention of an American citizen. It didn't address foreigners who do not have a connection with the United States. The court laid out very roughly what the procedures are and those are essentially the procedures that are being given to the foreign detainees at Guantanamo.

But I don't know why the administration dropped the case, although I heard Mr. Margulies talk about all this great way we have of handling classified information. That is nonsense. I had to make the decision to drop many prosecutions precisely because at the end of the day there was no way of protecting that classified information in a criminal prosecution if it was material to the conviction.

Senator LEAHY. So Hamdi got a free pass?

Mr. BARR. I don't know why they dropped it.

Senator LEAHY. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Leahy.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. I was thinking about the subject matter of today's hearing and the rules by which enemy combatants are detained, interrogated and the like, and it struck me as somewhat ironic when I considered what sort of rules and facilities are provided by our enemy for Americans and our allies who are captured during hostilities.

Of course, it occurred to me also that our enemy doesn't capture any Americans or allies. They kill them, they blow them up, which I think again demonstrates that are engaged in a different kind of conflict and a different kind of war. But it is nonetheless a war, but with an enemy that does not respect or observe the law of war or the conventions that we think of when we think about two countries fighting each other through uniform forces.

As the 9/11 Commission and others have observed, we can't rely strictly on a law enforcement paradigm that it seems has infused so much of the comment here today. We have got to adopt a new paradigm, both to share intelligence and to deal with the need to get actionable intelligence from these detainees, and, yes, to even detain them, these dangerous individuals who are likely to go back and kill more Americans, if released, until the end of the hostilities, as peculiar as that may seem to our modern sensibilities.

I certainly understand and endorse the work that Commander Swift and Mr. Margulies are doing as lawyers. As lawyers in an adversary system, their job is to present the best arguments that they can think of for their client, and I understand and respect that role that lawyers play. But I do believe, and I think we all would agree that the courts are ultimately the ones who are going to make the decision on this. In fact, the courts have. Indeed, in some cases the administration has prevailed and in some cases they have not prevailed.

Let me just ask you, Mr. Barr, with regard to the Geneva Convention issue, hasn't the administration's position that al Qaeda fighters do not have privileges of a POW been upheld by Federal courts? As a matter of fact, according to my count, it is at least three Federal courts. It has been endorsed by the 9/11 Commission and by the Schlesinger report.

Is that your understanding, sir?

Mr. BARR. Yes, Senator, that is my understanding. And as I said earlier, I have not heard any allegation or contention that could possibly bring al Qaeda under the protections of the Geneva Convention.

Senator CORNYN. Now, with regard to the Supreme Court's recent decisions which we are talking about here during this hearing, Mr. Barr, didn't the Court agree with the administration's position that the President has the power to detain enemy combatants and reject legal challenges to that position?

Mr. BARR. Yes. I think one of the things that has been missed by the media in reporting those decisions is all the core positions of the administration that were sustained. The Court specifically said, yes, you can detain enemy combatants. It is not punitive, it is not a trial-type situation where you are trying to punish them.

Number two, it said you can even detain American citizens as enemy combatants. It was in that context that they elaborated on the standard you need for keeping an American citizen in the United States. They also seemingly endorsed use of military tribunals, and they pointed out that military tribunals are inherently flexible and they talked about the need for flexibility in dealing with these kinds of procedures in the national security arena and how the flexibility of military tribunals permits that.

In fact, notwithstanding the professor's comments that we sort of have things on the shelf we can use, that is simply not true. These kinds of situations always involve unique circumstances, which is why we have generally constituted military commissions directed at specific conflicts. And I think that the President's order did exactly what we needed for this particular conflict.

Senator CORNYN. Thank you very much.

Well, in the end I hope we at least all can agree that notwithstanding the arguments people may make in court, or people of good faith who are trying to advance the cause of actually getting a decision on this, that we will ultimately at least agree that the courts are going to be the ones who are ultimately going to decide the parameters of the rights accorded to these detainees, as they have already largely through the Supreme Court's decisions in *Hamdi* and *Padilla* and others.

Thank you very much, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Cornyn.

Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman. Mr. Chairman, I just want the Committee to know that today Attorney General Gonzales, I gather in Brussels, has said, and I quote—and this is about Guantanamo—"We have been thinking about and continue to think about whether or not this is the right approach. Is this the right place, is this the right manner in which to deal with unlawful combatants," he told reporters in Brussels, and I must commend him for that open view.

Mr. Chairman, I would also like to put in the record something we downloaded from the White House fact sheet yesterday, and that is a statement on detainees and it says the United States is treating and will continue to treat all of the individuals detained at Guantanamo humanely, and to the extent appropriate and consistent with military necessity in a manner consistent with the principles of the Third Geneva Convention, 1949.

Then the fact sheet goes on to discern Taliban are entitled to POW status, but al Qaeda detainees are not. And I think in a way, that is the rub. I think, in a way, it is the determination of who is who, guilty of what, that is a real problem here. And I have just about reached the conclusion that this special military commission is not a positive thing, but the Uniform Code of Military Justice really is.

Could I ask this question of anybody that knows: How many cases have come before the military commission?

Commander SWIFT. To date, there are four. Two cases actually had commissions convened in them. The other two cases did not get that far. So there are four people identified at present. Two of the individuals who were to be tried by military commissions requested to represent themselves—or excuse me—one did, and in the other one there was a question regarding counsel so they never started. So there are a total of four.

Senator FEINSTEIN. Thank you. Commander Swift, if I might, you mentioned that you had been told you could only represent Mr. Hamdan as long as it was to negotiate a guilty plea. Did you receive any document to that effect?

Commander SWIFT. Yes, ma'am, I did.

Senator FEINSTEIN. And could you tell us about that document, please?

Commander SWIFT. Ma'am, it was a target letter to the acting chief defense counsel, who at that time was Colonel Will Gunn—he is now the chief defense counsel—on December 15, 2003. It requested Colonel Gunn, who was the detailing authority, to make counsel available for Mr. Hamdan. It was from the chief prosecutor, Colonel Fred Bork, who was at that time the acting chief prosecutor for the military commissions. He said that they were considering preparing charges and that they desired to have a defense counsel detailed. He then put some limitations on that.

Senator FEINSTEIN. And what were those limitations?

Commander SWIFT. Specifically, ma'am, he said that he was authorized to detail a military defense counsel to advise Mr. Hamdan on how he might engage in pre-trial discussions with a view toward resolving the allegations against him; that the prosecutor's office would make arrangements with Commander, Joint Task Force Guantanamo, for such detailed military counsel to have access to Mr. Hamdan.

Senator FEINSTEIN. Now, how do you interpret that?

Commander SWIFT. Well, I interpreted it most on this last line, ma'am: "Such access shall continue so long as we are engaged in pre-trial negotiations." I interpreted that, ma'am, to mean when I was detailed that the only way I could see Mr. Hamdan was we were negotiating for a guilty plea. There are no negotiations in a not guilty plea.

Senator FEINSTEIN. Mr. Chairman, may I enter that memo into the record, please?

Chairman SPECTER. Without objection, it will be made part of the record.

Senator FEINSTEIN. Thank you.

I would like to ask Professor Schulhofer a question. In your written testimony, you refer to Congress's law-making power under Article I, section 8, of the Constitution. It has been my view that Congress has both the power and the responsibility to take on the issue of detentions and interrogations, specifically pursuant to two clauses of section 8, to make rules concerning captures on land and water, and to make rules for the government and regulation of the land and naval forces.

Do you agree, and are these the particular sources you are referring to?

Mr. SCHULHOFER. Thank you, Senator. Yes, I believe that those two clauses are as explicit and clear as anything could be, and they are not in footnotes. They say that Congress shall have the power to make rules concerning captures and to make rules concerning the regulation of the armed forces. In the absence of congressional action, unquestionably the President must take action as commander in chief, but there is absolutely no room for doubt that this is an appropriate responsibility for Congress.

Senator FEINSTEIN. I think, Mr. Chairman, at best what we have is a very confused situation, depending on interpretation, how commanders interpret how orders are given. And I think we have seen this over and over again. What is clear to me is that we have the legal responsibility to make the rules and I think we ought to do

that. And I think we ought to see that they are consistent with the Geneva Conventions.

I would like to ask you this question. How would you recommend that the question of habeas corpus be handled?

Mr. SCHULHOFER. Thank you, Senator. I have tried to spell out some of the details in my written testimony. I think one place to start, just to be very clear about this, is we are not talking about a law enforcement paradigm. I think it is quite misleading to think that those like myself who have concerns about this process are simply saying you should follow a law enforcement paradigm.

What we are saying is that we should follow the normal military procedure for people who are captured in battle. The normal procedure would have been a prompt battlefield determination of status. Three years later, it is very difficult to do that when the President and the Secretary of Defense and right down the chain of command have already announced that these people are the worst of the worst.

So in that context, there needs to be some other process.

With respect to people accused of committing war crimes, there is, as well, a process already in place in terms of military courts martial. We are not talking about ordinary law enforcement. We are talking about military courts martial under the Uniform Code of Military Justice. So that would be the beginning framework. I think there is room for Congress to make refinements of the Classified Information Procedures Act. If Congress is not able to act, the courts have residual authority to address new situations, but that would be the basic approach.

And then I think the last thing I would want to say about that is I have said that this is a question of the war paradigm, but there is one important limit to that. If we accept the idea that the entire world is a battlefield—and I understand that. My office is less than a mile from Ground Zero. I understand that extremely well. And September 11th for us was not a day; it was months that we had the smoke and the National Guard. It was months that we could smell human flesh burning at Ground Zero. So I know what that means.

But if we accept the analogy, the conclusion is that the President then has unlimited discretion to swallow up the law enforcement paradigm even—

Chairman SPECTER. Professor Schulhofer, could you summarize this answer? We are trying to at least conclude by 1:30.

Mr. SCHULHOFER. Yes. I apologize, Senator. I think I have actually reached the conclusion of my answer and I will be happy to elaborate further after the hearing.

Chairman SPECTER. That sounds like a good idea.

Anything further, Senator Feinstein?

Senator FEINSTEIN. Thank you.

Chairman SPECTER. Senator Sessions.

Senator SESSIONS. Mr. Chairman, this has been a good and interesting discussion. I wish I had been able to hear all of it since the second panel had come.

I think, in general, the tone of this hearing has suggested widespread abuses on the part of our military, whereas what really is at stake here is a legal debate over exactly what procedures ought

to be utilized. If someone has violated the procedures, they ought to be disciplined.

Commander Swift, with regard to your appointment, isn't it true that you were appointed as counsel for Hamdan for all matters relating to military commission proceedings involving him?

Commander SWIFT. I was so appointed.

Senator SESSIONS. Not just solely to take a guilty plea.

Commander SWIFT. Sir, when I was appointed, my access to Mr. Hamdan was not controlled by the Office of the Chief Defense Counsel. It was controlled by the prosecutor, and the prosecutor told me at the time of my appointment that my access was controlled contingent upon him pleading guilty. In fact, he told me further that I had to give him an answer in 30 days and if I didn't give him an answer in 30 days, I had to request extensions. He was in control of whether I saw my client or not.

I believed as a lawyer that once I had an attorney-client relationship, then I had a duty to represent him, no matter what. But the truth of the matter was I had to advise Mr. Hamdan of the real practicalities, and that was that if he wasn't going to plead guilty, he might not see my again.

Senator SESSIONS. Well, Lieutenant Commander Swift, you are a lieutenant commander, a JAG officer. Prosecutors don't order around JAG defense counsel. I know that and you know that from the little time I had as a JAG officer, and I would note that the order directing you to represent him says "all matters relating to military commission proceedings," close quote.

Mr. BARR. Excuse me, Senator. Could I something there?

Senator SESSIONS. Yes, Mr. Barr.

Mr. BARR. Let's put something in perspective here. The United States has a lot of people that they could charge with war crimes. We are not under any obligation to try these people when they want to be tried. We can try them when we want to try them. Rudolph Hess was captured in 1939 and he was tried in 1946. These people are in detention as combatants. So we can take our time and judge who we want to do.

And it doesn't surprise me that as an initial matter, in terms of allocating our resources, the United States wanted to see if anyone was ready to plead guilty. And if they are ready to plead guilty, we will provide them with counsel. If they are not ready to plead guilty, they can stand in line and wait to be prosecuted down the road. That is not a surprising thing.

Senator SESSIONS. I would also note, Mr. Barr, that the—

Senator LEAHY. Can we have the Lieutenant Commander's answer?

Senator SESSIONS. I thought he answered.

Commander SWIFT. Sir, I would like to respond. As you said, this was extraordinary circumstances, though. I can't see my client without the permission of JTF. I have to write a message every single time and be approved.

Senator SESSIONS. Well, you are unhappy that you have to write a message to see the client. That is one thing. It is another thing to say that you weren't commissioned to represent him on anything but a guilty plea.

Commander SWIFT. My access was contingent upon it, sir. Also, he differed from the situation that Mr. Barr described in that he was in solitary confinement. Had he been among the general detainee population, I would be more willing to agree.

Mr. BARR. Another point on that. Anyone who has gone into a Federal maximum-security prison—you know, these violin strings about people being held in segregation, getting out of their cell 20 minutes a day—I am sorry; that is our system in our maximum-security prisons in the United States for American citizens.

Senator SESSIONS. I couldn't agree more, Attorney General Barr.

I would just like to point out that we have regular visits by the Red Cross. Two hundred of these detainees now have habeas corpus petitions pending in Federal courts. A thorough investigation of all procedures has been undertaken as part of ten major reviews, assessments, inspections and investigations, and we have had hearings on that repeatedly. Seventeen hundred interviews have been conducted. Sixteen thousand pages of documents have been delivered to Congress.

Detention operation enhancements and improvements have involved increased oversight and expanded training of the guards and interrogators to improve facilities. 390-plus criminal investigations have been completed or are ongoing. More than 29 congressional hearings have addressed this issue—29 congressional hearings. Those responsible are being held accountable.

In the Army, one general officer has been relieved from command. Thirty-five soldiers have been referred to trial by court martial, 68 soldiers have received non-judicial punishment, 22 memoranda of reprimand have been issued, 18 soldiers have been administratively separated. The Navy has had nine receive non-judicial punishment. The Marines: 15 convicted by court martial. Seven received non-judicial punishment, and four reprimanded.

So I think it is important for the people who are listening to this hearing today to know that our United States military takes this issue seriously. They brought up the Abu Ghraib matter before the press did. They announced it. They commenced their own investigation. People have been prosecuted and convicted, and we are not going to tolerate the kind of behavior that we have seen in certain of these instances.

But the fact is these are not American criminals, Mr. Barr. I think you have indicated that, and they are not entitled to the same due process rights an American does who expects to be tried in Federal district court somewhere.

Could I ask Mr. Barr one more thing?

Chairman SPECTER. Go ahead, Senator Sessions.

Senator SESSIONS. As Attorney General of the United States, you understand that an Executive has certain powers. The courts have certain powers and the legislative branch has certain powers.

Speaking as an attorney general who would be representing a President of the United States, do you have concerns about what could be an erosion of the Executive's power to conduct a war on behalf of the citizens of the United States?

Mr. BARR. Absolutely, Senator, and what we are seeing, I think, today is really a perversion of the Constitution. The Constitution sets up a body politic, members of a political community, and in

that body politic we have rules that govern us. And what the Constitution is all about is to say that when the Government acts against a member of the body politic to enforce our own domestic laws—that is, the Government acting against one of the people—the judicial branch backs off and acts as a neutral arbiter and various standards are imposed on the executive. And those standards sacrifice efficiency in order to be perfect. We don't want to make a mistake. We would rather let guilty people go and pay that price because we want to get it absolutely right.

That is not what is going on here. What is going on here is our body politic, the people, are under attack from foreigners, a different people. They are trying to impose their will on us and kill us. In that situation, the very notion of the judiciary backing off and playing some role as a neutral arbiter between the people of the United States and a foreign adversary is ludicrous and perverse.

The idea that we can fight a war with the same degree of perfection we try to impose on our law enforcement system, which is to say we will not tolerate any collateral damage in law enforcement and we have to be absolutely mistake-free—to try to use those rules and impose them on a war-fighting machine, to say it has to be absolutely perfect and we can't hold anyone in detention and they have all kinds of due process—the idea that a foreign person that our troops believe is a combatant is going to be held, you know, and we are going to turn the earth upside down and turn our army into detectives to figure out whether it is true or not is ridiculous. We will lose wars. We will lose our freedom.

Chairman SPECTER. Commander Swift, do you have a final comment? I note you straining to be recognized, so you are.

Commander SWIFT. Well, thank you, sir. Just a couple of points in response to what I have heard here today. I would point that where Mr. Hamdan is held is equivalent to the maximum-security prisons of the United States. The difference is it is called administrative by criminal sanction.

I agree that we need every tool available as a military officer to fight and win wars, and that they are not the same thing. I would point out, though, that when we go to hold accountability, when you hold a trial, sir, it says as much about the man who is being accused—it says as much about the society that holds the trial as it does about the individual before it. Our trials in the United States reflect who we are. They are the models of the world.

We heard statistics from Senator Sessions, and I couldn't agree more. What they demonstrated was that the Uniform Code of Military Justice works. It was able to try people who had been inside those prisons. All of those trials are done. It worked great. Why don't we use it and start holding the people who attacked us accountable?

Thank you for your time, sirs.

Chairman SPECTER. Thank you very much. Senator Leahy has one more comment and then we are going to conclude.

Senator LEAHY. Mr. Chairman, I would note, with all due respect, about the administration coming forth on Abu Ghraib and Afghanistan, a lot of people had asked questions about what was

going on there long before anything was said by the administration, and it was said only after it became public.

Senator SESSIONS. No.

Senator LEAHY. We, will go back—

Senator SESSIONS. The General in his press briefing announced that they were conducting an investigation of abuses at Abu Ghraib before anybody raised it.

Chairman SPECTER. We will continue this debate at tomorrow's executive session. It starts at 9:30.

[Laughter.]

Chairman SPECTER. Do you have a final statement, Senator Leahy?

Senator LEAHY. Well, Attorney General Barr, whom I have a great deal of respect for, made a strong statement about how people were held in maximum-security, allowed only a few minutes out and everything else. I would just remind him of something that he is well aware of. Those are people who have been convicted and then sentenced. They weren't just being held under charges.

Thank you, Mr. Chairman.

Chairman SPECTER. Well, thank you, Senator Leahy, and I thank the panel and the first panel. We have a great deal of work to do beyond what we have done here today, and we are going to be following up on some of the specifics for ideas as to how to implement the kinds of approaches which have been articulated here today.

I want to thank the staff, Evan Kelly especially, for wading through an extraordinarily difficult series of judicial opinions. It is worthwhile to go back to some of the basics. This has been as lively a Judiciary Committee hearing as we have had in a long time, absent a Supreme Court nomination, and we have a lot more work to do to follow up.

So thank you all.

[Whereupon, at 1:34 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow:]

[Additional material is being retained in the Committee files.]

Testimony of
The Honorable William P. Barr
Former Attorney General of the United States

June 15, 2005

Mr. Chairman, and Members of the Committee, I am pleased to provide my views on the important issues surrounding our response as a Nation to attacks against our homeland and the continuing national security threat posed by al-Qaeda. By way of background, I have previously served as an Assistant Attorney General, the Deputy Attorney General, and the Attorney General of the United States. I have also served on the White House staff and at the Central Intelligence Agency. The views I express today are my own.

My remarks today focus on the detention of foreign enemy combatants captured during our military campaign against the Taliban and al-Qaeda and, specifically, on the adequacy of the procedures governing their continued detention as enemy combatants and, in the cases of some detainees, their prosecution before military commissions for violations of the laws of war.

It is important to understand that the United States is taking three different levels of action with respect to the detainees. These are frequently confused in the popular media.

First, as a threshold matter, the United States is detaining all these individuals simply by virtue of their status as enemy combatants. The essence of war is the destruction of the enemy's forces – either by killing them or capturing them. When the American military captures and holds hostile forces, it does not do so as a punishment or as a prelude to eventual punishment. Our purpose is to incapacitate the enemy by eliminating their forces from the battlefield. Captured enemy forces are normally detained for as long as the enemy continues the fight.

The determination that a particular foreign person seized on the battlefield is an enemy combatant has always been recognized as a matter committed to the sound judgment of the Commander in Chief and his military forces. There has never been a requirement that our military engage in evidentiary proceedings to establish that each individual captured is, in fact, an enemy combatant. Nevertheless, in the case of the detainees at Guantanamo, the Deputy Secretary of Defense and the Secretary of the Navy have established Combatant Status Review Tribunals ("CSRTs") to permit each detainee a fact-based review of whether they are properly classified as enemy combatants and an opportunity to contest such designation.

As to the detention of enemy combatants, World War II provides a dramatic example. During that war, we held hundreds of thousands of German and Italian prisoners in detention camps within the United States. These foreign prisoners were not charged with anything; they were not entitled to lawyers; they were not given access to U.S. courts; and the American military was not required to engage in evidentiary proceedings to establish that each was a combatant. They were held until victory was achieved, at which time they were repatriated. The detainees at Guantanamo are being held under the same principles, except, unlike the Germans and Italians, they are actually being afforded an opportunity to contest their designation as enemy combatants.

Second, once hostile forces are captured, the subsidiary question arises whether they belonged to an armed force covered by the protections of the Geneva Convention and hence entitled to POW status? If the answer is yes, then the captives are held as prisoners of war entitled to be treated in accord with the various requirements of the Convention. If the answer is no, then the captives are held under humane conditions according to the common law of war, though not covered by the various requirements of the Convention. The threshold determination

in deciding whether the Convention applies is a "group" decision, not an individualized decision. The question is whether the military formation to which the detainee belonged was covered by the Convention. This requires that the military force be that of a signatory power and that it also comply with the basic requirements of Article 4 of the Treaty, e.g., the militia must wear distinguishing uniforms, retain a military command structure, and so forth. Here, the President determined that neither al-Qaeda nor Taliban forces qualified under the Treaty.

The third kind of action we are taking goes beyond simply holding an individual as an enemy combatant. It applies so far only to a subset of the detainees and is punitive in nature. In some cases, we are taking the further step of charging an individual with violations of the laws of war. This involves individualized findings of guilt. Throughout our history we have used military tribunals to try enemy forces accused of engaging in war crimes. Shortly after the attacks of 9/11, the President established military commissions to address war crimes committed by members of al-Qaeda and their Taliban supporters.

Again, our experience in World War II provides a useful analog. While the vast majority of Axis prisoners were simply held as enemy combatants, military commissions were convened at various times during the war, and in its immediate aftermath, to try particular Axis prisoners for war crimes. One notorious example was the massacre of American troops at Malmedy during the Battle of the Bulge. The German troops responsible for these violations were tried before military commissions.

Let me turn to address some of the challenges being made to the way we are proceeding with these al-Qaeda and Taliban detainees.

I. The Determination That Foreign Persons Are Enemy Combatants

The Guantanamo detainees' status as enemy combatants has been reviewed and re-reviewed within the Executive Branch and the military command structure. Nevertheless, the argument is being advanced that foreign persons captured by American forces on the battlefield have a Due Process right under the Fifth Amendment to an evidentiary hearing to fully litigate whether they are, in fact, enemy combatants. In over 225 years of American military history, there is simply no precedent for this claim.

The easy and short answer to this claim is that it has been, as a practical matter, mooted by the military's voluntary use of the CSRT process, which gives each detainee the opportunity to contest his status as an enemy combatant. As discussed below, those procedures are clearly not required by the Constitution. Rather they were adopted by the military as a prudential matter. Nonetheless, those procedures would plainly satisfy any conceivable due process standard that could be found to apply. In its recent Hamdi decision, the Supreme Court set forth the due process standards that would apply to the detention of an American citizen as an enemy combatant.[1] The CSRT process was modeled after the Hamdi provisions and thus provides at least the same level of protection to foreign detainees as the Supreme Court said would be sufficient to detain an American citizen as an enemy combatant. Obviously, if these procedures are sufficient for American citizens, they are more than enough for foreign detainees who have no colorable claim to due process rights.

Moreover, most of the guarantees embodied in the CSRT parallel and even surpass the rights guaranteed to American citizens who wish to challenge their classification as enemy combatants. The Supreme Court has indicated that hearings conducted to determine a detainee's

[1] Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004).

prisoner-of-war status, pursuant to the Geneva Convention,[2] could satisfy the core procedural guarantees owed to an American citizen.[3] In certain respects, the protocols established in the CSRTs closely resemble a status hearing, as both allow all detainees to attend open proceedings, to use an interpreter, to call and question witnesses, and to testify or not testify before the panel.[4] Furthermore, the United States has voluntarily given all detainees rights that are not found in *any* prisoner-of-war status hearing, including procedures to ensure the independence of panel members and the right to a personal representative to help the detainee prepare his case.[5]

Nevertheless, there appear to be courts and critics who continue to claim that the Due Process Clause applies and that the CSRT process does not go far enough. I believe these assertions are frivolous.

I am aware of no legal precedent that supports the proposition that foreign persons confronted by U.S. troops in the zone of battle have Fifth Amendment rights that they can assert against the American troops. On the contrary, there are at least three reasons why the Fifth Amendment has no applicability to such a situation. First, as the Supreme Court has consistently held, the Fifth Amendment does not have extra-territorial application to foreign persons outside the United States.[6] As Justice Kennedy has observed, "[T]he Constitution does not create, nor do

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2 The procedures are created under Army Regulation 190-8. Opening Brief for the United States, Odah v. United States, at 31.

3 Hamdi, 124 S.Ct. at 2651.

4 Opening Brief in Odah at 33-34.

5 Id. at 34-35.

6 Johnson v. Eisentrager, 339 U.S. 763 (1950); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (explaining that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States"); Zadvydas v. Davis, 533 U.S. 678 (2001) (citing Eisentrager and Verdugo for the proposition that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders").

general principles of law create, any juridical relation between our country and some undefined, limitless class of non-citizens who are beyond our territory."[7] Moreover, as far as I am aware, prior to their capture, none of the detainees had taken any voluntary act to place themselves under the protection of our laws; their only connection with the United States is that they confronted U.S. troops on the battlefield. And finally, the nature of the power being used against these individuals is not the domestic law enforcement power – we are not seeking to subject these individuals to the obligations and sanctions of our domestic laws – rather, we are waging war against them as foreign enemies, a context in which the concept of Due Process is inapposite.

In society today, we see a tendency to impose the judicial model on virtually every field of decision-making. The notion is that the propriety of any decision can be judged by determining whether it satisfies some objective standard of proof and that such a judgment must be made by a "neutral" arbiter based on an adversarial evidentiary hearing. What we are seeing today is an extreme manifestation of this – an effort to take the judicial rules and standard applicable in the domestic law enforcement context and extend them to the fighting of wars. In my view, nothing could be more farcical, or more dangerous.

These efforts flow from a fundamental error – confusion between two very distinct constitutional realms. In the domestic realm of law enforcement, the government's role is disciplinary – sanctioning an errant member of society for transgressing the internal rules of the body politic. The Framers recognized that in the name of maintaining domestic tranquility an overzealous government could oppress the very body politic it is meant to protect. The government itself could become an oppressor of "the people."

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[7] Verdugo-Urquidez, 494 U.S. at 275 (Kennedy, J., concurring).

Thus our Constitution makes the fundamental decision to sacrifice efficiency in the realm of law enforcement by guaranteeing that no punishment can be meted out in the absence of virtual certainty of individual guilt. Both the original Constitution and the Bill of Rights contain a number of specific constraints on the Executive's law enforcement powers, many of which expressly provide for a judicial role as a neutral arbiter or "check" on executive power. In this realm, the Executive's subjective judgments are irrelevant; it must gather and present objective evidence of guilt satisfying specific constitutional standards at each stage of a criminal proceeding. The underlying premise in this realm is that it is better for society to suffer the cost of the guilty going free than mistakenly to deprive an innocent person of life or liberty.

The situation is entirely different in armed conflict where the entire nation faces an external threat. In armed conflict, the body politic is not using its domestic disciplinary powers to sanction an errant member, rather it is exercising its *national defense powers* to neutralize the external threat and preserve the very foundation of all our civil liberties. Here the Constitution is not concerned with handicapping the government to preserve other values. Rather it is designed to maximize the government's efficiency to achieve victory – even at the cost of "collateral damage" that would be unacceptable in the domestic realm.

It seems to me that the kinds of military decisions at issue here – namely, what and who poses a threat to our military operations – are quintessentially Executive in nature. They are not amenable to the type of process we employ in the domestic law enforcement arena. They cannot be reduced to neat legal formulas, purely objective tests and evidentiary standards. They necessarily require the exercise of prudential judgment and the weighing of risks. This is one of the reasons why the Constitution vests ultimate military decision-making in the President as Commander-in-Chief. If the concept of Commander-in-Chief means anything, it must mean that

the office holds the final authority to direct how, and against whom, military power is to be applied to achieve the military and political objectives of the campaign.

I am not speaking here of "deference" to Presidential decisions. In some contexts, courts are fond of saying that they "owe deference" to some Executive decisions. But this suggests that the court has the ultimate decision-making authority and is only giving weight to the judgment of the Executive. This is not a question of deference – the point here is that the ultimate substantive decision rests with the President and that courts have no authority to substitute their judgments for that of the President.

The Constitution's grant of "Commander-in-Chief" power must, at its core, mean the plenary authority to direct military force against persons the Commander judges as a threat to the safety of our forces, the safety of our homeland, or the ultimate military and political objectives of the conflict. At the heart of these kinds of military decisions is the judgment of what constitutes a threat or potential threat and what level of coercive force should be employed to deal with these dangers. These decisions cannot be reduced to tidy evidentiary standards, some predicate threshold, that must be satisfied as a condition of the President ordering the use of military force against a particular individual. What would that standard be? Reasonable suspicion, probable cause, substantial evidence, preponderance of the evidence, or beyond a reasonable doubt? Does anyone really believe that the Constitution prohibits the President from using coercive military force against a foreign person – detaining him – unless he can satisfy a particular objective standard of evidentiary proof?

Let me posit a battlefield scenario. American troops are pinned down by sniper fire from a village. As the troops advance, they see two men running from a building from which the troops believe they had received sniper fire. The troops believe they are probably a sniper team.

Is it really being suggested that the Constitution vests these men with due process rights as against the American soldiers? When do these rights arise? If the troops shoot and kill them – i.e., deprive them of life – could it be a violation of due process? Suppose they are wounded and it turns out they were not enemy forces. Does this give rise to Bivens' Constitutional tort actions for violation of due process? Alternatively, suppose the fleeing men are captured and held as enemy combatants. Does the due process clause really mean that they have to be released unless the military can prove they were enemy combatants? Does the Due Process Clause mean that the American military must divert its energies and resources from fighting the war and dedicate them to investigating the claims of innocence of these two men?

This illustrates why military decisions are not susceptible to judicial administration and supervision. There are simply no judicially-manageable standards to either govern or evaluate military operational judgments. Such decisions inevitably involve the weighing of risks. One can easily imagine situations in which there is an appreciable risk that someone is an enemy combatant, but significant uncertainty and not a preponderance of evidence. Nevertheless, the circumstances may be such that the President makes a judgment that prudence dictates treating such a person as hostile in order to avoid an unacceptable risk to our military operations. By their nature, these military judgments must rest upon a broad range of information, opinion, prediction, and even surmise. The President's assessment may include reports from his military and diplomatic advisors, field commanders, intelligence sources, or sometimes just the opinion of frontline troops. He must decide what weight to give each of these sources. He must evaluate risks in light of the present state of the conflict and the overall military and political objectives of the campaign.

Furthermore, extension of due process concepts from the domestic prosecutive arena as a basis for judicial supervision of our military operations in time of war would not only be wholly unprecedented, but it would be fundamentally incompatible with the power to wage war itself, so altering and degrading that capacity as to negate the Constitution's grant of that power to the President.

First, the imposition of such procedures would fundamentally alter the character and mission of our combat troops. To the extent that the decisions to detain persons as enemy combatants are based in part on the circumstances of the initial encounter on the battlefield, our frontline troops will have to concern themselves with developing and preserving evidence as to each individual they capture, at the same time as they confront enemy forces in the field. They would be diverted from their primary mission – the rapid destruction of the enemy by all means at their disposal – to taking notes on the conduct of particular individuals in the field of battle. Like policeman, they would also face the prospect of removal from the battlefield to give evidence at post-hoc proceedings.

Nor would the harm stop there. Under this due process theory, the military would have to take on the further burden of detailed investigation of detainees' factual claims once they are taken to the rear. Again, this would radically change the nature of the military enterprise. To establish the capacity to conduct individualized investigations and adversarial hearings as to every detained combatant would make the conduct of war – especially irregular warfare – vastly more cumbersome and expensive. For every platoon of combat troops, the United States would have to field three platoons of lawyers, investigators, and paralegals. Such a result would inject legal uncertainty into our military operations, divert resources from winning the war into

demonstrating the individual "fault" of persons confronted in the field of battle, and thereby uniquely disadvantage our military vis-à-vis every other fighting force in the world.

Second, the introduction of an ultimate decision maker outside of the normal chain of command, or altogether outside the Executive Branch, would disrupt the unitary chain of command and undermine the confidence of frontline troops in their superior officers. The impartial tribunals could literally overrule command decisions regarding battlefield tactics and set free prisoners of war whom American soldiers have risked or given their lives to capture. The effect of such a prospect on military discipline and morale is impossible to predict.

The Supreme Court's decision in Rasul v. Bush does not undercut these long-standing principles. In Rasul, the Supreme Court addressed a far narrower question – whether the habeas statute applies extraterritorially – and expressly refrained from addressing these settled constitutional questions.[8] The Court, in concluding that the habeas statute reached aliens held at Guantanamo Bay, relied on the peculiar language of the statute and the "'extraordinary territorial ambit' of the writ at common law."[9] Of course, the idiosyncrasies of the habeas statute do not have any impact on judicial interpretation of the reach of the Fifth Amendment or other substantive constitutional provisions. Moreover, the Court's recognition in Rasul that the United States exercises control, but "not ultimate sovereignty" over the leased Guantanamo Bay territory confirms the inapplicability of the Fifth Amendment to aliens held there.

Nevertheless, even if Guantanamo Bay is somehow deemed sovereign United States territory, the Fifth Amendment is still inapplicable. The Supreme Court, in addition to the requisite detention on sovereign United States territory, demands that the aliens only "receive

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8 124 S. Ct. 2686 (2004).

9 Id. at 2697 n.12 (quoting R. Sharpe, Law of Habeas Corpus 188-189 (2d ed. 1989)).

constitutional protections" when they have also "developed substantial connections with this country."[10] Thus, under the Court's formulation, "lawful but involuntary" presence in the United States "is not of the sort to indicate any substantial connection with our country" sufficient to trigger constitutional protections. The "voluntary connection" necessary to trigger the Fifth Amendment's due process guarantee is sorely lacking with respect to enemy combatants. Whatever else may be said, there can be no dispute that these individuals did not arrive at Guantanamo Bay by free choice. Captured enemy combatants that have been transported to Guantanamo Bay for detention thus are not entitled to Fifth Amendment due process rights.

It should also be noted that the Supreme Court's decision in Rasul was a *statutory* ruling, not a *constitutional* one. In other words, the Court concluded only that the federal habeas statute confers jurisdiction on federal district courts to hear claims brought by aliens detained at Guantanamo Bay. The Court nowhere suggested that the Constitution grants such aliens a right of access to American courts.[11]

An important consequence follows: Congress remains free to restrict or even to eliminate entirely the ability of enemy aliens at Guantanamo Bay to file habeas petitions. Congress could consider enacting legislation that does so – either by creating special procedural rules for enemy alien detainees, by requiring any such habeas petitions to be filed in a particular court, or by prohibiting enemy aliens from haling military officials into court altogether.

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[10] Verdugo, 494 U.S. at 271.

[11] See Rasul, 124 S. Ct. at 2695 (explaining that, in light of the Court's interpretation of the habeas statute, "persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review"); id. at 2701 (Scalia, J., dissenting) (emphasizing that "petitioners do not argue that the Constitution independently requires jurisdiction here" (citing statement by counsel for petitioners during oral argument)).

II. Determination of Status under the Geneva Convention

The President has determined that neither members of al-Qaeda nor Taliban fighters are entitled to the protections of the Geneva Convention. While some lower courts and some critics have carped about this decision, there can be no doubt that al-Qaeda and the Taliban fail to meet the Geneva Convention's eligibility criteria.

The Geneva Conventions award protected POW status only to members of "High Contracting parties."[12] Al-Qaeda, a non-governmental terrorist organization, is not a High Contracting party.[13] This places al-Qaeda – as a "group" – outside the laws of war. Furthermore, al-Qaeda and the Taliban fail to meet the eligibility criteria set forth in Article 4 of the Geneva Convention. To qualify for protected status, the entity must be commanded by a person responsible for his subordinates, be outfitted with a fixed distinctive sign, carry their arms openly, and conduct their operations in accordance with the laws of war.[14]

Al-Qaeda and the Taliban fail to satisfy even one of these four bedrock requirements. These enemies our armed forces face on the battlefield today make no distinction between civilian and military targets and provide no quarter to their enemies. They have no organized command structure and no military commander who takes responsibility for the actions of his subordinates. Al-Qaeda and the Taliban wear no distinctive sign or uniform and violate the laws of war as a matter of course. Consequently, these organizations do not qualify for the POW protections available under the Geneva Convention.

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[12] Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 2.

[13] See Memorandum for the Vice President, et al. from President, Re: Humane Treatment of al-Qaeda and Taliban Detainees at 1.

[14] Id. at art. 4A(2).

For these reasons, the President rightly concluded that al-Qaeda and the Taliban do not qualify for POW status under Article 4 of the Geneva Convention.[15] The President's determination that the Geneva Convention does not apply to al-Qaeda and Taliban members is conclusive. This determination was an exercise of the President's war powers and his plenary authority over foreign affairs.[16] This most fundamental exercise of Executive authority is binding on the courts.[17] Furthermore, the United States has made "group" determinations of captured enemy combatants in past conflicts.[18] Accordingly, "the accepted view" of Article 4 is that "if the group does not meet the first three criteria . . . the individual member cannot qualify for privileged status as a POW."[19]

As far as I can tell, none of the President's critics have advanced any set of facts that would call into question the merits of the President's decision. I have heard no serious argument that either al-Qaeda or the Taliban fall within the requirements of Article 4 and thus are entitled to protection under the Convention. Instead, what we see is a lot of sharp "lawyer's" arguments that the President is somehow precluded from making a group decision and that the eligibility of detainees must be determined through individualized hearings before "competent tribunals." These arguments largely rest on a misreading of Article 5 of the Convention.

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15 See Memorandum for the Vice President, et al. from President, Re: Humane Treatment of al-Qaeda and Taliban Detainees at 1.

16 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

17 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964).

18 See, e.g., Howard S. Levie, Prisoners of War in International Armed Conflict, 59 Int'l Stud. 1, 61 (1977); Adam Roberts, Counter-terrorism, Armed Force, and the Laws of War, 44 Survival no. 1, 23-24 (Spring 2002).

19 W. Thomas Mallison and Sally V. Mallison, The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict, 9 Case W. Res. J. Int'l 39, 62 (1977).

Article 5 of the Convention provides that:

> [t]he present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[20]

There is nothing in this Article that forecloses the President from reaching a threshold decision that a particular military formation does satisfy the Treaty standards. Since the Convention's coverage depends, in the first instance, on whether a group in which the detainee participated has the requisite attributes, it necessarily calls for a "group" decision. Certainly, Article 5 does not mean that a group's eligibility can be relitigated through a series of individualized proceedings. By it terms, Article 5 applies only where an acknowledged belligerent raises a doubt whether he is qualifies for POW status. I am not aware that any detainee has raised any "doubt" as to their status. On the contrary, the principle argument of critics has been that a detainee can successfully raise doubt, within the meaning of Article 5, simply by asserting he is eligible. But the United States has expressly refused to adopt a modification of the Treaty that sought to establish that regime.

It seems to me that, once a particular organization has been found not to qualify under Article 4, no individualized inquiry under Article 5 is appropriate or necessary unless a detainee is raising a plausible claim that he belongs to another category that does qualify under Article 4. The classic example is the case of a pilot who, after conducting his mission, is shot down, sheds his uniform trying to escape, and is later apprehended and accused of sabotage. The evident purpose of Article 5 is to allow the pilot to make the claim that he is covered by the Geneva

[20] Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 5.

Convention because he carried out his belligerent acts as a member of the regular armed forces of a signatory power. Here, the detainees have raised no colorable claims that they are members of a force that falls within the categories set forth in Article 4.

III. The Propriety of Military Tribunals

Finally, I want to say a word about those detainees whom the United States is charging with violations of the laws of war. Throughout our history, we have used military commissions to try members of foreign forces for violations of the laws of war.[21] Congress has long recognized the legitimacy of military commissions as a means to prosecute war criminals.[22] As one commentator noted, military commissions "will not be rendered illegal by the omission of details required upon trials by courts-martial."[23] The courts therefore have specifically upheld the use of such commissions,[24] and the President has established military commissions to try members of the Taliban and al-Qaeda for violations of the laws of war.

In one sense we seem to making progress. Originally, when the President promulgated his military tribunal order, there was a hue and cry in some quarters that this was an end run around Article III courts and that all proceedings belonged in out civilian court system. It is undoubtedly this mindset that is still animating much of the sniping. But at this stage there does not appear to be any real argument that these trials belong in civilian courts. It now seems to be widely conceded that military commissions are, in fact, the place where war crimes should be

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[21] William Winthrop, Military Law and Precedents, 464, 832 (2d ed. 1920); Major William Birkhimer, Military Government and Martial Law, 533-35 (3d ed. 1914).

[22] See, e.g., Act of March 3, 1863, § 30 (12 Stat. 731, 736).

[23] Id.

[24] As the Court stated, "the detention and trial of [war criminals] – ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger – are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." Ex Parte Quirin, 317 U.S. 1, 25 (1942).

prosecuted. The debate now seems to have re-centered on exactly what kind of military trial is appropriate. Consequently, those that lost this debate are now attempting to transmogrify military commissions into carbon copies of Article III courts. This effort is without legal merit. First, the Supreme Court recognized in Hamdi that "enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[25] Second, as I will explain, the argument opponents of military commissions advance is derived from a fundamental misapprehension of the underlying statute at issue.

One prominent war criminal whom the United States wishes to try is Hamdan, the former bodyguard and driver of Osama bin Laden. Some individuals – including the district court in that case[26] – have argued that a military commission does not afford enough process and that war criminals must receive the full benefits of a formal military court martial. These arguments ignore the long-standing use of military commissions to try war criminals and grossly misread the Uniform Code of Military Justice.

Those who argue that war criminals should receive a full court martial also incorrectly rely on Article 36 of the Uniform Code of Military Justice ("UCMJ"). That section states that the rules that a President establishes for a military commission "may not be contrary to or inconsistent with" the UCMJ.[27] Contrary to recent arguments, the UCMJ does not establish the baseline for all military commissions. Rather, only a certain few UCMJ provisions apply to military commissions. Thus, requiring military commission to comply with all the provisions of

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25 Hamdi, 124 S. Ct at 2649.

26 Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004).

27 10 U.S.C. § 836(a).

the UCMJ would render those specific references superfluous and render the entire point of a commission unnecessary.

This conflicts with the aforementioned historical precedent and the UCMJ itself, which recognizes the distinction between commissions and courts martial. This limitation also would severely change the courts' traditional understanding that military commissions arise out of common law war powers and not out of any particular statute.[28] Thus, using the UCMJ to limit the President's use of military commissions would contravene the Executive's historic powers to create and manage commissions and would turn the UCMJ's own recognition of a distinction between commissions and courts martial on its head.[29]

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[28] See, e.g., In re Yamashita, 327 U.S. 1, 20 (1946).

[29] A traditional canon of statutory construction holds that courts should avoid interpreting a statute in a way that renders a portion of it worthless. Williams v. Taylor, 529 U.S. 362, 404 (2000).

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May 10, 2005

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Chairman Specter:

I am writing to give my strongest recommendation on behalf of Mr. Brett Kavanaugh to serve on the U.S. Court of Appeals of the District of Columbia Circuit. I have known him both professionally and as a friend for almost a decade and, I can attest that he is exceptionally well qualified to serve on that court.

As general counsel of GTE and subsequently Verizon, I was fortunate to have Brett work on a number of matters for me while he was at the Kirkland & Ellis law firm. Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weaknesses of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. I use a team approach, by which we combine outside lawyers and in-house lawyers into teams to work on various issues. In this regard, we at Verizon found Brett to be extremely collegial and a delight to work with.

Over the years I have come to know Brett as a friend, as well as a professional colleague. In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor.

Finally, I can assure you that Brett is a man of the highest character and personal integrity. In my many years of experience with him, I have never seen a situation in which he has cut corners or allowed expediency to override "doing the right thing."

In short, Brett possesses all the characteristics which we should want in our jurists. I urge the Committee to recommend him to the full Senate. Please let me know if I can assist you with any additional information.

Sincerely,

WPBarr

William P. Barr

MINUTES
Meeting of the Board of Visitors
The College of William and Mary in Virginia

April 21-22, 2005

The Board of Visitors of The College of William and Mary in Virginia met in the Board Room in Blow Memorial Hall on the campus in Williamsburg on Thursday and Friday, April 21-22, 2005.

On Thursday, April 21, the Committee on Audit, the Committee on Financial Affairs, Richard Bland College Committee, the Committee on Buildings and Grounds and the Committee on Student Affairs met in the Board Room. The Nominating Committee and the Committee on Academic Affairs met in the Board Conference Room.

Those present were:

William P. Barr
Robert A. Blair
Janet M. Brashear
John W. Gerdelman
R. Philip Herget III
Susan Aheron Magill, Rector
Jeffrey L. McWaters
Joseph J. Plumeri, II
Anita O. Poston
Michael K. Powell
Barbara B. Ukrop
Henry C. Wolf
Faculty representative: Robert B. Archibald
Student representative: Edward J. Rice

Absent: Thomas E. Capps
Lawrence S. Eagleburger
Sarah I. Gore
Suzann W. Matthews

Others present were:

Timothy J. Sullivan
P. Geoffrey Feiss
Stewart H. Gamage
Samuel E. Jones
Anna B. Martin
Susan H. Pettyjohn
W. Samuel Sadler
Edward C. Driscoll, Jr.
Michael J. Fox
Fanchon Glover
Michael L. Stump
William T. Walker, Jr.
Sandra J. Wilms

Also present were members of the William and Mary Faculty and Student Liaison Committees; Dean Carl Strikwerda, Dean Virginia McLaughlin and Richard Bland College President James B. McNeer and Dean of Administration and Finance Russell E. Whitaker, Jr.

Rector Susan Magill convened the Board in the Board Room as a committee of the whole at 3:10 p.m.

Advising the Board that Suzann Matthews' father, Curtis Wilson, had died early this morning so she had left to join her family in North Carolina, the Rector asked for a moment of silence for the two students who had died since the last Board meeting and for Suzann Matthews.

In his opening remarks, President Sullivan commented on his last year as president and reported on significant progress made on the Campaign for William and Mary, restructuring, and movement of faculty salaries from the 23rd to the 27th percentile. He outlined challenges that were ahead and expressed his thanks to the Board for their support during his presidency. The Board responded

with a round of applause.

Mr. Powell introduced Provost P. Geoffrey Feiss, who reported recent accomplishments by members of the faculty. He introduced Professor of History Melvin P. Ely and Associate Professor of Music Sophia Serghi. Professor Ely briefly discussed his research on the Israel Hill community, located on the Appomatox River near Farmville. Professor Serghi discussed her musical interest, noting that she was now moving into film scoring and would be working at the Sundance Film Institute during the summer. On her return this fall, she expressed interest in developing a film scoring studio as part of the Film Studies program. At the conclusion of the presentation, Dean Strikwerda distributed copies of Professor Ely's book and Professor Serghi's CD to the members of the Board.

Provost Feiss introduced Professor of Sociology David P. Aday, Director of the Southern Association of Colleges and School's (SACS) Reaccreditation Project, who discussed strategic planning institutional effectiveness and SACS and provided a brief overview of the self-study process to date. Professor Aday outlined the schedule, which will culminate in the final decision by SACS in December 2005. Provost Feiss advised that although Board members are not required to participate in the process, it would be valuable if one or two were able to meet with the on site team. Mr. McWaters volunteered to participate.

At 4:12 p.m. the **Committee on Student Affairs** convened. In the absence of Ms. Matthews, the Rector called on Vice President for Student Affairs Sam Sadler.

Vice President Sadler commented briefly on the recent student deaths and what the College has been doing in response. Mr. Sadler advised that the WCWM-FM Annual Report for 2004-2005 was included in the agenda book at Enclosure I. He noted that Ms. Matthews has requested a discussion of the Office of Student Affairs and outlined briefly their organization and critical issues. Mr. Sadler reported on several student successes since the last meeting.

Student Liaisons George Srour and Allison Biggs reported on student activities and discussed the new Student Assembly Diversity Initiative which included the creation of a cabinet post to explore diversity and related issues. The recent Student Assembly elections had resulted in the election of Ryan Scofield as President and Amanda Norris as Vice President.

Matt Reamy, chair of the Bone Marrow Drive, reported briefly on the recent drive which raised $50,000 with grants over $78,000. He advised that this year a Sam Sadler Contribution Award was established to be presented to the individual or organization who made the largest contribution and the first award will be presented next year. He thanked Suzann Matthews for her help every year.

The Rector moved that, pursuant to Section 2.2-3711.A.1., of the Code of Virginia, the meeting be closed in order to discuss matters pertaining to specific personnel and the consideration of contracts. Motion was seconded by Mr. Gerdelman and approved by voice vote. The observers were asked to leave the room and the Board went into closed session at 4:59 p.m.

The Board reconvened in open session at 5:30 p.m. The Rector moved adoption of the **Resolution** certifying the closed session was held in compliance with the Freedom of Information Act. Motion was seconded by Ms. Brashear and approved by roll call vote of the Board members conducted by Secretary to the Board Michael Fox. (Certification **Resolution** is appended.)

At 5:30 p.m. the Rector called on Vice Rector Jeff McWaters. Mr. McWaters advised the Board that he would not be standing for re-election to the position of Vice Rector of the College. The Rector recessed the Board to the student reception in the Board Dining Room.

On Friday, April 22, the Executive Committee met in the Rector's Office while the Committees on Public Affairs and Economic Development, Development and Alumni Affairs and Athletics met in the Board Room, prior to the full Board meeting.

Those present were:

William P. Barr
Robert A. Blair
Janet M. Brashear
John W. Gerdelman
R. Philip Herget III
Susan Aheron Magill, Rector
Jeffrey L. McWaters
Joseph J. Plumeri, II
Anita O. Poston
Michael K. Powell
Barbara B. Ukrop
Faculty representative: Robert B. Archibald
Student representative: Edward J. Rice

Absent: Thomas E. Capps
Lawrence S. Eagleburger
Sarah I. Gore
Suzann W. Matthews
Henry C. Wolf

Others present were:

Timothy J. Sullivan
P. Geoffrey Feiss
Stewart H. Gamage
Samuel E. Jones
Anna B. Martin
Susan H. Pettyjohn
W. Samuel Sadler
Edward C. Driscoll, Jr.
Michael J. Fox
Fanchon Glover
Michael L. Stump
William T. Walker, Jr.
Sandra J. Wilms

Also present were Dean Lawrence B. Pulley and Richard Bland College President James B. McNeer.

At 9:15 a.m. Rector Susan Magill convened the Board in the Board Room as a committee of the whole for the meeting of the **Committee on Public Affairs and Economic Development**. Ms. Poston presided as chair and congratulated President Sullivan and Vice President Gamage for the success in Richmond this year.

Ms. Poston asked for a motion that, pursuant to Section 2.2-3711.A.8., of the Code of Virginia, the meeting be closed in order to discuss matters pertaining to contracts for services. Motion was made by Ms. Brashear, seconded by Mr. Blair and approved by voice vote. The observers were asked to leave the room and the Board went into closed session at 9:16 a.m.

The Board reconvened in open session at 10:10 a.m. Ms. Poston asked motion to adopt the **Resolution** certifying the closed session was held in compliance with the Freedom of Information Act. Motion was made by Mr. McWaters, seconded by Mr. Gerdelman and approved by roll call vote

of the Board members conducted by Secretary to the Board Michael Fox. (Certification **Resolution** is appended.)

Vice President for Public Affairs Stewart Gamage reported that the Publications Office had recently won a CASE Gold National Award for the admissions publication and introduced Director of Publications Cindy Baker, Teri Edmundson from the Publications Office and Director of Admission Henry Broaddus. Ms. Gamage also introduced the Director of the DC Office Adam Anthony.

There being no further business, the Committee adjourned at 10:12 a.m. The Rector advised that, to accommodate the schedule of the Chair of the Nominating Committee, she was suspending the agenda and moved to the report of the Nominating Committee, chaired by Mr. Barr.

Mr. Barr reported that he had consulted with Professor Richard Williamson in his capacity as Coordinator of Legal Affairs and provided a brief review of the relevant sections of the *Bylaws* dealing with Board elections, noting there was a term length specified but no eligibility requirement. The election would be conducted as normal under the Bylaws and the officers would serve for two-year terms. Should any vacancy occur during that term, a special election would be held to elect a person to serve out the remainder to that term and keep the same two year schedule.

Mr. Barr reported that the Nominating Committee had met and recommended the following individuals to serve in the offices noted:

Susan Aheron Magill – Rector
Michael K. Powell – Vice Rector
Suzann W. Matthews – Secretary

Mr. Barr moved the nomination of all three names and asked for nominations from the floor. Hearing none, Mr. Barr moved that nominations be closed. Motion was seconded by Ms. Ukrop and approved by voice vote of the Board. Mr. Gerdelman moved adoption of the slate as presented. Motion was seconded by Ms. Ukrop and approved by voice vote of the Board. A round of applause was offered by the Board. Ms. Magill expressed her thanks to the members of the Board and to the members of the Nominating Committee.

At 10:44 a.m. the **Committee on Athletics** convened as a committee of the whole. Mr. Gerdelman presided as chair.

Director of Athletics Terry Driscoll reported on the teams. Mr. Driscoll asked Vice President Sadler to provide an update on the NCAA Certification process, noting that a site visit was scheduled from May 2 to 4. Mr. Sadler reported that in a preliminary review of the report four minor questions were addressed and the report was approved with no deficiencies. Mr. Driscoll reported on the NCAA Academic Progress Rate report. Mr. Driscoll briefly reviewed upcoming special events and presented a short quiz on athletics facts.

There being no further business, the committee of the whole adjourned at 11:14 a.m.

Following a short break, Rector Susan Magill called the annual meeting of the full Board to order in the Board Room at 11:25 a.m.

Those present were:

Robert A. Blair	Joseph J. Plumeri, II
Janet M. Brashear	Anita O. Poston
John W. Gerdelman	Michael K. Powell
R. Philip Herget III	Barbara B. Ukrop
Susan Aheron Magill, Rector	Faculty representative: Robert B. Archibald
Jeffrey L. McWaters	Student representative: Edward J. Rice

Absent: William P. Barr
Thomas E. Capps
Lawrence S. Eagleburger
Sarah I. Gore
Suzann W. Matthews
Henry C. Wolf

Others present were:

Timothy J. Sullivan	Edward C. Driscoll, Jr.
James B. McNeer	Michael J. Fox
P. Geoffrey Feiss	Fanchon Glover
Vernon R. Lindquist	Jackson N. Sasser
Stewart H. Gamage	Michael L. Stump
Samuel E. Jones	William T. Walker, Jr
Anna B. Martin	Richard A. Williamson
Susan H. Pettyjohn	Sandra J. Wilms
W. Samuel Sadler	.

Also present were Assistant Attorney General Deborah Love and Dean Lawrence B. Pulley.

The Rector asked for any corrections to the minutes of the meetings on February 3-4, 2005, and March 13-14, 2005. Hearing none, the Rector asked for a motion to approve the minutes. Motion was made by Ms. Poston, seconded by Mr. Gerdelman and approved by voice vote of the Board.

The Rector asked for a motion that, pursuant to Section 2.2-3711.A.1., 3., 7., 8. and 10., of the Code of Virginia, the meeting be closed in order to discuss matters pertaining to specific personnel, the consideration of contracts, promotions, tenure and leaves; consultation with legal counsel and briefings by staff members pertaining to actual or probable litigation; to discuss matters pertaining to gifts, bequests and fund raising activities and contracts for services; and to discuss matters pertaining to the consideration of honorary degrees. Motion was made by Mr. Blair, seconded by Mr. Powell and approved by voice vote. The observers were asked to leave the room and the Board went into closed session at 11:26 a.m.

The Board reconvened in open session at 11:50 a.m. The Rector moved adoption of the **Resolution** certifying the closed session was held in compliance with the Freedom of Information Act. Motion was seconded by Mr. Powell and approved by roll call vote of the Board members conducted by Secretary to the Board Michael Fox. (Certification **Resolution** is appended.)

In the absence of Mr. Capps, Mr. Blair reported for the Committee on Audit, noting that the Committee had met jointly with the Committee on Financial Affairs to receive the report of the

Auditor of Public Accounts on FY2004. Deputy Auditor of Public Accounts Bill Cole reported a clean audit. Mr. Blair noted that this report was responsive to the Committee's request for a timely report. Mr. Blair advised that the Committee had also heard a report from the Director, reviewed the audit activities and noted no problems.

In the absence of Mr. Wolf, Mr. Powell reported for the Committee on Financial Affairs. Mr. Powell called attention to the revision in Resolution 40 relating to the change in tuition for the School of Business. Vice President Sam Jones briefly reviewed specific highlights of the budget discussion relating to student financial assistance. Mr. Blair suggested that the Board provide additional funding from private funds under their control to bridge the gap a bit more. Resolution 45 was amended to provide an additional $100,000 for student financial assistance. Mr. Powell moved the adoption of **Resolution 39**, FY2005-06 Operating Budget for Educational and General Program; **Resolution 40(R)**, FY2005-06 Tuition and Fee Structure for Full- and Part-Time Students; **Resolution 41**, FY2005-06 Auxiliary Enterprise Operating Budgets; **Resolution 42**, FY2005-06 Sponsored Programs Operating Budget; **Resolution 43**, FY2005-06 State Appropriated Student Financial Assistance; and **Resolution 44**, FY2005-06 Applied Music Fee Motion was seconded by Mr. Blair and approved by voice vote of the Board. (**Resolution 40(R)** is appended.)

Mr. Powell moved the adoption of **Resolution 45**, FY2005-06 Board of Visitors Private Funds Budget, as amended. Motion was seconded by Mr. Blair and approved by voice vote of the Board. (**Resolution 45(R)** is appended.)

Mr. Powell moved the adoption of **Resolution 46**, Higher Education Financial and Administrative Operations Act and **Resolution 47**, Higher Education Financial and Administrative Operations Act, Alternative Authority for Covered Institutions. Motion was seconded by Ms. Poston and approved by voice vote of the Board.

Mr. Powell moved the adoption of **Resolution 48**, Resolution Authorizing Executive and Delivery of a Memorandum of Understanding with the William and Mary Business School Foundation Relating to the Development, Financing and Construction of the School of Business Building. Motion was seconded by Mr. Blair and approved by voice vote of the Board.

Mr. Powell moved the adoption of **Resolution 49**, Virginia Institute of Marine Science FY2005-06 Operating Budget. Motion was seconded by Mr. Blair and approved by voice vote of the Board.

Ms. Ukrop reported for the Richard Bland College Committee, noting that the Committee had received an update on the residential student housing proposal and anticipated an opening in the fall of 2008.

At the late Hunter Andrews' suggestion, plans for a capital campaign were being explored. The Sheridan Group was being hired to do a feasibility study for the campaign with the goal of raising $5 million to be used for housing and scholarship.

Ms. Ukrop reported that nineteen Richard Bland students were accepted at William and Mary and advised that the Committee had heard an update on the transfer concerns, noting that both Provost Lindquist and Provost Feiss have been working to address the concerns.

Ms. Ukrop reported that Richard Bland=s Commencement would be held on Friday, May 13, and the speaker would be Michael Powell. She encouraged Board members to attend.

In his remarks, President McNeer stated that no one has had a more positive influence on higher education than Tim Sullivan, noting that he had changed the shape of higher education not only at William and Mary but in Virginia. On behalf of Richard Bland, President McNeer presented President Sullivan with a small gift as a token of appreciation.

Ms. Ukrop moved adoption of **Resolution 1**, Restructuring Legislation; **Resolution 2**, Tuition and Fees for 2005-2006; **Resolution 3**, 2005-2006 Operating Budget Proposal; **Resolution 4**, Feasibility Study and Capital/Endowment Campaign, **Resolution 5,** Six Year Capital Outlay Plan; and **Resolution 6**, Lease of Land to Richard Bland College Foundation, as a block. Motion was seconded by Mr. McWaters and approved by voice vote of the Board.

Mr. McWaters reported for the Committee on Buildings and Grounds, noting that the Committee had received updates on William and Mary's six year capital outlay plan, which was revised in Committee, on Project MAST and on VIMS six year capital outlay plan, which was revised to reflect a higher figure in the bid on the bond project. Mr. McWaters advised that, with the retirement of Professor Gary Kreps, Associate Provost for Information Technology Courtney Carpenter will become Director of Project MAST and continue to provide updates to the Committee.

Mr. McWaters advised that the Committee had discussed the naming opportunities of two buildings at VIMS.

Mr. McWaters moved the adoption of **Resolution 7(R),** College of William and Mary 2006-2012 Capital Outlay Plan; **Resolution 8(R),** Virginia Institute of Marine Science 2006-2012 Capital Outlay Plan; **Resolution 9**, Naming of Hunter and Cynthia Andrews Hall; and **Resolution 10**, Naming of the Catlett-Burruss Research and Education Laboratory. Motion was seconded by Mr. Gerdelman and approved by voice vote of the Board. (**Resolution 7(R)** and **Resolution 8(R)** are appended.)

Mr. Powell reported for the Committee on Academic Affairs and moved adoption as a block of **Resolution 11**, Appointments to Fill Vacancies in the Instructional Faculty; **Resolution 12**, Appointments to Fill Vacancies in the Administrative and Professional Faculty; **Resolution 13**, Faculty Promotions; **Resolution 14**, Designated Professorships; **Resolution 15**, Term Designated Professorships for Associate Professors; **Resolution 16**, William and Mary Student Professorship; **Resolution 17**, Faculty Leaves of Absence; **Resolution 18**, Amendments to the Constitution and Bylaws of the Faculty Assembly; **Resolution 19**, Retirement of Herbert M. Austin, School of Marine Science; **Resolution 20**, Retirement of Thomas A. Barnard, Jr., School of Marine Science; **Resolution 21**, Retirement of James R. Baron, Department of Classical Studies; **Resolution 22**, Retirement of Lawrence S. Beckhouse, Department of Sociology; **Resolution 23**, Retirement of James A. Bill, Department of Government; **Resolution 24**, Retirement of Miles L. Chappell, Department of Art and Art History; **Resolution 25**, Retirement of David A. Evans, School of Marine Science; **Resolution 26**, Retirement of William H. Hawthorne, School of Business; **Resolution 27**, Retirement of Steven N. Haynie, Department of Kinesiology; **Resolution 28**, Retirement of Gary A. Kreps, Department of Sociology; **Resolution 29**, Retirement of Robert P. Maccubbin, Department of English; **Resolution 30**, Retirement of James N. McCord, Jr., Department of History; **Resolution 31**, Retirement of William E. O=Connell, Jr., School of Business; **Resolution 32**, Retirement of Roy L. Pearson, School of Business; **Resolution 33**, Retirement of Hans O. Tiefel, Department of Religious Studies; **Resolution 34**, Retirement of Franco Triolo, Department of Modern Languages and Literatures; **Resolution 35**, Retirement of Wanda A. Wallace, School of Business; **Resolution 36**, Retirement of Richard L. Wetzel, School of Marine Science; **Resolution 37**, Retirement of

Ronald C. Wheeler, School of Education; **Resolution 38**, Retirement of Edgar W. Williams, Jr., Department of Music. Motion was seconded by Mr. Blair and approved by voice vote of the Board.

Ms. Magill reported for the Executive Committee and moved the adoption of the report as given in closed session; namely to confer the following degrees at Commencement:

Sir John Elliott - Doctor of Humane Letters
Margaret McKane Mauldin - Doctor of Humane Letters

Motion was seconded by Mr. McWaters and approved by voice vote of the Board.

There was no old business.

Under new business, the Rector thanked Ned Rice for his service as the William and Mary student representative on the Board and as a valuable member of the Presidential Search Committee. She also thanked Professor Bob Archibald for his participation as the first William and Mary faculty representative to the Board. The Rector presented gifts of appreciation on behalf of the Board to both the Administrative Assistant to the Board Sandy Wilms and the Secretary to the Board Michael Fox. The Rector thanked the Nominating Committee for their work and Mr. Blair for his constructive assistance during the process.

The Rector asked Secretary of the Board Michael Powell to read into the record **Resolution 50,** A Resolution in Honor of Anne Klare Sullivan ’66 and Timothy J. Sullivan ’66. Mr. Powell read the resolution and moved its adoption. Motion was seconded by Mr. McWaters and approved by voice vote of the Board. The Rector presented a copy of the resolution to President Sullivan. (**Resolution 50** is appended.)

The Rector moved that, pursuant to Section 2.2-3711.A.1., of the Code of Virginia, the meeting will be closed in order to discuss matters pertaining to specific personnel. Motion was seconded by Ms. Ukrop and approved by voice vote. The observers were asked to leave the room and the Board went into Executive Session at 12:20 p.m.

The Board reconvened in open session at 12:50 p.m. The Rector moved adoption of the **Resolution** certifying the closed session was held in compliance with the Freedom of Information Act. Motion was seconded by Mr. Powell and approved by roll call vote of the Board members conducted by Secretary to the Board Michael Fox. (Certification **Resolution** is appended.)

Ms. Magill moved adoption of **Resolution 51**, Approval of Contract of Employment, noting that the contract includes an appointment to the Law School faculty with tenure. Motion was seconded by Mr. McWaters and approved by voice vote of the Board. (**Resolution 51** is appended.)

The Rector and President Sullivan took part in a brief ceremony to unveil the portrait of former Secretary to the Board and Assistant to the President James S. Kelly. The Rector welcomed Mr. Kelly, members of his family and friends. President Sullivan briefly commented on the artist, Nelson Shanks, noting that he had also painted the portrait of Chancellor Margaret Thatcher. Following Mr. Kelly’s brief response, the Board gave him a round of applause.

There being no further business, the Board adjourned at 1:00 p.m.

Note to Congress

National Review

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EDITOR'S NOTE: What follows is a letter to Congress from the newly formed Coalition for Security, Liberty and the Law, representing dozens of leaders in law enforcement, the legal community, think tanks, and public opinion. The debate over the Patriot Act typically focuses on its opponents--lead, most prominently, by the American Civil Liberties Union. This new coalition aims to change that--so that people who appreciate the contribution the Patriot Act is making to American security are heard.

23 September 2004

The Honorable Dennis Hastert

Speaker of the House

U.S. House of Representatives

Washington, D.C.

The Honorable Nancy Pelosi

Minority Leader

U.S. House of Representatives

Washington, D.C.

The Honorable Bill Frist

Majority Leader

U.S. Senate

Washington, D.C.

The Honorable Tom Daschle

Minority Leader

U.S. Senate

Washington, D.C.

The Honorable Orrin Hatch

Chairman, Senate Judiciary Committee

Washington, D.C.

The Honorable Patrick Leahy

Senate Judiciary Committee

Washington, D.C.

The Honorable James Sensenbrenner

Chairman, House Judiciary Committee

Washington, D.C.

The Honorable John Conyers

House Judiciary Committee

Washington, D.C.

Dear Leaders:

We write to express our strong support for the USA Patriot Act and concern about misinformation about the necessary legal tools it provides to battle al-Qaeda and our other terrorist enemies. Vital sections of the Patriot Act, such as information-sharing provisions, will expire in 2005. For the security and safety of the American people, no provision of the Patriot Act should expire. Moreover, the temporary provisions should be made permanent.

Since its nearly unanimous passage in October 2001, the Patriot Act has played a key--and often the leading--role in successful operations to thwart terrorists dedicated to

destroying America and our culture. In passing the Act, Congress extensively debated the commonsense updates in the law and provided safeguards for civil liberties.

For example, the Patriot Act allows investigators to use tools that had been available to investigate organized crime and drug trafficking. As Sen. Joe Biden (D-DE) explained during floor debate, "[T]he FBI could get a wiretap to investigate the mafia, but they could not get one to investigate terrorists. To put it bluntly, that was crazy! What's good for the mob should be good for terrorists."

The Patriot Act also removed major legal barriers that prevented the law enforcement, intelligence, and national defense communities from coordinating information. Now police officers, FBI agents, federal prosecutors and intelligence officials can protect our communities by "connecting the dots" to uncover terrorist plots before they are completed. Sen. John Edwards (D-N.C.) declared when he voted for the Act, "[W]e simply cannot prevail in the battle against terrorism if the right hand of our government has no idea what the left hand is doing."

The Act made the law current with modern technology. We no longer have to fight a digital-age battle with antique legal weapons left over from the era of rotary telephones. When investigating the murder of Wall Street Journal reporter Daniel Pearl, for example, law enforcement used one of the Act's new high-tech authorities to identify and locate some of the killers.

Before September 11, 2001, law enforcement, intelligence, and national security officials were prevented by legal and bureaucratic restrictions from sharing critical information with each other, and with state and local police.

Before September 11, law enforcement could more easily obtain business and financial records of white-collar criminals, such as nursing home scammers, than of suspected terrorists. It was easier to chase a money trail involving a white-collar criminal than one involving a terrorist. The Act ended this double-standard. Importantly, the Patriot Act still requires the government to ask a judge for a court order to do so.

Before September 11, federal judges could impose tougher prison terms on drug traffickers than on terrorists. The Act strengthened penalties for crimes committed by terrorists, such as arson or attacks on power plants and mass transit systems.

After the Act was passed, terrorist cells were dismantled in Oregon, New York, North Carolina and Virginia. Terrorists were prosecuted in California, Ohio, Texas and Florida. In other words, the Patriot Act's tools are protecting us. Terrorist funds--$200,000,000--have been frozen or seized. We're cutting off their money. We're following the money.

Further, Congress built into the Act strict and structured oversight of the Executive Branch. Every six months, the Justice Department must report to Congress about its activities under the Act. Justice Department officials have testified on the Patriot Act and other homeland security issues scores of times.

The government's success to date in preventing another catastrophic attack on the American homeland since September 11, 2001, would have been much more difficult, if not impossible, without the USA Patriot Act. The authorities Congress provided have substantially enhanced the ability of our law enforcement and intelligence officials to prevent, investigate, and prosecute acts of terror. It is an essential law that provides for checks and balances while enabling the government to fight what will, no doubt, be a challenging and prolonged war against terrorists determined to kill us and destroy our society.

It has been our experience that when people understand the specific provisions of the USA Patriot Act, as opposed to the inaccurate rhetoric, the most frequent reaction is surprise that most of what is in the Act was not already law. That is why, for the safety of the American people, we ask that no provision of the Patriot Act be allowed to expire and the temporary provisions be made permanent.

Sincerely,

Dr. Mark Albrecht, former Executive Secretary, White House National Space Council

Morris J. Amitay, Esq., Vice Chair, Jewish Institute for National Security Affairs

Robert Andrews, former Acting Assistant Secretary of Defense for Special Operations and Low Intensity Conflict

Stewart Baker, former General Counsel, National Security Agency, Steptoe & Johnson LLP

Dr. Thomas G. Barnes, Professor History & Law, University of California, Berkeley

William Barr, former Attorney General

William Bennett, former Secretary of Education and Director of the Office of National Drug Control Policy, Host "Morning in America," nationally syndicated radio show and Washington Fellow: The Claremont Institute

Bradford A. Berenson, former Associate Counsel to President George W. Bush and Co-Founder of Citizens for the Common Defence

Robert Bork, former acting Attorney General, Solicitor General and Circuit Court of Appeals Judge

Dr. Stanley C. Brubaker, Professor of Political Science, Colgate University

Carl M. Buchholz, former Special Assistant to the President for Homeland Security

Chuck Canterbury, National President, Fraternal Order of Police

Frank Cilluffo, former Special Assistant to the President for Homeland Security

Judge William Clark, former National Security Council Advisor, Former Secretary of the Interior

Robert J. Cleary, former U.S. Attorney for the District of New Jersey and Southern District of Illinois

Dr. William R. Van Cleave, Department Head, Defense & Strategic Studies Department, Southwest Missouri State University

Barbara Comstock, former Director of Public Affairs at the Department of Justice

Cesar V. Conda, former Assistant for Domestic Policy to Vice President Cheney

Joseph E. diGenova, former U.S. Attorney for the District of Columbia

Viet Dinh, former Assistant Attorney General

Robert D. Eaglet, Major General, USAF (Ret), former Deputy Assistant Secretary of Air Force

Richard A. Falkenrath, former Deputy Assistant to the President and Deputy Homeland Security Advisor

Vincent E. Falter, Major General, USA (Ret)

Alice Fisher, former Deputy Assistant Attorney General

Frank Gaffney, former Acting Assistant Secretary of Defense and President of the Center for Security Policy

Todd Gaziano, Director, Center for Legal and Judicial Studies, The Heritage Foundation

Fred Gedrich, former State and Defense Department Official

Rudolph Giuliani, former U.S. Attorney and Mayor of the City of New York

C. Boyden Gray, former White House Counsel and Co-Chairman of FreedomWorks

Steven J. Greer, Command Sergeant Major, US Army, (Retired)

Charles A. Hamilton, former Director for Strategic Trade Policy, Office of the Secretary of Defense

Mark Holman, former Deputy Assistant to the President for Homeland Security

Dr. Robert Kaufman, Pepperdine University School of Public Policy

Jack Kemp, former Secretary of Housing and Urban Development and Co-Chairman of FreedomWorks

Bernard Kerik, former New York Police Commissioner

Robert Khuzami, former Assistant United States Attorney, Southern District of New York

Edward Koch, former New York City Mayor and Partner, Bryan Cave, LLP

Frederick J. Kroesen, Gen - USA (Ret)

Paul J. Larkin, Jr., former Acting Director of the Criminal Investigation Division of the EPA Office of Criminal Enforcement, Forensics, and Training

Seth Leibsohn, Executive Director-Americans for Victory Over Terrorism

Dr. Peter Leitner, GMU National Center for Biodefense

Mark R. Levin, former chief of staff to Attorney General Edwin Meese

Dr. Douglas Macdonald, Colgate University

Heather Mac Donald, Manhattan Institute

Cliff May, President of the Foundation for the Defense of Democracies

Andrew C. McCarthy, former Prosecutor, Office of the U.S. Attorney for the Southern District of New York

Honorable Tidal W. McCoy, former Acting Secretary of the Air Force

Edwin Meese, former Attorney General

Larry A. Mefford, former FBI Executive Assistant Director, Counterterrorism and Counterintelligence

C. Preston Noell III, President, Tradition, Family, Property, Inc.

Theodore B. Olson, former Solicitor General of the United States

Duane A. Parde, Executive Director of the American Legislative Exchange Council

Jim Pasco, former Assistant Director, Bureau of Alcohol, Tobacco and Firearms

Dr. Robert L. Pfaltzgraff, Jr., Shelby Cullom Davis Professor of International Security Studies, The Fletcher School, Tufts University

Oliver "Buck" Revell, former Associate Deputy Director for Investigations, Federal Bureau of Investigation

Paul Rosenzweig, Heritage Foundation

Edward L. Rowny, former Ambassador and Lieutenant General USA Retired

Gary Schmitt, Executive Director, Project for the New American Century

William Schneider, Jr., former Under Secretary of State, U.S. Department of State

Kalev I. Sepp, Assistant Professor of Defense Analysis at the Naval Postgraduate School

Dr. Dennis Showalter, Professor of History, Colorado College

Ron Silver, Actor and former president of Actors' Equity

Dr. Joseph M. Skelly, Professor of History, College of Mount Saint Vincent

George J. Terwilliger III, former Deputy Attorney General

The Honorable Fred Thompson, Former Senator

Larry Thompson, former Deputy Attorney General

Richard Thornburgh, former Attorney General and Governor of Pennsylvania

Victoria Toensing, former Deputy Assistant Attorney General

George V. Vinson, former California Director of Homeland Security under Governor Gray Davis

William F. Weld, former Assistant Attorney General, Criminal Division and Governor of Massachusetts

R. James Woolsey, former Director of Central Intelligence

Load-Date: September 27, 2004

End of Document

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June 28, 2004

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Dear Chairman Powell:

I am writing because I am gravely concerned about your impending decision in the 800 MHz proceeding. As you know, Nextel's demand that the FCC bypass the public auction process and award it immensely valuable 1.9 GHz spectrum (worth *at least* $5 billion) is injurious to the wireless industry and especially to Verizon. Given our special need for that spectrum and our demonstrated readiness to bid on it, we have told you that, *as between* Nextel's proposal and the CTIA compromise by which 2.1 GHz spectrum would be sold to Nextel, we obviously would prefer the latter.

However, I have consistently been of the view that Congress must resolve this matter and that the FCC would violate the law if it were to proceed with either plan. As we have previously explained, adopting either plan would contravene the requirements of the Communications Act of 1934, as amended, concerning the Commission's disposition of public spectrum. More than that, proceeding on this course would place the Commission's members themselves in direct violation of federal laws governing the personal accountability of federal officials for the disposition of federal resources. While the Commission is familiar with the Communications Act, I believe it may not be as well acquainted with these latter proscriptions, some of which are criminal in nature. My purpose in writing is to urge the Commission to give these fiscal accountability laws the most careful and serious consideration.

At the outset, the regulatory history of Nextel's 800 MHz spectrum bears repeating. Nextel originally acquired its spectrum in the 800 MHz band for the limited purpose of private, two-way radio communications. Due to that limitation on use, the price that Nextel paid for the spectrum in secondary markets was relatively low. Nextel subsequently petitioned the Commission for a waiver to convert its use of the spectrum to commercial cellular operations and, in deploying its iDEN technology, expressly pledged that public safety systems should be "accorded full and continuing protection" where interference arises. *Petition for Waiver of Fleet Call, Inc.*, FCC File

No. LMK-90036 at A-12 ¶¶ 31, 33-34 (Apr. 15, 1990). While building a successful business on its expanded use of this spectrum, Nextel has increasingly caused interference to public safety operations but failed to take the measures necessary to put an end to this interference. As we have explained, the Commission undoubtedly possesses the power to simply order Nextel to stop the harmful interference it is causing to public safety's communications. *See* Letter from R. Michael Senkowski, Wiley Rein & Fielding LLP, to Marlene H. Dortch, Secretary, FCC, WT Docket 02-55 (Apr. 7, 2004) (attaching white paper entitled *The Federal Communications Commission Lawfully May Order Nextel To Pay The Costs Of Relocating Incumbent 800 MHz Licensees*).

In the wake of the September 11 attacks, Nextel embarked on what has been called "an audacious strategy" to link public safety concerns over the interference it was causing with its desire to obtain more robust spectrum without having to bid for it. Jesse Drucker & Anne Marie Squeo, *Interference Call: Nextel's Maneuver for Wireless Rights Has Rivals Fuming*, WALL ST. J., Apr. 19, 2004, at A1. Nextel launched a massive lobbying campaign to pressure the FCC into granting it a block of new 1.9 GHz spectrum – spectrum far more valuable and capable than its existing stock, and which would allow it to expand its business into new 3G services it can not currently provide. Nextel has proposed that "[i]n return" for the spectrum, it would make the "substantial contributions" of consolidating its operations in the 800 MHz band, giving up 5MHz of its existing spectrum to be added to public safety's existing inventory, and setting up fund of at least $850 million to pay for the relocation costs of public safety agencies. Nextel Press Release, "Critical Public Safety Needs Must Be Addressed" (Apr. 22, 2004) ("Nextel Press Release"), *available at* http://news.morningstar.com/news/BW/M04/D22/20040422006060.html.

Offered the chance for a minimum of $850 million *and* an additional 5 MHz of spectrum band, some public safety groups have supported this plan, though others have not. Thus has a private firm's grab for valuable public spectrum been dressed in the garb of a public safety initiative. While Verizon stands second to none in its commitment to public safety, there are legal ways to accomplish the goal of preventing interference with these important licensees and there are illegal ones. The Nextel plan – and its variants – are illegal ones.

Two different sets of laws clearly prohibit the Nextel plan. The first is the source of the Commission's organic authority, the Communications Act, which delegates to the agency certain powers to manage radio spectrum. As we have consistently maintained, the Communications Act confers upon the Commission no authority whatsoever to award the 1.9 GHz spectrum to Nextel outside the competitive bidding process mandated by Congress. *See* Letter from R. Michael Senkowski, Wiley Rein & Fielding LLP, to Marlene H. Dortch, Secretary, FCC, WT Docket 02-55 (Apr. 6, 2004) (attaching white paper entitled *The Federal Communications Commission Has No Authority To Award Spectrum To Nextel Through A Private Sale*).

Congress spelled out its purposes in mandating public auctions: (1) to capture the full value of radio spectrum, a public resource, for the benefit of the American people, *see* 47 U.S.C. § 309(j)(3)(c) (directing Commission to achieve "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use"); (2) conversely, to avoid conferring windfall upon private parties, *see id.* (Commission must consider "avoidance of unjust

enrichment through the methods employed to award uses of [the public spectrum] resource"); and (3) to allocate spectrum to its highest and best use, as determined by the highest qualified bidder, not the squeakiest political wheel, *see Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1405 (D.C. Cir. 1995) (explaining that because "the party able to use the license most efficiently will be able to bid the most," a system of competitive bidding ensures that "the license will end up in the hands of the firm best able to develop its potential"), *cert. denied*, 519 U.S. 823 (1996). Adoption of the Nextel plan would eviscerate these core legislative mandates.

But the purpose of this letter is not to repeat the legal infirmities of the Nextel plan under the FCC's organic statute, which we and other commenters have already well documented, but to focus your attention on a second set of laws that prohibits Nextel's proposed transaction. These laws are very different in nature from the Communications Act, but of greater consequence. They are the federal laws governing the accountability of government officials in their disposition of federal funds and other valuable public resources: the Anti-Deficiency Act ("ADA"), 31 U.S.C. § 1341(a)(1)(B); the Miscellaneous Receipts Act ("MRA"), 31 U.S.C. § 3302(b); and Section 641 of the criminal code, 18 U.S.C § 641.

Broadly, these laws are animated by one essential constitutional principle: Congress, and Congress *alone*, possesses the power to determine how public resources are to be expended or applied. U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.") Individual government officials simply are not free to expend public resources under their stewardship in support of activity that they themselves deem to be in the public interest. It is for Congress, not a given official, to define the legitimate government interests that warrant the expenditure of public funds or the disposition of federal resources.

Congress has protected its power of the purse through a range of statutory provisions, including criminal laws, three of which are relevant here. First, the ADA subjects to felony criminal liability any "officer or employee of the United States Government" who "involve[s] [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). Second, the MRA obliges "an official or agent of the Government receiving money for the Government from any source" to "deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b). An official who violates the MRA "may be removed from office" and "may be required to forfeit" the moneys not deposited. *Id.* § 3302(d). Finally, Section 641 of Title 18 imposes criminal liability on "[w]hoever . . . without authority , sells, conveys, or disposes of any . . . thing of value of the United States or of any department or agency thereof." 18 U.S.C. § 641.

It is no accident that Congress chose to employ the criminal law to police the fiscal accountability of public officials. Congress well understood that stewards of public resources could be exposed to relentless pressures to convert those resources to private gain. It therefore took stern measures, and aimed them directly at the officials themselves, to ensure that they would not succumb to these pressures and instead remain true to the public trust.

Enclosed is a memorandum by Mr. Charles J. Cooper, former Assistant Attorney General of the Office of Legal Counsel, the division of the Department of Justice responsible for advising agencies on compliance with the ADA and the MRA. As he explains, the plan you are considering is a patent violation of these laws.

It is indisputable that the FCC has no authority to expend federal dollars to pay for the relocation costs of either public safety agencies or private parties such as Nextel. Thus, the FCC could not directly provide financial support for these relocation costs. It is critical for the Commission to understand that *the ADA not only prohibits the agency from making such payments directly but also condemns any transaction that in substance accomplishes the same result.* The classic example of such a prohibited arrangement is one in which the agency, instead of making the payment itself, simply transfers something of value to an intermediary as part of a transaction in which the intermediary undertakes to make the payments the government cannot.

By design, these statutes cannot be circumvented by elevating form over substance. As the Comptroller General has repeatedly emphasized, the ADA is addressed to the substance of a transaction: the labels and characterizations that the agency might apply are irrelevant, and it is the underlying economic realities of the transaction that govern. *See, e.g., To the Secretary of the Interior*, 41 Comp. Gen. 493 (1962); Kate Stith, *Power of the Congress' Power of the Purse*, 97 YALE L.J. 1343, 1371-72 (1988). Thus, the ADA is a law of broad reach that extends to any contrivance that in substance converts a federal resource to support activity that the agency is not authorized to fund.

A 1963 decision of the Comptroller General involving the National Zoo is a good example of this point. *See To the Sec'y, Smithsonian Inst.*, 42 Comp. Gen. 650 (1963). There, the Zoo proposed to grant a permit to a private non-profit organization to install a coin-operated audio tour system. The non-profit planned to use the proceeds to finance a teacher training program and guidebook to the Zoo. Consequently, the Zoo expended no funds itself, but simply issued a permit. The Comptroller ruled that this arrangement violated both the ADA and the MRA. Just as the Zoo could not fund these charitable projects directly, it also could not do so by granting a valuable permit to a private party so that the party could then use that value to fund those efforts.

Here, the substance of the Nextel transaction could not be clearer. Under its plan, the government is to transfer to Nextel spectrum worth at least $5.3 billion in return for, among other things, Nextel's promise to establish a fund of $850 million to cover the costs of relocating the operations of public safety licensees to different frequencies. In addition, the current proposal reportedly contemplates that government would compensate Nextel for its *own* relocation costs. Nextel itself has described the Commission's grant of spectrum as reimbursement for Nextel's payment of relocation costs. *See* Nextel Press Release. It has also described its payment of those costs as a "contribution" for which the government must compensate it with additional spectrum – in other words, as something for which they deserve "credit" for consideration otherwise due the government. *See id.* Under either formulation, this transaction is a facial violation of both the ADA and the MRA: it is manifest that the economic value of the spectrum is being converted into cash payments to third parties that the Commission is legally barred from making directly. Put

another way, it is obvious that Nextel would not make the payments to public safety agencies if it were not recovering that value through the grant of public spectrum.

Indeed, we need not puzzle over the Nextel proposal's evasive purpose and substance: Nextel has been open about it. In its April 22, 2004, press release, Nextel frankly acknowledged that it is getting around the fact that the FCC could not directly fund public safety's needs. So Nextel explicitly proposes to accomplish these payments indirectly, through a transaction contrived to compensate Nextel with spectrum in exchange for Nextel's agreement to make payments that the Commission favors but is legally forbidden to make. Nextel makes no effort to disguise the scheme, proclaiming that it is "committed to funding public safety" but that, as Nextel puts it, "[i]n return for its substantial contributions, Nextel must be made whole with replacement spectrum." Nextel Press Release. Proposals to circumvent statutory restrictions on agency authority are not unfamiliar. Rarely, however, are such schemes openly detailed in a press release.

Nor would it matter whether an intermediary's payments are formally characterized, as Nextel has already done on the record here, as credits or reimbursement for payments that the government could not otherwise make. Even if the government were to disclaim the payments as a form of consideration or reimbursement, the grant of the license to Nextel would still violate the ADA so long as it is conditioned in any way – either expressly or implicitly – on Nextel's payments for the relocation costs of third parties. To determine whether the transaction is in fact so conditioned one need only ask this: would the government award the spectrum licenses to Nextel absent Nextel's relocation payments or, conversely, would Nextel make the payments absent the government's award of the licenses? Nextel has already answered unequivocally: "We are not doing this for charity." Yuki Noguchi, *Nextel, FCC in Standoff Over Prime Cellular Spectrum*, WASH. POST, May 7, 2004, at E01 (quoting Lawrence R. Krevor, Nextel's Vice President of Government Affairs).

From an economic standpoint, Nextel would not make the payments to public safety without, as it says, being "made whole" by acquiring the value of the 1.9 GHz spectrum. In other words, if Nextel is willing to give $1.5 billion to public safety agencies to obtain the spectrum, it should also be willing to pay that money to the government to obtain the spectrum. The only reason it is channeling that money to third parties, rather than to the Treasury, is to accomplish what it perceives to be the Commission's purpose – to ensure funding for public safety; but Congress has not authorized the Commission to expend any funds to that end. As Mr. Cooper's memorandum explains, it is this dimension of the arrangement that violates not only the ADA but the MRA as well. But for the plan's diversionary purpose, those sums paid to public safety agencies would be payable to the United States as consideration. They are thus proceeds or receipts that would otherwise be due the United States for the transfer of spectrum.

The legal infirmities of the Nextel plan are so plain that I am confident that, if you were to ask your legal advisors for their *best judgment* on the question whether the plan was legal under the ADA, the MRA, and Section 641, they would say it was not. There is simply no room for doubt. At a minimum, they would be constrained to advise you that there is a strong likelihood that the plan violates these statutes. And how could it be otherwise? If these statutory mandates

could be evaded through such transparent contrivances, what would remain of Congress' constitutional authority over the public fisc?

There is a fundamental difference between these prohibitions of criminal law and the constraints in an administrative agency's authorizing statute. There are times when agencies, including the FCC, advance strained "interpretations" of their authorizing statutes and take the "litigation risk" of such action. But when confronting criminal provisions such as these, that approach is illegitimate. Public officials (apart from prosecutors and judges, acting in their official capacities) have no authority to interpret either the ADA, the MRA, or Section 641; to the contrary, the very purpose of these provisions is to restrain the actions of these individuals, and the checks the statutes impose directly on them are necessarily impervious to an agency's evasive rationalizations. While these proscriptions may apply to an official's public acts, they seek to hold the official accountable in his personal, individual capacity. Given the duties of federal office, if a government official understands that a particular course of action involves a substantial probability of criminality, the fact that he may have a "colorable" argument to the contrary cannot justify proceeding on that course. Litigation risk is irrelevant; it is a question of fidelity to duties as an officer of the United States. He is thus bound to stay his hand until the matter is resolved by one with authority to do so.

As Mr. Cooper describes in his memorandum, the requirements of these laws are not quaint anachronisms but are taken extremely seriously. For that reason, there are well-established and well-worn avenues by which agencies may seek and obtain authoritative legal guidance on the application of these requirements. The Comptroller General is regularly consulted on the meaning and scope of federal budgetary statutes, and the Supreme Court has cited his "repeated[] rul[ings]" as persuasive authority on the meaning of the ADA. *Hercules Inc. v. United States*, 516 U.S. 417, 427 & n.10 (1996). In addition, the Office of Legal Counsel is available to all agencies to provide authoritative advice.

Given the grave legal problems that indisputably exist, the magnitude of the proposed transaction, and the disruption that retroactive invalidation of the Nextel plan would cause, I respectfully suggest that the Commission, before proceeding any further in this matter, obtain guidance from the Comptroller General on the lawfulness of the plan. It is my understanding that senior members of both chambers of Congress will be asking the Comptroller General for his opinion on this matter. Certainly, you could facilitate the prompt receipt of that advice. It is difficult to conceive of a legitimate reason why this prudent course of action should not be taken.

At the end of the day, I believe that the FCC cannot unilaterally take the steps proposed. This matter belongs in the Congress, which alone can make provision for the proper, adequate, and secure funding for the needs of public safety. Apart from the need to cure the legal flaws present on this record, public policy concerns dictate a congressionally-fashioned solution. Because the Nextel plan is in fact an end-run around limitations on FCC authority, it necessarily results in a bizarre administrative structure whereby a private commercial firm controls the funding available to public safety agencies for their communications needs, sitting in judgment on the legitimacy and adequacy of those agencies' expenditures. Surely the critical homeland security functions

performed by these agencies should instead be funded and administered by federal officials accountable to the Congress and the public.

Finally, I ask you to consider the net effect of a Commission decision that withdraws spectrum from the public auction process, while at the same time allowing those scrambling to obtain spectrum to get credit for promising interest groups a "cut of the action." The result is a political free-for-all in which those who can best manipulate the political system, and muster up the most attractive political constituencies, are able to extract the public spectrum. This is the antithesis of the orderly, objective, transparent, and economically-driven process that Congress instructed the Commission to follow.

Sincerely yours,

William P. Barr

Enclosure
cc: The Honorable Kathleen Q. Abernathy
The Honorable Michael J. Copps
The Honorable Kevin J. Martin
The Honorable Jonathan S. Adelstein

William P. Barr
Executive Vice President
And General Counsel

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Arlington, Virginia 22201

(703) 351-3030

June 1, 2004

Honorable Michael Powell
Honorable Kathleen Abernathy
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Powell and Commissioner Abernathy:

I am writing to request a clarification of whether you support a further stay of the D.C. Circuit's decision in the *USTA II* appeal. Based on the public filings, it is unclear whether either of you joined in the pending request for a further stay filed on behalf of the FCC.

I would appreciate it if you could clarify your position on this issue.

Sincerely,

William P. Barr

Ann D. Berkowitz
Project Manager – Federal Affairs

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(202) 515-2539
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January 7, 2004

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th H Street, SW, Portals
Washington, DC 20554

Re: CC Docket Nos. 01-337, 01-338, 02-33 and 02-52

Dear Ms. Dortch:

The attached letter from William Barr of Verizon was provided to Chairman Powell today. Please place it on the record in the above proceeding. Please let me know if you have any questions.

Sincerely,

Attachment

cc: Commissioner Abernathy
Commissioner Adelstein
Commissioner Martin
Commissioner Copps
B. Tramont
C. Libertelli
M. Brill
D. Gonzalez
J. Rosenworcel
L. Zaina

William P. Barr
Executive Vice President and General Counsel

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January 7, 2004

Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Dear Chairman Powell:

As the new year dawns, there remain pending before the Commission a number of issues that are important to the development and deployment of next generation broadband networks and services. The purpose of this letter is to recap those issues that are most critical to the near term deployment of these vital facilities and services.

Even before becoming Chairman you spoke eloquently about the need for "an agenda that is reflective of the Broadband Digital Migration," and about the need to "clear away the regulatory underbrush to bring greater certainty and regulatory simplicity to the market" because the Commission's "bureaucratic process is too slow to respond to the challenges of Internet time."[1] Likewise, two years ago, you quite rightly recognized that"[t]he widespread deployment of broadband infrastructure has become the central communications policy objective today," and have consistently reinforced that view since.[2] Your fellow Commissioners have expressed similar views, both as to the central importance of broadband policy and the need for rapid action to provide the clarity and certainty needed to foster investment.

While these insights were on target when made, the need for decisive Commission action has become even more acute with the passage of time. Today, the next generation of broadband networks is ready to move off the drawing board and into deployment. Given that current regulations continue to favor broadband services provided by cable companies over those provided by telephone companies like Verizon, the establishment of a clear national broadband policy that covers *all* competitors is critical to that near term deployment.

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[1] Michael K. Powell, Commissioner, FCC, "The Great Digital Broadband Migration," remarks before the Progress & Freedom Foundation, Washington, D.C. (Dec. 8, 2000).

[2] Michael K. Powell, Chairman, FCC, "Digital Broadband Migration" Part II, FCC Press Conference (Oct. 23, 2001); *see also* Separate Statement of Chairman Michael K. Powell, CC Docket No. 01-338 (Feb. 20, 2003) ("I have long stated that broadband deployment is the most central communications policy objective of our day").

Already, in just the time since the Commission announced its Triennial Review order in February of last year, Verizon has significantly increased the reach of its broadband services in reliance on the statements made at the time. Since the beginning of last year, we invested more than $600 million to increase the availability of our DSL services, including the addition of more than 10 million additional DSL-qualified lines by year's end. We also slashed DSL prices, increased the speed of our basic DSL offering, and introduced new symmetrical service offerings. These steps not only benefit our own customers, but they also increase the competitive pressure on the dominant cable providers and have prompted several of the major cable companies to respond in kind, by increasing the speed of their own broadband offerings, reducing prices, or both.

Even more importantly, Verizon has moved ahead aggressively with plans to roll out the second generation of broadband networks that will bring new fiber-optic connections to homes and small businesses. Already, we have completed the process of issuing requests for proposals and selecting vendors for the equipment and facilities that will make up these advanced broadband networks. Even now, we are preparing for the initial deployments beginning early this year, with a target of reaching one million homes by the end of the year. And we are prepared to devote some $1 billion in investment capital to achieving this goal.

But while we are doing our part to deliver the benefits of advanced broadband capabilities to consumers and to the nation's economy, we still do not know what the regulatory rules are for these new networks and services. In particular, there are two critical sets of issues that remain to be resolved.

1. *The first priority is to clarify the unbundling rules for broadband network facilities*.

At the time that the Triennial Review decision was announced, the Commission was clear that it intended to provide broad relief for broadband facilities in order to provide incentives for all providers to invest in broadband networks. This was reflected both in the news release announcing the Commission's decision and in the statements made by you and your fellow commissioners. And we have commended the Commission for taking bold action, and have acted based on the Commission's statements.

When the text of the Commission's decision was released, it too expressed an intent to provide broad relief from unbundling for broadband facilities, and recognized the benefits that would result. As the Commission put it, "with the *certainty* that their fiber optic and packet-based networks will remain free of unbundling requirements, incumbent LECs will have the opportunity to expand their deployment of these networks, enter new lines of business, and reap the rewards of delivering broadband services to the mass market." *Triennial Review* ¶ 272 (emphasis added). Likewise, "with the knowledge that incumbent LEC next-generation networks will not be available on an unbundled basis," competing providers also will have strong new incentives to pursue innovative alternatives. *Id*. "The end result is that consumers will benefit from this race to build next generation networks and the increased competition in the delivery of broadband services." *Id*.

Regrettably, the rules adopted in that proceeding do *not* provide the intended certainty that we will be able to benefit from our broadband investments. When it comes to the all-important details, the rules in certain key respects create new uncertainties and leave critical questions unanswered. In particular, there are three issues that are key to our near term deployment.

First, while the order provides that unbundling is not required for certain broadband facilities under section 251, a different section of the order construes section 271 to impose independent unbundling obligations that continue to apply even when elements do not meet the unbundling standard under section 251. Applying that conclusion to broadband elements would have the same negative effects on broadband deployment that the Commission correctly concluded would result from requiring unbundling under section 251. For example, these next generation networks are fundamentally different from previous circuit switched architectures, and are not readily disaggregated into component parts. As a result, construing section 271 to require access to separate elements of these new networks would require, at a minimum, a significant redesign of these integrated fiber networks to create new and artificial points of access to individual network components. In some cases, our engineers do not even know how to do that, and some functions, such as switching, no longer are performed by individual pieces of equipment but are dispersed throughout the network. In addition, there obviously is more to deploying these networks than just the underlying network facilities, and imposing unbundling obligations also would require the design and development of costly new operations support systems to manage access at these new access points.

Moreover, in order to make our broadband networks as efficient as possible, and thereby reduce the cost, we need to be able to design these networks and the operations systems and practices that support them to common standards as we deploy these networks across the country. Imposing unbundling obligations under section 271, however, would result in different regulatory regimes for former Bell companies than for others, and, in our case, different obligations for former Bell Atlantic service areas compared to former GTE service areas. And these disparate regulatory regimes obviously would defeat efforts to employ common facilities, systems and practices and significantly undermine efforts to deploy broadband network facilities in the most efficient and lowest cost manner.

All of this would greatly inflate the cost and delay deployment of these advanced networks. And the problem is further compounded by the fact that unbundling obligations have proven to evolve over time, adding new cost with each iteration, and increasing the uncertainty and risk. Given all of this, the Commission should simply forbear from applying any separate unbundling obligations that section 271 might ultimately be interpreted to impose.

Second, the order provides that fiber to the premises loops generally do not have to be unbundled in the case of mass-market customers, but imposes greater unbundling obligations for enterprise customers. While we believe it is mistaken to impose greater unbundling obligations on fiber network facilities in the highly competitive enterprise segment of the market, the crucial issue at the moment is that the order does not even define which customers are in the mass-

market for these purposes. As a result, we do not know which customers we can serve without becoming subject to unbundling requirements, which obviously presents a significant problem as we plan our near term deployments. Moreover, as noted above, we need to be able to design and build these networks to common standards in order to deploy them in the most efficient manner possible. What is needed is an objective, bright line *national* standard for determining when customers are and are not in the mass market for these purposes, such as the 48 numbers standard that has been proposed by Verizon.

Third, while the order provides that, as a general rule, fiber to the premises loops to mass market customers are not subject to an unbundling obligation, it suggests those same customers nonetheless are subject to unbundling obligations if they are located in multi-unit buildings. This makes no sense. These concentrated customer locations are among the first to be targeted by cable companies and other competitors with their own broadband services. And there obviously is no reason that owners of single family homes or lawyers with home offices should be able to obtain the benefits that these new broadband networks can deliver, but that less affluent customers renting apartments in nearby multi-unit buildings, or smaller businesses in strip malls or nearby office buildings, should not.

Moreover, the rules should make clear that fiber loops that extend to the basement of these multi-unit buildings are fiber to the premises loops, regardless of whether the fiber extends further to individual units in that building, and that these loops are not subject to unbundling. Fiber to the building *is* fiber to the premises and ought to be regulated as such. To the extent there is a concern about access to any copper wiring in the building that is owned by the incumbent, the Commission's rules can and do address that issue separately.

2. *The second priority is to apply the same regulatory classification to telephone company-provided broadband services that the Commission already has applied to cable broadband*.

In addition to clarifying the unbundling rules that will apply to the underlying network, another critical step is to establish the rules that will apply to the broadband services delivered over these new networks.

As you know, we have long advocated classifying all broadband services, including stand-alone broadband transmission services, as private carriage arrangements under Title I of the Act as the most straightforward way to establish a new regulatory regime for these competitive services. This is the approach that the Commission has taken in a long line of cases under similar competitive conditions, and has been upheld in the courts.[3] It also would ensure that telephone company-provided broadband services are afforded the same regulatory treatment

[3] *See, e.g.*, *AT&T Submarine Sys., Inc.*, 13 FCC Rcd. 21585, ¶¶6-11 (1998) (submarine cables); *Gen. Tel. Co. of the S.W.*, 3 FCC Rcd. 6778, ¶¶7-11 (1988) (for-profit microwave systems interconnected with public switched telephone network); *NorLight*, 2 FCC Rcd. 5167, ¶¶12-19 (1987) (interstate fiber optic systems); *Licensing Under Title III*, 8 FCC Rcd. 1387, ¶¶11-19 (1993) (satellite services); *Loral/Qualcomm P'shp, L.P.*, 10 FCC Rcd. 2333, ¶22 (1995) (same); *see also* n. 4 *infra*.

that today applies to cable-provided broadband services. And, of course, it is consistent with the approach that you and fellow commissioners have supported in public statements.

Some parties have expressed concern about moving forward with this approach with litigation pending in the 9th Circuit over the Commission's regulatory classification of cable modem services. We believe, however, that the Commission can establish a comprehensive broadband regulatory policy consistent with the 9th Circuit's *Brand X* decision, and that doing so would enhance the Commission's litigation posture so that its view of the correct policy result prevails for cable and telephone company-provided broadband alike.

First, the *Brand X* decision itself is very narrow and expressly left intact the Commission's ability to classify broadband transmission services as private carriage arrangements under Title I. As you know, the Commission's *Declaratory Ruling* on cable modem services actually did three separate things: i) it determined that cable modem service offered to end users constitute an information service subject to Title I; ii) it determined that cable companies are free to provide broadband transmission service to ISPs or other content providers on a private carriage basis under Title I; and iii) in a belt-and-suspenders approach to the issue, it waived the *Computer II* unbundling rules and tentatively concluded the Commission should broadly forbear from applying Title II requirements to the extent that courts should find them otherwise applicable.

The *Brand X* decision addressed only the first of these determinations, so that, even in the wake of that decision, cable modem service would remain largely deregulated. In particular, the court did not disturb the Commission's conclusion that cable companies are free to offer transmission services on a private carriage basis subject to Title I. On the contrary, the panel expressly said that it was not addressing the ability of cable companies to offer broadband service on a private carriage (as opposed to common carriage) basis and that this was an issue for the FCC. While this obviously is an important principle in the case of cable companies, and preserves incentives for those companies to provide transmission services on negotiated, commercially reasonable terms, it is equally significant in the case of telephone-company provided broadband services. Indeed, the overwhelming majority of our broadband transmission services are sold on a wholesale basis to ISPs and other content providers, and, under the express terms of the 9th Circuit's decision, the Commission remains free to classify these services as private carriage arrangements subject to Title I.

Second, as to the one issue that the *Brand X* decision does address, the Commission would actually improve its chances of ultimately prevailing by acting now to establish a technology-neutral policy for classifying broadband services. As an initial matter, the *Brand X* panel did not even consider the substance of the Commission's order; instead, it simply followed, without analysis, the Ninth Circuit's prior decision in *AT&T v. City of Portland,* 216 F.3d 871 (9th Cir. 2000). But the *City of Portland* case itself was decided wrongly not only because the panel did not have the benefit of the agency's expert views, but also because it was influenced by the glaring inconsistency between the Commission's treatment of cable modem services and other types of broadband services. In fact, the *City of Portland* panel pointedly noted that DSL is "a high-speed competitor to cable broadband" that the FCC regulates DSL "as an advanced

telecommunications service subject to common carrier obligations." 216 F.3d at 879. The regulatory classification of DSL plainly influenced the panel's determination that cable modem service likewise should be classified, at least in part, as a telecommunications service: "Under the Communications Act, this principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission such as telephone service and DSL, 'regardless of the facilities used.' 47 U.S.C. § 153(46)." *Id.*

In sharp contrast, in previous cases where the Commission has adopted a consistent policy classifying particular services offered by all providers under Title I on the grounds that common-carrier regulation is not necessary *due to the presence of competition in the relevant market*, the courts have upheld its decisions.[4] In the *Brand X* case, the Commission obviously could not point to any such consistent treatment. Nor could it rely on the fact that it has repeatedly concluded that the broadband market is developing in a competitive fashion, and that the preconditions for monopoly are absent, because the Commission was, at the same time, imposing common-carrier regulation on broadband services provided by the minority player in the market. The disparity in treatment of DSL and cable modem service under the existing regulatory scheme thus prevented the Commission from defending its cable modem classification on the simple and valid ground that competition in the broadband market makes common-carrier regulation of cable modem service unnecessary. By eliminating the common-carrier rules currently placed on telephone company-provided broadband, the Commission would enable this powerful new argument in support of its policy determinations, not only for telephone companies *but for cable companies as well*.

Although the *Brand X* panel considered itself to be bound by the previous *City of Portland* decision, the *en banc* court and the Supreme Court will not be so bound. The Commission can help the courts to avoid the mistake made in *City of Portland* by providing further guidance in the form of a coherent national broadband policy. By allowing DSL and other broadband services provided by telephone companies to be offered on a private carriage basis, the Commission would eliminate a major obstacle to the court's adoption of the Commission's own well-considered statutory classification. Conversely, as long as the Commission continues to impose radically greater regulatory burdens on telephone companies in their provision of broadband than it does on their competitors, it is likely to encounter resistance to its broadband regulations in the courts.

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[4] *See, e.g.*, *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 207-210 (D.C. Cir. 1982) (upholding Title I classification of enhanced services and CPE because "the market for enhanced services is 'truly competitive,'" and "charges for CPE provided by carriers need no longer be regulated . . . because of the competitive market conditions now prevailing"); *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 925-27 (D.C. Cir. 1999) (recognizing that transmission services may be subject to a compulsory common carrier obligation only in the presence of market power); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642-645 (D.C. Cir. 1976) (upholding Commission decision to treat certain commercial mobile services as non-common carrier telecommunications); *see also* H.R. Conf. Rep. No. 104-458, at 115 (1996) (stating that the definition of telecommunications service "recognizes the distinction between common carrier offerings … and private services").

Third, the Commission can (and should) take the same belt and suspenders approach in adopting a comprehensive national broadband policy that it took with respect to cable-provided broadband services. Specifically, it should classify broadband services offered by all providers, including stand-alone transmission services offered on a private carriage basis, under Title I of the Act. And it should also specifically declare that, to the extent a court should disagree with that interpretation, it is broadly forbearing from applying the common carrier requirements that otherwise would apply. By doing so, the Commission will then be able to start from a clean slate in defining the rules that it believes should apply to broadband providers generally, while ensuring that the Commission's policy determinations will be given effect.

Finally, one additional issue warrants attention. Representatives of the law enforcement community have urged the Commission to ensure that moving to Title I does not render CALEA inapplicable. On that score, I want to be clear. Verizon does not seek by having its broadband transmission services re-classified under Title I to avoid any CALEA obligations that would otherwise apply. Nor do we believe that would be the effect. This is so because, while CALEA imposes certain obligations on "telecommunications carriers," it has its own *unique definition* of that term, which is independent of the definition that is in the Communications Act. The CALEA definition of a "telecommunications carrier" includes an entity that acts as a "common carrier," as does the Communications Act. But, in addition, the CALEA definition also includes *other* providers that would not be telecommunications carriers under the Communications Act. Specifically, it includes any other providers of "wire or electronic communication switching or transmission service to the extent the Commission finds that such service is a replacement for a substantial portion of the local exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this chapter." 47 U.S.C. § 1001(8)(B)(ii). So merely classifying broadband transmission services under Title I for purposes of the Communications Act does not determine their status for purposes of CALEA, and the Commission has authority to apply whatever CALEA obligations would apply to those services if they remained under Title II. Of course, the same rule necessarily must apply to any comparable services provided by cable companies or others in order to avoid skewing the competitive market. And, at least in many instances, the technical details of what it would mean for CALEA to apply to broadband services and the manner in which that could be accomplished will need to be resolved. But that is true regardless of whether these services are re-classified under Title I or remain subject to Title II. Accordingly, this issue likewise presents no impediment to moving ahead to classify these services under Title I.

Sincerely,

William P. Barr

(Recess.)

MR. KEAN: Bring the hearing back to order. If I could, our final panel on government organization and domestic intelligence consists of William P. Barr, vice president and general counsel, Verizon Communications, and former attorney general of the United States; John Hamre, president and chief executive officer, Center for Strategic and International Studies and former deputy secretary of Defense; and John MacGaffin, director, AKE LLC, and former associate deputy director for Operations, Central Intelligence Agency.

I understand, General Barr, we begin with you.

WILLIAM BARR: Thank you, Mr. Chairman, members of the Commission. It's a real honor for me to have this opportunity to share my views with you. I guess this leg of the hearing's focus is on organizational issues, and obviously as you can tell from my prepared statement, I have very strong views that the suggestion of separating domestic intelligence out of the FBI and creating a separate MI5 type agency is a very bad idea, and I'll be glad to answer any questions the Commission may have about that topic or in fact any other topic that arose during the day.

When we make organizational decisions or judgments in the national security arena, we frequently create dichotomies and fissures that really are artificial and create difficulties. And obviously one of the fundamental decisions we made was separating foreign and domestic intelligence. Well, in the area of terrorism or in the drug war and in many areas we face, threats do not emerge in tidy categories of domestic threat or foreign threat, they're integrated wholes. There are foreign terrorist organizations that are attacking us and trying to insinuate themselves into the United States, but they don't neatly fall into either category and we frequently spend a lot of time once we make these divisions, trying to surmount the institutional difficulties by reintegrating them in some form or another.

And I think looking back at 9/11, I think one of the foremost structural shortcomings we had in our counterterrorist effort was this separation of law enforcement and intelligence and the idea that they can be easily cabined and carried out in separate domains. And I think this is obviously a false dichotomy. Terrorist organizations don't present themselves to us either as a law enforcement matter or a national security danger, they are both at the same time and they're just different sides of exactly the same coin. And if we have to approach them as both national security threats and law enforcement threats.

I think the primary lesson to be learned from 9/11 organizationally is the need to tightly integrate our law enforcement activities and our intelligence activities in the area of domestic counterterrorism. And I think the FBI is in

fact uniquely situated to provide the kind of integrated approach that's necessary by conducting both sets of activities in tandem. Clearly there were problems at the FBI, at the CIA and many of the agencies that contributed in one way or another to our failure to detect the imminent attack from al Qaeda.

Now, my own view is that the genesis of this is not so much some kind of institutional incapacity to handle national security and law enforcement at the same time. In fact, historically through World War II and well beyond, the FBI did view itself and did a fairly good job in both the national security arena and law enforcement. I really think the genesis of the difficulty came more from external constraints placed on the FBI and the societal expectations in the '70s and '80s and even into the early '90s. But whatever the source of the problem, the fact is there were problems.

And I think that Attorney General Ashcroft and Director Mueller have made major strides in addressing them. They clearly have reoriented the FBI and made it very clear that the mission is preemption or prevention of terrorist attacks, not the ultimate prosecution of a case. And on the intelligence side they have proceeded -- Director Mueller has proceeded to create collection capabilities at the FBI to create the capacity to diffuse and disseminate intelligence with all other sources of information and creating an analytical capability within the FBI, but also fusing and coordinating and contributing to other analytical infusion centers in the intelligence community.

And on the law enforcement side, we've heard a lot about the disperse case approach that the FBI uses and that was a problem, as it affected intelligence collection and national security activities. But we see developed within the FBI now an approach that allows the extraction of information from the criminal justice side that has intelligence value and its dissemination and ultimately its fusion with all other sources of intelligence.

In thinking about, you know, the institutional locus for intelligence collection, I think one thing to bear in mind is that intelligence, I think, should be carried out with reference to the end game. Intelligence, at least this kind of intelligence collection, is not an end in itself so we collect intelligence to act upon it, to do something with it. And within the United States, that is domestically, our end game is usually going to be a law enforcement response. And to me that means that intelligence activities designed to intercept threats within the United States have to be carried out with a view toward all those law enforcement options. An awareness of those options and an approach that keeps all those options on the table at a moment's notice.

For example, there may be a requirement to, at any given time, to pursue evidence, so we may have enough from an intelligence standpoint to satisfy ourselves that a particular

group is up to no good, but in order to have something stick against those individuals we may have to develop some evidence. So that effort has to be carried out with a view toward developing the evidence that could serve as a predicate for a criminal case. Or we may have to develop an alternative source, alternative evidence, in order to protect intelligence sources and methods, or we may need to develop a charge on a technical violation, simply to find a basis for holding somebody.

These are all things that are dynamic, that take place in the course of learning more and more about a group. And it seems to me that what that suggests is that in a domestic realm it's really impossible to separate out and handle on separate tracks, the collection of intelligence from the law enforcement context, which in most cases will be the group that's called upon to apprehend and hold the terrorists within the United States.

So those are just some general views on these organizational issues and I'll be glad to answer any questions the Commission has.

MR. KEAN: Who would like to go next?

(Laughter.)

JOHN MacGAFFIN: He always wins when we have these conversations. Chairman Kean, Vice-Chairman Hamilton, distinguished members of the Commission, it's an honor for me to speak to you today.

Neither the American people nor our federal, state and local governments have yet been able to fully understand the long developing crisis in national security which suddenly revealed itself to us on 9/11. Consequently, it should be no surprise that we have not yet been able to set a clear course for the future and to determine what steps we must take to increase the likelihood that such disasters can be prevented in the future. Attacks by those who carried out the events of 9/11 have continued against American interests since that time, although none as yet taken place again within the United States itself, but that's just a matter of time.

It falls to the Commission to provide the clearest possible view of the causes of 9/11, both the motivations and passions of those abroad who are consumed with hatred for us as well as understanding the workings of the national security elements of government which served us well before 9/11 and those that did not. It is only with this information that you will be able to judge the adequacy of those changes which have been put in place since September and to highlight those things still to be done. It's a difficult task but one in which failure is not an option.

All Americans have personalized the ways in which the attacks of 9/11 came home to them. For me it was the awful

understanding sometime during the night of September 11 and 12 of the magnitude of my failure and that of my colleagues at the FBI, the CIA and DOD to fully implement those systemic changes to our national security structure writ large that could have prevented this attack. It's harsh but true. The tragedy is we had the vision but not the will.

So is the problem domestic intelligence collection or is it one of analysis? For instance, last July, John Hamre and I and five of our colleagues collaborated on an article that was published in the Economist and entitled, "America Needs More Spies." It focuses on the critical requirement to improve the collection of intelligence domestically. We asserted that the harsh facts of the 9/11 tragedy are, and I quote, "Secret members of a conspiratorial foreign organization operated clandestinely abroad and in this country for almost a decade before September 11th, to plan, lay the groundwork for and successfully carry out a surprise attack on the United States. The activity was conducted by the leadership in Afghanistan, by plotters in the shadow of a Hamburg mosque, and by operational travelers from abroad and by an established al Qaeda support structure based in this country," unquote.

The bulk of the criticism of the national security establishment's performance before 9/11 has centered on a failure to, quote, "connect the dots." While I concede the lack of analysis and interagency communication might have contributed marginally to the intelligence failure, the main cause was a lack of effective collection against al Qaeda, both domestically and abroad. There simply were not enough of the right dots that would help us truly understand the plans and intentions of the enemy attacking us.

My remarks today address this issue in the context of domestic collection. Under current ground rules, domestic intelligence collection is primarily, if not exclusively, the responsibility of the FBI. Before proceeding further, we must clarify a distinction which sometimes unwittingly, and sometimes intentionally I think, has clouded this debate for years. That is, we must make the critical distinction between collection and gathering as it pertains to intelligence. While the FBI correctly highlights its unmatched ability to gather evidence, and with it information, there is nonetheless a national security imperative which distinguishes intelligence collection from a similar but different function found in law enforcement.

Gathering, which is not driven and informed by specific focused national security needs, is not the same as intelligence collection, as the DCI and the intelligence community understand that term. This collection is accomplished not incidental to law enforcement, but by a conscious, specifically targeted operational clandestine espionage activity, whether technical, human or a combination of both. Collection, as I will use the term today, means those intelligence activities which are

dictated by, coupled to a policy-driven, strategically determined set of collection requirements, and this is accomplished by a focused, clandestine operational activity. Tom Powers, the biographer of Richard Helms, described this focused, proactive effort as an effort to determine where the danger lies. That is, what we have to have in domestic collection rather than a more reactive approach to people who have broken or are about to break our laws.

So what are the essential elements and solutions to domestic intelligence collection which protect the country, and at the same time protect our constitutional liberties? First, I think we must recognize that domestic intelligence is critical and is the missing element of the national security system. Second, I believe we must acknowledge that the FBI has failed to establish an effective, nationally directed domestic intelligence collection organization, despite claiming counterterrorism and counterintelligence as its number one and two priorities.

Ironically, it is very well positioned geographically and resource wise to perform domestic intelligence collection missions. It has thousands of special agents, thousands and thousands of recruited assets, surveillances, court authorized electronic intercepts. We do not need significant new authorities, but we do need to use better those authorities we already have.

In order to establish an effective, nationally directed domestic intelligence collection capability -- capacity, the FBI must establish a national security entity responsible for all domestic intelligence collection against individuals and organizations who threaten our core diplomatic, economic and national intelligence interests, whether they be terrorist organizations, intelligence service or other foreign elements.

The new organization must be a career service with the attendant recruiting, training, operational and administrative structures and priority emphasis within the larger FBI organization. It should comprise approximately 60 percent of the total FBI support and special agent personnel, consistent with the prioritization of counterterrorism and counterintelligence on the top of the FBI task list.

For over nine-tenths of the FBI field office special agents in charge to have no national security, counterterrorism or counterintelligence experience, does not communicate in practice or in fact that counterterrorism and counterintelligence are the bureau's top two priority areas. For the bureau's award program to recognize, as it did last week in the Presidential Rank Awards, predominantly criminal law enforcement accomplishments indicates that either the bureau's counterterrorism and counterintelligence accomplishments are inadequate -- and if so, there should be consequences -- or the bureau's statement that

counterterrorism and counterintelligence are the top two priorities is not accurate.

I've provided in my statement a fuller description of what this organization, this national security entity within the bureau, should comprise. I agree with Attorney General Barr that the MI5 solution that's widely seen around this town is wrong for lots of reasons. First of all, we don't need a British system with British antecedents and its roots in British history and British governance. What we need is an American system rooted in our needs. But we also don't need to continue not doing the business of domestic collection that we've got now. So I do believe that the MI5 issue is often held up as a red herring here to divert attention to the problems of MI5, which are significant. So I stress I don't believe we should do that, but I also stress that we cannot continue on the path we are.

I have provided at your request a list of questions which I believe will help you better understand the several policy, operational and administrative areas that need to be transformed in order for the FBI to succeed in its domestic intelligence mission. Domestic intelligence collection, as opposed to gathering, must be part of and synchronized with national foreign intelligence collection. National foreign intelligence is driven by a national security requirements process. The domestic intelligence collection activity must also be driven by the same national security requirements process. The National Security Council, the DCI and the attorney general must provide validated collection requirements to the FBI and hold the FBI accountable for producing and disseminating domestic intelligence.

In conclusion, if the FBI can make this truly significant change and no longer cling to the law enforcement centered traditions and approaches which have served them and the country so well against another set of adversaries in another time, then we should all get firmly behind their reform efforts and bring the resources of our country to bear to ensure they succeed. If, however, the FBI cannot fully make this transition -- and this will be clear to you as you approach the end of the Commission's deliberations -- then I believe that you will have no choice but to propose some even more radical solution which places these responsibilities for counterterrorism, counterintelligence in another perhaps new organization. The stakes are just too high and the time too short to do otherwise. Thank you.

MR. KEAN: Thank you.

Mr. Hamre.

JOHN J. HAMRE: Governor Kean, Vice Chairman Hamilton, thank you for inviting me. Let me begin by saying how grateful I am that all of you have agreed to serve on this commission. I know over half of you well from personal previous professional exchanges, and I know you sure as heck didn't need this job.

(Laughter.) But the fact that you were willing to do it on behalf of us, on behalf of the country, addressed one of the biggest issues that we've got. This is really a testament to your patriotism and I want to say thank you, I really do. I'm grateful that you're willing to do it.

The good news about being able to go third on a panel is that everything has been said. The bad news is that everything has been said. And so I will be very, very brief. I, in my prepared statement, listed the three primary underlying factors that I think are causing great limits to our capacity to get actionable intelligence today. As Attorney General Barr said, one is the great divide that separates foreign intelligence and domestic intelligence. Obviously the bad guys know how to take advantage of that great seam in our constitutional democracy and that we have to overcome that.

Second, as Brother MacGaffin said, this bias towards collection at the expense of analysis, it's plagued us for years and it's plaguing us now, and I'll say just a minute where I think we have a particularly unique problem in the area of homeland security in this regard. But this is also -- it's an historic problem. We've always had this problem. And the third are the series of both official and unofficial ground rules that are tying the hands of law enforcement, especially with the FBI.

You know, I think a lot of it was put in place through explicit rules. Frankly, it's even larger in the sense of unwritten culturally understood rules. Don't do X because you're going to get in trouble. It really substantially constrains the inventiveness and the imagination of our law enforcement, and so these cultural dimensions are even bigger problems. We've got to deal with it.

Now, I think these under the underlying problems and, frankly, since September 11, I hate to say it, I think we've gotten off on the wrong foot on a lot of this. Because we had 19 folks hiding in our midst planning for a couple of years to attack us, we've gotten off on the mode that we've got to collect just about every bit of information on everybody. And it is just -- that's the core of the great growing anxiety Americans are feeling about the loss of their privacy as we try legitimately to get our arms around homeland security.

There is no solution to this problem other than a much stronger domestic intelligence program, surveillance. But unless that starts with a much stronger dimension of protecting privacy in the process, we're going to fail. And we can't afford to fail. We can't afford to fall back on comfortable rules, which is what we did with law enforcement, you know, in the '80s and the '90s: to tie their hands. So that they wouldn't get innocent people in trouble, we tied their hands so that they couldn't help us find the bad guys.

So we've got to address the privacy issues upfront. And we take it worse when we start with all the innocents and when we try to work our way in to try to find the guilty. For crying out loud, let's start with the people that we already are suspicious about. We went a full year before we committed ourselves to getting an integrated watch list. And I'll tell you, talk to people privately who are working on these things in the government, they say it's years away. The energy behind that isn't anywhere commensurate with its payoff.

We ought to start with the problem -- the likely problem people and build our way out, rather than start with a vast population of innocent people and work our way in. And we're just off on the wrong foot. And we've got a chance to fix this, but we really do have to change it. And it just scares Americans to think that before they get on an airplane there's a computer some place that's going to give them a red, yellow or a green color code, you know, before they're allowed to get on. When instead we ought to be tracking the 70,000 or 80,000 people who we know have ties with problem institutions, and then work our way out from that core.

We have a lot better chance, frankly, of dealing with the privacy issues if we start that way, and I would argue have much more actionable intelligence in the process. And we're going to have to go out and create actionable intelligence. This was what John and I argued in our little piece. You know, we're looking for the needle in the haystack, but we're spending all our time adding hay to the pile, okay? We need to find the needles. And that means we have to kind of create the dots.

We've got to use our intelligence capabilities to go out and find the problem people, the bad people, and that's going to take covert operations inside this country, and we're very nervous about that. Rightly so. I mean, you know, this is something that scares people. Most Americans came to this country from their home country because they didn't want to be around a government that spied on them, okay? So we understand the kind of impediments that we're facing that we want. That's part of our culture. That's what we value. But we're still going to have to overcome that.

Now, how do you organize to do that? Well, you know, I mean the -- and I'll use shorthand. You know, the CIA clearly is competent, but people don't trust it to spy domestically. The FBI was good at it in the past, but frankly the last 25 years has shifted it dramatically over to very much a constrained law enforcement culture. I completely agree with Attorney General Barr that Director Mueller is really working hard to change that, but we're a long ways away. I mean, I serve on his advisory board. I want him to succeed and I'll do anything I can to help him succeed, but we are a long ways away from having a transformed culture inside the FBI that would make that happen.

And the Department of Homeland Security was cobbled together with people that don't have an intelligence starting point. So what do you do? I mean, we're all wrestling with this problem. In our little group we opted for the view that it ought to stay inside the FBI, but that this frankly is a provisional case. I believe we need to start there because I strongly believe any domestic surveillance must be under the supervision of a constitutional officer of the government. I don't believe you can ever convince Americans to trust a system that isn't overseen by the attorney general.

Can the FBI make that transition? Frankly, we were somewhat divided. As a matter of fact, we were very divided. I think all of us have the hope that it would work. Not all of us had the conviction that it will and we made a few recommendations that we thought might strengthen the chance that it would. One would be to bring in direct management from the intelligence community that has analytic experience -- inside the FBI, a free standing entity, subject to the FBI's and the attorney general's oversight, but that has management leadership that has strong analytic skills.

Now, if that works, then we've got the best of all worlds. If that doesn't work, you at least have the prototypical starting point for a new entity if you need to spin it off and to create it, if you don't believe you can grow it inside the FBI. I want it to succeed inside the FBI and inside the Department of Justice. But if it doesn't succeed, you at least have not wasted a couple of years on an experiment that might fail.

Again, let me conclude by saying the only reason -- I may be too narrow. But the only reason to study history is how it informs our view of the future, and that's really what I think you're doing. I think these hearings are just crucial and the country really is looking to you, so I'm grateful that you gave us a chance to come today. Thank you.

MR. KEAN: Commissioner Gorelick.

MS. GORELICK: Thank you, Mr. Chairman, and thank you to the three of you for being here today and for sharing your thoughts with us. We have a fair amount of fire power on this panel. And I have a lot of questions but I know my fellow commissioners do as well, so I'll try to pick the most important ones from my point of view.

I was -- and this is a question for all three of you. I was struck, Attorney General Barr, by your very strong defense of the bureau as the appropriate agency to have the lead. And you say in your prepared statement that there are three basic criticisms of the FBI, which it is addressing. The one that I was struck by was the middle one, where you say that the FBI failed to exchange information with other elements of the intelligence community, and that it is addressing that failure or that criticism. But

what I hear from Mr. MacGaffin and Mr. Hamre is that they wouldn't say that that's the right question.

And so the second part of my question is to the two of you, because the way you pose the question it is not did they share the information they had, but did they cooperate with others in setting the strategic goals of collection and go out together with the other relevant agencies, primarily in the intelligence community, to seek out the right information domestically? And so my first question is whether the three of you would comment on that, that is: What is it that is the failure, if you will, and how are we going about addressing that failure? And if you could be brief, because I have a number of follow-ups, I'd appreciate it. Thank you.

MR. BARR: Well, I do think one of the failures was the failure to have in place, develop, foster intelligence collection as a function distinct from building criminal cases with criminal predicates. And I also think it was a failure not to have an analytical capability. And a lot of the sharing problems were caused by, in my view, ill-conceived constraints on law enforcement and the sharing of intelligence information.

In terms of the setting of the -- it's true that intelligence collection is different than gathering and it should be focused, and there has to be some agreement as to what the end is. But I also think we can get a little carried away here because a lot of this counterintelligence -- counterterrorism intelligence domestically within the United States has a somewhat of a tactical flavor to it. In other words, it is focusing on groups and elements. It's not sort of sitting back and saying, where's the next threat coming from and, you know, is this a breeding ground for terrorists over here in this part of Africa, or what have you. That's the CIA's function. But the function of sort of protecting the homeland when groups get into the United States has a certain operational, tactical flavor to it and I'm not sure that -- you know, it's the same as sort of doing national intelligence estimates and sitting around figuring that -- you know, I don't think it takes that long to figure that out, frankly.

MR. MacGAFFIN: I certainly agree that the failure to share is not the heart of the problem or the most egregious problem. There was, to follow my argument, not very much to share in any event. The problem is that there still two years later is not much more to share. I'm told, for instance, that the disseminated -- the information that is produced by the FBI's 56 field offices to be disseminated to other parts of the government has -- the good news is it's increased fourfold in that two-year period. The bad news is that that's -- it now averages four pieces of disseminated intelligence a day, in distinction to 450 by DIA or some of the others. So numbers are the wrong way to look at it, but there's a problem here.

But it is a failure: not the failure to share so much as the failure to acquire the right information. And while I agree with Attorney General Barr that the national estimate approach, you know, where's the next bad thing going to come from, ain't too hard, that's not the kind of work -- it's hard to get right, but it's not hard to sort of say it's going to come from that disadvantaged part of the world or another. But the work that has to be done is not that sort of intellectual. It's hard tactical penetration work to have your spy sitting next to the spy in the bin Laden mountaintop and in the bin Laden cell in Cincinnati, if you will, over long periods of time. So I don't accept that it -- I don't agree that it's tactical in the sense of we get a little snippet here and there and we'll put them together. It's long-term, hard work to get the right people in the right places to obtain over time the right information about those who wish us harm.

MR. HAMRE: Very quickly, September 11th really transformed this world so dramatically. I mean, the willingness of the intelligence community and the law enforcement community to share information is really unprecedented compared to my recollection. I mean, I've been around 25 years looking at it and it's unbelievable how much stronger the sentiment of collaboration is right now.

On September 12 I was asked to go up to an emergency meeting of an advisory board for one of the intelligence agencies that I try to help, and I can remember at the time we said we only had one, maybe two pieces of intelligence in all the files that we thought were relevant. Six months later we had lots more information, and what that tells me is that the way you change your filters that we look at the data gives you a sense that there's a lot more or a lot less that you're looking at. And, of course, an event tends to change your perception of what you're looking for. You want to proactively anticipate that and try to properly tune your filters before something happens rather than after it happens, where you have 100 percent certainty.

That's a very problematic question, of course, how to do that. But I do think it is a matter of mindset and I think we clearly missed September 11 because, for whatever reason, our collective policy intelligence minds weren't tuned to look the right way, even though there probably should have been plenty of evidence that we should have. I think we collect a lot of information. I think a lot of it is, frankly, pretty useless. We could probably extract a lot of intelligence out of the information that we have that we aren't currently processing, again because our filters aren't designed right -- our mental filters aren't designed right.

After you go through that process then you say, but where are there gaps that I think we should intentionally go out and create facts? And that, I think, needs to be a joint process. I think the spirit of collaboration is now present like it's never

been before, but that frankly the competencies and the mechanisms of cooperation don't really yet exist.

MS. GORELICK: Well, let me follow up on that because it seems to me that the central theme that we have heard over and over again is that there is not a common strategy between domestic and foreign law enforcement. And while, Attorney General Barr, I take your point very well, particularly given my own experience in the Department of Justice, that there are big dangers in separating out the people who do domestic collection from the prosecutors who might have to act on it, nevertheless what we now see is a proliferation of coordination points with no one discernible to us that can be identified as setting the strategies.

So you have the counterterrorism centers at both the FBI and the CIA, both of which have members of the other, you have the Defense Department with its own unit, you have the new TTIC that's been stood up, you have the terrorist screening function newly at the FBI, and then you have the Department of Homeland Security also standing up its own function. And so my question to you, if you will, old hands is would you structure it this way? And if not, how would you structure it? I understand, Attorney General Barr, you view -- the notion of an MI5 is not a good one. But what would you do with this proliferation and seeming lack of direction? And I'd like all three of your answers on that.

MR. BARR: Well, I don't know about seeming lack of direction. I assume that the director of Central Intelligence would be providing overall intelligence direction. But I don't necessarily think proliferation of fusion centers or even analytical centers is necessarily a bad thing, because sometimes intelligence has to be reworked, repackaged, reexamined from the standpoint of the operational mission of a particular agency. For example, Homeland Security I view as a static defense agency. The FBI in my view is dynamic.

That is, the FBI's job is to proactively go after and dismantle and destroy these groups as they come into the United States, whereas the Homeland Security is static defense of infrastructure, borders and so forth. They may need to take a look at the intelligence from the standpoint of what it means for them to have to do, whereas the FBI, launching attacks against these organizations, may want to take a look at the intelligence from its mission. It's very much the -- we have a CIA but that doesn't mean we take intelligence out of DOD. It doesn't mean we take -- we may have, you know, DIA but it doesn't mean we take intelligence out of the Navy. So I'm not disturbed by the proliferation of fusion or analytical centers.

MR. MacGAFFIN: I agree that there is a question of who's in charge of the common strategy, and I think that despite, as Dr. Hamre says, the willingness to collaborate and cooperate is

infinitely greater than it's been before, the actuality is of it is not there, number one. And what makes it even harder is that -- and why you have to have someone in charge, and it straddles this divide we're talking about of law enforcement and intelligence, isn't as neat as it's in the United States, therefore the FBI will deal with that.

For instance, and this will be perhaps a bit questionable, but the notion of the fellows in Lackawanna who -- the six alleged terrorists who were arrested there, the decision that was made to proceed with arrest and criminal prosecutions of those six. My personal view is that, you know, their most serious infraction was they went to the wrong summer camp. They should have gone to Lake Winnipesauke rather than Lake Tora Bora. They were not truly terrorists.

But leaving that aside, the right resolution instead of six in prison was probably four of them sent to their rooms and two of them somehow sent back to the Yemen to spy for us within that organization, the al Qaeda organization, to find out what's about to happen to us. That decision is -- because, going to your point of no one in -- how are we in charge across this divide -- not that no one is in charge, I don't mean that, but across this divide that decision is not made. What is in the national interest? Send them to their room and back to the Yemen, or send them to jail?

MS. GORELICK: So your view -- just so I can understand with some clarity here. Your view is a decision to prosecute in that circumstance, or one analogous to that circumstance, should not be made at the Justice Department because the Justice Department's tools, if you will, are focused on prosecution, but rather jointly across the national security spectrum because one of the things you might want to do is re-infiltrate someone like that?

MR. MacGAFFIN: Right. That's exactly correct, and I --

MS. GORELICK: And that would be analogous to the way we would treat a spy, for example?

MR. MacGAFFIN: For example. And I think that recently the trend with the more active involvement of AUSAs in the terrorist task force, joint terrorist task forces, that decisions on the ground tend to be the weight of their presence pushes things to the law enforcement side of the boat, making it very difficult for the FBI agent and these special agents to make the decision to develop long-term, difficult penetrations of these organizations that will do us harm. And it's just the weight of -- they're on that side of the boat and the boat is tipping in that direction, and that's not how you get at this problem.

MR. HAMRE: I'll be very brief. My worry is not that we have no direction, but that we -- our only direction is to

prevent exactly the same circumstances that caused September 11. I mean, that's what's tying us up in knots right now. I think we need to separate the issue of gunsmithing from marksmanship. I mean, I think what we're really lacking is a coordinating mechanism for the marksmanship questions.

What are we trying to stop? What are we trying to hit as a goal? What are we trying to stop? And what we've created for mechanisms of coordination are gunsmithing mechanisms. You know, how do we get the FBI and the CIA to share databases, and the TTIC? I mean, the TTIC is a -- I support it, but I think it's not going to do what we really need to have done, given the way it's currently constituted. There needs to be a coordination at a much higher level government-wide that represents the strategic thinking of the government about the problem, not the tactical manipulation of the boxes inside the government.

MS. GORELICK: And who should do that?

MR. HAMRE: Well, my personal view is that this is -- I do not agree with the notion that there is a domestic security that's separate from a national security. I don't think that it makes sense to have a National Security Council and a Domestic or a Homeland Security Council. I think that makes no sense. I think there is a national security imperative with a venue that it's a foreign sector and a venue that's in a domestic sector. I would put it under that rubric and I would, frankly, have the analytic leadership come from that quarter, with the intelligence community under the DCI leading the strategic question. But always the mechanism of action has to be under the supervision of the attorney general, in my view.

MS. GORELICK: So the overarching direction would come from the intelligence community, and the execution --

MR. HAMRE: Through the National Security Council.

MS. GORELICK: -- geometrically would come about in the -- somewhere within the Department of Justice?

MR. HAMRE: Yes.

MS. GORELICK: Mr. MacGaffin, you draw a somewhat -- well, strike "somewhat." You draw a bleak picture of our capacities, both from the data point which suggests that even today, in terms of distributed intelligence, very little of it relative to what is being distributed is coming from our domestic agencies, to are not honoring our intelligence officers within the FBI, to the failure to create an intelligence career track. In your heart of hearts do you believe that the Bureau, even with the energy that is being applied to this effort by Director Mueller, can do this? Can do what needs to be done?

MR. MacGAFFIN: I'm not sure and I spent, as you know, six years as senior advisor to the director and the deputy director. I found the similarities between the CIA and the FBI in terms of, you know, type 'A' point end of the stick guys who really want to get it done. I mean, I desperately want it to work that way, but there have to be some significant changes in the way it goes about its work relative to this very issue. So it's got everything going for it. It's got the -- I believe we have sufficient authorities, it's got the tools, but we've got to somehow turn this corner that we've all been talking about here and concentrate on penetration of those who would do us harm. The Tom Powers' analogy of the job here is to determine where the danger lies seems to be the most important part, and we're not doing that appropriately.

MS. GORELICK: Secretary Hamre, you said that your confidence, if you will, that the FBI can do this is provisional. How long is provisional?

MR. HAMRE: Well, there's no question that the director really has made it his priority. He's certainly communicated that to the Bureau. There are some small but very bright shining lights inside the Bureau that are starting to emerge. I think it's -- you know, the prevailing day-to-day culture is not -- does not embrace his vision. You know, clearly there needs to be an assessment -- an objective assessment about how well he's doing. I think this is very hard because he's very confident it's going to work because his vision is right, and I think his vision is right.

I remember being in government. I mean, you are so isolated when you are in government because the first thing you hear in the morning when you walk in is somebody saying, boy, you had a good day yesterday, Mr. Secretary. And the last thing you hear is, boy, you really kicked butt today. You know, I mean everybody around you is telling you what a great job you did and really your situational awareness of your own organization is really quite limited.

And trying to find a way to help the director get a sense of is this working or not, and is it really getting at the cultural imperatives that really motivate your average special agent who comes in every day, that's I think a harder question. I'm not -- I'm new to the law enforcement community so I would not want to render judgment about how to do that. I know how we do it in the military, but I would not know how to exactly do it here. But I think that there needs to be a very supportive but self-critical look at how well this is going.

MS. GORELICK: General Barr, you supervised the FBI as deputy attorney general and as attorney general for as long as most, if not all, of your predecessors, and you detail in your written statement and as well as in your testimony the number of regulatory and legislative and cultural barriers to the FBI being

the kind of organization that Mr. MacGaffin and Secretary Hamre are describing as necessary. What is your level of confidence that the bureau can do what needs to be done?

MR. BARR: I have a high level of confidence that the Bureau can evolve into precisely the kind of counterterrorism agency we need domestically. But let me just say that I think we're going to be attacked again, and I think we're going to be attacked probably several times very successfully, and we can't do anything about that. I think every employee of the United States government acting in absolute good faith and acting very competently, and still the nature of this danger and the problem we face as such that we're not going to be able to catch every terrorist that comes into the United States to do us harm. And so, you know, I think that we shouldn't underestimate the magnitude of the problem we have here.

And the other thing is, you know, I think we're actually getting a little bit too down on the FBI here. Yes, they -- in my view because of external restraints -- did not develop the kind of domestic intelligence collection that we now want them to have, and didn't sit around setting up analytical centers to analyze intelligence about people within the United States. And there was a time where if they tried to do that, they would be slapped down in good order. Now we want them to do it and they will develop it and do a good job on it.

But the fact of the matter is that before 9/11 the Justice Department was developing a lot of information about al Qaeda and Osama bin Laden. Developed more information than MI5 had. Developed more information and gave it to the British than MI5 had about Osama bin Laden's activities in Britain. So, you know, the Department wasn't doing that bad a job. Other agencies had problems as well as the FBI. If we're going to penetrate these organizations, they're not going to be penetrated initially by the FBI in the United States. They're going to be penetrated overseas, as you say, on a mountaintop in Afghanistan or somewhere. That's not the FBI's job. That's the CIA's job.

So, you know, our intelligence agencies have failed occasionally. They didn't get it right necessarily. The FBI has problems and we're trying to fix that. But we also shouldn't raise the bar here to a degree that -- and create expectations that we're going to be able to stop every terrorist that tries to kill Americans. We're not going to be able to do it.

MS. GORELICK: Thank you for your testimony.

MR. KEAN: Secretary Lehman.

MR. LEHMAN: Thank you. I'd like to ask you all to focus on just one overarching set of issues in framing the questions I'm going to ask and that is the genetic or cultural issue that underlies this debate about whether FBI should be the domestic

intelligence agency. What is the problem we're talking about? Well, sharing is certainly one manifestation of that. One very senior intelligence official has told us that he did not learn about the connections of three of the principal actors in the '93 bombing on the World Trade Center until years after when the trial was finally finished and they released the grand jury evidence. And we had this morning the former deputy attorney general tell us that one of his proudest accomplishments was his 6th August 2001 memo notifying the FBI that they must bring in the prosecutors immediately when they're beginning a case.

Time and time again, we've had witnesses that we've interviewed, including another one this morning, that have said, Well, I'd prefer not to answer those questions because this matter is in the grand jury or this matter is now in litigation. We got that answer time after time in pursuing issues around the Moussaoui case, for instance, but there were many others. Now, that's understandable perhaps before 9/11. But after 9/11, one would have expected that that mentality, the prosecutorial, the forensic, rather than the preventive mentality would have changed.

Yet, as late as last June 18th, a witness before the House Appropriations Subcommittee, in explaining how the FBI was pursuing or thought to be pursuing the terrorist issue, testified as follows, in part. "When we do our intelligence in the FBI, it should be forensic intelligence. It should be based on evidence. It should be based on fact. It must bear the scrutiny of law that can be looked at by a jury and a judge." And she went on, "We need to know what is reality, what can be proved and not based on simple assessments and projections." And on, "Well, other recourses may seem expedient, it is only through careful and aggressive case work that we will rid ourselves of the foe and maintain the cooperation of the American public."

Well, I've never read a more perfect articulation of anti-intelligence work than I could find. It reflects very well why the FBI is the best police force in the world, but it could also suggest that it could be the worst intelligence force in the world because intelligence is looking forward and sharing and not protecting evidence to get convictions. The situation or the question I'd like to pose to you assumes certain things. As Mr. MacGaffin has rightly said, the MI5 issue has, I think, been repeatedly dragged out as a red herring because MI5 is certainly not the alternative here.

A far better, closer potential alternative is the Canadian Security Intelligence Service which has many more analogies and interestingly, reading the debate in the 80s that went on when this was created, the exact same arguments that General Barr has educed here were made by the Royal Canadian Mounted Police and rejected. I think most observers within the Canadian government believe that real cultural problems were fixed by getting

intelligence functions out from under the police and the Justice Department, in effect.

My distinguished colleague, Jamie, earlier described very succinctly what the Justice Department has as its mission. Number one, to prosecute criminals and miscreants and, number two, to protect the rights of citizens. Well, both of those things are really at odds all the time and intentioned with intelligence collection and analysis and that does not mean that it can't be done, but it is certainly a major tension. Indeed, you can argue that the problems that have been discussed earlier in testimony about the threats to civil liberties by the PATRIOT Act and by powers before that and the corollary, the overreaction in bending over backwards as in the Moussaoui case, not to tread into that territory, is precisely because we try to do two incompatible functions, police work and intelligence in the same agency.

With that brief preamble, I'd like to ask you all to consider four options. Now, all three of you, in one form or another, have said that you favor essentially the status quo. More resources, the FBI should run faster, jump higher, do more language training, get better, more intelligent professionals in it but, basically, you're all three arguing for the status quo and just make it better. Now, I understand all of us have been laboring to acquire the same skills of collegiality that in your article in The Economist and sitting, as you are, as a panel, that you don't want to disagree too directly but I'd like to ask you to sort of leap out of that collegiality in your answers here.

First, I see four potential options that I'd like you to comment on. I've already commented on the first option, more resources, do better and give them a chance. Give Director Mueller time to do what he has set out to do and he's made significant changes. That begs the question, how do we know that he's succeeding? Do we have to wait for another 9/11 or, in its absence, we say he's succeeding? Or other metrics or measures that we can apply so as not to give this an indefinite tenure until it's proved its failure through another catastrophe? So, how about commenting on that? I mean, I suspect there's at least one closet CSIS sympathizer there, but let's see.

MR. BARR: I think it's analogous to the MI5. It's been a bad experiment for Canada. They're spending a lot of their time right now trying to patch up that relationship and reintegrate these functions. The Royal Canadian Mounted Police have had to create a lot of redundant functionality because of that split up. So I would say that I would not look at the Canadian system as an exemplar and I think, you know, your litany was really, I think, unfair.

First, you talked about the prosecutorial mentality because in fact they are prosecuting a case. Once a decision is made to

prosecute a case -- and the Moussaoui case was that decision was not made just by the Justice Department, it was made by the President to move down that tract -- then it is a prosecution and when it is a prosecution, you don't share grand jury information and other things and that's the law. So it doesn't surprise me that they weren't sharing it with you. That doesn't mean that it wasn't being shared within the Executive Branch.

The examples you gave in the past were precisely the problem as to why we needed the PATRIOT Act because of the limitations on grand jury information and because of the limitations on sharing intelligence with law enforcement and those have been addressed in the act. This culture thing is way overdone. You know, prior -- as I say, prior to the '70s, the FBI was well into domestic intelligence. They viewed themselves as wearing two hats, national security and law enforcement.

The problem with the FBI, as most people would have said then, was they were collecting too much intelligence about domestic matters. They knew too much about civil rights organizations, about anti-war organizations. They had the field pretty well covered. They knew how to collect information. If you look at certain other of their functions, like organized crime, that's an intelligence effort. That's not rushing in early and prematurely just to prosecute people. They know how to penetrate groups and keep those penetration agents in place for a long time and learn information and take down -- build intelligence on organizations and take them down. They've done that in the counternarcotics area, they've done that in the counter intelligence area.

So this notion that they're just prosecution bent and that's their culture and they can't do anything else is just hogwash. Now, what we've had is a period of time in the, you know, '70s, '80s, and '90s, where people didn't want them in that field, and they put a lot of restrictions on them. And you'd ruined your career if you stepped out of line at the FBI and started snooping around domestic matters too much. And now we've had an epiphany. Since 9/11 we want them to get back into that. That's the real story.

Now, you say that these are fundamentally incompatible, that's wrong. They're not incompatible. They are compatible activities. In fact they have to be carried out together because they both involve collecting information within the United States, and the tools and the resources are the same resources. That's my reaction.

(Laughter.)

MR. MacGAFFIN: I certainly can't associate myself with the run faster, jump higher approach, more resources, that's not at all what I'm recommending, and I think that's wrong. I think -- to go back to a question that was asked of John Hamre, I think

time is running out to get this right. I do not believe -- and I hope the formal statement I've submitted makes this clear, I don't believe that the changes and reforms that are in place are sufficient or adequate to the task. I don't believe they'll get us there. I'm hoping that your efforts and our efforts jointly to focus on this very issue will change, will add to and add an urgency and a significant change course correction in what Director Mueller and the others are doing. I do not think the path we're on now will get us there because I don't believe it really makes the distinction between gathering and focused collection, which is the heart of it.

The advantage of having Attorney General Barr is he's got the recollection to say what it was like, but today the FBI cannot rent 5,000 square foot of office space without getting advanced permission from the Congress. Operationally, the cultural environment they live in and the oversight they live in, which I think is unproductive, is dramatically constraining their imagination of what they think they can do. And I support -- wanted to give them the tools of the PATRIOT Act and there's great controversy about the PATRIOT Act. Frankly, what's been accomplished since they got it is modest.

In a large measure it's because of this culture. Granted, they had a history, but this is 25 and 30 years ago. I mean, there are five members of Congress that trace themselves back to that history. So I mean we really have a very different environment that we're working with now. Again let me state I want them to succeed, I want this to work. It isn't that I'm after the status quo. Plus this has to change, but I start with a premise of wanting competence under a constitutional oversight and I think the best place to ground that is in the FBI. I'm not confident it's going to work, but I want it to work. I'm hopeful but not optimistic. That's where I am personally.

Now, on that note let me say I think that there -- I'm a chief operations kind of guy, and there are things you could do to help them. This dichotomy between law enforcement and analysis is, I think, false, because intelligence doesn't spring out of just wise people sitting around a room thinking, it really springs out of facts that are presented to people who are then integrated into a framework and then tested against the hypotheses of other people. It really is grounded on collection. And for years we've not had the capacity to translate cases into intelligence input. You know, and the director is addressing that.

We need to start buying the capacity at every field office, people that can take a case and then extract out of it the intelligence that can be used and shared without violating the internal integrity of the case itself. We do that in the military world. We have analytic officers placed at tactical intelligence units, not to report on what's going on with that unit per se, but what are we now seeing about new tactics that

are being employed with radars, for example. We need the same kind of skill. But if you look at the grade structure in the FBI, what does it take to become a, you know, senior person. You ain't going to make it to be an analyst, you'll make it if you get to be a special agent, and you're on a different track. So you can solve this, but there's some real, serious gunsmithing questions internal to the FBI we need to tackle in the process.

MR. LEHMAN: I'd like to get each of your comments on the two most prominently discussed alternatives to leaving the functions in the FBI. Not the straw men that float around but the option of taking the organization that has been built and placing it somewhere else. And the two options that have most currency are -- and, by the way, all of them involve judicial oversight, not letting them run free. But taking them out from under the attorney general and the executive oversight, which I think is the real failing of the MI5 system, trying to apply it here. But have judicial oversight when they have to go to request a wiretap, it has the same or even stronger protections. Plus there is not the concern of the police power being collocated with the intelligence, analytic and gathering.

And the second common thread is that wherever it resides, it would collocate in the regional offices of the FBI, analogous to the way the CIA operates out of embassies abroad and other cover. So the two options that seem to be most current are to take the current domestic intelligence function from FBI, perhaps augmenting it with some of the other existing -- not creating a new organization, but taking the domestic intelligence function and placing it under number one, the director of Central Intelligence, as one option, or putting it in Homeland Security as another option.

So just limiting it to that option of a clearly overseen entity that is collocated with the FBI, has, as General Thompson said, rapid and open communications to prosecutors, but not as subordinates to the prosecutors who decide to make it a case and run for Congress or something. And this is the option that I'd like you to address, putting under the DCI, putting it under Department of Homeland Security.

General Barr.

MR. BARR: I think they're both ridiculous options. You know, who's going to collect -- analysis is centralized, collection is dispersed. You need resources to do it in the United States. It's different collecting intelligence and information you can act upon within the United States than it is in Afghanistan. You need feet on the street. You need the resources and the expertise that already exists in the FBI. And, as I said, it seems to me it has to be coordinated with the end game. You know, I'm all for shooting hellfire missiles from drones and knocking off people once we decided we found them in

Yemen. We don't do that in the United States. So we need an end game in the United States, and the DCI doesn't have an end game.

Putting it over to Homeland Security, you know, just boggles my mind. Those are law -- would you rather have a Customs culture influence these people? I mean, I don't know what you accomplish by that, except seemingly taking it out. You know, the object seems to be to remove it from the law enforcement function which is collecting a lot of information on its side of the house. In the United States where do we get the information from mostly? We actually get it by threatening people with prosecution. A lot of the information that's been developed has been developed by law enforcement side, by threatening punitive action against people, okay.

Now, maybe overseas we catch them in compromising positions and take photographs of them or something like that. But over here we collect information in different ways.

MR. LEHMAN: Next.

(Laughter.)

MR. MacGAFFIN: The problem is that the organization that has been built, that part of the FBI that you -- we're now sort of moving around the table or nailing down to the FBI the way General Barr would, doesn't do domestic collection. So the first and most fundamental thing is we've got to do it, and the point of whether the reforms currently in place will get us there or not, let's leave that aside.

I certainly agree with the notion of if you had a domestic collection capacity to really collect it domestically, putting it at the Department of Homeland Security doesn't make a lot of sense to me either, for a variety of reasons. Putting it under the DCI as has the first problem, the one John Hamre raised, and then during General Barr's, his attitude that, you know, who would trust the CIA to get it right. So for a lot of reasons you can't put it under the DCI in an organizational sense but you can't separate it from the notion of what is the whole picture we're trying to fill in here.

As we've all said at the beginning, you can no longer separate foreign and domestic in the sense that it goes from the shadow of the Hamburg mosque to Cincinnati, you've got to make this connect, and the DCI is -- and the intelligence assessment of the whole picture has got to be what guides domestic collection internally. So I don't think that to my mind the Department of Homeland Security is not an issue. There's got to be a DCI/NSC component for the kinds of issues at an operational level. We discussed about what happens to the kids up in Lackawanna and it's got to be relative to where are we going to put our time, Mr. FBI? What parts are you -- you can't just decide that on your own in the FBI where you're going to have

domestic collection, it has to be driven by a broader construct and we don't have that construct and we don't have domestic collection, and we don't do compromising photographs.

(Laughter.)

MR. HAMRE: Mr. Secretary, I mean I think, you know, in every case here you're always trying to design your government structure to accomplish two goals. One is to make it competent and the other is to make it controlled, so that it only does the things that you, an appointed officer of the government, want it to do. I think the problem we have here with the FBI is that we've got good control functions in place now. The case with the CIA, we've got good competency functions in place, but not necessarily the control as far as domestic acceptability. And Department of Homeland Security, I think we're still working on that.

I think from my standpoint, I think to address your specific question, I would want to look at the structure of oversight and whether it gives you competent control over it. I think that becomes the overwhelming sense of the long-term viability of this to the American public. And oversight, there are three levels of oversight. There is environmental oversight, how do we connect it to me, the citizen? You know, I do that through elected representatives, I do that through the President, I do it through constitutional officers that have to get confirmed.

We have structural oversight, where you set up structures such as ombudsmen and inspectors general and, you know, this sort of thing so that you've got a system to check. Then you have transactional oversight, you've got to get a FISA order if you're going to do something. And where do you best engineer most optimally those elements of control? Again, you could move them to the other organizations and you'll have other problems that you'll need to engineer.

I personally come down on the mode of saying I think right now you've got the better chance of accomplishing your goal if you start building out from where you are now with the FBI, but I would give it a different direct management oversight, I would give it more analytic management oversight and bring a DCI kind of person to do that and try to reward the analytic skills that you want in the law enforcement community, not just simply the transactional skills.

If you can do that, and then you raised the key question how do you measure success, how do you know you're succeeding in doing that? And that frankly takes -- there's no statistical thing, you just have to have smart people who are sincerely committed to helping the FBI do that who come in and just tell them God's truth of what they really understand is going on and ask a directorate to take that on sincerely and to look at it.

MR. LEHMAN: Thank you.

MR. KEAN: We've got very little time, and three commissioners who've asked to be heard, so if we can keep our questions and answers as short as possible.

Commissioner Ben-Veniste?

MR. BEN-VENISTE: Thank you, Mr. Chairman, and thank you both for meeting with us privately, sharing your views, honing those views as I hear today, and providing for a very lively and informative discourse. I particularly want to observe my agreement with the notion of targeted, focused, intelligence collection which is, or should be designed, toward achieving a particular goal, rather than the diffuse collection of every available scrap of information about every American citizen which is being discussed in other quarters.

I think the reasons for that are obvious. They deal with the problem for which the enhanced capability should be directed and they do not stir up unnecessarily the emotions of the American public with regard to its government spying on them. It's very basic, and I commend you for those observations. And without taking a lot of time I would suggest that the proposals in Mr. MacGaffin's statement here today, which are very specific and very directed toward a framework within the FBI of bifurcating the law enforcement functions from the intelligence functions, are those which we ought to very seriously consider in our recommendations as a commission.

The question I have is whether you gentlemen think that they can be accomplished without legislation, a legislative framework essentially reorganizing that part of the FBI that will deal with the recruitment of people who are most proficient in what it takes to analyze data, whether it is necessary to essentially legislate an individual function within the FBI that is charged with directing the collection of information, and whether it is necessary to establish a framework for measuring and promoting the individuals who would be selected for this intelligence function within the FBI. And I'll stop there.

MR. MacGAFFIN: Thank you for the endorsement of some of the work we've done on this. With regard to the question of is legislative input required, on a technical level, quickly reviewing the things that I wrote, I would think only the provision that the head of this new entity be -- the way in which he be selected and the term to run concurrently with or for the same duration as the director of the FBI's term, I think that probably would require it, I agree. Other than that, not only do I not -- can I quickly not think of anything that would require it, I would hate to do it because it's only going to work if everybody, if the whole process is, oh yeah, I got it, we've got to do this. And we've all been there where, you know, this part

of town is legislated and we said, oh yeah, we're going to do it my way.

So, it's got to come -- I don't think legislation helps other than those, other compulsions got to be put to it, but not legislation.

MR. BEN-VENISTE: Thank you, and I'll defer to my colleagues' questions.

MR. KEAN: Senator Gorton.

MR. GORTON: (Off mike.) Mr. MacGaffin, I'm going to follow the compliments of Mr. Ben-Veniste. I look at these 11 points as the most precise and substantive and --

MR. KEAN: Microphone --

MR. GORTON: I look on these 11 points as the most thoughtful and decisive and pointed suggestions that we've had to solve a very real problem. They've taken a great deal of thought and effort on your part and are the result of a great deal of experience. Generally speaking when you get a compliment like that before the question, there is a but, and this is the but: I go through this with great care, I listen to all three of your brutal criticisms of doing something like MI5 and now I want to ask you how this differs from MI5?

It seems to me that what you have created, what you've created here is two essentially separate entities. Maybe housed in the same place, but you will have a head that is appointed by the President, and really when you get right down to it, he's going to be picked by the President and he'll consult with these other three people in doing so for a fixed term. His personnel are going to be separate from the other FBI personnel. You're going to start with 60 percent FBI people but they will be trained and will go through a career entirely in this intelligence function.

And you don't get together at least until you get to the level of the attorney general, though I see little supervisory authority on the attorney general here, and now -- and I look at what we've learned about MI5, well, it's separate from the constables and law enforcement in Great Britain. They finally reach a point at the home secretary level is the first place that there's a real contact between them, who in turn is a creature of the prime minister. So, and with all respect, except for the fact that you call these people FBI agents, you know, my first question is how it differs from a separate entity such as that in the United Kingdom or in some other place?

I strongly suspect that you will have at least some sharing of information challenges between the old FBI and the new FBI. That's number one. Second, there's been, you know, bitter

criticism here of saying that you might have exactly this same kind of function except maybe that it works up through the CIA to the President, rather than through the attorney general, you know, to the president. But what we have from a point of view of communicating with one another and solving the fundamental problem is, that here in this situation housed in the FBI, however you do it, you are mixing an intelligence function with a law enforcement function and a cultural clash that you have testified to only too eloquently.

If you were dealing with a domestic CIA, you wouldn't have a culture clash, you'd have to have an entirely separate organization like this one because the rules would be so different. But it would be intelligence, intelligence and the problem of communicating with law enforcement. Here you have an intelligence and law enforcement mixed and still nothing to increase the communication between the present CIA for intelligence overseas, and the domestic intelligence that this new group is going to take with the fact that the terrorists move back and forth across the borders with a relative degree of ease.

So it's sort of a long speech, but haven't you given us an MI5 just simply with a different name, and is it so totally out of even our line of consideration that we should have all intelligence with two separate sections under one head, rather than have that split between domestic and foreign, faced that split between intelligence and law enforcement?

MR. MacGAFFIN: First, and this is going to sound like I'm ducking it, and I'll come to some of the other issues later. The first and most important part is the fact that it is in the FBI as our first proposal serves to root it in the tradition of America, in the great tradition of getting John Dillinger and whatever, the great confidence the American people have in their fate.

MR. GORTON: That's a good point.

MR. MacGAFFIN: That is a very, very important thing. Something that I learned about but I didn't appreciate in my 31 years at CIA but came to appreciate in my six years at the FBI, terribly important. So the fact that it's there is, number one, a very important difference, it's not a new organization, it's what's new is it's going to go about doing its business differently in a different form. It's going to truly do intelligence collection that it doesn't do now.

The comment on the relationship of the AG to this. You alluded to that in your remarks. There is an analogy in the Executive Order 12333 which essentially guides how in my old world of the CIA, how -- what is the approved and appropriate practice in regard to, in this case U.S. persons, the guidelines themselves were crafted and approved with full input by the

attorney general, but on a day-to-day basis are administered by the DCI and the deputy director for operations.

I can't tell you how many times I had visitors have come out to John MacGaffin in Beirut or Baghdad or wherever it was, and gave me and my staff, you know, here do you really understand 12333 with regards to -- I think that we need to do the same here, some version of the same thing here. To John Hamre's very well taken one, the attorney general has to have a firm foot in this, but not necessarily in the day-to-day management of what collection is done, but certainly has to set up and we've all got to be satisfied that the constitutional protections are there when the collection is done, if I make that point.

The communication, the last point you made was how do we, how does this deal with the question of communication across the intelligence -- across the great intelligence/law enforcement divide. You know, again while we've made progress in that since 9/11 with a club over their heads, the level of non-communications within the existing FBI across criminal and intelligence, national security sides is unbelievable at times. I mean, literally I was present when the person responsible for doing Russian organized crime met the person in the Bureau responsible for the national security side of pursing the Russians, and I knew them both -- you know, what's this all about.

So it's not that there is this great free flow of information across the internal workings of the Bureau as it exists now, that's a fallacy. It should be, I mean, the Bureau ought to be built on all the information that's appropriately available where it needs to be, but it doesn't work there now. So I guess that'd be my third point is that it's the ability to build this communication across law enforcement intelligence. The intelligence community would welcome and work with an organization like this embedded in the FBI that was clearly doing collection work, because then it's easy to say, here's the problem, it's al Qaeda, I'm going to do Paris and something else and you're going to do, you know, and that'll work. And when we've done that between the two, you know, it's a winner, and when we haven't you get what we got.

MR. GORTON: One brief question, Mr. Barr, do you buy into the MacGaffin formula?

MR. BARR: Not completely, I do think ultimately this will evolve into two directorates within the FBI. I think it's a far different situation than having a separate agency, because I don't think Mr. MacGaffin expected these two entities to be hermetically sealed. They would be interacting and coordinating in the field, in the field offices all the way up the chain. One thing to remember is, again, collection in the United States relies on law enforcement assets.

You know, during the first Gulf War when I was responsible for American counterterrorism, a lot of it boiled down to tracking people, figuring out where people were in the United States or where they were going. And that required a lot of stake outs, it required a lot of traffic stops, it requires, you know, going into stores to find out where certain apparel was bought. It requires going into hotels to check records in an entire city. Very intensive, requires feet on the street, law enforcement people.

An MI5 type agency, I don't care how many agents you put in it, it's not going to -- you know, you're going to have to have, you know, 20, 30, 40,000 agents running around the United States if they're specialized and dedicated, or it's going to have to be integrated with law enforcement assents in the United States. The FBI today has those assets, it is integrated with state and local law enforcement, 650,000 police, and they do a lot of the work necessary to track down terrorists.

In sharing information, any division even a division within an agency will create sharing problems. It happens at the much ballyhooed CIA, but in fact if it's in the same agency, the risks are lower, you usually get more sharing of information. The coordination with the CIA is something that happened, the FBI is part of the intelligence community and that coordination has to occur. And in that case, it's with, you know, entities outside the Department of Justice. But I don't think we should compound the problem by creating another fissure, this artificial distinction between law enforcement and intelligence --

MR. GORTON: What part of MacGaffin's recommendations do you disagree with?

MR. BARR: Well, I'm not sure I would be so prescriptive. In other words, from my experience institutions will evolve over time and develop appropriate cultures. For example, take the CIA. When I was first there, there was, you know, some distinctive culture between the DDO, the Directorate for Operations and the DDI. And yet, you know, most of the career intelligence people in through the CT program, they got the training of the covert people even though they might ultimately end up over in the DDI. That's not to say there were other ways for people to come in.

So I think, you know, there will be some things where you may want some overarching program where you get some basic law enforcement orientation for people, but I think eventually you will end up with two directorates. But I don't think we should necessarily make them hermetically sealed against each other, some cross fertilization is a good thing.

MR. GORTON: Thank you.

MR. KEAN: Last question from Congressman Roemer.

REP. ROEMER: I want to begin anyway where Dr. Hamre started his remarks and that was thanking the panel here. We want to thank you for your advice and your counsel here this afternoon, but more importantly, Mr. Barr, for your service to an administration a few years ago, doing a very good job. Dr. Hamre, another administration doing an excellent job as well. Mr. MacGaffin, 30 years in the CIA serving your country.

I'd like to shift a bit here from the FBI to what Mr. Barr referred to as the much ballyhooed CIA. Given your service there for 30 years as an officer and a deputy director of Operations, you have quoted Thomas Powers a couple of times, and he has written a very interesting book of essays on the CIA, and in one of them, Mr. MacGaffin, he talks about a very difficult endeavor to undertake in any organization, and that is doing an internal assessment of when you make mistakes.

And he interviews somebody at the end of his essay on the 9/11 failure, and he's talking to somebody with vast experience at the CIA that really finds it difficult to go through this internal assessment of where the CIA has made mistakes, and that it may be too bloody, it may be too difficult, we may not be able to do this, but we cannot fail to do this, we must undertake this assessment and this damage plan, and how we go forward with some vision in the future.

I'd like to press you very hard, because we get many of our most candid comments from people after they've left government service, and ask you in your remarks you're pretty explicit about the magnitude of the failure of 9/11. You say, and I quote, "The magnitude of my failure, the colleagues at the FBI, the CIA, the DOD, to fully implement those systemic changes to our national security structure writ large that could have prevented this attack." Unquote.

I just want to be specific in what do we need to recommend at the end of the day to see that these great talented people at the CIA that have done a wonderful job over 50 years in so many ways but may have been slow to get onto this new target of al Qaeda, what do we need to do specifically there at the CIA as an institution to see these changes made? What two recommendations would you make to us?

MR. MacGAFFIN: Unfair at the end of a long, tired day, but as you will note in my statement, I made very clear that while the issue here was domestic intelligence collection and we were going to spend a lot of time talking about the problems of that, that there are extraordinarily important issues that have to be addressed for the foreign side, for CIA and NSA particularly. In very short hand on the NSA side, getting out behind the technology curve, they're so far behind they can't get in front of it. For the CIA, I think it's getting back to the same

criticism I make of the FBI, getting back to real focused penetration operations against the most difficult targets.

It's really hard work, and unlike -- I happen to live in places that now make you say, hmm, like Beirut or Baghdad or Riyadh. But when I lived in Beirut, you know, it was terrible, my sail boat sunk one day, but other than that it wasn't too bad. The places where you have to do this work now are terrible, and so getting people who are willing to do this work in those places and take the risks, everyone as we have to do, get behind the FBI to make it do what it's got to do and let them know we support it, we've got to do the same thing too for the CIA.

And the kinds of things the between General Barr and Dr. Hamre talked about were people in the FBI say, yeah, go do that and get yourself in trouble, you get held out to twist in the wind. The same thing is true for operatives in the CIA. We've got to let them know that we support and encourage that, and that still hasn't happened.

REP. ROEMER: But be more specific, I'm not letting you off the hook with that. We've heard that over and over and over, that we need better human resources and better penetration in terrorist targets and better language skills and analytical capabilities and better strategic analysis of the information that comes in. How do we do that? We've been talking about these kinds of things in the intelligence community for several years now and some of these things have just not been done. How do we focus on those two or three things and how do we implement and achieve those?

MR. MacGAFFIN: Okay, and I didn't sign up for all of those, although we could do better on all of them, I focused directly and specifically on human source and technical -- human enhanced technical penetrations of those hard targets. And how do we do that? We do it through the recruitment of people who can -- who can understand and reach into the Islamic communities and can deal in those languages. But it's got to be the constant focus of the oversight committees, of the Administration, of how are we doing?

I mean, we're really good now, I understand, you know, from everyone's favorite source Bob Woodward, that the President has a thing in his desk drawer, that he pulls out and when Mr. Tenet goes down, they sort of cross off, you know, how many bad guys have you got that are still at large? Let's turn it around, and even though this is a terribly sensitive issue, and keep everybody's nose to the grind of how many sensitive penetrations have the FBI and the CIA and the NSA together working jointly given us in all these places because it's the only defense against the terrorists and the other organizations to do us harm. You're not going to do it with satellites, you're not going to do it any other way. And until we keep -- that's the only payoff,

is count them. Just as you count them when we take them out, let's count them when we bring them on board.

REP. ROEMER: Thank you, Mr. Chairman, thank you again.

MR. KEAN: Thank you very, very much. I want to thank you all. This has been a very interesting and a very valuable panel. I want to thank all the witnesses today for their time, we're greatly appreciative of the insights we've gotten. And while we've heard a diversity of opinions on each panel, we have also I think discerned some very interesting themes. First of all, the choice of security or liberty is false. Such thinking invites the pendulum swings of the past, going too far one direction then going back too far the other.

Instead we need creative thinking about how to live in a more dangerous world, how to make security and liberty into partners, not rivals, that creative thinking is in very short supply. But we heard witnesses today who helped us approach this challenge and do it constructively. In intelligence gathering we need guidelines that tell people what they can do, yet other ways to hold them accountable when there are abuses, that the wall between intelligence and law enforcement in place prior to 9/11 may have faithfully impeded investigation of the future hijackers.

And if the United States is to prevent terrorist acts before they occur, sharing information between law enforcement and intelligence is vital. We heard that the PATRIOT Act, debate swirls around symbols as much as substance. But the Commission must think about what Congress should do when the key provisions of that act expire at the end of 2005. We heard that preventive detention of terrorists may be necessary, but witnesses thought that we do not yet have the institutions or rules in place that will make such measures sustainable in the long haul in our democracy. As one witness put it, changing the rules is better than having no rules at all.

We heard testimony about the importance of a clear framework for immigration law decisions and designations of enemy combatants. Such a framework simply doesn't exist today our witnesses testified. We heard testimony about the importance of consistent enforcement of the law, both for those who we welcome to our country and those we do not. We heard about the importance about working with the Muslim and Arab American community as a critical part of our antiterrorism work. We heard testimony that we should not appeal to foreign models for addressing security issues, but we need a model for domestic intelligence consistent with American values and our own system of government.

We heard a very good airing of views about the future of the FBI and the critical question that came out is this: Does the combination of law enforcement and intelligence compromise

devotion to the intelligence mission? Or is that combination instead essential for the integration of collection and action in the field operating within the law? This is all very important to our mission. We need a strong, informed public debate about the U.S. government's new powers in fighting this war on terrorism. And I certainly hope, and we all do, that the Commission's hearing today contributed to that debate. Thank you all, very, very much.

End.

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House Select Intelligence Committee Holds Hearing on Constitutional Issues of Intelligence-Gathering

LIST OF SPEAKERS

GOSS:

Good morning, ladies and gentlemen. I'd ask that the committee come to order. I know that there are some who feel that this is an attempt by the Intelligence Committee to have a secret meeting in the middle of the night by standards that we seem to operate on the Hill sometimes, but nevertheless, I will tell you that we do get up early and do our work. We're just not always seen in such an organized fashion.

We welcome to the third in our series of hearings held by the Permanent Select Committee on Intelligence, examining the significant issues presented by the intersection of national security, intelligence collection and the protection of our individual liberties.

In April of this year, the committee held an open hearing to discuss some of these issues and that hearing focused primarily on the terrorist information awareness project, other data fusion and data mining development projects, biometric databases, linked network databases and the sharing of intelligence information among and between intelligence and law enforcement organizations, all of which are very difficult subjects.

In July, the committee held a closed hearing to discuss operational considerations faced by the intelligence community during the course of its intelligence and intelligence related activities, both abroad and domestically. Today, we will be discussing the constitutional and public policy considerations attendant to the fundamental power and responsibility of the federal government granted by the Constitution of the United States to protect the nation, defend our freedoms and secure the blessings of liberty for ourselves and our posterity.

As noted in our first hearing on this topic, this endeavor takes note of the inherent tension manifest in these elemental obligations of the federal government. The committee is of the view that a meaningful and lasting equal (inaudible) can be and indeed must be achieved if we are to succeed in fulfilling our mandate under the Constitution.

Before we can determine what must be done, we must define for ourselves what it is that the Constitution permits, what it requires, what it forbids and how it applies in the context of asymmetrical attacks by terrorist organizations.

Congress must determine, guided by the opinions of the Supreme Court, where the constitutional threshold is for government action. Then it would seem that Congress must decide if more protections as a policy matter must be added to the floor established by the Constitution. When it acts, Congress must be aware that enhancements to the Constitution's requirements through legislation may have the effect of restricting the federal government's capacity to find and disrupt future terrorist attacks all in the noble name of noble liberty.

A couple of examples might be used for the purposes of this discussion. In the aftermath of the Church and Pike committees' reviews of the intelligence community's activities during the Carter administration, Congress in the late 1970s imposed upon the president through the Foreign Intelligence Surveillance Act -- FISA, we call it, a process by which the federal government must plead certain facts and obtain an order from a specially designated judge before it is permitted to engage in intelligence collection activities in the United States.

They've all come to accept FISA as a useful tool in our domestic intelligence collection efforts as they have involved counterintelligence, counterespionage and counterterrorism activities of the federal government.

The questions remain, however, is FISA constitutionally required, or if not constitutionally required, then is it a restriction on the president's authority that Congress imposed for sound public policy reasons.

If it is the former, then we must be extra careful in our approach to amendments to FISA, of course. If, however, it is the latter, then Congress must be prepared to reconsider these restrictions in light of the public policy arguments made in the late 1970s and informed by the fact that this nation continues under a threat of violence on a daily basis from terrorist organizations intent on destroying us, our friends, the government and our cherished way of life or any or all of the above.

Additionally, Section 103(d)(1) of the National Security Act of 1947 as amended prohibits the Central Intelligence Agency from having and I quote, "a police subpoena or law enforcement powers or internal security functions," unquote.

After September 11, a number of people have asked the reasonable question of whether all of these restrictions continue to make sense. Others ask if those terrorist attacks established a new paradigm for the conduct of our law enforcement community, why too should they not create a new environment for our intelligence community.

It strikes me also that in the post-9/11 public debate on intelligence gathering, many voices seem to be reading from talking points drafted in the mid-70's, with little regard for the reality of how the security environment has actually changed. Does the very fact of September 11 not convince us that a significant and serious change in the way we undertake this task is required?

What I would like to know from the distinguished panel before us and indeed it is and we thank you for getting up early and joining us at this time to help educate us on these matters -- what I would like to know is whether this reaction on the activities of the CIA, in particular and as it is applied to all of our national intelligence community elements in general, is constitutionally based or is it a public policy bifurcation in the duties of the federal government.

If it is not constitutionally required, what I would like to discuss is whether in the aftermath of September 11 and in the context of the global war on terrorism, this public policy determination of the late 1940s still makes sense -- is this a statutory restriction that should be shelved in order to enhance our own national and homeland security.

Associated with these questions is the one big question relating to which government agency should be assigned responsibility for collecting domestic intelligence. Many viewpoints have been offered about which agency, but there has not been any real discussion of the need for or the utility of the creation of an American version of the British MI5, notwithstanding a lot of commentary about it.

GOSS:
Do we need such an organization? Can it be established within the construct of our Constitution? Would we need a constitutional amendment to provide the federal government the authority to engage in domestic intelligence collection?

If not to be the FBI that does this work under its current authorities as we know them, should we turn this responsibility over to one of the other intelligence community organizations that has a record of success in the collection of intelligence overseas. Or is the Department of Homeland Security the more appropriate entity to house this domestic intelligence collection organization. Or is there another answer beyond those? If so, what additional authorities would the secretary of the Department of, say, Homeland Security need, if any?

These questions really only scratch the surface of the national debate that must be joined on this issue. Additionally, we must be ever mindful, particularly if the Constitution permits the president to engage in this activity, that any new legislation on this subject will likely have the effect of restricting the president's organic authority under Article Two of the Constitution.

In that vein, there seems to have developed an almost breathless attitude with respect to particular provisions contained in the USA Patriot Act, which, as we know was enacted shortly after the murderous attacks upon our neighbors, ourselves and the nation on September 11, 2001.

The Patriot Act, which passed this House on a vote of 357 to 66 for some reason has now become something to be despised, at least among some. We on this committee, however,

hear routinely about the utility of the Patriot Act to our continuing efforts to deter and disrupt terrorist acts being planned against Americans and American interests.

I would expect that some of today's hearing might either extol or decry particular provisions or the entirety of the Patriot Act and I look forward to that discussion, because indeed, it's going to be continuing before Congress.

What I am most curious about, however, is how did the Patriot Act, in just two short years, become shorthand in some circles for an overreaching federal government. Is the Patriot Act an egregious affront to our constitutionally protected freedoms, or is it an expression and an embodiment of Congress' ability to fashion legislation that meets the needs of our national and homeland security while also protecting the very freedoms that are under attack by our terrorist foes.

As I said in April, serious minds must engage in this debate. Before the committee today we have such a panel and we are grateful to them for sharing their time and expertise with us. I look forward to their presentations and their thoughtful commentary and indeed, I've read most of it and find it fascinating.

Before I introduce our witnesses, however, I would like to point out the timeliness of this general topic. Even this morning I was seized by the news as I woke up about Colonel West, apparently a member of the Army, who is involved in what I would call dealing with the enemy on a firsthand basis and is confronted with the kinds of problems of how do you deal with the threats we have today which hardly fit the definition of conventional warfare.

I realize that doesn't come into the direct debate that we have in most likelihood, but it's exemplary of the kinds of problems that we are asking people to face who are doing the very hard work of defending our country and we would like to make this as clear as possible so people who are doing the hard, risky work are not put necessarily at jeopardy because they don't understand the rules of the game, which indeed, nobody has exactly drawn up yet.

Ms. Harman, I am pleased to recognize you at this time for any comments you may wish to make.

HARMAN:

Thank you, Mr. Chairman. I am pleased that seven members of our committee so far are here to be part of this very important public hearing. As you are well aware, last week you and I and Senators Roberts and Rockefeller met with representatives of the victims' families, the 9/11 victims' families.

Their plea to us as the senior members of the two intelligence committees was to hold more public hearings. Their point was that they assume we are doing some good things, but they don't know what they are and to the extent that the rules on classification permit us to talk about them, they would like to hear about them.

Lo and behold, a few days later, here we are in a third hearing on the subject of civil liberties and I think it is a very timely topic. I think your remarks were important and this brilliant panel before us, many of whom are good friends, will, I know, enlighten us.

On the one year anniversary of the attacks of September 11, 2001, The New York Times editorial board commented, quote, "What we suffered on that day will be an important part of the story of this country, but in the long run, it will not be as important a part of the story as what we choose to do in response to what we suffered."

September 11 prompted an emergency response to protecting the homeland against terrorism. In this first part of the story, we have been in a state of crisis; a period in which we have taken some dramatic affects to make the homeland more secure.

Two years later, we're a lot smarter. We are smarter about the nature of the threats. We are smarter about the tools needed to combat those threats and we are smarter about the effects our efforts have on our freedoms and our values.

Now is the time, in my view, to write the second part of this story about our response to what we suffered on 9/11. We must shift from emergency measures to a more enduring approach, an approach that is more sustainable and more strategic.

A key part of this strategic planning is to reexamine the issue of how well we protect our freedoms while securing the nation. After all, the war on terror is a war to protect freedom.

The terrorists seek to destroy lives and our way of life. We must deny them both objectives.

Today's hearing, as I mentioned, is the committee's third in a series on the civil liberties and intelligence implications of our fight against terrorism. In our first public hearing on these issues last April, we explored the impact of new tools like data fusion and data mining. At the time, the Total Information Awareness project of DARPA aroused alarm because of its director and it's (inaudible).

I had grave concerns with that program's leadership, but I was even more astonished that the administration allowed such efforts to develop in a policy vacuum, without a policy framework to guide the technology and reassure the American people and Congress that this was well thought out.

I do believe that data mining is a question of how, not if responsible, respected groups like the Markle Foundation Task Force on National Security in the Information Age, and the Center for Democracy and Technology, along with scholars at the Brookings Institution and the Heritage Foundation, all have concluded that data mining tools can be enormously beneficial for our national security and that these operations can be done in a way that preserves privacy and civil liberties. You'll hear more today from some of the witnesses about this.

However, I do not believe the president has yet adequately developed a proper policy framework for data mining. There has been a lack of leadership and a lack of sensitivity on the issue. The emergency approach must give way to a thoughtful, reasoned, more enduring approach.

Our debate on this issue of data mining will continue today. Let me mention three other questions that we must further address as well. First, are we developing the best approaches for performing domestic intelligence collection? You asked a similar question, Mr. Chairman, or is the new organization and a set of legal authorities necessary?

Second, and you asked this as well. How well is the Patriot Act working? Congress must fully appreciate concerns about the implementation of the Patriot Act, in my view, before we

consider legislative proposals to expand authorities further. I think that Patriot One may need revisions. Let's make them to make it work better and then if we need Patriot Two, let's go there later.

Finally, do we need more emphasis on thinking about civil liberties and security not as either/or, not as an either/or choice, but as mutually reinforcing values? Fortunately, there is a lot of good thinking on these issues and as I mentioned, we have the great thinkers before us.

Phillip Heymann a good friend, who now teaches at what you call "fair Harvard", has written a very interesting book recently called "Terrorism, Freedom and Security", which addresses a number of these questions. In fact, I have kind of plagiarized from his book. He asks whether we should be in a perpetual war on terror or whether we might redefine that term to be narrower and move on to a more sustained approach.

At any rate, I thank him and other witnesses, including Jeff Smith and Judy (ph) Miller, both of whom are extremely experienced, for being here.

In closing, let me say that these are hard issues and hard challenges and we will only find the answers through our collective wisdom. Our democracy thrives on a marketplace of ideas and I am very pleased that we can contribute to that marketplace through these discussions in a public hearing today.

In our fight against terrorism, we need to choose an intelligence strategy for securing America that reflects the historic strengths of our nation. As Thomas Jefferson advised in his first inaugural address, "The essential principles of our government form the bright constellation which has gone before us and guided our steps through an age of revolution and information. Should we wander from them in moments of error or of alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty and safety".

Now is the time to reevaluate central tenants in the counterterrorism campaign to date and to determine what needs to change to replace the state of emergency of the past two years

with a better, more effective, more enduring approach.

Thank you, Mr. Chairman.

GOSS:
Thank you, Ms. Harman. I would like to thank all the members who are here. This is an excellent showing for this time of day and I appreciate the other demands that are on us with the other legislation.

All of the witnesses, as you will see from your information packets, are former government officials and offer substantial expertise to the discussion today and I want to thank them again for making this time with us.

I've been advised that the order of presentation would be as follows: the Honorable William P. Barr, followed by the Honorable Phillip Heymann, followed by the Honorable Judith A. Miller, followed by the Honorable Paul Schott Stevens, followed by the Honorable Jeffrey Smith, followed by the Honorable John Yoo.

I give you that information for your advice and at this time, I recognize the Honorable William P. Barr, the executive vice president, general counsel of Verizon Communications and the former attorney general of the United States. General Barr, good morning.

BARR:
Thank you, Mr. Chairman, Ranking Member Harmon, Members of the Committee. I tried to address the questions you raised in your opening statements in my prepared remarks and I'll just right now in my oral statement try to make a few quick points.

First, I think a lot of the confusion in this area arises from the failure to distinguish between two distinct realms under our Constitution. First I would call the internal law enforcement or disciplinary realm of government which is we as a body politic have set rules to govern the members of our political community and we've reached agreements as to how we're going to enforce those rules. If there is transgression, we have procedures and process whereby we discipline people.

That's what law enforcement is and in that realm, we've created a lot of rights for people. In fact, the presumption is really against the government. That's very distinct from the realm we're talking about today, which is the national security realm and that is where we're not talking about disciplining an errant member of our body politic. We're talking about a foreign organized force, a nation or a group that is engaged in armed conflict against our society, that is an external attack on the United States.

And that is an entirely different realm and that is the national defense and when armed conflict breaks out, that is war. The powers of the government and the function of the government is performing are very different. We're not disciplining anyone. We're trying to destroy them. We're trying to win and in that context, the Constitution doesn't give rights to people who are attacking us at all. They have no rights under the Constitution.

The Constitution is only concerned with the efficient and ultimately effective prosecution of war against that group. Now, I think most of the present shortcomings and difficulties in our institutions that people harp on these days are frankly the product of the reforms that occurred during the '70s and '80s, because I think the basic premise there was that there was a lot of skepticism about the notion of inherent executive authority or of the need for broad national security powers and in an effort to constrain those powers and to subject them to the procedures and the processes and the presumptions that exist in our law enforcement realm, carry them over and impose them on the national security realm.

And frankly, there was also a premise that just about every problem in society, including problems of terrorism or anything else, can be addressed through the law enforcement process, through judicial methods, through setting rules.

We embarked on passing a lot of laws against terrorism during this period. The domestic security function, looking at the FBI was once before this era was considered to be overly robust. People were worried about gathering of information and setting up files and how much does the FBI know about groups in the United States. People didn't want that. They wanted -- you don't go and look at what people are doing unless there is a criminal predicate,

unless you have a justifiable law enforcement purpose, you shouldn't be out spying in the United States.

As an institution, of course, the FBI responded to those pressures. So I think three features of our approach that we had before 9/11 were very much products of this culture and of the steps taken during this period. A heavy reliance on law enforcement in the criminal justice process, strict limits and suspicion on national security powers and functions and really, the emergence of a wall of separation between national security and law enforcement, where you could not share or use information back and forth.

BARR:
Now, what is the nature of terrorism? Let's not put too fine a point on it. It's war. It's war. It's an organized foreign group that is trying to come into the United States and kill us. And not just kill our armed forces, they are trying to kill innocent people, men, women and children and wreak as much damage as they can.

And the fact that it is conducted surreptitiously and stealthily doesn't mean it's not war. It is war. It complicates the problem of defense, but it is still war.

Now my concern has been that the war power, the ability to operate in the national security realm inherently requires acting on imperfect information, acting in great circumstances of great exigency and weighing, sometimes, the lesser of two evils in order to be effective and that the methods of the law enforcement apparatus in our system are simply not appropriate to interpose into that realm. I think FISA is a perfect example of that.

FISA, for example, establishes this notion of probable cause to believe that someone is a foreign power before you can engage in electronic surveillance against them. The probable cause standard is a standard that arose within the criminal justice process, but the ultimate standard is reasonableness. And one of the things that has to go on to reasonableness is what is the nature of the harm, you know.

It's one thing to look for a marijuana joint in the back of a car. It's another to be looking for a nuclear device that could obliterate a city. And you have to look at that in terms of what is

the reasonableness of the government's conduct.

I would say that the probably cause standard and the law that's grown up around it is fraught with difficultly when you apply it in the national security context. The Moussaoui case is an example. They couldn't get into his computer because they could not establish, they felt probable cause to link him to a foreign power. And all the apologists are trying to say, "Oh yeah, well, they could have had this theory and that theory." The bottom line -- very problematic. They could not link Moussaoui to a foreign power.

Now let me just end with some comments about what I call the "end game". We hear a lot of stuff about we have to prevent terrorism in the United States. We shouldn't be focused on enforcement. We should be focusing on prevention. Everyone agrees with that and I think the FBI has reoriented its approach in that regard.

But what do we mean by prevention? One of the real knotty problems in this area and the thing that everyone tiptoes around is what do you do when you find them in the United States? You find a cell. You find a group. You find people you believe are terrorists. What is the end game?

Now at some point you apply coercive power against these individuals. You seize them. You try to hold them. Now I think that we can use national security powers in the United States. I have no problem with the Padilla case. I don't care whether they are a citizen or not. If they are an enemy combatant, if they are an adherent to Al Qaida and they are caught in the United States, they are subject to the laws of war and they can be detained under national security powers until hostilities end.

But I doubt very much that we as a country want to see the over- broad use of that power. I think generally we're going to want to see more use of -- we are going to want to reserve the law enforcement option. We are going to be able to want to arrest people and use that option. What we see in the Moussaoui prosecution how difficult, how truly difficult that is and how the process can turn into a circus when you are trying to use it to ultimately justify detention of an individual within the United States.

There are no easy answers to this, but as long as we want to keep law enforcement as one of the tools we can use, part of the end game of actually intersecting a terrorist and preventing something from happening, we're going to have to grab them. And as long as we want to do that under law enforcement powers, it seems to me that it has to be inextricably interwoven -- the function of gathering intelligence and carrying out national security activities and the law enforcement activities have to be tightly meshed together and coordinated.

Maybe MI5 can walk into Scotland Yard with a file at the 11th hour and say, "Pick this person up." But that won't cut it in the United States. In order to pick somebody up, you have to have probable cause and so, we have to work both of these tracks -- law enforcement and intelligence together and in my view, talk about separating them into two different agencies is preposterous and will really throttle our ability to be effective here at home.

Thanks.

GOSS:
Thank you. That was an excellent abbreviation of your written remarks, hitting all the high points. I neglected to say at the beginning that all prepared testimony submitted to the committee will be included in the record. Without objection. That was extremely well done. You've raised some interesting questions.

Next is Phil Heymann from Harvard, fair Harvard -- fair and balanced Harvard some would say, some wouldn't -- James Barr Ames professor of law, Harvard University School of Law and former deputy general of the United States. Welcome, sir.

HEYMANN:
Thank you very much, Mr. Chairman, Ranking Member and Members of the Committee.

If I could make clear where I differ from Bill Barr, I would think that that was the most important single thing that I could do. And let me see if I can try and do that.

I agree with Bill Barr that different powers are needed now because of the danger of the situation that we first saw clearly after September 11. But I think that it cannot be based on a delegation to the president of the right to do things that we have and things that we have

condemned when other nations do them at home or abroad, to do them in secret from the American public without legislative authority, without legislative oversight and without the involvement of courts in any way.

I'm saying in some cases without the involvement of courts in any way. Now, I take that to be an accurate statement of where we are now. I do not disagree with Bill Barr on the fact that some of the things that we do will have to be different than traditional criminal law. But those things should be decided upon in a way that starts to reflect again, not the emergency after September 11, but the system of government that we've had for 200 years.

The danger we face is not greater than the dangers we faced in the past. It is less by a long shot than the dangers of a powerful nation. It will hit us more, but not in the same way and not with the same threat to our national life than a powerful nation presents.

OK. Now why do I say that we have to move into a realm where the Congress decides what we're going to do that we have previously condemned and not, where there is oversight where the public knows how many people are being held as much as possible, that the public knows that. The answer is in short because the problem is going to be with us for a very long time.

The administration says that we're fighting Al Qaida, a group that might be 500 or 1,000 core members and we will destroy them and I think we will destroy them. But we have out there a billion and a half Muslims who by all the polls are increasingly year by year filled with hatred and resentment against the United States and if Al Qaida disappears, we have to assume that we're going to have other threats.

By that, I don't mean -- I want to be careful not to say a billion and a half. If one tenth of 1 percent -- one tenth of 1 percent of the billion and a half are willing to be suicide bombers and 50 times that many respond in polls that they approve of suicide bombings, we're talking about a million and a half people who we're going to have to worry about for a long time.

And it isn't just them we're going to have to worry about. Half of the problem we're facing is that weapons of mass destruction are going to be easier and easier to get by smaller and smaller groups of people. The next Timothy McVeigh may not try to use a car bomb.

The result of that is that we are going to be living with whatever system we create for decades and I don't believe the system we want to create is one where we empower or require, whichever you choose to call it, the president of the United States to decide in secret, without the public knowing, without the Congress participating, without courts involved, what we are going to do for the next 20, 30 or 40 years, including a whole set of things from detention of Americans to detention of others abroad, to coercive interrogation, all of which I am prepared to entertain and discuss with Bill Barr do we need them or don't we need them and under what circumstances.

But these are things that we have condemned in every country in the world and that Americans are very uncomfortable with and we have to address them and we have to create a new realm that isn't called war. War says the president will do all this, don't worry about it. And it isn't called crime. Bill Barr is right. The problem is bigger than we thought it was when we could deal with crime, much bigger. But we have to create a new realm.

OK. The first step in that is quite direct and straightforward and that is to acknowledge that there are conflicting interests. I'm going to not give examples because I don't want to take more time than I have. The Lawyers' Committee on Human Rights has a report out that lists the concerns about human rights and civil liberties. They are real. The idea that the president can decide that an American citizen is guilty enough to be detained or that he is sure enough that an American citizen is guilty of terrorism to detain him without access to courts, in violation of a federal statute that says no American citizen can be detained without federal legislation to support it.

These things, there are valid, important civil liberties, concerns and democratic freedoms that we have to worry about. I'm worried about my grandson and where he is going to be in the years ahead. There are also very serious national security concerns, as Mr. Barr emphasizes. What we have to do is look for ways through legislation to deal with both if

possible and that is what the FISA statute and the CIPA statute, the Classified Information Procedures Act do, try to find accommodations between the two or if we can't find accommodations, decide that there are some circumstances in which our freedoms have to give way and there are some circumstances in which national security has to give way.

That's reality. Now, on this -- I am prepared to -- I think both sides are dogmatic and one side wants to say this isn't a situation more dangerous than what we thought we were facing in the year 2000. The other side wants to say this is war and anything goes. Neither one is correct. This is something between crime and war that requires its own rules and we're doing foolish things in the meantime.

The power to detain American citizens, the one that I began with and I emphasized, to my mind is in violation of a very clear statute is the power that has been used once in two years. We don't need that. The case for it isn't made that we need that. I'd like to see the case that Padilla can't be held as a conspirator or for attempt and if we can't be, then I would take the risks of letting him go or I would pass a detention statute.

I wouldn't leave it to the president to decide who can be put away in the United States. That isn't American. OK. Let me just show that I come out on both sides of these issues on the Total Information Awareness package.

I have no doubt in my own mind that gathering commercial and other information about Americans and combining it is a form of surveillance. If I am having a marital affair now, which I want to assure my wife I'm not, the FBI or the CIA or the Defense Department can easily determine that from my credit cards, my bank records and others. It's a form of surveillance.

But we authorize and what's more, what was intended by the Total Information Awareness package is a form of surveillance without prior probable cause that I am suspected of a crime. But we do authorize surveillance with wars. We authorize wiretaps in national security cases. We authorize wiretaps in other cases. We authorize searches.

HEYMANN:

What we have to have, in those cases, is a judicial determination that the scope of it is going to be small enough, it's going to be carefully enough guarded, that it will not threaten the privacy of Americans.

I think that could be done with a system for bringing together information from a variety of sources. I don't think it can be done technically, which is what the Defense Department was talking about. I don't think it can be done by saying the government has developed a technical system that will prevent the misuse of huge volumes of information.

I think only human beings can do it, but I think we could have a court that approved matching programs and after asking a set of questions that you people would require which would go to how long will the information be kept, what kind of audit trail will there be, can it be disguised in the meantime so that no names are present until a pattern has been detected -- a whole set of questions that would look very much like the FISA statute would work.

All right. Let me close. Other things on the other side, I think, are equally foolish. I don't think we should be attending -- I think the Congress should address the question whether FBI agents should be attending religious meetings of mosques, particularly and political meetings without any prior reason to think that something bad is going on there.

On the other hand, this is an example of what I think the middle ground looks like, if hatred or violence is being preached in a religious meeting or a political meeting, I think the FBI ought to be able to attend. So if there is reasonable suspicion to think that violence is being preached or hatred is being preached, then let them attend.

Our present system, under some notion of war powers is that the FBI can attend without having any reason to believe -- it can attend any religious meeting and any political meeting at any time.

All right, just to close, for the overseas -- the way I think this is argued and I disagree with Mr. Barr on this is frequently to ask is the Department of Justice under Attorney General Ashcroft frequently says we will do everything that is lawful to protect the American people.

If this is war, everything is lawful -- not everything, but an awful lot is lawful and that means we will do everything permitted in war to protect the American people. I don't think we want that as the final outcome. I think what we want as the final outcome that intelligent people, going beyond the president and with oversight will decide what the balance should be, including among things that are lawful under the Constitution, between national security and democratic freedoms.

Now that's a great responsibility. That's like what the country had to do in the '30s to pull itself out of the Depression. We're going to have to do that.

Thank you, Mr. Chairman.

GOSS:
Thank you very much. I now turn to the Honorable Judith A. Miller, partner at Williams & Connolly and former general counsel for DOD. Good morning and welcome.

MILLER:
Good morning, Mr. Chairman, Ranking Member and Committee Members, thank you for having me today.

I am going to focus my remarks principally on the questions I think that you heard earlier in your first hearing that Chairman Goss referred to at the beginning of this hearing. I just wanted to say one thing in advance of that, which is wearing my old hat at DOD and listening to Mr. Barr talk about war having no constraints, there are and I used to sit there worrying about the law of armed conflict.

And those kinds of issues are hard issues to address, even when you have the clarity of an enemy that you are going after, as in Iraq, or maybe lately we don't, but to think that that analysis would be -- having used that analysis at DOD properly, to think that would be a routine benchmark for how we would act in the United States, I think, is going in a direction that would not serve our country well.

And also I think oversimplifies whether or not there are constitutional constraints, whether you call it war or not. I think using Defense Department resources in the United States

against American citizens, for example, which would be encompassed in the analysis that has been put forward this morning would create not only pragmatic difficulties for the department in its interactions and the confidence that the American people would have in it, but would also, I think, create a backlash in this country that we don't need and they're not trained in any event to carry out in an appropriate way.

Turning to the data mining issues that I wanted to focus my testimony on this morning and picking up on where Mr. Heymann left off to some extent, I certainly think that in the aftermath of 9/11, people believed and there has been much work by this committee and others that demonstrate that if we connected the dots in some new ways or a better way, things may have been different, or at least we would have had a shot at making things different before 9/11.

I personally believe that there are technology tools that may be available that can help us in the future to avoid that kind of terrible event. So I think it is a worthy enterprise to try and the question is how to go about it. I think to do it, we have to do it right or we'll lose again the confidence of the American people, as we saw, I think, with TIA and also with the Army's Jet Blue exercise of recent publication.

There are two levels of difficulty in dealing with this technology question in my view. One is that it is just not easy. Even if we had not to worry about guidelines or privacy or civil liberties at all, it isn't easy. I've spent the last several years working with both the Markle Foundation Task Force on these issues and also with several DFB task forces, and just even if you can find, even if you can write off the commercial -- if you can prevent that is in the private world and state and local law enforcement, which obviously we would not want to do, I believe, it is very hard just to get the federal systems and the federal data that we have acceptable and usable and searchable in a way that would be beneficial to law enforcement or national security.

But I do think that if you can work those issues both within the government and outside the government, and you will then be faced with, OK, we can have access to a lot of data. What should we do with it? My belief is that, again picking up on where Mr. Heymann left off;

there are certain issues that will come up in using the data. If you, for example, do subject base or link analysis, the very question about doing surveillance on an individual person comes to the fore immediately and I believe that there should be guidelines with respect to being able to do that.

There are other approaches that are called pattern-based approaches to mining data. The typical one is what we are all familiar with when we use our credit cards. You do something different and suddenly you get a bounce back. Is that the real person that belongs to this card? That is based on what the credit card companies have done for years, which is to find significant patterns in data and then construct models from that data and patterns and then use those models to predict behavior.

It's doubtful to me whether that precise approach can work with respect to terrorism. I think it is more likely that the patterns that we will be using to data mine, if we do, will be based on predictive models that we find elsewhere -- maybe red teaming that sort of puts together a variety of interesting factors that are associated with terrorist activity and then we take that model from the outside and impose it on the data that we have aggregated hopefully in a constitutional way.

I think that some of these things, in fact, could pay off, although there are very hard technical challenges that underlie them, regardless of whether or not we should or shouldn't be doing it, but each of these possible payoffs come with some risks that have typically been labeled "privacy issues" or "civil liberties" issues.

You can have false positives. You can have inaccurate data or failure to update that data. You can have inadequate controls about how the data is used. It's one thing to say, to pick up on something that both Mr. Barr and Mr. Heymann said earlier, if you think it's a nuclear bomb, you may draw the balance a little bit differently than if you think the same nifty tool can be used to find marijuana in the back seat of a car.

There are sort of different kinds of balances that might come into play and that leads to the final sort of risk that you may have a lack of clarity in the purpose that you are going to use these strong techniques. Even if you go into it saying we're only going to use it for terrorism,

for the mission creep in the classic sense, you end up, I think, tempting the government to use these powerful tools, which may turn out to be, in fact, very powerful in a variety of other ways that would create some real concern among the American public and I think within Congress.

So I think my fundamental message this morning is that although these technologies are probably important to our national security to pursue, we have not been going about it, at least so far, in the right way. I think Congress should require the executive branch to review the risks and benefits of these technologies in advance, to establish a government-wide process for review, to implement guidelines for use and to improve oversight and auditing so that we don't start out the way DARPA started out in the TIA case where they launched a research program, said effectively, "Trust us", I think in good faith, but nevertheless said, "Trust us", and lost the confidence of this institution and the American public.

I don't necessarily believe that the guidelines I'm talking about need always to be judicially based or even enacted in legislation, at least not in any sort of very tight legislation that will not keep up with the technology. But I think the Congress should consider asking hard questions of the executive branch when they think about doing these kinds of projects, require them to have a government-wide process of review in place with guidelines, an audit trail and have this committee and others be able to exercise oversight over those technologies.

Thank you.

GOSS:
Thank you. It's pleasing to hear that somebody thinks there is some use for oversight. Thank you very much.

The Honorable Paul Schott Stevens, partner at Dechert in Washington, former special assistant for national security and executive secretary and legal adviser to the National Security Council.

Mr. Stevens?

STEVENS:

Members of the Committee, I appreciate the opportunity to testify here this morning and I do, indeed, commend you for this series of open hearings that you are holding. These are extraordinarily important and difficult issues.

I was educated at fair Yale during the period of Vietnam, Watergate, having an active interest in national security affairs follows the events of the Church and Pike committees that ensued, was at the National Security Council as legal adviser as part of the relief team brought in with Frank Carlucci and Colin Powell and Iran- Contra, had occasion to work with this and the Senate Intelligence committee closely.

I saw oversight, Mr. Chairman, up close and personal in those days. And I know it is unfashionable. It's not politically correct, but part of what I draw from that experience and my own insights as a lawyer really is that we need a clear understanding of what Article Two intended the president of the United States to do, to be able to do, particularly in the times of the gravest national emergencies.

It's not an article that most people think about much any more. Article One and Article Three are much more popular. But if you look at our history, Article Two has been the bulwark against incessant threats to the security of the United States since the days of George Washington.

It was fashioned the way that it is because the framers of the Constitution recognized and I'm quoting from John Jay here, "that a wise, free people should first direct their attention to providing for their safety." Madison said, "Security is an avowed and essential object of the American union."

It was what they thought about first. It was one of the reasons they wanted a strong executive. In addition, if you look at all of the enumerated powers, broadly stated though they be, of the president in Article Two, I think that you come to the conclusion that they were there for a reason.

STEVENS:

They were there to fortify the office to perform unique multiple roles, roles that Congress can't perform, roles that the judiciary can't perform. He is the head of our state. He is our representative in foreign affairs. He is commander of our armed forces. He is chief executive.

What we broadly consider to be intelligence functions and I want to focus on that, that is the collection by various means of information and the evaluation of that information when it is important to our national security is really implied, necessarily implied in each of the president's grants of authority.

Moreover, I think it is clear that all of those grants of authority have never been looked at individually. They've been looked at together to define what the president's authority is. As Louis Henkin said, the president has more than one hat. He wears them all at the same time and he can act under one or another or all of them together.

In this regard, it's very important to note Article Two draws no express distinction between threats or crises or emergencies that arise abroad as opposed to those that arise at home. In Teddy Roosevelt's words, a president's responsibilities as steward of the people extend to both.

Now, I don't have to emphasize for this committee, I know, the practical importance of good intelligence in both of those contexts. During World War I, Winston Churchill made a point in graphic fashion that battles are won by slaughter and maneuver. The greater the general, the more he contributes in maneuver, the less he demands in slaughter.

And my perspective is intelligence is an essential part of that war of maneuver and perhaps and ever more important part, given the gravity of the threats posed by international terrorism, the gathering of intelligence, both domestic and foreign, is one of the most important ways that our president contributes in maneuver to the security of the country.

Now if I could emphasize, I think many of the differences of view here among lawyers, people who come at this from different perspectives really has to do with a different appreciation of the threat, the seriousness of the threat that the country faces.

I have to conclude that we just aren't all on the same page about that. We have not internalized the lessons of 9/11 in quite the same way. We don't regard the risks of weapons of mass destruction being used domestically by terrorist groups in quite the same way. In short, I think we come at the problem from different perspectives.

Part of the reason for that is that the information about those threats is necessarily classified. It's closely held. It's something that the public normally does not have and should not have and requires us in a way to defer to and trust our institutions of government, particularly the president of the United States, it seems to me, in ways that post-Vietnam, post-Watergate culture make very, very hard for us to do.

And if I were to say that there are differences at this table, I would certainly have a difference with my colleague and friend Phil Heymann; I think that's really where it originates. It's fine to say we're not at war, but we're not at peace. We're in some unknown third realm and what should we conclude from that.

I'm not sure that's going to be compelling to the people at the Pentagon who were attacked that morning on 9/11. I'm sure it won't be consoling to those people who lost loved ones or friends, as I did, in the World Trade Center attacks. It's not going to be very consoling to the next victims of domestic terrorism in the United States, and it certainly won't be very consoling if we have a catastrophic terrorist incident in the U.S.

There will be no doubt, I think, among the American people that we're not in some unknown third realm. We are, in fact, in a grave conflict, as serious an emergency as this country has ever, ever faced. But Phil makes another point that is excellent, which is, when will this end. How will we ever get back to a situation of normalcy and how can we trust the president with the exercise of those authorities that he has under Article Two of the Constitution meantime?

Those are very, very difficult questions; ones that seem to me can only be answered by the president together with the Congress. But Mr. Chairman, you posed at least one that sort of fascinated me and I want to make a specific comment on it and that is, is FISA constitutionally mandated?

There are probably differences here on the panel about that specific question and I'll put aside the issue of whether it is a good idea. Since I asked the question, is it required by the Constitution, as I read the Keith case which I think is the most authoritative pronouncement by the Supreme Court that would bear on that subject, Keith basically says with respect to surveillance of foreign powers or agents of foreign powers, our opinion says nothing.

It does say that with respect to domestic surveillance and particularly surveillance that has been used in criminal prosecution, we have to have some Fourth Amendment standard. But the court went way out of its way to say that Fourth Amendment standard in a domestic security context does not have to be exactly what it is in a criminal prosecution.

I think it is rare in Supreme Court precedent for the court to go so far as to say enormous flexibility, why, because of the important powers of the presidency that are at stake here and because of the important implications of that for our security.

So I would conclude from that FISA, in the context in which we normally think about it is, indeed, not constitutionally required, but were I an executive branch official today, I would probably still say, gee, it's a good idea insofar as Congress and the president are acting together on the principles of Justice Stone's opinion in the steel seizure cases. That makes sure that the president's authority is at its maximum. It gives him his greatest constitutional sanction when the two political branches of government are on the same page about an issue and I think the two should stay on the same page as much as possible.

But the circumstances nonetheless may require, particularly now, as I think in your statement asked, Mr. Chairman, for somewhat more greater flexibility, somewhat greater latitude. And I certainly would encourage that. I think the balancing we're constantly doing on separation of powers concerns on Fourth and First Amendment concerns in this area is one that is decisively influenced by the imminence and the gravity of the threat or the concerns that motivate executive actions.

Those have reached something of a zenith domestically with respect to 9/11 and the situation we now face. My government service was during the Cold War. We knew nothing of this. Terrorism, when I was at the NSC was an external threat. It was not something that

we thought of or had any concerns for here in the United States and certainly not in the way that we do now.

Now, I'll close with one point and just very generally. I think getting the executive and the Congress on the same page is important and you did a great job of that in connection with the USA Patriot Act. The Title Two provisions, I am puzzled as well, why they have become the poster child for oppressive, overreaching government. I think, frankly, we have kept that balance very effectively. Phil cites one case that he thinks is extreme of one individual.

That does not suggest to me that we are in the era of the Palmer raids or the Alien and Sedition Act or the Communist black list. It suggests to me that an executive is exercising considerable restraint and discretion, but in defense of the presidency's powers, I don't think any president would wish to relinquish or resign those, particularly given the circumstances we now face.

Thank you, Mr. Chairman.

GOSS:
Thank you very much. The Honorable Jeffrey H. Smith, partner at Arnold & Porter in Washington, former general counsel for the CIA. Welcome.

SMITH:
Mr. Chairman, thank you. I will try to keep my remarks very brief so that we can get quickly to questions. This has been a terrific session, I think, for all of us this morning. I have learned a great deal on how different people view many of these same issues.

Intelligence has never been more important to our national security. It's also never been more important to understand the role of intelligence and how it impacts on our civil liberties. We are in a war with terrorism, but we have to find a way to fight and win that war that is consistent with the preservation of our fundamental civil liberties. To do otherwise, in my judgment, undermines the very principles upon which our government is based and gives terrorists the victory they haven't earned.

I also believe that it is pragmatic that we preserve our civil liberties because the rest of the world looks to us for leadership. Among the reasons given by the president for the invasion of Iraq was not only to replace a brutal dictator, but also plant the seeds of democracy in a region of the world that has known little democracy.

If we are seen by our enemies as no different from those we just overthrew, we give ammunition to our most virulent critics that this is a war against Islam, that we do not respect those who have different beliefs and that democracy is a sham.

Intelligence is the key to understanding the threat we face and fashioning an appropriate response to it, that intelligence helps to identify not only the short-term threats, but the long-term trends that cause terrorism in the first place. It's central to determining how we wage the war. Central to the intelligence function is integrity of the intelligence process. We are asking a great many questions about intelligence in connection with the 9/11 attacks and the decision to invade Iraq.

If we believe the intelligence process failed going into Iraq, we must make sure that there are no intelligence failures as we develop and implement our next steps in Iraq and I commend this committee for the leadership you've taken on those hard questions.

We must win not only the shooting war, but also the political and moral war. That, in the end, give us the most secure peace and that's where our values intersect with intelligence policy -- how to fight and win while remaining a beacon to those in the Muslim world who seek to develop genuine democracy with strong security and police forces that do not abuse their own people.

Let me turn to a couple of specifics that the committee has asked us about. First on FISA -- I was in the Department of State as a young lawyer and worked on FISA and what I recall about it was there was uncertainty about whether it was constitutionally required. One thing that was absolutely clear was that the telephone companies would not place the taps because of uncertainty and for fear of their own liability and therefore, one of the compelling reasons for FISA was to protect the FBI agents who actually put the tap on, not unlike Colonel West in Iraq, and the telephone companies for fear of liability.

So I think Phil Heymann's point is a good one in this area where there are uncertainties. Legislation and guidelines can provide a great deal of comfort to those people who actually have to do it. I think that is very important. On the Patriot Act, I agree that it has worked well. I think the intelligence sharing between law enforcement and intelligence has worked well. There are still some problems with it, I am told, at the local level, but it is working well.

I think that I agree with all -- I think all of us on the panel are very reluctant to go further without understanding exactly how the Patriot Act has worked and I think this committee and others up here are doing the right thing in proceeding carefully.

I want to finally address the issue of do we need a domestic security service. I believe that law enforcement and intelligence are so fundamentally different that they cannot coexist in the same agency. I've come to that conclusion reluctantly, but I think the time has come to think seriously about creating a domestic security service.

My own solution or suggested solution, is to create as a first step a service within the service, that is to say, create within the FBI a genuine intelligence agency that can eventually be separated. It is sometimes called the "tear away Jersey option". The model I have in mind is the way in which we eventually separated the Air Force from the Army in 1947.

I believe that a separate service is needed. In my view, it should continue to report to the attorney general for reasons of oversight, civil liberties and effective handoff to the law enforcement agencies. I do not think it should have arrest power. I think it should be a classic and pure intelligence agency focused on counterintelligence and counterespionage and counterterrorism. It ought to have as its mission to identify and engage in clandestine collection in the United States with respect to those threats, regardless of where they originate, that will have their impact on U.S. territory.

I think that ought to be the organizing principle of this new agency, but I recognize this as difficult. It fits into the broader issue of intelligence reform, organizational reform. People talk about the need for a Goldwater-Nichols Act in the intelligence business. I think that is called for and my guess is that Congress will take that up after the 9/11 commission reports.

But I commend this committee for asking these hard questions and I look forward to answering some of those hard questions.

GOSS:
Thank you very much and we turn now to the Honorable John C. Yoo, the visiting professor of law, the University of Chicago, professor of law, University of California, Berkeley, former deputy assistant attorney general for the office of legal counsel. Welcome. The floor is yours, sir.

YOO:
Mr. Chairman and Ms. Ranking Member, thanks for having me and thank you for letting me go last by alphabetical order so I could hear everybody else's comments and help formulate some of my thoughts in response.

I'd like just to make three quick points, because also since I go last I always stand between the members and their questions. First, is FISA constitutional floor or a constitutional standard for searches for national security purposes and second, is this a war in where the constitutional standards that apply during wartime and third, what might a future system look like designed to handle the war against terrorism and the Al Qaida network.

First, as I think the FISA appeals court makes clear, FISA warrants are not constitutional Fourth Amendment warrants. The court pointed out that probable cause determination made by FISA is not the same probable cause determination that is required under the Fourth Amendment for a normal criminal warrant.

Congress, I think, and the executive branch in 1978 were quite clever to use the phrase as probable cause and warrants, but the court, I think, made clear that these were not warrants as required by the criminal justice system. And indeed, between the period of Keith and FISA, every lower court that came across this issue found that warrantless national security searches were constitutional within the broad language provided by the Fourth Amendment for reasonable searches that still fall outside the warrant context.

The second thing I would say about FISA is that certainly what -- the function performed is that of a safe harbor provision in a sense. If the executive branch complies with FISA, it

knows it has a supportive legislative branch for a likely finding by the courts that the search engaged in was reasonable.

That has nothing to do with whether you could go below that standard in terms of reaching whatever the constitutional minimum is. And that constitutional amendment that gets into the second question is what kind of state of affairs are we in right now. If the United States is in a state of war, then a very different Fourth Amendment standard under reasonableness would apply -- might apply if we were in a normal state in peacetime.

I certainly respect the view that the war on terrorism might be a gray area. I think that view has been rejected by all the courts so far that have heard the terrorism cases. All of them have found that we are in a state of war. The president and the Congress have both agreed that this is a war. And I think that under international law it is quite clear that this is a war. I don't think that anyone would doubt that the September 11 attacks had been conducted by a foreign nation that we would be in a state of war.

So why should the fact that it is a non-state, a particularly violent non-governmental organization, as it were, why should it be the fact that kind of organization carries out an attack that all of us acknowledge would be war if carried out by foreign nations should somehow be able to escape the laws of armed conflict and the broader governmental powers that would apply in war.

So if it is a war, there is two ways you could go under the constitution. One, which courts have previously found before FISA that in a national security situation you can use warrantless searches. Even today if you were try to operate within the current Fourth Amendment framework set up by the Supreme Court, the Supreme Court itself has recently said that in this area where your primary purposes are not just for law enforcement but you have other goals than this one protecting the national security, you would be simply subject to a balancing test under reasonableness standard and that just balances the government's compelling interest in fighting a war against privacy interests.

It is difficult to see in what other kind of situation the government would not have a more compelling interest to conduct warrantless searches than it does now in the middle of the

war where thousands of Americans have lost their lives in a direct attack on the United States.

And the third and last point and this is something that I didn't get into in my written testimony, but prodded by your both opening statements, what might a future look like. One thing I think is worth thinking about is whether a separation between law enforcement and intelligence personnel makes sense. In a way it is sort of the FISA problem writ large. FISA and the reason the Patriot Act amended it was because the Justice Department and the FISA court thought that the way you protect constitutional rights was to separate personnel, which in a way doesn't really make sense or that you would separate foreign intelligence information from law enforcement information not by trying to figure out the type of information it was and the uses to which it was put, but by not letting people talk to each other who are essentially working on the same matters.

So the continuing separation between law enforcement and foreign intelligence agencies in a way is just writ large, is the same problem that existed under the FISA statute and which it corrected in the Patriot Act.

So it is worth asking whether that kind of approach still makes sense. In a way, it is a way of really fighting the last war. FISA was really written to handle espionage during the Cold War against an enemy that was a nation state and was using spies to try to (inaudible) the United States and gather intelligence. That's clear to last war and you can handle that by separating the intelligence agencies, but what we are thinking about is we're fighting a very clever, responsive enemy and the question is, what are they going to try to do in the next war and whether you should try to change the bureaucracy now to try to confront that problem rather than worrying about the last war.

Thank you, Mr. Chairman.

GOSS:
Thank you very much indeed. As promised, that was an extremely rich, helpful contribution to the committee's deliberations on the subject.

We have only an hour and 15 minutes. I am therefore going to ask members to do the individual math and make sure they understand that we want every member to have the opportunity to ask questions. I am going to start with Mr. Gibbons.

GIBBONS:
Thank you very much, Mr. Chairman and I'll try to be very brief. It appears to me that throughout the period of time that we have been a nation ourselves we've had a binary approach to the Constitution, allowing for those applications of the Constitution in a war environment versus a criminal environment.

We are still in that environment. We are complexed, of course, by the organic powers of the administration to deal with certain activities that are bridging that.

The Patriot Act, therefore, attempts to bridge the binary differences between how we approach the Constitution.

There are two questions that I have and are very quick. I'm going to ask that each and every one of you on the first question think whether or not you can recite to this committee a specific instance where the violation of a right of an individual has taken place with regard to the citizens of this country and the U.S. Patriot Act after it has been enacted and signed into law.

Has there been a violation of anyone's rights and I don't mean speculative harm, I mean, actual harm that has been adjudicated and determined by the court.

Finally let me ask this one little brief one that perhaps somebody can address, Mr. Barr or Mr. Heymann. There are concerns about FISA with regard to the way it allows for records, access to records that are under Foreign Intelligence Surveillance Act, perhaps even held by a third party individual.

What violation of an individual's right would be addressed if access to that information is provided to a third party holder of that information, in other words, a request to get access to information that is held by a third party. Is there a Fourth Amendment right of protection in the privacy expectation of that information under a FISA request?

Question one to any of you and question two to perhaps Mr. Barr and Mr. Heymann?

BARR:
The answer to question one is I do not -- I am not aware of any violation of the right of a U.S. citizen since the enactment of the Patriot Act. I think the Patriot Act is critically important. My view is there are still some overly restrictive areas in the Patriot Act.

The second part of your question is one of the areas where the Patriot Act didn't go far enough. There is clearly no Fourth Amendment right interest that someone has in third party records. The Fourth Amendment said there are certain zones of privacy we have and the government can't get into those zones without some predicate. But the corollary to that is if not in a zone of privacy, the government is free to serve (inaudible).

And the law is clear that when we go out and engage in transactions whether it be taking a taxi cab, going to an ATM machine and creating a third party record, there is no expectation of privacy. In 335 statutes in this country, federal agencies are authorized to issue administrative subpoenas to obtain that information if it is relevant to an investigation.

So for example, the FEC can do it when it is investigating election laws. The FDA can do it when it is investigating something relating to drugs and all they have to say is it is relevant to one of their investigations -- 335 cases of that. And yet, in the terrorism area, where the stakes are so high, we require the government to go to a judge on foreign terrorists.

In other words, we've created rights for foreign terrorists that no American citizen has.

GIBBONS:
Thank you. Mr. Heymann?

HEYMANN:
I have never been much worried about the Patriot Act except for perhaps its immigration provisions, which I have not looked at hard enough. I was asked early on whether the fort (ph) was passed, whether I thought it was a terrible piece of legislation or repressive. I did not think so. I don't think so now. I think the exchange of information provisions and the change in the FISA statute are fine.

I indeed -- my point would be if there is problems with the FISA statute now, they should be addressed by legislation. I indeed have recommended, I think, to one member of this committee that there might well be listening (ph) to the FISA statute for visiting aliens, allowing something less than probable cause to monitor the conversations of a visitor, not a resident alien, but a visitor.

I wouldn't like to hereby embrace everything in a 500 page statute, and I very substantially agree with Mr. Barr that there is no constitutional provision that is involved with getting into records of credit cards, banks, things like that, but there are a -- Congress has passed maybe a dozen statutes requiring protections of privacy in that area. There is a long congressional history.

GIBBONS:
Thank you, Mr. Chairman.

GOSS:
Ms. Harman, I recognize you for your side.

HARMAN:
Thank you, Mr. Chairman. I am going to yield my five minutes for questions, but I do want to make a one-sentence comment, which is that the quality of testimony this morning has been absolutely superb. I am certainly smarter than I was before I heard it. I think this hearing demonstrates why public hearings on appropriate subjects held by this committee adds to the public debate and sophistication on critical issues. Civil liberties is obviously a critical issue and I would like to yield my time for questions to Mr. Holt.

HOLT:
Thank you, Ms. Harman.

I'm no smarter than I started out, but I am certainly am better informed and just overwhelmed with questions. Let me get to what I think is maybe the central question here. I guess Mr. Barr spoke about reasonableness being the measure here, but of course, that depends on one's point of view.

Earlier references to the Alien Sedition and Palmer raids and suspension of habeas corpus and so forth show that at different perceptions of threat we change our standards of reasonableness. And so, that's why, I guess, we've tied ourselves -- I'm not a lawyer, but I think we have tried to tie ourselves to the mast of the Constitution and deliberately developed precedence.

That's why I think it is worth really looking more at this question that a couple of you referred to and I'd like to ask the other panelists if they differ from Mr. Stevens and Mr. Yoo's account of how the wall of separation between enforcement and intelligence grew up, grew out of the Constitution and whether that changes, whether that wall shifts depending on a time of war and whether a time of war means just a linguistic expression of war or some other determination of war.

Let me ask anyone other than Mr. Stevens or Mr. Yoo to address this.

MILLER:
Briefly on that subject, I think that much of the concern and the testimony this morning about the wall of separation really focuses on approaches that the Department of Justice and the FBI developed internally over time through several administrations that were not necessarily required even by the original FISA Act, but not grew into bureaucratic principle.

I personally had instances where I was trying to persuade Justice and the FBI to revisit some of those principles and you know, they've been doing it this way for quite a while and it was very hard to get them to change their mind.

And so I think much of what the Patriot Act did with respect to FISA was to tear down barriers that had been created institutionally that were not required by the statute, perhaps were embraced by the court over time because it was sort of the standard argument that was being given by Justice and the FBI with respect to some of these issues.

MILLER:
The wall of separation, I think, will allow everyone -- I know Mr. Yoo in particular feels very good about the change in FISA and the appellate decision with respect to the powers that the

FISA court has, but I don't think that wall of separation was built into FISA originally and I don't think the analysis today really should turn on whether we call something war or not.

I mean, I think we should just go back and read the statute, read it as amended. I think that the change that has permitted cooperation between intelligence and law enforcement in proper circumstances was appropriate.

STEVENS:
Let me add a sentence or two to what Ms. Miller said. We have to remember that when this wall of separation dates from at least until World War II, because when the CIA was created, as the chairman said, it was by statute not to have any domestic law enforcement function and that was because Congress rightly feared what the KGB and the NKVD in those days was doing in Russia and what the Gestapo had done in Germany.

That legacy continues to exist. The difficulty we face today is that with terrorism and other threats, a lot of those lines don't make sense anymore. And so we have to find a new way of still protecting our civil liberties, not having a Gestapo and yet giving the executive branch the power that it needs to do the things that it has to do to defend us. And those are hard lines to draw, but this process, I think, is going to draw some of that out and maybe we can adjust some of these statutes accordingly.

HOLT:
Clearly my question was too open ended and I know Mr. Barr wanted to address it so later -- well, my time has expired and in fairness to the others. I'll have Mr. Barr submit it in writing, perhaps.

GOSS:
That's OK. Go ahead and answer the question.

BARR:
There is clearly no requirement for separation under the Constitution and actually separation on domestic matters does not go back to World War II. The CIA-FBI distinction is a bifurcation based on geography -- foreign intelligence versus domestic.

The FBI prior to FISA and all that stuff had both roles -- domestic security intelligence collection and law enforcement. There was not this issue of separation.

Now separation in collection is terrible. It is the enemy of success and we can't allow it to happen. They are both sources of power to the government, not limitations on the government. But there is a practical problem that we still haven't solved. I'm not sure it's solvable, which is once we decide to move on one track on the enforcement side, forget all of the information that we've accumulated, but once we say now we're going to try to use our law enforcement power against you, then the information we've accumulated becomes exposed in the public realm. That is what we see in the Moussaoui case. It's very hard to deal with that.

So that's a practical reason that at some point, particularly the enforcement point, you have to make choices based on the kind of information you want to surrender.

GOSS:
Thank you. I would note the presence of Mr. Burr and Mr. Gallegly earlier. They were called away to other matters.

Mr. Cunningham?

CUNNINGHAM:
Thank you, Mr. Chairman. I was tickled at the analogy of separation of Air Force and Army. As a Navy pilot, prior to 1947 it was the Army Air Corps. We never lost a war. Since we became an Air Force, we've never won one.

I would probably get a better grade in Mr. Barr's class than I would Mr. Heymann's. I think fair and balanced at Harvard is an oxymoron and I was ready to pounce on you, Mr. Heymann. I was ready to pounce on you, mining (ph) from your background. But I tell you what. I enjoyed your presentation and I was impressed with it. And I think I would actually get a better grade in Mr. Barr's class, but I would enjoy your class more, I think.

I hate people -- when I have a town hall meeting, I hate people that make a statement instead of asking a question, but I'm going to break my rule and I'm going to make some

statements. I'm not going to change at all.

You're right. We are in a war. If you take a look at what this committee has seen and the amount of people that we have caught and detained and questioned, the lives that we have saved in this country is phenomenal. The American public has no idea of what this committee and what our agencies have done in that.

I would say that my second book, Mr. Heymann, is called "Shalom: Parts 2 (ph)" when I flew in Israel. I wouldn't take away the Israelis' right and the things they do in self-preservation more than I would in the United States itself.

You made a statement that you were worried where your son will be. I'm worried about if your grandson will be and I think that's why these things are very, very important.

There was the Phoenix report -- let me give you an example. We had Middle Easterners in Arizona preaching Al Qaida, sending out literature, went to the madrassas, preached world jihad. Guess what? They were 9/11 pilots. There is a second group there today preaching Al Qaida, putting out the same literature.

One of them wanted to be a pilot. He was so stupid he couldn't pass so he went to be a copilot. Do you know what he is doing today? Airport security. And these people, I think, deserve to be looked at. I think there is probable cause there in my estimation.

I don't know if you have seen (inaudible) Gideon, the movie, but I support it and I think we need more sorts of Gideons like the Israelis use in this country.

I yield back, Mr. Chairman.

GOSS:
Thank you, Mr. Cunningham.

The gentleman from Minnesota, Mr. Peterson?

PETERSON:
Thank you, Mr. Chairman. I'm not sure if I'm smart enough or qualified enough to ask this question in the right way, but the Moussaoui situation, I don't know how much any of you

know about that or paid attention to it, but the Minneapolis office of the FBI is very frustrated in the way this whole thing was handled. And it still has not been resolved, in my mind.

They did not want them to do a FISA. They wanted them to do something else, which I can't really explain, some legal criminal deal. And apparently somebody at headquarters was reluctant to do it because it would undermine their case, because apparently whatever happened in the past, if they were denied this, that it had some kind of negative impact on prosecuting. So they made the decision they wanted to go with FISA, because that was less damaging to their case.

Well, their case is so screwed up that I'm not sure if it's going to win anyway, but my concern is that as I understand what happened and maybe some of you would know that whoever made the decision did not understand, apparently, the higher ups in the FBI understood they could tie Moussaoui, that Moussaoui -- you didn't have to tie him to an actual state, as long as he was part of a terrorist organization they should have given them this authority. Some underling didn't understand that.

I guess my question is, you all have said, well, we need to make these changes. The Congress needs to change the law so that we can deal with this. My experience and I've been around here for a while is whenever we end up passing, by the time the bureaucracy gets done implementing it, it doesn't look anything like what we did. I'm not sure these folks get it, some of these agencies. I would just like your perspective on that point of view. I have not gotten what I consider to be adequate answers out of the FBI to this day. And I'm not so sure that even if we change the law that they would necessarily do what we were suggesting.

Am I way off base?

BARR:

This was a case where Congress set a standard -- probable cause to believe that the target was a foreign power or an agent of a foreign power. Now that's the standard the Congress adopted. And the problem with the FBI was they weren't sure they could meet that standard. People who have come with 20/20 hindsight say "Well, you could have made this argument

and made this standard". I'm not so sure. They had a guy with two knives, he made statements about every good Muslim has to fight, you know, how does that make him a foreign power. And that was the concern within the FBI. And that goes back to what I said before. One of the problems here is that these rules ahead of time that Congress tries to crack and the standards that they've carried over from the criminal justice system too often act as restrictions on what is reasonable under the circumstances then puts agents in the impossible position of trying to do what they know is reasonable and may be very important versus what some rule written in a committee staff room says.

PETERSON:
But as I understand it, the top people knew that they could tie him, but the bottom people didn't and what I am frustrated with is that I can't even get -- the FBI won't tell me who made these decisions and who was actually involved so I can talk to them. So I wonder what the heck they are up to.

BARR:
Actually, Senator Leahy put out a report on this. They reviewed the situation. They'd go through the whole who stroked John on it and frankly, in an effort to say, yeah, there was probable cause, they could have established probable cause, but I think that actually if you look at the facts, you can see what worried them, which was the inability to tie into a foreign government or group known to be a group and that was the problem.

PETERSON:
That was their excuse. But I'm not sure...

BARR:
That's what the law says. The other reason you get this kind of institutional behavior is precisely because of the witch hunts and the destroyed reputations and the destroyed livelihood that many government agents have had to face in the past 30 years when they've been found to have made a mistake.

PETERSON:
But it's not tying them to a foreign power. It's tying them to a foreign terrorist group, which they could have done. They had the information that tied them to that.

BARR:

What tied them to a foreign terrorist group? What was the evidence that tied them to a foreign terrorist group?

PETERSON:

Well, I thought they had the...

BARR:

It's very, very problematic and that's why the administration has said there's no reason not to cover foreign individuals who are believed to be engaging in terrorist activities. They don't have to try to tie them to a group. Why is that important under the Constitution?

HEYMANN:

I don't disagree with anything much that Mr. Barr said, but except in thinking of whether they could have gone for it, you people know as well as any of us do the number of FISA warrants that have been granted in a row, which is something like 14,000, I believe.

In other words, the court that Mr. Barr worries about has not been a major impediment to getting warrants. They have granted, I believe, 14,000.

PETERSON:

The FBI wouldn't even push it.

HEYMANN:

I think Mr. Barr describes the law perfectly and except for his terrible one-sidedness about it, I would also agree that the times make a lot of difference to them, if they're worried -- they have apparently been getting criticism from the FISA court and they tend to back away and nowadays they'll go the other direction.

BARR:

This came in the wake of a tremendous amount of criticism of the FBI seeking FISA under circumstances where it wasn't justified.

PETERSON:

Thank you, Mr. Chairman.

GOSS:

Mr. Bereuter?

BEREUTER:

Thank you, Mr. Chairman. I want to thank the panel for an excellent presentation, for stimulating our thoughts in this area. I feel fortunate to follow Mr. Peterson, because actually he began the subject I'd like to pursue and as a result of the joint inquiry on 9/11 between the House and Senate Intelligence committees, I would have to say it is very clear that the FBI and Justice were in error, that they did an incomplete search and an incomplete knowledge of the statutes.

They did not have to tie it to a foreign government. They could and admitted that they had the evidence to tie it to a foreign terrorist group and they failed to do that, so subsequently we have instructed them that they need to inform their agents and the people in the department here about the full breadth of their powers in that respect.

But beyond that, we hopefully will be clarifying it further, although I don't think it needed any clarification, I think it has been used as an excuse of one of two major errors in the FBI, the other involving the Phoenix memo.

Professor Heymann, I think if I understood a few of your comments a few minutes ago, you said something like you think perhaps Congress should look at changing the FISA law with respect to visiting aliens as a possibility if that is correct.

Then I would ask you why do you distinguish between resident aliens and visiting aliens if I've understood your first point correctly?

HEYMANN:

The distinction I make is that I assume a very high percentage of resident aliens have developed a substantial loyalty to the United States and we, perhaps, have some obligation to them and I assume that visitors have no particular loyalty to the United States and we have no very great obligation to them.

HEYMANN:

That's really why I make the distinction. The statutes, by the way, in this area have made that distinction. The administration has not, but the FISA statute and other statutes define a category called "U.S. persons" which always include citizens and resident aliens.

BEREUTER:
But it would be true, wouldn't it, that a visiting alien or a resident alien could both have hostile intent toward the United States? I think one staff member reminded me that Charles Taylor was a resident alien of the United States.

HEYMANN:
I don't know.

BEREUTER:
So I am wondering how far we go in this area.

HEYMANN:
I could be convinced it was a mistake, but I would like to protect resident aliens and I think the Congress has tried to -- one, if you're really trying to legislate in this area, a very sensible way to do it would be to do it in the terms in the number of years the person had been in the United States. There are other statutes that talk about resident alien -- after five years you are eligible, I think, to apply for citizenship. That wouldn't be a bad way to make the distinction.

STEVENS:
Mr. Bereuter, could I just observe, though, we can begin to write in internal revenue code around exactly when and with respect to whom FISA will apply, how long a visit is necessary and then we'll have to have some certainty about the days that we've counted. Will three different people different (inaudible). There's a whole question here in a temporary visa that you then violate and remain in the United States. Are you visiting or not?

The reason constitutionally the president's authorities are written as large as they are is because at the end of the day, a great deal of flexibility and discretion is required in response to specific circumstances.

And I promise you, if we go down that road, if we begin writing what we think is liberalizations into FISA in terms of increasingly detailed requirements, there will be a lot more of these issues concerning well, at the FBI level we couldn't quite get it into the requirement, so that's why we didn't do X, Y or Z.

And that, it seems to me, is the slippery slope that you go down. It's one of the reasons the framers decided it's better to hold the president accountable, but to give him broad authority. It might, for example, rather than legislating, be appropriate for the committee in its oversight capacity to see how that discretion is being applied and not seek to fetter or channel it from the beginning, particularly under the circumstances we now face.

HEYMANN:
If I could just argue for a second against Mr. Stevens. We do need a statute and we have a FISA statute and we've had one for 25 years to prevent the president having the authority to wiretap any American citizen at any time the president believes the person is acting as an agent of a foreign power is the technical words.

We need the protection of the judiciary and we have that. My own view on not reducing the protections for visiting aliens is, in part, a law enforcement related or counterterrorism related issue. I don't think that when we have a guy like Moussaoui we want to pick him up right away. I think we want to know who he is dealing with and try to find as many of the dangerous people as we can.

And so I would try to loosen up our ability to find dangerous people.

GOSS:
Mr. Hastings?

HASTINGS:
Thank you very much, Mr. Chairman. Mr. Chairman, I applaud you and Ms. Harman and all of us for having this open hearing and the extraordinariness of the witnesses that are here. The tragedy is the limitation of time not just in our ability to answer questions or your ability to put information to us. I would urge perhaps in the future even as much as a one day retreat with the same and other individuals with the focus being pretty much the same but

maybe in an effort to give us some clear direction about what I agree with Mr. Barr about is an ample and an abundant amount of confusion with reference to the laws that we have the responsibility in dealing with oversight in.

Mr. Barr, you raised one thing that peaked my interest, suggesting that it is appropriate that people be detained until hostilities end. In the war as defined today against terrorism, I don't see any end. What then do you do with the individual be he or she an enemy combatant or however they come into detention.

When does that person have something else address them in some kind of system?

BARR:
Well, first, to the extent that they are an American citizen, at least, they do have access to the U.S. courts in terms of the writ of habeas corpus which cast the validity of their detention, in which case there would be some type of review as to whether this was a pretextual detention or whether there was some basis for determining that person was an unlawful combatant.

With respect to foreign persons who were being held as combatants, at least the initial judgment as to when hostilities end is invested in the president and it's largely diplomatic and political checks.

HASTINGS:
Left to that kind of determination, then, it's Guantanamo forever. I don't ask for a response. It just troubles me. I have found no reason to believe that the law in its present state does not cover every aspect of what is needed for investigative purposes or by the authorities that have that responsibility inclusive of FISA.

And I don't even quarrel that much with certain aspects of the Patriot Act. I think what goes unsaid here is with Jane Lunchbucket, if she is worried all is worried about Big Brother. And that's basically covering that realm whereas we are sophisticated enough and intellectual enough to carry it to another level talking about something about terrorism, and she buys the ticket to Florida with a credit card, she's not worried about privacy, but an amalgamation

of all the information about her, I would think, would create some reasonable expectation of privacy.

I guess what we really ought know and can any of you tell us is, can the FBI do its job. I think it can. They caught terrorists and tried them -- the U.N. bombers. We've caught domestic terrorists and tried them; the Oklahoma bomber and courts have been very protective.

I remember so vividly of law enforcement people crying the blues about Gideon and (inaudible) and those decisions. And do you know what it did. It made them make better cases. That's really all it did. As a matter of fact, I was scared sometimes I wanted to go back to the old system because I could win cases when the law enforcement people would mess up.

But in this instance, I just -- can the FBI do its job or is it sufficient in its present form modified, I think, by Mr. Mueller and Attorney General Ashcroft in a helpful way to get things done. Do you all feel me on that at all? Ms. Miller?

MILLER:
There are several questions in there. I certainly think that from the outside at least I think the steps that Mr. Mueller has taken to try to bring the FBI forward into dealing with the problems after 9/11 have been very, at least as I said on the outside, very useful and productive.

I do have a bias, as I think you do that the criminal justice system can, in fact, work in most instance and probably should be our first line approach.

HASTINGS:
Thank you, Mr. Chairman.

GOSS:
If one of you wishes to answer the question please do. I think it's important. It's a reasonable question and I think we'd be interested in the answer.

STEVENS:

Could I just make a brief comment? I think the question is what is the FBI's job? Because your comment was prefaced by a concern about Guantanamo Bay and indefinite detention.

I think of Guantanamo Bay as the armed forces job, not the FBI's job. Let me comment just on that part of the armed forces job that you asked about.

Lots of concern has been expressed about this notion of indefinite detention at the discretion of the president. But the fact of the matter is, we're only two years from the World Trade Center and the Pentagon bombings. If you consult your criminal statutes, you will find innumerable crimes in the United States that call for terms of imprisonment of 30 years. I think that if you are found by the president to be in cahoots with Al Qaida, that it is not unreasonable that you might be detained for two years or many more.

But at the end of the day, it's the president who has the kind of information, as Mr. Barr indicated, to make the determinations about when that term of detention would end and my own sense is that it will be used by a future president very conscientiously and humanely. That is what we would expect. I'm sure that is what we would all demand.

YOO:
Just a perspective from international law about your question. In the past, wars were over and prisoners were released because you would sign a peace treaty with a foreign nation and that foreign nation was then responsible to enforce the peace on its own citizens.

You don't have that situation with the Al Qaida terrorist network, so a peace treaty is not the way you figure out when the conflict is over. So what does a peace treaty represent? Back when countries started using it, you could look at examples of non-state warfare that existed before the Peace of Westphalia in 1648. And essentially the test had been when the enemy could no longer pose a threat to harm your country.

And so if you were to apply that test here, people currently in detention in Guantanamo Bay and the United States would have a right to release when hostilities with Al Qaida were over such as their capabilities were sufficiently degraded so that they could not launch attacks on the United States or its troops or citizens anymore.

SMITH:

One sentence on Guantanamo, Mr. Chairman, my problem is not that we're doing it. My problem is that we're doing it unilaterally. I would much prefer to see an international tribunal, some sort of international process as we've done in the Balkans and in Central Africa.

HASTINGS:

Thank you, Mr. Chairman.

GOSS:

Thank you, Mr. Hastings.

Mr. Burr?

BURR:

Thank you, Mr. Chairman. To all six of you, our gratitude for your willingness to come in and for your expertise you bring to the issue. I can assure you I don't hold the same expertise, so I will try to ask some questions quickly in layman's terms.

Mr. Barr, in your testimony you said and I quote, "As the Supreme Court has observed, the Constitution is not a suicide pact, but rather confers the powers to use all means necessary for its own preservation and defense. No foreign threat can arise if the Constitution does not empower the president to meet and defeat and I would ask all but Mr. Barr, do you agree or disagree with that. Let me start at that end.

HEYMANN:

I would never disagree with Mr. Barr.

STEVENS:

In your briefing materials there is a report that I authored just shortly after September 11 for CSIS concerning the president's authority with respect to the use of the armed forces in homeland defense. And it argues very strongly that the president's authority expands in times of grave emergency. So, I would say yes, absolutely.

BURR:

Mr. Heymann?

HEYMANN:
I haven't seen that and I am a little -- I'd like to think about it a little, but I certainly don't believe the president has the authority to do whatever he wants. I certainly don't believe the president has the authority to do whatever he thinks has to be done whenever he thinks there is a danger.

BURR:
So that would be a no. Thank you.

Ms. Miller?

MILLER:
I guess I would associate myself with Mr. Heymann, because I think that the president maybe -- I don't know if you can do yes or no in quite that way. As a former official in the executive branch, I have always -- my role often was to defend and I believed in defending executive branch and the president's prerogative to take care of the country in time of war.

BURR:
That would be no.

MILLER:
OK.

BURR:
OK. Thank you.

Mr. Smith?

SMITH:
Sadly, I have to vote no in the same way Professor Heymann and Judy Miller have voted no. But reluctantly, because I agree with the sentiment of Mr. Barr's statement.

BURR:
Let me ask you, Mr. Heymann, is there a difference between Pearl Harbor and 9/11?

HEYMANN:

There are a lot of differences.

BURR:

What happened to America is different in either attack?

HEYMANN:

Two days after Pearl Harbor, we were faced with a conflict with a Germany that probably had 70 million people, armor, the biggest air force in the world, accompanied by Japan, probably had 15 million, 16 million people, Italy, 40 million, 50 million. There is a lot of difference between that and 500 people with box cutters. And I don't mean to understate the danger of Al Qaida. I think we're in a new world after September 11.

BURR:

Are we at war?

HEYMANN:

I don't think we're at war.

BURR:

Mr. Smith, are we at war?

SMITH:

I think we should think of ourselves as war.

BURR:

Well, your testimony said we are at war. We are in war with terrorism.

SMITH:

In my mind it helps to think of this as war, yes. And the Congress has not declared war.

BURR:

Isn't the separation that I've heard this morning really over whether you think we're at war or not?

SMITH:

With all due respect, sir, I think that oversimplifies it a bit. What we're saying is what Professor Heymann said. We're facing a very different kind of war that we've not faced before. One of the difficulties we're having, I think, is we tend to project what we've done in the past with respect to legal theories and constructs into the future.

I think all of us are saying we need to think differently about it so that we can craft some new ways of fighting and winning this war, but without harming our gut...

BURR:
I don't think we're all after the same objective. In the same statement you said we're at war with terrorism, but we must find a way to fight and win the war consistent with the preservation of fundamental civil liberties.

Have we protected those fundamental civil liberties to date?

SMITH:
As far as I know, yes.

BURR:
OK. Let me ask you one other area of your testimony. I was struck by your comment on page three where you said when we obtained the KGB archives, we learned that the KGB was terrific in collection of intelligence information about the West, but they were terrible on its analysis, and I'm quoting here, "the reason, of course, was that they couldn't tell Stalin the truth", end quote.

In the next sentence you go on to say that we need to make sure that we not only have adequate collection, but also a process that assures the unvarnished analysis reaches our most senior policymakers. I just want to give you an opportunity to make it clear. You're not in any way suggesting that the president and the intelligence community are in any way like Stalin or the KGB.

SMITH:
Of course not. Thank you. I would never have suggested that. But the point is simply and this committee, among all others, has as one of the things that I am sure is central to what

you're trying to do is to preserve the integrity of that process and make certain that the DCI and all the great men and women who work for him can speak truth to power because that is essential in making valid decisions in a democracy.

BURR:
I thank you. Mr. Chairman, my time has expired.

GOSS:
Thank you, Mr. Burr. Mr. Ruppersberger?

RUPPERSBERGER:
It's a great panel and I wish we had a lot more time that we could discuss a lot of the issues that you've raised. I'd like to get into the -- referred, I think, Mr. Smith, about the FBI and putting aside the capability and the effectiveness of the FBI, do you view the civil liberty implications of keeping domestic intelligence a function within the FBI as opposed to creating a new agency. In other words, what really -- you touched on it in your testimony, but could you broaden why you feel that you think there should be a separate entity.

SMITH:
My principle reason for favoring a separate entity is because I think it would be a more effective intelligence service if it were separated from the law enforcement function. With respect to civil liberties, my preferred answer would be to have a collection agency part of the Department of Justice but without arrest authority, because I think that gives greater confidence that they would be less abusive -- potentially less abusive of civil rights than one that also has arrest authority.

Now, my civil libertarian friends disagree with that. They think that they need to have -- any domestic law enforcement agency ought to have arrest authority because that enforces the discipline that goes with it. That's a close call, but one that we have to think about.

RUPPERSBERGER:
Let me ask this to anyone on the panel with respect to the focus of the CIA. I mean, since 9/11 a lot of things have changed. I, from a personal point of view have observed, I think, a tremendous amount of teamwork with all the intelligence agencies, which is the main

reason why I think we haven't had another 9/11. We need to go a lot further, I'm sure, but how about the CIA's ability to do more in the United States.

Right now I assume they're working through the FBI. Do you think we need to look at that, the CIA's role since 9/11?

SMITH:
Just to kick it off without taking any time, I do think that keeping your foreign intelligence agencies and your defense department out of domestic roles is a very good idea all over the world. The primary reason is because you want to train foreign intelligence agencies and soldiers to behave in ways that you don't want people to behave -- you don't want the government to behave domestically.

RUPPERSBERGER:
How about when you are following a lead or a suspect.

HEYMANN:
You shouldn't have to drop a lead.

SMITH:
Well, do you think the way it is constituted now that there could be a violation? Say a CIA agent is aggressively pursing someone in the United States, someone who might be an American citizen but part of an Al Qaida cell?

STEVENS:
As you know, the CIA is operated in this country from its conception. It's collected information voluntarily. It is in fact, done some clandestine collection operations in the United States with cooperating sources.

The difficulty is if it begins to take on the color of a much more aggressive domestic presence, I think I am troubled by that. I would much prefer to have it done either by the FBI or by a new domestic security service.

RUPPERSBERGER:

While I have you here, I want to get back to the issue of the FBI also. I would be a little concerned and I would like you to comment on my comments, but if we were to create another domestic agency, are we, number one, in the amount of time it's going to take to do that, we really need all the manpower we have to focus on what is on the plate at this time and if you look at homeland security, we've got a long way to go there. It's created a lot of bureaucracy. I'm sure there is a lot of wasted money at this point.

Wouldn't it be better to take the best you have within to maintain either the goals that we have now and not move forward to create another agency with another bureaucracy? We have enough bureaucracies already.

STEVENS:
I agree. That is, in my mind, the compelling argument to leave it as it is and to create as I and others have suggested, a service within the service, that is to say, an intelligence collection service within the FBI. To my mind, at some point we ought to begin to think about trying to separate it, but if it works within the FBI, then I am all for that as well.

RUPPERSBERGER:
Do you see any negative implications by leaving it where it is now and moving forward?

STEVENS:
I think Director Mueller should be given ample opportunity to try and make it work. If it doesn't work, we can think about separating it.

RUPPERSBERGER:
Mr. Barr?

BARR:
I was going to say I agree with you, Congressman. The more you stovepipe functions, the more you create inefficiencies where you have to rebuild coordination.

I think right now when you look at the FBI, they don't have an artificial distinction between domestic and foreign. They are allowed to operate overseas and target organizations in conjunction with the CIA. But I think we have to fuse their operations together in dealing

with the phenomena of terrorism. I think that's starting to be done, bringing the skill set of the CIA and the FBI together.

RUPPERSBERGER:
Mr. Yoo, my time is up, but you can keep talking.

YOO:
I thought maybe a creative solution might be in the short term to look at the way the military interacts with law enforcement, even though there is something called a Posse Comitatus Act. There are several members of the panel who are far more expert at that than I.

But there is a similar bar on the military operating domestically, yet the Defense Department and law enforcement come up with a lot of creative solutions where the Defense Department can provide a lot of infrastructure, a lot of support, but the primary person who is always in contact with American citizens is still the Justice Department or the FBI official, but DOD is very active domestically now, consistent with the Posse Comitatus Act.

So you could read the National Security Act perhaps in the same way as to the police function, the bar and police functions for the CIA.

BARR:
Might I just add something? This goes back to Chairman Goss' opening statement. What you've heard here, I think, are policy judgments. I mean, the notion that the national security act was correct in keeping the CIA out of the domestic realm.

I do not think that they are constitutionally mandated. They may be exactly the right thing for us to do, but you could have written a National Security Act in 1947 that allows CIA to do extensive domestic intelligence collection.

I think you need to take these comments as policy judgments and not from a constitutional legal point of view the way it has to be.

GOSS:

I'm going to call now on Mr. Reyes noting that Mr. Boswell was here and Ms. Eshoo has joined us and we've got exactly 15 minutes before we have an adjournment vote or vise versa followed by something else.

Mr. Reyes, you're on.

REYES:
Thank you, Mr. Chairman. Before coming to Congress, I spend 26 and a half years in federal law enforcement and in the mid- '80s there was the decision made that we were going to go to war. And that war was the war on drugs. And we've been in the state of war on drugs since then. So when my colleague, Mr. Burr, talks about is it useful to think of ourselves as in a state of war, I would submit that it really simplifies things for many people to have that mentality.

But the reality is that that when we talk about a war on terrorism and even when we compare the retaliation against the Taliban in Afghanistan versus what we've done in Iraq, I see those as two completely different issues. And one was, I think, a necessary part of the war against terrorists. Another was an elected or a decision that we made electively to go there.

And I ask that question, or I preface my question that way because there are a number of issues that I think are important in this issue. One of them being that I spent a lot of time debating my colleagues in Congress on whether or not we should militarize the border, whether we should protect our borders with our military, irrespective of the fact that our military is stretched thinly. It's over-committed, it would be highly expensive, and those kinds of issues, at least at this point, don't seem to matter when we get into those kinds of debates.

But my question to you concerns with posse comitatus and the first one is that in this era of homeland defense against what people accept as asymmetric threats, have the support of the military to law enforcement changed from passive to active. Has that, in fact, or is that in fact redefining how we look at posse comitatus and the issues relative to being able to support whether you're talking about war on drugs or you're talking about war on terrorism or however else you couch that mindset.

So I'd like a comment on that.

MILLER:
Maybe I could start. For a long time, as you noted, with the war on drugs, before the war on terrorism, the Department of Defense has provided, and as John Yoo said earlier, has provided a lot of technical support to law enforcement and Congress has authorized that support specifically in statutory provisions in Title 10.

I view that as relatively speaking passive support. They are not in the lead. They are not interacting on a one to one basis. The opposite of that, though, the kind of migration of that occurred in the war on drugs in the Southwest border, if you will recall, when several young Marines confronted a young man who was herding goats and he ended up being shot. And we had enormous sets of reactions in Texas about how inappropriate that action as it turned out obviously was in terms of the result that the Marines took.

In my own line and it is a policy line based on the policy judgments of this Congress -- actually the Congress in the 1870s made and has now changed is that having active involvement of DOD and law enforcement and interactions directly with U.S. citizens is not a good idea. It wasn't a good idea before and it isn't a good idea except in cases of extreme emergency.

The Congress has also enacted statutes in Title 18 that allows the president to draw on whether it's an insurrection but also in chem-bio and nuclear events the president can take troops and use them in ways that they otherwise would not be able to.

But I think that's the exception that defines an otherwise good rule of not being active.

STEVENS:
I agree. The decision not to use regular military in the United States is a policy decision and it has been made in the area of law enforcement, in the area of suppressing insurrection or repelling foreign forces there is no such restriction. The drug war was a metaphorical war in large part and there was prudential judgment that drew more and more on military resources for that and we can debate that.

STEVENS:

The war on terrorism is a real war. It's not a metaphorical war. But still, as a general rule, it's best in my view not to use regular military except when there is no other choice, precisely to protect its relations with the civilian population.

So I do think existing authorities are sufficient to allow the drawing of military resources to the extent needed in the war on terror.

HEYMANN:

If I'm silent you won't think I agree that the war on terrorism is a real war.

GOSS:

Ms. Eshoo? I'd advise members we've got about nine minutes or so.

ESHOO:

Thank you, Mr. Chairman. Good morning to you and to our ranking member. I want to salute you both for having this public hearing. Public hearings of the House Intelligence Committee are a rarity and I want to thank all of the distinguished individuals that make up the panel this morning, because I think you underscore how important it is when we do have a public hearing that the issues that you are here to discuss and advise us on today, how important they are in the life of our nation.

I wish I had a dime for every constituent who has come up to me and raised the issue of the Patriot Act. It is somewhat of a phenomenon, I think, in our country that the whole issue of civil liberties, what the Patriot Act contains, doesn't contain, what people's views are about them is somewhat of a real movement in the country.

And most frankly, I would have never predicted that. I would have never predicated that. There are city councils from the smallest communities in the most unpredictable places to predictable places that have taken stands on this in opposition to it. Every time constituents raise it at town hall meetings or bump into me in the grocery store or anything in between, even at the League of Women Voters, the distress and the unsettled feeling that people have about this. It's there and you can always debate how people think, but there is a real emotion to this as well and you can never tell someone they are wrong for how they feel.

So in this discussion of civil liberties, the possible infringement on civil liberties, what provisions of the U.S. Patriot Act cause you the greatest concern with respect to civil liberties? Do you think there is anything wrong with it, with the Patriot Act? Many of us, obviously, hold our own views as we continue to look at this, but I might say, when we voted on it, emotions were high in the Congress. So we are not the most dispassionate people either. It passed by an overwhelming margin and I think that many of us are looking at what may be fiction and what is fact, what needs to be committed to and continued and what needs to be reviewed.

But I would be very interested to know what your views are on this, understanding that we don't have a lot of time, but in my area in many ways it's the $64,000 question.

Thank you.

GOSS:
I'd advise members that there are seven minutes left on a motion to adjourn and that will be followed by two five minute votes. That will not mean that I will be leaving to vote on the adjournment vote, because I'd like to hear whatever answers you offer.

HEYMANN:
I'm not really answering your question. I'll leave that to my colleagues, but I would like to say the need for renewal of the Patriot Act hopefully will be an occasion when the Congress will look at not only the criticisms, which I don't think anyone in the panel has many of, but also what new powers are necessary, which I don't know, I don't have a lot in mind, and also, what things should be regularized.

What is it that we are doing now under presidential authority -- I know this is not a unanimous view of the group -- that should be regulated, should be passed by legislation and should be done in the way that involves judicial review. In other words, I think the whole question of the long term future of what is either a war or not a war on terrorism, it doesn't make much difference at this point, ought to be opened at that time rather than simply thinking of it as how to undo Patriot Act One or to pass Patriot Act Two.

MILLER:

Could I make a follow up point which is that I think that in addition to the fact that the Patriot Act has to be renewed, the Congress built in a lot of provisions requiring the Department of Justice and others to come up and report what they were doing, whether in closed session or in open session, depending on the sensitivity of the issues.

The impression one has from the outside is that that hasn't really happened. I may be wrong about that. But it appears that that hasn't really happened and I think that perhaps has fed the emotional -- I don't know what your constituents are thinking or worrying about, but the lack of information certainly has fed the librarians by up until the time the attorney general then did make a statement about it.

ESHOO:
It's a very distinguished area. It's the Stanford University area -- we have more Ph.D.s in the district than any other place in the country, but that's not to say that they are very solid, average communities. It has it high ends to it. But it crosses political spectrums, economic spectrums, ethnic backgrounds. It's really quite amazing to me. It really is.

BARR:
I think it's not unusual in public opinion that the strength of feeling is sometimes inversely proportional to the extent of knowledge and understanding, particularly on issues of this kind.

And that's why I think, Congresswoman, public hearings of this committee, other efforts to generate an open debate, a greater sense of transparency to the extent that is possible on these issues, is the very best thing that we could do because I think as almost the unanimous sentiment here it suggests with respect to whether there are really big problems in Title Two, they aren't apparent to us, at least not to me.

ESHOO:
Is that the consensus of the panel?

MILLER:
I would just, if I could perhaps, but with a sort of asterisk that I do actually think that some further reporting about how Justice has actually used these. We're asked can you point to a

misuse, there is just a dearth of information, so the provisions as passed may be fine, how they are being implemented is the question mark.

ESHOO:
I raise this with constituents as well. Well, I think this is a very important discussion. Obviously all the things that haves been raised here are important. I think at one of the tougher times in the history of our country that the mark of maybe courage and leadership is to ask important, hard questions, that we probe ourselves. I think that this public hearing is part of that and I thank you, Mr. Chairman, for agreeing to have it and I thank all the witnesses very, very much.

Can I use you as a resource if I pick up the phone and call you? All right? Thank you.

GOSS:
Thank you very much. I'm sorry that the procedures and circumstances of the legislative branch are mysterious as well and it seems that when we are doing something of great value that sometimes we are asked to think about lower priority matters, like adjournment votes.

I do want to say this is clearly unfinished business but this has been a huge launch in an area that is of critical concern and everybody had given us a great deal of useful guidance, experience, anecdotal, thoughtful evidence and we would very much like to look at the panel as a resource.

Obviously as in analytical intelligence we all know that there are differing opinions and sometimes we don't get the consensus without an asterisk and I suspect we'll have a few asterisks before we get through.

Just to set the record to make sure that there are still some people in the United States who are pleased about the Patriot Act, I do have a letter, which I will put in the record from a lady in Tampa, which says very clearly that she feels safer because of the Patriot Act. So it cuts both ways.

I also do think that there is not much danger in the wonderfulness of our free democratic open society, that if there is misuse of the Patriot Act, that somehow we'll be reading about

it very quickly, because I know there are many who are looking for misuse as a safeguard, as appropriate. We are held accountable and that is exactly what makes us work as well as we do.

I have a series of questions, which I would like to also reserve the right to correspond with you or talk with you individually to try and get some further guidance on this. These are complicated. We're talking not only about the management of the community and how best to set it up so that it works more efficiently, but with the flexibilities and the safeguards that need to be there. We are also worried about understanding that we have the capabilities to fit the threats against the vulnerabilities which we now pretty much understand in a free democratic open society and the type of war we're fighting.

As you all have said, one way or another, it's different and we need to be able to adjust to that and this is part of that process. Obviously those of us who are not trained in the law will have a little more difficultly understanding the legalities and I am reminded that lawyers sometimes use different words or the same words that have different meanings.

I know that when I am speaking to a lawyer about the simple English word "probe", it means one thing. When I am talking to a doctor about a probe it means something else. And I want to make darn sure I understand the difference.

I think we have some problems like that with our language and some built in prejudices as we start some of these dialogues. I think it is very important that we try hard to understand each other.

So I thank you in that spirit. I thank you for that contribution today and I adjourn the hearing.

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TESTIMONY OF WILLIAM P. BARR
FORMER ATTORNEY GENERAL OF THE UNITED STATES
BEFORE
THE HOUSE SELECT COMMITTEE ON INTELLIGENCE
OCTOBER 30, 2003

Mr. Chairman and Members of the Committee, it is a pleasure to provide my views on the adequacy of existing law to protect the Nation from attacks by foreign terrorists; the significance of the PATRIOT Act adopted shortly after the attacks of 9/11; and the organization of our domestic intelligence and counterterrorism activities. By way of background, I served in the Administration of President George H.W. Bush as Assistant Attorney General for the Office of Legal Counsel, as Deputy Attorney General, and ultimately as Attorney General of the United States. During these years I was substantially involved in U.S. counterterrorism efforts and national security matters. Previously, I also served on the White House staff and the Central Intelligence Agency. I am presently Executive Vice President and General Counsel of Verizon Communications. The views I express today are my own and do not reflect the views of any governmental agency or corporation with which I have been or am presently associated.

I. Constitutional Framework

Let me start by making some general observations about the legal framework governing our efforts to defend the nation against attack by foreign terrorists.

One of the questions the Committee has asked is whether existing law is adequate to provide for fighting terrorists. I think the answer ultimately must be "Yes." But that is

because I believe that the critical legal powers are granted directly by the Constitution itself, not by Congressional enactments. When the Nation itself is under attack by a foreign enemy, the Constitution vests the broadest possible defense powers in the President. As the Supreme Court has observed, the Constitution is not a "suicide pact," but rather confers the power to use all means necessary for its own preservation and defense. No foreign threat can arise that the Constitution does not empower the President to meet and defeat.

For decades leading up to 9/11, and to some extent since then, there has been confusion about the proper legal model to apply to our counterterrorism activities here at home. There has been a tendency to view them primarily as law enforcement activities rather than national defense matters. This makes a difference because the scope of governmental power, and the restrictions on that power, varies according to the kind of *function* the government is performing. In this regard, the Constitution distinguishes between two different functional realms:

The first is where the government is acting solely in a *law enforcement* capacity. Here the government's role is disciplinary – sanctioning an errant member of society for transgressing the internal rules set within the body politic. The government is seeking to investigate, detain, and ultimately punish persons because their actions constitute violations of our internal laws. In this realm, the government's actions are subject to the greatest constraints. Indeed, the presumption largely lies against the government; the accused is afforded numerous rights to which the government's interests are

subordinated; courts are interposed as the arbiter; and the government must satisfy strict standards – "probable cause" and ultimate proof "beyond a reasonable doubt." The premise in this realm is that it is better for the government to fail than to make a mistake.

The second situation is fundamentally different. When a foreign enemy threatens the nation, our body politic is not using its domestic disciplinary powers to sanction an errant member but rather is exercising its *national defense powers* to protect against an external threat and preserve the very foundation of all our civil liberties. When there is a state of armed conflict, Presidential war powers are at their apex. The Constitution vests in the President -- both as Commander-in-Chief and as an inherent element of "Executive Power" -- the ultimate responsibility for determining what actions are necessary to defeat the aggressor. Here, the Constitution gives no rights to foreign forces attacking the United States. The rights criminal suspects have under our domestic justice system are inapplicable. The Constitution is concerned with one thing – destruction of the enemy. Having chosen war, the enemy's fate is judged by the rules of war. Within the realm of national defense, the premise must be that the government cannot be permitted to fail.

How do our counterterrorism efforts fall within this structure? There can be no doubt that combating foreign terrorists is a matter of national defense and falls squarely under the war power. The terrorists we face today are well-organized foreign forces that have publicly declared war on the United States; called for the killing of Americans wherever found; built up a global network of facilities and cells geared to make war on the United States; carried out a series of attacks on Americans, including the attacks on a

naval vessel, barracks, embassies, and the highly-coordinated attacks of September 11 in our homeland; actively sought weapons of mass destruction; and vowed to continue these attacks. This goes well beyond any threshold necessary to establish a "state of armed conflict" and mark these organizations and their adherents as "unlawful belligerents" subject to the laws of war.

Furthermore, foreign terrorists are subject to the war power whether or not there has been a formal declaration of war. It has long been established that, whenever foreign forces attack the United States, the President is "bound" to use his war powers to resist by force regardless of any declaration: "[I]t is none the less a war, although the declaration of it be 'unilateral.'" *The Prize Cases*, 67 U.S. 635, 668 (1862). And it is equally settled that those who engage in irregular operations against the United States -- "secret participants in hostilities, such as banditti, guerillas, spies, etc." -- are subject to the laws of war. 11 U.S. Op. Atty. Gen. 297, 307 (1865). Moreover, the status of a foreign terrorist as an unlawful belligerent does not change depending whether he is inside or outside the United States. As the Supreme Court noted in the now famous case involving the military trial and execution of Nazi saboteurs, never in the history of our Nation have foreign enemies who infiltrated our territory been accorded the status of civilian defendants with all the rights enjoyed by citizens of the United States. *See Ex Parte Quirin,* 317 U.S. 1, 42 (1942).

What does it mean, as a practical matter, when we choose to deal with terrorists as belligerents under our national defense powers? It means that we confront them as enemy combatants not as criminal suspects; that we can conduct searches against them without meeting the standards of the criminal justice system; that when we seize them we

are capturing them, not arresting them; that we detain them to incapacitate them, not antecedent to bringing criminal charges; and that we can hold them until we deem hostilities at an end, not for a pre-determined sentence.

Significantly, while foreign terrorists clearly fall under the war power and can be responded to accordingly, the government may also choose to treat their actions as violations of law and wield its law enforcement powers against them. Terrorism can constitute both unlawful belligerency *and* a crime. Indeed, over the past 30 years, Congress has passed a series of statutes criminalizing virtually every aspect of international terrorism. This has provided valuable tools to the government. Internationally, it has created a mechanism for sharing evidence, extraditing suspects, and obtaining complementary enforcement actions or investigative cooperation from other governments. Domestically, it has provided an alternative set of tools the government may use to investigate and incapacitate terrorists or to induce their cooperation.

The critical point, however, is that the terrorists' potential status as combatants or criminals are not mutually exclusive categories. The fact that terrorists' actions have been made criminal does not preclude the government from treating them as enemy combatants without any rights under our criminal justice system. Conversely, the fact that terrorists are unlawful belligerents does not preclude the government from wielding its law enforcement arsenal against them. In short, the status of terrorism as both a crime and unlawful belligerency confers two alternative sources of power, and the government is free to use either or both.

II. Adequacy of Current Statutes

Unfortunately, in the wake of Watergate and the Vietnam War, and prompted by several sensational instances of abuse, our county embarked on a 30 year campaign to curtail the powers of our security agencies. A mindset developed during this era that all national security issues could be dealt with within the framework of our criminal justice system or pursuant to carefully-hedged, detailed procedures derived from that system. Many either denied or made light of the notion that the President had Constitutional responsibility for judging what was required to protect the nation's security. Numerous statutes were passed, such as FISA, that purported to supplant Presidential discretion with Congressionally crafted schemes whereby judges became the arbiter of national security decisions.

I believe that many of the statutes enacted in this period were too restrictive and posed significant problems for effective counterterrorism efforts. In the wake of 9/11, however, two steps were taken that have gone far toward redressing the balance. First, the President's order on military tribunals has underscored that terrorism -- in the final analysis -- is a matter of national defense and that, apart from whatever statutory tools are in place, the President has broad powers to protect the nation. Second, the PATRIOT Act fixed many of the problems with FISA and filled a number of other gaps in our surveillance and intelligence collection laws.

FISA, enacted in 1978, is the principle statute controlling the power of the government to gather foreign intelligence information within the United States, including intelligence on international terrorism. To justify a search, it required the government to establish to a special court that there was "probable cause to believe that the target … is a foreign power or an agent of a foreign power." Further, FISA required that an executive branch official certify that "the purpose of the surveillance is to obtain foreign intelligence information."

One of the chief problems that arose under FISA was that this latter "purpose" provision became construed as requiring that the primary purpose of the surveillance had to be for foreign intelligence. This resulted in the notion that a "wall of separation" had to be maintained between intelligence and law enforcement activities. This, along with restrictions on the use of grand jury material, critically impaired our counterterrorism efforts by preventing coordination and sharing between law enforcement activities and intelligence activities. The single greatest accomplishment of the PATRIOT Act was to remove this wall of separation by requiring that a FISA surveillance only have collection of foreign intelligence as "significant" purpose. This now opens the way for the kind of closely integrated effort between law enforcement investigations and intelligence gathering that is essential.

While the PATRIOT Act was a major step forward and remedied FISA's most severe problems, I believe FISA remains too restrictive in a fundamental respect. It still requires that the government establish "probable cause" that an individual is either "a

foreign power" or an "agent of a foreign power." Where a foreign individual is concerned, the government must still show he is acting "on behalf of a foreign power." I believe that this makes the standard too high and too inflexible. The Moussaoui case shows how potentially catastrophic this standard could be. After Moussaoui was detained, FBI officials felt they could not establish an adequate basis under FISA to search his computer. They had little to establish a nexus to a foreign power. While apologists for FISA have advanced tortuous arguments that the "probable cause" standard could have been satisfied in that case, the truth is that it was quite problematic. As a result, the FBI was unable to get access to the computer until it was too late. Had there been information in the computer that led to exposure of the 9/11 plot, timely access could have saved 3,000 lives. It is easy to see that this same problem will repeat itself in the future.

I question this standard in two respects. First, there is no reason why it should not apply to foreign *individuals* instead of requiring a nexus with a foreign "power." In this regard, it should be borne in mind that Fourth Amendment rights only extend to "*the people*." Thus, where the government sees an *individual* foreign person apparently acting as a terrorist, that should be a sufficient basis to conclude that the individual is not part of "the people" and thus not protected by the Fourth Amendment. In an era of shadowy terrorist groups, it is frequently impossible to determine an organizational nexus at the initial stages of detecting potential terrorist activity, and for that reason extending coverage to individuals is important.

Second, the Fourth Amendment only protects against "*unreasonable*" searches. This is a relative standard. What is reasonable depends on the situation. It seems obvious to me that reasonableness can depend on the magnitude of the danger that the government is trying to deal with. Thus, the standard of reasonableness when the government is acting in purely a law enforcement mode may be different than when it is acting to defend the nation against foreign attack, and especially against foreign terrorist attacks designed to erode the very foundation of our freedoms. The standard for searching for a marijuana joint in the back seat of a car may be different than the standard for searching for a nuclear device that could obliterate Washington, D.C.

Most of law fleshing out the "probable cause" standard developed in the criminal law enforcement arena where it might be logical to insist on a higher evidentiary standard. However, when this standard is imported into the national security realm, it calls for a greater degree of assurance than is appropriate given the magnitude of the potential threat. It also puts judges in the position of making the ultimate judgment about the magnitude of the risk to national security -- assessments judges are not competent to make or responsible for making under the Constitution. Given the exigencies that exist in the area of terrorism, and the ultimate judgments that have to be made about national security, searches should be allowed when the government has a reasonable belief that persons are engaged in foreign terrorist activity and that a search is important to protect the public safety.

Another area under FISA that remains too restrictive relates to the government's ability to obtain third-party business records. When terrorists are on the move, they leave an evidentiary tracks – motel records, ATM records, car-rental records, and so forth. When government agents are hot on their trail, time is of the essence. Delay in gaining access to these records can spell the difference between successful apprehension and mass slaughter.

The law is clear that a person has no Fourth Amendment rights in these records left in the hands of third parties. Having willingly entered into transactions with other people, one loses any legitimate expectation of privacy in the records that reflect those transactions. Thus, the government is free to obtain such records from third parties without any showing of probable cause; it is enough that the records are relevant to an investigation.

In most other law enforcement and administrative contexts, government agencies are authorized to obtain such records expeditiously when they are relevant to an investigation by directly issuing "administrative" subpoenas. There is no requirement for prior judicial review. Indeed, there are over 335 such authorizations on the statute books. The FEC, for example, can issue such subpoenas when it is looking into possible election law violations. The Justice Department can issue such subpoenas when it is looking into false claims against the government.

But for some inexplicable reason, FISA still requires the government to go to a judge to obtain an order when it seeks these records in a counterterrorism investigation. This makes absolutely no sense since it is precisely in the terrorism context that the need for speed is most acute and the consequences can be most catastrophic. Foreign terrorists should not get rights that no one else in the country has. The President has called for giving the FBI administrative subpoena authority for third-party records relevant to counterterrorism investigations, and Congress should quickly enact his proposal.

Finally, there has been another development in the law over the past 30 years that, I believe, threatens the vigor of our counterterrorism efforts. A series of court decisions has watered down the doctrine of immunity so that it is now easier for a person to sue governmental officials in their *personal* capacity when it is alleged that they have violated that person's constitutional rights. These suits are punitive, since the aggrieved person can otherwise obtain compensation from the government rather than the individual. The theory is that the danger of personal liability will make government agents more observant of the rights of those with whom they deal. The prospect of having one's personal finances and career destroyed has had the predictable effect -- officers have tended to become more risk averse.

Whatever the merits of this approach in general, I question whether this should be applied in cases involving counterterrorism actions. Counterterrorism is a realm rife with unprecedented circumstances and gray zones. It is an area in which the stakes are high and yet judgments frequently have to be made with less than perfect information and

under tremendous time pressure. It seems to me that we do not want these officials to be making decisions based on worries over their own personal liability.

A somewhat dramatic example makes the point. I have never heard anyone suggest that the President does not have the power to order the shoot down of a high-jacked passenger plane if he believes that is going to be used for an attack. I have heard no objection to the combat air patrols over our cities or to the positioning of surface-to-air missiles around Washington. And yet this would mean taking the lives of a hundred innocent Americans, even though the Constitution prohibits the taking of life without "due process." Suppose a plane is high-jacked and minutes from Washington. Based on confused and imperfect information the President makes his best judgment to shoot down the plane. But he turns out to wrong – it was a "traditional" high-jacking after all. No one would deny that the government should pay compensation. But should we allow the President to be sued personally?

Of course, the principle reaches down to officials at every level. How about the TSA officer who strongly suspects that a passenger on a flight about to take off is a terrorist? He has troubling indications but not "probable cause." The passenger threatens to sue him if he is removed from the plane for further questioning? Does the officer play it safe for the passengers or play it safe for himself.

I believe Congress should consider strengthening immunity protection for officers involved in domestic security. If mistake are made and rights are invaded, the

government should pay compensation. But if the government certifies that an individual official was acting within the scope of his duties and in a good faith belief that his actions were reasonable to protect the public safety, I question whether it makes sense to allow punitive litigation against the individual to proceed.

III. The Organization of Domestic Counterterrorism Activities

An idea making the rounds these days is the notion of severing "domestic intelligence" from the FBI and creating a new domestic spy agency akin to Britain's MI-5. I think this is preposterous and goes in exactly the wrong direction. Artificial stove-piping *hurts* our counterterrorism efforts. What we need to do now is meld intelligence and law enforcement more closely together, not tear them apart. We already have too many agencies and creating still another simply adds more bureaucracy, spawns intractable and debilitating turf wars, and creates further barriers to the kind of seamless integration that is needed in this area.

Since 9/11, the criticism of the FBI as a counter-terrorism organization has focused on three related shortcomings. First, it is said that the Bureau focused on investigating terrorism solely as a criminal justice matter and sacrificed the need to gather intelligence to the exigencies of building particular cases for prosecution. Second, the FBI failed to exchange information with other elements of the Intelligence Community. And finally, because of its dispersed approach to building individual criminal cases, the Bureau never developed the capacity to fuse and analyze all available intelligence.

But these shortcomings are inherently fixable, and both Attorney General Ashcroft and FBI Director Mueller have moved vigorously and comprehensively to address them. Unfortunately, some say these reforms are doomed because the law enforcement and national security functions cannot co-exist in the same organization. They claim that the subordination of the national security function was the result of a deep institutional law enforcement bias within the FBI and this "mindset" will always mean national security objectives are sacrificed to law enforcement goals.

But the FBI has never been solely a law enforcement agency. It has always combined two functions, serving as the nation's criminal investigative arm, as well as its domestic security agency responsible for defending against foreign threats ranging from espionage to terrorism. Contrary to the critics' suggestions, the main impediment to the FBI's carrying out both roles was not any incapacity inherent in the agency itself. Rather, the root cause of the difficulty lies in the vast web of external legal constraints placed on the FBI by policymakers, including Congress and the Courts, over the past 30 years.

For three decades leading up to 9/11, Congress was at the fore of a steady campaign to curtail the Bureau's domestic intelligence activities and impose on all its activities the standards and process of the criminal justice system. These constraints made it extremely difficult for the Bureau to pursue domestic security matters outside the strictures of the criminal justice process. Prohibitions on sharing grand jury information with intelligence agencies and with using intelligence information in criminal

investigations created a "wall of separation." That separation effectively forced the Bureau to proceed largely on the criminal justice track if it wanted to preserve the option of using its law enforcement powers to incapacitate terrorists once they were detected.

The PATRIOT Act has now alleviated these constraints, allowing the closer meshing of law enforcement investigations with intelligence collection activities. Now that this artificial barrier has been removed, it would be a catastrophic mistake to deracinate domestic intelligence from the FBI and create a separate agency to perform this function. If we should have learned one lesson from 9/11 it is that domestic intelligence and criminal investigation are inextricably related and should be integrated to the maximum extent possible. The right thing to do is to fix the problems that occurred at the FBI -- and they are being fixed. Creating a new agency does not fix anything – it just makes the problem of coordination worse than before.

After all, in the FBI we start with the largest, most professional and highly trained "information gatherers" in the country, even in the world. The Bureau has always excelled at collection. Its capacity to conduct large-scale, complex investigations is unparalleled. Having operated within the United States for almost a century, it mastered the kinds of collection techniques and skill sets that are essential in developing information domestically, including questioning witnesses; interrogation; the use of sophisticated technical surveillance; the use of undercover operatives; surreptitious entries; and the most advanced forensics. Through decades it has built up a web of working relationships with 17,000 state and local police agencies, giving it access to

literally hundreds of thousands of eyes and ears on the ground and the ability to reach almost seamlessly into any community in the country. Likewise, through its worldwide network of liaison relationships, it has access to the flow of information not only from foreign intelligence services but from foreign police organizations.

Building on this outstanding base, taking advantage of the new freedoms won in the PATRIOT Act, and learning from the lessons of the past, Attorney General Ashcroft and Director Mueller are well along in transforming the Bureau into the first-class counterterrorism organization it is uniquely situated to be. The Bureau has clearly set as its priority the *prevention* of terrorist attacks before they occur, using all available tools – both intelligence and law enforcement – in close coordination. The Bureau has established an Office of Intelligence, and has otherwise built up substantial intelligence analytical capabilities. It has set up numerous mechanisms, such as its National Joint Terrorism Task Force and its Watch Center, to fuse and disseminate information throughout the Intelligence Community and state and local law enforcement agencies. It is organizing, staffing and training so that intelligence equities are given proper priority and pursued in tandem with law enforcement interests. It has reformed its dispersed case management practices, now providing national coordination of significant cases. It is recruiting the skills, developing the culture, and creating career paths to ensure that its intelligence and law enforcement missions are pursued hand-and-glove.

Its longstanding strengths, coupled with these reforms, now place the FBI in a unique position. It alone can bring to bear both intelligence gathering powers and

criminal investigative powers; ensure the kind of close integration of these efforts so as to maximize the collection and sharing of information; and manage both sets of activities in a way that preserves the fullest range of responsive options once terrorists' plans have been uncovered.

While everyone likes to talk about "coordination," it is important to bear in mind the exceptional degree of coordination that is really essential in domestic counter-terrorism. Trying to identify and catch terrorists after they have infiltrated the country calls for a level of coordination that is intensive and real time. It is not a leisurely business like estimating a rival nation's GDP or assessing its military forces. Coordination in the counterterrorism arena does not mean sending over reports at the end of each month. It calls for a fast-paced and dynamic process whereby leads developed in a criminal investigation may have to be exploited immediately through intelligence assets, and conversely intelligence information may call for immediate law enforcement action. It is absurd to think that creating two separate agencies will permit the kind of integrated effort needed.

Some say that the advantage of a new American domestic spy agency is that it will bring "focus" to the gathering of intelligence. But after cutting the ribbon on its new headquarters building, just how is this agency going to track down foreign terrorists in the United States. The bottom line is that -- given the sheer scale of our country, its legal system, and its culture – the job of collecting information within the country will necessarily depend on precisely the same people, infrastructure, and resources the FBI

has in place. While analysis of intelligence requires centralization, the collection requires wide dispersion and intensive coverage throughout the country. Tracking terrorists or uncovering a cell may require, for example, rapidly locating and interviewing witnesses around the country; locating and tracking vehicles; checking hotel records in hundreds of establishments around the country within hours; canvassing thousands of stores to determine where a particular item was purchased; simultaneously surveilling scores of sites or individuals throughout the nation; preserving, managing and exploiting hundreds of pieces of physical evidence through advanced forensics. Who does this?

Moreover, collection activities within the United States call for all the techniques and skill sets that the FBI has mastered, ranging from electronic surveillance to witness interviews. MI-5's largely made its mark penetrating Irish extremist groups. But in this country it is the FBI that has had almost a century of experience recruiting and managing undercover agents and informers, and unlike intelligence agencies, it can use both the carrot of money as well as the stick of criminal prosecution to induce cooperation. Further, the criticism that the Bureau has only a narrow law enforcement perspective is plain wrong. As its successes against organized crime and Soviet espionage clearly demonstrate, the Bureau knows well how to defer law enforcement actions in order string out and exploit undercover operations for maximum intelligence value.

The situation faced by MI-5 in combating Irish extremist groups is vastly different from the one we face today in the United States. Britain is much smaller – with 56 local police forces instead of our 17,000 – and has far more flexible laws relating to security

and civil rights. The fact is that, following the East African embassy bombings, the FBI has surpassed MI-5 and other Western security services in its ability to cover Middle Eastern terrorist groups. The FBI has been able to ferret out substantial information about terrorist activities in U.K. that had gone undetected, and MI-5 has drawn on FBI resources and talents in exploiting this information.

More importantly, there is an insurmountable problem in separating domestic intelligence from law enforcement in this country – and that relates to the end game. At the end of the day, the people looking for the terrorists are going to have to take action to incapacitate them. This may have to be done at an instant's notice. What exactly is the new domestic spy agency going to do to stop terrorists? We hear a lot of talk about "prevention," but what does that actually entail? Apart from any legal concerns, it is doubtful we will tolerate regular use of domestic hit squads. The fact is that within the United States the end game will frequently involve using law enforcement powers to take people into custody to prosecute them, if not for terrorism than for some technical offense that will still effectively neutralize them without exposing sensitive information.

But this means that intelligence activities must be conducted at every stage in a manner that preserves law enforcement options. This does not require delaying or diminishing intelligence activities. It does mean that intelligence activities must be carried out with an awareness of law enforcement options and in tandem with efforts to preserve and perfect those options. If law enforcement powers are to be invoked, its standards must be satisfied. As leads are pursued, for example, it may be necessary to

preserve evidence that can used to support future arrest. Or it may be necessary to develop alternative evidence so as to protect sensitive sources and methods. Or it may be necessary to develop potential charges on a technical violation just to have a sound basis to hold a suspect. In some cases, military tribunals might be an option, but even then legal standards must be satisfied. All of this requires full integration of intelligence collection and intelligence activities. Perhaps in Britain the MI-5 can show up at police headquarters at the 11th hour and demand they arrest somebody immediately. That will not cut it here. In short, counterterrorism in this country should *not* have an "exclusive focus" on intelligence if it is to be successful.

Nor can domestic intelligence be so insulated given our legal system. In the United States, domestic intelligence collection is subject to significant legal requirements and legal process. FISA, for example, requires preparing applications, going before judges, and establishing that there is evidence satisfying various legal standards. Even fully authorized intelligence activities can easily lapse into Constitutionally suspect areas. Undercover operations can sometimes result, for example, in government agents participating in serious criminal conduct. The FBI has had almost a century of experience working within Constitutional and legal safeguards. And while there have been lapses, there have also been lessons learned. In my view, the best way to ensure that domestic intelligence is carried out consistent with our civil liberties is to keep those activities in tandem with the law enforcement.

Director, Center for Democracy and Technology in Washington, D.C.

Gentlemen, thank you very much for joining the Committee today on what promises to be an opening salvo of a big discussion, a big discussion that we need. We will go, proceed from left to right if that would be OK, and so, Mr. Ellis, let us start with you, Executive Vice President and General Counsel of SBC. Thank you for joining us.

STATEMENT OF JAMES D. ELLIS, SENIOR EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, SBC COMMUNICATIONS INC.

Mr. ELLIS. Good morning, Mr. Chairman and members of the Committee. Thank you for the opportunity for SBC to share its views on the important issue of individual right to privacy, due process, versus the recording industry's efforts to enforce its copyrights. It is an important issue and one that we believe certainly deserves the exposure that these hearings will provide.

It is a timely topic. As has been mentioned, the explosion in subpoenas from the recording industry took place this summer. I believe the Internet community and the public are only just now beginning to be aware of the full implications of the position taken by the recording industry. I believe that the community as it begins to understand the full scope of the position advanced by the recording industry is going to become very vocal and insistent that their right to individual privacy and due process not be compromised by efforts to enforce copyrights.

Having said that, I want to be very clear. SBC's position is unquestionably that owners of copyrights have every right to enforce them vigorously. And to that extent, we certainly agree with most of the comments that have been made here today. We think it is important to the industry, to the economy, that copyright protections be served and accomplished.

Having said that, I would also add that SBC has a lot of intellectual property and we take every reasonable and responsible step to enforce those copyrights and protect that intellectual property. We do so by going to court, filing a lawsuit, availing ourselves of the rights under the Federal Rules of Civil Procedure. We obtain subpoenas subject to judicial oversight and review.

That happens every day in the courts across this land. That is how it is done, has been for generations. That is how the system has worked. In contrast, the recording industry has taken the position that merely by going into a clerk, making an assertion that their copyright is being infringed, and without notice to the Internet user and without any judicial oversight, they are entitled to obtain the names, address, and telephone number of that user.

Now, I do not believe that any civil litigant or law enforcement agency in this country has that capability. The essence of their position is that once they make that filing with the court clerk and pay their $25, due process and individual right of privacy goes out the window. That cannot be the law in this country.

The implications to that go well beyond the recording industry. If the recording industry can go in to a clerk, pay their $25, make an allegation, and obtain the name, address and telephone number,

then anyone else in this country, regardless of their motive, can do the same thing.

The implications go beyond privacy. They unfortunately go to personal security. The fact is the Internet is not the personal safe haven we wish it was. To the degree there is security, it is usually associated with the fact that e-mails are anonymous. They do not include, your e-mail address does not include, the name, address, and telephone number of the user. So people go into chat rooms, they access web pages, they use the Internet, counting on that anonymity.

Now, if the position of the recording industry prevails that anonymity is stripped away very simply. File your $25 and submit your statement that somebody is infringing on the property. That cannot be the test. If it is, I believe it will be inevitable, inevitable, that the Internet stalker, the child molester, the abusive spouse, or some other whacko who uses the Internet is going to use that same approach to find their victims.

It is for this reason that we support the legislation that was introduced by the chairman. It puts the recording industry in the same position as every other litigant. That is, you go file your lawsuit, you get your subpoena, and you pursue it subject to the Rules of Civil Procedure. If the recording industry has the evidence that people have violated it to the degree that they are entitled to this subpoena, then file the lawsuit. They served 2,000 subpoenas and to my knowledge they filed 200 lawsuits. I assume that means there are 1,800 people that have had their privacy violated without justification.

Bottom line for us is very simple: We do not believe that your constituents, our consumers, and Americans in general lose the right to privacy and due process simply because somebody makes an allegation that there has been wrongdoing and pays $25 to a clerk. That cannot be the law.

I would be happy to have any questions, sir.

[The prepared statement of Mr. Ellis follows:]

PREPARED STATEMENT OF JAMES D. ELLIS, SENIOR EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, SBC COMMUNICATIONS INC.

I would first like to thank Chairman McCain and Senator Brownback and Members of the Committee for inviting me here today to discuss the important issues surrounding the Digital Millennium Copyright Act, the privacy and security of Internet users, and the protection of copyright content.

SBC has a considerable body of intellectual property and we take all reasonable and responsible steps to protect those property rights. We recognize and respect the legitimate interests of other copyright owners as well.

However, when SBC acts to protect or assert its intellectual property rights, it has to follow fundamental and time-tested rules and procedures that are applied every day in our courts. Others, however, advocate what we believe to be a misapplication of the DMCA in order to create a private and limitless right of subpoena—devoid of all rules and procedures. The recording industry has legitimates rights and concerns—but the answer is not to create a private right of subpoena that completely ignores the safety and privacy of America's 100 million Internet users.

Peer-to-peer file swapping technology, like that utilized by music file swappers, did not exist in 1998 when the DMCA was passed. Yet, the recording industry would have you believe that Congress and the ISPs foresaw the future and agreed to strip all Internet users of their rights of privacy, anonymity and due process just because they are accused of infringing copyright over a peer-to-peer network.

Under this distorted interpretation of the DMCA, we have already seen that SBC and all ISPs are being besieged by thousands of subpoenas, all without any court

supervision. Given the fact that these subpoenas are merely rubber-stamped by a court clerk without judicial oversight, we are concerned about the protection of our customers' safety, rights of privacy, anonymity and due process. However, we remain committed to working with the recording industry and all copyright owners to find solutions that properly balance the rights of all interested parties.

I. Accepted Safeguards and Rules of Civil Procedure

SBC and thousands of other litigants adhere to the following fundamental and time-tested rules of procedure when protecting their intellectual property rights:

i. We have to investigate our claim and the elements of the claim.
ii. We have to expose our allegations to the light of day in a court of law;
iii. When we file a suit, SBC must abide by the requirements of Rule 11 of the Federal Rules of Procedure which insures that the attorney who signs the pleadings has undertaken a good faith investigation of the facts alleged,
iv. If necessary, we would petition the court for expedited discovery to learn the name and location of unknown defendants;
v. We could obtain a subpoena for the records of third parties in order to identify such unknown defendants;
vi. We would observe the provisions of Rule 45 of the Federal Rules of Civil Procedure and insure that the subpoena is issued by a Court within 100 miles of the party served which affords that party an opportunity to resist the subpoena in a forum convenient to them; and
vii. Interested parties would be afforded an opportunity to challenge us in court under the supervision of a judge or magistrate.

These same procedures are followed by litigants thousands of times a day in courts all across the country.

II. A System Without Safeguards or Rules

In contrast to the well-settled rules that everyone else follows, the Recording Industry Association of America ("RIAA" or "Recording Industry") and others would propose the following special treatment to avoid the annoyance of rules and procedures:

i. Without regard to Fed. R. of Civ. P. 45, a person claiming to be a copyright owner or its agent can pick any Federal District Court, from Guam to Maine, and can use that court as its private subpoena factory[1] to generate hundreds or thousands of subpoenas on the mere assertion of a "good faith" belief that their copyright has been infringed;
ii. The "good faith" belief is not subject to the obligations or sanctions of Fed. R. Civ. P. 11 because no lawsuit need be filed;
iii. After paying a small fee, and without any substantive review, the alleged copyright owner can require the clerk of the court to issue a subpoena whereby, under force of law, an ISP must within 7 calendar days, provide the name, address, telephone number and e-mail address of the person or persons informally accused of wrong-doing;
iv. The alleged copyright owner never needs to file a formal claim, and never needs to appear before a judge or magistrate. In fact, the party never has to explain what it did with the personal information it obtained.
v. By the time any Internet subscriber would be allowed to protect his/her private information or interests, it would be too late.

Again, Congress did not intend this application of the DMCA to peer-to-peer activity because peer-to-peer technology did not exist at the time the DMCA was passed in 1998.

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[1] RIAA's disregard for Rule 45 by using the District Court in Washington, D.C. to obtain subpoenas issued to entities located across the country has resulted in at least four court challenges. In addition to SBC, Boston College, MIT and Columbia University have all challenged this disregard for Rule 45. In all but the SBC case, RIAA has either been defeated in court, withdrawn its subpoenas or abandoned efforts to enforce them. While indicating its intent to voluntarily have subpoenas issued from the proper court on a *going forward* basis, RIAA still maintains that it can disregard Rule 45 in that "[t]he DMCA does not require formal service of subpoenas" and that "[t]he DMCA authorizes nationwide service of process." *See: RIAA Reply Brief in RIAA* v. *SBC Internet Communications Inc.,* U.S. District Court for the District of Columbia, Misc. Act. No. 03–MC–1220–IDB, pages 15–16.

III. The Safety and Privacy Risks of No Court Oversight

While SBC appreciates the need to protect legitimate copyright interests, this unsupervised private right of subpoena poses safety, security and privacy risks to all Internet users. There is great risk that others who under the guise of a copyright owner would obtain a subpoena for illicit or illegitimate purposes. A person's name, home address and telephone number might be released without that person ever knowing that the information is no longer private. Based on nothing more than an unverified allegation, personal information can be tied to activities, subject matter or affiliation of a person on the Internet and that information can be used for illegitimate reasons that go beyond copyright enforcement.

In this system, by the time any abuse is discovered, the name, home address and telephone number of the Internet subscriber has already been released. In addition, this private right of subpoena is available to anyone and everyone, not just the Recording Industry. That thought is especially disturbing considering this private right of subpoena is available to a pedophile lurking in an Internet chat room; an abusive spouse, or a stalker. Someone who is intent on doing bodily harm is not going to be dissuaded simply because the law states that they may be liable for "damages or attorneys fees" for misrepresentations. By then, the harm is done.

This past August alone, SBC's affiliated Internet Service Providers received almost 200,000 e-mails complaining of abuses of the Internet. While most of these e-mails complain about spam, and other Internet abuses, a significant number pertain to harassment and threats.

A female subscriber recently complained "This man has been Internet stalking me. He was first asking me to call him and when I refused, he started saying that he loved me. Then I received this in my mail . . . look at the title. I feel he is a threat to me." The title of the e-mail contains clear threats of bodily harm and is too offensive to repeat in this forum. I have submitted a redacted copy of the e-mail for the record.

If this private right of subpoena is ratified, the person making these threats can go to the *clerk* of any district court, submit a short form letter, pay a small fee and force an ISP to tell him this person's name, where she lives, and what her telephone number is. This is but one very real example of how the public policy implication of this issue extends far beyond mere music piracy.

SBC Internet Services, through its Pacific Bell subsidiary, recently filed suit in California against a company called Titan Media, along with the Recording Industry and one other company, over misuse of the DMCA. Titan Media is a purveyor of gay pornography and, by obtaining the issuance of one single DMCA subpoena in California, Titan demanded that Pacific Bell Internet Services turn over the names, addresses, telephone numbers, and e-mail addresses of 59 individuals who were alleged to have illegally obtained its pornography through peer-to-peer file swapping. SBC has no reason to believe that Titan's intentions and tactics are based upon any motivation other than simply protecting its copyrights. However, imagine the potential for abuse if such information is provided to a party with less than honorable intentions. Even associating a person's name with such material might have far reaching affects on the individual's personal and professional life beyond any copyright issues that may exist. The privacy implications of this unsupervised, private right of subpoena are frightening.

IV. Private Subpoena Power—Constitutional Issues

The private right of subpoena sought by the Recording Industry and its allies present difficult Constitutional problems as well. Article III of the Constitution limits the power of the courts to pending cases or controversies. Courts may not be private enforcers. Under this proposed system, there is no requirement that a lawsuit is ever filed. The party obtaining the subpoena never has to expose his claims to a judge or magistrate and never even has to explain what he did with the personal information he obtained.

The evidence at hand indicates that the Recording Industry alone has obtained close to 2,000 subpoenas—all out of the court in Washington, D.C.—but it has only filed approximately 250 lawsuits. This is a clear example of our courts acting as private enforcers with no pending claim or controversy, and this is directly contrary to the Constitution.

This unsupervised private right of subpoena also strips Internet users of their First Amendment rights to communicate and publish anonymously-without due process of law. The Recording Industry and its allies have taken the position that they need only make an allegation of infringement and Internet users have no rights. But that "guilty until proven innocent" proposal goes against our entire judicial system-whether civil or criminal. That so-called logic is analogous to saying that citizens who are merely accused of one particular type of crime have no constitu-

tional rights. Thankfully, our judicial system requires the often bothersome task of actually proving your allegations before the rights of the accused are forfeited.

V. Resource Burdens and Substantial Costs

The interpretation of the DMCA advocated by the Recording Industry and others would result in a limitless, private right of subpoena. As the Recording Industry has shown us, this process can be mechanized like an assembly line. Further, the Recording Industry demands compliance to its limitless subpoenas, all within 7 calendar days. This misuse of the DMCA would require ISPs to allocate significant resources at substantial costs which, according to the RIAA, cannot be recouped from the party seeking the records. In our experience, each subpoena requires approximately one hour to fully process, and that assumes that all information is correct and easily available. That estimate does not include the time to notify the subscriber that a stranger is asking for his/her personal information. That estimate also does not include the cost of assets and tools necessary to do the job.

The Recording Industry has taken the position that ISPs must respond within 7 calendar days, and that they must do so free of charge. This goes against the well-established provisions of Fed. R. Civ. P. 45, and the DMCA and the Federal District Court in the Verizon decision both clearly demand that the protections of Rule 45 apply.

However, this assembly line of subpoenas results in other very real and practical problems as well. ISPs do not operate with unlimited resources. Therefore, if any person can submit a limitless number of private subpoenas and demand an "expeditious response" at no cost, then ISPs will have no choice but to divert resources away from assisting with law enforcement subpoenas and warrants so that they can act as unpaid private investigators for the Recording Industry and others exploiting this abuse of the law.

This issue is NOT just about music piracy, and it is not just about the Recording Industry. Before we create an unsupervised private right of subpoena, sweeping away important procedural and Constitutional protections, all of these public policy issues should be addressed by Congress.

VI. Legislative Resolution

Legislation like that proposed by Senator Brownback addresses all of these issues because it relies on the same time-tested rules and procedures that the rest of us must follow. Requiring the filing of a lawsuit would bring this subpoena power within Constitutional and procedural safeguards. It would require that the alleged copyright owner reasonably investigate his claims, and expose his claims to the light of day, pursuant to the protections of the Federal Rules of Procedure. In so doing, it would provide Internet users basic notice and an opportunity to be heard—all the protections denied to them by the current abuse of the DMCA—and it would require more than a mere allegation based upon not even the slightest amount of due diligence.

Finally, a judge or magistrate would be able to examine the copyright owners' claims, address any glaring deficiencies in the claims, address any applicable defenses, and ensure that no mistakes were made by copyright owners or their computerized search robots. It would recognize the right of third-parties to recover costs associated with these burdens. And, it would provide basic due process before privacy and First Amendment rights are forever lost.

We don't seek to deny them the ability to assert their rights. We seek an opportunity to work together to protect legitimate copyright interests, while safeguarding the security and privacy of Internet users, and respecting the legitimate interests of ISPs. We propose to do this by applying the same rules to one and all. Thank you for your time and attention to this important matter.

Senator BROWNBACK. Thank you very much, Mr. Ellis. We appreciate it.

Mr. Rose, Executive Vice President of the EMI Group. Welcome and the floor is yours.

STATEMENT OF JOHN ROSE, EXECUTIVE VICE PRESIDENT, EMI GROUP AND EMI MUSIC

Mr. ROSE. Thank you, Mr. Chairman, and thank you, members of the Committee, for inviting EMI and me in particular to testify

today. Given the short nature of my remarks, I would ask that my complete statement be entered into the record.

Senator BROWNBACK. They will. And for all of the witnesses today, your complete statement will be put in the record, and so you are free to summarize if you choose.

Mr. ROSE. Thank you.

Unlike many on this panel, I am not a lawyer. My responsibilities include strategy, corporate development, digital distribution, and anti-piracy. I am here today to talk about the impact of the deliberations today on our business.

EMI is a music-only company. Music is the only thing we do, so what is decided and discussed here today is critical to us and critical to our employees. In the United States we employ approximately 2,500 people and, contrary to common belief, the largest concentration of those people are in Jacksonville, Illinois, and they do things like drive forklift trucks and work in warehouses.

I would like to make four points or at least talk about four topics: first, the degree of change that we are facing in the industry and how it is transforming our industry and our relationship to the telecom, computer, and software industries; second, the economics of piracy, the economics to us and the economics more broadly to the telecom and computer industries; third, why this subpoena process is so critical to us; and fourth, while critical, why it is only one small element in a much larger set of initiatives that we are addressing and pursuing to address the changes facing us.

Turning first to the degree of changes, we are facing the functional equivalent of a perfect storm, *i.e.,* change on multiple fronts that are dramatically transforming our business, changes in technology, changes in consumer behavior, in the digital world, in the physical world, changes in retail, and a new set of competitors from other industries, for whom now the content industries are a critical part of their businesses.

Piracy underlies all of these changes and I just want to point to one of the types of changes we are facing. If you go back to this chart, back in 1995 the music industry was pretty simple. You created a disk—vinyl, LP, cassette, CD—you sold it to a consumer, who put it in a purpose-specific device that played it. If you look at the world today, however, just a scant 7 years later, the number of devices have proliferated dramatically and at this point almost any device—number of formats have proliferated—and almost any device can play the content from any format. So we are really facing a world in which the music itself has been disconnected from the format—CD, cassette, digital download—on which it rode in.

One of the things that is doing is changing the underlying nature between the record industry, the telecom industry, the computer industry, and the software industry, creating a degree of interdependency in our economics that heretofore we had never seen.

Let me move to the economics of piracy. Piracy hurts us dramatically in four ways as a record company. First, it affects our ability to invest in artists. We have had over the last couple of years to cut our artist roster by 25 percent because of our inability to continue to invest in generating new artists.

Second, it affects our ability to invest in new technologies and new products and services. Just at the time when we need to be investing in innovation, we are actually counting every penny.

Third, it affects our shareholders. Despite increasing our profits by 33 percent over our last fiscal year, the market's view of the future of the record industry has led to a 76 percent drop in our market cap.

Finally, it affects our employees. Unfortunately, over the last 2 years we have had to lay off approximately 20 percent of our workforce in order to provide returns to our shareholders.

Ironically, in the midst of what has been truly a vitiating set of economics for the record business, if you look at the economics of piracy it is kind of interesting to see that there are actually significant benefits to the telecom, computer, and software industries and consumer electronics industries from file-sharing in a peer-to-peer environment. And while a lot of this debate is about privacy, it is also about economics.

In a good year, the music business, record and publishing, earns between $1 billion to $1.5 billion. The last couple years have not been good. If you decompose the traffic charges, the network service charges, the incremental profits from the sale of purpose-specific content equipment, there is approximately $7 billion of incremental profit that accrued to the telecom, computer, and software and consumer electronics industries.

This is preliminary work, it was done by a third party, and even if it is half right it is pretty important. But those economics threaten to kill the goose that lays the golden egg.

These subpoenas are critical to our future because expeditious identification of infringers are important. One brief example. One of our leading artists recorded a record. Before we actually got our hands on it to start developing marketing plans and manufacturing disks, it was leaked onto the web. 36 hours later in Asia, in the night markets, there were physical copies of his new album for sale with bonus tracks from his previous album, something that dramatically hurt our sales.

The DMCA recognizes the balance between the safe harbor for the ISPs and the need to identify individuals.

Finally, this is just one of several elements we are proceeding. We are pursuing a number of initiatives on enforcement, a lot on awareness, and we are working very hard to make all of our content available in the digital world. We have agreements with over 75 different digital providers currently and we are negotiating more than 100 as we speak now.

Thank you, Senator.

[The prepared statement of Mr. Rose follows:]

PREPARED STATEMENT OF JOHN ROSE, EXECUTIVE VICE PRESIDENT, EMI GROUP AND EMI MUSIC

Mr. Chairman, members of the Committee, thank you for inviting EMI Music to testify at this hearing. I am the Executive Vice President of the EMI Group and EMI Music. My main areas of responsibility include business strategy, digital distribution and anti-piracy. I have been with EMI for the last two years. Prior to joining EMI, I had a 20-year career as a consultant at McKinsey and Company serving media, telecommunications, and high tech companies. I am not a lawyer and so am here today to testify about the impact of piracy on the record industry and the var-

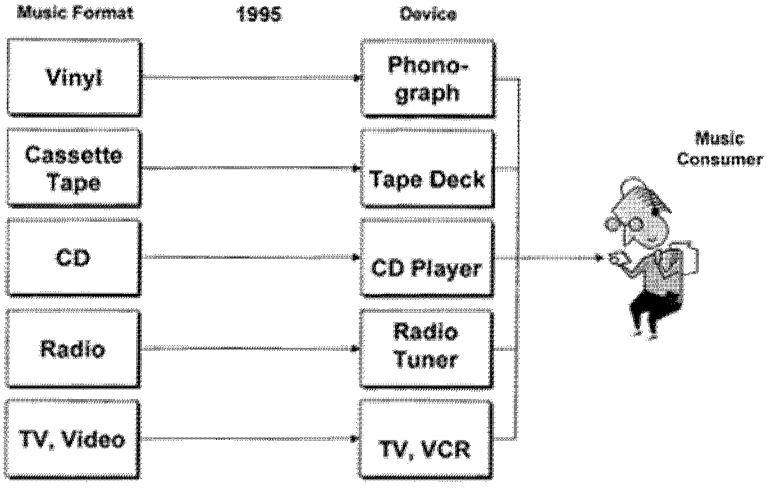
ious ways that we are combating piracy, adapting to the emergence of new technologies, and creating new products and services.

Mr. Chairman, we have to win the battle against digital piracy, and we need your help. We have to win not only because hundreds of thousands of American jobs are at stake, not only because a vital sector of the economy—one of the few that runs a positive trade surplus—is at stake, and not only because our product helps drive expansion of the telecommunications, consumer electronics and personal computer industries. We have to win the battle because the future of a unique American heritage—music—is at stake. EMI Music is the home to the recordings of Frank Sinatra and John Coltrane. Where is the next American music icon? If piracy continues unabated, we may never find him or her.

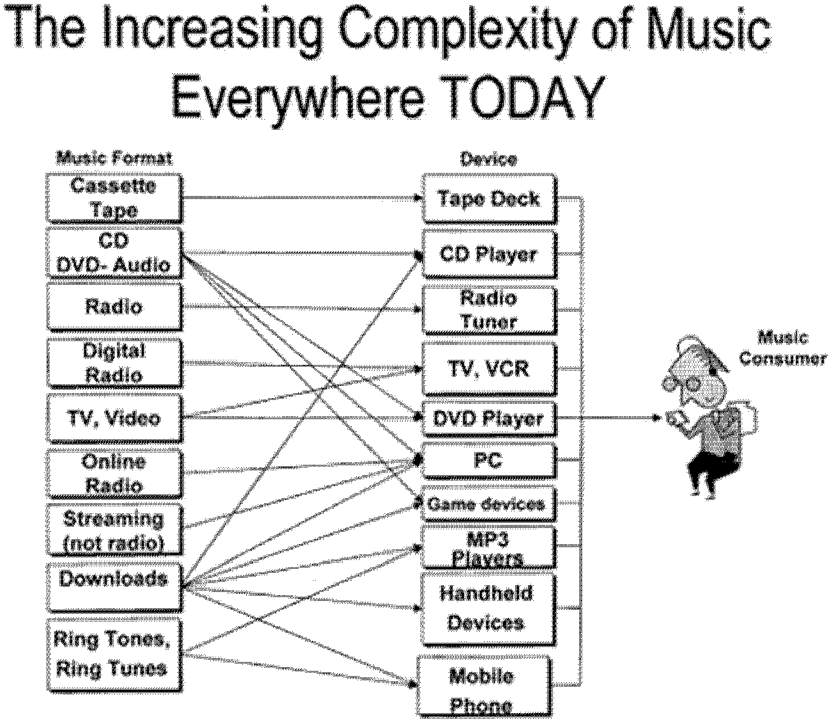
EMI is unique among the music companies—our only business is music. As a result, we have a big stake in online music. EMI has acted aggressively to make its music available to consumers through legitimate online services to meet consumer demand and thereby combat piracy. The lawsuits brought by the RIAA are only one part of an overall strategy whose goal is to reduce the amount of egregious digital piracy that is eroding our business. The other parts of that strategy are educating consumers and aggressively and eagerly providing our music to consumers the way they want it—by licensing our music to any number of legitimate digital distributors. I plan to discuss these other elements of our strategy later in my testimony.

The last few years have been dramatic ones for the record industry, including EMI. Few industries have faced the intensity of discontinuity felt by the record industry as a result of dramatic changes in technology, new competition from non-music entertainment products, consumer behavior through piracy, and a changing retail environment. Let me give you just one example of the transformative events experienced by the music business. In 1995, music formats and the devices for playing them were simple and the relationship between the two was straightforward. A vinyl record played on a record player. A cassette tape in a tape deck, a CD in a CD player and so on.

Music Everywhere in 1995



A mere seven years later, and not only have the number of music formats and music devices multiplied, but the relationship between the two has grown remarkably complex:



Few industries have coped as well with such extensive changes in their business environment. Still, the future of music has the potential to be dynamic and exciting. As we digitally deliver music to consumers and embrace the potential of new forms of distribution, the music industry has the potential to drive dramatic innovations among the music, telecommunications, consumer electronics and computer industries. But if we do not work across industry lines to solve the music piracy problems we face, the future of the industry also has the potential to be bleak.

I am not going to repeat all of the piracy facts that Cary Sherman of the RIAA has already presented to you in his written testimony. But I do want to highlight three recent statistics. First, according to the NPD Group, 7.5 billion music files on Americans' computers were obtained through peer-to-peer (P2P) file swapping. That's almost two-thirds of the total number of music files on computers. Second, in June of this year, even after extensive publicity that music piracy is illegal, long after the RIAA had initially sought its first subpoena, and long after the RIAA had won its lawsuit against Napster, only 37 percent of people surveyed in a poll knew that downloading files on P2P systems is illegal. Third, the growth in these P2P services has directly and unequivocally harmed our business. Every serious and credible study of these services—conducted by the industry and by third parties—concludes that a significant portion of the decline in record industry sales over the last three years is attributable to these P2P services.

At EMI those numbers have had a real and painful effect on us in several major respects:

- Piracy affects our ability to reinvest in new and developing artists thereby imperiling the livelihood of new artists and the future of music itself. Last year, at least in part due to digital piracy, EMI had to cut its artist roster by roughly one-fourth. Moreover, there is simply no question that digital piracy affects our decisions about signing new artists, how much we are willing to pay artists when we sign them, how long we are willing to maintain an unprofitable relationship with them hoping it will become profitable, and how many artistic risks we are willing to take.
- Piracy affects our ability to invest in new technologies and in new or creative ways to distribute our product.

- Piracy affects each of our shareholders. EMI is the most profitable large music company. Last fiscal year, our operating profits increased 33 percent. But in the same period, our market capitalization declined by 76 percent.
- And finally piracy affects our employees. Last year, digital piracy contributed to our decision to publicly and painfully cut our workforce by about 20 percent. Every other record company is facing the same situation.

In order for us to successfully adapt to these changes and to combat piracy, the legal environment has to remain stable and our ability to enforce and protect our property rights has to be guaranteed. The current legal strategy being pursued by the RIAA using the subpoena authority granted under the Digital Millennium Copyright Act (DMCA) is the result of long and careful thought.

Mr. Chairman, there has been a great deal of debate about the privacy implications of the DMCA subpoena process. As I say, I am not a lawyer, but I am confident of three things:

First, the DMCA subpoena process is structured the right way. It facilitates rapid and efficient resolution of copyright infringement claims, which is vital if we are to have a legal and business climate where technology can develop while at the same time content producers can thrive—protecting their substantial capital investments and making the reinvestments necessary to produce new content.

Let me elaborate on why an expeditious process is so important. Digital piracy of a new CD produced by an EMI artist—or any record company's artist—spreads in a flash. A digital pirate file on P2P systems multiplies like a virus. The pirate file is a perfect replica of the genuine file and enables P2P users to essentially set themselves up as miniature digital factories that can churn out our CDs faster than we can. In order to fight the virus, we have to move very quickly. A delay means that the perfect pirate file can have replicated thousands or hundreds of thousands of times before we can get to it. The DMCA subpoena gives us the speed that is so vital for us to survive.

You may be under the impression that digital piracy is only conducted by unsuspecting teenagers who just want to listen to the music they love. But that's not the case. Digital piracy also encompasses the organized and malicious piracy of hacking groups—rings of thieves whose goal is to obtain advance copies of music, videogames, business software and movies and to leak them onto the web. It also includes the piracy of egregious uploaders who make thousands of copyrighted songs available to anyone with an Internet connection. In fact, according to NPD data, eight percent of the total population of people who save digital files on their computers have more than 1,000 files. Those eight percent account for nearly 60 percent of the music available for download on P2P systems. To be sure, some digital piracy is what you may think of as casual—a 14-year-old coming home after school and listening to a few favorite songs. And, yet, more than 40 percent of all music files downloaded today are by people over the age of 30 according to NPD studies. All these types of digital piracy have direct connections to global physical piracy by organized crime rings.

In one instance late last year, the new album of one of EMI's biggest artists was leaked onto peer-to-peer sites several months before the CD was due to arrive in stores. In fact, it was leaked before EMI itself even had the master recording or could begin to execute its own marketing and sales plan. But because of P2P systems, within a matter of hours, a perfect digital copy of the music was available worldwide. Organized crime rings in parts of Asia were able to download the music, burn thousands of physical CDs, and have them on sale on the streets of Singapore and Hong Kong within a few days—complete with bonus material.

Second, the recent public debate spurred by the DMCA lawsuits has been enormously useful in raising public consciousness. I recently met in my office with a father of two children who told me that he would never allow his children to copy software. But he actually had been proud of his son's ability to download music using P2P systems. The RIAA's public education and legal strategy helped him realize that no principled distinction was guiding his thinking. A three-minute piece of intellectual property that you can listen to on radio may seem like a very different thing than a computer program. But the legal underpinnings of all these copyrighted works is the same. If you undermine the legal support structure for one, you undermine it for all of them.

Third, the current argument raised by Verizon and SBC about privacy is not so much about their customers' privacy as it is about economics. Ironically,

Verizon and SBC's bottom lines are directly tied to the record industry's fortunes as a result of the increasing interdependence and interrelated economics of our industries. The real question is whether the relationship between their profits and ours has to be inversely related. EMI believes that it does not.

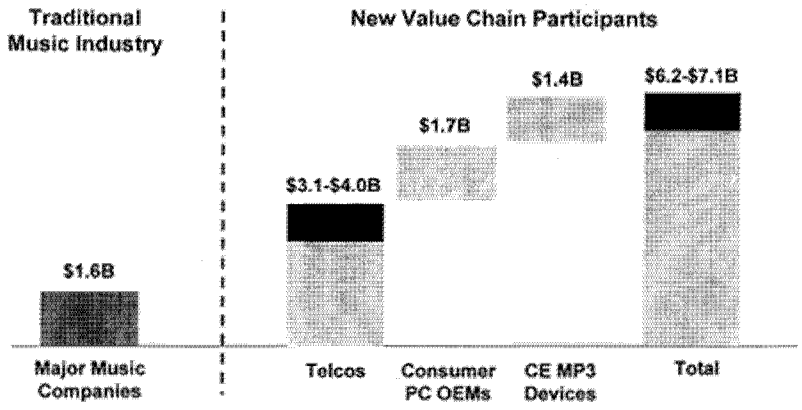
Thus far, the RIAA has asked for approximately 1,500 subpoenas. The regional Bell operating companies, two of which have representatives sitting before you today, have more than 200 million customers. They provide those customers with detailed bills on a monthly basis. They daily respond to many hundreds of thousands of consumer and government inquiries that dwarf the number of subpoenas that the RIAA has issued. Relatively, responding to a few hundred, or even a few thousand, DMCA subpoenas from the RIAA can hardly be a significant administrative burden.

This debate is not about privacy. It is about two phone companies attempting to protect the anonymity of customers who are breaking the law. The telecommunications companies, and the PC and consumer electronics industries, have become increasingly dependent on the content industries, music, movies and video games, to drive their businesses. These are the new economics of piracy.

In a good year, the largest record companies and the largest music publishers generated combined worldwide profits of approximately $1 to 1.5 billion, and this is likely an overestimate. As you know, the last few years have not been so good for the record companies, and those profits have been shrinking.

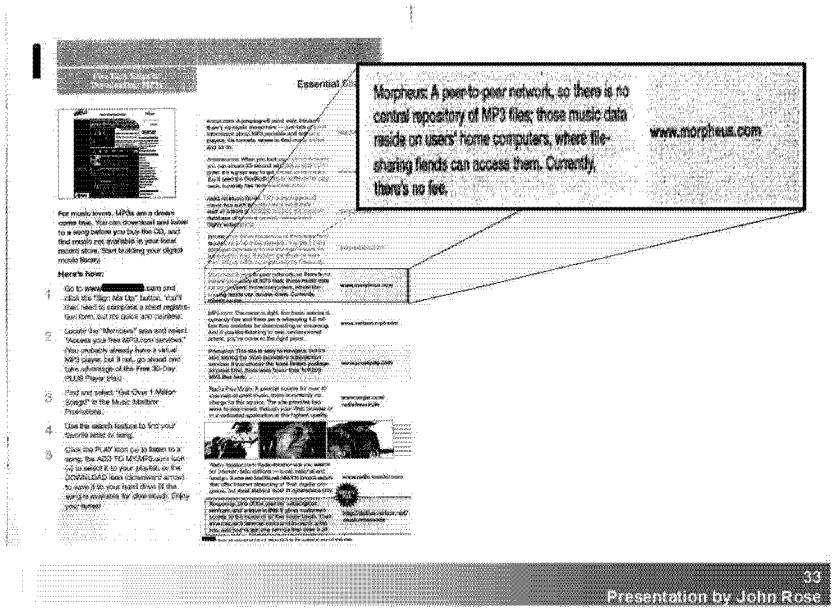
EMI recently commissioned a study that demonstrates that the 2.5 billion to 5 billion files traded per month on P2P systems generate calculable, incremental profits worldwide of almost $7 billion per year for the telecommunications, PC and consumer electronic industries. Moreover, these same companies also derive a completely different set of soft benefits from P2P systems—consumer pick up of their products, accelerated broadband penetration, consumer loyalty to the phone service/decreased churn—that are not included in these calculations. Our findings show that the telecommunications industries alone derive approximately $3–4 billion in worldwide incremental profits from P2P activity. The U.S. share of those profits is approximately $1 billion. The analysis in this study requires further refinement, but it is clear that these three industries are reaping enormous profits as a direct result of consumer digital copyright piracy. Even assuming that these numbers are off by 50 percent, these industries made more profit off digital piracy than the worldwide profits in 2002 of all the largest music companies combined.

Profits Created From Music and Copyrighted Material (2002)



No one in the music industry begrudges the right of the telecommunications, consumer electronics or PC industries to run businesses that profit from consumer behavior. But they certainly should not encourage or protect illegal behavior. A

Verizon brochure from last year illustrates this point. The cover of the brochure on "broadband living" highlights three main benefits to buying a broadband connection: sharing photos, working from home and downloading music. That brochure then lists among music sites, a P2P site whose only application for copyrighted music is illegitimate.

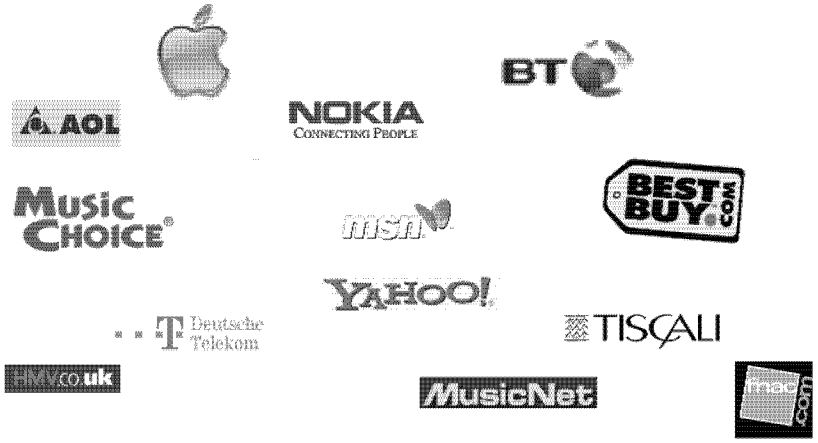


It has never been clearer that what happens in one industry—telecommunications—affects what happens in the other, the copyright industries. The DMCA understood and even tried to pave the way for a mutually beneficial interdependence. ISPs were relieved of liability in most circumstances—thereby removing a legal burden that could have hampered their development. But the copyright industries were provided with a simple, effective and speedy technique for protecting their property—thereby ensuring that rampant digital piracy would not undermine the copyright industries' business model. The DMCA anticipated a collaborative process between all of the stakeholders in the digital copyright world.

At EMI we are trying to deliver on that collaborative process. As I said at the beginning of my testimony, our strategy for combating piracy has three prongs: enforcement, awareness and availability. We will enforce our legal rights vigorously. We will strive to make our music widely available. Finally, we will undertake significant public awareness campaigns. You are already aware of the enforcement efforts that the RIAA has undertaken and the public awareness campaigns.

EMI has been at the forefront of efforts to legally distribute music online. No other company has been as aggressive and assertive about these opportunities. EMI was the first of the global record labels to license its repertoire to Pressplay and MusicNet, the first two legitimate digital music distributors. To date, EMI has licensed its music for digital distribution to almost 75 companies, and approximately another 75 deals are currently in the pipeline. Almost 34,000 EMI tracks are available for download in the United States. 140,000 are available worldwide. Our online music is available at Apple's iTunes store, at *Buymusic.com,* at MusicMatch and on nearly every major portal and site that sells legitimate digital music.

Important Players are Starting To Promote Legitimate Services



In the face of massive industry change, EMI is actively finding ways to rethink its product and its distribution approaches. The music industry is learning to sell its music in an ever-expanding number of formats in only a few years. EMI has created standard deal terms, legal licenses, product definitions and deal policies that it uses worldwide. The music industry has been criticized for being slow to join the party. But given the dramatic paradigm shift the industry has undergone, I would say it's actually been faster than other industries in comparable positions. Our ability as an industry to respond is at least comparable to that of the computer industry's response to the evolution from the mainframe to the mini-computer to the personal computer.

Mr. Chairman, EMI Music is one of the world's oldest recorded music companies. It began in 1897 with the formation of two companies, The Gramophone Company Ltd and the Columbia Graphophone Company Limited. Those two companies merged in 1931 to create Electric and Music Industries.

Today, EMI is the third largest record company in the world and the fifth largest in the United States. Its labels in the United States are Capitol, Virgin, Blue Note, Angel, Manhattan, Narada, EMI Christian Music Group, Capitol Nashville, Astralwerks, Higher Octave and S-Curve. EMI's employees are not just in New York and Los Angeles. In fact the majority of our employees are based elsewhere in the United States. We have employees in Milwaukee, Wisconsin, Jacksonville and Chicago, Illinois, Atlanta, Georgia, and Miami, Florida among other cities. We are actually the largest employer in the Nashville music community as well.

EMI releases the works of some of the world's best known and loved artists: the Beatles, the Rolling Stones, Garth Brooks, Frank Sinatra, the Beach Boys, Norah Jones, Radiohead, Kylie Minogue and Coldplay to name a few.

But we also work with a number of artists you may not have heard of—yet. These are the hundreds of new and developing artists that we hope to be able to bring to the world. Keri Noble is a new artist with Angel whose 5 song EP was just recently released. Joss Stone is a remarkable new soul singer whose first album on S-Curve Records was released yesterday. Jennifer Hansen and Dierks Bentley are two of country music's most exciting new acts. Tribalistas are superstars in Brazil who are beginning to be discovered by American audiences. Maksim is a classical pianist whose first album has just been released in Europe. Online piracy threatens EMI's ability to work with and invest in these new artists and others.

Digital piracy and its follow-on effects have a serious impact on the way we do business. The first recordings made for EMI were made using the old-fashioned horn gramophone. We've been through 78 rpm records, LPs, eight track, cassette tapes and now CDs. More advanced audio platforms such as DVD Audio and SACD could be the next technology leap. But today we have to deal with changes that are

among the most disruptive we've ever faced. Records are still as expensive to produce and market. Those costs do not go down and in fact they continue to go up. But because of piracy, it is harder and harder to run a profitable, long-term business.

EMI is the only major record company whose sole business is music. We want to work collaboratively with the telecommunications, consumer electronics and personal computer industries rather than sitting in conflict with them. We are dedicated to making the music business work and thrive. And we have a workable model to accomplish that goal. We are aggressively distributing our product digitally and physically. We have implemented significant measures to curb rampant physical piracy, and we remain committed to intensifying those efforts in the future.

Thank you for this opportunity to testify.

Senator BROWNBACK. Thank you, Mr. Rose. We look forward to the question and answer session.

Next will be Mr. Cary Sherman. He is President of the Recording Industry Association of America. Mr. Sherman, thank you for joining us today.

STATEMENT OF CARY SHERMAN, PRESIDENT, RECORDING INDUSTRY ASSOCIATION OF AMERICA

Mr. SHERMAN. Thank you for inviting me to testify.

Senator BROWNBACK. You have to get those microphones up pretty close.

Mr. SHERMAN. OK. Is that better?

Senator BROWNBACK. Much better.

Mr. SHERMAN. Thank you.

I am the President of the Recording Industry Association of America, the trade association representing the U.S. recording industry, and our members create, manufacture, and/or distribute 90 percent of all legitimate sound recordings in the United States.

At the outset I would just like to share some of the startling statistics about the impact of piracy on the music industry. Over the past 3 years, shipments of recorded new music in the U.S. have fallen by an astounding 31 percent. Hit records have been impacted most dramatically. In 2000 the ten top-selling albums in the U.S. sold a total of 60 million units. In 2001 that number dropped to 40 million; last year, 34 million.

The root cause for this drastic decline in record sales is the astronomical rate of music piracy on the Internet. Although this Committee has long stood on the front line in the battle to protect consumer privacy online and offline, it is important to make one thing crystal-clear: no one has a privacy or First Amendment right to engage in online copyright infringement. The issues presented by today's hearing have a lot more to do with piracy and a false sense of anonymity than privacy.

Millions of Americans have downloaded P2P software onto their computers in the last 3 years. By doing so, these individuals have opened their hard drives to the world, illegally sharing copyrighted material, and often unwittingly exposing their most sensitive personal information, including tax returns, medical and financial records, resumes, and family photos. At any moment you can log on to Kazaa, the world's most popular P2P system, and find any of these documents at the click of a mouse. It is hard to imagine more fertile ground for identity theft.

It is no wonder why Judge Bates, who presided over our lawsuit with Verizon, concluded: "If an individual subscriber opens his com-

puter to permit others through peer-to-peer file-sharing to download material from that computer, it is hard to understand just what privacy expectation he or she has after essentially opening the computer to the world."

Despite the inherent privacy risks of using peer-to-peer software, Verizon and SBC have done absolutely nothing to educate or warn subscribers about the privacy risks of using these services. The record is no better when it comes to warning about the legal consequences of using free sites to get music. Nowhere in their brochures, websites, or advertising are there any warnings or information about the grave privacy and real legal risks associated with using this software.

By contrast, they have used a combination of overt and subtle marketing strategies to encourage people to sign up for DSL so that they can get all the music they want for free and not have to go to the record store any more.

The motivation for this strategy is clear when you look at the broadband landscape. According to a USA Today article a few days ago, 70 percent of Americans with broadband capabilities use cable modems instead of DSL. The same article quotes an Internet analyst saying "It is going to be more streaming video and music downloading that is really going to dictate the switch." A recent report on broadband found that the growth in peer-to-peer is really driving the market and P2P traffic now consumes 50 to 70 percent of the capacity, up from perhaps 20 to 30 percent a year ago.

With a long way to go before catching up with cable, it is no wonder Verizon and SBC, the Nation's two largest DSL providers, are reluctant participants in the fight against online piracy. Fortunately for the copyright community, the vast majority of other ISPs around the Nation have been responsible and constructive partners in this important fight.

It is difficult to discount the commercial interests of Verizon and SBC when weighing the merits of their privacy arguments. After all, rather than focusing on the most pressing privacy problem facing their customers, they champion protecting the anonymity of subscribers who are engaged in clearly illegal activity. So while millions of their users are exposing their most sensitive personal information to the world, Verizon and SBC want this community to believe that the true threat to their customers' privacy is the DMCA information subpoena process.

What is even more remarkable is that their alternative to the DMCA process, John Doe lawsuits, would force copyright owners to sue ISP customers first and ask questions later. That strikes me as one of the least consumer-friendly options imaginable, not to mention the significant and unnecessary burden it would place on our Nation's already overburdened Federal courts.

The reality is that Verizon and SBC, under the self-serving guise of protecting their customers' privacy, simply do not want to live up to their end of the DMCA deal struck back in 1998, providing copyright owners with the limited information necessary to protect their rights in the digital world. In the end, we believe that Congress struck a fair balance in 1998 when it passed the DMCA and gave copyright owners the limited ability to access minimal infor-

mation solely for the purpose of identifying infringers and enforcing our rights.

As these issues continue to wind their way through the courts, we remain ready and willing to talk with ISPs about ways to ensure that the DMCA process operates smoothly and fairly, and I hope we can achieve that.

I look forward to answering the Committee's questions. Thank you.

Senator BROWNBACK. Thank you, Mr. Sherman, for your testimony. I look forward to questions afterwards.

Mr. William Barr, Executive Vice President and General Counsel for Verizon. Welcome to the Committee.

STATEMENT OF WILLIAM BARR, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, VERIZON COMMUNICATIONS

Mr. BARR. Thank you, Mr. Chairman.

The Internet is evolving into the central communications system for our society and promises vast benefits. It perfects markets by bringing buyers and sellers together. It is in fact providing essentially the archetypical public library for our society and it creates public forums for the exchange and debate of ideas.

But, as with any communications system, the vitality of the Internet ultimately depends on people's confidence in the security and privacy of their communications. People would not be using the telephone as much as they do if they felt it was easy for others to listen in. The Internet's development would be severely curtailed in our view if people felt that whenever they went out onto the Internet there were few safeguards against finding out who they are, what their communications—what communications they were having, and what websites they were visiting.

So apart from any philosophical commitment to privacy interests, there is a compelling business reason why community communications companies like Verizon are concerned about the privacy of their customers. Now, as with any communications system, they are capable of facilitating a lot of good, but at the same time they can also be used to do bad things. Telephones can be used for wire fraud. The Internet is used for a lot of bad things—dissemination of pornography, for fraudulent practices, and, yes, for the infringement of property rights, copyrighted material.

Now, up until now Congress has recognized that investigative and enforcement tools that are supposed to police against these kinds of abuses, these kinds of evils, have to be carefully crafted and controlled to ensure that they do not sacrifice legitimate privacy interests. That is why even when the government itself is pursuing the dire interests of the public, such as terrorism investigations or investigations into pedophiliacs stalking kids on the Internet, the government itself is subject to controls and supervision.

We agree that the recording industry has compelling property interests that deserve to be protected. We ourselves hold intellectual property rights and we try to enforce them. But that does not justify sweeping, invasive, and unsupervised access to sensitive information about individuals.

Now, when people use the Internet they rely on some protection of their identity, when they are visiting websites, exchanging e-

mails, because they are only identified by a number, the IP address. What this does is allow someone to come in, get the IP address, and thus identify them with their expressive activity.

Now, as the RIAA is interpreting the statute any individual can come in, file a one-page form that is based solely on an assertion and a statement that they believe that a copyright interest is being infringed, and based on that and on that alone we are compelled to turn over the identity of our customer.

Now, it is important, this is not just a right given the recording industry. Anybody can use this in our society. And it does not just relate to recording; it relates to anything that someone suggests is covered by copyright, including things that are unregistered and therefore could not serve as a basis for a suit.

Now, this is done without any judicial supervision. There is no one determining the bona fides of the person seeking this information. There is no protection against someone coming in and using a false name, getting access to this information. There is not even an inquiry into whether or not there is in fact copyrighted material, much less registered material that could actually serve as the basis for a lawsuit. And there is no scrutiny as to whether there is any reasonable basis to believe that the individual has impinged on that property right.

The Federal Government does not have this power in any arena. Congress has not given this power to the Federal Government investigating terrorism. Why should the record industry, private citizens, have this unfettered subpoena authority to reach the most sensitive information that people have?

There are no safeguards on its use. There is no requirement that it is used only for litigation. There are no express provisions dealing with penalties for the improper disclosure of this information. The government itself is subject to all these requirements.

Now, as you pointed out, Mr. Chairman, this is not just a tool that would be used by legitimate interests. Pornographers, stalkers, identity thieves would have the ability to do this and do it anonymously, so it could never be traced back to them. Even where the interests are legitimate, as with RIAA, a blunderbuss approach inevitably leads to abuses and mistakes. The use of bounty hunters has now arisen because they do not have to—the holder of the copyright does not have to identify themselves. They can go through intermediaries and use bounty hunters.

We now have the use of robots to track down people on the Internet, and we have already many examples of mistakes, like kids getting jerked around because they did a book report on Harry Potter or a university's system being shut down because a professor was named "Usher" and it was confused with the name of an artist.

Now, any response to this really requires three things in my view. One is a technological approach, and that is clearly what Congress envisioned in Title I of the Act. What Congress said in Title I of the Act was, if you protect this information with encryption or other kinds of protective devices, access codes, it will be a Federal crime to try to defeat it. So Congress set the table for the industry to work together to come up with these technological solutions. That has not happened because they preferred this jihad against 12-year-old girls.

Now, the other thing is an appropriately tailored discovery device, appropriately tailored like all available—with all the standard accountability in it, where it deals with registered material, there has to be specificity in the allegations, and strict limits on its use, and ultimately judicial supervision over it.

Finally, I think there has to be attention to the incentives, and this is where I think—I do not view the average American teenager as a thief or intentional thief. I think that the industry itself has to look in the mirror to see what created the incentives for this illegal and illicit activity. It has largely been the untenable business model in my view of the recording industry.

What young people want, as we wanted when we were kids: Buy the 45 rpm, buy the hit, and do your own mix. That is what people have always wanted. What is the model today? Can you go out and buy a hit? No. You have to buy a lot of schlock on a CD and pay 16 bucks for it in order to get the one or two songs you want. That is called bundling, and that is the business model necessary to feed the distribution chain that has come up in this industry.

Now, I am not justifying the piracy, but in my view it is not the freeness that drives the kids to download; it is the desire to be selective in what they want, identify the one song, and put it on their mixes. The industry itself has now slowly come to recognize that it left the vacuum. It did not go out and set up the iTunes or the MP3s that are paid sites. In fact, it fought them and it fought them up until recently.

But if the industry itself would move into this area then, just like the film industry when they tried to—when they said that the VCR was the Boston Strangler of their industry, they would end up making more money ultimately.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF WILLIAM BARR, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, VERIZON COMMUNICATIONS

Mr. Chairman and members of the Committee, thank you for inviting me here today to discuss this important issue.

We at Verizon recognize the legitimate interests of copyright owners and the threats to those interests that are posed by the misuse of new technologies, including peer-to-peer software. Verizon remains committed to working with the copyright community to find solutions to these issues that result in effective protection for intellectual property, without placing substantial burdens on Internet service providers or violating the privacy and First Amendment interests of their subscribers. Back in 1998, Verizon and other service providers agreed in the Digital Millennium Copyright Act ("DMCA") to conduct voluntary industry negotiations aimed at developing "standard technical measures" (also known as digital rights management tools), to protect copyright works from online infringement. The copyright community has never accepted our offer to begin negotiations on digital rights management standards and to work cooperatively toward a technical solution to this problem.

Indeed, Congress recognized in its report on the DMCA in 1998 that technological rather than legal solutions constituted the best method of ensuring the lawful dissemination of copyrighted works in our new networked, digital environment. *See* S. Rep. No 105–190, at 52 (1998) ("The Committee believes that technology is likely to be the solution to many of the issues facing copyright owners and service providers in this digital age."). Congress, in Title 1 of the DMCA created criminal penalties for those who circumvent such technical measures.

In the end, as in the area of VHS recordings and cable television access to broadcast programming, Verizon believes that appropriate technical and legal solutions will be found. As discussed in detail below, a new, unbounded subpoena power is not that solution.

As an Internet service provider, Verizon promptly takes down infringing material that resides on our system or network in response to requests from copyright owners and we have strict policies against infringement of copyrights. Verizon also promotes legitimate pay music sites such as MP3.com and Rhapsody as part of its ISP service. We will continue to work with copyright owners to marry the power of the Internet with the creative genius of content providers through new business relationships and licensed websites that offer music, video, and other proprietary content to the over 100 million Internet users in this country. Verizon believes that lawful and licensed access to quality content is essential to the continuing development of the Internet in general and broadband in particular, and we are committed to exploring technological and other solutions so that copyright owners may enjoy the fruits of their labors and Internet users will have access to a rich array of digital content.

However, the answer to the copyright community's present business problems is not a radical new subpoena process, previously unknown in law, that un-tethers binding judicial process from constitutional and statutory protections that normally apply to the discovery of private data regarding electronic communications. Verizon believes that the district court was wrong in concluding that Congress authorized such a broad and promiscuous subpoena procedure—but whatever the courts ultimately conclude on this issue—the subpoena power endorsed by the district court is not an effective remedy for copyright holders and has great costs in terms of personal privacy, constitutional rights of free expression and association, and the continued growth of the Internet.

As interpreted by the district court, this subpoena provision grants copyright holders or their agents the right to discover the name, address, and telephone number of any Internet user in this country without filing a lawsuit or making any substantive showing at all to a Federal judge. This accords truly breathtaking powers to anyone who can claim to be or represent a copyright owner; powers that Congress has not even bestowed on law enforcement and national security personnel. It stands in marked contrast to the statutory protections that Congress has enacted in the context of video rentals, cable television viewing habits, and even the requirements for law enforcement officers to gain access confidential data associated with electronic communications.

All one need do is fill out a one-page form asserting a "good faith" belief that a copyright has been infringed and one can obtain identifying information about anyone using the Internet There is no review by a judge or a magistrate; the clerk's office simply issues the subpoena in ministerial fashion. This identifying information can then be linked to particular material sent or received over the Internet, including e-mails, web browsing activity, chat room postings, and file-sharing activity. This subpoena power applies not just to music recordings, it applies to the expression contained in an e-mail or posting in a newsgroup, digital photographs, and even pornographic materials. It has and will be used and abused by parties far less responsible than the recording or movie industries. In essence, anyone willing to assert that they have a good faith belief that someone has used their words, pictures or other expression without permission becomes their own roving grand jury, without any of the normal checks and protections that apply to governmental investigations.

This subpoena process lacks the most basic protections that are applied to the discovery of confidential and personal data connected with expressive activity. As noted above, the filing that need be made is truly minimal, and is below the standard for the filing of a civil complaint in Federal court. The normal duties to investigate and substantiate a civil claim that apply to the filing of a lawsuit under the Federal Rules of Civil Procedure do not apply. The clerk's office simply rubberstamps these subpoenas in ministerial fashion—with no inquiry into the bona fides of the party filing the request or the self-interested "belief' that a copyright has been violated.

The individual subscriber, whose identity is at issue, is not even entitled to receive notice of the subpoena before his or her personal information is turned over to a third party. Thus, the subscriber, who may in fact be doing nothing illegal, will have his or her identity revealed without ever having an opportunity to be heard. Nor is there any provision for damages or other punishment for wrongfully obtaining or misusing the identity of a subscriber subject to such a subpoena. It is truly ironic that Congress has placed more substantial requirements and protections on law enforcement access to confidential information regarding electronic communica-

tions than apply to a private party under this statute.[1] This combination of unlimited scope, minimal substantive requirements, and lack of judicial supervision makes both mistakes and intentional abuses of this new power inevitable. Every time you send an e-mail, browse a website, or join a discussion in a chatroom or newsgroup, others gain access the numerical IP address that you are using. Armed with this IP address, anyone to whom you have sent an e-mail, from whom you have received an e-mail, with whom you or your children have spoken in a chat room, or who operates a website you have visited, no matter how sensitive the subject matter, can unlock the door to your identity.

This list is not limited to those with legitimate interests in enforcing copyrights. As safety and privacy groups like the National Coalition Against Domestic Violence and WiredSafety stated in our litigation, it opens the door to your identity to people with inappropriate or even dangerous motives, such as spammers, blackmailers, pornographers, pedophiles, stalkers, harassers, and identity thieves. In fact, over 92 diverse organizations, representing consumer and Internet interests, submitted letters to this Committee expressing serious concerns about the privacy, safety, and security of Internet users arising from the potential misuse of this subpoena process. These include the ACLU, the American Library Association, the Consumer Federation of America, and the National Coalition Against Domestic Violence. These groups do not condone copyright infringement. Rather, like Verizon, they are concerned that this subpoena power will cause great harm to privacy, free expression, and even personal security of Internet users with little gain in copyright enforcement.

As Ms. Aftab, from WiredSafety states, "With one broad sweep, the DMCA subpoena power will frustrate the work of the entire online safety community to arm our children and their parents with cyber-street-smarts. It won't matter what they voluntarily or mistakenly give away. All the information predators need can be obtained far more easily with the assistance of the local Federal District Court Clerk." The potential for abuse of this new subpoena power is limited only by the deviousness of the criminal mind.

Indeed, just since the district court's ruling went into effect in June, the evidence of mistakes, potential abuses, and troubling uses of this subpoena power has continued to mount. As you will hear from SBC directly, their company recently filed a suit in California against the Recording Industry, a copyright bounty hunter called "MediaForce" and an entity called Titan Media Group. Titan Media, a purveyor of pornographic videos over the Internet, sent one subpoena to SBC seeking the names, addresses and phone numbers of 59 individual subscribers who Titan asserted were infringing its copyrights in gay pornographic videos by exchanging them over the Internet. Titan eventually withdrew the subpoena when SBC threatened a court challenge, but the episode highlights the fact that this new subpoena power applies to *anyone* who can claim an interest in *any* form of expression. Titan Media, imitating the RIAA, has recently announced its own "amnesty program." Internet users must reveal their identity to Titan and agree to purchase a copy of their pornographic material or Titan threatens to use the subpoena process to expose their identity. In a similar vein, ALS Scan, a purveyor of graphic Internet pornography, has also been a beneficiary of this process and submitted a declaration in favor of RIAA's broad interpretation of the subpoena power in the litigation with Verizon. The potential for abuse, for invasion of personal privacy, for reputational harm, and even for blackmail is highlighted by these examples.

There is also no requirement that the copyright owner itself obtain the subpoena; it may be obtained by an agent of the copyright holder. A whole industry of copyright "bounty hunters" has sprung up, enterprises that search the Internet for possible instances of copyright infringement spurred on by economic incentives. The use of automated robots, known as "bots" or "spiders" has also led to a significant number of mistaken claims of copyright infringement. These bats operate much like the spiders that crawled through buildings in the movie Minority Report, scouring the Internet in search of file names that look like they match the names of copyrighted works or artists. Bots are far from perfect. Typing words such as "Madonna" or "the police" in an e-mail may earn you a DMCA subpoena, because the "bots" cannot distinguish the legitimate comment or discourse from copyright infringement. In 2001, Warner Bros. sent a letter to UUNet demanding that they terminate the Internet account of someone allegedly sharing a Harry Potter movie online. The small text file was entitled "Harry Potter Book Report.rtf," with a file size of 1k. The file was not an unauthorized copy of the movie, it was a child's book report, but the bot could

[1] *See, e.g.,* 18 U.S.C. §3121, *et seq.* (pen registers and trap and trace devices limited to govermnental personnel upon court order for valid criminal investigation); 18 U.S.C. §2703 (limits on disclosure of records pertaining to electronic communications services).

not tell the difference and such an "investigation" can quickly form the basis for a DMCA subpoena.

In the past few months, RIAA has already admitted numerous cases of "mistaken identity." In one case, RIAA demanded the take down of Penn State University's astronomy department's servers during finals week, based on a claim that it contained infringing songs by the artist Usher. In fact, "Usher" is a professor's last name and the file at issue was his own creation. RIAA later admitted sending at least two dozen other mistaken notices to Internet users as part of its campaign to warn peer-to-peer file-sharers. And this was before RIAA began its new campaign sending hundreds of subpoenas for subscriber identity to ISPs across the country. These chilling examples all sound like excerpts from the book "1984," except in this case, "Big Brother" isn't the Government, it is interested parties armed with their own private search warrants.

RIAA's most recent campaign began in July of this year after the district court's ruling went into effect. Despite the pending appeal on this issue, the Recording Industry has chosen to unleash numerous subpoenas on Internet service providers. Verizon has already received over 200 subpoenas, with which we have been required to comply. The Recording Industry alone has sent well over 1600 subpoenas to service providers across the country, placing a significant strain on the resources of the clerk's off1ce of the district court in D.C. and on the subpoena compliance units at many Internet service providers, including Verizon.[2]

As another example of the overreaching uses of the subpoena process,, RIAA now claims that it is entitled to discover subscribers' e-mail addresses and that it may issue these subpoenas from the district court in Washington, D.C., regardless of the location of the service provider or the customer. Obviously, obtaining the subpoena in a distant forum makes it a practical impossibility for many service providers and most customers to ever raise any objection to the subpoena. Indeed, Boston College and MIT successfully fought to quash subpoenas issued out of Washington, D.C. that were aimed at their students in Massachusetts. SBC's lawsuit includes jurisdictional challenges. Columbia University is seeking to quash subpoenas that RIAA has attempted to serve on it issued by the District of Columbia courts.[3]

In Verizon's view, Congress never intended to unleash a massive wave of subpoenas on public and private Internet service providers and their customers. This is not an effective solution to the very real problems faced by copyright owners; it only creates an additional level of problems for Internet service providers and chills the free exchange of protected content over the Internet. The use of the subpoena power in an attempt to create an *in terrorem* effect over the entire Internet is both improper and disserves the long-term interests of both copyright owners and Internet service providers. The district court has truly created a Frankenstein monster that Congress never contemplated and that has the potential to cause irreparable damage to public confidence in the privacy of Internet communications. Like the telephone itself, the growth of the Internet as a medium of political, social and economic change depends upon the confidence of users in the privacy of their communications and communications habits. Every person in this room believes that his or her private e-mail or web browsing habits can and should remain private—yet the district court's erroneous decision is a direct threat to that privacy. It has also burdened Internet service providers with responding to thousands of subpoenas. From our own experience, we can tell you that RIAA's barrage of subpoenas has diverted and strained our internal resources. This new burden on service providers—responding to thousands of subpoenas issued in the conduit context—was never part of the statutory compromise. It also threatens the limited resources of subpoena compliance units to satisfy legitimate law enforcement requests—as RIAA bombards

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[2] Indeed, press accounts indicate that the clerk's office of the district court in D.C. has been overwhelmed with subpoena requests and has been forced to reassign staff from other judicial duties. *See Ted Bridis,* Music Industry Wins Approval of 871 Subpoenas Against Internet Users, Associated Press (July 19, 2003) at 2 ("The RIAA's subpoenas are so prolific that the U.S. District Court in Washington, already suffering staff shortages, has been forced to reassign employees from elsewhere in the clerk's office to help process the paperwork, said Angela Caesar-Mobley, the clerk's operations manager.").

[3] The Federal Rules of Civil Procedure generally provide for the issuance and service of subpoenas in the district where the party in possession of the material resides to protect the rights of third parties to contest the subpoena. *See* Fed. R. Civ. P. 45(a)(2) & 45(b)(2) (placing jurisdictional and service limitations on district court subpoenas for the protection of those from whom production is sought). Despite the fact that Congress expressly provided that the protections of Rule 45 should apply to Section 512(h) subpoenas, *see* 17 U.S.C. §512(h)(6), RIAA has taken the position that it may obtain and serve a Section 512(h) subpoena from any district court in the country. Thus, in its view, it could seek a subpoena from the district court in Guam targeting a small service provider in New England.

service providers with dozens of subpoenas and purports to require responses on seven days or less notice. The protection of copyright, however legitimate a cause, should never be raised above law enforcement and national security efforts—efforts that Verizon has always been in the forefront of supporting.

Both the district court in our case and the copyright owners have eschewed a more measured remedy that has always existed in the law and is used by numerous businesses for many purposes, the so-called "John Doe" lawsuit. Under this procedure, a judge or magistrate reviews the merits of a case before a subpoena is issued, and the defendant is given notice and an opportunity to contest disclosure. The law demands a reasonable investigation of the relevant facts, ownership of a valid copyright registration, and a complaint filed in compliance with Rule 11. Verizon has successfully used this process to sue unknown spammers who abuse our network. Despite the Recording Industry's assertions to the contrary, the filing of a John Doe lawsuit is much more protective of all parties' interests than the DMCA subpoena process.

Since RIAA launched its subpoena campaign, the DC Clerk's Office publicly complained that its internal resources were being burdened and the clerk's office had to re-assign new employees to the fulltime task of processing subpoenas on an ongoing basis. If the district court's decision in our case is not overturned quickly, it threatens to turn the Federal courts into free-floating subpoena mills, unhinged from any pending case or controversy, capable of destroying anonymous Internet communication, and threatening privacy and due process rights as well as public safety.

While Verizon firmly believes that this subpoena process and the tactic of targeting college students, universities, libraries and other individual Internet users is inappropriate and will lead to serious harms with little gain in copyright protection, Verizon recognizes that a more comprehensive and long-term solution is necessary. Verizon commends Senator Brownback for taking a first step by introducing the Digital Consumer Internet Privacy Protection Act. This bill builds in necessary protections that addresses the fundamental due process and privacy rights of all Internet users, and ensures that subpoenas cannot be issued without sufficient judicial safeguards in place. The bill also appropriately gives the FTC enforcement authority to monitor the use of subpoenas involving digital media products and provides remedies for abuses of the process. An appropriate next step would be for affected parties to develop effective approaches that combine technical and legal solutions to balance the legitimate needs of all stakeholders. We urge Congress to act now before irreparable damage is done to public confidence in the Internet as a medium of free expression and association.

I thank the Chair and the members of this Committee for your attention. We look forward to working with you to resolve this critical issue.

Senator BROWNBACK. Thank you, Mr. Barr. I look forward to questions.

Finally will be Mr. Alan Davidson. He is Associate Director, Center for Democracy and Technology here in Washington. Mr. Davidson.

STATEMENT OF ALAN DAVIDSON, ASSOCIATE DIRECTOR, CENTER FOR DEMOCRACY AND TECHNOLOGY

Mr. DAVIDSON. Thank you, Mr. Chairman, and Members of the Committee. The Center for Democracy and Technology thanks you for holding this important hearing and we are pleased to be included, both because of CDT's long history of involvement on online privacy issues and also our current efforts to craft a balanced consumer perspective on digital copyright.

Our bottom line today is this: the 512(h) subpoena process is an important tool for copyright holders who are legitimately seeking to enforce their rights online, but it also raises real and serious privacy concerns for Internet users. The good news in our testimony today is that we believe that a package of minor additions to the law could address many of the most serious privacy concerns while also preserving and maybe even enhancing legitimate enforcement.

I will summarize. Our testimony makes four main points. The first is this: it is unhealthy for our country and unfair to copyright holders for large numbers of people to routinely violate the law of the land. Enforcement actions like those that have been undertaken by RIAA are, unfortunately, today a necessary part, though only a part, only a part, of protecting creators and authors in the digital age.

We actually agree with the approach that was taken by RIAA in its statement with the IT industry last winter that emphasizes new delivery mechanisms, education, and enforcement rather than seeking controversial new government technology mandates or network architecture changes.

Our second point is this: if you believe in enforcement, as we do, then you must give copyright holders the tools that they need to do enforcement, and our belief is that a subpoena process like that under 512(h) has an important role in assisting enforcement. With appropriate safeguards for individuals, it could actually be preferable to filing a large number of Federal lawsuits.

Our third point, and I think one that we need to say a little bit more about, is that there really are privacy concerns raised by the unique subpoena power currently granted under 512(h). As has been said here, online identity can be a very sensitive piece of information for people. People online reasonably expect that they will be largely anonymous when they visit health websites, when they make political statements, when they visit chat rooms or become online whistleblowers. For that reason, our law has traditionally strongly protected subscriber identity.

In contrast, section 512(h) contains very few of the safeguards that are demanded by either fair information privacy principles or that are typically found in existing subpoena or court order provisions. We have heard it from several of the panelists already today: 512(h) is available to any copyright holder, not just mainstream companies, record companies, or movie studios; and it can be used based on a mere allegation of infringement. No judge ever looks at a 512(h) application, no weighing of the assertions in the application is ever done, no user ever gets to challenge those assertions. The law places no real limits on how the information is going to be used, beyond the very open-ended requirement that it is going to be used for, "protecting rights."

512(h) gives no notice to end users, who typically have no idea that their information is being revealed. And notice, I should say, has long been a bedrock of our privacy law because it gives the party that is actually harmed the chance to combat potential misuse.

Because of all of this, 512(h) we believe is ripe for misuse: to reveal sensitive activities online, to blacklist alleged infringers, to embarrass people, to market to them, or even for criminal purposes. People ask why privacy advocates seem to be so obsessed or care so much about what might be a relatively minor provision, and I think it is in part because 512(h) is a very unusual authority and a dangerous precedent. Many provisions exist for government access to information, but always in the context of executive powers and almost in all cases with additional and constitutionally mandated privacy protections.

Private use of the courts exists, but it is always tethered closely to pending litigation and comes with the supervision of a judge able to assess facts and to balance interests. 512(h) stands alone.

Our final point, and I think what we are trying to say today, is that we think that—we propose in our testimony a package of suggested safeguards that will address many of the privacy concerns raised by 512(h) while supporting enforcement. Chief among those is that we support a notice requirement before subscriber identity is disclosed. Notice can give people a meaningful opportunity to quash a subpoena they think is wrongful. It can also have a major deterrent effect because subpoena applicants would know that their targets are actually going to hear of the requests that they make.

A notice requirement also, I should note, actually could help legitimate enforcement. An official notice to targets of investigations that their information was being subpoenaed we believe would be enough to stop a great deal of infringing behavior. We also list a whole set of other approaches—penalties for abuse that could give users redress if a subpoena is misused, clear limits on how information that is collected is going to be used. The least controversial of these is a simple report to Congress on the number of subpoenas requested, which would provide us with some sense of how often this process is being used and in what way. We have no idea right now how many of these subpoenas are being filed and in what way.

In summary, we think that there are relatively minor additional safeguards that do not fundamentally rework the provisions of the DMCA, but that could protect privacy while actually preserving legitimate enforcement. We note and agree that there are a lot of other privacy issues that are raised in the context of peer-to-peer file trading—the issue of privacy of sensitive files, as Senator Boxer has said; the issue of spyware in many applications. And while this hearing is focused on 512(h), which we think is also important, we stand ready to work with you on those issues.

Mr. Chairman, we commend you and members of the Committee for raising awareness of the very real privacy issues that are raised by 512(h) subpoenas. We look forward to working with you and this Committee and others in the community to craft a more balanced approach to this issue.

Thank you very much.

Senator BROWNBACK. Thank you, Mr. Davidson. Thank you for the constructive thoughts.

We will run the time clock at 5 minutes if you do not mind, because we have so many members here that are present and we do have another panel that is up. I think this has been an excellent discussion and an opening panel of thought.

Mr. Sherman, let me ask you just at the outset here. It seems as if everybody supports the intellectual property right that your industry has and that there is just not a question of that. People may vary on the degree of intensity that you think people really agree with this, but everybody supports that this is an intellectual property right, it must be protected.

The narrow focus that we have got on this hearing is on this particular subpoena issue and that is the thing that has really driven me the most on it. I wonder, if you went looking at this, if you just compare even really the PATRIOT Act, the USA PATRIOT Act,

and the ability of the Attorney General to get a subpoena versus your industry, the industry standards or the standards subjected to the industry are much lower than they are to the Attorney General.

The Attorney General, you must have an application made by a senior level FBI official. Under 512(h) it is available to anyone who claims an interest in the copyright. The Attorney General has to go through the courts. You can file this and a clerk does it.

Is there a way that your group could see fit to move those standards up slightly so that you could still get the subpoena, but it has an officer of the court that reviews it? And what would be so harmful to you doing that?

Mr. SHERMAN. You have to look at the information that is actually being sought when the Attorney General is asking for this information from a court versus the information to which we are entitled. We are entitled to merely the identity of the alleged infringer: name, address, telephone number, and e-mail, nothing else, nothing about what communications they have had, nothing about who they have been communicating with, nothing about their credit card information, their usage records, or any of that.

That information is available right now under Federal law under the Electronic Communications Privacy Act without any judicial supervision, just by someone in the government filing a form. It is also the same information that SBC and Yahoo routinely give to marketing partners under their privacy policy.

So all we get, the very limited information we get, is who it is who is engaged in the infringement.

Senator BROWNBACK. Mr. Barr, Mr. Ellis, is that correct?

Mr. BARR. That is totally disingenuous. They just do not get a name. They get the name associated with content, because that is where the IP address comes from. So it is the correlation of the name with activity on the Internet that is the privacy concern. That is what any individual can get under this process.

Someone appears on a website with the IP address, they can find out who that was, and that is the concern. That is the privacy concern.

Senator BROWNBACK. Mr. Sherman, a quick response. I have one more question.

Mr. SHERMAN. The reason that the information is available to be correlated is because it is on a publicly available network for anybody to see whatsoever. We are getting no more information than any other user of the Kazaa system could get. It is as if a street vendor who is selling counterfeit CDs was complaining that we knew he was selling counterfeit CDs because he was doing it on the street when we ask what his identity is.

Senator BROWNBACK. Mr. Davidson, very briefly.

Mr. DAVIDSON. Yes. I would just like to say, it is not just about what the recording industry is doing, unfortunately. It is what other people correlate with other kinds of content. I mean, the Titan Media example that was raised earlier in testimony is a great—maybe by you, Mr. Chairman—is a great example of how correlating identity with access to sensitive or very private information or private behavior online can be very troubling.

Senator BROWNBACK. That was going to be my next question. It is about the Titan Media example, which I presume we are going to see more of these. Either Mr. Rose or Mr. Sherman. Here is a group, hard-core pornographers, asking SBC for 59 Internet subscribers, and then Titan offers an amnesty: you can either buy our pornography and in exchange we will not identify you.

That seems to border, if not be, blackmail. I am concerned that we are going to see more examples of situations like that coming up with this type of process. Do you share that concern?

Mr. SHERMAN. This problem is not attributable to the procedures that we are talking about here. The fact is that under the John Doe process that Verizon and SBC are suggesting Titan Media would be able to get exactly the same kind of information, in fact a whole lot more, because under the DMCA information subpoena process you are limited to just name, address, and so on, whereas in a lawsuit you can get all those other records that we were talking about earlier. Even under the legislation you have introduced, Senator, Titan Media would be entitled to all of that information in the ordinary course of a lawsuit, and that request for information would not even be reviewed by a judge.

Senator BROWNBACK. Mr. Ellis, real quickly, is that accurate?

Mr. ELLIS. No, I do not agree at all. The real heart of the dispute as I understand it between the industry and at least our company goes to the way Mr. Sherman characterized the situation, "the alleged infringer." If we are dealing with somebody who has violated their copyright and they have the reason, the 59 for example in the case of the Titan, and they have reason to believe, then go file the lawsuit. And when you file the lawsuit, it is subject to all the standard protections that judicial review, substantive showings, and all of those protections.

What is at stake here is alleged infringers, the 59 people. If they had the evidence that they are all guilty, then go sue them. The issue is they are trying to use this as a fishing expedition. In this country there is a presumption of innocence until you have the evidence. That is the difference in the two views. We oppose simply fishing expeditions where you pay 25 bucks, make an assertion. They take the position they need that to go get the evidence. That is contrary to basic constitutional law: Get your evidence, go file your lawsuit; do not use the subpoena process to go get the evidence.

Mr. SHERMAN. May I please have the courtesy of a response?

Senator BROWNBACK. Fifteen seconds. My time is up, but please.

Mr. SHERMAN. We have the evidence. We go into court with the evidence. We do not issue a subpoena to get evidence. We just issue a subpoena to find out who the evidence is identifying. We have the evidence. In fact, the DMCA process requires the virtual prima facie case of copyright infringement in order for an information subpoena to issue.

Senator BROWNBACK. Mr. Sherman, it would seem to me then, why not go ahead and have a little higher level of review by an officer of the court? I would hope really, as we look down the road of this process, this is something that reasonable minds really could work out.

Senator Boxer.

Senator BOXER. Thank you.

I wanted to just put in the record an article by Lee Gomes, who does a column for the *Wall Street Journal,* and just read a little bit of it. It ran on Monday. So can I place that in the record in its entirety?

Senator BROWNBACK. Yes, without objection.

[The information referred to follows:]

5 of 5 DOCUMENTS

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WALL STREET JOURNAL ABSTRACTS
WALL STREET JOURNAL

February 10, 2003, Monday

SECTION: Section B; Page 1, Column 1

LENGTH: 61 words

HEADLINE: HOLLYWOOD NEEDS A FAST-PACED SCRIPT FOR COPYRIGHT ISSUES

BYLINE: BY LEE GOMES

ABSTRACT:
Portals column reports that the entertainment industry's copyright worries are blocking hardware design innovation in the consumer electronics world; for example, Digital Video Interface technology, arguably the best way to connect a DVD player to a TV set, is being stifled because movie studios worry that DVI connections could make movies easier to copy (M)

LANGUAGE: ENGLISH

Senator BOXER. I will just read the important part that I think weighs on what we are doing today. He said that: "With these suits, the industry is inviting a backlash among users and in Congress." He says: "Maybe I am"—he says: "Maybe, but I am hugely sympathetic to the record industry in this fight, largely because of the way I answer one of the central questions in the online music debate." He says: "It is this: Are music downloaders basically honest people who are simply yearning to breathe free of the inconvenience and high prices forced on them by the tyrannical music industry, or are they just trying to get something for nothing? Are they freedom-fighters or thieves? Maybe I am projecting from my own circles, but I have always assumed the latter."

He says: "I certainly understand why someone would want to buy only a single hit song off a CD"—which is what Mr. Barr said—"but should that be elevated to a Jeffersonian right? I like only the middle part of an Oreo. Does that mean I can just steal them?"

"Many people argue the record industry needs to make music easier to buy, but what could be easier to buy than a CD? And while I may not like the price, that is also true for Sub-Zero refrigerators. And yes, by having to drive to the music store or wait for a FedEx delivery from Amazon you do not get your music right this very second. But society needs to be careful about making a social virtue of impatience or about insisting that an industry provide a product in a manner conducive to its theft."

The point here—and he goes on with some very interesting things that he says. I think every industry can be criticized. Look, that is a fact of life. So can yours, Mr. Barr. Do you not share private information with your affiliates?

Mr. BARR. Yes, we do. And that is customer information within our corporation. We do not give it to third parties. My point—my point was——

Senator BOXER. How many affiliates do you have, Mr. Barr? How many affiliates do you have?

Mr. BARR. Hundreds.

Senator BOXER. Exactly my point. That is why in California we have a law that would prohibit you from sharing private financial information.

So here is the deal here. I see just a little bit of hypocrisy.

Mr. BARR. This has nothing to do with hypocrisy.

Senator BOXER. Excuse me, sir. It is my time to speak.

Mr. BARR. I thought that was a question.

Senator BOXER. Mr. Ellis—no, I made an observation. You do not have to agree with it. That is fine. I have no problem with your not agreeing with me. We agree on a lot of things, but not on this issue.

I find this kind of holier-than-thou discussion from SBC and Verizon amazing, because they share so much information with their hundreds of affiliates and do not think two wits about it. And they admit that they go to court to protect their property rights. But yet they are coming up with this John Doe idea, which they know very well is going to make it exceedingly burdensome for copyright holders to make sure there is as little theft as possible.

These are real lives you are talking about. As I understand the law, and I just had my staff give it to me, you control the information, Mr. Barr, that you give to Mr. Sherman when he files these suits. It says "only sufficient to identify the alleged infringer." So you are the one that controls the information.

As far as the answer that you gave, it is what Mr. Sherman has to do and the industry has to do is figure out exactly how many, how many cases of theft there are. So yes, they are going to look at the theft. It seems to me you are trying to protect privacy of theft. That is what you are really about, and I think it is a problem.

Now, on your own site this is what you say: "Free sites: Likely to have pretty much everything"—I want to make sure this is—this is Verizon, OK. Quoting from your brochure, "Your Guide to Broadband Living," quote: "Subscription sites do offer MP3s, the format for music files, to download. However, the official sites typically do not offer all music that is selling exceedingly well in stores. By contrast, the free sites are likely to have pretty much everything, but you may be pelted with some unwanted ads."

Now, how is that getting the information to people that what they are doing is illegal? I mean, it seems to me you are promoting this illegal downloading.

Mr. BARR. Well, actually that is one edition ago, but if you go to the very first paragraph of that guide you will see that we tell people that it is illegal to infringe on people's copyrights and that, with

all the available sites now that are authorized to provide music, people should be able to get music with a free conscience.

Moreover, that sentence that you take out——

Senator BOXER. Is that what you say, you can "get music with a free conscience?" Or do you say "the free sites are likely to have pretty much everything, but you may be pelted with some unwanted ads?"

Mr. BARR. And that sentence, of course, you are taking—that is a paragraph that comes after the warning about infringement.

Senator BOXER. I would ask unanimous consent to put this all into the record because, frankly, the message I get is not the message you are saying.

Mr. BARR. There is nothing illegal about a free site. There are authorized free sites and unauthorized free sites. You are trying to put a gloss on that.

Senator BROWNBACK. That will be put into the record, and the Senator's time has expired.

Senator BOXER. I think this will answer our argument.

Senator BROWNBACK. Senator Wyden.

STATEMENT OF HON. RON WYDEN,
U.S. SENATOR FROM OREGON

Senator WYDEN. Thank you very much, Mr. Chairman.

As I think the witnesses know, I have spent a lot of time over the last couple of years trying to find some common ground in this area. I have introduced the Digital Right to Know legislation that essentially empowers the consumers to make choices here, because I think, A, piracy is wrong; and B, I do not want to freeze innovation.

I am going to spend my time just over the next few minutes again looking for ways in which I think we can get to the bigger picture. I mean, you are not going to hold back demand here. Consumers want music in this way. They find it convenient, they find it attractive, and my sense is they are willing to pay for it and will be supportive of legal strategies if efforts are made to make that possible.

So I begin if I might with you, Mr. Sherman. You all seem to almost be on the cusp of a litigation forever strategy, which I think is unfortunate. We have got 261 suits. I gather grandmothers are getting sued, 12-year-olds are getting sued. You all want to send a message against piracy, and I support the efforts to go after piracy.

But give us a sense of how long this is going to go on? I mean, are you going to file 5,000 suits or 10,000 suits? At what point is that going to give way to something that people like me, who think your industry has got a point and the technology side has got a point, are going to take over? I mean, Apple iTunes has got an idea. It may not be the way to go. I have got a proposal in terms of digital right to know. I mean, there are proposals, it seems to me, that could help to find the common ground.

But tell us, if you would, how long do you see this litigation derby going on? Is there something that you can offer in terms of what you really hope to get out of this?

Mr. SHERMAN. I will be happy to respond, but I am also going to ask Mr. Rose to respond——

Senator WYDEN. All right, good.

Mr. SHERMAN.—because you have to understand that the litigation is just one piece of a much larger series of concurrent strategies to force a paradigm shift in the way people get music. Right now people—up until recently, people did not even think twice about downloading music and did not even think about, let alone worry about, whether it was right or wrong, legal or illegal.

The result of these lawsuits, something we did not want to do and something we did not take lightly, has been to inform more people in the space of a week that this conduct is illegal than anything we have done, notwithstanding a multi-year education program featuring artists, songwriters, and the entire music community. So it is having an effect.

Orientation programs at colleges have changed as a result. Parents are discussing with their kids what they are doing on the Internet, which has the added value of not just talking about the illegal activities such as downloading music, but also what they are doing with respect to the security of the computer at home, the privacy of their hard drive, viruses being spread, as well as pornography and kiddy porn.

So this national debate that has been ignited I think has been beneficial to everybody with respect to the ethics and the legality of online behavior. But all this would be irrelevant if we were not offering legitimate alternatives that consumers prefer, and that is why I wanted Mr. Rose to refer to some of the things that we are doing.

Senator WYDEN. Because my time is short, all right, let us say it has been relevant up to this point. At what point—I really am curious, how many suits will be enough? I mean, how many kids and grandmothers and the like are going to be chased down before we get down to what I think are the kinds of approaches, both legislatively and technologically, that are going to bring people together? Will 5,000 suits send the message you want?

Mr. SHERMAN. I really cannot answer the question because this is an evolving target, in which we are trying to change people's mind set and encourage consumers to migrate to legitimate services where they can get exactly what they want, but legally.

How many suits has DirecTV had to file in order to discourage satellite theft? They are over 10,000 now. You do not read anything about it. Why is this somehow—why is music property less respected than signal theft?

If I can just pass this off.

Mr. ROSE. Thank you, Mr. Sherman.

We are working extraordinarily hard, by the way collaboratively, with most of the telecommunications, computer companies, software companies, and consumer electronics companies, to launch a number of legitimate services. And the notion that file-sharing is occurring among teenagers because the only product they can buy is a CD is absolutely no longer true. First, more than 40 percent of the downloading is done by people over 30. Second, for almost a year now every single radio release, meaning every single hit that EMI sells, has been available for purchase through the legiti-

mate download services the day it went to radio, on an unbundled basis, before it goes to retail.

Third, almost every CD that we have for sale is available on a legitimate basis on a track by track basis, and we are focusing now on legitimate downloads.

That is just one of probably 50 different products that we are working with the telecom companies and computer companies to provide.

Senator WYDEN. Mr. Chairman, if I could just get one other question, because I am not going to stay.

In my legislation, and I think it goes right to the heart again of my concern that the only thing that is getting attention is lawsuits rather than efforts to bring people together. I introduced the Digital Consumer Right to Know Act, and it grows out of the fact that not too long ago some CDs were released with a copy protection system that made it impossible to play the CD on a computer, and somebody went out and bought the CD with the specific intention of playing it on their personal computer, they sued.

I said, would it not make a lot more sense and an approach that would be fairer to all sides to just let people know up front what their rights are. I mean, something like that, while certainly not dealing comprehensively with the piracy issue, could be one significant step in solving this problem, empower consumers, be fair to your industry, be fair to technology as well.

I just wanted to wrap up, with the graciousness of the chairman, about whether or not you all would support as part of the solution a digital right to know that would empower the consumer when they walk into stores to actually know what their rights are as part of this effort to be fair to the responsible parties.

Mr. SHERMAN. Actually, I think your legislation has helped stimulate an inter-industry dialogue on voluntary labeling standards that all the digital media industries can embrace, that will give consumers the information that they need to know how their products will work. Everybody shares the view that consumers need to know what they are buying, what they can do with it, and it is a question of how to communicate that information in the best possible way. So we certainly agree with the objective.

Senator BROWNBACK. Thank you very much. I think that is a very constructive thought. I have put similar labeling provisions in the bill that I have put forward as well, and hopefully we can get to some agreements on a few items.

Senator Inouye.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

Senator INOUYE. I have been listening, Mr. Chairman, to the questions. Very interesting.

Two months ago I read an article in the *New Yorker* magazine, and it was such a profound statement I thought I would take it down: "Maybe it is because I am in college, that I have an 18-year-old sister and a 10-year-old brother, but let me tell you, nobody I know buys CDs any more. My sister, she just gets on her computer and knows only two things: file-sharing and instant messaging. She and her friends go online and one instant messages the other and

says, oh, there is this cool song I found, and they go and download it, play it, and instant message back about it. My brother has never seen a CD except for the ones my sister burns."

And this is a quote from a University of Virginia student.

Is this piracy that widespread, Mr. Sherman?

Mr. SHERMAN. Absolutely. In fact, it has really been the combination of downloading and burning that has had the most tremendous impact on sales. When you see those lines converging about the uptick in downloading and CD burner penetration and the number of blank CD disks sold and you start looking at the sales figures, they correlate rather precisely.

The impact is bad, it is worldwide, it is getting worse, and if something is not done about it the creative industries will not be able to sustain a future. This is not just music. This is movies next, and then software. The BSA just came out with a study yesterday showing student attitudes toward software copying and it became quite clear that, because of music downloading, they feel very little compunction about copying software programs as well.

So it holds a terrible future for what is now the copyright industry's contribution to the GNP, 5 percent of our GNP and our number one export, and it is all at risk.

Senator INOUYE. So it involves much more than just a few computer hacks?

Mr. SHERMAN. Absolutely.

Senator INOUYE. What you are trying to tell me is that it is part of our culture now?

Mr. SHERMAN. It has become a part of our culture. We need to begin to change that culture. This is not going to change overnight. This requires a multipronged effort. That is why we have embarked on education campaigns, technical measures, but most important of all, offering legitimate alternatives that will attract consumers back into the paying marketplace.

Senator INOUYE. I have no other questions.

Senator BROWNBACK. Thank you, Senator Inouye.

Senator Lautenberg.

STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM NEW JERSEY

Senator LAUTENBERG. Thanks, Mr. Chairman.

I have not devoted as much time as I would have liked to to a full comprehension, but the one thing—to start with first of all, I would like to put my opening statement in the record as if read.

Senator BROWNBACK. Without objection.

Senator LAUTENBERG. The one thing that I do start with is that we have to protect the process and the value of copyrights. If we understand that, there is an obligation in some way to pay for that creativity and the production of the material that people are so eager to get their hands on. That seems to be only, Mr. Chairman, in your remarks counterbalanced by the subpoena opportunity to find out who is doing what. I would imagine that there are ways to deal with this.

But just in getting some knowledge here, does a company, Mr. Barr, like Verizon advertise—I know that Senator Boxer talked about that briefly—advertise the fact that this is available? What

do you say in terms of offering your broadband services? Do you include music and video and so forth?

Mr. BARR. Yes, I think we do provide a guide, both a printed guide and an online guide. I think two or three editions ago Morpheus was listed as a site in one of the guides, and then we deleted it.

Senator BOXER. I have it here, 2002.

Mr. BARR. Well, it was produced in 2001. And it was deleted from the subsequent guides. Our guides indicate that infringing is wrong, that you do not have to do it. We have a financial interest in promoting MP3 in Rhapsody, which are authorized sites, and we are promoting them, advertising them. On the bottom of every page on our website, we state that unauthorized downloading of songs is illegal and we discourage it.

Senator LAUTENBERG. I wondered, each of you, is there a responsibility—and, Mr. Davidson, you can respond—to launch an educational campaign to inform their DSL customers about the illegality of trading or downloading copyrighted content over the Internet? After I hear Senator Inouye's report on the letter from the child that does not buy CD's any more, but the people who produce them still have the expense and still have the artists who create this hard at work trying to make the product. Go ahead, Mr. Davidson.

Mr. DAVIDSON. Maybe I can jump in by just saying first of all, yes, I think there actually, there should be more done along educational efforts, and I think that the enforcement efforts that are going on will be wasted unless we can figure out how to educate a new generation and also provide them with real alternatives, because there is clearly a giant demand for digital music and we have not yet figured out how to meet that demand.

I would just like to say, both to your question and to Senator Boxer's about the motive, underlying motivations here, I do not think it is fair to the consumer interests that are here also. We do not make any money from selling broadband. I do not think many of the privacy groups that signed onto briefs and have written in support of Verizon or SBC do, either. We think that, independent of that debate, which you can all have, there is also a real privacy concern here and one that we think can be addressed. I just did not want that to get overlooked.

Senator LAUTENBERG. Mr. Rose.

Mr. ROSE. Thank you, Senator. There is really an underlying economic issue here and it is important. We have gone from a world where the economics of the telecom industry and the economics of the content industries were relatively unlinked to a world where they have become increasingly linked.

The primary applications that people who sign up for broadband services are interested in, among others, are entertainment-driven services, and the free and easy accessibility of the peer-to-peer networks have been to a certain extent a driver of the adoption of those services, as well as the underlying traffic on the networks that they create drives real economics.

We are actively seeking collaborative ways to develop new and legitimate products and services with the telecom industries and with the computer industries. But it is absolutely true that our eco-

nomic interests in the short term are not aligned. In the long term, they have to be aligned. The telecom and computer industries desperately need a vital and robust set of content businesses to create the very content that people want to move over their networks and use their access devices for. But in the short term, we have been to a reasonable degree at loggerheads, and it is interesting to note that it is only these kinds of processes that have made the public statements and consumer information around the illegality of digital downloads move to the forefront of the Verizon and other telecom companies' communications.

Senator LAUTENBERG. The question I asked, is it realistic to educate, to try to educate people? The demand is so great, the volume of transactions so enormous, to think that this, all of the education in the world, can make a difference? I mean, is this young woman that Senator Inouye referred to, is she going to feel guilty about burning this music into a disk that she has at home now, the process is so available and so commonplace?

Mr. Rose?

Mr. ROSE. If all of the grocery stores in the world had no cashiers, no one would be interested in buying groceries. They would just go and take them.

We have to really do three things. One is make legitimate music no more than one click away, any music that you want, in whatever form that you want it, so that consumers have the ability to find the music that they love and buy it in convenient ways. We are working with the computer and telecom industries very hard to do that.

That alone will not be enough. Without enforcement and awareness, those three planks—*i.e.,* ongoing awareness campaigns in colleges and elsewhere, so that people understand that file-sharing and moving content around without payment is illegal, and the enforcement tools to identify people who infringe—without those three things, the world will not change. With all three of them, it will change dramatically.

Mr. SHERMAN. If I could just add one point, as somebody who was actively involved in changing the mindset about tobacco, I think you know that a battle can be won; it just may take some time.

Senator LAUTENBERG. There is more physical evidence, though, on tobacco than there are of the dangers of pirating a song that young people love.

Yes, Mr. Davidson.

Mr. DAVIDSON. May I just add?

Senator LAUTENBERG. May I ask for a minute more?

Senator BROWNBACK. Yes.

Mr. DAVIDSON. I just wanted to add a quick point, which was—thank you very much—which was that the old conventional wisdom was that you cannot compete with free downloading. I think that the new conventional wisdom—I think anybody who has used some of these fabulous new downloading products like the Apple iStore—and I am a music addict and I have become an iStore addict. Unfortunately, my wife has been lecturing me about this.

These are fabulous services. I think that they can compete with free. I think that they are fast, they are virus free, and they are

legal. There is a lot of experimentation going on. It is going a little bit slower than some of us would like, but it is happening. And I do believe that real alternatives, coupled with education and enforcement activity, can make a very big difference.

But if we do not have the legal alternatives, this becomes like Prohibition. You know, we are just suing lots of people and not giving them an outlet for what they really want to do.

Senator LAUTENBERG. It is a very simple route, obviously, Mr. Chairman. I leave it in your hands.

[Laughter.]

[The prepared statement of Senator Lautenberg follows:]

PREPARED STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM NEW JERSEY

Mr. Chairman:

This is a pretty timely hearing.

The media have characterized the ongoing dispute and litigation between the music recording industry and Internet Service Providers (ISPs) as "piracy versus privacy."

I think it's important to understand that *both sides,* in a sense, need to prevail. We need to stop digital piracy, but not at the expense of privacy. Conversely, we can't protect privacy at the expense of copyrighted material.

We all recognize that musicians and the recording industry are losing millions of dollars from copyrighted materials being downloaded and shared illegally.

If you want proof, just look at the fact that music CD sales have dropped 26 percent since 1999. Meanwhile, the number of blank, *recordable* CDs sold at retail increased by 40 percent last year alone.

Piracy is not only affecting the music industry. Two weeks before the big screen release of the summer blockbuster "The Hulk," bootleg copies of the film started showing up on file-sharing networks around the world.

It cost Universal Studios 150 million dollars to make "The Hulk," yet anyone with a high-speed Internet connection and a big enough hard drive could see it for free.

This problem for the movie industry will only get worse when technology freely allows consumers to trade or swap movies similar to the way they now trade music files.

The recording and movie industries have the right to protect their copyrights.

But I do have concerns about the subpoena process used to obtain the names of those who allegedly engage in significant copyright infringement.

Due process is important. And I believe a consumer's due process rights exist even before a lawsuit is actually filed in court.

The bottom line here is that the music and movie industries *and* Internet Services Providers will have to get creative and invest in encryption technology, consumer education, and new products that are priced appropriately. That kind of collaboration may be preferable to a "legislative fix" since technology is always faster than Congress!

I look forward to hearing from the witnesses on this important subject.

Thank you, Mr. Chairman.

Senator BROWNBACK. Well, we would get it done that way.

I cannot help but think, as Mr. Rose put it, that we have got industries represented here that are absolutely critical to the future of this country and global in their span, and that cannot people of good minds be able to resolve this, because both of you need each other and will into the future. So I am hopeful that we can.

We will continue this debate and this discussion, but I am hopeful we are going to be able to work it out and move forward in the interest of all as we protect the intellectual property rights and we also protect the privacy of the individual. It has been an excellent panel.

Senator BOXER. Mr. Chairman, I wonder if I could just have a chance at another round, because this is so critical to my state. I could make it 5 minutes if you allow.

Senator BROWNBACK. We are really tight. We have got the next panel, too, that is going to be up.

Senator BOXER. I will make it 4 minutes.

Senator BROWNBACK. How about two questions and we will do that. Can we do that?

Senator BOXER. Well, I will do it as fast as I can.

Senator BROWNBACK. Run it at 4 minutes here.

Senator BOXER. I will just make a closing statement on the panel and I will try to do it in a couple of minutes.

Some unanswered points here. I think the fact is that the Digital Millennium Copyright Act did try to do exactly what we are talking about today, find a balance. And guess what, it was not easy. Why we would want to open it up is beyond me.

My Chairman feels he needs the courts more involved. The courts are involved. You have got to prove before you can go forward that you have got a case to make that there was good reason to believe there was copyright infringement.

I know that the Internet service providers were involved in this compromise. You wanted to be off the hook. You did not want to be liable for stealing. You did not want to be liable for the porn that is coming up on these sites. You did not want to be liable. You wanted to wash your hands of it and you got your wish, and now you are not cooperating with the industry. And that was written into the law, that your safe harbor was based upon the fact that you would cooperate with the industry.

So I am rather sad that we have come to this circumstance, because I think we listened to you, we gave you the safe harbor. And I do agree with Mr. Sherman. You know, all of us who have raised kids, we know something about how you change behavior. It is not easy and maybe sometimes we never do. But if we keep saying, if you do this you are going to be grounded; oh, you did it, okay; the next time you do this, you do it, you are going to be grounded, and you keep threatening, it never changes the behavior.

You have got to carry out. You have to have the enforcement. And if you start going this John Doe route, it is going to be a legal nightmare.

I honestly do think, with the combination of the new technologies like the iTunes and making that more available, and with the cooperation of the ISPs on this, not saying, oh, you can go to a free provider but you may get annoyed by popups. Wrong. You may get annoyed by a lawsuit.

We have to all work together. I am really sad that you are just not working together. So my message to you is, as Senator Brownback has said, both of these industries are crucial to the future of our country. Our country has got so many problems. Do we really need this one? Can you please figure it out?

You are all business people. You all know that you need to protect your intellectual property. So why do you not get together, shake hands, and work together, and then we will not need to open up this whole law, because I am not for that. I just think that is a nightmare.

So thank you very much, Mr. Chairman, for giving me the chance to speak about something that is so crucial to the jobs in my state and to the economy of my state. Thank you.

Senator BROWNBACK. Thank you, Senator Boxer.

I want to thank the panel very much. It has been quite illuminating and hopefully we can move forward on this.

Our second panel is: Mr. Lawrence Blanford, President and Chief Executive Officer of the Philips Consumer Electronics Company; Mr. Jack Valenti, Chairman and Chief Executive Officer of the Motion Picture Association of America; Mr. Christopher Murray, Legislative Counsel for the Consumers Union; and Dr. Edward W. Felten, Professor of Computer Science at Princeton University.

We will get that panel in place as soon as possible. Let us get seated as quickly as we can with the panelists in the room in order so we can move forward. The hour is late. We have gone a long period of time.

We start this second portion with—I want to enter into the record a letter sent to the Chairman of this Committee, Chairman McCain, dated September 4, 2003. It is sent by two pages, two and a half pages, of groups that have problems with the subpoena process that has developed by virtue of the RIAA versus Verizon lawsuit. I want to note that to the people present and the members, that it contains an eclectic group of individuals, consumer activists, privacy concerns. A women's shelter group, I believe, as well is in this because they are concerned about these identity issues coming forward. Hopefully this is something that we can get dealt with.

This is the second issue, no longer on the subpoena, but this is about really issues of built-in hardware to protect intellectual property rights, and the industries' interaction, difficulty of interacting back and forth on the protection of intellectual property right, but at the same time building hardware that will work and hardware that will work for the consumer. So I am glad to have this panel to develop and to go into this topic in some depth.

We will start with Mr. Lawrence Blanford. He is President and CEO of Philips Consumer Electronics. Mr. Blanford.

STATEMENT OF LAWRENCE J. BLANFORD, PRESIDENT AND CHIEF EXECUTIVE OFFICER, PHILIPS CONSUMER ELECTRONICS NORTH AMERICA

Mr. BLANFORD. Thank you, Mr. Chairman, and thank you, Members of the Committee. I am President and Chief Executive Officer of Philips Consumer Electronics in North America. Philips is a leader in digital television and digital content protection technologies. Philips commends the Committee for holding such a timely and important hearing and you, Senator Brownback and Senator Wyden, for your leadership in this area.

Mr. Chairman, let me be clear. Philips is 100 percent committed to working collaboratively with the studios to develop consumer-respectful solutions that safeguard against what my fellow witness Jack Valenti fears will be the Napsterization of video. That said, what are the essential elements of a digital broadcast content production system around which we in the industry and public policymakers can coalesce?

their systems act as conduits, locators, or hosts for infringing materials posted by third parties.

In exchange for these safe harbors, Section 512 requires ISPs to provide specific assistance to content creators alleging that someone is using ISP services or systems to host, locate, or transmit infringing content. For example, Section 512 can require an ISP to remove allegedly infringing materials hosted by the ISP, or to identify an allegedly infringing customer in response to a subpoena under Section 512(h) of the Act.

Recently, the subpoena provisions of Section 512(h) came under scrutiny when they were invoked by content creators trying to identify individuals allegedly trading infringing materials over peer-to-peer file-sharing networks.

Our second panel consists of three panelists who will discuss the legal and policy implications of the subpoena provisions that underlie both the Section 512 compromise and our broader system for reconciling copyright and the Internet.

Mr. Cary Sherman is the President of the Recording Industry Association of America. His organization has served Section 512(h) subpoenas to obtain identifying information about individuals alleged to have been trading infringing music files over peer-to-peer file-sharing networks.

Mr. William Barr is the former Attorney General of the United States and is the General Counsel of Verizon. His company provides ISP services and has received Section 512(h) subpoena.

Our last panelist, Ms. Marybeth Peters, if the Register of Copyrights. She brings to this narrow but important dispute about Section 512(h) subpoenas her unquestioned expertise with the broader issues of law and policy that underlie both the DMCA and the Copyright Act. She has also been gracious enough to help us streamline this large hearing by agreeing to appear on the same panel as our private-party witnesses and agreeing to go last in order to provide some perspective on the views of the two preceding folks.

I just want to express my gratitude for having all three of you here. All three of you are leaders in the respective areas in this field, and we are just very grateful to have you here.

I think we will start with you, Mr. Sherman, and then we will go to General Barr and then we will come to Marybeth.

STATEMENT OF CARY SHERMAN, PRESIDENT AND GENERAL COUNSEL, RECORDING INDUSTRY ASSOCIATION OF AMERICA, WASHINGTON, D.C.

Mr. SHERMAN. Thank you, Chairman Hatch, for inviting me to testify today and for your ongoing commitment to protecting intellectual property. We are all very grateful.

My name is Cary Sherman. I am the President of the Recording Industry Association of America, the trade association representing the U.S. recording industry. Our members create, manufacture, and/or distribute 90 percent of all legitimate sound recordings in the United States.

I would like to take just a minute up front to give the Committee some information regarding some announcements we made yesterday. Following a multi-year campaign to educate the public about

the illegality of unauthorized downloading and the launch of more than a dozen high-quality, low-cost, legitimate online music services, the RIAA filed lawsuits yesterday against more than 250 individuals who were sharing, on average, over 1,000 copyrighted music files on public P2P networks.

We simultaneously announced a program to grant what amounts to amnesty for individuals who voluntarily identify themselves and pledge to stop illegally sharing music on the Internet. Should you have any questions about it, I would be pleased to respond to them later.

We would have preferred to avoid litigation, but we could no longer simply stand by and watch while our products are stolen in mass quantities and the livelihood of thousands of artists, musicians, songwriters, recording companies, and retailers are destroyed. We hope that this ongoing effort will educate the public about the consequences of online piracy and help foster an environment in which a legitimate online music marketplace can thrive.

Let me now turn my attention to the topic of today's hearing. Let me just begin with some startling statistics. Over the past 3 years, shipments of recorded music in the United States have fallen by an astounding 31 percent. Hit records have been impacted most dramatically.

In 2000, the top 10 selling albums in the U.S. sold a total of 60 million units. In 2001, that number dropped to 40 million, and last year it totaled just 34 million. The root cause for this drastic decline in record sales is the astronomical rate of music piracy on the Internet.

Although there is no easy solution to the piracy problem, one thing is clear. Verizon's DSL subscribership is growing due to the explosion in the use of P2P, and it is very troubling to our industry that Verizon actually encourages its new subscribers to visit unauthorized P2P services instead of legitimate licensed sites as their preferred source for music online.

If you sign up for Verizon DSL, you get a brochure, "Your Guide to Broadband Living and Content," that tells users, and I quote, "Subscription sites do offer up MP3s to download. However, they typically don't offer music that is selling exceedingly well in stores. By contrast, the free sites are likely to have pretty much everything, but you may get pelted with some unwanted ads." And people wonder why the copyright community is skeptical of Verizon's claim that the real issue is privacy and not piracy by their subscribers.

After all, nowhere in the brochure does Verizon warn its customers about the serious privacy threats of using P2P. Think about it. Kazaa has been downloaded over 250 million times, and many of those who use it are unwittingly sharing sensitive personal information—e-mails, tax returns, financial and medical records—with millions of others on the Internet. You would think that a company as concerned about privacy as Verizon claims to be would warn its subscribers that they are committing privacy suicide when they put Kazaa on their computers.

So what does all of this have to do with what we are talking about today? First, it helps explain why RIAA's members, with the support of a broad array of other organizations in the music indus-

try representing artists, songwriters, music publishers, and others, took the action we announced yesterday, and why Judge Bates conclusively decided on two separate occasions that the DMCA information subpoena process does apply in the P2P context and that the real privacy threat is millions of users essentially opening their computers to the world.

Second, and perhaps most important for this hearing, they illustrate that Congress, under the leadership of this Committee, saw the future in 1998 when it passed the DMCA. The rampant piracy of music on the Internet is a true-to-life example of exactly the kind of problem Congress envisioned copyright owners would face in the digital world.

Although P2P technology did not exist in 1998, Congress understood that the Internet and advances in technology would lead to an explosion in online theft of intellectual property. So in exchange for exempting ISPs from any liability for the infringing activities occurring on or over their networks and connections, subject, of course, to certain prerequisites, Congress created a framework by which copyright owners, with the assistance of ISPs, could expeditiously identify individuals engaging in infringing activities online. That compromise—expeditious access for copyright owners to identifying information of infringers in exchange for broad liability limitations of ISPs—is as fair today as it was in 1998.

Five years after the passage of the DMCA, we hear nothing from Verizon about changing its liability limitation, but a lot about its concerns over privacy. I just want to mention one thing. No one has a privacy right to engage in copyright infringement on the Internet, and illegally sharing or downloading copyrighted music online is not a form of free speech or civil disobedience protected by the First Amendment.

As I understand Verizon's privacy argument, disclosing its subscribers' identifying information pursuant to a valid DMCA information subpoena threatens to violate its subscribers' privacy because the information subpoena process, in their estimation, is susceptible to abuse and does not provide the same protections afforded by a more traditional John Doe lawsuit.

But Congress considered and decided this question back in 1998. Ironically, the very principle ISPs profess to defend, the privacy of their subscribers, is at greater risk in a John Doe action than through the information subpoena provisions of the DMCA. There are statutory limits on the type of information a copyright owner can obtain via an information subpoena and the purpose for which that information can be used.

A copyright owner can only receive information that is necessary to identify and contact the alleged infringer. More importantly, the copyright owner is statutorily limited to using that information exclusively for purposes of enforcing their copyright.

Compare that to the John Doe alternative where a copyright owner can request anything related to the ISP subscriber account, including user habits, website visits, payment records. And once that information is provided to a copyright owner, there are no statutory restrictions whatsoever on how it can be used or with whom it can be shared.

RIAA and the copyright community as a whole are committed to protecting the privacy of individuals and support the balance that was struck by this Committee and the Congress in the DMCA to protect both privacy and ensure the enforcement of copyrights.

Congress anticipated the needs of copyright owners and the rights of individuals in the DMCA, and enacted a provision that has been upheld and validated by the courts and constitutional scholars. As the content community continues to face the challenges of digital piracy, Congress must ensure that tools are available to limit costly damages in an expeditious manner. Our Nation's cultural assets, balance of trade, and world leadership in intellectual property depend on it.

Thank you very much.

[The prepared statement of Mr. Sherman appears as a submission for the record.]

Chairman HATCH. Well, thank you.

General Barr, we will turn to you.

STATEMENT OF WILLIAM BARR, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, VERIZON COMMUNICATIONS, WASHINGTON, D.C.

Mr. BARR. Thank you, Mr. Chairman, Senator Durbin.

We believe that the health and the vitality of the Internet as a medium of communications in our society depends on the availability of a rich array of content, which in turn requires vigorous protection of intellectual property rights. But at the same time, we think it also depends on the public's confidence in the privacy and security of the Internet as a communications medium and their assurance that there is some protection for private information.

Our concern is that a very ill-conceived blunderbuss approach to addressing the first set of issues, intellectual property, is being applied in a way that is riding roughshod and ultimately sacrificing very real privacy and safety concerns.

Now, from the opening statement of Mr. Sherman it would appear that Verizon stands alone in this, when, in fact, as the Committee is aware, there are 92 groups supporting our position, including library associations, civil liberties groups, child safety groups, and numerous other Internet service providers.

Mr. Sherman sort of suggests that our interest in privacy is somehow this new-found interest and is not really altruism here; it is economic interest. Well, be that as it may, our point in our opening statement is that privacy is important to the well-being of the Internet, just as important as intellectual property rights, the ability of individuals to know that their private information is not going to be handed away willy-nilly to other people.

Now, I think what is going on here is that the RIAA is taking the subpoena provisions of the DMCA and radically expanding them to apply to an area that they were not intended to apply to. That is our view. This sweeping subpoena that they claim, bereft of any of the safeguards that have been employed throughout our history to protect privacy concerns and place checks on the availability of private information, poses, we think, a threat to personal privacy and First Amendment rights.

We further think that the tactic of using these massive subpoenas has really sidetracked the recording industry into this inter orem campaign against 12-year-old girls rather than pursue collaboratively with the network industry a long-term, effective technological solution, as Congress explicitly envisioned in the Act, working collaboratively to develop a long-term technological solution to this problem.

Our view is that both the take-down provisions and the subpoena provisions in the Act were expressly directed at infringers who were storing material on service providers' facilities. So they were distributed copyrighted material from websites that were hosted on the internet service providers' facilities.

We believe the subpoena provisions were meant to allow for the identification of the individuals who were storing that information on the facilities of the Internet service providers. Indeed, our view is that the subpoena provisions explicitly cross-reference the provisions dealing with the storage of information three times.

Now, in that context, there are some safeguards for these privacy concerns because we have control and access to that information. It is right there on our system, and when we are served with a subpoena, we can immediately verify whether there is a legitimate basis for the property owner's concerns. Further, the privacy concerns are somewhat diminished because the party has voluntarily given this information to us to store. Indeed, other provisions of the Act, sections (f) and (g), provide protections to owners who have done that.

Our view is that the subpoena provisions were never intended to allow private parties unfettered power to delve into what individuals have on their own desktop or laptop hard drives, or into the nature of direct communications from one computer to another.

The RIAA is claiming a radical new process—it is heretofore unknown in the law; the district court acknowledged it was a novelty—to obtain personal and private information about electronic communications without the safeguards that have always been applied even to government investigations or in civil lawsuits, and without any accountability for how that information is used.

The process goes like this. When people are using the Internet, they can generally rely on some protection of their identity. When they are browsing or in chat rooms or sending e-mails, the computer does reveal a number, the IP address, which cannot be correlated to an individual.

But under RIAA's interpretation of the Act, any individual can simply fill out a one-page form. They can assert that they have a copyright interest. It doesn't have to be a registered one that would serve as the basis of a lawsuit, and Federal copyright protections cover a broad array of any expressive activity—pictures, content of e-mails, and so forth.

Then they can assert a good-faith belief that their copyright interest is being infringed, and that is the basis upon which they can compel the surrendering of any individual's name, address, telephone number. And now they claim they can get the e-mail address of any Internet user. Not only do they get that identification information, but they are able to correlate it to specific communicative activity on the Internet, to those individuals.

This is not done in connection with a pending lawsuit or a grand jury investigation. There is no judicial supervision of this. Nobody looks at this at the courthouse. It is just served on us and we have to comply. No one reviews the bona fides of the requester. No one reviews whether there is, in fact, copyright information involved. No one determines whether, in fact, there is a reasonable basis for the allegation.

Unlike the information that the government is supplied in an investigation, there are no express safeguards provided for this information and how it is used. There is no requirement to file a civil lawsuit. There are no express sanctions or penalties for the misuse of this information or for its disclosure into the public. There are countless illicit ways that this information can be used without the victim every knowing, without anyone ever knowing how it came to be that their identity was disclosed and exploited in some way.

This goes far beyond the power that this Congress gives Federal investigative agencies who are investigating things like pornography, who are investigating things like terrorism. The Government doesn't have this power.

This is very analogous, for example, to pen registers and to trap-and-trace. The Government just can't go and fill out a one-page form and claim a belief that it would be helpful. They have to have a judge review it and a judicial order based on a certification that it is relevant to an ongoing investigation, and that material is under seal. So when the Government acts in an investigative capacity, this Congress, consistent with constitutional liberties, has ensured that there are safeguards. But given the sweeping nature of this power, deputizing commercially-interested individuals to go out and do this kind of thing, abuses aren't just possible, but abuses are inevitable.

This is not just a tool that is going to be used by legitimate groups like RIAA. This is a tool that can be and is now being used by pornographers themselves. It can be used by pedophiles and stalkers.

Think about the pornographers. We have already had a case since the district court decision where a group that makes gay pornography has sought the names of 59 individuals who they claim were exchanging this pornographic material. And now they have announced, as RIAA has, their own amnesty program. Do you know what the deal is? If you buy our hard-core pornography, we won't come after you. Just think of all the abuses that pornographers can use. People visit a website, they get the IP address, and they can blackmail those individuals.

Now, think of stalkers. There is nothing in here that requires a stalker to give his real name, or a pedophile. They meet someone in a chat room, go down to their local district courthouse, fill out the form, use a false name, and we have to surrender the information, the identity of these people. That is an outrage. That doesn't exist in any other context in the law and it has to be stopped.

Even where there are legitimate interests, such as RIAA's interest, the blunderbuss power that they are applying here inevitably is going to result in mistakes and abuses, and it already has. There is now a sub-industry of bounty hunters that goes about hunting down people. Congress is many times worried about bounty hunt-

ers when they are involved in law enforcement activities, but now we have commercially-interested bounty hunters who can go and get these documents.

We have robots like in "Minority Report," you know, spiders crawling around the Internet with little lights on their foreheads looking for files. That is all very fine, except they find a book report, which they did, a kid's 1-kilobit book report on Harry Potter, and they get slammed by the RIAA. Just recently, they tried to shut down the computers of, I think it was Penn State astronomy department because it found the name Usher in a file; obviously, in their mind, some kind of recording artist, but, in fact, the name of the department head.

So this is the kind of force that has been loosed onto the Internet, and our position is if this is what Congress wanted, it is a disgrace and it should be stopped. If this is not what Congress, if this was not the intent of the legislation, then Congress should act now and deal with it, and not wait for years of litigation and this kind of activity to bring a terror campaign against individuals without any kind of due process.

Congress did spell out how it thought, and rightly so, in my view, this was to be addressed in Title I of the legislation, which is technological protection for the content. The content can be wrapped. It can be protected through encryption, it can be protected through access code protection. Working collaboratively with the networks, that can be pretty much immune from attack and defeat. In fact, Congress has passed laws in Title I saying it would be a crime to try to circumvent those kinds of protections once we worked them out.

But ever since they have embarked on this cat-and-mouse game with teenagers, they have had no interest in coming to the table and talking about this long-term technological problem, which means what? Which means you are going to have a technological arms race with efforts to evade this and hide IP addresses and all this cat-and-mouse stuff going on, instead of something that Congress has already laid the ground work for, which is a regime of protecting content, of having the networks and the content providers work to develop a scheme, and has already passed a law saying it is criminal to try to evade that scheme. So this is largely a wasteful, self-defeating effort.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Barr appears as a submission for the record.]

Chairman HATCH. Well, thank you. We are going to need to have you give us your best ideas as to how to resolve some of these problems that you have raised.

Ms. Peters, we will turn to you.

STATEMENT OF MARYBETH PETERS, REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, WASHINGTON, D.C.

Ms. PETERS. Mr. Chairman, Senator Durbin, I am pleased to testify at this very timely hearing. Senator Hatch, you were among the leaders in drafting and enacting the Digital Millennium Copyright Act, and I know that these—

Chairman HATCH. You would have to say that after General Barr's comments.

[Laughter.]

Ms. PETERS. I am going to say it is a good thing.

Mr. BARR. Properly interpreted, it is a good thing.

Chairman HATCH. Excuse me to interrupt again. We need both of your ideas on how we solve these problems because much of what he says I agree with; in fact, most everything. Yet, I see where you are right, too. In other words, RIAA should not have to put up with the wholesale pilfering of your copyright materials. So we need to have some help here and maybe if you two could get together and give us some advice, it would be very helpful because this is important stuff.

Then, Ms. Peters, of course, we are going to rely on you to help us, too. Go ahead. I am sorry to interrupt you.

Ms. PETERS. What I was going to say is that I know these issues are important to you, as they are to me.

In 1999, Napster popularized peer-to-peer technology and tried to turn it into a profit-making business. In a remarkably short period of time, Napster was being used by millions to copy and distribute an unprecedented amount of copyrighted music.

We agreed with the Ninth Circuit's holding that Napster users infringed at least two of the copyright-holder's exclusive rights—reproduction and distribution. Since Napster's departure, other businesses utilizing peer-to-peer technology, such as Aimster, Grokster, and Kazaa, have appeared.

Mr. Chairman, make no mistake, the law is unambiguous. Using peer-to-peer networks to copy or distribute copyrighted works without permission is infringement, and copyright owners have every right to invoke the power of the courts to combat such activity. Every court that has addressed the issue agrees.

Copyright law has long recognized that those who aid and abet copyright infringement are no less culpable than direct infringers themselves. Based on this principle, the Ninth Circuit Court correctly found that Napster was both vicariously liable and a contributory infringer. Unfortunately, the *Napster* decision was not the last word on the matter.

Earlier this year, a Federal court in California surprised many when it held that *Grokster* and Streamcast are not liable as secondary copyright infringers. Mr. Chairman, these are people whose businesses are dependent upon massive copyright infringement. Any application of the law that allows them to escape liability for lack of knowledge of those same infringements is inherently flawed.

The *Grokster* decision was wrongly decided, and if it is upheld, it will be a major impediment to the fight against massive online infringement that is so rampant today. *Grokster* is not the last word on the subject, either. The decision in *Aimster* is reassuring.

Hanging over all of these cases, however, is the Supreme Court's decision in *Sony*. The correct application of the doctrines of secondary liability in the *Sony* case should produce findings of liability for the proprietors of *Grokster*. If that is not the result, *Sony* should be revisited by the Supreme Court or by Congress.

Unless and until the *Grokster* decision is overruled, copyright owners have no choice but to pursue the individual peer-to-peer

users who are actually engaging in infringement. While copyright owners have expressed regret that they are compelled to take this step, they need offer no apology. People who use peer-to-peer technology for unauthorized reproduction or distribution of copyrighted works are breaking the law.

Litigation and even publicity about the subpoenas have made clear to everyone that the so-called file-sharing of copyrighted works is not an innocent activity without legal consequences. Knowledge that such conduct may lead to expensive and burdensome litigation and a potentially large judgment should have a deterrent effect.

Copyright owners have every right to enforce their rights in court, whether they are taking action against providers of peer-to-peer services designed to profit from copyright infringement or against persons engaging in individual acts of infringement.

To take action against users of peer-to-peer networks, copyright owners must know who those users are. Congress recognized this and included in the DMCA a process by which owners can learn basic identifying information about alleged infringers from their Internet service providers.

As you recall, the DMCA began as an effort to implement the 1996 WIPO Internet treaties. However, as this legislation moved forward, ISPs demanded that it include limitations on their liability for copyright infringements carried out over their networks. Congress heeded this call and provided the ISPs with a huge benefit: virtually no liability for qualifying ISPs.

This was balanced by placing on ISPs certain obligations. One requires ISPs to respond expeditiously to subpoenas seeking identifying information about subscribers accused of copyright infringement. The ability of copyright owners to use Section 512(h) is a critical part of that bargain, allowing copyright owners to pursue primary infringers.

Recently, the scope and constitutionality of Section 512(h) has come under attack. In the RIAA–Verizon litigation, Verizon claims that the subpoena power of 512(h) is inapplicable to the mere conduit activity described in 512(a).

As the district court held, the plain language of 512(h) demonstrates that this interpretation is not correct. I agree. The statutory text confirms the compromise that copyright owners and ISPs are to work together to remedy infringement in all categories of activities.

The United States has intervened in the Verizon litigation to defend the constitutionality of Section 512(h). The Copyright Office has assisted the Justice Department in this effort and we firmly believe that 512(h) is appropriate and constitutional.

One observation. The alleged constitutional infirmities apply to any subpoena applied pursuant to 512(h), not only to subpoenas to identify participants in peer-to-peer networks. And if 512(h) is declared unconstitutional, I believe the result would be that 512 as a whole, including the limitations on ISP liability, would be unconstitutional.

In conclusion, the DMCA represents a carefully crafted and balanced bargain which utilizes both enlightened self-interest and the incentives created by doctrines such as secondary liability to en-

courage all stakeholders to work together. Some are now selectively challenging key components of that bargain, particularly in the context of peer-to-peer technology.

Taken together, the positions of Grokster along with arguments now made by Verizon and others, if they prevail, will leave copyright owners with little or no remedy against the most widespread phenomenon of infringement in the history of this country.

Thank you.

[The prepared statement of Ms. Peters appears as a submission for the record.]

Chairman HATCH. Well, thank you. You answered one of my major questions there. Let me just say before I turn to Senator Durbin, who will be our last questioner, I want to thank the members of this panel for your testimony.

I think that these issues have not ripened enough to permit this Committee to determine whether Section 512(h) works as intended or whether legislation could be brought to improve it. The first court challenges to 512(h) subpoenas are still ongoing and I don't think we can yet determine whether these subpoenas are being used responsibly to identify alleged infringers. More actual experience with these provisions could reveal potential improvements to them.

Perhaps in the meantime, what I would like to do over the next 6 months is I would like to ask Verizon and the 92 companies that are supporting your position, General Barr, and RIAA and any affected consumers to report back to me and my staff and Senator Leahy and his staff at least bi-monthly on how the subpoenas are operating and how further legislation might improve them.

In these reports, I would ask both of you to keep two principles in mind. First, the Section 512(h) subpoena process exists because ISPs, as Ms. Peters made clear, argued successfully and over the objections of the content creators that they should be immune from secondary infringement liability because individuals misusing ISP services were the proper targets for Internet copyright infringement.

This broad immunity ensured, as Ms. Peters said, that only viable targets for copyright enforcement would be individual Internet users who guessed wrong about whether Internet content respects the complex strictures of copyright.

The interests of those burdened consumers, it seems to me, are critically important. But a claim that their interests cannot be reconciled with content creators' need for efficient identification mechanisms seems like a claim that the intent of Section 512 cannot be achieved without the reopening of all of Section 512. That is not a claim that should be made or accepted lightly.

Secondly, the Committee needs statistically valid data to support any claims about consumer preferences. Copyright-holders have long used means short of Federal lawsuits to resolve disputes with alleged infringers. Valid data would help this Committee determine whether individual Internet users actually prefer a mechanism that requires them to be identified not as the private recipients of cease and desist letters, but as named defendants in public Federal court complaints seeking damages, statutory damage fees, and injunctions.

So what I am hoping, Mr. Sherman and General Barr, is that your organizations will help us here and provide this Committee with—I would like bi-monthly reports and proposals that I have requested. Now, that is a little work, but my goal here is not to find fault with either of you. I think both of you make good cases here. It is try and get this system so it really does work, work efficiently, work constitutionally in a sound manner, and work to the betterment of copyright protection.

It is complex. I mean, it took us 5 years to get the DMCA passed, and I can remember all of the back and forth, absolute gut fights that we were in to get that done. I have no doubt that it is not perfect. On the other hand, I think we might be able to resolve some of these problems in a way that would be mutually beneficial and perhaps satisfactory.

Naturally, content providers and copyright owners have a tremendous interest in their protection. Naturally, service providers have a different set of interests, as well as those interests, and we need some help here as to how best to solve these problems.

I think these young kids or anyone else wouldn't think of walking into a record store and stealing CDs right off the shelf, and yet that is exactly what they are doing over the Internet. And that is just one aspect of it. There are movies, books, CDs, you name it, and we have got to find some way to have our society be honest about these very important copyright protections. So if I could get some help from both of you, I would appreciate it and I will count on it.

Senator Durbin, you are going to be our last and then I have got to close up shop here.

Senator DURBIN. Thanks, Mr. Chairman. I am going to be brief here.

Mr. Barr, I thought you made a pretty compelling argument, but I am really troubled by this brochure if it accurately depicts what you were advising your customers to do, which is to use the free sites, the P2P sites, for acquiring music. It strikes me that you don't come to this discussion with clean hands.

Mr. BARR. Senator—

Senator DURBIN. If I can finish, it strikes me that you are encouraging them to use these sites which basically open up their privacy to the world, and I think Judge Bates made that observation when he said that this peer-to-peer file-sharing, as quoted by Mr. Sherman, "It is hard to understand just what privacy expectation a user has after essentially opening his computer to the world."

It strikes me that it sounds like you are encouraging Lady Godiva to get on the horse and then complaining that the arresting sheriff is sneaking a peek and invading her privacy. I mean, I don't think you can have it both ways.

Mr. BARR. Well, Senator, if you have the brochure in front of you, you will see that the very first paragraph of the brochure says that the courts have ruled that groups like Napster and that kind of sharing is a violation of law, and that it is quite possible to get your needs satisfied on the Internet with a completely clean conscience. That is the first paragraph.

The paragraph that Mr. Sherman quoted from, after elision—you will note that that paragraph starts off by listing a number of sites,

like Rhapsody and MP3, and so forth, and then makes the distinction between subscription sites and free sites. Now, free sites can be authorized sites. Free sites is not a synonym for P2P.

So that paragraph was intended to list the lawful, authorized sites, some of which are subscription, some of which are free, and then explain the difference between subscription and free sites.

Senator DURBIN. So, Mr. Sherman, are you misrepresenting this by saying that this quote and the one that you have highlighted here are an invitation to P2P and an invitation to squander your privacy?

Mr. SHERMAN. No. I stand by my quotation. I will admit that the 2003 version is an improvement over the 2002, which specifically proposed people to go to the Morpheus site, which is one of the illegal sites that we have had the most problems with. So Verizon has improved it a little bit.

Just when you look at "the free sites have pretty much everything you want, but you may be pelted with some unwanted ads," how about the fact that you may also be engaging in illegal activity about which the recording industry announced 6 months ago that we intend to bring lawsuits to enforce our rights? That would be a service to the DSL subscribers, not the sort of notice that is being given here.

Senator DURBIN. Let me ask you about what was announced yesterday by your industry. Are you headed to junior high schools to round up the usual suspects? How are you going to deal with this in a fashion that doesn't turn off your potential customers for a long time to come?

Mr. SHERMAN. Well, the word "customers" is an interesting term because if somebody doesn't actually buy your product but simply steals it, what do you consider them? What is the shoplifter at Saks Fifth Avenue? Is that a customer?

Senator DURBIN. So you write them off?

Mr. SHERMAN. Well, no, we don't write them off. We try to bring them back, and we try to bring them back by letting them know that this is really illegal activity, that they are not anonymous when they engage in it, and that there can be consequences.

We have done a lot of market research and we have come to the unhappy conclusion that people don't shoplift not because it is immoral or because it is wrong, but because they fear they may get caught. And we are trying to let people know they may get caught, and therefore they should not engage in this behavior.

Yes, there are going to be some kids caught in this, although you would be surprised how many adults are engaged in this activity. This is not just children. But we think that it is great for parents to know what their kids are up to. If a child brought home a shoplifted CD from Tower, I don't think the average parent would say, oh, look how cute, he loves music. They would make him take that CD back and lecture him about honesty and theft, and so on and so forth.

Parents need to know what their kids are doing when they are downloading music from the Internet, too, as well as everything else we have talked about at this hearing today—the access to pornography whether they want it or not, the child pornography, the security threat, the privacy threat.

Parents may not realize that their kids are opening up the parents' hard drive for the rest of the world to see. That would be a service if ISPs notified their customers that there is a privacy risk to engaging in illegal file-sharing activity on these peer-to-peer networks.

Senator DURBIN. I think that is a very constructive suggestion, and I don't mean to downplay the threat to your industry when I suggested that you are going after adolescents. I think it is a serious problem. It is theft and it should be viewed as such. I think you have a tough public relations campaign here to go after the offenders without appearing too heavy-handed in the process.

I would say, Mr. Barr, that we have found, I think, in both political parties that privacy is one of the most important things that Americans want to protect, whether it is medical privacy or financial privacy. I think we are learning. Senator Hatch and I—and I respect his leadership on this—are learning and hoping that we can make the laws that we have passed better in the future.

I thank you all for coming to this hearing. Thank you, Mr. Chairman.

Chairman HATCH. Well, I appreciate your kind comments. I have to say that nobody respects privacy rights better than I do, and I understand all of the concomitant liabilities you would have if those privacy rights are not respected. There are all kinds of problems that would come forth.

All three of you have been terrific. I think we have benefitted a great deal from this, and I agree with you that, yes, there are some children doing this, but there are a lot of adults doing it as well, who ought to know better and who deliberately do it knowing that it is wrong. It is just time for people to wake up.

I would hate to get to that point where we have to give three warnings and then blow up the set. I am speaking tongue-in-cheek to a large degree, but there is still a lot of truth to that, and I have to say that this hearing has been very beneficial.

Ms. Peters, I have always respected you. I think you are one of the best servants in Government that we have, and we appreciate your viewpoint here today. It was well put and something I am extremely interested in, and we appreciate the efforts that you have put forward. Help us to be able to do a better job to be able to protect the respective interests and to resolve some of these difficulties.

I have no ax to grind here. I just want to make sure that we resolve these difficulties that exist and that we live within the framework of laws. To that degree, I think you folks can be of tremendous help to us. So with that, I want to thank you again.

Let me just make one more comment. The deadline for submitting written questions to witnesses will be 5:00 p.m. next Tuesday, September 16. So I hope all staff will pay attention to that.

Thanks so much, and we will recess until further notice.

[Whereupon, at 4:33 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Response to Questions from Senate Judiciary Committee

Questions from Senator Chambliss

Q1. Mr. Barr, what is the impact on service providers in terms of responding to the hundreds of subpoenas you have received?

A1. The hundreds of subpoenas discussed in my testimony had been issued under 17 U.S.C. § 512(h), which creates a procedure for the issuance of subpoenas addressed to online service providers without judicial supervision in certain circumstances. Copyright owners had been using section 512(h) to issue subpoenas against peer-to-peer file sharing, which Verizon did not believe was an authorized, or appropriate, use of the special section 512(h) subpoena process. On December 19, 2003, the US Court of Appeals for the District of Columbia Circuit agreed with Verizon and held unanimously that Section 512(h) does not apply to online service providers when they are acting as a conduit for online traffic. Rather, the Court held that section 512(h) only applied where content was stored on a service provider's servers. *RIAA v. Verizon Internet Services, Inc.*, 351 F.3d. 1229 (D.C. Cir. 2003), *cert. denied*, 125 S. Ct. 309 (2004). The Eighth Circuit agreed, shortly thereafter. *In re Charter Communications, Inc., Subpoena Enforcement Matter*, 393 F.3d 771 (8th Cir. 2004). To a large extent, the impact on service providers is now moot. Since the Court of Appeals' decision, RIAA has been obtaining court-ordered subpoenas on a regular basis and sending them to Verizon pursuant to a process both parties have found acceptable. Verizon has promptly responded to the subpoenas and as distributor of content, believes strongly in copyright protections and compliance with copyright enforcement in partnership with the content community.

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Q2. Mr. Barr, you have stated that the subpoena process under the Digital Millennium Copyright Act is less protective of parties' interests than is true of the traditional subpoena process. How is this so? Can you compare the process law enforcement must go through with the process the Recording Industry Association of America is using to get identifying information?

A2. After the Court of Appeals' decision, content owners, including the RIAA, began filing John Doe lawsuits and obtaining traditional subpoenas issued with the appropriate judicial oversight The traditional subpoena requires that the copyright owner file a valid complaint in federal court, investigate the facts and inquire into defenses and prove ownership of a federal copyright registration. Under the traditional subpoena process, defendants also enjoy fundamental due process protections, including notice, the opportunity to be heard and to raise defenses. Judicial oversight deters potential abuses as does the availability of FRCP Rule 11 sanctions. None of these protections were part of the old RIAA form subpoena process. Similarly, government entities under a variety of criminal statutes, including the Video Privacy Protection Act and Cable Communications Policy Act, can only obtain subscriber information subject to extensive limitations and pursuant to court order or judicial supervision. This issue, however, is now largely moot. In the preceding five years, the filing of John Doe lawsuits has not interfered with copyright owners' enforcement activities. As RIAA President Cary Sherman stated in a press release shortly after the D.C. Circuit's 2003 decision, "[o]ur campaign against illegal file sharers is not missing a beat." He confirmed that "[t]he 'John Doe' legal process is a well-established mechanism for aggrieved parties to enforce their rights. The process by which we obtain the identity of defendants has changed, but the enforcement program has not." *See* http://www.riaa.com/newsitem.php?news_month_filter=1&news_year_filter=2004&resultpage=&id=7A2318DB-1A51-7911-AB93-54D8337A9B90.

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Question from Senator Cornyn

Q. The "fair use" doctrine of copyright law gives consumers a certain amount of flexibility to use copyrighted materials they legitimately possess, without risk of liability for copyright infringement. Does that doctrine apply, however, to materials that have yet to even be released to the public? Under what conditions, if any, would it even be possible for ordinary consumers to lawfully possess such "pre-release" materials? Should the NET Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) be amended, so that any reproduction or distribution of "pre-release" material shall constitute per se infringement under 17 U.S.C. § 506(a)(2)?

A. The thrust of the question appears to focus on whether a consumer's infringing conduct should be subject to enhanced criminal liability with respect to pre-release materials. It is our understanding that Congress addressed this issue in Title I of the Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9 (enhancing criminal penalties for infringement of works "being prepared for commercial distribution" including by "making it available on a computer network").

On the broader question related to the fair use doctrine, the Copyright Act expressly recognizes that "the fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of [the four fair use factors]." 17 U.S.C. § 107. In *Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539 (1985), the Supreme Court recognized that, although the unpublished status of a work was important, it was "not necessarily determinative" in considering a claim of fair use. *Id.* at 554. While a claim of fair use is not likely to prevail where a consumer widely distributes a full copy of a pre-release entertainment work, there may be other circumstances in which a claim of fair use could be appropriate. It is therefore be important to target illegal activity while maintaining the flexibility of the fair use doctrine.

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Questions from Senator Leahy

Q1. I have deep respect for privacy rights, and if there is an abuse of law, I believe that should be dealt with. Is there some use of the § 512(h) subpoena with which Verizon would be comfortable?

A1. Verizon has no objection to the use of the traditional Fed. R. Civ. P. 45 subpoena process in the context of a pending John Doe lawsuit, where a pre-service subpoena is subject to judicial supervision and subject to the Federal Rules of Civil Procedure. Further, Verizon does not believe that section 512(h) creates substantial privacy problems if the provision is limited to its original intended scope, where content is stored on a service provider's system or network. In that situation, the service provider has access to the content and may examine it, as contemplated by the take-down notice, which forms an essential part of the subpoena application.

Q2. Did Verizon raise any privacy concerns on behalf of its customers when it decided to support § 512(h) in 1998?

A2. Verizon was a leading participant in the 1998 negotiations, and specifically understood that section 512(h) was intended to apply solely as an adjunct to the take-down process available for material residing on the service provider's system or network in the context of subsection (c). That was the reason for the repeated cross references to subsection (c) and for the references in the required take-down notice to "material . . . to be removed or access to which is to be disabled." In that context, Verizon did not believe that section 512(h) raised substantial privacy concerns, because the material was publicly hosted on a provider's servers and it was expected that the service provider would have access to, and the ability to examine, the allegedly infringing material, and to judge the copyright owner's claim. The service provider would also have the ability to disable access to infringing material, providing more time for deliberative

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judicial review. Further, Verizon understood that, in the subsection (c) take-down context, the sanctions for misrepresentation provided in subsection (f), and the counter-notification described in that subsection, would be available to further protect user interests.

Q3. To the extent that Verizon raised these concerns before, why did Verizon support the subpoena provision regardless of its concerns, and why do those privacy concerns now weigh more heavily?

A3. As discussed above, Verizon did not believe that, properly confined to the subsection (c) context, subsection (h) created substantial privacy concerns. Our concern with privacy arose out of the misconstruction of subsection (h) by the U.S. District Court for the District of Columbia, which enabled the sending of subpoenas in a context where the service provider often was unable to review the copyright owner's claim of infringement or remove specific material. Moreover, the District Court's construction could not logically be limited to peer-to-peer activity; it necessarily swept all conduit functions within the scope of subsection (h). Verizon believes that the conduit functions expressly considered by Congress in 1998 — anonymous web browsing and private email — were Internet functions where privacy and anonymity interests were at their zenith. The District Court decisions placed the privacy and anonymity of users of these Internet functions at risk. Fortunately, the D.C. Circuit corrected the District Court's error and the parties have been working amicably on enforcement activities ever since.

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Q4. Is there any way the parties can come together, as they did in 1998, to work out terms for the issuance and response to 512(h) subpoenas, which would satisfy everyone, and respect the privacy rights of individual customers? Could the parties agree to give notice to subscribers that their information is being requested, so that the subscriber could fight the subpoena if they wished?

A4. The parties did come together after the Court's unanimous decision and worked out a mutually agreeable process whereby RIAA could serve Verizon with judicially reviewed subpoenas and RIAA would take that information and contact the users directly. RIAA uses the information to send "pre-litigation" settlement notices to users and concludes that "[W]hat we've found is that more students tend to settle in the prelitigation stage, saving them from increasing costs that would otherwise occur if the legal process dragged on." RIAA Sees a 99.6% Capitulation Rate from Students at UT, http://arstechnica.com/news.ars/post/20080129-less-than-1-of-u-of-tennessee-students-hold-out-against-riaa.html, January 29, 2008. Those who do not settle are sued. RIAA has stated that its enforcement program continues to be a success, noting that the large number of lawsuits filed has "arrested the growth of a runaway solution that would have grown worse and worse." *See* RIAA's next moves in Washington, ZD Net, May 26, 2006, http://news.zdnet.co.uk/itmanagement/0,1000000308,39271312,00.htm.

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SUBMISSIONS FOR THE RECORD

Statement of William Barr
Executive Vice President and General Counsel
Verizon Communications

Before the United States Senate
Committee on The Judiciary

Pornography, Technology and Process: Problems and Solutions on Peer-to-Peer Networks
September 9, 2003

Mr. Chairman and members of the Committee, thank you for inviting me here today to discuss this important issue.

We at Verizon recognize the legitimate interests of copyright owners and the threats to those interests that are posed by the misuse of new technologies, including peer-to-peer software. Verizon remains committed to working with the copyright community to find solutions to these issues that result in effective protection for intellectual property, without placing substantial burdens on Internet service providers or violating the privacy and First Amendment interests of their subscribers. Back in 1998, Verizon and other service providers agreed in the Digital Millennium Copyright Act ("DMCA") to conduct voluntary industry negotiations aimed at developing "standard technical measures" (also known as digital rights management tools), to protect copyright works from online infringement.[1] The copyright community has never accepted our offer to begin those negotiations and to work cooperatively toward a technical solution to this problem. In the end, as in the area of VHS recordings and cable television access to broadcast programming, Verizon believes that appropriate technical and legal solutions will be

[1] 17 U.S.C. 512(i)(1) & (2).

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found. As discussed in detail below, the district court's misreading and misapplication of the Section 512(h) subpoena power is not that solution.

As an Internet service provider, Verizon promptly takes down infringing material that resides on our system or network in response to requests from copyright owners and we have strict policies against infringement of copyrights. Verizon also promotes legitimate pay music sites such as MP3.com and Rhapsody as part of its ISP service. We will continue to work with copyright owners to marry the power of the Internet with the creative genius of content providers through new business relationships and licensed websites that offer music, video, and other proprietary content to the over 100 million Internet users in this country. Verizon believes that lawful and licensed access to quality content is essential to the continuing development of the Internet in general and broadband in particular, and we are committed to exploring technological and other solutions so that copyright owners may enjoy the fruits of their labors and Internet users will have access to a rich array of digital content.

However, the answer to the copyright community's present business problems is not a radical new subpoena process, previously unknown in law, that un-tethers binding judicial process from constitutional and statutory protections that normally apply to the discovery of private data regarding electronic communications. Verizon believes that the district court was wrong in concluding that Congress authorized such a broad and promiscuous subpoena procedure in the DMCA—but whatever the courts ultimately conclude on this issue—the subpoena power endorsed by the district court is not an effective remedy for copyright holders and has great costs in terms of personal privacy, constitutional rights of free expression and association, and the continued growth of the Internet.

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As interpreted by the district court, this subpoena provision grants copyright holders or their agents the right to discover the name, address, and telephone number of any Internet user in this country without filing a lawsuit or making any substantive showing at all to a federal judge. This reading of the DMCA accords truly breathtaking powers to anyone who can claim to be or represent a copyright owner; powers that Congress has not even bestowed on law enforcement and national security personnel. It stands in marked contrast to the statutory protections that Congress has enacted in the context of video rentals, cable television viewing habits, and even the requirements for law enforcement officers to gain access confidential data associated with electronic communications.

All one need do is fill out a one-page form asserting a "good faith" belief that a copyright has been infringed and one can obtain identifying information about anyone using the Internet. There is no review by a judge or a magistrate; the clerk's office simply issues the subpoena in ministerial fashion. This identifying information can then be linked to particular material sent or received over the Internet, including e-mails, web browsing activity, chat room postings, and file-sharing activity. It is also important to remember that the threshold for a claim of copyright in any form of expression is extremely low. This subpoena power applies not just to sound recordings, it applies to the expression contained in an e-mail or posting in a newsgroup, digital photographs, and even pornographic materials. It has and will be used and abused by parties far less responsible than the recording or movie industries. In essence, any private party willing to assert a property right in any form of expression is constituted as their own roving grand jury, without any of the normal checks and protections that apply to governmental investigations.

Under our constitutional scheme, the issuance and enforcement of judicial process in civil cases is generally confined to an actual case or controversy and is undertaken under judicial

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supervision. The district court's reading of Section 512(h) departs from this constitutional tradition and thus eliminates many of the normal constraints on discovery by civil litigants. The statute lacks the most basic protections that are applied to the discovery of confidential and personal data connected with expressive activity. As noted above, the filing that need be made is truly minimal, and is below the notice pleading standard for the filing of a civil complaint in federal court. The normal duties to investigate and substantiate a civil claim that apply to the filing of a lawsuit under the Federal Rules of Civil Procedure do not apply. The clerk's office simply rubberstamps these subpoenas in ministerial fashion—with no inquiry into the bona fides of the party filing the request or the self-interested "belief" that a copyright has been violated.

The individual subscriber, whose identity is at issue, is not even entitled to receive notice of the subpoena before his or her personal information is turned over to a third party. Thus, the subscriber, who may in fact be engaged in fully protected speech or association, will have his or her identity revealed without ever having an opportunity to be heard in court. There is no opportunity to assert the normal defenses to a claim of copyright infringement—fair use, the non-protection of ideas, or the fact that material resides in the public domain. Nor is there any provision for damages or other punishment for wrongfully obtaining or misusing the identity of a subscriber subject to such a subpoena. It is truly ironic that Congress has placed more substantial requirements and protections on law enforcement access to confidential information regarding electronic communications than apply to a private party under this statute.[2] Given the substantial privacy protections that Congress built into the DMCA itself, *see* 17 U.S.C. § 1205 (savings clause for state and federal privacy laws); *id.* § 512(m) (protection of subscriber privacy

[2] *See, e.g.*, 18 U.S.C. § 3121, *et seq.* (pen registers and trap and trace devices limited to governmental personnel upon court order for valid criminal investigation); 18 U.S.C. § 2703 (limits on disclosure of records pertaining to electronic communications services).

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from monitoring of Internet communications) it is utterly implausible that Congress wished to create this substantial threat to personal privacy in the subpoena provision contained in the same statutory scheme.

This combination of unlimited scope, minimal substantive requirements, and lack of judicial supervision makes both mistakes and intentional abuses of this new power inevitable. Every time you send an e-mail, browse a website, or join a discussion in a chatroom or newsgroup, others gain access the numerical IP address that you are using. Armed with this IP address, anyone to whom you have sent an e-mail, from whom you have received an e-mail, with whom you or your children have spoken in a chat room, or who operates a web site you have visited, no matter how sensitive the subject matter, can unlock the door to your identity.

This list is not limited to those with legitimate interests in enforcing copyrights. As safety and privacy groups like the National Coalition Against Domestic Violence and WiredSafety stated in our litigation, it opens the door to your identity to people with inappropriate or even dangerous motives, such as spammers, blackmailers, pornographers, pedophiles, stalkers, harassers, and identity thieves. In fact, over 92 diverse organizations, representing consumer and Internet interests, submitted letters to this Committee last week expressing serious concerns about the privacy, safety, and security of Internet users arising from the potential misuse of this subpoena process. These include the ACLU, the American Library Association, the Consumer Federation of America, and the National Coalition Against Domestic Violence. These groups do not condone copyright infringement rather, like Verizon, they are concerned that this subpoena provision will cause great harm to privacy, free expression, and even personal security of Internet users with little gain in copyright enforcement.

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As Ms. Aftab, from WiredSafety states, "With one broad sweep, the DMCA subpoena power will frustrate the work of the entire online safety community to arm our children and their parents with cyber-street-smarts. It won't matter what they voluntarily or mistakenly give away. All the information predators need can be obtained far more easily with the assistance of the local Federal District Court Clerk." The potential for abuse of this new subpoena power is limited only by the deviousness of the criminal mind.

Indeed, just since the district court's ruling went into effect in June, the evidence of mistakes, potential abuses, and troubling uses of this subpoena power has continued to mount. SBC recently filed a suit in California against the Recording Industry, a copyright bounty hunter called "MediaForce" and an entity called Titan Media Group. Titan Media, a purveyor of pornographic videos over the Internet, sent one subpoena to SBC seeking the names, addresses and phone numbers of 59 individual subscribers who Titan asserted were infringing its copyrights in gay pornographic videos by exchanging them over the Internet. Titan eventually withdrew the subpoena when SBC threatened a court challenge, but the episode highlights the fact that this new subpoena power applies to *anyone* who can claim an interest in *any* form of expression. In a similar vein, ALS Scan, a purveyor of graphic Internet pornography, has also used the DMCA notice and takedown process and in fact submitted a declaration in favor of RIAA's broad interpretation of the subpoena power in the litigation with Verizon. The potential for abuse, for invasion of personal privacy, for reputational harm, and even for blackmail is highlighted by these examples.

The statute does not even require the copyright owner itself to obtain the subpoena, it may be obtained by an agent of the copyright holder. A whole industry of copyright "bounty hunters" has sprung up, enterprises that search the Internet for possible instances of copyright

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infringement spurred on by economic incentives. The use of automated robots, known as "bots" or "spiders" has also led to a significant number of mistaken claims of copyright infringement. These bots operate much like the spiders that crawled through buildings in the movie Minority Report, scouring the Internet in search of file names that look like they match the names of copyrighted works or artists. Bots are far from perfect. Typing words such as "Madonna" or "the police" in an e-mail may earn you a DMCA subpoena, because the "bots" cannot distinguish the legitimate comment or discourse from copyright infringement. In 2001,Warner Bros. sent a letter to UUNet demanding that they terminate the Internet account of someone allegedly sharing a Harry Potter movie online. The small text file was entitled "Harry Potter Book Report.rtf., with a file size of 1k. The file was not an unauthorized copy of the movie, it was a child's book report, but the bot could not tell the difference and such an "investigation" can quickly form the basis for a DMCA subpoena.

In the past few months, RIAA has already admitted numerous cases of "mistaken identity." In one case, RIAA demanded the take down of Penn State University's astronomy department's servers during finals week, based on a claim that it contained infringing songs by the artist Usher. In fact, "Usher" is a professor's last name and the file at issue was his own creation. RIAA later admitted sending at least two dozen other mistaken notices to Internet users as part of its campaign to warn peer-to-peer file-sharers. And this was before RIAA began its new campaign sending hundreds of subpoenas for subscriber identity to ISPs across the country. These chilling examples all sound like excerpts from the book "1984," except in this case, "Big Brother" isn't the Government, it is interested parties armed with their own private search warrants.

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RIAA's most recent campaign began in July of this year after the district court's ruling went into effect. Despite the pending appeal on this issue, the Recording Industry has chosen to unleash numerous subpoenas on Internet service providers. Verizon has already received nearly 200 subpoenas, with which we have been required to comply. The Recording Industry alone has sent well over 1000 subpoenas to service providers across the country, placing a significant strain on the resources of the clerk's office of the district court in D.C. and on the subpoena compliance units at many Internet service providers, including Verizon.[3]

RIAA now claims that it is entitled to discover subscriber's e-mail addresses through these subpoenas and further claims that it may issue these subpoenas from the district court in Washington D.C., regardless of the location of the service provider or the customer. Obviously, obtaining the subpoena in a distant forum makes it a practical impossibility for many service providers and most customers to ever raise any objection to the subpoena. Indeed, Boston College and MIT successfully fought to quash subpoenas issued out of Washington, D.C. that were aimed at their students in Massachusetts. SBC has filed a lawsuit in the Northern District of California seeking to have the entire process declared unconstitutional. Columbia University is also seeking to quash subpoenas that RIAA has attempted to serve on it issued by the District of Columbia courts.[4]

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[3] Indeed, press accounts indicate that the clerk's office of the district court in D.C. has been overwhelmed with subpoena requests and has been forced to reassign staff from other judicial duties. *See Ted Bridis,* Music Industry Wins Approval of 871 Subpoenas Against Internet Users, Associated Press (July 19, 2003) at 2 ("The RIAA's subpoenas are so prolific that the U.S. District Court in Washington, already suffering staff shortages, has been forced to reassign employees from elsewhere in the clerk's office to help process the paperwork, said Angela Caesar-Mobley, the clerk's operations manager.").

[4] The Federal Rules of Civil Procedure generally provide for the issuance and service of subpoenas in the district where the party in possession of the material resides to protect the rights of third parties to contest the subpoena. *See* Fed. R. Civ. P. 45(a)(2) & 45(b)(2) (placing jurisdictional and service limitations on district court subpoenas for the protection of those from whom production is sought). Despite the fact that Congress expressly provided that the protections of Rule 45 should apply to Section 512(h) subpoenas, *see* 17 U.S.C. § 512(h)(6), RIAA has taken the position that it may obtain and serve a Section 512(h) subpoena from any district court in the country.

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In Verizon's view, Congress never intended to unleash a massive wave of subpoenas on public and private Internet service providers and their customers. This is not an effective solution to the very real problems faced by copyright owners, it only creates an additional level of problems for Internet service providers and chills the free exchange of protected content over the Internet. The use of the subpoena power in an attempt to create an *in terrorem* effect over the entire Internet is both improper and disserves the long-term interests of both copyright owners and Internet service providers. When Congress enacted the DMCA in 1998, it outlined a set of carefully crafted take-down duties for material hosted by service providers. Service provider duties were carefully calibrated to the service providers' involvement with and control over the particular material asserted to be infringing. Congress created a subpoena power to identify only those individuals who were directly linked to specific material residing on the service provider's network that could be "taken down." The language of the of the statute addressing the subpoena power makes three separate cross-references to notices and procedures that only apply in the context of material residing on a service provider's system or network.[5] The subpoena provision was never intended to apply to materials residing on the user's hard drive, such as e-mails, instant messages, or shared files *i.e.*, situations where the ISP is serving in a pure transmission or "conduit" role as described in the statute. By stretching the subpoena power to address a problem that was not before the Congress that enacted the DMCA, the district court has created a Frankenstein monster that Congress never contemplated and that has the potential to cause

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(Continued . . .)
Thus, in its view, it could seek a subpoena from the district court in Guam targeting a small service provider in New England.

[5] *See* 17 U.S.C. § 512(h)(2),(4) & (5). Indeed, the statute provides that a subpoena may only issue if "the notification filed satisfies the provisions of subsection (c)(3)(A)," *id.* § 512(h)(4), a provision that only applies in the context of material residing on a service provider's system or network. This limitation makes perfect sense in light of the fact that infringing material available on websites was the principal problem before the Congress that passed the DMCA in 1998.

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irreparable damage to public confidence in the privacy of Internet communications. Given the concerns the Congress expressed throughout the DMCA regarding the protection of the privacy rights of individual Internet users,[6] Verizon submits this is a clear perversion of Congressional intent.

Title II of the DMCA was designed to protect Internet service providers from copyright liability in order to promote the growth of the Internet as a medium of political, social, and economic exchange. But like the telephone itself, that medium depends upon the confidence of users in the privacy of their communications and communications habits. Every person in this room believes that his or her private e-mail or web browsing habits can and should remain private—yet the district court's erroneous decision in the RIAA matter has turned the DMCA into a direct threat to that privacy. It has also burdened Internet service providers with responding to thousands of subpoenas. From our own experience, we can tell you that RIAA's barrage of subpoenas has diverted and strained our internal resources. This new burden on service providers—responding to thousands of subpoenas issued in the conduit context—was never part of the statutory compromise embodied in the DMCA. It also threatens the limited resources of subpoena compliance units to satisfy legitimate law enforcement requests—as RIAA bombards service providers with dozens of subpoenas and purports to require responses on seven days or less notice. The protection of copyright, however legitimate a cause, should

[6] *See* 17 U.S.C. §§ 512(m), 1205. *See also* S. Rep. No. 105-190, at 18 (1998) ("[T]he committee concluded that it was prudent to rule out any scenario in which section 1201 might be relied upon to make it harder, rather than easier, to protect personal privacy on the Internet."). Ironically, the district court's decision in the RIAA case has constituted Section 512(h) as a far greater threat to personal privacy on the Internet than any of the technological copyright protection devices that the Committee was concerned about when it included Section 1205 in Title I of the DMCA.

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never be raised above law enforcement and national security efforts—efforts Verizon has always been in the forefront of supporting and cooperating with.

Both the district court in our case and the copyright owners have eschewed a more measured remedy that has always existed in the law and is used by numerous businesses for many purposes, the so-called "John Doe" lawsuit. Under this procedure, a judge or magistrate reviews the merits of a case before a subpoena is issued, and the defendant is given notice and an opportunity to contest disclosure. The law demands a reasonable investigation of the relevant facts, ownership of a valid copyright registration, and a complaint filed in compliance with Rule 11. Verizon has successfully used this process to sue unknown spammers who abuse our network. Despite the Recording Industry's assertions to the contrary, the filing of a John Doe lawsuit is much more protective of all parties' interests than the DMCA subpoena process.

Since RIAA launched its subpoena campaign, the DC Clerk's Office publicly complained that its internal resources were being burdened and the clerk's office had to re-assign new employees to the fulltime task of processing subpoenas on an ongoing basis. If the district court's decision in our case is not overturned quickly, it threatens to turn the Federal courts into free-floating subpoena mills, unhinged from any pending case or controversy, capable of destroying anonymous Internet communication, and threatening privacy and due process rights as well as public safety.

While Verizon firmly believes that this subpoena process and the tactic of targeting college students, universities, libraries and other individual Internet users is inappropriate and will lead to serious harms with little gain in copyright protection, Verizon recognizes that a more comprehensive and long-term solution is necessary. This Committee should promptly call the interested parties together, to negotiate and establish a balanced process that addresses the

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legitimate needs of copyright owners while respecting the fundamental due process and privacy rights of Internet users, and recognizing the capabilities and limits of Internet service providers in policing content not under their control. Indeed, this Committee recognized in its report on the DMCA in 1998 that technological rather than legal solutions constituted the best method of ensuring the lawful dissemination of copyrighted works in our new networked, digital environment. *See* S. Rep. No 105-190, at 52 (1998) ("The Committee believes that technology is likely to be the solution to many of the issues facing copyright owners and service providers in this digital age."). If some form of subpoena power is deemed necessary in conjunction with technological solutions, it must be more limited and contain substantial protections for both ISPs and their subscribers. Any compromise should include, among other requirements, notice to subscribers and an opportunity to defend against such subpoenas, a requirement that all the elements of copyright infringement be established, that the jurisdictional requirements of the federal courts be met, and that a judge approve any subpoena prior to its issuance, as well as penalties for any misuse of the subpoena process, full reimbursement of costs for Internet service providers, immunity for ISPs who provide customer information in response to valid subpoenas, and protection of confidential subscriber data from publication or other misuse. This Committee never had an opportunity to address and balance those interests in 1998 because the technologies at issue simply did not exist. It should do so now before irreparable damage is done to public confidence in the Internet as a medium of free expression and association.

I thank the Chair and the members of this Committee for your attention. We look forward to working with you to resolve this critical issue.

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S. HRG. 108–343

THE WORLDCOM CASE: LOOKING AT BANKRUPTCY AND COMPETITION ISSUES

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

JULY 22, 2003

Serial No. J–108–26

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Durbin, Hon. Richard J., a U.S. Senator from the State of Illinois	25
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah	1
prepared statement	99
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont, prepared statement	119

WITNESSES

Bahr, Morton, President, Communications Workers of America, Washington, D.C.	16
Baird, Douglas G., Vice Chair, National Bankruptcy Conference, Chicago, Illinois	17
Barr, William P., General Counsel, Verizon Communications, Washington, D.C.	10
Goldstein, Marcia L., Weil, Gotshal and Manges, LLP, New York, New York	13
Katzenbach, Nicholas DeB., Board Member, MCI Telecommunications, Ashburn, Virginia	12
Neporent, Mark A., Chief Operating Officer, Cerberus Capital Management, LP, New York, New York	20
Thornburgh, Richard, Bankruptcy Examiner, Kirkpatrick and Lockhart, LLP, Washington, D.C.	2

QUESTIONS AND ANSWERS

Responses of William Barr to questions submitted by Senator Hatch	41
Responses of Marcia L. Goldstein to questions submitted by Senators Feingold and Kohl	45
Responses of Richard Thornburgh to questions submitted by Senator Hatch	53

SUBMISSIONS FOR THE RECORD

Bahr, Morton, President, Communications Workers of America, Washington, D.C.	55
Baird, Douglas G., Vice Chair, National Bankruptcy Conference, Chicago, Illinois, prepared statement	60
Barr, William P., General Counsel, Verizon Communications, Washington, D.C., prepared statement	67
Durbin, Hon. Richard J., a U.S. Senator from the State of Illinois, letter and attachments	78
Goldstein, Marcia L., Weil, Gotshal and Manges, LLP, New York, New York, prepared statement	84
Katzenbach, Nicholas DeB., Board Member, MCI Telecommunications, Ashburn, Virginia:	
prepared statement	101
letter and attachments to Senator Durbin	114
Neporent, Mark A., Chief Operating Officer, Cerberus Capital Management, LP, New York, New York, prepared statement	121
Thornburgh, Richard, Bankruptcy Examiner, Kirkpatrick and Lockhart, LLP, Washington, D.C., prepared statement and attachments	131

THE WORLDCOM CASE: LOOKING AT BANKRUPTCY AND COMPETITION ISSUES

TUESDAY, JULY 22, 2003

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:23 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Kennedy, Schumer, and Durbin.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. Good afternoon. I apologize to you for being late, but we are way behind, and I got waylaid in the subway coming back, so I could not very well get here on time.

I am happy to welcome you all here to today's hearing, entitled "The WorldCom Case: Looking at Bankruptcy and Competition Issues."

I first would like to thank all of our witnesses today for their time and cooperation, and I hope that this hearing will help us better understand the WorldCom situation and its potential public policy implications.

Along with many Americans I am deeply concerned about the devastation caused by WorldCom's massive corporate fraud which has caused immeasurable harm to so many. While we cannot go back in time and undo what has already occurred, we are presented today with an opportunity. We have an opportunity to examine the WorldCom case and determine whether there are lessons to be learned with respect to our public policy going forward.

The focus of today's hearing will be two-pronged. First we will examine the WorldCom bankruptcy case and consider in light of the facts whether any changes in our current bankruptcy laws may be in order. Second, we will assess the implications of a reorganized MCI emerging from bankruptcy on competition in the telecommunications market. Here again we will examine and evaluate what impact if any this anticipated competitive landscape should have on public policy.

Some have raised fairness concerns that WorldCom will be able to emerge from bankruptcy with much of the fruits of its widespread fraudulent conduct intact. They argue that it will emerge from Chapter 11 with an enhanced market position relative to its competitors, giving it not only a fresh start, but a head start. They

believe that, in view of the WorldCom case, our bankruptcy system is set up to make crime pay.

Others contend that the MCI which will emerge from bankruptcy is a new entity with new leadership. They point to the extraordinary measures it has taken to prevent the recurrence of past misdeeds. They further argue that MCI will not have a meaningful competitive advantage from its Chapter 11 reorganization. And they argue that our bankruptcy laws appropriately are not designed to punish, but rather to permit a company to reorganize and emerge from bankruptcy as a viable entity.

As we move forward, I believe we need to have a full understanding of the WorldCom case to help us determine whether our bankruptcy laws are functioning fairly and effectively. We also need to understand the WorldCom case in order to conclude whether our policies are sufficient to enable the telecom industry to enjoy robust competition under fair terms that benefits consumers. No doubt, this is a complex case containing important issues deserving of examination.

We are fortunate to have highly-respected individuals here today to testify on these important matters. We will first hear from former Attorney General Richard Thornburgh, who is the Bankruptcy Examiner in the case. We are fortunate to have you with us, General Thornburgh, and of course I personally look forward to your testimony. I think others will also. I think there would be more here—and they will come later—but Paul Bremer is testifying in closed session, and I wish I could have made that myself, but I am very happy to be able to listen to you.

On our second panel we are honored to hear former Attorney General William Barr, the Executive Vice President and General Counsel of Verizon Communications; former Attorney General Nicholas Katzenbach, who serves on the Board of Directors of MCI Telecommunications; Marcia Goldstein of the law firm of Weil, Gotshal and Manges; Douglas Baird, Vice Chair of the National Bankruptcy Conference; and Mark Neporent, the Chief Operating Officer of Cerberus Capital Management.

I appreciate all of you appearing here today, and with that, we will start with you, General Thornburgh.

STATEMENT OF RICHARD THORNBURGH, BANKRUPTCY EXAMINER, KIRKPATRICK AND LOCKHART, LLP, WASHINGTON, D.C.

Mr. THORNBURGH. Good afternoon, Mr. Chairman.

I appreciate the opportunity to appear before you today in connection with my responsibilities as the examiner int WorldCom bankruptcy proceedings, the largest bankruptcy in United States history. To date, my examination, which began in August 2002 and continues to date, has resulted in two interim reports detailing my observations concerning the conduct of WorldCom management and others affecting the operations of the company. I anticipate filing a third report this fall. Today I will limit myself to summarizing for you the observations contained in my first and second interim reports, as well as describing the examination process itself.

On July 21, 2002, WorldCom and substantially all of its direct and indirect subsidiaries filed voluntary petitions seeking relief

under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. These positions came just four weeks after the company publicly disclosed on June 25, 2002 that it had discovered substantial accounting irregularities that would result in adjustments to its financial statements totaling more than $3.8 billion. The company restated an additional $3.3 billion in August 2002.

The day after WorldCom filed its bankruptcy petitions, Judge Arthur J. Gonzalez, the presiding Bankruptcy Court Judge, granted the motion of the United States Trustee for the appointment of an examiner pursuant to Section 1104(c)(2) of the Bankruptcy Code. On August 6, 2002 the Court approved my appointment as examiner. The Court's order provides that the examiner—and I am quoting the order—"shall investigate any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement or irregularity in the management of the affairs of [WorldCom] by current or former management, including but not limited to issues of accounting irregularities." The Court also directed me to coordinate with the United States Department of Justice, the United States Securities and Exchange Commission, and other Federal agencies investigating matters related to WorldCom so as to avoid any duplication of effort. Further, the Court ordered me to file a report regarding my examination within 90 days of my appointment.

Upon my appointment I promptly engaged professionals to assist me in discharging the broad mandate prescribed by the Court. I engaged my law firm, Kirkpatrick & Lockhart LLP, as my legal counsel, and engaged J.H. Cohn LLP as my forensic accountants and financial advisors. My professionals and I immediately set out toward our goal of assessing thoroughly, objectively and responsibly the acts and omissions of current and former management, as well as the integrity of WorldCom's management, its accounting and financial reporting processes and its corporate governance practices and internal controls.

Our investigation has been and continues to be multi-faceted. We have reviewed millions of pages of documents received from numerous sources and conducted or participated in scores of interviews of persons with relevant information. Our document collection efforts and interviews continue to date. I am pleased to acknowledge the cooperation of WorldCom and its counsel regarding these matters. I also acknowledge with appreciation the assistance provided by Hon. Richard C. Breeden, the Corporate Monitor, appointed by the United States District Court for the Southern District of New York in a proceeding commenced by the SEC against WorldCom. Further, in an effort to avoid unnecessary duplication of effort and expense, I note that we have maintained an active dialogue regarding matters related to our examination with counsel and financial advisors for the Official Committee of Unsecured Creditors in the bankruptcy proceedings, as well as the Special Investigative Committee of the Company's Board of Directors and its counsel and professionals, and KPMG LLP, the company's current outside auditors.

Consistent with the Court's initial directive, my professionals and I have also coordinated extensively with the Department of Justice, the SEC and other agencies that are investigating matters

related to WorldCom. We have refrained from publishing certain findings or results of our investigation in deference to those ongoing prosecutorial and regulatory inquiries, because those agencies have represented to us that such disclosures may adversely affect the process of determining possible criminal or other wrongdoing by persons involved in these matters.

Mr. Chairman, I respectfully request that you and other members of the Committee respect my inability to discuss these matters at today's hearing because of the related law enforcement and regulatory concerns. Similarly, I feel it would be inappropriate for me to discuss our ongoing fact-gathering efforts because any such comments may have a detrimental impact on our investigation. Accordingly, I will confine my remarks this afternoon to matters that have been addressed in my first and second interim reports of examination which are a part of the public record.

As I stated earlier, the Court initially directed that I file a report of examination within 90 days of my appointment. Pursuant to that directive, I filed my first interim report in a timely manner on November 4, 2002. The initial 90-day period obviously did not permit me the time necessary to explore all matters related to the conduct of WorldCom management. In addition, as I stated a moment ago, we omitted from the first interim report certain details, particularly items related to the specifics of the company's accounting fraud in deference to ongoing prosecutorial and regulatory interests. Therefore, the observations set forth in my first interim report were preliminary in nature. Nonetheless, as described in that report, a picture had already begun to emerge regarding the deeply problematic culture and lack of corporate controls at WorldCom.

After I filed my first interim report, my professionals and I continued our investigative efforts to advance the preliminary observations contained in that first interim report. My second interim report filed July 9, 2003, summarized my observations based upon this additional investigation. As stated in that report, the WorldCom story is not limited to the massive accounting fraud that has been publicly reported. We uncovered additional deceit, deficiencies and a disregard for the most basic principles of corporate governance. My observations in that report reflect a broad breakdown of the system of internal controls, corporate governance and individual responsibility, all of which worked together to create a culture which all too few individuals took responsibility until it was too late.

Our investigation reflects that WorldCom was dominated by Bernard Ebbers and Scott Sullivan, the former chief executive officer and chief financial officer of the company, respectively, with virtually no checks or restraints placed on their actions by the Board of Directors or other management. Significantly, although many present or former officers and directors of WorldCom told us that they had misgivings regarding decisions or actions by Mr. Ebbers or Mr. Sullivan during the relevant period, there is no evidence that these officers and directors made any attempt to curb, to stop or to challenge the conduct by Mr. Ebbers or Mr. Sullivan that they deemed questionable or inappropriate. Instead, as described in our reports, it appears that the company's officers and directors went along with Mr. Ebbers and Mr. Sullivan, even under circumstances

that suggested corporate actions were at best imprudent and at worst inappropriate and fraudulent.

There are many specific corporate governance failings identified in my first and second interim reports. I will highlight only a few examples for you this afternoon. First, we observed no meaningful deliberative processes related to the company's acquisitions. As stated in my reports, WorldCom's dramatic rise in stock value throughout the 15 years preceding its bankruptcy fueled numerous acquisitions that caused the company to grow tremendously in both size and complexity in a relatively short period of time. The company's approach to such acquisitions was ad hoc and opportunistic. Acquisitions were completed with little meaningful or coherent strategic planning. WorldCom management routinely provided the company's directors with extremely limited information regarding many of these acquisitions. In fact, several multibillion dollar acquisitions were approved by the Board of Directors following discussions that lasted for 30 minutes or less and without the directors receiving a single piece of paper regarding the terms or implications of the transactions. Significantly, although persons involved with the Board's consideration of some of these matters informed us that they were disturbed at the time, no director or anyone else voiced any objection to cursory considerations by the Board.

Second, the company's lack of internal controls infected its debt offerings and use of credit facilities. Indeed, there is no evidence that WorldCom management or the Board of Directors reasonably monitored the company's debt level or its ability to satisfy its outstanding obligations. Messrs. Ebbers and Sullivan had virtually unfettered discretion to commit the company to billions of dollars in debt obligations with virtually no meaningful oversight. WorldCom issued more than $25 billion in debt securities in the 4 years preceding its bankruptcy. With respect to such offerings, Messrs. Ebbers and Sullivan comprised the entirety of the company's price committee. The Board passively "rubber-stamped" proposals from Messrs. Ebbers or Sullivan regarding additional borrowing, most often via unanimous consent resolutions that were adopted after little or no discussion.

It seems clear that WorldCom's ability to borrow monies was facilitated by its massive accounting fraud, which allowed the company to falsely present itself as credit-worthy and "investment grade." It also seems clear that the company's ability to borrow vast sums allowed it to perpetuate the illusion of financial health created by its accounting fraud. As late as a few weeks before it disclosed its massive accounting irregularities, WorldCom used false financial statements to access all of a $2.65 billion line of credit, the proceeds of which it used to pay down another credit facility. As the company's treasurer candidly told us in an interview, WorldCom merely "robbed Peter to pay Paul."

Third, our investigation raises significant concerns regarding the circumstances surrounding the company's loans of more than $400 million to Mr. Ebbers. As detailed in my reports, the Compensation and Stock Option Committee of the Board of Directors agreed to provide enormous loans and a separate guaranty for Mr. Ebbers without initially informing the full Board or taking appropriate steps to protect the company. Further, as the loans and guaranty

increased, the Committee failed to perform appropriate due diligence that would have demonstrated that the collateral offered by Mr. Ebbers was grossly inadequate to support the company's extensions of credit to him, in light of his substantial other loans and obligations. Our investigation reflects that the Board was similarly at fault for not raising any questions about the loans and merely adopting the actions of the Compensation Committee.

I believe the loans to Mr. Ebbers are troubling for another additional reason. These extraordinary loans highlighted the extent of Mr. Ebbers' business activities that were not related to WorldCom. In my view, the Board should have questioned whether these non–WorldCom business activities were consistent with the need for Mr. Ebbers to devote his time and attention to managing the business of such a large and complex company as WorldCom. However, it appears that the Board did nothing to attempt to persuade Mr. Ebbers to divest himself of his other businesses or otherwise limit his non–WorldCom business activities. To the contrary, the Compensation Committee and the Board provided the massive funding that facilitated Mr. Ebbers' personal business activities.

Finally, the fact that WorldCom's accounting irregularities went undetected for so long provides further testament to the inadequacy of the company's systems of internal controls. The Audit Committee of the Board of Directors and the Internal Audit Department appear to have acted in good faith. To their considerable credit, they took significant and responsible steps once accounting irregularities were discovered in the spring of 2002. Nonetheless, it seems abundantly clear that the Audit Committee over the years barely scratched the surface of any potential accounting or financial reporting issues. Moreover, the Internal Audit Department adopted an operational audit function: that is, it focused its efforts on efficiency and cost savings concerns, rather than acting as WorldCom's "internal control police." Finally, it appears that the Audit Committee, the Internal Audit Department, and Arthur Andersen, the company's former outside auditors, allowed their missions to be limited and shaped by Mr. Sullivan in ways that served to conceal and perpetuate the company's accounting fraud.

All told, I believe that WorldCom's conferral of practically unlimited discretion upon Messrs. Ebbers and Sullivan, combined with passive acceptance of management's proposals by the Board of Directors, and a culture that diminished the importance of internal checks, forward-looking planning and meaningful debate or analysis formed the basis for the company's descent into bankruptcy. In many significant respects, WorldCom appears to have represented the polar opposite of model corporate governance practices during the relevant period. Its culture was dominated by a strong chief executive officer who was given virtually unfettered discretion to commit vast amounts of shareholder resources and determine corporate direction with only minimal scrutiny or meaningful deliberation or analysis by senior management or by the Board of Directors. The Board of Directors appears to have embraced suggestions by Mr. Ebbers without question or dissent, even under circumstances where its members now readily acknowledge they had significant misgivings regarding his recommended course of action.

Although the absence of internal controls and the lack of transparency between senior management and the Board of Directors at WorldCom does not directly translate to the massive accounting fraud committed by the company, I believe that these corporate governance failings fostered an environment and culture that permitted the fraud to grow dramatically. A culture and internal processes that discourage or implicitly forbid scrutiny and detailed questioning can be a breeding ground for fraudulent misdeeds. They also can beget ill-considered and wasteful acquisitions, improperly managed and unchecked debt and poor credit management, a lack of due diligence regarding personal loans made by the company to its chief executive officer, and an effective neutering of other gatekeepers, such as the lawyers, the Internal Audit Department and the company's outside auditors. In tandem with the accounting irregularities, these developments fostered the illusion that WorldCom was far more healthy and far more successful than it actually was during the relevant period. Ultimately, they also produced the largest bankruptcy in the history of this country.

With that, Mr. Chairman, I will conclude my introductory remarks. I thank you for the opportunity to address the Committee this afternoon. With your permission I will offer the summary sections of my first and second interim reports, which outline more fully my observations based upon our investigation, to be entered into the record as a supplement to my statement. Thank you.

Chairman HATCH. Thank you, General Thornburgh. Let me commend you for the work you are doing as the examiner in this case. As always you have demonstrated a commitment to finding out the facts in a careful, deliberative and thorough manner. I have to say the reports are valuable to this Committee as we examine this difficult issue.

Now, your reports carefully describe WorldCom's massive fraud accounting irregularities and a complete lack of basic principles of corporate governance. Some contend that the "bad apples" responsible for these problems have left or have been forced to leave the company. Would you briefly describe your findings to date concerning—you have given us the extent of the fraud and other problems with WorldCom, but I would like to know whether personnel who are responsible for these activities, are still with the company, in your opinion.

Mr. THORNBURGH. In the course of my duties as examiner and carrying out the Court's instruction to us in carrying that job forward, we have identified in our investigation individuals who were guilty of fraudulent, dishonest, incompetent activities and of misconduct, mismanagement and irregularity in the management of the affairs of WorldCom. That was what we were charged to do by the Court. Those persons identified in the two reports that I have rendered up to now in many cases have been the subjects of criminal proceedings or proceedings by the Securities and Exchange Commission, and a number of these persons have, to my understanding, been discharged or terminated by the company.

Our investigation proceeds, as I indicated. We are constrained in identifying any other potential subjects of this kind of activity we were directed to investigate by two limitations which I am sure you will understand. One is our deference to law enforcement authori-

ties who have requested in some cases that we not even interview individuals who are persons of interest to them in their investigation. Secondly, with respect to matters that are under way and will be spelled out in our final report, it would be premature to discuss or identify any of those persons.

All that being said, I think that the task of cleaning out the company is a business responsibility, one for the current management of WorldCom. Our job is to report the facts and to identify those practices and persons that come within the scope of the order entered by Judge Gonzalez in my appointment.

Chairman HATCH. I think that you have done some relative work in examining WorldCom's accounting and internal controls. What is your assessment of MCI's prior and current accounting and internal controls?

Mr. THORNBURGH. The examination that we undertook that resulted in our first report dwelt on a number of accounting issues. At that time we were requested by law enforcement authorities to forego any mention in our first interim report of any findings or conclusions in that respect. Since that time the Securities and Exchange Commission, the United States Attorney's Office in the Southern District of New York and the Special Committee appointed by the Board of Directors and its counsel and accountants have more or less carried the ball on the completion of those examinations, and mindful of Judge Gonzalez's admonition about duplication of effort, we have been content to monitor those ongoing efforts rather than run out to completion the initial work that we undertook last fall.

I think those accounting deficiencies have been pretty well chronicled to date with regard to the internal controls. The deficiencies that existed during the period in question on the part of the external auditors, Arthur Andersen, the Internal Audit Department and the Audit Committee of the Board of Directors have been set forth in great detail in the two reports that we have filed, and I think they provide a road map of precisely what went wrong in that regard.

Chairman HATCH. Let me just say, in your second interim report you observed that there is a great deal more to this story, and that you believe, "that the extent of the breakdowns that WorldCom will eventually be determined to extend even beyond the examiner's findings."

Without compromising your ongoing investigation, when do you anticipate that you will have a more complete picture of the problems at MCI/WorldCom?

Mr. THORNBURGH. We hope and expect to wind up our efforts by the end of September of this year. Let me develop a little bit more beyond the record and the order entered by Judge Gonzalez what our charge was from the Judge. First of all, and obviously, was to compile a history, if you will, of precisely what occurred within the company that brought it to its collapse, and that is really the prime narrative of the reports that we will file and will be completed we hope by the end of September. The second was to identify practices and persons responsible for the wrongdoing that we found, so as to ensure the bankruptcy judge that any plan of reorganization did not carry forward either those persons or those practices in any re-

organized company. The third is to identify potential causes of action against third parties or against insiders that will enhance the bankrupt estate and recover any ill-gotten gains.

In each of those cases our task, I am sorry to say, is not complete to the extent that we can give you a full and complete picture today, but I anticipate with the filing of our final report and the examination of the three reports in toto will give as good a record as can be compiled in each of those three areas and provide a basis for appropriate action by Judge Gonzalez as he requested.

Chairman HATCH. I understand that your investigation is still continuing, but do you believe that your final report will be completed before the bankruptcy court confirms its reorganization plan?

Mr. THORNBURGH. That of course we do not really have any control over because that is under Judge Gonzalez's jurisdiction. I hope that we will be able to proceed with dispatch, although I must say that recent scheduling problems for interviews and recent requests for documents have been a bit frustrating, and we are in constant communication with the company in order to try to speed that up so that we can meet whatever deadlines Judge Gonzalez feels are appropriate. As I said, we have had a lot of cooperation from all the parties involved here, but in order to finish our task within the parameters that permit the proceedings to go forward and ultimately determinate, we need to have that cooperation stepped up a couple levels.

Chairman HATCH. I want to thank you for being here. I appreciate your testimony and always appreciate having you appear before the Committee.

Mr. THORNBURGH. Thank you, Senator.

Chairman HATCH. Thanks my friend.

[The prepared statement of Mr. Thornburgh appears as a submission for the record.]

Chairman HATCH. Let me to go to the second panel. William Barr will be our next witness. He is the former Attorney General of the United States. He headed the Justice Department during the first Bush administration and brings a unique perspective on the telecom industry, given his previous position as General Counsel for GTE and his current position as the Executive Vice President and General Counsel for Verizon Communications. So we are happy to have you here, Attorney General Barr, and look forward to hearing your testimony here today.

Nicholas Katzenbach, I would like to welcome you to the Committee, yet another former Attorney General, Hon. Nicholas Katzenbach, held the top position at the Justice Department during the Johnson administration, and later served as Under Secretary of State from 1966 to 1969. Attorney General Katzenbach appears today in his capacity as a Board member of MCI.

Marcia Goldstein, we are honored to have you here as well. She a partner with the New York law firm of Weil, Gotshal and Manges. Ms. Goldstein is the lead attorney in charge of WorldCom's Chapter 11 reorganization.

Morton Bahr is the President of the Communication Workers of America. We are delighted to have you here and welcome you. CWA is America's largest communications and media union, rep-

resents over 700,000 telecom workers in the private and public sectors. We are just honored to have you with us, and we look forward to hearing what you have to say.

Douglas Baird. Mr. Baird is the Vice Chair of the National Bankruptcy Conference. NBC is a well-established nonprofit organization that has routinely advised us up here in Congress on the operation of the bankruptcy laws. So we are grateful to have you here to enlighten us.

Then Mark Neporent is the Chief Operating Officer for Cerberus capital Management. He appears today on behalf of the largest creditor for MCI, and as Co–Chair of the MCI/WorldCom Official Creditors Committee.

We are happy to have all of you here, and we will turn to you first, General Barr.

STATEMENT OF WILLIAM P. BARR, GENERAL COUNSEL OF VERIZON COMMUNICATIONS, WASHINGTON, D.C.

Mr. BARR. Thank you, Mr. Chairman.

MCI committed largest fraud in American history, inflicting the greatest harm on the greatest number of American citizens ever. I believe that the Federal Government's enforcement response to this has been the most shameful episode I have witnesses in 25 years in Washington, D.C.

The problem in my view is not with the bankruptcy laws. I believe the problem is the abdication of enforcement authorities. Have the enforcement authorities taken any action to strip away the fruits of the crime? No. In fact, they have left this company with virtually all of the fruits of the crime intact to deploy against law-abiding companies in the marketplace. Have they taken any action which would have been a matter of course to suspend the company from doing further business with the Government? No. In fact, they have radically expanded MCI's business with the Government in the months since the fraud came to light. Have they obtained meaningful restitution for the victims of this crime? No. In fact, restitution has been limited to three-tenths of 1 percent of the loss.

I believe that the problem here involves the intersection of two different and distinct bodies of law that have very different objectives in which the Government plays very different roles. The first of these is the bankruptcy law. Bankruptcy law provides the general rules for handling the estate of an insolvent company. Here, under bankruptcy, creditors are given priority, and obviously there is a lot of interest in conserving the assets of the entity. But when a company engages in criminal activity, criminal fraud, deriving substantial ill-gotten gains and business advantages at the expense of a variety of victims including shareholders and other companies, than a wholly different set of rules and laws and principles come into play, and that is the criminal enforcement process.

When a crime is committed the Government's interest is not in preserving the assets of the company that committed the crime and derived those assets through fraud. It is in securing the disgorgement of the ill-gotten gains through enforcement processes, and also it is not just directed at the interest of the creditors, it is directed at the interest of vindicating the interest of all of the

victims of the fraud. Title 18 makes this explicit in the criminal code where it says that these enforcement responsibilities of the Government take priority in bankruptcy. In other words if I was a massive con artist and went out and—and probate law provides a good analogy here because probate are the general rules that apply to the disposition of an estate when someone died—but if I was a massive con artist and part of my estate involved ill-gotten gains, money I had obtained through fraud, the Government does not waltz in and say, now the probate process takes over, now we are interested in conserving your assets and passing them on. No, the enforcement authorities sort out what goes into the estate and what does not, and the same is true with bankruptcy. If I was a con artist and did not die, but just declared bankruptcy, then it is no answer to say, well, gee, the bankruptcy process is now invoked. The person is in bankruptcy. Let the bankruptcy rules handle this. No. The Government's responsibility is the same. In other words, bankruptcy relates to the disposition of assets that are in the estate, but where a crime is involved, it is the responsibility of the enforcement authorities to determine what assets are fair to allow to go into the estate, and that is the threshold issue.

But what is happening here is that the Government has abdicated its responsibility and it is stumbling all over itself to meet MCI's timeline and private preferences as to how it wants to emerge from bankruptcy. It is interesting, we have a lot of bankruptcy aficionados here today, and it is always interesting to hear about bankruptcy, but it sort of misses the point which is the enforcement responsibilities of the Government. Bankruptcy does not provide the remedial scheme for crime. The enforcement authorities and the criminal laws provide the remedial scheme for crime. For people to come in today and say, well, the Government should only punish individuals. That is one proposition, the Government should punish individuals not the company; and the other proposition is: hey, under bankruptcy law creditors get everything. Therefore, you should not take any of the assets away from the company, you should leave it all for the creditors. That is clearly fallacious and I cannot imagine that any member of this Committee would embrace either of those principles. Enforcement is not just about punishment, as every of this Committee knows. Enforcement is about, in part, remediation, disgorgement of ill-gotten gains and restitution, dealing with the victims of crime. It is not a question of punishment. It is a question of the intervention of enforcement authorities to make sure that crime does not pay and ill-gotten gains are surrendered.

MCI is suggesting that we are here trying to force the liquidation of MCI, but in fact we are not. We do not care what result is ultimately reached in bankruptcy so long as the Government does a fair job with its enforcement responsibilities, and MCI is not able to use its ill-gotten gains to secure dishonest advantage in the marketplace, and it is very clear that the Government could do far more without denying MCI the opportunity to reorganize. Indeed, some of the major issues such as continuation of Government contracts and the use of net operating losses, that is, their claim that they should be able to operate tax free for the foreseeable future,

these are matters which they themselves say are not integral to their reorganization plan.

So, further, the amount of penalty that has been exacted by the SEC, as I said, is three-tenths of 1 percent of the losses, and is a tiny fraction of the amount of ill-gotten gains, and it leaves the company in a position where its debt-to-sales ratio is the lowest in the sector, 22 percent, compared to the average in the sector of 85 percent. So it is being put in an extremely advantageous position in the sector. None of the companies here today who are concerned with this—and I know I am speaking here not just for Verizon but for AT&T and SBC and Bell South. None of these companies are concerned about competing with anyone on an honest playing field. But what we object to and what should offend the sense of justice of this Committee, is that MCI, far from being punished and far from being held to account, required to remedy the consequences of its wrongdoing, it is being massive advantages over competitors and law-abiding citizens. That is not good for the employees in this sector. It is not good for the consumers in this sector. It is not good for the economy.

Thank you.

[The prepared statement of Mr. Barr appears as a submission for the record.]

Chairman HATCH. Thank you, General Barr.

General Katzenbach, we will turn to you.

STATEMENT OF NICHOLAS DEB. KATZENBACH, BOARD MEMBER, MCI TELECOMMUNICATIONS, ASHBURN, VIRGINIA

Mr. KATZENBACH. Mr. Chairman, my name is Nicholas Katzenbach. I serve as an independent member of the Board of Directors of MCI. I served as Attorney General from 1964 to 1966, and since leaving public service I have practiced law, including serving for 17 years as General Counsel of IBM.

I joined the Board of MCI in July 2002, and I served as a member of the Special Investigative Committee of the Board. Prior to that time I had no connection with WorldCom or any of its affiliates. I knew none of the directors, all of whom have since resigned. I knew none of its senior management, all of whom have since either been dismissed or resigned. I was not around the company in any way when its then senior management perpetrated the largest financial fraud in American business history.

In my written statement, which has been submitted to the Committee, Mr. Chairman, I describe at some length the measures that the new management under Michael Capellas has taken to overcome the legacy of gross misconduct. I have not seen the slightest doubt that we are succeeding in that effort, and it is gratifying to know that Judge Rakoff, who presides over the SEC suit against the company, agrees. In his recent decision fining the company he said, "The Court is aware of no large company accused of fraud that has so rapidly and so completely divorced itself from the misdeeds of the immediate past and undertaken such extraordinary steps to prevent such misdeeds in the future." That is the end of the quote. I do not think even our competitors question those efforts. I certainly hope not.

What they do seek is to inflict more pain on MCI, and if possible, I believe, to destroy the company. I think their real purpose is to reduce competition, but their ostensible reason to punish the corporation for past misdeeds. There is of course no way to punish an abstract legal concept. So the question is who? Which real people do they believe should be punished? Is it the 55,000 remaining employees of MCI who already have seen their jobs put at risk and their retirement savings driven toward oblivion? Or is it the stockholders whose investment has been totally destroyed? Or the creditors who financed this huge expansion only to see fraud destroy most of their investment? All these people are victims of the fraud, not perpetrators. The perpetrators are long gone, and they are defendants in the courts where they should be. Or is it the new management and the new board who are trying successfully both to make the company a model for ethical behavior and a successful competitor? Or is it our customers who are free today and should be free tomorrow to choose the most reliable service at the best price? Or is it, as I believe, simply a ploy to reduce competition and raise prices in troubled times at the expense of those who have already suffered far more than competitors have suffered?

I am not a bankruptcy expert by a long shot, but it seems to me that our competitors seek to amend those laws narrowly for no reason other than to enhance their competitive advantage. If they believe that those laws should be changed whenever the management of a company is guilt of fraud, they should at least be forthright and say so. Such changes would potentially affect companies in many diverse industries who are not here today to defend laws duly enacted by Congress. Such changes raise important policy questions which kicking around MCI's past management does not suffice to answer.

Mr. Chairman, I heard the eloquent statement of Mr. Barr, and all I can say is that what he describes as those ill-gotten gains are the loans that were made to MCI/WorldCom, which were made in part as a result of fraud. I do not see any pot of gold anywhere that is not before the bankruptcy court, and I think Mr. Barr would agree that all the assets are before the bankruptcy court. They are to be distributed there in accordance with law, in an effort to punish those to reward as far as it can, those who have suffered the losses from this fraud. Mr. Barr refers to the interest of justice, and quite frankly, Mr. Chairman, I cannot see how punishing innocent people who are not involved in the fraud serves the interest of justice in any way whatsoever.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Katzenbach appears as a submission for the record.]

Chairman HATCH. You are welcome. Thank you so much.

Ms. Goldstein?

STATEMENT OF MARCIA L. GOLDSTEIN, PARTNER, WEIL, GOTSHAL AND MANGES, LLP, NEW YORK, NEW YORK

Ms. GOLDSTEIN. Thank you, Mr. Chairman.

I am MCI's bankruptcy counsel, and I co-chair the Business, Finance and Restructuring Department at Weil, Gotshal and Manges,

which is the largest bankruptcy and reorganization practice in the country.

This is a hearing on public policy matters arising from the WorldCom Chapter 11 case. The company's competitors have called for MCI's liquidation or have demanded other punitive actions against the company. Verizon particularly has done so in written communications to Chairman Donaldson of the SEC, and in submissions to the District Court presiding over the SEC enforcement action and presiding over the recent approval of our settlement with the SEC.

My view is that these demands represent the narrow, competitive self-interest of MCI's long-time competitors and completely ignore the structure and goals of our bankruptcy laws. Let me state emphatically that as a matter of law the liquidation or forced sale of MCI is not an option here. MCI will emerge from bankruptcy consistent with its reorganization plan and the requirements of Chapter 11. The only parties who would benefit from a liquidation or forced sale would be MCI's competitors, not creditors, not shareholders, not employees, not consumers.

The Federal bankruptcy laws balance two goals: equal treatment for creditors of equal rank and the restructuring of a business to preserve jobs and to maximize return to creditors. At the heart of these goals stands the basic premise of bankruptcy policy, that when the going concerned value of an enterprise exceeds liquidation value, reorganization of the debtor will maximize return to creditors and lead to preservation of the enterprise.

Following the announcement of the accounting fraud last June, WorldCom turned to Chapter 11 in order to preserve value for its creditors. Just as the bankruptcy laws intended, Chapter 11 enabled WorldCom to obtain otherwise unavailable financing and the much-needed breathing room to develop and implement a business plan, provide uninterrupted service to its customers, and propose a plan of reorganization that is supported by 90 percent of its creditor constituencies.

Under Verizon's theory MCI should be liquidated, subjected to a forced sale, or otherwise punished, rather than reorganized to prevent it from benefiting from its pre-petition fraud. The theory, however, not only completely ignores the fundamental principles of Chapter 11 but also the realities of who the stakeholders are in this Chapter 11 case. The legislative history of Chapter 11 is clear that the creditors, the new owners of the company, should not pay for the fraud. Indeed, in this case, if any parties were the victims of the fraud who should receive the restitution that Mr. Barr talked about, it is the creditors who made loans based upon misleading financial information. Contrary to the premise of the Verizon theory, a Chapter 7 sale or a forced sale would not yield a fair result to either the company's employees or its creditors. Creditors would recover significantly less than under MCI's reorganization plan. In the scenario of a Chapter 7, and this is what was suggested to Chairman Donaldson in the letter from verizon back in March, financing would be cut off, trade credit would dissipate, new business would be highly unlikely, customers would be unnerved and the value and stability that has been achieved in the Chapter 11 state could precipitously decline. Most significantly,

creditors would have no vote as they would in Chapter 11, and as a natural result of consolidation, many MCI jobs would be eliminated. The notion that MCI would remain a going concern and employees would not suffer is just disingenuous.

Let us be clear: Verizon's proposed punishment, which as we have read would be a break up or forced sale of MCI, is only for its own benefit so that it can bid for MCI's business at a distressed value, and eliminate it as a competitor. This scenario demonstrates clearly why bankruptcy laws are not driven by the interests of competitors, but rather, by their nature, preserve competition. In addition, injured stockholders of MCI, many of whom are employees or were employees will receive compensation, including stock from reorganizes MCI through the settlement made with the SEC. However, the distributions contemplated by the SEC settlement would only be available upon completion of a successful emergency from Chapter 11. If Verizon gets its way, the shareholders would suffer as well.

Verizon and others have expressed the concern that MCI will emerge from Chapter 11 with a reduced debt load and therefore a competitive advantage. Such concerns are misplaced. Chapter 11 assists all debtors in restructuring a balance sheet when they cannot meet the debt load that they have. Over leverage was one of the problems that resulted from WorldCom's fraud, and lack of corporate governance as described by Mr. Thornburgh.

The proposed debt level for reorganized MCI, which is approximately $5.5 billion, represents about 41 percent of the post-bankruptcy value of the company. In contrast, Verizon's debt represents only 30 percent of the value of its company. We do not believe that that is necessarily a relevant measure, nor the measure of debt service to sales is a relevant measure for determining the ability to compete in a market. But if there is any competitive advantage based upon leverage, it clearly falls to Verizon. Further, in my experience, companies seek bankruptcy protection only as a very last resort, given the burdens, constraints and other negative repercussions of Chapter 11.

Mr. Chairman, I apologize, but I would just like to conclude with a final remark. The creditors of the company will be the new owners of a reorganized MCI. If Chapter 11 could not achieve this results, such creditors would be penalized twice, once by the losses resulting from WorldCom's pre-bankruptcy fraud and again by being denied recovery under the normal operation of the Bankruptcy Code. It is the protections and benefits of Chapter 11 that have enabled MCI to take the steps to emerge as a rehabilitated enterprise that has regained the confidence of its creditors, customers and employees. The context in which MCI cleaned house, settled with the SEC, developed a business plan, and negotiated a plan of reorganization with its major creditor constituents is the product of a balance Federal bankruptcy law. It should be commended. It should not be punished or otherwise denied.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Goldstein appears as a submission for the record.]

Chairman HATCH. Thank you.

Mr. Bahr, we will turn to you.

STATEMENT OF MORTON BAHR, PRESIDENT, COMMUNICATIONS WORKERS OF AMERICA, WASHINGTON, D.C.

Mr. BAHR. Thank you, Mr. Chairman, Senator Durbin.

WorldCom's bankruptcy was not the result of honest business mistakes or unforeseen economic conditions. Rather, it was the produce of persistent, pervasive and massive corporate fraud. WorldCom's Chapter 11 filing cost investors $200 billion, three times the size of Enron. WorldCom's lies and false financial reports destabilized the entire telecommunications industry.

I want to talk about the real people that General Katzenbach referred to. Tens of thousands of employees, not only at WorldCom but throughout the telecom sector lost their jobs and retirement savings, yet WorldCom is positioned to emerge from bankruptcy with perhaps the strongest balance sheet in the industry. This would cause further destabilization and job loss in the struggling telecom sector.

The victims of WorldCom's crimes are legion. Among the largest group are employee pension funds. Public pensions and Taft–Hartley funds lost at least $70 billion. Public funds in almost every State suffered staggering losses, $1.2 billion in California, $393 million in New York, $277 million in Texas, $23 million in Utah, to cite just four examples. I have attached a list of public pension funds losses by State.

State and local governments have been forced to make up for these losses by cutting vital public services. According to New York State Comptroller Alan Hevesi, and I quote, "Police officers, firefighters, teachers and other public servants have lost their jobs and public services have been diminished throughout New York State because of these financial losses."

Mr. Chairman, the damage does not stop there. More than 22,000 WorldCom employees lost their jobs, and thousands more saw their 410(k) retirement savings decimated. Initially, these laid-off workers were left with nothing, even as the new WorldCom Board agreed to pay its new CEO $20 million over 3 years. The AFL–CIO came to their aid, and won minimal severance benefits of $5,000 each.

WorldCom employees were not the only telecom workers who saw their livelihoods and careers collapse. How can an honest company compete with WorldCom's $11 billion in counterfeit earning? Imagine that you are AT&T or Sprint, bidding against WorldCom. AT&T and Sprint have to price the bid to cover costs, plus a reasonable profit, but WorldCom could low-ball the bid, get the contract and then cover the losses by cooking the books. When WorldCom's fraudulent accounting was revealed, AT&T's Vice Chairman said, and I quote, "We were constantly dissecting all of the public information about WorldCom and we would scratch our heads and try to figure out how they were doing it."

Trying to match WorldCom's cost structure, AT&T turned to cost cutting. AT&T told us it had to downsize half of the employees who took care of the network, maintained the network, to make it line up with WorldCom. During the period of WorldCom's corrupt practices, AT&T eliminated 18,000 jobs represented by our union. These job cuts devastated individual workers and their families.

Let me read from just one letter written by Laura Unger, the CWA Local president in New York City. "AT&T told us it had to downsize half of the employees that took care of AT&T's network to make it line up with WorldCom's financials. Cost cutting was accomplished in several ways: layoffs, office consolidations and so-called voluntary terminations. My local had over 800 members in 1999. By the spring of 2002 it was under 400. An office was moved from New York City and consolidated with another in White Plains to cut costs. In order to keep their jobs many members added over 2 hours to their daily commute. One member was leaving at 5:00 a.m. every morning to get to work. This winter he died suddenly of a heart attack at age 47. His wife attributed it to the extra strain of traveling so far every day." I have attached letters from CWA leaders across the country with similar stories to my testimony.

WorldCom is using the bankruptcy proceeding to shed more than $27 billion in debt and to avoid punishment for its crimes. Absent meaningful penalties, WorldCom is positioned to emerge from bankruptcy with the best balance sheet in the business. Employees at companies that played by the rules will once again be victims of aggressive cost cutting setting off another destabilizing cycle of job loss throughout the industry.

Mr. Chairman, to date WorldCom has received paltry punishment for its crimes. The $500 million SEC cash settlement plus $250 million in stock is less than the cash penalty imposed on junk bond trader Michael Milken in the 1980's.

Some argue that higher penalties would prevent WorldCom's emergence from bankruptcy, and this in turn would hurt the company's remaining employees and customers. This argument fails on at least three counts.

First, our bankruptcy laws were not designed to shield criminal companies from punishment.

Second, WorldCom could sell assets. There are buyers who would continue WorldCom's operations and provide stability to WorldCom's employees.

Third, in today's marketplace long distance customers have many choices. Wireless plans and the Bell companies' bundled offerings would be the driving force behind price competition, not WorldCom.

No company including Enron has done as much damage to the American economy. The Federal Government must send a clear message that it will not coddle the poster child of corporate crime. It is long past time for the Government to suspend WorldCom from Federal contracts and prevent its unfair use of tax loopholes.

Thank you.

[The prepared statement of Mr. Bahr appears as a submission for the record.]

Chairman HATCH. Thank you, Mr. Bahr.

Mr. Baird, we will take your testimony.

STATEMENT OF DOUGLAS G. BAIRD, VICE CHAIR, NATIONAL BANKRUPTCY CONFERENCE, CHICAGO, ILLINOIS

Mr. BAIRD. Mr. Chairman, I am grateful for the opportunity to speak on behalf of the National Bankruptcy Conference.

We should not underestimate the harm done in the name of WorldCom before it filed for bankruptcy. Fraudulent conduct disrupted the lives of thousands of workers both at WorldCom and elsewhere. Moreover, this conduct likely caused others to invest billions of dollars on telecommunications equipment that no one needs. The frauds and other crimes committed by WorldCom's former managers give rise to a large number of issues in many areas of the law.

I have been asked to focus narrowly on the bankruptcy issues raised by WorldCom. I make two points. First, we should be mindful of the central concern of bankruptcy law. When a firm's finances become hopelessly confused, we need to make sure that the assets of the firm are preserved and put to good use rather than broken up piecemeal. Second, we want to make sure that any bankruptcy reforms made because of WorldCom take account of other bankruptcy cases. These include the bankruptcies of firms that were victims of the fraud committed by WorldCom.

Let me elaborate first on the need to preserve assets. Bankruptcy law fully respects the legal rights of those who have recourse against WorldCom's assets. These include competitors to the extent they have causes of action under non-bankruptcy law. Moreover, bankruptcy law does not and should not affect the regulatory sanctions WorldCom must face for these past transgressions. The job for bankruptcy law, given all this, is to ensure that WorldCom's assets are not destroyed in the process of holding those responsible for the frauds and other crimes they committed. We use WorldCom's fiberoptic cables every day as we access the Internet and place a phone. WorldCom still employs thousands who keep this vast network up and running. It makes no sense to rip up that cable or tear out those phone lines because of what was done in the name of WorldCom in the past.

Imagine I commit a crime with a car. Now, I of course should be held accountable. I should not be able to keep the car. But we should not destroy the car. Destroying the car does nothing to help the victims of the crime. Indeed, preserving the car may be the only way we can compensate the victims for their loss. In the end we can punish only people, not assets. You can imagine Chapter 11 at that part of the law that is worried about the car as opposed to the criminal who used it. Bankruptcy law allows the assets to be used productively, while allowing the bad guys to be punished and the victims to obtain redress. Chapter 11 creates a forum in which the assets of troubled firms can be kept together rather than scrapped.

Now, there are different ways of doing this.

In many large Chapter 11's a firm can be sold as a unit. In others, there is not a formal sale of the firm. Instead, a new capital structure is put in place, and those with rights to the assets, rather than getting cash, get interest in the reorganized firm. But in the end these two routes are the same. These two routes both allow the assets to be used productively. Both allow the on-the-ground people to maintain those assets and to keep their jobs. Both allow victims to be compensated. The choice between these two routes depends on what is best for the investors, fraud victims and others with

rights against the firm. In short, bankruptcy allows us to make the best of a bad situation.

WorldCom, I should say, does present some peculiar challenges. For example, in part of because of WorldCom's bad behavior but also because of technological innovation, much fiberoptic cable throughout the telecommunications industry lies unused and will remain dark forever.

Hard regulatory issues need to be sorted out by virtue of this overcapacity that is now in the system. These issues, however, are not bankruptcy issues. Chapter 11 focuses only on a particular firm and asks whether that firm going forward can succeed, notwithstanding its troubled past. What do we do with the car, assets, now that the car is in the hands of new owners? Bankruptcy judges are poorly equipped to decide how to make an entire industry work better. Bankruptcy judges are not regulators and they should not be regulators.

I focused on bankruptcy issues narrowly, but I think bankruptcy law may offer one broader lesson. After all, Chapter 11 has had to deal with fraud from the time of Charles Ponzi to the present day. Bankruptcy suggests that solutions to industry-wide problems should be forward looking. If we are to use Government regulation to solve the problem of overcapacity, we should ask what regulations make the most sense for consumers today and for consumers tomorrow. We should not focus on bad acts committed in the past. Again, we have to separate the car from the driver.

I conclude with a brief note about S. 1331 and the treatment of net operating losses on consolidated returns. We have a tax code that treats related entities as a single entity for some purposes but not for others. Sorting through what type of treatment, whether it should be treated as one or many separate firms, has proved enormously complex. S. 1331 addresses a question that is currently unsettled. This is the question when there are consolidated returns should net operating losses of one entity be reduced when another related entity has cancellation of indebtedness income? S. 1331 provides that net operating losses should be reduced in these cases. This is a reasonable position, and this indeed may be the law today.

I would urge caution however before legislating this change. This question arises all the time. It applies to many firms. It affects WorldCom but it also affects firms that are in bankruptcy that may have been the victims of WorldCom. In some cases reducing net operating losses of related entities makes intuitive sense. In others it makes no sense at all. The tax treatment of consolidated returns is an intricate web. You cannot pull out one thread and expect nothing else to change. In my written statement I identified one technical problem, but there may be others. This kind of change—and again, it would be a reasonable outcome—is a change that the experts on the Joint Committee on Taxation should vet carefully before you proceed.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Baird appears as a submission for the record.]

Chairman HATCH. Mr. Neporent, we will turn to you.

STATEMENT OF MARK A. NEPORENT, CHIEF OPERATING OFFICER, CERBERUS CAPITAL MANAGEMENT, LP, NEW YORK, NEW YORK

Mr. NEPORENT. Mr. Chairman and distinguished members of the Committee, thank you for the opportunity to express my views and the views of the Official Unsecured Creditors Committee in MCI's Chapter 11 case at this hearing.

My name is Mark Neporent and I am the Chief Operating Officer of Cerberus Capital Management, one of the largest creditors in MCI's Chapter 11 case. My firm, together with its affiliates, manages funds and accounts with committed capital exceeding $9 billion. Our investors includes insurance companies, pension funds, endowments, institutions, wealthy individuals and many fund-to-funds.

I have personally been engaged in the business of restructuring and reorganizing companies, both large like this one, and small companies, as a practicing lawyer and as a principal, and I have observed the delicate balancing of policy and law that occurs in this process. I am also the Co–Chairman of the Official Unsecured Creditors Committee in MCI's case. The committee, as the statutory representative of all unsecured creditors, represents creditors across the entire MCI corporate structure with aggregate claims exceeding $40 billion.

MCI's creditors, employees, customers and public policy are best served and protected by adherence to the process envisioned by and incorporated in the Bankruptcy Code. Ms. Goldstein has already described today the two separate and distinct policies that have long guided this process in the United States. They are, one, a fresh start for financially distressed companies, and two, the equality of treatment of creditors. These policies, while designed to protect two different albeit converging interests are equally important to the success of the Federal bankruptcy regime. Taking punitive action against MCI, as suggested by Verizon and others, will only undercut the policies underlying the Bankruptcy Code and its role in our economy. These actions will harm, not help, the very parties and interests that these policies were designed to protect, the victims here, the creditors.

Bankruptcy long ago lost its stigma and it is now widely recognized as a legitimate and sometimes necessary corporate strategy in the context of our capitalist system. As noted in a recent news article, scores of businesses, some of them icons of American industrialism, have gone through bankruptcy and emerged to become strong, vibrant concerns, employing millions, offering consumers a wide variety of desirable goods and services. Texaco, Remington Arms, Continental Airlines, Southland Corporation's 7–11 stores, these companies have all gone through this process and been restored to viable business enterprises.

MCI's bankruptcy case is an excellent example of how the policies underlying Federal bankruptcy law are being implemented effectively to take what is a truly tragic situation and salvage the maximum possible value for the true victims of this fraud, again, the creditors.

MCI was forced to seek bankruptcy protection in July 2002 due to the fraudulent activities of but a handful of its top executives.

Within a year of the filing, virtually all employees remotely connected to the fraud, and the entire Board of Directors, had been fired or replaced. A dynamic new CEO has been hired to lead MCI out of the woods, and its financial management team has been completely rebuilt. All parties have worked closely with Hon. Richard Breeden, the former Chairman of the SEC, to shape and ensure that MCI will emerge from bankruptcy as a model of good corporate governance and a good corporate citizen.

A number of MCI's competitors have asserted that it should be punished for the crimes of its former executives by being either forced to liquidate or restricting its ability to obtain and serve its Government contracts. This is the equivalent of the corporate death penalty, capital punishment for the transgressions of a few rogue executives. In doing so, those opposing MCI's reorganization ignore a fundamental policy of Federal bankruptcy law, the protection of the creditors, the real victims here, which include numerous individuals, banks, pension funds, insurance companies and endowments, who had nothing to do at all with the fraud perpetrated by these few senior executives.

MCI's reorganization plan provides creditors with a much greater chance of recovery than does liquidation. MCI's going-concern value is estimated to be approximately 12 to $15 billion, while its liquidation value is estimated to be only $4 billion. Within 9 months after this filing, representatives of virtually all of MCI's debt have quickly and efficiently resolved their differences exactly in the manner contemplated by the Bankruptcy Code, and have given their support to MCI's reorganization plan.

Mr. Chairman, this would be remarkable in any case, but it is especially so in this case, the largest bankruptcy case in history. The only parties who will benefit from MCI's liquidation are its competitors and related powerful special interest groups. These competitors have enjoyed decades of unchecked monopolistic advantage as the mega combinations of the past. Monopolies, which built their franchises in an environment protected from competition, now rather than face MCI head-to-head on the competitive landscape, they seek to eliminate the competition and destroy creditor value with misplaced and misguided attacks on innocent creditors, employees and customers.

I note that the recently enacted Sarbanes–Oxley Act of 2002 has reaffirmed the policy of allowing corporations to attain relief from claims arising from fraud, while revoking that privilege for individuals. This underscores an important distinction that has already been made here today between the individual corporate officers that commit a fraud and the corporate entity and creditors that they victimize.

I see I am virtually out of time, Mr. Chairman, so let me say that MCI's new management, the Board, and the creditors Committee have worked tirelessly for more than a year to provide the building blocks for the emergence of MCI from bankruptcy and a chance to recover some of the billions of dollars that have been lost at the hands of a few dishonest and misguided executives.

This Chapter 11 case is an exemplar of how Congress envisioned the Bankruptcy Code to work. I can tell you from two decades of personal experience, it does not often work this well. The company,

its employees, its creditors, the Federal judges supervising this case, and the system are to be commended. The self-serving attempts by MCI's competitors to force liquidation find no support in the law, public policy or common sense, and should be dismissed.

Thank you again, Chairman Hatch and distinguished members of the Committee for allowing me to share my views.

Mr. Chairman, with your permission, I would like to submit my full written testimony to the record.

Chairman HATCH. Without objection we will take all the full written statements as though fully delivered.

[The prepared statement of Mr. Neporent appears as a submission for the record.]

Chairman HATCH. Mr. Barr, let me turn to you. Some have suggested that MCI/WorldCom's past frauds have had a direct impact on bursting the telecommunications bubble. As a competitor in the market, can you describe what impact the WorldCom fraud had on the actions of your company and others in the telecommunications industry? And if you care to—and I want to give the same rights to Mr. Katzenbach or Ms. Goldstein—comment on what you have heard here today from those who disagree with you.

Mr. BARR. Yes. If I could start with the latter part of the question and then work my way around to the bubble.

Chairman HATCH. Sure.

Mr. BARR. In our criminal justice system we recognize two kinds of misconduct by corporations. One is where there is in fact a rogue employee, who for self-serving reasons, to benefit themselves, commits a violation. In that situation the company is viewed as a victim. In the other situation, as where the acts are committed to benefit the company's business, in that situation the company is not the victim. They are the beneficiary of the fraud. It might do well to remember why do people commit corporate crimes other than of the latter type, that is, to benefit the corporation? Why do they do it? They do it to hurt competitors. That is the reason they commit the fraud in the first place.

So if I go out and steal $15 billion from a bank, and I set up a business, and I use that cost-free money to me to set up a business, what am I doing? I am stealing customers, I am stealing business, from competitors. So there are two sets of victims, there are the people I stole the money from, and then there are the—the reason I stole that money is to deploy it to hurt other companies and to gain advantage over those companies.

There are two sets of victims. Now, we have no problem with the creditors getting paid money for their losses, but what is wrong here is for the creditors to waltz in as if they are the only ones that have been hurt by this, and says, you know what? That looks like a good deal. This company is set up with cost-free money. We want a piece of that action.

What justice requires and what enforcement requires, and what that means in this situation is that they are getting the premium for the crime. They are the participants after the fact and the beneficiaries of the fraud, and the continuing injury is done to competitors in the marketplace. So I make no apology for being a competitor in the marketplace. We are the obvious victim of the fraud, and we, like they, are an entity. So who are the victims? It is our em-

ployees and our shareholders, and we are standing up for them, and we do not want them to continue to be victimized for the benefit of vulture funds.

Now, turning to the bubble. This is another very severe injury done to our economy by WorldCom and by the senior leadership of WorldCom, who for years put out statements that the Internet was doubling, traffic was doubling every 3 months, and that combined with their own fallacious revenue reports, led to a lot of investment in long-haul fiber, $50 billion of misinvestment, largely driven, in my view, by the false public statements of high-level WorldCom executives. This is all laid out in a very good article by Greg Sidak over at AEI, which I call to the Committee's attention. So that is even another example of the damage done to our sector and to our economy by this company.

Chairman HATCH. Mr. Katzenbach or Ms. Goldstein?

Mr. KATZENBACH. I will be very brief. I must say that I was amazed to hear that Mr. Ebbers and Mr. Sullivan were acting for the benefit of the company. That is something I had never perceived before. I think they were acting for their own benefit, for the millions of dollars which they got out of this purported success for an enormous ego trip that they were on, and I think that is why they acted.

I was also happy the Mr. Barr at least acknowledged that his purpose was liquidation. He had not said that as precisely before. He just does not want—

Mr. BARR. I did not say that.

Mr. KATZENBACH. Yes, you did. You did say that. You said that the purpose was to punish them in a way—it is all right for the creditors to get money, but they could not get back into the market.

Mr. BARR. Nick, not punishment. To surrender the ill-gotten gains. That is called justice.

Mr. KATZENBACH. The ill-gotten gains? You are talking about the money that the creditors lent because of the fraudulent representation of Mr. Ebbers. Those are the ill-gotten gains.

Ms. GOLDSTEIN. Mr. Chairman, I would like to also make a few comments on that point. Mr. Barr makes the analogy of stealing from a bank and having cost-free assets to run a company. That is not what happened here. There is no cost-free money here. The company, as a result of the acts of its prior management, poor corporate governance, ended up in a very over-levered situation. At the same time creditors were defrauded. They were the parties who lent the money to WorldCom during this frenzy of the telecom bubble. So I would like to address at both times the question of the telecom boom and WorldCom's part in it, and also who are the victims and what is the proper way to proceed to punishment.

There is no theft here that is cost free. As I said, there was a fraud, an accounting fraud. Creditors lent money. The company became over leveraged. What is the ill-gotten gain? The ill-gotten gain, as Mr. Katzenbach said, was the money taken from creditors, not from competitors. Those same creditors were also investing in the competitors. Shareholders were also investing in the competitors. WorldCom was not responsible for either the boom or the bust in the telecom industry. There were a number of economic issues that were taking their toll on the overall telecom market, and that

had much more to do with just WorldCom and its particular fraud in the accounting area, and the telecom bust occurred well before WorldCom announced and discovered its fraud.

The problem here, Mr. Chairman, and other members, is that the company is in part the victim. Even as Mr. Thornburgh described, the frenzied acquisitions undertaken with insufficient corporate governance, who is the victim today of assets that this company overpaid for substantially when we look at those transactions in hindsight and look at the real value of the assets that this company has.

The fraud overinflated the company's earnings. It resulted in unnecessary and over leverage. The company is now reorganizing. It has to make restitution, but it has to make restitution to the parties who were injured in the first instance. That is the creditors. The creditors lent the money.

The other point to make here is there has long been a distinction between the bankruptcy of an individual who commits a fraud—that individual cannot obtain money by purposes of fraud and then discharge that debt in bankruptcy. But the policy that this Bankruptcy Code enacts is very different for the corporate entity that has been involved in a pre-petition fraud. The creditors of that company are not the perpetrators of the fraud. They are not, as Mr. Barr suggests, the beneficiaries who are going to run off with a premium. They are not going to recover more than 100 percent here, indeed far less. The creditors become the new owner of the company, so the company will be sold, maybe not sold to a competitor, but it will be sold to a new owner, the group of creditors, who in exchange for the indebtedness that was incurred by WorldCom from them will now become the shareholders of this company.

I would like to quote, if I may, from the legislative history of this Bankruptcy Code. "A corporation which is taken over by its creditors through a plan of reorganization will not continue to be liable for obligations arising from the corporation's pre-petition fraud, since the creditors who take over the reorganized company should not bear the burden of acts for which the creditors were not at fault."

This is the core of a number of provisions in the Bankruptcy Code, including the distinction between individuals who commit fraud and a corporation that commits fraud. It is also notable that Section 510(b) of the Bankruptcy Code requires the subordination of securities fraud claims to the claims of creditors in the same class. The defrauded security holders have other remedies that are being pursued. There are many, many class actions here, and it is not the normal creditors who extended credit, made loans to this company, who should pay for the fraud committed vis-a-vis these defrauded security holders. The individuals responsible are being sued. They are being pursued by the criminal authorities and rightly so. That should not interfere with the transfer of ownership under the plan of reorganization that has been—

Chairman HATCH. My time is up, but I want to give Mr. Barr a chance since both of you have testified, to say anything he wants to say.

Ms. GOLDSTEIN. Sorry, sir.

Mr. BARR. Yes. This notion that the creditors are the only victims here is just nonsense, and I will give just one very tangible example why the existing business, the customers and the network, are not all the assets of the creditors here. During the time of this fraud WorldCom's business in Government contracts went from $122 million to $1.2 billion, increased ten times, tenfold, its business with the executive. But for the fraud they were not qualified for that business. If their true financial picture had been presented to the Government, they could not have gotten that business. They lied to the Government and they increased their business by $1.2 billion. Now, who would have gotten that business? That is money out of the pocket primarily of AT&T. That is business stolen from AT&T shareholders by this fraudulent company, and those customers, the Federal Government, exists today. That business exists.

So to say that, gee, we want an interest in this thing because we were the only ones hurt, is simply wrong.

Chairman HATCH. Senator Durbin?

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you, Mr. Chairman. I am listening to this and it sounds like a very high-level seminar involving a law school and a business school. Perhaps I can bring this discussion to a little bit different level for a moment. I think we all can see the obvious, the commission of the largest corporate fraud in history, $11 billion. I guess what we are trying to determine is whether or not MCI/WorldCom has been unjustly enriched because of that situation, because of that fraud. I think that is an important question. We certainly know the victims. They include not only creditors, they include people in my home State who had pension funds invested in MCI/WorldCom. Illinois looks like they had State pension fund losses due to their fraud, $65 million; State bankruptcy claims in Illinois filed in the case, $145 million; in overall State residents' 401(k) funds lost due to the corporate fraud, $8.6 billion. So there is a human side to this story.

But I guess I will go over to your point, Mr. Barr, this concept of justice, and what does the Government owe its citizens in terms of the enforcement of justice, and the best we can do is to take a look at illustrations. After the Enron scandal, clearly something had been done which was egregious and demanded a response, and before the first Enron officer was indicted, this administration, this Department of Justice, brought criminal action against Arthur Andersen. The net result of it, corporation based in my home city of Chicago, my home State of Illinois I should say, was that some 18 to 20,000 people lost their jobs. No one ever suggested they were all guilty of wrongdoing. Only a small number may have been. The net result of it is they were all out of business, they were all out of work, before the first Enron official was even indicted.

Now let us look at the other side of the ledger at MCI/WorldCom. $11 billion in accounting fraud with the creation of the trillion dollar bubble that the Chairman mentioned, the loss of 500,000 jobs or more in the industry. And what was the net result for MCI/WorldCom? It appears that they have done quite well. It appears

that their approach is, everybody has a bad day. And now they have even reached the point where they are not only not subject to criminal action to this point, but are being rewarded by this administration with sole source contracts in Iraq.

I would like to ask Mr. Katzenbach or Ms. Goldstein, can you explain to me why we should set an example where a corporation on one hand is guilty of the worst corporate fraud in the history of the world, and then is rewarded with a $45 million sole source contract by the Government that is supposed to police that kind of activity?

Mr. KATZENBACH. Yes, I will certainly try to, Senator. Let me be absolutely clear, I agree with you in every respect about the nature of the fraud, about the way the company was run, about the horrors that took place, about the losses that people made in it. All of that you and I are totally in agreement with.

And the question is, as you put it, what do you do about that? Now, the thing that I think you do not do about that is what you just suggested with Arthur Andersen, you do not punish people further. You do not punish the employees who were not involved in this by putting this company out of business. You do not punish the creditors who were the ones that were defrauded, in my view. There is not much point in talking about the stockholders. They have not got much left, although they might have a little bit out of this if in fact it was successful. You are sort of saying that there is some big bonanza that somebody got here? Who? Who got it? I do not know anybody that got it. The creditors are the only ones that could even be conceived as getting it, because they are not the stockholders.

Senator DURBIN. Mr. Katzenbach, let me ask you this. In terms of Government doing business with the private sector, do you feel any price should be paid by MCI/WorldCom for the largest corporate fraud in the history of the world, or it is just business as usual? They should be allowed to not only bid on contracts, to be favored with sole source contracts in Iraq and the like. Is that not sending a message that corporate misconduct of historic proportion is not even a factor in terms of how you will be treated by our Government?

Mr. KATZENBACH. Let me see if I cannot answer that, because the way in which you put it is that somehow or other you can punish MCI/WorldCom without punishing all these other people. I think that is what you are saying, I can do that in some way which does not punish the employees, does not punish the stockholders, does not punish the creditors, does not punish the new management, does not punish the customers of this.

Now, let us turn to the Government contracts issue which is the other issue. I think it is still a punishment if you take that away and give it to competitors, although I can see that competitors would like it. But who is that a punishment of? It is the same people we were just talking about. May I just say parenthetically, that was not a sole source contract in Iraq.

Senator DURBIN. It is my understanding that it was, but I will stand corrected.

Mr. KATZENBACH. It was not.

Senator DURBIN. Who else bid on that contract?

Mr. KATZENBACH. It was an Australian company that bid on it. AT&T bid on a contract in conjunction with the other company.

Senator DURBIN. I stand corrected on that. I thought that it was.

Mr. KATZENBACH. That is my understanding.

Senator DURBIN. It is my understanding that—

Mr. KATZENBACH. It is a classified contract, and I cannot get into it any deeper, even if I knew, which I do not.

Senator DURBIN. I just say that it is my understanding that then Eriksson, the foreign corporation, was turned to by your company to perform under that contract. So, obviously, a lot remains—

Mr. KATZENBACH. As I understand it, they have performed a number of these kinds of contracts.

Senator DURBIN. Mr. Chairman, I will just conclude.

And thank you very much for your response, and say try to rationalize the treatment of Enron, Arthur Andersen and MCI/WorldCom. Try to rationalize the Government response to these three corporations, and tell me that we have established any meaningful standard of conduct, any meaningful punishment for misconduct. I just cannot find any linkage within this administration which gives me comfort that justice is being served.

Ms. GOLDSTEIN. Senator Durbin, I would like to take a shot at trying to rationalize the treatment of those three entities if the Chairman would permit.

Chairman HATCH. That would be fine, but let us give Mr. Barr equal time.

Mr. BARR. Well, let me just say that I think—

Chairman HATCH. Well, let her do it, and then you can sum up. I mean I just want to make sure this is balanced, and I think so far that seems to be.

Ms. GOLDSTEIN. Thank you very much, Mr. Chairman.

Arthur Andersen was indicted criminally for obstruction of justice. That is a very, very different scenario from what we have with respect to WorldCom. This company has fully cooperated with all of the authorities conducting investigations. When it learned of the accounting improprieties, the company immediately came forward to the SEC, and ever since then it has cooperated with the SEC, it has cooperated with the examiner, it has cooperated with the United States Attorney's Office for the Southern District of New York, it has cooperated with the Justice Department.

I would just like to refer to Judge Rakoff's opinion in which he approved our recently-announced settlement with the SEC. The SEC should not be blasted, as Mr. Barr has done, for not taking enough action. The monetary penalty is not everything here. In fact, the SEC is very clear that this is the largest monetary penalty in corporate history. It will actually get some money to the company's stockholders by virtue of the cash and stock, $750 million, that will be set aside for that purpose.

And just as an aside, with respect to the pension funds, Senator, the pension funds are among the creditors that I referred to who have been injured here. If MCI is not allowed to reorganize, they will be hurt twice, just like every other creditor, once by the fraud, and then by virtue of the fact that the company is not allowed to reorganize in the best way it can for creditors, and as the pension funds of Illinois, and the pension funds of New York, and many

other pension funds, are very large creditors who would be hurt if we cannot reorganize in the way proposed.

But the SEC, as Judge Rakoff commented, said that the way the SEC has proceeded here is not just to clean house but to put the company on a new and positive footing, not just a monetary fine, he points out. They are not just enjoining future and violations, but trying to take WorldCom and create a model of corporate governance and internal compliance for this and other companies to follow.

Pursuant to the consent order, Senator, WorldCom has to adhere to and establish the highest ethical standards on an ongoing basis. It has established an Office of Ethics. It has established a mandatory training program, educational program for its officers with respect to, and to assure that these ethical standards are maintained. This company and this bankruptcy—the company's fraud and the bankruptcy are unprecedented in many ways, the largest corporate fraud in history, the largest bankruptcy in history, but also, as Judge Rakoff points off, few if any companies have ever been subject to such wide-ranging internal oversight imposed from without, but to the company's credit it has fully supported to corporate monitor's efforts and the strict discipline thereby imposed. Even the appointment of a corporate monitor is unprecedented in a situation like this.

This company has done everything possible to cooperate with all the law enforcement authorities to totally clean house and go beyond just firing the culpable, but to establish itself as a good corporate citizen.

Chairman HATCH. Mr. Barr?

Mr. BARR. I will just focus on what Senator Durbin was talking about which was the Government contracts. In my view, the administration is flouting the requirements of law in Government contracts and it is a disgrace. Congress has clearly provided in law that to do business with the Government is a privilege, and the burden is on the company of establishing that it has a satisfactory record of business ethics, and that is the language in the statute, and the burden is on the company. If there is any doubt, the call goes against the company. There is no way that MCI could establish a satisfactory record of business ethics. Even if you just put aside their past misconduct, this is a company that cannot even file a public financial statement because they do not have sufficient confidence in the integrity of their data. This is a company whose own auditors just came forward, KPMG, and said they still do not have sufficient controls in place. So under statutory standards they should not be doing business with the Government, and yet the Government continues to throw contract after contract on them. Contrast that to Enron. Within a split second almost of them being put under investigation, they were suspended by the GSA. Andersen, suspended by the GSA. To say there is a double standard here is an understatement.

Chairman HATCH. Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

I thank all of the witnesses. As the Committee looks at this issue, we are obviously concerned about bankruptcy laws. We have jurisdiction on those issues. We are concerned about competition.

We have important responsibilities on those issues, tax law, what the implications are going to be.

It seems to me you have a remarkable combination of a variety of different forces that are taking place here, just in following these arguments.

I would like to come back to questions for Mr. Katzenbach. We have not had the completion of the report ordered by the bankruptcy judge, but as we understand from Attorney General Thornburgh's presentation earlier that is going to be wrapped up in the fall. Mr. Katzenboch, How can you be so sure in terms of the representations that you are giving to the Committee that all of the challenges which the MCI was faced with during this area in terms of fraud, that all of the circumstances which might have gotten contracts based on fraudulent information, all of these elements, how can you give the assurances to the Committee that all of these issues have been resolved to your own kind of satisfaction? How much weight can we give to that?

Mr. KATZENBACH. I think you should give considerable weight not to what I say, but to what has been done. I think that will be up to the two judges are sitting in bankruptcy, to determine whether that has been done.

In terms of the employees that have gone, let me speak to that because I was on the Special Investigative Committee. I should say that because of the difficulty of getting law firms that did not have conflict, the investigation is being done by more than one law firm. For the special committee, we used Wilmer, Cutler, Pickering and Bill McLucas, head of the group, to investigate all of the fraud connected with the finances of the company. When Mr. Capellas came in he said he wanted zero tolerance as far as people were concerned. Anybody who was connected with this, he wanted out. We did that with Wilmer Cutler, and I and two Board colleagues, plus the monitor, Mr. Breeden, spent two full days going through the history of everybody who was identified as even a possible person involved in this fraud. I think we were very tough because if any one of us thought somebody should be discharged, that person was discharged without argument. So at least in terms of a pretty thorough investigation, I feel pretty confident about that.

As far as other areas are concerned, we were not involved. Mr. Thornburgh was responsible for looking at other areas and any misconduct there. Mr. Capellas went to him and said, if you come across anybody whom you think has been engaged in any bad conduct, I want their names, and you tell me what they have done and they are out. Mr. Thornburgh—this is not a criticism—Mr. Thornburgh, I think he felt his responsibilities were primarily to the court and not to MCI/WorldCom, so he declined to do that.

But when anybody was mentioned, as they were, in his report, they left, rightly or wrongly. I am concerned because I think we may have been tougher on some people than fairness and justice would have required. But because of the past of the company we felt, and Mr. Capellas felt, there could be no doubt about what we did. That is a long answer, I know, but that is one that worries me. It is awfully hard to look at a company so dominated by a couple of people without any way of getting out the truth except to go to

the Board of Directors, perhaps, who was also dominated by the company.

As far as processes are concerned, we worked very hard on that with KPMG. I think by the time we come out of bankruptcy we will have controls in the financial area that are as good as or better than any other company that now exists. If we do not, we should not be allowed out of bankruptcy, and that will be for the judges to look at and to evaluate.

Senator KENNEDY. I gather from what you have told us, you are satisfied from your own personal knowledge that all of the fraud was discovered, and you are satisfied that all of the employees that were involved in the fraud have left the company, and you are telling us that all of those who might have known about the fraud have left the company.

Mr. KATZENBACH. I think so. Certainly as far as the financial fraud I am talking about. There are areas that Mr. Thornburgh is investigating which could conceivably above fraud, and as to those I cannot make representations because I do not know.

Senator KENNEDY. What about a point that is made that at least some of the contracts that they are getting or that they might have received in the recent time may have been based upon conditions that are in place now that are based upon some illicit activity, and therefore given them some kind of unfair advantage over their competition?

Mr. KATZENBACH. I do not think they had any unfair advantage over the competition. The Government is free, in these cases, if they do not want the contracts, do not like the contracts, and do not believe that they are being well served by the company, they can avoid the contracts, as can private concerns. The fact that big users, private and public, have considered—have stayed with MCI, I believe, is because not only do they have well-performed at a good price, but in fact, and I think this is generally known, Senator, but in fact, in terms of outages which are of great concern to an intelligence agency, for example, MCI is very significantly lower than anybody else in this industry. It is technologically good.

Senator KENNEDY. Is there anything you want to add to that, Mr. Bahr?

Mr. BAHR. I would just comment on the last statement by General Katzenbach. As I said in my testimony, because of its corporate fraud, MCI/WorldCom was able to low-ball the bid. When you had AT&T and Sprint bidding, they had to come in with a bid that was competitive, that had a reasonable profit, and here we had WorldCom able to come in and low-ball the bid because later they cooked the books.

What we have now in the Federal Government are contracts that WorldCom still has that were gained during the time of this fraud, and now the argument is, well, if you discontinue MCI/WorldCom, there will be an enormous expense to put a new carrier in. But I would just like to make one other comment. We heard Mr. Barr refer as to how quickly the Government moved to debar or suspend from Federal contracts, Enron and Arthur Andersen. Somehow we are being told that this bankruptcy is different.

We heard Mr. Baird here say that the guy that was driving that automobile should be responsible for the accident, but do not de-

stroy the automobile. I do not see the analogy. First of all, that automobile never disadvantaged other automobile drivers, nor letting it still operate would further disadvantage. The testimony by Mr. Neporent, giving us other bankruptcies, or when Continental Airlines went into bankruptcy, prior to that bankruptcy they did not cook the books to the point that it caused other airlines to stress, caused layoffs in other airlines, or when they came out of bankruptcy, which they did not get in because of massive corporate fraud, were they at a much greater advantage than the other competitors and airlines. So I think that the case is not made to treat WorldCom differently than other bankruptcies.

Senator KENNEDY. Chairman, my time is up. Can I put a statement of Senator Leahy in the record, be placed in the record? Thank you.

Chairman HATCH. Without objection, we will do that.

Ms. GOLDSTEIN. Mr. Chairman, may I respond to the comments made by Mr. Bahr to my left?

Chairman HATCH. Sure. Let me just make a point. Senator Schumer has indicated he wants to come through. I will give him 5 minutes. We are going to recess unless he gets here, because I do not know whether he is coming or not. I just want to make that clear, so please get Senator Schumer here if he wants to question.

Go ahead.

Ms. GOLDSTEIN. Yes. I just want to get back to the issue of Government contracts and compare the situation of WorldCom to Enron and Arthur Andersen. Arthur Andersen was suspended from Government contracts because it was indicted. Enron, immediately upon commencing its Chapter 11 case, rejected its Government contracts and then was suspended. WorldCom, on the other hand, has been working with the GSA, cooperating with its inquiry, and has been performing and performing well under its Government contract, so it does stand in a different situation than both Enron and Arthur Andersen.

Also I just wanted to clarify a point raised earlier with respect to the bidding on the Iraq contract, and I would like to add to the record an article dated June 9th from the Bloomberg Press, which indicates that a company called Telstra, which is Australia's largest phone company, bid together with AT&T Corporation to build that mobile phone network in Iraq, so it was bid on by a coalition between Telstra and AT&T, and I just wanted to clarify the record on those two points.

I thank you very much, Mr. Chairman.

Chairman HATCH. Thank you. We have just a few more minutes we will give Senator Schumer to get here.

But, Mr. Bahr—

Senator SCHUMER. I am here, Mr. Chairman.

Chairman HATCH. I am glad to see you got here.

You know, I appreciate your observations about the impact of WorldCom fraud on employees of the telecommunications industry. As you know, District Judge Rakoff recently approved the civil fine and settlement between WorldCom and the SEC, and in his ruling Judge Rakoff, as I understand it, noted that a harsher penalty would unfairly punish WorldCom's employees. Now, could you help us to know what your feelings are with regard to how you reconcile

CWA's advocacy of stiffer penalties against WorldCom with the findings of Judge Rakoff? I think that is important for the record, and I want to give you that chance.

Mr. BAHR. I appreciate that, Senator. I think if our assessments are correct, and assessments largely outside of the WorldCom family, that MCI coming out of bankruptcy, largely free of debt, creates more instability in the telecom sector that really cannot stand it, that there will be employees laid off, that they will be employees of the companies that played by the rules.

We certainly do not advocate any worker getting laid off anywhere, but if there had to be a choice of who has a job, it should be those workers who work for companies that are law-abiding and that play by the rules.

On the other hand, there are companies that are willing to buy the assets and would guarantee the stability of employment of MCI's employees. So there are alternatives. I admit no easy answers, but alternatives.

Chairman HATCH. Senator Schumer, we will turn to you.

Senator SCHUMER. Thank you, Mr. Chairman. I appreciate you waiting for me. Most of the questions I was going to ask were asked already, but I have a few that I would like to ask. I thank this distinguished panel for being here.

The first question I have is the settlement. As most of you know, I was very worried about the SEC sort of giving WorldCom a slap on the wrist situation. At the end of the day they did more than many people had feared, maybe not enough for some. Can I get a general view of what people thought of the settlement in terms of how fair it was? You do not want to be punitive. At the same time you want to make sure wrongdoing is punished. If people regard this kind of massive fraud as a cost of doing business, we have not done much good in this country. So I will just go right down the line.

Mr. BARR. Senator, I think it was grossly deficient. It was not just a question of punishment, because as you know, enforcement is not just about punishment but making sure that people do not enjoy the benefits of the crime, disgorgement, restitution for victims. Here they did not go nearly far enough, and in fact, explained themselves by saying, well, even if we should have gone further, we really cannot, because we are worried if we push it too far, this is a civil proceeding and we may drive them into liquidation.

But the law specifically provides that if the SEC does not believe that it has the civil tools, then it should refer it to the Department of Justice who has the criminal tools, and notwithstanding the misstatement of law earlier by Marcia Goldstein. Criminal forfeiture, disgorgement, penalties are not dischargeable; they take priority, which is clear recognition in the law that enforcement comes first, decides what is fair to leave in the estate, and then bankruptcy comes second, which determines how that state is split up.

Senator SCHUMER. Mr. Katzenbach?

Mr. KATZENBACH. I have already spoken on that, so many times, Senator, all I will say to you on this is we could live with that because it did not put us out of business. I think anything more would have been punitive. That was also the opinion of Judge

Rakoff. Got it as 250 million, and then said anything more than that is punitive and will put them out of business. That is the wrong—

Senator SCHUMER. Do you think it compared fairly, given the amount of fraud, to other settlements?

Mr. KATZENBACH. Yes. But that amount of fraud is so great, you know, you could boil the ocean and then not satisfy people on that amount of fraud, I agree. But who was involved in that, they are gone.

Senator SCHUMER. Ms. Goldstein.

Ms. GOLDSTEIN. Than you, Senator Schumer. First, I would like to address what Mr. Barr said was a misstatement on my part, which was not. I was referring to the provisions earlier, Senator, in the Bankruptcy Code, that distinguish individual bankruptcy under which a indebtedness incurred by reason of fraud would not be dischargeable.

Mr. BARR. That is only civil.

Ms. GOLDSTEIN. It is not clear, frankly, because I have done a lot of work in this area, that even a criminal penalty would be non-dischargeable in the corporate case. There is a complete discharge, and there is no case and no statute that is clear, and I would admit, Mr. Barr, that there is some open issue as to the status of a criminal penalty in a corporate bankruptcy. But clearly, penalties associated with the commission of a fraud, indebtedness associated with the commission of a fraud, are clearly dischargeable in bankruptcy.

And I would like to turn now more directly to Senator Schumer's question about the SEC settlement. That settlement itself is very controversial because it demonstrates to some extent the conflict between securities law enforcement and the Bankruptcy Code, and I think that the settlement is fair. It is still subject to approval in the bankruptcy court, and I believe that the bankruptcy court will approve this settlement because it balances the enforcement power of the SEC versus the goal of bankruptcy, which is to pay creditors in the order of their priority and rehabilitate the company.

Senator Schumer, earlier I mentioned that it is the creditors who will become the new owners of WorldCom, so I think we have to bear in mind that this large penalty, as $750 million recovery against a $2.25 billion fine will be paid and it will be a reduction in the potential recovery of the innocent creditors who did not commit the fraud. Now—

Senator SCHUMER. But if you had a sort of classic law school rascal case, the creditors are probably more to blame, although admittedly—

Ms. GOLDSTEIN. If the creditors were a party to the fraud, we might have a different instance here, but I think here—

Senator SCHUMER. Do they not have some kind of watch dog responsibility?

Ms. GOLDSTEIN. I do not think that a lender has ever been held responsible for the accounting fraud of the party who effectively obtained loans based on fraudulent financials from the particular lender or investor.

Chairman HATCH. Senator, would you yield on that?

Senator SCHUMER. I yield to my good friend, Orrin.

Chairman HATCH. Let me just ask you this. Is there not some responsibility on the creditors' part to investigate why they rose the debt so much, and loaned so much money?

Ms. GOLDSTEIN. I think that—

Chairman HATCH. Let me ask you further. In that regard—and I am sorry to interrupt you, Senator, but this is something that has bothered me. In that regard, how much of the total debt of WorldCom will be discharged in bankruptcy, and then how much will remain after? I have heard various figures. I would just like to know for myself, but those two questions I would like you to answer. It seems to me some of the creditors, to give that kind of money, if it is as high as I have heard it is.

Ms. GOLDSTEIN. Let me explain a little bit about the plan of reorganization that was negotiated with the creditors.

Chairman HATCH. Would you answer that other question too?

Ms. GOLDSTEIN. The indebtedness owed to WorldCom's creditors at the commencement of the case is approximately $40 billion.

Chairman HATCH. Do you not think that is awfully high, and do you not think the creditors have some responsibility to be sure that the money they are lending is—

Ms. GOLDSTEIN. The creditors, I would say 30 billion of that or I would say 27 billion of that is institutional debt, bond holders, bank debt, and I would say, Senators, that those institutions do due diligence and make a credit assessment. I know for certain that banks take their loans up through a credit Committee and do a credit analysis of the company that they are making loans to, and there is information when bond debt is issued in the high yield market, through a prospectus that describes the financial condition of the company. The fact is that at the time some of this debt was issued, not all, for example, you have a $2.6 billion issue of debt at MCI, MCIC, which is one of the subsidiaries, that is issued before 1996. So I would say that with respect to that debt, there were no fraudulent financials. That is outside the parameter.

So we are looking at the more recently issued debt of the WorldCom entities.

Senator SCHUMER. Which is how much of the total?

Ms. GOLDSTEIN. Which is at least $11 billion out of the $27 billion total that was issued during the period of fraud. It may be more. It may be $18 billion.

Senator SCHUMER. It is a lot.

Ms. GOLDSTEIN. It is a lot. But those creditors, Senators, did not have the information that would enable them to understand that these books were cooked.

Senator SCHUMER. Ms. Goldstein, what Orrin is saying and what I am saying here, or just asking, frankly, is that nobody is saying the creditors committed the fraud, encouraged the fraud, participated in the fraud. But these are all these bankruptcy proceedings, and all of these are very difficult balancing acts, and in the law we often hold that somebody who is not fully to blame, but might have been more in a position to do something to stop it, not being fully culpable, but not being fully removed, should suffer more than somebody who is totally removed, let us say one of Mr. Bahr's union members who is in another company that is competing, or I guess a stockholder would be more directly involved, per se, even

if it is a small little stockholder, than a debtor, but a worker. I mean we do not have any—what about all the workers who lose their jobs and things like that, their pensions, et cetera?

Ms. GOLDSTEIN. Let me make a few comments on that. Most of the creditors in this case will receive a recovery which we estimate to be 36 cents on the dollar. So it is not as if they are running off with a lot of money here. They are being punished. They have suffered dramatic losses, and that includes the pension funds who hold bonds in this company. So to take further punishment against the company, which would reduce recoveries even more, would be very hurtful to those parties, including pension funds.

Senator SCHUMER. Okay, I have it. So you are saying the market punishment suffices.

Ms. GOLDSTEIN. There is tremendous market punishment.

Senator SCHUMER. Do you agree with that, Mr. Bahr?

Mr. BAHR. Senator, WorldCom acquired $17–1/2 billion of assets through the use of its inflated earnings, so taking away a half a billion still leaves 17 billion.

But as I stated in my testimony, the cash penalty was larger against Mr. Milken than against this company.

Chairman HATCH. Would the Senator yield?

Senator SCHUMER. I will be happy to yield.

Chairman HATCH. Of the $40 billion how much of that would be dischargeable in this bankruptcy? At least approximate it.

Ms. GOLDSTEIN. Okay. All of the 40 billion will be dealt with in the bankruptcy. The company will emerge with 5.5 billion in new debt that will be issued to these creditors, and the creditors will receive the balance of their recovery in stock. Some trade creditors will also receive a cash payment.

Chairman HATCH. But virtually all of the $40 billion except for the 5.5—

Ms. GOLDSTEIN. Will be exchanged for stock and notes, that is correct.

Senator SCHUMER. So they did not lose as much as you were first saying if the company comes back and does great?

Ms. GOLDSTEIN. The valuation of the company that is projected on its emergence is only $12 billion.

Senator SCHUMER. Yes, but they have equity and—

Ms. GOLDSTEIN. They have equity, and if the company can perform, and compete in an environment vis-a-vis their much larger and better positioned competitors. I pointed out earlier, Senator, that on emergence MCI will come out with $5.5 billion in debt vis-a-vis a value of $12 billion. It is about 41 percent. If you look at Verizon's debt, for example, that represents about 30 percent of the company's value. So from who is more leveraged, frankly, even on emergence from bankruptcy, MCI will be.

Chairman HATCH. Senator, would you yield again?

Senator SCHUMER. You are the Chairman.

[Laughter.]

Chairman HATCH. I am grateful you would yield, but these are problems that bother me.

You indicated that there would be a competitive disadvantage in your testimony, General Barr. And you have indicated that

Verizon, for instance, would have an advantage from a debt-to-capital ratio, I guess. I am not sure. But who is right here?

Mr. BARR. How do people pay off debt? They pay it off with money coming in the door, and money coming in the door, your revenue, your sales, that is a hard and fast thing that you can count and see. The proper way of measuring your leverage is the ratio of your debt to the money coming in the door, your sales, and that is a figure that, as I say, the average in our industry is 85 percent, and they are coming out with 22 percent.

The problem with a debt-to-equity ratio is how do measure equity for WorldCom? They do not have financial statements out in the public. They can pick any number out of the air.

Chairman HATCH. They have all these assets that they have developed, right, minus the debt?

Mr. BARR. Right.

Chairman HATCH. Does assets—

Mr. BARR. What is the value of the equity? I do not how to value the equity except sell—

Chairman HATCH. Some would say $40 billion. I do not think that is accurate. I guess I am asking what would be accurate.

Ms. GOLDSTEIN. I would like to address that. First of all, by saying what is our equity, we do not have financial statements, we have an approved disclosure statement in the case with financial information and a valuation done by the company's financial adviser, Lazard Freres and Company.

The historical financials do not bear on the valuation of the company's assets today, and so that valuation, which is approximately $12 billion, is based upon information that has been available to creditors, indeed to Verizon as well, and has been approved as adequate information for creditors to make a decision.

Chairman HATCH. So assuming that you have about 5.5 billion in debt and the assets are worth about 12 billion, to use your figures, how does that compare to other companies in the industry who claim that they are going to be disadvantaged by the reduction of $35 billion approximately in—

Mr. BARR. Their equity value is based on a series of their own projections, which they have been changing almost on a weekly basis. They do not have accurate financial statements. The equity number is a number you can game, but cash in the door is not.

Chairman HATCH. But, General, are you not saying that because of the huge discharge in bankruptcy, whatever that number may be, but starting with 40 billion, whatever it is below that, that all the other companies are stuck with their high debt for putting in infrastructure and so forth, and that WorldCom will only have 5.5 billion and yet will have all the infrastructure that at least some of the $40 billion built?

Mr. BARR. What I am saying is, especially when you have stolen assets—

Chairman HATCH. I mean am I right in that?

Mr. BARR. The only way you can get fairness here is to make sure there is a real cost basis to the property that is being used by MCI going forward, a real cost basis that puts real constraints on their business. And when companies like Verizon and AT&T build network, we spend real money, and we have to recover that

in our prices. They are coming in here with made-up numbers as to their equity and what their costs are, and huge debt relief. So the only way to put the stolen assets, particularly, here, because—I am not complaining about the operation of bankruptcy law. What I am complaining about is its operation in tandem with forgiving their continued possession of tainted assets. The only way is to put a real cost basis on those assets. I have no problem if they want to borrow the money and pay the creditors cash.

Mr. NEPORENT. Mr. Chairman, maybe I could address that for a moment. I guess I am a little bit confused by Attorney General Barr's analogies. I mean nobody disputes that $40 billion has gone into this company and been lost. Nobody disputes, and in fact the creditors agreed, that 35 of that $40 billion is going to be converted to equity. The valuation of that equity can be determined on very standard market metrics, multiples of earnings before interest and taxes, many other metrics, which incidentally is also the way that Verizon's equity is valued including the way that the public markets value the equity, so there is really no confusion here. The value of the equity can be measured coming out based on metrics that financial professionals can agree upon. The cost basis is fairly obvious. We know how much money has gone into the company; creditors' claims have been reconciled.

So it is really quite simple. The dollars that purchased those assets were the dollars that were invested by the real creditors, by the victims of this fraud.

Mr. BARR. Look, either your equity is based on the market, and you can look at our stock and what it trades for and see what it is, or what he is saying is it is based on historical numbers. But then their historical numbers are garbage.

Mr. NEPORENT. No, Senator, that is not what I am saying. I am saying that our numbers are based probably—I think on the last year's worth of revenues, the last year of earnings before interest and taxes. There is a track record of this company post-fraud. There is a projection. There is a core business operation that can be measured, and those are the numbers that are being used to measure this equity value, not the completely different business that existed before the company was reorganized, simply not the case.

Ms. GOLDSTEIN. Senator, I would like to make one other point here. Verizon has suggested that the proper measure is to look at the debt of the company as compared to its sales, but that really is meaningless. If you ran a company for sale and did not factor into it other parts of the picture such as costs, such as EBITDA, you could run a company to the ground based on the amount of sales. In fact, I was confused earlier by Mr. Morton Bahr when he said that the company had ill-gotten gains because we could underbid on a contract. The company probably found itself, as we did when we reviewed these as bankruptcy counsel, with many, many contracts that they had to reject because they were just not profitable.

Let me get back to debt and compared to sales. Sales is not a meaningful figure here. If you look at MCI's revenue, half of that revenue gets paid to local exchange carriers, so you really cannot look at it that way. The other point to make here—

Mr. BARR. Wait a minute. Excuse me. That is a ludicrous argument. Everyone has expenses, and we collect a lot of revenue that we have to pay out to expenses including companies like MCI.

Ms. GOLDSTEIN. But that is my point, Mr. Barr.

Mr. BARR. So it is ludicrous to say that if your revenue includes expenses, it is not a legitimate—

Ms. GOLDSTEIN. That is my point, Mr. Barr. Let us look at Verizon's margin and let us look at MCI's margin. That would be a little different. What I am saying is, is that sales cannot be looked at in a vacuum, and you could argue that yours is a better way to look at it, and I could argue that debt-to-equity ratio is a better look at it, but the fact is, that if you actually look at the debt service as a debt service number, how much does Verizon pay in interest as compared to its revenues, or how much does any of these other—of the other RBOCs such as SBC pay in interest as compared to its revenues, you would see that this is a very small fraction. We are dealing with numbers of 5 percent and under. So whether we are having a competitive advantage really is not going to be determine on the level of debt here.

Mr. BARR. This is academic. There have been repeated statements by all manner of MCI officials about how lean, mean, fighting machine they are going to be when they come out, and how they will have competitive advantages, and they make them every day up to Wall Street in order to pump up.

Senator SCHUMER. Let me ask you this, Ms. Goldstein, and then I have one final question of Morty, of Mr. Bahr. We have two Barrs, only one is a member of the bar. Right? I think I am right about that.

Do you think that WorldCom should emerge from this with the same competitive—let us not say a greater competitive advantage? But there is the argument, do you think that WorldCom should emerge with the same competitive advantage, on equal footing with the other companies or not?

Ms. GOLDSTEIN. I am not convinced that based upon the plan of reorganization that WorldCom has filed that we are going to emerge with any kind of unprecedented and improper competitive advantage.

Senator SCHUMER. That is not the question I asked you.

Ms. GOLDSTEIN. Then I am not sure what the question is.

Senator SCHUMER. My question is not whether you should have an advantage, but is there not an argument that can be made that maybe you ought to have a disadvantage?

Ms. GOLDSTEIN. I think we already do have a disadvantage. WorldCom went into Chapter 11. Chapter 11 is not a desirable route for any company. I have been practicing in this area for 28 years. No company wants to be in Chapter 11. It carries with it, no matter what we say about the fact that there is not a stigma, it carries with it a number of negatives. Customers are concerned, particularly in a company which has to enter into long-term contracts. Trade creditors are reticent to extend credit. The company is totally disabled. WorldCom has been fortunate that it has been able to achieve stability—

Senator SCHUMER. The markets, if you have to go issue new debt, will the markets pay any attention to the fact that you have come out of Chapter 11?

Ms. GOLDSTEIN. I think the fact that we have just been in Chapter 11, the markets will scrutinize us very heavily in terms of—

Senator SCHUMER. Well, they will scrutinize everybody hopefully.

Ms. GOLDSTEIN. And the fact is that the success rate of companies coming out of Chapter 11 is not very good. I think only about 20 to 30 percent succeed, and there is a high level of return to Chapter 11. You are weakened by Chapter 11. We hope that WorldCom can pursue—and when Mr. Capellas says we are going to come out as a lean, mean competitive machine, what he is trying to say is, we are going to try and be competitive and succeed.

The fact is we have not changed our projections every week. The company put out a set of projections back in March that was associated with its April 15th disclosure statement. We did a supplement, and the company amended its projections. The amendment to the projection reflected a few things: the increase in the SEC settlement from 500 million to 750 million; but it also reflected a decrease in its EBITDA projections because of the competitive pricing that they have been experiencing recently with respect to bundled services. So MCI, in bankruptcy, where it pays no debt service, had to relook at how successful it could be because it is going to have to match the competitive pricing engaged in by competitors.

Senator SCHUMER. But that is true of any new company in the world.

Ms. GOLDSTEIN. I am not criticizing that. I am saying that is a fact.

Senator SCHUMER. One final question to my friend, Mr. Bahr, and this is a general question. We have lost 172,000 jobs in the telecom sector in the last 2 years. That is pretty huge. So my question to you is, in relevance to this, how do we grow those jobs again? How do we have telecom return to be the vibrant sector that it was in the 1990's, growing and creating new jobs and all of that?

Mr. BAHR. I think a good deal of the problem is a result of bad public policy by the FCC, starting in the previous administration and continuing into this administration. The order that we are expecting for the last two or 3 months from the FCC, which still has not come down, is going to prolong a good part of it. You cannot ask any company to invest in its business and then in the name of competition give it away below cost, and then still have the responsibility of maintaining the network.

So I think we are driven by public policy as well as a bad economy at this time, and the lack of investment.

Senator SCHUMER. You see it turning around in the near term?

Mr. BAHR. We always hope. I always have confidence in all these folks sitting here. We know that it is the companies that create the jobs, and our role is to try and work as best we can in the most cooperative way to help grow the business so that we have good jobs and good customer service, and thus impact positively on the economy.

Senator SCHUMER. I think you have done that. You have really tried to help whichever companies your members are part of. I have seen that.

Mr. BAHR. Thank you.

Chairman HATCH. I just want you to know you are my kind of union leader. I think you have done very, very well.

I appreciate all of you coming today. We hope this has been a balanced and fair hearing, and it has been very interesting to me, and we will all have to reassess and reevaluate, and we appreciate the information that you have given us today.

With that, we will recess until further notice.

[Whereupon, at 4:41 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

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August 20, 2003

VIA E-MAIL AND MAIL

Senate Judiciary Committee
Att: Barr Huefner
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Huefner:

Attached are answers to the questions submitted by Chairman Hatch to William Barr in connection with his testimony before the Committee on July 22, 2003.

If you have any questions, please let me know.

Yours truly,

John M. Goodman

Out-of-market competition

Q. Why hasn't Verizon entered and competed in the home market of another RBOC?

A. Verizon is actively competing in the home markets of other Bell companies, and has, for many years, been competing across the country against other incumbent local carriers in both the traditional local telephone market and in the wireless market.

In just the three years since the merger of Bell Atlantic and GTE that formed Verizon, the company has spent hundreds of millions of dollars to allow it to compete in providing both narrowband and broadband services in out-of-region areas. Pursuant to the terms of the FCC order approving that merger, the Commission has already has reviewed and confirmed more than $400 million of Verizon's out-of-region investment, and it is currently reviewing submissions documenting more than $150 million in additional out-of-region investment. And these sums do not reflect out-of-home-market activities by GTE and Bell Atlantic before their merger in 2000.

Verizon also competes with (and faces competition from) other incumbents in the wireless market. Verizon currently has over 35 million wireless customers nationwide, many of whom live in the home markets of other Bell companies. In growing numbers, wireless services compete directly with landline phones, diverting billions of minutes and millions of lines from incumbents' traditional local business. The wireless sector also has affected the pricing of landline services. For example, the bundled and flat rate packages that have become so prominent in the landline sector were influenced by and in many ways reactions to the marketing of wireless services. Verizon and the other incumbents thus compete against each

other, other wireless carriers, as well as other non-traditional alternatives to voice service, such as e-mail and instant messaging.

Increased FCC enforcement powers

Q. Would you agree[that FCC enforcement powers should be increased to maintain healthy competition envisioned by the 1996 Telecom Act]?

A. No. The FCC has ample enforcement authority, and uses it.

Q. Please comment on the following proposals to strengthen FCC enforcement power:

1) An increase of the penalty for violations of the Communications Act committed by common carrier.

Verizon does not support changing the existing statutory forfeiture caps. Actual FCC enforcement actions against carriers clearly demonstrate that these caps do not operate as a ceiling or otherwise limit the FCC's broad discretion under section 503(b) to impose significant fines and forfeitures.

Under section 503(b) of the Act, and the inflationary adjustments provided for under the Debt Collection Improvement Act of 1996, the FCC currently can fine a common carrier up to $120,000 per violation or per day of a continuing violation, up to a total of $1.2 million. The FCC has repeatedly demonstrated its ability under existing authority to impose fines or reach settlements with common carriers for amounts far in excess of $1.2 million; as high as $6.5M in a single enforcement action.

If any change is made, it should not be limited to "common carriers," as the question suggests, and should apply equally to all firms subject to the FCC's jurisdiction. This is especially important in light of the convergence underway in the telecommunications sector, whereby companies that started in different lines of business are providing a broad range of services in competition with one another.

2) An extension of the statute of limitations for a violation.

There is no need to extend the statute of limitations. As noted above, the FCC has demonstrated its ability to take swift and significant action against carriers under the existing limitations period. While extending this period would not necessarily change the outcome of any FCC action, it would certainly add further delay, uncertainty and regulatory uncertainty in a market that already has too much.

3) Additional penalties for any violations of the "market-opening" provisions of the 1996 Telecommunications Act (sec. 251, 252, 271, 272).

The Bell companies' conduct in the marketplace is actively overseen by the FCC and state commissions. It is also subject to significant performance monitoring and remedy plans imposed by both the states and the FCC. In addition, the FCC can revoke or suspend a Bell company's long distance authorization for a violation of these provisions. There is no need for additional penalties for violations of the market opening provisions of the Act.

In addition, Congress should not single out these provisions of the Act for special penalties. Other violations by carriers can endanger public safety (*e.g.*, the E911 rules), disrupt the operation of competitive markets (*e.g.*, slamming) and invade consumer privacy (*e.g.*, CPNI, junk fax, do-not-call). Congress should not signal that these violations are less important by authorizing additional penalties only for the Act's market opening provisions.

Weil, Gotshal & Manges Responses to Questions from Senator Feingold

1. **Your law firm represents both WorldCom and MCI, even though both companies are separate legal entities that filed for bankruptcy as separate legal entities. How can a single law firm address – in a neutral and fair way without conflicts of interest – all of the legal issues relating to claims against MCI asserted by WorldCom? Isn't it a conflict of interest to represent both MCI and WorldCom as to matters which are adverse between them?**

It is standard practice in chapter 11 cases for one law firm to represent affiliated debtor entities in jointly administered cases. Well known examples, in addition to WorldCom, are Enron, Bethlehem Steel, Global Crossing, Kmart, and United Airlines. In fact, the Supreme Court recognized congressional intent to allow affiliated debtors to be reorganized in joint proceedings. *See Duggan v. Sansberry*, 327 U.S. 499, 511 (1946) (*citing Mar-Tex Realization Corp. v. Wolfson*, 145 F.2d 360, 363 (2d Cir. 1944)). The unified administration of affiliated debtors is eminently practical because it conserves both judicial and estate resources. *See Grubbs v. Pettit*, 282 F.2d 557, 563 (2d Cir. 1960). In the WorldCom cases, 222 individual legal entities filed chapter 11 petitions. It would have been impractical for each legal entity to retain separate bankruptcy counsel to represent its estate.

The requirements for a law firm (or other professional) to be retained by a debtor are set forth in section 327 of the Bankruptcy Code. Section 327(a) permits the retention of a professional as long as the professional does not (i) hold or represent an interest adverse to the estate and (ii) is disinterested. 11 U.S.C. § 327(a). The term "disinterested" is defined in section 101(14) of the Bankruptcy Code and essentially requires that the professional not have an interest materially adverse to the estate. 11 U.S.C. § 101(14). The "twin requirements of disinterestedness and lack of adversity telescope into what amounts to a single hallmark." *In re Martin*, 817 F.2d 175, 180 (1st Cir.1987). Therefore, professionals seeking to be retained under section 327(a) of the Bankruptcy Code must demonstrate that they hold no interest adverse to the estate. *In re Mercury*, 280 B.R. 35, 54 (Bankr. S.D.N.Y. 2002).

The fact that intercompany claims may exist between and among affiliated debtors does not automatically disqualify a law firm from representing all of the affiliated debtors. *See Hassett v. McColley (In re O.P.M. Leasing Servs., Inc.)*, 16 B.R. 932, 939-40 (Bankr. S.D.N.Y. 1982) (despite the existence of an intercompany claim, where parent and subsidiary debtor share a "common goal" and "unity of interests," one attorney may represent both estates); *In re Iorizzo*, 35 B.R. 465, 468-69 (Bankr. E.D.N.Y. 1983) (attorney could represent five affiliated debtors as long as the attorney was not involved in pursing intercompany claims). Therefore, without a showing of an actual, present conflict, courts will permit one law firm to represent affiliated debtors. *See O.P.M. Servs.*, 16 B.R. at 940; *In re Rundlett*, 137 B.R. 144, 146 (Bankr. S.D.N.Y. 1992) ("In this district, it has been held that inter-company claims do not constitute an impermissible conflict of interest for representation.").

While significant intercompany claims exist between and among nearly all of the 222 debtor entities in the WorldCom chapter 11 cases (collectively, the "Debtors"), none of those claims are being prosecuted by any Debtor against any other Debtor. The Debtors share a "unity of interest" and a "common goal" of being reorganized as a single, integrated business. Moreover, the Debtors believe that the prosecution of those intercompany claims would severely prejudice the Debtors in terms of cost and delay and would negatively impact the distributions to all creditors. In fact, for these and other reasons, the Debtors have worked closely with all of the major creditor constituencies to formulate a plan of reorganization that takes into consideration the relative strengths and weaknesses of the intercompany claims and eliminates the need to prosecute the intercompany claims through substantive consolidation.

2. Why didn't you seek separate legal counsel for MCI to provide neutral advice regarding the claims asserted by WorldCom?

As discussed above, WorldCom is not asserting claims against MCI. The relative strengths and weaknesses of intercompany claims manifest themselves in disputes between creditors of the different estates. Accordingly, while the Debtors serve as fiduciaries for all creditors, the separate interests of creditors of MCI Communications Corp. and its subsidiaries (collectively, the "MCI Companies") are fully represented in these chapter 11 cases by several constituencies. On July 29, 2002, the United States Trustee for the Southern District of New York (the "U.S. Trustee") appointed the statutory committee of unsecured creditors (the "Committee"). The Committee and each of its members serve as fiduciaries for all unsecured creditors, regardless of which Debtor such creditors' claims are asserted against. Of the 14 members of the Committee, six are creditors of the MCI Companies. Moreover, no less than eight law firms have been retained by various constituencies to represent the specific interests of the creditors of the MCI Companies. Specifically, creditors of the MCI Companies are represented by (i) an ad hoc committee of MCI senior bondholders, (ii) the indenture trustee for the MCI senior bond, (iii) an ad hoc committee of MCI subordinated bondholders, (iv) the indenture trustee for the MCI subordinated bonds, (v) an ad hoc committee of MCI trade creditors, and (vii) AOL and EDS, which are members of the Committee and trade creditors of the MCI Companies. Each of these parties or groups is represented by one or two law firms.

The adequate representation of the creditors of the MCI Companies has been confirmed by the United States Bankruptcy Court for the Southern District of New York. On April 30, 2003, HSBC Bank USA, the indenture trustee under the MCI subordinated bonds, filed a motion (the "HSBC Motion") to appoint an official committee of creditors of the MCI Companies on the grounds that the creditors of the MCI Companies' estates were not properly represented in the plan of reorganization negotiation process. By order, dated May 30, 2003 (the "HSBC Order"), the Bankruptcy Court denied the HSBC Motion on the basis that "the representation of the creditors of MCI by the [Committee] is adequate as required by section 1102 of [the Bankruptcy Code] and that the appointment of an additional committee pursuant to section 1102 of the Bankruptcy Code is not necessary to assure adequate representation of creditors of MCI." *See* HSBC Order at 2, a copy of which is annexed hereto.

3. Who is your primary client in this matter – MCI or WorldCom?

WG&M represents all of the Debtors in these jointly administered cases, including WorldCom and MCI.

4. I assume you sought permission from the Department of Justice or the Court to represent both MCI and WorldCom as to claims between the companies. Is that correct? If so, please provide details of that request and the response you receive.

On July 21, 2002, WG&M filed an application, pursuant to section 327(a) of the Bankruptcy Code (the "WG&M Application"), seeking to be retained as counsel to the Debtors. By order, dated September 4, 2002, the Bankruptcy Court granted the WG&M Application. The U.S. Trustee did not object to the WG&M Application.

5. Did your law firm specifically and separately disclose to the Bankruptcy Court or the Department of Justice that you would represent both MCI and WorldCom as to claims between them? If so, please provide copies to the Committee.

In the WG&M Application, WG&M discloses that it will represent all of the Debtor entities. WG&M does not specifically and separately disclose that it will represent any Debtor entity in its prosecution of claims against any other Debtor entity, and in fact, WG&M has not and will not represent any Debtor entity in its prosecution of claims against any other Debtor entity. The WG&M Application makes clear that the Debtors are retaining "conflicts counsel" and, to the extent it would be inappropriate for WG&M to represent the Debtors in a certain matter, conflicts counsel (or another appropriate firm) will be retained to represent the Debtors in such matter.

6. In the WorldCom/MCI bankruptcy, MCI has only one director. This sole director is also the CEO of WorldCom. Because WorldCom is asserting numerous claims against MCI, do MCI's creditors have reason to be concerned that this director has divided loyalties when it comes to protecting the bankruptcy estate of MCI for the benefit of MCI's creditors?

As CEO of WorldCom, Inc., and as a director of each of the 222 Debtor entities, Michael Capellas has a fiduciary duty to all creditors. The estates of all 222 Debtors share a "unity of interest" and a "common goal" of being reorganized as a single, integrated business. Thus, there is no divided loyalty.

This too has been confirmed by the Bankruptcy Court. On April 17 and 21, 2003, the ad hoc committee of MCI trade claims and ad hoc committee of MCI bondholders, respectively, filed motions seeking the appointment of a trustee (the "Trustee Motions") for the MCI Companies on the basis that, among other things, the MCI Companies do not have a fiduciary acting on their behalf. Following an evidentiary hearing, the Bankruptcy Court denied the Trustee Motions based upon, among other things, the fact that the Debtors had appropriately discharged their fiduciary duties in evaluating and analyzing the issues surrounding the formulation of the plan of reorganization. *See Memorandum*

Decision and Order Denying Motions for Appointment of a Chapter 11 Trustee and Examiner, dated May 16, 2003 at 15, a copy of which is annexed hereto.

7. Given the potential conflicts of interest associated with representing both WorldCom and MCI when WorldCom is asserting claims against MCI, why did you oppose motions to set up a trustee or a committee of MCI creditors to safeguard MCI's interest? Are you opposed to separate representation for MCI's creditors?

Neither WG&M nor the Debtors are opposed to the creditors of the MCI Companies receiving proper representation. In fact, as noted above in response to question 2 and as recognized by the Bankruptcy Court, the creditors of the MCI Companies are adequately represented in these chapter 11 cases.

At the outset of these cases, the U.S. Trustee found no legal or factual basis to support the appointment of a chapter 11 trustee or separate committee for creditors of the MCI Companies. In addition, the U.S. Trustee did not support the Trustee Motions. Simply put, in light of the more than adequate representation of the creditors of the MCI Companies, the relief requested in the HSBC Motion and the Trustee Motions was not in the best interests of the Debtors, their estates, or creditors (a conclusion that the Bankruptcy Court agreed with). Accordingly, consistent with their fiduciary duties, the Debtors, through WG&M, opposed the motions.

8. Examiner Thornburgh's report indicated that many of the claims against MCI by WorldCom were suspicious. Did you advise MCI regarding possible defenses it could raise against WorldCom claims?

In analyzing the issues concerning substantive consolidation, we examined and advised the Debtors of various issues concerning the enforceability of, and defenses to, intercompany claims.

9. Should Examiner Thornburgh's work be completed before there is a confirmation hearing on the proposed re-organization plan?

Mr. Thornburgh's appointment as examiner is focused on the facts and circumstances surrounding the prepetition fraud and related issues. Mr. Thornburgh's examination does not concern whether the Debtors can satisfy the requirements for confirming a plan of reorganization under section 1129 of the Bankruptcy Code. The confirmation requirements will be the subject of an evidentiary hearing and will be decided upon by the Bankruptcy Court.

10. Did KPMG serve as an advisor in any capacity for WorldCom or MCI prior to the bankruptcy filings? If so, how can KPMG independently evaluate the validity and enforceability of intercompany claims that may have arisen, in part, because of advice it gave?

Prior to the commencement of the chapter 11 cases, KPMG provided tax advice to the Debtors. KPMG has now been retained as the Debtors' auditor.

11. Is KPMG also a client of your law firm, in addition to being the auditor for WorldCom and MCI? If so, how can your law firm assess the usefulness of KPMG's service to the bankruptcy estate in a disinterested fashion? Wouldn't you have an obligation to protect your client KPMG if it turns out that KPMG provided pre-bankruptcy advice that could be the subject of litigation?

KPMG is a client. This fact was prominently disclosed in WG&M's disclosure affidavit, which was annexed as an exhibit to the WG&M Application. WG&M would not represent either KPMG or the Debtors in any dispute or litigation between them.

12. Will you or your law firm receive a bonus or other form of special compensation if the proposed re-organization plan is confirmed?

No.

13. Has anything occurred since you and your firm decided to represent both WorldCom and MCI in this proceeding to make you doubt whether this dual representation is appropriate in these circumstances?

No.

Weil, Gotshal & Manges Responses to Questions from Senator Kohl

1. Can you please explain how your joint representation is not a conflict of interest and how the representation would not adversely affect either company when their interests diverge?

It is standard practice in chapter 11 cases for one law firm to represent affiliated debtor entities in jointly administered cases. Well known examples, in addition to WorldCom, are Enron, Bethlehem Steel, Global Crossing, Kmart, and United Airlines. In fact, the Supreme Court recognized congressional intent to allow affiliated debtors to be reorganized in joint proceedings. *See Duggan v. Sansberry*, 327 U.S. 499, 511 (1946) (*citing Mar-Tex Realization Corp. v. Wolfson*, 145 F.2d 360, 363 (2d Cir. 1944)). The unified administration of affiliated debtors is eminently practical because it conserves both judicial and estate resources. *See Grubbs v. Pettit*, 282 F.2d 557, 563 (2d Cir. 1960). In the WorldCom cases, 222 individual legal entities filed chapter 11 petitions. It would have been impractical for each legal entity to retain separate bankruptcy counsel to represent its estate.

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of those claims are being prosecuted by any Debtor against any other Debtor. The Debtors share a "unity of interest" and a "common goal" of being reorganized as a single, integrated business. Thus, there are no divergent interests between and among the Debtors. Moreover, the Debtors believe that the prosecution of those intercompany claims would severely prejudice the Debtors in terms of cost and delay and would negatively impact the distributions to all creditors. In fact, for these and other reasons, the Debtors have worked closely with all of the major creditor constituencies to formulate a plan of reorganization that takes into consideration the relative strengths and weaknesses of the intercompany claims and eliminates the need to prosecute the intercompany claims through substantive consolidation.

On July 21, 2002, Weil, Gotshal & Manges ("WG&M") filed an application, pursuant to section 327(a) of the Bankruptcy Code (the "WG&M Application"), seeking to be retained as counsel to the Debtors. By order, dated September 4, 2002, the Bankruptcy Court granted the WG&M Application. There were no objections to the WG&M Application. In the WG&M Application, WG&M discloses that it will represent all of the Debtor entities. WG&M has not and will not represent any Debtor entity in its prosecution of claims against any other Debtor entity. The WG&M Application makes clear that the Debtors are retaining "conflicts counsel" and, to the extent it would be inappropriate for WG&M to represent the Debtors in a certain matter, conflicts counsel (or another appropriate firm) will be retained to represent the Debtors in such matter.

2. Can you also explain how creditors to the different legal entities may be affected by your joint representation?

The separate interests of creditors are fully represented in these chapter 11 cases by several constituencies. First, Debtors serve as fiduciaries for all creditors. Second, as CEO of WorldCom, Inc., and as a director of each of the 222 Debtor entities, Michael Capellas has a fiduciary duty to all creditors. Third, on July 29, 2002, the United States Trustee for the Southern District of New York (the "U.S. Trustee") appointed the statutory committee of unsecured creditors (the "Committee"). The Committee and each of its members serve as fiduciaries for all unsecured creditors, regardless of which Debtor such creditors' claims are asserted against. The 14 members of the Committee are representative of the entire creditor body, including creditors holding WorldCom, Inc. bonds, MCI Communications Corp. bonds, Intermedia Communications Inc. bonds, bank claims, and general unsecured trade claims. Finally, there are numerous ad hoc committees that have been formed to represent the various interest of creditors. For example, no less than eight law firms have been retained by various constituencies to represent the specific interests of the creditors of the MCI Communications Corp. and its subsidiaries (the "MCI Companies"). Specifically, creditors of the MCI Companies are represented by (i) an ad hoc committee of MCI senior bondholders, (ii) the indenture trustee for the MCI senior bond, (iii) an ad hoc committee of MCI subordinated bondholders, (iv) the indenture trustee for the MCI subordinated bonds, (v) an ad hoc committee of MCI trade creditors, and (vii) AOL and EDS, which are members of the Committee and trade creditors of the MCI Companies. Each of these parties or groups is represented by one or two law firms. In addition, ad hoc committees of WorldCom, Inc.

bondholders, bank claim holders, and Intermedia Communications Inc. bondholders have been formed.

In fact, the adequate representation of the creditors of the MCI Companies has been confirmed by the United States Bankruptcy Court for the Southern District of New York. On April 30, 2003, HSBC Bank USA, the indenture trustee under the MCI subordinated bonds, filed a motion (the "HSBC Motion") to appoint an official committee of creditors of the MCI Companies on the grounds that the creditors of the MCI Companies' estates were not properly represented in the plan of reorganization negotiation process. By order, dated May 30, 2003 (the "HSBC Order"), the Bankruptcy Court denied the HSBC Motion on the basis that "the representation of the creditors of MCI by the [Committee] is adequate as required by section 1102 of [the Bankruptcy Code] and that the appointment of an additional committee pursuant to section 1102 of the Bankruptcy Code is not necessary to assure adequate representation of creditors of MCI." *See* HSBC Order at 2, a copy of which is annexed hereto.

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September 2, 2003

BY FACSIMILE AND FIRST CLASS MAIL

Honorable Orrin G. Hatch, Chairman
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Re: The WorldCom Case: Looking at Bankruptcy and Competition Issues

Dear Chairman Hatch:

Thank you for the opportunity to appear at the referenced hearing of the United States Senate Committee on the Judiciary conducted on July 22, 2003.

I write in response to your July 29, 2003 letter enclosing certain written questions from Committee Members. My responses to those written questions are as follows:

Question No. 1: In your Second Interim Report, you criticize claims by WorldCom against MCI as biased. You also said you were investigating these claims further. The existence of claims asserted by WorldCom against MCI is being used as the legal basis to consolidate the two companies for purposes of paying creditors, to the detriment of MCI's other creditors. If, upon further investigation, it turns out that these WorldCom claims are fraudulent or invalid, would it be proper to reduce payments to MCI's other creditors based on the legal theory that assumes these claims are valid?

Answer: As I testified at the hearing on July 22, I respectfully state that I believe it would be inappropriate for me to comment regarding matters that go beyond the findings or observations contained in my First Interim Report and Second Interim Report. As the Bankruptcy Court Examiner, I am committed to discharging responsibly and objectively the broad mandate prescribed by Judge Arthur J. Gonzalez of the United States Bankruptcy Court for the Southern District of New York. Consistent with the Court's directives, I am also committed to coordinating closely with the prosecutorial and regulatory bodies addressing matters related to WorldCom. Our investigation of several matters is active and

ongoing. Under these circumstances, I do not feel it would be appropriate for me to comment or speculate regarding matters that are not addressed in my prior reports to the Court or that may be the subject, in whole or in part, of our ongoing investigative efforts.

Question No. 2: What is the status of your investigation of WorldCom's claims against MCI?

Answer: As stated above, I respectfully assert that I do not believe it is appropriate for me to comment regarding the status or scope of our ongoing investigative efforts. I make this general assertion both because I do not wish to compromise our continuing investigation and because I do not want to address matters prematurely and prior to the discovery of all relevant facts or before I report my findings to Judge Gonzalez.

Question No. 3: Are you aware of the large royalty claim that WorldCom is asserting against MCI? Are you investigating that claim?

Answer: I have some familiarity with the royalty claim. However, for the reasons stated above, I do not believe it would be appropriate for me to comment regarding matters that may touch upon subjects of our active and ongoing investigation.

Question No. 4: Do you believe that your work as Examiner should be completed before the reorganization plan is completed?

Answer: As I stated above, my charge is to report to the Bankruptcy Court in the manner and according to the timetable dictated or approved by Judge Gonzalez. Accordingly, I believe that questions regarding the relationship between the end of my work as Examiner and the Court's assessment of the reorganization plan are committed to the sound discretion of the Court.

* * * *

Thank you again for your courtesies and attention.

Respectfully submitted,

Dick Thornburgh

SUBMISSIONS FOR THE RECORD

Statement of

Morton Bahr
President
Communications Workers of America

Before
U.S. Senate Committee on the Judiciary

"The WorldCom Case:
Looking at Bankruptcy and Competition Issues"
July 22, 2003

Good afternoon, Mr. Chairman and members of the Senate Judiciary Committee. I appreciate the opportunity to testify before you.

WorldCom's bankruptcy was not the result of honest business mistakes or unforeseen economic conditions. Rather, it was the product of persistent, pervasive, and massive corporate fraud, the largest in U.S. history, estimated at $11 billion and counting. WorldCom's chapter 11 filing cost investors $200 billion, three times the size of Enron.

WorldCom's lies and false financial reports destabilized the entire telecommunications industry. Tens of thousands of employees – not only at WorldCom but throughout the telecom sector -- lost their jobs and retirement savings.

Yet, WorldCom is positioned to emerge from bankruptcy with the strongest balance sheet in the telecommunications industry. This will cause further destabilization and job loss in the struggling telecom sector, and send a message to corporate America that crime pays.

The victims of WorldCom's crimes are legion. Among the largest group of victims are employee pension funds. Public pension funds and jointly-administered Taft-Hartley funds lost at least $70 billion from WorldCom's bankruptcy. Public funds in almost every state suffered staggering losses -- $1.2 billion in California, $393 million in New York, $277 million in Texas, and $23 million in Utah, to cite just four examples. I have attached to my testimony a list of public pension fund losses by state.

State and local governments have been forced to make up for these losses by cutting vital public services. According to the New York state comptroller Alan Hevesi: "Police officers, firefighters, teachers, and other public servants have lost their jobs and public services have been diminished throughout New York State because of these financial losses."

Mr. Chairman, the damage does not stop there. More than 22,000 WorldCom employees lost their jobs and thousands more saw their 401(k) retirement savings decimated. Initially, these laid-off WorldCom employees were left with nothing, even as the new WorldCom Board agreed to pay its new CEO $20 million over three years. The AFL-CIO came to the aid of these non-union laid-off WorldCom employees, and won minimal severance benefits of $5,000 each.

WorldCom employees were not the only telecom workers who saw their livelihoods and careers collapse as a result of WorldCom's illegal behavior.

How could an honest company compete with WorldCom's $11 billion in counterfeit earnings? Imagine you are AT&T, or Sprint, bidding against WorldCom. AT&T and Sprint have to price the bid to cover costs, plus a reasonable profit. But WorldCom could lowball the bid, get the contract, and then cover the losses by cooking the books.

When news of WorldCom's fraudulent accounting came out, AT&T's vice chairman was quoted as saying: "We were constantly dissecting all of the public information about WorldCom and we would scratch our heads and try to figure out how they were doing it."

Trying to match WorldCom's cost structure, companies such as AT&T turned to cost cutting. AT&T told us it had to downsize half of the employees who took care of the network to make it line up with WorldCom. During the period of WorldCom's corrupt practices, AT&T eliminated 18,000 non-management jobs represented by CWA.

I have attached letters from CWA leaders across the country who describe the devastating impact of these job cuts on their lives and their families. Let me paraphrase a few of the stories:

From San Antonio, Texas, where AT&T closed a 500 – person bilingual call center of largely female Hispanic employees in 2001. Clarissa Davila, a 32 year-old mother of three, was one who lost her job. She was a cancer patient in remission, who could ill afford the loss of income and especially her health coverage. Another laid-off San Antonio

employee lost her health benefits while her husband was awaiting a heart transplant.

From New York City, where AT&T cut 400 frontline jobs during the period of WorldCom's fraud: One employee who was able to save his job by commuting four hours every day died suddenly this winter of a heart attack. His wife attributed it to the strain of traveling so far.

I could go on and on.

Mr. Chairman, as WorldCom's fraud-induced bankruptcy sent the entire telecommunications industry into a tailspin, other CWA-represented telecom companies eliminated an additional 55,000 frontline jobs. Altogether, more than 172,000 jobs have been cut in the telecom sector in the past two years.

WorldCom is using the bankruptcy proceeding to shed more than $27 billion in debt and to avoid punishment for its crimes. Absent meaningful penalties, WorldCom is positioned to emerge from bankruptcy with the best balance sheet in the business. Employees at companies that played by the rules will once again be victims of aggressive cost-cutting, setting off another destabilizing cycle of job loss throughout the industry.

Mr. Chairman, to date WorldCom has received paltry punishment for its crimes. The $500 million SEC cash settlement, plus $250 million in stock, is smaller than the cash penalty imposed on junk bond trader Michael Milken in the 1980s.

Some argue that higher penalties would prevent WorldCom's emergence from bankruptcy, and this in turn would hurt WorldCom's remaining employees and telephone consumers. This argument fails on at least three counts.

First, our bankruptcy laws were not designed to shield criminal companies from punishment.

Second, WorldCom could sell assets to pay higher penalties. There are eager buyers who would continue WorldCom's operations and provide stability to WorldCom's valued employees.

Third, in today's converging telecom marketplace, long-distance consumers have many choices. Wireless plans and the Bell companies' bundled offerings are the driving force behind price competition, not WorldCom.

No company, including Enron, has done as much damage to the American economy through corrupt practices as WorldCom. The federal government must send a clear message that it will not coddle corporate crime. It is long past time for the Department of Justice to initiate a criminal case against WorldCom, for the federal government to debar WorldCom from contracts, and prevent its unfair use of tax loopholes.

Testimony Presented By

Prof. Douglas G. Baird, Vice Chair

National Bankruptcy Conference

Senate Judiciary Committee Hearing

Tuesday, July 22, 2003

SD-226, Dirksen Senate Office Building

"The WorldCom Case: Looking at Bankruptcy and Competition Issues"

Testimony of Douglas G. Baird

July 22, 2003

Introduction

I am the Harry A. Bigelow Distinguished Service Professor at the University of Chicago Law School. Since 1980, I have taught commercial law and bankruptcy at the University of Chicago, as well as at Harvard, Stanford, and Yale. I also serve as the Vice Chair of the National Bankruptcy Conference, and it is in that capacity that I appear today.

The National Bankruptcy Conference is a voluntary, non-profit, non-partisan, self-supporting organization of 61 bankruptcy judges, law professors, and lawyers. Its members are recognized experts in bankruptcy law and procedure, and they are committed to the improvement and integrity of the bankruptcy system. The organization came into being when members of Congress urged the country's leading bankruptcy experts to come together and help draft the Chandler Act of 1938, the first comprehensive revision of the Bankruptcy Act of 1898. For over 70 years, the NBC has assisted Congress in crafting this country's bankruptcy laws.

Today, I address the role that Chapter 11 plays when a firm in a troubled industry cannot pay its debts in large part because of the fraud and other crimes committed by its former managers. I make two observations.

- Chapter 11 promotes robust competition in a market economy. It allows assets to be used productively in compliance with all applicable nonbankruptcy laws and regulations even when those assets were previously managed by those engaged in harmful and criminal conduct.
- The proposal embodied in S.1331 on the tax treatment of NOLs on consolidated returns raises a long-standing issue of tax policy. Reforms in this complex environment ought to be undertaken with great care. While I take no issue on the ultimate merits, I believe that the issue deserves much more serious study than it has received to date.

Chapter 11 Promotes Competition

Chapter 11 ensures that firms that can demonstrate their future viability can sort out their financial affairs while remaining effective competitors in the market. Chapter 11 is especially valuable when a firm's managers have engaged in fraud. Indeed, managers who engage in financial fraud injure most immediately workers, suppliers, unsecured creditors, and public investors. By allowing a viable firm to survive under new management, Chapter 11 minimizes the harm these innocent people suffer.

A firm's assets should not be sold for scrap as punishment for the misdeeds of its former managers. The person who commits a crime with a car must be punished. The car itself should not be. Destroying the car does nothing to help the victims of the crime.[1] The same is true for a firm brought to financial ruin by dishonest managers. We must recognize the rights of the victims, but we do this by putting the assets to productive use and recognizing whatever rights they have as a result of the injuries they have suffered.

None of this, however, is to suggest any leniency towards those involved in wrong-doing. Individuals cannot receive a discharge in bankruptcy for liability for fraud or defalcation in a fiduciary capacity, embezzlement, larceny, or indeed any form of willful and malicious injury. *See* 11 U.S.C. §523(a)(4), (6). The Sarbanes-Oxley Act of 2002 precludes individuals from obtaining a discharge from debts related to violations of securities law. *See* Sarbarnes-Oxley Act of 2002, § 803(a), Pub. L. 107-204, 116 Stat. 745, 801 (2002)(adding Section 523(a)(19) to the Bankruptcy Code, precluding the dischargeability of debts arising from the violation of any federal or state securities laws).

Chapter 11 debtors do not get a dispensation from governmental rules and regulations. In fact, they are required to operate in compliance with all regulatory and other laws. *See, e.g.,* 28 U.S.C. §959(b)("a . . . debtor in possession, shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in

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[1] Holding a piece of property liable for a crime is known as a "deodand." Deodands are rarely found in modern legal systems. They were, however, features of some ancient legal regimes. *See, e.g.,* Exodus 21:28 ("If a bull gores a man or a woman to death, the bull must be stoned to death, and its meat must not be eaten. But the owner of the bull will not be held responsible.").

possession thereof"). Therefore, Chapter 11 does not give firms a competitive advantage over others in their industry. Firms in bankruptcy are still subject to the same rules and regulations as everyone else. Antitrust laws and indeed all other regulatory regimes that exist outside of bankruptcy apply with full force inside of bankruptcy. A firm in bankruptcy can no more violate laws against unfair competition than pollute the atmosphere. Chapter 11 merely provides firms with an additional forum in which they can sort out their financial. Firms cannot and do not file for Chapter 11 to profit unfairly at their rivals' expense.

When viable firms can sort out their financial problems while they continue to operate, jobs are saved and markets work more effectively. The world would be a worse and less competitive place if Greyhound Bus or Dow Corning no longer existed. Bloomingdale's and Macy's survived notwithstanding ill-conceived LBOs when they were able to use Chapter 11 to deleverage their capital structures. In general, competitors have little interest in encouraging competition, while the public as a whole does. Hence, we do not give competitors a voice when firms are restructured, whether outside of bankruptcy or in. Chapter 11 does allow firms to reduce debt, but the financial restructurings that take place in bankruptcy are no different in kind from the restructurings that take place outside when a firm is sold or debt is converted into equity. If such deleveraging makes operational sense, the legal system should facilitate it.

Firms that enter bankruptcy should not be discriminated against on that account alone. Section 525 of the Bankruptcy Code sensibly prohibits discrimination against entities because they are, or have been, a debtor in bankruptcy. *See Federal Communications Comm'n v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003) (FCC could not discriminate against a Chapter 11 debtor simply because it had filed a case under Chapter 11). Workers, suppliers, and public investors should not be put at a special disadvantage merely because their firm is in Chapter 11.

Chapter 11 focuses only on a particular firm and asks whether that firm going forward can succeed, notwithstanding its past financial difficulties. Bankruptcy judges are poorly equipped to implement a regulatory process designed to ensure that an entire industry works better. Chapter 11 does not—and should not—weed out firms merely because of perceived overcapacity in an industry. In our legal and economic system no judge or agency determines who wins and who loses—even when the problem is overcapacity. The natural forces of competition provide the best means of identifying winners and losers in the economy. Chapter 11 is part of that process.

Even if we were to use government regulation to solve problem of overcapacity, the solution should be forward-looking. It should not weed out firms by looking at the bad acts of former managers.

Comments on S.1331

I also comment briefly on S. 1331 entitled "To clarify the treatment of tax attributes under section 108 of the Internal Revenue Code of 1986 for taxpayers which file consolidated returns." As we understand it, S. 1331 is intended to clarify the tax consequences of the following fact pattern:

> **Example 1.** Acme and its wholly owned subsidiary file consolidated returns. Acme borrows $20 million from a bank and contributes the proceeds to its subsidiary. The subsidiary spends the $20 million in a deductible fashion, generating a $20 million net operating loss ("NOL") at the subsidiary level, while Acme itself breaks even. Acme then files itself and its subsidiary for bankruptcy, and upon emergence issues new Acme stock worth $5 million in exchange for the $20 million bank debt. Does Acme's $15 million in cancellation of debt ("COD") income reduce the loss generated by the consolidated group as a whole (here, the $20 million loss generated by the subsidiary)? Or does Acme's COD income reduce only Acme's own attributes (here, its basis in assets, including its stock in its subsidiary)?

If S. 1331 became law, this issue would be resolved in the government's favor by requiring Acme's COD income to be used to reduce the $20 million loss generated by its subsidiary.

I take no position on the merits of S. 1331. I do think, however, that it would be unwise for the Senate Judiciary Committee to take action on S. 1331 in this context and at this time for several reasons.

First, the issue is far more complex than it would appear to be from the simple hypothetical posed above. (The current edition of the standard treatise on consolidated tax returns devotes 11 single-spaced pages (and 19 detailed, substantive footnotes) to the topic. *See* Dubroff *et al., Federal Income Taxation of Corporations Filing Consolidated Returns* § 33.06[1] (2002).) This complexity reflects not only the inherent tension that the tax law faces in dealing with consolidated groups that are treated as a single entity for some purposes and as a collection of individual corporations for others, but also the highly interactive nature of the tax attribute system applicable in bankruptcy. We think it unwise to attempt to make rifle-shot changes to this complex tapestry of tax law without a much more

broad-based, in-depth review by those with the greatest understanding of the extremely complicated issues raised by discharge of indebtedness in the consolidated return context.

One example of the sorts of dangers that may be in store if an opposite course is followed can perhaps be found in S. 1331 itself. While apparently intending to clarify the state of existing law with respect to how COD income offsets NOLs and other consolidated attributes listed in section 108(b)(2) of the Internal Revenue Code, the bill erroneously references section 108(b)(1) (rather than 108(b)(2)), and then appears to require that all items listed in section 108(b)(2) be treated on an aggregate, group-wide basis, even though it could hardly be thought that extending this treatment to asset basis (*see* section 108(b)(2)(E)) could be thought to "clarify" existing law, since under no reading of that law could asset basis be thought to be subject to group-wide reduction when a member incurs COD income.

Second, I am not convinced that a policy consensus in favor of the result championed by S. 1331 has developed, even though the basic question that it addresses has been understood and debated for many years. For example, in 1990-91, the Section of Taxation of the American Bar Association formed a task force to study the problems involving cancellation of indebtedness in the consolidated return context. After months of work, the task force was unable to reach agreement on the very question addressed by S. 1331, and eventually prepared and submitted to the IRS separate reports favoring and opposing the result currently embodied in S. 1331. Indeed, even the IRS has had difficulty making up its mind on the issue. For a number of years, the IRS seemed to oppose the result suggested by S. 1331. *See* PLR 9121017 (Feb. 21, 1991). While it is true that more recently the IRS has shown some evidence of having changed its mind, *see* FSA 19991207 (Dec. 14, 1998); Chief Counsel Advice 200149008 (Aug. 10, 2001), it would appear that the IRS considers this issue to be part of a much broader policy dilemma dealing with consolidated returns that remains unresolved and under study.

This lack of consensus may well reflect the fact that, whatever the strength of the policy arguments in favor of the S. 1331 in circumstances like those in Example 1, those arguments are less compelling, if not unpersuasive, when the circumstances are somewhat different:

> **Example 2.** Acme has two wholly owned subsidiaries, SubA and SubB, and includes both of them in its consolidated return. Acme contributes $20 million of its retained earnings to SubA, which spends the $20 million in a deductible fashion, generating a $20 million NOL at the SubA level.

> Meanwhile, SubB borrows $10 million from Bank and breaks even. If SubB were to file for bankruptcy and realize $3 million in COD income in the process of restructuring its debt to Bank, S. 1331 would appear to cause the $20 million loss incurred by SubA to be reduced by $3 million as a result of SubB's realization of COD income, even though SubA's loss had nothing do with SubB's debt. Is that an appropriate result?

Finally, the statute that S. 1331 would amend has been on the books for more than twenty years and reflects the many policy compromises—pro-debtor and pro-government—that led to the enactment of the Bankruptcy Tax Act of 1980. As Senator Grassley put it in a colloquy with Senator Santorum on May 15, 2003, "we are talking about tax legislation that has been on the books for an awfully long time." It seems to us that, whatever the merits of S. 1331 may be, it addresses an issue that should not be considered in isolation, apart from its historical context, but only as part of a global effort to revisit the entire framework of bankruptcy taxation. I and other members of the National Bankruptcy Conference would, of course, be delighted to participate actively in such an effort, if Congress were to choose to follow that course.

Conclusion

Congress should not overlook the role of Chapter 11 in fostering a competitive economy. As Thomas Friedman of the *New York Times* recently noted, a person designing the best economy to compete in the new global era:

> would have designed a country with a system of bankruptcy laws and courts that actually encourages people who fail in a business venture to declare bankruptcy and then try again, perhaps fail again, declare bankruptcy again, and then try again, before succeeding and starting the next Amazon.com—without having to carry the stigma of their initial bankruptcies for the rest of their lives . . . . In Silicon Valley, bankruptcy is viewed as a necessary and inevitable cost of innovation, and this attitude encourages people to take chances. If you can't fail, you won't start . . . .

THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 369-70 (2000) (Updated and expanded Anchor Books edition).

TESTIMONY OF WILLIAM P. BARR, GENERAL COUNSEL OF VERIZON AND FORMER UNITED STATES ATTORNEY GENERAL, BEFORE THE SENATE JUDICIARY COMMITTEE
July 22, 2003

Thank you for inviting me to appear at this hearing. My message today is a simple one: The federal government's response to date to the massive fraud committed by MCI is one of the most shameful episodes I have witnessed in Washington since starting my career in public service more than 25 years ago. MCI committed the largest securities fraud in American history, falsely manufacturing more than $11 billion in income. Investors lost roughly $180 billion—more than three times the losses in Enron—and MCI's brazen scheme dramatically deepened the crisis of confidence in corporate America, imposing incalculable costs across the whole economy. In response, the federal government has taken several affirmative steps—not to punish MCI, or to strip away the gains from its fraud, or to ensure that full restitution is paid to the tens of thousands of pensioners and companies victimized by the fraud—but to resuscitate the company from its self-inflicted wounds by giving it a series of artificial advantages over law-abiding competitors.

None of these giveaways is mandated by the bankruptcy code, through which MCI is seeking to effectuate its resurrection, or by any other law. Rather, these bail-outs are contrary to the letter and spirit of numerous federal statutes, including the securities laws, the tax code, and the laws governing the expenditure of public funds on government contracts. Companies that compete with MCI—such as Verizon, AT&T, SBC, BellSouth, and many smaller companies—have already paid a high price as victims of MCI's fraud. Going forward, we are all ready to compete for customers with anyone on an honest playing field. What we object to—and what should offend this Committee's most basic sense of justice—is that MCI is being rewarded, given massive advantages over competing firms, for bilking pensioners and employees out of

their life savings, and being allowed to continue exploiting its fraud at the expense of the employees and shareholders of law-abiding companies. This action can only have dire effects for the economy—which depends on the telecommunications sector as an engine of growth—for public confidence in American financial markets, and for the rule of law.

The Precedence of Law Enforcement Over Bankruptcy

MCI and its apologists within the government completely misrepresent this matter as one governed by MCI's rights in bankruptcy. They seem to believe that the public-policy priority is conserving the company's assets and ensuring its rapid emergence from bankruptcy, and that any actions that do not support these objectives somehow violate MCI's rights in bankruptcy. The government is thus stumbling all over itself to tailor its enforcement response to *further* the particular bankruptcy result preferred by MCI.

This is a perversion of the law and the government's role. In cases where no crime has been committed, bankruptcy gives priority to creditors. But when a crime has been committed, the interests of law enforcement take precedence over the commercial default rules of bankruptcy. The government's interest is not in preserving the assets accumulated by a criminal enterprise, but in securing the disgorgement of all ill-gotten gains. The government's actions must be directed not only toward vindicating the interests of creditors, but toward securing restitution for all victims, including shareholders and other actors in the marketplace. Otherwise, bankruptcy becomes a money-laundering machine, giving criminal corporations a blank check to keep stolen property merely because they invoke its protection.

It is the government's obligation to use its law enforcement powers—including disgorgement, restitution, and punitive fines—to bring justice to all of MCI's victims. Its policy of avoiding any conflict with MCI's goals in bankruptcy is a transparent subversion of the public

interest to the private interests of MCI. We are not here today because an economic downturn caused a deterioration in MCI's business. Nor are we here because MCI failed to execute its business plan. We are here because MCI committed the largest white collar crime in American history—defrauding more hard-working people out of more money than any company before it. The government has no basis to abdicate its law-enforcement authority merely because the enormity of MCI's fraud caused the company to crumble.

The SEC Allows MCI to Keep the Fruits of its Fraud

MCI's fraud was massive, whether measured by its scope, duration, or brazenness. The SEC's former economist, Robert Comment, estimated that MCI secured roughly $18.4 billion in "ill-gotten gains from its accounting fraud." As former Attorney General Thornburgh explained in two interim reports on the fraud, MCI reaped these gains by engaging in a "concerted program of manipulation" over a period of years, extending even beyond "the massive accounting fraud that has been publicly reported." The investigation into MCI's wrongdoing is ongoing, and no one has yet heard "the entire or final story" of malfeasance at MCI.

Nonetheless, the SEC has closed the books on MCI's fraud, bringing its enforcement action against the company to a close with a fine totaling $750 million. This paltry disposition imposes no punishment whatsoever on MCI, and, more importantly, allows the company to keep as much as 95 percent of the ill-gotten gains it secured through fraud.

That this result gives MCI an artificial advantage over its honest competitors—who were already the company's victims—is obvious. MCI's fraud was so massive that a significant part of its business today—its assets, customers, and market position—are the fruit of its unlawful conduct. MCI used its fraudulently inflated stock to gain strategic advantages through acquisitions, and its reporting of false results undermined the ability of competitors to raise

capital and make investments. The SEC's disposition, which allows MCI to keep virtually all of the gains it obtained through fraud, blesses MCI's continuing operation with the balance sheet of a criminal enterprise—putting MCI in the same position as if it had robbed a bank, plowed the proceeds into its business, and gotten away scot-free.

A simple analogy sharpens the point. Imagine two competing trucking firms. One is an honest business, leasing trucks and making payments on time. The other is a criminal enterprise, which acquires its trucks through theft and uses this illicit advantage to steal business from the honest firm. There are two classes of victims—those whose property is directly stolen, and those whose businesses are injured by the criminal enterprise's illicit advantages.

What must the government do to right this wrong? Obviously, the individuals who stole the trucks should be punished, but just as obviously this alone does not remedy the offense. If new management is simply allowed to take over the corrupt company, keeping and using stolen trucks, the law-abiding competitor will still be a victim. It will lose customers and profits, not because it was beaten in the marketplace, but because it must compete against an enterprise built on criminal activity.

So too with MCI. Under the SEC's settlement, MCI is allowed to profit from its fraud, and competing firms will continue to be the victims of a massive crime. The fact that the new owners will be MCI's creditors—themselves victims of the fraud—does not justify allowing those new owners to exploit MCI's ill-gotten gains. It is patently unjust to reward one set of victims by offering them the opportunity to "cash in" on the crime at the expense of another set of victims.

The SEC has tried to defend its settlement by claiming that the fine imposed on MCI is the largest it has ever imposed. This is a sound bite, not a rationale. Every other case the SEC

has handled before this one pales in comparison. It's obvious that MCI deserves the largest fine ever, because MCI perpetrated the largest fraud ever investigated by the SEC.

The question is, how large should the fine have been? Michael Milken paid $600 million—roughly equal to MCI's fine in today's dollars—for an offense that pales in comparison to the fraud committed by MCI. In MCI's case, the irreducible minimum of the SEC's enforcement obligation was to remediate the effects of the company's fraud by compelling disgorgement of all ill-gotten gains and preventing any continuing injury to victims. The SEC's settlement with MCI does not live up to the most basic obligation of our justice system—to ensure that "crime does not pay."

MCI's Tax-Avoidance Scheme

Compounding the SEC's failure to deny MCI the fruits of its fraud, the government has failed to block MCI's effort to avoid the payment of taxes on any profits it earns once it emerges from bankruptcy. Even though MCI is using its bankruptcy to shed more than $20 billion in debt, it is using a shell game to retain approximately $10-15 billion in net operating losses incurred while the company *claimed* it was profitable. As a result, MCI will potentially be able to escape the payment of billions of dollars in taxes.

This is a gross injustice. When MCI's honest competitors earn profits, they have to pay taxes. If MCI earns profits after it emerges from bankruptcy, they will for years be tax-free. American taxpayers will be forced to subsidize the worst corporate criminal in history, and MCI will perpetuate the harms caused by its fraud at the expense of every telecommunications company that plays by the rules. This is a brazen attempt to circumvent the *existing* tax code. And although Senators Santorum and Conrad have introduced legislation to ensure that MCI does not succeed in pulling off this scheme, no enforcement agency has moved to forestall

MCI's gratuitous and despicable effort to cheat the Treasury—and its competitors—out of billions of dollars.

MCI's Avalanche of Government Contracts

Finally, the government has moved to subsidize MCI by granting the company a growing stream of lucrative contracts. In 2000, during the height of MCI's fraud, the company only did $122 million in business with the government. Today, that figure has grown to more than $1.2 billion—meaning that MCI has multiplied its government business by *ten times* since committing its fraud. MCI is now one of the ten largest government contractors, and has won almost every telecommunications contract awarded in the past year. MCI even secured a no-bid contract to build a wireless telephone network in Iraq, notwithstanding the fact that MCI does not sell wireless service and has no expertise in building wireless networks.

By directing these tax dollars to MCI, the government—in particular the General Services Administration—has flouted the clear-cut mandate of the law, which provides that a firm cannot do business with the government unless it can affirmatively demonstrate a "satisfactory record of integrity and business ethics." That MCI does not meet this standard is obvious to everyone but the GSA, given the magnitude of MCI's unprecedented fraud and what former Attorney General Thornburgh described as a pervasive "culture that permitted . . . fraud . . . and ultimately propelled the Company's descent into bankruptcy."

Almost 30,000 firms and individuals have been suspended or debarred from government contracts, confirming the fact that doing business with the government is not a right, but a privilege. Enron was suspended promptly after its fraud was announced, and others have been debarred for improprieties relating to amounts as little as a few hundred dollars. Under pressure from Senator Collins, the GSA has only just begun to inquire into MCI's fitness to contract with

the government, but has not, and apparently is not, undertaking any examination into the nexus between MCI's fraud and its ability to underbid competitors. Thus, the company that General Thornburgh described as "the poster child for corporate governance failures," and which the SEC itself called "one of the ultimate symbols of corporate corruption," continues to be kept afloat with hundreds of millions of tax dollars sent to Washington by the very same people defrauded by MCI.

As bad as MCI's fraud was, it would be a greater injustice if the government were to participate as an accessory after the fact. What the government seems to be saying is that it is willing to ignore MCI's massive fraud and prop up the company as long as MCI continues to give the government a good price. Instead of serving as the protector of society, the government has become a "fence" for stolen goods.

The Claims of MCI's Apologists

MCI's apologists in the government—particularly the SEC—have offered four justifications for their abject capitulation to the largest corporate criminal in American history.

First, the SEC claims that, because MCI is now in bankruptcy, its paltry recovery is the best it can do using its civil enforcement authority. The SEC argues that if it sought a larger recovery for MCI's defrauded shareholders, it might push MCI into liquidation. In the event of liquidation, the SEC asserts, it might not recover anything because *civil* claims—even the government's—are assigned a low priority. No matter how unfair, the SEC reasons, it is better to accept the scraps from MCI's table then be stiffed altogether.

This is sophistry. For one thing, it is clear that MCI can afford to pay a much larger penalty before facing any risk of liquidation. The average ratio of debt to sales in the telecommunications industry is 85 percent. But based on the numbers it released with its

reorganization plan, MCI will emerge from bankruptcy with a ratio of just 22 percent—the lowest in the industry by far. MCI also has roughly enough cash on hand to make the states whole for all of the pension-fund losses they suffered as a result of the fraud. In other words, MCI has the financial wherewithal to pay a fine that begins to approach the magnitude of its ill-gotten gains and pays meaningful restitution to its victims. The SEC's disposition not only leaves MCI with the fruits of its fraud, but in the best competitive position in the entire sector.

The SEC's argument is also wrong as a matter of law. The gravamen of the SEC's position is that its civil enforcement powers are inadequate to secure a just disposition. But Congress has specifically provided that, where civil remedies are inadequate, the SEC is authorized to refer a securities fraud case to the Justice Department for all "necessary criminal proceedings." This is not just a question of punitive action, but of using the remedial tools available to the Justice Department, which is expressly empowered to force full disgorgement of *all* ill-gotten gains and set up a fund to compensate victims for their losses. These remedies *cannot* be avoided in bankruptcy.

The SEC has thus abdicated its most basic responsibility. Rather than affirmatively referring the case to the Justice Department for a fair disposition, it has acted as a cheerleader for MCI's efforts to blow past any enforcement, touting its slap-on-the-wrist settlement as "sufficiently tough to deter future violations of the federal securities laws." This doesn't pass the red-face test.

Second, MCI's apologists assert that the company deserves credit for cleaning up its act—that those involved in the fraud are gone and that MCI is "on its way to transforming itself" into "a good corporate citizen." Even if true, this line of argument is totally irrelevant to the issue at hand. Enforcement has *two* goals—not just punishment, but also remedying the effects

of wrongdoing. The extent of rehabilitation is only relevant to what *punitive* enforcement action should be taken; it has no bearing at all on what *remedial* enforcement action is necessary. No level of cooperation or rehabilitation can justify allowing a perpetrator of fraud to keep its ill-gotten gains.

Even as to punitive action, the claim that cooperation or rehabilitation is sufficient to spare a corporation from punishment is fundamentally pernicious to the administration of justice. It is always the case that individuals commit corporate crimes. If firms could evade punishment merely by sacking the perpetrators and aiding the government in their prosecution, corporations would never be indicted. The law provides for the punishment of corporations precisely because they can do disproportionate injury to the public if they commit a crime. No individual could have pulled off a fraud of the magnitude committed by MCI. Corporations are therefore required to police themselves, and if those efforts fail in as spectacular a fashion as they did at MCI, the corporation must be punished. Any other result eliminates the possibility of deterrence. Cooperation and rehabilitation may therefore be relevant to the *degree* of penalty imposed on MCI, but they do not speak to the necessity of corporate punishment.

In any event, while the SEC has been mouthing the mantra of MCI's rehabilitation for eight months, events continue to demolish the claim. MCI's outside auditor recently concluded that the company's much ballyhooed reforms were insufficient and that fraud may still "occur and not be detected." Likewise, the Thornburgh report documented a "culture" of corruption not confined to "a limited number of individuals," and identified "a growing number of problematic issues" matching MCI's known fraud "in their egregiousness, arrogance, and brazenness." MCI itself has revised the estimates of its fraud three separate times, and the company still cannot produce audited financial statements. And the day after MCI's new CEO assured the public that

"[n]o one even arguably associated with the past wrongdoing continues to work at the company," MCI's general counsel and treasurer were forced to resign. The spectacle of the SEC falling all over itself to vouch for the integrity of this company is appalling.

Moreover, MCI's cooperation results from necessity, not probity. The fraud here was so egregious that the company had no choice but to cooperate. If this kind of "desperation cooperation" were rewarded with a slap on the wrist, the most brazen violators of the law would escape scot-free, while those with the temerity to raise a legitimate defense would suffer the harshest punishment. This result cannot be squared with any rational concept of justice.

Finally, MCI's apologists claim that appropriate enforcement action would "unfairly damage the company's creditors" and would put "the 55,000 employees of WorldCom . . . out of work." While this argument seems to have persuaded Judge Rakoff to approve the SEC's settlement, it's a bugaboo. Telecommunications is a volatile and risky industry in which no one's job is guaranteed. MCI itself has already laid off more than 25,000 workers since its fraud was announced. What presents a *massive* risk to jobs is the government's campaign to subsidize MCI at the expense of honest competitors. More than 650,000 people are employed by other firms in the telecommunications sector. Giving MCI a host of artificial advantages is not required to sustain its operations and puts the jobs of honest competitors at risk.

* * *

Fortunately, the Department of Justice has not yet completed its investigation into the fraud at MCI. The Department has the tools at its disposal to ensure the complete disgorgement of MCI's ill-gotten gains, and to set up a fund to compensate MCI's victims. Moreover, the Department's guidelines make clear that this is the quintessential case for corporate prosecution, given the magnitude of the crime, the number of high-level executives involved, the pervasive

culture of fraud, and the total breakdown of internal controls. Left to its own devices, it is hard to imagine that the Department will not take appropriate enforcement action. If corporate prosecution is not called for in this case, it hard to imagine a case where it would be.

The danger is that the capitulation to MCI by other offices of government, including the SEC and GSA, will create a climate of accommodation—a climate perhaps fostered by a political decision to prop up MCI regardless of the costs. This hearing is therefore quite timely, because it affords the Committee an opportunity to support the Justice Department's effort to make a decision in this case based *only* on a fair and reasoned application of the law.

The enforcement of our criminal and securities laws always takes precedence over bankruptcy. Bankruptcy is a refuge for honest companies that failed in business, not for a criminal enterprise that collapsed under the weight of its own deceptions. What MCI's competitors want—and what the American public wants—is justice. Honest competition is good for shareholders, for employees, and for consumers. Dishonest competition—competition where the government places its thumb on the scale by giving affirmative advantages to corporate criminals—kills investment, kills jobs, and kills economic growth. More importantly, it undermines the rule of law, which is the cornerstone of our freedom and prosperity.

RICHARD J. DURBIN
ILLINOIS

COMMITTEE ON APPROPRIATIONS

COMMITTEE ON THE JUDICIARY

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www.senate.gov/~durbin

July 28, 2003

The Honorable Nicholas deB. Katzenbach
Board Member
MCI Telecommunications
22001 Loudoun County Parkway
Ashburn, Virginia 20147

Dear Mr. Katzenbach:

It was a pleasure to see you at the July 22, 2003 Senate Judiciary Committee hearing on the WorldCom bankruptcy. At the hearing, I raised my concerns about the propriety of the federal government's decision to continue doing business with WorldCom/MCI, and discussed as an example, a recent government contract awarded to WorldCom/MCI to construct a wireless system in post-war Iraq. In response, you pointed out that the Iraq award was not a sole source contract because AT&T had bid on the same contract.

Following the hearing, I received the enclosed letter and attachments from AT&T which dispute your characterization of AT&T's involvement in the contract in question. In order to ensure the most accurate record of the hearing, would you please provide to me and to the Senate Judiciary Committee your response to the enclosed materials.

Sincerely,

Richard J. Durbin

Attachment

cc: The Honorable Orin G. Hatch, Chairman, Judiciary Committee
The Honorable Patrick J. Leahy, Ranking Member, Judiciary Committee
Peter Jacoby, Vice-President & Director Congressional Relations, AT&T

Peter G. Jacoby
Vice President and Director
Congressional Relations

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1120 20th Street, NW
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July 23, 2003

The Honorable Richard Durbin
332 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Durbin:

I am writing to provide the Judiciary Committee information to clarify its record in connection with its July 22nd hearing titled, "The WorldCom Case: Looking at Bankruptcy and Competition Issues." At that hearing, you asked former Attorney General Nicholas Katzenbach, a member of the MCI/WorldCom Board of Directors, about a contract recently awarded to MCI/WorldCom to build a wireless system in Iraq. You described the award as a single source contract and Mr. Katzenbach disagreed, saying that AT&T and Telstra had bid on that contract. Because Mr. Katzenbach alleged facts concerning AT&T, I write this letter to specify the facts as AT&T understands them.

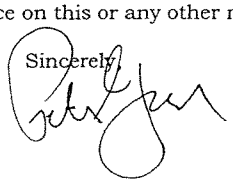
AT&T has been, and remains, very interested in opportunities to restore and enhance telecommunications services in Iraq. To our knowledge, a Request for Proposal has never been issued for this work, and no bidding procedures were established or followed concerning the award of this work. However, pursuant to our interest in helping to restore telecommunications services in Iraq, this past spring we began discussing with people in the United States government the telecommunications needs in Iraq and the various approaches to best meet those needs. We also devoted significant internal resources to explore ways to quickly restore and enhance telecommunications services to meet the needs of the United States, humanitarian efforts in Iraq and the Iraqi people. In addition, in order to provide an integrated "turn-key" solution, we reached out to partners, including Telstra, the incumbent provider of wireline and wireless telecommunications services in Australia.

Recycled Paper

On May 7, 2003, we submitted to the Office of Reconstruction and Humanitarian Aid an unsolicited proposal to provide various telecommunications services within Iraq. We also continued our discussions with persons in the United States government both here and in Iraq concerning opportunities for providing and enhancing telecommunications in Iraq. During the course of these discussions, on May 15, 2003, we were surprised to learn through press reports that MCI/WorldCom had already been awarded a contract to provide telecommunications services in Iraq. *(See attachments)* Given that there had been no formal bidding process and a lack of transparency in the bid process, we do not know when the work was actually awarded to MCI/WorldCom or pursuant to what contractual vehicle it is being performed. We do believe, as you indicated, that this was a no-bid award of work to MCI/WorldCom.

I hope this information proves helpful to the Committee as it seeks to gain a more complete understanding of the issues it explored at its hearing on July 22. I also would like to close this letter by thanking the Committee for taking the time to explore these issues, and by reaffirming AT&T's commitment to provide services to the United States government wherever and whenever needed. Whether it be reconstruction efforts in Iraq or telecommunications needs here at home, AT&T stands ready to serve with the same quality, reliability, and value that people have come to rightfully expect from us. Please do not hesitate to contact me if I can be of further assistance on this or any other matter.

Sincerely,



Attachments

MCI to Begin Rebuilding of Iraqi Phones U.S. Awards Contract For Small Network

Christopher Stern Washington Post Staff Writer
May 15, 2003; Page E1

American telephone giant MCI has been awarded a contract to build a small mobile phone network in Baghdad as the United States takes an initial step to rebuild basic communications in a city ravaged by two wars and 11 years of severe economic sanctions.

A working phone system is largely absent in much of the Iraqi capital, apart from limited grids of wired networks. Many Westerners, including military personnel, aid workers and journalists, have had to rely on satellite phones, which typically do not work indoors. Even before the most recent U.S. bombing, Iraq's telecommunications resources were scarce and unreliable. Analysts estimate that the prewar telephone network was capable of serving only three out of every 1,000 people.

Given the rudimentary state of telecommunications, there is growing impatience in Iraq with the pace of the work to install a new system. Sources at the Office of Reconstruction and Humanitarian Assistance have begun complaining that MCI has fallen behind schedule in getting even a relatively small system of 5,000 to 10,000 phones up and running.

Sources said the Defense Department, which awarded the contract, never specified a completion date but the company had informed the government that it should be able to finish by next month.

MCI spokeswoman Natasha Haubold said the company has been waiting in line to ship the necessary equipment to Iraq but given the priority of other humanitarian aid, such as food and clothing, the first delivery of its gear was not completed until last week.

"We are on schedule for implementation in June," Haubold said.

MCIis a division of WorldCom Inc., which filed for bankruptcy protection last year after disclosing a massive accounting scandal. WorldCom expects to emerge from bankruptcy later this year and operate under the name MCI.

The U.S. government has continued to be the Ashburn-based telecommunications company's biggest customer throughout the current scandal and bankruptcy process. Although it no longer operates a wireless network in the United States, MCI played a role in getting a similar mobile phone network into operation in Afghanistan.

Sources declined to comment on the value of the Baghdad wireless contract.

Initially, telecommunications companies such as Lucent Technologies Inc., Motorola Inc. and Qualcomm Inc. had hoped that the U.S. government would award a far larger contract to rebuild most of Iraq's telecommunications infrastructure. But Bush administration officials earlier this month decided to leave that decision to the

incoming Iraqi government. Analysts have estimated that it may cost at least $900 million to put a state-of-the-art telecommunications network in place.

Speculation about a major telecommunications contract began to build in March when Rep. Darrell Issa (R-Calif.) attacked the Defense Department's plans even before they were disclosed.

Issa called on the Pentagon to award the contract to a company that would use a wireless standard developed by Qualcomm, a telecommunications firm based near his Southern California district. Issa then introduced a bill that would have effectively required any company that won the contract to use Qualcomm's Code Division Multiple Access (CDMA) standard.

But sources confirmed yesterday that MCI's network would use the Global System for Mobile Communication (GSM) standard that is more widely used around the world, particularly in countries that neighbor Iraq.

Issa had been particularly critical of GSM because it was developed in Europe by a consortium of countries including some nations, such as France, that had opposed the U.S. invasion of Iraq.

"Obviously, we are disappointed that they didn't use a predominantly U.S. technology," said Issa's chief of staff, Dale Neugebauer.

Neugebauer questioned the wisdom of awarding the contract at the expense of U.S. taxpayers.

"There is tremendous commercial interest in building a cell-phone system in Iraq and very little need for investment by the U.S. government," said Neugebauer.

Staff writer Peter Slevin contributed to this report.

MCI Will Build Cellphone Network In Iraq by June Under U.S. Contract

By JESSE DRUCKER and MICHAEL M. PHILLIPS, THE WALL STREET JOURNAL

May 15, 2003

The Bush administration has tapped MCI -- the former WorldCom Inc. -- to build a small cellular-telephone network in Iraq to help speed the much-criticized reconstruction effort there.

The system is expected to be in place by June, according to the company, which is reorganizing under federal bankruptcy-court protection. Cellular communications would allow U.S. officials, American troops and international aid workers to coordinate better among themselves, removing one of the major obstacles to the U.S.-led rebuilding campaign.

It is unclear when the contract was awarded or how much MCI is earning for the deal. Equipment for the network already has started arriving in the country and eventually will be able to accommodate between 5,000 and 10,000 users, according to a person familiar with the pact.

A Pentagon official said the contract is worth about $45 million, but gave no details.

Business Week and CNN previously disclosed the contract.

The deal gives MCI a beachhead in a market that many telecom companies and investors have an eye on enviously. The Bush administration plans to leave decisions about major phone projects to an interim Iraqi government.

"The reason why it's not to be assumed that MCI will ... cash in on bigger contracts is there's still an international political process that needs to play out before big telecom and oil contracts are awarded," said Joseph Braude, the senior Middle East analyst at Pyramid Research, a telecommunications consulting firm in Cambridge, Mass.

Numerous Iraqi and American consortia are mustering resources to invest in the sector. But they are holding back on actual investments, in part because there is no Iraqi authority to give them an operator's license or concession, and they don't want to risk expropriation by a new government. In addition, they are nervous about remaining U.S. and United Nations sanctions.

"We're ready to go into Baghdad the day it's legal," said William T. Carlin, chief operating officer of interWAVE Communications Inc. of Mountain View, Calif. His company, which was working with an MCI competitor, supplies compact cellular networks for operators in developing countries.

MCI spokeswoman Natasha Haubold declined extensive comment on the deal, but said MCI "is looking forward to continuing to support its customers as their needs continue to change and evolve."

MCI doesn't currently have a wireless network in the U.S., and exited from its wireless-reselling business last year. The company also disclosed the largest case of accounting fraud in U.S. history last summer, but the federal government has continued to award it large contracts in part because of the perceived need for competition in telecom services.

The Iraqi network will use GSM technology, the wireless standard in most of the world, according to the person familiar with the matter. A dispute over the future of Iraq's telecom infrastructure erupted in March when Rep. Darrell Issa (R., Calif.) demanded that the U.S. fund a network using a technology known as CDMA, which was developed commercially by Qualcomm Inc., one of Mr. Issa's largest campaign contributors.

WRITTEN STATEMENT OF

MARCIA GOLDSTEIN
PARTNER
WEIL, GOTSHAL & MANGES LLP

HEARING ON

"THE WORLDCOM CASE:
LOOKING AT BANKRUPTCY AND COMPETITION ISSUES"

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

JULY 22, 2003

Biographical Background

My name is Marcia L. Goldstein. I currently serve as bankruptcy counsel for MCI in its chapter 11 case. I am a partner and co-head of the Business Finance and Restructuring Department of Weil, Gotshal & Manges LLP, which is the largest bankruptcy and reorganization practice in the country. During my nearly 28 years at Weil, Gotshal & Manges, I and others in my group have represented numerous debtors in chapter 11 cases, as well as financial institutions with significant claims in such cases.

I am on the Advisory Board of Colliers Bankruptcy, 15th Ed., have been a Visiting Lecturer in Bankruptcy at Yale Law School, am a member of the National Bankruptcy Conference and the American College of Bankruptcy. I have served as the Chair of the Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York.

Issues Under Consideration

Two questions which have been raised by certain competitors of MCI, particularly Verizon, are the subject of this hearing:

> First, whether a chapter 11 debtor, such as MCI, which has engaged in pre-filing fraud or misconduct, should be denied an opportunity to reorganize under chapter 11 of the United States Bankruptcy Code; and
>
> Second, whether a reorganization of MCI under chapter 11 would confer on it an unfair competitive advantage.

The answer to both of those questions is: No. To answer otherwise would be in direct conflict with the underlying policies and premises of the federal bankruptcy laws and long standing judicial precedent and practice.

The Purpose of Chapter 11: Rehabilitation of the Debtor

The federal bankruptcy laws foster the balancing of two goals: the equitable distribution of a troubled company's assets through the equal sharing of losses by creditors of equal rank, and the restructuring or rehabilitation of a business to preserve jobs and to maximize the return to creditors and, if possible, other stakeholders of the debtor. Thus, the federal bankruptcy laws prevent creditors from dismembering the assets of a debtor, while providing the opportunity for a fresh start. At the heart of these goals stands the basic premise of bankruptcy policy that when the "going-concern value" of an enterprise exceeds the "liquidation value" of the enterprise, reorganization of the debtor will maximize return to creditors and lead to the preservation of the enterprise for the greater good. Congress has recognized this fundamental premise. As Senator Hatch has observed,

> Chapter 11's overriding purpose is to take whatever steps are expedient to preserve the failing business for the benefit of all if possible.

130 Cong. Rec. S 8892 (daily ed. June 29, 1984) (remarks of Sen. Hatch). And the Supreme Court has confirmed that

> [b]y permitting reorganization, Congress anticipated that the business could continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners. H.R. Rep. No. 95-595, p.220 (1977).

United States v. Whiting Pools, Inc., 462 U.S. 198, 203 (1982). Accordingly, one of the criteria for confirmation of a plan of reorganization under chapter 11 of the Bankruptcy Code (11 U.S.C. § 101 et seq.) is that the plan satisfy the so-called "best interests test,"

which requires that each holder of an impaired claim or equity interest either accepts the plan, or will receive or retain under the plan property of a value that is not less than the value such party would receive or retain if the debtor were to be liquidated under chapter 7 of the Bankruptcy Code. *See* 11 U.S.C. § 1129(a)(7).

Thus, in its effort to enable a debtor to rehabilitate its business and continue to operate post-chapter 11, Congress designed the Bankruptcy Code expressly to afford the debtor a "fresh start." And while we currently operate under the Bankruptcy Code of 1978, this basic premise has been part of the fabric of this country's bankruptcy laws, and our national economy, for almost two centuries. As the Second Circuit Court of Appeals has stated, "Congress made it a central purpose of the bankruptcy code to give debtors a fresh start in life and a clear field for future effort unburdened by the existence of old debts." *In re Bogdanovich*, 292 F.3d 104, 107 (2d Cir. 2002).

To this end, chapter 11 of the Bankruptcy Code provides a financially troubled business with an opportunity to restructure its balance sheet and its business affairs, and includes an array of provisions designed to promote this result:

- First and foremost, upon the filing of a petition for relief, the automatic stay instantly and automatically stops all actions and proceedings against the debtor to enforce or collect on a pre-chapter 11 obligation. The automatic stay affords the debtor breathing room from creditors and creates an opportunity for negotiation with parties in interest. 11 U.S.C. § 362.

- Section 364 of the Bankruptcy Code provides the parameters whereby the debtor may obtain liquidity in the form of "new" money through debtor-in-possession financing. 11 U.S.C. § 364.

- The debtor may relieve itself of burdensome contracts through the rejection process. Conversely, if the debtor has contracts it deems valuable but is unable to utilize, the debtor may often assign such contracts to third parties willing pay the debtor for them, even if the contract prohibits assignment. 11 U.S.C. § 365.

- Under the Bankruptcy Code pre-chapter 11 fraudulent and preferential transfers may be "avoided" and the proceeds thereof recovered for distribution to creditors. 11 U.S.C. §§ 547, 548, 550.

The comprehensive scheme embodied in chapter 11 balances the rehabilitative policies with creditors protections:

- Through the claims reconciliation process, creditors of the debtor are afforded a forum for their claims to be asserted, contested, and resolved. 11 U.S.C. § 502, Fed. R. Bankr. P. 3007.
- Non-ordinary course transactions must be on notice to creditors, who may object and be heard by the bankruptcy court. 11 U.S.C. § 363.
- The Bankruptcy Code sets forth certain mandatory provisions for a plan of reorganization. 11 U.S.C. § 1123(a).
- Holders of claims and interests are provided with a disclosure statement which contains adequate information of a kind and in sufficient detail to enable hypothetical, reasonable investors typical of a debtor's creditors to make an informed judgment whether to accept or reject a proposed chapter 11 plan. 11 U.S.C. § 1125.
- Holders whose claims or interests are impaired by distributions under the proposed chapter 11 plan are entitled to vote whether to accept or reject it. 11 U.S.C. § 1126.

In this manner, the Bankruptcy Code seeks "to avert the evils of liquidation," provide a fresh start for the debtor, and promote for the prompt and efficient administration and settlement of the chapter 11 estate that maximizes the return to creditors.

Conversely, punishing a debtor for its failure to pay debts or for its prepetition actions – even fraud or other misconduct – by mandating liquidation – is antithetical to the chapter 11 construct. The bankruptcy laws promote rehabilitative, not punitive goals. And, even in the case of criminal conduct, the statutory scheme developed by Congress relies on traditional arms of the state and federal governments to exact the appropriate punishment of culpable parties. Indeed, with the enactment of the

Bankruptcy Code in 1978, the Securities and Exchange Commission's role in bankruptcy was dramatically reduced in recognition that the SEC's policing of fraud and other securities violations pursuant to its enforcement powers diminished the need for the SEC's involvement in the chapter 11 process. Clearly, Congress believed that anti-fraud policies are best addressed by the securities laws and enforced by the SEC rather than the bankruptcy courts.

MCI's Chapter 11 Filing

How do these premises apply to MCI? The announcement of accounting improprieties last June created an immediate liquidity crisis for MCI as all sources of financing and capital were cut off. MCI turned to chapter 11 in order preserve value for its creditors. Chapter 11 was the only alternative which enabled MCI to obtain financing and the much needed breathing room to develop and implement its business plan, revive its operations, cooperate with the Securities and Exchange Commission with respect to the rectification of and punishment for its prepetition securities law violations, and propose a plan of reorganization that is supported by creditors holding 90% of the company's indebtedness. In this manner, MCI is a classic example of a company moving toward a consensual reorganization and the rehabilitation that the bankruptcy laws were designed to foster.

Concurrently, the traditional arms of the federal government have continued to investigate and indict the culpable individuals responsible for the pre-chapter 11 accounting fraud at MCI. MCI has and will continue to cooperate with these investigations. In addition, the Securities and Exchange Commission commenced an enforcement action immediately upon MCI's disclosure of accounting irregularities and

in the context of that action, MCI consented to the entry of a permanent injunction regarding the company's future conduct and compliance with securities laws. MCI has also consented to a $2.25 billion penalty judgment as a resolution of the SEC action. When its reorganization plan becomes effective, MCI will pay $500 million in cash and $250 million in stock in satisfaction of the penalty judgment. It is the largest fine in corporate history and it has been approved by the United States District Court for the Southern District of New York, the court presiding over the SEC action against MCI.

MCI has not only sought to restructure its balance sheet and reshape its business, but it has also sought to re-invent itself in many ways.

- MCI consented to the appointment of a corporate monitor to oversee certain aspects of the company's business practices, including the review and reformulation of the company's corporate governance procedures;

- MCI has "cleaned house" of the culpable individuals, fired or accepted the resignation of every employee accused of participation in the fraud by the board's special investigative committee or the bankruptcy examiner, and even those employees who, while not accused of personal misconduct, are alleged to have been insufficiently attentive in preventing fraud. All of these actions have been designed to put the company on a new a positive footing – led by a new board of directors, new chief executive officer, and new senior managers;

- MCI has not only cooperated with the corporate monitor, the Examiner appointed in the chapter 11 case, the SEC, the Department of Justice, the United States Attorneys' office for the Southern District of New York, and other investigative bodies, but has sought to become a model of corporate governance and internal compliance. In furtherance thereof, MCI created an ethics office that has revamped corporate ethics standards and a mandatory educational program to reinforce such standards.

The Verizon Theory

The view that MCI should not be permitted to reorganize under the Bankruptcy Code but should be subject to a forced sale under chapter 7 is espoused primarily by MCI's competitors, notably Verizon. Under the "Verizon Theory," MCI should be liquidated to prevent it from benefiting from its prepetition fraud. The Verizon Theory, however, not only completely ignores the fundamental principles of chapter 11, but also the realities of who the stakeholders are in the MCI chapter 11 case.

Relief Under Chapter 11 is Not Denied to Debtors Based Upon Prepetition Fraudulent Conduct

Nothing in the Bankruptcy Code prohibits an entity that engaged in prepetition fraudulent conduct from seeking rehabilitation under chapter 11 or requires the liquidation of such companies. There are a number of examples of companies which engaged in prepetition misconduct or fraud, or violations of the security laws, that have successfully reorganized under the Bankruptcy Code, including Sunbeam, Inc. and Leslie Faye, Inc. Other recent chapter 11 cases demonstrate how market regulators, law enforcement agencies, and bankruptcy courts can respond in harmony when culpable individuals engage in fraudulent misconduct at the expense of creditors and public security holders. The facts and circumstances of MCI's chapter 11 case are no different. If the Verizon point of view is accepted, no such entity would be or would have been permitted to reorganize under chapter 11.

Rather, in cases in which debtors have engaged in prepetition misconduct, the initial stages of a reorganization case provide the context for the removal of culpable individuals and/or other remediation. Since the filing of its chapter 11 cases, MCI has

totally revamped its management, board of directors and corporate governance practices. In fact, had MCI not "cleaned house" or remediated its prepetition improper conduct, liquidation would still not be the appropriate remedy. Rather, pursuant to section 1104 of the Bankruptcy Code, the Bankruptcy Court could direct the appointment of a trustee to replace management and conduct appropriate investigations. Given the company's voluntary replacement of its senior management and board of directors, and its consent, at the outset of its chapter 11 case, to the appointment of an examiner to investigate areas of prepetition misconduct, the drastic remedy of a trustee was not necessary. For these reasons, among others, when certain creditors of MCI filed a motion seeking the appointment of a trustee, the Bankruptcy Court denied such request. *See In re WorldCom, Inc.*, No. 02-13533 (AJG) (Bankr. S.D.N.Y. May 16, 2003) (Memorandum Decision and Order Denying Motions for Appointment of a Chapter 11 Trustee and Examiner).

District Judge Jed Rakoff of the Southern District of New York, who presides over the SEC enforcement action against MCI, responded to competitors' suggestions that denying access to reorganization under chapter 11 and requiring a forced sale under chapter 7 should be additional punishment for MCI. In approving the proposed $750 million SEC settlement, Judge Rakoff observed that liquidation

> would undercut the basic tenets of bankruptcy reorganization, a unique innovation of United States bankruptcy law that has contributed materially to the conservation of economic resources and the stability of the U.S. economy.

Securities and Exchange Commission v. WorldCom, Inc., No. 02 Civ. 4963 (JSR), slip op. at 8 (S.D.N.Y. June 7, 2003). Recognizing the inherent conflict between the

rehabilitative purposes of chapter 11 and the liquidation of the company, Judge Rakoff commented that:

> To kill the company . . . would unfairly penalize its 50,000 innocent employees, remove a major competitor from a market that involved significant barriers to entry, and set at naught the company's extraordinary efforts to become a model corporate citizen. It would also unfairly impact creditors, over 90 percent of whom have stated their support for the company's plan of reorganization in recognition that it affords them far more value than liquidation.

Id. In these circumstances, and particularly in view of the policy aims of the Bankruptcy Code, the liquidation or a forced sale of MCI, an enterprise on the cusp of completing its reorganization, can serve no legitimate purpose.

The Verizon Theory: Of Trucks and Truck Drivers

On several occasions, the proponents of the Verizon Theory have expressed their view that when a business expands operations through the use of inappropriate means and acquires new customers or additional assets, that business, with its allegedly fraudulently acquired assets, should be removed from the marketplace and sold for the benefit of its competitors.

The Verizon Theory neglects the very heart of the policy goals of equitable distribution underlying the Bankruptcy Code. The expansion of MCI's operations was funded by its creditors, not its competitors. It was these creditors who financed the acquisition of the assets that enabled MCI's growth. These creditors are among the victims of the prepetition accounting fraud and are entitled to recover on account of their losses to the maximum extent possible. Although a sale of MCI's assets could occur in chapter 11 under circumstances where creditors elect this alternative in lieu of a stand-alone reorganization, MCI has received no proposal from its creditors

along these lines, and, to the contrary, has received overwhelming creditor support for its proposed plan of reorganization. Where the going-concern value of the enterprise exceeds the liquidation value, as is true in MCI's case, the liquidation of the enterprise is not an appropriate remedy.

Although the proponents of the Verizon Theory assert that liquidation of the assets acquired through fraudulent means is the only way to afford the so-called injured competitor with recourse, an "injured" party is only entitled to damages where it has demonstrated a sustainable cause of action for its alleged injury and has established that the injury was in fact caused by the party charged. Competitors have put forth no sustainable causes of action along these lines.

Contrary to the premise of the Verizon Theory, a chapter 7 sale would not yield a fair result to either MCI's employees or its creditors. A mandatory chapter 7 liquidation of MCI would result in a forced sale of assets at a depressed price. Only a handful of MCI's competitors would have the wherewithal to bid and such competitors, including Verizon, would be the only beneficiaries of such a forced sale. Nonetheless, these competitors suggest that creditors would receive a fair price in such a "going concern liquidation" of MCI. This ignores the realities of chapter 7. In fact, creditors would recover significantly less than the recoveries provided for in the reorganization plan that has been filed in the Bankruptcy Court. Conversion to chapter 7 would result in a default in MCI's available DIP financing with the result that existing trade credit would dissipate, new business opportunities would disappear, customers would be unnerved and the business stability achieved by MCI since its chapter 11 filing would be immediately undermined, with a resulting deterioration in value. A forced sale in such conditions –

where creditors would have no vote – as they would in chapter 11 – would benefit only MCI's competitors, who would bid for MCI's business at a distressed value and eliminate it as an additional competitor. This is antithetical to the fundamental premise of US bankruptcy law.

The proponents of the Verizon Theory also espouse the view that MCI's employees would not be affected by a "going-concern liquidation" of the company. Again the Verizon Theory ignores reality. Many MCI jobs would be eliminated if the company were sold to a competitor in a forced sale. This is a natural result of consolidation. It is generally accepted that the reorganization of a debtor is the best way to preserve the employment of the debtor's employees. Indeed, the employees are best served by enabling them to have the opportunity to realize the benefits of the successful reorganization of the debtor. In addition, injured stockholders of MCI – many of whom are or were employees – will receive compensation, including stock, from reorganized MCI through the SEC Settlement and the Sarbanes-Oxley compensation fund. The liquidation of MCI in chapter 7 would result in the subordination of the SEC penalty and no opportunity for recovery to injured stockholders.

Our federal bankruptcy laws favor rehabilitation of the enterprise and the maximization of creditor value. These laws are not driven by the interests of a debtor's competitors, such as Verizon. Chapter 11 reorganization would have little purpose if competitor "interests" were a consideration. This consideration is neither a part of the formula, nor should it be. As the Supreme Court has observed,

> The Bankruptcy Code does not authorize free-wheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization.

N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984).

Competitive Balance Concerns

Verizon and others have expressed concern that MCI will emerge from chapter 11 with a reduced debt load and therefore a competitive advantage. They assert that reorganized MCI will be positioned to engage in predatory pricing practices and, thus, destabilize the telecommunications industry. Such concerns are misplaced. The proposed debt level for reorganized MCI, approximately $5.5 billion, which will represent about 41% of the post-bankruptcy value of the company. In contrast, Verizon's debt represents only 30% of the value of its company. We don't believe that this is a relevant measure for determining the ability to compete in a market but, if there is any competitive advantage to be had, it clearly falls to Verizon. .

Moreover, as Judge Rakoff observed, these arguments of unfair advantage should be disregarded. The Verizon Theory ignores that, while corporate reorganization under chapter 11 may confer upon the debtor an advantage in the terms of reducing pre-chapter 11 debt, companies seek bankruptcy protection as a last resort because chapter 11 involves significant competitive disadvantages due to negative publicity and customer hesitation. It is common for a debtor's competitors to try to eliminate an entity while in chapter 11 and when it emerges. The repeat filings of certain chapter 11 debtors is testimony to the difficult competitive marketplace a debtor will face following emergence from chapter 11 protection. In fact, during MCI's chapter 11 case – while it has had no pre-chapter 11 debt service requirements at all – it has been MCI's competitors (not MCI) that have engaged in competitive pricing strategies, and in that environment, MCI was forced to lower its prices and reduce its future EBITDA projections.

Despite Verizon's characterization, competitors of MCI are not the victims of the accounting irregularities. Rather, the victims in this matter are the creditors and shareholders who lost billions of dollars. Having suffered such losses, creditors of MCI have relied upon the provisions of the Bankruptcy Code to enforce their claims to obtain the maximum value possible. The creditors of MCI will be the new owners of a reorganized MCI. If chapter 11 could not be utilized to implement this result, it is not the culpable individuals who would be punished; neither is it MCI that would be punished. Rather, it is the creditors of MCI who would be punished. In fact, creditors would be penalized twice: once by losses resulting from MCI's pre-chapter 11 improprieties and financial distress and again by denying the normal operation of the Bankruptcy Code. While the credit markets have already adjusted expectations in light of the former, the latter could prove more destabilizing – not just for MCI creditors, but for the chapter 11 process in general. The impact on financial markets and the availability of credit could be significantly impaired. As Congress noted in the legislative history of the Bankruptcy Code:

> A corporation which is taken over by its creditors through a plan of reorganization will not continue to be liable for [obligations] arising from the corporation's prepetition fraud . . . since the creditors who take over the reorganized company should not bear the burden of acts for which the creditors were not at fault.

S. Rep. 95-989, at 130 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5915. This is the basis for section 510 of the Bankruptcy Code, which requires subordination of securities fraud claims to the claims of other creditors and explains why claims arising from fraud are discharged in corporate bankruptcies.

The hearing before the bankruptcy court to consider MCI's plan of reorganization is scheduled to commence on August 25th. MCI will have to establish, to the satisfaction of the Bankruptcy Court, that its plan has met all statutory requirements. It is the protections and the benefits of chapter 11 that have enabled MCI to take the steps to emerge as a rehabilitated enterprise that has regained the confidence of its creditors, customers, and employees. The context in which MCI "cleaned house," settled with the SEC, developed a business plan and negotiated a plan of reorganization with its major creditor constituents is the product of balanced federal bankruptcy law. It should be commended, not punished or otherwise denied.

Thank you for the opportunity to be heard on the matters before this Committee today.

News Release
JUDICIARY COMMITTEE
United States Senate • Senator Orrin Hatch, Chairman

July 22, 2003 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on

"THE WORLDCOM CASE: LOOKING AT BANKRUPTCY AND COMPETITION ISSUES"

Good afternoon and welcome to today's hearing entitled "The WorldCom Case: Looking at Bankruptcy and Competition Issues."

I first would like to thank all of our witnesses today for their time and cooperation. I hope that this hearing will help us better understand the WorldCom situation and its potential public policy implications.

Along with many Americans, I am deeply concerned about the devastation caused by WorldCom's massive corporate fraud, which has caused immeasurable harm to so many. While we can't go back in time and undo what has already occurred, we are presented today with an opportunity. We have an opportunity to examine the WorldCom case and determine whether there are lessons to be learned with respect to our public policy going forward.

The focus of today's hearing will be two-pronged. First, we will examine the WorldCom bankruptcy case and consider, in light of the facts, whether any changes in our current bankruptcy laws may be in order. Second, we will assess the implications of a reorganized MCI emerging from bankruptcy on competition in the telecommunications market. Here again, we will evaluate what impact, if any, this anticipated competitive landscape should have on public policy.

Some have raised fairness concerns that WorldCom will be able to emerge from bankruptcy with much of the fruits of its widespread fraudulent conduct intact. They argue that it will emerge from Chapter 11 with an enhanced market position relative to its competitors, giving it not only a fresh start but a head start. They believe that, in view of the WorldCom case, our bankruptcy system is set up to make crime pay.

Others contend that the MCI which will emerge from bankruptcy is a new entity with new

leadership. They point to the extraordinary measures it has taken to prevent the recurrence of past misdeeds. They further argue that MCI will *not* have a meaningful competitive advantage from its Chapter 11 reorganization. And, they argue that our bankruptcy laws appropriately are not designed to punish, but rather to permit a company to reorganize and emerge from bankruptcy as a viable entity.

As we move forward, I believe we need to have a full understanding of the WorldCom case to help us determine whether our bankruptcy laws are functioning fairly and effectively. We also need to understand the WorldCom case in order to conclude whether our policies are sufficient to enable the telecom industry to enjoy robust competition under fair terms that benefits consumers. No doubt, this is a complex case containing important issues deserving of examination.

We are fortunate to have highly respected individuals here today to testify on these important matters.

We will first hear from former Attorney General Richard Thornburgh, who is the Bankruptcy Examiner in the case. We are fortunate to have you with us and look forward to your testimony.

On our second panel, we are honored to hear from: former Attorney General William Barr, the Executive Vice President and General Counsel of Verizon Communications; former Attorney General Nicholas Katzenbach, who serves on the Board of directors of MCI Telecommunications; Marcia Goldstein of the law firm Weil Gotshal; Douglas Baird, Vice Chair of the National Bankruptcy Conference; and Mark Neporent, the Chief Operating Officer of Cerberus Capital Management.

I appreciate all of you appearing today, and look forward to your testimony.

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101

WRITTEN STATEMENT OF

NICHOLAS DEB. KATZENBACH

INDEPENDENT MEMBER OF THE MCI BOARD OF DIRECTORS,

HEARING ON

"THE WORLDCOM CASE:
LOOKING AT BANKRUPTCY AND COMPETITION ISSUES"

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

JULY 22, 2003

Chairman Hatch, Senator Leahy, and members of the Committee:

My name is Nicholas Katzenbach, and I serve as an independent member of MCI's Board of Directors. I served as the Attorney General of the United States from 1964 to 1966. Since leaving public service, I have been practicing law – including serving for 17 years as Senior Vice President and General Counsel of IBM.

I joined the Board of MCI on July 21, 2002, almost exactly a year ago, to serve as an independent watchdog who could represent the interests of investors and who could provide a fresh perspective on the operations and management of the company. Dennis Beresford, former chairman of the Financial Standards Accounting Board, joined me on the Board at that time and C.B. Rogers, who has wide experience as a corporate director, later joined us. Together, the three of us comprised the Special Investigative Committee of the Board that was charged with overseeing an independent investigation of the financial irregularities that occurred at WorldCom.

None of us was affiliated with the company in any way during the late 1990s, when MCI was taken over and was being operated by the former management of WorldCom. Nor were any of us affiliated with the firm when those WorldCom executives – all of whom have now been dismissed from the firm – perpetrated the largest financial fraud in American history.

As someone who has been involved in cleaning up the damage inflicted on MCI during the WorldCom era, I believe I can offer this Committee a perspective on MCI that is quite different from the viewpoints of some other witnesses from whom you'll be hearing today.

I'd like to begin by asking those who would inflict further pain on MCI: Who is it, exactly, whom you intend to punish? Is it the 55,000

employees of MCI, who have already seen their jobs put at risk and their retirement savings driven toward oblivion? Or is it the creditors of the company, who have already seen the value of their investment plummet? Or is it the victims of WorldCom's fraud who – because of our settlement with the SEC – now have a stake in the future success of MCI? Or is it the nation's long-distance telephone customers, who would surely see their phone bills rise and see their service suffer if MCI were to be driven out of business? Nothing that MCI's opponents suggest would hurt the already-departed and already-disgraced senior management of WorldCom, who were ousted and replaced after the fraud was discovered. The draconian punishment advocated by MCI's opponents would, at best, be a futile gesture – and, at worst, would inflict further pain on the innocent.

Mr. Chairman, I'd like to tell you about MCI as I've come to see it – and about the clean break that the company's new management has made with the practices of the past. The company has been transformed: The old WorldCom no longer exists. In its place is a reformed, restructured, realigned company – MCI – that is focused not on the past but on the future.

Under our new Chairman, President and Chief Executive Officer, Michael Capellas, MCI is determined to return to the high standards of ethics, innovation and vigorous competition that had marked the first decades of MCI's existence – the years before WorldCom took over our company.

Let there be no misunderstanding of our position – or of our rigorous focus on corporate integrity. The behavior of the former WorldCom executives, who were responsible for the accounting fraud at the company, is indefensible. The company was right to force these executives out, and it was right to blow the whistle on itself and on its internal problems. We will

continue to cooperate completely with all of the various investigations, criminal and civil, that are looking into this past misconduct.

Let me also assert, Mr. Chairman, that I take vigorous exception to some of the allegations that have been made in recent days, and are being offered to this Committee today, about the character of the newly restructured MCI. I feel compelled to call the Committee's attention to the motivation behind some of those from whom you'll be hearing testimony today. Some of MCI's critics are calling for MCI to be barred from competing for federal contracts; to be hobbled in competing in the open marketplace; and to be broken up as a corporation, allowing its assets to be auctioned off to the highest bidder.

Mr. Chairman, MCI today is being attacked by the very same telecommunications behemoths that have always resented MCI's role as a vigorous marketplace competitor. Those industry giants have always tried to impede the creation of a level playing field. MCI's history has been one of fighting against monopolies and fighting for market innovation. Throughout its 30-year history, MCI's performance has proven the virtue of open competition. We have provided lower rates to long-distance customers; we have innovated with new and higher-quality services; we have offered customers a broad range of new service options; and we have led the industry in improving standards of customer service. For 30 years, we have proven our value as a competitor in the marketplace.

Yet like any innovator that seeks to break up cozy, long-established monopolies, MCI has inspired relentless opposition from its business rivals. By their very nature, monopolies and oligopolies don't like a level playing field, because they seek to suppress competition. At every turn, AT&T and the Regional Bell Operating Companies have sought to re-establish and

reinforce their comfortable positions of dominance. And they have fought bitterly to impede MCI in its effort to innovate.

We should thus have no illusions about the one-sided information being propounded today by AT&T and the Baby Bells. Let us recognize their strident demands for what they truly are: An opportunistic business tactic to enlist support for their ultimate goal – driving MCI out of business. Our detractors are not acting in the spirit of the public interest: They are arguing a case in their own self-interest. Their arguments are driven by the economic benefits that they, themselves, may gain from politicizing this battle.

Mr. Chairman, let me submit to you: Our rivals are attempting to use political and regulatory means to quash MCI, because they know that they cannot win this fight in the open marketplace.

In fact, Mr. Chairman, it is especially interesting to note that one of the Regional Bell Operating Companies – one of the most strident voices attacking us today – actually approached MCI in 2001, offering to buy our company. The offer was rejected, and the company chose to remain an independent competitor. Now, like a spurned suitor, that Bell company seeks to win by political maneuvering what it could not win directly. By seeking a breakup of MCI, that rival aims both to eliminate a competitor and to scoop up our assets at a bargain-basement price – thus solidifying its dominant position in the marketplace, and reinforcing its quasi-monopoly. Such tactics are profoundly antithetical to consumers' interests and to the public good.

Worse, those who would put MCI out of business would punish those who have surely suffered enough already: the 55,000 innocent employees of MCI. Those dedicated, highly skilled employees have already seen their career prospects damaged, simply by their association with the WorldCom

fraud; they have already seen their stock options become worthless; they have already seen the value of the company stock in their 401 (k) plans wither. And now they are living under the threat of additional job losses – amid our nation's prolonged recession, when jobs are already scarce – as the rival long-distance firms and the Baby Bells contrive to undermine their company. This final indignity, inflicted by our rivals, is an injustice to our employees and to their hard work.

MCI is restructured, realigned and ready to compete. As we anticipate our emergence from bankruptcy protection this fall, let me describe, Mr. Chairman, the steps that MCI has taken to demonstrate its good will; to reform its corporate governance structure; to strengthen its internal safeguards against any wrongdoing in the future; and to enhance the quality of its operations.

First, our efforts to overcome the legacy of misconduct. When MCI discovered evidence of the WorldCom leadership's accounting fraud, the company responded immediately. The company immediately brought the fraud to the attention of governmental authorities. The Board fired the CFO, and the board accepted the resignation of the Controller and other implicated accounting personnel. MCI has cooperated with all investigations, has submitted tens of thousands of documents, and has facilitated dozens of interviews of company personnel. Immediately after the fraud was discovered, the Special Committee of our Board directed that an independent investigation be conducted and a report be developed to determine the facts and causes of the fraud. As part of these investigations, personnel involved in fraudulent activity or otherwise associated with inappropriate conduct have been separated from the company. The company has also cooperated

with a separate investigation led by an examiner appointed by the United States Bankruptcy Court.

Second, our efforts to instill the highest standards of integrity in our realigned company. The new management of MCI has made business integrity, open communication, ethics and sound corporate governance the core principles of our company. The changes we have implemented are comprehensive, and they vividly demonstrate our commitment to corporate ethics and integrity. MCI has an entirely new Board of Directors. MCI is actively rebuilding its executive management team, and has installed a new CEO, a new CFO, a new Acting Controller a new Acting Treasurer, a new Executive Vice President of Human Resources, and a new Acting General Counsel. As a result of the work of the Special Investigative Committee of the Board of Directors, a panel on which I served, more than 30 executives have been replaced.

Moreover, MCI has rebuilt its finance and accounting operations. In addition to installing a new CFO and Treasurer, more than 400 new financial personnel have been hired. MCI has a new Vice President responsible for instituting sweeping changes in internal controls. The company has also retained an external consulting group to review the adequacy of the company's internal controls implementation efforts. The company's internal audit function now reports directly to the Audit Committee of the company's Board of Directors, rather than to the CFO. The company retained the accounting firm KPMG as its new external auditor in May 2002. Since then, KPMG has conducted an extensive review of the company's financial reporting and internal control procedures, and made recommendations to ensure appropriate accounting practices going forward.

Third, our cooperation in working with the court-appointed Corporate Monitor. The company consented to the appointment of a Corporate Monitor as part of the U.S. Securities and Exchange Commission's investigation of WorldCom securities and accounting issues. That Monitor is Richard C. Breeden, a former Chairman of the SEC. The company has forged a constructive working relationship with the Monitor and his staff, who have virtually unlimited access to company decision-making and information. The Monitor is invited to all Board meetings. The Monitor reviews and approves company compensation and expenditure matters, and is in the process of developing a comprehensive corporate governance report and recommendation. MCI has made a firm commitment to implement the Monitor's recommendations.

To ensure that integrity and business ethics will be at the center of all our activities, MCI has strengthened its ethics procedures, has appointed a new Chief Ethics Officer, and has published a new company-wide Code of Ethics and Conduct. Our top 80 executives have signed a binding ethics pledge, and the compensation of our CEO is directly dependent upon ethical performance. We have implemented a "zero tolerance" policy that dictates that any suspected violation of law, company policy, or the Code of Ethics and Business Conduct will be investigated and will be addressed appropriately. MCI recently conducted a two-day ethics and financial-controls training session for its top executives, and the company is in the process of developing and implementing a company-wide ethics training program.

Fourth, our commitment to transparency and openness. The company recognizes that the small group of former personnel who perpetrated the fraud was able to do so by limiting access to information and evading

appropriate internal checks and balances. We have addressed and eliminated the risk that such a circumstance will ever happen again: We have made open, far-reaching communication a hallmark of the new MCI. On a quarterly basis, we conduct a thorough business review of all the company's financial data, business plans and key issues and opportunities with the company's top 80 executives. We have made extensive efforts to communicate openly and often to employees on all-important company matters, and we have fostered a company culture that encourages communication, questions and discussion among our employees.

Fifth, our settlement with the U.S. Securities and Exchange Commission – and what it says (and what the federal Courts say) about MCI's commitment to business integrity and ethical conduct. The approval, on July 7, of MCI's recent settlement of the SEC's accounting and securities-fraud complaint was a turning point for the new MCI. The United States District Court's approval of the settlement fully supports the conclusion that MCI has implemented, and is committed to sustaining, a corporate culture based on trust and integrity.

One of the most notable aspects of the settlement is that, using the provisions of Sarbanes-Oxley, $500 million in cash plus $250 million in stock of the new company will be distributed to shareholders and bondholders defrauded by WorldCom. In a very real sense, the victims of WorldCom's fraud now have a stake in the future success of MCI.

The decision – by Judge Jed Rakoff of the United States District Court for the Southern District of New York – included several very powerful findings that support MCI's position. In his decision, Judge Rakoff wrote: "The Court is aware of no large company accused of fraud that has so rapidly and so completely divorced itself from the misdeeds of the

immediate past and undertaken such extraordinary steps to prevent such misdeeds in the future. . . . The Court is satisfied that the steps already taken have gone a very long way toward making the company a good corporate citizen." The Court added that the SEC, "with the full cooperation of the company's new management and significant encouragement from the Court-appointed Corporate Monitor, has sought something different: Not just to clean house, but to put the company on a new and positive footing; Not just to enjoin future violations, but to create models of corporate governance and internal compliance for this and other companies to follow; Not just to impose penalties, but to help stabilize and reorganize the company and thereby help preserve more than 50,000 jobs and obtain some modest, if inadequate, recompense for those shareholder victims who would otherwise recover nothing whatever from the company itself."

The Court's treatment of the same arguments put forward here today by Verizon is instructive and worth noting. The Court said that the argument by competitors, "notably Verizon and AT&T," that MCI should be liquidated, "has not commended itself to the [SEC] and does not persuade this Court. Corporate reorganization under Chapter 11 of the bankruptcy laws always confers a competitive advantage to the debtor in terms of elimination of debt; yet companies rarely seek bankruptcy except as a last resort, for it involves numerous competitive disadvantages as well. . . . "

The Court continued: "...[A]ny suggestions that companies as large and well-positioned as Verizon and AT&T will not be able to compete effectively with the new WorldCom/MCI lacks credence. Verizon, indeed, already enjoys a special competitive advantage of its own by virtue of its status under FCC rules as a de facto local monopoly."

The Court's decision is a ringing endorsement of MCI's actions and commitment. It recognizes that MCI is not – as some of our rivals contend – a company somehow built on or created by fraud. MCI has been built by employees who are driven by a competitive, pioneering spirit, and who seek to deliver the benefits of open market competition: lower prices, technologically advanced products and services, innovation, and an unwavering commitment to customer service.

The Court's decision, moreover, underscores the fact that MCI has long been at the forefront of competition in the telecommunications marketplace. Our company helped break open the long-distance monopoly that had existed well into the 1970s. We have consistently provided our customers with a greater range of choices, naturally leading to lower prices, better service and product innovation. MCI created a host of new consumer long-distance services, built the first data network, and drove Internet and e-mail innovation.

Given MCI's record of innovation, it's no wonder that our rivals are putting intense pressure on Congress, the General Services Administration and other government decision-makers in an effort to challenge our right to continue to serve the government as a federal contractor. Our rivals' self-serving attacks should have no place in the determination of whether MCI is now indeed a responsible government contractor. In the Court's recent decision, Judge Rakoff saw through the hyperbole of our rivals: "To kill the company . . . would unfairly penalize its 50,000 innocent employees, remove a major competitor from a market that involves significant barriers to entry, and set at naught the company's extraordinary efforts to become a model corporate citizen."

MCI remains a responsible federal contractor under any reasonable interpretation of the applicable standards. Companies that (like MCI) fall victim to misconduct by some executives, but who take meaningful steps to address it, should not automatically be disqualified from competition for government business. We remain able to provide our government customers with the positive benefits of competition, including more choices and lower prices. That surely benefits the taxpayers. It also helps ensure that our satisfied government customers do not face an unwarranted disruption of services.

MCI takes great pride in our many years of service to our federal, state and local government customers. We provide services to nearly every federal government agency, and operate some of the most complex, sophisticated and reliable network solutions ever deployed. Our performance as a government contractor continues to meet and exceed the most exacting standards. Our network is unmatched in scope and capability. We are especially proud of our role in supporting our national-security agencies' infrastructure, and we are gratified by the many positive comments about our service from officials at the U.S. Department of Defense and other national-security agencies. We provide a host of critical network solutions to the federal government, and believe we have demonstrated – and continue to demonstrate – a record that is unparalleled in its rapid response, flexibility and dedication in supporting national-security initiatives, both at home and abroad.

Mr. Chairman, MCI remains an innovative, responsible, cost-effective competitor in the open marketplace. Having fallen victim to a corporate fraud – perpetrated by a relative handful of senior executives, all of whom have now been dismissed – MCI has taken vigorous action to restore the

integrity of its procedures and its internal standards. MCI is determined to live up to a high standard of ethical conduct that will set a positive example for all other corporations to follow. MCI is reborn, realigned and ready for competition. It is deeply regrettable that our business rivals, promoting their own business goals, would seek to restrict choice, stifle innovation and limit competition by attacking MCI – and thus would attempt to deny the nation's consumers, and our government, of the proven services MCI provides.

Mr. Chairman, thank you for the opportunity to offer this testimony to you today. I look forward to answering any questions that you and your colleagues may have, and to providing any further information that the Committee may desire.

# # #

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The Honorable Richard Durbin
United States Senate
332 Dirksen Office Building
Washington, D.C. 20510

September 6, 2003

Dear Senator Durbin:

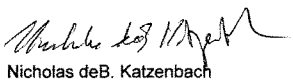
Thank you for your letter of July 28 and the opportunity to respond t AT&T's letter to you regarding the Iraq cellular network that MCI operates and maintains for the Department of Defense. Just to be clear, this is a small network fro DOD use, not an Iraq-wide commercial network. DOD has told MCI that this contract was awarded to MCI after DOD duly considered its competitive choices. Although I have no firsthand knowledge regarding other vendors that were considered, as was mentioned at the July 22nd hearing, Bloomberg News Service reported that the Australian company, Telestra, and its partner, ATT&T, lost the contract to MCI. The Bloomberg article is enclosed and was given to the Judiciary Committee staff for inclusion in the hearing record.

We believe that MCI received the contract because we offered a good price, could meet the customer's wartime planning and installation schedule and its service delivery requirements. Further, MCI had the experience of establishing and operating telecommunications networks in similar hostile environments, including Afghanistan, Bosnia, Somalia, Haiti and Desert Storm. MCI employees, working with our Armed Forces ad at great personal risk, set the Iraqi network up in less than two weeks after arrival in Baghdad and continue to maintain it.

I have also enclosed a copy of a letter that one of our employees who has been involved with the Iraqi cellular network wrote to Senator John Warner. The letter vividly describes some of the circumstances under which our employees are living and

working in Iraq and the pride they take in doing their jobs. I am extremely proud of our employees who volunteered for this assignment and I am equally proud that MCI could be of service to our country.

Sincerely,



Nicholas deB. Katzenbach

Telstra Misses Out on Iraq Mobile Contract, Australian Says

2003-06-08 17:06 (New York)

June 9 (Bloomberg) -- Telstra Corp.'s failure to win a contract to help rebuild Iraq's phone network shows how hard it will be for Australian companies to compete against U.S. businesses for work there, the Australian newspaper reported.

Telstra, Australia's biggest phone company, bid with AT&T Corp., to build a $45 million mobile phone network in Iraq, the newspaper said. The contract was awarded to WorldCom Inc., which has never built a mobile network, and which fell into bankruptcy last year after perpetrating a $11 billion fraud on investors, the newspaper said.

Telstra executives, including Phil Sporton, the head of the company's network design and construction unit, visited Baghdad three weeks ago to look at building a general system for mobiles, the newspaper said, citing Telstra spokesman Stephen Morrison.

Telstra's share of the work would have been worth less than A$10 million ($6.6 million). Winning the contract could have helped Telstra win a share of a further $1 billion of phone infrastructure contracts there, the newspaper said.

(Australian, 6-9, Online)

1945 Old Gallows Road
Vienna, VA 22182-3931

July 21, 2003

Senator John Warner
225 Russell Senate Office Building
Washington, DC 20510

Dear Senator Warner:

I'm writing to inform you that MCI's cellular contract, in support of the Department of Defense and other U.S. Agencies in Iraq, continues to be in the press for the wrong reasons. It has been alleged that the contract was improperly sole-sourced to MCI and that MCI lacked the experience necessary to deploy this network. Both of these allegations are untrue.

Although I am not personally aware of the details due to the sensitive nature of the contract, a DOD official told me that it was a competitive contract. Recently, there was an article released by Bloomberg indicating that AT&T teamed with the Australian company, Telstra, to pursue this opportunity. So there was at least one other bidder for this contract.

As for our experience, MCI has supported the DOD in the past by establishing and operating telecommunications networks in similarly hostile environments, including a cellular system in Afghanistan, and other networks in Bosnia, Somalia, Haiti and Desert Storm. In the past, MCI has been the go-to company for the DOD when it needed support in these situations.

I would like to share with you our experience to-date, in providing cell phone service in Baghdad that is not being told by the media. MCI continues to work alongside the soldiers and civilians in Iraq, providing desperately needed communications across much of the city of Baghdad. It is the primary and most reliable means of communications locally and internationally as satellite phone coverage is spotty and requires the user to be outside.

MCI employees travel the road between the airport and the "green zone" (where the Coalition Provisional Authority (CPA) and V Corps HQ are located) many times daily. This is the same road mentioned in an article in the Washington Post last week as being the deadliest road in Iraq. Our mission requires we go into the heart of the city daily to install more cellular antennas, perform maintenance and refuel generators.

Our employees have been fired at (a bullet hole in one of our Suburbans attests to that), have had a narrow miss when a grenade was dropped from an overpass, have come upon Humvee's destroyed by satchel charges or land mines, witnessed our troops being MedEvac'd after being wounded or killed, have been shot at on top of buildings in downtown Baghdad while installing cell towers/antennas, and have suffered the loss of friends we've made in Iraq. Our employees have endured no water, no plumbing, no electricity, 120-degree heat day after day

and long periods without a shower. They do this without complaint knowing their job is critical, aware of the sacrifice that many Americans have already made.

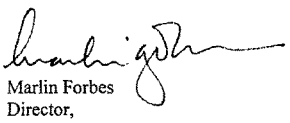
Everyday is a challenge operating and maintaining the 11 cell sites we have working. We drive through the street of Baghdad pulling a 1000-gallon fuel tanker behind a Ford F-350 pickup for refueling the generators. MCI employees understand the risk and know what an RPG would do to them and the tanker. But they go out day after day, into increasingly hostile streets to get the job done.

Senior government officials have acknowledged that the only thing that works well in Baghdad is the cell phone system. The current system was never designed to handle the call volume locally or internationally that it is being asked to support. Recently call blockage has been a constant and our customers have been so concerned about adverse publicity in the US press that they had been reluctant to add additional capacity even though it impacts their mission. Late last week we were given permission to expand the system and rectify, what had been a very sad state of affairs, especially considering young Americans were dying and political maneuvering, largely driven by MCI's competitors, was the principle cause for the delay.

Given the criticism that MCI has received over our involvement with the DOD, one could wonder whether we would bid on a similar contract in the future. I can tell you unequivocally that we would, because it's the right thing to do ... **because we are proud Americans**.

As Paul Harvey says, "now you know the rest of the story". Thanks for taking the time to read it.

Sincerely,



Marlin Forbes
Director,
Defense and International Markets
MCI

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement Of Senator Patrick Leahy
Senate Committee On The Judiciary
Hearing On WorldCom Bankruptcy
July 22, 2003

Like most Americans, I was outraged by the actions taken by WorldCom's top executives, by their fraud, and by their attempts to escape responsibility for their misdeeds. If reports are to be believed, the executives at WorldCom took steps that were deceptive, unethical and illegal.

I vigorously supported Sarbanes-Oxley, the most sweeping corporate reform legislation in decades, precisely because of the need to confront corporate fraud, like the debacle that has since been presented by WorldCom. Working with Senator McCain and other Senators, I sponsored many of the criminal and corporate accountability provisions in the new law, including strong new criminal penalties for securities fraud and for failure to comply with new document retention requirements. In addition, I worked on provisions for corporate whistleblowers who alert us to this kind of fraud. I was honored to serve on the House-Senate conference committee.

In terms of sheer dollar amounts, WorldCom may have perpetuated one of the largest corporate frauds in American history. WorldCom issued financial reports that grossly exaggerated its income by more than $11 billion and its balance sheet by more than $75 million. In doing this, WorldCom left its employees without a secure retirement. It also took out enormous loans that could not be repaid, and in its failure, WorldCom threw the telecommunications industry into disarray.

When WorldCom's fraud came to light, its creditors lost an estimated $200 billion in debt and equity. That is *three* times the size of the Enron losses. In addition, at least 22 States lost more than $2.6 billion in public retirement funds. In Vermont, WorldCom's fraudulent actions reduced the State pension fund by $9 million. WorldCom's fraud hit its own employees particularly hard. More than 22,000 employees lost their jobs and incomes for their families. WorldCom's actions solidified a downward spiral in the telecommunications sector, resulting in significant job losses and bankruptcies across the industry and reduction in competitive alternatives for consumers.

In addition to the private, civil remedies being sought against WorldCom, the federal government has responded on many levels. The Securities and Exchange Commission and the Department of Justice have launched investigations. WorldCom has agreed to

- more -

pay a $750 million penalty to the SEC and to comply with corporate governance and internal controls. WorldCom executives are under indictment, and some have pleaded guilty to criminal charges. The General Services Administration is reviewing WorldCom's fitness to hold government contracts, and the Internal Revenue Service is reviewing the propriety of its claims to certain tax deductions and for refunds.

By the same token, our purpose as WorldCom goes forward and emerges from bankruptcy proceedings should be the same here as it is in other bankruptcies: to divide assets fairly, and, if possible, create an entity that will be able to compete and create jobs in the future. Unless there is some reason to believe that the bankruptcy code is not sufficient to respond to the failure of WorldCom, then the bankruptcy should proceed in the ordinary course. Our bankruptcy laws are intended to attempt to achieve fairness through a structured division of a debtor's assets, and our bankruptcy laws can also allow companies to restructure and return to business. In this way, the bankruptcy code attempts to prevent the situation in which a company that is capable of holding its own is driven out of business. I would like to see competition in the telecommunications industry be both fair and spirited.

I understand that there are significant concerns about the competitive landscape as WorldCom emerges from bankruptcy. As a result of the bankruptcy proceeding, WorldCom may have less debt than some of its competitors. Lowered debt ratios are a serious concern and one that bankruptcy courts handle frequently. If, as we move forward, there is some reason to believe the bankruptcy system is breaking down, we are ready to step in and take appropriate action. Similarly, if the actions taken by the DOJ, the SEC, the IRS, and the GSA are inadequate to the challenges presented in this uniquely troubling situation, we should do whatever is necessary to help those agencies chart the right course.

# # # # #

Testimony of

Mark A. Neporent
Chief Operating Officer

Cerberus Capital Management, L.P.

on the Benefit of MCI's Reorganization to Creditors and the Economy

Committee on the Judiciary

United States Senate

July 22, 2003

My name is Mark Neporent and I am the Chief Operating Officer of Cerberus Capital Management, L.P. Cerberus, together with its affiliates, manages and has full investment discretion over funds and accounts with committed capital exceeding $9 billion. Cerberus is one of the largest participants in the U.S. distressed debt, distressed securities, and reorganization markets. Cerberus' investors include insurance companies, pension funds, endowments, institutions, wealthy individuals and many fund-of-funds. We have been managing capital in this sector for more than 15 years.

I have been engaged in the business of restructuring and reorganizing companies, both large and small, as a partner in Schulte Roth & Zabel LLP, a large New York City based law firm, and as a principal at Cerberus. Accordingly, I have first-hand experience with the utility of federal bankruptcy law and policy and the delicate balancing of the diverse interests affected by those laws and policies. I am also the co-chairman of the Official Creditors' Committee of WorldCom/MCI's ("MCI") Chapter 11 bankruptcy case. The Committee, as the statutorily mandated fiduciary representative of all unsecured creditors, represents the various classes of creditors across the MCI corporate structure, with aggregate claims exceeding $40 billion.

MCI's creditors, employees and customers will be best served and protected by adherence to the process envisioned by and incorporated in the Bankruptcy Code. Taking punitive action against MCI, at the behest of its competitors, would undercut the longstanding and successful implementation of the policies underlying the Bankruptcy Code and its role in our economy.

Even before federal bankruptcy law was substantively revised in 1978 with the passage of the United States Bankruptcy Code, two separate and distinct policies have long guided the bankruptcy process in the United States. [1] Those policies consist of a fresh start for financially distressed companies and equality of treatment of its creditors, large and small. Congress reiterated, and reinforced these policies 25 years ago when it enacted the Bankruptcy Code. [2] These policies, while designed to protect two different (albeit converging) interests, are equally important to the success of the federal bankruptcy regime. Bankruptcy long ago lost its stigma, and is widely recognized, not only in the United States, but in numerous other developed countries that have modeled their bankruptcy laws after ours (*i.e.*, Canada, Japan, Germany), as a

legitimate and sometimes necessary corporate strategy in the context of a capitalist system. As noted in a recent news article, "scores of businesses, some of them icons of American industrialism, have gone through bankruptcy and emerged to become strong, vibrant concerns, employing millions and offering consumers a wide variety of desirable goods and services. Texaco, Remington Arms, Continental Airlines, Southland Corporation's 7-11 stores – all have declared bankruptcy and stayed in business." [3]

Federal bankruptcy law is designed to favor reorganization rather than liquidation and to provide debtors with a "fresh start" by affording a variety of protections to a company undergoing a reorganization, including the ability to emerge from bankruptcy with a reduced debt load if its creditors agree and certain tests are met. Just as important are the policies of absolute priority (*i.e.*, the statutory hierarchy which dictates the order of payment among creditors and shareholders) and providing creditors a fair and equal opportunity to get paid. Creditors are to be treated the same as every other similarly-situated creditor and are assured that they cannot be forced to take less in a reorganization than they would receive in a liquidation.

The reorganization provisions contained in the Bankruptcy Code take each of these policies into account by providing both debtors and creditors certain rights and protections under the law. Indeed, MCI's bankruptcy case is an excellent example of how these policies are being implemented effectively to take a tragic situation and salvage the maximum possible value for creditors, shareholders, customers, employees and vendors . It is well documented that WorldCom, Inc., MCI, and a number of their affiliates were forced to seek bankruptcy protection in July 2002, largely due to the fraudulent activities of a handful of the top executives of a company that, at the time, employed nearly 75,000 employees. Within a year of the filing of the largest bankruptcy case in U.S. history, all employees even remotely connected to the fraud, and the entire Board of Directors, were replaced. A dynamic new CEO, Michael Capellas, whose integrity is beyond question, has been hired to lead MCI out of the woods. The financial management team has been rebuilt around Robert Blakely, MCI's new CFO, and over 400 new financial personnel. MCI has worked with Richard Breeden, former chairman of the SEC, to shape MCI as a model of good corporate governance. Each of MCI's top 80 executives have signed a comprehensive ethics contract and MCI has adopted a "zero-tolerance" ethics policy firm wide. Within nine months after the filing, representatives of all major creditor constituencies agreed on a reorganization plan. This would be remarkable in any case, and is especially so in the largest bankruptcy case in history.

Since the announcement of its reorganization plan, a number of MCI's competitors have asserted that it should be punished for the crimes of its former executives by either being forced to liquidate or having its ability to service government contracts revoked. This is the functional equivalent of a corporate death penalty – capital punishment of the enterprise for the transgressions of a few rogue executives (who are now being pursued, rightfully so, by the government and the victims of these executives' fraud). In doing so, those opposing MCI's reorganization are completely ignoring the second fundamental policy of federal bankruptcy law, namely that of protecting the thousands of creditors, including numerous individuals, banks, pension funds, insurance companies, and endowments, not to mention over 55,000 innocent employees who had nothing to do with the fraud.

Overall, Chapter 11 of the Bankruptcy Code is intended to provide a debtor with the opportunity to rehabilitate its business in all respects, to preserve jobs, and to maximize the value for creditors. [4] Forcing MCI to liquidate or otherwise limit its activities or opportunities would not accomplish any of these objectives. Instead, liquidation would cause MCI's extinction, leave 55,000 employees without jobs, negatively impact millions of residential and business customers who rely on MCI for their critical telecommunications needs, dramatically reduce the return to creditors, and adversely affect the competitive balance in the telecommunications sector (which is exactly what MCI's opponents are trying to achieve under the guise of moral high ground). Similarly, limitations imposed on MCI's servicing of government contracts would seriously and unfairly constrict MCI's ongoing operations, not to mention the government's bargaining power with local monopolies and other entrenched competitors. In addition, it would put the success of MCI's plan of reorganization in jeopardy and leave tens of thousands of workers jobless and reduce the anticipated return to creditors, not to mention create certain disruption and massive cost to government operations currently serviced by MCI.

MCI provides services to nearly every federal government agency and to many states, operating some of the most complex and sophisticated network solutions ever deployed. MCI's performance as a government contractor continues to meet and exceed the most exacting standards – it was never affected by the fraud – and its network is unmatched in scope and capability. MCI's service levels are the best in the industry and are continuing to improve. [5]

It is beyond doubt that MCI's reorganization plan provides creditors with a much greater chance of recovery than does liquidation, which would literally throw away billions of dollars of value. MCI's going-concern value is estimated to be approximately $12-15 billion, while its liquidation value is only $4 billion. Not surprisingly, representatives of 90% of MCI's debt have quickly and efficiently resolved their internecine differences – exactly as contemplated by the Bankruptcy Code – and have given their support to MCI's proposed reorganization plan.

It is obvious that the only parties who would benefit from MCI's liquidation, elimination of its aggregate viability and value, or restriction of or elimination of its ability to participate in government contracts, are MCI's competitors and the powerful special interest groups that work for these competitors. Neither the provisions of the Bankruptcy Code, nor the policies promulgated thereby, are satisfied by such tactics. Essentially, these competitors and special interest groups are attempting to gain a strategic advantage by seeking MCI's liquidation. The competitors who propose the imposition of the corporate death penalty here have themselves enjoyed decades of unchecked monopolistic advantage as the mega-combinations of the past monopolies. These competitors built their franchises in an environment protected from competition. Now, rather than turn their resources to competition and face MCI head-to-head on the competitive landscape, they seek to eliminate the competition, or at least hamper it severely, with misplaced and misguided attacks on innocent creditors, employees and customers.

The liquidation of MCI or diminution in its services in no way punishes those few individuals responsible for forcing MCI into bankruptcy. These individuals have long since been removed. There has been, at the creditors' insistence and with MCI's cooperation, a full "housecleaning" both in management and of the Board of Directors. Likewise, the destruction of MCI will not benefit creditors, employees, customers, vendors or the public interest. MCI's demise at the

hands of its competitors will, instead, directly punish those who are specifically entitled to be protected as a matter of public policy and law by forcing thousands of employees to lose their jobs and thousands of creditors to receive billions less than they would otherwise receive through reorganization – the exact opposite of a fundamental bankruptcy principle of value maximization.

Some have urged that creditors be brushed aside as mere "vultures" and that the old Worldcom/MCI shareholders who, for the most part, are institutions and not individuals, are the only real victims of the fraud and insolvency. To be sure, the rogue senior executives at WorldCom did mask the true financial picture and held or delayed the disclosure of the information that led to the destruction of the value of WorldCom's equity. However, the reality is that in March 2000 a variety of macroeconomic concerns began to take their toll on the overall telecom market and, ultimately, resulted in an historic three year bear market from which we are only now (maybe) beginning to emerge. These macroeconomic forces led to a decline of over 40% in the Telecom Growth Index, while WorldCom's stock declined approximately 25% over the corresponding period. [6] So, like the stock of virtually every company in the telecommunications sector, WorldCom's stock was already in the process of plummeting at the time the fraud was announced. Shareholders who did not cut their losses by selling during the bear market likely lost most, or all, of their investment.

MCI's fraud did not create the telecom bubble, nor did it pop that bubble. The SEC noted, in presentations to Judge Rakoff at the hearings on the SEC fine and settlement, that shareholders did not give their money to MCI, they gave it to other market participants. [7] MCI "gained" not a dollar from shareholders as a result of its fraud. The same is not true of MCI's creditors. Creditors (the banks and bondholders) lent their money directly to MCI because MCI defrauded them into doing so. MCI gained billions of dollars from creditors whose funds were used to build the business and acquire the assets that MCI's competitors now say should be liquidated. Common sense, not to mention the law, measures damages by the perpetrator's ill-gotten gains. These "gains" came from the creditors, not the shareholders. This fundamental premise is, likewise, recognized in the Bankruptcy Code's distribution hierarchy which requires that creditors be repaid in full before equity holders are entitled to receive anything. [8]

Destroying MCI will not benefit the misled shareholders. The shareholders are deep into the process of using the legal system to obtain redress from the perpetrators of the fraud – the handful of rogue executives – rather than the MCI corporate enterprise which is itself a victim of fraud. MCI's creditors are entitled to rely on judicial and legal checks and balances - like adherence to statute and the legislative policies embodied in the federal bankruptcy laws. MCI's adversaries should not be permitted to make an end run around these laws and policies to serve their own parochial interests.

Decades of successful federal bankruptcy policy has been premised upon rehabilitation and reorganization, rather than liquidation, regardless of the cause of insolvency. Under the Bankruptcy Code, fraud that leads to bankruptcy does not in any way prevent or limit the reorganization of a corporate entity. Indeed, the recently-enacted Sarbanes-Oxley Act of 2002 continued and reaffirmed this policy by permitting corporations to obtain relief under the Bankruptcy Code from claims arising from fraud, while revoking that privilege for individuals

who commit certain crimes. [9] This underscores the distinction between individual corporate officers that commit a fraud and the corporate entity that they victimized. This enables the business that was victimized by the criminal activity of its management to be rehabilitated and reorganized.

Further, the SEC has clearly voiced its support of MCI and its future success. [10] Specifically, the SEC sought to put MCI on stable ground and to help it reorganize, thereby preserving thousands of jobs and avoiding disruption of customer service, all while creating a model corporate citizen. In approving the settlement between MCI and the SEC, Judge Rakoff recently found that these efforts had been successful. In fact, the court noted that it was not aware of any large company so thoroughly having "divorced itself from the misdeeds of the immediate past and undertaken such extraordinary steps to prevent such misdeeds in the future." [11]

Additionally, Judge Rakoff dismissed the call for liquidation voiced by MCI's competitors, noting that liquidation would "unfairly penalize" MCI's "innocent" employees, "remove a major competitor from a market that involves significant barriers to entry, and set at naught [MCI's] extraordinary efforts to become a model corporate citizen." [12] Further, the court clearly showed its support for the bankruptcy policy of protecting creditors when it stated that liquidation would "unfairly impact creditors" and that it "would undercut the basic tenets of bankruptcy reorganization . . . ," which the court noted have "contributed materially to the conservation of economic resources and the stability of the U.S. economy." [13]

Accordingly, successful reorganizations by corporate debtors further national economic stability and growth. Without the ability to reorganize, corporate debtors would be forced to lay off thousands of employees annually, all while minimizing the return to creditors and reducing competition in the marketplace.

MCI's successful reorganization is critical to the nation's economy in that it will further competition and innovation. Consumers must have a robust field of telecom competitors to keep prices in check and to drive the development of new products and services. Without MCI, the telecommunications market would not be very different than it was prior to the breakup of AT&T.

MCI is a remade company prepared to emerge from Chapter 11 as a robust contributor to the global economy. In fact, MCI provides critical communication services for tens of thousands of businesses and government agencies around the world. It carries approximately 30% of the world's Internet traffic, with some of the world's most important financial institutions relying on MCI, including NASDAQ, the London and Stockholm Stock Exchanges, and the Chicago Board of Trade. Additionally, MCI provides key network and infrastructure support for numerous federal government security and service agencies, including, to name a few, the Department of Defense, the United States Navy and Coast Guard, the Federal Aviation Administration, the United States Postal Service, and the Social Security Administration.

MCI's former senior management and directors have been removed and its 55,000 innocent employees are working harder than ever to ensure future success. Federal bankruptcy policy is being fully satisfied and followed in MCI's bankruptcy case as MCI is being afforded an

opportunity to reorganize while the value returned to its creditors is being maximized. It is time to move forward. MCI's new management and Board, and my Creditors' Committee, have worked tirelessly for more than a year to provide the building blocks for the emergence of MCI from bankruptcy and a chance to recover some of the billions of dollars lost at the hands of a few dishonest and misguided executives. This Chapter 11 case is an exemplar of how Congress envisioned the Bankruptcy Code to work. I can tell you from two decades of personal experience – it does not often work this well. The Company, its creditors, and the system are to be commended. Accordingly, the self-serving attempts by MCI's competitors to force liquidation find no support in the law, public policy, or common sense and should be dismissed.

Thank you Chairman Hatch and members of the Committee for allowing me to share my views.

Endnotes

1. H.R. REP. NO. 95-595, at 285 (1977) (acknowledging "the two strong bankruptcy policies of a fresh start for the debtor and the equality of treatment of all creditors").

2. "The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors and produce a return for its stockholders. The premise of business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap. Often the return on assets that a business can produce is inadequate to compensate those who have invested in the business. Cash flow problems may develop, and require creditors, both trade creditors and long-term lenders, to wait for payment of their claims. If the business can extend or reduce its debts, it can often be returned to a viable state. It is more economically efficient to reorganize than to liquidate because it preserves jobs and assets." *Id.* at 220. (emphasis added).

3. Richard Lessner, *Punishing Innocent Workers*, Sacramento Bee, July 14, 2003, at www.sacbee.com.

4. Bankruptcy is not a panacea. Although the commencement of a reorganization case has lost its stigma, the negative impact of a filing can be great. The filing of a reorganization case creates uncertainty with employees, whose loyalty and work ethic are critical to any successful restructuring. It also creates uncertainty with vendors who may be reluctant to provide goods and services for fear of not being paid, or who may impose draconian payment terms to try and protect their interests which adversely effects working capital. Customers may not wish to deal with a bankrupt entity and take their business elsewhere. MCI has experienced more than its share of these consequences, but new management has done a good job restoring confidence in MCI's long-term viability.

5. Based on reportable outages to the FCC in 2002. *See* chart attached as Exhibit A.

6. *See* chart attached as Exhibit B. Some of the major macroeconomic forces precipitating the decline beginning in March 2000 included:
   a. a perceived slowing in the growth rate of the Internet and data transmissions;
   b. a reduction in funding to negative cash flow Internet and technology companies;
   c. a surplus of data transmission capacity driven by technology advancements and prior investments in capacity; and
   d. a concomitant slowdown in capital expenditures.

7. *SEC v. WorldCom, Inc.*, No. 02 Civ. 4963, Tr. of Hearing 27 (S.D.N.Y. June 11, 2003) (comments of SEC).

8. Despite the clear statutory distribution priority, the Creditors' Committee, out of a sense of moral fairness approved a radical and voluntary departure from the priority and has consented to $750 million of value being distributed to security holders under MCI's plan of reorganization.

9. Sarbanes-Oxley Act of 2002, PL 107-204, § 803, 116 Stat 745 (2002).

10. *SEC v. WorldCom, Inc.*, No. 02 Civ. 4963, 2003 WL 21523992 at **2-3 (S.D.N.Y. July 7, 2003) (approving MCI settlement with SEC).

11. *Id.* at 5.

12. *Id.* at 6-7.

13. *Id.* at 7.

Exhibit A

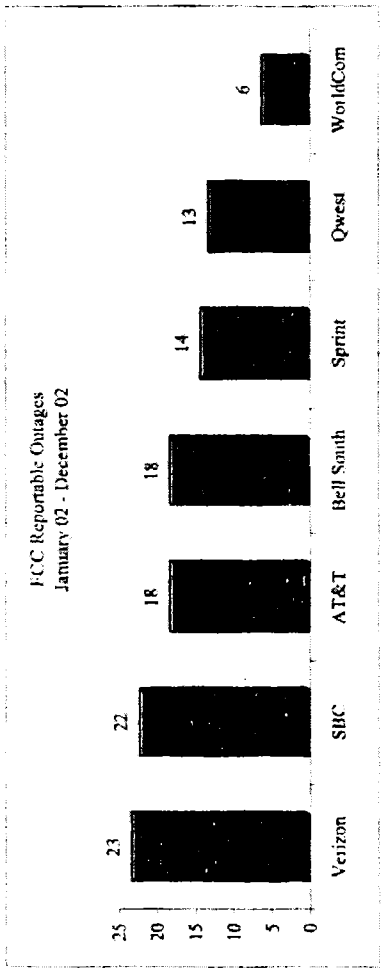
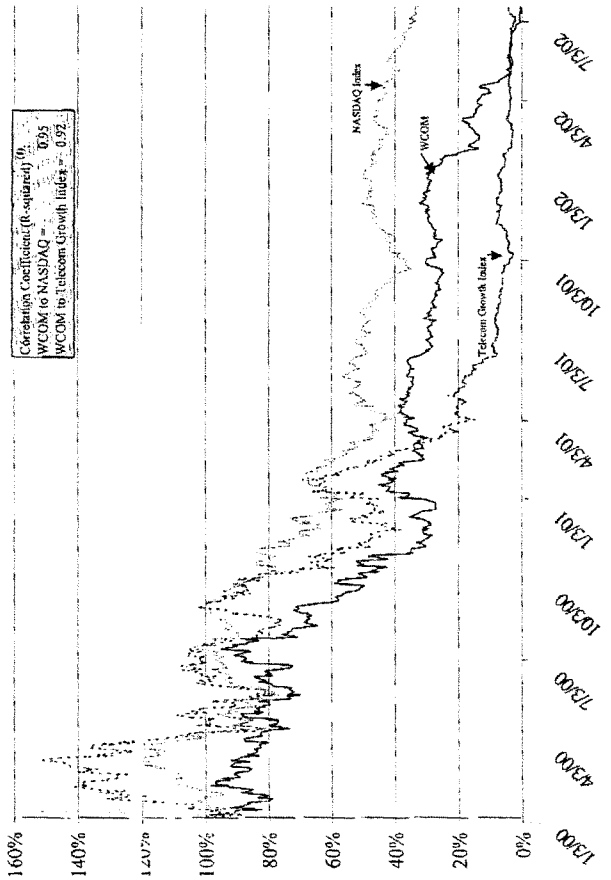

FCC Reportable Outages
January 02 - December 02
25
20
15
10
5
0
23
22
18
18
14
13
6
Verizon
SBC
AT&T
Bell South
Sprint
Qwest
WorldCom

Exhibit B



(1) Calculation period is from 1/3/00 to 6/23/03 (date the fraud was announced).
Telecom Growth Index includes: McLeod, XO, TWTC, ALCX, WCG, LVLT, ICG, 360Networks and Viatel

07/18/2003 19:58 FAX 312 909 1115 CCK 009

May 2, 2003

The Honorable James B. Comey, Jr.
United States Attorney
Southern District of New York
One St. Andrews Plaza
New York, NY 10601

Re: WorldCom

Dear U.S. Attorney Comey:

It is my understanding that the Department of Justice is still in the process of investigating the massive fraud involving WorldCom, and has not yet determined whether this is an appropriate case for bringing criminal charges against WorldCom as a corporate entity.

Our concern is that WorldCom's own aggressive timetable for bankruptcy reorganization will effectively preempt the Department's opportunity to conduct a thorough investigation and make a deliberate decision on the appropriate scope of criminal liability. I'm sure the Department would agree that WorldCom's private timeline cannot be allowed to impinge on the due course of the investigation. Whatever decision the Department ultimately makes on the prosecution of WorldCom, one thing is certain—WorldCom should not be the one to decide whether it will be subject to criminal sanctions for fraud.

As explained more fully below, unless the Department acts quickly to preserve its enforcement rights in WorldCom's pending reorganization, the confirmation of the company's reorganization plan may significantly impair the Department's pursuit of criminal charges against WorldCom. I am therefore writing to urge the Department to file objections to WorldCom's proposed disclosure statement and reorganization plan in order to ensure that the Department is able to complete its investigation, and make its prosecutorial decisions, on its *own* timeline—not one dictated by WorldCom. The deadline for objecting to the disclosure statement summarizing WorldCom's reorganization plan is May 13, 2003, and the deadline for objecting to the plan itself will follow soon thereafter.

WorldCom's proposed plan of reorganization and its accompanying disclosure statement utterly fail to notify creditors and the court that substantial fines and restitution claims could be assessed against the company as a result of on-going criminal investigations. In fact, the plan purports to relegate "all fines, penalties, and Claims for disgorgement" to a class of subordinated claims that are not to receive *any* distributions under the plan. *See In re WorldCom, Inc.*, Chapter 11 Case No. 02-13522(AJG), Debtors'

Joint Plan of Reorganization Pursuant to Section 1125 of the Bankruptcy Code, at §§ 1.97 & 4.07(b) (filed April 14, 2003). Although the disclosure statement accompanying the plan makes a brief reference to the possibility that WorldCom may have to pay a *civil* fine to the SEC—warning that the that payments to creditors "may be subject to reduction in the event a civil penalty is imposed against the Debtors in connection with the SEC lawsuit"—WorldCom's plan is clearly designed to tell creditors, investors, and the bankruptcy court that the company will emerge from Chapter 11 free and clear of any fines or orders of restitution the Department may secure in a criminal prosecution. *In re WorldCom, Inc.*, Chapter 11 Case No. 02-13522(AJG), Debtors' Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, at 6 n.1 (filed Apr. 14, 2003). At a minimum, these omissions are extremely misleading to creditors. And should the Department fail to act promptly to object to the plan and the disclosure statement, its ability to pursue criminal charges against WorldCom could be compromised.

At the outset, there is a risk that the confirmation of WorldCom's plan could preclude the Department from collecting the level of fines or restitution that would be commensurate with WorldCom's conduct. WorldCom's plan provides that all property of the bankruptcy estate shall revest with the company free and clear of all claims, liens, and encumbrances, except for those expressly provided for by the plan. And as noted, the plan purports to exclude any distributions for the payment of fines, penalties, and claims of disgorgement. The plan also contains broad injunctive provisions that WorldCom could rely on in an effort to bar the Department from seeking (or to trying to collect) any fine or judgment of restitution once WorldCom's bankruptcy is closed.

The Department may be of the view that its ability to collect criminal fines and orders of restitution is guaranteed by statute, notwithstanding WorldCom's bankruptcy, but the law on this issue is not clear. Although 18 U.S.C. § 3613 provides that a discharge of debts under the Bankruptcy Code shall not "discharge liability to pay" fines or restitution, courts interpreting that provision have found that the government's rights may be trumped in some circumstances when the prosecution was not completed pre-petition. *See, e.g., In re Reasonover*, 236 B.R. 219, 236 (Bankr. E.D. Va. 1999).

More practically, the confirmation of WorldCom's plan without an objection from the Department will result in a dissipation of the assets available to satisfy any criminal fine or order of restitution. Once the plan is confirmed, and disbursements made to creditors, the Department will have no call on these distributed funds. *See id.* If a reorganized WorldCom, holding only the assets remaining after distributions are made to creditors, is unable to satisfy an ordered fine or restitution—a distinct possibility given that WorldCom's victims suffered an estimated $175 billion in losses—WorldCom's current plan would leave the government unable to enforce the company's sentence. Confirmation of WorldCom's proposed plan without a reservation of rights by the Department may therefore expurgate the only real measures of punishment the government can seek against a corporation like WorldCom. An objection by the Department would solve this problem, either by requiring

WorldCom to set aside a contingency fund to satisfy any potential criminal judgment, or to delay its distributions to creditors until the Department concludes its investigation.

Finally, if the Department remains silent in the face of the current reorganization plan, it would, as a political matter, be effectively estopped from initiating a post-bankruptcy prosecution of WorldCom. The Department would be accused of tremendous unfairness to WorldCom's creditors if it fails to register disagreement with the provisions of WorldCom's plan providing that the company will emerge from bankruptcy free and clear of all criminal fines and orders of restitution. Under WorldCom's plan, creditors are being paid a mix of cash and equity. While the cash paid to these creditors is lost to the government—and is thus from the creditors' perspective secure—the value of WorldCom's equity would be significantly diminished by the imposition of criminal sanctions.

If it is the Department's position that it can seek a criminal fine or order of restitution notwithstanding confirmation of the plan, and seek to collect these sanctions notwithstanding any discharge in bankruptcy, creditors should be so advised in the disclosure statement. The purpose of WorldCom's disclosure statement is to give the creditors a comprehensive catalogue of the reorganized company's obligations, identifying all of the known factors that could bear on the value of the assets pledged to each class of creditors. If the Department fails to file an objection, and allows WorldCom's creditors to vote for the proposed plan of reorganization in reliance on the existing disclosure statement, the Department will not be able to prosecute WorldCom without fundamentally altering the deal agreed to by creditors. Politically, WorldCom's effort to push through its reorganization plan—without any reservation of rights for the Department—is therefore an effort to cut off Department's investigation before it is complete.

To keep its options open, the Department should object to WorldCom's proposed disclosure statement and plan of reorganization to ensure that the confirmed plan reserves the government's right to collect all fines and restitution ordered in the event that WorldCom is convicted post-bankruptcy. Again, the deadline for objecting to the disclosure statement summarizing WorldCom's reorganization plan is May 13, 2003, and the deadline for objecting to the plan itself will follow soon thereafter. Whatever decision the Department ultimately makes on the prosecution of WorldCom, it should not allow the company to preempt the Department's inquiry through the artful drafting of its reorganization plan.

Sincerely,

William P. Barr

cc: Deputy Attorney General Larry Thompson

William P. Barr
Executive Vice President and General Counsel

verizon

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October 28, 2003

Honorable John Ashcroft
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Ashcroft:

I wanted to be sure that you saw the attached letter I sent today to James Comey, the United States Attorney for the Southern District of New York.

As I explain in the attached, various federal departments – including the Department of Justice – have granted or sought waivers of the GSA's suspension of MCI from receiving further government business pending an investigation into MCI's full debarment from government work.

It appears that in each instance the waiver is the product of an unwillingness to seek out and use reputable alternatives to MCI, rather than any true "compelling need" on the Government's part. I am very concerned that the repeated, casual reacceptance of MCI by the Government – and in particular by the Department of Justice – will only serve to weaken any case that the Department may decide to bring against MCI for its frauds.

I hope that you will insist that, pending the Department's own continuing investigation of MCI, the rest of the Government take the GSA's suspension seriously and that any waiver be undertaken with an eye toward its effects on the ongoing criminal investigation.

Sincerely,

William P. Barr

WPB/mb
Attachment

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October 28, 2003

James Comey
United States Attorney
Southern District of New York
1 St. Andrew's Plaza
New York, NY 10007

Dear Mr. Comey:

I am writing to ensure that you are aware that at least three federal departments – including the Department of Justice – have or are considering providing hundreds of millions of dollars in additional government business to MCI, despite the fact that the General Services Administration has issued a government-wide suspension of MCI as an eligible government contractor because of its massive fraud and its failure to implement adequate controls to prevent new frauds.

In the few weeks since the General Services Administration ordered MCI's suspension, MCI has been awarded or may be awarded federal business under seven separate contracts, and there are rumors of others. As described in last Friday's article in the Washington Post (*Federal Ban Doesn't Hurt WorldCom Much*, E1) and based on information I have received through the Freedom of Information Act, the Defense Information Security Agency (DISA), the Department of Justice, the Armed Forces Retirement Home and the Social Security Administration have each waived or sought waivers of the MCI suspension. In each instance, however, the agency made no serious attempt to seek replacements for MCI over the year between the time MCI admitted to the largest accounting fraud in United States history and the expiration of the contracts at issue. Instead, each agency believes that, by making a conclusory finding of "compelling need," it can provide additional business to MCI, no matter how badly it has behaved. These waivers send a clear message: The federal government does not care whether it is doing business with a potentially criminal company.

Each declaration of "compelling need" by the Government is another predetermination of your ongoing investigation into MCI's accounting and other frauds. Government agencies should actively be seeking alternatives to MCI, not avoiding that effort because they can follow the easy path of waiving the GSA suspension – and imperiling your potential case – as each MCI contract comes up for renewal.

I would be happy to provide you with details about these waivers and to discuss this matter at your earliest convenience.

Sincerely,

William P. Barr

WPB/mb
cc: Karen Seymour, Chief, Criminal Division
Alexander Southwell, AUSA

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March 19, 2003

Chairman William H. Donaldson
Securities & Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

Re: WorldCom

Dear Chairman Donaldson:

I am writing because I believe the SEC's enforcement response to WorldCom's crimes—the largest corporate fraud in U.S. history—has been, to date, grossly inadequate and fundamentally misdirected.

Just from what is known so far, WorldCom engaged in a concerted program of manipulation over three years by which it fraudulently manufactured $9 billion in income, making victims of investors, pension funds, and every honest company struggling to survive the telecom meltdown. Investors lost roughly $175 billion—more than three times the losses in Enron. And WorldCom's brazen scheme dramatically deepened the crisis of confidence in corporate America, imposing incalculable costs across the economy.

While the SEC and Justice Department have focused on pursuing the *individuals* who perpetrated this crime, the government seems poised to allow WorldCom *as a company* to escape with the fruits of its unlawful conduct. What the government is wholly ignoring is that a significant part of WorldCom's business is itself the product of the fraud. If WorldCom is allowed to reorganize under Chapter 11 of the bankruptcy laws and reemerge debt free, this would permit WorldCom to continue to profit from those ill-gotten gains and would perpetuate, and indeed magnify, the injury suffered by honest competitors already victimized by WorldCom's conduct.

Such a result would be as gross an injustice as the underlying fraud itself. The government's willingness to accept such an outcome can only stem from a fundamentally mistaken view of the relationship between the securities laws and the Bankruptcy Code. The government seems to believe that its enforcement actions must be adjusted to comport with WorldCom's options under bankruptcy law. This is exactly backwards. The bankruptcy law expressly recognizes that the government's enforcement interests take precedence over the rights normally afforded to companies in bankruptcy.

Therefore, WorldCom's options in bankruptcy must be limited to those dispositions that comport with the government's enforcement interest. As discussed more fully below, the SEC should seek WorldCom's liquidation, because that is the only remedy that can eliminate the taint of WorldCom's unprecedented unlawful conduct.

The core mission of our justice system is to ensure that "crime does not pay," and the core mission of our securities laws is to ensure that securities fraud does not pay. Thus, when individuals commit crimes, they are not only punished but also compelled to surrender the benefits gained from wrongdoing. Likewise, when a business engages in crime that produces illicit advantages, it is axiomatic that—whatever individual punishment is meted out—*the company itself cannot be left in a position to profit from those ill-gotten gains.*

In WorldCom's case, the fraud was so massive that a significant part of its business today—its assets, customers, and market position—are the fruit of criminal conduct. From 1999 to 2002, WorldCom doubled its debt, fraudulently raising about $15 billion, which it then used to expand its assets, operations and customer base. WorldCom also used its fraudulently inflated stock to gain strategic advantages through acquisitions. Its reporting of false results weakened competitors and helped it capture greater market share.

Reorganizing under Chapter 11 would allow WorldCom to capitalize on these ill-gotten gains. It would emerge debt-free with assets and customers it would not have had but for the crime. Forgiveness of the $15 billion in fraudulent debt would give WorldCom the balance sheet of a criminal enterprise—putting WorldCom in the same position as if it robbed a bank, plowed the proceeds into its business, and escaped scot-free. Its competitive advantages would flow directly from criminal conduct.

A simple analogy sharpens the point. Imagine two competing trucking firms. One is an honest business, leasing trucks and making payments on time. The other is a criminal enterprise, which acquires its trucks through theft and uses this illicit advantage to steal business from the honest firm. There are two classes of victims—those whose property is directly stolen, and those whose businesses are injured by the criminal enterprise's illicit advantages.

What must the government do to right this wrong? Obviously, the individuals who stole the trucks should be punished, but just as obviously this alone does not remedy the offense. If new management is simply allowed to take over the corrupt company, keeping and using stolen trucks, the law-abiding competitor will still be a victim. It will lose customers and profits, not because it was beaten in the marketplace, but because it must compete against an enterprise built on criminal activity.

So too with WorldCom. Under a reorganization, WorldCom would be allowed to profit from securities fraud, and competing firms would continue to be the victims of a massive crime. The fact that the new owners would be WorldCom's creditors—

themselves victims of the fraud—does not justify allowing those new owners to exploit WorldCom's ill-gotten gains. *It is patently unjust to reward one set of victims by offering them the opportunity to "cash in" on the crime at the expense of another set of victims.*

Measured against this standard, the SEC's partial settlement with WorldCom falls far short of what is required to ensure a just result and to deter other would-be violators of the securities laws. That settlement—which does not even require WorldCom to admit that it broke the law—would do little more than enjoin *future* violations of the securities laws and attempt to reduce the risk of such *future* violations through a mix of training and oversight of WorldCom's employees. The settlement would do nothing to address the fact that WorldCom is using its bankruptcy as a vehicle to continue to profit from its crimes.

The proper course is the sale of WorldCom's business in an auction under Chapter 7 of the bankruptcy law. Liquidation would bring justice to all victims. Creditors would be paid from the sale proceeds, allowing them to capture WorldCom's fair value without giving them the unfair opportunity to participate in the upside of criminal conduct. WorldCom's employees would keep their jobs under the employ of new owners. And competitors would get a fair shake, because any buyer, having paid fair value, would have a cost-structure on par with an honest competitor. The taint of WorldCom's misdeeds would be purged once and for all.

The SEC has the means to achieve this result, and the bankruptcy laws are no impediment. The Bankruptcy Code is clear that WorldCom's bankruptcy is no bar to the SEC's continued prosecution of securities fraud claims against the company. Moreover, the Bankruptcy Code expressly gives the SEC standing as a party in interest in WorldCom's bankruptcy that can be heard on any issue. The SEC therefore has standing under section 1112 of the Bankruptcy Code to oppose any plan of reorganization proposed by WorldCom and to seek the conversion of WorldCom's bankruptcy to a Chapter 7 liquidation.

The only showing the SEC must make to secure this result is that "cause" exists to convert WorldCom's case to Chapter 7. Section 1112 provides a non-exhaustive list of factors constituting "cause" for liquidation, and courts have recognized that the inability to effectuate a reorganization plan, and the absence of "good faith" and "clean hands," are independent justifications for conversion to Chapter 7.

Here, the "cause" is readily apparent. If WorldCom is not liquidated, it will profit from its massive violation of the securities laws, meaning that the company is lacking in both "good faith" and "clean hands." Further, the SEC can compel the conversion of WorldCom's bankruptcy to Chapter 7 by making it clear to the court that it would not allow a reorganized WorldCom to issue securities, on the ground that the company would still be tainted by fraud. WorldCom would thus be unable to effectuate a reorganization plan, and the conversion of its bankruptcy to Chapter 7 would be virtually automatic.

At this point, it is no overstatement to say that WorldCom would be a valueless enterprise but for its fraud. In its most recent financial statement, WorldCom wrote down almost $80 billion, leaving the company with a valuation of just $10 billion. Given that WorldCom fraudulently borrowed roughly $15 billion in debt that it is seeking to have forgiven in bankruptcy, there is literally nothing left of WorldCom that is not attributable to its crimes.

None of the arguments that have been made on WorldCom's behalf warrant leniency. Some have asserted that WorldCom should be spared enforcement because it is a major supplier of important services to the government, including services important to law enforcement and national security, that is "too big to fail." Others have lamented that liquidation would put WorldCom's employees out of work.

This argument is a red herring. No one is talking about sweeping away WorldCom's business, *à la* Arthur Andersen. In a liquidation, qualified buyers would buy WorldCom's assets (along with the services of its employees) at fair prices and continue to operate them. Thus, the issue is not whether the business continues to exist, or whether the government will still be able to obtain critical services. It is whether the ongoing business has the cost structure of an honest enterprise or a criminal enterprise, and whether the government obtains services from vendors who fairly compete, or instead seeks to cash in on the crime by effectively serving as a "fence" for stolen goods.

WorldCom apologists also claim that the company deserves leniency for cooperating with the government's investigation. But cooperation cannot trump the numerous other factors that dictate action against the corporation in this case, including the crime's unprecedented scale, its brazen nature, its catastrophic impacts, the involvement of senior officials, and the unscrupulous corporate culture that bred these offenses.

WorldCom's cooperation results from necessity, not probity. The crime here was so egregious that the company had no choice but to cooperate. If this kind of "desperation cooperation" were rewarded with a pass, the most brazen criminals would go scot-free, while those with the temerity to raise a legitimate defense would suffer the harshest punishment. This result cannot be squared with any rational concept of justice.

In any event, law enforcement gives greatest weight for cooperation when it helps to snare a bigger fish. Here, there is no bigger fish than WorldCom.

Finally, WorldCom derides calls for liquidation by claiming that those urging it are self-interested. That is true, but only in the sense that any victim of crime has a strong self-interest in making sure that it is not victimized again. Liquidation will not eliminate WorldCom as a rival. It will level the competitive playing field by ensuring that WorldCom and its assets are owned by someone who paid a fair price for them.

In a capital-intensive industry like telecommunications, reorganizations are inherently destabilizing, because they risk a downward spiral in prices that denies non-bankrupt companies the opportunity to service their debt and recover their investments. To allow a corrupt company to perpetuate its violation of the securities laws and visit this injury on an already shaken sector would be an injustice of the highest order.

Please do not hesitate to contact me if you would like to meet to discuss this matter further.

Respectfully,

William P. Barr

cc: Attorney General John Ashcroft
Deputy Attorney General Larry Thompson
FCC Chairman Michael Powell

Ann D. Berkowitz
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February 6, 2003

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; *and Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147

Dear Ms. Dortch:

Yesterday, Ivan Seidenberg of Verizon had a telephone conversation with Chairman Powell to discuss Verizon's positions on the record in above proceeding. The attached document was provided to Chairman Powell following the conversation. Please let me know if you have any questions.

Sincerely,

Attachment

cc: Chairman Powell
C. Libertelli

Chairman Powell:

This is a brief follow up to your discussion today with Ivan Seidenberg.

First, with respect to broadband, I want to re-emphasize the importance of conducting a service-specific impairment analysis, both from a legal and practical standpoint.

From a legal standpoint, the Act makes clear that a carrier may obtain "*access* to network elements on an unbundled basis" only to the extent it is impaired in its ability "to provide the *services* that it seeks to provide." The FCC previously has conducted precisely this type of service-specific analysis. And it has been affirmed on this score by the D.C. Circuit, which has pointedly noted that "it is is far from obvious to us that the FCC has the power, without an impairment finding as to [the particular] services, to require that ILECs provide [access to elements] for such services on an unbundled basis."

This does not mean that the FCC has to conduct a separate impairment analysis for every individual service imaginable. But it does require a separate impairment analysis for each distinct product or service market, and the FCC has repeatedly (and correctly) found that broadband is a separate and distinct product market.

Some have suggested that the FCC should do an impairment analysis that focuses on facilities instead. To the extent their objective is keep fiber facilities free from the taint of unbundling and to restore investment incentves, the goal is laudable. But an analysis focused solely on facilities creates both legal and practical complications. And the same result can be reached through a properly conducted service-specific analysis that does not suffer from those complications.

From a legal standpoint, an impairment analysis focused on facilities cannot be squared with the Act. This is so because the Act does not require ILECs to turn over specific facilities for competitors to use for any conceivable purpose. As noted above, it only provides for unbundled "access" to network elements to provide the "services" for which there is impairment. And if the FCC is to provide the certainty necessary to foster investment, it is critical that it get the legal framework right and make a clear cut finding that there is no impairment in the already competitive broadband market.

A facilities-focused analysis presents practical problems as well. A good example is the analysis for hybrid fiber-copper loops. Some have argued that the FCC should conclude that carriers are not impaired with respect to all fiber loops so that those loops do not have to be unbundled. They would apply a different rule to hybrid fiber-copper loops, however. The theory for doing so appears to be that hybrid loops exist today, that carriers should have access to technology that exists today, and that the area where investment still needs to be made is in extending fiber to the curb or to the home.

The assumptions underlying this theory are mistaken. Only about 15 percent of Verizon's working lines are served over loops that contain fiber (though the fiber has capacity to serve a somewhat higher percentage), not all loops that are partly fiber are capable of delivering a broadband service, and, under existing rules, carriers do not have unbundled access to the fiber portion of the loops in order to provide broadband services.

As a result, significant investment still needs to be made even in the case of hybrid loops. And it's important to keep in mind that this is a step in the future evolution of the network as fiber is extended farther toward the home. Imposing an unbundling obligation, and creating a class of carriers dependent on this configuration, would impede that evolution. In addition, the fact remains that competitors are not impaired in the broadband market, regardless of the type of facilities at issue, and a finding that they are impaired over some technologies but not others is not sustainable.

This does not mean that there is no way that carriers can obtain access to ILEC loops. If the loop is entirely copper, which is all carriers obtain unbundled access to today, the FCC can adopt grandfather or transition provisions. If the loop is partly fiber, carriers can get access at negotiated, commercially reasonable rates. But the FCC should not distort the impairment analysis to create a new obligation to provide unbundled access at TELRIC rates, which is antithetical to providing the investment incentives that are key to the continued development of the broadband market.

Second, another critical issue involves recent proposals to change the rules for when carriers can get access to combinations of unbundled loops and transport (or EELs), and their impact on the competitive special access market.

As I outlined in my recent letter on the subject, even a small change in these rules can have dramatic consequences in terms of both the revenues at stake and the effect on facilities investment. In recent days, a number of parties have come forward with proposals to address issues raised by smaller carriers, while attempting to protect the competitive special access business. Likewise, we have suggested ideas of our own to address the specific concerns that we have heard articulated. In the last minute rush of this proceeding, however, it's fair to say that no party or the FCC has been able to really evaluate the ramifications of any of these proposals fully.

This is a particular concern in this instance, because any changes could have the unintended and unanticipated effect of undermining a market segment where the FCC has succeeded in fostering meaningful facilities-based competition. Experience shows that other carriers will try to make something different of these proposals than is intended in order to exploit an arbitrage opportunity between subsidized TELRIC rates and competitive special access rates. In particular, they will try to convert any unbundling obligation into a way to supplant interstate access services bound for IXC's or ISP's POPs. In addition, any rules requiring combinations of elements need to be carefully considered to avoid creating a new class of carriers that are dependent on UNEs and to avoid creating the equivalent of a new high capacity UNE-platform for business customers. As a result, we believe it is vitally important for the FCC to obtain comment on the various proposals (which it could do on an expedited basis) in order to fully understand the ramifications of those proposals.

William P. Barr

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January 30, 2003

Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Powell:

This letter explains why the Commission should not modify its rules limiting the ability of carriers to substitute unbundled loop-transport combinations (so-called "EELs") for special access services.

Executive Summary:

- *First*, the requirement to provide "enhanced extended loops" or "EELs" was originally established as a way to extend the reach of CLECs' local switches in order to provide competing local telephone service. By contrast, as the Commission and the D.C. Circuit have expressly held, special access services for the origination and termination of non-local traffic comprise a distinct and separate market and the Act therefore requires the Commission to undertake a separate, service-specific impairment analysis for special access services. Moreover, as the Commission previously found, special access is a "mature source of competition in telecommunications markets," and competing carriers have not (and cannot) show that they are impaired without access to unbundled elements to provide special access. In the absence of such a showing, the Commission recognized that substituting EELs for special access would be inconsistent with the Act, "undercut the market position of many facilities-based competitive access providers," and threaten revenues that ILECs depend on to support the local network. The D.C. Circuit expressly upheld the Commission's analysis, and pointedly suggested that such a service-specific analysis is required by the express terms of the Act. According to the Court, "it is far from obvious . . . that the FCC *has the power* without an impairment finding as to *nonlocal services* to require that ILECs provide EELs for such services."

- *Second*, based on this analysis, the Commission determined that EELs should be available only to carriers providing "a significant amount of local exchange service" over that facility. It also adopted three alternative tests for satisfying this standard that had been proposed by a cross-industry group of CLECs and ILECs. The dual lynchpins common to these tests were specific, objective criteria for what constituted a significant amount of

local exchange traffic, and a prohibition on the "commingling" of unbundled elements (such as loops) with special access services (such as special access transport). These specific tests also were expressly upheld by the D.C. Circuit, which rejected claims the rules were not administratively feasible, relying on evidence provided by the FCC that carriers were taking advantage of the availability of EELs. Indeed, in Verizon's case alone, CLECs have obtained more than 400,000 voice-grade equivalent circuits as EELs, including more than 200,000 in the last year. The Court also expressly affirmed the commingling restriction as "the only way to prevent carriers from using [EELs] 'solely or primarily to bypass special access services,'" because the absence of such a restriction would "allow the entire base of the loop or 'channel termination' portion of special access circuits to be converted into unbundled loops."

- *Third*, in the wake of the D.C. Circuit decision, other parties appear to concede that restrictions on the availability of EELs are required, but have filed a series of recent *ex partes* proposing wholesale changes to the current rules that would make them meaningless. These proposals are based on a false premise: it is simply not true that existing restrictions have prevented CLECs from obtaining access to EELs. As noted, CLECs *have* obtained hundreds of thousands of voice-grade equivalents from Verizon alone. More important, because the "restrictions" that the CLECs have proposed provide no meaningful limit at all, their effect would be to prescribe special access rates at TELRIC, and undercut what the Commission already found to be a mature source of competition. Moreover, the ultimate impact of these proposals would be to create a new high-capacity, business UNE-platform for dedicated services (regardless of service type), with even more deleterious consequences than the current UNE-platform requirement for mass market services. Indeed, the proposals would cost Verizon alone in excess of *$1 billion* in special access revenues annually, with catastrophic consequences for local network investment and for the continued viability of facilities-based competition.

- *Fourth*, to the extent the Commission has any remaining concerns about the ability to use EELs to extend the reach of CLEC switches for local voice service in the absence of an unbundled switching requirement, those concerns can be addressed directly. As we have explained elsewhere and address below, the Commission could adopt a narrow exception to the commingling prohibition to permit CLECs to connect analog voice grade loops used to provide competing local telephone service to special access transport. Likewise, to the extent the Commission has a concern about potential abuse of the auditing rights provided by its rules, which Verizon has never invoked, it can address any such concerns directly. What the Commission should *not* do is modify the existing EELs restrictions more broadly, without first subjecting the details of any proposed changes to public comment and thoroughly exploring the ramifications of any modification. Even small changes to the existing rules likely will have large and unintended consequences. But it is impossible for parties to comment intelligently (and, therefore, for the Commission to make an informed decision), without first knowing what, if any changes, are under consideration and without knowing what elements have to be made available in the first place.

Discussion:

1. Background: EELs Are Intended To Extend the Reach of CLEC Local Switches, Not To Facilitate Special Access Bypass

EELs are combinations of unbundled local loops and unbundled dedicated transport that provide a link between a requesting carrier's collocated facilities in one wire center and a customer served out of a distant wire center. The EEL requirement reflected regulators' interest in providing a way for competitors to extend the reach of their switches for the provision of local exchange service without the need to establish additional collocation arrangements. As the NYPSC put it, by permitting CLECs access to EELs, "CLECs with at least some network facilities [are able] to gain access to unbundled local loops in many central offices without the need to collocate in each . . . central office, thereby enhancing CLECs' ability to vie for local customers."[1] The explicit justification for requiring access to EELs was that it would spur the "development of facilities-based *local* competition . . . principally geared toward . . . residential and smaller business markets."[2]

In the *UNE Remand Order* proceeding, the Commission likewise noted that the purpose of EELs was to "extend[] a customer's loop from the end office serving that customer to a different end office in which the competitor is already collocated" thus permitting the carrier to "transport[] aggregated loops over efficient-high capacity facilities *to their central switching location.*" *UNE Remand Order*, 15 FCC Rcd 3696, ¶ 288 (1999) (emphasis added). The Commission limited access to these loop-transport combinations to *only* those circumstances where such arrangements would be used to provide a "significant amount of local exchange service in addition to exchange access service, to a particular customer."[3]

At the same time, the Commission refused to require ILECs to make EELs available solely or primarily for use in the provision of special access service.[4] That determination was firmly grounded in the recognition that the special access market is separate and distinct from the local exchange market. Indeed, the "exchange access market occupies a different legal category from the market for telephone exchange service." *Supplemental Order Clarification* ¶ 14. And, as the Commission has found, the market for special access has become highly

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[1] Order Directing Tariff Revisions, *Proceeding on Motion of the Commission to Examine Methods by Which Competitive Local Exchange Carriers Can Obtain and Combine Unbundled Network Elements*, Case 98-C-0690, at 2 (N.Y. Pub. Serv. Comm'n Mar. 24, 1999).

[2] *Id.* at 7-8 (emphasis added); *see also* 8, n.5 ("EEL arrangements potentially offer CLECs an important additional means of executing a plan to enter the *local exchange* market.") (emphasis added).

[3] *Supplemental Order*, 15 FCC Rcd 1760, ¶ 5 (1999).

[4] *Id.* at ¶ 4; *see also Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 8 (2000).

competitive in the absence of access to UNEs. "Competitive access, which originated in the mid-1980s, is a mature source of [facilities-based] competition in telecommunications markets." *Id.* ¶ 18. Special access customers are characteristically large businesses with high traffic volumes – voice, data, or both – justifying dedicated point-to-point facilities to carry traffic to IXCs' or ISPs' points of presence. Competitors have captured at least 36 percent of that market. In light of that record, the FCC concluded that there was no evidence that competitors are impaired in their ability to provide special access without access to unbundled loops and transport. *Id.* ¶ 15. Far from promoting competition, permitting requesting carriers to substitute UNEs for special access would "undercut the market position of many facilities-based competitive access providers." *Id.* ¶ 18. Moreover, such special-access bypass would cause "substantial market dislocations," threatening to eliminate ILEC special access services, thereby jeopardizing an important source of revenues that help to support the local network. *Id.* ¶ 7.

The crucial legal determination in the *Supplemental Order Clarification* is that section 251(d)(2) should be read to require a *service specific* analysis to determine whether a requesting carrier would be impaired in its ability "'to provide *the services that it seeks to offer.*'" *Id.* ¶ 15 (quoting 47 U.S.C. § 251(d)(2)(B)).[5] The Commission found that the parties had presented no evidence that carriers would be impaired in the provision of special access service in the absence of access to EELs. *See id.* ¶ 16. The Commission rightly determined that it could not "impose [unbundling] obligations first and conduct our 'impair' inquiry afterwards." *Id.* Rather, the burden is on requesting carriers affirmatively to demonstrate impairment *in the provision of special access service* to justify unbundling of UNEs for the provision of such service – something that they have not and cannot do.

The D.C. Circuit expressly upheld this analysis in its *CompTel* decision. The Court first upheld the Commission's determination to conduct a service-specific impairment analysis. The Court agreed that, in conducting its impairment analysis, the Commission must "consider the markets in which a competitor 'seeks to offer' services and, at an appropriate level of generality, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services." *CompTel v. FCC*, 309 F.3d 8, 13 (2002). Indeed, the Court indicated that such a service-specific inquiry is not merely permitted, but *required* in this case: "it is far from obvious . . . that the FCC *has the power* without an impairment finding as to non-local services, to require that ILECs provide EELSs for such services." *Id.* The Court agreed that there was no evidence to suggest that requesting carriers are impaired in their "ability to provide long distance or exchange access service" without access to unbundled elements. *Id.* And the Court likewise found that the Commission's concerns about market

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[5] *See also UNE Remand Order* ¶ 81 (holding that, because "[d]ifferent types of customers use different *services* . . . it is appropriate for us to consider the particular types of customers that the carrier seeks to serve")(emphasis added); *Line Sharing Order*, 14 FCC Rcd 20912 ¶ 31 (1999) (reiterating conclusion that "it is appropriate to consider the *specific services* and *customer classes* a requesting carrier seeks to serve when considering whether to unbundled a network element")(emphasis added).

dislocations and undermining the market position of facilities-based competitors provided further justification for its restrictions. *Id.* at 16.

2. The Existing Restrictions Should Not Be Changed

In an effort to give content to its determination that unbundled loop-transport combinations should be made available only for use to provide a "significant amount of local exchange service," the Commission set out three sets of circumstances under which a carrier would satisfy that requirement. *Supplemental Order Clarification* ¶ 22.

These existing "safe harbors" were the result of negotiations by a broad cross-section of the telecommunications industry, including both ILECs and CLECs. The criteria include requirements designed to ensure that the EELs are being used to connect to the CLEC's local switch rather than an IXC or ISP POP – the purpose of the collocation requirement – as well as traffic volume requirements designed to ensure that the EELs are being used predominantly for local traffic, not just long-distance traffic. *Id.* ¶ 22. In addition, the Commission adopted a prohibition on "commingling," a term it used to refer to the combining of unbundled elements (such as loops) with special access services (such as special access transport circuits). *Id.* ¶ 28. The purpose for this provision was to ensure that each of a carrier's customers satisfies the substantial local usage requirement and to prevent all special access channel terminations from being immediately converted to unbundled loops at TELRIC rates. *Id.*

Moreover, the D.C. Circuit specifically upheld the Commission's safe harbors, rejecting claims that the restrictions were not administrable. The court held that "it is plain that supplying the information is feasible, as the Commission has produced evidence that some carriers are taking advantage of the safe harbors." *CompTel*, 309 F.3d at 17. The Court likewise agreed with the FCC that the commingling restriction is "the only way to prevent carriers from using these units 'solely or primarily to bypass special access services,'" and that the absence of such a restriction would "allow the entire base of the loop or 'channel termination' portion of special access circuits to be converted into unbundled loops." *Id.*

Despite the Commission's earlier decision – and the D.C. Circuit's approval of that decision – CLECs again argue that the current restrictions must be changed because they are overly restrictive and have prevented them from obtaining EELs. But experience proves that carriers can and do take advantage of the current safe harbors to gain access to EELs. Verizon alone has provisioned more than 400,000 voice-grade equivalent circuits as unbundled loop transport combinations – more than 200,000 in the last year alone. More than a dozen CLECs, large and small, have converted special access circuits to EELs.

Indeed, if anything, the current safe harbors are not restrictive enough and allow circuits to be "flipped" to sub-competitive TELRIC pricing even when they are used predominantly for exchange access service, rather than local exchange service. Some requesting carriers have gamed the existing rules by self-certifying compliance with the Commission's safe harbors, even in circumstances where the circuits at issue on their face did not satisfy the clear requirements of the Commission's rules. *See, e.g., Net2000*

Communications, Inc. v. Verizon Washington, D.C. Inc., 17 FCC Rcd 1150 (2002). In the *Net2000* case, the requesting carrier sought conversion of existing special access circuits, and "certified that the circuits provided 'a significant amount of local exchange service to the particular customers served.'" *Id.* at ¶ 11. Verizon did not convert the circuits because the request on its face did not "conform to the Commission's requirements." *Id.* After the requesting carrier brought a formal complaint, the Commission vindicated Verizon and held that the requesting carrier's certification was improper. As the Commission held, "the requested circuits were . . . ineligible for conversion" and thus the carrier's request for conversion "in conflict with [the Commission's] co-mingling restriction was inappropriate." *Id.* ¶ 33.

Notably, *Verizon's* record of compliance with the Commission's rules on this score is unblemished, and whenever Verizon's practices in this regard have been challenged – formally or informally – Verizon has prevailed. Moreover, while some parties have complained that incumbents might abuse the existing rules that permit audits to verify compliance with the Commission's rules, Verizon has never invoked that right. Thus, while the audit right is important to protect against abuse by requesting carriers, any suggestions that *Verizon* has abused that right are simply fabrications.

Carriers also have objected to the existing safe harbors because they prevent requesting carriers from using unbundled loop-transport combinations to establish dedicated connections to IXC or ISP POPs. But that provides no basis for criticizing the existing rules; to the contrary, the very purpose behind the restrictions is to ensure that EELs are not used simply as a TELRIC-priced substitute for special access.

In short, actual experience under the existing rules has provided firm empirical evidence that the rules do not prevent carriers from obtaining EELs. To the contrary, that experience demonstrates that, if anything, the restrictions are too lax; carriers have gamed the existing rules to obtain access to EELs without providing local services or connections to the switched local network. Too often, EELs have simply been used simply as a new high-capacity, dedicated UNE-platform for large businesses. And such use of EELs is inconsistent with the purpose for which those facilities are intended and undermines, rather than promotes, facilities-based local competition.

3. Proposals to Change the Existing Rules Would Impose No Meaningful Limits At All, And Would Destroy a Working Competitive Market

As outlined above, EELs were originally conceived as a way for new entrants to extend the reach of their local switches in order to promote competing local voice services, particularly in the residential and small business markets. As a purely legal matter, a finding that EELs should be made available for *those services* does *not* permit EELs to be made available to carriers seeking to establish dedicated connections for non-local traffic being carried to IXC POPs, or delivered to ISPs. *Supplemental Order Clarification* ¶ 16. Rather, the Commission must carry out a service-specific impairment analysis *before* EELs can be made more widely available.

Because they cannot demonstrate that they would be impaired in the provision of special access services without access to EELs, CLECs now try to avoid that fundamental principle by instead proposing changes to the existing rules that would ostensibly be easier to administer. But those proposals work far more than mere "administrative" changes. They fail to impose *any* meaningful limitations on access to EELs; if adopted, those proposals would effectively prescribe TELRIC rates for special access services and would violate the Act.

Some parties have claimed that the only limitation that is needed is a requirement that an EEL terminate in a requesting carrier's collocation arrangement. To be sure, because EELs were intended to extend the reach of a CLEC's local switch, the Commission should require, as it currently does, that an EEL terminate in a collocation arrangement *and* that CLECs certify that the traffic received over the EEL is predominantly local traffic routed to the CLEC's local switch. But the requirement that an EEL terminate in a collocation arrangement, standing alone, does not impose a significant limitation – large carriers already have nearly ubiquitous collocation arrangements, already terminate a significant portion of their special access circuits to collocation arrangements, and could readily reconfigure the rest to do so. The result would be TELRIC priced special access.

Likewise, a requirement that a requesting carrier assign a local number to a circuit, or provide a porting capability or a local voice capability would pose no meaningful limitation on special access bypass. At most, any such requirements may mean that some part of a circuit might be capable of providing local service. They do not require a substantial amount of local traffic, which is an absolute prerequisite to EEL use under the impairment analysis. And requiring the assignment of a local number is meaningless. First, CLEC misuse of local number resources is well established, and would provide no check on gaming. Second, such a rule is simply inadequate. For example, assigning a single telephone number to a DS-3 or DS-1 would appear to be sufficient to convert it to TELRIC pricing under the CLECs' proposals.

CLECs' remaining criteria are window dressing, not meaningful limitations related to the use of a particular facility. Essentially all carriers that purchase special access, including AT&T, WorldCom and others, already have state certificates of authority, PSAP 911 certificates, interconnection agreements, and local interconnection trunks. None of these indicia that a carrier might carry local traffic somewhere in a jurisdiction answer the question required under the impairment analysis: does the EEL in question carry a substantial amount of local traffic. These requirements would create no meaningful obstacle to special access bypass.

The Commission should also reject proposals for abandoning the prohibition on commingling, *i.e.*, combining unbundled elements with special access. Absent this restriction, as the Commission and D.C. Circuit have expressly found, carriers would be able to convert the entire base of special access channel terminations into unbundled local loops to be provided at UNE rates. *See CompTel*, 309 F.3d at 17-18. As the Commission previously recognized, the consequences would be disastrous both for ILECs and for the future of facilities-based competition in this mature segment of the market.

Adopting the recent CLEC proposals would thus ignore the clear guidance of the D.C. Circuit, which has firmly endorsed both the Commission's existing restrictions and the policy considerations that underlie those rules. Moreover, such a policy would create a new UNE-platform for high-capacity dedicated services and "induc[e] IXCs to abandon [special and] switched access for unbundled network element-based special access on an enormous scale." *Supplemental Order Clarification* ¶ 7. The ramifications of such a policy for investment incentives and the health of the industry would be even more severe than with the current mass market UNE-platform requirement, because there is already a mature, competitive market in special access. Moreover, permitting special access bypass would eliminate a critical source of revenues that help pay for the cost of operating, maintaining, and upgrading local telephone networks to provide broadband and other new service capabilities. Allowing access to existing special access facilities at UNE prices thus serves no competitive purpose under the Act, and in fact injures facilities-based competition by undercutting existing facilities-based providers. Indeed, imposing an unbundling obligation for special access services would create a vicious cycle by undercutting existing facilities-based providers, deterring carriers from deploying new facilities, and, by doing so, indefinitely perpetuate both unbundling and regulation.

If the new CLEC proposals prove anything, it is that the Commission should not make any significant modifications to the existing EELs restrictions until the parties have had a chance to debate these and other proposals fully. Unlike the Commission's unbundling rules – which the Commission is required to revisit in light of the D.C. Circuit's decision in *USTA* – the Commission's existing restrictions on special access bypass have been *upheld* by the D.C. Circuit in *CompTel*. The Commission is under *no* obligation to modify those rules, which are indisputably consistent with the 1996 Act. Accordingly, the Commission should not rush to modify existing rules at the risk of opening the door to special access bypass on a massive scale. The ramifications of such a development – for incumbents, for facilities-based competitive access providers, and for local network investment – would be devastating.

Moreover, as noted above, to the extent the Commission has any remaining concerns about the ability to use EELs for their intended purpose, they can be addressed directly. In particular, the Commission could adopt a narrow exception to the commingling prohibition in its current rules to permit CLECs to connect single channel analog voice grade loops to special access transport. This would provide CLECs with another alternative (in addition to those already available) to extend the reach of their switches to customers in distant wire centers by obviating the need for collocation in the wire center serving the unbundled voice grade loops. If the Commission does so, however, it is critical to prevent gaming by making clear that the substantial local use standard applies to any such standalone loops, and by requiring a certification that the loop terminates on a CLEC switch which is used for originating and terminating local voice calls. Moreover, the Commission should make clear that the special access transport circuit is not subject to TELRIC pricing under these circumstances – which is sometimes referred to as "ratcheting." On the contrary, even the CLECs have conceded that ratcheting is unnecessary. *See* Transcript of Oral Argument, *CompTel v. FCC,* Case No. 00-1272 at 20 (D.C. Cir. Sept. 5, 2002) (Counsel for Intervenors WorldCom et al. ("Now we're not trying to convert the transport link. We'll pay full access

rates for that, so there's no chance that we can cheat. We're talking about only wanting to convert local loops").

Likewise, to the extent the Commission has any concerns about possible abuse of the audit rights in its existing rules, it can address any such concerns directly as well. As noted above, Verizon has never even invoked its audit rights, and any such concerns are unfounded in our case. To the extent there are concerns about specific practices of other parties, however, any such concerns can be addressed without a wholesale abrogation of the existing rules.

What the Commission should *not* do (and cannot do consistent with the Act's impairment standard), however, is modify the existing restrictions more broadly without first airing the details of any proposed changes so that parties can comment fully on the ramifications for the competitive special access market. This is an area where even small changes will likely have large, unanticipated, and unintended consequences. And the cost of getting it wrong is enormous, both in terms of the consequences for local network investment and for the continued viability of facilities based competition in a mature segment of the market.

Sincerely,

William P. Barr

cc: Commissioner Abernathy
Commissioner Copps
Commissioner Martin
Commissioner Adelstein
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January 17, 2003

Honorable Michael Powell
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Dear Chairman Powell:

I am writing to thank you for our last meeting and to follow up on a few key issues related to broadband.

The ultimate task before the Commission in its various ongoing broadband proceedings, is to define an overall regulatory regime for broadband that will produce rational market-based incentives for investment by all facilities-based broadband providers. While the immediate issue in the *Triennial Review* is the unbundling rules for broadband, it is therefore important to address that issue with a view toward the ultimate resolution of all the inter-related broadband issues that are now pending.

1. The broadband market is a separate and distinct market.

The starting point of any broadband analysis is the fact that broadband is a separate and distinct market from the traditional services offered by either cable operators or phone companies. Even where these companies deliver their traditional services over the same wires as broadband, there should be no question that the broadband market is separate from both video distribution *and* traditional voice telephone service.

The Commission confirmed this analysis in its *Cable Modem Declaratory Ruling*, 17 FCC Rcd 4798, ¶ 7 (2002), where it concluded that cable broadband is not a cable service. From this conclusion, it followed necessarily that cable broadband is not subject to the old rules

governing video distribution, including requirements to obtain local franchises, pay franchise fees to municipal authorities, and make broadband capacity available to interlopers seeking leased access.

The situation for phone companies is the same. Even though our broadband services in many instances are delivered over the same wires as voice telephony, the broadband services (and the network capabilities used to provide them) should not be subject to the old rules governing narrowband services.

The reason, as the Commission found in the order approving the AOL Time Warner merger and elsewhere, is that broadband is a distinct market from narrowband. *See* 16 FCC Rcd 6547, ¶ 72 (2001). This market is already competitive, with multiple providers vying for the attention of consumers, and new technologies, such as satellite, fixed wireless and others, poised to expand their presence in the market. Investment is the key to this new market, as massive expenditures are required to transform old networks into new ones optimized to deliver broadband services, and to build entirely new networks delivering broadband over new technologies.

As we have explained previously, there are several key hallmarks of an overall regulatory regime for the broadband market that will provide rational incentives to make these investments, and thereby promote the continued development of multiple facilities-based platforms. *First*, as it already has in the case of cable modem services, the Commission should permit all broadband transmission services to be provided under Title I. It should do so both when these transmission services are part of a bundled service offering (in which case they have long been classified as information services) and when they are offered on a stand-alone basis (in which case they should be classified as private carriage). *Second*, as it has for cable modem services, the Commission should make clear that its *Computer Rules*, which were designed for narrowband services at a time when local telephone companies were thought to have a bottleneck in that market, do not apply to broadband. *Third*, as is true for cable companies, the Commission should make clear that local telephone companies may provide access to ISPs and other content providers at commercially reasonable, negotiated rates (not regulated, cost-based rates). *Fourth*, and again as is already true for cable, local telephone companies should not be required to provide unbundled elements for use to provide broadband services.

With respect to the specific unbundling issues in the *Triennial Review*, there is no question, as addressed further below, that all segments of the broadband market are both contestable and are being actively contested by multiple competing providers using their own facilities platforms. Under these circumstances, the Commission simply cannot, consistent with the terms of the Act and binding precedent from the Supreme Court and D.C. Circuit, find that there is any impairment with respect to broadband. To the extent the Commission finds that competing providers continue to be impaired with respect to voice services, that is an issue that it can (indeed, must) deal with separately. But it cannot let its conclusions with respect to the voice market infect its conclusions with respect to the broadband market.

2. The Commission must conduct a service-specific impairment analysis that addresses broadband separately from traditional voice services.

The legal analysis that compels this result is straightforward. First, the Act itself prescribes a *service*-specific impairment analysis. This follows directly from the terms of the impairment standard itself, which requires the Commission to determine whether competing providers are impaired with respect to their ability "to provide the *services* that [they] seek to provide." *See* § 251(d)(2) (emphasis added). Indeed, the Commission itself has conducted precisely this type of service-specific impairment analysis in its prior orders. For example, in its *Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 14 (2000), the Commission concluded that special access service constitutes a distinct product or service market, and therefore is subject to a separate impairment analysis under the terms of the Act. The D.C. Circuit expressly upheld that analysis in its *CompTel* decision, 309 F.3d 8, 12 (2002), and suggested that, while the issue was not squarely presented there, a service-specific analysis not only is permitted by the Act, but likely is compelled by the Act's express terms.

Of course, the Commission itself has recognized that a service-specific impairment analysis is appropriate for broadband, both in its *UNE Remand* and *Line Sharing* decisions where it analyzed broadband (which it referred to as advanced services) separately. Indeed, the need to perform a separate impairment analysis for broadband necessarily follows from the Commission's repeated, and unquestionably correct, conclusion that broadband constitutes a separate and distinct market from traditional narrowband services. This means that in the current unbundling proceeding, the Commission must undertake separate impairment analyses for broadband services and for traditional voice services.

Second, competing providers may obtain unbundled access only to those network capabilities they need to provide the services for which they are impaired. Again, this follows directly from the terms of the Act and the Commission's previous orders. Under the express terms of the Act, incumbents are required only to provide competitors with "*access* to network elements on an unbundled basis" in order to provide the services for which they are impaired. *See* ∋ 251(c)(3) (emphasis added). And, as the Commission has expressly found, what competitors get access to, consistent with the definitions in the Act, is the particular "features, functions, and capabilities" of the network facility at issue that allow them to provide the service for which they are impaired. *See* ∋ 153(29). Indeed, this is the very analysis adopted by the Commission in its *Line Sharing* decision, 14 FCC Rcd 20912, ¶ 19 (1999), where it defined the element that competitors could obtain access to as the capability to provide high speed data services over a copper loop. The D.C. Circuit expressly upheld this *definitional* analysis in its *USTA* decision, 290 F.3d 415, 430 (2002). It also is consistent with the analysis the Commission has employed in any number of other decisions, from defining capacity on shared transport as an element to defining operator services as an element, that consistently have been upheld by the courts of appeals and even the Supreme Court.

To put this latter point in practical terms, take the example of an incumbent that deploys an integrated fiber-based network architecture. If the Commission were to conclude that there are circumstances under which competitors are impaired with respect to some particular service

(such as voice), the incumbent would not have to unbundle the entire fiber loop and turn it over to the use of a competitor. Rather, the incumbent would merely have to provide competitors with access to the *capability* to provide the specific services for which the Commission concludes they are impaired.

For analytical purposes, in other words, the Commission can conceive (and has) of the phone company wires as having two separate channels. The narrowband channel is used to provide traditional narrowband services, while the broadband channel is used to provide broadband services. Of course, from a purely technical standpoint, the two in some instances may be provided over separate wires, while in others they will be provided over a common integrated network. But the key conceptual point is that the broadband and narrowband channels must be addressed separately, and it is the narrowband channel alone that may be subject to any unbundling or other rules governing traditional voice services.

3. The Commission should find that there is no impairment for broadband.

As noted above, while the record here confirms that broadband is a developing market in which significant additional investments need to be made, it also clearly establishes that all segments of the broadband market are both contestable and are being actively contested by multiple providers vying to provide service over their own facilities platforms.

In the larger business segment, which includes services such as Frame Relay and ATM, the major long distance carriers dominate. Indeed, AT&T, WorldCom and Sprint control more than two-thirds of the retail market for Frame Relay and ATM services.

In the residential segment, cable continues to dominate with approximately two-thirds of all residential broadband subscribers. In addition, two-way satellite services (that do not rely on a telephone uplink) are now available, and a variety of fixed wireless and other emerging technologies are entering in many areas as well.

Some parties have argued that small business should be treated as a separate market segment. In contrast, the Commission previously has included small businesses along with residential customers as part of the mass-market segment. This makes good sense, because the same providers that serve the residential market also are vying to serve the small business market.

Regardless of whether the Commission analyzes small businesses separately or as part of the mass market, however, it is clear that the small business segment is both contestable and being contested. Indeed, while the small business segment unquestionably is still developing, it is developing competitively. Although broadband providers initially focused on serving either residential customers or larger business customers, a number of competing platform providers have now tailored services specifically to meet the needs of smaller business customers and are moving to serve these customers.

Cable companies are moving especially aggressively to serve small businesses. As we have documented separately, six of the seven largest cable operators already have developed and offer a separately branded service for business customers. Several also have formed separate business units dedicated to providing broadband to business customers (such as Cox, Comcast and Charter). Cable operators have designed their services to provide the features that small businesses desire, such as high upstream bandwidth and the ability to use a single connection for multiple computers. According to analysts, cable operators were already providing cable modem service to between 600,000 and 700,000 business subscribers as of year-end 2002 – more than 40 percent of all small business broadband – and this figure is projected to as much as triple over the next three years. And cable operators (such as Time Warner and Comcast) also are rolling out fiber-based data services capable of speeds of from 1 to 100 megabits by taking advantage of their existing fiber infrastructure and passive optical network technologies.

Other broadband providers also are moving to serve small business customers. Two satellite providers – Hughes and StarBand – have begun providing two-way services (that do not rely on a telephone uplink) designed specifically for small businesses. Fixed wireless and other emerging services (including use of technologies such as WiFi for local distribution) also are alternatives in many areas. And many small business customers also are sufficiently clustered that entrants can readily overbuild broadband networks to serve them, and some competitors are doing precisely that.

Small business customers in major central business districts have still other alternatives. Indeed, these central business districts are the areas that competitors moved into first, even before the passage of the 1996 Act. And competitors that provide broadband services such as Frame Relay and ATM to larger business customers located in buildings in central business districts obviously could provide lower-speed versions of those services to small businesses in the buildings as well. Indeed, analysts estimate that approximately one-third of all Frame Relay services already are sold at fractional speeds.

As even this brief summary makes clear, all segments of the broadband market are developing competitively. Under these circumstances, imposing an unbundling obligation on one, and only one, service provider would be affirmatively counter-productive and, by handicapping one potential competitor, would jeopardize the continued development of this market segment on a competitive basis.

Accordingly, the Commission should eliminate any requirement to provide unbundled access to elements of the incumbents' networks for use to provide broadband services. This means that the previous line sharing requirement must be eliminated. Indeed, there simply is no way to impose a line sharing obligation consistent with the impairment standard in the Act or the D.C. Circuit's *USTA* decision. As a purely transitional measure, however, existing customers could be grandfathered for some period of time.

Likewise, the requirement to provide collocation at the remote terminal also should be eliminated. This obligation was imposed principally on the mistaken belief that, by providing a means of leasing the copper subloop portion of hybrid loop facilities, it would serve as a way of

providing broadband services in those circumstances. In practice, however, it has proven to serve no purpose, except to impose added cost, operational complexity and uncertainty on the incumbents. And, of course, if other carriers did come to roost in the middle of an incumbent's loop, they would then claim that they were dependent on that configuration and that the incumbent should be forced to maintain it, triggering yet further investment-deterring litigation. Consequently, the requirement to provide collocation at the remote terminal should be eliminated along with the other broadband unbundling obligations.

With respect to the local loop, the Commission should make clear that where incumbents have deployed fiber in the loop, they do not have to provide unbundled access to that loop for use to provide broadband services. To the extent competing carriers want to use the local telephone company's network to provide broadband services, they may enter into voluntary negotiations to establish private carriage arrangements at commercially reasonable rates. Or, alternatively, they could negotiate voluntary partnering arrangements with satellite or cable providers, or invest in one of the many other developing technologies.

Finally, in those areas where fiber has not yet been deployed in the loop, to the extent competing carriers provide broadband services by leasing an entire copper loop, the same conclusion logically applies. Nevertheless, the Commission could, as a purely transitional mechanism, establish a transition period of up to two years during which carriers could purchase the entire copper loop under existing rules in those areas where fiber has not been deployed, and continue to use it to provide broadband services. At the end of the transition period, however, carriers could only provide broadband services over all copper loops under negotiated private carriage arrangements at commercially reasonable rates.

4. <u>If the Commission finds that there is impairment with respect to voice, it should limit any unbundling obligations to providing a voice grade capability</u>.

With respect to the separate analysis for voice services, one issue that the Commission obviously will have to address is whether competing providers are impaired in their ability to provide voice services where incumbents deploy new all fiber network architectures.

As we (and others) have explained previously, we believe the correct answer is that carriers are not impaired in any meaningful sense even for voice under this scenario. On the contrary, the incumbent in this situation is building what amounts to an all new distribution network, and other providers have the same ability as the incumbent to do so. Indeed, competitors actually have an advantage to the extent they have a greater ability to target deployment of their fiber networks to the most lucrative customers.

To the extent the Commission disagrees, however, any unbundling requirement it imposes should be limited to providing unbundled access to a voice grade capability to reach the customer. In the context of a fiber loop facility, this means that, in any circumstances where the Commission retains an unbundling obligation for voice, the requirement should be limited to providing a voice grade capability.

Today, where incumbents have deployed hybrid copper/fiber loops, they provide access for voice services either by providing access directly to the digital loop carrier (which is possible where universal digital loop carrier is present), or by providing access to a spare copper loop (which is the only alternative where integrated digital loop carrier is present because it cannot be unbundled technically). Going forward, as incumbents deploy all fiber loop facilities, they likewise should have the choice of satisfying any obligation by providing access in some way to a voice grade capability over the new fiber network (essentially, the equivalent of a 64 kilobit signal in today's technical parlance), or by providing access to a copper loop.

Under no circumstances, however, should incumbents be left with an obligation to maintain two parallel networks. Any such requirement would merely inflate the cost and operational complexity of deploying new network architectures, and deter development of the network and the deployment of new broadband services. Indeed, in some places, existing facilities may have to be removed to make room for the new ones, in which case it may not even be possible (let alone economic) to maintain duplicate networks.

This means that as incumbents deploy new network architectures, they need the option of moving any carriers that previously obtained unbundled copper loops onto the new fiber network (provided they have access to a voice grade capability over the fiber network). Otherwise, they will still be left with the burdens of maintaining two parallel networks. Accordingly, under all circumstances, incumbents should be able to move all such customers over to the new network within no more than a year after the new network is deployed in a given area, and sooner where circumstances warrant. This would allow carriers to continue to obtain access to a voice grade capability at unbundled element rates for so long as the Commission maintains an unbundling requirement. And, as noted above, if these carriers also want to provide broadband services over the new fiber network, they could do so under private carriage arrangements, at commercially reasonable rates.

Finally, in all events, even if the Commission determines that there are some circumstances where incumbents must provide access to a voice grade capability once they have deployed fiber, there are two specific circumstances in which incumbents should not have to provide unbundled access to a voice grade capability. The first is in so-called "greenfield" situations. These include new developments, office parks, or major buildings that have not previously received service and where any provider, whether the incumbent or a competitor, will be deploying facilities for the first time. The second is in wire centers where cable telephony is already available. Where there already is a second fully facilities-based wireline provider competing head-to-head, there is no justification for imposing an unbundling obligation on only one of those competitors. Nor can imposing such an obligation be squared with the impairment standard in the Act, since the market at that point is clearly contestable and is unquestionably being contested.

5. <u>The Commission can address issues relating to the unbundling of DS-1 capable loops separately from broadband</u>.

As we have explained elsewhere, the Commission should eliminate the obligation to provide unbundled access to DS-1 capable loops in those areas where the Commission itself previously concluded that the market not only is contestable, but is already being contested through the use of competing carriers' own facilities. Specifically, it should do so in those areas where it has concluded there is sufficient competition to provide pricing flexibility for special access loops (referred to as "channel terminations"). To date, Verizon has obtained such relief for approximately 25 percent of its wire centers.

However, this is an issue that the Commission can address separately from broadband. This follows from the definitions that the Commission itself has used for broadband services and that Verizon previously proposed for use as a common definition in all the ongoing broadband proceedings. For example, in the context of various merger review proceedings, the Commission has defined "advanced services" (its moniker for broadband) primarily in terms of the particular technology employed. That definition encompasses services such as ADSL, IDSL, xDSL, Frame Relay and ATM that rely on packetized technology and have the capability of supporting transmission speeds of at least 56 kilobits in each direction, but expressly excludes voice services and other traditional data services. In other contexts, the Commission has defined "advanced services" primarily based on speed to include services with a transmission speed of at least 200 kilobits in both directions. The definition that Verizon proposed simply harmonizes the two by providing that broadband includes services that *either* rely on packetized technology *or* that have transmission speeds in excess of 200 kilobits in both direction, but *excludes* voice services and traditional (*i.e.*, non-packetized) data services.

Significantly, this definition would exclude DS-1 capable loops from the definition of broadband. Indeed, when Verizon provides unbundled access to a DS-1 loop, the signal delivered to a requesting carrier is not packetized but is capable of providing voice services and traditional data services. As a result, to the extent that competing carriers are using DS-1 capable loops to extend the reach of their own local telephone networks, they could continue to do so in any areas where the Commission maintains an unbundling obligation with respect to DS-1 loops.

By the same token, this definition would mean that competing providers are not entitled to unbundled network element rates if they use those loops to provide broadband services such as Frame Relay or ATM. But, so far as Verizon can determine, carriers do not use unbundled loops for this purpose anyway. And the simple fact is that the two major long distance carriers already dominate the Frame Relay and ATM business *without* using unbundled elements, controlling more than two-thirds of the retail business for these services.

In addition, to the extent the Commission maintains a requirement to provide unbundled access to DS-1 capable loops, it should tailor that requirement to the way the competing carriers claim they intend to use it. Specifically, competing carriers claim that they need access to DS-1 capable loops as a transitional bridge to supplement their own local telephone network facilities while they continue to build out.

Accordingly, the Commission should limit the period during which competitors get access to DS-1 capable loops at unbundled element rates to two years from the date they obtain

access to a given loop. After that date, the price should revert to special access rates. That is a sufficient period of time to allow the carrier to build its own facility to replace that loop, while preserving its incentive to do so. And if the carrier chooses not to build its own facility, it can still use the existing loop to reach its customer; all that changes is the rate.

Finally, of course, as we have explained at greater length separately, the Commission must retain its existing restrictions on the use of unbundled network elements to provide traditional special access services, *i.e.*, in those situations where the requesting carrier seeks to use the requested network element to establish a connection between the customer's premises and a carrier's point of presence without providing "a significant amount of local exchange service."

6. The Commission should initiate a further proceeding to determine the impact of the development of IP telephony on any remaining obligations it imposes here to provide access to a voice grade capability on next generation networks.

In the future, phone company networks will increasingly be designed to optimize their broadband functionality. And as voice-over-IP becomes a commercial reality, the voice market will be opened to a range of additional competitors. These developments will raise a host of new and important questions for the Commission to resolve, including the role that IP-telephony competitors play in the Commission's impairment analysis.

Accordingly, the Commission should open a further proceeding to consider how the changes in network architecture spawned by broadband, and the development of voice-over-IP, will affect the unbundling of voice service capabilities.

In framing this further proceeding, as well as deciding the current one, the Commission should work to ensure that as markets for voice, video, and broadband data all converge, rules designed to spur entry into the traditional voice market do not retard the development of broadband networks. After all, the purpose of the Act was not to arrest the evolution of phone company networks, or to require phone companies to build networks in perpetuity that serve as convenient wholesale platforms for non-facilities based providers of narrowband services. Just like all firms, these would-be competitors must respond to changes in the marketplace, and should not be allowed to use the regulatory process to bind phone companies to the technologies or the networks of the past.

Sincerely,

William P. Barr

Ann D. Berkowitz
Project Manager – Federal Affairs

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December 17, 2002

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th H Street, SW, Portals
Washington, DC 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; *and Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147

Dear Ms. Dortch:

The attached letters from William Barr of Verizon were provided to Chairman Powell, Commissioner Abernathy, Commissioner Adelstein, Commissioner Copps and Commissioner Martin respectively today. Please place it on the record in the above proceeding. Please let me know if you have any questions.

Sincerely,

Attachments

cc: Chairman Powell
Commissioner Abernathy
Commissioner Adelstein
Commissioner Martin
Commissioner Copps
J. Rogovin
L. Zaina
C. Libertelli
M. Brill
D. Gonzalez
J. Goldstein
W. Maher
J. Carlisle
M. Carey
R. Tanner
S. Bergmann
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December 17, 2002

The Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Powell:

This is a follow up to my letter to you of October 16, 2002 in which I proposed a framework for addressing the issues before the Commission in the pending review of its unbundled network element rules.

My purpose here is to provide you with a copy of the attached letter, which elaborates on certain of the points made in my October 16 correspondence discussing application of the Act's unbundling standard to the competitive special access market and to high-capacity facilities generally. Specifically, the attached letter elaborates on three crucial points:

First, as the Commission itself has recognized, special access today is a mature competitive market, and that fact is due in part to previous Commission policies that promoted the growth of facilities-based competition in this market segment. To avoid jeopardizing this competitive success story, it is critical that the Commission reconfirm existing restrictions on the use of unbundled network elements to provide traditional special access service.

Second, with respect to high capacity DS-1 facilities that are used for local traffic, the Commission itself has previously determined that, in areas where the Commission has granted pricing flexibility to incumbent carriers, competing carriers already have made "irreversible investments" in competing facilities. Under the standards in the Act and the D.C. Circuit's orders, therefore, unbundling of high-capacity facilities cannot be required in these areas. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

Third, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. Simply put, when competing carriers are already successfully competing and serving customers using special access, allowing access to the same facilities at UNE prices is an uneconomic arbitrage process that serves no competitive purpose under the Act, and in fact injures facilities-based competition. Consequently, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

Binding federal determinations that are consistent with these key principles are critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segments served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business.

Sincerely,

William P. Barr

Attachment

cc: Commissioner Abernathy
Commissioner Adelstein
Commissioner Copps
Commissioner Martin

1300 I Street, NW
Suite 400 West
Washington, DC 20005

December 17, 2002

William F. Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Mr. Maher:

The purpose of this letter is to address in greater detail the application of the Act's unbundling standards to high-capacity facilities – loops and dedicated transport. In particular, this letter elaborates on three central points addressed in William Barr's letter to Chairman Powell of October 16, 2002. Because competition for the highest capacity services (DS-3 and above) is pervasive, and there is virtually no reliance on unbundled elements for those services today, this discussion focuses on unbundling requirements associated with dedicated DS-1 services.

- *First*, at a bare minimum, the Commission should reconfirm restrictions on use of high-capacity facilities to provide traditional special access service for long distance traffic, because the evidence is overwhelming that competitors have captured a significant percentage of this market segment without access to UNEs.

- *Second*, with respect to use of high capacity facilities for local traffic, the Commission itself already determined in its *Pricing Flexibility Order* that, in areas that qualify for either Phase I or Phase II pricing flexibility, "competitors have made irreversible investments in facilities" (14 FCC Rcd 14221, ¶ 77 (1999)); consequently, under the standards articulated by the D.C. Circuit, no unbundled access to high-capacity facilities can be ordered in these areas. A binding federal determination to this effect is critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segment served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

- *Third*, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. In particular, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for Phase I or Phase II pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

1. Competitors Are Not "Impaired" If Particular Markets Are Contestable in the Absence of Unbundled Network Access

As an initial matter, four of the key legal principles established by the D.C. Circuit's decisions in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*") and *Competitive Telecommunications Association v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*") are particularly pertinent to the Commission's analysis of these issues.

First, determination of circumstances where mandatory unbundling may be appropriate under section 251(d)(2)'s impairment standard must be "linked (in some degree) to natural monopoly" characteristics of an element. Unbundling may be appropriate only if "genuinely competitive provision *of an element's function* [would be] wasteful" because "the cost characteristics of an 'element' render it . . . unsuitable for competitive supply." *USTA*, 290 F.3d at 427. Under this standard, the Commission may require unbundling of a particular element only in circumstances where unbundled access to the element is needed to permit requesting carriers to compete in the particular market where the carrier seeks to offer service. If the market in question is subject to competitive entry – *i.e.*, if the market is contestable – in the absence of unbundled access to a particular element, competitors are not "impaired" within the meaning of the statute. That standard is unquestionably satisfied in cases where (1) a particular element has been "significantly deployed on a competitive basis" (*id.* at 422); or (2) if a functional alternative to the element is otherwise available either from the incumbent or "'outside the incumbent's network.'" (*id.* at 429 (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999) ("*AT&T*"))). Where markets are contestable without access to unbundled elements, the costs of unbundling outweigh any possible benefit. As the court noted, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *Id.* at 427.

Second, the Commission must "consider the markets in which a competitor 'seeks to offer' services and, *at an appropriate level of generality*, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services." *CompTel*, 309 F.3d at 10 (quoting *Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 15 (2000)) (emphasis added). One aspect of that inquiry must be defining an appropriate *geographic* market in which to assess impairment. As the Commission held in its *Pricing Flexibility Order*, the task is "to define . . .

geographic areas narrowly enough so that the competitive conditions within each area are reasonably similar, yet broadly enough to be administratively workable." *Pricing Flexibility Order*, ¶ 71. There, the Commission held that "MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition." *Id.* at ¶ 72. In contrast, the Commission rejected a wire center by wire center analysis, both because it was unnecessary to reflect the scope of competitive entry and because it would be administratively unworkable. The D.C. Circuit affirmed this Commission's determination of the appropriate geographic market for use in assessing competitive entry, and expressly rejected the argument that it is necessary to carry out such an analysis wire center by wire center. *WorldCom, Inc. v. FCC*, 238 F.3d 449, 446-61 (D.C. Cir. 2001) ("*WorldCom*").

Third, the Commission must consider evidence of impairment on a service-specific basis. As the D.C. Circuit noted in upholding the Commission's existing limitations on the use of unbundled elements to provide special access services, "it is far from obvious to us that the FCC *has the power* without an impairment finding as to nonlocal services, to require that ILECs provide EELs for such services on an unbundled basis." *Comptel*, 309 F.3d at 13 (emphasis added); *see also USTA*, 290 F.3d at 426 (suggesting that the statute requires "a more nuanced concept of impairment" that considers "specific markets or market categories"). To use an example that is elaborated on below, in analyzing the need to unbundle high-capacity facilities, the Commission should continue to evaluate the special access market for long distance traffic – which has special characteristics for both functional and historical reasons – as a separate market segment.

Fourth, because a finding of impairment is a prerequisite to imposing an unbundling requirement, and that finding obviously must be based on substantial record evidence, the burden is on the proponents of unbundling to demonstrate that the impairment standard has been satisfied for a particular element in a relevant segment of the market. This point is especially important in cases such as this where there is no question that the facilities at issue already have been significantly deployed on a competitive basis. Under these circumstances, absent concrete evidence to the contrary, the presumption has to be that the facilities are capable of being competitively supplied both where they have been deployed and where they as yet have not. Indeed, as the D.C. Circuit recognized, deployment of competitive facilities in certain markets indicates that all markets with comparable characteristics are likewise contestable, even if facilities have not actually been deployed. *See USTA*, 290 F.3d at 422. Or as Chairman Powell put it at the time of the *UNE Remand Order*: "evidence of CLEC [facilities] deployment strongly suggests that CLECs are not significantly impaired without access . . . both in areas in which CLECs have deployed [facilities] *and areas in which they have not done so*." 15 FCC Rcd 3696, 3927 (1999) (emphasis added).

2. The Commission Should Retain Its Restriction on Special Access Bypass

At a bare minimum, the Commission should confirm that high-capacity facilities need not be made available – either alone or in combinations – for the provision of traditional special access service, *i.e.*, in those situations where the requesting carrier seeks to use the requested

facilities to establish a connection between the customer's premises and a carrier's point of presence without providing "a significant amount of local exchange service." *See Supplemental Order Clarification*, ¶ 8.

As noted above, the D.C. Circuit has already held that the Commission was permitted – indeed, required – by the terms of the Act to undertake a service-specific analysis that distinguishes between the local and long-distance-access segments of the market. *CompTel*, 309 F.3d at 13. And when it comes to special access service for long distance traffic, the Commission has correctly recognized that the extensive existing competition proves that telecommunications carriers are not impaired in their ability to provide special access service without access to unbundled elements. To the contrary, the FCC has properly found that the market for special access has become highly competitive in the absence of UNE access. "Competitive access, which originated in the mid-1980s, is a mature source of [facilities-based] competition in telecommunications markets." *Supplemental Order Clarification*, ¶ 18. This is true regardless of whether the special access traffic at issue is voice or data, as would be expected because the facilities used for both types of traffic are the same.

The FCC's prior decision to restrict the use of UNEs to provide special access service was sound. In the *Supplemental Order Clarification*, the Commission properly noted that "the exchange access market occupies a different legal category from the market for telephone exchange services." *Supplemental Order Clarification*, ¶ 14. It was therefore impossible for the Commission to grant competitors access to network elements "solely or primarily for use in the exchange access market" without first finding that competitors are impaired in their ability to provide special access services without access to UNEs. *Id.* at ¶ 15. Based on the record before it, the Commission found no evidence that competitors in the special access market are impaired without access to unbundled loops and transport: "we generally do not impose such obligations first and conduct our 'impair' inquiry afterwards." *Id.* at ¶ 16. Moreover, to grant access could cause "substantial market dislocations" by "undercut[ting] the market position of many facilities-based competitive access providers." *Id.* at ¶¶ 7, 18.

The current record strongly supports those conclusions. No party has introduced evidence, let alone carried their burden of demonstrating, that competitors are impaired in the provision of special access service. To the contrary, the evidence is that competition has continued to thrive in the rapidly expanding special access market *without* access to UNEs. Competitors account for a third or more of *total* special access revenues *nationwide*, and their share of the market has been growing rapidly. *See* UNE Fact Report 2002 at III-1, IV-6, IV-7. Competitors now have extensive local networks in place in most of the markets where special access demand is concentrated. A number of wholesale fiber suppliers also serve most major markets. And even in the areas where competitive facilities are not yet available, competing providers have been able to compete successfully by reselling special access service purchased from incumbents. Competitors now provide more than 150 million voice-grade equivalent special access and private lines using either their own facilities, the facilities of other competitive suppliers, or by reselling ILEC special access service. Such widespread and pervasive competition establishes beyond serious dispute that the traditional special access market is

contestable – that is, that competing providers can and do compete effectively in the special access market without UNEs. Consequently, the record here compels the conclusion that competing providers are not impaired in their "ability to provide long distance or exchange access service" without access to unbundled elements, including high capacity loops and transport. *Cf. CompTel*, 309 F.3d at 13.

Moreover, the Commission's concerns about market dislocations and undermining the market position of facilities-based competitors likewise require that the Commission affirm its determination that competitors are not entitled to unbundled network elements to provide special access service. As the D.C. Circuit noted in its decision upholding the Commission's existing restrictions on the use of UNEs to provide special access, Congress "preferred 'facilities-based competition' over 'parasitic free-riding.'" *CompTel*, 309 F.3d at 20. It would be contrary to the goals of the Act and this Commission's policies to displace existing facilities-based competition with "completely synthetic competition" using elements of the incumbents' networks provided at TELRIC rates. *See USTA*, 290 F.3d at 424. At a minimum, therefore, it is critical to maintain restrictions on the use of unbundled elements to provide special access in order to avoid disrupting this well functioning, competitive market.

Moreover, the current restrictions were proposed by a cross-industry group that included major CLECs, and were expressly upheld by the D.C. Circuit in *CompTel*, 309 F.3d at 22. While some CLECs unquestionably have tried to game the current tests for determining whether the substantial local traffic requirement is satisfied, overall the tests have proven to be workable. In fact, while some parties here rehash their previous claims that the tests are not administratively feasible, the D.C. Circuit squarely rejected those claims, holding that "it is plain that supplying the information is feasible, as the FCC has produced evidence that some carriers are taking advantage of the safe harbors." *Id*. If anything, the current tests are too lax and allow circuits to be converted to sub-competitive TELRIC pricing even when they are used predominantly for non-local traffic. Given all of this, there is no basis for relaxing these existing restrictions further, and doing so would serve only to undermine the mature facilities-based competition that already exists.

This is equally true of the existing companion rule prohibiting "commingling" of unbundled elements with special access services. As the Commission explained to the D.C. Circuit, this prohibition is "the only way to prevent carriers from using these units 'solely or primarily to bypass special access services,'" because "allowing commingling would allow carriers to avoid the requirement that each customer be provided a significant amount of local exchange service." *Id*. at 22-23. The court agreed, and recognized that the prohibition is necessary to prevent the "gaming" that otherwise would occur. For example, as the court itself pointed out, the absence of a commingling restriction would "allow the entire base of the loop or 'channel termination' portion of special access circuits to be converted into unbundled loops." *Id*. at 24. And that, of course, would undermine the existing facilities-based competition that the Commission sought to preserve and promote.

3. Where ILECs Have Qualified for Pricing Flexibility, They Should Not Be Required To Provide Unbundled Access to High Capacity Facilities

Even if CLECs plan to use high-capacity facilities to provide a substantial amount of local exchange service – as opposed to solely or primarily special access service – they should not have access to unbundled high capacity loops and transport where the market for local services provided using these facilities is contestable without access to high capacity facilities at UNE rates. In those situations where competitive facilities already exist, provision of those facilities is not merely contestable, but already contested. Indeed, to require access in that circumstance – *i.e.*, where facilities have been "significantly deployed on a competitive basis" (*USTA*, 290 F.3d at 422) – would violate the Supreme Court's admonition that the Commission cannot "blind itself to the availability of elements outside the incumbent's network" (*AT&T*, 525 U.S. at 389).

It is critical that the Commission itself establish binding restrictions on incumbents' unbundling obligations based on objective market conditions. Clear, readily applied national rules will provide stability and certainty, which will in turn promote investment and innovation by competitors and incumbents alike. And the Commission unquestionably has both the legal authority and the obligation to establish binding national rules: the Act gives "the Commission" – not the states – the power to "determin[e] what network elements should be made available" on an unbundled basis. 47 U.S.C. § 251(d).

Moreover, the Commission has already created an appropriate framework – and in a series of subsequent orders already has applied that framework itself – for initially identifying certain geographic markets where unbundling of high-capacity facilities *cannot* be required in its *Pricing Flexibility Order*. In that order, the Commission granted incumbents pricing flexibility for special access services, conditioned on a showing that "market conditions in a particular area warrant the relief at issue." *Pricing Flexibility Order*, ¶ 68. The requisite showing focuses on precisely the question that the courts have made clear must be considered before any unbundled access may be required: investment in competitive facilities. Indeed, the Commission granted relief specifically because it determined that certain geographic markets were *contestable* where a significant portion of those geographic areas already were being *contested* – that is, competing providers already had made sunk investments in competing facilities.

Thus, the Commission ruled that incumbents are to be granted "Phase I" regulatory relief – that is, the ability to offer contract tariffs and volume and term discounts – once they can show that "competitors have made irreversible investments in the facilities needed to provide the services at issue." *Id.* at ¶ 69. As the Commission found, such investment "is an important indicator of . . . irreversible entry" because, even if a particular competitor does not succeed, "that equipment remains available and capable of providing service in competition with the incumbent." *Id.* at ¶ 80. And to obtain "Phase II" relief, where the incumbent's own rates are effectively deregulated, the incumbent must make an even more extensive showing – that is, it must show that the market not only is contestable, but that a sufficient portion of the geographic

market at issue is actually being contested such that the market is workably competitive and market forces alone will constrain the incumbent's rates. *Id.* at ¶ 69.

The Commission has established separate competitive triggers to allow pricing flexibility for (1) dedicated transport and (2) service over high-capacity loops, known as "channel terminations." *See id.* at ¶ 70. Accordingly, a determination that "competitors have made irreversible investments in the facilities needed" to provide dedicated transport establishes that competitors are not impaired without unbundled access to an incumbent's high-capacity dedicated transport facilities. If an incumbent has been granted Phase I relief with respect to dedicated transport in a particular MSA, therefore, the Commission should not require provision of unbundled access to dedicated transport. The same logic applies to high-capacity loops: in any MSA where the Commission has granted Phase I relief for channel terminations under the separate standard that applies to those facilities, the Commission should not require provision of unbundled access to high capacity loops.

The Commission should definitively eliminate unbundling obligations wherever the incumbent has qualified for either Phase I or Phase II relief. Phase I triggers were specifically designed to identify markets where there is "facilities-based competition with significant sunk investment" and therefore an alternative to an incumbent's facilities for the provision of service. *See id.* at ¶ 80. By contrast, Phase II relief – which essentially deregulates incumbents' rates – is granted in those markets where competitors have *already* "established a significant market presence," sufficient to constrain ILEC end-user pricing. *Id.* at ¶ 141; *see also id.* at ¶ 77 ("competitors that are sufficiently entrenched to survive attempts by incumbents to exclude them from the market [by lowering prices to end-users] may not yet have a sufficient market presence to constrain prices throughout the MSA"). Because the impairment analysis must focus on "CLECs' *ability* to provide . . . service," (*CompTel*, 309 F.3d at 13 (emphasis added)), the existence of mature competition – while more than *sufficient* to establish non-impairment – is not *necessary* to demonstrate non-impairment.

The fact that an incumbent has been granted Phase I or Phase II pricing flexibility relief in a particular area provides conclusive evidence that the corresponding network elements – *i.e.*, high-capacity transport or loops – need not be made available on an unbundled basis in that area. At the same time, the fact that an ILEC has not yet received such relief in a particular geographic area – and such relief currently covers only 37 percent of Verizon's wire centers (and a smaller percentage of wire centers nationwide) – does not relieve the Commission of the need to conduct an impairment inquiry with respect to these other areas. To the contrary, competing carriers can and have deployed competing facilities outside the areas where incumbents have been granted pricing flexibility as well. And if the segment of the local market served with high-capacity facilities is contestable in the absence of unbundled access, granting such access would be contrary to the "goals of the Act." *AT&T*, 525 U.S. at 388. Accordingly, the Commission should establish additional, objective triggers for the removal of high-capacity facilities from the UNE list outside the areas where pricing flexibility has been granted.

We continue to believe that the extensive evidence demonstrating that competing carriers have widely deployed their own high-capacity facilities where there is demand for high-capacity services shows that they are not impaired anywhere without the ability to purchase these facilities from incumbents at artificially low TELRIC rates. At an absolute minimum, however, just as the Commission determined that "collocation can reasonably serve as a measure of competition in a given market and predictor of competitive constraints upon future LEC behavior" (*WorldCom*, 238 F.3d at 459), the Commission should likewise rule that, outside those areas where pricing flexibility has been granted, high-capacity facilities do not have to be available as UNEs in any wire center where there are two or more fiber-based collocated competitors – regardless of the prevalence of collocation in the remainder of the MSA. Such a rule is fully supported by the Commission's analysis in the *Pricing Flexibility Order* and the D.C. Circuit's subsequent affirmance: collocation is a reliable indicator of sunk investment of a type that proves that the markets served in that particular wire center are contestable. Indeed, as the Commission and the court each recognized, collocation tends to *underestimate* the degree of facilities-based investment, "because it fails to account for the presence of competitors that do not use collocation and have wholly bypassed incumbent LEC facilities." *Pricing Flexibility Order*, ¶ 95.

Finally, as long as competitors have access to ILEC high-capacity facilities on an unbundled basis, they have little incentive to deploy competing facilities. For that reason, the Commission should require that *if* high-capacity facilities are made available, any such unbundling obligation should have a firm sunset date.

4. The Commission Must Consider the Availability of ILEC Tariffed Special Access Services

The availability of tariffed special access services as an alternative means of serving customers is an additional factor that must be taken into account as part of the Commission's impairment analysis. Specifically, the availability of special access service is an additional factor that supports removing the obligation to unbundle high capacity facilities in any areas where the incumbent has qualified for pricing flexibility relief, and is also a factor that must be taken into account in establishing objective standards to determine whether high capacity facilities must be unbundled outside these areas.

Consideration of the availability of tariffed special access services as an alternative is compelled by the language and logic of the Commission's decision in the *Supplemental Order Clarification* and the Court's decisions in *USTA* and *CompTel*. As the Commission has held, it is appropriate to impose an "unbundling obligation" for purposes of offering a service in a particular market *only* if "denial of the requested elements *would in fact impair the competitor's ability to offer services*" in *that market*. *Supplemental Order Clarification*, ¶ 15 (emphasis added); *see CompTel*, 309 F.3d at 10. If markets are contestable without access to unbundled network elements, that is the end of the matter. Or to put it another way, if competing providers are able to enter the market and compete successfully using a combination of tariffed special access services purchased from the incumbent and their own facilities, they self-evidently are not

impaired without access to unbundled elements. Indeed, that is precisely the way that competition developed in the long-distance market: competing carriers relied initially on services purchased from AT&T under volume and term discount arrangements until they completed the build out of their own facilities. Likewise, special access services are available under tariffs that include volume and term discounts, and carriers have the same ability as they do in the long distance market to use these arrangements to supplement their own facilities as they complete the build out of their networks.

Accordingly, competitors' efforts to gain access to high-capacity facilities as UNEs is *exclusively* about price, since the same *function* is served by purchasing high capacity facilities at special access rates. Providing access to facilities at TELRIC rates – rather than the competitive rates available under tariff – simply encourages anti-competitive arbitrage, an uneconomic wealth transfer from incumbents to competitors that discourages productivity and innovation and penalizes investment.

In the case of those local customers served over high-capacity facilities, it is clearly the case that other providers can and do compete successfully using existing special access services purchased from incumbents and others to fill gaps in their networks. Indeed, there is significant marketplace evidence that proves that competitors that obtain high-capacity circuits from incumbents (rather than provisioning them independently or purchasing from a third-party supplier) rely on special access services far more often than on UNEs. In Verizon's region, for example, competing carriers as a whole had obtained almost twice as many DS-1 circuits as special access than as UNEs. In addition, many competing carriers that obtain high capacity circuits from incumbents do so entirely by purchasing special access service rather than UNEs. In Verizon's region, for example, there are several competing carriers that purchase all their DS-1 circuits exclusively as special access, and many others that rely on special access primarily (though not exclusively) to satisfy their demand for DS-1 circuits. Based on a sample of nine of the largest purchasers of special access, three purchase all of their DS-1 circuits as special access, and five additional competing carriers purchase 80 percent or more of all of their DS-1 circuits as special access.

Moreover, there's no real question that competing carriers are competing successfully using tariffed special access services purchased from incumbents and others to provide local services as well as to provide their own special access services for long distance traffic. This makes sense given the nature of special access service and the markets served. Tariffed special access services are provided over dedicated point-to-point facilities deployed specifically to meet the needs of carriers and business customers, not residential users. For example, carriers can and do use *existing* special access services to provide the direct link between customer premises and their local networks (as opposed to a long distance carrier's POP), including their equipment collocated in incumbent's central offices – even in circumstances where the ILEC provides no service of any kind to the end-user customer directly. This allows carriers to integrate the special access circuits into their own local networks, and use them to carry customers' local as well as long distance traffic. Using such services, providers have successfully competed for business customers of all shapes and sizes, from the most concentrated and most lucrative telecommunications consumers to small business customers. For example, the customers that are

being served by competing carriers in this fashion range from donut shops and car dealerships to law firms, doctor's offices, brokerage branch offices, hospitals, and educational institutions.

There can thus be no doubt that there is *already* fierce competition to serve those customers, both in the market for the customer-to-carrier connections themselves and in the vertical telecommunications markets – including long-distance and local voice and data services – in which high-capacity facilities provide an input. Indeed, competing carriers have won roughly 150 million voice grade equivalent lines using a combination of their own facilities and special access circuits purchased from incumbents and others. And they are competing successfully in providing various services that use special access as an input, such as enterprise long distance services, high-speed data services such as ATM and Frame Relay, and local services provided to large business customers. Indeed, a group of large business customers just informed the WorldCom bankruptcy court that, "Sprint, AT&T and WorldCom account for over 90% of enterprise telecommunications usage and are widely viewed as the only interexchange carriers capable of providing the full suite of network services required by major corporations." The evidence of such robust competition in vertical or adjacent markets establishes that access to high-capacity facilities is no barrier to competition. *Cf. Advanced Health-Care v. Radford Comm. Hosp.*, 910 F.2d 139, 150 (1990) ("[T]he central concern in an essential facilities claim is whether market power in one market is being used to create or further a monopoly in another market."); *USTA*, 290 F.3d at 427 n.4. Indeed, as this Commission has held, once such competition exists, it can expand into additional market segments: "large customers may create the inducement for potential competitors to invest in sunk facilities which, once sunk, can be used to serve adjacent smaller customers." *Pricing Flexibility Order*, ¶ 79.

Taking account of the availability of special access services as an alternative to unbundling high-capacity facilities is especially appropriate in light of the unique characteristics of special access. The Commission has already concluded that special access services are competitive, and that – in many markets – competition already constrains special access retail prices, and competitors have used special access in combination with their own facilities to enter local markets. Taking into account the availability of competitive special access service in this context thus does not compel the conclusion, for example, that the possibility of competing by reselling incumbents' retail services would eliminate the need to unbundle local loops for provision of local voice service. But under the specific circumstances here, where tariffed special access services can and are being used to compete successfully, it would be reversible error for the Commission to fail to take that alternative into account in conducting its impairment analysis.

Finally, Verizon's opponents claim that the only reason they buy Verizon's special access services is because they have been unable to obtain the equivalent services as UNEs. As an initial matter, as we have explained at length elsewhere, Verizon *does* provide unbundled high-capacity facilities wherever such facilities exist. The instances in which it does not do so are those where the requested facilities do *not* exist, and, therefore, they could not be provided without investing in and deploying new facilities or equipment or without undertaking significant construction work. That is entirely consistent with the Act, which the Commission has

recognized "does not require [Verizon] to construct network elements ... for the sole purpose of unbundling those elements for ... other carriers." *See, e.g., Virginia Arbitration Non-Cost Order*, CC 00-218, DA 02-1731, ¶ 468 (rel. July 17, 2002). Moreover, even in those instances, the simple fact is that Verizon will build facilities for use by competing carriers to the same extent as it will for its own retail customers, and will make the newly constructed facilities available at competitive special access rates (which, in contrast to sub-competitive TELRIC rates, provide at least an opportunity to recover the costs of constructing the facilities).

More fundamentally, however, the opponents' claim misses the point entirely. Regardless of the *reason* they use special access services purchased from Verizon to compete, the fact of the matter is that they have demonstrated they are able to enter and compete successfully by using those services. While they no doubt would prefer to pay the artificially low TELRIC rates, that proves nothing. If competing carriers are able to enter and compete using a combination of special access and their own facilities (as these carriers have), then they self-evidently are not impaired without access to the same facilities at UNE rates. And providing access to these facilities at artificially low rates under these circumstances would merely undermine the continued growth of facilities-based competition and flout the directives of the D.C. Circuit.

Sincerely,

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December 17, 2002

The Honorable Kathleen Abernathy
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Commissioner Abernathy:

This is a follow up to my letter to Chairman Powell of October 16, 2002 in which I proposed a framework for addressing the issues before the Commission in the pending review of its unbundled network element rules.

My purpose here is to provide you with a copy of the attached letter, which elaborates on certain of the points made in my October 16 correspondence discussing application of the Act's unbundling standard to the competitive special access market and to high-capacity facilities generally. Specifically, the attached letter elaborates on three crucial points:

First, as the Commission itself has recognized, special access today is a mature competitive market, and that fact is due in part to previous Commission policies that promoted the growth of facilities-based competition in this market segment. To avoid jeopardizing this competitive success story, it is critical that the Commission reconfirm existing restrictions on the use of unbundled network elements to provide traditional special access service.

Second, with respect to high capacity DS-1 facilities that are used for local traffic, the Commission itself has previously determined that, in areas where the Commission has granted pricing flexibility to incumbent carriers, competing carriers already have made "irreversible investments" in competing facilities. Under the standards in the Act and the D.C. Circuit's orders, therefore, unbundling of high-capacity facilities cannot be required in these areas. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

Third, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. Simply put, when competing carriers are already successfully competing and serving customers using special access, allowing access to the same facilities at UNE prices is an uneconomic arbitrage process that serves no competitive purpose under the Act, and in fact injures facilities-based competition. Consequently, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

Binding federal determinations that are consistent with these key principles are critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segments served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business.

Sincerely,

William P. Barr

Attachment

cc: Chairman Powell
Commissioner Adelstein
Commissioner Copps
Commissioner Martin

1300 I Street, NW
Suite 400 West
Washington, DC 20005

December 17, 2002

William F. Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Mr. Maher:

The purpose of this letter is to address in greater detail the application of the Act's unbundling standards to high-capacity facilities – loops and dedicated transport. In particular, this letter elaborates on three central points addressed in William Barr's letter to Chairman Powell of October 16, 2002. Because competition for the highest capacity services (DS-3 and above) is pervasive, and there is virtually no reliance on unbundled elements for those services today, this discussion focuses on unbundling requirements associated with dedicated DS-1 services.

- *First*, at a bare minimum, the Commission should reconfirm restrictions on use of high-capacity facilities to provide traditional special access service for long distance traffic, because the evidence is overwhelming that competitors have captured a significant percentage of this market segment without access to UNEs.

- *Second*, with respect to use of high capacity facilities for local traffic, the Commission itself already determined in its *Pricing Flexibility Order* that, in areas that qualify for either Phase I or Phase II pricing flexibility, "competitors have made irreversible investments in facilities" (14 FCC Rcd 14221, ¶ 77 (1999)); consequently, under the standards articulated by the D.C. Circuit, no unbundled access to high-capacity facilities can be ordered in these areas. A binding federal determination to this effect is critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segment served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

- *Third*, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. In particular, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for Phase I or Phase II pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

1. Competitors Are Not "Impaired" If Particular Markets Are Contestable in the Absence of Unbundled Network Access

As an initial matter, four of the key legal principles established by the D.C. Circuit's decisions in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*") and *Competitive Telecommunications Association v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*") are particularly pertinent to the Commission's analysis of these issues.

First, determination of circumstances where mandatory unbundling may be appropriate under section 251(d)(2)'s impairment standard must be "linked (in some degree) to natural monopoly" characteristics of an element. Unbundling may be appropriate only if "genuinely competitive provision *of an element's function* [would be] wasteful" because "the cost characteristics of an 'element' render it . . . unsuitable for competitive supply." *USTA*, 290 F.3d at 427. Under this standard, the Commission may require unbundling of a particular element only in circumstances where unbundled access to the element is needed to permit requesting carriers to compete in the particular market where the carrier seeks to offer service. If the market in question is subject to competitive entry – *i.e.*, if the market is contestable – in the absence of unbundled access to a particular element, competitors are not "impaired" within the meaning of the statute. That standard is unquestionably satisfied in cases where (1) a particular element has been "significantly deployed on a competitive basis" (*id.* at 422); or (2) if a functional alternative to the element is otherwise available either from the incumbent or "'outside the incumbent's network.'" (*id.* at 429 (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999) ("*AT&T*"))). Where markets are contestable without access to unbundled elements, the costs of unbundling outweigh any possible benefit. As the court noted, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *Id.* at 427.

Second, the Commission must "consider the markets in which a competitor 'seeks to offer' services and, *at an appropriate level of generality*, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services." *CompTel*, 309 F.3d at 10 (quoting *Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 15 (2000)) (emphasis added). One aspect of that inquiry must be defining an appropriate *geographic* market in which to assess impairment. As the Commission held in its *Pricing Flexibility Order*, the task is "to define . . .

geographic areas narrowly enough so that the competitive conditions within each area are reasonably similar, yet broadly enough to be administratively workable." *Pricing Flexibility Order*, ¶ 71. There, the Commission held that "MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition." *Id.* at ¶ 72. In contrast, the Commission rejected a wire center by wire center analysis, both because it was unnecessary to reflect the scope of competitive entry and because it would be administratively unworkable. The D.C. Circuit affirmed this Commission's determination of the appropriate geographic market for use in assessing competitive entry, and expressly rejected the argument that it is necessary to carry out such an analysis wire center by wire center. *WorldCom, Inc. v. FCC*, 238 F.3d 449, 446-61 (D.C. Cir. 2001) ("*WorldCom*").

Third, the Commission must consider evidence of impairment on a service-specific basis. As the D.C. Circuit noted in upholding the Commission's existing limitations on the use of unbundled elements to provide special access services, "it is far from obvious to us that the FCC *has the power* without an impairment finding as to nonlocal services, to require that ILECs provide EELs for such services on an unbundled basis." *Comptel*, 309 F.3d at 13 (emphasis added); *see also USTA*, 290 F.3d at 426 (suggesting that the statute requires "a more nuanced concept of impairment" that considers "specific markets or market categories"). To use an example that is elaborated on below, in analyzing the need to unbundle high-capacity facilities, the Commission should continue to evaluate the special access market for long distance traffic – which has special characteristics for both functional and historical reasons – as a separate market segment.

Fourth, because a finding of impairment is a prerequisite to imposing an unbundling requirement, and that finding obviously must be based on substantial record evidence, the burden is on the proponents of unbundling to demonstrate that the impairment standard has been satisfied for a particular element in a relevant segment of the market. This point is especially important in cases such as this where there is no question that the facilities at issue already have been significantly deployed on a competitive basis. Under these circumstances, absent concrete evidence to the contrary, the presumption has to be that the facilities are capable of being competitively supplied both where they have been deployed and where they as yet have not. Indeed, as the D.C. Circuit recognized, deployment of competitive facilities in certain markets indicates that all markets with comparable characteristics are likewise contestable, even if facilities have not actually been deployed. *See USTA*, 290 F.3d at 422. Or as Chairman Powell put it at the time of the *UNE Remand Order*: "evidence of CLEC [facilities] deployment strongly suggests that CLECs are not significantly impaired without access . . . both in areas in which CLECs have deployed [facilities] *and areas in which they have not done so*." 15 FCC Rcd 3696, 3927 (1999) (emphasis added).

2. The Commission Should Retain Its Restriction on Special Access Bypass

At a bare minimum, the Commission should confirm that high-capacity facilities need not be made available – either alone or in combinations – for the provision of traditional special access service, *i.e.*, in those situations where the requesting carrier seeks to use the requested

facilities to establish a connection between the customer's premises and a carrier's point of presence without providing "a significant amount of local exchange service." *See Supplemental Order Clarification*, ¶ 8.

As noted above, the D.C. Circuit has already held that the Commission was permitted – indeed, required – by the terms of the Act to undertake a service-specific analysis that distinguishes between the local and long-distance-access segments of the market. *CompTel*, 309 F.3d at 13. And when it comes to special access service for long distance traffic, the Commission has correctly recognized that the extensive existing competition proves that telecommunications carriers are not impaired in their ability to provide special access service without access to unbundled elements. To the contrary, the FCC has properly found that the market for special access has become highly competitive in the absence of UNE access. "Competitive access, which originated in the mid-1980s, is a mature source of [facilities-based] competition in telecommunications markets." *Supplemental Order Clarification*, ¶ 18. This is true regardless of whether the special access traffic at issue is voice or data, as would be expected because the facilities used for both types of traffic are the same.

The FCC's prior decision to restrict the use of UNEs to provide special access service was sound. In the *Supplemental Order Clarification*, the Commission properly noted that "the exchange access market occupies a different legal category from the market for telephone exchange services." *Supplemental Order Clarification*, ¶ 14. It was therefore impossible for the Commission to grant competitors access to network elements "solely or primarily for use in the exchange access market" without first finding that competitors are impaired in their ability to provide special access services without access to UNEs. *Id.* at ¶ 15. Based on the record before it, the Commission found no evidence that competitors in the special access market are impaired without access to unbundled loops and transport: "we generally do not impose such obligations first and conduct our 'impair' inquiry afterwards." *Id.* at ¶ 16. Moreover, to grant access could cause "substantial market dislocations" by "undercut[ting] the market position of many facilities-based competitive access providers." *Id.* at ¶¶ 7, 18.

The current record strongly supports those conclusions. No party has introduced evidence, let alone carried their burden of demonstrating, that competitors are impaired in the provision of special access service. To the contrary, the evidence is that competition has continued to thrive in the rapidly expanding special access market *without* access to UNEs. Competitors account for a third or more of *total* special access revenues *nationwide*, and their share of the market has been growing rapidly. *See* UNE Fact Report 2002 at III-1, IV-6, IV-7. Competitors now have extensive local networks in place in most of the markets where special access demand is concentrated. A number of wholesale fiber suppliers also serve most major markets. And even in the areas where competitive facilities are not yet available, competing providers have been able to compete successfully by reselling special access service purchased from incumbents. Competitors now provide more than 150 million voice-grade equivalent special access and private lines using either their own facilities, the facilities of other competitive suppliers, or by reselling ILEC special access service. Such widespread and pervasive competition establishes beyond serious dispute that the traditional special access market is

contestable – that is, that competing providers can and do compete effectively in the special access market without UNEs. Consequently, the record here compels the conclusion that competing providers are not impaired in their "ability to provide long distance or exchange access service" without access to unbundled elements, including high capacity loops and transport. *Cf. CompTel*, 309 F.3d at 13.

Moreover, the Commission's concerns about market dislocations and undermining the market position of facilities-based competitors likewise require that the Commission affirm its determination that competitors are not entitled to unbundled network elements to provide special access service. As the D.C. Circuit noted in its decision upholding the Commission's existing restrictions on the use of UNEs to provide special access, Congress "preferred 'facilities-based competition' over 'parasitic free-riding.'" *CompTel*, 309 F.3d at 20. It would be contrary to the goals of the Act and this Commission's policies to displace existing facilities-based competition with "completely synthetic competition" using elements of the incumbents' networks provided at TELRIC rates. *See USTA*, 290 F.3d at 424. At a minimum, therefore, it is critical to maintain restrictions on the use of unbundled elements to provide special access in order to avoid disrupting this well functioning, competitive market.

Moreover, the current restrictions were proposed by a cross-industry group that included major CLECs, and were expressly upheld by the D.C. Circuit in *CompTel*, 309 F.3d at 22. While some CLECs unquestionably have tried to game the current tests for determining whether the substantial local traffic requirement is satisfied, overall the tests have proven to be workable. In fact, while some parties here rehash their previous claims that the tests are not administratively feasible, the D.C. Circuit squarely rejected those claims, holding that "it is plain that supplying the information is feasible, as the FCC has produced evidence that some carriers are taking advantage of the safe harbors." *Id*. If anything, the current tests are too lax and allow circuits to be converted to sub-competitive TELRIC pricing even when they are used predominantly for non-local traffic. Given all of this, there is no basis for relaxing these existing restrictions further, and doing so would serve only to undermine the mature facilities-based competition that already exists.

This is equally true of the existing companion rule prohibiting "commingling" of unbundled elements with special access services. As the Commission explained to the D.C. Circuit, this prohibition is "the only way to prevent carriers from using these units 'solely or primarily to bypass special access services,'" because "allowing commingling would allow carriers to avoid the requirement that each customer be provided a significant amount of local exchange service." *Id*. at 22-23. The court agreed, and recognized that the prohibition is necessary to prevent the "gaming" that otherwise would occur. For example, as the court itself pointed out, the absence of a commingling restriction would "allow the entire base of the loop or 'channel termination' portion of special access circuits to be converted into unbundled loops." *Id*. at 24. And that, of course, would undermine the existing facilities-based competition that the Commission sought to preserve and promote.

3. Where ILECs Have Qualified for Pricing Flexibility, They Should Not Be Required To Provide Unbundled Access to High Capacity Facilities

Even if CLECs plan to use high-capacity facilities to provide a substantial amount of local exchange service – as opposed to solely or primarily special access service – they should not have access to unbundled high capacity loops and transport where the market for local services provided using these facilities is contestable without access to high capacity facilities at UNE rates. In those situations where competitive facilities already exist, provision of those facilities is not merely contestable, but already contested. Indeed, to require access in that circumstance – *i.e.*, where facilities have been "significantly deployed on a competitive basis" (*USTA*, 290 F.3d at 422) – would violate the Supreme Court's admonition that the Commission cannot "blind itself to the availability of elements outside the incumbent's network" (*AT&T*, 525 U.S. at 389).

It is critical that the Commission itself establish binding restrictions on incumbents' unbundling obligations based on objective market conditions. Clear, readily applied national rules will provide stability and certainty, which will in turn promote investment and innovation by competitors and incumbents alike. And the Commission unquestionably has both the legal authority and the obligation to establish binding national rules: the Act gives "the Commission" – not the states – the power to "determin[e] what network elements should be made available" on an unbundled basis. 47 U.S.C. § 251(d).

Moreover, the Commission has already created an appropriate framework – and in a series of subsequent orders already has applied that framework itself – for initially identifying certain geographic markets where unbundling of high-capacity facilities *cannot* be required in its *Pricing Flexibility Order*. In that order, the Commission granted incumbents pricing flexibility for special access services, conditioned on a showing that "market conditions in a particular area warrant the relief at issue." *Pricing Flexibility Order*, ¶ 68. The requisite showing focuses on precisely the question that the courts have made clear must be considered before any unbundled access may be required: investment in competitive facilities. Indeed, the Commission granted relief specifically because it determined that certain geographic markets were *contestable* where a significant portion of those geographic areas already were being *contested* – that is, competing providers already had made sunk investments in competing facilities.

Thus, the Commission ruled that incumbents are to be granted "Phase I" regulatory relief – that is, the ability to offer contract tariffs and volume and term discounts – once they can show that "competitors have made irreversible investments in the facilities needed to provide the services at issue." *Id.* at ¶ 69. As the Commission found, such investment "is an important indicator of . . . irreversible entry" because, even if a particular competitor does not succeed, "that equipment remains available and capable of providing service in competition with the incumbent." *Id.* at ¶ 80. And to obtain "Phase II" relief, where the incumbent's own rates are effectively deregulated, the incumbent must make an even more extensive showing – that is, it must show that the market not only is contestable, but that a sufficient portion of the geographic

market at issue is actually being contested such that the market is workably competitive and market forces alone will constrain the incumbent's rates. *Id.* at ¶ 69.

The Commission has established separate competitive triggers to allow pricing flexibility for (1) dedicated transport and (2) service over high-capacity loops, known as "channel terminations." *See id.* at ¶ 70. Accordingly, a determination that "competitors have made irreversible investments in the facilities needed" to provide dedicated transport establishes that competitors are not impaired without unbundled access to an incumbent's high-capacity dedicated transport facilities. If an incumbent has been granted Phase I relief with respect to dedicated transport in a particular MSA, therefore, the Commission should not require provision of unbundled access to dedicated transport. The same logic applies to high-capacity loops: in any MSA where the Commission has granted Phase I relief for channel terminations under the separate standard that applies to those facilities, the Commission should not require provision of unbundled access to high capacity loops.

The Commission should definitively eliminate unbundling obligations wherever the incumbent has qualified for either Phase I or Phase II relief. Phase I triggers were specifically designed to identify markets where there is "facilities-based competition with significant sunk investment" and therefore an alternative to an incumbent's facilities for the provision of service. *See id.* at ¶ 80. By contrast, Phase II relief – which essentially deregulates incumbents' rates – is granted in those markets where competitors have *already* "established a significant market presence," sufficient to constrain ILEC end-user pricing. *Id.* at ¶ 141; *see also id.* at ¶ 77 ("competitors that are sufficiently entrenched to survive attempts by incumbents to exclude them from the market [by lowering prices to end-users] may not yet have a sufficient market presence to constrain prices throughout the MSA"). Because the impairment analysis must focus on "CLECs' *ability* to provide . . . service," (*CompTel*, 309 F.3d at 13 (emphasis added)), the existence of mature competition – while more than *sufficient* to establish non-impairment – is not *necessary* to demonstrate non-impairment.

The fact that an incumbent has been granted Phase I or Phase II pricing flexibility relief in a particular area provides conclusive evidence that the corresponding network elements – *i.e.*, high-capacity transport or loops – need not be made available on an unbundled basis in that area. At the same time, the fact that an ILEC has not yet received such relief in a particular geographic area – and such relief currently covers only 37 percent of Verizon's wire centers (and a smaller percentage of wire centers nationwide) – does not relieve the Commission of the need to conduct an impairment inquiry with respect to these other areas. To the contrary, competing carriers can and have deployed competing facilities outside the areas where incumbents have been granted pricing flexibility as well. And if the segment of the local market served with high-capacity facilities is contestable in the absence of unbundled access, granting such access would be contrary to the "goals of the Act." *AT&T*, 525 U.S. at 388. Accordingly, the Commission should establish additional, objective triggers for the removal of high-capacity facilities from the UNE list outside the areas where pricing flexibility has been granted.

We continue to believe that the extensive evidence demonstrating that competing carriers have widely deployed their own high-capacity facilities where there is demand for high-capacity services shows that they are not impaired anywhere without the ability to purchase these facilities from incumbents at artificially low TELRIC rates. At an absolute minimum, however, just as the Commission determined that "collocation can reasonably serve as a measure of competition in a given market and predictor of competitive constraints upon future LEC behavior" (*WorldCom*, 238 F.3d at 459), the Commission should likewise rule that, outside those areas where pricing flexibility has been granted, high-capacity facilities do not have to be available as UNEs in any wire center where there are two or more fiber-based collocated competitors – regardless of the prevalence of collocation in the remainder of the MSA. Such a rule is fully supported by the Commission's analysis in the *Pricing Flexibility Order* and the D.C. Circuit's subsequent affirmance: collocation is a reliable indicator of sunk investment of a type that proves that the markets served in that particular wire center are contestable. Indeed, as the Commission and the court each recognized, collocation tends to *underestimate* the degree of facilities-based investment, "because it fails to account for the presence of competitors that do not use collocation and have wholly bypassed incumbent LEC facilities." *Pricing Flexibility Order*, ¶ 95.

Finally, as long as competitors have access to ILEC high-capacity facilities on an unbundled basis, they have little incentive to deploy competing facilities. For that reason, the Commission should require that *if* high-capacity facilities are made available, any such unbundling obligation should have a firm sunset date.

4. The Commission Must Consider the Availability of ILEC Tariffed Special Access Services

The availability of tariffed special access services as an alternative means of serving customers is an additional factor that must be taken into account as part of the Commission's impairment analysis. Specifically, the availability of special access service is an additional factor that supports removing the obligation to unbundle high capacity facilities in any areas where the incumbent has qualified for pricing flexibility relief, and is also a factor that must be taken into account in establishing objective standards to determine whether high capacity facilities must be unbundled outside these areas.

Consideration of the availability of tariffed special access services as an alternative is compelled by the language and logic of the Commission's decision in the *Supplemental Order Clarification* and the Court's decisions in *USTA* and *CompTel*. As the Commission has held, it is appropriate to impose an "unbundling obligation" for purposes of offering a service in a particular market *only* if "denial of the requested elements *would in fact impair the competitor's ability to offer services*" in *that market*. *Supplemental Order Clarification*, ¶ 15 (emphasis added); *see CompTel*, 309 F.3d at 10. If markets are contestable without access to unbundled network elements, that is the end of the matter. Or to put it another way, if competing providers are able to enter the market and compete successfully using a combination of tariffed special access services purchased from the incumbent and their own facilities, they self-evidently are not

impaired without access to unbundled elements. Indeed, that is precisely the way that competition developed in the long-distance market: competing carriers relied initially on services purchased from AT&T under volume and term discount arrangements until they completed the build out of their own facilities. Likewise, special access services are available under tariffs that include volume and term discounts, and carriers have the same ability as they do in the long distance market to use these arrangements to supplement their own facilities as they complete the build out of their networks.

Accordingly, competitors' efforts to gain access to high-capacity facilities as UNEs is *exclusively* about price, since the same *function* is served by purchasing high capacity facilities at special access rates. Providing access to facilities at TELRIC rates – rather than the competitive rates available under tariff – simply encourages anti-competitive arbitrage, an uneconomic wealth transfer from incumbents to competitors that discourages productivity and innovation and penalizes investment.

In the case of those local customers served over high-capacity facilities, it is clearly the case that other providers can and do compete successfully using existing special access services purchased from incumbents and others to fill gaps in their networks. Indeed, there is significant marketplace evidence that proves that competitors that obtain high-capacity circuits from incumbents (rather than provisioning them independently or purchasing from a third-party supplier) rely on special access services far more often than on UNEs. In Verizon's region, for example, competing carriers as a whole had obtained almost twice as many DS-1 circuits as special access than as UNEs. In addition, many competing carriers that obtain high capacity circuits from incumbents do so entirely by purchasing special access service rather than UNEs. In Verizon's region, for example, there are several competing carriers that purchase all their DS-1 circuits exclusively as special access, and many others that rely on special access primarily (though not exclusively) to satisfy their demand for DS-1 circuits. Based on a sample of nine of the largest purchasers of special access, three purchase all of their DS-1 circuits as special access, and five additional competing carriers purchase 80 percent or more of all of their DS-1 circuits as special access.

Moreover, there's no real question that competing carriers are competing successfully using tariffed special access services purchased from incumbents and others to provide local services as well as to provide their own special access services for long distance traffic. This makes sense given the nature of special access service and the markets served. Tariffed special access services are provided over dedicated point-to-point facilities deployed specifically to meet the needs of carriers and business customers, not residential users. For example, carriers can and do use *existing* special access services to provide the direct link between customer premises and their local networks (as opposed to a long distance carrier's POP), including their equipment collocated in incumbent's central offices – even in circumstances where the ILEC provides no service of any kind to the end-user customer directly. This allows carriers to integrate the special access circuits into their own local networks, and use them to carry customers' local as well as long distance traffic. Using such services, providers have successfully competed for business customers of all shapes and sizes, from the most concentrated and most lucrative telecommunications consumers to small business customers. For example, the customers that are

being served by competing carriers in this fashion range from donut shops and car dealerships to law firms, doctor's offices, brokerage branch offices, hospitals, and educational institutions.

There can thus be no doubt that there is *already* fierce competition to serve those customers, both in the market for the customer-to-carrier connections themselves and in the vertical telecommunications markets – including long-distance and local voice and data services – in which high-capacity facilities provide an input. Indeed, competing carriers have won roughly 150 million voice grade equivalent lines using a combination of their own facilities and special access circuits purchased from incumbents and others. And they are competing successfully in providing various services that use special access as an input, such as enterprise long distance services, high-speed data services such as ATM and Frame Relay, and local services provided to large business customers. Indeed, a group of large business customers just informed the WorldCom bankruptcy court that, "Sprint, AT&T and WorldCom account for over 90% of enterprise telecommunications usage and are widely viewed as the only interexchange carriers capable of providing the full suite of network services required by major corporations." The evidence of such robust competition in vertical or adjacent markets establishes that access to high-capacity facilities is no barrier to competition. *Cf. Advanced Health-Care v. Radford Comm. Hosp.*, 910 F.2d 139, 150 (1990) ("[T]he central concern in an essential facilities claim is whether market power in one market is being used to create or further a monopoly in another market."); *USTA*, 290 F.3d at 427 n.4. Indeed, as this Commission has held, once such competition exists, it can expand into additional market segments: "large customers may create the inducement for potential competitors to invest in sunk facilities which, once sunk, can be used to serve adjacent smaller customers." *Pricing Flexibility Order*, ¶ 79.

Taking account of the availability of special access services as an alternative to unbundling high-capacity facilities is especially appropriate in light of the unique characteristics of special access. The Commission has already concluded that special access services are competitive, and that – in many markets – competition already constrains special access retail prices, and competitors have used special access in combination with their own facilities to enter local markets. Taking into account the availability of competitive special access service in this context thus does not compel the conclusion, for example, that the possibility of competing by reselling incumbents' retail services would eliminate the need to unbundle local loops for provision of local voice service. But under the specific circumstances here, where tariffed special access services can and are being used to compete successfully, it would be reversible error for the Commission to fail to take that alternative into account in conducting its impairment analysis.

Finally, Verizon's opponents claim that the only reason they buy Verizon's special access services is because they have been unable to obtain the equivalent services as UNEs. As an initial matter, as we have explained at length elsewhere, Verizon *does* provide unbundled high-capacity facilities wherever such facilities exist. The instances in which it does not do so are those where the requested facilities do *not* exist, and, therefore, they could not be provided without investing in and deploying new facilities or equipment or without undertaking significant construction work. That is entirely consistent with the Act, which the Commission has

recognized "does not require [Verizon] to construct network elements ... for the sole purpose of unbundling those elements for ... other carriers." *See, e.g., Virginia Arbitration Non-Cost Order*, CC 00-218, DA 02-1731, ¶ 468 (rel. July 17, 2002). Moreover, even in those instances, the simple fact is that Verizon will build facilities for use by competing carriers to the same extent as it will for its own retail customers, and will make the newly constructed facilities available at competitive special access rates (which, in contrast to sub-competitive TELRIC rates, provide at least an opportunity to recover the costs of constructing the facilities).

More fundamentally, however, the opponents' claim misses the point entirely. Regardless of the *reason* they use special access services purchased from Verizon to compete, the fact of the matter is that they have demonstrated they are able to enter and compete successfully by using those services. While they no doubt would prefer to pay the artificially low TELRIC rates, that proves nothing. If competing carriers are able to enter and compete using a combination of special access and their own facilities (as these carriers have), then they self-evidently are not impaired without access to the same facilities at UNE rates. And providing access to these facilities at artificially low rates under these circumstances would merely undermine the continued growth of facilities-based competition and flout the directives of the D.C. Circuit.

Sincerely,

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December 17, 2002

The Honorable Jonathan Adelstein
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Commissioner Adelstein:

This is a follow up to my letter to Chairman Powell of October 16, 2002 in which I proposed a framework for addressing the issues before the Commission in the pending review of its unbundled network element rules.

My purpose here is to provide you with a copy of the attached letter, which elaborates on certain of the points made in my October 16 correspondence discussing application of the Act's unbundling standard to the competitive special access market and to high-capacity facilities generally. Specifically, the attached letter elaborates on three crucial points:

First, as the Commission itself has recognized, special access today is a mature competitive market, and that fact is due in part to previous Commission policies that promoted the growth of facilities-based competition in this market segment. To avoid jeopardizing this competitive success story, it is critical that the Commission reconfirm existing restrictions on the use of unbundled network elements to provide traditional special access service.

Second, with respect to high capacity DS-1 facilities that are used for local traffic, the Commission itself has previously determined that, in areas where the Commission has granted pricing flexibility to incumbent carriers, competing carriers already have made "irreversible investments" in competing facilities. Under the standards in the Act and the D.C. Circuit's orders, therefore, unbundling of high-capacity facilities cannot be required in these areas. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

Third, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. Simply put, when competing carriers are already successfully competing and serving customers using special access, allowing access to the same facilities at UNE prices is an uneconomic arbitrage process that serves no competitive purpose under the Act, and in fact injures facilities-based competition. Consequently, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

Binding federal determinations that are consistent with these key principles are critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segments served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business.

Sincerely,

William P. Barr

Attachment

cc: Chairman Powell
Commissioner Abernathy
Commissioner Copps
Commissioner Martin

1300 I Street, NW
Suite 400 West
Washington, DC 20005

December 17, 2002

William F. Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Mr. Maher:

The purpose of this letter is to address in greater detail the application of the Act's unbundling standards to high-capacity facilities – loops and dedicated transport. In particular, this letter elaborates on three central points addressed in William Barr's letter to Chairman Powell of October 16, 2002. Because competition for the highest capacity services (DS-3 and above) is pervasive, and there is virtually no reliance on unbundled elements for those services today, this discussion focuses on unbundling requirements associated with dedicated DS-1 services.

- *First*, at a bare minimum, the Commission should reconfirm restrictions on use of high-capacity facilities to provide traditional special access service for long distance traffic, because the evidence is overwhelming that competitors have captured a significant percentage of this market segment without access to UNEs.

- *Second*, with respect to use of high capacity facilities for local traffic, the Commission itself already determined in its *Pricing Flexibility Order* that, in areas that qualify for either Phase I or Phase II pricing flexibility, "competitors have made irreversible investments in facilities" (14 FCC Rcd 14221, ¶ 77 (1999)); consequently, under the standards articulated by the D.C. Circuit, no unbundled access to high-capacity facilities can be ordered in these areas. A binding federal determination to this effect is critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segment served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

- *Third*, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. In particular, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for Phase I or Phase II pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

1. Competitors Are Not "Impaired" If Particular Markets Are Contestable in the Absence of Unbundled Network Access

As an initial matter, four of the key legal principles established by the D.C. Circuit's decisions in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*") and *Competitive Telecommunications Association v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*") are particularly pertinent to the Commission's analysis of these issues.

First, determination of circumstances where mandatory unbundling may be appropriate under section 251(d)(2)'s impairment standard must be "linked (in some degree) to natural monopoly" characteristics of an element. Unbundling may be appropriate only if "genuinely competitive provision *of an element's function* [would be] wasteful" because "the cost characteristics of an 'element' render it . . . unsuitable for competitive supply." *USTA*, 290 F.3d at 427. Under this standard, the Commission may require unbundling of a particular element only in circumstances where unbundled access to the element is needed to permit requesting carriers to compete in the particular market where the carrier seeks to offer service. If the market in question is subject to competitive entry – *i.e.*, if the market is contestable – in the absence of unbundled access to a particular element, competitors are not "impaired" within the meaning of the statute. That standard is unquestionably satisfied in cases where (1) a particular element has been "significantly deployed on a competitive basis" (*id.* at 422); or (2) if a functional alternative to the element is otherwise available either from the incumbent or "'outside the incumbent's network.'" (*id.* at 429 (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999) ("*AT&T*"))). Where markets are contestable without access to unbundled elements, the costs of unbundling outweigh any possible benefit. As the court noted, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *Id.* at 427.

Second, the Commission must "consider the markets in which a competitor 'seeks to offer' services and, *at an appropriate level of generality*, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services." *CompTel*, 309 F.3d at 10 (quoting *Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 15 (2000)) (emphasis added). One aspect of that inquiry must be defining an appropriate *geographic* market in which to assess impairment. As the Commission held in its *Pricing Flexibility Order*, the task is "to define . . .

geographic areas narrowly enough so that the competitive conditions within each area are reasonably similar, yet broadly enough to be administratively workable." *Pricing Flexibility Order*, ¶ 71. There, the Commission held that "MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition." *Id.* at ¶ 72. In contrast, the Commission rejected a wire center by wire center analysis, both because it was unnecessary to reflect the scope of competitive entry and because it would be administratively unworkable. The D.C. Circuit affirmed this Commission's determination of the appropriate geographic market for use in assessing competitive entry, and expressly rejected the argument that it is necessary to carry out such an analysis wire center by wire center. *WorldCom, Inc. v. FCC*, 238 F.3d 449, 446-61 (D.C. Cir. 2001) ("*WorldCom*").

Third, the Commission must consider evidence of impairment on a service-specific basis. As the D.C. Circuit noted in upholding the Commission's existing limitations on the use of unbundled elements to provide special access services, "it is far from obvious to us that the FCC *has the power* without an impairment finding as to nonlocal services, to require that ILECs provide EELs for such services on an unbundled basis." *Comptel*, 309 F.3d at 13 (emphasis added); *see also USTA*, 290 F.3d at 426 (suggesting that the statute requires "a more nuanced concept of impairment" that considers "specific markets or market categories"). To use an example that is elaborated on below, in analyzing the need to unbundle high-capacity facilities, the Commission should continue to evaluate the special access market for long distance traffic – which has special characteristics for both functional and historical reasons – as a separate market segment.

Fourth, because a finding of impairment is a prerequisite to imposing an unbundling requirement, and that finding obviously must be based on substantial record evidence, the burden is on the proponents of unbundling to demonstrate that the impairment standard has been satisfied for a particular element in a relevant segment of the market. This point is especially important in cases such as this where there is no question that the facilities at issue already have been significantly deployed on a competitive basis. Under these circumstances, absent concrete evidence to the contrary, the presumption has to be that the facilities are capable of being competitively supplied both where they have been deployed and where they as yet have not. Indeed, as the D.C. Circuit recognized, deployment of competitive facilities in certain markets indicates that all markets with comparable characteristics are likewise contestable, even if facilities have not actually been deployed. *See USTA*, 290 F.3d at 422. Or as Chairman Powell put it at the time of the *UNE Remand Order*: "evidence of CLEC [facilities] deployment strongly suggests that CLECs are not significantly impaired without access . . . both in areas in which CLECs have deployed [facilities] *and areas in which they have not done so*." 15 FCC Rcd 3696, 3927 (1999) (emphasis added).

2. The Commission Should Retain Its Restriction on Special Access Bypass

At a bare minimum, the Commission should confirm that high-capacity facilities need not be made available – either alone or in combinations – for the provision of traditional special access service, *i.e.*, in those situations where the requesting carrier seeks to use the requested

facilities to establish a connection between the customer's premises and a carrier's point of presence without providing "a significant amount of local exchange service." *See Supplemental Order Clarification*, ¶ 8.

As noted above, the D.C. Circuit has already held that the Commission was permitted – indeed, required – by the terms of the Act to undertake a service-specific analysis that distinguishes between the local and long-distance-access segments of the market. *CompTel*, 309 F.3d at 13. And when it comes to special access service for long distance traffic, the Commission has correctly recognized that the extensive existing competition proves that telecommunications carriers are not impaired in their ability to provide special access service without access to unbundled elements. To the contrary, the FCC has properly found that the market for special access has become highly competitive in the absence of UNE access. "Competitive access, which originated in the mid-1980s, is a mature source of [facilities-based] competition in telecommunications markets." *Supplemental Order Clarification*, ¶ 18. This is true regardless of whether the special access traffic at issue is voice or data, as would be expected because the facilities used for both types of traffic are the same.

The FCC's prior decision to restrict the use of UNEs to provide special access service was sound. In the *Supplemental Order Clarification*, the Commission properly noted that "the exchange access market occupies a different legal category from the market for telephone exchange services." *Supplemental Order Clarification*, ¶ 14. It was therefore impossible for the Commission to grant competitors access to network elements "solely or primarily for use in the exchange access market" without first finding that competitors are impaired in their ability to provide special access services without access to UNEs. *Id.* at ¶ 15. Based on the record before it, the Commission found no evidence that competitors in the special access market are impaired without access to unbundled loops and transport: "we generally do not impose such obligations first and conduct our 'impair' inquiry afterwards." *Id.* at ¶ 16. Moreover, to grant access could cause "substantial market dislocations" by "undercut[ting] the market position of many facilities-based competitive access providers." *Id.* at ¶¶ 7, 18.

The current record strongly supports those conclusions. No party has introduced evidence, let alone carried their burden of demonstrating, that competitors are impaired in the provision of special access service. To the contrary, the evidence is that competition has continued to thrive in the rapidly expanding special access market *without* access to UNEs. Competitors account for a third or more of *total* special access revenues *nationwide*, and their share of the market has been growing rapidly. *See* UNE Fact Report 2002 at III-1, IV-6, IV-7. Competitors now have extensive local networks in place in most of the markets where special access demand is concentrated. A number of wholesale fiber suppliers also serve most major markets. And even in the areas where competitive facilities are not yet available, competing providers have been able to compete successfully by reselling special access service purchased from incumbents. Competitors now provide more than 150 million voice-grade equivalent special access and private lines using either their own facilities, the facilities of other competitive suppliers, or by reselling ILEC special access service. Such widespread and pervasive competition establishes beyond serious dispute that the traditional special access market is

contestable – that is, that competing providers can and do compete effectively in the special access market without UNEs. Consequently, the record here compels the conclusion that competing providers are not impaired in their "ability to provide long distance or exchange access service" without access to unbundled elements, including high capacity loops and transport. *Cf. CompTel*, 309 F.3d at 13.

Moreover, the Commission's concerns about market dislocations and undermining the market position of facilities-based competitors likewise require that the Commission affirm its determination that competitors are not entitled to unbundled network elements to provide special access service. As the D.C. Circuit noted in its decision upholding the Commission's existing restrictions on the use of UNEs to provide special access, Congress "preferred 'facilities-based competition' over 'parasitic free-riding.'" *CompTel*, 309 F.3d at 20. It would be contrary to the goals of the Act and this Commission's policies to displace existing facilities-based competition with "completely synthetic competition" using elements of the incumbents' networks provided at TELRIC rates. *See USTA*, 290 F.3d at 424. At a minimum, therefore, it is critical to maintain restrictions on the use of unbundled elements to provide special access in order to avoid disrupting this well functioning, competitive market.

Moreover, the current restrictions were proposed by a cross-industry group that included major CLECs, and were expressly upheld by the D.C. Circuit in *CompTel*, 309 F.3d at 22. While some CLECs unquestionably have tried to game the current tests for determining whether the substantial local traffic requirement is satisfied, overall the tests have proven to be workable. In fact, while some parties here rehash their previous claims that the tests are not administratively feasible, the D.C. Circuit squarely rejected those claims, holding that "it is plain that supplying the information is feasible, as the FCC has produced evidence that some carriers are taking advantage of the safe harbors." *Id*. If anything, the current tests are too lax and allow circuits to be converted to sub-competitive TELRIC pricing even when they are used predominantly for non-local traffic. Given all of this, there is no basis for relaxing these existing restrictions further, and doing so would serve only to undermine the mature facilities-based competition that already exists.

This is equally true of the existing companion rule prohibiting "commingling" of unbundled elements with special access services. As the Commission explained to the D.C. Circuit, this prohibition is "the only way to prevent carriers from using these units 'solely or primarily to bypass special access services,'" because "allowing commingling would allow carriers to avoid the requirement that each customer be provided a significant amount of local exchange service." *Id*. at 22-23. The court agreed, and recognized that the prohibition is necessary to prevent the "gaming" that otherwise would occur. For example, as the court itself pointed out, the absence of a commingling restriction would "allow the entire base of the loop or 'channel termination' portion of special access circuits to be converted into unbundled loops." *Id*. at 24. And that, of course, would undermine the existing facilities-based competition that the Commission sought to preserve and promote.

3. Where ILECs Have Qualified for Pricing Flexibility, They Should Not Be Required To Provide Unbundled Access to High Capacity Facilities

Even if CLECs plan to use high-capacity facilities to provide a substantial amount of local exchange service – as opposed to solely or primarily special access service – they should not have access to unbundled high capacity loops and transport where the market for local services provided using these facilities is contestable without access to high capacity facilities at UNE rates. In those situations where competitive facilities already exist, provision of those facilities is not merely contestable, but already contested. Indeed, to require access in that circumstance – *i.e.*, where facilities have been "significantly deployed on a competitive basis" (*USTA*, 290 F.3d at 422) – would violate the Supreme Court's admonition that the Commission cannot "blind itself to the availability of elements outside the incumbent's network" (*AT&T*, 525 U.S. at 389).

It is critical that the Commission itself establish binding restrictions on incumbents' unbundling obligations based on objective market conditions. Clear, readily applied national rules will provide stability and certainty, which will in turn promote investment and innovation by competitors and incumbents alike. And the Commission unquestionably has both the legal authority and the obligation to establish binding national rules: the Act gives "the Commission" – not the states – the power to "determin[e] what network elements should be made available" on an unbundled basis. 47 U.S.C. § 251(d).

Moreover, the Commission has already created an appropriate framework – and in a series of subsequent orders already has applied that framework itself – for initially identifying certain geographic markets where unbundling of high-capacity facilities *cannot* be required in its *Pricing Flexibility Order*. In that order, the Commission granted incumbents pricing flexibility for special access services, conditioned on a showing that "market conditions in a particular area warrant the relief at issue." *Pricing Flexibility Order*, ¶ 68. The requisite showing focuses on precisely the question that the courts have made clear must be considered before any unbundled access may be required: investment in competitive facilities. Indeed, the Commission granted relief specifically because it determined that certain geographic markets were *contestable* where a significant portion of those geographic areas already were being *contested* – that is, competing providers already had made sunk investments in competing facilities.

Thus, the Commission ruled that incumbents are to be granted "Phase I" regulatory relief – that is, the ability to offer contract tariffs and volume and term discounts – once they can show that "competitors have made irreversible investments in the facilities needed to provide the services at issue." *Id.* at ¶ 69. As the Commission found, such investment "is an important indicator of . . . irreversible entry" because, even if a particular competitor does not succeed, "that equipment remains available and capable of providing service in competition with the incumbent." *Id.* at ¶ 80. And to obtain "Phase II" relief, where the incumbent's own rates are effectively deregulated, the incumbent must make an even more extensive showing – that is, it must show that the market not only is contestable, but that a sufficient portion of the geographic

market at issue is actually being contested such that the market is workably competitive and market forces alone will constrain the incumbent's rates. *Id.* at ¶ 69.

The Commission has established separate competitive triggers to allow pricing flexibility for (1) dedicated transport and (2) service over high-capacity loops, known as "channel terminations." *See id.* at ¶ 70. Accordingly, a determination that "competitors have made irreversible investments in the facilities needed" to provide dedicated transport establishes that competitors are not impaired without unbundled access to an incumbent's high-capacity dedicated transport facilities. If an incumbent has been granted Phase I relief with respect to dedicated transport in a particular MSA, therefore, the Commission should not require provision of unbundled access to dedicated transport. The same logic applies to high-capacity loops: in any MSA where the Commission has granted Phase I relief for channel terminations under the separate standard that applies to those facilities, the Commission should not require provision of unbundled access to high capacity loops.

The Commission should definitively eliminate unbundling obligations wherever the incumbent has qualified for either Phase I or Phase II relief. Phase I triggers were specifically designed to identify markets where there is "facilities-based competition with significant sunk investment" and therefore an alternative to an incumbent's facilities for the provision of service. *See id.* at ¶ 80. By contrast, Phase II relief – which essentially deregulates incumbents' rates – is granted in those markets where competitors have *already* "established a significant market presence," sufficient to constrain ILEC end-user pricing. *Id.* at ¶ 141; *see also id.* at ¶ 77 ("competitors that are sufficiently entrenched to survive attempts by incumbents to exclude them from the market [by lowering prices to end-users] may not yet have a sufficient market presence to constrain prices throughout the MSA"). Because the impairment analysis must focus on "CLECs' *ability* to provide . . . service," (*CompTel*, 309 F.3d at 13 (emphasis added)), the existence of mature competition – while more than *sufficient* to establish non-impairment – is not *necessary* to demonstrate non-impairment.

The fact that an incumbent has been granted Phase I or Phase II pricing flexibility relief in a particular area provides conclusive evidence that the corresponding network elements – *i.e.*, high-capacity transport or loops – need not be made available on an unbundled basis in that area. At the same time, the fact that an ILEC has not yet received such relief in a particular geographic area – and such relief currently covers only 37 percent of Verizon's wire centers (and a smaller percentage of wire centers nationwide) – does not relieve the Commission of the need to conduct an impairment inquiry with respect to these other areas. To the contrary, competing carriers can and have deployed competing facilities outside the areas where incumbents have been granted pricing flexibility as well. And if the segment of the local market served with high-capacity facilities is contestable in the absence of unbundled access, granting such access would be contrary to the "goals of the Act." *AT&T*, 525 U.S. at 388. Accordingly, the Commission should establish additional, objective triggers for the removal of high-capacity facilities from the UNE list outside the areas where pricing flexibility has been granted.

We continue to believe that the extensive evidence demonstrating that competing carriers have widely deployed their own high-capacity facilities where there is demand for high-capacity services shows that they are not impaired anywhere without the ability to purchase these facilities from incumbents at artificially low TELRIC rates. At an absolute minimum, however, just as the Commission determined that "collocation can reasonably serve as a measure of competition in a given market and predictor of competitive constraints upon future LEC behavior" (*WorldCom*, 238 F.3d at 459), the Commission should likewise rule that, outside those areas where pricing flexibility has been granted, high-capacity facilities do not have to be available as UNEs in any wire center where there are two or more fiber-based collocated competitors – regardless of the prevalence of collocation in the remainder of the MSA. Such a rule is fully supported by the Commission's analysis in the *Pricing Flexibility Order* and the D.C. Circuit's subsequent affirmance: collocation is a reliable indicator of sunk investment of a type that proves that the markets served in that particular wire center are contestable. Indeed, as the Commission and the court each recognized, collocation tends to *underestimate* the degree of facilities-based investment, "because it fails to account for the presence of competitors that do not use collocation and have wholly bypassed incumbent LEC facilities." *Pricing Flexibility Order*, ¶ 95.

Finally, as long as competitors have access to ILEC high-capacity facilities on an unbundled basis, they have little incentive to deploy competing facilities. For that reason, the Commission should require that *if* high-capacity facilities are made available, any such unbundling obligation should have a firm sunset date.

4. The Commission Must Consider the Availability of ILEC Tariffed Special Access Services

The availability of tariffed special access services as an alternative means of serving customers is an additional factor that must be taken into account as part of the Commission's impairment analysis. Specifically, the availability of special access service is an additional factor that supports removing the obligation to unbundle high capacity facilities in any areas where the incumbent has qualified for pricing flexibility relief, and is also a factor that must be taken into account in establishing objective standards to determine whether high capacity facilities must be unbundled outside these areas.

Consideration of the availability of tariffed special access services as an alternative is compelled by the language and logic of the Commission's decision in the *Supplemental Order Clarification* and the Court's decisions in *USTA* and *CompTel*. As the Commission has held, it is appropriate to impose an "unbundling obligation" for purposes of offering a service in a particular market *only* if "denial of the requested elements *would in fact impair the competitor's ability to offer services*" in *that market*. *Supplemental Order Clarification*, ¶ 15 (emphasis added); *see CompTel*, 309 F.3d at 10. If markets are contestable without access to unbundled network elements, that is the end of the matter. Or to put it another way, if competing providers are able to enter the market and compete successfully using a combination of tariffed special access services purchased from the incumbent and their own facilities, they self-evidently are not

impaired without access to unbundled elements. Indeed, that is precisely the way that competition developed in the long-distance market: competing carriers relied initially on services purchased from AT&T under volume and term discount arrangements until they completed the build out of their own facilities. Likewise, special access services are available under tariffs that include volume and term discounts, and carriers have the same ability as they do in the long distance market to use these arrangements to supplement their own facilities as they complete the build out of their networks.

Accordingly, competitors' efforts to gain access to high-capacity facilities as UNEs is *exclusively* about price, since the same *function* is served by purchasing high capacity facilities at special access rates. Providing access to facilities at TELRIC rates – rather than the competitive rates available under tariff – simply encourages anti-competitive arbitrage, an uneconomic wealth transfer from incumbents to competitors that discourages productivity and innovation and penalizes investment.

In the case of those local customers served over high-capacity facilities, it is clearly the case that other providers can and do compete successfully using existing special access services purchased from incumbents and others to fill gaps in their networks. Indeed, there is significant marketplace evidence that proves that competitors that obtain high-capacity circuits from incumbents (rather than provisioning them independently or purchasing from a third-party supplier) rely on special access services far more often than on UNEs. In Verizon's region, for example, competing carriers as a whole had obtained almost twice as many DS-1 circuits as special access than as UNEs. In addition, many competing carriers that obtain high capacity circuits from incumbents do so entirely by purchasing special access service rather than UNEs. In Verizon's region, for example, there are several competing carriers that purchase all their DS-1 circuits exclusively as special access, and many others that rely on special access primarily (though not exclusively) to satisfy their demand for DS-1 circuits. Based on a sample of nine of the largest purchasers of special access, three purchase all of their DS-1 circuits as special access, and five additional competing carriers purchase 80 percent or more of all of their DS-1 circuits as special access.

Moreover, there's no real question that competing carriers are competing successfully using tariffed special access services purchased from incumbents and others to provide local services as well as to provide their own special access services for long distance traffic. This makes sense given the nature of special access service and the markets served. Tariffed special access services are provided over dedicated point-to-point facilities deployed specifically to meet the needs of carriers and business customers, not residential users. For example, carriers can and do use *existing* special access services to provide the direct link between customer premises and their local networks (as opposed to a long distance carrier's POP), including their equipment collocated in incumbent's central offices – even in circumstances where the ILEC provides no service of any kind to the end-user customer directly. This allows carriers to integrate the special access circuits into their own local networks, and use them to carry customers' local as well as long distance traffic. Using such services, providers have successfully competed for business customers of all shapes and sizes, from the most concentrated and most lucrative telecommunications consumers to small business customers. For example, the customers that are

being served by competing carriers in this fashion range from donut shops and car dealerships to law firms, doctor's offices, brokerage branch offices, hospitals, and educational institutions.

There can thus be no doubt that there is *already* fierce competition to serve those customers, both in the market for the customer-to-carrier connections themselves and in the vertical telecommunications markets – including long-distance and local voice and data services – in which high-capacity facilities provide an input. Indeed, competing carriers have won roughly 150 million voice grade equivalent lines using a combination of their own facilities and special access circuits purchased from incumbents and others. And they are competing successfully in providing various services that use special access as an input, such as enterprise long distance services, high-speed data services such as ATM and Frame Relay, and local services provided to large business customers. Indeed, a group of large business customers just informed the WorldCom bankruptcy court that, "Sprint, AT&T and WorldCom account for over 90% of enterprise telecommunications usage and are widely viewed as the only interexchange carriers capable of providing the full suite of network services required by major corporations." The evidence of such robust competition in vertical or adjacent markets establishes that access to high-capacity facilities is no barrier to competition. *Cf. Advanced Health-Care v. Radford Comm. Hosp.*, 910 F.2d 139, 150 (1990) ("[T]he central concern in an essential facilities claim is whether market power in one market is being used to create or further a monopoly in another market."); *USTA*, 290 F.3d at 427 n.4. Indeed, as this Commission has held, once such competition exists, it can expand into additional market segments: "large customers may create the inducement for potential competitors to invest in sunk facilities which, once sunk, can be used to serve adjacent smaller customers." *Pricing Flexibility Order*, ¶ 79.

Taking account of the availability of special access services as an alternative to unbundling high-capacity facilities is especially appropriate in light of the unique characteristics of special access. The Commission has already concluded that special access services are competitive, and that – in many markets – competition already constrains special access retail prices, and competitors have used special access in combination with their own facilities to enter local markets. Taking into account the availability of competitive special access service in this context thus does not compel the conclusion, for example, that the possibility of competing by reselling incumbents' retail services would eliminate the need to unbundle local loops for provision of local voice service. But under the specific circumstances here, where tariffed special access services can and are being used to compete successfully, it would be reversible error for the Commission to fail to take that alternative into account in conducting its impairment analysis.

Finally, Verizon's opponents claim that the only reason they buy Verizon's special access services is because they have been unable to obtain the equivalent services as UNEs. As an initial matter, as we have explained at length elsewhere, Verizon *does* provide unbundled high-capacity facilities wherever such facilities exist. The instances in which it does not do so are those where the requested facilities do *not* exist, and, therefore, they could not be provided without investing in and deploying new facilities or equipment or without undertaking significant construction work. That is entirely consistent with the Act, which the Commission has

recognized "does not require [Verizon] to construct network elements ... for the sole purpose of unbundling those elements for ... other carriers." *See, e.g., Virginia Arbitration Non-Cost Order*, CC 00-218, DA 02-1731, ¶ 468 (rel. July 17, 2002). Moreover, even in those instances, the simple fact is that Verizon will build facilities for use by competing carriers to the same extent as it will for its own retail customers, and will make the newly constructed facilities available at competitive special access rates (which, in contrast to sub-competitive TELRIC rates, provide at least an opportunity to recover the costs of constructing the facilities).

More fundamentally, however, the opponents' claim misses the point entirely. Regardless of the *reason* they use special access services purchased from Verizon to compete, the fact of the matter is that they have demonstrated they are able to enter and compete successfully by using those services. While they no doubt would prefer to pay the artificially low TELRIC rates, that proves nothing. If competing carriers are able to enter and compete using a combination of special access and their own facilities (as these carriers have), then they self-evidently are not impaired without access to the same facilities at UNE rates. And providing access to these facilities at artificially low rates under these circumstances would merely undermine the continued growth of facilities-based competition and flout the directives of the D.C. Circuit.

Sincerely,

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December 17, 2002

The Honorable Michael Copps
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Commissioner Copps:

This is a follow up to my letter to Chairman Powell of October 16, 2002 in which I proposed a framework for addressing the issues before the Commission in the pending review of its unbundled network element rules.

My purpose here is to provide you with a copy of the attached letter, which elaborates on certain of the points made in my October 16 correspondence discussing application of the Act's unbundling standard to the competitive special access market and to high-capacity facilities generally. Specifically, the attached letter elaborates on three crucial points:

First, as the Commission itself has recognized, special access today is a mature competitive market, and that fact is due in part to previous Commission policies that promoted the growth of facilities-based competition in this market segment. To avoid jeopardizing this competitive success story, it is critical that the Commission reconfirm existing restrictions on the use of unbundled network elements to provide traditional special access service.

Second, with respect to high capacity DS-1 facilities that are used for local traffic, the Commission itself has previously determined that, in areas where the Commission has granted pricing flexibility to incumbent carriers, competing carriers already have made "irreversible investments" in competing facilities. Under the standards in the Act and the D.C. Circuit's orders, therefore, unbundling of high-capacity facilities cannot be required in these areas. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

Third, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. Simply put, when competing carriers are already successfully competing and serving customers using special access, allowing access to the same facilities at UNE prices is an uneconomic arbitrage process that serves no competitive purpose under the Act, and in fact injures facilities-based competition. Consequently, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

Binding federal determinations that are consistent with these key principles are critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segments served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business.

Sincerely,

William P. Barr

Attachment

cc: Chairman Powell
Commissioner Abernathy
Commissioner Adelstein
Commissioner Martin

1300 I Street, NW
Suite 400 West
Washington, DC 20005

December 17, 2002

William F. Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Mr. Maher:

The purpose of this letter is to address in greater detail the application of the Act's unbundling standards to high-capacity facilities – loops and dedicated transport. In particular, this letter elaborates on three central points addressed in William Barr's letter to Chairman Powell of October 16, 2002. Because competition for the highest capacity services (DS-3 and above) is pervasive, and there is virtually no reliance on unbundled elements for those services today, this discussion focuses on unbundling requirements associated with dedicated DS-1 services.

- *First*, at a bare minimum, the Commission should reconfirm restrictions on use of high-capacity facilities to provide traditional special access service for long distance traffic, because the evidence is overwhelming that competitors have captured a significant percentage of this market segment without access to UNEs.

- *Second*, with respect to use of high capacity facilities for local traffic, the Commission itself already determined in its *Pricing Flexibility Order* that, in areas that qualify for either Phase I or Phase II pricing flexibility, "competitors have made irreversible investments in facilities" (14 FCC Rcd 14221, ¶ 77 (1999)); consequently, under the standards articulated by the D.C. Circuit, no unbundled access to high-capacity facilities can be ordered in these areas. A binding federal determination to this effect is critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segment served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

- *Third*, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. In particular, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for Phase I or Phase II pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

1. Competitors Are Not "Impaired" If Particular Markets Are Contestable in the Absence of Unbundled Network Access

As an initial matter, four of the key legal principles established by the D.C. Circuit's decisions in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*") and *Competitive Telecommunications Association v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*") are particularly pertinent to the Commission's analysis of these issues.

First, determination of circumstances where mandatory unbundling may be appropriate under section 251(d)(2)'s impairment standard must be "linked (in some degree) to natural monopoly" characteristics of an element. Unbundling may be appropriate only if "genuinely competitive provision *of an element's function* [would be] wasteful" because "the cost characteristics of an 'element' render it . . . unsuitable for competitive supply." *USTA*, 290 F.3d at 427. Under this standard, the Commission may require unbundling of a particular element only in circumstances where unbundled access to the element is needed to permit requesting carriers to compete in the particular market where the carrier seeks to offer service. If the market in question is subject to competitive entry – *i.e.*, if the market is contestable – in the absence of unbundled access to a particular element, competitors are not "impaired" within the meaning of the statute. That standard is unquestionably satisfied in cases where (1) a particular element has been "significantly deployed on a competitive basis" (*id.* at 422); or (2) if a functional alternative to the element is otherwise available either from the incumbent or "'outside the incumbent's network.'" (*id.* at 429 (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999) ("*AT&T*"))). Where markets are contestable without access to unbundled elements, the costs of unbundling outweigh any possible benefit. As the court noted, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *Id.* at 427.

Second, the Commission must "consider the markets in which a competitor 'seeks to offer' services and, *at an appropriate level of generality*, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services." *CompTel*, 309 F.3d at 10 (quoting *Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 15 (2000)) (emphasis added). One aspect of that inquiry must be defining an appropriate *geographic* market in which to assess impairment. As the Commission held in its *Pricing Flexibility Order*, the task is "to define . . .

geographic areas narrowly enough so that the competitive conditions within each area are reasonably similar, yet broadly enough to be administratively workable." *Pricing Flexibility Order*, ¶ 71. There, the Commission held that "MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition." *Id.* at ¶ 72. In contrast, the Commission rejected a wire center by wire center analysis, both because it was unnecessary to reflect the scope of competitive entry and because it would be administratively unworkable. The D.C. Circuit affirmed this Commission's determination of the appropriate geographic market for use in assessing competitive entry, and expressly rejected the argument that it is necessary to carry out such an analysis wire center by wire center. *WorldCom, Inc. v. FCC*, 238 F.3d 449, 446-61 (D.C. Cir. 2001) ("*WorldCom*").

Third, the Commission must consider evidence of impairment on a service-specific basis. As the D.C. Circuit noted in upholding the Commission's existing limitations on the use of unbundled elements to provide special access services, "it is far from obvious to us that the FCC *has the power* without an impairment finding as to nonlocal services, to require that ILECs provide EELs for such services on an unbundled basis." *Comptel*, 309 F.3d at 13 (emphasis added); *see also USTA*, 290 F.3d at 426 (suggesting that the statute requires "a more nuanced concept of impairment" that considers "specific markets or market categories"). To use an example that is elaborated on below, in analyzing the need to unbundle high-capacity facilities, the Commission should continue to evaluate the special access market for long distance traffic – which has special characteristics for both functional and historical reasons – as a separate market segment.

Fourth, because a finding of impairment is a prerequisite to imposing an unbundling requirement, and that finding obviously must be based on substantial record evidence, the burden is on the proponents of unbundling to demonstrate that the impairment standard has been satisfied for a particular element in a relevant segment of the market. This point is especially important in cases such as this where there is no question that the facilities at issue already have been significantly deployed on a competitive basis. Under these circumstances, absent concrete evidence to the contrary, the presumption has to be that the facilities are capable of being competitively supplied both where they have been deployed and where they as yet have not. Indeed, as the D.C. Circuit recognized, deployment of competitive facilities in certain markets indicates that all markets with comparable characteristics are likewise contestable, even if facilities have not actually been deployed. *See USTA*, 290 F.3d at 422. Or as Chairman Powell put it at the time of the *UNE Remand Order*: "evidence of CLEC [facilities] deployment strongly suggests that CLECs are not significantly impaired without access . . . both in areas in which CLECs have deployed [facilities] *and areas in which they have not done so*." 15 FCC Rcd 3696, 3927 (1999) (emphasis added).

2. The Commission Should Retain Its Restriction on Special Access Bypass

At a bare minimum, the Commission should confirm that high-capacity facilities need not be made available – either alone or in combinations – for the provision of traditional special access service, *i.e.*, in those situations where the requesting carrier seeks to use the requested

facilities to establish a connection between the customer's premises and a carrier's point of presence without providing "a significant amount of local exchange service." *See Supplemental Order Clarification*, ¶ 8.

As noted above, the D.C. Circuit has already held that the Commission was permitted – indeed, required – by the terms of the Act to undertake a service-specific analysis that distinguishes between the local and long-distance-access segments of the market. *CompTel*, 309 F.3d at 13. And when it comes to special access service for long distance traffic, the Commission has correctly recognized that the extensive existing competition proves that telecommunications carriers are not impaired in their ability to provide special access service without access to unbundled elements. To the contrary, the FCC has properly found that the market for special access has become highly competitive in the absence of UNE access. "Competitive access, which originated in the mid-1980s, is a mature source of [facilities-based] competition in telecommunications markets." *Supplemental Order Clarification*, ¶ 18. This is true regardless of whether the special access traffic at issue is voice or data, as would be expected because the facilities used for both types of traffic are the same.

The FCC's prior decision to restrict the use of UNEs to provide special access service was sound. In the *Supplemental Order Clarification*, the Commission properly noted that "the exchange access market occupies a different legal category from the market for telephone exchange services." *Supplemental Order Clarification*, ¶ 14. It was therefore impossible for the Commission to grant competitors access to network elements "solely or primarily for use in the exchange access market" without first finding that competitors are impaired in their ability to provide special access services without access to UNEs. *Id.* at ¶ 15. Based on the record before it, the Commission found no evidence that competitors in the special access market are impaired without access to unbundled loops and transport: "we generally do not impose such obligations first and conduct our 'impair' inquiry afterwards." *Id.* at ¶ 16. Moreover, to grant access could cause "substantial market dislocations" by "undercut[ting] the market position of many facilities-based competitive access providers." *Id.* at ¶¶ 7, 18.

The current record strongly supports those conclusions. No party has introduced evidence, let alone carried their burden of demonstrating, that competitors are impaired in the provision of special access service. To the contrary, the evidence is that competition has continued to thrive in the rapidly expanding special access market *without* access to UNEs. Competitors account for a third or more of *total* special access revenues *nationwide*, and their share of the market has been growing rapidly. *See* UNE Fact Report 2002 at III-1, IV-6, IV-7. Competitors now have extensive local networks in place in most of the markets where special access demand is concentrated. A number of wholesale fiber suppliers also serve most major markets. And even in the areas where competitive facilities are not yet available, competing providers have been able to compete successfully by reselling special access service purchased from incumbents. Competitors now provide more than 150 million voice-grade equivalent special access and private lines using either their own facilities, the facilities of other competitive suppliers, or by reselling ILEC special access service. Such widespread and pervasive competition establishes beyond serious dispute that the traditional special access market is

contestable – that is, that competing providers can and do compete effectively in the special access market without UNEs. Consequently, the record here compels the conclusion that competing providers are not impaired in their "ability to provide long distance or exchange access service" without access to unbundled elements, including high capacity loops and transport. *Cf. CompTel*, 309 F.3d at 13.

Moreover, the Commission's concerns about market dislocations and undermining the market position of facilities-based competitors likewise require that the Commission affirm its determination that competitors are not entitled to unbundled network elements to provide special access service. As the D.C. Circuit noted in its decision upholding the Commission's existing restrictions on the use of UNEs to provide special access, Congress "preferred 'facilities-based competition' over 'parasitic free-riding.'" *CompTel*, 309 F.3d at 20. It would be contrary to the goals of the Act and this Commission's policies to displace existing facilities-based competition with "completely synthetic competition" using elements of the incumbents' networks provided at TELRIC rates. *See USTA*, 290 F.3d at 424. At a minimum, therefore, it is critical to maintain restrictions on the use of unbundled elements to provide special access in order to avoid disrupting this well functioning, competitive market.

Moreover, the current restrictions were proposed by a cross-industry group that included major CLECs, and were expressly upheld by the D.C. Circuit in *CompTel*, 309 F.3d at 22. While some CLECs unquestionably have tried to game the current tests for determining whether the substantial local traffic requirement is satisfied, overall the tests have proven to be workable. In fact, while some parties here rehash their previous claims that the tests are not administratively feasible, the D.C. Circuit squarely rejected those claims, holding that "it is plain that supplying the information is feasible, as the FCC has produced evidence that some carriers are taking advantage of the safe harbors." *Id*. If anything, the current tests are too lax and allow circuits to be converted to sub-competitive TELRIC pricing even when they are used predominantly for non-local traffic. Given all of this, there is no basis for relaxing these existing restrictions further, and doing so would serve only to undermine the mature facilities-based competition that already exists.

This is equally true of the existing companion rule prohibiting "commingling" of unbundled elements with special access services. As the Commission explained to the D.C. Circuit, this prohibition is "the only way to prevent carriers from using these units 'solely or primarily to bypass special access services,'" because "allowing commingling would allow carriers to avoid the requirement that each customer be provided a significant amount of local exchange service." *Id*. at 22-23. The court agreed, and recognized that the prohibition is necessary to prevent the "gaming" that otherwise would occur. For example, as the court itself pointed out, the absence of a commingling restriction would "allow the entire base of the loop or 'channel termination' portion of special access circuits to be converted into unbundled loops." *Id*. at 24. And that, of course, would undermine the existing facilities-based competition that the Commission sought to preserve and promote.

3. Where ILECs Have Qualified for Pricing Flexibility, They Should Not Be Required To Provide Unbundled Access to High Capacity Facilities

Even if CLECs plan to use high-capacity facilities to provide a substantial amount of local exchange service – as opposed to solely or primarily special access service – they should not have access to unbundled high capacity loops and transport where the market for local services provided using these facilities is contestable without access to high capacity facilities at UNE rates. In those situations where competitive facilities already exist, provision of those facilities is not merely contestable, but already contested. Indeed, to require access in that circumstance – *i.e.*, where facilities have been "significantly deployed on a competitive basis" (*USTA*, 290 F.3d at 422) – would violate the Supreme Court's admonition that the Commission cannot "blind itself to the availability of elements outside the incumbent's network" (*AT&T*, 525 U.S. at 389).

It is critical that the Commission itself establish binding restrictions on incumbents' unbundling obligations based on objective market conditions. Clear, readily applied national rules will provide stability and certainty, which will in turn promote investment and innovation by competitors and incumbents alike. And the Commission unquestionably has both the legal authority and the obligation to establish binding national rules: the Act gives "the Commission" – not the states – the power to "determin[e] what network elements should be made available" on an unbundled basis. 47 U.S.C. § 251(d).

Moreover, the Commission has already created an appropriate framework – and in a series of subsequent orders already has applied that framework itself – for initially identifying certain geographic markets where unbundling of high-capacity facilities *cannot* be required in its *Pricing Flexibility Order*. In that order, the Commission granted incumbents pricing flexibility for special access services, conditioned on a showing that "market conditions in a particular area warrant the relief at issue." *Pricing Flexibility Order*, ¶ 68. The requisite showing focuses on precisely the question that the courts have made clear must be considered before any unbundled access may be required: investment in competitive facilities. Indeed, the Commission granted relief specifically because it determined that certain geographic markets were *contestable* where a significant portion of those geographic areas already were being *contested* – that is, competing providers already had made sunk investments in competing facilities.

Thus, the Commission ruled that incumbents are to be granted "Phase I" regulatory relief – that is, the ability to offer contract tariffs and volume and term discounts – once they can show that "competitors have made irreversible investments in the facilities needed to provide the services at issue." *Id.* at ¶ 69. As the Commission found, such investment "is an important indicator of . . . irreversible entry" because, even if a particular competitor does not succeed, "that equipment remains available and capable of providing service in competition with the incumbent." *Id.* at ¶ 80. And to obtain "Phase II" relief, where the incumbent's own rates are effectively deregulated, the incumbent must make an even more extensive showing – that is, it must show that the market not only is contestable, but that a sufficient portion of the geographic

market at issue is actually being contested such that the market is workably competitive and market forces alone will constrain the incumbent's rates. *Id.* at ¶ 69.

The Commission has established separate competitive triggers to allow pricing flexibility for (1) dedicated transport and (2) service over high-capacity loops, known as "channel terminations." *See id.* at ¶ 70. Accordingly, a determination that "competitors have made irreversible investments in the facilities needed" to provide dedicated transport establishes that competitors are not impaired without unbundled access to an incumbent's high-capacity dedicated transport facilities. If an incumbent has been granted Phase I relief with respect to dedicated transport in a particular MSA, therefore, the Commission should not require provision of unbundled access to dedicated transport. The same logic applies to high-capacity loops: in any MSA where the Commission has granted Phase I relief for channel terminations under the separate standard that applies to those facilities, the Commission should not require provision of unbundled access to high capacity loops.

The Commission should definitively eliminate unbundling obligations wherever the incumbent has qualified for either Phase I or Phase II relief. Phase I triggers were specifically designed to identify markets where there is "facilities-based competition with significant sunk investment" and therefore an alternative to an incumbent's facilities for the provision of service. *See id.* at ¶ 80. By contrast, Phase II relief – which essentially deregulates incumbents' rates – is granted in those markets where competitors have *already* "established a significant market presence," sufficient to constrain ILEC end-user pricing. *Id.* at ¶ 141; *see also id.* at ¶ 77 ("competitors that are sufficiently entrenched to survive attempts by incumbents to exclude them from the market [by lowering prices to end-users] may not yet have a sufficient market presence to constrain prices throughout the MSA"). Because the impairment analysis must focus on "CLECs' *ability* to provide . . . service," (*CompTel*, 309 F.3d at 13 (emphasis added)), the existence of mature competition – while more than *sufficient* to establish non-impairment – is not *necessary* to demonstrate non-impairment.

The fact that an incumbent has been granted Phase I or Phase II pricing flexibility relief in a particular area provides conclusive evidence that the corresponding network elements – *i.e.*, high-capacity transport or loops – need not be made available on an unbundled basis in that area. At the same time, the fact that an ILEC has not yet received such relief in a particular geographic area – and such relief currently covers only 37 percent of Verizon's wire centers (and a smaller percentage of wire centers nationwide) – does not relieve the Commission of the need to conduct an impairment inquiry with respect to these other areas. To the contrary, competing carriers can and have deployed competing facilities outside the areas where incumbents have been granted pricing flexibility as well. And if the segment of the local market served with high-capacity facilities is contestable in the absence of unbundled access, granting such access would be contrary to the "goals of the Act." *AT&T*, 525 U.S. at 388. Accordingly, the Commission should establish additional, objective triggers for the removal of high-capacity facilities from the UNE list outside the areas where pricing flexibility has been granted.

We continue to believe that the extensive evidence demonstrating that competing carriers have widely deployed their own high-capacity facilities where there is demand for high-capacity services shows that they are not impaired anywhere without the ability to purchase these facilities from incumbents at artificially low TELRIC rates. At an absolute minimum, however, just as the Commission determined that "collocation can reasonably serve as a measure of competition in a given market and predictor of competitive constraints upon future LEC behavior" (*WorldCom*, 238 F.3d at 459), the Commission should likewise rule that, outside those areas where pricing flexibility has been granted, high-capacity facilities do not have to be available as UNEs in any wire center where there are two or more fiber-based collocated competitors – regardless of the prevalence of collocation in the remainder of the MSA. Such a rule is fully supported by the Commission's analysis in the *Pricing Flexibility Order* and the D.C. Circuit's subsequent affirmance: collocation is a reliable indicator of sunk investment of a type that proves that the markets served in that particular wire center are contestable. Indeed, as the Commission and the court each recognized, collocation tends to *underestimate* the degree of facilities-based investment, "because it fails to account for the presence of competitors that do not use collocation and have wholly bypassed incumbent LEC facilities." *Pricing Flexibility Order*, ¶ 95.

Finally, as long as competitors have access to ILEC high-capacity facilities on an unbundled basis, they have little incentive to deploy competing facilities. For that reason, the Commission should require that *if* high-capacity facilities are made available, any such unbundling obligation should have a firm sunset date.

4. The Commission Must Consider the Availability of ILEC Tariffed Special Access Services

The availability of tariffed special access services as an alternative means of serving customers is an additional factor that must be taken into account as part of the Commission's impairment analysis. Specifically, the availability of special access service is an additional factor that supports removing the obligation to unbundle high capacity facilities in any areas where the incumbent has qualified for pricing flexibility relief, and is also a factor that must be taken into account in establishing objective standards to determine whether high capacity facilities must be unbundled outside these areas.

Consideration of the availability of tariffed special access services as an alternative is compelled by the language and logic of the Commission's decision in the *Supplemental Order Clarification* and the Court's decisions in *USTA* and *CompTel*. As the Commission has held, it is appropriate to impose an "unbundling obligation" for purposes of offering a service in a particular market *only* if "denial of the requested elements *would in fact impair the competitor's ability to offer services*" in *that market*. *Supplemental Order Clarification*, ¶ 15 (emphasis added); *see CompTel*, 309 F.3d at 10. If markets are contestable without access to unbundled network elements, that is the end of the matter. Or to put it another way, if competing providers are able to enter the market and compete successfully using a combination of tariffed special access services purchased from the incumbent and their own facilities, they self-evidently are not

impaired without access to unbundled elements. Indeed, that is precisely the way that competition developed in the long-distance market: competing carriers relied initially on services purchased from AT&T under volume and term discount arrangements until they completed the build out of their own facilities. Likewise, special access services are available under tariffs that include volume and term discounts, and carriers have the same ability as they do in the long distance market to use these arrangements to supplement their own facilities as they complete the build out of their networks.

Accordingly, competitors' efforts to gain access to high-capacity facilities as UNEs is *exclusively* about price, since the same *function* is served by purchasing high capacity facilities at special access rates. Providing access to facilities at TELRIC rates – rather than the competitive rates available under tariff – simply encourages anti-competitive arbitrage, an uneconomic wealth transfer from incumbents to competitors that discourages productivity and innovation and penalizes investment.

In the case of those local customers served over high-capacity facilities, it is clearly the case that other providers can and do compete successfully using existing special access services purchased from incumbents and others to fill gaps in their networks. Indeed, there is significant marketplace evidence that proves that competitors that obtain high-capacity circuits from incumbents (rather than provisioning them independently or purchasing from a third-party supplier) rely on special access services far more often than on UNEs. In Verizon's region, for example, competing carriers as a whole had obtained almost twice as many DS-1 circuits as special access than as UNEs. In addition, many competing carriers that obtain high capacity circuits from incumbents do so entirely by purchasing special access service rather than UNEs. In Verizon's region, for example, there are several competing carriers that purchase all their DS-1 circuits exclusively as special access, and many others that rely on special access primarily (though not exclusively) to satisfy their demand for DS-1 circuits. Based on a sample of nine of the largest purchasers of special access, three purchase all of their DS-1 circuits as special access, and five additional competing carriers purchase 80 percent or more of all of their DS-1 circuits as special access.

Moreover, there's no real question that competing carriers are competing successfully using tariffed special access services purchased from incumbents and others to provide local services as well as to provide their own special access services for long distance traffic. This makes sense given the nature of special access service and the markets served. Tariffed special access services are provided over dedicated point-to-point facilities deployed specifically to meet the needs of carriers and business customers, not residential users. For example, carriers can and do use *existing* special access services to provide the direct link between customer premises and their local networks (as opposed to a long distance carrier's POP), including their equipment collocated in incumbent's central offices – even in circumstances where the ILEC provides no service of any kind to the end-user customer directly. This allows carriers to integrate the special access circuits into their own local networks, and use them to carry customers' local as well as long distance traffic. Using such services, providers have successfully competed for business customers of all shapes and sizes, from the most concentrated and most lucrative telecommunications consumers to small business customers. For example, the customers that are

being served by competing carriers in this fashion range from donut shops and car dealerships to law firms, doctor's offices, brokerage branch offices, hospitals, and educational institutions.

There can thus be no doubt that there is *already* fierce competition to serve those customers, both in the market for the customer-to-carrier connections themselves and in the vertical telecommunications markets – including long-distance and local voice and data services – in which high-capacity facilities provide an input. Indeed, competing carriers have won roughly 150 million voice grade equivalent lines using a combination of their own facilities and special access circuits purchased from incumbents and others. And they are competing successfully in providing various services that use special access as an input, such as enterprise long distance services, high-speed data services such as ATM and Frame Relay, and local services provided to large business customers. Indeed, a group of large business customers just informed the WorldCom bankruptcy court that, "Sprint, AT&T and WorldCom account for over 90% of enterprise telecommunications usage and are widely viewed as the only interexchange carriers capable of providing the full suite of network services required by major corporations." The evidence of such robust competition in vertical or adjacent markets establishes that access to high-capacity facilities is no barrier to competition. *Cf. Advanced Health-Care v. Radford Comm. Hosp.*, 910 F.2d 139, 150 (1990) ("[T]he central concern in an essential facilities claim is whether market power in one market is being used to create or further a monopoly in another market."); *USTA*, 290 F.3d at 427 n.4. Indeed, as this Commission has held, once such competition exists, it can expand into additional market segments: "large customers may create the inducement for potential competitors to invest in sunk facilities which, once sunk, can be used to serve adjacent smaller customers." *Pricing Flexibility Order*, ¶ 79.

Taking account of the availability of special access services as an alternative to unbundling high-capacity facilities is especially appropriate in light of the unique characteristics of special access. The Commission has already concluded that special access services are competitive, and that – in many markets – competition already constrains special access retail prices, and competitors have used special access in combination with their own facilities to enter local markets. Taking into account the availability of competitive special access service in this context thus does not compel the conclusion, for example, that the possibility of competing by reselling incumbents' retail services would eliminate the need to unbundle local loops for provision of local voice service. But under the specific circumstances here, where tariffed special access services can and are being used to compete successfully, it would be reversible error for the Commission to fail to take that alternative into account in conducting its impairment analysis.

Finally, Verizon's opponents claim that the only reason they buy Verizon's special access services is because they have been unable to obtain the equivalent services as UNEs. As an initial matter, as we have explained at length elsewhere, Verizon *does* provide unbundled high-capacity facilities wherever such facilities exist. The instances in which it does not do so are those where the requested facilities do *not* exist, and, therefore, they could not be provided without investing in and deploying new facilities or equipment or without undertaking significant construction work. That is entirely consistent with the Act, which the Commission has

recognized "does not require [Verizon] to construct network elements ... for the sole purpose of unbundling those elements for ... other carriers." *See, e.g., Virginia Arbitration Non-Cost Order*, CC 00-218, DA 02-1731, ¶ 468 (rel. July 17, 2002). Moreover, even in those instances, the simple fact is that Verizon will build facilities for use by competing carriers to the same extent as it will for its own retail customers, and will make the newly constructed facilities available at competitive special access rates (which, in contrast to sub-competitive TELRIC rates, provide at least an opportunity to recover the costs of constructing the facilities).

More fundamentally, however, the opponents' claim misses the point entirely. Regardless of the *reason* they use special access services purchased from Verizon to compete, the fact of the matter is that they have demonstrated they are able to enter and compete successfully by using those services. While they no doubt would prefer to pay the artificially low TELRIC rates, that proves nothing. If competing carriers are able to enter and compete using a combination of special access and their own facilities (as these carriers have), then they self-evidently are not impaired without access to the same facilities at UNE rates. And providing access to these facilities at artificially low rates under these circumstances would merely undermine the continued growth of facilities-based competition and flout the directives of the D.C. Circuit.

Sincerely,

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December 17, 2002

The Honorable Kevin Martin
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Commissioner Martin:

This is a follow up to my letter to Chairman Powell of October 16, 2002 in which I proposed a framework for addressing the issues before the Commission in the pending review of its unbundled network element rules.

My purpose here is to provide you with a copy of the attached letter, which elaborates on certain of the points made in my October 16 correspondence discussing application of the Act's unbundling standard to the competitive special access market and to high-capacity facilities generally. Specifically, the attached letter elaborates on three crucial points:

First, as the Commission itself has recognized, special access today is a mature competitive market, and that fact is due in part to previous Commission policies that promoted the growth of facilities-based competition in this market segment. To avoid jeopardizing this competitive success story, it is critical that the Commission reconfirm existing restrictions on the use of unbundled network elements to provide traditional special access service.

Second, with respect to high capacity DS-1 facilities that are used for local traffic, the Commission itself has previously determined that, in areas where the Commission has granted pricing flexibility to incumbent carriers, competing carriers already have made "irreversible investments" in competing facilities. Under the standards in the Act and the D.C. Circuit's orders, therefore, unbundling of high-capacity facilities cannot be required in these areas. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

Third, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. Simply put, when competing carriers are already successfully competing and serving customers using special access, allowing access to the same facilities at UNE prices is an uneconomic arbitrage process that serves no competitive purpose under the Act, and in fact injures facilities-based competition. Consequently, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

Binding federal determinations that are consistent with these key principles are critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segments served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business.

Sincerely,

William P. Barr

Attachment

cc: Chairman Powell
Commissioner Abernathy
Commissioner Adelstein
Commissioner Copps

1300 I Street, NW
Suite 400 West
Washington, DC 20005

December 17, 2002

William F. Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Mr. Maher:

The purpose of this letter is to address in greater detail the application of the Act's unbundling standards to high-capacity facilities – loops and dedicated transport. In particular, this letter elaborates on three central points addressed in William Barr's letter to Chairman Powell of October 16, 2002. Because competition for the highest capacity services (DS-3 and above) is pervasive, and there is virtually no reliance on unbundled elements for those services today, this discussion focuses on unbundling requirements associated with dedicated DS-1 services.

- *First*, at a bare minimum, the Commission should reconfirm restrictions on use of high-capacity facilities to provide traditional special access service for long distance traffic, because the evidence is overwhelming that competitors have captured a significant percentage of this market segment without access to UNEs.

- *Second*, with respect to use of high capacity facilities for local traffic, the Commission itself already determined in its *Pricing Flexibility Order* that, in areas that qualify for either Phase I or Phase II pricing flexibility, "competitors have made irreversible investments in facilities" (14 FCC Rcd 14221, ¶ 77 (1999)); consequently, under the standards articulated by the D.C. Circuit, no unbundled access to high-capacity facilities can be ordered in these areas. A binding federal determination to this effect is critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segment served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

- *Third*, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. In particular, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for Phase I or Phase II pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

1. Competitors Are Not "Impaired" If Particular Markets Are Contestable in the Absence of Unbundled Network Access

As an initial matter, four of the key legal principles established by the D.C. Circuit's decisions in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*") and *Competitive Telecommunications Association v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*") are particularly pertinent to the Commission's analysis of these issues.

First, determination of circumstances where mandatory unbundling may be appropriate under section 251(d)(2)'s impairment standard must be "linked (in some degree) to natural monopoly" characteristics of an element. Unbundling may be appropriate only if "genuinely competitive provision *of an element's function* [would be] wasteful" because "the cost characteristics of an 'element' render it . . . unsuitable for competitive supply." *USTA*, 290 F.3d at 427. Under this standard, the Commission may require unbundling of a particular element only in circumstances where unbundled access to the element is needed to permit requesting carriers to compete in the particular market where the carrier seeks to offer service. If the market in question is subject to competitive entry – *i.e.*, if the market is contestable – in the absence of unbundled access to a particular element, competitors are not "impaired" within the meaning of the statute. That standard is unquestionably satisfied in cases where (1) a particular element has been "significantly deployed on a competitive basis" (*id.* at 422); or (2) if a functional alternative to the element is otherwise available either from the incumbent or "'outside the incumbent's network.'" (*id.* at 429 (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999) ("*AT&T*"))). Where markets are contestable without access to unbundled elements, the costs of unbundling outweigh any possible benefit. As the court noted, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *Id.* at 427.

Second, the Commission must "consider the markets in which a competitor 'seeks to offer' services and, *at an appropriate level of generality*, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services." *CompTel*, 309 F.3d at 10 (quoting *Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 15 (2000)) (emphasis added). One aspect of that inquiry must be defining an appropriate *geographic* market in which to assess impairment. As the Commission held in its *Pricing Flexibility Order*, the task is "to define . . .

geographic areas narrowly enough so that the competitive conditions within each area are reasonably similar, yet broadly enough to be administratively workable." *Pricing Flexibility Order*, ¶ 71. There, the Commission held that "MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition." *Id.* at ¶ 72. In contrast, the Commission rejected a wire center by wire center analysis, both because it was unnecessary to reflect the scope of competitive entry and because it would be administratively unworkable. The D.C. Circuit affirmed this Commission's determination of the appropriate geographic market for use in assessing competitive entry, and expressly rejected the argument that it is necessary to carry out such an analysis wire center by wire center. *WorldCom, Inc. v. FCC*, 238 F.3d 449, 446-61 (D.C. Cir. 2001) ("*WorldCom*").

Third, the Commission must consider evidence of impairment on a service-specific basis. As the D.C. Circuit noted in upholding the Commission's existing limitations on the use of unbundled elements to provide special access services, "it is far from obvious to us that the FCC *has the power* without an impairment finding as to nonlocal services, to require that ILECs provide EELs for such services on an unbundled basis." *Comptel*, 309 F.3d at 13 (emphasis added); *see also USTA*, 290 F.3d at 426 (suggesting that the statute requires "a more nuanced concept of impairment" that considers "specific markets or market categories"). To use an example that is elaborated on below, in analyzing the need to unbundle high-capacity facilities, the Commission should continue to evaluate the special access market for long distance traffic – which has special characteristics for both functional and historical reasons – as a separate market segment.

Fourth, because a finding of impairment is a prerequisite to imposing an unbundling requirement, and that finding obviously must be based on substantial record evidence, the burden is on the proponents of unbundling to demonstrate that the impairment standard has been satisfied for a particular element in a relevant segment of the market. This point is especially important in cases such as this where there is no question that the facilities at issue already have been significantly deployed on a competitive basis. Under these circumstances, absent concrete evidence to the contrary, the presumption has to be that the facilities are capable of being competitively supplied both where they have been deployed and where they as yet have not. Indeed, as the D.C. Circuit recognized, deployment of competitive facilities in certain markets indicates that all markets with comparable characteristics are likewise contestable, even if facilities have not actually been deployed. *See USTA*, 290 F.3d at 422. Or as Chairman Powell put it at the time of the *UNE Remand Order*: "evidence of CLEC [facilities] deployment strongly suggests that CLECs are not significantly impaired without access . . . both in areas in which CLECs have deployed [facilities] *and areas in which they have not done so*." 15 FCC Rcd 3696, 3927 (1999) (emphasis added).

2. The Commission Should Retain Its Restriction on Special Access Bypass

At a bare minimum, the Commission should confirm that high-capacity facilities need not be made available – either alone or in combinations – for the provision of traditional special access service, *i.e.*, in those situations where the requesting carrier seeks to use the requested

facilities to establish a connection between the customer's premises and a carrier's point of presence without providing "a significant amount of local exchange service." *See Supplemental Order Clarification*, ¶ 8.

As noted above, the D.C. Circuit has already held that the Commission was permitted – indeed, required – by the terms of the Act to undertake a service-specific analysis that distinguishes between the local and long-distance-access segments of the market. *CompTel*, 309 F.3d at 13. And when it comes to special access service for long distance traffic, the Commission has correctly recognized that the extensive existing competition proves that telecommunications carriers are not impaired in their ability to provide special access service without access to unbundled elements. To the contrary, the FCC has properly found that the market for special access has become highly competitive in the absence of UNE access. "Competitive access, which originated in the mid-1980s, is a mature source of [facilities-based] competition in telecommunications markets." *Supplemental Order Clarification*, ¶ 18. This is true regardless of whether the special access traffic at issue is voice or data, as would be expected because the facilities used for both types of traffic are the same.

The FCC's prior decision to restrict the use of UNEs to provide special access service was sound. In the *Supplemental Order Clarification*, the Commission properly noted that "the exchange access market occupies a different legal category from the market for telephone exchange services." *Supplemental Order Clarification*, ¶ 14. It was therefore impossible for the Commission to grant competitors access to network elements "solely or primarily for use in the exchange access market" without first finding that competitors are impaired in their ability to provide special access services without access to UNEs. *Id.* at ¶ 15. Based on the record before it, the Commission found no evidence that competitors in the special access market are impaired without access to unbundled loops and transport: "we generally do not impose such obligations first and conduct our 'impair' inquiry afterwards." *Id.* at ¶ 16. Moreover, to grant access could cause "substantial market dislocations" by "undercut[ting] the market position of many facilities-based competitive access providers." *Id.* at ¶¶ 7, 18.

The current record strongly supports those conclusions. No party has introduced evidence, let alone carried their burden of demonstrating, that competitors are impaired in the provision of special access service. To the contrary, the evidence is that competition has continued to thrive in the rapidly expanding special access market *without* access to UNEs. Competitors account for a third or more of *total* special access revenues *nationwide*, and their share of the market has been growing rapidly. *See* UNE Fact Report 2002 at III-1, IV-6, IV-7. Competitors now have extensive local networks in place in most of the markets where special access demand is concentrated. A number of wholesale fiber suppliers also serve most major markets. And even in the areas where competitive facilities are not yet available, competing providers have been able to compete successfully by reselling special access service purchased from incumbents. Competitors now provide more than 150 million voice-grade equivalent special access and private lines using either their own facilities, the facilities of other competitive suppliers, or by reselling ILEC special access service. Such widespread and pervasive competition establishes beyond serious dispute that the traditional special access market is

contestable – that is, that competing providers can and do compete effectively in the special access market without UNEs. Consequently, the record here compels the conclusion that competing providers are not impaired in their "ability to provide long distance or exchange access service" without access to unbundled elements, including high capacity loops and transport. *Cf. CompTel*, 309 F.3d at 13.

Moreover, the Commission's concerns about market dislocations and undermining the market position of facilities-based competitors likewise require that the Commission affirm its determination that competitors are not entitled to unbundled network elements to provide special access service. As the D.C. Circuit noted in its decision upholding the Commission's existing restrictions on the use of UNEs to provide special access, Congress "preferred 'facilities-based competition' over 'parasitic free-riding.'" *CompTel*, 309 F.3d at 20. It would be contrary to the goals of the Act and this Commission's policies to displace existing facilities-based competition with "completely synthetic competition" using elements of the incumbents' networks provided at TELRIC rates. *See USTA*, 290 F.3d at 424. At a minimum, therefore, it is critical to maintain restrictions on the use of unbundled elements to provide special access in order to avoid disrupting this well functioning, competitive market.

Moreover, the current restrictions were proposed by a cross-industry group that included major CLECs, and were expressly upheld by the D.C. Circuit in *CompTel*, 309 F.3d at 22. While some CLECs unquestionably have tried to game the current tests for determining whether the substantial local traffic requirement is satisfied, overall the tests have proven to be workable. In fact, while some parties here rehash their previous claims that the tests are not administratively feasible, the D.C. Circuit squarely rejected those claims, holding that "it is plain that supplying the information is feasible, as the FCC has produced evidence that some carriers are taking advantage of the safe harbors." *Id*. If anything, the current tests are too lax and allow circuits to be converted to sub-competitive TELRIC pricing even when they are used predominantly for non-local traffic. Given all of this, there is no basis for relaxing these existing restrictions further, and doing so would serve only to undermine the mature facilities-based competition that already exists.

This is equally true of the existing companion rule prohibiting "commingling" of unbundled elements with special access services. As the Commission explained to the D.C. Circuit, this prohibition is "the only way to prevent carriers from using these units 'solely or primarily to bypass special access services,'" because "allowing commingling would allow carriers to avoid the requirement that each customer be provided a significant amount of local exchange service." *Id*. at 22-23. The court agreed, and recognized that the prohibition is necessary to prevent the "gaming" that otherwise would occur. For example, as the court itself pointed out, the absence of a commingling restriction would "allow the entire base of the loop or 'channel termination' portion of special access circuits to be converted into unbundled loops." *Id*. at 24. And that, of course, would undermine the existing facilities-based competition that the Commission sought to preserve and promote.

3. Where ILECs Have Qualified for Pricing Flexibility, They Should Not Be Required To Provide Unbundled Access to High Capacity Facilities

Even if CLECs plan to use high-capacity facilities to provide a substantial amount of local exchange service – as opposed to solely or primarily special access service – they should not have access to unbundled high capacity loops and transport where the market for local services provided using these facilities is contestable without access to high capacity facilities at UNE rates. In those situations where competitive facilities already exist, provision of those facilities is not merely contestable, but already contested. Indeed, to require access in that circumstance – *i.e.*, where facilities have been "significantly deployed on a competitive basis" (*USTA*, 290 F.3d at 422) – would violate the Supreme Court's admonition that the Commission cannot "blind itself to the availability of elements outside the incumbent's network" (*AT&T*, 525 U.S. at 389).

It is critical that the Commission itself establish binding restrictions on incumbents' unbundling obligations based on objective market conditions. Clear, readily applied national rules will provide stability and certainty, which will in turn promote investment and innovation by competitors and incumbents alike. And the Commission unquestionably has both the legal authority and the obligation to establish binding national rules: the Act gives "the Commission" – not the states – the power to "determin[e] what network elements should be made available" on an unbundled basis. 47 U.S.C. § 251(d).

Moreover, the Commission has already created an appropriate framework – and in a series of subsequent orders already has applied that framework itself – for initially identifying certain geographic markets where unbundling of high-capacity facilities *cannot* be required in its *Pricing Flexibility Order*. In that order, the Commission granted incumbents pricing flexibility for special access services, conditioned on a showing that "market conditions in a particular area warrant the relief at issue." *Pricing Flexibility Order*, ¶ 68. The requisite showing focuses on precisely the question that the courts have made clear must be considered before any unbundled access may be required: investment in competitive facilities. Indeed, the Commission granted relief specifically because it determined that certain geographic markets were *contestable* where a significant portion of those geographic areas already were being *contested* – that is, competing providers already had made sunk investments in competing facilities.

Thus, the Commission ruled that incumbents are to be granted "Phase I" regulatory relief – that is, the ability to offer contract tariffs and volume and term discounts – once they can show that "competitors have made irreversible investments in the facilities needed to provide the services at issue." *Id.* at ¶ 69. As the Commission found, such investment "is an important indicator of . . . irreversible entry" because, even if a particular competitor does not succeed, "that equipment remains available and capable of providing service in competition with the incumbent." *Id.* at ¶ 80. And to obtain "Phase II" relief, where the incumbent's own rates are effectively deregulated, the incumbent must make an even more extensive showing – that is, it must show that the market not only is contestable, but that a sufficient portion of the geographic

market at issue is actually being contested such that the market is workably competitive and market forces alone will constrain the incumbent's rates. *Id.* at ¶ 69.

The Commission has established separate competitive triggers to allow pricing flexibility for (1) dedicated transport and (2) service over high-capacity loops, known as "channel terminations." *See id.* at ¶ 70. Accordingly, a determination that "competitors have made irreversible investments in the facilities needed" to provide dedicated transport establishes that competitors are not impaired without unbundled access to an incumbent's high-capacity dedicated transport facilities. If an incumbent has been granted Phase I relief with respect to dedicated transport in a particular MSA, therefore, the Commission should not require provision of unbundled access to dedicated transport. The same logic applies to high-capacity loops: in any MSA where the Commission has granted Phase I relief for channel terminations under the separate standard that applies to those facilities, the Commission should not require provision of unbundled access to high capacity loops.

The Commission should definitively eliminate unbundling obligations wherever the incumbent has qualified for either Phase I or Phase II relief. Phase I triggers were specifically designed to identify markets where there is "facilities-based competition with significant sunk investment" and therefore an alternative to an incumbent's facilities for the provision of service. *See id.* at ¶ 80. By contrast, Phase II relief – which essentially deregulates incumbents' rates – is granted in those markets where competitors have *already* "established a significant market presence," sufficient to constrain ILEC end-user pricing. *Id.* at ¶ 141; *see also id.* at ¶ 77 ("competitors that are sufficiently entrenched to survive attempts by incumbents to exclude them from the market [by lowering prices to end-users] may not yet have a sufficient market presence to constrain prices throughout the MSA"). Because the impairment analysis must focus on "CLECs' *ability* to provide . . . service," (*CompTel*, 309 F.3d at 13 (emphasis added)), the existence of mature competition – while more than *sufficient* to establish non-impairment – is not *necessary* to demonstrate non-impairment.

The fact that an incumbent has been granted Phase I or Phase II pricing flexibility relief in a particular area provides conclusive evidence that the corresponding network elements – *i.e.*, high-capacity transport or loops – need not be made available on an unbundled basis in that area. At the same time, the fact that an ILEC has not yet received such relief in a particular geographic area – and such relief currently covers only 37 percent of Verizon's wire centers (and a smaller percentage of wire centers nationwide) – does not relieve the Commission of the need to conduct an impairment inquiry with respect to these other areas. To the contrary, competing carriers can and have deployed competing facilities outside the areas where incumbents have been granted pricing flexibility as well. And if the segment of the local market served with high-capacity facilities is contestable in the absence of unbundled access, granting such access would be contrary to the "goals of the Act." *AT&T*, 525 U.S. at 388. Accordingly, the Commission should establish additional, objective triggers for the removal of high-capacity facilities from the UNE list outside the areas where pricing flexibility has been granted.

We continue to believe that the extensive evidence demonstrating that competing carriers have widely deployed their own high-capacity facilities where there is demand for high-capacity services shows that they are not impaired anywhere without the ability to purchase these facilities from incumbents at artificially low TELRIC rates. At an absolute minimum, however, just as the Commission determined that "collocation can reasonably serve as a measure of competition in a given market and predictor of competitive constraints upon future LEC behavior" (*WorldCom*, 238 F.3d at 459), the Commission should likewise rule that, outside those areas where pricing flexibility has been granted, high-capacity facilities do not have to be available as UNEs in any wire center where there are two or more fiber-based collocated competitors – regardless of the prevalence of collocation in the remainder of the MSA. Such a rule is fully supported by the Commission's analysis in the *Pricing Flexibility Order* and the D.C. Circuit's subsequent affirmance: collocation is a reliable indicator of sunk investment of a type that proves that the markets served in that particular wire center are contestable. Indeed, as the Commission and the court each recognized, collocation tends to *underestimate* the degree of facilities-based investment, "because it fails to account for the presence of competitors that do not use collocation and have wholly bypassed incumbent LEC facilities." *Pricing Flexibility Order*, ¶ 95.

Finally, as long as competitors have access to ILEC high-capacity facilities on an unbundled basis, they have little incentive to deploy competing facilities. For that reason, the Commission should require that *if* high-capacity facilities are made available, any such unbundling obligation should have a firm sunset date.

4. The Commission Must Consider the Availability of ILEC Tariffed Special Access Services

The availability of tariffed special access services as an alternative means of serving customers is an additional factor that must be taken into account as part of the Commission's impairment analysis. Specifically, the availability of special access service is an additional factor that supports removing the obligation to unbundle high capacity facilities in any areas where the incumbent has qualified for pricing flexibility relief, and is also a factor that must be taken into account in establishing objective standards to determine whether high capacity facilities must be unbundled outside these areas.

Consideration of the availability of tariffed special access services as an alternative is compelled by the language and logic of the Commission's decision in the *Supplemental Order Clarification* and the Court's decisions in *USTA* and *CompTel*. As the Commission has held, it is appropriate to impose an "unbundling obligation" for purposes of offering a service in a particular market *only* if "denial of the requested elements *would in fact impair the competitor's ability to offer services*" in *that market*. *Supplemental Order Clarification*, ¶ 15 (emphasis added); *see CompTel*, 309 F.3d at 10. If markets are contestable without access to unbundled network elements, that is the end of the matter. Or to put it another way, if competing providers are able to enter the market and compete successfully using a combination of tariffed special access services purchased from the incumbent and their own facilities, they self-evidently are not

impaired without access to unbundled elements. Indeed, that is precisely the way that competition developed in the long-distance market: competing carriers relied initially on services purchased from AT&T under volume and term discount arrangements until they completed the build out of their own facilities. Likewise, special access services are available under tariffs that include volume and term discounts, and carriers have the same ability as they do in the long distance market to use these arrangements to supplement their own facilities as they complete the build out of their networks.

Accordingly, competitors' efforts to gain access to high-capacity facilities as UNEs is *exclusively* about price, since the same *function* is served by purchasing high capacity facilities at special access rates. Providing access to facilities at TELRIC rates – rather than the competitive rates available under tariff – simply encourages anti-competitive arbitrage, an uneconomic wealth transfer from incumbents to competitors that discourages productivity and innovation and penalizes investment.

In the case of those local customers served over high-capacity facilities, it is clearly the case that other providers can and do compete successfully using existing special access services purchased from incumbents and others to fill gaps in their networks. Indeed, there is significant marketplace evidence that proves that competitors that obtain high-capacity circuits from incumbents (rather than provisioning them independently or purchasing from a third-party supplier) rely on special access services far more often than on UNEs. In Verizon's region, for example, competing carriers as a whole had obtained almost twice as many DS-1 circuits as special access than as UNEs. In addition, many competing carriers that obtain high capacity circuits from incumbents do so entirely by purchasing special access service rather than UNEs. In Verizon's region, for example, there are several competing carriers that purchase all their DS-1 circuits exclusively as special access, and many others that rely on special access primarily (though not exclusively) to satisfy their demand for DS-1 circuits. Based on a sample of nine of the largest purchasers of special access, three purchase all of their DS-1 circuits as special access, and five additional competing carriers purchase 80 percent or more of all of their DS-1 circuits as special access.

Moreover, there's no real question that competing carriers are competing successfully using tariffed special access services purchased from incumbents and others to provide local services as well as to provide their own special access services for long distance traffic. This makes sense given the nature of special access service and the markets served. Tariffed special access services are provided over dedicated point-to-point facilities deployed specifically to meet the needs of carriers and business customers, not residential users. For example, carriers can and do use *existing* special access services to provide the direct link between customer premises and their local networks (as opposed to a long distance carrier's POP), including their equipment collocated in incumbent's central offices – even in circumstances where the ILEC provides no service of any kind to the end-user customer directly. This allows carriers to integrate the special access circuits into their own local networks, and use them to carry customers' local as well as long distance traffic. Using such services, providers have successfully competed for business customers of all shapes and sizes, from the most concentrated and most lucrative telecommunications consumers to small business customers. For example, the customers that are

being served by competing carriers in this fashion range from donut shops and car dealerships to law firms, doctor's offices, brokerage branch offices, hospitals, and educational institutions.

There can thus be no doubt that there is *already* fierce competition to serve those customers, both in the market for the customer-to-carrier connections themselves and in the vertical telecommunications markets – including long-distance and local voice and data services – in which high-capacity facilities provide an input. Indeed, competing carriers have won roughly 150 million voice grade equivalent lines using a combination of their own facilities and special access circuits purchased from incumbents and others. And they are competing successfully in providing various services that use special access as an input, such as enterprise long distance services, high-speed data services such as ATM and Frame Relay, and local services provided to large business customers. Indeed, a group of large business customers just informed the WorldCom bankruptcy court that, "Sprint, AT&T and WorldCom account for over 90% of enterprise telecommunications usage and are widely viewed as the only interexchange carriers capable of providing the full suite of network services required by major corporations." The evidence of such robust competition in vertical or adjacent markets establishes that access to high-capacity facilities is no barrier to competition. *Cf. Advanced Health-Care v. Radford Comm. Hosp.*, 910 F.2d 139, 150 (1990) ("[T]he central concern in an essential facilities claim is whether market power in one market is being used to create or further a monopoly in another market."); *USTA*, 290 F.3d at 427 n.4. Indeed, as this Commission has held, once such competition exists, it can expand into additional market segments: "large customers may create the inducement for potential competitors to invest in sunk facilities which, once sunk, can be used to serve adjacent smaller customers." *Pricing Flexibility Order*, ¶ 79.

Taking account of the availability of special access services as an alternative to unbundling high-capacity facilities is especially appropriate in light of the unique characteristics of special access. The Commission has already concluded that special access services are competitive, and that – in many markets – competition already constrains special access retail prices, and competitors have used special access in combination with their own facilities to enter local markets. Taking into account the availability of competitive special access service in this context thus does not compel the conclusion, for example, that the possibility of competing by reselling incumbents' retail services would eliminate the need to unbundle local loops for provision of local voice service. But under the specific circumstances here, where tariffed special access services can and are being used to compete successfully, it would be reversible error for the Commission to fail to take that alternative into account in conducting its impairment analysis.

Finally, Verizon's opponents claim that the only reason they buy Verizon's special access services is because they have been unable to obtain the equivalent services as UNEs. As an initial matter, as we have explained at length elsewhere, Verizon *does* provide unbundled high-capacity facilities wherever such facilities exist. The instances in which it does not do so are those where the requested facilities do *not* exist, and, therefore, they could not be provided without investing in and deploying new facilities or equipment or without undertaking significant construction work. That is entirely consistent with the Act, which the Commission has

recognized "does not require [Verizon] to construct network elements ... for the sole purpose of unbundling those elements for ... other carriers." *See, e.g., Virginia Arbitration Non-Cost Order*, CC 00-218, DA 02-1731, ¶ 468 (rel. July 17, 2002). Moreover, even in those instances, the simple fact is that Verizon will build facilities for use by competing carriers to the same extent as it will for its own retail customers, and will make the newly constructed facilities available at competitive special access rates (which, in contrast to sub-competitive TELRIC rates, provide at least an opportunity to recover the costs of constructing the facilities).

More fundamentally, however, the opponents' claim misses the point entirely. Regardless of the *reason* they use special access services purchased from Verizon to compete, the fact of the matter is that they have demonstrated they are able to enter and compete successfully by using those services. While they no doubt would prefer to pay the artificially low TELRIC rates, that proves nothing. If competing carriers are able to enter and compete using a combination of special access and their own facilities (as these carriers have), then they self-evidently are not impaired without access to the same facilities at UNE rates. And providing access to these facilities at artificially low rates under these circumstances would merely undermine the continued growth of facilities-based competition and flout the directives of the D.C. Circuit.

Sincerely,

Michael E. Glover

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November 22, 2002

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th H Street, SW, Portals
Washington, DC 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; *and Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147

Dear Ms. Dortch:

The attached letter from William Barr of Verizon was provided to Chairman Powell today. Please place it on the record in the above proceeding. Please let me know if you have any questions.

Sincerely,

Attachment

cc: Commissioner Abernathy
Commissioner Martin
Commissioner Copps
B. Tramont
C. Libertelli
M. Brill
D. Gonzalez
J. Goldstein
W. Maher
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November 22, 2002

Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Powell:

There is no issue more important to the future of the telecommunications industry, or to the industry's capacity as an engine of economic growth, than the regulatory treatment of broadband. This letter proposes a framework for addressing each of the key broadband issues pending before the Commission.

Over the next decade, local companies will have to make substantial additional investments in broadband infrastructure – investments to deploy current broadband services more widely and to develop successive generations of innovative broadband offerings. Much of this investment will be focused on pushing fiber deeper into the network, first through broadband enabled remote terminals, and ultimately through the deployment of fiber directly to end-users. These investments will be extremely risky, given the dominant broadband position of cable companies and further competition from satellite and wireless operators.

The broadband network will be in a constant state of evolution and flux as local companies undertake these upgrades. Each successive generation of the broadband network will, however, allow unaffiliated providers of applications, content and other information services to reach broadband customers over the network. Over time, local companies will also be developing their own content, aimed primarily at competing with cable companies in highly concentrated markets for the delivery of video services.

It is critical that the Commission's rules governing broadband take into account the risk, magnitude, and complexity of the investments that local companies must make, as well as the intensely competitive nature of the broadband market. The Commission's rules must establish a framework that maintains the incentive of local companies to invest by ensuring that broadband returns are not limited, by means of artificial and unnecessary regulation, to the mere recovery of costs.

The current regulatory regime is fundamentally antithetical to the investment that local companies must make. Local companies today are subject to a host of retail and wholesale regulatory requirements that in combination require them *both* to provide stand-alone broadband transmission services at cost-based rates, *and* to provide competing carriers with unbundled access to the broadband network at artificially low TELRIC prices. This combination of requirements, at best, permits telephone companies can earn back their costs (or less under TELRIC) and requires them to bear the full downside risk of investments that fail, while leaving others to capture any upside of investments that succeed.

Neither category of requirements, retail or wholesale, should apply to broadband.

On the retail side, local companies must be allowed to provide broadband transport to ISPs and other content providers on commercially negotiated terms – *not* cost-based rates, terms, and conditions prescribed by regulators. Local companies have every incentive to provide broadband transport to unaffiliated providers of information services on reasonable terms, because only by doing so can they maximize the value of their investments. Retail rate regulation is therefore both unnecessary and counterproductive, curbing the delivery of new content and services to end-users by slowing the deployment of essential underlying infrastructure.

The touchstone of local companies' dealings with information service providers should be commercial reasonableness. Where a local company offers access on terms comparable to those previously approved by federal authorities in connection with a cable-company consent decree, for example, the commercial reasonableness of such an offer could not be disputed. Likewise, any terms that are voluntarily agreed to by ISPs or other content providers would, by definition, be commercially reasonable. The key is that the Commission allow the market, rather than regulatory fiat, to determine the terms under which other providers obtain access to our network.

On the wholesale side, local companies must likewise be freed from any obligation to unbundle network elements used to provide broadband services. Between the premises of end-users and the point where information service providers interconnect, local companies must be allowed to reap the rewards of their investments. Allowing other carriers to lease these newly deployed broadband facilities, and thereby act as virtual resellers of broadband transport, destroys the ability of local companies to engage in market-based commercial negotiations with providers of information services.

Worse yet, broadband unbundling obligations hinder and delay investments in critical infrastructure by creating a class of firms whose vested interests militate against evolution of the network. Unlike traditional circuit switched voice, broadband networks are in rapid flux and an unbundling regime is antithetical to their rational and efficient evolution. By its very nature, an unbundling regime allows third parties to "roost" in the incumbent's network based on the technology and configuration that exists at a given time. Those firms become dependent on maintaining that configuration and fiercely resist any new design that will displace them. The result is further protracted proceedings, and incumbents are required either to forgo the next generation upgrade or shoulder the costs of shifting the firms that have taken roost to the new

configuration. Were other carriers allowed, for example, to collocate switching equipment in remote terminals, those facilities would be stranded when local companies deployed all-fiber loops. Facing this loss, these firms would inevitably demand a right to purchase a finished broadband service from incumbents at cost-based rates or insist that local companies maintain their obsolete copper networks. Either way, investment would be deterred and demands for regulation would persist indefinitely.

It is therefore essential that the Commission's unbundling rules eliminate any requirement to unbundle network elements for use to provide broadband services. In particular, the Commission should not reinstate a line sharing obligation, mandate the unbundling of packet switching equipment or fiber loop facilities, or require remote terminal collocation.

Moreover, as the local network evolves and is optimized for broadband, it will be more and more the case that new facilities will consist entirely of fiber-based or other advanced technologies and architectures. These next generation networks, the initial versions of which are only now being deployed for the first time by local telephone companies and competitors alike, will be entirely broadband in nature, and cannot be unbundled into previously defined elements absent significant redesign and cost, if at all. Indeed, with these next generation networks, services that traditionally were thought of as narrowband will be nothing more than one of many applications delivered over a broadband service. Because of the unique technological and market considerations that these networks present, it is critical that they be free of unnecessary unbundling obligations that increase their cost and risk and deter their deployment.

The simplest way to achieve these goals is to regulate broadband services offered by all providers under Title I of the Communications Act, *including both bundled information services and stand-alone broadband transmission services*. As we've addressed at some length in our previous letters and pleadings on the issue, classifying both types of services under Title I – as the Commission recently has done in the case of cable broadband services – is well within the Commission's authority. And, most importantly, it would allow the Commission to establish a single unified set of *federal* rules for broadband by writing on a clean slate free from the regulatory underbrush that has grown up around different regimes.

Regardless of whether the Commission proceeds under Title I or by exercising forbearance or other authority under Title II, the resulting framework of regulation can and should be the same. The key regulatory principles are as follows:

1. *Telephone companies must be able to provide integrated offerings that combine content and transmission on a deregulated basis under Title I.* Since the Commission first deregulated enhanced services in the 1980's, telephone companies (or their affiliates) have been permitted to provide bundled information service offerings –integrated offerings that include both information content and transmission components – to consumers on a deregulated basis under Title I. Verizon, for example, offers integrated Internet access services, including high-speed Internet access provided over broadband DSL connections, through its Verizon On-Line unit today. These integrated retail offerings have long been provided free of regulation, and there is no conceivable basis for imposing any new rules on these offerings.

There are, however, a series of regulatory requirements that do burden local companies when they provide these integrated offerings that do not apply to cable or other broadband competitors. In particular, the requirements adopted in the *Computer II* and *Computer III* proceedings – rules expressly designed for narrowband services – have been reflexively extended to broadband. These rules require telephone companies to *both* strip out the broadband transmission component of any information service and provide it separately under tariff at cost-based rates, *and* unbundle the underlying transmission service itself into its component parts and offer the various piece-parts under tariff at cost-based rates as well. These requirements should not apply to broadband for at least three related reasons.

First and foremost, the requirements are inherently destructive of incentives to invest in broadband and in the new integrated content-based offerings necessary for local companies to compete against cable. This is so because these requirements limit the revenues that telephone companies can earn to the cost-based rate for transmission, *and* deny these companies the ability to differentiate their integrated content services by incorporating innovative and unique network-based features into their bundled offerings.

Second, the rationale behind these requirements is wholly absent for broadband. The premise of the *Computer II/III* regime – that the local telephone network is the primary, if not exclusive, means through which information service providers can gain access to their customers – is demonstrably false in broadband. In the large business segment of the market, which includes services such as frame relay and ATM, the three largest long distance carriers are dominant and collectively control more than two-thirds of the retail market. In the mass market, it is the cable companies that are dominant, likewise serving roughly two-thirds of all customers. While some parties have argued that small businesses should be treated as a separate market segment, that view is misplaced. Both cable companies and satellite providers have rolled out services tailored to small businesses and are aggressively targeting that segment along with the rest of the mass market. But regardless, even if small businesses are viewed as a separate market segment, local telephone companies today are not even players when it comes to providing broadband services to these customers and therefore cannot be considered dominant.

Third, the Commission has ample authority to eliminate the *Computer II/III* requirements for broadband. These requirements are a creature of the Commission's own invention, and, in the recent *Declaratory Ruling* order, the Commission already declined to apply these requirements to cable's broadband services. In doing so, the Commission expressly recognized that there is nothing about the Act that requires it to "find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II of the Act." The Commission, of course, has not extended these requirements to satellite or wireless providers either.

Having made a decision not to apply these requirements to the dominant broadband providers, the Commission cannot lawfully apply them to a minority player in the same market. As explained at greater length in our brief before the Ninth Circuit, the Act itself requires that broadband be defined and regulated "without regard to any transmission media or technology." Moreover, the courts have established that, under basic principles of administrative law, the

Commission cannot unjustifiably treat similarly situated parties differently, and must, in defining the regulatory regime that applies to broadband, take the competitive context into account.

Imposing discriminatory regulatory burdens on cable and telephone company-provided broadband would also run afoul of the First Amendment. The Internet access and other content services that we provide over broadband are a form of speech, and broadband is the microphone through which we deliver that speech. Accordingly, one-sided regulatory burdens that inhibit our ability to speak to our chosen audience, or that impose costs on us that do not apply to other speakers, run afoul of the First Amendment in the same way as does a discriminatory tax that applies only to some media (such as newsprint) but not to others. In short, applying the same rules to our broadband services as govern cable is not only the right policy, it is mandated by law.

2. ***Stand-alone broadband transmission services should be classified as private carriage arrangements that are deregulated under Title I.*** In addition to providing bundled offerings that include both information content and transmission, Verizon and other local companies also offer a number of broadband transmission services on a stand-alone basis. For example, virtually all telephone companies offer some forms of packet-switched services, such as ATM and frame relay to large business customers, on a stand-alone basis, and some companies have chosen to offer services such as DSL on that basis as well. There is no reason why local companies should be required to provide these broadband services subject to the full panoply of common carrier regulations – including cost-based pricing and the *Computer II/III* unbundling requirements – simply because they are offered on a stand-alone basis. Indeed, as the Commission pointed out in its cable *Declaratory Ruling* order, applying common carrier rules to stand-alone offerings merely deters broadband providers from offering any stand-alone services.

A far better solution is to allow telephone companies the option of providing stand-alone broadband transmission as private carriage, governed by Title I, on commercially reasonable, market-based terms and conditions. This would allow the parties to these arrangements to experiment with nontraditional compensation arrangements, such as those that prevail today in the cable industry and on the Internet. For example, the parties might agree to a compensation arrangement based on a percentage of an ISP's revenue earned over broadband, or based on the number of "hits" delivered to a particular content provider's Web site. While it is impossible today to predict how these compensation arrangements may evolve over time, the key is that the Commission afford players in the market the flexibility to determine what arrangements make sense and to change those arrangements over time.

As we explained in previous letters and pleadings on the issue, the Commission has ample legal authority to classify stand-alone broadband transmission services as private carriage subject to Title I. And since those submissions were made, the Commission itself has agreed. In its *Declaratory Ruling*, the Commission held that, where cable companies choose to provide stand-alone transmission services to ISPs and other "end-users," such an "offering would be a private carrier service and not a common carrier service."

In that case, of course, the Commission determined that stand-alone transmission services should be classified as a private carriage because cable companies choose to offer it on that basis. Telephone companies, by contrast, have historically been *required* to offer their services on a common carrier basis and have not been given that choice. But that is not a basis for denying local companies the same option available to cable operators. It would be wholly circular to say that these services have to be provided on a common carrier basis because they previously were offered on a common basis solely to satisfy a regulatory requirement. Moreover, the Commission previously has given other providers (including satellite operators) the choice of offering certain services on a private carriage basis. It clearly can do the same here.

As with cable companies, classifying broadband transport as private carriage would allow local companies to "provide pure telecommunications to selected clients with whom they deal on an individualized basis." Of course, a private carrier by definition is free to decline service to a given customer if it cannot agree to terms with that customer, just as the customer is free to decline to use that service if it does not like the terms on which it is offered. It is this mutual right to choose that is key to ensuring that these arrangements will be driven by the market rather than by regulatory fiat.

3. *The Commission must eliminate unbundling requirements that apply to broadband.* Just as the retail unbundling requirements imposed by the Commission's *Computer II/III* rules are fundamentally antithetical to the investments that local companies must make in broadband, so too are the wholesale unbundling requirements imposed under section 251. The accompanying obligation to make unbundled elements available at TELRIC rates further compounds this problem.

To the extent the Commission classifies broadband transmission services under Title I, the section 251 unbundling requirements would not apply. These requirements are imposed under Title II, and necessarily apply only to facilities and services regulated under that Title. Moreover, the Act's definition of those network elements that can be subject to unbundling encompasses only those facilities used to provide "telecommunications services," defined as common carrier services subject to Title II. The definition of a network element does not include facilities and equipment used to provide private carriage services under Title I – services that the Commission has held are a form of "telecommunications" but are not "telecommunications services."

Even if the Commission were to classify some broadband transmission services as common carrier services subject to Title II, however, it still could not impose unbundling requirements under the "necessary and impair" standard prescribed by the Act.

As an initial matter, the FCC and every other federal agency to consider the question have correctly recognized that broadband is a separate market, distinct from traditional narrowband telephone services. Moreover, as explained above, local telephone companies such as Verizon are minority players in the broadband market. In the large business segment of the market, the major long distance carriers are the dominant providers, and in the mass market, cable companies are dominant with satellite and wireless providers competing aggressively as well.

As the D.C. Circuit's recent decision makes clear, the Act's unbundling standard simply cannot be satisfied under these circumstances. On the contrary, the touchstone of impairment under the Act is, in the words of the court, whether an element is "unsuitable for competitive supply," an inquiry that must be "linked (in some degree) to natural monopoly" characteristics. And in making that determination, the Commission must take into account the entirety of "the competitive context," including intermodal "competition in broadband services coming from cable (and to a lesser extent from satellite)." Here, of course, the Commission has correctly recognized that the broadband market is characterized by significant competition, and that the "preconditions for monopoly appear absent." Under the terms of the Act, that is the end of the matter.

In terms of specific rules, this first means that the line-sharing requirement vacated by the D.C. circuit cannot be reinstated. Because broadband services already are being provided over multiple competing facilities-based platforms, there simply is no plausible case to be made that they are not suitable for competitive supply without access to line sharing.

Second, it means that packet switches and other advanced services equipment cannot be unbundled even in the limited circumstances where the Commission's previous rules required them to be. The major long distance carriers already dominate packet switched services such as ATM and Frame Relay without using local telephone companies' packet switches. And the cable companies dominate mass-market services without using local telephone companies' DSLAMs. Accordingly, advanced services equipment unquestionably is suitable for competitive supply and cannot be unbundled under any circumstances.

Third, for the same reason that line sharing cannot be required, the Commission also cannot require unbundled access to fiber loop facilities for use to provide broadband services. As the D.C. Circuit recognized just recently, the Commission not only can, but also must conduct its impairment analysis on a service-specific basis. In the case of broadband, the presence of multiple competing facilities-based platforms demonstrates beyond dispute that these services are suitable for competitive supply without access to fiber loop facilities. And requiring access to provide broadband services would only deter these facilities from being built by significantly increasing their cost, risk, and operational complexity.

Finally, the Commission should eliminate its accompanying requirement to provide collocation at the remote terminal. Competing facilities-based broadband providers self-evidently do not need collocation at the remote terminal to provide their services. At the same time, imposing such a requirement is a major deterrent to the widespread deployment of broadband equipment deeper into the network because it increases the cost, risk, operational complexity and security concerns of doing so. This requirement should therefore be eliminated as well.

It is imperative that the Commission act quickly on the above issues to restore rational incentives to invest in broadband. The separate issue of whether and how local telephone companies should provide narrowband access to newly emerging next generation networks is more complicated and the Commission should promptly initiate a further notice to develop the

record needed to consider the issue fully. As noted above, as the local network evolves and is optimized for broadband, it will be more and more the case that new facilities will consist entirely of integrated fiber-based or other advanced technologies and architectures. These next generation networks will be entirely broadband in nature, and in many instances cannot be unbundled into previously defined elements absent significant redesign and cost, if at all. Indeed, in next generation networks, the components that are capable of being unbundled, the points at which access is technically feasible, and even what constitutes an element may all change. And services that traditionally were thought of as narrowband will be nothing more than one of many applications delivered over broadband. Moreover, these are new networks that only now are being designed and deployed for the first time by local telephone companies and competitors alike. If the evolution of the network is to proceed in a timely and efficient manner, it is critical that the Commission consider fully the unique technological and market considerations these emerging networks present because unnecessary unbundling requirements would only increase their cost and risk and deter their deployment.

4. ***The Commission should eliminate separate affiliate and other similar requirements that increase the operational complexity and inflate the cost of broadband services.*** Just as telephone companies are subject to a number of requirements that increase the potential risk and decrease the return of providing broadband services, they also are subject to other requirements that increase the operational complexity and cost of their broadband services. Chief among these are separate affiliate and similar requirements that result in unnecessary duplication of facilities, operations systems, and personnel with no corresponding benefit. Some of these requirements apply to multiple companies while others were imposed only on individual companies prior to the time the Commission adopted broadband rules of general applicability. Regardless of their source, these requirements make no sense when applied to broadband and should be eliminated.

One such requirement is the ban on shared operations, installation, and maintenance adopted by the Commission as part of its rules implementing section 272 of the Act. This requirement forces Verizon and other companies that are subject to the requirement to artificially divide what would naturally be a single, continuous broadband service and operate it instead as two separate services – one interLATA and one intraLATA. This results in the duplication of everything from network operations centers and surveillance systems to the systems and personnel that handle the installation, provisioning, maintenance, and repair of broadband facilities and services. And by increasing the operational complexity of providing these separate components of the service in a coordinated manner, it greatly increases the number of potentially service-affecting fault points.

This single requirement already has imposed some $200 million dollars in unnecessary costs on Verizon, and will impose an additional $300 million in costs over the coming three years. In the future, this requirement will impose similar costs on emerging broadband services. To make matters worse, because broadband is relatively new and is used by only a fraction of the customers using narrowband, the added costs will spread over a smaller customer base and have a correspondingly greater negative impact on the costs of broadband services and on incentives to invest.

The Commission can and should decline to apply the ban on shared operations, installation, and maintenance to broadband. It is solely a creation of the Commission's own rules, and is not required by the Act. Whatever the logic may have been for imposing it on narrowband services – where it also should be repealed, as we have explained elsewhere – it makes absolutely no sense when applied to broadband, where it forces local companies to bear inflated costs that other broadband competitors do not face.

The Commission should also eliminate similar company-specific requirements, such as those imposed as conditions in merger approval proceedings. Those conditions were imposed at a time when the Commission had not yet conducted proceedings to establish rules governing all broadband providers. In contrast, once the Commission *has* settled on rules of general applicability, those new rules should apply equally to all providers and should supplant any company-specific requirements that were imposed prior to their adoption.

For example, in connection with the Bell Atlantic-GTE merger, the Commission required Verizon to provide broadband services through a separate data affiliate. As a result of that requirement, Verizon already has incurred nearly half a billion dollars in incremental costs to provide broadband services. While much of that separate affiliate requirement has since terminated, the portion of it that remains continues to impose costs and operational complexities on us that our competitors do not have to bear. In fact, satisfying these remaining requirements alone continues to occupy an estimated 400 individuals who could be more productively employed doing other things. These remaining requirements should be eliminated.

5. ***The Commission must establish a uniform national broadband policy.*** In order to provide the regulatory certainty needed to justify the massive investments that local companies must make, the Commission must establish a truly national broadband policy that eliminates the prospect of a patchwork quilt of inconsistent state regulations. Unless the Commission establishes a single national policy quickly and decisively, its own broadband initiatives will become mired in a tangle of conflicting state and local rules.

The Commission has already adopted just such an approach for cable-provided broadband services. In its recent *Declaratory Ruling*, the Commission expressly held that, because cable modem traffic "bound for information service providers (including Internet access traffic) often has an interstate component," cable modem service "is properly classified as interstate and it falls under the Commission's ... jurisdiction." This also is the approach the Commission has adopted for DSL services that connect to information service providers. And, of course, it is the approach the Commission has adopted for other related services as well, such as special access services, which are classified as interstate whenever they carry more than a de minimis amount of interstate traffic.

The concern about inconsistent state rules is not merely hypothetical, as ongoing developments make clear. For example, a number of states either have imposed or are attempting to impose a variety of burdensome requirements on interstate DSL services. These range anywhere from state tariffing requirements, to service quality requirements, to requirements to unbundle packet switching equipment that are inconsistent with this

Commission's rules. These are precisely the types of state-by-state requirements that are incompatible with a deregulatory national broadband policy.

Moreover, just as it is vital to ensure that states do not regulate broadband services directly, it is equally important to make clear that they cannot do so indirectly by allocating costs to, or imputing revenues from, competitive broadband services. If state regulators were allowed to impute revenues from broadband to other regulated services (as they have done in the case of other deregulated services), the net effect would be both to create a new implicit subsidy forbidden by the Act, and to prevent local companies from profiting from their risky investments in new broadband services and facilities. Likewise, if state regulators were allowed to allocate costs from regulated services to broadband, the effect again would be to create a prohibited new subsidy and drive up the costs of broadband to the detriment of consumers and of competition.

Of course, this does not suggest that state commissions cannot continue to regulate local voice services. On the contrary, in the limited instances where states still regulate these services on a cost-plus basis, they can continue to do so based on the cost of providing a stand-alone narrowband telephone network. But what they cannot do is regulate broadband services indirectly under the guise of exercising their authority over local voice services.

In sum, our nation needs a truly national, broadly deregulatory broadband policy, and this Commission is the only entity that can provide it. By adopting a market-oriented national policy, this Commission can help start a virtuous circle of investment and innovation – one that will lead not only to widespread access to next-generation broadband services but also to meaningful facilities-based competition to cable in its core video market.

I look forward to discussing these issues further.

Sincerely,

William P. Barr

CC:
Commissioner Abernathy
Commissioner Martin
Commissioner Copps
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October 16, 2002

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th H Street, SW, Portals
Washington, DC 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338

Dear Ms. Dortch:

The attached letter from William Barr of Verizon was provided to Chairman Powell today. Please place it on the record in the above proceeding. Please let me know if you have any questions.

Sincerely,

Attachment

cc: Commissioner Abernathy
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Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Powell:

The issues pending before the Commission in its review of the unbundled network element rules are critically important to restore the long-term health of the telecommunications industry. The purpose of this letter is to propose a framework for addressing these issues.

The Commission's previous unbundling rules were based, as the D.C. Circuit has said, on the "belief in the beneficence of the widest unbundling possible." Six years of experience have refuted that belief and proven that expansive unbundling is fundamentally destructive of investment, and therefore of the long-term competitiveness and health of the entire industry.

At the very time when so many promising new information technologies are emerging, the FCC's unbundling rules and prices are affirmatively discouraging investment in this critical infrastructure. The ready availability of the incumbent's facilities deters other firms from investing in alternative facilities and technologies. Moreover, incumbents have no incentive to invest or innovate under a UNE regime that allows entrants to capture all the upside of any good investment while leaving the incumbents with the downside of investments that do not succeed.

Although the unbundling regime was intended to spur facilities-based competition, the opposite is happening under the current regime. In markets such as New York, where carriers once invested heavily to deploy their own switches, that deployment declined precipitously once carriers began the widespread rollout of services using the so-called UNE-platform. Several carriers, including one of the largest, have even begun to move customers served with their own switches to UNE-platform arrangements. Likewise, where carriers once invested heavily in facilities to serve business customers, competing carriers recently have begun to use the UNE-platform to serve business customers as well. And where carriers once invested heavily in fiber-optic facilities to provide high-capacity services, they increasingly are demanding unbundled elements

instead. In fact, carriers now go so far as to demand that incumbents build new high-capacity facilities solely to make them available as unbundled elements at prices below those that they (or any other carrier) could build them. As if that weren't enough, one of the leading providers of facilities-based service to residential customers was recently downgraded due to concern that its investment is being undermined by carriers that provide service entirely over unbundled elements.

The damage already caused by the Commission's overly expansive unbundling rules sets in context the legal analysis of the Act's unbundling requirement, as interpreted by both the Supreme Court and the D.C. Circuit. Both courts recognized that limiting the extent of unbundling obligations is as important to the Act's purposes as is providing access. Those decisions make clear that unbundling rules that go too far vitiate the Act's text and purpose just as much as, if not more than, sharing obligations that are too narrow. As the D.C. Circuit put it, there "are plainly two sides to the effects on investment of ubiquitously available UNEs at Commission-mandated prices." On the one hand, the unbundling of elements that cannot be competitively provided may facilitate the efforts of competing carriers to "set about providing the other elements and offering complete competitive service." On the other hand, each "unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."

As you explained in words foreshadowing the D.C. Circuit's decision, the Commission must strike "a careful balance between aiding new entrants and not making access to the incumbent's facilities too easy." As you have noted previously, because unlimited unbundling eviscerates investment incentives and inhibits development of the form of competition that will spur innovation, provide price discipline, and otherwise provide the greatest benefit to consumers, the Act mandates that incumbents' unbundling obligations be limited to providing access only to those elements truly needed to enable the development of a competitive market.

The current proceeding provides the Commission with an opportunity to establish this critically important but currently missing balance. The following pages outline a proposed approach that takes into account the practical marketplace experience over the past six years; carries out the Supreme Court's mandate to develop a "limiting standard" that is "rationally related to the goals of the Act"; complies with the guiding principles recently set forth by the D.C. Circuit; and is consistent with the views you and your fellow Commissioners have articulated about the proper role of unbundling.

I. Key Principles of Impairment

The Commission's initial task is to identify the core principles that will guide its determination of what elements should be unbundled.

A. The Impairment Standard's Relation To Natural Monopoly

1. ***General Standard.*** The touchstone of impairment under the Act is, in the words of the D.C. Circuit, whether an element "is unsuitable for competitive supply." The impairment inquiry therefore must, as the D.C. Circuit held, be "linked (in some degree) to natural monopoly" characteristics of an element. To put it in economic terms, an element may be unbundled under the statute when, in the D.C. Circuit's words, "it would make *no economic sense* for competitors to duplicate the facility" – when, for example, "average costs are declining throughout the range of the relevant market," such that an entrant with less than full market scale cannot successfully compete.

The key to the impairment analysis therefore is whether an entrant can, over time using its own facilities, profitably serve less than the entire market. Consider, for example, a metropolitan area with two million customers. Were telephone service a natural monopoly, only a firm serving all two million customers could achieve optimum scale, and smaller firms would be unable to compete. But if a competitor could build a business serving 5,000 business customers using its own loops, switching, and transport, then those network elements are in no sense a natural monopoly in that business market. Similarly, if a competitor could build a business serving one-third of residential customers with its own facilities, then the incumbent's facilities likewise lack natural monopoly characteristics in that market.

2. ***Scale-Related Costs.*** A transient cost disparity resulting from differences in scale does not meet the standard for unbundling established by the Act. The key inquiry is whether an entrant can ultimately be efficient serving its targeted market share, not whether the entrant experiences cost disparities as it ramps up toward that share. If an entrant can target less than the entire market, and ultimately serve that share efficiently without relying on unbundled elements, the cost disparities incurred along the way as the entrant builds market share in no sense mean that the incumbent's facilities have any natural monopoly characteristics. The temporary cost disparities associated with building scale therefore cannot justify unbundling.

After all, any entrant in any industry in which economies of scale exist will experience unit cost differences as it builds toward efficient scale. In a competitive, capital intensive network industry – as was the case with wireless – profitability is not generally achieved in less than 5-10 years, and economic break-even typically requires at least a decade.

It is plainly impermissible to rely on these universal cost disparities as a justification for requiring access to incumbents' facilities. As the D.C. Circuit made clear, the Commission may not interpret impairment by reference to cost disadvantages inherent in entry itself, as opposed to costs that result from the nature of the element in question. Thus, as the D.C. Circuit explained, "[t]o rely on cost disparities that are universal as between new entrants and incumbents in *any* industry is to invoke a concept too broad, even in support of an *initial* mandate, to be reasonably linked to the purpose of

the Act's unbundling provisions." Instead, "impairment" must be pinned to "cost differentials based on characteristics that would make genuinely competitive provision *of an element's function* wasteful." To use UNEs as a means of defraying start-up costs or accelerating economic payback is a naked subsidy that violates the Act, because any analysis aimed at this impermissible objective shifts the inquiry from whether a market is contestable to identifying the best way to ease the contest for entrants.

If the Commission's objective is to enable entrants to build scale, the Act provides an explicit mechanism for achieving this goal: resale. Resale allows competitors to make more efficient use of their facilities as they build them, because it permits them to add customers at lower unit costs and avoid the expense of unused capacity. Although competitors commonly complain that resale is not a profitable business in its own right, this assertion misses the point. The Act's purpose in mandating resale is not to create a viable business by eliminating transient scale-related cost disparities. Rather, it is to provide a way of building scale that is less expensive than relying solely on new facilities. Thus, the FCC's prior notion that incumbents' whole network should be defined as a UNE-platform to provide another means of resale cannot stand.

3. *Alternative Technologies.* In determining whether an element meets the standard for unbundling, the Commission must consider the full range of technologies by which that element's *function* could be performed. The flaw in the Commission's prior approach was that it focused myopically on the extant telephone network and effectively treated it as a natural monopoly because the agency did not believe it to be feasible or efficient for an entrant to replicate that network with its copper loops and circuit switches. But the economically relevant question is whether there are alternative approaches to performing the same *function*, using any technology. That is why the D.C. Circuit said that the Commission must pin its UNE determination on "characteristics that would make genuinely competitive provision of an element's *function* wasteful." It makes no sense to say that a railroad is a natural monopoly in the cargo market, while ignoring trucks, barges, and planes. A facility is not a natural monopoly if it faces intermodal, rather than intramodal, competition.

It is especially important for the Commission to take a broader technological perspective here because intermodal competition is generally a key factor in network industries. The determination that an element has natural monopoly characteristics reflects the judgment that construction of alternative facilities should be discouraged – *i.e.*, that alternative facilities would necessarily be less efficient than shared use of the incumbent's existing plant. That is certainly not true under any reasonable definition of the telecommunications market today and in the future. The advent of IP technology and investments in cable networks have already created an alternative channel into the home that competes directly with telephony systems. Further, wireline already faces active competition from the increasing reach and bandwidth of mobile wireless, and at least three fixed wireless solutions – LMDS, MMDS, and WCS – have emerged, with Ku/Ka band satellite solutions in development. The FCC's expansive unbundling rules have already diverted capital into what the D.C. Circuit called "synthetic competition," rather

than the development of these promising alternative technologies. Thus, as the D.C. Circuit held, the Commission must "consider the relevance of competition" from technologies other than traditional telephony.

4. ***Countervailing Advantages.*** The determination of whether an element can be competitively provided must not view the cost of supplying the element in isolation, but must also consider entrants' compensating advantages that render provision of such elements viable. If an entrant's cost of providing an alternative element is higher than the incumbent's, but the entrant nevertheless can profitably do so because it can sell other services, avoid other costs, or achieve qualitative advantages in a way that is not available to the incumbent, the element can be supplied competitively and unbundling cannot be required. The question is whether the entrant can provide an overall service that is competitive, not whether the cost of each input matches that of the incumbent.

The most likely entrants have scale and scope advantages that the incumbents cannot match. For example, in the national business market, the interexchange carriers already have national presence and scale, whereas the incumbent LECs are regional. Interexchange carriers also have significant scope advantages in their current service offerings. Cable operators, moreover, can provide telephony as an adjunct to services and functions that incumbent LECs are not in a position to provide.

In addition to these scale and scope advantages, competing carriers unquestionably have many other advantages. They can, for example, target their offerings exclusively toward profitable market segments. As the D.C. Circuit explained, these carriers enjoy the "advantage" of "being free of any duty to provide underpriced service to rural and/or residential customers and thus of any need to make up the difference elsewhere." Moreover, they do not face the diseconomies of scale associated with a large embedded network; they can build their networks using the most up-to-date equipment and more efficient topological designs.

The Commission itself recognized that competing carriers have such "cost advantages" in its last unbundling order, but refused to give them any weight. The D.C. Circuit's decision requires the Commission to correct this error – one that you expressly identified in your partial dissent when you highlighted the "apparent" "difficulties" of any impairment analysis that gives "almost no weight to other factors directly relevant to assessing whether a CLEC can become an effective competitor in a particular market or customer segment, such as CLECs' ability to target market and the relative profit potential of serving different types of customers." As you have explained, "meaningful, robust competition requires that rival firms vie for customers based on the distinct assets and capabilities each brings to the market."

5. ***Comparative Impairment.*** The unbundling inquiry under the Act must turn on whether a competing provider is competitively impaired *compared to the incumbent.* Burdens that both the incumbent and the entrant share are not a sufficient justification for unbundling. Thus, the fact that retail rates in many segments of the residential market

have been set by regulators at artificially low levels cannot constitute impairment in any competitively cognizable sense. In such markets, as the D.C. Circuit observed, "given the ILECs' regulatory hobbling, any competition will be wholly artificial" – unless, as noted above and by the Court, "provision of service may, by virtue of economies of scale and scope, enable a CLEC to sell complementary services (such as long distance or enhanced services) at prices high enough to cover incomplete recovery of costs in basic service."

6. *Timing.* Some carriers have argued that certain elements, such as high capacity loops and transport facilities, should be subject to unbundling because they take time to build. The argument demonstrates why unbundling of such elements is contrary to the Act: it assumes that entrants *can* eventually deploy such elements profitably, and thus demonstrates that they are not "unsuitable for competitive supply." Entrants have had six years to build these facilities, and many have already done so. Entrants' failure to build more or different facilities may be attributable to their business plans, to the availability of other alternatives (such as special access services), to distortions of retail rates, or to other factors, but it certainly does not show that these elements have natural monopoly characteristics.

Even if the Commission were inclined to accept the "time to build" rationale – which we believe would violate the Act and conflict with the D.C. Circuit's opinion – the argument plainly does not entitle the entrants to the unbundling of elements of the incumbents' network *other* than the particular elements that entrants claim to need more time to build.

On the contrary, the entrants who advance this claim could not be allowed access to the incumbents' switching (which has been competitively deployed) based on the claim that they need more time to build their own loops. Nor could entrants who advance this claim be allowed access to the incumbents' loops unless the entrants can provide their own facilities for other elements. The only arguably legitimate reason for them to ask for use of the incumbents' loops during the time they need to construct their own is that they can use this time to deploy *other* facilities *more rapidly*. Otherwise, the entrants could simply wait to enter the market until they had deployed all of their own facilities. (Entrants might also wish to use incumbents' facilities in the meantime in order to build scale, but as discussed above, this is not a lawful basis for requiring unbundling.) Accordingly, under no circumstances may entrants obtain the UNE-Platform under this rationale.

Another implication of the "time to build" rationale is that the entrant must actually build the facilities in question within a reasonable time period specifically prescribed in advance. Absent a firm sunset for unbundling in this context, the entrants' incentive to invest will be diluted, and the entrants will return to the Commission again and again to plead for more time.

In addition, this rationale is inconsistent with TELRIC pricing. TELRIC is designed to deter uneconomic bypass, i.e., to prevent the socially wasteful duplication of elements of the incumbent's network that can be most efficiently provided by the incumbent. But the "time to build" rationale assumes that the entrant can and should eventually bypass the incumbent's network entirely, i.e., that the elements are not a natural monopoly. Setting prices at TELRIC thus sends the wrong price signal by deterring the very bypass that the entrants promise and undercutting those carriers that have already built competitive facilities.

Finally, the Commission must train its efforts primarily on the root causes of delay, rather than on a costly effort to ameliorate its effects. Thus, if the problem stems from issues with building or right-of-way access, the Commission should address those issues directly and thereby eliminate any long-term impediments to competition.

7. *Burden/presumption.* The Commission's prior approach, which assumed that more unbundling was better, effectively led to a presumption in favor of unbundling – a presumption the incumbent had the burden of rebutting by showing that more unbundling was not needed. This approach cannot survive the D.C. Circuit's decision, which compels the opposite presumption. That Court held, in keeping with the terms of the Act, that it is the decision to unbundle that must be justified – that an element can be unbundled only if the Commission makes a determination that the significant inherent costs of unbundling are outweighed by the need for and benefit of unbundling a given element.

Under the express terms of the Act, the burden therefore rests on the proponents of unbundling, and ultimately the Commission, to demonstrate that the impairment standard has been satisfied for a particular element in a relevant segment of the market. A finding of impairment is an absolute statutory prerequisite to an element's unbundling, and the Act allows the Commission to impose an unbundling obligation only *after* it finds – based on substantial record evidence – that competing carriers would be impaired without access to a given element.

B. The Fallacy of the "Least Common Denominator" Approach

In determining whether to require unbundling, the Commission has previously used a "least common denominator" standard that is fundamentally inconsistent with the Act and destructive of investment in alternative facilities. The FCC's test has been that if there is *any* would-be entrant who would need access to succeed, the UNE must be supplied. Thus, the FCC, while acknowledging that some entrants do not need certain UNEs, has justified their unbundling on the grounds that others may need them. But this is the exact reverse of the inquiry mandated by the Act: the question is whether there are some who could succeed without UNEs, not whether there may be some whose success might depend on them.

The purpose of the UNE regime is to remove any natural monopoly barrier that would otherwise preclude the development of competition in the market. The inquiry must therefore focus on whether there are *any* entrants in a position to contest the market without obtaining access to the incumbent's network element. If there are firms so situated, then lack of access is not a barrier to the evolution of competition. To continue to make UNEs available because one can hypothesize another entrant who could not make it otherwise is not only unnecessary, but is affirmatively harmful by discouraging investment by those entrants who could have done without.

In this market, as with any other, the entrants most likely to succeed are those who bring certain assets and advantages to the contest – scale, scope, customers, and technologies in related markets. The evaluation of need must focus on these entrants, not those who would have the highest hill to climb. In network industries, the need to recover huge capital outlays typically results in a few large competitors, and competition is often intermodal. Thus, it is not surprising that ILECs now face competition from cable and mobile wireless, and will soon from fixed wireless and satellite. Indeed, because telecommunications is an investment-intensive business, and because competitors must achieve some scale in whatever segment they target to succeed, the market cannot reach a stable equilibrium if the Commission aims to maximize the number of competitors. The FCC has no warrant to artificially augment entry based on its own preconception of a better scheme of competition than the one that is naturally arising.

To understand this point, it is instructive to look to the regulation of cable television. Cable faces no wholesale regulation, and was relieved from virtually all retail regulation based solely on the entry of satellite. You yourself recently described video distribution as "a vibrant competitive market," even though consumers typically have a choice between only a single cable operator and two satellite providers. Moreover, under the Commission's own rules, cable operators are subject to "effective competition" – and the last vestiges of retail regulation are eliminated – when an ILEC takes its first step into their local markets. By the same token, incumbent LECs are subject to extant or imminent entry from cable operators, and today face far more competitive discipline from wireless telephony than cable operators do from satellite. Here, as there, the Commission should allow competition to unfold, rather than seek to manufacture synthetic competitors.

C. The Proper Definition Of Markets

Any determination of impairment must be based on an economically relevant market definition. The D.C. Circuit's decision requires the Commission to base its unbundling rules on "market-specific variations in competitive impairment." This inquiry requires precisely the same market definition analysis that has traditionally been applied in the antitrust context. It has three dimensions, each one of which is separately relevant to the Commission's application of the impairment standard: customers, products, and geography. Each dimension is critical, because the task at hand is to ensure

the proper flow of capital for both entrants and incumbents, and investment decisions are driven by economically relevant markets and not by artificial regulatory categories.

When defining markets, there are two equal sins – overinclusiveness and underinclusiveness. One of the Commission's previous errors was to require unbundling in all markets merely because an element was deemed competitively unavailable in some markets. For example, the Commission defined a national market for switching, and found that because it might be needed in some areas it must be unbundled everywhere. This was a sin of under-granularity. As the D.C. Circuit held, the Act does not permit a universal "finding of material impairment where the element in question – though not literally ubiquitous – is significantly deployed on a competitive basis" in some geographic markets. Simply put, the Commission's unbundling rules cannot be "detached from any specific markets or market categories." In this way, the Commission's market definition must be granular enough to conform to the way that elements are used and decisions about investment are made in the marketplace.

But the Commission must also avoid the mirror-image problem of adopting a market definition that is *too* granular to be economically relevant. This error underpinned the Commission's line sharing order, which focused narrowly on the needs of those entrants who wished to provide DSL, without considering the broader market of broadband services. The D.C. Circuit rejected the Commission's over-granular definition of the product market as a "quite unreasonable" construction of the Act.

The Commission must avoid the same error in its geographic market definitions. The disaggregation of an economically relevant geographic unit into even more granular segments – from a metropolitan area to a central office to a city block – distorts the impairment analysis. Perhaps some self-interested parties would fancy a door-to-door analysis of the availability of elements, but potential investors in new facilities for entrants and incumbents would rush the exits.

Once the exercise of market definition is complete, the Commission must establish unbundling rules based on reasonable inferences from the evidence of competitive deployment. In markets where competitors have deployed their own facilities to substitute for an element of the incumbent's network, the Act precludes the element's unbundling. In markets where an element has not yet been widely deployed by competitors, however, unbundling cannot be presumed or automatic. As you explained in your partial dissent, "evidence of CLEC [facilities] deployment strongly suggests that CLECs are not significantly impaired without access . . . both in areas in which CLECs have deployed [facilities] *and areas in which they have not done so*." The Commission should treat like markets alike, whether or not deployment patterns in those markets are the same.

D. A National Policy

The Act expressly assigns to *this Commission* the task of determining what elements must be made available on an unbundled basis, and once the Commission makes that determination, it cannot be countermanded by the states.

The Act expressly precludes the states from requiring an element to be unbundled once the Commission has determined that it does not meet the impairment standard. The Act preserves state authority to issue *only* those rules that are "consistent with the requirements" of section 251 *and* that would not substantially prevent achievement of the purposes of the 1996 Act. As both the Supreme Court and the D.C. Circuit have held, both the text and purpose of section 251 are violated whenever incumbents are required to unbundle elements for which the impairment test is not satisfied. As the D.C. Circuit explained, the Act permits unbundling only when the benefits – more rapid deployment of other facilities by entrants – outweigh the costs – the reduced incentive for innovation and investment. For a state to require unbundling in circumstances that the Commission has already determined do not meet the impairment standard would conflict with the balance established by the Act.

In fact, a national checkerboard of different unbundling rules would conflict with the statutory balance even more than an erroneous determination by the FCC. Allowing each state to require unbundling even of those elements the FCC has determined need not be provided is antithetical to the stability and predictability necessary for innovation and investment. For this reason, the Act expressly gives "the Commission" – not the states – supremacy in "determining what network elements should be made available" on an unbundled basis. And the states cannot preempt that determination once the Commission has made it.

Likewise, once the Commission has determined that there is no impairment with respect to an element, it cannot compel the former Bell companies to unbundle that element under section 271. Doing so would be antithetical to the Act's text and core goals, and imposing more stringent unbundling requirements on the Bell companies would be particularly illogical because their local markets typically are more competitive than those of smaller incumbents. At a minimum, therefore, the Commission should forbear from applying a separate unbundling requirement under section 271 where that section has been "fully implemented," as is true where a former Bell company has received interLATA authority.

II. Specific Unbundling Requirements

As noted above, translating these principles into specific rules requires a three dimensional analysis that takes into account the characteristics of specific market segments. For example, the Commission itself has recognized that the analysis may be different for business customers than for residential customers, for special access services than for local services, and for traditional dedicated services than for traditional switched

services. Each of these segments is addressed below. For purposes of this letter, I have focused on the subset of issues of most central importance to providing economically rational investment incentives and to restoring the financial health of the industry; additional issues are addressed in our prior filings in this proceeding.

A. Traditional Business Services

Within the traditional business segment of the market, the Commission has recognized that large or "enterprise" businesses are a distinct class of customers from other "general" business customers. Likewise, the Commission has recognized that already competitive special access services are a distinct market segment from other traditional telephone services.

Accordingly, an analysis of the traditional business services segment must take these distinctions into account, and must begin by categorically excluding enterprise customers and special access services from the scope of any unbundling requirements.

1. Enterprise Business Segment

The enterprise segment of the traditional business market consists of the largest business customers, which typically operate at multiple locations nationally and typically spend hundreds of thousands of dollars (or more) annually for telecommunications services. These customers are highly sophisticated, typically employ their own telecommunications managers or consultants, and generate sufficient, concentrated demand to warrant deployment of competing facilities. As a result, this is the first customer segment that was targeted by competing carriers for service on a facilities basis. In fact, this is the very customer class that was the focus of so-called competitive access providers even before the passage of the 1996 Act, including companies such as MFS and TCG before they were bought by the major long distance carriers.

The enterprise segment of the market unquestionably is suitable for competitive supply, and access to unbundled elements is wholly unnecessary to serve this class of customers. Indeed, the major long distance carriers already control the vast majority of the national market for enterprise customers. To cite just one example, these customers are heavy users of packet switched services such as ATM and Frame Relay, and the major long distance carriers control roughly two-thirds of the nationwide market for these services. And other carriers serve these customers almost exclusively without using unbundled elements. Instead, they rely on their own facilities, supplemented as needed by special access services purchased from the local incumbents or from other providers at competitive rates.

In contrast, incumbent local carriers such as Verizon are at a significant competitive disadvantage in this market segment. These customers operate on a national basis, and want suppliers who can provide a full range of local and long distance services nationally and who control their own facilities. Unlike the major long distance carriers, the operations of incumbent local carriers are limited to specific local or regional areas,

and the largest local carriers have been unable to provide critically important long distance services. For this reason, as WorldCom's Chief Marketing Officer has explained, "Bell companies don't present a major threat to WorldCom, Inc.'s business service group" because they "don't have the products, systems, or sales forces to attack the middle and high-end segments of the business-service market."

As a result, competing carriers self-evidently are not competitively impaired without access to unbundled elements in this market segment, and there is no plausible case for imposing an unbundling requirement to serve these customers. Doing so also would have severe harmful consequences. As the Commission itself previously recognized in the context of already competitive special access services, imposing an unbundling requirement in the presence of existing facilities-based competition would undermine that existing competition, and would risk snatching defeat from the jaws of victory. And because this market segment initially drives much of the innovation that occurs in the industry, imposing an unbundling obligation to serve these customers would likewise undermine the development of innovative new technologies and services.

2. Special Access Services

The Commission previously has recognized that dedicated special access services comprise a distinct market segment that is subject to extensive competition. Of course, where services already *are* being supplied on a competitive basis, they unquestionably are *suitable* for competitive supply. Accordingly, under no circumstances may competing carriers be permitted to substitute unbundled elements for special access services – regardless of whether those elements are purchased individually or in combination.

Special access services consist of the various dedicated facilities that run from a business customer to a carrier's point of presence. The customers for special access are long distance carriers and large business customers with sufficiently high call volumes to justify the use of dedicated facilities. Demand for these services is highly concentrated, with 80 percent of special access revenues being generated from fewer than one-quarter of wire centers. Competitors therefore can address this market with a limited, targeted investment.

The special access market is highly competitive. It was among the first to be opened to competition before the 1996 Act was passed, and facilities-based competitors already have captured a third or more of the market. Indeed, special access competition is so robust that the Commission has granted pricing flexibility in MSAs that account for a significant majority of special access demand. The Commission did so, moreover, precisely because it determined that these services could be competitively supplied, and that market forces could be safely relied upon to produce competitive rates. The D.C. Circuit, of course, agreed completely.

Given all of this, competing carriers unquestionably are not impaired in their ability to provide special access services without access to unbundled elements. In contrast, as the Commission itself recognized in its most recent order on the subject, permitting unbundled elements to be used to provide these services would "undercut the market position of many facilities-based competitive access providers," thus jeopardizing "a mature source of competition in telecommunications markets."

Accordingly, under no circumstances should competing carriers be permitted to substitute unbundled elements for special access services. To the extent the Commission retains an unbundling obligation for any of the underlying elements used to provide special access services, the Commission therefore must also limit the use of those elements to providing local (rather than special access) service. As is explained below, however, the high capacity facilities used to provide special access should not be subject to an unbundling requirement regardless of the type of service involved.

3. General Business Segment

The general business segment of the market also is characterized by significant competition and in many respects is clearly suitable for competitive supply. Competing carriers already serve some *20 million* business lines using some or all of their own facilities – including more than *160 million* voice grade equivalent circuits – and, overall, serve between *26 and 33 percent* of the business lines in the country.

With respect to traditional dedicated services, just as other carriers are not impaired in their ability to provide special access services without access to unbundled elements, the same is true of high capacity facilities that are used to provide predominantly local services. And with respect to switched services, competing carriers are not impaired without access to unbundled switching or the so-called UNE-platform.

a. ***High capacity transport, loops and dark fiber.*** Just as facilities used to provide dedicated special access services are suitable for competitive supply, so too are dedicated high capacity facilities used to provide local (rather than special access) services.

The facilities used to provide high-capacity dedicated transport and loops are essentially the same as the facilities used to provide special access service, and the customers are the same types of entities – sophisticated, high-volume users with concentrated demand. The fact that these facilities are suitable for competitive supply is best evidenced by the fact that competing carriers already serve a third or more of all special access services, which are just a combination of high capacity transport and loops, without using unbundled elements.

Not surprisingly, therefore, competitors have focused heavily on high capacity services, and have succeeded in providing them without using unbundled elements. Indeed, competing carriers provide more than *160 million* voice grade equivalent circuits, the majority of which are provided over high capacity lines. In order to do so, they have

deployed almost *184,000 fiber route miles* and built hundreds of alternative local fiber networks, with many MSAs served by *ten* or more competitive fiber networks. Carriers also are using alternative technologies, such as terrestrial wireless, to provide high capacity services.

Special access services also are an alternative for use in providing high capacity services, and competing carriers can and do compete using special access services (provided by incumbents or competitive access providers) to supplement their own facilities. Indeed, competing carriers themselves have repeatedly conceded in their filings with the Commission that they use special access services purchased from incumbents to serve their own customers. And they do so for literally untold millions of voice grade equivalent lines.

Indeed, given the ubiquitous availability of special access as an alternative, the issue with high capacity facilities comes down purely to one of price. And on that score, there is no question that competing carriers can provide high capacity services in the same way competitors initially entered the long distance business. There, competing carriers relied initially on services purchased from AT&T under volume and term discount arrangements until they completed the build out of their own facilities. Likewise, special access services are available under tariffs that include volume and term discounts, and carriers have the same ability as they do in the long distance market to use these arrangements to supplement their own facilities as they complete the build out of their networks.

It is especially ironic that other carriers would claim they need an additional price break for high capacity services. As an initial matter, the Commission itself originally adopted the tariffed rates for these services as proxy prices for the corresponding network elements based on its conclusion that the rates already reflected forward-looking costs under its "new services" test. In addition, some of the same carriers that now claim they need an extra price break previously challenged special access prices on the grounds that they were too *low* and would undermine competing providers. But most fundamentally of all, the Commission since has concluded that these services not only are capable of being competitively provided, but also that the bulk of these services already are sufficiently competitive that the market can be relied upon to produce competitive rates. As a result, requiring an additional price break would produce rates that are manifestly *below* competitive levels – a result that unquestionably would destroy incentives to invest and deploy facilities more broadly.

For these reasons, the Commission should adopt the following rules:

DS-3 facilities and above. Transport and loop facilities used to provide services with a capacity of DS-3 or greater (whether lit or dark) should not be available as unbundled elements anywhere. These facilities are used to provide the highest capacity services to customers who generate traffic volumes that are more than sufficient to justify building facilities to reach them. Indeed, each individual DS-3 circuit is capable of

providing the equivalent of 672 voice grade circuits. And while competing carriers have focused on providing high capacity services, they have done so without relying on unbundled elements. Indeed, competing carriers have purchased only 140 DS3 loops from all the Bell companies combined and not a single loop above the DS3 level.

DS-1 facilities. High capacity transport and loops facilities used to provide service with a DS-1 capacity (whether lit or dark) are similarly capable of and are being competitively supplied, with each individual circuit providing the equivalent of 24 voice grade circuits. In addition, special access is a ubiquitous alternative where competing carriers have not yet built out their own facilities.

Thus, as an initial matter, DS-1 transport and loop facilities (whether lit or dark) should be conclusively unavailable as unbundled elements: (a) in areas where the Commission has granted petitions for special access pricing flexibility; (b) in the case of transport facilities, where there are two or more collocated facilities-based competitors in wire centers on either of the end points of a given circuit, and (c) in the case of loop facilities, where there either are two or more collocated facilities-based competitors in a wire center, or where a given customer or another customer at the same location already is being served by a competing carrier using its own facilities or the local incumbent's (or another carrier's) special access service.

The reasons are straightforward. Where the Commission has granted pricing flexibility for the portion of a special access circuit that corresponds to transport or loop facilities respectively, it already has concluded that these facilities are capable of being competitively supplied throughout that area (and that market discipline will ensure competitive rates there). In addition, where competing carriers already have a facilities-based presence at one or both ends of a given circuit, they clearly are capable of deploying competing facilities. And, of course, if a carrier does not yet have its own transport facilities along a given route, special access service remains available as an alternative. Likewise, where a competing carrier already is using its own facilities or special access service to serve a particular location, it obviously does not need unbundled elements to do so. In contrast, imposing an unbundling obligation under these circumstances would severely undermine incentives by all facilities-based providers to invest to extend the reach of their facilities or to innovate.

Outside of these areas, DS-1 facilities should be presumptively unavailable as unbundled elements. The Commission may, however, choose to make these facilities available for a limited time where a competing carrier shows that certain criteria are satisfied. Specifically, to obtain access to a DS-1 *transport* facility, a carrier must show that it cannot obtain collocation in or conduit into a given wire center, and that no alternative facilities provider has facilities within half a mile of the wire center. In order to obtain access to a DS-1 *loop* facility, a carrier must show that the local incumbent is the only facilities-based provider serving the particular location at issue and that the building owner (as opposed to the customer) has refused to provide the competing carrier with access to the building. These criteria will protect against any possibility that a

competing carrier might be barred from reaching particular locations as they work to extend the reach of their own networks.

b. ***Traditional switched services.*** In the traditional switched segment of the business market, competing carriers plainly are not impaired without access to unbundled switching or the UNE-platform, and the requirement to provide them should be eliminated immediately for all business customers.

The case on this score is compelling and the key facts are not disputed. Competing carriers already have captured up to a third of the business access lines in the country, almost entirely through the use of some or all of their own facilities or through resale. They have deployed more than *1300* circuit switches (and thousands more packet switches), and already use those switches to serve approximately 20 million business lines. Moreover, they are capable of (and are) using these switches on a widespread basis. Indeed, collocation is now ubiquitously available, and competing carriers have obtained some *25,000* collocation arrangements. As a result, they now use their own switches to serve customers in wire centers that contain *86 percent* of all Bell company access lines, and *96 percent* of all Bell company access lines in the top 100 MSAs. Several carriers also have admitted on the record that they use their own switches to serve even the smallest business customers. And, of course, business services face rapidly increasing competition from wireless, e-mail and instant messaging, which are displacing both lines and millions of switched minutes of use from the local incumbents.

In the business market, moreover, resale is a viable alternative that allows carriers to establish a customer base while they deploy their own switches. Because retail rates for business customers are higher than for residential customers, the margin produced by the wholesale discount is larger. Businesses also are heavy users of other value-added services and of long distance services that further increase the margin available to carriers serving these customers. As a result, competing carriers previously have used resale as a way to serve literally millions of business customers nationwide.

Nonetheless, as prices have been ratcheted constantly lower in state pricing proceedings and in section 271 proceedings, competing carriers in recent months have begun to submit UNE-platform orders in significant volumes for business customers. In fact, some carriers have begun to actually move customers that they were serving using their own switches to UNE-platform arrangements. And carriers also have migrated many of the customers they previously served through resale to UNE-platform arrangements solely to take advantage of the steeper discounts that are available that way.

The Commission must eliminate the unbundled switching and UNE-platform requirements for use to serve business customers now, before they further undermine facilities-based competition as they have in the residential segment of the market.

B. Traditional Residential Services

In the residential segment of the market, competing carriers likewise are not impaired without access to unbundled switching or the UNE-platform, and the Commission should so find. As a purely transitional measure, however, the Commission may opt to provide carriers with a reasonable period during which the prices for platform arrangement will move to the resale rate. This will allow carriers the option of migrating customers to their own switches, as they claim they want to do, or of keeping their existing arrangements in place at the resale rates prescribed by Congress.

As in the business market, the case for eliminating the unbundled switching and UNE-platform requirements in the residential market is compelling. Competing carriers already serve at least *three million* residential customers with their own switches. While these carriers tend to target the highest value customers with broad packages of services, they are capable of providing service to many more. As noted above, competing carriers collectively now provide some form of local service using their own switches in wire centers that account for *86 percent* of all Bell company access lines and *96 percent* of those lines in the top 100 MSAs. In fact, cable companies alone now offer local telephone service to more than *10 million* U.S. homes and have enjoyed great success in signing up customers. AT&T and Cox, for example, have disclosed that they already have achieved penetration rates of up to *30 to 40 percent* in some areas, and are adding roughly one million new customers every year. And several cable companies are now actively conducting trials of local telephone service using IP technology in anticipation of deploying these services more broadly. As in the business market, moreover, wireless services also are an increasingly potent competitor, diverting billions of minutes from wireline networks and replacing both primary and secondary lines at an accelerating rate. Again, as in the business market, non-traditional services such as e-mail and instant messaging are diverting still further minutes.

To the extent that carriers claim they cannot economically provide residential service using their own switches, that is a function of the retail rates set by state commissions. The local incumbents face the same problem, of course, so that claim does nothing to show that other carriers are impaired *competitively* compared to the incumbent. That is why the D.C. Circuit held that the mere fact that retail rates are subsidized in the residential market cannot be the basis for a finding of impairment. In contrast, the fact that competitors are using their own switches to serve some *20 million* business customers and selectively to serve *three million* additional residential customers shows that switching is in fact capable of being competitively supplied where retail rates are compensatory.

Nor is there any merit to the claim that carriers are relying on the platform only as an initial entry strategy before transitioning customers to their own facilities. In the three years since these carriers began using the platform extensively, there is no evidence whatsoever that they have done so on a widespread basis. On the contrary, the opposite is happening. Carriers instead are expanding their reliance on the platform even where they have their own switches, and, as noted above, several carriers (including one of the largest) have sought to move customers off their own switches and on to the UNE-

platform. And as any number of independent analysts have pointed out, this ever increasing reliance on use of the platform at deeply discounted rates is undermining investment by incumbents and competing facilities-based providers alike. In fact, as noted above, one of the principal competing providers of facilities-based service to residential customers was recently downgraded for precisely this reason.

Accordingly, the Commission should find that competing carriers are not impaired without access to unbundled switching or the UNE-platform. As a purely transitional measure, however, the Commission may choose to establish a reasonable transition period to phase out their availability for residential customers. If it does so, the Commission should transition the rates for these arrangements to the resale rate over a 12 month period. One-third of the differential between the UNE-platform rate and the resale rate should be eliminated immediately, another third after 6 months, and the final third after 12 months. This transition period would provide carriers with more than adequate time to do what they now claim they want to do, and migrate the embedded base of customers to their own switches through bulk transfer procedures. Moreover, by transitioning to the resale rate in stages starting immediately, carriers will have an incentive to begin the migration process immediately rather than wait until the end of the transition period. After that time, carriers may choose to negotiate market rates for these arrangements, or to take advantage of the resale rate. And to avoid exacerbating the problem during the transition period, competing carriers should not be permitted to add new customers using the UNE-platform after the initial 6-month period.

Of course, as you have noted on multiple occasions, correcting the current unbundling rules will not itself address the underlying core problem in the residential market segment of artificially low retail rates. Accordingly, the Commission also should urge state commissions to use the transition period as an opportunity to address this issue as commissions in states such as New York and Massachusetts have begun to do. Rationalizing both the unbundling rules and the regulation of retail rates will promote further investment by all potential providers and lead to the development of a healthy competitive market.

C. Broadband Services.

As Verizon and others have explained at length in connection with the Commission's various broadband-related proceedings, the country is in desperate need of a comprehensive national broadband policy that relies on the unfettered market to promote investment and innovation – a market that is free of the current one-sided regulatory constraints that apply only to local telephone companies.

We continue to believe that the best way for the Commission to establish such a policy is to start fresh by classifying *all* broadband services – *including both bundled high-speed information service offerings and stand-alone transmissions services* – under Title I of the Act. Among other things, doing so would make clear that broadband services and facilities are not subject to unbundling requirements. Regardless, even if the

Commission were to classify some broadband as common carriage subject to Title II, there still would be no basis for imposing an unbundling obligation under the impairment standard in the Act.

As an initial matter, the Commission itself has correctly recognized that broadband services are part of a distinct market that must be analyzed separately from traditional telephone services. Within the broadband market itself, there are two distinct classes of customers: larger business customers and mass market customers (which include both residential and smaller business customers). In each case, local telephone companies are decidedly minority players challenging competitors who already dominate the market, and there is no basis for imposing an unbundling obligation.

Larger business customers. In this segment of the market, the local incumbents are at best secondary players. The leading providers of the relevant services – predominantly ATM and frame relay – are the major long distance carriers who collectively control roughly two-thirds of the nationwide market for these services. They do so, moreover, without relying on unbundled elements. Rather, they use a combination of their own extensive long-haul networks, their own local distribution networks (including fiber and terrestrial wireless links), and special access circuits leased from either the local incumbents or alternative sources. And where, as here, other providers dominate a segment of the market without using unbundled elements, there is no conceivable basis for a finding that they are competitively impaired without access to unbundled elements to serve these customers.

Mass market customers. In the mass market segment, the Commission itself repeatedly has found both that the market is developing on a competitive basis and that cable companies are dominant. The local telephone companies again are secondary players, with barely half the market share of the dominant cable companies. In addition, competition is emerging from at least two other independent platforms (satellites and terrestrial wireless). And all of these competing facilities-based platforms offer service that is more widely available than the DSL service provided by local telephone companies.

Moreover, while cable and satellite-based providers initially focused on residential customers – and cable companies alone now have more than *10 million* subscribers and offer service to *more than 75 million* homes – they also are now aggressively pursuing business customers. For example, a recent Yankee Group report found that cable companies already had obtained *more than 500,000* business subscribers to cable modem service by the end of 2001. And satellite-based providers, who rolled out two-way services earlier this year, now offer broadband services tailored to the business market as well.

As Dr. Alfred Kahn put it, "the very idea of maintaining and expanding unbundling obligations at TELRIC rates for ILEC services, when these not only face stiff competition but have only one-half the market share of their major, unregulated rivals,

who are subject to no such obligations cannot possibly be compatible with the spirit of the Telecommunications Act." The D.C. Circuit confirms that it is not: "nothing in the Act appears a license ... to inflict on the economy the sort of costs [engendered by unbundling] under conditions where [the Commission has] no reason to think doing so would bring on a significant enhancement of competition."

Indeed, imposing one-sided unbundling requirements on the new entrants into this market segment would serve only to undermine investment incentives, and impede continued development of competition to the dominant cable incumbents. Accordingly, the Commission should decline to impose such a requirement for use in providing broadband services. In particular, it should decline to re-impose a line sharing requirement, eliminate the requirement to provide collocation at the remote terminal, decline to impose an unbundling obligation on packet switches and other advanced service equipment, and decline to impose an unbundling obligation on fiber-loop facilities for use in providing broadband services.

I look forward to further discussion of these issues with you.

Sincerely,

William P. Barr

CC:

Commissioner Abernathy
Commissioner Martin
Commissioner Copps
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July 16, 2002

Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, SW
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Dear Chairman Powell:

I congratulate you on the Commission's victory in the Supreme Court in the TELRIC pricing cases. The Commission, its staff, and its lawyers demonstrated a great deal of dedication in defending its rules in the various stages of litigation, and you have every reason to be proud of their efforts.

The Court's decision establishes that the Commission had the authority under the 1996 Act to adopt TELRIC as the pricing methodology for unbundled elements. It does not, however, resolve either the numerous disputes about how the existing rules should be interpreted and applied, or whether those rules should be modified to ensure the appropriate incentives for efficient investment, entry, and other competitive decisions by all providers. As you are no doubt aware, parties routinely offer views as to the meaning of TELRIC in the course of section 252 arbitrations and section 271 proceedings that differ starkly from the views expressed by the Commission before the Supreme Court, and states themselves have adopted (and continue to adopt) interpretations that depart widely from those views as well.

Accordingly, the Commission should provide greater guidance as to how the existing rules can be applied in the most economically appropriate manner possible, and ultimately modify the rules to the extent necessary to ensure they send the right economic signals to all providers. It can do so through a number of proceedings: in its review of section 271 applications, in the *Triennial Review* rulemaking, where a number of parties have already raised pricing issues, and in any arbitration or other such proceeding that may come before the Commission.

With respect to the existing rules, the disputes typically center on five key issues that are central to an economically appropriate forward-looking pricing scheme. As previously explained by a number of prominent economists including Dr. Alfred Kahn and this Commission's former chief economist, Dr. Howard Shelanski, additional clarification with respect to each will help produce forward-looking cost-based prices that are more appropriate for use in today's marketplace.

First, the Commission should further clarify the appropriate calculation of the cost of capital. While the Court endorsed the use of the currently authorized 11.25% rate of return as a reasonable starting point, it agreed with this Commission's conclusion that this figure should be "adjusted upward" to the extent that the relevant risks warrant doing so. As the Commission explained to the Court, "an appropriate cost of capital determination takes into account not only existing competitive risks . . . but also risks associated with the regulatory regime to which a firm is subject." (FCC Reply Brief at 12 n.8.)

Both these types of risk require an upward adjustment to the 11.25% starting point. As the Fact Report filed on behalf of Verizon and others in the *Triennial Review* demonstrates, both today and going forward, incumbents face significantly greater competitive risks from both intramodal and intermodal competitors who have made substantial investments in their own facilities than when the Commission adopted the pricing rules. Moreover, the regulatory risks inherent in the competitive market assumptions embodied in TELRIC – such as the assumption that the network is replaced with the most efficient technology currently available – also require an upward adjustment to the cost of capital. Indeed, AT&T and WorldCom's own economic expert has conceded that "all the model assumptions have to be consistent. So, to the degree that it requires a competitive market to get all of the other assumptions, that would be true of the cost of capital as well."

Thus, because TELRIC requires that prices be set based on various competitive assumptions, the cost of capital calculated under TELRIC must reflect the risks associated with those assumptions. The Commission accordingly should make clear that an 11.25% cost of capital that was based on the risks an incumbent faced in the absence of competition must be adjusted upward to reflect the competitive and regulatory risks an incumbent faces providing unbundled elements priced at TELRIC. Indeed, the principal proponents of TELRIC use a materially higher cost of capital when it comes to making their own business decisions. At a minimum, a reasonable application of TELRIC principles should incorporate a cost of capital no lower than that employed by these competing providers themselves.

Likewise, a reasonable application of the existing rules must include an appropriate factor to take into account the uncollectibles that will be experienced by the carriers providing unbundled elements. As with any start-up enterprises, it is to be expected that a portion of the charges incurred by carriers utilizing unbundled elements will become uncollectible. Experience to date has borne out this expectation, with uncollectible levels substantially higher than those historically incurred for other customers. If this fact is not reflected in the underlying prices, the carrier providing the unbundled element is left holding the bag. Accordingly, a reasonable forward-looking pricing standard must fully account for the expected level of these uncollectibles, and, in doing so, must take into account ongoing developments in the marketplace.

Second, the Commission should further clarify the appropriate treatment of depreciation. Here again, the Court agreed with the Commission that TELRIC permits variations from regulatorily prescribed depreciation lives, particularly when those prescriptions are demonstrably out of date. At an absolute minimum, the Commission should make clear that the starting point

should be the same lives that are used for financial reporting purposes in accordance with well-recognized accounting principles. The Commission itself has previously approved the use of financial reporting lives in connection with section 271 applications by Verizon in Pennsylvania and Southwestern Bell in Oklahoma. Such lives are intrinsically forward-looking and are updated frequently to reflect technological and other changes that affect the length of an asset's economic life. By contrast, regulatorily prescribed lives are often not nearly as current – some parties have advocated the use of regulatory lives set as long ago as *1994*, even before the Act was passed – and are not appropriate for use even as a starting point in the marketplace of today and tomorrow.

Third, even in a TELRIC study, the assumed technology mix cannot be inconsistent with the limits of such technology. As an initial matter, although the Commission's rules and now the Court have expressly found that TELRIC requires only the use of *currently available* technologies, CLECs, and some states, have continued to base costs on theoretical or allegedly foreseeable technologies. The clearest example of this fallacy is the assumed use of the GR-303 interface in connection with digital loop carrier technology. It is neither rational nor cost-minimizing to deploy GR-303 over the long run given rapidly changing technology. Moreover, as the Commission itself recently found in connection with BellSouth's 271 application for Georgia, unbundling standalone loops using integrated digital loop carrier technology with GR-303 simply is "not practicable." Although some parties claim that such unbundling is *theoretically possible* (though not currently available), that is not the standard.

More generally, the Commission should clarify that, even for a replacement-cost model such as TELRIC, while it may require a firm to consider the *possibility* that all inputs (except wire center locations) may be varied, it does not require a firm to assume that all of its current inputs are *instantaneously* replaced with what appears to be the best or least cost technology today, or to assume false economies that supposedly would result from such an instaneous replacement. The Commission already has recognized this point in its decisions concerning the appropriate mix of switching technologies. Although an instantaneous, one-time replacement model presumably would result in only new switches perfectly sized to meet current and expected future demand, the Commission has made clear in both its Rhode Island and Georgia/Louisiana 271 orders that it is perfectly appropriate to assume a mix of new switches and growth additions and other incremental upgrades.

Nor can an extreme instantaneous and ubiquitous replacement approach be justified on the theory that the value of existing assets and therefore costs are immediately driven down to the value of the current least-cost technologies. While the costs of new technologies may have a constraining effect on the value of existing facilities, the scope of that effect depends on a complex interaction of different variables and in many cases will not actually lower the cost of providing service with the existing asset. To take one simple example, if Boeing were to develop a new, more efficient commercial aircraft, no airline would instantaneously replace all the planes in its fleet with this new type of aircraft. Moreover, the ticket prices for airline seats would not be instantaneously reduced to reflect the lower operating costs of the new type of plane. This latter point is critical because the market at issue in UNE proceedings is not the sale of the underlying asset (such as the plane), but *services* provided over that asset (a ride between two

cities). Thus, even if the development of a new switch would constrain the resale value of an older switch in the secondary market, it does not follow that the rate for leasing capacity on the older switch would instantaneously be reduced to the cost of leasing capacity on a hypothetical network having all new switches.

Fourth, the Commission should recognize that existing fill factors in incumbent networks, which reflect the amount of spare capacity available to account for administrative needs, demand fluctuations and churn, breakage, and growth, represent a reasonable estimate for purposes of a TELRIC study. Verizon has clear incentives, due to both competitive pressures and price-cap regulation, to reduce the amount of such spare as much as possible so as to lower its costs. At the same time, there must be sufficient spare to meet relevant service quality requirements so that, for example, Verizon can provision second lines or meet spikes in demand in a particular location within the time period required by a state commission.

For example, the fill factors observed in Verizon's network are the by-product of its efforts to design and engineer a network that best balances the relevant considerations. These factors have remained remarkably stable, notwithstanding changes in technology and demand, and there is no reason to believe that they will or should increase in a forward-looking network. On the contrary, there is strong reason to believe that fill factors are at least as likely to decline as to increase. Traffic increasingly is being diverted to the networks of intermodal competitors such as wireless and cable companies. In fact, as the Commission's own ARMIS data shows, traffic volumes already have decreased in many instances. As a result, while a TELRIC network built today would have to include sufficient capacity to handle both current volumes and any growth or spikes in demand that may occur in particular locations, the average fill factor going forward is as likely to be lower as it is to be higher.

Fifth, the Commission should continue to make clear that carriers are entitled to recover the non-recurring costs they incur to make unbundled elements available. While the Commission previously held precisely that, some parties continue to claim (with varying degrees of success) that these costs should be ignored, typically on the theory that the tasks would be costless in some purely hypothetical future network. But the Commission has rejected this very claim in the context of loop conditioning charges where some of the same parties argued that conditioning would not be required in an ideal future network. As it has in the past, the Commission should continue to make clear that these very real costs must be recovered from the carriers on whose behalf they are incurred.

In addition to clarifying how the existing rules should be interpreted and applied so as to be as economically appropriate as possible, the Commission also should consider modifications to those rules to make them appropriate for use in today's competitive marketplace. In particular, the Commission should alter its methodology to eliminate the assumption that the existing network is completely "reconstructed" to reflect a technology mix that goes beyond what likely will ever be in place in any real-world network.

A more economically correct approach would look to what the network is expected to look like during a reasonable, forward-looking planning period over which it is possible to

predict what technologies will be deployed in the network. In a market with rapidly changing technologies, such a period may be in the range of three to five years, which, as the Court observed, also is the typical length of interconnection agreements. Because the network that will be in place during such a planning period represents the forward-looking network the incumbent will use to provide unbundled elements, the cost of that network is the most economically correct measure of forward-looking costs.

As Drs. Kahn and Shelanski have explained, it also is the economically appropriate target for competing providers to shoot at as they make investment decisions of their own. If they are able to deploy more efficient technologies than the incumbent has in place, or deploy them in a more efficient manner, then they should do so. This, in turn, will prompt the incumbents to invest in efficiency-enhancing measures of their own, and so on as the cycle continues. This is the essence of what economist Joseph Schumpeter termed the process of "creative destruction" that is central to the workings of a market economy. And it is critical to instilling all competing providers with the incentive to make economically rational investments in the telecommunications sector.

In sum, this letter touches on a few key issues that have arisen concerning how TELRIC is to be interpreted and concretely applied in setting rates and whether it should be modified to better estimate forward-looking costs. These same disputes have been, and continue to be, echoed in section 252 arbitrations and 271 proceedings across the country. The Commission can and should use proceedings before it to resolve some of these fundamental pricing issues. Doing so will provide much-needed additional certainty and reduce the burden that these proceedings place on the resources of carriers and state commissions alike. More fundamentally, Commission resolution of these issues can help ensure that TELRIC is interpreted in the most economically appropriate manner so that UNE prices provide the best possible market signals to ILECs, CLECs and intermodal competitors alike, a result that is critical to the continued investment by all competing providers.

Sincerely,

WPBarr (by MK)

William P. Barr

Cc: Commissioner Abernathy
Commissioner Copps
Commissioner Martin

1515 North Court House Road
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Arlington, VA 22201-2909

January 9, 2002

Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, SW
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Dear Chairman Powell:

I applaud your initiation of a new proceeding on the appropriate regulatory classification for broadband services.

The need for a national broadband policy is critical. While cable companies are moving to enhance their already dominant position in broadband – through the merger of AT&T Broadband and Comcast, for example – their key competitors continue to be hamstrung by onerous common carrier regulations designed for the traditional voice world as it existed in years gone by. If the broadband market is to develop on a competitive basis, it is critical that the Commission remove artificial barriers to investment and, most importantly, that it treats all broadband providers alike. Further, handicapping telephone company broadband services thwarts the ability of telephone companies to compete with cable in its core video market. Only by establishing a competitively neutral national broadband policy can the Commission ensure that market forces, not regulation, will determine the winners and losers in the broadband and video marketplaces.

We believe that the best way for the Commission to establish a comprehensive policy for these new services is to start afresh by declaring that all broadband services fall under Title I of the Act. This is certainly the right approach for our bundled high-speed information service offerings, given that the Commission has long classified all of our other information services under Title I. *But it is just as essential for all broadband transmission services, regardless of whether they are part of a bundled service offering or offered on a stand-alone basis.* It is therefore vital that the Commission's upcoming proceeding address the appropriate regulatory classification for these stand-alone broadband transmission services.

There are strong policy reasons and ample legal authority for classifying *all* broadband services – *including stand-alone transmission services* – under Title I, regardless of the heritage of the company that provides them. Although the full case will be made in the upcoming proceeding, there are a number of reasons why the Commission should strongly consider this approach from the outset.

First, the Commission must eliminate regulatory requirements that deter investment in broadband facilities if phone companies and other broadband providers are to have appropriate market-based incentives to build broadband facilities. As you have recognized, this country is still in the early stages of broadband deployment, and billions of dollars of new investment are needed to increase the availability of broadband services. Classifying broadband transmission services under Title I will allow the Commission to adopt a new policy specifically tailored to these new services – one that will free the market to drive efficient investment.

Second, classifying broadband transmission services under Title I will avoid creating a significant disincentive for the owners of broadband facilities to provide these services on a stand-alone basis. If the Commission were to place only bundled high-speed information services under Title I, then telephone companies and cable companies alike would be discouraged from using their facilities to offer stand-alone broadband transmission services, whether to their own customers or to other providers as an input for new service offerings. Put to a choice of using their broadband facilities to offer either unregulated bundles of services or heavily regulated pure transmission, companies likely will choose the former.

Third, the Commission has ample legal authority to declare that all broadband transport services fall under Title I – though it could not lawfully do so for one class of providers only, such as for cable companies but not telephone companies. Whether provided by telephone companies or cable companies, high-speed data transmission may constitute a form of "telecommunications" under the terms of the Communications Act. But that does not mean that, when offered on a stand-alone basis, the resulting service must be classified as a "telecommunications service" (which the Commission has interpreted to be synonymous with common carriage) subject to common carrier regulation under Title II.

On the contrary, it is well established that telephone companies can be common carriers for some purposes but not others, and telephone companies have long provided a broad array of non-common carrier services. In upholding the right of telephone companies to offer dark fiber services on a non-common carrier basis, the D.C. Circuit noted that "[w]hether an entity in a given case is to be considered a common carrier" turns not on its typical status but "on the particular practice under surveillance."[1]

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[1] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994); *see also NARUC v. FCC*, 533 F. 2d 601, 608 (D.C. Cir. 1976) (finding it "logical to conclude that one can be a common carrier with regard to some activities but not others")..

Traditionally, the Commission has imposed common carrier regulation on services only to counteract market power in the underlying transport market.[2] Absent such market power, the Commission has allowed service providers to elect for themselves whether to offer their services on a common carrier or non-common carrier basis. And it is clear that telephone companies can act as non-common carriers where they offer transmission services or facilities, just as they can for other types of services.[3]

In the broadband market, telephone companies are the new entrants challenging the cable incumbents, leaving no reason for the Commission to subject their broadband offerings to the requirements of Title II. Moreover, there is no inconsistency in treating telephone companies as common carriers in the narrowband voice market but not in broadband, given the very different economics and competitive dynamics of the two markets. Accordingly, the Commission has ample legal authority to allow telephone companies to elect to offer broadband transmission services on a non-common carrier basis.

Finally, the Commission has previously adopted precisely the approach advocated here to permit other emerging markets and technologies to develop free of regulatory constraints. In its *Computer II* decision, for instance, the Commission found that, although it had jurisdiction over "computer-enhanced" services under Title I, it would not serve the public interest to subject enhanced services to traditional common carriage regulation under Title II because, among other reasons, the enhanced services market was "truly competitive."[4] And it reached the same conclusion for computers and other forms of customer premises equipment that were once part of the AT&T services tariffed under Title II. Just as the Commission has used Title I in the past to enable market forces to shape then-emerging markets, it should do so again with broadband.

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[2] *See, e.g., AT&T Submarine Systems, Inc.*, Mem. Op. and Order, 13 FCC Rcd 21585, 21589 ¶¶ 9, 12 (1998) (explaining that "public interest requires common carrier operation" of facilities only where incumbent operator "has sufficient market power to warrant regulatory treatment as a common carrier"); *Cox Cable Communications, Inc., Commline, Inc. and Cox DTS, Inc.*, Mem. Op., Decl. Ruling, and Order, 102 F.C.C.2d 110, 121-22, ¶¶ 26-27 (1985) (finding no "compelling reason" to impose common carrier regulation on carrier that had "little or no market power"); *see generally* M. Kende, Office of Plans and Policy, FCC, *The Digital Handshake: Connecting Internet Backbone*, at 9 (OPP Working Paper No. 32, Sept. 2000) (common carrier regulation "serve[s] to protect against anti-competitive behavior by telecommunications providers with market power. In markets where competition can act in place of regulation as the means to protect consumers from the exercise of market power, the Commission has long chosen to abstain from imposing regulation.").

[3] *See, e.g., Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999) (upholding regulation of undersea fiber optic telecommunications cable on non-common carrier basis); *Southwestern Bell Tel. Co.*, 19 F.3d 1475 (recognizing provision of dark fiber on non-common carrier basis); FLAG Pacific Limited, *Cable Landing License*, DA00-2568 (Int'l Bur. 2000) (involving undersea telecommunications cable on a non-common carrier basis); FLAC Atlantic Limited, *Cable Landing License*, DA99-2041 (Int'l Bur. 1999) (same).

[4] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, 430, ¶ 119, 432, ¶ 124, 433, ¶ 128 (1980) ("*Computer II*").

You suggested in a recent speech that the proper response when "someone advocates regulatory regimes for broadband that look like, smell like, feel like common carriage" is to "scream at them." We're not screaming, but we are asking the Commission in the upcoming proceeding seriously to consider treating *all* broadband services under Title I, thus allowing marketplace competition to deliver better services at lower prices – just as the Commission did with such spectacular success in the case of computers, the Internet, and other information services.

Sincerely,

William P. Barr

Cc: Commissioner Abernathy
Commissioner Copps
Commissioner Martin

Mr. Chairman, I am pleased that we are carefully considering the President's efforts to fight terrorism. While I think that much of the criticism directed towards the Administration is inaccurate, it is important that we fully discuss these issues. I think that the Administration has done a good job of developing ways to bring terrorists to justice, and I find them to be reasonable tools in the fight against international terrorism. I hope that my colleagues will join me in supporting the Administration's efforts to combat terror.

Chairman LEAHY. We have on the panel former Attorney General William Barr. Mr. Barr it was, as always, good to be with you last week. I enjoyed our conversations and a chance to get caught up on a lot of subjects; and Professor Heymann, who is the former Deputy Attorney General of the United States and one who has spent a lot of time in this room before the Committees; former Attorney General Bell from Duke University; Scott Silliman, who is no stranger to the members of this Committee. He is the executive director of the Center on Law, Ethics and National Security, Duke University; Kate Martin, who is the director of the Center for National Security Studies; and Neal Katyal, a visiting professor, Yale School, who is now a professor of law at my old alma mater, Georgetown.

Attorney General Barr, if you would like to—first off, I want to thank all of you for staying. This has been a long morning. Those of you who have been in the administration know that when we accommodate the requests of the administration and the senior member of the President's party to have an administration witness come, that they get a chance to go a little longer than we thought.

General Barr, good to have you here.

STATEMENT OF WILLIAM P. BARR, FORMER ATTORNEY GENERAL OF THE UNITED STATES

Mr. BARR. Thank you, Mr. Chairman, Senator Hatch.

I would like to briefly touch on the legality or the constitutionality of the military tribunal order of the President, and then recognize that there are really two issues beyond that, and that is whether it is prudent and advisable in a particular circumstance to use those procedures or whether greater rights and procedures should be given, in a particular case, given to a foreign national who is at war against the United States.

And then, finally, the so-called civil rights concerns, and the understandable concerns that may emerge if these things were to be applied to people within the United States.

I think there is no doubt that the President was well within his constitutional authority to promulgate this order, as his predecessors took similar steps. It is important to recognize we are talking here about two distinct realms.

There is a fundamental difference between the Government, when it is acting in a law-enforcement capacity, that is, when it is acting within the framework of civil society, regulating civil society, setting up procedures, processes, rights, levels of appeal, and so forth, the rules of the game within society, and the realm, when the Government is acting in national defense, that is, when that society comes under attack by foreign adversaries.

They are wholly different, and the relationship between the Government and the individual changes radically once there is a state of armed conflict from a foreign or armed adversary. In that case,

where there is a state of armed conflict, as the Supreme Court has recognized, we are now dealing with the national defense power of the United States, the law of war applies and tribunals are part of the war power.

Whether or not a combatant is engaged in military operations or has been captured, the relationship between the sovereign Government and that individual is the relationship of us exercising national defense power against that individual. That is what military tribunals involve, the exercise of military or, that is, the war power as to those individuals. It is not the judicial power of the United States.

Now no war need be declared for this power to come into being. It is an adjunct of any lawful use of force by the Government. And the Supreme Court and Congress have recognized repeatedly that the country can exercise its powers of national defense and engage in armed conflict without a formal declaration of war. And, indeed, from the very foundation of the Republic, it was recognized, particularly where the United States is attacked and the President is responding to attacks, there is no requirement for a declaration of war for there to be the lawful use of the war power.

The question has been raised whether Congress has to authorize the use of military tribunals. The answer is obvious. Congress does not have to authorize it because it is an incident of the war power. As the Supreme Court has repeatedly said, it is just like the President moving a division from Point A to Point B. It is incident to the war power just like hearings and subpoenas are incident to the legislative power, and therefore it does not require any specific authorization.

So, even if there was nothing in the U.S. Code or in the laws, the Commander-in-Chief could constitute military tribunals to try cases that arise under the laws of war. But, of course, the fact is that Congress has sanctioned them and specifically recognized their jurisdiction in 10 U.S.C. 1821.

Now one of the problems arises because people naturally feel concerned when these tribunals would be used against people in the United States. I think there seems to be a visceral understanding that overseas, where we apprehend people on the battlefield, it does not make much sense to bring them back and try them in our civil courts for violations of the laws of war, but there seems to be a concern that, gee, what happens when someone comes into the United States?

From a legal standpoint, there is no geographical limit to the principle that when the Government is defending the country and exercising its war powers against armed foreign nationals who are waging war against the United States, it does not matter whether those nationals are overseas or where they have successfully entered the United States.

The last time that an armed adversary came into the United States abiding by the rules of war was, I think, in 1814, when the British came in their red coats openly bearing arms. They were not entitled to our constitutional protections. They are not entitled to due process. Their rights as combatants come from the laws of war, not our Constitution.

The fact that a foreign adversary enters the United States successfully does not mean that all of a sudden he becomes invested with constitutional rights. If he robs a bank, he breaks the civil order and we proceed against him, he gets the same rights as a citizen. If he is bearing arms against the United States and waging war against the United States, he gets no right under the Constitution. His rights arise under the laws of war.

Now here we have a different kind of entry, surreptitious entry by an enemy, which is itself a violation of the laws of war. They did not come in uniform, they did not come openly bearing arms, and they came with the intent of destroying civilian targets. For the same reason that a uniformed adversary who sets foot in this country is not entitled to constitutional protections, the same is true, if not more so, for someone who violates the laws of war by entering surreptitiously, which the Supreme Court has repeatedly held and has averted to numerous times.

Nevertheless, that does raise the issue, when you start using military tribunals against people who are present in the United States, there may be an understandable concern that, in theory, this is a device that could be abused and taken too far. The question really is, is it being taken too far here, and there is no evidence at all that it is. In fact, we have a very clear objective, events that establish that this is not being used as a pretext.

We are in a very dangerous situation of unprecedented and kind of war we are waging. It has to be predicated on the President's determination that this is triable, these individuals have committed violations of the law of war that are traditionally triable in military tribunals, it applies only to noncitizens, and notwithstanding some of the hysterical commentary, the Supreme Court has not been stripped of habeas corpus jurisdiction over individuals who are in the United States. This language was in President Roosevelt's executive order. It follows President Roosevelt's executive order and *Quirin* shows that the Supreme Court could exercise habeas corpus to ensure that there was no abuse.

Thank you.

[The prepared statement of Mr. Barr follows:]

STATEMENT OF HON. WILLIAM P. BARR, FORMER ATTORNEY GENERAL OF THE UNITED STATES

Mr. Chairman, Senator Hatch and the Members of the Committee, I am pleased to provide my views on the important issues surrounding our response as a Nation to attacks against our homeland and the continuing national security threat posed by al Qaeda. By way of background, I have previously served as the Assistant Attorney General, the Deputy Attorney General, and the Attorney General of the United States. I have also served on the White House staff and at the Central Intelligence Agency. The views I express today are my own.

President Bush's decision to authorize the use of military tribunals against members of al Qaeda is not only well within his constitutional authority, but is supported by ample historical precedent and practical common sense. Al Qaeda is an armed foreign force that is waging war against the United States. In confronting such an enemy, the President is acting as Commander-in-Chief of our armed forces—he is exercising the war powers of the United States. Our national goal in this instance is not the correction, deterrence and rehabilitation of an errant member of the body politic; rather, it is the destruction of foreign force that poses a risk to our national security. It is anomalous to maintain that the President has constitutional authority to order deadly bombing strikes or commando raids against such an enemy, while at the same time maintaining that, if the enemy surrenders or is captured, the President is suddenly constrained to follow all the constitutional

protections applicable to domestic law enforcement. Foreign nationals who are in a state of armed conflict with the United States do not enjoy the same constitutional rights as American citizens. Since before the Revolutionary War, it was recognized that those who violate the laws of war during an armed conflict have the status of "unlawful belligerents" and are subject to military trial for their offenses. Whether they pursue their deadly purpose in a training camp in Afghanistan or a flight school in Florida, al Qaeda members are unlawful belligerents and, under clear Supreme Court precedent, are entitled only to treatment consistent with the laws of war. Having cast their lot by waging war against the United States, they are properly judged by the laws of war.

1. THE PRESIDENT HAS CONSTITUTIONAL AUTHORITY TO ORDER THE TRIAL OF AL QAEDA MEMBERS BY MILITARY TRIBUNAL.

On September 11, 2001 this Nation was attacked by a highly-organized foreign armed force known as "al Qaeda." The attack cost more American lives and caused more property damage than the Japanese sneak attack on Pearl Harbor. This same organization has declared itself at war with the United States and has stated its intention to use any weapons at its disposal—including weapons of mass destruction—against both civilian and military targets. Prior to September11, 2001, al Qaeda acknowledged perpetrating armed attacks on our military personnel, our naval ships, and our embassies. al Qaeda operatives and their supporters are presently engaged in the field against our own military forces in Afghanistan. They have personnel in over 60 countries, where they are undoubtedly poised to attack United States interests. There can be little doubt that "cells" of this organization remain in the United States, ready to carry out further attacks.

It is clear that a state of war exists between the United States and al Qaeda. Al Qaeda has openly proclaimed a war against the United States and has repeatedly carried out attacks against us. The President, as Commander-in-Chief, is empowered to take whatever steps he deems necessary to destroy this adversary and to defend the Nation from further attack. As the Supreme Court recognized in The Prize Cases, 67 U.S. 635, 668 (1862):

> If a war be made by the invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "unilateral."

In this case, the President's judgment that a state of armed conflict existed is confirmed by the actions both of the Congress and our allies. By its Joint Resolution of September 18, 2001, Congress recognized that the attacks of September 11th "render it both necessary and appropriate that the United States exercise its rights to self-defense. "Authorization for the Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224, (2001). Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. *"Id.* §2(a). The Joint Resolution expressly recites that it constitutes a specific statutory authorization for the use of military force within the meaning of the War Powers Resolution. *Id.* §2(b). Obviously, the President does not need a joint resolution of Congress to enforce our domestic criminal laws, and those laws are not generally for the "self-defense" of the Nation. Similarly, our NATO allies have recognized that the attacks of September 11th constitute acts of war by invoking the mutual self-defense provisions of Article 5 of the North Atlantic Treaty.[1]

When the United States is engaged in an armed conflict and exercising its powers of national defense against a foreign enemy, it is acting in an entirely different realm than the domestic law enforcement context. The Nation, and all those who owe her allegiance, are at war with those foreign enemies. That is not an analogy or a figure of speech—it describes a real legal relationship and one that is fundamentally different from the government's posture when it seeks to enforce domestic law against an errant member of society. When we wage war, the Constitution does not give foreign enemies rights to invoke against us; rather, it provides us with the means to defeat and destroy our enemies. As President Lincoln understood, and

[1] Article 5 of the North Atlantic Treaty can only be invoked in the case of an "armed attack" against a NATO member.

repeatedly said, maintaining the security of our Union is the sine qua non of all civil liberties. It is the basis upon which the exercise of all other civil rights depends.

Much of the criticism of the President's Executive Order authorizing the use of military tribunals stems from a fundamental confusion between the realm of domestic law enforcement and the realm of military defense of the Nation. This is not a confusion that has been shared by past Presidents, past Attorneys General, or the United States Supreme Court. Since the Revolutionary War, this country has used military tribunals to punish violations of the laws of war by our enemies during armed conflicts. Congress has consistently confirmed the jurisdiction of these tribunals by statute and the Supreme Court has recognized that military tribunals lie outside the judicial power and the constitutional norms that must attend a civilian trial. Military tribunals constitute part of the executive function of the actual prosecution of war—they are an instrument at the President's disposal as part of the overall war effort. The President's decision to use them in our war against al Qaeda is supported by historical precedent, Supreme Court decisions, and common sense.

American history is replete with examples of the use of military tribunals to try foreign combatants for violations of the laws of war. The legitimacy of their use does not depend upon the nature of the armed conflict, whether a formal declaration of war has been made, or whether the unlawful belligerent committed the violation here or abroad. Thus, in 1780, George Washington appointed a "Board of Commissioned Officers" to try Major John Andre, a British spy who was accused of receiving strategic information from Benedict Arnold. In 1818, then-General Andrew Jackson ordered two British citizens tried by a military tribunal for inciting Seminole Indian attacks against American civilians in Georgia. Military tribunals were used extensively during the Civil War to try confederate soldiers and spies who acted out of uniform to attack Union ships or industrial plants. See *Ex Parte Quirin*, 317 U.S. 1, 31 n. 9 (1942) (listing examples). Indeed, a military tribunal, known as the Hunter Commission, was empanelled to try those responsible for the assassination of President Lincoln. In opining on the constitutionality of such a commission, Attorney General Speed wrote: "The commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the law and usage of war. "11 U.S. Op. Atty. Gen. 297, 305 (1865). He further opined that the laws of war provided for military trials for "secret participants in hostilities, such as banditti, guerillas, spies, etc. "*Id.* at 307.[2] Attorney General opinions have also recognized that military tribunals could be used to try Indians for crimes against civilians where a state of open hostility between an Indian tribe and the United States existed. See, e.g., 14 U.S. Op. Atty. Gen. 249 (1873) (Modoc Indian prisoners accused of crimes against civilians during hostilities with the United States could be tried by military tribunal). *See also* 13 U.S. Op. Atty. Gen. 470, 471 (1871) (noting that war need not be "formally proclaimed" for the laws of war to apply to military engagements with Indian tribes).

The most recent and most apt example of the use of military tribunals is the trial of the eight Nazi saboteurs that took place before seven military officers here in Washington, D. C. in July of 1942. These foreign operatives were trained in what the Supreme Court referred to as a "sabotage school" near Berlin. *Ex Parte Quirin*, 317 U.S. at 21. They entered the United States surreptitiously, moved about in civilian dress, and were trained and equipped to attack civilian targets such as roads, bridges and industrial plants. They were initially arrested and detained by civilian authorities. President Roosevelt determined that they should be tried for violations of the laws of war before a special military commission, composed of seven United States army officers.

In *Ex Parte Quirin*, a unanimous Supreme Court upheld the jurisdiction of the military commission to try these individuals for violations of the laws of war. Echoing Attorney General Speed, the Supreme Court found that the military tribunal was "an important incident to the conduct of war," that allowed the President "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." 317 U.S. at 28–

[2] Attorney General Speed's opinion has stood the test of time. Recently, a federal district court rejected a challenge to the jurisdiction of the Hunter Commission in reviewing the denial of a request to correct military records pertaining to Dr. Samuel Mudd, the medical doctor who aided John Wilkes Booth and David Herold after the assassination. *See Mudd v. Caldera*, 134 F. Supp. 2d 138 (D.D.C. 2001). Relying upon the Supreme Court's *Quirin* decision, the district court found that "persons such as spies or combatants not wearing uniforms or in disguise, who may come secretly across enemy lines for the purpose of robbing, killing or destroying bridges, roads, canals, etc.," are "unlawful belligerents" subject to military trial for violations of the laws of war. *Id.* at 145.

29. Thus, these tribunals were part and parcel of the Commander-in-Chief's prosecution of the war effort. The Supreme Court held that military tribunals were not an exercise of the judicial power conferred by Article III of the Constitution, and therefore were not subject to constraints imposed upon civilian criminal process by the Fifth and Sixth Amendments. *Id.* at 38–39. The Court noted that unlawful belligerents had been subject to military trial since before the framing of the Constitution, and that Congress had authorized the trial of alien spies by military tribunal shortly after the adoption of the Constitution. *Id.* at 41. The Supreme Court also noted that anomaly that would be created by a contrary ruling—our own soldiers would be subject to military trial for violations of the laws of war while enemy aliens charged with such violations would receive all the constitutional protections of a civilian trial. *Id.* at 44.[3]

The Supreme Court's ruling in *Quirin* makes clear that unlawful belligerents cannot invoke the constitutional guarantees applicable to a civilian trial and are not entitled to judicial review of the results of a military tribunal. Indeed, *Quirin* reserved the issue whether unlawful belligerents were entitled to a trial at all before the President could subject them to "disciplinary measures. "*Id.* at 47. *Qurin's* holding does not turn on location within or outside the United States, the potential applicability of civilian crimes, the availability of civilian courts, or even the citizenship of the individuals involved. Rather, *Quirin* turns entirely on status as "unlawful combatants" under the laws of war. It is this status that entitles the President to exercise military power against such persons—including the use of military tribunals.

Nor need we examine the issue reserved in *Quirin* of the Executive's authority to establish military tribunals absent legislative mandate. Congress has authorized the use of military tribunals consistent with the laws of war in the Uniform Code of Military Justice. Title 10, United States Code, Section 821, provides that: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." The President is also given authority to prescribe the rules for all military tribunals, including "pretrial, trial, and post-trial procedures" and "modes of proof." *See* 10 U.S. C. §836. In *Application of Yamashita*, 327 U.S. 1, 7–8 (1946), the Supreme Court held that, by enacting the precursors to these provisions in the Articles of War, Congress had "sanction[ed] trial of enemy combatants for violations of the laws of war by military commission," and had "adopted the system of military common law applied by military tribunals."

The President's judgment that members of al Qaeda and those who knowingly give them aid and comfort are subject to military justice is clearly supported by the facts and the law in this case. The very raison d'etre of al Qaeda is to violate the laws of war by targeting innocent civilians in order to create a state of terror. As the Supreme Court noted in *Quirin*, never in the history of our Nation have foreign enemies who infiltrated our territory been accorded the status of civilian defendants with all the rights enjoyed by citizens of the United States. *See* 317 U.S. at 42 ("It has not hitherto been challenged, and, so far as we are advised, it has never been suggested in the very extensive literature of the subject that an alien spy, in time of war, could not be tried by military tribunal without a jury.") (footnote omitted). If armed al Qaeda members had made a military landing on Manhattan Island and began attacking civilians, few would argue that they were not combatants subject to the laws of war. How does the fact that they instead infiltrated the United States surreptitiously with the same evil purpose *somehow give them greater constitutional rights*? By such logic, Nazi war criminals could have avoided military justice simply by sneaking into the United States and invoking their "right" to a jury trial in civilian court.

2. Domestic Criminal Justice Procedures Will Frustrate Our Fight Against al Qaeda.

In addition to its sound constitutional and statutory basis, the President's Executive Order establishing the option of military tribunals makes good sense. It will allow for a more effective response to the al Qaeda threat, while at the same time

[3] In *Quirin*, the Supreme Court reserved the constitutional issues of whether the President needed any legislative authorization to empanel military tribunals, *see* 317 U.S. at 29, and whether Congress could "restrict the power of the Commander in Chief to deal with enemy belligerents," *id.* at 47, because it found that Congress had approved the use of military tribuanals in the Articles of War.

not insisting upon the application of constitutional and statutory rights in a context where they are inapposite and where their wooden application could lead to their erosion.

The constitutional protections applicable to a domestic criminal trial, such as trial by jury in the district where the crime occurred, the right a grand jury indictment, and the right to confront and cross examine witnesses are designed to protect our citizenry from the power of government. They have no logical application to the exercise of military power to protect our citizenry and our government from an external foe. Indeed, these rights can be exploited by a foreign enemy to learn about our defenses and intelligence methods and make future attacks more likely to succeed.

Civilian criminal defendants have the right to obtain any statements they have made that are recorded by the government (including electronic surveillance tapes), *see* Fed. R. Crim. P. 16, prior written statements of government witnesses who testify at trial, *see* 18 U.S.C. §3500, and any material that might impeach the credibility of government witnesses. *See Giglio* v. *United States*, 405 U.S. 150 (1972). These rights are inimical to the successful confrontation of a foreign foe. Indeed, one of the key factors in the success of the attacks of September 11th was the operational security practiced by the al Qaeda members in the United States. Information disclosed during civilian trials regarding our law enforcement techniques and capabilities could assist al Qaeda in evading detection in future attacks. Moreover, a public trial can be used by civilian criminal defendants to practice what is known as "graymail. "The defense claims the necessity of revealing national security information during the trial, thus gaining significant leverage over the prosecution. We should not even allow the possibility for such an occurrence in our pursuit of al Qaeda.

Civilian criminal defendants have the right to challenge the seizure of evidence under the Fourth Amendment. They can also challenge the authenticity of physical evidence by demanding that a chain of custody be established. These rules cannot logically be applied to "evidence" uncovered in a military theater such as Afghanistan. Our military forces are rightly concerned with winning the war—not securing crime scenes and careful documentation of chains of custody.

Finally, civilian trials in this context are not safe for grand jurors, judge, petit jurors or civilian witnesses. In the aftermath of these attacks and our military response, a prolonged civil trial would make the federal courthouse itself and all trial participants clear targets for al Qaeda reprisals. Military trials held on military installations—whether here or abroad—will be safer for all concerned.

In closing on this issue, let me say that all power is subject to abuse. But neither our constitutional law nor our policy toward terrorism should be made by parade of horribles. The President has limited the application of his order to foreign nationals who: 1) are al Qaeda members; 2) commit acts of international terrorism against the United States; or 3) knowingly aid and abet acts of international terrorism against the United States. As cases like *Quirin* and *Yamashita* make clear, the writ of habeas corpus is always available to test the jurisdiction of military tribunals in Article III courts. Moreover, our courts martial and military tribunals have a long history of rendering impartial justice. Many Nazi and Japanese combatants were acquitted of war crimes by military tribunals. The President's Executive Order promises "full and fair trials" under procedures to be promulgated by the Secretary of Defense. I have no doubt those procedures will, consistent with 10 U.S.C. §836, incorporate as many aspects of civilian procedure are practicable under the circumstances. We should not pass judgment on these military tribunals until they themselves are allowed to operate and pass judgment. We insult our military by comparing these tribunals to those established by foreign dictators or by slighting them as "Kangaroo courts" before they have even been convened.

3. The Attorney General May Lawfully Withhold Operational and Other Details Regarding an Ongoing Criminal Investigation.

The Committee has also expressed some concern over the fact that the Department of Justice has declined to release statistical data regarding its continuing investigation into al Qaeda activities and operatives here at home. In my view, this criticism is unfounded. The Sixth Amendment guarantees a criminal defendant "a speedy and public trial. "In addition, the Supreme Court has found that the public has a common law and First Amendment right to access to proceedings central to the criminal process, such as pretrial hearings. *See generally Richmond Newspapers* v. *Virginia*, 448 U.S. 555 (1980). These rights have never been interpreted to extend to operation details of the investigative stage of criminal law enforcement. Our laws provide for strict secrecy of grand jury proceedings, both for the protection of individuals called before the grand jury and the integrity of the government's investiga-

tion. See Fed. R. Crim. P. 6(e). Affidavits in support of arrest and material witness warrants as well as indictments are often filed with the court under seal in cases where they may contain information that could compromise ongoing criminal investigations. In its Exemption 7, the Freedom of Information Act expressly recognizes that information that "could reasonably be expected to interfere with enforcement proceedings," including compromising confidential sources or law enforcement "techniques or procedures" is exempt from public disclosure. See 5 U.S.C. § 552(b)(7).

That is undoubtedly the case here. Information about who is presently detained by the government, when and where they were arrested, their citizenship and like information could be of great value to criminal associates who remain free. First, it would provide al Qaeda with information regarding what "cells" or operations have been compromised and which "cells" or operations are still intact. Equally dangerous, it could allow al Qaeda to extrapolate the kind of criteria and sources of information law enforcement was employing in attempting to locate al Qaeda operatives and thereby tailor their activities to avoid further detection. These are exactly the kinds of harms that FOIA Exemption 7 is designed to protect against.

Finally, as Attorney General Ashcroft has noted, there may be significant privacy and even due process concerns with the wholesale release of the names of those detained in this investigation. A government "blacklist" naming individuals suspected of connections with al Qaeda could seriously affect the reputation, employment prospects, and even physical safety of the individuals involved. Moreover, such a list would be compiled based upon mere suspicion, without an opportunity for those named to marshal evidence of their innocence of the charge. *Cf. Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123 (1951). For these reasons, I believe the Department of Justice has acted properly in refusing to release operational and statistical information that could compromise ongoing law enforcement operations and violate the rights of the individuals involved.

4. THE ATTORNEY GENERAL'S INTERIM RULE AUTHORIZING THE MONITORING OF ATTORNEY CLIENT COMMUNICATIONS IN LIMITED CIRCUMSTANCES IS CONSTITUTIONAL.

In my view, the Attorney General's rule regarding the monitoring of attorney-client communications, given the limited and unique circumstances to which it applies, is constitutional under the analysis set out by the Supreme Court in *Weatherford* v. *Bursey*, 429 U.S. 545 (1977). Three factors lead me to this conclusion. First, the monitoring is undertaken for the lawful purpose of frustrating further criminal activity that threatens innocent human life. The Supreme Court has recognized that this is a legitimate law enforcement interest that must be balanced against Fifth and Sixth Amendment rights. *See New York* v. *Quarles*, 467 U.S. 649 (1984) (recognizing "public safety" exception to Fifth Amendment requirement of Miranda warnings). Second, as in Bursey itself, the prosecution team will not learn of any conversation regarding legal strategy that might prejudice the defendant or benefit the government. *See Bursey*, 429 U.S. at 557–58 (holding that unless there was "a realistic possibility of injury to Bursey or benefit to the State, their can be no Sixth Amendment violation"). Third, the requirement that both the detainee and his attorney receive notice of the monitoring eliminates the need for prior judicial intervention under the doctrine of "implied consent. "*See, e.g.*, *McMorris* v. *Alioto*, 567 F. 2d 897, 900–01 (9th Cir. 1978 (Kennedy, J.) (applying doctrine of implied consent to searches of persons entering a federal courthouse).

The Attorney General has carefully limited his rule to prisoners who are already under Special Administrative Measures, see 28 C.F.R. § 501. 3(a), and for whom he further finds there is "reasonable suspicion exists to believe" that attorney client communications may be used to "facilitate acts of terrorism. "*Id.* § 501. 3(d). The Attorney General has indicated that he will interpret the term "reasonable suspicion," as the Supreme Court has in the case of police stops, *see Terry* v. *Ohio*, 392 U.S. 1, 27–28 (1968), to require objective facts from which a reasonable person could draw an inference that criminal activity was afoot.

This rule is a necessary prophylactic measure designed to allow the Attorney General to take appropriate action in the face of the kind of massive danger to innocent human life posed by attacks such as those perpetrated on September 11th. Faced with this kind of threat, we cannot require the Attorney General to prove to a court that the attorney client privilege has already been abused to further criminal activity. By the time the Attorney General has marshaled such facts and presented them to a court, it could well be too late. In these unique circumstances, where law enforcement acts not to gather evidence but to prevent an imminent and potentially devastating public harm, it is appropriate that the Attorney General make the initial determination without judicial intervention. Because both the detainee and his

attorney are given notice of the monitoring, they may challenge the Attorney General's actions in federal court after the fact.

CONCLUSION

The actions of the President and the Attorney General have, in my view, been measured and prudent in light of the threat to American lives and liberty posed by al Qaeda. Our Constitutional scheme contemplates that the powers and duties of the Executive Branch of government will expand in a time of national crisis or armed conflict. The swiftness and unity of purpose with which the Executive can act to defeat foreign threats to our liberty has proven an indispensable bulwark in securing our freedoms throughout our history. In perilous times, as the Framers envisioned, it has been both the energy and wisdom of a strong Chief Executive (uniquely accountable to all the people) that has ultimately protected our liberty, not undermined it. We owe our freedoms today in no small measure to the decisive actions of Abraham Lincoln and Franklin Roosevelt, taken in the face exigent danger. In the current circumstances, the real threat to domestic liberties is the artificial restriction of our powers of national defense by gratuitously expanding constitutional guarantees beyond their intended office. I have every confidence that the President and the Attorney General will protect our Nation and the liberties we hold dear. I welcome the Committee's questions.

Chairman LEAHY. I have always enjoyed having your testimony. I hate to be a bit of a bear on the light. Unfortunately, we have other constraints that require that.

Mr. Heymann?

STATEMENT PHILIP B. HEYMANN, JAMES BARR AMES PROFESSOR OF LAW, HARVARD LAW SCHOOL

Mr. HEYMANN. How long would you like me to restrict myself to, Senator Leahy? Seriously.

Chairman LEAHY. I thought the panel had been told 5 minutes.

Mr. HEYMANN. Five minutes is just fine.

I would like to explain that I think of myself here and I would like to speak today as a terrorism expert whose book is doing surprisingly well since September 11th. I don't want to focus on the constitutional issues because you have lots of other people to focus on them. I don't agree with Mr. Barr. And I would like to say as to that only that when asked what was the nearest precedent, Mike Chertoff said *Ex Parte Quirin*. *Ex Parte Quirin* is a case about eight identified people, indisputably Nazis, indisputably from Germany, sent to a military trial, a single military trial, on the charges of espionage, being behind enemy lines without uniform, which had been traditional since the Revolutionary War. Very traditional.

It is a long way to go from that to an order that covers 20 million people in the United States, lasts forever, covers any act of terrorism, whether connected to Al Qaeda or not, covers any aiding, abetting, or conspiracy towards any act of terrorism, covers harboring anybody who aided or abetted ever in the past somebody who ever in the past was a terrorist, and forever henceforth. That is a long way from *Ex Parte Quirin*, so I don't share Mr. Barr's confidence that the Supreme Court will sustain that order.

Let me go to the policies of counterterrorism. The first lesson there that everybody who has studied terrorism learns is a military lesson, and that is, after you get your gun, try very hard not to shoot yourself in the foot. Or if you are going to bomb the enemy, try not to bomb friendly forces at the same time.

The President's order on military detention, the military order which authorizes both detention and military tribunals, shoots us in the foot in a major way for no good reason.

I have to step back for one second. I feel a little bit like there are two totally different orders being discussed. Most of the hearing before the Committee was a discussion with Mr. Chertoff of the handling—nobody limited it this way, but in the back of our minds was—the handling of Al Qaeda terrorists seized in Afghanistan, where there are no courts, and subject to military trial there, and, indeed, as Mr. Chertoff said he hoped, subject to very fair trials under regulations that we have not yet seen by the Department of Defense. The trials, he suggested, may very well be public, although keeping them private is probably the primary purpose of having military tribunals in this case.

The order I am talking about doesn't have to do with a handful of people or 20 people or 40 people in Afghanistan. It covers 20 million people living in the United States, most of whom—15 million of whom—are legal residents, and their children. It says that there can be indefinte detention or a military tribural whenever the President suspects that one of this multitude is or may have been a terrorist in the past or has aided or harbored a past or present terrorist. And it makes those consequencies possible whether the terrorism involved was a large terrorist event or a trivial terrorist event—and there are terrorist events as trivial as the September 11th occasion was massive and horrible.

Whenever that takes place, the President has the extraordinary power have described. Mr. Chertoff assures us the President won't exercise the power wrongly. I believe he will do his best. But I don't think the Constitution gave the President there powers—and I don't think the President can take it and I don't think Congress should give them to President when their reach is to any of 20 million people in the United States, plus anyone else outside the United States, whom he reasonably suspects falls in those categories. A secret trial before three colonels sounds to much like Paraguay in the 1970's. We don't know whether there is to be proof beyond a reasonable doubt. We don't know whether all the evidence that the colonels see will be made available to the defense. You don't do that if you are interested in effective counterterroris unless there is a real necessity. There is lots of evidence that it is not necessary.

Now, number one, Britain hasn't found it necessary to do without judges. Germany didn't find it necessary to do without judges. Italy had a terrorist group, the Red Brigades, that numbered fully as many as Al Qaeda, and it was all in Italy. It didn't find it necessary to do without judges. We are the first ones to find it necessary to do without judges.

What I think the Congress must do, what I think is the only intelligent thing to be done, is to look at both the benefits and the costs of what is being proposed. There are two powers the President wants over every non-citizen he suspects aiding, other having aided, any form of terrorism. The first is indefinite detention. Senator Hatch made the point earlier today that everybody who is now detained is detained either as a violator of immigration laws or as somebody arrested for a crime. It is a reassuring point until you

realize that the President's order gives the Secretary of Defense power to detain anybody, without any of those protections. Second, also gives the military the power to try anyone in this cateory before military tribunals without well-specified law because there is no law of war at the moment on terrorism.

Well, what is the case for it? Now, my successor as head of the Criminal Division, Michael Chertoff, in remarkably honest and straightforward testimony, insisted that these matters could be tried properly before civilian courts. The United States has succeeded in every terrorist case, that it had to. We have extra-territorial statutes. We have the Classified Information Protection Act. We have the Foreign Intelligence Surveillance Act. We have ways of protecting witnesses. It is very hard to imagine why we wouldn't be able to try in our federal courts any of those 20 million people now living in the United States.

Michael Chertoff was arguing, well, maybe you should, maybe you shouldn't, the President should decide. The costs are immense: the foreign policy costs, the sense of insecurity of people who aren't citizens of the United States, the sense of insecurity of citizens who know that *Ex Parte Quirin* allows exactly the same thing to be done—by a Presidential order for citizens. Being unnecessary in light of the proven capacities of our prosecutors, courts, and law, the proposal has no compensating benefits.

I have 12 other points. Please get them out of my paper.

[The prepared statement of Mr. Heymann follows:]

STATEMENT OF DR. PHILIP B. HEYMANN, JAMES BARR AMES PROFESSOR OF LAW, HARVARD LAW SCHOOL

Mr. Chairman, Members of the Committee:

I am pleased to testify because the Committee is reviewing what I regard as one of the clearest mistakes and one of the most dangerous claims of executive power in the almost fifty years that I have been in and out of government. I do not say that as a civil libertarian; I have always considered public safety to be fully as relevant as democratic traditions when they really are in conflict. So my advice to members of your staff and the House Judiciary staff on the Administration's bill revised as the PATRIOT statute, was that, with some exceptions, the provisions were reasonable and often overdue. I do not have the same reaction to the President's order on military trials.[1]

At the same time I reject as "knee-jerk" the security reactions of columnists such as George Will or the law professors he quotes, including my good friend and admired colleague, Larry Tribe.[2] They are at least as dangerous as the thoughtless objections of those on the opposite side. I have personally seen and studied the effects of military courts in Guatemala where I later worked, and in Argentina, Paraguay, and the People's Republic of China. I have seen the fear and hatred they engender in a population and compared that to the immense appreciation and respect both our military and our courts have long enjoyed. I have watched the strained identification with us that the leaders of Zimbabwe and Egypt have based on our "shared" recourse to military courts, a step rejected by Britain, France, Germany, and Italy when they were under sustained terrorist attacks. (See Appendix A.) Knee-jerk reactions are no safer on one side of these issues than on the other.

We have a deep tradition—expressed powerfully in the Declaration of Independence—of confining military courts and secret proceedings to as small an area of necessity as possible.[3] Only in the following circumstances have our courts allowed

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[1] Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831 (November 16, 2001).

[2] George F. Will, *Trials and Terrorists*, WASHINGTON POST, Nov. 22, 2001, at A47.

[3] The Declaration of Independence notes: "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). "[The King] has affected to

military tribunals to try citizens and aliens alike: where in a wartime situation there are no operable civilian courts; where, before peace is declared, there is to be a trial of wartime atrocities against the internationally recognized laws of war; where spies attached to a belligerent nation have been caught behind our lines. In all other situations they have refused, in inspired language, to depart from a legal tradition so old, so important, and so much a part of what we stand for.

There is, in short, a high Constitutional presumption of civilian trials, except in a few identified situations during quite traditional wars, recognized as such by the Congress, where we could lose our freedoms to another nation. I will not argue today whether a war on many forms of terrorism continuing until this century-long modern phenomenon is ended will, unlike a war on the murderous Colombian cartels or the Mafia, qualify as a war for the Supreme Court's jurisprudence on military trials. I doubt it. In any event, the detention provisions of the same Presidential order clearly do not satisfy the specified Constitution criteria for extra-judicial detention: "invasion or rebellion" leading Congress to suspend habeas corpus.

I don't need the heavy presumption, captured by Jefferson in the Declaration of Independence, to make my case. Nor need I refer to the last six words of the pledge of allegiance. Like almost everyone else who has studied how nations have handled terrorism, I ask only that the government consider and specify openly what are the costs and benefits of any change in democratic traditions it proposes. If Attorney General Ashcroft or President Bush had done this with regard to the importance and scope of their prospective change from civilian courts to secret military tribunals, the public would not accept the change. Certainly the Congress would not agree to it.

Let me review the benefits, costs, and inflammatory breadth of the President's order.

The benefits. The proposal will help solve whatever problem remains after more than two decades of legislation and proud law enforcement experience in dealing with the difficulties of civilian trials of terrorists and spies. The Congress has passed "extra-territorial" criminal statutes that apply stern measures to terrorism committed abroad against Americans.[4] It has passed statutes allowing special electronic and physical searches of spies and terrorists from other countries and has just extended, in a very sensible way, their scope.[5] Two decades ago I helped author a statute to allow trials while protecting national secrets.[6] The intelligence investigators and prosecutors have used it with immense success. We have decades of experience in protecting witnesses. There is precedent, from the United Kingdom, that allows the conviction, as a conspirator or accomplice, of someone who has aided terrorists without proof that he had to know of the specific crime.[7] We have on several occasions flown back to the U.S. for trial terrorists arrested by U.S. intelligence or law enforcement half-way around the world.[8] In our courts there is no available exclusionary rule or other defense for a non-American searched or captured abroad, even if the search or arrest did not comply with the requirements of the Fourth (or any other) Amendment for searches and seizures in the United States.[9]

Using these well-developed capacities, we have had remarkable success in trying and convicting the terrorists responsible for the bombings of the World Trade Center in 1993 and our embassies in Kenya and Tanzania. I have a hard time thinking of the prosecutorial benefits of military tribunals over civilian tribunals so fully empowered as ours, except that the military tribunals could, by selection or message from higher authority, use their secrecy, their lesser burden of proof, and the possibility of conviction by a two/thirds vote to convict without even the evidence that a jury of angry, patriotic Americans would demand.

The costs. What then are the costs of authorizing for all non-citizens indefinite detention without trial or, alternatively, a secret military trial with secret or untested evidence before a military panel chosen and evaluated by their commander, without

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render the military independent of, and superior to, the civil power." Id. at para 14. "He has made judges dependent on his will alone, for the tenure of their offices, and the amount of payment of their salaries." Id. at para. 11.

[4] *E.g.*, Hostage Taking Act, 18 U.S.C. § 50 U.S.C. §§ 2331–2332 (2001) (killing of U.S. citizens abroad).

[5] Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–1811 (2001).

[6] Classified Information Procedures Act, 18 U.S.C. §§ 1–16 (2001).

[7] Director of Public Prosecutions for *Northern Ireland* v. *Maxwell*, [1978] 3 All E.R. 1140. See also *Regina* v. *Bainbridge* [1960] 1 Q.B. 129.

[8] *E.g.*, *U.S.* v. *Yunis*, 924F.2d 1086, 1089 (D.C. Cir. 1991); Christopher Drew, *FBI Captures Lebanese Hijacking Suspect at Sea*, CHICAGO TRIBUNE, Sept. 18, 1987, at 1.; Christopher John Farley et al., *Going Without a Prayer: An Inside Look at How the FBI and CIA Nabbed an Infamous Suspect After a Global, Four-Year Manhunt*, TIME, June 30, 1997, at 34.

[9] *U.S.* v. *Verdugo-Urguides*, 494 U.S. 259 (1990); *U.S.*

judicial review of the adequacy of the evidence. To these must be added a possible death sentence for any of about 18 million non-citizens living in the United States (about one-third of whom may have violated their terms of entry)[10] whenever the executive decides they have engaged, or are engaged, in terrorism related or unrelated to al Qaeda. I will list only a dozen such costs.

(1) The authorization claims the critical powers—executive detention unreviewable in any court and secret military trials—of a police state, at the unreviewed discretion of the executive, over millions of individuals lawfully living in the United States, based on an unreviewed suspicion of unidentified forms of support of undefined political violence with an unspecific international connection. In doing so it will undermine the support and loyalty of many millions here in the U.S. and their relatives abroad.[11] At the same time it will stifle speech and legitimate dissent among those covered.

(2) If sustained by Congress and the courts, it would create a precedent very likely to be applicable to citizens. The Supreme Court declined to draw any distinction between citizens and aliens in *Ex Parte Quirin*. The "military order" itself is careful to preserve the "lawful authority of the Secretary of Defense. . .to detain or try any person. . .not subject to this order."

(3) It relegates the Congress as well as the courts to a position of impotence in addressing one of the most fundamental questions about how much of our democratic tradition we will preserve. Nothing in the joint resolution of September 18, 2001, that authorized the use of "necessary and appropriate" force, remotely considers (approves or rejects) military detention and secret trials in the United States.[12]

(4) It deprives the U.S. of its historic claim of moral leadership among the world's nations in matters of fairness to individuals, leaving us in the position of encouraging the outrages of dictators like President Mugabe.[13] It will make more difficult future efforts at military coalition-building.

(5) It has denied us, and will deny us, the benefits of legal cooperation with our closest allies in the form of extradition and mutual legal assistance.[14]

(6) It will create resentment, fear, and suspicion of the military, our most respected profession, undoing much of the benefits of more than a century during which the Posse Comitatus Act has protected the military from public fear and resentment.[15]

(7) It will end a twenty-year successful effort to win respect and trust for a long-ridiculed military justice system.

(8) It undermines public confidence in the ability of our law enforcement to handle cases of international terrorism—confidence hard-earned with the patient, intelligent legislative help of the U.S. Congress.

(9) It will leave lasting doubts about the honesty of convictions in the wake of secret trials with secret evidence.[16]

(10) It will teach American children, particularly the children of immigrants, that this is not a nation "with liberty and justice for all."

(11) If we are at "war," the President's order directly conflicts with our obligations under Article 102 of the Geneva Convention on Prisoners of War that requires trials of prisoners of war, even for war crimes, only under "the same procedure" as we use in Courts Martial of our own soldiers.[17]

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[10] The 200 census counted 28.4 million foreign-born residents of whom 37.4% were citizens. We had 24 million vists from tourists in 1999 plus 6.5 students, business, and worker visits.

[11] Greg Winter, *Some Mideast Immigrants, Shaken, Ponder Leaving U.S.*, N.Y. TIMES, Nov. 23, 2001, available at *www.nytimes.com:* Jodi Wilgoren, *Swept Up in a Dragnet, Hundreds Sit in Custody and Ask, 'Why?'*, N.Y. TIMES, Nov. 25, 2001, available at *www.nytimes.com.*

[12] Unlike the "military order," the joint resolution is also limited to those thought to be involved with the attacks of September 11th.

[13] Fred Hiatt, *Democracy: Our Best Defense*, WASHINGTON POST, Nov. 19, 2001, at A21.

[14] Sam Dillon & Donald G. McNeil, Jr., *A Nation Challenged: The Legal Front; Spain Sets Hurdles for Extractions*, N.Y. TIMES, Nov. 24, 2001, at A1.; William Safire, *Essay: Kangaroo Curts*, N.Y. TIMES, Nov. 26, 2001, at A17.

[15] Posse Comitatus Act, 18 U.S.C. § 1385 (2001).

[16] C.f. Boris I. Bittker, The World War II German Saboteurs/Case and Writ of Certiorari before judgment by the Court of Appeals: A Tale of None Pro Tone Jurisdiction, 14 Const. Commentary 431, 451 nl. (1997) (citing Eugene Rachlis, *They Came to Kill: The Story of Eight Nazi Saboteurs in America* (Random House, 1961, 156–159)). In 1942, eight Nazi Saboteurs were arrested on U.S. soil and tried before a Military Commission. The FBI attributed the unmasking of the Saboteurs to the extraordinary sleuthing of its agents althought the proximate cause of the capture was the defection of one of the saboteurs.

[17] For a Court Martial, as well as for any other properly authorized military tribunal, he is directed—by the very statute on which the claimed authority for the "military order" of November 13, 2001 is based—to "apply the principles of law and the rules of evidence generally recog-

(12) Unless a secret military tribunal whose personnel are chosen and later evaluated by the executive is an "independent and impartial tribunal," it also violates Article 14 of another treaty we have signed and ratified (The International Covenant on Civil and Political Rights). A non-independent tribunal is legal only if the President determines and announces that we are in a situation "which threatens the life of the nation." [18]

The drafting. Bypassing Congressional and judicial review, the order is drafted with an appalling carelessness as to its over-broad scope. Most citizens and commentators think that it applies only to military or terrorist leaders captured abroad who have violated the laws of war. At the President's discretion:

1. It applies within the Unites States to 18 million non-citizens and it applies throughout the world to the citizens of every nation.
2. It applies to acts committed decades ago and to persons only remotely connected to those acts.
3. It allows indefinite discretionary detention without plans for any trial, even before a military tribunal.
4. It attempts to suspend habeas corpus without Congressional action or compliance with the Constitutional requirements of "invasion or rebellion."
5. It has many applications the Supreme Court will not permit under the Court's requirement, where civil courts can operate, of a violation of the law of war. For example, harboring an ex-terrorist is not a violation of the law of war (or else our officials who have hosted leaders of other nations who fall in this category are war criminals.)
6. It allows the President to decide when a threatening form of group crime becomes a war justifying detention and military tribunals, and to exercise that authority, without Congressional sanction. Using language with the sweep of the commerce clause of our Constitution, he has exercised that judgement by applying the order to relatively minor acts of terrorism (any act that carried "adverse effects on the U.S.. . .economy ") and not just to massive attacks such as those of September 11, 2001.

My conclusion is simple. It should be a proud and patriotic responsibility of the Congress to protect the people of the United States against the unnecessarily dangerous path of recourse to military tribunals and detention without trial which the President has taken in response to public fears. President Bush has said that it is our traditional freedoms that al Qaeda, and its like, fear and envy. We must be prepared to fight for these traditions admired around the world. We must not surrender any fundamental liberty without manifest necessity and Congressional review. There is no such necessity and there has been no such review in the case of President Bush's "Military Order" of November 13, 2001.

APPENDIX A

Western European countries have taken cautious steps to eliminate the risks of intimidation. Germany centralized the prosecution and adjudication functions in the case of terrorism, providing special protection for those responsible. For terrorist trials, France eliminated the participation of a majority of lay individuals who act as fact-finders in felony trials, substituting a panel of judges all but one of whom is anonymous. More dramatically, trials of narco-terrorists and other terrorists in Colombia take place before a single judge whose identity is carefully hidden.

Closest to the U.S. common law tradition was the situation of Great Britain in Northern Ireland. The British ?Diplock Courts? are perhaps the most famous of the special anti-terrorism courts in operation. Lord Diplock headed a Commission to evaluate the operation of the Northern Ireland justice system when opposition to internment without judicial trial had led the government to seek alternative ways of processing court cases involving paramilitaries. He concluded that intimidation of jurors by the defendants and their colleagues and ?perverse? verdicts rendered by jurors sympathizing with the cause of the government?s opponents made jury trials impractical.

The Diplock Commission recommended implementation of special "Diplock" courts for the trial of specified offenses such as murder, weapons offenses, bombings, and the like. Such courts are presided over by a single judge but without the normal jury. The trials have been public; defendants have had legal representation and

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nized in the trial of criminal cases in the United States district courts "so far as he considers practicable."

[18] Article 14, *International Covenant of Civil and Political Rights*, 999 U.N.T.S 171, entered into foce Mar. 23, 1976; United National General Assembly Resolution 2200A [XX1]. 16 December 1966.

could cross-examine witnesses against them. The standard for conviction has remained guilt beyond a reasonable doubt. Defendants have an unfettered right to appeal if found guilty. Judges are required to provide a written opinion regarding their views of the law and the facts of the case when rendering a verdict. Their reasoning can be challenged on appeal.

Britain's attorney general is empowered to decide, at the request of defense counsel, if specific cases involving scheduled offenses should be "certified out" as not being political in nature. Cases that are "certified out" revert back to the regular jury trial courts. In 1995, the attorney general approved 932 of 1,234 applications for removal from Diplock Court. In that year 418 people were tried for scheduled offenses in Diplock Court and 395 were convicted (360 of these pleaded guilty). Of the 58 defendants who pleaded not guilty, 23 (40%) were found not guilty at trial.

These uses of special courts have been careful and their purpose, avoiding intimidation of fact finders, is important. But special courts always create special fears because the motivation for special courts has not always been merely to deal with intimidation. Secret courts, instituted by the military to further its purposes have been used in Guatemala, Argentina, Chile, and elsewhere. The purpose was less to deal with threats than to assure that the fact finders would be sympathetic to the views of the government.

Chairman LEAHY. We are going to ask some questions and give you a chance to give us more.

Mr. Bell?

STATEMENT OF GRIFFIN B. BELL, SENIOR PARTNER, KING & SPALDING, AND FORMER ATTORNEY GENERAL OF THE UNITED STATES

Mr. BELL. I have filed a statement, so I am just going to be very short. I am posing it by trying to answer questions that have been raised in the public arena.

Did the President have power to issue this order setting up military tribunals? I don't think there is any doubt that he had power. I don't think there is anything irregular about it. I don't think there is anything illegitimate about it.

I picked out three cases. First, in the Revolution, Major John Andre was tried by a military tribunal. He was the negotiator with the traitor Benedict Arnold. After the Civil War, the commander of the Andersonville Prison camp, Captain Wirtz, was tried by a military tribunal in Washington, although he lived in Georgia, and was executed. We tried the German spies that everyone has been talking about, but we also tried General Yamashita after World War II ended in a military tribunal convened by General MacArthur, not by the President but by General MacArthur. So military tribunals are not uncommon in time of war.

Now, is the focus of the President's order too broad? I think not. First, it has to be—what he does, if he puts someone under this order, it has to be in the interest of the United States. He has to have reason to believe that the person is a member of Al Qaeda or is engaged in international terrorism acts or has harbored someone who did.

What procedures are to be followed by the military court, a tribunal? We don't know yet because they haven't been promulgated, but there are some things in the order that tell us some elements of due process. The order says that the defendant will be afforded counsel, there will be a record made of the trial, and that the evidence will be that which has probative value to a reasonable person. Incidentally, the same standard that was set out by General MacArthur when General Yamashita was tried.

Will the trial be without a jury? Yes. This is true with our own soldiers who are prosecuted under the Code of Military Justice. There is no jury. It is hard for me to understand why we would want to give someone charged with international terrorism a jury when our own soldiers would not have a jury if they were being prosecuted.

We can assume that military officers serving on the military court martial or tribunal would be no less fair than a civil jury. I read a comment by Secretary of War Stimson who said during World War II in a biography of General Marshall on that very subject, when he said, "All the civilians wanted to shoot the Germans after the war, but the military wanted to have fair trials." So I think we shouldn't assume that juries somehow or another are fairer than military officers.

Will the trial be secret? No, and I think it is nonsense to contend otherwise. The order does not say so. The order protects classified information. When I was Attorney General, we began to prosecute spies or espionage cases again after a long period of time, and we had to deal with courts on how to try cases where we had to protect sources and methods and foreign intelligence, and we were able to do that. And the idea was that lawyers every day tried trade secret cases, and you don't make the trade secrets public. So we found ways to do that. We tried people who, for example, had stolen plans from the CIA and sold them to the Russians for satellite plans, and we tried a jury trial without making the plans available to the public. So we know how to try cases of this kind. I think that is what it means, but the Secretary of Defense might very well spell out what that means.

What of the conviction by a two-thirds vote? If we were trying one of our own servicemen, everything would be by two-thirds vote, every crime, except life, which would be three-fourths, and death, which would be unanimous. That is a debatable question, a fair question to debate, and the Code of Military Justice might very well be considered by the Secretary of Defense.

What is the burden and quantum of proof? I would say it would be reasonable to follow what was used in General Yamashita's trial.

Lastly, what of the right to appeal? In military tribunals, there is no general right of appeal, but this order does not preclude writs of habeas corpus, and it is beyond my imagination that you couldn't use a writ of habeas corpus if someone was tried in the United States. I think you cannot use a writ on a decision by Justice Jackson for non-resident aliens or a case tried in some other country. I think that is settled. But in this country, no.

I would like to suggest one thing to the Committee. I have high regard for the Judiciary Committee. I have appeared here many times. I think it would be well to wait until the Secretary promulgates these orders, rules, and regulations before you finally conclude this matter. Some of these questions probably will be cleared up at that time, and I think we need to give the Secretary of Defense a chance to allay a lot of the worries that people have.

Thank you.

[The prepared statement of Mr. Bell follows:]

STATEMENT OF HON. GRIFFIN BELL, SENIOR PARTNER, KING & SPALDING AND FORMER ATTORNEY GENERAL OF THE UNITED STATES

I. SUBJECTING TERRORISTS TO TRIAL BY MILITARY TRIBUNAL IS COMPLETELY CONSISTENT WITH THE UNITED STATES CONSTITUTION AND WITH THIS NATION'S HISTORICAL PRECEDENT.

As I wrote in an editorial that appeared in the Wall Street Journal two weeks after the September 11th attacks, the President's responsibility to protect our citizens from foreign terrorists implicates very different concerns from those raised by our standard law enforcement process as administered by our civilian courts.

There can be no doubt that the perpetrators of the September 11th attacks are more than simple criminals. By their level of organization, their access to vast reservoirs of foreign resources, their professed dedication to the destruction of the United States, and their strategy of targeting and slaughtering our civilian population, it is plain that these terrorists, and those who support them, are nothing less than combatants engaged in an armed conflict with the United States.

Congress has acknowledged the existence of this armed conflict, passing on September 18, a joint resolution authorizing the President to use armed force against the perpetrators of the September 11th attacks, in light of the "unusual and extraordinary threat to the national security and foreign policy of the United States."

In this context, when fulfilling his responsibility to protect our citizens from armed combatants against the United States, the President's authority flows, not from his role as the nation's chief law enforcement officer, but rather from his role as Commander-in-Chief of the nation's Armed Forces.

In exercising his authority as Commander-in-Chief, the President is not bound to afford captured combatants the same protections afforded to criminal defendants by the Bill of Rights.

It is absurd to suggest that the U.S. military must observe the same civil liberties in its interaction with foreign soldiers that our law enforcement agents must observe in their interactions with common criminal defendants. While a U.S. serviceman must abide by certain domestic and international rules of engagement when conducting a war, he is certainly not responsible for conforming his actions to the U.S. Constitution. A U.S. soldier need not obtain a search warrant prior to entering an enemy building, nor must he advise a captured soldier of his right to retain an attorney.If an enemy combatant is taken into custody, there remain domestic and international norms that must be observed in the treatment of that prisoner. However, trial by jury in a civilian court is not a right enjoyed by such a prisoner. Neither the United States Constitution, nor any international treaty, imposes the incongruous obligation that a captured combatant must receive a trial in a civilian court.

Nor has it been our practice, at any time during the history of this country, to attempt to provide trials for captured combatants in our civilian courts.

Military tribunals, such as those authorized by the President's recent Executive Order, are the traditional means by which foreign combatants, including terrorists, have, historically, been brought to justice.

Military tribunals were used extensively by this country during and after World War II. Hundreds of German and Japanese prisoners were tried by military tribunals for violations of the law of war following the end of that war. In 1942, President Franklin Roosevelt convened a military tribunal in Washington, DC, to try eight Nazi saboteurs who were arrested in New York and Chicago after embarking on our East Coast from German submarines.

During and after the Civil War, military commissions were used to try war criminals, including the individuals who participated in the assassination of President Lincoln.

Military tribunals were used to try war criminals during the Mexican-American War, various wars against the American Indians, and the American Revolution.

The Supreme Court has consistently approved of military tribunals, explaining in one case, "Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war." [*Madsen* v. *Kinsella*, 343 U.S. 341, 346–47 (1952)]

Congress has expressly authorized the use of such tribunals in Title 10 of the United States Code [10 U.S.C. §821], and has provided that the President shall have the power to prescribe the procedures to be used [10 U.S.C. §836].

There are some critics who have argued that certain rights, such as the right to a trial by jury and the right to indictment by grand jury, are essential elements of the "American Way," and must be provided in all contexts, even to enemy prisoners of war. To these critics, I say that our own servicemen are subject to the Uniform

Code of Military Justice, which does not provide for such rights. It would indeed be peculiar to insist that captured enemy combatants are entitled to greater rights than those provided to our own soldiers.

Other critics have predicted that the procedures established for these tribunals may amount to little more than a "kangaroo court," with rules that are so slanted against a defendant that justice will not be served. To these critics, I say your criticism is, as of now, unfounded. The Secretary of Defense has yet to issue a code of procedures for these tribunals. This nation has, in the past, conducted trials by military tribunal that meet all reasonable standards of both substantive and procedural due process. Such tribunals have, in the past, resulted in both convictions and acquittals of the individuals charged with violations of the law of war. There is no reason to believe that our Secretary of Defense will establish patently unfair procedures for trials pursuant to the President's directive.

II. CONSIDERATIONS OF NATIONAL SECURITY SHOULD PROPERLY BE WEIGHED AS THE GOVERNMENT DETERMINES WHETHER TO DIVULGE THE IDENTITIES OF INDIVIDUALS WHO HAVE BEEN DETAINED IN CONNECTION WITH THE INVESTIGATION INTO THE SEPTEMBER 11th ATTACKS.

There have been allegations that the Justice Department has acted improperly in failing to divulge publicly to the press the identities of all persons being detained in connection with the investigation into the September 11th attacks.

I have seen no evidence to suggest that the Justice Department has acted improperly in this respect.

In his capacity as Commander-in-Chief of the armed forces, the President and his cabinet must retain the right to designate certain information as classified in order to protect our national security and to preserve the integrity of ongoing criminal investigations.

The Freedom of Information Act, which is the primary vehicle for ensuring the openness of our democratic government, expressly recognizes the government's authority to withhold certain information to protect national security and to preserve the integrity of ongoing criminal investigations.

It is perfectly reasonable to expect that releasing the names of those individuals being detained in connection with this investigation would have a negative impact on our efforts to track down other terrorists and to protect against further terrorist attacks. While I am not privy to the details of the current investigation, my experience as Attorney General leads me to believe that such information would be extremely useful to those terrorists who remain at large.

The fact that the Justice Department has not provided this information to the press does not mean that the detainees are powerless to vindicate their rights. It is my understanding that each of the detainees in question is either believed to be here in violation of our immigration laws, or is being held on a material witness warrant. The Attorney General has represented that each of these detainees has had access to legal counsel should they wish to challenge the basis for their detention. Presumably, counsel for any one of the detainees could contact the press if it were in the interest of that detainee to do so. Moreover, as with any case in this country in which a person has suffered a deprivation of liberty, each of these detentions is subject to judicial review.

Also, it would seem to me that our government would be committing a serious violation of the privacy of these detainees if, for example, the Justice Department published a list of the detainees in the Washington Post or the New York Times.

In sum, I have no reason to believe that the Justice Department has acted improperly in declining to release to the press the identities of the detainees in connection with this investigation. The decision not to release such information appears to have a sound basis grounded in the operational necessities of conducting this war on terrorism.

SUMMATION

1. The President has acted under the common law of war. Although we have not declared war since World War II, war has been authorized by the Congress through the authority to use armed forces as they are now being used in Afghanistan. Public Law 107–40. Congress authorized military tribunals in Sections 821 and 836 of Title 10 of the United States Code. Military tribunals have been used throughout the history of our nation. Major John Andre was executed after trial by a military commission during the Revolutionary War; Captain Wirtz, the Commander of Andersonville Prison, was tried by a military tribunal following the Civil War and was executed. Such tribunals were used in the Civil War and in World War II. President Roosevelt convened a military tribunal to try the German spies and General Yamashita was

tried at the end of the war by a military tribunal constituted by General MacArthur. It is simply incorrect to say that there is anything irregular or illegitimate about President Bush constituting military tribunals in the current war on terrorism.

2. Is the focus of the Order too broad? I think not. It applies only to non-citizens selected by the President. The President determines from time to time in writing that it is in the interest of the United States that an individual be subject to the Order if there is reason to believe that he or she is or was a member of the al Qaeda or has engaged in, aided or abetted or conspired to commit acts of international terrorism or acts in preparation therefor that have caused, threatened to cause or have as their aim to cause injury to or have adverse affects on the United States, its citizens, national security, foreign policy or economy or has knowingly harbored one or more individuals described in Paragraphs (i) or (ii) of Section 2(a)(i) of the President's order. This seems to me to be a narrow focus.

3. What procedures are to be followed by the military court? These are yet to be promulgated by the Secretary of Defense. The terms of the order are such that we can be sure that any defendant will be afforded defense counsel, that a record will be made of the trial, that evidence will be limited to that which has probative value to a reasonable person.

4. Will trials before the military tribunal be without a jury? Yes. That is true also when our own soldiers are tried under the Code of Military Justice. There is no jury. We can assume that military officers serving on a military court martial or tribunal would be no less fair than a civil jury. See Comment of Secretary Stimson, Paragraphs 467 and 468 in Pogue's George L. Marshall: Organizer of Victory.

5. Will the trials be secret? No. It is nonsense to contend otherwise. What the Order provides is that classified information will be protected. We have been doing this for many years in espionage cases, which are tried in the federal courts. Classified material is protected without the denial of rights to defendants. It is in the interest of the nation to protect sources and methods in foreign intelligence. We await the procedures to be promulgated by the Secretary of Defense; it may well be that there will be procedures for protecting classified information as it is contemplated by the President's Order.

6. What of the conviction by a two-thirds vote? In the Code of Military Justice, which applies to our own servicemen, a two-thirds vote of those constituting a general military court martial applies in any sentence less than life imprisonment or death. In the case of life imprisonment, the Code provides for a three-fourths vote for conviction, and for death there must be a unanimous vote. Has the President abused his authority as Commander in Chief by providing for a two-thirds vote in the case of life imprisonment or death? I think not, although it can fairly be argued that the Code of Military Justice standard is a precedent to be considered.

7. What is the quantum of proof? In the trial of General Yamashita following World War II, the burden and quantum of proof for the tribunal constituted by General MacArthur was evidence proving or disproving the charge which, in the opinion of the tribunal, would have probative value in the mind of a reasonable person. Here, again, we should await the quantum and burden of proof that is set out in the procedures to be established by the Secretary of Defense.

8. Lastly, what of the right of appeal to the courts? The Order provides an appeal to the President or, by his order, to the Secretary of Defense. The Order purports to take away the jurisdiction of all other courts, state or federal, for these convictions. The President's order contains no reference to the writ of habeas corpus, and I believe that there is no basis for construing the order as an attempt to suspend that right. The Constitution (Article I, Section 9) provides that not even Congress can suspend the Writ of Habeas Corpus unless, when in cases of rebellion or invasion, the public safety may require it.

9. There have been a number of cases in the Supreme Court considering whether Writs of Habeas Corpus will lie from military tribunals to federal courts. In some cases, the order constituting the tribunal was silent as to the use of the writ, but Justice Jackson for the Court in *Johnson* v. *Eisenstranger*, 339 U.S. 763 (1950), dealt extensively with the question of whether non-resident enemy aliens could even use the writ. As to those cases which involve U.S. citizens, or aliens on U.S. soil, the case of *In re Quirin*, 317 U.S. 1 (1942), plainly established that habeas corpus review was an appropriate means for defendants to test the jurisdiction of military tribunals.

With due deference to this important Committee carrying out your oversight function and your legislative function, I suggest that it would be well to adjourn this hearing pending receipt of such orders and regulations by the Secretary of Defense, as are contemplated by Section 4(b) and (c) of the President's Order as well as the meaning of the provision in Section 4(a) of punishment "in accordance with the penalties provided under applicable law."

Chairman LEAHY. Thank you, General Bell. I appreciate your being here, and you bring back memories of my early days in this Committee where I think my seat was probably so far back that you never even noticed me because I was probably behind you. I didn't care much for the seniority system back then. Now that I have studied it 25 years, I like it a lot better.

Professor?

STATEMENT OF SCOTT L. SILLIMAN, EXECUTIVE DIRECTOR, CENTER ON LAW, ETHICS AND NATIONAL SECURITY, DUKE UNIVERSITY SCHOOL OF LAW

Mr. SILLIMAN. Mr. Chairman, Senator Hatch, Senator Specter, the President's order cites as one of its legal predicates Article 21 of the Uniform Code of Military Justice. That provision, I submit, creates no new authority in the President as to military commissions. It merely acknowledges that in establishing the jurisdiction for courts-martial, Congress did not deprive these commissions, another type of legal tribunal, of concurrent jurisdiction with respect to offenses which, by statute or by the law of war, may be tried by these commissions.

As to statutory offenses, Congress clearly has the authority under Article I, section 8, clause 10, to define and punish offenses against the law of nations, of which the law of war is a subset. But it has done so only in a very restricted manner, notably, in the War Crimes Act of 1996, none of whose provisions are applicable to what we are dealing with in this instance. So we must, therefore, look to the law of war for the predicate authority for military commissions.

Customary international law recognizes the right of a military commander to use military commissions to prosecute offenses against the law of war, offenses which, by definition, must take place within the context of a recognized state of armed conflict. I maintain that shortly before 9 o'clock in the morning on Tuesday, September 11th, we were not in a state of armed conflict and we did not enter into a state of armed conflict until some time thereafter, certainly on or after the 7th of October.

Some argue that the events of that horrendous Tuesday demand a reappraisal of customary international law concepts regarding the distinction between state and non-state actors and that, irrespective of whether the attacks were carried out by one, 19, or a greater number of terrorist non-state actors, that they should nonetheless be considered acts of war. I cannot agree in that. The answer lies in legislation rather than an instantaneous sweeping aside of traditional customary law concepts.

Articles 18 and 21 of the Uniform Code of Military Justice could be amended to allow for the use of military commissions or even courts-martial to try offenses, not just against the law of war but against the law of nations, and could include the broader category of offenses such as we are dealing with on September 11th.

A word about the much cited case of *Quirin* involving the eight German saboteurs. Although the Supreme Court did sanction the use of a military commission in that instance, it did so in the clear context of a formally declared war, saboteurs entering this country surreptitiously and illegally at a time frame only 7 months after

the attack on Pearl Harbor, where the vulnerability of this country was shockingly realized. That realization of vulnerability also gave birth to the infamous internment camps for Japanese Americans sanctioned by the Supreme Court in the *Korematsu* case. The *Korematsu* case is a precedent, Mr. Chairman, that I suggest few would want to bring forward. I suggest that *Quirin*, like *Korematsu*, can be extended too far beyond its context.

I, therefore, see a weakness in the legal predicate for using military commissions to prosecute offenses occurring on September 11th, and I believe that that weakness could result in a finding that such commissions would not have jurisdiction over those offenses, the September 11th offenses.

I also have policy concerns, Mr. Chairman. I acknowledge the convenience and perhaps the prudence of commissions sitting overseas for terrorists captured incident to combat in Afghanistan and the Supreme Court opinions can be read as precluding judicial review in those cases. That is the *Eisentrager* case. But as to military commissions sitting in this country prosecuting resident aliens, I see not only an adverse impact upon our international credibility, but also a potential tarnishing of a proud heritage of 50 years of military justice under the Uniform Code of Military Justice.

Senators Kennedy and Kohl have both mentioned the Berenson case, 1996, in Peru. I would suggest that there appears to be little difference between the lack of protections afforded her in Peru and the minimal due process standards set out in the President's order.

We should expect a reproach from the international community for hypocrisy since we continually tout ourselves as a nation under the rule of law. I believe such a criticism could result in a fracturing of the disparate coalition that has been forged to wage a long-term campaign against terrorism worldwide, a campaign which must necessarily go farther than just the use of military force.

Secondly, many in this country do not accurately perceive the distinction between courts-martial under the Uniform Code of Military Justice and military commissions to be empaneled under the President's order. On Sunday's televised news program "Face the Nation," former Deputy Attorney General George Terwilliger stated that "there is a fundamental misconception that somehow a military court cannot be just. Our own soldiers and airmen are subject to military justice on a regular basis. The military can provide fair trials."

That implies, Mr. Chairman, that military commissions will generally follow the same rules of procedure and modes of proof of courts-martial. As this Committee knows, that is not the case. Regrettably, this confusion is widespread, and I have a great concern that in pursuing the use of military commissions, especially in this country, this blurred distinction could sully the image of military justice under the code, a very fair and impartial system of which we have always been proud.

I look forward to answering any questions you might have, Mr. Chairman.

[The prepared statement of Mr. Silliman follows:]

SCOTT L. SILLIMAN, EXECUTIVE DIRECTOR, CENTER ON LAW, ETHICS, AND NATIONAL SECURITY, DUKE UNIVERSITY SCHOOL OF LAW

Mr. Chairman, Senator Hatch and members of the Committee. My name is Scott L. Silliman and I am the Executive Director of the Center on Law, Ethics and National Security at the Duke University School of Law. I am also a senior lecturing fellow at Duke and hold appointments as an adjunct professor of law at Wake Forest University, the University of North Carolina, and North Carolina Central University. My research and teaching focuses primarily in the field of national security law. Prior to joining the law faculty at Duke University in 1993, I spent 25 years as a uniformed attorney in the United States Air Force Judge Advocate General's Department. During Operations *Desert Shield* and *Desert Storm,* I served as the senior Air Force attorney for Tactical Air Command, the major command providing the majority of the Air Force's war-fighting assets to General Schwarzkopf's Central Command.

I thank you for the invitation to discuss with the Committee some of my concerns with respect to the inherent tension which exists in successfully defending against terrorism while at the same time preserving our freedoms. In the event that members of al-Qaeda are captured or surrender incident to the military campaign in Afghanistan, or if individuals suspected of complicity in the attacks of September 11th are arrested in this country or elsewhere, there are several prosecutorial options available to the government. These are (1) trial in the federal district courts, as was done with regard to those responsible for the initial attack upon the World Trade Center in 1993 and upon our embassies in Kenya and Tanzania in 1998; (2) trial in the courts of any other country, under the principle of universal jurisdiction; (3) trial before some type of an international tribunal, either one currently in being or one to be established in the future; or (4) trial by military commission or other military tribunal established by the President in his capacity as Commander-in-Chief. None of these approaches is optimal; all have problems and limitations associated with their use. The President, however, has indicated his intent to pursue the use of military commissions and, accordingly, my comments will be restricted to the military order issued on November 13th which authorizes the detention, treatment and trial of certain non-citizens in the war against terrorism. In particular, I will discuss what I consider to be a weakness in the Administration's argument regarding the President's legal predicate for authorizing the use of military commissions with respect to the terrorist attacks on September 11th, a weakness which I believe needs to be remedied by the Congress through legislation. I will then discuss my policy concerns as to the overall breadth of the current order and how I believe it could adversely impact our international credibility as a nation under the rule of law.

AUTHORITY OF THE PRESIDENT TO AUTHORIZE MILITARY COMMISSIONS

The military order of November 13th lists three statutory provisions which, in addition to the President's constitutional powers, are cited as authority for the order. These are the Authorization for Use of Military Force Joint Resolution, signed by the President on September 18, 2001, and Articles 21 and 36 of the Uniform Code of Military Justice. As to the Joint Resolution, the key operative language is contained in Section 2(a) which authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on Sept 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Section 2(b) declares that Congress, through this resolution, is satisfying its own requirements under the War Powers Resolution of 1973 regarding the need for a specific statutory authorization approving the use of our armed forces in this regard. There can be no doubt that the Joint Resolution is meant to buttress and affirm the President's right as commander-in-chief to use force in self-defense against a continuing threat, either from a state or a non-state actor. This inherent right of self-defense, clearly recognized in customary international law and codified (but not supplanted) by Article 51 of the United Nations Charter, was reiterated in United Nations Security Council resolutions 1368 of September 12th (Security Council Res. 1368, UN Doc. SC/7143) and 1373 of September 28th (Security Council Res. 1373, UN Doc. SC/7158), both of which referred directly to the attacks of September 11th. It should be noted, however, that although there are frequent references in the text of the Joint Resolution to "terrorist acts" and "acts of international terrorism", nowhere in the resolution, or in the presidential signing statement, is there any mention or characterization of the attacks of September 11th as acts of war. They are clearly denoted as *terrorist* acts.

Under the Constitution, Congress was granted authority to make rules for the government of the land and naval forces (Article I, Section 8, Clause 14). It did so most recently through enactment of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801 et seq., in 1950. Article 21 of the Code, cited in the President's military order, mentions military commissions but does so only in acknowledging that the Code's creation of jurisdiction in courts-martial to try persons subject to the UCMJ, does "not deprive military commissions...of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals" (10 U.S.C. § 821). A corresponding provision in Article 18 of the UCMJ, although not cited in the military order, provides that "(G)eneral courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war" (10 U.S.C. § 818). Articles 18 and 21 can only be read as reflective of Congress' intent, by enacting statutory authority for trials by courts-martial and providing for the concurrent jurisdiction of courts-martial with military commissions, not to divest the latter of the jurisdiction that they have by "statute or by the Law of War". The other provision of the UCMJ specifically cited in the military order is Article 36, 10 U.S.C. § 836, which is a general delegation of authority to the President to prescribe trial procedures, including modes of proof, for courts-martial, military commissions, and other military tribunals. This provision states that the President shall, "so far as he considers practicable, apply the principles of law and the rules of evidence" as generally used in criminal cases in federal district courts (10 U.S.C. § 836). In the military order, the President makes a specific finding that using those rules would not be practicable in light of the "danger to the safety of the United States and the nature of international terrorism" (Section 1(f), Military Order of November 13, 2001). This provision, therefore, has relevance only to the rules for the conducting of military commissions, rather than to the authority for establishing them.

Has Congress legislated as to war crimes, other than in the UCMJ? Although the Constitution grants Congress authority to define and punish offenses against the law of nations (Article I, Section 8, Clause 10), it has done so only in a very limited manner through the War Crimes Act of 1996 (18 U.S.C. § 2441). That statute makes punishable any grave breach or violation of common Article 3 of the Geneva Conventions, any violation of certain articles of Hague Convention IV of 1907, or a violation of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, when either the perpetrator or the victim is a member of the United States armed forces or a national of the United States. None of these treaty provisions, violations of which are proscribed under the Act, appear to be applicable with regard to the terrorist attacks. Therefore, since the only relevant statutory references to military commissions are contained in the UCMJ, and those only recognize jurisdiction with respect to offenses proscribed by statute (of which none apply here) or the law of war, a subset of international law, it is the law of war to which we must now turn.

Customary international law clearly recognizes the authority of a military commander to use military tribunals to prosecute offenses against the *jus in bello* occurring during an armed conflict. The *jus in bello*, regulating how war should be conducted, differs from the jus ad bellum, which governs when the use of force is permissible by one state against another. Our history is replete with instances of military tribunals being used to deal with violations of the *jus in bello* in times of armed conflict, with the trials of General Yamashita and the German saboteurs during World War II being the most recent examples.

My concern with regard to the legal predicate for the application of the President's military order is that violations of the law of war—the *jus in bello*—do not occur within a vacuum; they must by definition occur within the context of a recognized state of armed conflict. I maintain that at shortly before 9:00 am on the morning of September 11th, we were not in a state of armed conflict and we did not enter into such a state until sometime thereafter. Therefore, with regard to the attacks of September 11th, the principal event prompting our armed response in self-defense against Osama bin Laden and the al-Qaeda organization in Afghanistan, these are clearly acts of terrorism in violation of international law, but not necessarily violations of the law of war. If my premise is correct, then it presents an impediment to using military commissions for the trial of those charged with or complicit in those particular attacks, as distinguished from charges relating to later events. Some may argue that the events of September 11th demand a reappraisal of existing customary international law concepts with regard to the distinction between state and non-state actors and that, irrespective of whether the attacks were carried out by one, nineteen, or a greater number of terrorist non-state actors, these attacks should be considered, at the instant they occurred, as nothing short of an act of war.

I am unwilling to concur in that argument and, as will be discussed later, I believe the answer to this problem lies in legislation rather than an instantaneous sweeping aside of longstanding principles of customary law.

In many of the Administration's pronouncements in support of the military order of November 13th, the Supreme Court opinion in *Ex Parte Quirin*, 317 US 1 (1942), is mentioned. I submit that *Ex Parte Quirin*, the case involving the eight German saboteurs who, in 1942, landed on our shores in Florida and Long Island with intent to do damage to our defense facilities, bears closer scrutiny than it has been given by military commission proponents. The Supreme Court sanctioned the use of a military commission to try the saboteurs, but did so in the context where there was a formal declaration of war by Congress and the individual saboteurs had entered this country surreptitiously. Even though one of them, Haupt, claimed to be an American citizen by virtue of the naturalization of his parents while he was still a minor, the Court determined that such citizenship did "not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war" (*Ex Parte Quirin*, 317 U.S. 317, 37 (1942)). Throughout Chief Justice Stone's opinion, there are references to the power of the President as Commander-in-Chief *in time of war*. Ten years later, Justice Robert Jackson, in his concurring opinion in the *Steel Seizure Case*, would develop his oft-quoted analysis of presidential powers in relation to those of Congress and determine that the President's authority is at a maximum when he acts pursuant to an express or implied authorization of Congress (*Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 US 579, 592 (1952)). The Congressional declaration of war against Germany was just such a mandate for President Roosevelt, especially bearing in mind that the eight saboteurs breached our shores just seven months after the attack on Pearl Harbor where the vulnerability of this country to attack was shockingly realized. That realization of vulnerability also gave birth to the infamous internment camps for Japanese Americans which were established during this very same period and which were sanctioned by the Supreme Court in *Korematsu* v. *United States*, 323 US 214 (1944), an opinion which virtually no one claims has continued precedential value. Thus, I suggest that to draw authority from *Ex Parte Quirin* for the military order of November 13th is to take the case out of the context of the very specific circumstances in which it was decided, a declared war and a Supreme Court desiring to maximize the President's authority to act to defend our shores against an attack from state actors. No such context exists now, no matter how much we proclaim the "acts of war" of September 11th and try to make terrorists into state actors.

In conclusion of the first part of my statement, dealing with what I consider a weakness in the argument for the President's legal authority to use military commissions to prosecute terrorists for offenses against the war of war occurring on September 11th, I submit that this weakness can be remedied, certainly as to future acts of terrorism which do not reach to the level of being offenses against the law of war. If Congress were to enlarge the scope of Articles 18 and 21 of the Uniform Code of Military Justice by either changing the words "law of war" to "law of nations", thereby incorporating acts such as those of September 11th, or by inserting additional language setting forth specifically denoted acts of terrorism, such an amendment would empower military commissions (Article 21) and courts-martial (Article 18) to prosecute acts of terrorism outside the context of a recognized state of armed conflict. As to the use of courts-martial, however, this would necessitate pretrial, trial and post-trial procedures, including modes of proof, as prescribed in the Manual for Courts-Martial, Exec. Order 12960, 63 Fed. Reg. 30065 (June 2, 1998), unless the President, acting under the Congressional delegation of Article 36 of the Code, were to modify those procedures, as he has done in the November 13th military order.

Policy Concerns Regarding the Use of Military Commissions

Mr. Chairman, my comments to this point have reflected a specific legal concern regarding the Constitutional predicate for the President to authorize the use of military commissions. I would now like to share with the Committee my more general policy concerns regarding the choice of military commissions as against other prosecutorial forums. I should say at the outset that my area of greatest concern is with respect to military commissions sitting in the United States and prosecuting resident aliens who entered this country legally and whose only offense might be that they are, or were at some time in the past, members of al-Qaeda. I acknowledge the convenience and possible prudence of commissions sitting in overseas areas, especially in a theater of military operations, for the prosecution of those members of al-Qaeda who are captured incident to combat in Afghanistan, and I think an argument could certainly be made that the Supreme Court's opinion in *Johnson* v.

Eisentrager, 339 U.S. 763 (1950) would preclude judicial review by the Article III courts over such commissions held overseas. The concept of military commissions sitting in this country is another matter.

The administration has evidenced frustration with what it perceives to be restrictions and limitations that seemingly hinder prosecutors in attempting to bring terrorists to trial in our federal district courts. Mention has been made of the rules governing disclosure which would compel release of sensitive intelligence information. The lengthy trials of those convicted of the 1993 bombing of the World Trade Center and the 1998 attacks upon our embassies in Africa are cited as examples of the inability of the federal district courts to adequately cope with trials of terrorists. Further, it is argued that a criminal justice system which incorporates rehabilitation and reincorporation into society as part of the sentencing process is ill-suited to deal with those whose zealous religious beliefs idealize martyrdom. I suggest that these arguments are not necessarily persuasive. Congress has provided tools for prosecutors to deal with classified information in criminal trials, notably the Classified Information Procedures Act, 18 U.S.C. App § 1 et seq. (1980), and the two prior successful convictions of al-Qaeda terrorists are indicative that it can be done, no matter how problematic for prosecutors the trials may be.

As to the option of using international tribunals, I concede that no existing tribunal has jurisdiction over the terrorists. Neither the ad hoc tribunal for the former Yugoslavia, nor the one for Rwanda, could prosecute terrorists without the United Nations Security Council having to make specific amendments to either of their respective charters. The International Criminal Court, a UN sponsored treaty-based tribunal, is not yet in existence and, even if a sufficient number of states were able to quickly ratify the Rome Treaty, that tribunal has only prospective jurisdiction. Lastly, although the United Nations Security Council could create yet another ad hoc tribunal for the specific purpose of dealing with terrorist acts, any such attempt would surely founder because of the inability of the international community to agree upon a definition of "terrorism"—a flaw that greatly restricts the feasibility of using any international tribunal for this purpose. Thus, international tribunals do not provide us with a current, viable forum for prosecuting terrorists.

The third option, trials by other countries under the jurisdictional principle of universality, is not well-suited to the United States for policy reasons. I agree with critics of this option that America needs to be directly or at least indirectly involved in the prosecution because the attack upon our people and our facilities occurred within our country and we clearly have the greatest interest in prosecuting those responsible for or complicit in the attacks. Further, the opportunity for capital punishment, and its arguable deterrence value, is greatly diminished when other sovereigns conduct the prosecutions within their own countries. This potential choice of forum is the least practical.

Acknowledging that none of the prosecutorial forums is optimal, but that the two most feasible are trials in our federal district courts and trials by military commission, the President clearly signaled his intent on November 13th to use the latter. I suggest that this choice may entail costs which outweigh the benefits, notably with regard to commissions sitting in this country. I believe we should be cognizant of a potential adverse impact upon our international credibility, as well as a tarnishing of the image of 50 years of military Justice under the UCMJ.

It was but five years ago that the United States roundly condemned the conviction by a military tribunal in Peru of New York native Lori Berenson on charges of terrorism. Through official channels, we requested that she be retried in a civilian court because of the lack of due process afforded her in the tribunal. Our cries of unfairness were echoed by United Nations officials who openly criticized Peru's anti-terrorism military courts. There seems little difference in the measure of due process afforded Berenson in Peru and what is called for under the President's military order, and I believe this opens us to a charge of hypocrisy from the international community. The force of this criticism could be lessened if those who advise the Secretary of Defense counsel him to ensure a high level of due process in the regulations establishing the commissions, but the charge laid against us can never be totally ameliorated. Consequently, I believe our use of military commissions may result in a fracturing of the large and disparate coalition which has been put together to wage the long-term campaign against terrorism worldwide, a campaign which must necessarily involve far more than the use of military force. As to my second point, my sense is that the American people do not accurately perceive the distinction between courts-martial under the military justice system and military commissions which could be empaneled under the President's order. I have heard it said on radio talk shows that if military commissions are good enough for our servicemen and servicewomen, then they are certainly good enough for terrorists. Even former Deputy Attorney General George Terwilliger, on this past Sunday's news program

Face the Nation, said that "there is a fundamental misconception that somehow a military court cannot be just. Our own soldiers and airmen are subject to military justice on a regular basis. The military can provide fair trials." This suggests to me that a segment of the American people, having perhaps become acquainted with military justice through the portrayal of courts-martial on television or in the movies, believe that military commissions will generally follow the same rules of procedure and modes of proof. This Committee knows that is not so. There is a marked contrast in the protections afforded our service personnel under the military justice system, and the lack of due process in military commissions. To illustrate, there is a guarantee of judicial review under the former; that is specifically denied under the latter. Although courts-martial may, under certain circumstances be closed to the public, the evidentiary rules and burden of proof required for conviction are virtually identical to those in our federal district courts; that is not the case in military commissions. In other words, the two systems have little in common, and this must be made clear as the debate on the propriety of using military commissions continues.

In the final analysis, the decision is one for the President to make, and he has already indicated the probable path he intends to pursue. I believe, however, that hearings such as are being conducted by this Committee will allow for a broad and balanced airing of views on this issue, not only to hopefully better inform the Members in both chambers, but also to give the Administration the benefit of additional voices in the debate. This should, and must, be done before the first terrorist is brought to trial.

Mr. Chairman, Senator Hatch and members of the Committee, thank you again for inviting me to share my concerns with you. I look forward to answering any questions you might have.

Chairman LEAHY. Thank you very much, Professor. I appreciate that, and I also appreciate very much you making that very needed distinction between these tribunals and our well-established—you were a colonel in the military, and you know the well-established rules of military tribunals.

Ms. Martin, thank you very much, and, again, I appreciate you spending so much time here with us today. Please go ahead and testify.

STATEMENT OF KATE MARTIN, DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES, WASHINGTON, D.C.

Ms. MARTIN. Thank you, Mr. Chairman, and I thank the Committee for the opportunity to appear today, and I particularly want to thank the chairman for convening this extraordinarily important series of oversight hearings.

The Government's efforts to identify the perpetrators of the terrible attacks on September 11th and to prevent future attacks before they occur could not be more crucial. But we have become increasingly concerned that, instead of conducting a focused and effective law enforcement investigation, the Government has turned instead to a number of radical and overly broad measures that threaten basic rights without in turn providing any increased security.

While some have cast the terrible situation we find ourselves in today as one in which we must decide what liberties we are willing to sacrifice for an increased measure of safety, I do not believe that is an accurate or helpful analysis. Before asking what trade-offs are constitutional, we must ask what we gain in security by restricting our civil liberties.

The common thread in the Justice Department's recent actions in detaining individuals, providing for eavesdropping, and the President's order on military commissions is the secrecy and lack of public and congressional participation in adopting those meas-

ures. It is only by forcing the Government to articulate why and how particular restrictions on our liberties will contribute to security that we can have any guarantee that the steps being taken will, in fact, be effective against terrorism.

The hearing today I believe is the crucial first step in that open and public dialogue which to date has been prevented by the administration's unilateral actions.

I want to talk briefly, I think, about the detentions and only for a moment about military commissions. As this Committee is well aware, in the past couple of months more than 1,000 people have been detained according to the Justice Department. Some 600 people are still in detention. At the same time, law enforcement officials have on several occasions been careful to state that only a handful of those individuals, maybe 10 or 20, have in any way been tied to the hijackers from September 19th or other members of Al Qaeda or bin Laden. Hundreds of others are currently in jail. While the Department asserts that their rights are being respected and that it has complied with all applicable constitutional and legal limits, it has until yesterday refused to release that information which the public and this Committee needs to assure ourselves that that is, in fact, the case.

While we welcome the disclosures of the Attorney General yesterday, giving some partial information about the individuals who have been detained, we join in Senator Feingold's request and demand for a full accounting of everyone who has been detained.

There are certainly numerous press accounts which, if accurate, raise serious questions about whether or not individuals' rights have been violated in serious and unconstitutional ways. Most specifically, it appears that perhaps ten, perhaps hundreds of individuals, including United States citizens, have been held for weeks, if not months, in jail when the FBI and the Government has no information connecting them in any way to the September 11th attacks.

There are examples, some of them I am sure the Committee is aware of. Perhaps the most egregious one is the two American citizens who were held in jail, a father and a son, one for several weeks and one for several months, on charges that they possessed suspicious passports. A Federal judge finally had an opportunity to look at it, and it turned out that the plastic on the passport had split, presumably because of age. The key factor, it would appear, in those people spending time in jail while the FBI is conducting an investigation appears to be their Arabic-sounding name, despite their U.S. citizenship.

The Justice Department has defended the detentions by saying that all the individuals now in custody have been charged, either under the criminal law or as immigration violations. I think the question that this Committee needs to ask and the public needs to be assured about is: On what justification are such individuals held in jail before there has been a trial convicting them either on a criminal charge or having violated the immigration laws?

What we are especially concerned about that appears to be happening is that people who have been arrested are being—excuse me. The Justice Department has made an effort that when people are arrested on either immigration or criminal charges, has urged all of the authorities that bail should be denied and as a blanket

matter has urged that they be kept in jail pending trial. That obviously raises serious concerns about imprisonment without there being adequate probable cause of a crime and without meeting the constitutional standards.

I just want to mention one thing, if I might. On the material witness warrants, Mr. Chertoff said that he was prohibited from identifying those individuals who were being held. I don't believe Rule 6(e), governing grand jury secrecy, says anything about not disclosing the number of individuals held on a material witness warrant. I might also mention that there has been information disclosed to the press about not only the identities of the core suspects, but the evidence against them.

Perhaps in the question period I might have an opportunity briefly to discuss military commissions.

[The prepared statement of Ms. Martin follows:]

STATEMENT OF KATE MARTIN, DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES

Thank you Mr. Chairman and Vice-Chairman for the opportunity to testify today on behalf of the Center for National Security Studies. The Center is a civil liberties organization, which for 30 years has worked to ensure that civil liberties and human rights are not eroded in the name of national security. The Center is guided by the conviction that our national security must and can be protected without undermining the fundamental rights of individuals guaranteed by the Bill of Rights. In our work on matters ranging from national security surveillance to intelligence oversight, we begin with the premise that both national security interests and civil liberties protections must be taken seriously and that by doing so, solutions to apparent conflicts can often be found without compromising either.

We commend the Committee for holding this series of oversight hearings to examine how the Justice Department can persevere our freedoms while defending against terrorism. After the scheduled examination of the Department's current initiatives and activities in investigatng the September 11 attack, we urge the government to next examine how the Department of Justice intends to implement the new authorities granted in the USA PATRIOT Act.

Certainly, there is no greater government responsibility today than to work to prevent future terrorist attacks like those on September 11. The Attorney General and the FBI Director share the enormous responsibility of carrying out an effective investigation to prevent more attacks. Of equal importance is Congress' responsibility to conduct oversight of that investigation to protect our security and to protect the Constitution.

While some have cast the terrible situation we find ourselves in today as one in which we must decide what liberties we are willing to sacrifice for an increased measure of safety, I do not believe that is an accurate or helpful analysis. Before asking what trade-offs are constitutional, we must ask what gain in security is accomplished by restrictions on civil liberties. It is only by forcing the Justice Department to articulate why and how particular restrictions will contribute to security and that we can have assurance that the steps being taken will be effective against terrorism. This hearing today is the beginning of that essential inquiry.

Immediately following the September 11 attacks, we, along with more than 140 organizations from across the political spectrum called for the apprehension and punishment of the perpetrators of those horrors. At the same time, we all recognized that we can, as we have in the past, in times of war and of peace, reconcile the requirements of security with the demands of liberty.

The government's efforts to identify any perpetrators and to prevent future attacks before they occur could not be more crucial. But we have become increasingly concerned that instead of a focused and effective law enforcement investigation, the government has turned to a number of radical and overly broad measures that threaten basic rights without providing any increased security. We understand that this Committee intends to examine all of them and we welcome your efforts. We will address each briefly in turn.

LACK OF CONGRESSIONAL AUTHORIZATION OR CONSULTATION

A common thread in the recent Justice Department actions is the secrecy and lack of congressional consultation with which they have been carried out. In detaining

more than 1,000 individuals, in adopting a policy of eavesdropping on attorney-client communications, and in setting up a system of secret military trials and detentions, the administration has acted unilaterally without congressional participation or even consultation. By considering these actions in secret before adopting them, the administration prevented any public debate about their effectiveness. The lack of congressional notification is especially troubling in light of the administration's simultaneous request to the Congress to enact what was described as a comprehensive package of new authorities needed to combat terrorism passed as the USA PATRIOT Act. The administration's conduct calls into question its commitment to respecting the constitutional separation of powers and role of the Congress. Indeed, all of these actions would enhance the power of the Executive at the expense of the constitutional roles of both the Congress and the judiciary.

In the case of the new wiretapping policy and the military commission order, the lack of congressional authorization is fatal to the legality of those actions. Only the Congress, not the President, may legislate wiretapping standards or authorize military tribunals. The administration's edicts are invalid on that ground alone.

The lack of public discussion has now left us with restrictions on our liberties without any increase in our security. Only through an open and public dialogue involving the Congress, the Executive, and the American people can we find a solution that advances both national security and civil liberties. The unwillingness of the government to engage in a public or constitutional dialogue, not about the details of the investigations, but about the constitutional rules governing that investigation has prevented that process. This Committee must now remedy that problem.

THE DANGERS OF EXCESSIVE SECRECY

In times of crisis, even more than in times of peace, a commitment to robust public debate is especially important. This is true for two reasons. First, the executive branch is more likely to take actions that violate basic civil liberties and thus an alert and informed public is necessary to counter-act that dangerous tendency. Second, the government is more likely to make effective decisions if there is an informed and influential public.

The government has the right, and indeed the obligation, to keep secret information whose disclosure would genuinely harm national security, interfere in an investigation, or invade the privacy of individuals. However, because public debate requires access to government information, the executive branch also has an obligation to release as much information as possible and to avoid taking actions that would chill essential public debate on national policy issues. Regrettably, the government has been seriously deficient on both accounts.

Almost as worrisome as the detentions of aliens since September 11 is the secrecy and veil of obfuscation that the government has thrown around its actions in blatant disregard of its affirmative obligations to provide information especially about actions in the criminal justice system, its obligation to inform Congress of its actions, and the requirements of the Freedom of Information Act (FOIA).

The Justice Department and the Attorney General have engaged in selective leaks of information about the detentions as part of their effort to calm the public and suggest that it is making progress in the investigation. At the same time, they have refused to provide the Congress and the public with the information to which they are entitled. Its response to FOIA requests about the detentions shows its cavalier disregard of the law. The FBI has responded that no information can be disclosed in response to the request despite the fact that much information has been in the press, clearly coming from the government. The Justice Department, after agreeing that the request deserved an expedited response because it involved a "matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affects pubic confidence," has failed to provide a substantive response.

More broadly, the Attorney General has sent the entire bureaucracy a clear signal by reversing the directive regarding discretionary release of information under FOIA as established by his predecessor. Instead of requiring that information be released except when its disclosure would result in some harm, Ashcroft has directed that information be withheld whenever possible under the statute, regardless of whether disclosure would be harmful or violate the public's right to know.

Although the directive cites the September 11 attacks as justification, it covers all government information, much of which has no national security or law enforcement connection whatsoever. It is clearly intended to send the message to the bureaucracy that instead of working with the public to share information that is rightfully theirs, the government should take advantage of the ambiguities in the law

to deny information. The result will surely be a less open and less accountable government.

Congress and the courts are our only recourse. We expect to file suit for the material we requested under FOIA as soon as possible. We will be making other FOIA requests and will file other lawsuits. We are also exploring other statutory as well as constitutional bases for legal action to compel the release of documents. However, we need the Congress. We urge this committee to hold the Justice Department to account by demanding information and holding hearings. We urge you to make public as much of the information that you believe is in the national interest, even if it means acting over the objections of the Justice Department.

SECRET DETENTIONS

In the first few days after the attacks, some 75 individuals were picked up and detained. While the administration sought increased authority from the Congress to detain foreign individuals on the grounds of national security with no judicial oversight, it picked up hundreds more individuals. The Attorney General announced that 480 individuals had been detained as of September 28; 10 days later another 135 had been picked up; and in one single week during October, some 150 individuals were arrested. As of November 5, the Justice Department announced that 1,147 people had been detained.

While trumpeting the numbers of arrests in an apparent effort to reassure the public, the Department has refused to provide the most basic information about who has been arrested and on what basis. We know that the detainees include citizens, legal residents, and, according to INS director James Zigler, 185 individuals were being held on immigration violations. According to the Attorney General and FBI Director, the remaining group includes a small number of individuals held on material witness warrants and others held on violations of local, state, or federal laws. Apparently none have been charged as terrorists, indeed only 10 or 15 are even suspected of being terrorists. At this time, we do not have any idea how many have been released.

As the number of secret detentions increased, press reports began to appear, which if accurate, raise serious questions as to whether the rights of the detainees are being violated. As each successive week has brought hundreds more arrests, demands for release of basic information have intensified. The unprecedented level of secrecy surrounding the extraordinary detention of hundreds of individuals, prompted us, along with nearly 40 other civil liberties, human rights, legal, and public access organizations to demand release of the detainees' names and the charges against them under the FOIA request. The Chair and other members of this Committee and of the Congress have also demanded a public accounting of the arrests.

In response, the Department has only stonewalled. Justice Department officials have refused to release further information on the detentions, and have stopped keeping a record of those detained, presumably in order to avoid having to answer questions about who is being counted in the tallies.

Public disclosure of the names of those arrested and the charges against them is essential to assure that individual rights are respected and to provide public oversight of the conduct and effectiveness of this crucial investigation. Public scrutiny of the criminal justice system is key to ensuring its lawful and effective operation. Democracies governed by the rule of law are distinguished from authoritarian societies because in a democracy the public is aware of those who have been arrested. Individuals may not be swept off the street and their whereabouts kept secret.

The government has made varying claims to justify this secrecy. Ironically, it now claims that it is withholding the names of detained individuals in order to protect their privacy. What is needed to ensure the protection of the rights of these individuals, who have been jailed by the government now worrying about their privacy is what we have always relied upon in protecting against government abuses, namely public sunshine.

Likewise, the Department's claim that releasing the names and charges could harm the investigation is contradicted by its own disclosures. Not only have officials already identified several suspected terrorists, but they have also outlined evidence against them. The Attorney General himself described the evidence against the three individuals whom he believes had prior knowledge of the September 11 attacks. Finally, the Department has made the astonishing claim that because it asked courts to seal some of the proceedings, it is now helpless to disclose even the identities of the courts or the authorities under which those gag orders were sought.

While we are not seeking the details of the investigation or an outline of the evidence being collected by the FBI, we do urge this Committee to secure the release

of information crucial to public accountability: the names and charges against those who have been detained.

There is every reason to fear that the cloak of secrecy is shielding extensive violations of the rights of completely innocent individuals. These violations include imprisonment without probable cause, denial of the constitutional right to bail, interference with the right to counsel, and abusive conditions in detention. We will only outline a few examples, but there are many more.

A. IMPRISONMENT WITHOUT PROBABLE CAUSE.

While the government has admitted that it has evidence of terrorism against only a small fraction of the detainees, it has imprisoned hundreds of individuals against whom there is no evidence of criminal activity. For example, a father and son, both US citizens, were arrested as they returned from a business trip in Mexico because their passports looked suspicious. The father was released after ten days and sent home wearing a leg monitor, but the son spent two more months in jail until a federal judge determined that the plastic covering had split. The key factor in their arrest appears to be their Arabic sounding names. While the Attorney General has announced that terrorists will be arrested for spitting on the sidewalk, he has yet to explain why innocent Americans will be jailed for doing so.

In a handful of cases, the Department is using the authority of the material witness statute to detain people. We urge this Committee to examine carefully the circumstances of those detentions, which are now all shrouded in secrecy, and to consider the dangerous ramifications of using the material witness statute not to secure testimony but to authorize preventive detention.

There is growing evidence that the FBI has abandoned any effort to comply with the constitutional requirement that an individual may only be arrested when there is probable cause to believe he is engaged in criminal activity. The FBI is now seeking to jail suspicious individuals until the agency decides to clear them. The FBI is providing a form affidavit, which relies primarily on a recitation of the terrible facts of September 11, instead of containing any facts about the particular individual evidencing some connection to terrorism, much less constituting probable cause. The affidavit simply recites that the FBI wishes to make further inquiries.[1] In the meantime, the individual is held in jail.

B. DENIAL OF THE CONSTITUTIONAL RIGHT TO BAIL.

The right to be free on bail until trial is a vital part of the constitutional presumption of innocent until proven guilty. While individuals can be denied bail when there is a substantial risk that they would flee or commit acts of violence if released, this constitutional standard currently seems to have been abandoned. Instead of considering whether a particular individual is likely to flee, the Department is attempting to detain all individuals picked up as part of the September 11 investigation. If the past few weeks are an example of what the future holds, it is likely that individuals charged with "spitting on the sidewalk" may serve more time in jail pre-trial than they would if they were found guilty.

All these circumstances raise serious questions about the effectiveness of the current effort. Is the FBI carrying out a focused investigation executing the work necessary to identify and detain actual terrorists, or is this simply a dragnet, which will only be successful by chance. The fact that 1,000, or even 5,000, individuals are arrested is no assurance that the truly dangerous ones are among them.

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[1] While the FBI affidavits are difficult to find, one filed in a bail proceeding in immigration court appears to contain the general formula. It says:

"In the context of this terrorism investigation, the FBI identified individuals whose activities warranted further inquiry. When such individuals were identified as aliens who were believed to have violated their immigration status, the FBI notified in INS. The INS detained such aliens under the authority of the Immigration and Nationality Act. At this point, the FBI must consider the possibility that these aliens are somehow linked to, or may posses knowledge useful to the investigation of the terrorist attacks on the World Trade Center and the Pentagon. The respondent, Osama Mohammed Bassiouny Elfar, is one such individual. . . .

At the present stage of this vast investigation, the FBI is gathering and culling information that may corroborate or diminish our current suspicions of the individuals that have been detained. . .In the meantime, the FBI had been unable to rule out the possibility that respondent is somehow linked to, or possesses the knowledge of the terrorist attacks on the World Trade Center and the Pentagon. To protect the public, the FBI must exhaust all avenues of investigation while ensuring that critical information does not evaporate pending further investigation."

C. VIOLATION OF THE RIGHT TO CONSULAR NOTIFICATION.

Mohammed Rafiq Butt, a Pakistani citizen who was detained for entering the country illegally, died in custody of an apparent heart attack on October 23. Pakistani diplomats only learned of Mr. Butt's arrest when journalists called the Embassy to ask for a comment on his death. Clyde Howard, director of the State Department's Consular Notification and Outreach Unit, said, "We are concerned about these failures of notification when they happen to us overseas, so it becomes more difficult for us to assert our rights under the Vienna Convention if we are not doing a good job in giving the same notification here."[2]

We urge this Committee to examine whether since September 11, law enforcement officials have consistently failed to notify foreign governments when their nationals are arrested. US treaty obligations require foreign consulates to be so notified.

D. VIOLATION OF THE RIGHT TO COUNSEL AND THE FOURTH AMENDMENT.

Even before the Justice Department announced its new policy of eavesdropping on conversations between detainees and their attorneys, there were numerous reports of interference with the right to counsel. Many immigration detainees were prevented from finding counsel. The administration's "one call a week" policy made it difficult for detainees to communicate with their families, find lawyers, or even know if they had successfully secured representation. There is reason to fear that detainees' lawyers have been muzzled by gag orders, or simply intimidated into silence with threats of actions organized against their clients.

Under the Justice Department's recently announced policy, solely on the Attorney General's say-so, the Department can eavesdrop on the privileged attorney-client conversations of persons who have not even been charged. Such individuals can be held incommunicado, with their activities severely restricted. While others have outlined the clear unconstitutionality of this policy, I want to emphasize the equally unlawful way in which it was adopted.

Only weeks before the unilateral announcement of this new policy, the Attorney General had come to the Congress seeking a comprehensive package of new powers the administration believed were necessary to fight terrorism. At no time did the government suggest that any amendment was needed to the wiretap statutes authorizing surveillance of such privileged conversations. Had it done so, there could have been a public debate about whether current law was inadequate in some way. Instead, the Attorney General has simply declared that the government will suspend the Fourth Amendment requirements of probable cause and judicial warrant for wiretapping and substitute his say-so. Such an approach shows a lack of respect for both the Bill of Rights and our system of divided government.

I also want to comment on the administration's claim that the eavesdropping is acceptable under the Constitution because the FBI agents who eavesdrop on privileged conversations will not be involved in criminal prosecution of the individual. It appears highly doubtful that this will be the reality, given the FBI's description of its investigation as a mosaic in which each small piece of information can only be understood when contextualized. Even more significantly, it is clear that such information could be used against the individual in any detention or military commission proceeding authorized by President Bush's most recent order.

INTIMIDATION OF IMMIGRANTS

Many of the recent actions appear to be aimed not so much at gathering information about Al Qaeda and its members, but at simply intimidating those who have come to visit, do business, or work and become Americans. There are myriad reports of individuals who have been jailed for weeks because they have overstayed their visas. Usually they would have been granted some kind of adjustment allowing them to leave the country voluntarily or stay and become law-abiding and productive members of our society, but not since the recent terrorist attacks. The plan to question 5,000 individuals without knowing anything about any specific individual indicating that he or she might have useful information will certainly intimidate many into leaving the country. This plan will take enormous law enforcement resources and will generate many reams of memos; but whether it will produce any useful information is open to question. It is urgent that this Committee immediately examine whether these actions are no more than attempts to intimidate individuals from the Middle East into leaving the country. If so, such a policy needs to publicly

[2] John Dually and Wayne Washington, "Diplomats Fault Lack of US Notice on Many Detainees", *The Boston Globe*, November 1, 2001.

defended and debated. It is not clear what law enforcement or national security purpose is served by such a tactic, which presumably will not work on those who have actually entered the country ready to die in the order to kill Americans. It does, however, erode the trust and confidence of minority and immigrant communities and make law enforcement resources otherwise unavailable.

THE ORDER AUTHORIZING MILITARY COMMISSIONS AND PREVENTIVE DETENTION VIOLATES SEPARATION OF POWERS AND THE BILL OF RIGHTS

The constitutional defects of the recent order authorizing secret military trials and military detentions are outlined elsewhere. Here, I only offer a few observations.

- Individuals currently in detention may be threatened with secret transfers to military custody.

The broad scope of the order would authorize the President to direct that individuals currently held, even if not criminally charged, be immediately transferred to secret military custody, even overseas. It seems clear that the intent of the order is to authorize such transfers in secret and to impose both legal and practical obstacles to individuals obtaining any judicial review of such transfers.

- The authorization of military detention of aliens inside the United States on the say-so of the President is an unconstitutional end-run around the provisions of the USA Patriot Act.

In addition to military commissions for individuals captured overseas, the order authorizes detention of aliens inside the United States believed by the President to be involved in terrorism. This part of the order is a deliberate end-run around the provisions of the USA Patriot Act concerning such detentions, which limits the conditions and time under which individuals may be detained. The President's Order attempts to authorize what the Congress rejected in the first administration draft of the anti-terrorism bill. It is a deliberate end-run around the limits and restrictions agreed to by the administration in negotiating the detention provisions of the Patriot Act.

- The military commission order violates separation of powers.

The administration's unilateral issuance of this order without even discussing it with the Congress is the most blatant example of its disregard for the explicit text of the Constitution. The Constitution gives to the Congress explicit authority over military tribunals.

Article I specifically vests in the Congress: the power to create judicial tribunals "inferior to the Supreme Court;" "To define and punish" Offenses against the Law of Nations; To make Rules concerning Captures on Land and Water; and "To make Rules for the Government and Regulation of the land and naval Forces." Article I, sec. 8. When the Supreme Court approved the use of military commissions in World War II, Congress had specifically authorized their use in the Articles of War adopted to prosecute the war against Germany and Japan.

Accordingly, this order violates separation of powers as the creation of military commissions has not been authorized by the Congress and is outside the President's constitutional powers.

Individuals accused of war crimes are entitled to fundamental due process protections even if tried by military courts.

Since the Supreme Court approved the use of military commissions to try offenses against the laws of war in World War II, the law of war and armed conflict has come to include the requirements that even those characterized as unlawful combatants accused of war crimes must be accorded fundamental due process. Thus, any constitutionally authorized military commissions would be bound by the current legal obligations assumed by the United States. These would include the United Nations charter and the International Covenant of Civil and Political Rights, none of which were in existence at the time the Supreme Court approved the use of military commissions during World War II.

We urge the Congress to make clear that such order is not authorized and thus unconstitutional. If military trials are deemed necessary for individuals captured in Afghanistan or fleeing therefrom, the Congress should authorize their use consistent with the requirements of due process enshrined in the Constitution and the international covenants agreed to by the United States.

In the meantime, we appeal to the Committee to require the Attorney General to immediately notify the Committee of any plans to apply the order to any individuals now detained in the United States and to inform you of the identities of such individuals and the basis for applying the order before doing so.

We urge the Congress to insure that those accused of even the most terrible crimes against humanity be accorded fundamental due process because our commitment to accord everyone the protection of the rule of law is what in the end distinguishes us from the terrorist who simply kill in the name of some greater good.

CONCLUSION

In the darkest days of the Cold War we found ways to reconcile both the requirements for security and those of accountability and due process, by taking seriously both interests. No less is required if in the long run, we expect to be successful in the fight against terrorists, who care nothing for either human liberty or individual rights.

We need to look seriously at how security interests can be served while respecting civil liberties and human rights. It is time to give serious consideration to whether promoting democracy, justice, and human rights will, in the long run, prove to be a powerful weapon against terrorism along with law enforcement and military strength. Current administration policies assign no weight to respecting civil liberties as useful in the fight against terrorism. Only when that is done, will we truly be effective in what has been acknowledged to be a long and difficult struggle.

Chairman LEAHY. Thank you.

I would also note for each of the witnesses, obviously we are, because of the time, being a little bit tighter on the control of the time than normal. But, certainly, you will be getting back transcripts of this and anything you want to add to the transcript, any one of you, of your own testimony, of course, feel free to do that and to make it part of the permanent record. This is going to be a series of hearings that are going to go on for some time and if individual witnesses wish to add to their testimony, they will be able to.

Professor, thank you very much for being here, and please go ahead.

STATEMENT OF NEAL KATYAL, VISITING PROFESSOR, YALE LAW SCHOOL, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY, WASHINGTON, D.C.

Mr. KATYAL. Mr. Chairman, Senator Hatch and members of the Committee, in my judgment the President's order for military tribunals and the Attorney General's attorney-client regulation both contain serious constitutional flaws. Much attention has been focused on whether these decisions violate notions of fair play, but there is a troubling and different issue. These decisions aggressively usurp the role of Congress.

Of course, all Presidents are tempted to go it alone. President Truman seized the steel mills and President Roosevelt tried to pack the courts. Yet, our Constitution's structure, as Senator Specter reminds us in his eloquent editorial in today's New York Times, mandates that fundamental choices such as these be made not by one person but by the branches of Government working together. Ignoring this tradition charts a dangerous course for the future and may jeopardize the criminal convictions of the terrorists today.

Throughout history, there have been times when this country has had to dispense with civil trials and other protections. Yet, those circumstances have been rare, carefully circumscribed, and never unilaterally defined by a single person.

A tremendous danger exists if the power is left in one individual to put aside our constitutional traditions when our nation is at crisis. The safeguard against the potential for this abuse has always

been Congress' involvement in a deep constitutional sense. The default should be faith in our traditions and faith in our procedures.

The attorney-client regulation was announced with no legislative consideration whatsoever. It comes close to infringing both Fourth Amendment rights of privacy and the Sixth Amendment rights to counsel. Those subject to the rule aren't even charged with a crime, for the regulation explicitly contemplates use against "material witnesses."

The Government is currently detaining over 1,100 individuals. On what basis we don't even know. Yet, now it asserts the unilateral power to abrogate the freedom between attorney and client, a freedom described by our Supreme Court as the oldest privilege at common law.

A client might want to talk to his lawyer about the most private matters imaginable—a divorce created, in part, by the Government's attention, for example—and can't do privately. This is a dramatic and unprecedented aggrandizement of power.

The decree's constitutionality is particularly in doubt when a series of less restrictive alternatives exist, and this is particularly true if, as the Justice Department says today, the regulation only applies to 16 individuals, a fact that will actually backfire on the administration's legal case in the future. Such an intrusion into private affairs can only be justified by compelling circumstances, and these circumstances should be announced by this body, by the Congress, in the form of law, not executive decree.

The Fourth Amendment focuses on reasonableness, and one way in which courts assess reasonableness is by looking to Congress. When the courts were in conflict over whether the courts could conduct certain intelligence surveillance, this body and the President compromised in the FISA, the Foreign Intelligence Surveillance Act. This Committee stated at that time the goal of the legislation was to end the President and the Attorney General's practice of disregarding the Bill of Rights "on their own unilateral determination that national security justifies it."

Moving to the issue of military tribunals, the sweep of the order goes far beyond anything that Congress has authorized, for it explicitly extends the tribunal's reach to conduct unrelated to the September 11 attacks.

For example, if a Basque separatist tomorrow kills an American citizen in Madrid, or a member of the Irish Liberation Army threatens the American embassy in London, the military tribunal has jurisdiction over both claims. So, too, the tribunal may have jurisdiction over a permanent green card-holder in Montana who tries to hack into the Commerce Department.

There is no conceivable legislative authorization for these types of trials, trials that may take place under conditions of absolute secrecy. The administration thus sets an extremely dangerous precedent. A future President might unilaterally declare that America is in a war on drugs and decide to place certain narcotics traffickers in secret military trials.

Imagine another President who hates guns. That President might say the threat posed by guns is so significant that monitoring of private conversations between attorneys and gun dealers, and monitoring of conversations between attorneys and gun pur-

chasers, is required, pointing to the precedent set by this administration.

Now, these examples might seem unbelievable to you, but they are much smaller steps than the one the administration is now taking when one compares what previous administrations have done to what the present administration claims it can do today.

It is therefore my hope that this Committee will use its authority to impress upon the administration that its decrees have serious constitutional problems and secure a promise from the President not to use military courts, particularly in America, and not to use attorney-client monitoring until this body so authorizes them. This Committee could then immediately commence hearings to determine whether those policies are appropriate and, if so, how they should be circumscribed, just as it did with the USA PATRIOT bill.

In conclusion, like all Americans, I believe the administration is trying, in good faith, to do the best it can, but that is part of the point. Our constitutional design can't leave these choices to one man, however well-intentioned and wise he may be. We don't live in a monarchy.

[The prepared statement of Mr. Katyal follows:]

STATEMENT OF NEAL KATYAL, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY

INTRODUCTION

Thank you, Chairman Leahy and members of the Committee, for inviting me here today to discuss the topic of preserving our freedoms while defending against terrorism. In particular, I will focus my remarks on the constitutionality of the President's recent Order regarding military tribunals and Attorney General Order No. 2529–2001, which permits the Justice Department to monitor communications between attorneys and their clients under certain circumstances. In my judgment, both of these policies usurp the power of Congress. Our Constitution's framework, from top to bottom, evinces a strong structural preference that decisions of this magnitude not be made by one person. Our Founders understood the temptation that a single person would have when given unbridled power, an understanding substantiated this century when President Franklin Roosevelt tried to pack the courts and President Truman attempted to seize the steel mills. The current course of conduct is an unprecedented aggrandizement of power, one that not only threatens the constitutional prerogatives of this body but also risks jeopardizing the criminal convictions of those responsible for the September 11 attacks.

At the outset, let me be clear about what I am not saying: I cannot say that either of these policies, if crafted correctly and appropriately circumscribed, would be unconstitutional. The policies come close to the constitutional line, but national security in some instances may compel the country to create military tribunals or to monitor conversations between attorneys and clients. The problem today is that the Executive Branch has not made this case, either to this body or to the country. As bystanders, it is impossible to know whether military necessity requires the measures taken by the Administration. Many terrible things have been done in the name of national security—but many terrible disasters have also been averted through concerted efforts by our law enforcement agents and intelligence community. The tough issue is how to strike a balance.

Our Constitution commits this tough issue not to a single person, but to our branches of government working together. Throughout history, there have been times when this country has had to dispense with civil trials, with other protections in the Bill of Rights, and with the rules of evidence. Those circumstances have been rare, carefully circumscribed, and never unilaterally defined by a single person. A tremendous danger exists if the power is left in one individual to put aside our constitutional traditions and protections when he decides the nation is in a time of crisis. The safeguard against the potential for the abuse of military trials has always been Congress' involvement, in a deep constitutional sense.

As I will explain, the sweep of the Military Order goes far beyond anything Congress has authorized, for it explicitly extends the tribunals' reach to conduct unrelated to the September 11 attacks. For example, if a Basque Separatist tomorrow

kills an American citizen in Madrid, or a member of the Irish Liberation Army threatens the American embassy in London, the military tribunal has jurisdiction over both persons. So too, the tribunal has jurisdiction over a permanent green card holder in Montana who tries to hack into the Commerce Department, thus disregarding years of legislative consideration over the computer crimes statutes. There is no conceivable statutory warrant for such trials, trials that may take place under conditions of absolute secrecy. At most, the reach of a military tribunal can reach a theater of war, not Spain, Great Britain, Montana, or the range of other locations not currently in armed conflict.

The Military Order thus sets an extremely dangerous precedent. A future President might unilaterally declare that America is in a "War on Drugs," and decide to place certain narcotics traffickers in military trials. A President might say that some prospective threat is "the moral equivalent of war" and set up military tribunals to counter that threat as well. Some of these decisions might be entirely justified given the particular facts at issue. But they are the sorts of decisions that cannot be made by one man alone. *These hypotheticals are much smaller steps than the one the Administration is now taking.* The Administration's Military Order is such a dramatic extension of the concept of military tribunals, when compared to the predecessors in American history, that these other steps appear not only plausible, but even likely, down the road.

Because the Military Order strays well beyond what is constitutionally permissible, this Committee should inform the White House of the serious constitutional concerns involved in the President's unilateral Military Order. It should ask the President not to use the tribunals until necessary authorizing legislation is passed, and should immediately commence hearings to determine whether military tribunals are appropriate and, if so, how they should be constituted. Without legislation, however, the use of a military tribunals raises serious constitutional concerns, *difficulties that may even lead to reversal of criminal convictions.*

THE MILITARY ORDER

The jurisdiction of the military tribunal reaches any suspected terrorist or person helping such an individual, whether or not the suspect is connected to Al Qaeda and the September 11 attacks. That individual can be a permanent resident alien, thus potentially applying to millions of American residents. The order explicitly permits tribunals to be set up not simply in Afghanistan, but rather they will "sit at any time and any place"—including the continental United States. § 4(c)(1); see also § 3(a), § 7(d). The order authorizes punishment up to "life imprisonment or death." § 4(a). Both conviction and sentencing (including for death) is determined when two-thirds of a military tribunal agree. At the trial, federal rules of evidence will not apply, instead evidence can be admitted if it has "probative value to a reasonable person." § 4(c)(3). Grand jury indictment and presentment will be eliminated, so too will a jury trial. The members of the military tribunal will lack the insulation of Article III judges, being dependent on their superiors for promotions. The Order also strongly suggests that classified information will not be made available to defendants, even though such material may be used to convict them or may be significantly exculpatory. See § 4(c)(4); § 7(a)(1). The Order further claims that defendants "shall not be privileged to seek any remedy or maintain any proceeding. . .in any court of the United States, or any State thereof." § 7(b). And most damaging: the tribunals may operate in secret, without any publicity to check their abuses.

In short, these military tribunals will lack most of the safeguards Americans take for granted, safeguards that the American government routinely insists upon for its citizens, either here or when they are accused of a crime overseas. The Constitution generally requires: 1) a trial by Jury, U.S. Const., Art III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"); 2) that the jury trial be a *public* one, U.S. Const., Am. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . ."); 3) those accused the right to confront witnesses and subpoena defense witnesses, *Id.* ("to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor"); 4) proof beyond a "reasonable doubt" for criminal convictions in general, and detailed procedural protections to insure accuracy before the death penalty is imposed; and 5) indictment by a grand jury, U.S. Const., Am. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger"). These constitutional guarantees may be found inapplicable at times,[1]

[1] E.g., *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950).

but much caution is warranted before making such a finding. Such findings should be made carefully, and not by a single person in a secretive way.

THE STRUCTURE OF THE CONSTITUTION EVINCES A STRONG PREFERENCE AGAINST THIS UNILATERAL MILITARY ORDER

The American colonists, who wrote our Declaration of Independence penned among their charges against the King, first, "He has affected to render the Military independent of and superior to the Civil Power",[2] second, "For depriving us, in many Cases, of the Benefits of Trial by Jury,"[3] and third, that George III had "made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries." It was no accident that the Framers established three branches of government in the wake of George III's reign. A Congress to write the laws, an Executive Branch to enforce them, and a Judicial Branch to interpret them. Consider how markedly the Order establishing the military tribunal departs from this constitutional scheme. This Congress has not been asked to create a military tribunal. The Order attempts to strip the Judicial Branch of much or all of its authority to review the decisions taken by the Executive Branch. And the judges are not "judges" as civilians know them, but rather officials who are part of the Executive Branch. The Executive Branch is acting as lawmaker, law enforcer, and judge. The premise of the Military Order is to bar involvement by any other branch, at every point. This is exactly what James Madison warned against when he wrote "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." Federalist No. 47 (Cooke ed., 1961), at 324.

The issues raised by the Military Order concern not only today, but tomorrow. You can already hear how our treatment of the Nazi saboteurs in 1942 has become the guidepost for our treatment of individuals today. What will the present course of conduct mean for situations down the road? Once the President's power to set up military tribunals is untethered to the locality of war or explicit Congressional authorization, and given to the President by dint of the office he holds, there is nothing to stop future Presidents from using these tribunals in all sorts of ways. In this respect, it is important to underscore that the precedent the Bush administration seeks to revitalize, the Nazi saboteur case of *Ex Parte Quirin*, 317 U.S. 1, 20, 37–38 (1942), explicitly goes so far as to permit military tribunals to be used against American citizens. We must be extraordinarily careful when revitalizing an old and troubling court decision, for doing so will set new precedent for future Presidents that can come back to haunt citizens and aliens alike. Our Constitution limits the power of one person to set this sort of destructive precedent. If the exigencies of the situation demand it, the Congress can of course authorize military tribunals or attorney/client monitoring, just as it expanded law-enforcement powers in the USA PATRIOT Act, Pub. L. No 107–56, 115 Stat. 272 (2001).

In past circumstances, military tribunals have been set up only when Congress had declared war or had authorized such tribunals. It is often asked what purpose the Declaration of War Clause in the Constitution serves. We know it is not about initiation of troops on foreign soil, Presidents have done that for time immemorial without such a declaration by Congress. But one thing, among others, a declaration of war offers is to establish the parameters for Presidential action. By declaring war, the Congress is stating that the President should receive additional powers in times of military necessity. A declaration of war serves to confine the circumstances in which a military tribunal can be used, and it also serves to limit the tribunal's jurisdiction to a finite period of time. As Justice Jackson put it,

> Nothing in our Constitution is plainer than that a declaration of a war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the coun-

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[2] E.g., *Laird* v. *Tatum*, 408 U.S. 1, 19(1972) (Douglas, J., dissenting) (finding that this clause restricts the power of the military); *Reid* v. *Covert*, 354 U.S. 1, 29 (1957); *Bissonette* v. *Haig* 776 F.2d 1384, 1387 (8th Cir. 1985).

[3] See, e.g., *Neder* v. *United States*, 527 U.S. 1, 31 (1999) (Scalia, J., concurring in part and dissenting in part) (stating that this clause restricts the ability of the government to limit jury trials); *Parkland Hosiery Co.* v. *Shore*, 439 U.S. 322, 341 n.3 (1979) (Rehnquist, J., dissenting); *Duncan* v. *Louisiana*, 391 U.S. 145, 152 (1968); United States ex rel. *Toth* v. *Quarles*, 350 U.S. 11, 16 n.9 (1955).

try by his own commitment of the Nation's armed forces to some foreign venture. . . .

Youngstown v. *Sawyer*, 343 U.S. 579, 642 (Jackson, J., concurring).[4] Just as this body feared that the wide-ranging law enforcement powers authorized in the USA PATRIOT Act might be in existence for too long a time and therefore imposed a sunset clause, see § 224, so too a declaration of war restricts the duration and scope of military jurisdiction. No such confinement exists in the Military Order.

A declaration of war, however, is not the only way for this body to provide its assent to military tribunals. Congress can, through ordinary legislation, authorize them, and, if appropriate, limit them. If it were to do so, the constitutional footing of the tribunals would be far stronger. The current unilateral action taken by the Bush Administration threatens to result in the release of those subject to the Military Order. Without sufficient approval by Congress, the Executive Branch has set up an easy constitutional challenge to the existence of the tribunals. There is no good reason why criminal convictions should be jeopardized in this way. The Executive should make his case to Congress, and let Congress decide how it wants to proceed. The failure to do so may be read by courts to imply that reasons other than national security undergird his decision. Should this body authorize such trials, by contrast, it would be read by courts as extremely important indicia about the seriousness of the threat.[5]

THE NAZI SABOTEUR CASE, *Ex Parte Quirin*, IS NOT APPROPRIATE PRECEDENT

The Administration has repeatedly pointed to the fact that President Roosevelt issued an order permitting the military trial of eight Nazi saboteurs. The Supreme Court upheld the constitutionality of the military tribunals in the *Quirin* case, but did so in a way that militates against, not for, the constitutionality of the present Military Order.

In *Quirin*, formal war had been declared by the Congress. The Supreme Court opinion is rife with references to this legislative authorization for the tribunals. E.g., 317 U.S., at 26 ("The Constitution thus invests the President, as Commander in Chief, with the power to *wage war which Congress has declared*") (emphasis added); *Id.*, at 25 ("But the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army *in time of war* and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution *or laws of Congress* constitutionally enacted") (emphasis added); *Id.*, at 35 (stating that "those who during time of war pass surreptiously from enemy territory into are own. . .have the status of unlawful combatants punishable as such by military commission") (emphasis added); *Id.*, at 42 ("it has never been suggested in the very extensive literature of the subject that an alien spy, *in time of war*, could not be tried by a military tribunal without a jury") (emphasis added). What's more, the Court, found that two portions of legislation, the Articles of War, 10 U.S.C. § 1471–1593, and the Espionage Act of 1917, 50 U.S.C. § 38, had recognized the validity of military tribunals in times "of war." *Quirin*, 317 U.S. at 26–27. But applicable legislation here is lack-

[4] See also Youngstown, 343 U.S. 579, 612 (1952) (Frankfurter, J., concurring) ("In this case, reliance on the powers that flow from declared war has been commendably disclaimed by the Solicitor General").

[5] Naturally, if the subject of the tribunal is a major figure like Osama Bin Laden, courts may be unlikely to void a conviction on any ground. But these tribunals aren't being consider for Bin Laden alone, but also for the more minor players. In those cases, the risk is significant that a court will overturn a conviction because these tribunals are not constitutionally authorized. Should the courts instead uphold such unconstitutionally created tribunals, Americans will then be left with a dangerous precedent that can be used to undermine constitutional guarantees in other situations. Consider Justice Jackson's thoughts in his *Korematsu* dissent:

[A] judicial construction of the due process clause that will sustain this order is far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. . . .But one a judicial opinion rationalizes such an order to show that it conforms to the Constitution. . .the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon. . . .A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. *Korematsu* v. *United States*, 323 U.S. 214, 245–46 (1944) (Jackson, J., dissenting). Precisely because courts are not equipped to assess the national security implications of various measures, this body has a vital role to play in balancing the national security against our constitutional tradition of individual liberties.

ing.[6] Indeed, the *Quirin* Court explicitly reserved the question of the President's unilateral power: "It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions." *Id.*, at 29.[7]

As I will discuss in detail in a moment, it cannot be maintained that this body has acted comparably with respect to the September 11 attacks. Congress has not declared war. Congress has not stated that the laws of war are applicable to terrorists or that military tribunals are appropriate. It is of course within Congress' prerogative to make these statements, and to have them acted upon by the Executive Branch in its discretion, and later interpreted by the courts. But without a clear statement by Congress, it is a very dangerous precedent to permit the Executive Branch to unilaterally make such a decision. The *Quirin* case does not go nearly as far as supporters of the tribunals wish, indeed, it confirms the simple constitutional fact that Congress, not the President, is responsible for setting up these tribunals.

Furthermore, the *Quirin* case took place at a time when Americans were in a full-scale world war, where the exigencies of the situation demanded a quick result. See *Quirin*, 317 U.S., at 39 (stating that military tribunals "in the natural course of events are usually called upon to function under conditions precluding resort to such procedures [as trial by jury]"). *Quirin*, just as the Revolutionary War, the War of 1812, and the Civil War, were all circumstances in which there was total war in the homeland, with large numbers of enemy troops as occupants. There was a real danger in each that America might lose. The Administration today, by contrast, has not made the case, or even attempted to do so, that the circumstances are comparable. This body might of course so find, and that would go a long way towards removing the constitutional objections. Proportionality is an endemic feature of our government, and deprivations of individual rights that are proportional to the threat presented will often survive constitutional scrutiny. In this case, however, military tribunals cannot be said to be an automatically proportionate response to a threat. If the Administration believes that they are, it should, as other Presidents have done, ask the Congress for greater authority due to the nature of the threat, not decide as much on its own.

President Roosevelt's order also strictly circumscribed the military tribunal's jurisdiction to cases involving "sabotage, espionage, hostile or warlike acts, or violations of the law of war." Roosevelt Proclamation, 56 Stat. 1964, 1964 (July 2, 1942); *Quirin*, 317 U.S. at 30 (finding that prosecution did not violate prohibition on federal common law of crime because Congress explicitly incorporated the law of war into the jurisdiction for military tribunals). The recent Military Order, by contrast, brings millions of green-card holders and others into its jurisdiction. The Military Order extends jurisdiction to "the laws of war and *other applicable laws*." § 1(e) (emphasis added); *see also* § 4(a) (individuals will be "tried by military commission *for any and all offenses triable* by military commissions") (emphasis added).

These distinctions are all made against the backdrop of a case that said that its holding was an extremely limited one. The Court explicitly said that it had "no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals," and that "[w]e hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by

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[6] The Articles of War appeared at 10 U.S.C. §§ 1471–1593 (1940) but was later replaced by the Uniform Code of Military Justice, 10 U.S.C. §§ 801 et seq., which preserves the recognition of the military commissions as having concurrent jurisdiction with the courts-martial when authorized by statute or when trying those who violate the law of war. 10 U.S.C. § 821. Congress's authority here arises out of Article I, § 8, cl. 10 of the United States Constitution which confers power upon the Congress to "define and punish. . .Offenses against the Law of Nations. . ." The common law of war is a subset of the law of nations. *See In re Yamashita*, 327 U.S. 1, 7 (1946).

[7] It is notable that the some of the main proponents of military tribunals for terrorists have noted that affirmative Congressional authorization is necessary. See Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 Ok. City. L. Rev. 349, 398–99 (1996) (stating that the tension between *Quirin* and *Milligan* "can be resolved simply by Congress declaring terrorism to be a form of unlawful belligerency, from which ordinary law no longer secures either public safety or private rights, and further declaring terrorists to be enemy armed forces"); id., at 377 (discussing what "Congressional authorization for the use of military means against terrorism" should provide in order to authorize the President "to establish a military commission").

military commission." *Quirin*, 317 U.S., at 45–46. Indeed, *Quirin* recognized that the use of tribunals may be conditioned by the Sixth Amendment.[8]

The Nazi saboteur case, as Justice Frankfurter later called it, is not "a happy precedent." Danielsky, *The Saboteurs' Case*, 1 J. S. Ct. Hist. 61, 80 (1996) (quoting memorandum from Justice Frankfurter).[9] The real reason President Roosevelt authorized these military tribunals was to keep evidence of the FBI's bungling of the case secret. One of the saboteurs, George Dasch, had informed the FBI of the plot upon his arrival in the United States, and the FBI dismissed his story as a "crank call." Later, the saboteur went to Washington, checked into the Mayflower Hotel, and told his story in person to the FBI. The FBI still did not believe him. It was only after he pulled $80,000 in cash out of his briefcase that the government took him seriously. With Dasch's help, the government arrested the other saboteurs. Yet the government put out press releases suggesting that it was the FBI's diligence that resulted in the arrests.[10] "This was the beginning of government control on information about the Saboteurs' Case and the government's successful use of the case for propaganda purposes." Danielsky, *supra*, at 65.

Finally, even if one is left believing the *Quirin* case provides some judicial precedent in favor of the present military order, this Body is by no means compelled to believe that this judicial decision is the last word on what is constitutional. After all, two years after *Quirin*, the same Supreme Court upheld the internment of Japanese Americans during World War II in the infamous *Korematsu* case, 323 U.S. 214 (1944). *Korematsu* demonstrates that judges will sometimes bend over backwards to defer to a claim of military necessity. Judges are generalists and not particularly suited to evaluating claims of military necessity. For that reason, judicial precedents are not always a helpful guide in determining the meaning of the Constitution, for their determinations are made under traditions that sometimes under enforce certain constitutional rights. See Sager, *Fair Measure: The Legal Status of Under enforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978). This body, by contrast, has the security clearances and the expertise to scrutinize and evaluate claims of military necessity in light of its commitment to the Constitution, see U.S. Const., Art. VI [2]. This is particularly the case here, for the Constitution's meaning has evolved in several ways since 1942, not only with respect to equality, but particularly with respect to the treatment of criminal defendants and conceptions of due process. See Katyal, *Legislative Constitutional Interpretation*, 50 Duke L.J. 1335, 1346–59.

In sum, while the natural tendency is to look to the *Quirin* case, *Quirin* is only a narrow (and inapplicable) exception to the general presumption against military trials in this nation. What's more, *Quirin* was decided before the due process revolution in the federal courts, which took place only in the 1960s. It is not even clear that the limited holding in *Quirin* exists today.

OTHER APPLICABLE PRECEDENT

In circumstances that echo some of today's more far reaching provisions, a military commission tried a group of men for conspiracy against the United States in

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[8] We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in Ex parte Milligan, supra." Id., at 29

[9] The private papers of the Justices reveal that Chief Justice Stone struggled to find a way to claim that Congress had authorized the tribunals, and his answer appears dubious. "Stone answered it uneasily by interpreting a provision in Article of War 15. . . .Thus Congress, he said, in enacting Article 15, had adopted the law of war as a system of common law for military commissions. To arrive at this interpretation, Stone ignored the legislative history of Article 15. . .He also ignored the petitioners' argument that it was settled doctrine that there is no federal common law of crime. Finally, he ignored the constitutional problems raised by his interpretation." Danielsky, *supra*, at 73. See also id., at 76 (quoting Justice Black's memorandum on the case, which stated that I "seriously question whether Congress could constitutionally confer jurisdiction to try *all* such violations before military tribunals. In this case I want to go not further than to declare that these particular defendants are subject to the jurisdiction of a military tribunal because of the circumstances. . .").

[10] Attorney General Biddle stated that as a result of the secrecy, "it was generally concluded that a particularly brilliant FBI agent, probably attending the school in sabotage where the eight had been trained, had been able to get on the inside. . ."Danielsky, supra, at 65. Biddle insisted on absolute secrecy, Secretary of War Stimson later wrote in his diary, because of particular evidence that was likely to come out at a public trial. This evidence included Dasch's cooperation, the FBI's ignoring of Dasch's phone call, and the delay in reporting discovery of the saboteur's landing. Id., at 66.

1864. *Ex Parte Milligan*, 71 U.S. 2, 120 (1866). Milligan sought a writ of habeas corpus, arguing that a military court could not impose sentence on civilians who were not in a theater of war. Several features of the opinion are relevant. The Court disagreed with the government's claim that Constitutional rights did not operate in wartime, explaining the reach of the Fourth, Fifth, and Sixth Amendments, and stating that the founders of the Constitution

> foresaw that troublous times would arise, when rules and people would become restive under restraint. . .and that the principles of constitutional liberty would be in peril. . . .The Constitution of the United States is the law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

Milligan, 71 U.S., at 120. *see also* William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* 137 (1998) ("The *Milligan* decision is justly celebrated for its rejection of the government's position that the Bill of Rights has no application in wartime. It would have been a sounder decision, and much more widely approved at the time, had it not gone out of its way to declare that Congress had no authority to do that which it never tried to do.")

Milligan went on to hold that when courts are closed due to war, then martial law may be justified in limited circumstances:

> If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war really prevails, there is a necessity. . .as no power is left but the military.. . .As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross distortion of power. Martial rule can never exist where courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the *locality of actual war*. Because, during the [Civil War] it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered.

Milligan, 71 U.S., at 127. This part of *Milligan* was distinguished in *Quirin*, but only on the unique facts of the case, for the *Quirin* defendants were charged with violating the Law of War after a declared war and were charged in the locality of the actual war. Under the still-standing *Milligan* rule, martial law might have been appropriate in New York City in the days immediately following the World Trade Center attacks, when Foley Square was closed and the Southern District of New York was not operating as usual. Military tribunals could not exist in other states, however, and would cease in New York after the federal courts became operational. While *Milligan* states the general rule, *Quirin* at most provides an extremely limited exception to it.

The five Justices in *Milligan*'s majority went so far as to prevent military tribunals from being used even when explicitly authorized by Congress. Their decision provoked controversy, leading Chief Justice Chase to author a partial dissent (joined by three other Justices). Chief Justice Chase believed that the laws of Congress did not authorize the use of military tribunals, and therefore joined the majority opinion in part. *Milligan*, 71 U.S., at 136. This opinion is notable because it underscores the power of Congress to authorize these tribunals:

> We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana. . . .
> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success. . .. Congress cannot direct the conduct of campaigns, nor can the President or any commander under him, *without the sanction of Congress*, institute tribunals for the trial and punishment of offenses, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.
> We by no means assert that Congress can establish and apply the laws of war where no war had been declared or exists.
> . . . .it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals.

Id., at 137–40; *see also Id.*, at 122 (majority op.) ("One of the plainest constitutional provisions was, therefore, infringed when *Milligan* was tried by a court not

ordained and established by Congress, and not composed of judges appointed during good behavior").[11] Under either rule in *Milligan*, the majority rule or Chief Justice Chase's dissent, the present Military Order fails. It lacks basic constitutional protections, and has not been authorized by Congress.

In another World War II case, the Court faced the issue of the Executive's authority to order military tribunals to try violators of the law of war. In *In re Yamashita*, 327 U.S. 1 (1946), General Yamashita of the Imperial Japanese Army was tried and convicted by a military commission ordered under the President's authority.[12] The Court held that the trial and punishment of enemies who violate the law of war is "an exercise of the authority sanctioned by Congress, to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists—from its declaration until peace is proclaimed." *Id.*, at 11–12 (emphasis added).[13]

The Supreme Court dealt with the use of military commissions again in *Madsen* v. *Kinsella*, 343 U.S. 341 (1952), where the dependant wife of an American serviceman was convicted by military commission for the murder of her husband. The Court found it within the President's power to establish a military tribunal but under certain constraints. Madsen stated that these commissions "have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war." *Id.* at 346. As such, the Court recognized that these tribunals derive their authority from the Congress' power to "declare war." *Id.* at 346 n.9, and from the occupation of Germany and the recent "cessation of hostilities." *Id.*, at 348.[14]

Of course, there may be times when Congress cannot declare war, for one reason or another.[15] But in many of those cases, the Congress can of course specifically authorize a military tribunal as part of a resolution authorizing force or as stand-alone legislation. If a particular Administration feels that such Congressional activity is not feasible (due to, for example, an invasion), it bears a burden in justifying a unilateral course of action. But in a case like the one today, where Congress is able to meet (indeed, has been meeting to respond to several Administration requests), this justification for unilateralism does not appear tenable.

CONGRESS HAS NOT AUTHORIZED THE MILITARY TRIBUNALS

The present Military Order relies on the Resolution passed by Congress for legal support. The Resolution states: "That the President is authorized to use *all necessary and appropriate force* against those nations, organizations, or persons he determines *planned, authorized, committed, or aided* the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order

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[11] More recent military precedent also suggests that the civil war was similar to a declared war, and that charges could be brought in the locality of war. See Opinion of Patrick T. Henry, Assistant Secretary, Department of the Army, March 6, 2000, available at *http://www.surratt.org/documents/muddarmy.pdf* ("One might content that the facts *Ex Parte Quirin*are distinguishable from those in the Mudd Case [regarding the Lincoln assassination] because the assassination of President Lincoln did not occur during a time of formally declared war. However, the state of hostilities we now call the Civil Was was not legally declared at an end until 1866. At the time of President Lincoln's assassination, Washington D.C. served as the nation's military headquarters and was a fortified city. It remained under martial law for the duration of the Civil War. . .Soldiers, for the most part, conducted civil policing in and around the city. Under these circumstances, conditions tantamount to a state of war existed at the time of President Lincoln's assassination").

[12] In this case, the President had proclaimed that "enemy belligerents who, *during time of war, enter the United States, or any territory or possession thereof, and who violate the law of war, should be subject to the law of war and to the jurisdiction of military tribunals." 327 U.S., at 10. This Presidential order was specifically predicated on a state of war existing between two belligerent powers.*

[13] *Yamashita* also recognized that the very existence of these commissions grew out of Congress's War Power and not any Executive authority. *Id.* at 12–13 (noting "[t]he war power, from which the [military] commission derives its existence" and that the military tribunals had "been authorized by the political branch of the Government").

[14] The Court quotes from Winthrop, Military Law and Precedents, 831 (2d ed. 1920), stating "it is those provisions of the Constitution which empower Congress to 'declare war' and 'raise armies,' and which, in authorizing the initiation of *war*, authorize the employment of all necessary and proper agencies for its due prosecution, from which the tribunal derives it original sanction. Its authority is thus the same as the authority for the making and waging of war and for the exercise of military government and martial law." The court thus subscribes to the view that military commissions derive any authority they have from Congressional sanction under the war powers. They act only pursuant to Congressional delegation of authority.

[15] A declaration of war in today's circumstances may be possible. See Prize Cases, 67 U.S. 635, 666 (1863) ("But it is not necessary to constitute war, that both parties should be acknowledged as independent nations of sovereign States.").

to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Pub. L. No. 107–40, 115 Stat. 224 § 2(a). This Resolution is patently quite far from a declaration of war, and is limited in many respects. Significantly, the Resolution passed by Congress,

1) restricts its reach only to "force,"
2) applies only to persons involved in some way in the September 11 attacks, and
3) permits such activity "in order to" avert prospective damage to the United States.

Now compare the Resolution with the Military Order, which,

1) goes well beyond any conceivable definition of "force,"
2) does not confine its reach to persons involved in the September 11 attacks, but goes so far as to permit any terrorist unconnected to the attacks to be tried before a military tribunal,
3) is entirely retrospective, meting out sentences for past acts, and
4) extends its jurisdiction to places that are not localities of armed conflict.

A tougher question is presented by persons in Afghanistan, for the Use of Force Resolution when read in conjunction with the Uniform Code of Military Justice could suggest military jurisdiction for those that are the direct targets of Congress' Resolution. As I will explain in a moment, this reading is questionable, but the case is a closer one. *But the Military Order goes much, much farther than this*, and illustrates the precise dangers with unilateral determinations by the Executive. The Order does not confine its reach to those involved in the September 11 attacks. It states that individuals subject to the order include anyone whom,

"there is reason to believe. . .
(i) is or was a member of the organization known as al Qaida;
(ii) has engaged in, aided or abetted, or conspired to commit, *acts of international terrorism*, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
(iii) has knowingly harbored one or more individuals described [in the first two categories above].

Military Order, § 2(a) (emphasis added). There is absolutely no constitutional warrant for such a dramatic expansion of the military tribunal's authority to cover individuals completely unconnected to the September 11 attacks, no matter how broadly the statutes and precedent can be stretched. This is particularly important in light of the fact that the Congress explicitly rejected proposed White House language that would have authorized a broader use of force. See Lancaster, Congress Clears Use of Force, Wash. Post, Sept. 15, 2001, at A4. Subsections ii) and iii) of the Military Order therefore underscore just how important it is for this body to carefully circumscribe the jurisdiction and reach of a military tribunal. Without such guidance, military tribunals can creep far beyond the circumstances of an emergency, sweeping up many unrelated investigations. "Mission creep" can infect not only military operations that employ force, but also those that involve prosecutors and judges.

In the wake of the martial law of the Civil War, Congress passed the Posse Comitatus Act to prevent the military from becoming part of civilian affairs. The Act states, "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C.S. § 1385 (2001). This Act reflects the underlying presumption against blurring military and civilian life, unless Congress authorizes otherwise or the Constitution so demands. It is instructive that this fundamental law has itself been modified recently with respect to the War on Drugs and immigration. See 10 U.S.C. §§ 371–380 (authorizing Secretary of Defense to furnish equipment and personnel to assist civilian agencies in enforcing drug and immigration laws, but preventing the military, with the exception of the Coast Guard, from conducting "a search and seizure, an arrest, or other similar activity"). The Posse Comitatus Act underscores the general presumption against civilian life becoming subject to military law, unless Congress or the Constitution explicitly say otherwise. The recent Military Order undercuts this post Civil War tradition, and does so unilaterally.

As previously stated, the Uniform Code of Military Justice (UCMJ) is still on the books. It might be thought that the language in the Uniform Code, which recognizes

the concurrent jurisdiction of military tribunals, 10 U.S.C. §821,[16] constitutes sufficient congressional authorization of them under the rule laid down in *Quirin*. I have already explained why *Quirin*, and its interpretation of the predecessor statute to the UCMJ, does not come close to justifying the present Military Order. Not only the facts and opinion in *Quirin*, but cases decided under the UCMJ itself suggest that this body has not authorized the military tribunals envisioned in the recent Military Order.

In *United States* v. *Averette*, 19 U.S.C.M.A. 363 (1970), a civilian employee of the Army was charged with criminal violations in Vietnam and tried by court-martial under the UCMJ. The United States Court of Military Appeals there decided that, in determining the applicability of the UCMJ, "the words *'in time of war'* mean. . .*a war formally declared by Congress.*" *Id.*, at 365 (emphasis added). Further, the court believed that "a strict and literal construction of the phrase *'in time of war'* should be applied," *Id.*, in the case of the jurisdiction of military courts. The conclusion in this case was that the hostilities in Vietnam, although a major military action, was not a formal declaration of war for purposes of the military's jurisdiction.[17] The Court of Military Appeals followed this line of reasoning is *Zamora* v. *Woodson*, 19 U.S.C.M.A. 403 (1970), where it held again that the term *'in time of war'* means "a war formally declared by Congress," *Id.* at 404, and that the military effort in Vietnam could not qualify as such. The question of whether a terrorist can even qualify as a belligerent or engage the machinery of the "laws of war" is itself not clear. See Scharf, Defining Terrorism as the Peace Time Equivalent of War Crimes, 7 ILSA J. Int'l & Comp. L. 391, 392 (2001) ("The key is the 'armed conflict' threshold. By their terms, these conventions do not apply to 'situations of internal disturbances and tensions such as riots and isolated and sporadic acts of violence.' In those situations, terrorism is not covered by the laws of war, but rather by a dozen anti-terrorism conventions").[18]

Finally, the United States Court of Claims faced this issue in *Robb* v. *United States*, 456 F.2d. 768 (Ct. Cl. 1972). The Court of Claims held that the decedent's prior court-martial had not held jurisdiction over him as a civilian employee of the Armed Forces because "short of a declared war," *Id.*, at 771, the court-martial did not possess jurisdiction under the UCMJ.

Thus both civil and military courts have held that the UCMJ's use of the term "in a time of war" requires an actual, congressionally declared war to provide jurisdiction over civilians for the military courts-martial or tribunals. This strict reading should also apply to the Court's previous rulings holding the President's power to convene military tribunals to vest only *"in time of war."* This strict reading is justified not only because of the precedent established by the Court of Military appeals, but also in light of the tremendous damage to individual rights the Executive and the military could create if military courts could be convened without explicit Congressional authorization

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[16] The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." 10 U.S.C. §821.

[17] In a rather different setting, the military courts have found that a substantive offense, sleeping at one's post during time of war, was possible during the Korean War. *United States* v. *Bancroft*, 3 U.S.C.M.A. 3 (1953). The Court pointed to many indicia of a wartime situation, including special "national emergency legislation." Id., at 5. See also *United States* v. *Ayres*, 4 U.S.C.M.A. 220 (1954) (following *Bancroft*). *Averette* is not modified by *Bancroft* or *Ayres*, as *Averette* is the more recent case and was explicitly decided in light of these other case. While members of our military might be subject to additional punishment based on statutes that aggravate penalties during wartime, to apply the jurisdiction of the UCMJ to those not ordinarily subject to it requires an affirmative act of Congress. *Averette*, at 365 ("We emphasize our awareness that the fighting in Vietnam qualifies as a war that word is generally used and understood. By almost any standard of comparison—the number of persons involved, the level of casualties, the ferocity of the combat, the extent of the suffering, and the impact on our nation—the Vietnamese armed conflict is a major military action. But such a recognition should not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction.")

The *Averette* ruleing means that when the constitutional rights hang in the balance, courts should read statutes as narrowly to avoid violating these rights unless congressional intent is clear. The term "time of war" is ambiguous, and as such, should be read narrowly as requiring a congressional declaration of war before constitutional rights are abrogated in the name of national security. Congress must speak clearly if it wishes to constrain, or allow the Executive to constrain, civil rights through its war powers.

[18] Making the laws of war applicable to terrorists may also raise problems, including possibly providing them with the "combatant's privilege,"under which combatants are immune from prosecution for common crimes, and prisoner of war status upon detention. Scharf, supra, at 396–98.

After all, many would be surprised to learn that the Administration is arguing that this Body has already ratified military tribunals for terrorists. The dusting off of an old statute passed for an entirely different purpose and in another era raises significant constitutional concerns when that statute is used to justify the deprivation of individual rights. The Supreme Court often speaks in terms of "clear statement" rules: if the legislature wants to deprive someone of a constitutional right, it should say so clearly, otherwise the legislation will be construed to avoid the constitutional difficulty. E.g., *Kent* v. *Dulles*, 357 U.S. 116, 129–30 (1958) (holding that the Secretary of State could not deny passports on the basis of Communist Party membership without a clear delegation from Congress, and that this permission could not be *"silently granted"*) (emphasis added).[19] Without a clear statement by this Congress about the need for military tribunals, it will be difficult for a civilian court to assess the exigencies of the situation and to determine whether the circumstances justify dispensing with jury trials, grand juries, and the rules of evidence on habeas review.

Even if there is some ambiguity in the UCMJ about the meaning of "time of war," standard principles of legislative interpretation would counsel reading the statute to avoid constitutional difficulties, and mean that the President lacks authority.[20] As Justice Jackson put it in his concurrence in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 673 (1952), in the zone of twilight between the powers of Congress and the President, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables. . . ." One of these imperatives is the preservation of individual rights. In *Valentine* v. *United States ex rel Neidecker*, 299 U.S. 5 (1936), the Court considered the Executive's power to extradite under a treaty where the treaty did not provide for such extradition. Although this case took place before Youngstown, it is clear that this Executive action would fall into Jackson's zone of twilight. The Court did not allow the extradition because of the trampling of individual rights: "the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceeding against [an individual] must be authorized by law. . . .It necessarily follows that as the legal authority does not exist save as it is given by an act of Congress. . .[i]t must be found that [a] statute. . .confers the power." *Id.* at 9; *see generally* Silverstein, Imbalance of Powers 115–16 (1997) (stating the proposition that when it comes to individual liberties, the

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[19] *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981) loosened the definition of "implied Congressional authorization" somewhat but did not find that lack of Congressional voice would constitute implicit authorization. The decision expressly disclaimed any attempt to use its precedent in other cases: "we attempt to lay down no general 'guidelines' covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case." Id., at 661. In *Dames*, a case in which a constitutional right was probably not at stake, the Court approved an Executive Order which terminated all litigation between United States nationals and Iran in return for the establishment of a claims tribunal to arbitrate the disputes. The Court did not find explicit authorization by Congress but grounded a finding of implied authorization in the fact the Congress had passed the International Claims Settlement Act of 1949 which approved another executive claims settlement action and provided a procedure to implement future settlement agreements. Also, the legislative history of the International Emergency Economic Powers Act (IEEPA) showed that Congress accepted the authority of the President to enter into such settlement agreements. *Id.* In the current case, Congress has passed no such legislation which recognizes or ratifies the President's authority to convene military tribunals without a declaration of war, and the constitutional rights at stake are significant. As such, implicit approval of Congress cannot be found here as it was in *Dames & Moore*.

[20] A comparison between the Military Order and President Truman's seizure of the steel mills via Executive Order is instructive. The Supreme Court declared Truman's Executive Order unconstitutional because it "was a job for the Nation's lawmakers, not for its military authorities. . . .In the frame work of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown, supra*, at 587 (majority cop. per Black, J.). Even though legislative action might "often be cumbersome, time-consuming, and apparently inefficient," Justice Douglas stated, that was the process our Constitution set up. See id., at 629; see also id. ("The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. . .to save the people from autocracy") (quoting *Brandeis, J., Dissenting in Myers* v. *United States*). *See also Youngston, id.*, at 650 (Jackson, J., concurring) ('Aside from suspension of the privilege of the writ of habeas corpus. . .[the founders made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so. . . .[T]he President of the [German] Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more the 250 occasions. Finally, Hitler persuaded President Von Hindenberg to suspend all such rights, and they were never restored.").

Court is hesitant to defer to the Executive in the absence of specific Congressional mandate).[21]

In the current case, the Executive Order is made applicable even to resident aliens who are constitutionally vested with due process rights. As such, the Court should be wary of allowing the Executive to unilaterally abrogate these individual protections.[22]

Finally, if the UCMJ were stretched to give the President power to create a tribunal in this instance, it would leave the statute so broad as to risk being an unconstitutional delegation of power. Such a statute would leave the President free to define a "time of war," grant him the discretion to set up military tribunals at will, bestow upon the Executive the power to prosecute whomever he so selects in a military tribunal, and give him the power to try those cases before military judges that serve as part of the Executive Branch and perhaps even the ability to dispense with habeas corpus and review by an Article III court. It would be a great and unbounded transfer of legislative power to the Executive Branch, a claim that every defendant before the tribunal would raise repeatedly. *See Clinton* v. *City of New York*, 118 S. Ct. 2091, 2108–10 (Kennedy, J., concurring); *Industrial Union Dep't, AFL–CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J. Concurring); *American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 545 (1981) (Rehnquist, J., dissenting); *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21, 91–93 (1974) (Brennan, J., dissenting).

There is one other aspect of the Military Order that is constitutionally troubling: its secrecy.[23] Government secrecy is a tremendously dangerous, though important, power. The Constitution was designed to avoid secrecy when the criminal process has been engaged. Our Founders feared secret trials, knowing that the impulse would be too great for the prosecutor to abuse his powers. See U.S. Const., Am. VI; cf., *Morrison* v. *Olson*, 487 U.S. 654, 728–29 (1988) (Scalia, J., dissenting).

When criminal trials take place in open court in front of a jury of one's peers, a tremendous checking function exists. Yet the Military Order scraps all of this, and permits trials to be conducted in secret, without the attention of press or peers. Nothing will check the power of the prosecutor in these trials. Our enemies will call them "show trials" to cover up for our government's failures, our friends will wonder

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[21] The *Pentagon Papers Case, N.U. Times Co.* v. *United States*, 403 U.S. 713 (1971), also underscores the constitutional problems with unilateral executive action. In that case, the Court, in a per curiam opinion, denied the President an injunction to block the New York Times and the Washington Post from publishing certain documents which the Administration claimed would be damaging to the military effort in Vietnam. Justice Brennan observed that the Executive acted without authorization from Congress. Previously, Congress had considered legislation which would have made such disclosure criminal. Brennan stated that "[i]f the proposal. . .had been enacted, the publication of the documents involved here would certainly have been a crime. Congress refused, however, to make it a crime." *Id.* at 746. Justice Douglas indicated that the case might have been different with specific Congressional authorization, stating "[t]here is. . .no statute barring the publication by the press of the material which the Times and the Post seek to use." *Id.* at 720. Douglas also conceded that a state of declared war might authorize such action on the part of the Executive when he state "[t]he war power stems from a declaration war. . . .Nowhere (in the Constitution] are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have." *Id.* 722. Similarly here, a declared state of war vests the President with the power to abrogate some Fifth Amendment rights but in the absence of such declaration of war or specific Congressional authorization, the Executive's attempt to remove Fifth Amendment protections through the use of military tribunals is constitutionally problematic.

[22] Additionally, if one subscribes to Justice Murphy's view that the Fifth Amendment protects all people accused by the Federal Government and "[n]o exception is made as to those who are accused of war crimes or as to those who possess the status of any enemy belligerent," then it would be logical that the Executive not be allowed to unilaterally abrogate individual rights of even non-resident aliens. *In re Yamashita*, 327 U.S. at 26 (Murphy, J., dissenting) (stating that "[t]he immutable rights of the individuals, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above the status of belligerency or outlawry. They survive any popular passion of frenzy of the moment. . . .Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.").

[23] There is also a second strain of unilateralism in the Military Order, that of unilateralism in our foreign policy. Spain has already refused to extradite suspects in the September 11 investigation until America promises not to subject them to a military trial. The upshot of the military order may be to weaken not strengthen, our ability to conduct thorough investigations, to interview material witnesses, and prosecute those responsible. Again, these costs of the tribunals may be worth it, but these are the types of determinations that are appropriate for Congressional oversight.

why American justice cannot handle those who are obviously culpable. And a dubious precedent will be set that gives the President the power to establish these tribunals in circumstances untethered to formal declarations of war. If the circumstances demand secret trials, this body can so authorize them. Our Constitution and laws necessarily require many procedures before the cloak of government secrecy can be worn.

ATTORNEY GENERAL ORDER NO. 2529–2001 RAISES SERIOUS CONSTITUTIONAL CONCERNS AND JEOPARDIZES THE CRIMINAL CONVICTIONS OF THOSE RESPONSIBLE FOR TERRORISM

A similar analysis of executive unilateralism applies to Attorney General Order No. 2529–2001. This regulation was announced with no legislative consideration whatsoever. It comes close to infringing both Fourth Amendment right to privacy and the Sixth Amendment right to counsel. Those who are the subject of the rule have not been charged with a crime, for the order permits monitoring of "inmates," defined under this rule to include not merely criminal convicts, but anyone "held as witnesses, detainees or otherwise." The government is currently detaining well over 1000 individuals, some on immigration violations, some as possible suspects, and still others who are material witnesses, all of whom are subject to such monitoring. The monitoring may occur, not on a probable cause standard, but whenever the Justice Department determines that "reasonable suspicion exists to believe that an inmate may use the communications with attorneys. . .to facilitate acts of terrorism." *Id.* Moreover, the determination that someone is too threatening to speak privately with counsel is made not by a judge, but by the executive branch acting unilaterally, in contradistinction to other legislative procedures such as the Foreign Intelligence Surveillance Act (FISA).

Again, this dramatic order, if carefully circumscribed, might be justified on national security grounds, but it is the type of action that requires legislation, not a unilateral decision by the Executive Branch. After all, "the attorney-client privilege under federal law [is] the oldest of the privileges for confidential communications known to the common law." *United States* v. *Zolin*, 491 U.S. 554, 562 (1989).

My analysis here will not dwell on judicial cases, for a good reason, there are none. The Government has not issued such a sweeping ruling in its entire history. All previous precedents pale in comparison to the major change of law issued by the Attorney General. To be sure, there are indications that both the Fourth Amendment and Sixth Amendment are violated when the government monitors conversations between attorneys and their clients. But my argument is really one based on common sense: such an intrusion into private affairs can only be justified by compelling circumstances. Standard separation of powers principles suggest that such a justification be announced by Congress, in the form of law, and enforced at the discretion of the President.

While defenders of the regulation have pointed out that separate teams for "prevention" and "prosecution" will be set up, the result of this form of monitoring is to chill the relationship between attorney and client. Confidentiality is the essence of representation in this privileged relationship. As a result of the new regulation, people will not be able to consult their lawyers without the risk of a government agent listening to their conversation. The conversation might be about the most private matters imaginable—a divorce created in part by the government's detention, for example. A long tradition has prevented the government from intruding into conversations between lawyer and client, for such matters may be deeply private ones, subject to traditional fourth amendment protection. Amar & Amar, *The New Regulation Allowing Federal Agents to Monitor Attorney-client Conversations: Why it Threatens Fourth Amendment Values*, Find law, Nov. 16, 2001, at *http://writ.news.findlaw.com/amar/20011116.html.*

Without the order, clients might talk to their lawyers about arranging plea bargains and other deals in exchange for information about future plots of terrorism. In the wake of the Regulation, these conversations may conceivably to dry up, resulting in the government receiving less, not more, information. Again, the Justice Department might have special reason to discount this risk, and special reason to believe that clients are passing messages through their attorneys. But if so, it is up to them to make that case to this Body.

As anyone who has worked with intelligence data knows, there are often mistakes. This is natural given the shadowy world of informants and purchased information, and circumstances in the wake of September 11 may justify holding people in detention on the basis of such data, despite these mistakes. But to go farther than this, and to abrogate the historic relationship between attorney and client in the name of national security, threatens constitutional freedoms, and, indeed, may

threaten the criminal convictions of these individuals. This is particularly the case when a series of less restrictive alternatives exist to the regulation. See Amar & Amar, *supra* (discussing "cleared counsel" approach in Classified Information Procedures Act and videotaping of attorney/client conversations that could become reviewable ex parte by a judge).

Congressional legislation authorizing such searches will undoubtedly put such a regulation on stronger constitutional footing. The Fourth Amendment focuses on reasonableness, and one way in which courts assess reasonableness is by looking to Congress. Because there is a "strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable,'" *United States* v. *Di Re*, 332 U.S. 581, 585 (1948), the Court has in certain circumstances chosen to "defer to [the] legislative determination" about the safeguards necessary for searches and seizures under a particular regulatory scheme. *Donovan* v. *Dewey*, 452 U.S. 594, 603 (1981). *see also* Amar, *Fourth Amendment, First Principles*, 107 Harv. L. Rev. 757, 816 (1994) ("Legislatures are, and should be, obliged to fashion rules delineating the search and seizure authority of government officials. . . .In cases of borderline reasonableness, the less specifically the legislature has considered and authorized the practice in question, the less willing judges and juries should be to uphold the practice."). Without legislative approval, by contrast, courts may well frown on such an unprecedented intrusion into privacy. *See Coplon* v. *United States*, 191 F.2d 749 (D.C. Cir. 1951) (Sixth Amendment violated by government interception of private telephone consultations between the accused and lawyer); *Hoffa* v. *United States*, 385 U.S. 293, 306 (1966) (assuming without deciding that Coplon is correct).

While some have claimed that *United States* v. *Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991) justifies the immense monitoring order involved here, a close reading of *Noriega* reveals otherwise. It is telling that the main precedent cited by defenders of the regulation is a district court opinion from a single district in Florida. In the case, former Panamanian dictator Manuel Noriega claimed that the interception of his phone calls while in prison (but not those with his attorneys) violated his Fourth Amendment right, and that his Sixth Amendment right was violated when conversations with his attorneys were intercepted. The district court decision dismissed the latter claim because the government did not intentionally intercept the attorney/client phone calls, see 764 F. Supp., at 1489, a claim that the government can in no way make today. The AG Regulation contemplates intentional monitoring of these conversations. The Fourth Amendment claim Noriega put forth was not at all about monitoring of attorney/client conversations, *Id.*, at 1490, and therefore did not decide the difficult issue raised by the Attorney General's Regulation. Moreover, the Noriega monitoring was done under very limited circumstances where probable cause was almost certainly met and the search was as reasonable as the facts were unusual. Noriega did not concern a sweeping order such as the one involved today, which, again, targets even those held as material witnesses.

In this respect, a comparison with FISA is helpful. When the Circuit Courts were in conflict on the question of whether the President has inherent authority to conduct surveillance without a prior judicial screen, compare *Zweibon* v. *Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (disclaiming executive power) with *United States* v. *Butenko*, 494 F.2d 593 (3d Cir. 1974) (upholding it), Congress and the President compromised in the Foreign Intelligence Surveillance Act of 1978. The Act rejected the notion that the executive may conduct surveillance within the U.S. unbridled by legislation.[24] FISA was re-affirmed and amended just last month with the passage of the USA PATRIOT Act.

The approach taken with the passage of FISA disclaimed any pretense of unilateralism. At that time, the Senate Judiciary Committee declared that the FISA was a "recognition by both the executive branch and the congress that the *statutory* rule of law must prevail in the area of foreign intelligence surveillance."." S. Rep. No. 95–604, at 7 (1977) (emphasis added). The Senate Intelligence Committee announced that the FISA represented a "*legislative* judgment that court orders and other procedural safeguards are necessary to insure that electronic surveillance by the U.S. government within this country conforms to the fundamental principles of the Fourth Amendment." S. Rep. No. 95–701, at 13 (1978).

Speaking for the executive branch before this Committee, Attorney General Bell himself agreed to this judgment, praising the Act because "'for the first time in our society the clandestine intelligence activities of our government shall be subject to the regulation and receive the positive authority of a public law for all to inspect.'"

[24] See Pub. L. No. 95–511, 92 Stat. 1783 (codified as 50 U.S.C. §§ 1801–11 (2001)); Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Act of 1978*, 137 U.Pa. L. Rev. 793 (1989).

Id. at 7 (citation omitted). He praised it because, as he said, "'it strikes the balance, sacrifices neither our security nor our civil liberties, and assures that the abuses of the past will remain in the past and that the dedicated and patriotic men and women who serve this country in intelligence positions, often under substantial hardships and even danger will have *the affirmation of Congress* that their activities are proper and necessary.'" *Id.* (emphasis added). Again today, we find ourselves in a world where we need recognition both by the President and by Congress that the *statutory* rule of law must prevail in the area of foreign intelligence surveillance. The world is not so different today that we do not need the "positive authority of a public law for all to inspect," or that we do not need procedural safeguards to protect against the abuses of the executive branch.

Twenty-four years ago this Committee spoke that it wanted to "curb the practice" by which the President and the Attorney General may disregard the Bill of Rights on their "own *unilateral determination* that national security justifies it." S. Rep. 95–604, at 8–9 (emphasis added). The executive branch at that time agreed, and since that time the judiciary has protected that deference to legislative judgment. A similar course of action is appropriate today.

The Possibility of Legislative Reversal of Either Executive Decision Does Not Make Them Constitutional

The Congress today retains some formal power over both the Military Order and the Attorney General Regulation and can use legislation to reverse them. But this possibility does not transform either Executive decision into a constitutional one. The Executive Branch has acted ultra vires in issuing both of these decisions, and both lack the appropriate constitutional stature to survive separation of powers scrutiny. The speculative possibility of a Congressional reversal cannot make an act of the Executive constitutional. (If President Clinton during a budget deadlock got frustrated and decided to proclaim his budget proposal the law of the land, and directed his Secretary of Treasury to begin disbursements, Congress would of course have the power to trump his "budget" with one of their own, but the existence of its trumping power wouldn't make the President's initial action constitutional.) Indeed, President Truman's Order to seize the steel mills could have been reversed by Congress (a possibility explicitly invited by President Truman—in contradistinction to the recent Administration actions—who sent messages to Congress stating that he would abide by a legislative determination to overrule his Executive Order). The dissent in *Youngstown* made much of Truman's overture to Congress, but that did not stop the Supreme Court from declaring President Truman's action unconstitutional for overstepping his authority.

Furthermore, there may be all sorts of barriers to Congressional reversal: trials might be underway, in which case a Congressional reversal might create double jeopardy problems, or the Congress might not want to set up a dangerous confrontation between the branches in a time of national crisis. A Congressional reversal would require not a simple majority, but a two-thirds one (because a President would have the power to veto the legislation proposing the reversal), therefore such a reading of the Constitution would work a subtle but dangerous transformation in power away from the Congress and toward the President. A future President could then set up military tribunals in a national crisis, declaring, for example, the "War on Drugs" to require military tribunals for narcotics traffickers, and the Congress would have to attain a two-thirds majority affirmatively reverse such a determination. The Separation of Powers is designed precisely to guard against such transfers of constitutional authority. Particularly because our constitutional traditions are evolving ones, it is dangerous for one person to be given the authority to freeze the Constitution at a single moment in time. This body is uniquely equipped to assess the meaning of constitutional guarantees, such as the Fourth, Fifth and Sixth Amendments, in light of contemporary circumstances.

Conclusion

Given the national importance and fundamental commitment to Constitutional values, the better course of action is for the President to only act in this area when his powers are at their highest ebb, namely, when he acts with the approval of the co-equal legislative branch. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) (when the President acts with explicit authorization of Congress, "his authority is at its maximum, for in includes all that he possesses in his own right plus all that Congress can delegate."). Even though I am a supporter of the unitary executive theory, which generally endorses a broad view of constitutional powers of the President, the Military Order and AG Regulation go too far.

The Executive Branch should therefore, at a minimum, decline to enforce either the Military Order or the Attorney General regulation until this body has expressly authorized these methods. The Congress should then immediately take up the question of whether these methods are necessary and proper, and give due weight to the views of the Administration on this point. A united Executive-Legislative determination, just as with FISA, the USA PATRIOT Act, and other major national-security decisions, will best safeguard individual liberty for the future and prevent convictions from being overturned in the ongoing terrorism investigations. *At the very minimum*, Congress should consider enacting legislation similar to the War Powers Act and laws governing covert activity, so that the President is required 1) to notify some or all members of Congress quickly when military tribunals are initiated, and 2) to provide details of the cases to this body so that it may perform its oversight function.

In conclusion, like most all Americans, I believe the Administration is trying to make the best calls that it can. But that's part of the point: Our Constitutional design can't leave these choices to one man, however well intentioned and wise he may be. We do not live in a monarchy. The structure of government commits wide-ranging decisions such as this to the legislative process. To say this is not to be "soft on terrorism," but actually to be harder on it. We cannot afford to jeopardize our beliefs, or to risk accusations of subverting our constitutional tradition, simply because one branch thinks it expedient.

Chairman LEAHY. Thank you very much, Professor.

Let me ask you, General Barr—I know you have long supported the idea of military tribunals—when did you first consult with the administration on the option of military tribunals, this administration?

Mr. BARR. Well, I didn't consult with anybody. I reminded people of work that had been done previously in the Department on this topic.

Chairman LEAHY. Reminded people just on the street or people in the administration?

Mr. BARR. Staff people in the administration.

Chairman LEAHY. And when did you do that?

Mr. BARR. After September 11.

Chairman LEAHY. Shortly thereafter?

Mr. BARR. Yes.

Chairman LEAHY. General, I am thinking back to the time when you were Attorney General under former President Bush. We went through Desert Storm and Desert Shield, facing thousands of people that we were in open conflict with.

Let me ask you, did former President Bush ever issue a similar order for military tribunals during Desert Storm or Desert Shield?

Mr. BARR. No.

Chairman LEAHY. What about after the bombing of Pan Am Flight 103 over Lockerbie, Scotland?

Mr. BARR. No. It was in that context which we explored the possibility because we looked at the Nuremberg model and considered setting up a joint military tribunal.

Chairman LEAHY. And did you recommend that to the President?

Mr. BARR. No, because my informal contacts with the Scots indicated they were not interested in doing that, primarily because of the death penalty.

But the Iraqi war is a good example. That was not a declared war, but I think it would be ridiculous to say that if the Republican Guards had started executing American prisoners or pilots that had been shot down that we would have been powerless to convene military courts to try them for those violations of the laws of war. Our only option would not have been, as some seem to suggest,

bringing back Republican Guard members and trying them in our civilian courts.

There has never been a circumstance I am aware of of an armed foreign combatant waging war against the United States having been tried for war crimes in a civilian court.

Chairman LEAHY. But I think you have heard the testimony that, the way it is drafted, this could go well beyond an armed combatant directing actions against the armed forces of the U.S.

Mr. BARR. Not at all. I think Mike Chertoff was referring to one of FDR's orders. FDR issued two orders. One of them was extremely broad. The second one was the one that was directed at these specific Nazis. His first one was sweeping and applied to anybody who was a resident of a country at war against the United States who attempted to enter the United States for the purpose of carrying out hostile or warlike actions.

So I think that the President's order applies to people who commit war crimes; that is, they have to be in a state of unlawful belligerency against the United States and commit war crimes that are triable in military tribunals. The order says that in Section 4.

Chairman LEAHY. Do you agree with that, Mr. Heymann?

Mr. HEYMANN. Well, no, I don't think they have to be war crimes. I think the order plainly applies to any terrorist act, but the big problem is that you don't know whether the guy is a terrorist or not.

Israel killed a Norwegian waiter on the mistaken ground that he was one of the people responsible for the Munich Olympics massacre of the Israeli athletic team.

This order applies to any of 20 million people, unreviewable, whom the President believes are terrorists or have helped terrorists or were terrorists or used to harbor terrorists. And it is the power; it is not how it is being exercised.

I think your first question is whether you are going to address the claim of power of the President or whether you are going to address its likely use, limited to a relatively few people. And I agree with former Attorney General Barr that I don't think there is an obligation to bring them back from Afghanistan. But the claim of power reaches 20 million people living in the United States and anyone in Spain, France, or Germany, and it applies to indefinite detention without trial, without the immigration grounds we are now using, as well as to military trials. It is an extraordinary claim of power.

Chairman LEAHY. Well, since I am going to follow the lights very strictly for everybody, I will stop at that point and not do a follow-up.

Senator Hatch?

Senator HATCH. Mr. Silliman, if I understand your testimony correctly, you are willing to accept that the President can, consistent with our laws and our Constitution, establish military tribunals to try those accused of violating the "law of war."

Mr. SILLIMAN. That is correct, Senator.

Senator HATCH. But, apparently, your objection to the President's order is that we were not technically at war with Al Qaeda until after they orchestrated the September 11 attacks. Your analysis appears to me, at least, to lead to the perplexing result that the

President could lawfully order trial by military tribunal for terrorists who commit war crimes after the September 11 attacks, but cannot try them by military tribunal for the September 11 attacks themselves.

Here is where I find it difficult to believe that our laws would command such a perverse result: Even if I were inclined to accept your analysis, I wonder how you deal with the following fact. The President did not premise his order exclusively on the September 11 attacks. Rather, his order explicitly states, "International terrorists, including members of Al Qaeda, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens within the United States."

Now, the question is, is it your position that it is the province of this Congress to second-guess the President's factual determination as to when a state of war came into being?

Mr. SILLIMAN. No, Senator. Let me try to explain. My analysis is based on a distinction between what we would call and have called terrorist acts, such as the initial bombing of 1993. The bombing of our embassies in Tanzania and Kenya in 1998 and the bombing on the USS Cole are but examples of this.

Senator HATCH. Right.

Mr. SILLIMAN. Now, I suggest that the problem is that every time we have looked at violations of the law of war, it has been within the context of dealing with state actors. We are dealing with nonstate actors here, and what I am suggesting is that on the 11th of September we dealt with 19 terrorists who committed a horrendous act against the World Trade Center and the Pentagon. I concede that, but we were not yet at a state of armed conflict.

I agree with the comments that we need not be in a declared war. I think all would agree with that, but we were not at that moment in a state of armed conflict with any kind of recognized entity. And it interests me that in the joint resolution of the Congress and in the President's signing order in the declaration of emergency issued, there is not one mention of violations of the law of war. Continually, the reference is to terrorist acts, terrorist acts, terrorist acts.

The rhetoric of war against terrorism has now been extended to create a legal predicate for violations of the law of war, and I am unwilling to go that far. I believe, as I suggest in my statement, Senator, that the Congress could, in fact, define violations of the Law of Nations which go far beyond the law of war to include terrorist acts, and could do so either in Article 21 of the Code for Military Commissions or in Article 18 to provide for courts-martial, if the Committee feels that a higher level of due process should be in order.

That is the province of Congress, but I do admit that the President of the United States, as Commander-in-Chief, has the power under the law of war to bring into being military commissions, but only to prosecute violations of the law of war.

Senator HATCH. But you don't think the law of war applies in this instance?

Mr. SILLIMAN. I do not believe that the law of war applies at 8:47 on Tuesday morning, September 11. It did at some time. My concern, Senator, is as to a prosecution by military commission of of-

fenses directly related to that specific attack. That is my concern, and I fear that if we were to lose a case in a military commission that it would damage the entire credibility of the President's authority.

Senator HATCH. I don't think we would have much chance of losing the case if we could find the right people. I mean, let's be honest about it.

In your written testimony, you acknowledge that the Secretary of Defense has not yet established the procedures by which the military tribunals will operate. You go on to say that the guidelines and the modes of proof that will be employed by such tribunals will be different than and inferior to those employed by the military in connection with the court martial process. I don't know how you are able to reach that conclusion without knowing the Secretary of Defense's forthcoming procedures.

Mr. SILLIMAN. Senator, I concede, as has been mentioned several times this morning, that the Secretary of Defense is seeking guidance and counsel right now to promulgate those regulations. No one knows to what level of due process he will raise that bar.

Senator HATCH. But you can't presume that he will not have—

Mr. SILLIMAN. No, Senator. My script is the President's order itself. As has been suggested earlier in this hearing, it could possibly have been prudent for the administration to consult with the Department of Defense in a further and more extensive mode to bring those due process requirements into the initial iteration of the order rather than leaving us as we are now to guess.

Senator HATCH. But you could become more supportive if those due process requirements are met?

Mr. SILLIMAN. I could be more supportive, Senator, certainly of trials outside this country, and I could be more supportive of trials within this country with a high degree of due process. However, the President always has the option of using courts-martial, with the assistance of legislation from this Committee and other Committees.

Senator HATCH. Ms. Martin, just one question for you. Many, including you, have asserted that the names of each individual being held on immigration charges should be released. In support of that argument, you cite the Freedom of Information Act as support for that argument.

In 1991, the Supreme Court found that the disclosure of unredacted reports of interviews of Haitian nationals who were interdicted and returned to Haiti, as to whether they were harassed or prosecuted after their return, would have constituted a clearly unwarranted invasion of privacy. That is in *U.S. Department of State* v. *Ray*.

In so doing, the Court held, among other things, that disclosure of the names would publicly identify the returnees, possibly subjecting them or their families to embarrassment in their social and community relationships, or even to retaliatory action.

Now, my question for you is, is it not reasonable to assume that the release of the names of those being held on immigration violations could subject those persons to embarrassment or harm, if and when they are released?

Ms. MARTIN. Senator, I think that the problem here is that the administration and the Justice Department have made repeated public statements saying that the hundreds of people who have been arrested have been arrested in connection with a terrorism investigation and the harm to their reputation will follow from the fact that they have been identified as being arrested in an investigation of terrorism, when there isn't, in fact, any evidence linking them to the investigation of terrorism.

Mr. Chertoff, I believe, correctly stated that there is no legal prohibition against disclosing the names of those who have been detained on immigration violations. The INS, in fact, in implementing the Supreme Court decision in *Ray* which you refer to has adopted a regulation which provides that, although in many situations the names of immigration detainees will be withheld, that will not be the case when questions are raised about agency practice. I believe that that is exactly the situation before us, and that therefore the names are required to be released under the Freedom of Information Act.

Chairman LEAHY. Thank you.

Senator Feingold?

Senator FEINGOLD. Thank you very much, Mr. Chairman. I would like to ask a question of Professor Katyal and Professor Heymann.

I am concerned about statements I have read or heard in the press recently indicating that one reason that the administration has moved unilaterally, without authorization or consultation with Congress, on a number of issues that we have been discussing today, from issuing an executive order on military tribunals to regulations on the monitoring of attorney-client communications, apparently is that the administration believes Congress moves too slowly in considering and making decisions.

Professor Katyal, in your testimony you specifically discuss the constitutional necessity of the involvement of Congress and the dangers of unilateral actions by the executive branch in authorizing military tribunals and monitoring of privileged attorney-client communications.

I am wondering if both Professor Katyal and Professor Heymann could comment on the role of Congress in times of crisis or national emergency and the importance of congressional authorization or consultation with the executive branch. Obviously, I am interested in hearing you comment on whether there isn't a valuable deliberative process that Congress brings to our Nation that is always needed, but is especially vital as the Nation responds to a crisis.

Let's start with Professor Katyal.

Mr. KATYAL. Senator, of course, this body has, after September 11, recalibrated and acted efficiently in things like the USA PATRIOT Act, working with the administration on a very quick basis. But even if this body were to be a slow one in the future, efficiency can't be a reason to disregard the Constitution.

President Truman, for example, said that he needed to seize the steel mills right away because Congress wasn't going to act, and the Supreme Court struck down that executive order and said that efficiency can't be a reason for unilateral action. So I think that this course of conduct is a tremendously dangerous one not just be-

cause it disregards separation of powers, but also because one day courts are going to review what this military tribunal does and it may be the case that in some circumstances a court might find that this military order is unconstitutional as applied to some of these people.

Senator FEINGOLD. Thank you.

Professor Heymann?

Mr. HEYMANN. Senator Feingold, there are obviously some cases where the executive has to move more quickly than any deliberative body of 100, let alone of 535, can act. But the matter of military tribunals, particularly as applicable to, as I keep repeating, 20 million non-citizens in the United States is not one of those matters.

Other countries have emergency powers—they were not written into our Constitution—that allow the president to bypass the congress and to bypass anything like a bill of rights when the president determines there is an emergency. We do not have that in our Constitution. It was not part of our tradition and I am very proud that it is not part of our tradition.

Senator FEINGOLD. Thank you, Professor.

Let me now ask a question of General Barr and General Bell. As I understand the President's military order, anyone that the President designates as a terrorist, for the purposes of the order, would be subject to the exclusive jurisdiction of a military commission. This has already been discussed some here on this panel.

As such, this order could conceivably be applied to designated terrorists or their supporters who have no connection to Al Qaeda or to the tragic events of September 11.

Now, I would like each of you to address whether you think that interpretation is correct and, if so, do you think that the President could or should consider establishing military commissions to deal with other terrorist-related acts against United States interests perhaps in the Middle East or in Central America.

General Barr?

Mr. BARR. Senator, I think the President has to find either that they are members of Al Qaeda or that they are members of other terrorist organizations that have either already committed or are in the process of committing significant acts of terrorism which, under Section 4 of the order, would have to be of a magnitude and in a context which would make them violations of the laws of war against the United States. So I don't think it is as sweeping as people suggest, that the potential group of people is as sweeping. But you are right that it is not limited to Al Qaeda.

Senator FEINGOLD. General Bell?

Mr. BELL. I think modified by the word "international" terrorism, and I think it has to be some act of war. I think again—and I am not sure you were in the room when I said this—we need to wait until the Secretary of Defense promulgates his orders and regulations to see what a lot of these things mean. That would be the time for the Congress to really get into whether this can stand or whether there ought to be some congressional legislation.

Mr. BARR. Senator, may I just—

Senator FEINGOLD. General Barr?

Mr. BARR. You may have been out when I mentioned that we should also bear in mind that if this is used against people in the United States—and, of course, it could only be used against noncitizens, but if they are in the United States, then I think the order allows for the writ of habeas corpus for judicial review.

So when you say exclusive jurisdiction, that is right, but the determination up front that this is properly within the jurisdiction of the court and there was a reasonable basis for exercising it—Article III courts would be open to hear those claims for people in the United States.

Mr. BELL. I agree with that.

Mr. HEYMANN. Though the order itself was intended to bar all judicial review.

Mr. BARR. No, that is not right, Phil, because the language in the order was taken from FDR's order, and the Supreme Court in the *Quirin* case did not interpret that language as affecting their ability under a writ of habeas corpus to review whether jurisdiction was proper in the military tribunal. What that language does is say that the person is not entitled to a de novo Article III trial on the merits.

Senator FEINGOLD. Do you agree with that characterization, Professor Heymann?

Mr. HEYMANN. Well, I agree with General Barr that, yes, indeed there would be habeas corpus review of, number one, whether these tribunals were constitutionally established, and, number two, whether the person before them came within the terms of a constitutional tribunal.

Perhaps the order was first written for President Roosevelt. I certainly believe General Barr on that, but it was written with an obvious intent to eliminate all judicial review. In other words, anyone who reads this will think that the United States has gone to unreviewable military courts.

Mr. BELL. I come at it a little different way. I think there is an assumption that the President would obey the law, and there is no law that the President can suspend the writ of habeas corpus. So that is the way I come at it.

Senator FEINGOLD. Mr. Silliman?

Mr. SILLIMAN. I would agree with Professor Heymann that it is clear that there could be review by the Supreme Court as to the jurisdiction of the tribunal, just as in the *Quirin* case, but that the order appears to deny that.

There is one point, Senator, I think that has not been raised that needs to be. The administration has walked a very fine line in doing two things. It has tried to capitalize on the concept of a war and acts of war, while at the same time declaring that those in Al Qaeda are unlawful belligerants, unlawful combatants.

The result of that is that they are denied prisoner of war status under the Geneva Convention which would require trial by courts-martial. So what the administration has done is forced these people into some forum that has minimal due process, and I think that needs to be clearly understood.

Senator FEINGOLD. Thank you for the extra time, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Specter?

Senator SPECTER. Thank you all for coming. I believe this has been enormously helpful to have this kind of an analysis. I think that had the analysis been held before the promulgation of the executive order, it would have been framed somewhat differently.

The executive order does purport, I believe, on its face to bar any judicial review. This is the specific language: "The individual shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf in any court of the United States."

Now, that is very, very sweeping, but I think it is correct, as noted by both General Bell and General Barr, that it runs afoul of the Constitution which has a specific provision to the contrary: "The privilege of the writ of habeas corpus shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it."

Mr. BELL. And then Congress does it.

Senator SPECTER. Well, that is not what that phrase says, so that I believe there is a lot to be learned from what we have been talking about today.

General Bell, I think your comment about no secret trials is very, very helpful. When the Assistant Attorney General testified, he talked about the need for secrecy on military secrets, and you have been very blunt about it: "Will the trials be secret? No, and it is nonsense to contend otherwise." I believe that this kind of a commentary will be very helpful.

I want to turn for just a minute to the regulations promulgated by the Attorney General on detention of aliens. There is no distinction as to legal aliens or illegal aliens, and in a Nation of immigrants there are a lot of people who are aliens before they become citizens. Both of my parents, for example, were aliens when they got to these shores.

The regulations provide that if an immigration judge authorizes the release, it is stayed until there is an appeal by the Board of Immigration Appeals. And if the Board of Immigration Appeals says the person can be released, then he or she is still not released when the commissioner certifies the Board's custody to the Attorney General, and then the stay continues until a decision by the Attorney General. But I do not see any standard for making a determination as to what the Attorney General has in mind.

We questioned earlier today whether the rules were complied with about publication in the Federal Register, which did not appear until after the order was put into effect, and a comment period. The language of "reason to believe" may be necessary as a minimal standard. I am not sure.

What do you think about it, Mr. Heymann? Is "reason to believe" sufficient without probable cause? We do face a tremendous threat.

Mr. HEYMANN. In the military order, Senator Specter?

Senator SPECTER. Well, military tribunals. That is the standard, where there is reason to believe that someone is a member of Al Qaeda or another terrorist organization.

Mr. HEYMANN. The question is whether to take the writing at this point seriously. It is written as if it is a subjective determination of the President. That Presidential determination is plainly

not meant to be reviewable by any court. It says, "when I determine that I have reasonable suspicion."

Senator SPECTER. Would you require probable cause?

Mr. HEYMANN. If anybody living in the United States were to be denied civil trails or detainned indefinitely, I would require at least that.

Senator SPECTER. Well, there is no language of suspicion. It is just "reason to believe." If somebody said "suspicion," it would be challengeable immediately. But we do face an enormous threat. We perhaps ought to give some thought as to some specification perhaps a little bit beyond "reason to believe."

General Bell, what do you think?

Mr. BELL. Well, some definitions in the regulations would help because "reasonable suspicion" is an art form and a well-known term in law because of use on the borders. We can search an automobile at the border on reasonable suspicion, for example, but this says "reason to believe." But you are talking about some immigration regulations, as I understand it.

Senator SPECTER. The Attorney General's detention of aliens.

Mr. BELL. I view the whole immigration legal system as a quagmire.

Senator SPECTER. That is the nicest thing that has ever been said about it.

[Laughter.]

Senator SPECTER. General Barr, a final question. What do you think about having a little activity, and perhaps others, too, of the Department of Justice playing some sort of a role here?

The responsibility for drafting the rules has been sent to counsel in the Department of Defense. We are into some pretty tricky areas here, for those of us who have been in the criminal courts or with military tribunals or with constitutional rights, with all of the contours and complexities.

If you were Attorney General, would you pick up the phone and say to the Secretary of Defense, I would like to offer you some help?

Mr. BARR. Absolutely, and I am confident that is going to happen. I don't know what the process was, but I know from my own experience that I can't think of an executive order that would be issued without having some legal review in the Department of Justice. I would assume there was some review as to form and legality of the order.

Now, I think you are really getting at what are the rules of the game going to be going forward, and it is inconceivable to me that the Department of Justice will not be heavily involved in consulting with the Secretary of Defense and giving them their experience in trying terrorist cases.

Senator SPECTER. Well, the Assistant Attorney General this morning was not so sanguine about that. He didn't put that in the mix.

Mr. Heymann, did you have your hand up?

Mr. HEYMANN. Yes. I just wanted to add a word there. Whatever the Secretary of Defense does, the claim of presidential power is either going to be accepted by the Congress and the courts or it isn't, and it is an extraordinary claim of presidential power.

The Secretary of Defense may cut it back to reasonable exercises, and I think these hearings are a very important step in that process. But the claim of power here over people all over the world and 20 million people in the United States made on the basis that the President is asserting seems to me to be something that should not go unchallenged.

Senator SPECTER. Well, I thank you. I believe it is enormously helpful to have—I am sorry I didn't get a chance to ask Professor Silliman or Ms. Martin or Professor Katyal a question, but it is very helpful to have this kind of mature thinking and questioning, and to come to a conclusion which accommodates security and constitutional rights.

Thank you.

Chairman LEAHY. Thank you, Senator Specter.

I think as a practical matter, the question of who advises whom is going to be asked next week. The Attorney General is going to be before this Committee, and I believe the Secretary of Defense is going to be before the Armed Services Committee, and I am sure that they will have the same story. Otherwise, it gets interesting. But I am sure they will.

General Barr, Professor Heymann, General Bell, Professor Silliman, Professor Martin and Professor Katyal, thank you very much. I agree with what has been said here on both sides of the aisle. Your presence here, all of you, has been extremely helpful. I know you have been here a long, long time, and I do want to add please feel free to add to your transcript. You may get additional questions. This has been very helpful, on what is probably the most contentious issue presently before the Congress. So thank you all very much.

We stand adjourned.

[Whereupon, at 1:32 p.m., the Committee was adjourned.]

AMERICAN BROADBAND COMPETITION ACT OF 2001 AND THE BROADBAND COMPETITION AND INCENTIVES ACT OF 2001

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

ON

H.R. 1698 and H.R. 1697

MAY 22, 2001

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CONTENTS

MAY 22, 2001

OPENING STATEMENT

The Honorable F. James Sensenbrenner, Jr., a Representative in Congress From the State of Wisconsin, and Chairman, Committee on the Judiciary ... 1

WITNESSES

The Honorable Terry S. Harvill, Commissioner, Illinois Commerce Commission
Oral Testimony ... 4
Prepared Statement ... 6
The Honorable William P. Barr, Executive Vice President and General Counsel, Verizon Communications
Oral Testimony ... 44
Prepared Statement ... 46
Mr. Jeffrey Blumenfeld, Partner, Blumenfeld and Cohen
Oral Testimony ... 50
Prepared Statement ... 51
Mr. John F. Malone, President and Chief Executive Officer, The Eastern Management Group
Oral Testimony ... 56
Prepared Statement ... 60

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Insert from Mr. John F. Malone
Wall Street Journal, Yochi J. Dreazen, "Bells' Rivals Double Local Market Share", May 22, 2001 ... 59
Insert from the Honorable John Conyers, Jr., A Representative in Congress From the State of Michigan
Los Angeles Times Editorials "Ma Bell's Arrogance, Multiplied", April 27, 2001 ... 84
USA Today, "Public Pays Price as Baby Bells Stifle Competition", April 25, 2001 ... 85
MSNBC, "And the broadband played on. . ." Opinion by Brock N. Meeks, April 25, 2001 ... 86
Insert from the Honorable Bob Goodlatte, a Representative in Congress From the State of Virginia
Press Release - Federal Communications Commission, May 21, 2001 "Federal Communications Commission Releases Latest Data on Local Telephone Competition" ... 98
Affidavit of Dr. Niel Ransom, Alcatel, USA, Inc., State of Illinois Commerce Commission, Docket No. 00–0393 ... 101
Insert from the Honorable Terry Harvill, Commissioner, Illinois Commerce Commission
Commissioner Harvill's response to questions submitted by Mr. Goodlatte ... 108

APPENDIX

STATEMENTS SUBMITTED FOR THE HEARING RECORD

Statement of the Honorable F. James Sensenbrenner, Jr., a Representative in Congress From the State of Wisconsin and Chairman, Committee on the Judiciary ... 119

Page

Statement of the Honorable John Conyers, Jr., a Representative in Congress From the State of Michigan 119
Statement of the Hononable Chris Cannon, a Representative in Congress From the State of Utah 120
Statement of the Honorable Bob Goodlatte, a Representative in Congress From the State of Virginia 121
Statement of the Honorable Rick Boucher, a Representative in Congress From the State of Virginia 122
Statement of the Honorable Sheila Jackson Lee, a Representative in Congress From the State of Texas 123

MATERIAL SUBMITTED FOR THE HEARING RECORD

Letter submitted to Chairman Sensenbrenner from the League of Wisconsin Municipalities dated June 11, 2001 126
Answers to Post Hearing Questions 128

AMERICAN BROADBAND COMPETITION ACT OF 2001 AND THE BROADBAND COMPETITION AND INCENTIVES ACT OF 2001

TUESDAY, MAY 22, 2001

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:05 p.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order. Today, the Committee holds a hearing on H.R. 1698, the "American Broadband Competition Act of 2001", also known as the Cannon-Conyers bill, and H.R. 1697, the "Broadband Competition and Incentives Act of 2001", also known as the Conyers-Cannon bill.

Last week, Speaker Hastert announced his intention to refer to this Committee H.R. 1542, the Internet Freedom and Broadband Deployment Act of 2001, also known as the Tauzin-Dingell bill. Shortly after the recess, we will hold a hearing on that bill.

We are considering all of these bills because of our jurisdiction over the antitrust laws. On this Committee, we do not look to regulations to solve economic problems. Rather, we believe in removing roadblocks to open competition so that markets will solve economic problems.

It is with that in mind that we turn to the problem of broadband. I want to ensure that all Americans get high-speed broadband service as quickly as possible, while at the same time maintaining competition and choice in that market. Both of the bills before us today, as well as the Tauzin-Dingell proposal, seek that same goal. The question is which, if any of them, will work.

Contrary to what some have suggested, I have not decided that question for myself. Rather, I want to hear all the evidence. In the last couple of months, I spent a full day at AT&T headquarters in New Jersey and a full day at SBC headquarters in Texas trying to learn more about this question. I have scheduled these 2 days of hearings and am still learning.

Above all, whatever legislation we pass must lead us to a world in which individual consumers with choices freely decide market outcomes. At a minimum, we must reverse the Seventh Circuit recent decision in the *Goldwasser* case. That decision directly contradicts the clear Congressional intent that antitrust laws should continue in force in this industry. *Goldwasser* simply reads the antitrust savings clause out of the law and it must be corrected.

All who follow this issue should be on notice that the Judiciary Committee has always exercised its jurisdiction in this area and will continue to do so vigorously this year. This sector of our economy achieved its current vibrancy because of the application of the antitrust laws, specifically in the AT&T breakup decision of the 1980's. Only through the continued application of the antitrust expertise of this Committee, the Justice Department, and the FTC will that free market vibrancy continue, and I fully intend to see that it does.

With that, I will turn to Mr. Conyers for his opening statement, and in doing so, I would like to thank him and his staff for their contributions to our jurisdictional efforts in this area. The gentleman from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman and Members of the Committee and witnesses and friends. I start off by thanking Chairman Sensenbrenner for calling the hearing, for exercising excellent leadership in protecting the Committee's historic jurisdiction over competition in the telecommunications industry.

If you don't like the unregulated monopoly control of your local telephone market, which leads to high prices, shoddy service, less innovation, then you'll hate the Tauzin bill, which will create a mirror image of that exact same monopoly control in DSL broadband.

A little history. The Bell system was created intentionally as a monopoly by the government, protected against competition, and it was sued by the Justice Department three times for antitrust violations and was judged to be an illegal monopoly by the Federal courts in 1984, when it was broken into seven regional Bells plus AT&T.

In 1996, Congress again found the Bells to have monopoly control over the essential facility of the local loop. A Republican Congress then said that it was critical to competition that the monopoly's facilities be open to competitors. Five years after passage of the 1996 law, we have seen the fruits of competition in almost all areas of telecommunications, with the notable exception of local telephone service.

What was seven Bell companies and GTE have been reduced by merger to four behemoths. These companies now control in excess of 90 percent of the wires into our Nation's homes and businesses. While innovation has flourished and prices have been slashed in the area of long distance, exactly the reverse has occurred in the local network. The road to local competition has been littered with scores of bankrupt companies and tens of thousands of lost jobs.

The other bill would effectively transfer, effectively duplicate the monopoly over local telephone service into broadband DSL services. That's why I say if you don't like the unregulated monopoly control of your local telephone market, which leads to high prices, shoddy service, and is less innovative, then you will not like the Tauzin bill because it effectively eliminates the 1996 requirements in section 251 and section 271 that the local monopoly facilities be open to competitors. It's a license to monopolists to exclude.

Therefore, the bills introduced by myself and my colleague, Mr. Cannon, take a different approach. It says that the monopolists don't get the right to exclude if they control over 85 percent of the

market, market control that would be sufficient for most any court in an antitrust case utilizing the "essential facility" analysis.

They reiterate the bipartisan consensus that emerged in 1996 that antitrust laws are preserved, that a liberal regulatory apparatus will not insulate a monopolist from antitrust scrutiny, and the bills provide greater incentives not found in the Tauzin approach to broadband roll-outs, and the bills provide for a rapid resolution of disputes.

Competition should be almost our religion in telecommunications. It should be our credo. It is the touch-tone for lower prices, better services, and for unleashing the innovative creativity that has built our new economy from the ground up, and historically, it has been the role of this Committee to preserve those basic rules of competition, and I welcome the testimony of all the witnesses. Thank you, sir.

Chairman SENSENBRENNER. Thank you.

Chairman SENSENBRENNER. Our panel today consists of four distinguished witnesses. The first witness is Commissioner Terry Harvill of the Illinois Commerce Commission. Commissioner Harvill has a Bachelor's and a Master's degree from Illinois State University. Before being appointed to the Commission, he served on its staff, as well as on the staff of Governor Jim Edgar of Illinois. He was appointed to the Commission in 1998 and serves through 2003.

Our second witness is Mr. Bill Barr, the Executive Vice President and General Counsel of Verizon. Mr. Barr has a Bachelor's and Master's degree from Columbia University and a law degree from George Washington University. After law school, he clerked for Judge Malcolm Wilkie of the D.C. Circuit. He has a long and distinguished career in public service both at the Central Intelligence Agency and the Department of Justice, culminating with his service as Attorney General of the United States from 1991 to 1993. Before coming to Verizon, he was with the GTE Corporation and also in private practice with the Washington law firm of Shaw, Pittman, Potts and Trowbridge.

Our third witness is Mr. Jeff Blumenfeld, a partner in the Washington law firm of Blumenfeld and Cohen. Mr. Blumenfeld is a graduate of Brown University and the University of Pennsylvania Law School. After serving as an Assistant United States Attorney and an attorney in the Antitrust Division, he founded his own law firm in 1984. In that capacity, he represents a wide variety of clients in the telecommunications field and also serves as an adjunct professor at the Georgetown University Law School.

Our fourth witness is Mr. John Malone, the President and Chief Executive Officer of the Eastern Management Group, a telecommunications consulting firm. He holds a Bachelor's and MBA degree from the University of Dayton. He spent 10 years with AT&T before founding his current company in 1979. The firm consults with all types of telecommunications companies, and Mr. Malone is recognized as one of the leading consultants in this area.

Gentlemen, would you please all stand and raise your right hand and take the oath. Do you and each of you solemnly swear that the testimony that you are about to give to this Committee will be the

truth, the whole truth, and nothing but the truth, so help you, God?

Mr. HARVILL. I do.

Mr. BARR. I do.

Mr. BLUMENFELD. I do.

Mr. MALONE. I do.

Chairman SENSENBRENNER. Let the record show that each of the witnesses answered in the affirmative.

Without objection, the Chair is granted authority to recess the Committee at any time during this afternoon's meeting, and without objection, each of your written statements will be included in that part of the record where your testimony appears. I would ask each of you to summarize your testimony in about 5 minutes or so, and first up is Commissioner Harvill.

TESTIMONY OF THE HONORABLE TERRY S. HARVILL, COMMISSIONER, ILLINOIS COMMERCE COMMISSION, CHICAGO, ILLINOIS

Mr. HARVILL. Good afternoon, Mr. Chairman, Ranking Member Conyers, and other distinguished Members of the Committee. Thank you for inviting me here today to discuss H.R. 1697, the "Broadband Competition and Incentives Act of 2001", and H.R. 1698, the "American Broadband Competition Act of 2001." I appreciate the opportunity to provide a State commission perspective on this important issue.

My name is Terry Harvill and I'm a Commissioner with the Illinois Commerce Commission. The Illinois Commerce Commission is the State of Illinois' public utility agency which is responsible for several financial and service aspects of investor-owned electricity, natural gas, telephone, water, and sewer utilities.

I'm also an economist, and as a general premise, I prefer competition to regulation. I believe that markets should be defined not by regulators, but by consumers. I believe that markets should be free from government interference. However, I also believe that regulation, in the absence of fully-developed competitive markets and when consistent with the public interest, should be permitted to function as a substitute for certain aspects of competition. These two beliefs are not inconsistent.

Congress showed tremendous leadership when it passed the Telecommunications Act of 1996, a landmark statute that balanced the concerns of consumers with the competitive interests of many competitive telecommunications companies. The act considers the deployment of telecommunications services in a competitively and technologically neutral manner. Rather than designating monopolistic providers with specific technologies, the act allows consumers to choose providers and technologies for their telecommunications needs.

In addition, the act requires Incumbent Local Exchange Carriers, or ILECs, to grant competitors access to their networks and lease the components of that network at reasonable prices. After demonstrating their networks are sufficiently open to competition, the ILECs would then be allowed to enter into the long distance market.

Unfortunately, the progress over the past 5 years has been slow. Explanations for this slow progression vary according to industry interest. Competitive Local Exchange Carriers, or CLECs, claim that the ILECs, unwilling to abide by the market-opening provisions of the act, utilize the regulatory and legal process to delay their market entry and limit their ability to compete. Conversely, ILECs argue that the lack of robust competition is due, in part, to the CLECs' defective and inadequate business plans. While a combination of the two is probably—excuse me, while the combination of the two positions is more likely the case, we're faced with the reality of sparse and sporadic competition.

Lost in the cacophony, however, is the fact that the act is working. Over the past several months, the FCC has granted interlata relief to certain ILECs in four States and a fifth application is pending. Competition for business consumers is beginning to emerge for large consumers throughout the cities in the United States. Although the pace is below the level for which we had hoped, the act—the fact remains that the Act is functioning as intended. This progress should be allowed to continue. I ask that you not confuse frustration regarding the slow pace with the misinformed conclusion that the act has become counterproductive to its intended goals.

Today, I call upon you to allow the markets to develop and leave the act as written. In my opinion, government intercession is not necessary at this time and would create more harm than good. Specifically, any major modification to the act or to the competitive safeguards contained in the act would diminish the vital incentives for the ILECs to meet their obligations to open their local markets. Equally important, major modification would also jeopardize the ability of providers to provide competition to the ILECs.

However, if any modification of the act could be justified, it would be to emphasize and provide additional incentives for continued infrastructure improvements by adding broadband capabilities to existing networks. One such area for modification is the enforcement provisions intended to induce competitive behavior from the ILECs. H.R. 1697 and 1698 would not only maintain the core market opening requirements of the act, but they would also offer effective incentives for the deployment of advanced services.

Specifically, H.R. 1697 would prevent any ILEC from entering the long distance market for either voice or data until its market share reached 85 percent or below. Correspondingly, 1698 would enhance the antitrust remedies available to both the Department of Justice and telecommunications carriers seeking to avail themselves to competitive opportunities created by the enactment of the Telecommunications Act.

The nascent competitive telecommunications market as envisioned by the Telecommunications Act of 1996 should be allowed to develop as Congress intended. To the extent that broadband services continue to be provided over the voice network, the opportunity for unfettered competition should continue. Without competitive guidelines, it's unlikely that millions of Americans will ever experience the intended benefits of the act, and that would be an unnecessary travesty.

Thank you, and I'd be happy to answer any questions you may have.

Chairman SENSENBRENNER. Thank you, Commissioner.

[The prepared statement of Mr. Harvill follows:]

PREPARED STATEMENT OF TERRY S. HARVILL

Good afternoon, Mr. Chairman, Ranking Member Conyers, and other distinguished Members of the Committee. Thank you for inviting me here today to discuss H.R. 1697, the "Broadband Competition and Incentives Act of 2001" and H.R. 1698, the "American Broadband Competition Act of 2001." I appreciate the opportunity to provide a state commission perspective on these two important pieces of legislation. My name is Terry Harvill, and I am a Commissioner with the Illinois Commerce Commission. The Illinois Commerce Commission is the state of Illinois' Public Utility Commission and regulates several financial and service aspects of investor-owned electricity, natural gas, telephone, water, and sewer utilities.

I am also an economist, and, as a general premise, I prefer competition to regulation. I believe that markets should be defined not by regulators but by consumers. I believe that markets should be free from government interference. However, I also believe that regulation, in the absence of fully developed competitive markets and when consistent with the public interest, should be permitted to function as a substitute for certain aspects of competition. These beliefs are not inconsistent.

Congress showed tremendous leadership when it passed the Telecommunications Act of 1996—a landmark statute that balanced the concerns of consumers with the competitive interests of myriad telecommunications companies. The Act considers the deployment of telecommunication services in a competitively and technologically neutral manner. Rather than designating monopolistic providers with specific technologies, the Act allows consumers to choose providers and technologies for their telecommunication needs. In addition, the Act requires incumbent local exchange carriers or ILECs to grant competitors access to their networks and to lease their network components at reasonable prices. After demonstrating that their networks are sufficiently open to competitors, the ILECs would be allowed to enter long-distance markets.

Unfortunately, progress over the past five years has been slow. Explanations for this slow progression vary according to industry interests: competitive local exchange carriers or CLECs claim that the ILECs, unwilling to abide by the market-opening provisions of the Act, utilize the regulatory and legal process to delay their market entry and limit their ability to compete. Conversely, the ILECs argue that the lack of robust competition is due, in part, to the CLECs' defective and inadequate business plans. While a combination of the two positions is more likely the case, we are faced with the reality of sparse and sporadic competition. Lost in the cacophony, however, is the fact that the Act is working. Over the past several months, the FCC has granted interLATA entry to certain ILECs in four states, and notice of a fifth application was filed just recently. Competition for business consumers is beginning to emerge in the larger cities throughout the United States. Although the pace is below the level for which we had hoped, the fact remains that the Act is functioning as intended. This progress should be allowed to continue. I ask that you not confuse frustration regarding this slow pace with the misinformed conclusion that the Act has become counterproductive to its intended goals.

Today, I call upon you to allow the markets to develop and leave the Act as written. In my opinion, government intercession is not necessary at this time and would create more harm than good. Specifically, any major modification to the competitive safeguards found in the Act would diminish the vital incentives for the ILECs to meet their obligations to open local markets; equally important, major modification would also jeopardize the ability of providers to offer competition to the ILECs. As a result, the imperative competition that has spurred technological innovation, and thereby propelled the deployment of advanced services, will be delayed or perhaps suspended. Consumers will ultimately lose, since the expected benefits of the Act, such as increased consumer choice, better customer service, and reduced prices, may never materialize.

However, if any modification to the Act could be justified, it would be to emphasize and provide incentives for continued infrastructure improvements by adding broadband capabilities to existing networks. One such area for modification is the enforcement provisions intended to induce competitive behavior of the ILECs. As written, the Act contains no real penalties if the ILECs fail to open their markets. H.R. 1697 and 1698 would not only maintain the core market-opening requirements

of the Act, but they would also offer effective incentives for the deployment of advanced services.

Specifically, H.R. 1697 would prevent any ILEC from entering the long-distance market for either data or voice until its market share in the state dropped below 85 percent. This legislation recognizes two critical elements of the emerging telecommunications market. First, it recognizes the fact that DSL and the deployment of advanced services, as a whole, are dependent on the local loop networks provided by the ILECs. This legislation would prohibit monopolistic local telephone providers from expanding their reach into the interLATA data services market without first showing that their networks are, in fact, open to competition. Second, H.R. 1697 recognizes the increasing convergence of voice and data transmissions. Given the difficulty in distinguishing data from voice transmission, any exemption from the Act could easily be expanded to include basic voice transmissions thereby eliminating the original intent of the Act. Such a result would prove disastrous for consumers.

In addition, H.R. 1697 would promote competition in rural and underserved areas by creating incentives for companies to deploy advanced services. To this end, H.R. 1697 develops powerful incentives for the deployment of advanced services to those areas.

Correspondingly, H.R. 1698 would enhance the antitrust remedies available to both the Justice Department and telecommunications carriers seeking to avail themselves of competitive opportunities created by the enactment of the Act. By removing any antitrust defenses based on the Communications Act of 1934, and by banning the joint marketing of advanced telecom services with an ILEC's other telecommunication and information services and those of its affiliates, H.R. 1698 would expand the disincentives for anticompetitive behavior by the ILECs. Furthermore, by creating arbitration panels for the resolution of disputes based on Section 252 interconnection agreements, the bill would offer the parties a potent alternative to the state commission processes currently available under the Act. The alternative dispute resolution process could also provide positive outcomes, such as promoting consistent policy decisions across a multi-state region and resolving disputes between carriers more quickly, thereby expediting the development of competition.

The nascent competitive telecommunications market, as envisioned by the Telecommunications Act of 1996, should be allowed to develop as Congress intended. To the extent that broadband services continue to be provided over the voice network, the opportunity for unfettered competition must continue. Without competitive guidelines, it is unlikely that millions of Americans will ever experience the intended benefits of the Act. That would be an unnecessary travesty.

Thank you.

N A R U C
National Association of Regulatory Utility Commissioners

Nora Mead Brownell, *President*
Pennsylvania Public Utility Commission
William M. Nugent, *First Vice President*
Maine Public Utilities Commission
David A. Svanda, *Second Vice President*
Michigan Public Service Commission
Allan T. Thoms, *Treasurer*
Iowa Utilities Board
Charles D. Gray, *Executive Director*
Washington, D.C. Office

May 7, 2001

The Honorable W.J. "Billy" Tauzin
Chairman, House Energy and Commerce Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Tauzin:

On behalf of the National Association of Regulatory Utility Commissioners (NARUC), we write to reaffirm our opposition to the Internet Freedom and Broadband Deployment Act, "the Tauzin-Dingell bill." This bill seriously undermines the key local market opening requirements contained in the Telecommunications Act of 1996 ("the Act"), and guarantees years of costly and time-consuming litigation. In addition, the bill does nothing to stimulate deployment of advanced services in rural areas.

1. **H.R. 1542 THREATENS STATE OVERSIGHT OF VOICE SERVICES AND COULD POTENTIALLY RAISE LOCAL PHONE RATES.**

H.R. 1542 preempts state commission authority to regulate "the rates, charges, terms, or conditions for, or entry into the provision of, any high speed data service or Internet access service, or to regulate the *FACILITIES* used in the provision of either such service." The next paragraph then says, "Nothing in this section shall be construed to limit or affect the authority of any State to regulate voice telephone exchange *SERVICES*. . ."

These two sections contradict one another. The facilities used to provide DSL services are the same facilities used to provide voice services. This contradiction between "facilities" and "services" will unquestionably lead to costly litigation over the *scope* of state authority to set local telephone rates. When coupled with the provision to exempt the Bell companies from their market opening requirements, this bill will compromise the state's ability to safeguard local telephone rates where competitive alternatives do not exist. The bill's conflicting definitions of "internet" and "internet access," only further exacerbates the problem.

2. **THIS BILL PERMITS BELL COMPANIES TO SOLIDIFY THEIR POSITION AS DOMINANT PROVIDERS OF VOICE AND DSL SERVICES.**

The purported goal of H.R. 1542 is to provide the Bell companies incentives to invest the capital needed to upgrade their systems for DSL service for rural and underserved areas. The Bell companies already control at least 75% of the DSL market *and most analysts expect them to pick up the bulk of any new DSL business*. Exempting them from their line sharing, unbundling and resale requirements can only assure that expectation is realized.

A New Paradigm Resources Report released earlier this month entitled "CLEC REPORT 2001" - affirms only few competitors will survive the current economic downturn unscathed. Eight competitors are already operating under Chapter 11 bankruptcy protection and eleven DSL providers are now out of business. Conversely, according to a recently released IGI Consulting Report, the residential data market is still strong with Verizon reporting record DSL sales of 180,000 plus – "even in the first quarter of 2001, supposedly in the middle of the downturn." This bill will accelerate these trends.

Some Bell companies are still reluctant to comply with the current law and open their networks to new entrants. Exempting them from their market-opening obligations virtually eliminates any hope of local voice or DSL competition in the future. Other Bell companies are committing significant resources to open networks, and we would not like to see those efforts reduced or discontinued as a result of this bill.

We again urge you to consider the serious constraints this bill will place on the ability of state commissions to protect consumers and promote competition in the voice and DSL markets.

Thank you for your consideration of our concerns. If you have any questions about the status of broadband deployment, local competition, or service quality in your district, please do not hesitate to contact any one of us or your state commission.

Sincerely,

Joan Smith, Chair
NARUC Telecommunications
Committee,
Commissioner, Oregon PUC

Allan Thoms, Vice Chair
NARUC Telecommunications Committee
Chairman, Iowa Utilities Board

Nora Mead Brownell, President
NARUC
Commissioner, Pennsylvania PUC

Thomas Dunleavy, Vice Chair
NARUC Telecommunications Committee
Commissioner, New York PSC

N A R U C
National Association of Regulatory Utility Commissioners

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William M. Nugent, *First Vice President*
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David A. Svanda, *Second Vice President*
Michigan Public Service Commission
Allan T. Thoms, *Treasurer*
Iowa Utilities Board
Charles D. Gray, *Executive Director*
Washington, DC Office

April 24, 2001

The Honorable W.J. "Billy" Tauzin
Chairman
House Energy and Commerce Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Tauzin:

On behalf of the National Association of Regulatory Utility Commissioners (NARUC), we respectfully urge you not to cosponsor or support the Internet Freedom and Broadband Deployment Act, sponsored by Reps Tauzin and Dingell. This bill preempts state commission authority to regulate all rates, charges, terms and conditions for high speed data services including the facilities used in the provision of such services

This bill will seriously undermine key local telephone market opening requirements contained in the Telecommunications Act of 1996 ("the Act"), and guarantee years of costly and time-consuming litigation. In addition, the bill does nothing to stimulate or assure deployment of advanced services in rural areas.

1. THE "TAUZIN/DINGELL" BILL THREATENS TELECOMMUNICATIONS COMPETITION BY GUTTING KEY MARKET-OPENING PROVISIONS IN THE 1996 ACT.

As proponents have conceded, *The Internet Freedom and Broadband deployment Act eliminates a major incentive for the Bell Companies to open their local markets to competition.* Section 271 of the Act is designed to open local phone markets. That section currently requires the Bell companies to comply with a 14-point market-opening checklist before being allowed to provide long-haul transmission of data or voice across LATA boundaries. The "Tauzin/Dingell" bill eliminates those requirements with respect to data services severely undermining efforts to fully open local markets for competitive entry.

Bell Companies in five states with widely varying demographics have already passed the Section 271 checklist. To date, New York, Massachusetts, Texas, Oklahoma, and Kansas can now provide cross-LATA voice and data services. There are more applications pending throughout the country. Indeed, an April 12, 2001 Precursor © Group estimate suggests that the Bell companies will file for Section 271 authorization in all but one of the remaining states where they currently lack authorization to move voice or data traffic across LATA boundaries by the second quarter of 2002. It suggests that all will have met the checklist requirements by the second quarter of 2003.

In the Qwest region, 13 states have begun region-wide OSS testing with competitors to solve the technical requirements of interconnection as a prelude to individual State PUC approval of Qwest entry into cross-LATA voice and data services. There is no urgent need to pass this bill and undermine the process that Congress envisioned in 1996.

2. NOTHING IN CURRENT LAW PREVENTS BELL COMPANIES FROM PROVIDING ADVANCED SERVICES TO CONSUMERS TODAY.

The current law does not prevent Bell Companies from providing broadband services to customers. They are only prevented from carrying data traffic across a LATA boundary. Indeed, the Bell companies have had digital subscriber line (DSL) technology for several years. However, only recently, in response to competitive pressure from cable modem service, have local telephone companies begun aggressively deploying DSL.

Local competition is the fastest way for consumers to obtain broadband services at competitive prices. The "Tauzin/Dingell" bill would actually inhibit the deployment of advanced services because it reduces the incentives for RBOCS to open their local markets to competition. In fact, Bell companies have already aggressively deployed broadband facilities in their home urban markets and are actively marketing high speed Internet access in the areas where they face competition.

In conclusion, we urge you not to cosponsor this bill and support the continued growth and innovation stemming from the pro-competitive measures in the 1996 Act that Congress worked so hard to pass. Competition will eventually eliminate the need for regulation of broadband services. Exempting these services from Section 271 requirements can only further delay the arrival of competition. *Congress should address broadband deployment to rural and urban areas directly and in a competitively and technologically neutral way – not by removing the Bell's incentives to open their local markets.*

We are enclosing a copy of a resolution passed by the National Association of Regulatory Utility Commissioners (NARUC) last March opposing this legislation. This resolution articulates the concerns that all state public service commissions have about this bill.

Thank you for your prompt attention to our concerns. If you have any questions about the status of broadband deployment or the status of local competition in your district, please do not hesitate to contact any one of us or your state commission. You may call Jessica Zufolo at 202-898-2205 in the NARUC Washington office for further details about how to reach us or your state commission colleagues.

Sincerely,

Jim Smith, Commissioner
Oregon PUC
Chair, NARUC Telecommunications Committee

Allen Thomas, Chairman
Iowa Utilities Board,
Vice Chair, NARUC
Telecommunications Committee

Attachment: NARUC Resolution

N A R U C

National Association of Regulatory Utility Commissioners

R E S O L U T I O N

Resolution Regarding Broadband Legislation In The 106th Congress

WHEREAS, The stated goal of the Telecommunications Act of 1996 (1996 Act) is to provide for a pro-competitive, deregulatory framework "designed to accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition"; and

WHEREAS, Several bills being considered in Congress would amend the 1996 Act to allow the Bell Operating Companies (BOCs) to provide in-region, interLATA data services without first having to comply with the market-opening requirements of the 1996 Act, including the fourteen point "competitive checklist" requirements of Section 271; and

WHEREAS, Some of these bills also contain provisions that would limit State commissions from enforcing the market-opening requirements of Section 251 for data and advanced services, thereby denying States from fulfilling their obligations to regulate core telecommunications facilities used to provide both voice and data services, and to promote deployment of advanced telecommunications capabilities; and

WHEREAS, Soon the majority of traffic carried over the public switched network will be sent over packet-switched networks, and as such, technical distinctions between voice and data will become less relevant; and

WHEREAS, State commissions have been at the forefront of implementing and enforcing the market-opening requirements of the 1996 Act and in working with the BOCs and competitive local exchange carriers to advance BOC progress towards compliance with those requirements; and

WHEREAS, In approving Bell Atlantic's application to provide in-region, interLATA services in New York, the FCC made it clear that it will rely heavily on the factual record developed by State commissions and the States' rigorous analysis of the evidence in considering whether to grant future 271 applications; and

WHEREAS, The FCC also stated that it will work in concert with the States to monitor post-interLATA entry compliance by the BOCs; and

WHEREAS, Southwestern Bell recently filed its Section 271 application with the FCC, following an extensive review by the Texas Public Utility Commission, and several other States presently are reviewing BOC compliance with Section 271 requirements; and

WHEREAS, In addition to the coordinated effort on Section 271, the States and the FCC have established a joint conference to cooperatively address the numerous and complex issues

associated with the development and deployment of advanced telecommunications capabilities to all Americans, consistent with the objectives outlined in Section 706 of the 1996 Act; and

WHEREAS, This unprecedented level of coordination and cooperation by State and Federal regulators to (1) implement the market-opening requirements of the Act, (2) promote and ensure BOC compliance with Section 271, and (3) foster the deployment of advanced telecommunications capabilities to all Americans, demonstrates that the 1996 Act is working as Congress intended; *now therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened in its March 2000 Winter Meeting in Washington, D.C., reaffirms its support for the 1996 Act; *and be it further*

RESOLVED, That the NARUC opposes federal legislation that would permit the Bell Operating Companies to provide data services across LATA boundaries without first fully opening their local markets to competition as currently required under the 1996 Act; *and be it further*

RESOLVED, That the NARUC further opposes federal legislation that would limit the ability of State public utility commissions from exercising their authority and resources to fulfill their obligation to regulate core telecommunications facilities used to provide both voice and data services and to promote deployment of advanced telecommunications capabilities.

Sponsored by the Committees on Telecommunications and Finance and Technology
Adopted by the NARUC Board of Directors March 8, 2000

Office of the Chairman & Commissioners

Illinois Commerce Commission

April 30, 2001

The Honorable J. Dennis Hastert
Speaker of the House
2369 Rayburn House Office Building
Washington, D.C. 20515-1314

Dear Speaker Hastert:

On behalf of the Illinois Commerce Commission, we respectfully urge you to oppose H.R. 1542, the Internet Freedom and Broadband Deployment Act of 2001, sponsored by Representatives Tauzin (R-LA) and Dingell (D-MI). If enacted, H.R. 1542 would seriously undermine the key market opening requirements contained in the Telecommunications Act of 1996 ("the Act"). These requirements, mandating Bell companies to demonstrably open their local markets to competition prior to receiving authority to provide the services authorized by H.R. 1542, are a driving force behind the deployment of broadband services today, and are currently leading to the development of local competition across Illinois.

Current telecommunications law does not prevent Bell companies from providing broadband services to customers, if such broadband services do not cross LATA boundaries. In fact, Bell companies have already deployed this very same broadband technology in their home markets where new competitors are offering competing services. H.R. 1542 attempts to circumvent obligations under the Act which prevent Bell companies from providing the long-haul transmission of data across LATA boundaries within their own serving areas until they have opened their markets to competition.

If enacted, H.R. 1542 would:

- Give monopoly carriers free rein to enter long distance data markets without any of the safeguards contained in the Act. For several years local telephone companies have possessed digital subscriber line (DSL) technology. Only recently and primarily in response to competitive pressure have local telephone companies begun aggressively deploying DSL. Local competition is the fastest and most effective way for consumers to obtain broadband services at competitive prices. This bill undermines that competition.

- Pre-empt state commission authority to regulate not only high-speed data services, but also interexchange voice telephone services carried over a packet switch network. Packet switching is the way the Internet works. In packet switching, the "conversation" (which may be voice, video, images, data, etc.) is sliced into small packets of information. Each packet is given a

unique identification and each packet carries its own destination address. The packets are reassembled in proper sequence at its destination using the identification and sequencing information.

- Eliminate the Federal law which currently permits state commissions to enhance competition for local telephone services by requiring additional points of interconnection with the incumbent local telephone company network.

- Drastically reduce incentives for Bell companies to meet their obligations to open local markets. Data traffic already comprises roughly half of all telecommunications traffic today. If Congress weakens the long distance entry requirements of the Act with this proposed exception for data communications services, the Bell companies will largely lose the incentive to open their local markets to competition.

- Endanger crucial pro-consumer policies. H.R. 1542 puts at risk the requirement that incumbent local telephone companies share their lines with competitive data local exchange carriers. This line sharing requirement is critical to the rapid deployment of competitive broadband services to consumers.

In sum, we respectfully urge you to oppose this ill-conceived "broadband relief" measure and to support the growth and innovation stemming from the Act that is beginning to benefit American telephone consumers. We firmly believe that enactment of this legislation will harm competition by destroying the carefully crafted incentives of the Act for Bell companies to open their local markets to competition.

Thank you for your consideration of this matter.

Sincerely,

Chairman Richard L. Mathias

Commissioner Ruth K. Kretschmer

Commissioner Terry S. Harvill

Commissioner Mary Frances Squires

STATE OF ILLINOIS

Office of the Chairman & Commissioners

Illinois Commerce Commission

April 30, 2001

The Honorable Richard J. Durbin
United States Senator
364 Russell Senate Office Building
Washington, D.C. 20510-1304

Dear Senator Durbin:

On behalf of the Illinois Commerce Commission, we respectfully urge you to oppose H.R. 1542, the Internet Freedom and Broadband Deployment Act of 2001, sponsored by Representatives Tauzin (R-LA) and Dingell (D-MI). If enacted, H.R. 1542 would seriously undermine the key market opening requirements contained in the Telecommunications Act of 1996 ("the Act"). These requirements, mandating Bell companies to demonstrably open their local markets to competition prior to receiving authority to provide the services authorized by H.R. 1542, are a driving force behind the deployment of broadband services today, and are currently leading to the development of local competition across Illinois.

Current telecommunications law does not prevent Bell companies from providing broadband services to customers, if such broadband services do not cross LATA boundaries. In fact, Bell companies have already deployed this very same broadband technology in their home markets where new competitors are offering competing services. H.R. 1542 attempts to circumvent obligations under the Act which prevent Bell companies from providing the long-haul transmission of data across LATA boundaries within their own serving areas until they have opened their markets to competition.

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- Endanger crucial pro-consumer policies. H.R. 1542 puts at risk the requirement that incumbent local telephone companies share their lines with competitive data local exchange carriers. This line sharing requirement is critical to the rapid deployment of competitive broadband services to consumers.

In sum, we respectfully urge you to oppose this ill-conceived "broadband relief" measure and to support the growth and innovation stemming from the Act that is beginning to benefit American telephone consumers. We firmly believe that enactment of this legislation will harm competition by destroying the carefully crafted incentives of the Act for Bell companies to open their local markets to competition.

Thank you for your consideration of this matter.

Sincerely,

Chairman Richard L. Mathias

Commissioner Ruth K. Kretschmer

Commissioner Terry S. Harvill

Commissioner Mary Frances Squires

Public Service Commission
State of North Dakota

COMMISSIONERS
Susan E. Wefald, President
Leo M. Reinbold
Anthony T. Clark

Executive Secretary
Jon H. Media

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e-mail: ndpsc@oracle.psc.state.nd.us
TDD 800-366-6888
Fax 701-328-2410
Phone 701-328-2400

May 17, 2001

The Honorable Byron L. Dorgan
United States Senate
713 Hart Office Building
Washington, D.C. 20510

Dear Senator Dorgan:

We are forwarding to you the following letter that we recently sent to Representative Pomeroy. It is regarding HR 1542, the "Internet Freedom and Broadband Deployment Act of 2001."

While we understand that this piece of legislation is currently not before the Senate, we wanted to make you aware of our concerns. As always, please let us know if we can be of assistance to you on utility matters.

Sincerely,

Tony Clark
Commissioner

Susan E. Wefald
President

Leo M. Reinbold
Commissioner

Enclosure

STATE OF ILLINOIS

Office of the Chairman & Commissioners

Illinois Commerce Commission

April 30, 2001

The Honorable Henry J. Hyde
Member of Congress
2110 Rayburn House Office Building
Washington, D.C. 20515-1306

Dear Congressman Hyde:

On behalf of the Illinois Commerce Commission, we respectfully urge you to oppose H.R. 1542, the Internet Freedom and Broadband Deployment Act of 2001, sponsored by Representatives Tauzin (R-LA) and Dingell (D-MI). If enacted, H.R. 1542 would seriously undermine the key market opening requirements contained in the Telecommunications Act of 1996 ("the Act"). These requirements, mandating Bell companies to demonstrably open their local markets to competition prior to receiving authority to provide the services authorized by H.R. 1542, are a driving force behind the deployment of broadband services today, and are currently leading to the development of local competition across Illinois.

Current telecommunications law does not prevent Bell companies from providing broadband services to customers, if such broadband services do not cross LATA boundaries. In fact, Bell companies have already deployed this very same broadband technology in their home markets where new competitors are offering competing services. H.R. 1542 attempts to circumvent obligations under the Act which prevent Bell companies from providing the long-haul transmission of data across LATA boundaries within their own serving areas until they have opened their markets to competition.

If enacted, H.R. 1542 would:

- Give monopoly carriers free rein to enter long distance data markets without any of the safeguards contained in the Act. For several years local telephone companies have possessed digital subscriber line (DSL) technology. Only recently and primarily in response to competitive pressure have local telephone companies begun aggressively deploying DSL. Local competition is the fastest and most effective way for consumers to obtain broadband services at competitive prices. This bill undermines that competition.

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unique identification and each packet carries its own destination address. The packets are reassembled in proper sequence at its destination using the identification and sequencing information.

- Eliminate the Federal law which currently permits state commissions to enhance competition for local telephone services by requiring additional points of interconnection with the incumbent local telephone company network.

- Drastically reduce incentives for Bell companies to meet their obligations to open local markets. Data traffic already comprises roughly half of all telecommunications traffic today. If Congress weakens the long distance entry requirements of the Act with this proposed exception for data communications services, the Bell companies will largely lose the incentive to open their local markets to competition.

- Endanger crucial pro-consumer policies. H.R. 1542 puts at risk the requirement that incumbent local telephone companies share their lines with competitive data local exchange carriers. This line sharing requirement is critical to the rapid deployment of competitive broadband services to consumers.

In sum, we respectfully urge you to oppose this ill-conceived "broadband relief" measure and to support the growth and innovation stemming from the Act that is beginning to benefit American telephone consumers. We firmly believe that enactment of this legislation will harm competition by destroying the carefully crafted incentives of the Act for Bell companies to open their local markets to competition.

Thank you for your consideration of this matter.

Sincerely,

Chairman Richard L. Mathias

Commissioner Ruth K. Kretschmer

Commissioner Terry S. Harvill

Commissioner Mary Frances Squires

Public Service Commission
State of North Dakota

COMMISSIONERS
Susan E. Wefald, President
Leo M. Reinbold
Anthony T. Clark

Executive Secretary
Jon H. Muehlen

May 17, 2001

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TDD 800-366-6888
Fax 701-328-2410
Phone 701-328-2400

The Honorable Earl Pomeroy
United States House of Representatives
1110 Longworth Building
Washington, DC 20515

Dear Congressman Pomeroy:

The North Dakota Public Service Commission urges you to oppose HR 1542, the "Internet Freedom and Broadband Deployment Act of 2001." If enacted, this bill will thwart our efforts to bring local competition and broadband services to customers throughout North Dakota. In addition, the bill does nothing to stimulate deployment of advanced services in rural areas.

- **H.R. 1542 threatens the balance struck by the Telecommunications Act of 1996.**

When Congress passed the 1996 Act, it carefully crafted an incentive based approach, known as the 14-point check list, to encourage Bell companies like Qwest in North Dakota, to open their local networks to competition. The act specifies that the Bells meet this rigorous checklist, ensuring that competitors have the ability to enter into the local telephone market. The FCC makes final determination on whether the incumbent local phone company has complied, but it does so upon a record and recommendation built by state commissions. H.R. 1542 undermines this competitive process that Congress worked so hard to construct when it passed the 1996 Act.

HR 1542 would deregulate data traffic prior to a Bell company meeting the obligations of the 14-point checklist. As Internet usage increases among consumers and businesses, data traffic will surpass voice communications by 2002. Deregulation of this traffic would dramatically diminish local oversight of telecommunications companies that to date have retained virtual control over local network.

- **H.R. 1542 will thwart years of hard work and resources spent on the multi-state 271 collaborate project in the Qwest region.**

Qwest has not yet submitted a 271 application to the North Dakota Commission. However, we are working with Qwest and the 14 states in the Qwest region to build the record on which we will make our recommendation once Qwest does apply (perhaps as early as the fourth quarter of this year).

To date, North Dakota is participating in three collaborative efforts with other states in the Qwest region to facilitate this application. We are concerned that HR 1542 seriously undercuts this investment by gutting critical provisions of the 1996 Act.

- **H.R. 1542 preempts state authority to protect consumers and promote competition and technology in telecommunications.**

The legislation preempts the authority of the North Dakota legislature and commission by creating vast limitations on state or FCC authority regarding data and digitized traffic. For example, it would exempt the Bells from resale and network unbundling requirements that currently are applicable to high-speed data.

This undermines efforts to require incumbent carriers to "line-share," which is a process by which a portion of the local loop is leased by a competitor for the provision of technology such as DSL. Line sharing is critical to the deployment of broadband in North Dakota. In fact, services like DSL have been available for years, but have only recently been made available to consumers, precisely because competition forced incumbent carriers to do so.

- **HR 1542 limits state oversight of voice services and could raise local phone rates.**

H.R. 1542 preempts state authority to regulate "the rates, charges, terms, or conditions for, or entry into the provision of, any high speed data service or Internet access service, or to regulate the *FACILITIES* used in the provision of either such service." The legislation's next paragraph then says; "Nothing in this section shall be construed to limit or affect the authority of any State to regulate voice telephone exchange *SERVICES*. . ."

These two sections contradict one another. The facilities used to provide DSL services are the same facilities used to provide voice services. This contradiction between "facilities" and "services" will unquestionably lead to costly litigation over the *scope* of state authority to set local telephone rates. When coupled with the provision to exempt the Bell companies from their market opening requirements, this bill will compromise the state's ability to safeguard local telephone rates where competitive alternatives do not exist. The bill's conflicting definitions of "internet" and "internet access," only further exacerbates the problem.

For these reasons, we respectfully urge you to not support H.R. 1542. If we can be of any assistance to you on this or any other utility issue, please do not hesitate to contact us.

Sincerely,

Tony Clark
Commissioner

Susan E. Wefald
President

Leo M. Reinbold
Commissioner

AARP

April 24, 2001

The Honorable W.J. Tauzin
Chairman
Energy & Commerce Committee
U. S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Tauzin:

As you prepare to hold a hearing on the "Internet Freedom and Broadband Deployment Act of 2001," in the Energy and Commerce Committee, AARP would like to make you aware of some concerns we have with the legislation as drafted. Our concerns are not with the goal of the legislation, which is to accelerate the deployment of broadband services to all consumers, but rather with the means by which the legislation proposes to achieve that result.

If enacted, this bill would seriously undermine the key market opening requirements contained in the Telecommunications Act of 1996 (the Act). The legislation currently being considered would allow the Regional Bell Operating Companies (RBOCs) to provide interLATA data services without fulfilling the Section 271 checklist requirements of the Act. AARP has been a strong supporter of the Telecommunications Act, believing that residential consumers are beginning to see promised benefits of competition. We lent support to Verizon's successful Section 271 application in New York in 1999 and are pleased to see that the RBOCs are fulfilling the Act's requirements in other states as well.

AARP is also concerned that enactment of the Internet Freedom and Broadband Deployment Act of 2001 may adversely impact competition for local telephone service. As drafted, the legislation puts at risk the line-sharing requirements that allow competitors into the local exchange market. Absent these requirements it is unlikely that a truly competitive marketplace will continue to develop, leading to market power concerns and the attendant pressures to increase local rates. Adding provisions in the legislation to discourage the RBOCs from foreclosing competition in the local markets would serve to benefit a large segment of AARP's members.

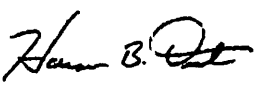
601 E Street, NW Washington, DC 20049 (202) 434-2277 www.aarp.org
Esther "Tess" Canja, President Horace B. Deets, Executive Director

Finally, AARP believes that passage of this legislation is unnecessary. Currently, there is nothing in the 1996 Act that prohibits the RBOCs from providing Digital Subscriber Line (DSL) service to the customers that they now serve. In fact, they are doing so today, competing with other providers in their efforts to satisfy the needs of consumers for high-speed Internet access. AARP believes that legislative language focusing on the enforcement of service quality standards in the provision of DSL service would be helpful to consumers, many of whom have been frustrated in their efforts to achieve high-speed Internet access.

AARP appreciates the Chairman's efforts to accelerate the deployment of broadband technologies to a greater percentage of the population. Efforts to close the "digital divide" while providing residential ratepayers with the Internet access they desire are to be applauded. However, AARP believes that the Internet Freedom and Broadband Deployment Act of 2001, as currently drafted, is not the best means to accomplish this goal

We look forward to continuing to work with the Committee to find an approach that will bring technological advances to all Americans without endangering the framework that serves to stimulate the competitive marketplace that we all desire.

Sincerely,



Horace B. Deets

STATE OF FLORIDA

E. LEON JACOBS, JR.
CHAIRMAN

CAPITAL CIRCLE OFFICE CENTER
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
(850) 413-6046

Public Service Commission

April 23, 2001

The Honorable Robert Wexler
United States House of Representatives
213 Cannon House Office Building
Washington, D.C. 20515

RE: The Internet Freedom and Broadband Deployment Act.

Dear Representative Wexler:

On behalf of the Florida Public Service Commission (FPSC), we urge you to consider some of our questions regarding the Internet Freedom and Broadband Deployment Act to be sponsored by Representatives Tauzin (R-LA) and Dingell (D-MI). We suggest that you carefully scrutinize the bill before considering signing on as a co-sponsor. The requirements in Section 271 of the Telecommunications Act of 1996 (the Act) mandate that Bell companies demonstrate they have opened their local markets to competition prior to receiving relief from restrictions against providing InterLATA (local access and transport area) service. These requirements are valuable tools to help achieve local competition, which may be undermined by the bill in question.

We have not yet received a draft of the bill, so we do not know whether its provisions will be identical to those contained in last year's H.R. 2420. However, based on the presumption that the legislation will be similar to H.R. 2420, we note the following potential areas of concern:

- The bill may give a monopoly carrier the ability to enter long distance data markets without any of the safeguards contained in the Act. Only recently, and primarily in response to competitive pressures, have local telephone companies begun aggressively deploying digital subscriber line (DSL) technology. Local competition is the fastest and most effective stimulus for consumers to obtain broadband services at competitive prices. This bill could undermine development of local competition.

- The bill may diminish local oversight of telecommunications companies that to date have retained dominant control over local markets. The Internet uses packet switching, in which the "conversation" may include both voice and data traffic. This may result in the commingling of voice transmission over the same facility. Currently, over one-half of the traffic on the network is data. This is expected to climb to over 90% by 2005.

- The bill may eliminate the federal provision which currently permits state commissions to enhance competition for local telephone services by requiring additional points of interconnection with the incumbent's local telephone company network.

- The bill may reduce incentives for Bell companies to meet their obligations to open local markets. If Congress weakens the long distance entry requirements of the Act with this proposed exception for data communications services, the Bell companies may largely lose the incentive to open their local markets to competition. Weakening incentives to open local markets may result in ALECs leaving the market. Every alternative local exchange company (ALEC) has to interface with the RBOC in order to provide service. Currently, ALECs only have 6 percent of the market in Florida.

- The bill may harm pro-consumer policies. Should this Act contain the same language as H.R. 2420, it could put at risk the requirement that incumbent local telephone companies share their lines with competitive data local exchange carriers. Elimination of the line sharing requirement could decrease the rate of deployment of competitive broadband services to residential consumers.

Furthermore, a statutory change does not appear necessary to achieve the stated purpose of the legislation. Under current telecommunications law, Bell companies are not prevented from providing broadband services to customers if such broadband services do not cross LATA boundaries. In fact, Bell companies are aggressively deploying this very same broadband technology in their home markets where new competitors are offering competing services.

In Florida, local telecommunications competition and the deployment of advanced services by both RBOCs and CLECs is in its infancy. The FPSC has been given the responsibility to promote local competition. We are implementing this mission in several ways. We are currently in the midst of setting prices for unbundled network elements for BellSouth, we have conducted extensive testing of BellSouth operations support systems (OSS), and we are readying to make an expedited decision on a BellSouth 271 application. Through these and other efforts, we believe that we can foster increased local competition and promote the timely deployment of advanced services.

We note that overall, Florida ranks well above the national averages in broadband deployment, number of broadband providers, and lines. According to FCC data, 87% of Florida zip codes are served by at least one broadband provider, 69% are served by one to three providers, and 13% are served by at least 4 providers. These percentages are above the national averages of 59%, 49%, and 4%, respectively. Florida has 100% more ADSL providers, 200% more cable providers, and 40% more types of traditional wireline, optical, satellite, and fixed wireless providers than the national averages. Florida also has 260% more broadband lines than the national average.

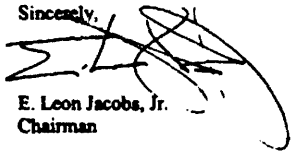
Before considering co-sponsorship of any "271 relief" legislation, you may want to obtain answers to the following questions:

- Does the bill undermine the incentives for Bell operating companies to open their local markets to competition?
- Would the Regional Bell Operating Companies lose their incentive to open up their markets if the data traffic were allowed across LATA boundaries?
- Does this bill harm, rather than help, competition in broadband deployment? If so, does that impede broadband deployment to rural areas?
- While the Florida Public Service Commission does not "regulate" the Internet, wouldn't the preemptive language in the bill keep the FPSC from overseeing the nondiscriminatory application of terms and conditions in tariffs for high-speed data services?
- Does the bill take away the regulatory leverage to spur the Bell companies to open up their markets?

In sum, we respectfully urge you to be cautious about this "RBOC relief" legislation. We note that NARUC has passed a resolution against such legislation. Last year, 30 state commissions filed comments against passage of H.R. 2420. It is important to note that when an efficiently operating competitive market is achieved, legislation like that proposed in H.R. 2420 in 1999, might be appropriate. Until that time, we believe that incentive regulation and state participation may well be the best way to ensure that local competition is achieved. Bills like H.R. 2420 have laudable goals, but they could also derail the work that state commissions are currently doing to achieve local competition and they could lessen the incentives for RBOCs to seek 271 approval for voice traffic. We urge you to consider the impact this type of legislation could have in regard to preempting not only the efforts of the FPSC, but more importantly, preempting the Florida Legislature in these matters.

Thank you for your consideration. We would be happy to provide further information about Florida's activities on Section 271 and local competition upon request.

Sincerely,



E. Leon Jacobs, Jr.
Chairman

ELJ:CBM:jm

STATE OF WASHINGTON
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
1300 S. Evergreen Park Dr. S.W., P.O. Box 47250 • Olympia, Washington 98504-7250
(360) 664-1160 • TTY (360) 586-8203

May 4, 2001

The Honorable Jennifer Dunn
U.S. Representative
1501 Longworth House Office Building
Washington, DC 20515

Dear Representative Dunn:

On behalf of the Washington Utilities and Transportation Commission, we respectfully urge you to oppose H.R. 1542, the Internet Freedom and Broadband Deployment Act of 2001, sponsored by Representatives Tauzin (R-LA) and Dingell (D-MI). If enacted, H.R. 1542 would seriously undermine key market opening requirements contained in the Telecommunications Act of 1996. The 1996 Act requires Bell companies to show that they have effectively opened their local markets to competition prior to receiving authority to provide interLATA services in their regions.

Current telecommunications law does not prevent Bell companies from providing broadband services to customers, if those broadband services do not cross LATA boundaries. In fact, Bell companies have already deployed this very same broadband technology in their home markets where new competitors are offering competing services. H.R. 1542 circumvents obligations under the 1996 Act. These obligations prevent Bell companies from providing the long-haul transmission of data across LATA boundaries within their own serving areas until they have opened their markets to competition.

If enacted, H.R. 1542 would:

- Significantly reduce incentives for Bell companies to meet their obligations to open local markets. Data traffic already comprises roughly half of all telecommunications traffic today. If Congress weakens the long distance entry requirements of the 1996 Act with this proposed exception for data communications services, the Bell companies will largely lose the incentive to open their local markets to competition.

- Give local monopoly carriers the opportunity to enter long distance data markets without key safeguards contained in the 1996 Act. For several years local telephone companies have possessed digital subscriber line (DSL) technology.

Only recently and primarily in response to competitive pressure have local telephone companies begun aggressively deploying DSL. Local competition is the fastest and most effective way for consumers to obtain broadband services at competitive prices This bill undermines that competition.

Potentially preempt state commission authority to regulate not only high-speed data services *but also interexchange voice telephone services carried over a packet switch network.* Packet switching is the way the Internet works. In packet switching, the conversation (which may be voice, video, images, data, etc.) is sliced into small packets of information. Each packet is given a unique identification and each packet carries its own destination address. The packets are reassembled in proper sequence at their destination using the identification and sequencing information.

In sum, we respectfully urge you to oppose this ill-conceived measure and to support the growth and innovation stemming from the 1996 Act that is beginning to benefit American telephone consumers. We firmly believe that enactment of this legislation will harm competition by destroying the carefully crafted incentives of the 1996 Act for Bell companies to open their local markets to competition.

Thank you for your consideration of this matter.

Sincerely,

Marilyn Showalter
Chairwoman

Richard Hemstad
Commissioner

cc: Charles Gray, Executive Director, NARUC

COMMISSIONERS:
LAUREN "BUBBA" MCDONALD, JR., CHAIRMAN
ROBERT B. BAKER, JR.
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STAN WISE

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Georgia Public Service Commission

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May 2, 2001

The Honorable Bob Barr
House of Representatives
1207 Longworth House Office Building
Washington, DC 20515

Dear Representative Barr:

I respectfully urge you not to cosponsor or support H.R. 1542, the Internet Freedom and Broadband Deployment Act, sponsored by Reps. Tauzin and Dingell. This bill preempts state commission authority to regulate all rates, charges, terms and conditions for high speed data services including the facilities used in the provision of such services.

This bill will seriously undermine key local telephone market opening requirements contained in the Telecommunications Act of 1996 ("the Act"), and guarantee years of costly and time-consuming litigation. In addition, the bill does nothing to stimulate or assure deployment of advanced services in rural parts of Georgia.

1. THE "TAUZIN/DINGELL" BILL THREATENS TELECOMMUNICATIONS COMPETITION BY GUTTING KEY MARKET-OPENING PROVISIONS IN THE 1996 ACT.

As proponents have conceded, *The Internet Freedom and Broadband deployment Act eliminates a major incentive for the Bell Companies to open their local markets to competition.* Section 271 of the Act is designed to open local phone markets. That section currently requires the Bell companies to comply with a 14-point market-opening checklist before being allowed to provide long-haul transmission of data or voice across LATA boundaries. The "Tauzin/Dingell" bill eliminates those requirements with respect to data services severely undermining efforts to fully open local markets for competitive entry.

Bell Companies in five states with widely varying demographics have already passed the Section 271 checklist. To date, New York, Massachusetts, Texas, Oklahoma, and Kansas can now provide cross-LATA voice and data services. There are more applications pending throughout the country. Indeed, an April 12, 2001 Precursor © Group estimate suggests that the Bell companies will file for Section 271 authorization in all but one of the remaining states where they currently lack authorization to move voice or data traffic across LATA boundaries by the second quarter of 2002. It suggests that all will have met the checklist requirements by the second quarter of 2003.

In the Qwest region, 13 states have begun region-wide OSS testing with competitors to solve the technical requirements of interconnection as a prelude to individual State PUC approval of Qwest entry into cross-LATA voice and data services. There is no urgent need to pass this bill and undermine the process that Congress envisioned in 1996.

2. NOTHING IN CURRENT LAW PREVENTS BELLSOUTH FROM PROVIDING ADVANCED SERVICES TO CONSUMERS TODAY.

The current law does not prevent Bell Companies from providing broadband services to customers They are only prevented from carrying data traffic across a LATA boundary. Indeed, the Bell companies have had digital subscriber line (DSL) technology for several years. However, only recently, in response to competitive pressure from cable modem service, have local telephone companies begun aggressively deploying DSL.

Local competition is the fastest way for consumers to obtain broadband services at competitive prices. The "Tauzin/Dingell" bill would actually inhibit the deployment of advanced services because it reduces the incentives for RBOCS to open their local markets to competition. In fact, Bell companies have already aggressively deployed broadband facilities in their home urban markets and are actively marketing high speed Internet access in the areas where they face competition.

3. THE "TAUZIN/DINGELL BILL WOULD MAKE IT IMPOSSIBLE FOR STATE PUC'S TO KEEP BASIC RATES FROM SKYROCKETING.

The bill expressly preempts state commission authority to oversee the nondiscriminatory application of terms and conditions in tariffs for high-speed data services. There may also be the risk that there might be commingling of voice transmission over the same facility. Packet switching is the way the Internet works. In packet switching the "conversation" (which may be voice, video images, data, etc.) is sliced into small packets of information Each packet is given a unique identification and each packet carries its own destination address.

Currently, over one half of the traffic on the network is data. This is expected to climb to over 90% by 2002. Deregulation of this traffic would dramatically diminish local oversight of telecommunications companies that to date have retained dominate control over local markets.

Since voice and data is indistinguishable over the network, it is likely that at least some voice services will be provided using Internet protocols. These services may not fit within the definition of "telephone exchange service," a terms that presupposes the traditional circuit-switched telephone network of copper loops and central office switches. Under the bill, even if Internet-based telephone service replaces conventional service as a basic mode of local telecommunications, State Commissions would be powerless to protect consumers against higher rates or poor service quality.

BEST AVAILABLE COPY

In conclusion, we urge you not to cosponsor this bill and support the continued growth and innovation stemming from the pro-competitive measures in the 1996 Act that Congress worked so hard to pass. Competition will eventually eliminate the need for regulation of broadband services. Exempting these services from Section 271 requirements can only further delay the arrival of competition. *Congress should address broadband deployment to rural and urban areas directly and in a competitively and technologically neutral way – not by removing the Bell's incentives to open their local markets.*

We are enclosing a copy of a resolution passed by the National Association of Regulatory Utility Commissioners (NARUC) last March opposing this legislation. This resolution articulates the concerns that all state public service commissions have about this bill.

Thank you for your prompt attention to our concerns. If you have any questions about the status of broadband deployment or the status of local competition in your district, please do not hesitate to contact me.

Sincerely,

Stan Wise
Georgia Public Service Commissioner

TENNESSEE REGULATORY AUTHORITY

Sara Kyle, Chairman
Lynn Greer, Director
Melvin Malone, Director

460 James Robertson Parkway
Nashville, Tennessee 37243-0505

May 8, 2001

The Honorable William L. Jenkins
United States Representative
1708 Longworth House Office Building
Washington, DC 20515-4201

Dear Representative Jenkins:

On behalf of the Tennessee Regulatory Authority, we respectfully urge you to oppose H.R. 1542, the Internet Freedom and Broadband Deployment Act, sponsored by Representatives Tauzin and Dingell. As you know, we sent a letter last year articulating serious concerns regarding H.R. 2420, the identical predecessor to H.R. 1542 as introduced. Several amendments offered to improve the bill failed or were ruled out of order at a markup session held by the House Telecommunications Subcommittee on April 26, 2001. If enacted as currently amended, H.R. 1542 would seriously undermine the key market opening requirements contained in the Telecommunications Act of 1996 ("Act") and thwart the emerging deployment of broadband data services in Tennessee.

The Act currently requires Bell companies to demonstrably open their local markets and networks to competition prior to receiving authority to provide the interLATA data services that would be authorized by H.R. 1542. The main inducement for the Bell companies to open their markets to competitors is entry to the interLATA long distance markets. If Congress weakens the long distance entry requirements of the Act with this proposed exception for data communications services, the Bell companies will largely lose that incentive to open their local markets to competition.

Such a result would undo the hard work done in states that have successfully completed the Act's Section 271 process and states that are conducting Section 271 reviews. Bell companies in five states (New York, Massachusetts, Texas, Oklahoma, and Kansas) with widely varying geographic and demographic characteristics have already passed the Section 271 checklist. We currently expect BellSouth to file a Section 271 application for Tennessee this year.

It is important to note that even without a Section 271 application pending for Tennessee, BellSouth is deploying broadband services. After all, Bell companies that have not achieved Section 271 relief are not prevented from providing intraLATA broadband services. Indeed, BellSouth has had digital subscriber line ("DSL") technology for several

years. Only recently, however, in response to competitive pressure from cable modem service providers and other DSL providers, has BellSouth begun aggressively deploying DSL. Clearly, local competition is the fastest and most effective way for consumers to obtain broadband services at competitive prices. H.R. 1542 undermines that competition.

The current version of H.R. 1542 would endanger crucial pro-consumer policies. H.R. 1542 puts at risk the requirement that incumbent local telephone companies share their lines with competitive data local exchange carriers. This "line sharing" requirement is integral to competition in residential markets for advanced telecommunications services. Further, H.R. 1542 would prevent state regulators from requiring Bell companies to provide additional points of network interconnection with competitors and would eliminate Bell companies' wholesale requirements for data offerings. These regulatory requirements for the Bell companies wholesale operations are necessary to create retail competition; and competition will facilitate the provision of advanced services to all Americans at affordable rates as required by Section 706 of the Act.

The current version of H.R. 1542 also would pre-empt state commission authority to regulate not only high-speed data services, but also interLATA voice telephone services carried over a packet switch (data) network. Packet switching is the way the Internet works. In packet switching, the "conversation" (which may be voice, video, images, data, etc.) is sliced into small packets of information. Because an ever increasing amount of voice services are carried by data networks, H.R. 1542 would eliminate most of the incentives that encourage Bell companies to work with state regulators and other policy-makers to bring competition to all telecommunications markets.

In conclusion, Tennessee consumers will suffer if there is any loss of the developing competition thus far gained in BellSouth's local markets, including the markets for broadband services. While competition may eventually eliminate the need for regulation of broadband services, deregulation at this time is clearly premature for Tennessee and would undermine the progress achieved so far. We firmly believe that enactment of this bill at this time will delay the emergence of broadband competition and its associated benefits by destroying the Act's carefully crafted incentives for Bell companies to open their local markets to competition.

We are enclosing a copy of a resolution passed last year by the National Association of Regulatory Utility Commissioners opposing this legislation. Thank you for your consideration of this matter.

Sincerely,

Sara Kyle
Chairman

H. Lynn Greer, Jr.
Director

Melvin J. Malone
Director

Enclosure

cc: Charles Gray, Executive Director, NARUC

STATE OF FLORIDA

E. LEON JACOBS, JR.
CHAIRMAN

CAPITAL CIRCLE OFFICE CENTER
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
(850) 413-6046

Public Service Commission

April 23, 2001

The Honorable Joe Scarborough
United States House of Representatives
127 Cannon House Office Building
Washington, D.C. 20515

RE: The Internet Freedom and Broadband Deployment Act.

Dear Representative Scarborough:

On behalf of the Florida Public Service Commission (FPSC), we urge you to consider some of our questions regarding the Internet Freedom and Broadband Deployment Act to be sponsored by Representatives Tauzin (R-LA) and Dingell (D-MI). We suggest that you carefully scrutinize the bill before considering signing on as a co-sponsor. The requirements in Section 271 of the Telecommunications Act of 1996 (the Act) mandate that Bell companies demonstrate they have opened their local markets to competition prior to receiving relief from restrictions against providing InterLATA (local access and transport area) service. These requirements are valuable tools to help achieve local competition, which may be undermined by the bill in question.

We have not yet received a draft of the bill, so we do not know whether its provisions will be identical to those contained in last year's H.R. 2420. However, based on the presumption that the legislation will be similar to H.R. 2420, we note the following potential areas of concern:

- The bill may give a monopoly carrier the ability to enter long distance data markets without any of the safeguards contained in the Act. Only recently, and primarily in response to competitive pressures, have local telephone companies begun aggressively deploying digital subscriber line (DSL) technology. Local competition is the fastest and most effective stimulus for consumers to obtain broadband services at competitive prices. This bill could undermine development of local competition.

- The bill may diminish local oversight of telecommunications companies that to date have retained dominant control over local markets. The Internet uses packet switching, in which the "conversation" may include both voice and data traffic. This may result in the commingling of voice transmission over the same facility. Currently, over one-half of the traffic on the network is data. This is expected to climb to over 90% by 2005.

- The bill may eliminate the federal provision which currently permits state commissions to enhance competition for local telephone services by requiring additional points of interconnection with the incumbent's local telephone company network.

- The bill may reduce incentives for Bell companies to meet their obligations to open local markets. If Congress weakens the long distance entry requirements of the Act with this proposed exception for data communications services, the Bell companies may largely lose the incentive to open their local markets to competition. Weakening incentives to open local markets may result in ALECs leaving the market. Every alternative local exchange company (ALEC) has to interface with the RBOC in order to provide service. Currently, ALECs only have 6 percent of the market in Florida.

- The bill may harm pro-consumer policies. Should this Act contain the same language as H.R. 2420, it could put at risk the requirement that incumbent local telephone companies share their lines with competitive data local exchange carriers. Elimination of the line sharing requirement could decrease the rate of deployment of competitive broadband services to residential consumers.

Furthermore, a statutory change does not appear necessary to achieve the stated purpose of the legislation. Under current telecommunications law, Bell companies are not prevented from providing broadband services to customers if such broadband services do not cross LATA boundaries. In fact, Bell companies are aggressively deploying this very same broadband technology in their home markets where new competitors are offering competing services.

In Florida, local telecommunications competition and the deployment of advanced services by both RBOCs and CLECs is in its infancy. The FPSC has been given the responsibility to promote local competition. We are implementing this mission in several ways. We are currently in the midst of setting prices for unbundled network elements for BellSouth, we have conducted extensive testing of BellSouth operations support systems (OSS), and we are readying to make an expedited decision on a BellSouth 271 application. Through these and other efforts, we believe that we can foster increased local competition and promote the timely deployment of advanced services.

We note that overall, Florida ranks well above the national averages in broadband deployment, number of broadband providers, and lines. According to FCC data, 87% of Florida zip codes are served by at least one broadband provider, 69% are served by one to three providers, and 13% are served by at least 4 providers. These percentages are above the national averages of 59%, 49%, and 4%, respectively. Florida has 100% more ADSL providers, 200% more cable providers, and 40% more types of traditional wireline, optical, satellite, and fixed wireless providers than the national averages. Florida also has 260% more broadband lines than the national average.

Before considering co-sponsorship of any "271 relief" legislation, you may want to obtain answers to the following questions:

- Does the bill undermine the incentives for Bell operating companies to open their local markets to competition?
- Would the Regional Bell Operating Companies lose their incentive to open up their markets if the data traffic were allowed across LATA boundaries?
- Does this bill harm, rather than help, competition in broadband deployment? If so, does that impede broadband deployment to rural areas?
- While the Florida Public Service Commission does not "regulate" the Internet, wouldn't the preemptive language in the bill keep the FPSC from overseeing the nondiscriminatory application of terms and conditions in tariffs for high-speed data services?
- Does the bill take away the regulatory leverage to spur the Bell companies to open up their markets?

In sum, we respectfully urge you to be cautious about this "RBOC relief" legislation. We note that NARUC has passed a resolution against such legislation. Last year, 30 state commissions filed comments against passage of H.R. 2420. It is important to note that when an efficiently operating competitive market is achieved, legislation like that proposed in H.R. 2420 in 1999, might be appropriate. Until that time, we believe that incentive regulation and state participation may well be the best way to ensure that local competition is achieved. Bills like H.R. 2420 have laudable goals, but they could also derail the work that state commissions are currently doing to achieve local competition and they could lessen the incentives for RBOCs to seek 271 approval for voice traffic. We urge you to consider the impact this type of legislation could have in regard to preempting not only the efforts of the FPSC, but more importantly, preempting the Florida Legislature in these matters.

Thank you for your consideration. We would be happy to provide further information about Florida's activities on Section 271 and local competition upon request.

Sincerely,

E. Leon Jacobs, Jr.
Chairman

ELJ:CBM:jm

STATE OF NEW HAMPSHIRE

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May 9, 2001

The Honorable John E. Sununu
U.S. House of Representatives
316 Cannon House Office Bldg.
Washington, DC 20515

Dear Congressman Sununu:

As Commissioners of the New Hampshire Public Utilities Commission, we write to express our opposition to the H.R. 1542, the Internet Freedom and Broadband Deployment Act. This bill undermines the central balance of the Telecommunications Act of 1996 ("the Act"), under which Regional Bell Operating Company authority to enter inter-LATA markets comes only upon a showing that local exchange markets are open. The bill would further dilute the ability of state commissions and legislatures to protect consumers and promote competition within our states.

The New Hampshire Public Utilities Commission subscribes to the positions on this bill provided to your committee by the National Association of Regulatory Utility Commissioners in its May 7, 2001 letter. As the NARUC letters explain, H.R. 1542 (1) threatens state oversight of voice services, and could promote increases in local exchange rates, and (2) permits RBOCs to further solidify their position as dominant providers of both voice and DSL services by exempting them from their line-sharing, unbundling and resale requirements for data lines.

HR 1542 raises at least four major concerns that would adversely impact New Hampshire ratepayers and businesses. First, it would preclude any state or federal regulation of high-speed data services, including consumer protection or service quality regulation. Second, HR 1542 includes a limited but incomplete reservation of state authority regarding voice traffic. This reservation does not include continuing state authority over inter-exchange voice telephone services carried over a packet switch network. As voice and data services increasingly are provided over common facilities, this failure to reserve state authority could provide a large exemption from state oversight over even voice services.

Third, HR 1542 would exempt the RBOCs and other incumbent local exchange carriers from resale and network unbundling requirements that now apply to high speed data and internet access services under the Act. The current "line sharing" requirement is critical to the rapid deployment of competitive broadband services to consumers. Finally, the Tauzin-Dingell bill would also allow Bell companies to provide in-region interLATA (local access and transport area) data services without having to satisfy the market-opening mandates outlined in section 271 of the Act. Since data traffic comprises roughly half of all telecommunications traffic today, this requirement would significantly reduce incentives for the RBOCs to meet their obligations to open local markets.

In conclusion, HR 1542 should be opposed, because if enacted, it would seriously undermine the current authority of the states to protect the interests of consumers and ratepayers, as well as to undermine key market opening requirements contained in the Telecommunications Act of 1996.

Thank you very much for your consideration of these comments. We would be more than happy to talk with you or with any member of your staff to discuss these important issues further.

Sincerely,

Douglas L. Patch	Susan S. Geiger	Nancy Brockway
Chairman	Commissioner	Commissioner

cc. Hon. W.J. "Billy" Tauzin, Chairman, House Energy and Commerce Committee
Hon. Nora Mead Brownell, President, NARUC
Hon. Joan Smith, Chair, NARUC Telecommunications Committee
J. Bradford Ramsay, General Counsel, NARUC

PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA
505 VAN NESS AVENUE
SAN FRANCISCO, CALIFORNIA 94102

LORETTA LYNCH
PRESIDENT

TEL: (415) 703-2444
FAX: (415) 703-2033

April 30, 2001

Honorable Christopher Cox
Member of House of Representatives
2402 Rayburn House Office Building
Washington, DC 20515

Subject: H.R. 1542, the Tauzin/Dingell bill

Dear Congressman Cox:

The California Public Utilities Commission opposes HR 1542, and urges you also to oppose this misguided and fundamentally problematic piece of proposed legislation. If enacted, HR 1542 would seriously undermine the key market opening requirements contained in the Telecommunications Act of 1996 (the Act).

HR 1542 raises at least four major concerns that would adversely impact California ratepayers and businesses. First, it would preclude any state or federal regulation of high-speed data services, including consumer protection or service quality regulation. In particular, in its proposed new Section 232(a), HR 1542 would prohibit the FCC or the states from regulating the rates, charges, terms, or conditions for, or entry into, the provisioning of any high speed data service. This prohibition is of very great concern to us, because we at the California Public Utilities Commission have received a high volume of complaints regarding the provision of Digital Subscriber Line (DSL) service, and the Tauzin-Dingell bill would prevent us from taking any steps to protect DSL customers from abuses in the future.

Second, HR 1542 includes a limited reservation of state authority regarding voice traffic. However, this reservation does not include continuing state authority over inter-exchange voice telephone services carried over a packet switch network. Packet switching is the way the Internet works. In packet switching, the "conversation" (which may be voice, video, images, data, etc.) is sliced into small packets of information. Each packet is given a unique identification, and each packet carries its own destination address. The packets are reassembled in proper sequence at their destination using provided identification and

sequencing information. As the Internet becomes an increasingly important component of the voice telecommunications system, this market segment, if deregulated, will not be subject to the same consumer protection laws and requirements as other regulated voice telecommunications providers. At this point in time, when the parameters of this emerging service are still unknown, it would be imprudent to eliminate state oversight over such Internet voice telephone service.

Third, HR 1542 would exempt the RBOCs and other incumbent local exchange carriers from resale and network unbundling requirements that now apply to high speed data and internet access services under the Act. These requirements would put at risk current efforts by the FCC and by our Commission under California law (AB 991 - Papan) to require incumbent local exchange companies to share their lines with competitive local exchange data carriers. The current "line sharing" requirement is critical to the rapid deployment of competitive broadband services to consumers.

And fourth, the Tauzin-Dingell bill would also allow Bell companies to provide in-region interLATA (local access and transport area) data services without having to satisfy the market-opening mandates outlined in section 271 of the Act. Since data traffic comprises roughly half of all telecommunications traffic today, this requirement would drastically reduce incentives for the RBOCs to meet their obligations to open local markets.

In conclusion, HR 1542 should be opposed, because if enacted, it would seriously undermine the current authority of the states to protect the interests of consumers and ratepayers, as well as to undermine key market opening requirements contained in the Telecommunications Act of 1996.

Thank you very much for your consideration of these comments. We would be more than happy to talk with you or with any member of your staff to discuss these important issues further.

Sincerely,

Loretta M. Lynch

Loretta Lynch
President

NEW MEXICO PUBLIC REGULATION COMMISSION

COMMISSIONERS

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DISTRICT 4 LYNDA M. LOVEJOY
DISTRICT 5 TONY SCHAEFER, CHAIRMAN

1120 Paseo de Peralta
P.O. Box 1269
Santa Fe, New Mexico 87504

April 27, 2001

Hon. Joe Skeen
U. S. Representative
Rayburn House Office Building, Room 2302
Washington, DC 20515

Dear Congressman Skeen:

On behalf of the New Mexico Public Regulation Commission (NMPRC) we respectfully urge you not to support H.R. 1542, the Internet Freedom and Broadband Deployment Act, sponsored by Reps. Tauzin and Dingell. H.R. 1542 essentially eliminates a major incentive to open local markets to competition and short circuits the well planned process opening local markets which is now underway in 13 western states.

This bill preempts state commission authority to regulate all rates, charges, terms and conditions for high-speed data services, including the facilities used in the provision of such services. It will seriously undermine key local telephone market opening requirements contained in the Telecommunications Act of 1996 (the Act). In addition, the bill does nothing to stimulate or assure deployment of advanced services in rural areas.

In the QWEST territory there is presently a 13-state collaborative study of Operational Support Systems (OSS) which is an important element of a Section 271 application. Approval of this application allows a Bell Operating Company (BOC) to serve interstate customers with voice and data. In order to qualify for 271 approval, there is a fourteen-point checklist dealing with opening up the telecommunications market to competitors for the benefit of the general public having access to alternative telecommunications services. This study is to be completed by the end of August, at which time QWEST will make their 271 filing in their 14 state territory.

QWEST is not precluded from offering broadband services to its customers. This commission recently approved an Alternative Form of Regulation (AFOR) agreement which requires QWEST to provide high speed data services to both urban and rural areas of the state. Obviously, this will allow improved access to the internet and other services. H.R. 1542 will not improve access to services in New Mexico and could possibly hurt the BOC's incentive to open their markets to competition as required in the Telecommunications Act of 1996.

Enclosed is a resolution from the National Association of Regulatory Utility Commissioners (NARUC) opposing this legislation. Also enclosed is a copy of a letter we received via e-mail from the AARP opposing the bill.

Thank you for your consideration of this matter. Please feel free to call any of the commissioners or staff at the PRC to address any issues you may have.

Yours truly,

TONY K. HARKER, Chairman

JEROME D. BLOCK, Commissioner

HERB HUGHES, Commissioner

LINDA LOVEJOY, Commissioner

Encls. as noted

cc: Sen. Jeff Bingaman (w/encls)
Sen. Pete Domenici (w/encls)

Chairman SENSENBRENNER. Mr. Barr.

TESTIMONY OF THE HONORABLE WILLIAM P. BARR, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, VERIZON COMMUNICATIONS, WASHINGTON, D.C.

Mr. BARR. Good afternoon, Mr. Chairman, Ranking Member Conyers. It's a pleasure to appear before this Committee today. I'd like to focus my comments on H.R. 1697 and 1698. I believe that these proposals are unwarranted and would be destructive to both of the fundamental principles in the antitrust laws and our telecommunications policy.

Now, the Telecom Act created special duties and imposed special duties on the incumbent LECs that go far beyond the requirements in the general antitrust laws. We have to facilitate the business operations of our competitors in countless ways that are summed up in thousands and thousands of pages of FCC rules. This has required a massive investment on our part, an effort to completely redo the systems, the software, and the processes that are used to operate our network so that it can serve as a platform for a countless number of retailers. And what is truly remarkable, in my view, about this very substantial IT project that dwarfs what we have had to expend, for example, on Y2K, is how successful it has been in a relatively short period of time.

Now, many competitors have been quite vocal in suggesting that the ILECs, or the incumbents, are not living up to our obligations to provide wholesale service, and they claim that some kind of substantial change in law is necessary to deal with this alleged misconduct. The indisputable and objective facts, though, I think belie these claims.

First, in our long distance application proceedings, the so-called 271 proceedings, all these claims have been levied by our competitors and they've been painstakingly reviewed by State commissions, by independent auditors, and ultimately by the FCC, and in these proceedings, they have been found—they have been rejected. Our petitions have been approved. We've been allowed to go into long distance. We've been found to be living up to our obligations and not to have engaged in foot dragging. On the contrary, we've been getting high marks for working cooperatively with competitors, and indeed, just 2 days ago, the FCC put out the latest competition data, which shows that it is surging in States where the Bells have been admitted to compete in long distance, far outpacing the other States.

Now, the second point is that the FCC and the States have put in place specific objective standards and measures about what—that we have to meet in providing our wholesale obligations. We have to keep two million, approximately, metrics to demonstrate that we are meeting our obligations. SBC has said that they have to keep three million, and the reason why you keep all these objective standards is precisely to avoid subjective bickering about whether you're doing your job or not. The numbers are there. Either we're meeting the criteria or we're not, and largely those show that we are meeting the criteria required by the FCC. Where we're not, on the margin, we pay no fault penalties and we quickly cure those problems.

Moreover, there are already comprehensive enforcement schemes to deal with any potential misconduct in these wholesale obligations. I've already mentioned the performance assurance plans that are no fault in nature. If you don't meet the standard, you pay. And the FCC has determined, in adopting these plans, that these payments are sufficient to ensure compliance with the act and to deter misconduct.

Moreover, the FCC is free beyond these automatic no fault payments to impose specific sanctions for any misconduct, including substantial fines and taking us out of the long distance market. So, for example, in New York, when we had some failure in third-party-supplied software which resulted in some notifications not going to the CLECs that their order had been received—ten percent of the notifications did not go out because of this software glitch—we were fined $13 million in excess of the mandatory payments we had to make under the performance assurance plan. It was unintentional, but it was remedied promptly by the FCC.

Beyond this level of enforcement, any aggrieved party can bring claims and obtain remedies from State commissions, from the FCC and the Federal courts specifically under the Telecommunications Act.

I think it's wrong to immediately give credence to all the complaints made by competitors that we're dragging our feet. There's a forum for those to be heard. They've been heard. Our long distance applications have been approved. They have many remedies to demonstrate these claims, and what these claims largely boil down to, what many of them are are policy disputes that are being presented as claims of foot dragging, for example, reciprocal comp, which most of you know has been a big issue. They come in and say, you have to pay for certain—for Internet-bound traffic as if it's local traffic. We say, no, it's interstate traffic. It's not local traffic. We don't owe reciprocal comp on it. They say, yes, you do. You're not meeting your obligations. That brings a policy issue. It goes to the FCC and the FCC adopts a national policy, and guess what? We won that one. It's interstate and they changed the compensation rules on Internet-bound traffic.

These issues come up all the time. What kind of collocation is required? Do you have to let competitors in 24 hours?

Chairman SENSENBRENNER. Mr. Barr, do you think you could wrap it up, since the red light is flashing.

Mr. BARR. Okay. I'd be glad to. These policy issues are presented all the time, and what this act does is unprecedented. What it says is that these issues are—that claims of violation of regulatory statute are automatically per se antitrust violations. That's never been done before. And they're automatic per se violations of antitrust, and then it would throw all these issues out into litigation brought by customers and brought by competitors and to be decided by Federal juries willy-nilly around the country. It's exactly for this reason that we have a telecommunications act, so we have expert agencies setting a comprehensive, coherent policy. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. Thank you, Mr. Barr.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF WILLIAM P. BARR

Thank you, Mr. Chairman, for the opportunity to testify before the Committee. I am Bill Barr, Executive Vice President and General Counsel of Verizon.

I am here to urge you not to support H.R. 1697 and H.R. 1698. Both bills represent bad antitrust policy. Even more important, they also represent bad economic policy for this country.

These bills are based on two premises. The first is that telephone companies like Verizon have been impeding the competition that the 1996 Act was intended to foster. And, second, that new remedies are needed to deal with this bad conduct. Both of these notions are false.

In recent years, we have heard numerous complaints from our competitors that we were failing to live up to the requirements of the 1996 Act. These competitors brought their claims to state regulators and to the FCC. This was done on a comprehensive basis as part of the section 271 process through which we obtained long distance authority in New York and Massachusetts. Many complaints were also pursued apart from those proceedings. The states and the FCC reviewed all these claims and concluded that we were complying with our obligations under the Act.

Moreover, there are many opportunities under existing law if a competitor can show we violated the rules or impeded competition, and new remedies are, therefore, not required. Verizon has entered into "no fault" performance assurance programs, under which we make payments if the service we provide to competitors does not meet objective standards. The FCC has concluded that guarantee payments required by these plans are sufficient to give us the incentive to meet the standards. The FCC has the power to impose significant forfeitures for violations of the Act or its rules or orders. The FCC can suspend or revoke our authority to provide interLATA service if we fail to continue to meet any condition of that approval. A competitor can file a complaint if it believes that we have failed to adhere to our interconnection agreement. Nothing new is needed.

Moreover, the changes proposed in these two bills are ill-advised as both antitrust and telecommunications policy.

Just five years ago, Congress passed the Telecommunications Act of 1996. One of the primary motivations of many Members for working hard to enact this law was that the telecommunications sector was being regulated under the antitrust regime of the AT&T consent decree and that, they strongly believed, was bad for that sector and bad for economy. This Committee, in reporting H.R. 1528, wrote that "national telecommunications policy should be set by Congress acting through generally applicable legislation."[1] These bills would reverse that sound judgment.

These bills would create an antitrust regime for a part of the telecommunications industry that is different both from the regime that applies to American industry generally and from that which applies to most sectors of telecommunications. It would also give the Attorney General extraordinary regulatory authority in the telecommunications industry, authority which that official does not enjoy in any other sector. This authority would include not just making

judgments on the state of competition but also disbursing Federal loans and loan guarantees to providers of telecommunications services and establishing alternate dispute resolution mechanisms for parties to private contracts.

These bills amend the antitrust laws and appear to be concerned about competition. However, both bills completely ignore the broadband providers that together have more than a 70 percent share of the residential broadband market—giant cable companies like AT&T—and focus entirely on telephone companies that are relative new entrants with a less-than-30-percent share. The focus of the bill on these companies is even more remarkable when you add the fact that the cable operators today exclude other Internet providers from their systems. If this Committee is looking for exclusionary conduct to remedy, I would urge them to look at these practices by the cable industry.

H.R. 1697

Section 101 of this bill would give the Attorney General a veto over an Act of Congress. And unlike Presidential vetoes, Congress would not even get an opportunity to override that veto.

If Congress decides to amend section 271 of the Communications Act to allow a Bell company to provide some form of interLATA service, the bill would permit the Attorney General to reverse Congress' action by finding that the Bell company had market power in the provision of wireline telephone exchange service. There is no

[1] H. Report 104–203, on the Antitrust Consent Decree Reform Act of 1995, 104th Cong., 1st Sess. (1995).

reason that the Attorney General should be able to taketh away what Congress decides to giveth.

The bill establishes 85 percent of business and residential subscribers as the definition of market power that requires the Attorney General veto. This approach makes no sense for several reasons.

First, it effectively gives Bell company competitors control over Bell company entry.

Second, it would give these competitors a reason not to pursue residential customers. Under the bill, a Bell company is deemed to have market power—and to be precluded from any new authority Congress affords—if its competitors have less that 15 percent of *both* business and residential customers. Our competitors already have every incentive to go after the relatively high value business customers and ignore residential consumers, and this bill would increase that incentive.

Third, and more fundamentally, there is no logic in saying that a Bell company should not be allowed to provide Internet backbone services because it has a large share of the residential voice telephony market where it provides local service. Sprint has a large share of the residential voice market where it provide service, but no one has ever suggested that this fact should prevent Sprint from being an Internet backbone provider. The FCC has concluded that broadband and narrowband are separate markets, and there is no way that a large customer base in the narrowband market can give an firm an unfair advantage in the broadband Internet backbone market.

Finally, this provision reverses one of the judgments made by Congress in the 1996 Telecommunications Act. In those debates, some urged that the new law establish a "market share test" for Bell company entry into the long distance business. This Committee rejected that approach, as did Congress overall. There is no reason that a market share test is makes any more sense today than it did five years ago.

H.R. 1698

Section 2 of H.R. 1698 adds two new provisions to the Clayton Act that together constitute a radical departure from established antitrust law.

New section 28 prohibits an antitrust court from dismissing a claim on the ground that defendant's conduct is subject to the Communications Act. It also allows a court to consider as a possible antitrust violation any conduct that violates the Communications Act or FCC rules.

New section 29 goes one step further by making violations of certain Communications Act provisions per se antitrust offenses. It then goes on to prescribe a specific penalty for such violations, a penalty that may have nothing whatever to do with the offense—that the defendant carrier be prohibited from jointly marketing any advanced telecommunications service with any other telecommunications or information services.

These provisions scrap years of antitrust jurisprudence, in which violations of regulatory statutes are not antitrust violations and certain regulated conduct cannot violate the antitrust laws. They also reverse Congress' judgment five years ago to deregulate the telecommunications industry, promote competition and empower agencies, rather than antitrust courts.

There are many regulated industries in this country. Congress and the courts have long accommodated both the regulatory regime and the antitrust laws. Often, regulatory approval or oversight confers immunity from the antitrust laws. In other cases, adherence to regulatory mandates is a defense to an antitrust challenge. H.R. 1698 ignores this long history of regulatory-antitrust accommodation by removing any defense based upon the fact that the conduct was regulated.

For example, one of these well-established principles is the filed-rate doctrine, which prevents courts from revisiting the reasonableness of a utility's rates once the utility has filed and received approval of those rates with a governmental agency.[2] Another is state action immunity,[3] which that alleged restraints that are supervised and approved by state regulators cannot violate federal antitrust laws. These doctrines make sense: the American public would be ill-served by regulators unsure of whether there would be judicial deference to their decisions, and by courts and juries poorly suited for determining permissible rates or practices in such varied industries as telecommunications, electricity and railroads. But H.R. 1698 casts aside this wisdom, favoring a regime in which any multiplicity of courts could second-guess the highly technical judgments of state and federal regulatory agencies.

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[2] *E.g., Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922).

[3] *E.g., Parker v. Brown*, 317 U.S. 341 (1943).

But, more important, these provisions are inconsistent with the regime Congress established only five years ago for this industry. The Telecommunications Act of 1996 opened local telecommunications markets to competition by imposing special duties on incumbent local exchange carriers. It established a carefully balanced system of privately negotiated interconnection agreements, state public commission and Federal Communication Commission supervision, and limited federal court review of agency decisions. All disputes over interconnection agreements were to be brought first to state commissions possessed of the technical expertise and regulatory experience needed to resolve these complex issues.

But Congress did not simply conflate antitrust and telecommunications regulation. On the contrary, it imposed through the Act precisely the kinds of affirmative duties to help one's competitors do not exist under the antitrust laws. And the Act made an appropriate assessment of institutional competence by leaving regulation in the first instance to the regulators.

This bill expands antitrust law well beyond what Congress or any court has found appropriate. Antitrust law exists to promote competition, not to protect competitors. It seeks to remedy competitive injuries, not trivial commercial ones. It deals with intentional or willful conduct, not failure to perfectly satisfy detailed technical regulatory requirements. And yet this bill would transform into per se antitrust violations minor commercial disputes that do not affect competition and without any showing of bad intent.

With very narrow exceptions, antitrust law does not require an incumbent to aid a competitor. This is because the greater such a duty, the more likely the impairment of competitive incentives for both the incumbent and competitor, and the more likely the ultimate harm to the consumer. The Telecommunications Act, however, imposes many such duties on incumbents. The U.S. Court of Appeals for the Seventh Circuit recently recognized that Congress thereby limited antitrust law's application to telecommunications regulation: to use the court's words, the requirements under Sections 251, 252, 271 and 272 "are precisely the kinds of affirmative duties to help one's competitors that . . . do not exist under the unadorned antitrust laws."[4] Violations of these Telecommunications Act requirements, therefore, is not the stuff of an antitrust violation.

Furthermore, using antitrust law to enforce the Telecommunications Act would discourage competitors from developing their own alternative facilities or services. Such concerns are particularly apt in the context of local telecommunications markets, because the 1996 Act's overriding goal, as Congressman Goodlatte stated years ago, is to "give[] new entrants the incentive to build their own local facilities-based networks."[5] Why should a competitor build its own network when it can obtain access to another's by wielding the weapon of an antitrust lawsuit? The answer has been self-evident to courts for a century, which is why

they rarely, if ever, subject the type of duties imposed by the Act to antitrust scrutiny. So it is

that "[i]ncreased sharing by itself does not automatically mean increased competition. It is in the unshared, not in the shared, portions of the enterprise that meaningful competition would likely emerge."[6]

H.R. 1698 also risks protecting inefficient competitors and technologies in its expansion of antitrust. Suppose, for example, that a new entrant is faced with the choice of developing a new, wireless interface with a user's premises, or instead purchasing the incumbent's existing wire at cost. Even though development of the wireless interface might offer significant consumer benefit, development of such a system might entail huge sunk cost investment and much higher risk than reliance on existing technology. Using antitrust to broaden the sharing requirements of the Act thus diminishes the incentive of new entrants to innovate, and raises the risk that competitors will merely "free ride" on the incumbents' investments and innovation.

Even if it were appropriate to slap the antitrust label onto any Telecommunications Act violation—which it plainly is not—H.R. 1698 would offer unclear—and hence unmanageable—standards to the courts. Section 28(a)(1) provides that a court "may consider" any Act violation in assessing anticompetitive or exclusionary conduct. What does this mean? It means that some courts may consider it; others may not. Of those that consider, some may find a violation to be conclusive evidence of anticompetitive conduct, notwithstanding the antitrust

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[4] *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 400 (7th Cir. 2000).

[5] 141 Cong. Rec. H8465 (daily ed. Aug. 2, 1995) (Rep. Goodlatte).

[6] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 429 (Breyer, J., concurring in part and dissenting in part).

laws; others may find it to be merely suggestive. The smart competitor would now focus not on promoting new facilities and services, but on shopping for favorable fora.

Conversely, Section 29(a), which demands courts find an antitrust violation whenever an carrier is found to violate certain sections of the Act, flicks away years of jurisprudence and usurps the judicial function. The Supreme Court has repeatedly made clear that violation of other legal duties is not an antitrust violation. Aside from the considered judgment of the Court, the fact that antitrust law since its inception never has presumed violation from such things as minor contract disputes should give you pause.

In short, section 2 of H.R. 1698 is bad antitrust law. It's bad telecommunications law. And it's bad for consumers.

Section 3 of the bill directs the Attorney General to establish a mandatory alternative dispute resolution process to resolve disputes arising under interconnection agreements. Verizon is eager to find ways to expedite the resolution of interconnection disputes. We support, for example, the provision in H.R. 1795 that establishes state arbitration of these issues, with a quick decision. We do not understand, however, why the Attorney General of the United States should be the person to set up a dispute-resolution mechanism for this part of the telecommunications industry.

Broadband Policy

Both these bills have the word "broadband" in their titles. However, other than the loan program in H.R. 1697, they have little to do with broadband services and do nothing at all to stimulate broadband deployment.

The Internet is a wonderful tool that developed far faster than anyone could have imagined. Use of personal computers and dial-up access to the Internet fueled the growth the U.S. and world economy enjoyed in the late 1990's. This growth has now reached a plateau. More is needed now to move the economy to the next level. And that stimulus—stimulus to the economy as a whole—could be provided by greater deployment of high-speed broadband Internet access.

Using policies for the Internet and broadband services that were intended for a local voice telephone market has slowed deployment of broadband, inhibited competition and slowed investment at the very time when we need every possible player involved to help advance the capabilities and capacity of the Internet.

Two landline technologies provide residential consumers with high speed Internet access at a reasonable cost—Digital Subscriber Line (DSL) services and cable modem services. Only one of these services, DSL, is subject to significant federal regulation. Even worse, only certain providers of DSL—the Bell operating companies—are so constrained as to not be able to provide data services across LATA boundaries that were drawn with traditional voice telephone service in mind. If consumers are to get widespread deployment of high speed Internet services from competing providers, it is necessary for DSL services to be deregulated just like cable modem services. Current regulation hampers significant DSL deployment and denies consumers benefits.

Existing federal regulations handicap Verizon's provision of DSL. The FCC has applied the section 251 unbundling and resale requirements to Verizon and other incumbent local telephone companies. They require Verizon to allow competitors to put their DSL equipment not only in our central office equipment buildings but also in small "remote terminal" boxes in local neighborhoods. They require us to provide not only unbundled lines from our locations to customers, but also "subloop" pieces of those lines. The FCC first required us to provide DSL-capable loops, then it required "line sharing"—allowing a competitor to use only a portion of the capacity of the loop almost for free to provide DSL service while Verizon provided the underlying basic telephone service. Now we are also required to "line split"—to arrange for two different competitors to share our lines, while we provide no service at all to the customer.

The FCC is now considering requests from other carriers that we be required to provide our new DSL services to them at very low TELRIC prices—that is prices that are below our costs. If we have to do this, what incentive will we have to make the investments that make these services possible? And yet that investment is exactly what you and the public expect from us.

The other characteristic of the regulatory landscape is uncertainty—participants and investors don't know for sure what the rules are. One federal court of appeals has held that cable modem service is a "telecommunications service" under the Communications Act; another has held the opposite. A third circuit court has found that comparable services provided by telephone companies are "telecommunications services." Whether Verizon must provide wholesale DSL services at discounts to their competitors and whether it must unbundle its retail DSL service are now before the courts. Our investment decisions, and the investment decisions of our competitors,

will be effected by the actions of these courts and by the Commission's actions in response to them. If Congress wants to encourage broadband investment, it needs to set a clear, national broadband policy, and that policy must allow all competitors to play by the same rules.

Thank you.

Chairman SENSENBRENNER. Mr. Blumenfeld.

TESTIMONY OF MR. JEFFREY BLUMENFELD, PARTNER, BLUMENFELD AND COHEN, WASHINGTON, D.C.

Mr. BLUMENFELD. Thank you, Mr. Chairman, Ranking Member Conyers, Members of the Committee. I appreciate the opportunity to address these issues today.

[Microphones were switched.]

Mr. BLUMENFELD. Mr. Chairman, Ranking Member Conyers, Members of the Committee, thank you for the opportunity to address these issues. I would like to devote the time of my oral testimony to two fundamental issues. One is the historical role that antitrust has played in creating competition in the telecommunications industry, and the second is the relation of antitrust to regulation, both in the '96 act and in the legislation that is pending before the Committee at this time.

As the Chairman pointed out in his opening remarks, antitrust has historically played a crucial role in opening this industry to competition. That was true through a series of private lawsuits in every segment of the industry, from ordinary telephones through telephone equipment used to provide services, through the services themselves, including long distance. It was true, also, in the historic government case, which I had the honor of being able to serve as a senior trial lawyer in, and in that case, also, the antitrust were the gravamen of the government's complaint and the basis on which, ultimately, relief was granted which created the competition that we now see in this industry across all of its segments.

The heart of the antitrust laws is to create obligations for companies to deal fairly with each other. The ILECs are fond of quoting the holding of the *Colgate* case, which recognizes that one, economic freedom every company has is the freedom to refuse to deal with certain customers. But they are not fond of quoting what is actually the contrary of that, which is that for a firm with market power, the right to refuse to do business is sharply bounded. Specifically, where a company with market power refuses to do business with a competitor with the purpose and effect of injuring competition, that is, engages in predatory exclusionary conduct, that conduct is illegal under the antitrust laws.

Read in the converse, what that means is the antitrust laws do create an obligation on the part of companies with significant market power to deal with their competitors where the refusal to do so would be anticompetitive, and where it creates that obligation, it creates the obligation in two parts. It creates an obligation to deal with them on reasonable terms and conditions—on reasonable terms and reasonable conditions.

In the networking industries, what that has always meant is that a firm with market power that is a network-based firm must allow access to its network, connection to its network, on reasonable terms and conditions. And there again, for a network company, there are two facets of reasonable terms and conditions. They

must be technically reasonable and they must be economically reasonable.

Technically reasonable interconnection must mean the ability to connect with the incumbent's monopoly network at points that make technical sense both from the competitor's point of view in terms of their business and technology and the point of view of the incumbent. These are exactly the kinds of obligations that are tracked and specified in section 251 of the act.

Similarly, there's an obligation to deal in financially reasonable terms. Everybody in the telecommunications industry has agreed for at least the last decade that financially reasonable terms for monopolists to deal with a competitor means at prices that resemble incremental costs. In fact, the telephone companies themselves in the 10 years or so that they spent successfully and appropriately fighting to change additional regulation from rate-based regulation to price cap regulation, argued, mostly with the support of their competitors and with the acceptance of regulators, that where faced with competition, they should be able to charge prices at incremental costs because prices at incremental cost are the prices that prevail in a competitive marketplace. These are obviously akin to the obligations that are tracked in section 252 of the Communications Act.

So the relationship between the antitrust laws and the Telecommunications Act, both historically and in the '96 act, could not be more different than the *Goldwasser* court described them to be. And in ruling as it did, the *Goldwasser* court was exactly wrong.

The bills that are pending before the Committee today would simply sharpen the relationship between the antitrust laws and the Communications Act to make it clear, as must be both law and the policy in this country, that a course of conduct that violates specific Federal regulatory scheme, which itself was designed to open markets to competition, cannot possibly be a defense to an antitrust case and are more appropriately regarded, as they have been regarded for decades in the antitrust law, as clear evidence of antitrust violation, an integral part of that case.

I commend both of these bills to the Committee for preservation of competition in our industry. Thank you.

Chairman SENSENBRENNER. Thank you, Mr. Blumenfeld.

[The prepared statement of Mr. Blumenfeld follows:]

PREPARED STATEMENT OF JEFFREY BLUMENFELD

Chairman Sensenbrenner, Ranking Member Conyers, members of the Committee, good afternoon. Thank you for the opportunity to testify before you on two important pieces of legislation:

- H.R. 1697—the Broadband Competition and Incentives Act of 2001; and
- H.R. 1698—the American Broadband Competition Act of 2001.

I am Jeffrey Blumenfeld, co-founder and managing partner of the law firm Blumenfeld & Cohen—Technology Law Group[sm].

Just as the legislation before the Committee seeks to reaffirm the proper balance between antitrust laws and government regulation in the communications industry, throughout my professional carrier I have been intimately involved in the interplay of these bodies of law in the communications sector. In the 1980s, while at the Antitrust Division of the Department of Justice, I participated in the *AT&T* litigation and subsequently led the group charged with implementing the *AT&T* consent decree. I left the Antitrust Division to start my own law firm, recognizing the crucial interplay between the antitrust and telecommunications regulation. For the past

decade and a half I have taught telecommunications law and trial practice at Georgetown University Law Center. Most recently, from August 1997 to March 2001, I served as General Counsel to Rhythms NetConnections Inc., a data CLEC. Through all these experiences I have developed a perspective on what works and what doesn't in opening monopoly markets in the telecommunications sector.

Perhaps the most important lesson I have learned over the years is that only when the antitrust laws are given free rein will telecommunications competition develop properly. In enacting the Telecommunications Act of 1996 ("1996 Act"), Congress clearly intended that antitrust law continue to apply along with the 1996 Act. In fact, the 1996 Act includes a specific antitrust savings clause. Unfortunately, a recent appellate decision, *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000) ("*Goldwasser*"), despite the court's claims to the contrary, failed to give full force to this clause, and instead essentially found an implied antitrust exemption that threatens to foreclose antitrust law as an avenue for recourse. This, coupled with the anticompetitive effect of intransigent behavior by incumbent telephone monopolists, cries out for Congressional action.

H.R. 1697 and H.R. 1698 effectively address these concerns. Regulation under the 1996 Act should complement, not supplant, the antitrust laws. Congress must reaffirm the crucial role that the antitrust laws have played and must continue to play in opening telecommunications markets to competition. To accomplish this important goal, Congress must overrule the *Goldwasser* decision. In addition to ensuring that antitrust remedies are available to competitive carriers and to the public at large, Congress should provide for a rapid, fair mechanism for CLECs to obtain remedies for continued incumbent telecommunications company violations of the 1996 Act. The two bills before the Committee will attain these objectives. If they are enacted, they will provide the necessary complement to regulation under the 1996 Act and will enable consumers to benefit from a quick, effective infusion of local telecommunications competition.

Today there is widespread recognition that competition is desirable in telecommunications markets, and should be the rule, rather than the exception. Indeed, wherever it has been allowed to flourish, competition has brought lower prices, product and service variety, and innovation to telecommunications consumers. Antitrust law has been the principal driver of this telecommunications competition. Initially, regulatory decisions by the FCC, exemplified by the *Carterfone and Specialized Common Carriers* decisions, created opportunities for firms to enter markets dominated by the Bell System, including the Bell Operating Companies. Numerous companies, large and small, tried to capitalize on these perceived opportunities to compete. Faced with Bell System intransigence, however, they found the delays and costs resulting from trying to play the regulatory game against this experienced, powerful opponent stymied them in their efforts to introduce competition into the telecommunications industry.

When these would-be competitors could not capitalize on the FCC's market-opening decisions, they turned to the antitrust laws. Through antirust litigation these firms won significant victories. They established that, contrary to the Bell System's arguments, the Communications Act does not create an implied exception to the antitrust laws. *See, e.g., Southern Pacific Comm. Co. v. AT&T*, 740 F.2d 980, 999–1000 (D.C. Cir. 1984). Of equal importance, they established that AT&T's refusal to provide them with interconnection violated those antitrust laws. *E.g., MCI v. AT&T*, 708 F.2d 1081 (7th Cir. 1982).

The culmination of these private efforts was the government's antitrust action against AT&T and the ensuing break-up of the Bell System. The competitive benefits of the *AT&T* decree have been clear. We see striking evidence of this in today's fierce price competition in long-distance telephone service and abundant choice and innovation in telephone network equipment and terminal equipment.

The 1996 Act was a natural follow-up to earlier antitrust activity. It essentially attempted by Congressional action to jump-start competition in the last monopoly portion of the telecommunications market—the local market. The 1996 Act recognized that competitive market structure and competitive behavior are the keys to creating high-quality, innovative, local telecommunications services at affordable prices. Indeed, the stated purpose of the Act is "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." To achieve this goal, the 1996 Act, among other things, established specific interconnection obligations applicable to incumbent providers. These obligations were expressly designed to promote efficiency and competition, while ensuring that the incumbents still receive a reasonable profit.

The 1996 Act was thus meant to serve the same purposes as the antitrust laws. But Congress did not envision that the 1996 Act would be the sole means of achiev-

ing those ends. Rather, the 1996 Act was plainly meant to complement existing antitrust obligations. The Act made this explicit, providing that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. §601(b)(1). Thus, the 1996 Act sought to create local competition through the promulgation of specific regulatory provisions, with the Federal Communications Commission and state commissions providing the details, and with the antitrust laws serving their historical function of vindicating the interests of competition.

While early FCC and state commission decisions provided much hope for competitors, it now appears that, as in the past and as Congress anticipated, communications regulations alone is not enough to counteract the intransigence of the incumbent monopoly providers and create competitive markets. ILECs have shown time and again that they will resist and negate competition by using every loophole in the regulations and the narrowest interpretation of their regulatory obligations. In addition, the regulatory process is inherently slow-paced. For example, incumbent providers challenged the FCC's authority to promulgate pricing rules for interconnection and access to their local networks, as well as the merits of the rules themselves. Only this coming fall, over five and a half years after the passage of the 1996 Act, will the Supreme Court hear a challenge to the merits of the FCC's pricing rules and potentially provide the competitive sector of the industry with the pricing certainty necessary to develop long term business plans.

These realities have seriously retarded the competitive provision of advanced services. For instance, due in large part to howls of protest from incumbents, it took the FCC over two years to complete its line sharing proceeding, and this Order is now in the courts, three years after the issue was raised. In light of the ILECs' ability and willingness to continually tie the regulatory process in knots, additional avenues of recourse are needed to open local markets.

This is not to say that federal and state regulators are failing to act to open the local market. Rather, federal and state regulators simply do not wield a heavy enough club to truly stop ILEC behavior intended to retain their local monopolies. For example, Verizon generated $63 billion in revenues in 2000, or $173 million per day. Even if the FCC's enforcement authority is increased to a maximum of $10 million (as requested by Chairman Powell and as is currently under consideration in the Committee on Energy and Commerce), even the most egregious and willful continuing violation of the 1996 Act by Verizon would only result in a fine of less than 6% of its revenues for *one day*. In fact, even if the FCC fined Verizon $10 million per day each day of the year, the fines would amount to only 3 weeks of revenues. Clearly, regulators do not have the tools to pry open local markets against the wishes of incumbents.

Congress attempted to provide the ILECs with incentives to cooperate in opening their local markets to competition by permitting them to enter the long distance markets in their home regions if they opened their local markets to competition—so-called Section 271 authority—but this has failed to provide sufficient incentives. Instead, the ILECs have determined that there is more value in protecting their monopoly market share than in providing in-region long distance. Five years after the 1996 Act passed, incumbents have gained Section 271 authority in only five states, and only after a long process of fits and re-starts in seeking such authority. And even in these states, ILECs still wield monopoly market power, and will now do so without the incentives Section 271 provides to cooperate in opening the local market. In fact, once Verizon (then Bell Atlantic) received Section 271 authority in New York, its performance in complying with the 1996 Act declined, resulting in Verizon agreeing to pay up to $27 million if its performance remained substandard. In essence, Verizon exchanged a sum equal to roughly four hours' revenues for the right to shirk its obligations under the 1996 Act.

The current state of competition demonstrates that regulation is insufficient to open local telecommunications markets on its own. Over five years after the passage of the 1996 Act, ILECs still control almost 92% of the local market. After a promising few years, almost every single competitive carrier is struggling not just to compete with the ILECs, but merely to survive. CLECs that once had stock valuations of hundreds of millions, if not billions, of dollars have been forced to exit the market. Winstar, NorthPoint, e.spire and others, once so high-flying, filed for bankruptcy in recent months. Other CLECs are on the verge of bankruptcy. Those that are not in quite this dire situation have still watched their stock values drop well over 50%, and in some instances over 90%. These declines have forced CLECs to curtail expansion plans, particularly because these plans often require expending well over sixty percent of a start-up company's revenues, as compared to the approximately twenty percent of revenues that ILECs spend on capital expenditures.

Moreover, the companies best financed to enter the local markets of the incumbent providers are the other ILECs. The 1996 Act lifted all restrictions on ILECs providing either local or long distance services out-of-region, yet out-of-region ILEC local competition has not materialized, and ILECs are eschewing the opportunity to enter long distance markets outside their local monopoly regions. Rather, the ILECs are only interested in providing competitive long distance service in markets where they can leverage their existing local monopolies.

Faced again with Bell company intransigence and delay, and seeing the promise of the 1996 Act fade as the years pass, would-be competitors and consumers are again turning to the antitrust laws. As it attempted to do with the savings clause in the 1996 Act, Congress must again ensure that antitrust remedies remain available for behavior that not only violates the antitrust laws, but may also violate the 1996 Act. CLECs like Covad and Intermedia have filed antitrust suits alleging monopolization by the ILECs, and consumers have filed class actions relying on similar allegations. *Goldwasser* is one of these actions, but it stands out for its far-reaching, wrong-headed pronouncements on the application of the antitrust laws to the telecommunications industry. In *Goldwasser* a panel of the Seventh Circuit affirmed dismissal of a complaint that, among other things, charged Ameritech with monopolization under Section 2 of the Sherman Act. That decision, if followed by other courts, threatens to undo the combination of regulation and antitrust enforcement that has proven so beneficial over the years.

Two of *Goldwasser's* holdings are especially problematic. The first involved complaint allegations that the court viewed as claims that Ameritech's behavior was illegal simply because it violated the 1996 Act. In dismissing these allegations, the court strongly implied that the obligations imposed by the 1996 Act categorically could not be obligations imposed by the antitrust laws, and therefore that conduct violating the 1996 Act could not violate the antitrust laws. The court did not consider whether the alleged conduct could constitute an independent violation of the antitrust laws, whatever the status of that conduct under the 1996 Act, nor did it account for prior decisions holding that the violation of regulatory requirements related to the promotion of competition can lead to a finding of antitrust liability. *See, e.g., Farley Transp. Co. V. Santa Fe Trail Transp. Co.*, 786 F.2d 1342 (9th Cir. 1985); *Western Concrete Structures Co. v. Mitsui & Co.*, 760 F.2d 1013 (9th Cir. 1985). Unfortunately, some district courts in other Circuits have followed this aspect of *Goldwasser. Law Offices of Curtis V. Trinko v. Bell Atlantic*, No. 00 Civ. 1910 (SHS) (S.D.N.Y. 2000); *Intermedia Communications v. BellSouth Telecommunications*, Case no. 8:00 Cov.-1410-T-24(c) (M.D. Fla. 2000).

The court dismissed other allegations in the *Goldwasser* complaint with the holding that the 1996 Act "must take precedence over" the antitrust laws when the two statutory schemes cover the same field. This is nothing less than an erroneous conclusion that the 1996 Act creates an implied exemption from the antitrust laws. It gives short shrift to the savings clause in the 1996 Act, which explicitly forbids an implied antitrust exemption. The court attempts to explain away the savings clause by interpreting it to cover only markets that are not regulated because they have become sufficiently competitive. This is a Catch-22 of the highest order: forbidding antitrust suits when there is a monopoly that is regulated, and permitting them only when the market power that could support a monopolization claim no longer exists.

Goldwasser also ignores consistent precedent teaching that federal regulation under the Communications Act, even before it contained a savings clause, did not result in an implied antitrust exemption. And finally, *Goldwasser* fails to account for the history of productive, pro-competitive interplay between antitrust law and telecommunications regulation.

H.R. 1697 and H.R. 1698 represent pro-competitive, pro-consumer responses to *Goldwasser* and to current conditions in telecommunications markets. H.R. 1698 confirms that the antitrust savings clause to the 1996 Act means what it says—nothing in the Act supercedes the antitrust laws, and the antitrust laws are to be given full play in this industry. Given the history of this industry and the centrality of the antitrust laws in achieving the competition we see in some segments of the industry today, the wisdom of this approach is indisputable.

H.R. 1698 also reflects a proper recognition that the market-opening provisions of the 1996 Act embody Congressional establishment of rules of conduct necessary to promote telecommunications competition. Congress plainly intended that the 1996 Act be a prescription for competition, and it imposed a set of duties on incumbent carriers to achieve that objective.

Those duties are largely grounded in the antitrust laws, and the seminal antitrust decisions in the telecommunications industry. It is correct, as the *Goldwasser* court observed, that the *Colgate* doctrine recognized that an integral part of economic

freedom recognized by the antitrust laws is the right to refuse to do business. It is also correct, however, that for a firm with market power that right is not unbounded. Beginning at least as early as *U.S. v. Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383 (1912), and continuing through *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) and *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), the antitrust laws have uniformly held that a firm with market power violates the law when it engages in a predatory refusal to deal, conduct with the purpose and effect of harming competition. Where the refusal to deal with a competitor would be illegal predatory conduct for a firm with market power, that firm is obligated to deal with its competitors on reasonable terms and conditions.

In a networking industry, whether railroading or telecommunications, the antitrust obligation for a firm with market power to deal with its competitors on reasonable terms and conditions translates to an obligation on the part of the incumbent with market power to connect its network with the networks of its competitors on reasonable terms and conditions. *E.g., Terminal Railroad Ass'n, supra; MCI v. AT&T, supra.*

In the telecommunications industry, "reasonableness" has two components: technical and financial. Technically reasonable terms require connection of the networks at technically feasible points of the two networks. When competition came to the long distance market, the antitrust courts eventually determined that connection between the networks of the Bell System and its competitors was required in a way that would allow the long distance company to reach its customers over the local loop plant of the local telephone companies. This requirement has become the now common and widely accepted practice of local access. Interestingly, if we restate that in the somewhat pejorative jargon the ILECs like to use in these discussions, the ILECs would say "the antitrust courts forced us to allow our competitors to use our networks to serve their customers." Connection between networks for competition in the local market on technically reasonable terms, given the businesses and technologies at issues, would mean a variety of feasible connection points, including connection for local loops, connection for local switches. In other words, antitrust determinations of technically reasonable connection points would result in obligations much like those imposed by Sections 251 and 271 (despite the semantic difference that the 1996 Act uses the term "unbundling" to denote connection at certain network points).

Financially reasonable terms generally would translate to financial terms that would prevail in a competitive market, that is, that the incumbents should be able to charge for connection the amounts they would be able to charge in a competitive market, *i.e.*, in a market where they faced competition for the sale of network connections. In the telecommunications industry competitive prices are measured by incremental cost. This approach is agreed upon not only by all regulators, but by all industry participants as well, including the ILECs. Throughout the late 1980s and early 1990s, as the ILECs actively sought to change the regulatory scheme from rate base regulation to price cap regulation, they uniformly argued—successfully, and generally with the concurrence of their competitors—that where they faced competition they should be able to price at incremental cost, because incremental cost was the appropriate measure of a competitive price. This, of course, is exactly the concept that is captured in Sections 252 and 271. In antitrust, regulation and the 1996 Act, incremental cost includes a competitive rate of return or "reasonable profit."

Thus, the market opening requirements of the Act are closely tied, in both purpose and substance, to the duties imposed by the antitrust laws. This is a far cry from the *Goldwasser* view that the obligations imposed by the 1996 Act are somehow alien to the competitive regime of the antitrust laws. The *Goldwasser* view is simply wrong as a matter of antitrust law and antitrust history in this industry. Contrary to the Goldwasser view, the Act's specific requirements are consistent with antitrust law, and complement and effectuate general duties established under antitrust laws. H.R. 1698 properly recognizes that aspect of the 1996 Act, by allowing antitrust courts and antitrust enforcers to look to the Act for guidance in measuring behavior under the antitrust laws.

H.R. 1697 embodies another important link between antitrust principles and the 1996 Act. The 1996 Act's bargain with the RBOCs, set out in Section 271 of the Act, was that they could begin provide long-distance service originating in their own regions when, on a state-by-state basis, they satisfied a competitive checklist meant to demonstrate that the local exchange markets that they had historically dominated were open to competition. The history of the telecommunications industry teaches us, however, that, despite regulatory requirements meant to foster competition, incumbent telephone monopolists have a distressing ability to thwart competition by abusing their market power. Regrettably, it is becoming clear that in prac-

tice Section 271 is an example of the failure of such a requirement. Even in the few states where the FCC has granted the ILEC authority to provide in-region long-distance service by finding that the ILEC has met the market-opening requirements of Section 271, the competition envisioned by the 1996 Act remains minimal.

By adding a requirement that incumbents seeking Section 271 approval not have monopoly power, H.R. 1697 provides an important competitive safeguard. By committing the question of monopoly power to the Department of Justice and providing a clear standard based on market shares, the legislation provides for a well-informed decision by government officials with expertise and long experience in both antitrust principles and telecommunications markets. Under this provision Antitrust Division officials will apply the full spectrum of their knowledge of telecommunications markets and their familiarity with antitrust analysis to determine whether an ILEC has market power. If there is such a finding of market power, Section 271 authority will not be available. In addition, the Bill would establish that no ILEC with a market share of 85% or more could receive Section 271 authority.

Both of these provisions are salutary efforts to import the key antitrust concept of market power into Section 271. A possible concern with these provisions arises out of the bill's market share standard. That standard is best read to identify only situations in which an ILEC has market power and thus cannot receive Section 271 authorization. That is, the bill provides that the Attorney General can never grant Section 271 relief where an ILEC has a market share of 85% or higher in either the business or residential markets. My concern is that the provisions might be misread to embody a negative implication, *i.e.*, to say that an ILEC with less than 85% market share *must* meet the requirements of Section 271. The Committee should foreclose the possibility of the Bill being read to imply that ILECs with a market share less than 85% do not have market power. The 85% standard is well in excess of the level at which courts have been willing to find full-blown monopoly power, and such a reading would be inconsistent with the role that the Bill assigns to the Department of Justice. Therefore, and perhaps in an excess of caution, the Committee may wish to consider adding language to the Bill or the legislative history to ensure the correct reading.

H.R. 1698 also provides a solution to one of the most vexing problems with both traditional antitrust and 1996 Act regulatory tools for opening the local market: it would create a mechanism that enables individual, speedy, multistate dispute resolution of interconnection agreement disputes. While such a remedy is limited to the rights negotiated or arbitrated into an interconnection agreement, the 45-day commercial arbitration dispute resolution provision would enable competitors to have specific allegations of agreement violations remedied in a matter of weeks, rather than the years that are often necessary for antitrust and regulatory proceedings. While antitrust (or regulatory) remedies would generally be necessary to cure overarching anti-competitive behavior, commercial arbitration with discovery rights and a 45-day decision window will enable CLECs to obtain redress for specific interconnection agreement violations. Such rapid, cost-effective redress is essential if individual CLECs, struggling to stay afloat today, are to be able to afford to address specific ILEC bad acts in time to take advantage of the remedies.

In conclusion, the interplay between antitrust law and telecommunications regulation is crucial to the development of competition in local telecommunications markets. In light of current trends in the market and the unfortunate holding of *Goldwasser*, it is imperative that Congress step in and reaffirm what the 1996 Act antitrust savings clause says—that antitrust law and communication regulation complement each other in the battle to create local telecommunications competition. H.R. 1697 and 1698 would accomplish this and therefore should be passed.

Thank you.

Chairman SENSENBRENNER. Mr. Malone.

TESTIMONY OF MR. JOHN F. MALONE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, THE EASTERN MANAGEMENT GROUP, BEDMINSTER, NEW JERSEY

Mr. MALONE. Thank you, Mr. Chairman, Ranking Member, Members of the Committee. For 20 years, I have been President of a management consulting company working in the communications sector exclusively. All of our firm's 400 clients are either carriers, including CLECs, ILECs, interexchange carriers, or manufacturers

or software companies. Our business is to help our clients compete effectively in a crowded telecommunications market.

I'd like to share with you some insights about the CLEC market today based upon our experience. Right now, there are 150 CLECs operating in the United States, according to NPRG. In each of the 15 largest markets in the United States, there are an average of 15 Competitive Local Exchange Carriers working within those markets. Frankly, I think that's too many.

The next 150 markets boast an average of three CLECs per market. I think that's closer to the right number. Lots of CLECs have targeted these smaller markets and found far less competition, companies like KMC, Commonwealth. Smart business thinking, as far as I'm concerned.

CLECs right now are bulldozing through the ILEC marketplace. The FCC just reported that CLECs now have 8 percent, or 8.5 percent, share of all the access lines. They've captured 15 percent of the marketplace for small and medium business size customers. CLECs have 20 percent market share of business customers in many cities, and 20 percent total market share of all customers, including residence, in some non-major areas.

Interestingly, one-half of all businesses who either start up and procure telephone service or are relocating are passing those orders to Competitive Local Exchange Carriers. Let me repeat that. One-half of the businesses who are putting in service are giving the business to CLECs.

So, if this industry is so great, then why isn't anybody making money? I think that's a really good question. I'd like to share with you, based on my experience working with CLECs, three reasons why.

Number one, there is far too much competition in this marketplace. Venture capitalists know when they put money into companies that about one in every seven investments will work. Behind every one of the 150 CLECs, there is a good venture capitalist, and these venture capitalists, if you polled them, would say, with one-seventh of the investments expected to work long term, we figure this marketplace ought to hold about 21 profitable CLECs, not 150. Not every CLEC can be expected to survive and we can't make them.

Reason number two, bad business plans. I've seen a lot of CLEC business plans. They don't reflect competing against anybody except the phone company. Every major city I indicated has an average of 15 CLECs. Think of Reagan National Airport, 15 shuttles, all competitors, departing every hour on the hour for La Guardia. If that sounds preposterous, imagine that each one of them thought that the only competition they would face would be the Amtrak Metroliner.

Tampa is a fairly typical CLEC target. It's not in the 15 largest cities, it's a little bit smaller than that. It's got 36 CLECs operating in the city. Each CLEC has an extensive network that they put in place. Each CLEC must sign up about 6,000 business customers in order to hope to break even on their investments or they'll risk extinction—6,000 business customers. But Tampa doesn't have 6,000 business customers for each of 36 CLECs. That would be over a

quarter of a million businesses. Tampa's got about 5 percent of that number of businesses. That's an example of bad business planning.

Problem number three, operating company, or operating problems with businesses. Many CLECs face enormous amounts of employee turnover. Two-hundred percent per year employee turnover is not uncommon. If your employees are turning over every 6 months, think of it as every 6 months, all the employees take their passes and hand them in and walk out the front door. You can't build a business that way. It doesn't surprise me that CLECs find that one-quarter to one-half of their customers leave each year, and it's not because the telephone companies are messing around with the CLECs, it's because the CLECs are messing around with themselves. Funny thing, many sales reps leave a CLEC and then take their customers with them.

In conclusion, the CLEC industry is robust. It does have problems, of course. I make a living solving them. But CLECs report to us that the problems that they have are well within their control and they'd like to be able to be left alone, at least on the operating level, to solve them.

I just would like to finish by saying that it would please me if I might enter into the record as part of my testimony a piece that was in this morning's Wall Street Journal. It's headlined by Yochi Dreazen, the writer, "Bells' Rivals Double Local Market Share," based on a report that came out from the FCC purporting CLEC penetration last year.

Chairman SENSENBRENNER. Without objection, the article will be included.

[The information of Mr. Malone follows:]

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Bells' Rivals Double Local Market Share

By Yochi J. Dreazen
Staff Reporter of The Wall Street Journal

WASHINGTON—New Federal Communications Commission data show that competitors to the four large regional phone companies nearly doubled their share of the nation's local phone-service market last year, though the Baby Bells continue to dominate the market.

The report is likely to bolster continuing Bell efforts to win FCC approval to sell long-distance service in as many states as possible. Bell competitors have long contended that the Bells shouldn't be allowed to offer long-distance until they relax their control over the local phone-service market. But the data could make it easier for the Bells to argue that their local markets are already sufficiently open to competition. "The market is open," said BellSouth Corp. spokesman Bill McCloskey. "It is time to let the Bells compete in long-distance."

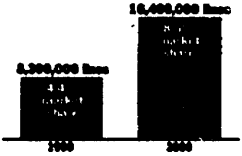
The FCC said that so-called competitive local-exchange carriers, or CLECs, controlled 16.4 million local lines, or 8.1% of the total, as of the end of last year. A year earlier, the Bell rivals controlled just 8.3 million local lines, or 4.6% of the total.

The FCC also found that the Bell rivals secured their largest footholds in the five states where Bell companies opened their local markets to competition in exchange for the right to sell long-distance phone service. Bell rivals control 20% of the local market in New York, for example, where Verizon Communications has been selling long-distance phone service since December 1999.

The report offered a rare burst of good news for the beleaguered CLEC industry, which has been hammered by plunging stock prices, an inability to raise needed new capital, and a string of pro-Bell FCC decisions. Several Bell competitors have filed in bankruptcy court in recent months, and many others are teetering.

Local Phone Service: How Competition Stacks Up

Bell competitors nearly doubled their share of the local phone market last year



Competition was strongest in the five states where Baby Bells have won the right to offer long-distance service:

State	Local lines served by Bells	Market share*
New York	2,800,000[1]	20%
Kansas	220,328	13%
Texas	644,980	12%
Massachusetts	509,731	11%
Oklahoma	102,456	6%

*As of December 2000 [1]In New York, Bell rivals' market share surged after the FCC granted Verizon's long-distance bid in December 1999

Source: FCC

Some CLECs also accuse the Bells of anticompetitive behavior designed to preserve their lucrative near-monopoly over the local phone-service market. Officials at several other Bell rivals also tried to call attention to the fact that the Bells still control more than 90% of the local phone-service market nationwide.

"In a couple of places, like New York and Texas, the Bell monopoly is eroding," said John Windhausen, the president of the Association of Local Telecommunications Services, a trade group representing Bell competitors. "But in the vast majority of states, the Bells have a very, very strong stranglehold on the local market."

Bell officials, by contrast, said their local markets were open to competition and urged the FCC to allow them to sell long-distance in as many states as possible. Verizon spokesman Peter Thonis said that the entry of the Bells into the nation's long-distance markets will ultimately force incumbent long-distance companies like AT&T Corp. to begin offering local service as a way of holding onto their customers. "Our entry would spark competition," he said.

—Shawn Young contributed to this article.

Mr. MALONE. Thank you for your attention.
[The prepared statement of Mr. Malone follows:]

PREPARED STATEMENT OF JOHN MALONE

Mr. Chairman and Members of the Committee. My name is John F. Malone. I am President and CEO of The Eastern Management Group. Thank you for inviting me to share with you my knowledge and views of the competitive telecommunications industry. I trust these insights will be helpful as you endeavor to formulate judgments regarding both the "American Broadband Competition Act of 2001", and the "Broadband Competition and Incentives Act of 2001".

My firm, The Eastern Management Group, is a management consultancy. For more than 20 years we have assisted Incumbent Local Exchange Carriers (ILEC), Interexchange Carriers (IXC), Competitive Local Exchange Carriers (CLEC), Internet Service Providers (ISP), Operations Support Systems (OSS) software developers, and network infrastructure manufacturers. We have assisted our clients by developing business strategies and operating plans that help each one to compete effectively in a crowded telecommunications environment. The Eastern Management Group has more than 400 clients worldwide.

Among The Eastern Management Group's clients are such distinguished firms as AT&T, Verizon, Nortel, and Telcordia Technologies. In addition we are proud to have a remarkable list of CLEC clients, dating back to the early 1990s, when my firm first assisted Centex Telemanagement, now a component of WorldCom, with refining its business operations.

There is a robust and healthy market for competition in the communications industry today. More than 150 CLECs contend for business against the incumbent telephone companies. Each of the largest 15 markets (Tier I MSAs) is home to an average of 15 CLECs.

The next 150 markets (Tier II, III, IV MSAs) are each served by an average of three CLECs. And how big is a Tier IV market? Chico Paradise, California is the 165th largest MSA according to the Department of Commerce, with a population of 200,000. Three CLECs in a market is a comfortable number of businesses to be competing against the incumbent telephone company. However there is evidence that some of these smaller markets are beginning to get very crowded with CLECs, which may eventually pose problems.

CLECs have successfully penetrated the customer base of the incumbent telephone companies. According to the FCC, CLECs have successfully devoured more than seven percent of the ILEC business. The US Telecommunications Association (USTA) contends that CLECs serve 20 million access lines, though the actual number may be far greater.

Such penetration numbers do not tell the entire story. CLECs are not known to target the residential customer. Focused primarily on business customers, CLECs enjoy greater than 15 percent share of the market for medium and large business customers. In some cities the CLEC market share is substantially above 20 percent.

One-half of all companies, acquiring telephone service for the first time, or relocating, buy from a CLEC.

BellSouth losses to CLECs are on the order of $30 million per month. Verizon monthly losses to CLECs exceed $40 million.

Given the environment described, it is prudent to ask why CLECs are not yet making money, and why are bankruptcies being filed. The answer is that to succeed, CLECs need four things: 1.) Business plans, 2.) Management, 3.) Back-office, and 4.) Money. On occasion one or more of these requirements is absent.

The CLEC market is saturated with competitors. In business school, students learn that empirical evidence exists to demonstrate no more than five competitors can successfully compete within a market. For any business, including a CLEC, to knowingly enter into a market already occupied by more than five competitors is worse than bad judgment it is suicidal. Yet in the 15 largest markets, from New York (1) to Phoenix (15), there are an average of 15 CLECs doing business in each market.

If Reagan National Airport offered 15 competing Shuttles to LaGuardia, each one departing on the hour, anyone might rightfully question whether all these competing companies had sound business plans or common sense. Yet this is analogous to the current situation in the CLEC market.

The cornerstone of a CLEC business is a large computer called a Central Office, which routes the CLEC customers' calls. Beginning in 1996, with the passage of the Telecommunications Act, CLECs began to purchase these devices. Each CLEC would purchase one for each city in which it operated.

At a purchase price of $6 million per Central Office, a CLEC needs, on average, 6000 customers connected to each Central Office to cover costs.

In a city where 15 CLECs are competing for customers, the aggregation of CLECs would require a total of 90,000 customers (15 X 6000) if they all hope to succeed. Since CLECs choose not to serve residential customers, this means that 90,000 business customers must be signed-up for service. It is interesting to note that a city (MSA) with a population of 3 million (Tier I) will have on the order of 100,000 businesses. It is improbable that 15 CLECs could expect to capture 90 percent of any market.

Should a city with a population of 2 million have 15 CLECs the unfortunate circumstance is that only, on average, 70,000 businesses would exist and not the 90,000 required by the CLECs.

The Tampa MSA ranks number 21 in size according to the Census Bureau. It boasts 36 CLECs operating in the city. Collectively these CLECs own 41 Central offices. This should require that the 36 CLECs be capable of signing-up 250,000 business customers. Tampa has only a small fraction of the number of businesses CLECs would need as customers if they were ever to prosper.

Standing behind each of the 150 CLECs is a Venture Capitalist, the investor of first-resort. No Venture Capitalist expects all portfolio companies to succeed. One in seven is a likely expectation. Of 150 CLECs, 21 companies is the total number of successful ventures that Venture Capitalists would probably expect to see remaining when the market settles-down.

As an industry, CLECs have done better at signing up customers than servicing them. Employee turnover for many CLECs is 200 percent a year meaning the average employee stays on the payroll for six months.

There is a lot of training that goes into preparing a CLEC employee to meet customer needs. Though three months is typically allocated to training one could not easily profess to be an expert in less than a year.

Even at 12 months of experience, sales people frequently sell only $1,000 per month of new business when more than double that amount is required to grow a healthy CLEC. Customer Service people with similar experience are just beginning to see a payoff in fewer typed errors on orders passed to the ILEC for service.

CLECs face high customer turnover. A look-alike competitor offering a lower price will victimize those that eschew selling unique or innovative services. In the CLEC industry it is not uncommon to witness one-half of a company's customers leave each year. Routinely sales people depart a CLEC and take their customers with them.

As CLECs grow in size, software systems (Operations Support Systems), often cannot keep growing to meet the increasing demands of the business. CLECs often do not plan for enormous success, and faced with an onslaught of new customers, software systems can grind to a halt. Orders may be slow to process. There are numerous examples of bills not going out at all. A customer cannot pay a CLEC if a bill is not rendered. At some CLECs the average customer balance is three to six months in arrears.

Following the Telecommunications Act of 1996, Wall Street lavished CLECs with money. While some companies applied reasonable financial practices in managing their businesses others did not. Those less disciplined have been and will continue to be penalized.

Equity and debt financing is available to CLECs today. In 2001, CLECs will invest between one and two dollars in their network for every one-dollar of new revenue generated from customers. Investments in CLECs through public and private debt and equity offerings are still being made in tranches of $100-500 million. It is clear that this money would not be available if the CLEC industry were not robust and with a promising future.

Finally, in a recent study by The Eastern Management Group 30 CLECs were interviewed to assess the state-of-the-industry. While operating managers at CLECs acknowledged existing problems with business plans, management, back-office and money management, they felt solving those problems was within their own grasp, and solvable.

The study showed that CLECs do not believe ILECs are hindering their performance.

CONCLUSION

The CLEC industry is healthy. More than 150 CLECs currently operate within the US and have captured more than seven percent of the market. The CLEC industry is doubling in size each year. For CLECs to succeed each one needs good business plans, a strong back office, good management, and money. CLECs have been

learning this lesson well. What CLEC operating managers do not contend they need is greater restrictions on incumbent telephone companies.

Chairman SENSENBRENNER. The Chair has noted the arrival of Members on both sides of the aisle, and as has been done in the past, we'll recognize the Members in the order of arrival, alternating between the Republican and Democratic side, and we'll enforce the 5-minute rule vigorously on everybody including himself, given the number of Members who have appeared. So let me start out.

I'd like a yes or no answer, Mr. Barr and Mr. Malone. Do you agree that the *Goldwasser* case was wrongly decided insofar as it reads the antitrust savings law out of the Telecom Act of '96?

Mr. BARR. I think it was rightly decided and it does not leave the savings clause out.

Chairman SENSENBRENNER. Okay. Mr. Malone?

Mr. MALONE. I am not an attorney and I would really have to defer to somebody else who's a lot smarter in that subject than I.

Chairman SENSENBRENNER. Well, Mr. Barr, do you want a market in this area where antitrust laws don't apply, or do you think that antitrust laws should apply in this area?

Mr. BARR. Which area?

Chairman SENSENBRENNER. The area of telecommunications, both——

Mr. BARR. The antitrust laws generally apply to that area. I think that a lot of the discussion is based on a misunderstanding of the *Goldwasser* case and the relationship between antitrust law and specific regulatory regimes.

Chairman SENSENBRENNER. Mr. Harvill, *Goldwasser* was a Seventh Circuit case that applies to Illinois as well as Wisconsin. Would you like to add to this?

Mr. HARVILL. Once again, I'll take the same out as Mr. Malone. I'm not an attorney, so I probably should consult with counsel.

Chairman SENSENBRENNER. Okay. Now, the Bell companies argue that their local networks are sufficiently open to allow competing local exchange companies to compete for local service. If that's true, why haven't the Bell companies themselves become competitors for local service outside of their region on a major scale? Mr. Barr, I think that Verizon pulled out of local phone service in certain parts out of their local area. Why don't we see more competition between the big Bells versus the little ones?

Mr. BARR. Because I think we need a business model that's profitable and where we will make a sufficient return, and I believe that right now our emphasis is pursuing—trying to pursue broadband.

Chairman SENSENBRENNER. Well, don't you think that a Verizon, with its assets, is better able to establish competition in the Midwest, which is SBC Ameritech, than somebody who Mr. Malone is describing as somewhat undercapitalized and not able to attract venture capital?

Mr. BARR. In some areas, yes. In fact, GTE, because it was able to do interlata, was able to put facilities across the country and have a national network, and that would provide an excellent platform for us to move out of franchise, as the expression goes. That's one of the reasons why this data relief provision, the interlata part,

would contribute to competition around the country, by allowing us to put core facilities there.

Chairman SENSENBRENNER. But GTE isn't around anymore.

Mr. BARR. GTE is part of Verizon.

Chairman SENSENBRENNER. I know.

Mr. BARR. Yes, but we're not allowed to own ingenuity or own those facilities which were nationwide networks because of the interlata restriction on data.

Chairman SENSENBRENNER. Commissioner Harvill, can you tell us a bit about the Illinois experience with the deployment of DSL by SBC and where does that matter stand now?

Mr. HARVILL. As it stands right now, the Illinois Commerce Commission entered an order a couple of months ago which required Ameritech Illinois to unbundle what's been termed Project Pronto by SBC Ameritech. Project Pronto, for all intents and purposes, according to the Commission order, is essentially an upgrade to the network that's already in place. What we've required them to do on an unbundled network element basis is to unbundle the components that are necessary for the competitors to purchase to provide advance services or high-speed access to consumers. The response we saw from SBC from that order was that they stopped deploying Project Pronto for data, and I reference data only. They continue to deploy Project Pronto for voice under the argument that it would cost too much to share that network with their competitors.

Chairman SENSENBRENNER. Now to all of you, if there's no change in the current law, how long do you expect it to be before the Bells get into the long distance market in all of the States? I know the Bells are in the long distance market in some States. How long do you think it's going to be without Tauzin-Dingell before the bills get into the market in the rest of the States?

Mr. HARVILL. As it relates to Illinois, we had a previous section 271 proceeding in Illinois 2 years ago, before Ameritech Illinois was acquired by SBC. My understanding from that case was they had met a clear majority of the checklist, the 14-point checklist.

As it stands right now, the one major burden that they have to overcome is obviously their operational support systems that facilitate the CLECs and consumers from switching from one company to another. That process is on track in Illinois. I would expect probably within 12 to 18 months, you will see a decision from the Illinois Commerce Commission either supporting or not supporting that order. But they are on the right track.

Chairman SENSENBRENNER. Does anybody else wish to respond to that?

Mr. BARR. We plan to complete the section 271 process, or hope to, by the middle of next year.

Chairman SENSENBRENNER. Mr. Blumenfeld?

Mr. BLUMENFELD. Mr. Chairman, I would say probably within a year. If I can just make one comment on that, the pace at which they get section 271 permission has always been completely in their control. The pace that we have seen is not because they don't know how to do this, it's because they're hoping they won't have to.

You know, when my children were young, we had a requirement, my wife and I, that you had to practice piano for an hour before

you went out to play, and, of course, about 10 minutes in, the kid would show up saying, "Can I go out now?" and we'd say, "No, you have to practice for an hour." So they'd come back 5 minutes later and say, "Can we go out now?" and you'd say, "No, you have to practice for an hour."

Well, pretty soon, you realize three things. One is, you're never going to last an hour. No one can hold out that long. The second is that after about two more tries, they're going to your spouse. There's got to be a better forum somewhere. And the third is, if they spent this much time practicing piano as they did trying to get out from practicing piano, they'd be pretty good piano players.

Chairman SENSENBRENNER. No concert pianists in the Blumenfeld family. [Laughter.]

Chairman SENSENBRENNER. Mr. Malone?

Mr. MALONE. Mr. Chairman, I'd just like to make a couple of comments here. It will probably take a year to 2 years. The FCC has indicated they expect ten applications this year. I talked to a lot of regional Bells in different States and it seems to be going a heck of a lot faster than that.

Second point, I would strongly urge a Regional Bell Operating Company, and a few of them are clients of mine, not to do anything in terms of interstate competition until they receive section 271 relief. These companies within their own territory have a leveragable brand. It's less leveragable when they go outside their territory. If they can sell long distance in the entire United States, you can take one marketing cost and spread it across all 50 States, but what they have to do is they have to distribute that marketing cost. The same dollar of marketing is going to be spent if they're outside their territory, but they're going to pick up far fewer customers. It's just not good economics to be selling it all over the country. But I argue that once they receive section 271, they'll all be in each other's backyard.

Chairman SENSENBRENNER. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I appreciate all the witnesses' testimony, but it's always especially good to visit with the former Attorney General. We go back 20 years or so, and you're as good as ever. The only thing I can't understand is your—if your companies are—and the other Bell companies are complying with the 1996 Telecommunications Act and its provisions are working, then there'd be no reason for you to want to roll back section 251 regulations and sanction the enforcement, the gut section 271, right?

Mr. BARR. Well, that's not what we're trying to do.

Mr. CONYERS. Oh, okay.

Mr. BARR. We're not entirely happy with the access regime that has been adopted with respect to our local exchange facilities, but we are working through that process under the section 251 and section 271 process. But we are seeking two changes. One is the application of the long distance or interlata restriction to data traffic. In our view, that shouldn't—that is taking an old category that existed with respected to long distance voice and applying it to a different marketplace and there is competition is suffering in that marketplace now. The FCC has said that a little while ago, there

were 30 backbones. Now, it's probably four or five. It's becoming highly concentrated and there's concern over the degree to which that is concentrated.

Mr. CONYERS. But isn't that gutting section 271? I mean, maybe my language is not as smooth as yours, but you're talking about changing 271.

Mr. BARR. We're talking, I think, about clarifying section 271 so that it does not apply to data. Now, the incentives, the extent to which the entry into long distance is perceived as a carrot, would still exist. The broadband market, I mean, the long haul data market right now is $6 billion compared to $100 billion——

Mr. CONYERS. Okay. Okay.

Mr. BARR [continuing]. So it's still very important to enter the voice long distance market.

Mr. CONYERS. Okay. Now, do you agree that the Bells have, in effect, in real time, monopolistic control over the local loop, the essential facility for the provision of DSL broadband?

Mr. BARR. Not today, I don't believe.

Mr. CONYERS. You don't think so?

Mr. BARR. No. In fact, I——

Mr. CONYERS. Do you agree that the Bells ever had monopolistic control over local phones?

Mr. BARR. Oh, yes, of course.

Mr. CONYERS. But not DSL? You're going to use the same lines, but you'll be good guys this time.

Mr. BARR. Well, FCC has found that—I believe that the FCC has found that broadband is a discrete and separate market and some of the providers of broadband do use spectrum on their facilities. Cable was a monopoly and telephones were a monopoly, but the fact that they're both competing in this new market doesn't make them monopolies.

Mr. CONYERS. Let me sleep more——

Mr. BARR. These were both essential facilities or neither of us are essential.

Mr. CONYERS. Let me sleep more comfortably tonight. Will you be nice guys and non-monopolistic even though you have 90 percent of the market?

Mr. BARR. Of which market?

Mr. CONYERS. The one you have 90 percent of. [Laughter.]

Mr. BARR. Well, we——

Mr. CONYERS. You've got more than—you've got several?

Mr. BARR. Well, in New York, for example, I think we have below 80 percent of the market——

Mr. CONYERS. All right.

Mr. BARR [continuing]. In the local exchange market. In the broadband market, we're the insurgent. Cable has over 70 percent of the market.

Mr. CONYERS. We're not making much progress this afternoon.

Mr. BARR. Excuse me?

Mr. CONYERS. Mr. Former Attorney General, we're making little progress this afternoon, me and you.

Mr. BARR. Facts are stubborn.

Mr. CONYERS. Yes. Okay. Now let me—maybe you can just help me with this disconnect about the facts that are so stubborn. The

Atlanta Constitution, April 4 this year, "Once Mighty Telecom Competitors Fell Far Fast." Boston Globe, "Ringing In a Year of Opportunities, Bell Companies Have Won Recent Regulatory Victories But Face Big Test for Bigger Gains: Revamp of Telecom Act." Business Week, "Don't Let Telecom Competition Vanish." CBS Marketwatch, "The Death of Competitive Telecom?" Chicago Tribune, "Consumers Yet to See Benefits of Telecom Act." Interactive Week, "Carrier Retreat Bashes Gear Vendors." Los Angeles Times, "Ma Bell's Arrogance, Multiplied." It goes on and on.

What don't we, me and them, understand about your approach that leads to this flood of material that's available to everybody?

Mr. BARR. When you look at the local exchange market, traditional switch telephony, which is how people tend to measure competition—I think wrongfully so, but that's how they do it—competition goes where the money is, and because of regulation, the margins are in the business customers and in certain narrow segments of the consumer market, basically, the high value, big spending individuals and communities. That's where competition is directed.

Most people, or a very large segment in many markets, do not cover their costs of service, so people rarely come in to compete for customers who are—who have no margin. I think that's one of the principal problems. Competition is focused on the business market——

Mr. CONYERS. You know, that's one of the most non-responsive answers you've ever given me in over 20 years, Bill Barr.

Chairman SENSENBRENNER. On that happy note, the gentleman's time has expired.

The gentleman from Florida, Mr. Keller.

Mr. KELLER. Thank you, Mr. Chairman.

Let me direct my first question to Mr. Blumenfeld. Mr. Blumenfeld, I don't pretend to fully grasp all of this. The one thing I have grasped is I want to make this decision based on what's best for the consumer here, and I'd like for you to address how you see both bills, Cannon-Conyers and Tauzin-Dingell, affecting the average consumer.

Mr. BLUMENFELD. Thank you, Mr. Congressman. I think that the effect of each is fairly clear, and the effect of Tauzin-Dingell is obviously radically different from the effect of Conyers-Cannon.

It was interesting to hear Mr. Barr say that he thought that his company no longer had market power in the DSL market. As you know, for 4 years—almost 4 years—I was general counsel of Rhythms NetConnection, one of the three nationwide DSL competitors. To the extent that his statement can be true, it can be true only because the unbundling provisions of the Telecommunications Act required his company and others like it to unbundle elements of their network, and the act was focused on elements of the network, not on the services, to allow competitors like Rhythms and others to provide whatever services they want and to deploy, in the words of Congress in the purpose of the act, new technologies to do so.

That's exactly what DSL was. DSL was a technology that was invented by the Bell companies almost 20 years ago. When they saw that the only way that they could deploy it as a customer service at the time was by undercutting their much higher-priced existing

services, they took it downstairs and locked it in the basement. The '96 Telecom Act gave Rhythms and other companies like it the keys to that closet in the basement, and we went down there and we unlocked that DSL technology. We bought unbundled network elements. We bought collocation space. We paid through the nose to do it, and we deployed DSL for the first time ever to consumers.

And to hear those companies now talk about the disastrous disadvantage they have compared to cable companies when they had this technology for almost 20 years, could have deployed it decades ahead of the cable companies ever even thinking about data, could be deploying it out of region now and don't do that, it's kind of a surprise.

So to me, here's the difference between the bills. The Tauzin-Dingell bill would eliminate the obligation of telephone companies to unbundle network elements that are relied upon, that are necessary, that are essential for data competitors to exist on the telephone network, and so it would eliminate competition within the telecom sector for data, allowing only competition between a telephone monopoly and a cable monopoly.

Where I got trained in antitrust, competition between two monopolies is not enough. The Cannon-Conyers bill, by preserving the antitrust laws and by sharpening their focus, would provide consumers with a greater variety of choices, a greater variety of providers, better price and services, not only between technologies, but within each technology. That's what competition is about in this country.

Mr. KELLER. So Cannon-Conyers would be good for consumers and Tauzin-Dingell would not be good for consumers?

Mr. BLUMENFELD. Without question, Mr. Congressman.

Mr. KELLER. Mr. Barr, you may have a different take on that same question?

Mr. BARR. H.R. 1697 would be a disaster for consumers because competition—the difficulty, as I mentioned, is that competition has been focused on the business market. The competitors have not been interested in going into the residential market because margins are low, and that's why it's very significant that once the Bells get into long distance, there's a big jump in residential competition, as the FCC just reported and said in their press release. That's where the surge is coming.

However, if this bill were passed, then the IXCs could keep the Bells out of long distance and continue to focus on the business market because the trigger of 85 percent in the consumer market would never be met. So I think it's a bad idea. Tauzin-Dingell, I think, is very pro-consumer.

I never talked about the DSL market. That would be talking like the Delta shuttle market. The FCC has said there is a broadband market and the two products right now that are the biggest contenders in that market are cable modems and DSL. The cable companies are completely deregulated and, as they said with wide approbation, that in order to invest, they need to be able to derive revenue other than transport revenue, and that's all we're seeking.

The current rules say that if someone wants to just do broadband and not serve in the local exchange market, which was what the bill was all about, they can take our pipe, take our investment, and

derive all the value, and leaving us just mere transport at telluric prices and no one's going to invest under that regime. And people are saying it is going to cost around $200 billion, ultimately, to get the kind of infrastructure we need in this country in broadband. That's a large investment.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman, and I want to join with you in thanking each of the four witnesses for their testimony here today.

Mr. Barr, under H.R. 1697, the Bell companies would be barred from utilizing the benefits of any new legislation that gives them the right to offer new interlata services until such point in time as both their business and residential markets have competitors serving 15 percent or more of those markets, and the assumption of that provision would seem to be that, in some way, the Bell companies have acted to keep competitors out, to have their markets closed.

And I'd like for you to comment on that general assumption and on several facts with respect to the relative share of the local exchange market that is held today by competitors with respect to the business market, on the one hand, and the residential market, on the other. So several questions.

First of all, are the markets open? Secondly, is there an identical right of access for both the business market and for the residential market by competitors? Third, what percent of the small business market do the competitors have? I'm told it's something on the order of 35 to 40 percent, which would suggest that it is fully open and competitive. And what percent of the market on the residential side do the CLECs have? I'm told it's something like 5 percent. And why is there this difference? I mean, why, if the markets are open, as I'm assuming you're going to say, and if the right of access is the same, as I also assume you will say, is there such a difference between the presence of competition in the business market, on the one hand, and the residential market, on the other?

Chairman SENSENBRENNER. Before the witnesses answer, let me say that there are two votes scheduled and then the next round of votes will be about 4:30. We've got about 3 minutes left in Mr. Boucher's time. I would appreciate you all wrapping it up in 3 minutes. We'll then recess the Committee and come back right after the votes. Who would like to answer first?

Mr. BOUCHER. It's Mr. Barr.

Mr. BARR. Obviously, we believe the market is open and certainly has been certified as open in the States where we've gotten long distance approval, such as Massachusetts and New York, and we're moving rapidly in that direction in the other States.

But as I mentioned before, and I don't think there's anything wrong with this, it's just that people—competition goes where the margin and the money is, and because of the pricing system in the retail market that's mandated, the margin is in the business market. So that's where the competition has been drawn. SBC says that in their major cities, 40 percent of the business market has been lost to them. The reported competition in New York is up over 20 percent of the business market has been taken from us. The fig-

ures are much lower in the residential market, and what the FCC recently reported is that when the Bells are admitted into long distance, then the residential competition really takes off and substantial benefits go to consumers as a result.

Mr. BOUCHER. I'm told that, across the nation, approximately 40 percent of the local exchange lines going into residences are at rates that are actually below the cost of the telephone company in providing the service to that resident. Is that true?

Mr. BARR. I'm not sure about the national picture, but in some States for us, it is higher than that, and in other States it's there, and in other States, it's not. That doesn't surprise me. In some States, it's over half of our lines are below cost.

Mr. BOUCHER. And so would you agree that there's very little incentive on the part of competitors to serve a market where you can't charge even as much as the cost of providing the service?

Mr. BARR. Absolutely, and I understand that 2 weeks ago, before the Senate Judiciary Committee—I wasn't there, but I understand that Reed Hunt, the former Chairman of the FCC, and Pat Wood, the Chairman of the Texas Commission, identified the primary problem as precisely what you're driving at, which is these low below-cost retail rates. I think that was described as the primary problem that competition faces.

Mr. BOUCHER. And so it would be that an explanation for why only 5 percent of the residential market is in the hands of competitors, that they would rather stake their claim and make their investment in the much more lucrative business market where higher margins can be earned, would that be correct?

Mr. BARR. We think that's exactly what's happening.

Mr. BOUCHER. And so the bill really is requesting the impossible, that is, that competitors be found in a circumstance where competitors simply don't want to make the investment. Is that a proper conclusion?

Mr. BARR. That's right. I think what is triggering residential competition is precisely the Bell entry, so that the long distance companies have to offer packages and have to start selling that local element to consumers. And if that is blocked, until you reach 85 percent in the residential market, that's just not going to happen.

Mr. BOUCHER. Thank you very much, Mr. Barr. You've been a terrific witness. [Laughter.]

Mr. BOUCHER. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman's time has expired and the Committee stands in recess.

[Recess.]

Chairman SENSENBRENNER. The Committee will be in order. I would say that the Chair has still got his list of who appeared in order and we will not prejudice anybody for coming back late. But the one person who is ready and eager to ask questions is the gentleman from North Carolina, Mr. Coble, who is recognized for 5 minutes.

Mr. COBLE. I thank the Chairman. Gentlemen, good to have you all with us. Let me catch my breath.

Mr. Barr, now it seems like one of you all said four States. I was thinking five States had already received section 271 authority. Is that right, five States?

Mr. BARR. That's my understanding.

Mr. COBLE. All right, sir.

Mr. BARR. Three from SBC, two from Verizon.

Mr. COBLE. All right. So having said that, a number of other applications are scheduled to be approved in the next year. Many would say, what's the need for legislative action by the Congress today? Some would argue that the Telecom Act in its current form is working.

Let me put this question to you, Mr. Barr. Does the Tauzin-Dingell bill offer other benefits to the industry in addition to allowing the RBOCs to offer long distance data services prior to receiving section 271 approval?

Mr. BARR. Yes, Congressman. There are two parts to that bill. One is the interlata data relief, which you have referred to, which would allow the BOCs to provide long haul for data traffic. The other part deals with broadband access, essentially the last mile, and what it seeks to do is make the rules that govern cable and the DSL pipe, broadband pipe, more equitable, more on the same playing field, thus allowing investment to be recovered and for there to be some opportunity to profit from the investment.

Mr. COBLE. Well, now who would suffer detriment from such a proposal, if anybody, if anyone?

Mr. BARR. I don't think anyone would suffer detriment. I think it would lead to greater competition and more rapid deployment and wider deployment of broadband.

Mr. COBLE. Commissioner Harvill, the competitive industry has complained that the Bell companies are able to use their control over the local loop to hinder their competitive efforts. A, do you think these complaints are valid, and if so, how about giving us some specific examples of what is occurring.

Mr. HARVILL. Thank you. I think in some instances, as I mentioned in my prepared testimony, that the truth lies somewhere in the middle. Yes, there probably are instances where the ILECs or the incumbents are not providing the services that they're required to, and there are probably other instances where the CLECs are overstating the problem. As I said, it's somewhere in the middle.

I would say this. In Illinois, we have a continuing problem with regard to the orders that we pass, actually having the companies implement what we ordered. An example of that is, and it doesn't matter what the service is, but in this case it was shared transport. The Illinois Commerce Commission ordered a particular product, or a particular service, to be provided by Ameritech Illinois on five different occasions. The first instance, it took 11 months to reach that decision. Ameritech made a compliance, finally. It took another 11 months to actually get to a conclusion on that. Ameritech filed a tariff but refused to actually provide the service, so it was litigation and delay, and that was a particular problem. That problem wasn't actually solved until SBC acquired Ameritech and we made it a provision of the merger approval. So I think that's one specific instance.

Mr. COBLE. Mr. Blumenfeld, would you or Mr. Malone want to add to either one of those questions I've put?

Mr. MALONE. Yes, thank you. I'd like to just make a comment. Section 271 relief in any State probably is a free ticket to about $1 billion of additional revenue for a regional Bell. This is very important to a regional Bell. I don't know if you know, but the average regional Bell figures that in any given year, 70 percent of the growth in revenue that they'll experience over the prior year will come from one service. Think of call waiting features. Think of caller ID. These are ideas that, in the years they're introduced, generated about 70 percent of the growth in revenue.

Section 271 relief, long distance, will do that. Look what occurred at Verizon when they introduced it in New York, and you're seeing the same kind of thing up in Massachusetts. No regional Bell in their right mind would trifle with a CLEC as part of a corporate plan in order to try and stifle the competition when you've got the section 271 opportunity there in front.

Now, does that mean that out of 500,000 employees spread amongst the regional Bells that there isn't some nut out there? Maybe there is, but it certainly doesn't seem like it passes the red face test in terms of a concentrated effort to jeopardize that decision.

Mr. COBLE. Mr. Blumenfeld?

Mr. BLUMENFELD. Mr. Congressman, again, I think that the issue is not so much, is there a concentrated effort, as that a company acts on what it believes to be its rational economic incentives to preserve the monopoly it has rather than to get into a market where they're not competitive.

I think the post-divestiture AT&T company shows us how much harder it is to be a competitor in a competitive market than it is to be a successful player in a monopoly market, and I think that while I've heard others as distinguished as Mr. Malone argue that the rational economic incentive is to give up control of the local monopoly in order to get into long distance, I'm afraid, unfortunately, that most of the Bells believe in the heart of their business planning that the rational incentive is to keep the monopoly as long as possible and give up as little as possible and still get permission to be in long distance.

Mr. COBLE. Mr. Chairman, I see that red light. I yield back.

Chairman SENSENBRENNER. The gentleman's time has expired.

The other gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. It looks like I jumped the line here.

Chairman SENSENBRENNER. Promptness pays.

Mr. WATT. I should take advantage of it.

Let me do a little poll here so I know where everybody is. I take it there are two people on this panel who think these bills are good bills. Raise your hand if you think these bills are good bills.

[Show of hands by Mr. Harvill and Mr. Blumenfeld.]

Mr. WATT. There are two people on this panel who think these bills are terrible bills but think that Tauzin-Dingell is a good bill. Raise your hand if you think that.

[Show of hands by Mr. Barr and Mr. Malone.]

Mr. WATT. But everybody thinks that the Telecommunications Act was a good act.

[Nodding of heads.]

Mr. WATT. All four of you. And shouldn't be changed. So two of you think that it ought to be changed one way, but it shouldn't be changed the other way. Two of you think it ought to be changed the other way and shouldn't be changed the other way. Am I right? Yes?

Mr. BLUMENFELD. It may appear that way, but I think, at least speaking for myself, which I'm safest doing, that the reality is that the heart of the Cannon-Conyers legislation is to clarify that Congress really meant what it said in preserving antitrust jurisdiction, a point that the *Goldwasser* court got exactly wrong, and then adds——

Mr. WATT. I take it Mr. Barr's argument would be that the heart of Tauzin-Dingell would be to clarify, not to change, am I right? Maybe I'm wrong. I don't want to put words in Mr. Barr's mouth. Am I misstating what your position is?

Mr. BARR. No. I think the Telecom Act did not fully anticipate the internet market and I think that the Tauzin bill tries to accommodate that new market.

Mr. WATT. So you think it—you think Tauzin-Dingell clarifies and Mr. Blumenfeld thinks Cannon-Conyers and Conyers-Cannon clarifies, but everybody's satisfied with the Telecommunications Act?

Mr. BARR. My position——

Mr. WATT. It's just not clear.

Mr. BARR. I agree with something that you said earlier, I think last year. I think it was your position in connection with the Boucher-Goodlatte bill. The Cannon-Conyers bill changes the antitrust laws and it does so by incorporating a very complex code of conduct for one industry and making those per se violations within the antitrust law, and I believe your position last year was you were very concerned about taking the general rules that are applicable to everybody and start packing it with specific industry-specific codes of conduct, and I think that's my concern——

Mr. WATT. You remember where I was last year better than I remember where I was last year. [Laughter.]

Mr. BARR. I think that was your position.

Mr. WATT. Which is not unusual. So would a credible position be from all four of your perspectives to leave both ends of this alone and let the telecom bill work itself out for a few more years? Is there something wrong with that, Mr. Malone?

Mr. MALONE. I'd just like to make—I'd like to make two comments, Representative. I think, first comment, the Telecommunications Act is a great voice act, and as Mr. Barr had just mentioned, it really was not designed to cover data.

The second point——

Mr. WATT. Well, there's some dispute about that, though, isn't there?

Mr. MALONE. Well, there is dispute, yes.

Mr. WATT. Yes. Okay.

Mr. MALONE. The second point that I would like to make, though, goes to the Conyers-Cannon piece about 15 percent of the

residence market being in the hands of competition before the regional Bells would be allowed to pursue interlata services. The practical matter is that the Competitive Local Exchange Carriers really don't want to play in that residence market.

Mr. WATT. Okay. That actually brings me to the final point, and my red light is getting ready to go off, so let me try to ask the final question. What can we do—is there something that we can do to incentivize all of these players to get into the local residential market as opposed to the local business market?

Mr. MALONE. It's a wonderful question. Relative to the Competitive Local Exchange Carriers, forget about it. They don't want to play in that marketplace. They don't want to play in it for a very good reason. It's not——

Mr. WATT. I understand why they don't want to play in it. I'm trying to figure out, what can we do to change that?

Mr. HARVILL. If I may, I think the Telecommunications Act of 1996 is very clear, and if anything, this is proof that the Telecom Act is working. In the States where the RBOCs have opened up their markets, you're starting to see competition for both business and residential consumers. If it wasn't working, you wouldn't see competition at all, and I think this is testimony to the fact that the act, as written, is working, and by removing incentives from that act, you're going to just go in the other direction.

Mr. WATT. Well, for whatever reason——

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Pennsylvania, Mr. Gekas.

Mr. GEKAS. Thank you, Mr. Chairman.

General Barr, the answer you gave to the Chairman puzzled me a little bit when he alluded to the fact that antitrust could apply even under current law. Your fear is that if one of these bills had been adopted or would be adopted, there would be an odd mixture of the antitrust and regulatory jurisdictions, is that correct? Well, let me back up. Under current law, there are instances, are there not, where antitrust can apply?

Mr. BARR. Yes. I think that current law was well described by *Goldwasser*. I disagree with those who feel that *Goldwasser* was a departure from the mainstream. What *Goldwasser* said was, I think, the three traditional approaches to how you deal with a general competitive statute, like the antitrust law, and then specific regulatory regimes, and the three principles are these.

One, the existence of the regulatory regime does not in itself exempt the regulated industry from the application of antitrust laws. The case specifically says that and specifically says we are not saying there's any implied immunity. So today, even though we're regulated, an ILEC can be liable for price fixing, market allocation, predatory conduct. It would be a violation under the antitrust laws.

Principle number two, the fact that an industry may violate a regulatory statute that's specific to its industry does not and never has been deemed to be necessarily a violation of the antitrust laws. The basic principle is, you violate the antitrust laws if the action would be a violation apart from the regulatory regime. H.R. 1698 changes that and says it's a per se violation, which would mean that you're making—under the antitrust laws, you're bringing a host of regulatory disputes.

The third principle is where the real rub is, I think, and the third notion, what the court says is it focuses on a specific claim, that is, the claim of the essential facility, and Mr. Blumenfeld made my point, essentially, because what he says is the antitrust law says that under the essential facilities doctrine, you need reasonable access, and what the court said was when Congress has passed a specific law tasking an agency to determine precisely the same issue, what is reasonable access, how should it be given, on what terms, what are reasonable terms, and the agency has a comprehensive scheme where it is addressing those questions, then it must be given precedence over courts and juries deciding the question otherwise and saying, well, we don't think interconnection should take place in 90 days. We think it should be 45 days. You can't have two hands on the steering wheel.

Mr. GEKAS. So that if an action were taken under current law against your company or a company like yours on antitrust, you could interpose a defense that under the Communications Act and the regulatory scheme, that's covered in a separate jurisdiction, is that what you're saying?

Mr. BARR. No. I'm saying that some claims, we would not have any kind of defense on. We would be subject to it just like everybody else. On the other hand, if we were doing something because we were told to do it by a Federal regulatory agency acting under a Congressional enactment, then we would have——

Mr. GEKAS. Like the Communications Act.

Mr. BARR. Well, no, the specific act. In other words, price fixing, for example, we're regulated, but that's an act that's not authorized. But on the other hand, if we're charging a UNE price that's specifically approved by the FCC, we shouldn't be liable for that.

Mr. GEKAS. Under the proposed law, you would be subject to that liability, is that what you're saying?

Mr. BARR. Well, I think under—yes, you could read the proposed law that way. But the main problem under the proposed law is that these policy disputes as to what reasonable access is, which are supposed to be decided by the FCC on a coherent basis, that's why the act was partially adopted. It's now going to be kicked over to juries and plaintiffs' lawyers and customers to decide piecemeal in a hodgepodge of litigation, and you can't have a coherent policy if you have two hands on the steering wheel.

And this is the basic doctrine in what's called primary jurisdiction. Where Congress has an expert agency, tasks it with doing something, sets up a specific enforcement mechanism, that should take precedence over other remedies.

Now, *Goldwasser* did not deal with a suit by a competitor. It dealt with a suit by a customer, and what the court said was a customer has a much higher hurdle weighting in here, because, ultimately, their claim is that the rate is wrong, that the rate should be lower, and under the filed rate doctrine of the Supreme Court, which has been black letter law for a long time, the Court's right.

Mr. GEKAS. I have no further questions.

Mr. BLUMENFELD. May I respond briefly to that, Congressman?

Mr. GEKAS. Yes, certainly.

Mr. BLUMENFELD. And I'll try to stay within my time. I recognize that Mr. Barr was the Attorney General, and I hate to say this, but

he has unfortunately just overturned many decades of antitrust law. Several reasons. First of all——

Mr. GEKAS. The first time.

Mr. BLUMENFELD. And this is the place to do it, certainly. But first of all, it has always been true under the Communications Act, even before the '96 act was passed, that a person who felt that a regulated carrier had violated Communications Act had a choice of enforcing that act either in the courts or at the FCC. So that's always been the law. That's nothing new.

Second of all, throughout the history of antitrust litigation in this industry, it has always been litigated against the background of telecommunications law being formulated by the FCC with very specific regulatory requirements, including those about interconnecting networks. Nevertheless, the antitrust courts have always been free to conclude, as every court that's looked at it, including the Supreme Court, have repeatedly said, has always been free to conclude that a company is violating the antitrust laws even though it's regulated. One of the better wits on our staff when I was trying the *AT&T* case used to describe this defense by the Bell system as the defense of regulation means never having to say you're sorry. But what the courts have correctly said is that what you're doing is violating the regulatory commandment. You can hardly say that that regulatory commandment takes precedence over the antitrust law, and that itself should, and is, evidence of the anticompetitive activity.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from New York, Mr. Weiner.

Mr. WEINER. Thank you, Mr. Chairman.

General Barr, would you help me with a philosophical issue. If we assume for a moment that our Nation's policy should be to encourage competition, both competitions in the DSL market and competition in the global broadband market, so you're the giant in the DSL market but you're relatively small in the overall broadband market, but if we look at the '96 act, aren't you guys the perfect example for why we shouldn't touch anything?

You've gone through the process. You've done it well. You've done it through an arduous process, admittedly. You've done your checklist. You've come to States like my home State of New York and shown people that you're willing to compete, although it was difficult and expensive to do it. As a result, according to the Wall Street Journal piece that Commissioner Harvill just held up, there is increased competition for DSLs. There are cable companies throughout the country who have a big advantage over you, admittedly, in passing many more homes who are delivering broadband. In some areas like mine, I've got broadband choices. I've got yours, because you hit my block first, and now I'm going to try out the one from my local cable company.

Why is it that this is not exactly the way things should be working? I mean, as it is, you're all going to get your butts kicked when satellite gets its deal in order and then we'll—you know, we are notoriously bad in this House of deciding who the big guy is. You know, in the '80's, the big guy was the phone company who was going to squash the not-so-big-guy cable company, and now the cable company is the phone company.

So I guess what I'm asking is, don't we have an opportunity now to kind of look at the way things have played out and say, do you know what? All things being considered, it's kind of worked the way we hoped it worked, with some glitches, but it's kind of worked the way we'd hoped it worked.

Mr. BARR. I think that this is a dynamic marketplace and that as to—a lot depends on what market we're talking about, and that's how, looking at this from an antitrust standpoint, that's the first question. What's the market?

And I would agree with you generally philosophically as to the voice market, that is, the local exchange business that these rules were initially adopted to deal with. I'm not happy with them. I think the FCC went overboard. I think a lot of what's happened is that they were subsidizing competitors, and I'm not happy with the regime. But I agree that it's chugging along. Results are starting to be achieved. And I'm not here suggesting that that be fundamentally changed.

But looking ahead to the telecommunications market of this century, where there's convergence going on and a different market is taking shape, where content and telecommunications are going to merge into a hybrid market so that people will be offering content with a telecommunications component, I think it's very important not to distort that market at the beginning and give undue market power to any particular player. I agree, you should be neutral as to technology. Let the tele-satellite people come in. Let the fixed wireless come in. Let the cable people compete, even though they're coming in with major advantages in market share at this point. But don't handicap the local telephone company in that emerging future market.

I view this somewhat as wireless, as the wireless market. We originally had two players coming in. It was a duopoly initially, third, fourth, fifth. Look what's happened, an explosion of new services. Prices have dropped dramatically from the early days. There was that early concern that, somehow, the local company, if it was allowed to go into wireless, would somehow leverage that. It didn't happen.

Mr. WEINER. But certainly—and I'll get to you in a moment, Commissioner, but isn't there a pretty good argument, looking at the Verizon example, that there isn't anything about the '96 act that is inherently tying your hands and constricting you so much? You have the ability to go deliver DSL service. The only question is, do you help along these other guys who, frankly, couldn't exist in the—I mean, is it fair to say a lot of the players in the DSL market, besides yourselves, would cease to exist if they didn't have the advantages or the leveling of the playing field that was granted to them in the '96 act?

I mean, for Verizon, of all folks, who have learned to do it well, and maybe you're, for the purpose of this question, a victim of your success, if you look at the five States that have—that you've gone through the process, well, everyone has. I mean, in fairness, everyone has benefitted. It's caused you a little more aggravation than anyone else, but it has worked.

So I'm talking about the broadband marketplace. I'm not talking about telephony. So, I mean, the problem is that it seems to be

making the argument that you're hamstrung by this process so much, yet when the process does play out, and within a year, according to testimony, it's going to play out nationwide, we'll have—all worlds will have the Bells. We'll have the Bell's competitor for DSL. We'll have cable is going to continue to have its penetration. And we're going to have technological investments going on in satellite and then everyone benefits.

Mr. BARR. Well, let's ask ourselves the question, why isn't cable, when it comes to the Internet right now, why isn't it an essential facility? Why aren't there courts or people saying, gee, you have to carry? The reason is because the telephone exists.

Now, our point is we're not an essential facility when it comes to the broadband market. Either we both are or neither are, and we're not. We're competitors. And yet the rules that apply to us say that we cannot make a profit on any investment. This is not like the local exchange business, where you have a relatively stable legacy network structure. We have to make a lot of investment, and to make that investment——

Mr. WEINER. That's a persuasive argument.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Arizona, Mr. Flake.

Mr. FLAKE. To those of us who are afraid of applying antitrust even more places, we're told that this is simply a stick and that it will likely not be applied here, just threatened, and that that will carry the action needed. Mr. Blumenfeld, could you address that? How many times do you think, or how often do you think that—do you foresee antitrust action would be coming in and being enforced here or just threatened, and then Mr. Barr, if you could give your opinion on that, as well.

Mr. BLUMENFELD. That's a very good question. I mean, first, I think it's important to recognize that what the bills before the Committee are talking about are looking specifically at antitrust enforcement where the conduct violates the Telecommunications Act. So the bills are not attempting to say that even conduct that complies with the act might violate the antitrust laws, although, frankly, the antitrust laws do say that because they're independent jurisdiction. So the bill does nothing to change the antitrust status of conduct that complies with the Telecommunications Act.

Secondly, antitrust law is a very effective remedy both where it is brought, but even more than that, where there is a possibility of it being brought. Firms are more likely to confirm their conduct to the antitrust requirements than they are to the regulatory requirements because the penalties are so much greater. The history of regulation in this industry is that you cannot enforce regulations enough to create competition. Commissioner Harvill talked about that to some extent. And even where fining is involved, that's true.

I know that Chairman Powell proposed increasing penalties to $10 million for a violation. Not to pick on Mr. Barr's company, but they reported year 2000 revenues of roughly $63 billion. That's roughly $173 million a day. A $10 million penalty is something like less than 2 hours' revenue. Put another way, for a family with a $63,000 income, that's a $10 fine.

So the regulatory process is not enough. It takes antitrust exactly because not the fact of an antitrust inquiry, but the effective

remedies that are available on the antitrust laws do provide a strong incentive for compliance. That's why the antitrust laws have always been a significant part, the most significant part, perhaps, of creating competition in this industry.

That's why, as a proponent of this, I think it is important to ensure that the antitrust laws continue to apply, and that's, frankly, why the ILECs are not pleased about the notion that they would still be exposed to antitrust liability even with the existence of the '96 act. I don't think it will be frequent in actual lawsuit terms, but I think it will be effective because of the remedies that are available, both the government remedies of further divestiture and of specific conduct requirements, as well as the threat of treble damage actions from private plaintiffs.

Mr. BARR. I think that the exposure to the treble damages and the per se rule that would be adopted in this, a per se violation of the antitrust laws, would be highly destructive of competition in the Telecom Act, and I'd like to—three specific ways.

These claims, as I say, come up in policy context. Gee, you're not obeying the law because you're not giving us 24 hours' access. Gee, you run out of space. You have to add new space. It's your obligation. Gee, you have to add new space. You have to—it's your burden to go and get the zoning permit, not ours. It's unfair competition to force us to do it. All these issues come up and they're resolved by the FCC in a coherent way. This will make those decisions decided by juries all over the country, and, therefore, we'll have a hodgepodge.

Second, it will disrupt the expeditious process for resolving these things and getting on with life on a no-fault basis that the FCC has put into place. Currently, as I say, we have to meet certain criteria. If we miss, we pay a fine. And while our overall revenues are very healthy, obviously, as you know, the net revenues are what count. It's the profit that counts, and these have a major impact on our net revenue.

Now, what this would do is cast the whole thing into a litigious, fault-finding blame game, instead of the way the FCC has it, which encourages cooperation. We are a wholesale provider. We have a customer relationship and these people are trying to shove it into a contentious, litigious relationship.

The third way it will hurt is just the burden and litigation risk it exposes us to. Moving to new technology, putting in fiber, raises a host of new questions on unbundling. How do you unbundle fiber? Fiber is inherently different than cable. It's hard to sequester a piece of the fiber and say, this is going to be unbundled. There are all these new issues that come up when you put in new technology and new capacity, and yet these are precisely the issues that claims come in. Oh, gee, you're not following the act because you haven't followed this, or you should apply this rule to this. So any change in the way we do business, especially into these new riskier technologies, will create massive litigation risks and destroy the incentive that the act was designed to achieve.

Chairman SENSENBRENNER. The time of the gentleman has expired.

The gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. I first wanted to thank the Chair for scheduling this hearing in such a prompt fashion as soon as the referral was made. I think it's very healthy that this Committee is looking at these important, and I think somewhat complicated, issues.

I was thinking, listening to the debate and the questions from my colleagues, that we're all really believers in the free market, but markets can be defeated in a lot of ways. I mean, you can defeat markets by over-regulating, but you can also defeat free markets by the accumulation of market power in the private sector and the use of that power in a way that is unfair to competitors, and we don't want either extreme. We want actual free markets.

So I guess the question I have listening to this is, everyone agrees that, at least if I'm hearing it correctly, no one is saying that the '96 act was a mistake, that we shouldn't have gone forward with that, but it hasn't quite done everything we wanted to do, and the question is what to do about that fact.

I remember when we looked at the act and the Judiciary Committee had a role in it, and then antitrust whiz Ann Bingaman argued very strongly to us that the Justice Department should have a much bigger role in the act than was ultimately concluded. I'm wondering, Mr. Harvill, if you believe—I mean, obviously, we have not had the kind of competition that we'd hoped we would, and I heard and listened with great interest to Mr. Malone's comment about some of the start-ups and maybe they weren't such good business people and they had turnover, and I think, you know, there's some truth to some of those comments. But we've also heard, not on this panel today so much, but we've heard in real life and seen that some of these companies had litigation departments as big as engineering departments, and the Kovads and North Points are really limping today and they really had a hard time getting the act complied with.

So I'm wondering, Mr. Harvill, if the Ann Bingaman suggestions of a greater role for the Justice Department Antitrust Division had been included, would that have assisted in the effort to bring competition to, especially broadband, in your judgment?

Mr. HARVILL. Thank you for the question. It's a very good question. The Telecom Act, as I said previously, I think created a clear path for the ILECs to get into the long distance market. I believe that, obviously, the pace is not quite what we had expected, that there—we're on that path and we're going to get there. We're going to get there in Illinois and I'm assuming we're going to get there across the country, eventually.

One of the nice things about the '96 act was the fact that it provided incentives for the ILECs to open their markets, and that was, obviously, the carrot of getting in the long distance market.

The problem is, as we sit here today, there is no penalty if the ILECs choose not to comply with that. If the ILECs choose not to open their local markets, obviously, they don't get into the long distance market, but there is no real penalty.

So I think anything that you can do to increase the incentives, and I'm big on incentives here. You try and put incentives in place as opposed to penalties. But anything that you can do to incent them to get into this, to open their markets up to their competitors,

is one of the best things that you can do. Hindsight is 20/20. You know, obviously, maybe if you would have done that, things might have been different, but we deal with the reality of what we have today.

Ms. LOFGREN. The second question is really for Mr. Barr, and that has to do with the incentives for deployment in rural as well as inner-city areas for broadband. In the Conyers-Cannon bill, there is a provision that has a loan scheme that would assist or make available the roll-out of technology in those underserved areas, and my understanding is that Mr. Dingell had an amendment that required build-out in the Commerce Department bill. Which of those two approaches do you think is preferable, and will either one of them actually work, in your judgment?

Mr. BARR. I think the best way to approach it is through a technology neutral approach. That is, not pick any one type of provider, such as a telephone line or a cable line, but try to have the most efficient provider address these areas. In some of these communities, satellite—for example, rural, satellite would be more efficient. So I think a carrot approach involving loans, tax credits——

Ms. LOFGREN. If I could—I don't want to interrupt you, but actually, the bill, the Conyers-Cannon bill, I don't think is specific technology. It talks about providers of broadband, not a specific——

Mr. BARR. Right.

Ms. LOFGREN [continuing]. Type of provider.

Mr. BARR. Right. And, therefore, I think that that is a good approach, and, you know, I also think there should be an examination of the use of the excise tax revenues and other things to provide a carrot to have a, really a race to get those kinds of benefits out to those communities.

Chairman SENSENBRENNER. The gentlewoman's time has expired.

The gentleman from Georgia, Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman. I'd like to begin by thanking you and the staff for putting together an outstanding panel today. The witnesses have provided both a broad policy and legal framework within which to consider this legislation, and all four of them have demonstrated a very keen grasp of the specifics and the legal and mechanical issues involved. It really is one of the very best panels that we've had on this or other legislation.

I am particularly intrigued by the back and forth between Mr. Barr and Mr. Blumenfeld, and it really does, as I think Mr. Barr indicated, illustrate that what we're talking about here are policy differences. I think you can see in the two witnesses different approaches of different administrations with which they have been associated, and we really are talking about fundamental policy differences.

And I think I share some of your concerns, Mr. Barr, that if you look at the areas in which both H.R. 1697 and H.R. 1698 take us in tandem, they would seem to expand the power of the Department of Justice in several areas, including the antitrust area, with the per se violation provision that you've dealt with. And in both of these areas, in H.R. 1697 and H.R. 1698, expanding the power of the Attorney General over—in areas involving decisions regarding market power, as well as in the per se violation, that these are

at the expense of the proper role of Congress in setting the policy and the laws.

And I'd like your thoughts with regard to whether or not these are unique forays by legislation. Are these unique areas? Are these unique approaches? Is this the first time, really, in any industry that is regulated by the Congress that we would be seeing this per se rule and the ability of the Attorney General to override, basically, Congressional intent and Congressional power and where you see that taking us in perhaps some other areas, as well, in terms of its precedent setting value.

Mr. BARR. Yes, Congressman. I think it is unprecedented in several respects, and one of them is the finding that violations of regulatory regime are per se violations of the antitrust laws. Per se violations of the antitrust laws are very rare. They are reserved for section 1. There are no per se violations for section 2. And this basically trivializes the antitrust laws by taking any regulatory violation, including technical violations, and treating them as per se violations of the antitrust laws.

Also, I think what is unique here, and I may be wrong on this, but certainly in my memory, the antitrust—Congress passed this law against the backdrop of antitrust enforcement. The industry was run by an antitrust consent decree administered by Judge Greene. So there had been a history of antitrust enforcement, but Congress was specifically trying to substitute a coherent regulatory regime run by an expert agency and have a coherent national policy. So that's why the MFJ, the antitrust results of all this antitrust enforcement, was removed and the legislation was substituted, along with a very specific regime that involves process, that involves coordination with the States, that involves an expert agency.

And what this does, essentially, is with a sweep of the hand, turn this all over, not to Judge Greene but to 850 Judge Greenes around the country, and more importantly, because these are frequently fact questions, turns it over to juries all over the country.

What Congress did in the act was it took certain fact finding and turned it over to be legislative fact finding by an administrative agency. We all know the distinction in administrative law has been adjudicative facts and legislative facts, and what Congress did was say, we want an expert agency to give a coherent policy through this fact finding process. What this does is turn it all into case-by-case adjudicative fact finding by juries. It is a complete retreat. It will lead to a throttling of the progress that has been made to date under the Telecom Act, which I would not underestimate.

I would urge the Congress to go back and look at the progress of competition in the long distance market and compare it to the progress of competition here. I would urge the Congress to—this Committee to go back and look at competition in the cable, and when was cable deregulated? What was the level of competition that led this body to deregulate cable from soup to nuts? There's a lot of competition out there right now in the local market.

Chairman SENSENBRENNER. The gentleman's time is about ready to expire, and I'm afraid that if we wait until after the 4:30 roll calls, nobody is going to come back.

The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. I thank the Chairman and I probably won't use my full time, so if the gentleman from Georgia wants to ask that final question, I will yield to him the balance of my time.

Mr. Blumenfeld, Mr. Barr makes a point about the issue of competition, and the progress, the apparent progress that has been made. I think it's by the year 2002, it's, and I've seen it somewhere, in some memorandum, it's likely that there will be some 20 States that the Bells will be allowed to provide long distance service.

I mean, what implications does that have in terms of the Conyers legislation, in terms of what position we should take?

Mr. BLUMENFELD. Thank you, Congressman. I think, actually, it has important implications for our understanding of what's going on here. Mr. Barr said earlier that where ILECs obtain competitive entry, competition flourishes. I think he has reversed the cause and the effect.

The point of section 271 and the reason that process has worked as well as it has is not, I think, as originally envisioned, because it provides the ILECs a strong incentive to open their markets. As I said, I think their incentive is to open their markets as little as possible and still get long distance authority. The reason section 271 has worked in practice is because of the process that it sets up. It sets up a process under which, first, the local regulators, and then the FCC, with the participation of the Justice Department, have to make very close determinations of whether the companies have opened their markets to competition enough, and in the course of that process, all of the States have adopted and the FCC has adopted a set of processes to look into that.

Mr. DELAHUNT. And you're satisfied with those processes?

Mr. BLUMENFELD. Yes, exactly. And those processes are working. Those processes produce market opening behavior, which in turn frees the ILECs, as it should, to go into long distance and opens the markets to competition. That's why we're saying——

Mr. DELAHUNT. And you're suggesting that Conyers-Cannon would be that spur, if you will, in this situation?

Mr. BLUMENFELD. That's right, and most certainly we should not eliminate the requirements that are embedded in section 271 or section 271 itself.

Mr. DELAHUNT. Taking back my time, Mr. Barr, do you want to——

Mr. BARR. I think this proves my point. Conyers-Cannon isn't the law, and yet in State after State, despite all these complaints of misconduct, the authorities are saying, you're meeting your obligations in letting us in. Moreover, after we're let in, contrary to the supposition there would be backsliding, I saw Pat Woods said there hasn't been backsliding. If anything, it's been improved performance after the ILECs after they're let in and competition takes off, because, I mean, let's look at brass tacks.

A lot of people in New York, they never hear from the IXC. They don't know they have a choice. Anyone in New York, anyone in Massachusetts can pick up the phone today and have an alternative carrier—anybody—but they never hear that.

Mr. DELAHUNT. Well, the fact that competition opens up, what is the impact, therefore, in terms of the RBOCs as it relates to the Tauzin-Dingell bill?

Mr. BARR. Well, I think that there's a superceding market that is developing, and that's broadband, and that's where a lot of the value is going to be. As the voice market is commoditized over time and prices are driven down to their incremental costs, no one invests money just to get their incremental costs back.

Mr. DELAHUNT. No, but in the case of telephony, if that's the correct term, I mean, really what we're talking about is a loss leader. I mean, I wouldn't think that Verizon is going to complain substantially about having market share in terms of the traditional telephone because it presents opportunities to promote and market other services, DSL, all the Internet services that would be embodied in broadband activity, so——

Mr. BARR. Well, I think you were talking about moving into the broadband market——

Mr. DELAHUNT. Right.

Mr. BARR [continuing]. And that is where margins should be higher and returns should be higher because it's a riskier new business. It requires more investment, new products, content, putting—there's a host of things that people demand that we can supply in competition with cable and we think that's going to be the marketplace of the future. A lot of companies are not going into providing local telephone competition. They're looking ahead and they're leapfrogging and they're putting their investment in broadband and new technology and we want to be competitors in that market and we think that's the right policy for the country, to have maximum competition. We think that if you distort it now and the market is turned over to the cable companies, which we think there is a risk of, then 3 years from now, you'll be sitting around trying to figure out what to do with the cable companies.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Michigan.

Mr. CONYERS. I ask unanimous consent to include these several articles in the proceedings.

Chairman SENSENBRENNER. These articles will be included in the record, if no objection. Without objection, so ordered.

[The information of Mr. Conyers follows:]

LOS ANGELES TIMES EDITORIALS

JOHN P. PUERNER, *Publisher*
JOHN S. CARROLL, *Editor*
JANET CLAYTON, *Editor of the Editorial Pages*

Ma Bell's Arrogance, Multiplied

The nation's regional telephone companies, or Baby Bells, agreed five years ago to open their lines to competition in exchange for the right to enter the long-distance phone market. That was then. Today, they still control 96% of the local phone market and, like all monopolies, stick their customers with ever-rising bills. They deploy a barrage of legal maneuvers and technical hurdles to block other companies from offering high-speed Internet services, known as digital subscriber lines (DSL), over their networks.

The 1996 Telecommunications Act, meant to bring competition into local phone service, clearly hasn't delivered. Most consumers have no choice but to pay high prices. Reps. W. J.(Billy) Tauzin (R-La.) and John D. Dingell (D-Mich.) say they intend to fix this by allowing the Baby Bells into the long-distance DSL business while keeping their local-service monopoly. It is a proposal without logic. The change would only strengthen the Bells' chokehold on local service and remove any incentive to compete and innovate.

The reasoning behind Tauzin's bill, HR 1542, is that the local Bells need an incentive to invest the billions of dollars it would take to upgrade their systems for DSL service, and giving them free range in long-distance data service would do the trick. A staunch supporter of the local Bells, Tauzin says high-speed Internet service is in its infancy and should not be hobbled by regulation.

The Bells already control at least 75% of the DSL market, using their monopoly muscle to keep others out. The only thing they can't provide is long-distance services, voice or digital, unless specifically authorized. They prevent others from competing in their market, as some 70 California Internet companies told the Federal Communications Commission earlier this month, by delaying or denying service to independent Internet providers, stealing the independents' customers and pricing them out of the market. The penalties for such conduct are so low that the Bells simply consider them part of the cost of doing business. If there are no competitors in some markets, it is largely because the Bells drove them out.

Requiring competition in the local phone market by law has not so far provided sufficient incentive for the Bells to open up to newcomers. Lifting that mandate for the most profitable long-distance DSL services would kill any hope of competition in the future. The Bells would keep on charging their consumers high prices regardless of the quality of their service.

No one except the phone companies would mourn the death of the Tauzin-Dingell bill.

To Take Action: *Rep. Tauzin, (202) 225-4031 or www.house.gov/tauzin. Rep. Dingell, (202) 225-4071 or www.house.gov/dingell.*

WEDNESDAY, APRIL 25, 2001

"USA TODAY hopes to serve as a forum for better understanding and unity to help make the USA truly one nation."
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President and Publisher: Tom Curley

USA TODAY

Today's debate: High-speed Internet access

Public pays price as Baby Bells stifle competition

Our view: Lobbying, roadblocks preserve monopolies, make DSL scarce.

Consumers hoping for the day when they might enjoy the fruits of local telephone competition got another blow with the demise of PSINet. Last week, it announced that it would likely file for bankruptcy protection, and this week, it gets delisted from Nasdaq.

The Ashburn, Va.-based company offers competitive high-speed Internet access over local phone lines. But it, like many other "digital subscriber line" firms, has crashed in recent months. That leaves customers with few choices other than their good old local Baby Bell monopolies, which control about 87% of the once-competitive DSL market.

This is just a microcosm of a much bigger problem for consumers. Despite a 1996 law designed to break open the local Bell monopolies, little competition has emerged. And where it did show promise, such as the DSL market, the Bells hobbled it. Result: Consumers pay more, and quality suffers.

This sorry state of affairs has prompted some states to consider a radical solution: break up the local Bells to foster competition. But in Washington, lawmakers are looking to reward the local monopolists.

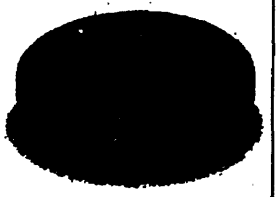
The Bells say it's not their fault that many DSL firms had lousy business plans or were slammed by tough economic times. While some DSL firms have themselves to blame, the Bells helped others along, using their control over the wires and switches making up the phone network to hamstring companies that need access to that network to compete. A sampling:

▶ The Federal Communications Commission found that Verizon, the local Bell serving mainly the Northeast, almost always processed orders for its own Pennsylvania customers in a timely fashion last year, but did so for competitive companies only about 20% of the time. Verizon says the comparison isn't fair and it's better now at processing DSL orders.

▶ Kentucky ruled last November that BellSouth harmed a DSL competitor in the state by providing "preferential and discriminatory service to itself."

Bells keep monopoly

The once-competitive "digital subscriber line" (DSL) market for high-speed Internet access is being monopolized by the local Bells. Share of residential DSL market:



Sources: The Yankee Group

By Adrienne Lewis, USA TODAY

▶ Washington state this month ordered Qwest, the local Bell serving the Northwest, to give AT&T access to its equipment. AT&T had complained that Qwest, among other things, padlocked equipment boxes to "frustrate competition."

The effect: Struggling competitors have to spend time and money fighting with the Bells instead of winning new customers.

Given such Bell intransigence and the general lack of competition, several states are now wondering whether breaking up the Bell empire would bring needed consumer choice. The hope is that a separate hardware company would have no incentive to deny network access to competitors. And the breakup of AT&T quickly resulted in healthy competition for long-distance service.

But the idea has little chance of gaining traction. Pennsylvania's utility commission considered "structural separation" and was buried under an avalanche of Verizon lobbying. And in Washington, lawmakers wooed by aggressive Bell lobbying are looking the other way. A bill to be introduced this week by Rep. Billy Tauzin, R-La., would, in fact, loosen rules on the Bells, letting them provide long-distance data service without first opening their markets.

Until somebody faces up to the fact that the local Bell monopolies won't go willingly into a fair fight, consumers will be left with higher bills and no real choice.

And the broadband played on ...

Bill lets local phone monopoly infect high-speed data market

OPINION
By Brock N. Meeks
MSNBC

WASHINGTON, Apr 25th — The Baby Bells have cannibalized their siblings, gorging themselves on bull market-fueled mergers and acquisitions faster than venture capitalists could write ludicrous checks for ludicrous sums of money funding even more ludicrous dot-com business plans. It was all legal; all done under the radar, lost in the noise of baby billionaires and $3,000-per-head B2B conferences held in Toledo. And it was done in the spirit of competition and telecom "reform." And we all got screwed in the process.

THE 1996 TELECOM Reform Act promised to level the playing field, drop prices and jump-start competition for local, wireless and high-speed Internet services. Instead we got a footrace to the feeding trough, and when the feasting was over, the seven "Baby Bells" were four.

In the wake of this consolidation there is only vapor-like competition. Instead we have a pock-marked telecom industry, littered with failed or failing competitors, that is second only to the spectacular financial flameouts whose epitaphs are chiseled into the Chapter 7 tombstones of the dot-com graveyard.

And now a bill in Congress is looking to blow away any facsimile of making the local telephone companies obey the law that mandates they open their networks to any and all competitors in an effort to level the competitive playing field. This bill, dubiously called the "The Internet Freedom and Broadband Deployment Act of 2001," does nothing more than strip-mine the remaining competitive safeguards of the current law, green-lighting the Bells to bludgeon any remaining competitors into oblivion.

GRAB FOR HOLY GRAIL

The Telecom Reform Act was sham from jump street but the act's critical voices were drowned out in the din of the lobbying bloodbath being waged between cable and telecom interests who were throwing more cash into congressional coffers than Las Vegas sports books see on Super Bowl Sunday.

The law requires the local monopoly telephone companies to resell their network services to competitors. And when that local network is quantifiably competitive — based on a 14-point checklist written into law — the Bells are granted the Holy Grail of Telecom: entry into Valhalla, er ... I mean, the long-distance market.

But the Bells have kept underfinanced competitors tied up in legal battles and fought the 14-point checklist in the courts, spending billions trying to put the regulatory genie back in the bottle.

And along the sidelines of the so-called level playing field lies the carnage of broken promises: By now consumers were supposed to have several local phone companies from which to choose, including residential services offered by long-distance, cable and wireless companies. Many have tried, a few have made lurching advances, but all have failed to make a significant dent in the residential offering of telephone service. As of June 2000, Baby Bell competitors served only 3.2 percent of residence and small business phones.

And remember "video dialtone"? Those promised multibillion-dollar cable-like networks the Bells said they would build to compete with local cable operations? They are all toast.

Finally, while long-distance rates have fallen faster than Madonna's latest single from Billboard Magazine's Hot 100 — down 34 percent since Ma Bell was broken up — local telephone rates have RISEN 70.2 percent.

FREAKY LEGISLATIVE MOJO

That the Bells have been aggressively deploying broadband services at all comes only after nimble but faltering companies like Covad invaded their space and began offering DSL cheaper, faster, whether the Bells liked it or not. And clearly, they did not.

Even as the Bells are currently being fined tens of millions of dollars by the FCC for stonewalling competitors' DSL orders and providing sloppy service to connect those DSL customers to their networks, they realized the writing on the digital wall and began to actively market their own DSL services. But only in those areas where companies like Covad have penetrated.

If this broadband deployment bill is passed, the Bells will be a position to monopolize yet another market: the high-speed data market.

The bill "would be a boon for the Baby Bells but a disaster for consumers," says Mark Cooper, director of research for the Consumer Federation of America. "The Bells are being rewarded with a bill that will help them maintain their local phone monopolies ... and at the same time, establish a new national monopoly — this time in the broadband services market," Cooper says.

If the bill passes, the Bells no longer have to prove their markets are competitive to get into long-distance data services, from which they are currently banned. They'll be able to offer those services immediately, meaning they'll be instant long-haul data competitors to companies such as WorldCom and AT&T, Broadwing and others.

And if that happens, it'll take more than Broadwing's "freaky engineer mojo" to keep the Bells from dominating the field and crushing upstarts.

In addition, rural areas will be bypassed in the broadband land rush; hell, the Bells today loathe having to service the high-cost rural areas with plain old telephone lines.

And when the Bells have little threat of competition, they all too easily fall back into the sloth that made them the plodding monopolies they are today. They have escaped the enthusiasm and entrepreneurial passion that has fueled Internet-based companies, and not by accident, but by choice and design.

The telephone companies hovered below the market "bubble," out of sight, out of mind. Sat there grinning, dammit, waiting for this time, this environment, this Congress.

The broadband bill is being fast-tracked; too few hearings, too quickly for much groundswell of debate. Congress and the deep-pocket telephone company lobbyists writing fat checks are depending on your being asleep at the keyboard, not making much noise.

Shhhh... if you're real quiet you'll be able to hear another DSL provider going belly up and the boys in the Bell boardrooms slapping each other on the back.

Chairman SENSENBRENNER. The gentleman from California is—did I interrupt you in the middle of a sentence, Mr. Delahunt?

Mr. DELAHUNT. [Shakes head no.]

Chairman SENSENBRENNER. The gentleman from California is recognized for 5 minutes.

Mr. ISSA. Thank you very much, Mr. Chairman.

Mr. Barr, you know, when I was a kid growing up, I always was told, be careful what you ask for. I think what I'm seeing here is what you want to do is have it both ways. You want to have the advantages of retaining your monopoly. You want to tell us that there isn't enough market to support lots of CLECs, that clearly there can't be enough, so we're going to have to have more or less a monopoly or a duopoly or something akin to it with very little competition.

And then at the same time, if I understand what's been said here, you want to say that you have this incredible competitor over on the other side called cable and that if we don't help you, if we don't essentially free you up very quickly, you're going to have your clock cleaned by cable, and it's sort of interesting, because I hear there's not enough market, and then I hear, but on the other hand, we're in a competitive market because of one other monopoly of some sort that exists in each of your markets.

Which is it? Is there enough market that, aggressively, all the 280 million Americans who want broadband and will use what should logically be one MIP-plus speeds, is that a market worth going after at $39 a month or isn't it?

Mr. BARR. Well, you obviously misheard me, and it's probably because I wasn't clear enough. What I was saying, CLECs and other companies can come in and compete for local switch telephony. I don't know how many competitors is the right number. I don't know how much the market will support. That's for the marketplace to decide, and there are hundreds of CLECs out there all trying to make their plans work and we are meeting our obligations, to the extent that they want to rely on our facilities.

So I'm not suggesting that—first, I don't think we have a monopoly anymore, and second, I'm not suggesting that it has to be a monopoly, a duopoly, or that there's not enough business there to attract new entrants who can be successful.

What I'm saying is that the market and technology have a funny way of moving and that the marketplace is evolving and what's taking place is, I think, a superceding technology, where cable and telephony are really sort of blending into the same offering, which is a broadband offering, very rich in content, video offering, where telecommunications will be an imbedded functionality—voice mail, conferencing, video conferencing, voice telephony, and so forth, and this is all going to be part of a unified offering and that this is naturally a competitive market. Today, it's a competitive market, and there are promising technologies that will mean it's even more and more competitive over time and we want to participate in that marketplace——

Mr. ISSA. Well, to the extent that——

Mr. BARR. We think it's a good policy that we be allowed to do so.

Mr. ISSA. To the extent that you say you want to participate, I'm a little confused, because Verizon has recently pulled out of the California market. What would be your reason for wanting to pull out of the richest market in America?

Mr. BARR. I'm not sure what you're—are you talking about selling the video business?

Mr. ISSA. Yes.

Mr. BARR. Yes. Well, that—please focus on this. What I am saying is precisely that you have a convergence of technology. To compete against cable, it would be prohibitively expensive for us to come in and over-build, that is, build a new cable system from scratch when we already have a wire into the home. That's why we invented DSL, so we could compete with cable. And so how we want to compete with cable is to fit our system to compete with cable over our system. Cable wants to compete with us by doing the same thing.

Mr. ISSA. Okay. Well, if I can give you a——

Mr. BARR. So that's what we want to do. We want the telephone to compete with cable and cable to compete with telephone. That's the way it—I think everyone anticipated it when the act was passed. That's the way it should be, and the rules should allow both to happen, and——

Mr. ISSA. And if I can follow up with another question, since my time is so limited, would it surprise you, and this happens to be in California where you have chosen not to compete——

Mr. BARR. No, we want to compete. We just don't want to compete by building an analog video system. We want to have a broadband offering.

Mr. ISSA. I understand. Would it surprise you to know that within a two-mile area, DSL is not available, even though T1 lines are available in large amounts. The cost of an Internet connection at T1 speed is about $800 a month, while the cable companies are supplying two MIP, roughly twice T1 speed, for $49. Would you say that a market in which a consumer is paying $49 for T1 times two and a business next door is paying $800 for T1 is a dysfunctional market at this time?

Mr. BARR. Well, you're sort of making my point, which is we want to configure our network through investment, substantial investments, so we can offer a broadband offering at the most efficient price. That requires massive investment. The recent cable has made that—can make that investment is because they get it back.

Mr. ISSA. Okay. Then back to my original——

Mr. BARR. The rules say we don't get it back.

Mr. ISSA. Back to my original question, if I heard you correctly, and I think I have for a second time, you're really arguing that you'd like to go back, at least in broadband, to being a monopoly and able to compete one monopoly against another, which I think—wait a second, this is my question. My time is expiring. I think you are clearly saying that cable is your competition. You need to have a monopoly to compete. Is that correct, yes or no?

Mr. BARR. It is a complete and utter nonsequiter to say that two monopolies are competing with each other.

Mr. ISSA. I'll take that as a non-responsive answer, then. Thank you, Mr. Chairman.

Mr. BARR. If two companies are competing with each other, by definition, it's not a monopoly.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Florida is recognized for 5 minutes.

Mr. WEXLER. Thank you, Mr. Chairman.

To Mr. Blumenfeld and Mr. Barr, I just want to acknowledge that, at least from my point of view, it's been actually wonderful to listen to both of you and learn from both of you. You're both excellent advocates for your cause and I really do appreciate what you've been saying.

Mr. Blumenfeld, I was struck by your analogy that you gave at the beginning with respect to your children and playing the piano and you setting a standard of practicing for an hour and so forth. But in fairness to your analogy, in the context of your advocacy for the bill that you're here about, wouldn't the more appropriate analogy be you set the standard for an hour for your kids to play the piano and then they can go out and play. Forty-five minutes into their practicing, your wife comes in the room, maybe doesn't like what she hears, and she says, an hour is not going to be good enough. Practice for an hour and a half. It would seem to me that would be a closer analogy to the bill than your original analogy.

And if I could just follow with that, I'm privileged to represent the State of Florida. If I understand the facts in Florida correctly, Bell South has lost upwards to 900,000 people in terms of local customers. That suggests to me, if I understand the standard in the act is—it's open, there's competition, not bringing out a specific percentage, but that suggests to me it's open.

Understanding that you and Mr. Barr have a different view of the past behavior of the Bell Souths of the world in terms of why or why not there's competition, would you agree with Mr. Barr's assessment that once the Bells are able to get into the long distance business, that at least at that point, then, competition in the local market increases?

Mr. BLUMENFELD. Congressman, I believe that competition in the local market increases because the Bell has finally complied, by and large, with the requirements of the act, which have resulted in the market opening and have also resulted in the Bell getting into long distance. If the question is, does their being in long distance introduce another long distance competitor, obviously, it does.

Mr. WEXLER. Okay. So following that, then, if under the current law, when the Bells comply and then they are allowed to get into long distance and then competition in the local business gets greater, then why would you be here advocating for yet another hurdle for the Bells to get into the long distance? If open market is enough, then why do we want to have a specific market share requirement, as well?

Mr. BLUMENFELD. I think that is a difficult question under the act. As I understand the provisions of the Conyers-Cannon bill, the point is to say, the way I read the provisions acting together, the point is to say that the determination of market opening is based on sort of a traditional analysis of whether or not a market is open, but that if the Bell retains a share of 85 percent, that that would prohibit a finding that the market is open. That 85 percent, I

should note, is a higher number than has appeared in a number of antitrust cases that have looked at market share.

It is certainly not crucial in the antitrust laws to have a particular market share, but market share is meaningful. It is hard to believe that you have a structurally competitive marketplace if there are—if one provider has virtually all of the customers, because in a structurally competitive marketplace, one would envision customers making choices among providers over time, and so that share should logically come down over time.

But the most important thing is to not gut the exact provisions that have created the opening in the marketplace. That is, you can't say, as I think Mr. Barr would like to, once we've opened the market, we can get rid of the rules, and once we've opened the market, or actually before, we can get rid of the antitrust laws, so long as it's something in the jurisdiction of the Telecom act, because that way we have a nice orderly regime. That, I don't see at all, and that will not create competition.

Mr. WEXLER. Mr. Malone?

Mr. MALONE. May I just make one comment? I've spent a lot of time in Florida dealing with CLECs and customers there. A very important point that we found. We interviewed 30 competitive local exchange carriers to find out, both before section 271 and after section 271, did the CLECs feel that the regional Bell operating companies were incumbering their performance? Now, we didn't talk to lawyers, lobbyists, or people like that. What we talked to is we talked to the operating managers, the CEOs, and the top officers and the workers inside the company, and here's what they said.

Twenty-eight out of 30 companies said that the regional Bells are not the problem with running their business. They don't have performance issues with the regional Bell at the rank and file level. What they have is they have problems inside their own company and they're working their way through them, and that's both before section 271 and after section 271. The facts seem to suggest that the regional Bells are not running roughshod.

Chairman SENSENBRENNER. The gentleman's time has expired.

Now, let me ask for a show of hands of how many Members wish to come back after these votes and ask questions.

[Show of hands.]

Chairman SENSENBRENNER. One, two, three, four, five. I would ask the Members to come back promptly, because I believe these will be the last votes of the day. The Committee is recessed for the votes.

[Recess.]

Chairman SENSENBRENNER. The Committee will be in order and the Chair recognizes the gentleman from California, Mr. Schiff, for 5 minutes.

Mr. SCHIFF. Thank you, Mr. Chairman.

I'd like to pose a question for Mr. Barr and also for Mr. Blumenfeld. Mr. Barr, looking at the *Goldwasser* decision, there seems to be some internal inconsistency in the court saying, on the one hand, that our principal holding is not that the 1996 act confers implied immunity on behavior that would otherwise violate the antitrust law. Such a conclusion would be troublesome, at best, given the antitrust savings clause in the statute. And yet the court

goes on to say, nevertheless, when one reads the complaint as a whole, these allegations appear to be inextricably linked to the claims under the '96 act, and even if they were not, such a conclusion would force us to confront the question of whether the procedures under the '96 act for achieving competitive markets are compatible with the procedures that would be used to accomplish the same result under the antitrust laws. In our view, they are not.

So on the one hand, it says we're not finding that they are incompatible, and on the other hand, it says we're finding that they're incompatible, and I wonder if you could address that.

And if I could pose a question to Mr. Blumenfeld at the same time, assuming that the court erred, isn't the remedy to provide that an antitrust claim is not otherwise superceded rather than saying—going beyond that and saying that any act that would violate the '96 act also constitutes an antitrust violation? Is that what the bill does, and doesn't that go beyond remedying any flaw in the court decision?

Mr. BARR. That's an excellent question about these paragraphs that deal with what I call the third point in *Goldwasser*, and I think the key to it are the paragraphs that begin, "The only question that remains under the antitrust law," and then goes on through the ensuing paragraph, because what the court's doing there is after it's making its first two preliminary points, which are there's no general immunity and what's a violation of a regulatory regime is not necessarily a violation of antitrust, then it's focusing on the specific claim that there's a violation of the essential facility doctrine, and the ensuing two paragraphs are all focused, saying, look, your remaining claim is the essential facilities doctrine under which the argument is that there has to be reasonable access.

But the statute we're dealing with is specifically designed by Congress to define that reasonable access. Therefore, the statute is addressing exactly the same subject matter and Congress has made a decision that the FCC shall determine what is reasonable access and on what terms, and where you have precisely the same subject matter being addressed, and that's what they say at the end of that second paragraph I pointed to, it's in that situation that you have to give precedence to the specific scheme. Otherwise, who decides? I mean, that's fundamentally what the court's saying here. Who decides what's reasonable access?

Mr. SCHIFF. Are you reading the act, then, and the savings clause to mean that whenever you are dealing with a telecommunications issue outside of the parameters of the '96 act, the antitrust laws are not superceded, but when you're within that area, they are superceded?

Mr. BARR. No. I'm even being a little bit more generous to the antitrust laws than that. What I'm saying is there is no general exemption from the antitrust laws, even on matters that are subject to the Communications Act. However, when a specific matter, such as the reasonableness of access, has been addressed in the statute and the FCC has been charged with making that determination, then that has to be given precedence over a general directive of the antitrust law.

All the antitrust law says is that if it's an essential facility, there has to be reasonable access. Well, that's not very enlightening.

That doesn't tell you whether it's 45 days, 90 days, and what the scope of that obligation is. Where Congress has specifically said—section 251 is all about what is reasonable access. The FCC shall go not only up through the essential facility requirements, but beyond them if it wishes, and it shall make those determinations and shall do so in consultation with the States and have one national policy that when you have a specific later enacted regime that is directed at precisely that question that's addressed in the antitrust law, then it has to be given precedence. That's all the court was saying.

Mr. SCHIFF. Mr. Barr, if I can interrupt you for a second, because I do want Mr. Blumenfeld to address the second half of the question, that is, if there's a problem in the court decision, does the remedy go too far?

Mr. BLUMENFELD. Thank you, Congressman. I think, in addition to the two pieces of language you read, you have to look at the ending of the first paragraph on the—I'm sorry, the ending of the paragraph you were reading from, the '96 act, in short, more specific legislation that must take precedence. This is Mr. Barr's theory that the '96 act has somehow displaced the antitrust laws on specific conduct that's subject to the act. That is the essence of an implied immunity, which is just flat wrong under the antitrust law.

If it goes too far, and I have no question that the *Goldwasser* case is wrong, it is certainly correct that paragraph 28 of the proposed legislation specifically addresses that issue. It's paragraph 29, as I understand it, which is the gist of your question. Do we need the additional paragraph 29 to say not only that, but where there is a violation of the act, that is a per se violation of the antitrust laws.

And I think if the Committee wants to consider whether the additional provision of paragraph 29 is necessary or whether, perhaps, the Committee might want to restate it in terms of "shall be considered," "shall be presumptively admissible," "shall be taken as indicative of unreasonable conduct," I think that any of those approaches would certainly be consistent with what the antitrust laws would do.

Chairman SENSENBRENNER. The time of the gentleman has expired.

The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. First of all, I would like to apologize for being late and would like to ask unanimous consent that my opening statement be included in the record.

Chairman SENSENBRENNER. Without objection.

Chairman SENSENBRENNER. Also without objection, three articles, newspaper editorials requested by Mr. Conyers will be included in the record. And also, without objection, Members may send written questions to the witnesses, which will also be included in the record.

Now I will reset the clock and you are recognized for 5 minutes.

Mr. CANNON. Thank you. You know, I have a couple of passions in life. The dissemination of broadband is one of them and political debate is another. I must say that in an area of creative security, with only a few facts that we can see with clarity, we've had some marvelous weaving of the perception or the reality that we are

dealing with or trying to fumble with as a politician in this case. I couldn't help but notice that today in this obscure area, we have some poignant things happening. Teligent filed for chapter 11, and interestingly, below the fold, "Verizon Hikes Charges," and in this case it's for national 411 service. But a couple of weeks ago, that was for DSL service. But I hasten to point out here that it's not the urgent problems that some companies are having, but rather the larger issues that are important here, so I appreciate both your time.

I'd like to just clarify a couple things with Mr. Barr that you said. First of all, you talked about voice and data, and one of the problems we have here is that we've got two competing bodies of law and, over time, we have changes here. I just want to be clear that when we have this bundled package that we're moving toward, there's not going to be much difference between voice and data. You cannot segregate those out. So if the RBOCs get data relief, they will effectively get voice relief. I mean, do we agree on that?

Mr. BARR. No. The proposal is merely for the long—the ability to do long-haul carriage of data bits, including voice bits. However, as I understand it, the ILEC will not be allowed to make a voice offering to the customer. In other words, they cannot offer a product to the customer that's a voice substitute, which creates another incentive for——

Mr. CANNON. But this is one of those areas that may be obscured a little bit by language, but if a person has the long distance data capability and he has the ability on the other end to get out of an IP protocol, he can use that long distance for voice over IP even now, right?

Mr. BARR. Not for his own voice over IP. That's the point. They're two separate markets.

Mr. CANNON. Actually, ultimately, they merge, right?

Mr. BARR. They will ultimately—I believe that they will largely converge, but the relief being sought in the Tauzin bill is for the back-end long haul of data, but the ILEC would still be prohibited from offering a voice over IP that would be a substitute for its own retail voice product.

Mr. CANNON. Would you like to comment on that, Mr. Blumenfeld?

Mr. BLUMENFELD. Yes. Thank you, Mr. Cannon. One of the concerns that I have in this debate is that Mr. Barr always talks about the interlata relief portion of Tauzin-Dingell, but the other portion of Tauzin-Dingell specifically removes the existing obligation of telephone companies to unbundle network elements where those network elements will be used by competitors to provide any of the services that are covered by this new deregulation—data services using that term generically. In other words, what the legislation does is the exact opposite of the point of the act, which was to force the unbundling of the network in order to encourage the deployment of new technologies and advanced services, both of which are the essence of the act.

Because of the convergence that you have described and then Mr. Barr has described and which I completely agree with, the effect long term of the second part of Tauzin-Dingell, which eliminates the obligation to unbundle existing network and new network ele-

ments for use by data competitors, will eliminate entirely competition over the telephone network, that is, competition within the telecom sector that in any way requires access to the existing telephone network. And the more there is convergence, the more that will be true, leaving the situation that Mr. Barr does explain of him and his colleagues competing against the cable companies, as if it were true that the cable companies are today capable of providing that bundle of services, which they are not.

At my house, I have DSL service from Rhythms NetConnections. When I go on the Verizon website, I can't get DSL service from Verizon. I tried to get DSL service from my cable company, StarPower. They can't provide it to me, either. So if we were in this situation of two competing monopolies, I live in Northwest D.C. on the D.C. side of Chevy Chase, I wouldn't have DSL service at all. That's why two competing monopolies is not enough.

Mr. CANNON. Thank you. In situations of obscure areas, Mr. Chairman, I think we need 10 minutes of questioning time, but seeing that we have only five under the current rules, I yield back what remains.

Chairman SENSENBRENNER. Which is none. [Laughter.]

Chairman SENSENBRENNER. The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. We need days. Mr. Chairman, let me thank you for holding this hearing and the authors of the legislation that is before us. Particularly, I am gratified that the Judiciary Committee has carved out its stakeholder's position on these very important issues. I would hope that as we deliberate, and I understand that the clock is ticking very fast and so we'll probably have a short span of time to review these issues, that we do not get characterized as a good cop/bad cop, and that, in fact, we can find some way to address the multitude of concerns and still wind up walking the same pathway together.

In particular, I think that's important when we talk about the 1996 act that we all thought was going to put us in the right focus and right direction. What I'd like to do, Mr. Blumenfeld, is come directly to you, and you note that Members have been coming in and out. There have been hearings in various parts of the House, all over today, and so you may have gone over this, but if you would indulge me, what went wrong with the 1996 act from your perspective? I certainly do not expect for you to give us the treatise, but just as we are focusing on these issues.

Mr. BLUMENFELD. I think, first of all, that the '96 act was about as good a cut, frankly, as was possible at a legislative solution to these issues, and I think that the FCC and the States have done a remarkable job in an area of great complexity and difficulty. At the same time, I think it has always been true that the regulatory tools and the regulatory processes by themselves are slightly too blunt as instruments to be entirely effective in convincing companies to open up their monopolies, that is, convincing them to act in a way that they strongly believe is contrary to their economic incentives, and that we need the additional incentive provided by the antitrust laws to be able to do that.

The *AT&T* case resulted in a divestiture because of the government's belief that you will not successfully write rules that force a

vertically integrated monopoly to open up its network to its competitors because it would be forcing them to act in a way that's contrary to their own interest. Therefore, the only way to accomplish it is by divesting the company with the network from the company that is, in that case, in long distance and equipment manufacturing.

The '96 act tried to say, let's try not to have to do that. The logical next divestiture would be the network company, on the one hand, and a services company on the other. The service company would have competed against other service companies. That would be an analogous divestiture. The '96 act tried to say, if the problem is that a vertically integrated company has the incentive, because it's in competitive markets, and the ability, because it owns the network, to disadvantage its competitors, let's write rules that prevent them from exercising that ability. Let's write rules——

Ms. JACKSON LEE. If I might, it sort of tracks the administrative law process versus the court process, if you will.

Mr. BLUMENFELD. Exactly.

Ms. JACKSON LEE. And you think that there are missing elements to get where we need to go because there is not an incentive to do this voluntarily.

Mr. BLUMENFELD. Exactly, and——

Ms. JACKSON LEE. Can I go on to the next?

Mr. BLUMENFELD. Yes.

Ms. JACKSON LEE. You see the frightful position we are in with the shortness of the time. Opponents of the present legislation, H.R. 1697 and H.R. 1698, suggest that it conflicts with *Goldwasser*, which suggests that violations of the act did not constitute violations of the antitrust laws, and it goes on. Can you just give me a response to that, please, in answer to that?

Mr. BLUMENFELD. Yes. Very briefly, the point is that *Goldwasser* is exactly wrong in its fundamental premise, which is that conduct which violates—I'm sorry, the obligations set forth in the act could not possibly be found from the antitrust laws themselves. That's——

Ms. JACKSON LEE. And I will——

Mr. BLUMENFELD. That's just wrong.

Ms. JACKSON LEE. Let me pursue that with you, because I've got to get a question in for Mr. Barr. This is terrible that the time is short, but we're respectful of the Chairman at this point.

Mr. Barr, first of all, let me say that we understand the value that the baby Bells have in our respective communities and we're very appreciative of their long history, but tell me this. What would you do to change, or to make H.R. 1697 and H.R. 1698 palatable? Aren't you aware of the fact, or comment on the fact that we are losing a lot of the upstart companies on broadband and so competition is decreasing, a lot of bankruptcies, and so the broadband access is sort of going in your direction. How do you respond to that, and also with the bill dealing with Dingell-Tauzin, any comments on how it impacts closing the digital divide?

Mr. BARR. Well, I think there's a——

Chairman SENSENBRENNER. In 25 words or less, because the gentlewoman's time has expired.

Ms. JACKSON LEE. I thank the Chairman. Your changes to H.R. 1697, H.R. 1698, and digital divide.

Chairman SENSENBRENNER. The gentlewoman's time has expired. Mr. Barr?

Mr. BARR. First, on the build-out, Tauzin-Dingell has a mandatory build-out. I don't think that's the best way of assuring broad access, but it does address that situation.

The other two bills, H.R. 1698 and H.R. 1697, I don't think the case has been made for them and I think that the provisions that try to make it a per se violation of antitrust laws, to have regulatory violations, would be very destructive, and I think the market share test would lead to less competition for residential customers, and I think Mr. Blumenfeld has essentially said that he believes that the Bells are going to continue to get into long distance, that there is competition in the States where we've been permitted to enter long distance because we've gotten our system. So the process is working, and I don't think the record of the act is that bad. I think competition is taking hold faster than it did in long distance and faster than it did in the cable market.

Chairman SENSENBRENNER. The gentlewoman's time——

Ms. JACKSON LEE. Thank you. We look forward to sending questions. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman's time has expired.

The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman, and I thank you for conducting this hearing today. I hope it's one of many on this very, very important issue to——

Chairman SENSENBRENNER. Well, as you know, we have 30 days, so there are only so many hearings we can hold.

Mr. GOODLATTE. Well, there may be other opportunities, but I do have an opening statement that I would ask be made a part of the record.

Chairman SENSENBRENNER. Without objection. Without objection, all Members' opening statements may become a part of the record.

Mr. GOODLATTE. Thank you. And in addition, earlier, an article cited by Mr. Malone from the Wall Street Journal, "Bell Rivals Double Local Market Share," was made a part of the record. I have the actual Federal Communications Commission release of the data on which that article was based and I'd ask that that be made a part of the record, as well, showing the dramatic——

Chairman SENSENBRENNER. Without objection.

Mr. GOODLATTE [continuing]. Dramatic and rapid increase in competition in the local voice market.

[The information of Mr. Goodlatte follows:]

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Federal Communications Commission
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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC, 515 F 2d 385 (D.C. Circ 1974).

FOR IMMEDIATE RELEASE:
May 21, 2001

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Email: mbalmori@fcc.gov

FEDERAL COMMUNICATIONS COMMISSION RELEASES LATEST DATA ON LOCAL TELEPHONE COMPETITION

Total Lines Reported by New Entrants Climbed to 16.4 Million

Washington, D.C. – The Federal Communications Commission (FCC) today released summary statistics of its latest data on local telephone service competition in the United States. Providers file such data twice a year under the Commission's local competition and broadband data gathering program. This program was adopted in March 2000 to assist the Commission in its efforts to monitor and further implement the pro-competitive, deregulatory provisions of the Telecommunications Act of 1996.

The information released today was filed by qualifying providers on March 1, 2001, and reflects data as of December 31, 2000. Noteworthy data include:

1. **New Entrant Phone Lines Continue Robust Increases**
   - CLECs reported about 16.4 million (or 8.5%) of the approximately 194 million nationwide local telephone lines in service to end-user customers at the end of the year 2000, compared to 8.3 million (or 4.4% of nationwide lines) at the end of 1999.
   - CLEC market share grew 93% over the one-year period of January to December 2000.
2. **States with Long Distance Approval Show Greatest Competitive Activity**
   - CLECs captured 20% of the market in the State of New York – the most of any state. CLECs reported 2.8 million lines in New York, compared to 1.2 million lines the prior year – an increase of over 130%, from the time the FCC granted Verizon's long distance application in New York in December 1999 to December 2000.
   - CLECs captured 12% of the market in Texas, gaining over a half-a-million (644,980) end-user lines in the six months since the Commission authorized SBC's long distance application in Texas – an increase of over 60% in customer lines since June of 2000.
   - CLEC market share in New York and Texas (the two states that had 271 approval during the reporting period ending in December 2000) are over 135% and 45% higher than the national average, respectively.

3. **Residential vs. Business Competition**
   - About 60% of CLEC local telephone lines served medium and large business, institutional, and government customers. By contrast, almost 20% of incumbent local exchange carrier (ILEC) lines served medium and large business customers.
   - CLECs served 4.6% of the residential and small business customers at the end of the year 2000, compared to 2.3% for the year ago period.
   - CLEC share of the residential and small business customer market grew nearly 45% during the six-month period of June 2000 to December 2000.

4. **Mode of Competitive Entry and Other Data**
   - CLECs provided about 35% of their end-user customer lines over their own local loop facilities. Incumbent telephone companies provided about 6.8 million resale lines as of the end of the year 2000, compared to about 5.7 million lines six months earlier, and they provided about 5.3 million UNE loops as of the end of the year 2000, an increase of 62% during the six months.
   - At least one CLEC was serving customers in 56% of the nation's zip codes at the end of the year 2000.
   - About 88% of United States households reside in these zip codes. CLECs reported lines in all states except Hawaii, and also in the District of Columbia and Puerto Rico.
   - The 77 providers of mobile wireless telephone services that reported information served over 101 million subscribers at the end of the year 2000, compared to about 91 million subscribers at the end of the prior six months period.

As additional information becomes available, it will be routinely posted on the Commission's Internet site. The Commission recently accepted comments on whether certain modifications should be made to the reporting system.

The data summary is available in the FCC's Reference Information Center, Courtyard Level, 445 12th Street, S.W., Washington, D.C. Call International Transcription Services, Inc. (ITS) at (202) 857-3800 to purchase a copy. The data summary can also be downloaded from the **FCC-State Link** Internet site at <www.fcc.gov/ccb/stats>.

- FCC -

Common Carrier Bureau contact: Industry Analysis Division at (202) 418-0940; TTY (202) 418- 0484.

Mr. GOODLATTE. It's my view that what we have here is a conflict between the Conyers-Cannon bill, which is re-regulatory in nature, takes us backward, takes us into the old economy, and the opportunity to move forward and to continue to deregulate. Deregulation was the hallmark of the Telecommunications Reform Act of 1996. Unfortunately, it didn't go as far as it needed to go in terms of freeing up everybody to compete in these areas.

We've seen that there is competition in the local market. In fact, with the fact that 40 percent of residential users being effectively subsidized, that part of the market is really off the table. Nobody's going to go in and compete with somebody when they're losing money in that portion of the market. And in the area where all the money is, the business market, the competition is now up to 35, 40 percent. That's a pretty hefty chunk when you consider that the Bells have to use that market to subsidize those other 40 percent.

But where we don't have that competition is in the roll-out of broadband services, and it seems to me that it is deregulation that—and I have a good example of that here today. Mr. Harvill, you wrote a letter to Speaker Hastert and Congressman Hyde, in fact, the entire Illinois Congressional delegation, in which you opposed the so-called Tauzin-Dingell bill because it puts at risk the requirement that incumbent local telephone companies share their lines with competitive data local exchange carriers. As a Member of that Commission, you helped write the order regarding the line collocation and unbundling, is that correct?

Mr. HARVILL. That's correct.

Mr. GOODLATTE. In addition, your letter states that local competition is the fastest and most effective way for consumers to obtain broadband services at competitive prices. I certainly agree with that statement. Would you argue that your order regarding collocation and unbundling is a critical part of ensuring that competition for Illinois?

Mr. HARVILL. Very much so.

Mr. GOODLATTE. All right. Well, I have an affidavit here which, Mr. Chairman, I would also ask be made a part of the record——

Chairman SENSENBRENNER. Without objection.

Mr. GOODLATTE [continuing]. From Dr. Niel Ransom of Alcatel USA, Incorporated, filed in the Illinois court by Alcatel, which is the manufacturer of the line card equipment used in Illinois phone systems.

Chairman SENSENBRENNER. Let me ask Mr. Harvill, are you familiar with this affidavit or do you wish to have Mr. Goodlatte furnish it to you?

Mr. HARVILL. I'm not familiar with it, but——

Mr. GOODLATTE. We will be happy to furnish it to the gentleman.

Chairman SENSENBRENNER. Would somebody run it down for Mr. Harvill to look at.

[The information of Mr. Goodlatte follows:]

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION
DOCKET NO. 00-0393

AFFIDAVIT OF DR. NIEL RANSOM
OF ALCATEL USA, INC.

1. My name is Niel Ransom. I am a resident of Rolesville, North Carolina, employed as the Chief Technology Officer (CTO) for Alcatel USA. As an authorized representative of Alcatel USA ("Alcatel"), I am filing this affidavit with the Illinois Commerce Commission ("ICC") regarding the ICC's March 14, 2001 Order in Docket No. 00-0393 ("Order") pertaining to Illinois Bell Telephone Company and the Illinois Commerce Commission Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service.

2. Alcatel builds next generation networks, delivering integrated end-to-end voice and data networking solutions to established and new carriers, as well as enterprises and consumers worldwide.

3. Alcatel USA filed comments with the Federal Communications Commission ("FCC") on October 12, 2000 regarding the FCC's Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98. Alcatel USA also filed reply comments with the FCC on November 14, 2000 regarding the FCC's Second Further Notice of Proposed Rulemaking proceeding on Deployment of Wireline

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1

Services Offering Advanced Telecommunications Capability in CC Docket No. 98-147 and Implementation of Local Competition Provisions of the Telecommunications Act of 1997 in CC Docket No. 96-98.

4. I have attached the above mentioned FCC filings to this affidavit, which I incorporate into this affidavit by reference. In the FCC filings, Alcatel commented on the use of foreign or non-authorized line cards (or "plug-ins") in Litespan® Next Generation Digital Loop Carrier ("NGDLC") systems. Manifestly, as Alcatel's FCC filings explain, it is not technically feasible to install line cards not manufactured or licensed by Alcatel in its systems. Furthermore, as is the case with other internal system components, it is not possible to directly access or interconnect with these line cards. Access is only possible through the derived (or "virtual") facilities and service lines supported by the systems. Therefore, Alcatel believes that a line card should not be treated as a separate "unbundled network element" and neither physical nor virtual line card collocation is appropriate.

5. In our FCC filings, Alcatel noted a variety of reasons why it is not technically feasible to install line cards designed for other systems into our system, including, but not limited to, board and system physical hardware designs, powering requirements, thermal dissipation, software interoperability, and restricted proprietary, copyright-protected intellectual property. If one were to attempt to place a line card designed for other systems in our system, the card in all likelihood would not physically fit correctly into the card guides nor interconnect properly with our backplane electrical pins. If, by chance, one were able to physically get another manufacturer's card plugged into the backplane, it would not inter-operate with our system and element

management software, as would be required for service provisioning, surveillance and maintenance. Were another manufacturer to attempt to design a compatible line card for our system, installing it would void our system's warranties, and there is a very high probability that it would cause damage to the system and disrupt service. Developing a new line card to operate into our or other manufacturers' systems requires detailed knowledge of the proprietary internal design of the system and associated changes by the system's manufacturer to the software of the system's controller and element management system.

6. I would also like to point out some issues that I see with respect to the Order's requirement that Ameritech Illinois make available to competitive providers nondiscriminatory access, at just and reasonable rates, to Project Pronto UNEs, as indicated on page 25 of the Order.

7. Of first note is the Order's creation of the UNE "Lit Fiber Subloops between the RT and the OCD in the CO consisting of one or more PVPs (permanent virtual paths) and/or one or more PVCs (permanent virtual circuits) at the option of the CLEC." A significant issue here is that the Alcatel Litespan system that Ameritech Illinois had planned to deploy does not have the ability to provide this capability. The Litespan system terminates the ATM fiber on the system on a ATM Bank Control Unit ("ABCU"), which provides one PVP to its associated Channel Bank Assembly ("CBA"). All ADLU line cards that are plugged into that CBA must have all of their Permanent Virtual Circuits ("PVCs") provisioned to that one PVP. The PVP is carried through the ABCU over a single OC-3c fiber path to/from the OCD in the Pronto network architecture. Within a system using multiple CBAs to provide DSL service,

each CBA has it own unique PVP. The CBAs are daisy chained, according to a proprietary internal format, to share the OC-3c fiber path to/from to the OCD.

8. If Ameritech Illinois were required to offer the Lit Fiber Subloop UNE at the PVP level, each CLEC would have to be given its own, dedicated CBA. This would drastically reduce the economic efficiencies compared to sharing CBAs.

9. I also would like to comment further on the issue of line cards owned by the CLEC and collocated in the NGDLC equipment at the RT. (As I noted above, it is not technically feasible to install line cards not manufactured or licensed by Alcatel in our systems.) The RT's CBAs are cabled directly to cable binder groups serving individual SAIs. As a result, when an ADLU card is installed in a CBA, all of the lines supported by the card are cabled to the SAI. If the cards were individually owned, significant inefficiencies could arise, because unassigned lines on one CLEC's ADLU line card could not be used by other CLECs or by Ameritech-Illinois. I further note that the Alcatel Litespan ADLU cards are combination cards, supporting both POTS and ADSL. Not only would ADSL efficiency be significantly reduced, the system capacity for basic services would also be substantially decreased.

10. I should also point out that installation of the ADLU card itself does not establish service; nor are there any physical points of access on the cards for interconnection to other carriers. The system's software is needed to provision the card, monitor its call states, and perform other surveillance and maintenance functions. The software's Right to Use (the intellectual property right) has been licensed to and purchased by Ameritech Illinois. It cannot be modified or used by others. Thus, the only technically feasible points of service interconnection are at the OCD in the central office on one

end and, at the other end, beyond the RT, at either the SAI (if the CLEC has its own connecting distribution facilities), or at the end-user customer NID.

11. On behalf of Alcatel, I therefore respectfully request the Illinois Commerce Commission to review our FCC filings, along with this affidavit.

12. This concludes my affidavit.

M. Niel Ransom
CTO
Alcatel USA
April 10, 2001

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California
County of Sonoma } ss.

On April 10, 2001 before me, Noelle C. Cruise Notary Public
Date Name and Title of Officer (e.g., "Jane Doe, Notary Public")
personally appeared Maurice N. Ransom
Name(s) of Signer(s)

☐ personally known to me
☒ proved to me on the basis of satisfactory evidence

to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

NOELLE C. CRUISE
Commission # 1208791
Notary Public - California
Sonoma County
My Comm. Expires Jan 22, 2003

WITNESS my hand and official seal.

Noelle C. Cruise
Signature of Notary Public

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Mr. GOODLATTE. The affidavit states that the order of the Illinois Commission, your order that you claim is so critical to ensuring fast and low-priced broadband service, which is an admirable goal, is not technically feasible. So I have to ask, if the maker of the equipment says that they can't do what you ordered them to do because it's technologically not feasible, how do you expect broadband service to be delivered at all, much less fast and at low prices, and doesn't this regulatory requirement that you've imposed, in fact, delay the roll-out of high-speed Internet services while companies attempt to redesign their systems, and wouldn't that delay result in higher costs to the phone company and, ultimately, to the consumer?

Mr. HARVILL. Let me begin by saying this. This is four pages and I haven't had an opportunity to look at it. However——

Chairman SENSENBRENNER. Mr. Harvill, would you prefer to answer Mr. Goodlatte's question in writing, which we can put into the record?

Mr. HARVILL. I will do that, but I——

Chairman SENSENBRENNER. Without objection, Commissioner Harvill's written answer will appear.

[The response of Mr. Harvill follows:]

STATE OF ILLINOIS

Illinois Commerce Commission

TERRY S. HARVILL
COMMISSIONER

160 NORTH LASALLE STREET
SUITE C-800
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TEL: (312) 814-2859
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June 19, 2001

The Honorable F. James Sensenbrenner, Jr.
United States Representative
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Congressman Sensenbrenner:

During the May 22, 2001, Committee on the Judiciary Hearing regarding H.R. 1697 and 1698, respectively, Congressman Goodlatte inquired about certain aspects of an affidavit of Dr. Neil Ransom of Alcatel USA, Inc. In his affidavit, Dr. Ransom criticized a recent Illinois Commerce Commission ("ICC") decision pertaining to SBC/Ameritech-Illinois' Project Pronto. Since I was unfamiliar with the contents of the affidavit, you graciously allowed me the opportunity to address his concerns in a subsequent written response. To this end, please find my response to his inquiry below.

As part of its Project Pronto loop upgrade, Ameritech has chosen to deploy a technology called Next Generation Digital Loop Carrier ("NGDLC"). NGDLC is capable of supporting both voice and DSL services, just as Ameritech's existing copper loops are. However, while existing copper loops can only support DSL services to a maximum distance of 18,000 feet from the central office, NGDLC, by utilizing fiber, eliminates this distance limitation. As a result, NGDLC expands the availability of DSL services to a greater number of consumers. Another component of NGDLC are line cards, which plug into slots on NGDLC equipment housed in Ameritech's remote terminal. Unlike the line cards used in Ameritech's current DLC infrastructure, which support voice services only, the NGDLC line cards support both voice and data services. Additionally, NGDLC line cards also determine what "flavor" of DSL service can be provided over the line.[1] Prior to halting DSL deployment in Illinois, SBC/Ameritech-Illinois stated that it planned to utilize line cards capable of supporting only one flavor of DSL (i.e., ADSL) in its NGDLC. Rather than allow the incumbent

[1] Various "flavors" of DSL provide consumers with choices regarding the quality of service they desire in DSL service. For example, Asymmetrical DSL ("ADSL") provides unspecified data speeds for both downloads and uploads, while Symmetrical DSL ("SDSL") provides for a constant, specified data speed for both downloads and uploads.

local exchange carrier to unilaterally determine what flavors of DSL services will be available to millions of consumers, the ICC chose to allow the marketplace to decide by allowing competitors to request that Ameritech insert line cards capable of supporting other flavors of DSL services. Once implemented, the ICC believed, this decision would promote competition in the advanced services market as well as increase the types of DSL services available to consumers.

Dr. Ransom's affidavit is predicated on a flawed interpretation of the ICC's ruling with regard to line cards. Dr. Ransom assumes that the ICC's ruling requires Ameritech to insert incompatible line cards in its NGDLC equipment,[2] when, in fact, it does not. On the contrary, the Commission has acted to mitigate Ameritech's concern of inserting incompatible line cards in the NGDLC equipment. In its original decision pertaining to line cards, the ICC stated

> [w]e require CLECs to limit the collocation of line cards to those that provision [unspecified bit rate] UBR [quality of service] Qos products, until such time as Ameritech Illinois' data affiliate begins offering a product based upon a different Qos, at which time the CLECs' should be allowed to offer products based upon the same Qos. [Docket No. 00-0312/0313 consol. Arbitration Decision on Rehearing at 37].

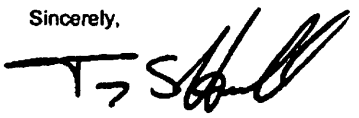
As demonstrated by this passage, the ICC's decision considered the technical feasibility of inserting various line cards in NGDLC equipment and never intended, nor allowed, the utilization of incompatible line cards. In essence, Dr. Ransom interpreted the ICC's decision as requiring Ameritech to put a square peg in a round hole. This interpretation, if true, would defy common sense.

In fairness, I can understand why Dr. Ransom misinterpreted the Commission's conclusion regarding line cards. Dr. Ransom's affidavit pertained specifically to Docket No. 00-0393, which is the second proceeding in which the ICC was required to rule on line cards. Since the ICC order in Docket No. 00-0393 did not contain the language pertaining to the limitation cited above, Dr. Ransom's interpretation is understandable. However, when one considers the ICC's previous decisions, such as the one in Docket No. 00-0312/0313, cons., with regard to line cards, it is apparent that the Commission would not allow a situation as described by Dr. Ransom to occur. Nevertheless, the ICC has voted to rehear this issue in Docket No. 00-0393 and most likely will provide greater clarity to this issue in order to avoid further misinterpretations.

[2] Affidavit of Dr. Neil Ransom of Alcatel USA, Inc., paragraph 4 ("...foreign or non-authorized line cards...") ("...line cards not manufactured or licensed by Alcatel..."); paragraph 5 ("...line cards designed for other systems...").

If you require additional information or have further questions, please feel free to contact me at your convenience.

Sincerely,



Terry S. Harvill
Commissioner

Mr. GOODLATTE. That being the case, we will move on to Mr. Barr and give him the opportunity for my few remaining seconds to comment any further on the Blumenfeld decision.

Mr. BARR. The *Goldwasser* decision?

Mr. GOODLATTE. *Goldwasser*, I'm sorry. [Laughter.]

Mr. GOODLATTE. The *Goldwasser* decision criticized by Mr. Blumenfeld.

Mr. BARR. Right. As I say, *Goldwasser* is not an outlier by any stretch of the imagination. It represents the black letter law in this area. Recently, specifically on the issue of the Telecommunications Act, three district courts have reached the same result. The issue is being considered right now in the 11th Circuit. If there's a difference there, the issue will ultimately go to the Supreme Court, and I'm confident that they will agree with the *Goldwasser* court that, again, on the third prong of what *Goldwasser* was talking about, the fundamental issue is, who decides?

When this antitrust law says they want some kind of reasonable accommodation or access and Congress has passed a statute to provide that and said the FCC should make those rules through a legislative rulemaking process, the idea of throwing that to 800 judges is just preposterous. You know, I'm pretty familiar with the antitrust laws. I don't see anything in there that says 45 days is mandated by the antitrust law. But if the FCC says 90 days is reasonable, I just don't see throwing that out to judges in the country and juries to come up with different rules as to what's reasonable or not.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. Will the gentleman yield? Mr. Barr, since we have son of *Goldwasser* coming up from the 11th Circuit, do you think that the prudent thing for Congress to do is to hold back on dealing with this entire subject until we do have a determination by the Supreme Court on exactly the extent to which the antitrust laws apply?

Mr. BARR. Well, I think it would be imprudent to address *Goldwasser* and the relationship between antitrust and section 251 at this stage. But I don't think that all telecommunications legislation should be held up for that.

Chairman SENSENBRENNER. The crux of this entire debate is whether the Telecommunications Act does require antitrust consideration being used in determination of whether or not telecommunications activities are monopolistic or not. And it seems to me—you know, I think you're right. I agree with you that having 850 Federal courts reach differing conclusions on this will be a hodgepodge that flies directly in the face of the 1996 act, which was designed to have a uniform playing field in this area. But I think this Committee felt that implicit in the 1996 act was not a preemption of standard antitrust considerations in determining what was monopolistic and what was not.

You know, carrying this on to the whole issue of broadband, the RBOCs have got monopolies that are regulated over their local phone service. State public utility commissions get involved in that. They are attempting to use their assets that are regulated, meaning the phone wires into all of our houses, to go into an area that is unregulated, and I think the complaint by the long distance car-

riers and the cable carriers is that that's not fair and that's monopolistic. So it's up to Congress to determine that question one way or the other. Tauzin and Dingell have one solution to the problem. Cannon and Conyers have another solution to the problem.

But incumbent on that, isn't a determinative ruling by the United States Supreme Court, which is binding on all Federal courts, at least those that decide to follow precedent, a way of attempting to give Congress a roadmap on what our legislative options are rather than speculating on what courts would do?

Mr. BARR. I don't think so. I think that we're talking about two different markets. I think you put your finger on it, which was we have discovered spectrum on our pipes that can be used in a different market, and that market is already a competitive market and it's a market that people should be encouraging competition in, and I think Congress could move in that direction, and I think that the issue here that's being discussed is looking through the rear view mirror at the section 251 obligations on the local exchange assets and trying to impose an additional layer of enforcement on the theory that the things aren't working now and that these poor CLECs don't have any redress, and it's nonsense.

You know, their claims have been looked at. We are getting into—the ILECs are getting into long distance. They have plenty of forums to go to get these claims resolved. There are millions of objective measurements out there as to whether we're performing our job. This should not be in dispute. Look at the numbers. If we fail, we pay. And I think that there's no case that has been made for the approaches that are being taken in this legislation that would just open the floodgates of litigation.

Chairman SENSENBRENNER. The gentleman from Alabama has been very patient and is recognized for 5 minutes.

Mr. BACHUS. Thank you, Mr. Chairman.

First, let me say that if Congress had not wanted the Bells in the long distance service, they wouldn't have passed legislation to allow them in. At the time that we did that, we put requirements on them and a year ago, we could be having this hearing and wondering if they're working. Can we all agree that the market's opening today?

Mr. BLUMENFELD. I think it is certainly right that the markets are opening gradually under the auspices of the act, particularly the processes that have been put in place to give reality to this section 271 checklist.

Mr. BACHUS. Mr. Blumenfeld, I agree with your opening. You say gradually. Now, they doubled this last year, did they not?

Mr. BLUMENFELD. Yes, they have, but going from two to four is also a doubling and that's still gradual.

Mr. BACHUS. Well, but doubling is—can you think of anything that's growing faster than the doubling of a market in a year?

Mr. BLUMENFELD. I think that new markets tend to grow—can tend to grow very quickly, but you're starting with very small numbers.

Mr. BACHUS. And it is growing very quickly.

Mr. BLUMENFELD. I think there's no question that local competition is much more significant now because of the act than it was before the act.

Mr. BACHUS. Right, and if it's growing and yet we add another procedure, I think it would be more honest for us, if we didn't want the Bells in it, just to take them out.

Mr. BLUMENFELD. I don't think, Congressman, that we're adding another procedure. All that we're saying is that Congress meant it when it said that the antitrust laws continue to apply and that the *Goldwasser* court, when they said the act is more specific legislation that must take precedence over the antitrust laws, was just wrong. The antitrust laws are independent obligations that always apply, whether or not there's an act.

Mr. BACHUS. Let's go into that. I mean, you've raised that. The legislation H.R. 1698 deems violation of sections 251, 252, 271, 272 as violation of the antitrust laws. Now, you know who enforces the Communications Act, don't you? Who is that?

Mr. BLUMENFELD. Well, it's actually enforced by a combination of the FCC, the District courts, and the State commissions, depending on what provision we're talking about.

Mr. BACHUS. Well, but the FCC enforces whether an entity is complying with the act or not, right?

Mr. BLUMENFELD. It's one of the agencies that enforced it, yes.

Mr. BACHUS. I mean, at least now, with the court's interpretation, they've said the Congress legislated and set up this regulatory thing and that was the FCC.

Mr. BLUMENFELD. Yes, that's correct, and it was true under the '34 act, that is, prior to the '96 amendments, that the FCC regulated, among other things, interconnection among carriers in sections 201, 202, 203, 204——

Mr. BACHUS. Well, you know, if——

Mr. BLUMENFELD [continuing]. But the antitrust laws always applied there. No one ever thought—well, the Bell system always argued that they didn't, but the courts always found that the antitrust laws still applied, despite the fact that there was a regulatory regime that also applied, just the same way that in any body of laws, if the securities laws apply to certain conduct, even though the criminal laws also apply to some of that overlapping conduct.

Mr. BACHUS. Let me ask you this. Now, the FCC doesn't enforce the—they're not the enforcement agency for the antitrust law.

Mr. BLUMENFELD. That's correct.

Mr. BACHUS. Let me switch gears with you. What about the data market? Cable serves 75 percent of the market. The remaining 25 percent is split between DSL, wireless, and satellite. Shouldn't all the providers of broadband be regulated in the same manner? You've advocated we regulate the Bells.

Mr. BLUMENFELD. I've advocated that we continue to enforce the act, which contemplated that among the other new uses to which the network would be put would be data and Internet related. COMPTEL has previously submitted an indication that in their study, the terms "Internet" and "broadbands" or "data" were mentioned no less than 500 times during the floor debates on this act. The Verizon, then Bell Atlantic, annual report of 1996, the Chairman's letter spends probably a quarter of its time talking about the growing importance of data and the country is moving to DSL.

Mr. BACHUS. I understand that. The growth is in data, we all agree on that. And the cable is supplying 75 percent of that service.

Mr. BLUMENFELD. But I have to say that the Bell companies argue that they're at a huge disadvantage against this giant cable——

Mr. BACHUS. I'm not talking about—that's their argument. My point to you is the cables are unregulated.

Mr. BLUMENFELD. Well, cable is actually not unregulated. Cable is regulated at the local level. So if we want to talk about 850 different regulators——

Mr. BACHUS. But you——

Mr. BLUMENFELD [continuing]. There are probably several thousand regulators——

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. BACHUS. I guess my question—could I just ask, do you disagree that they ought to be subject to the same regulation?

Mr. BLUMENFELD. I think that the telephone companies should be subject to the rules that are in the '96 Telecom Act, even if they compete for some services with cable companies who are subject to a completely different regime of regulation, but also at both the State and the local—I'm sorry, the Federal and the local level.

Chairman SENSENBRENNER. I have one other series of questions in order to have the record complete. We've heard a lot today and elsewhere that the RBOCs do not make a lot of money on residential service, and this is one of the reasons why CLECs and other competition do not wish to offer residential service to consumers. I have also been told that most State public utility commissions do not allow a phone company to find out whether a person who has applied for lifeline-type service is actually below the poverty level, and in California, 32 percent of the total residential phone lines are on the lifeline low-rate service.

I assume that while the percentages might be a little different in Illinois, Mr. Harvill, that the lowered revenue as a result of lifeline service being provided by Ameritech there is taken into account by your Commission in terms of determining what type of rate of return Ameritech gets on its regulated services, so they're still guaranteed their rate of return on their regulated services even if a lot of people who really shouldn't be paying the lifeline rate because their incomes are high have applied for it and they can't be questioned on whether they're really poverty-stricken folks. Am I correct in that assumption?

Mr. HARVILL. Let me clarify that in one way. Ameritech Illinois has been subject to alternative regulation in Illinois for 6 years. As such, they've been subject to price cap regulation as opposed to rate of return regulation. I think right now, we're in the process of reviewing the alt reg case before the Illinois Commerce Commission and it's a question as to whether or not it will continue or stop. More than likely, I'm assuming it will continue. I have no reason to believe that it wouldn't.

At the same time, I think it's very clear that under that alternative regulation program that Ameritech has been under for 6 years, both the company has done extraordinarily well—we're talking returns on equity of close to 40 percent—and consumers have done pretty well. There have been numerous annual rate reductions associated with the formula that's been utilized. So we don't really look at it in terms of that.

Ameritech Illinois has argued that, yes, there should be some rate rebalancing done in the context of this review. That's something we're taking under consideration. And if there are, indeed, services that are below water, more than likely the Commission will be very cognizant of that fact and raise them to where they are actually above water.

Mr. BLUMENFELD. Mr. Chairman? I'm sorry——

Chairman SENSENBRENNER. Yes, Mr. Blumenfeld?

Mr. BLUMENFELD. If I might just make one comment, I have litigated rate cases and cost cases against the ILECs in numerous States throughout the country, in all of which this claim is made that there are many services provided below cost that are subsidized by other services.

There are two things that are important to recognize. First of all, if you look at the history of telecommunications, every time, going back 40 years, there's been an effort to enter any segment of the market, the incumbent provider always argued that that happened to be the exact segment of the market that was providing a subsidy to all of the other segments that were below cost. And then as a different segment came up for competition, that became the exact segment that was providing a subsidy for all of the other segments that were below cost. So this is a constantly shifting target.

Secondly, when you look at the telephone companies' own cost studies, their own incremental cost studies, which, in the context of these alternative regulation cases, they submitted in order to show what price floors they would have for each of these services, their own incremental cost studies showed in almost every single case across the country, that I was involved in, at least, and, therefore, where I know the data, that there are none of their services are being provided at prices that are below the incremental cost of the service, which includes a reasonable return, that is, the return that's attainable in a competitive market.

Chairman SENSENBRENNER. And that includes lifeline service, Mr. Blumenfeld?

Mr. BLUMENFELD. Lifeline service is different in that, frequently, there is a subsidy from a public fund source back to the telephone company that makes up the differential between the lifeline charge and the total charge, and the California example that you mentioned is interesting because California did a controlled study on this cheating question, that is, since there's self-certification, how much cheating is there, and they found that with the two control groups, that there turned out to be a remarkably small amount of cheating. That is, the number of families that qualified under a rigid screen were essentially the same as the number of families that self-reported. So they concluded to continue with self-reporting because, in fact, the sort of the social opprobrium of self-reporting yourself as being below the poverty line was an effective check at keeping people from getting lifeline service who didn't merit it.

Chairman SENSENBRENNER. Mr. Barr, you look like you're suppressed. [Laughter.]

Mr. BARR. Thank you, Mr. Chairman. Even the FCC and the Supreme Court recognize that this is a serious problem and that there are substantial cross-subsidies in the marketplace, and that unless they are addressed, competition will go where there's margin and,

quote, "leave the ILEC holding the bag," as the Supreme Court said.

I didn't understand what Mr. Blumenfeld was talking about, because obviously, when someone goes in to compete for a particular product, they're looking for margin, and if there's margin in a local product, it is subsidizing a product in which there is no margin. So the fact that it's moving around—the subsidy can be found in products that have margin shouldn't be a surprising fact. That is the nature of cross-subsidy.

The notion that we somehow are compensated for this in the rate of return simply doesn't exist as the market is opened to competition. Where do we get that recovery? As the FCC pointed out, being able to assure a rate of return becomes non-viable and non-sustainable as the market is opened to competition. Where do we pick up that revenue? If they try to add it to a product, all that does is make it a more attractive product for somebody to come in and cherry pick. So we're not compensated for this, and this is one of the major problems of the Telecom Act.

Mr. BLUMENFELD. If I may, just very briefly, Mr. Chairman, now we're at the nub of what makes a monopoly a monopoly, because now we're not using subsidy in the economic sense of providing a cost shifting to a service that would otherwise be below cost. Now what we're saying is some services are more profitable than other services——

Mr. BARR. Excuse me. I was talking about below cost——

Mr. BLUMENFELD. I know——

Mr. BARR [continuing]. And I was saying that the FCC itself——

Chairman SENSENBRENNER. Should I flip a coin on who gets the last word? [Laughter.]

Mr. BLUMENFELD. We can just speak simultaneously, I think, and then just——

Chairman SENSENBRENNER. I've noticed that. [Laughter.]

Chairman SENSENBRENNER. I think it's time to shut this hearing off. I'd like to thank you all——

Mr. BACHUS. Mr. Chairman?

Chairman SENSENBRENNER. Yes, Mr. Bachus?

Mr. BACHUS. Could I ask one follow-up question as a result of your question?

Chairman SENSENBRENNER. If you do not tip over the beehive.

Mr. BACHUS. Mr. Blumenfeld, you mentioned you're an antitrust lawyer or your firm handles antitrust legislation?

Mr. BLUMENFELD. Yes, sir.

Mr. BACHUS. So, actually, you're not a disinterested witness.

Mr. BLUMENFELD. I don't think that anyone who's knowledgeable enough to appear before the Committee is entirely disinterested.

Mr. BACHUS. I see.

Mr. BLUMENFELD. I never pretended to be disinterested. I'm interested.

Mr. BACHUS. Oh, and I'm not accusing you of representing that. I just point out that this legislation, as many of us said, would result in a lot of lawsuits, and that would certainly benefit antitrust lawyers.

Chairman SENSENBRENNER. You know, let me state that, first of all, I'd like to thank all four of you for your patience and your ex-

cellent testimony and answers to our questions. You were not selected as disinterested witnesses. I think if we wanted somebody truly disinterested, we would get somebody from the Federal Communications Commission, in which case I would hear about that from the Chairman of another Committee. [Laughter.]

Chairman SENSENBRENNER. But I think that you have shed an awful lot of light on a lot of the questions that we have had. This debate will resume in the couple of weeks with four other witnesses who are equally interested in the outcome of this debate.

And if there's no further business to come before the Committee, the Committee stands adjourned.

[Whereupon, at 5:53 p.m., the Committee was adjourned.]

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ORIGINAL

April 3, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND

Magalie R. Salas, Esq., Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
12th Street Lobby, TW-A325
Washington, D.C. 20554

EX PARTE OR LATE FILED

Re: *CC Docket No. 98-184; Ex Parte Filing*

Dear Ms. Salas:

Enclosed are two copies of a letter from William P. Barr, with attachments, to be filed on the public record in the above-referenced docket. By copy of this letter, I am hand delivering this document to the persons listed below.

If you have any questions, please contact me.

Very truly yours,

Steven G. Bradbury

Enclosure
cc (w/encl.): Dorothy Attwood
Robert Atkinson
Rebecca Benyon
James Bird
Michelle Carey
Kyle Dixon
Jordan Goldstein
Johanna Mikes
Paula Silberthau
Lawrence Strickling
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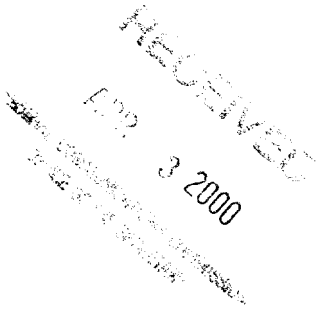
April 3, 2000



Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: ***GTE Corp. and Bell Atlantic Corp., CC Docket No. 98-184***

Dear Ms. Salas:

I am writing on behalf of Bell Atlantic and GTE in support of our proposal to spin off GTE Internetworking to an independent corporation 90% owned and controlled by public shareholders while retaining an option to increase our 10% equity interest in the future upon securing 271 relief. For the reasons outlined in our prior submissions and below, we believe our original proposal is both lawful and strongly in the public interest. In the interest of obtaining expeditious approval, however, we are modifying that proposal in certain respects described below to eliminate any conceivable remaining concerns. With these modifications, the proposal should be promptly approved.

OVERVIEW AND SUMMARY

Proposed DataCo Structure

Our proposal to eliminate the section 271 issues relating to GTE Internetworking ("GTE-I") was initially set forth in our Supplemental Filing of January 27, 2000 ("Supp. Filing"). Attached as Exhibit A to this letter is a comprehensive description of the proposal containing certain modifications we are now making. Briefly, that proposal, as modified, is as follows: GTE-I will become a separate public corporation ("DataCo") that will be 90% owned and controlled by public shareholders. The merged Bell Atlantic/GTE ("NewCo") will own only a 10% interest in DataCo with an option to increase its interest once it receives sufficient interLATA relief to operate the business.

Through an initial public offering, or "IPO," public shareholders will purchase shares of DataCo Class A common stock, which will initially carry 90% of the voting rights and the right to receive 90% of any dividends or other distributions. In exchange for relinquishing ownership and control of GTE-I, NewCo will receive shares of Class B stock of DataCo that will have 10% of the

voting rights and the right to receive 10% of any dividends or other distributions. NewCo will also have the option, in the form of conversion rights, to increase its ownership in the future once it receives sufficient interLATA relief to operate the business. The Class B shares will be convertible into new shares that will represent up to 80% of the outstanding stock of DataCo.

The Bell Atlantic/GTE merger would close as soon as the IPO has been completed. (We are withdrawing our original proposal to close upon transfer of Class A shares to the investment banks.)

NewCo's conversion rights will be exercisable within five years from the closing of the merger. In order to exercise its conversion rights so as to own and control DataCo, NewCo must be able to operate DataCo in compliance with any section 271 restrictions. NewCo will thus have five years to eliminate those interLATA restrictions. If, by the end of five years, NewCo has eliminated such restrictions on at least 95% of its 271-restricted lines, NewCo may petition the Commission to obtain at least one more year to eliminate the remaining restrictions.

Just as GTE is free to sell GTE-I today to a third-party buyer, NewCo would have the right at any time to sell its shares. Contrary to AT&T's suggestion, the saleability of an option does not change its nature and make it a current equity interest, nor does it impact incentives to obtain 271 relief. Our proposal in fact creates powerful positive net incentives to obtain 271 relief, since DataCo is a unique asset that will be integral to NewCo's national data strategy. If it were to sell its DataCo shares to a third party, NewCo would be abandoning this opportunity.

Nevertheless, as a voluntary undertaking to further enhance incentives, we are proposing that NewCo would be foreclosed from retaining proceeds from such a sale to the extent they are attributable to DataCo's provision of interLATA services in states where NewCo has yet to obtain long distance relief.

Specifically, if NewCo sells its shares before it has eliminated interLATA restrictions on at least 50% of its restricted lines, NewCo will only be allowed to retain those sale proceeds equal to the amount it would have received if it had sold DataCo at the time of closing and reinvested the proceeds. Thus, NewCo would be no better off than if it had sold its interest in DataCo to a third party before closing the merger. If, on the other hand, NewCo sells its shares after achieving the 50% mark, then it will forgo the sale proceeds to the extent they represent gain attributable to those Bell Atlantic states in which 271 restrictions still apply.

Until NewCo exercises its option, DataCo will be independent of NewCo. The public shareholders will have 90% voting control, and DataCo will have an independent board of directors, initially consisting of 10 directors. One member will be the CEO of DataCo and eight of the remaining nine directors will be outside directors who will have no affiliation with Bell Atlantic or GTE. The tenth director will be elected by a class vote of the Class B shares and will not be eligible to serve as chairman. We are modifying our original proposal to provide that, following the IPO,

during the next three annual elections, the board will be expanded to 13 members and a majority (at least seven) will be new members who will be nominated and elected to the board for the first time after the IPO. (*See* Exhibit B.)

NewCo's interests as a minority investor with an option to acquire a controlling interest in the future will be protected by certain reasonable investor safeguards. These are both typical of the rights commonly held by option holders or other prospective acquirers and modeled on investor protections that have regularly been permitted by the Commission. The applicants have modified their proposal by eliminating or paring back several of these investor safeguards. (*See* Exhibit C.)

The GTE-I business being placed in DataCo provides Internet backbone and related data services. DataCo does not provide traditional switched long-distance voice service. As will be discussed below, this substantially lessens any theoretical risk of discrimination, since DataCo is not highly dependent upon Bell company local exchange facilities. DataCo's business plans do not contemplate acquisition of a traditional switched long-distance voice provider. Bell Atlantic and GTE will agree that NewCo would not consent to DataCo's acquisition of a traditional switched long-distance voice provider unless and until the Commission has reviewed and approved such acquisition.

The DataCo solution will preserve the integrity and competitiveness of GTE-I's existing business while also preserving NewCo's ability (contingent on the necessary interLATA relief) eventually to acquire control of DataCo and bring to market the full range of long-term Internet and data benefits promised by the Bell Atlantic/GTE merger. In the meantime, this solution will enable customers to begin realizing immediately some of these important data benefits, since a significant portion of DataCo's business will be outside the Bell Atlantic region or in in-region states, such as New York, where Bell Atlantic has achieved 271 relief. Accordingly, NewCo will market DataCo services (or the two companies will market their services jointly) as and where permitted by law, pursuant to a marketing agreement that we are submitting to the Commission today. (A summary of that agreement is contained in Exhibit D.) NewCo will not participate in marketing any of DataCo's interLATA services in any 271-restricted state. All terms in the marketing agreement are non-exclusive and the agreement is one that both Bell Atlantic and GTE could enter into today with any similarly situated company.

Consistent with the fact that DataCo and NewCo will each be independent public corporations whose directors and officers will owe duties of care and loyalty to their respective shareholders, all other commercial interactions between the companies will also be conducted pursuant to commercially reasonable contracts. In particular, NewCo will provide certain necessary services to DataCo on a transitional basis, just as NewCo would need to do even if DataCo were divested to an unaffiliated third party purchaser. All of these transitional services contracts are for one year or less and are terminable at any time at DataCo's election without penalty. We are submitting copies of these contracts for the record, and they are summarized in Exhibit D.

Finally, we will agree to hire an independent auditor, acceptable to the Chief of the Common Carrier Bureau, to monitor NewCo's ongoing compliance with the terms of Exhibit A.

The Proposed Structure Is Lawful and Fully Satisfies Section 271

As I will discuss at length below, the DataCo proposal is fully consistent with the requirements of the Communications Act and is amply supported by basic legal principles and a host of precedents, including the Commission's own prior rulings and precedents from Judge Greene under the MFJ. All of these precedents establish that DataCo will not be an "affiliate" of NewCo. In particular, the consistent rule of law, repeatedly affirmed by the courts and this Commission, is that an option or other convertible interest, like NewCo's option in DataCo, does not constitute *per se* ownership or control. Moreover, all of the features of our proposal, including the 90% public voting control, the independent board and the contractually specified commercial relationships, will ensure that NewCo does not exercise actual control over DataCo. In support of our legal analysis is a Second Supplemental Declaration of Professor Ronald J. Gilson ("Gilson Second Supp. Decl."), attached hereto as Exhibit E.

None of the arguments offered by AT&T in opposition to this proposal have any force. AT&T cites no authority that undercuts the basic legal principle that options are not ownership. In the end, AT&T's arguments come down to a matter of policy, and only prove that the Commission's acceptance of the DataCo structure is a matter of discretion that turns on whether our proposal is consistent with the objectives of section 271.

The DataCo structure is manifestly consistent with the policies underlying section 271, and, indeed, it affirmatively advances those policies. This proposal will *increase* the net incentives of NewCo to complete the 271 process as soon as possible, since reacquiring ownership and control of DataCo in the near future is the key to NewCo's national data strategy. The Commission only recently recognized in the *Qwest/U S WEST Merger Order* that just such a prospect creates "powerful new incentives" to complete the 271 process. At the same time, our proposal creates a bigger "stick" to compel prompt 271 compliance, since the loss of the unique benefits offered by owning DataCo would be a blow to NewCo's long-term business plans.

Although no sale of NewCo's option could compensate for such a loss, the voluntary undertakings that we are now including in our proposal will enhance these positive incentives even further by expressly limiting NewCo's ability to realize value from such a sale in proportion to NewCo's progress in attaining 271 relief. This proposal, as modified, also ensures that NewCo will not receive any material benefits uniquely attributable to DataCo's interLATA operations in states where it has not yet received long distance relief.

Finally, the acceptance of our proposal holds no risk of creating a precedent that will lock the Commission in to approving other option arrangements that might be proposed by other Bell

companies. The features of our proposal make it highly unlikely, as a practical matter, that any similar arrangement will be proposed in the foreseeable future, particularly one involving a large, integrated interexchange carrier, since, as part of our proposal, we are ceasing to offer traditional voice long-distance service in the Bell Atlantic region – something no large IXC could do. Moreover, the unique attributes of DataCo, and the important competitive role it plays in the Internet backbone market, provide ample grounds to distinguish this case from future cases in terms of the policies of section 271 and the public interest benefits of the Bell Atlantic/GTE merger.

DISCUSSION

I. Basic Legal and Policy Principles Fully Support Our DataCo Proposal.

It is time to clear away the fog generated by AT&T's multiple submissions and refocus on the core principles that should undergird the Commission's analysis of the DataCo proposal.

Sections 3(1) and 271 of the Communications Act provide that a regional Bell company may not "own" or "control" an entity that provides in-region interLATA service. The term "own" is defined to mean "to own an equity interest (or the equivalent thereof) of more than 10 percent." Under our proposal, NewCo's Class B shares will contain an option that, upon exercise in the future, would allow NewCo to acquire an equity interest up to 80%. In addressing whether NewCo's possession of this option is consistent with sections 3(1) and 271, it is useful to lay out an organizing structure for the analysis. Logically, there are two separate and distinct questions before the Commission:

(1) Whether the plain language of section 3(1)'s "affiliate" definition, on its face, mandates a conclusion that NewCo's option, *as a matter of law*, constitutes prohibited equity ownership or control, such that the Commission has no discretion to approve our DataCo structure?

(2) If the answer to the first question is no, the second question involves a *policy* judgment: Whether it is reasonable and appropriate for the Commission, in the exercise of its policy discretion, to accept the overall DataCo proposal on the ground that this proposal is consistent with, and even advances, the objectives of section 271?

As we demonstrate below, well-settled principles of law, as well as precedents in a host of contexts, including Commission and MFJ precedents, clearly establish that options do not constitute ownership or control. Thus, NewCo's option cannot constitute equity ownership or control *per se*. For the Commission to hold otherwise would require a substantial deviation from prior precedents.

Although AT&T has tried to clothe its arguments in *per se* terms – to argue that our option must be viewed as a violation of section 3(1)'s plain terms and that the Commission is foreclosed from considering 271 policies in evaluating our proposal, *see* AT&T March 10 Ex Parte at 1-2;

AT&T March 22 Ex Parte at 11-12 – AT&T's core arguments are, in fact, policy arguments in disguise. They rest not on the plain meaning of section 3(1), but on questions that call for exercise of the Commission's prudential discretion.

Once it is seen that AT&T's *per se* arguments are without force, the real question at issue is squarely within the policy discretion of the Commission: whether the DataCo structure is a reasonable and acceptable means to preserve and even enhance the objectives of section 271. Once the issue is properly framed, the fact that the DataCo structure is consistent with the purposes of section 271 (and, indeed, will advance those purposes by creating a powerful new incentive for NewCo to achieve 271 relief), while conferring on NewCo no ability to control the management of DataCo, fully justifies the Commission's acceptance of our proposal.

A. NewCo's option is not equity ownership.

1. Under the plain terms of section 3(1), NewCo's option is not an equity interest or its equivalent.

NewCo's right to convert its Class B shares into new shares representing up to an 80% interest in DataCo is a classic option.[1] It is black-letter law that options do not constitute present "ownership" or "equity," but only the right to acquire ownership in the future.[2] This is because an option (before exercise) confers no right to vote, to participate in corporate earnings, or to participate

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[1] *See* Declaration of Professor Ronald J. Gilson ¶¶ 14, 16 (Feb. 22, 2000) ("First Gilson Decl."), appended to Response of Bell Atlantic and GTE in Support of Proposal to Transfer GTE Internetworking to a Separate Corporation Owned and Controlled By Public Shareholders (filed Feb. 22, 2000) ("Response"); Supplemental Declaration of Professor Ronald J. Gilson ¶ 7 n.3 (Mar. 14, 2000) ("Gilson Supp. Decl."), appended to Bell Atlantic/GTE's March 14 Ex Parte; Gilson Second Supp. Decl. ¶ 3 & n.1.

[2] *See, e.g.*, *Western Union Tel. Co. v. Brown*, 253 U.S. 101, 110 (1920) ("An option is a privilege given by the *owner* of property to another to buy the property at his election. It secures the privilege to buy and is not of itself a purchase. The owner does not sell his property; he gives to another the right to buy at his election.") (emphasis added); *O'Brien v. United Home Life Ins. Co. of Ind.*, 250 F.2d 483 (6th Cir. 1958); James on Option Contracts § 501 (1916) ("the weight of authority" "holds that an option contract to purchase does not vest any estate, legal or equitable, in the optionee prior to his election to purchase"); 12A Fletcher Cyclopedia of Private Corp. § 5575 (1993) ("An option to purchase stock does not vest in the prospective purchaser an equitable title to, or any interest or right in, the stock."); 18B Am. Jur. 2d *Corporations* § 1960 (1985) ("Since a stock option does not obligate the optionee to buy the shares offered, it gives him no right or title to such shares unless he accepts the offer in accordance with its terms . . ."). *See also* Supp. Filing at 35; Response at 8 n.8 (citing additional cases).

in dissolution proceeds[3] – the three traditional indicia of equity ownership. Gilson Second Supp. Decl. ¶ 3; First Gilson Decl. ¶ 10 n.5. It makes no difference whether the exercise price is fixed,[4] or whether, as here, exercise is accomplished through conversion of another instrument. First Gilson Decl. ¶ 14. For the same reason, the general rule is that option holders may not bring shareholder derivative suits because they lack the requisite "proprietary interest" in the corporation.[5] The bottom line is that options do not constitute ownership until they are exercised. First Gilson Decl. ¶ 19 ("only exercise or conversion transforms an option into equity").

Thus, the plain and ordinary meaning of "equity interest" in section 3(1) unambiguously excludes options, and the mere holding of an option cannot mean that NewCo owns an equity interest in DataCo. *See, e.g., Association of Flight Attendants v. USAir, Inc.*, 24 F.3d 1432, 1435 (D.C. Cir. 1994) ("USAir has no present *equity interest* in Shuttle, but it has an *option* to purchase a controlling interest in the company effective October 10, 1996.") (emphasis added). This has been the invariable principle in a host of contexts.[6]

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[3] First Gilson Decl. ¶ 16. *See also Bright v. Lord*, 51 Ind. 272 (1875) (stock option holder gets no dividends before exercise of option).

[4] 67 Am. Jur. 2d *Sales* § 136 (1985).

[5] *See Harff v. Kerkorian*, 324 A.2d 215, 219 (Del. Ch. 1974), *rev'd on other grounds*, 347 A.2d 133 (Del. Super. 1975); *Kusner v. First Pennsylvania*, 395 F. Supp. 276 (E.D. Pa. 1975), *rev'd on other grounds*, 531 F.2d 1234 (3d Cir. 1976); 19 Am. Jur. 2d *Corporations* § 2346 (1986).

[6] AT&T cites no cases to refute the general rule that an option to purchase property confers no right in the underlying property until exercised. Instead, AT&T futilely tries to distinguish the various cases we cited in our Response at 8 n.8. *See* AT&T March 22 Ex Parte at 13 n.20. AT&T's argument that "state" corporate law cases are irrelevant is puzzling, given that corporate law is generally a matter of *state* law. *See* BA/GTE March 14 Ex Parte at 9 n.4 (citing *Burks v. Lasker*, 441 U.S. 471, 478 (1979)). AT&T dismisses *Martin v. Schindley*, 442 S.E.2d 239 (Ga. 1994), and *Thacher v. Weston*, 83 N.E. 360, 361 (Mass. 1908), on the sole ground that those cases involved options to purchase *real* property rather than stock. But the fact that the general rule applies to *all* property and not just stock simply confirms that it is a *general* rule of black-letter law that options do not confer ownership. AT&T concedes that *Ball v. Overton Square, Inc.*, 731 S.W.2d 536 (Tenn. Ct. App. 1987), held that "an option to purchase stock does not vest in the prospective purchaser an equitable title to, or any interest or right in, the stock," *id.* at 540, but AT&T nonetheless professes it "ironic" that we rely on *Ball* because, in its view, that case "did not disagree" with the trial court's conclusion that "the option gave its holder 'control' over the firm." AT&T March 22 Ex Parte at 13 n.20. The only "irony" is that AT&T misreads as *failing* to disagree with the trial court the very portion of the *Ball* opinion in which the appellate court stated, "We disagree with the trial court's ruling," and vacated the trial court's judgment on this point. 731 S.W. 2d at 540-41 (vacating and remanding trial court judgment). Finally, AT&T finds it "unintelligible" that we rely on *Nerken v. Standard Oil Co.*, 810 F.2d 1230 (D.C. Cir. 1987), because that case turned on the meaning of the term "outstanding common stock" rather than on

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This general principle of law – that options are not equity ownership until exercised – explains why the acquisition of an option, warrant or similar convertible interest does not trigger Hart-Scott-Rodino merger review under the antitrust laws. *See* 16 CFR § 802.31 (exempting acquisition of "convertible voting securities" from HSR reporting requirement). Only the "subsequent conversions" of such interests trigger review. *Id.*

Not surprisingly, the same principle pervades the Commission's own precedents. The Commission has consistently followed the traditional rule by finding that options, warrants and other convertible securities are not current ownership interests but only "potential future equity interests."[7] Accordingly, in all contexts where the Commission enforces ownership limits in order to safeguard competition, the Commission has consistently ruled that options and other convertible interests do not count as ownership. These include the Commission's CMRS spectrum cap rules,[8] its LEC/LMDS cross-ownership rules,[9] its application of section 310's foreign ownership ban,[10] its broadcast attribution rules,[11] and its cable attribution rules.[12]

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[6] (...continued)
"whether a prospective right to own stock is ownership under the law generally." AT&T March 22 Ex Parte at 13 n.20. As we explained in our prior submission, the passage of *Nerken* that AT&T cites also states the general rule that "one is not an owner of common stock prior to conversion of the preferred or before an option to buy has been exercised." 810 F.2d at 1232. And a later portion of *Nerken* that AT&T conveniently omits from its discussion goes on to hold – with respect to a different instrument – that the acquisition of an option to buy common stock does not constitute present ownership of the stock itself. *Id.*

[7] *Biennial Review of Spectrum Aggregation Limits*, Report and Order, WT Docket No. 98-205, ¶ 8 (Sept. 22, 1999). *See In re Woods Communications Group*, 12 FCC Rcd 14042, ¶¶ 13-14 (1997) (characterizing options as "future equity holdings" and "possible equity interests").

[8] 47 CFR § 20.6(d)(5) (CMRS spectrum cap rules) (excluding options, warrants and other conversion rights from attribution).

[9] *Id.* § 101.1003(e)(5) (LEC/LMDS cross-ownership rules) (same).

[10] See BBC *License Subsidiary*, 10 FCC Rcd 10968, ¶ 20 n.12 (1995) (applying the foreign ownership ban of 47 U.S.C. § 310(b)(4)) ("future interests, such as options and convertible rights, are not relevant to our alien ownership determinations until converted"); *In re GWI PCS, Inc.*, 12 FCC Rcd 6441, ¶ 10 (1997) (same); *In re DCR PCS, Inc.*, 11 FCC Rcd 16849, ¶ 24 (1996) (same).

[11] 47 CFR § 73.3555, Note 2(b) & (f) (broadcast attribution rules) (making clear that options, warrants and other convertible interests are not treated as *per se* ownership interests).

[12] *Id.* § 76.501, Note 2(e) (cable attribution rules) (same).

Finally, the general principle that options are not ownership also underlies the MFJ precedents we have cited (arguably the most relevant legal precedents for the issue at hand, since the MFJ was the direct legal antecedent to section 271). In a long line of cases, the Justice Department approved and Judge Greene allowed options and other conditional interests to be acquired by Bell companies in prohibited businesses, including interLATA businesses. *See* Supp. Filing at 40-43 (summarizing MFJ option precedents); *see also* Response at 12-13. The MFJ precedents alone are sufficient to establish that NewCo's option cannot be, *per se*, a prohibited equity interest for a BOC.

Against this mountain of consistent precedent, AT&T hangs much of its argument on the so-called "equity plus debt," or "ED," rule, adopted by the Commission as part of its cable and broadcast attribution rules.[13] In fact, the ED rule, far from undercutting the general principle that options do not constitute ownership, actually supports our point.

The ED rule, which counts debt as well as equity interests and uses a 33% safe harbor rather than the 10% mandated in section 3(1), is *not* a rule about *ownership*; it is a rule about the *capacity to influence* (and is thus more closely related to control, as I will explain in more depth later).[14] The Commission's discussion of options and the ED rule in footnote 329 of its *Cable Attribution Order* (on which AT&T places such great weight) only reinforces the point that the Commission generally does *not* count options as *ownership* (even options that are immediately convertible). The Commission was using section 3(1)'s affiliate definition on an interim basis in the cable context for purposes of the "LEC test," and Time Warner had argued that options and other convertible instruments that are convertible into voting stock *within 60 days* should be counted as *the "equivalent" of an "equity interest" within the meaning of section 3(1)* because the SEC defines such immediately convertible instruments to be "beneficial interests" (for control purposes) under the securities laws. Time Warner Comments at 8-9 (citing 17 CFR § 240.13d-3 and 15 U.S.C. § 78(*l*)-(n)). The Commission expressly *rejected* that argument and determined instead that options that are immediately exercisable do not equal equity ownership or its equivalent. *Cable Attribution Order* ¶ 129 n.329 ("[w]e disagree with Time Warner"). Thus, footnote 329 shows that even options that are immediately convertible into ownership and control by their holders (in contrast to the situation here, where NewCo's ability to take ownership will be contingent on 271 relief) are not

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[13] *See In re Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd 12559, ¶¶ 35-65 (1999) ("*Broadcast Attribution Order*") (adopting original ED rule); 47 CFR § 73.3555, Note 2(j) (ED rule in broadcast context); *id.* § 76.501, Note 2(i) (ED rule in cable attribution context).

[14] *See Broadcast Attribution Order* ¶¶ 38, 40; *In re Implementation of 1992 Cable Act*, CS Docket No. 98-82, ¶¶ 83, 86, 90, 129 (1999) ("*Cable Attribution Order*").

considered *ownership* by the Commission, and are more properly addressed (if at all) under the *control* analysis.[15]

AT&T's remaining arguments on the issue of equity ownership are patently flawed. To accept them would require overthrowing the traditional rule about options and jettisoning all the prior precedents, including the Commission's.

AT&T's "definitional" argument. First, AT&T argues that NewCo's option must be an "equity interest" because another statute, the Securities Exchange Act of 1934, defines "equity security" for insider trading purposes to include options and convertible securities. Thus, AT&T points to a different term in a different statute that serves a very different purpose. *See generally* Gilson Supp. Decl. ¶¶ 4-16 (discussing at length the "entirely different" purposes of the securities laws); Gilson Second Supp. Decl. ¶ 8. Clearly, the fact that stock options are in certain circumstances regulated as equity securities by the SEC under its disclosure and insider trading rules does not mean that the holders of stock options *own* shares of the company before the options are exercised.[16] They do not, and courts have specifically held that the Securities Exchange Act cannot be read to suggest otherwise.[17]

AT&T's "valuation" argument. AT&T's second argument focuses on the expected market value of the public's Class A common stock. AT&T points to the fact that, because the markets will anticipate the eventual exercise of the Class B option, the public's 90% interest may tend to trade at a value that approximates 20% of the total enterprise value of DataCo. From this, AT&T argues that NewCo must currently own 80%. This argument confuses the valuation the market places on a security with the extent of the ownership rights the security confers. The market valuation will only reflect the expectation that *somebody* will eventually exercise NewCo's conversion rights. But

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[15] When I address the issue of "control" in part I.B of this letter, I will discuss at greater length the Commission's apparent decision in footnote 329 to count such immediately convertible instruments under the ED rule for *control* purposes.

[16] Indeed, AT&T itself recognized that options are not ownership when it omitted any reference to MediaOne's option to acquire an additional interest in Time Warner Entertainment ("TWE") in describing MediaOne's "ownership interest" in TWE in its official filings with the Commission. Bell Atlantic/GTE March 14 Ex Parte at 4 n.2. Thus, when AT&T is under a legal duty to disclose truthfully to the Commission all "ownership interests" it may hold in a relevant entity, its disclosures reveal that AT&T does not really believe its own argument that options are equity interests by definition.

[17] *See Harff v. Kerkorian*, 324 A.2d 215, 220 (Del. Ch. 1974) ("As to the Securities Exchange Act of 1934, 15 U.S.C. Section 78c(a)(11) does define an 'equity security' to include all securities convertible in to stock. However, such definition is expressly limited to use within the Securities Exchange Act, and the rationale of the act and the cases interpreting the act do not warrant a broader application.") (quotation omitted), *rev'd on other grounds*, 347 A.2d 133 (Del. Super. 1975).

that person may not be NewCo; it may be a person who is not subject to 271 restrictions. When valuing outstanding public securities, markets will anticipate any dilution to which the securities may be subject from the future exercise of all options, warrants or other convertible interests. Thus, for example, in valuing the common stock of companies like GTE and Bell Atlantic, analysts will discount share values by the number of options issued to management. This practice certainly does not mean that the shareholders own less equity; nor does it mean that the option holders actually own the company to the extent of the discount.

AT&T's "saleability" argument. AT&T's final argument on ownership focuses on the market value of NewCo's option if sold. Because NewCo can capture the value of its option through a sale, AT&T claims that the option is really an equity interest.

This argument has two parts. First, AT&T maintains that there is no "contingency" to NewCo's option and therefore that it is not a true option. On this point, AT&T is wrong in both law and fact: That an option is vested and has positive value does not make it any less of an option in the eyes of the law. All that is necessary to render an instrument an option is that the holder retains the discretion to exercise.[18] An option is no less an option simply because it has value and can be sold; indeed, options are generally saleable unless otherwise provided.[19] Thus, AT&T's argument proves far too much and would indict all options as ownership. Furthermore, as a factual matter here, NewCo's ability to exercise its option and take ownership and control of DataCo manifestly *will be* contingent on the fulfillment of a substantial condition precedent – namely, securing the necessary relief from section 271's interLATA restrictions. (Although AT&T's "contingency" argument has no legal merit, the voluntary undertakings we have now made remove any conceivable basis to claim that NewCo is *certain* to receive the value of its option, since we have committed that NewCo will forgo proceeds from the sale of its shares – other than the amount it would have received if it had sold DataCo for cash and reinvested the proceeds – in the event it sells before attaining 271 relief on 50% of Bell Atlantic's lines. *See* Exhibit A.)

The second part of AT&T's saleability argument, just like its valuation argument discussed above, simply confuses the market value of an instrument with the extent of ownership rights conveyed by that instrument. AT&T contends that, because NewCo can sell its option and translate

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[18] *See McGuire v. Andre*, 259 Ala. 109, 114, 65 So. 2d 185, 189 (1953) ("the distinguishing feature of an option contract is that it imposes no binding obligation upon the person holding the option"); *Suburban Imp. Co. v. Scott Lumber Co.*, 59 F.2d 711 (4th Cir. 1932) (similar).

[19] *See* 12A Fletcher Cyclopedia of Private Corp. § 5575 (1993) ("The fact that . . . a large profit is expected on resale[] is immaterial so far as the validity of the option is concerned."). *See also id.* ("An option to purchase stock . . . is assignable."); Restatement (Second) of Contracts § 320 (1979); *McNamara v. Commissioner*, 210 F.2d 505 (7th Cir. 1954) (stock option assignable before exercise unless the terms of the instrument restrict its transfer or assignment).

its value into proceeds, the option is really the equivalent of a current equity interest. It is a bizarre concept of ownership advanced by AT&T: that NewCo would make itself more of an owner by selling its option and forever abandoning the possibility of ownership.

The Justice Department (and Judge Greene implicitly) rejected the argument, made then by MCI and others, that if a BOC held an option that could be *sold for market value*, the BOC would have an "immediate equity interest" in violation of the MFJ's interLATA restriction. *See* Supp. Filing at 42-43. This argument was rejected on the grounds that a BOC's *sale* of an option ensured that the BOC would never exercise it – and never hold the present ownership interest that would have triggered the MFJ prohibitions. *Id.* at 43 (quoting Ameritech argument). Similarly, the Commission's rejection, in footnote 329 of the *Cable Attribution Order*, of Time Warner's argument that options that are immediately convertible (*i.e.*, within 60 days) should count as current equity interests also confirms the point. If an option's immediate convertibility into voting stock does not make it a cognizable equity interest, then *a fortiori* the saleability of the option cannot do so.[20]

The fatal flaw in all of AT&T's arguments is the implicit equating of *value* with the extent of equity *ownership*. This flaw is exemplified by AT&T's facile reading of the phrase "equivalent" of an "equity interest" in section 3(1) to include any instrument that is "equal in value" to a corresponding equity interest. AT&T March 10 Ex Parte at 3. One thing is clear from the face of the statute, however: The phrase "equivalent" of an "equity interest" cannot mean anything *more* than interests that convey the same ownership and control rights as equity. *See* Gilson Second Supp. Decl. ¶¶ 11-12. It cannot simply mean anything that has the same value as an equity interest, since that would encompass traditional instruments that are plainly not equity, such as convertible debt (or even cash, for that matter). Any instrument, including an option, that is convertible into voting stock will have a value equal to the present value of the future ownership interest into which it is convertible, but that does not make the instrument, in substance, the "equivalent" of present equity ownership. To the extent there is ambiguity in the term "equivalent," moreover, the Commission plainly has the discretion to construe it in light of the purposes of section 271, which, as Professor Gilson points out, is obviously concerned not merely with *value* equivalence, but with *control* equivalence – the capacity to participate in and exert control over a prohibited interLATA business. *See* Gilson Supp. Decl. ¶¶ 23-28; Gilson Second Supp. Decl. ¶ 12.

In truth, AT&T's argument about value, in all its various forms, is not a legal, but a policy, argument under section 271. The underlying concern is that the market value of the option might

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[20] If it did, then the cash received from the sale of the option would itself constitute the equivalent of an equity interest, an absurd result. *See Harff v. Kerkorian, supra*, 324 A.2d at 220 ("That a bond is convertible at the sole option of its holder into stock should no more affect its essential quality of being a bond than should the fact that cash is convertible into stock effect the nature of cash. Any bond, or any property, for that matter, is convertible into stock through the intermediate step of converting it to cash."); *In re Migel's Will*, 71 Misc. 2d 640, 642 (N.Y. Sup. Ct. 1972) (same).

adversely affect the net incentives of the Bell company to pursue 271 relief because, through a sale of the option, the BOC could capture and retain appreciation in the value of a prohibited interLATA business. I demonstrate below that this policy argument is unpersuasive. It is sufficient here to establish that this argument utterly lacks force as a *per se* legal claim about whether options constitute equity ownership.

* * *

In sum, the plain terms of section 3(1) establish that NewCo's option is not an "equity interest" or its "equivalent," since any other interpretation would require the Commission to depart from general principles of law and the overwhelming weight of precedents, including its own. Thus, if AT&T were truly correct that equity ownership is a pure legal question that must be addressed within the four corners of section 3(1)'s "affiliate" definition, the debate would be over and we would win. At a minimum, in light of the general understanding that options are not equity ownership, it would plainly be a reasonable interpretation of section 3(1) to conclude that NewCo will not "own" an "equity interest (or the equivalent thereof) of more than 10 percent" in DataCo. As I discuss below, to the extent the issue is one that falls within the policy discretion of the Commission, and may be informed by the purposes of section 271, acceptance of the DataCo proposal would clearly be a reasonable and appropriate exercise of that discretion.

2. The conclusion that NewCo does not own DataCo is consistent with, and indeed furthers, the policies of section 271.

Once it is seen that the question of ownership involves a discretionary judgment in light of the policies of section 271, the case for approving the DataCo proposal is powerful.[21]

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[21] As a general definition provision, section 3(1) does not itself supply any policy content, and thus the policy considerations that are relevant here are the underlying objectives of section 271. AT&T claims that because section 3(1) is a general definition that relates to several sections of the Act (including not only 271, but also dialing parity, pole attachment, interconnection and the regulation of such things as obscene calls, pay-per-call services and telemessaging), it must be given a single "uniform" interpretation and cannot be applied differently depending on the policies and purposes of the underlying provision at issue. AT&T March 22 Ex Parte at 11. If AT&T were right that section 3(1) must be construed devoid of policy content, we would necessarily prevail – not only because the plain meaning of section 3(1) supports us, but also because it would make no sense to extend these various other regulatory provisions to encompass option arrangements, which confer on the option holder no capacity to control the activity under regulation. AT&T, however, is wrong as a matter of statutory construction. Section 3(1) does not define the terms "equity interest" or its "equivalent"; therefore, the effect of section 3(1) is simply to incorporate by reference these terms into each separate provision where the word "affiliate" is used and to which 3(1) applies. A common term used in various sections of a statute can be given different meanings depending on the context and

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First, the direct effect of our proposal is to *increase* the net incentives of NewCo to complete the 271 process as soon as possible. As the only independent top-tier Internet backbone, DataCo is a unique asset, and the ultimate ability to reacquire ownership and control of DataCo is the driving force behind NewCo's national data strategy. The motivation to get DataCo back and realize the vertical synergies that can only come from integrating with DataCo will create, in other words, an even bigger "carrot" for NewCo to achieve 271 compliance. The unique value of achieving interLATA relief and integrating with DataCo will far outweigh for NewCo the cash value of selling its option, and thus NewCo will have a powerful overall net incentive to pursue 271 approvals. *See In re Qwest Communications Int'l, Inc. and U S WEST, Inc.*, CC Docket No. 99-272, ¶ 2 (rel. Mar. 10, 2000) ("*Qwest/U S WEST Order*") (recognizing that Qwest/U S WEST will have "powerful new incentives" to comply with section 271 to realize the maximum integrated value of Qwest's national network).

Second, the risk to NewCo of losing DataCo forever by failing to achieve interLATA relief within five years will also create a much bigger "stick" to ensure continued progress in the 271 process. Because of the central importance of DataCo to NewCo's national data strategy, and because of the unique and irreproducible position occupied by DataCo among peering Internet backbones, any loss of DataCo, whether through a sale of NewCo's option or otherwise, would be unacceptable blow to NewCo's business.

Third, as we explained in our Supplemental Filing and our Response, there is no significant risk of discrimination here. As a practical matter, discrimination by NewCo in favor of DataCo is highly implausible and would be readily detectable. *See* Declaration of Raymond F. Albers (filed Feb. 22, 2000) (attached to our Response). Moreover, the nature of the DataCo Internet business, which is marketed to enterprise and ISP customers, not consumers, and which relies primarily on special access circuits, rather than local loops, raises far fewer concerns, in terms of its dependence on non-competitive local exchange facilities, than would a traditional consumer-oriented voice long-distance service. *See* Supp. Filing at 50-51; Response at 28-29. Finally, NewCo's need to obtain 271 relief in order to acquire ownership and control of DataCo would make it irrational for NewCo to undertake any strategy of discriminating in favor of DataCo, since any such conduct would directly put at risk NewCo's ability to satisfy the requirements of section 271 and ultimately to

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[21] (...continued)
purposes of the particular sections where it is applied. *See, e.g., Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932); *United States v. SCS Business & Tech. Inst.*, 173 F.3d 870, 881 n.15 (D.C. Cir. 1999). That is all the more true in this case because of the Commission's *Chevron* discretion. *See, e.g., U S WEST Communications, Inc. v. FCC*, 177 F.3d 1057, 1059-60 (D.C. Cir. 1999); *Abbott Labs. v. Young*, 920 F.2d 984, 987 (D.C. Cir. 1990). AT&T all but concedes this point when it acknowledges that the meaning of the term "control" – which also appears in 3(1)'s definition of "affiliate" – varies depending on context and "totality of circumstances." *See* Coffee Decl. ¶ 9 ("control" is "a question of fact that depends on the totality of the circumstances"); AT&T March 10 Ex Parte at 9-12.

realize its national data synergies. Judge Greene applied the very same reasoning when he concluded that the existence of the MFJ waiver review process and the requirement that a BOC obtain a waiver from the court before exercising an option to acquire an interLATA business would alleviate the risk of discrimination because any such conduct "would almost certainly be made known to the Court during any subsequent waiver proceedings."[22]

AT&T's only argument in the face of these positive 271 benefits is to assert that NewCo's ability to sell its option, examined in isolation, will create an incremental incentive not to comply with 271. *See* AT&T March 22 Ex Parte at 9-10. That cannot be the appropriate test. What matters, clearly, is the overall balance of incentives, as described above.

Moreover, it would not violate the purposes of section 271 for NewCo to realize a gain from selling its option. The 271 interLATA restriction is aimed at precluding BOCs from receiving the specific benefits associated with a LEC's ability to bundle local and long-distance products together, and is not a punitive statute aimed simply at precluding BOCs from receiving value from passive or conditional investments in interLATA businesses. *See AT&T v. Ameritech Corp.*, 13 FCC Rcd 21438, ¶¶ 5, 36-37 (1998). After all, the same aggregate gain could be realized from a 10% investment in each of eight different Internet companies – an investment strategy expressly authorized by sections 3(1) and 271. In addition, GTE could sell DataCo free and clear today, and if it did so, NewCo would realize the present value of any expected future appreciation of the business. Similarly, in theory, Bell Atlantic could transfer for value its executory option to acquire GTE and thus realize, in the sale price of that option, the value of any appreciation in the DataCo assets that may have built up during the past 20 months since Bell Atlantic and GTE entered into their merger agreement. Finally, of course, Bell Atlantic could receive a similar return simply from a passive investment in an index or mutual fund targeted at high-growth Internet stocks.

The economic reality is the same in all of these examples: Bell Atlantic would receive the "benefit" of the gain in appreciation of a prohibited interLATA business. Yet no one could argue that Bell Atlantic had realized that gain through the sort of "participation" or "involvement" in the prohibited businesses that 271 precludes. *See AT&T v. Ameritech*, 13 FCC Rcd 21438, ¶¶ 36-37 (section 271 prohibits a BOC's unauthorized "participat[ion]" or "involvement" in long distance markets and the receipt of "material benefits . . . uniquely associated with the ability to include a long distance component in a combined service offering"). In other words, 271 is concerned with *participation and control*, not merely *value*. Gilson Supp. Decl. ¶ 26. Thus, the receipt of market value or gain does not, in and of itself, amount to the improper provision of interLATA service through an "affiliate" in violation of section 271.

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[22] *United States v. Western Elec. Co.*, No. 82-0192, slip op. at 7 (D.D.C. Aug. 7, 1986).

This conclusion is only strengthened by the voluntary undertakings we have now included in our DataCo proposal. We believe our original proposal was more than sufficient to justify the Commission's exercise of its policy discretion to approve the DataCo structure. Nevertheless, to the extent there remains any residual concern stemming from NewCo's ability to receive market value from the sale of its option in DataCo, any such concern is dispelled by our voluntary commitment that if NewCo sells its stock, it will forgo the benefits of DataCo's appreciation in proportion to NewCo's failure to obtain 271 relief. Moreover, NewCo will receive no benefits at all from DataCo's appreciation if it sells its option before it has attained 271 relief for more than 50% of Bell Atlantic's lines. These undertakings substantially enhance the already powerful incentives our proposal creates for NewCo to open its markets and receive 271 relief, and thus remove any conceivable basis to claim that NewCo will improperly "own" DataCo by virtue of its ability to sell its interest for value.

B. NewCo will not control DataCo.

As the Commission has repeatedly affirmed, and AT&T concedes, the question of control involves a fact-specific, case-by-case analysis. *See* AT&T March 10 Ex Parte at 9-12; Coffee Decl. ¶ 9 ("control" is "a question of fact that depends on the totality of the circumstances"). There can be no argument that as a matter of law an option such as NewCo's constitutes "control" *per se*. There is no legal authority for a general rule that options always equate with control, and, indeed, AT&T makes no such argument. Accordingly, the issue of control inherently involves the exercise of judgment and policy discretion by the Commission.

Here, our proposal includes several special features that should put to rest any policy concern about prohibited control. These include that DataCo will be 90% controlled by public shareholders and will be operated by an independent board that owes its fiduciary duties to the public shareholders. In addition, NewCo's relationships with DataCo will all be contractually specified. The additional undertakings we are making today diminish even further any theoretical risk of control by (1) modifying the board selection process to ensure that within three years a majority of DataCo's board will consist of new directors who were not originally installed by GTE, and (2) altering or eliminating several aspects of NewCo's investor safeguards that have been the focus of AT&T's objections.

In addition, we are separately submitting today for the record copies of the contracts that will govern commercial relations between NewCo and DataCo, and we are agreeing to the appointment of an independent auditor to monitor the implementation of these contracts. The marketing agreement between NewCo and DataCo complies in all respects with section 271, is non-exclusive and contains commercially reasonable terms that both GTE and Bell Atlantic could agree to with any third party Internet company. The transitional services contracts relate to services that NewCo would need to provide to DataCo even in the event of a complete divestiture; they are for one-year terms or less and are all terminable by DataCo at its election and without penalty.

All of these points, taken together, are sufficient to dispel any possible suggestion that NewCo will actually exercise control over the day-to-day management of DataCo.[23]

AT&T suggests that NewCo will somehow indirectly control DataCo simply by holding its option (that is, that DataCo's management will feel obliged to operate DataCo for the primary benefit of NewCo simply because of NewCo's option). *See* AT&T March 22 Ex Parte at 4, 19-20. That claim is at war with its earlier saleability argument: a saleable option should not give *NewCo* any special degree of control relative to any other entity that might acquire the option from NewCo. In other words, any notion of *control* must be specific to a particular *holder* of the option. The fact that NewCo may well choose to sell the option to another holder, as AT&T argues, means that it cannot be certain NewCo will ever exercise the option, which in turn will make it far less likely that DataCo's board and management team will feel beholden to NewCo.

Furthermore, the fact that NewCo must first satisfy the condition precedent of securing necessary relief from the 271 restrictions before it may own and operate DataCo means, at a minimum, that its conversion to an 80% owner will not happen in the near future. This added factor of a substantial and uncertain period of delay before NewCo will be in a position to take ownership and control will make it even less likely that DataCo's management will do the bidding of NewCo in the day-to-day operations of the company.

AT&T's last argument in support of the notion that NewCo's option will confer control is based on footnote 329 in the Commission's *Cable Attribution Order*. There (accepting, for the sake of argument, AT&T's interpretation of that footnote), the Commission appeared to suggest that options or other instruments that are immediately convertible into voting stock (*i.e.*, within 60 days)

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[23] In his latest declaration, Professor Coffee has switched ground away from the Securities Acts of 1933 and 1934, and away from the definition of "equity security," and now bases his discussion on isolated SEC cases assertedly addressing questions of "control" under the Public Utility Holding Company Act of 1935 – at statute that is now "mostly dismantled," as Professor Coffee himself acknowledges, and that, in any event, had "radically different purposes" from the Communications Act, Gilson Second Supp. ¶ 10. Specifically, Professor Coffee relies on a statement from the leading treatise on securities law that "[m]ost of the early SEC control cases arose under" that statute. Coffee Supp. Decl. ¶ 3 (citing Loss & Seligman, *Securities Regulation* (3d ed. 1990)). What he fails to say, however, is that the very same paragraph he quotes from Loss & Seligman goes on to say that "[i]n these cases, however, the accent was on 'controlling influence,' which the Commission and the courts said meant *'something less in the form of influence over the management or policies of a company than 'control' of a company.'*" Loss & Seligman at 1711 (emphasis added). Moreover, the same treatise also makes clear that even under the securities laws, "the context [for applying the concept of 'control'] – perhaps also the meaning of the concept – varies from statute to statute and sometimes within a particular statute." *Id.* at 1691.

would be considered in applying the "ED exception."[24] (As noted above, the ED exception is intended to address the potential for *control*; it is not a rule about *equity ownership*.) It is evident for several reasons that this prudential exception to the Commission's ordinary attribution rules (even accepting AT&T's reading of the rules) does not suggest that the Commission should or must reflexively apply the same exception to NewCo's option.

First, the Commission made it clear in crafting the ED exception that it was context-specific. It was warranted, according to the Commission, by the particular structures of the cable and broadcast industries, where it is common for distributors and programmers to share a variety of interrelated interests.[25] It was also warranted by the particular policy concern arising in the programming context that a party's ability to aggregate a variety of generally non-attributable interests carries a "potential for influence" that "may undermine the diversity of voices we seek to promote." *Cable Attribution Order* ¶ 83. There are no comparable concerns here.

Second, the ED exception cannot properly apply in this proceeding because it was adopted to address something less than actual control (and all parties here concur that section 3(1) requires actual control). In particular, the ED exception was expressly designed to capture interests that confer on their holders a level of "influence" *falling short of "control."*[26]

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[24] *See Cable Attribution Order* ¶ 129 n.329.

[25] *See Broadcast Attribution Order* ¶ 40 ("The current attribution exemptions are too broad with respect to certain currently non-attributable interests held by major program suppliers and same-market broadcasters, thus permitting them to wield a level of influence that should be subject to limitation by the multiple ownership rules."); *Cable Attribution Order* ¶ 82 ("We will tailor the [ED exception] to address the structure of the cable industry and to serve the particular purposes of each of the substantive cable rules at issue in this proceeding."); *id.* ¶ 90 (ED exception is justified in cable context in part because it is common for "cable operators to form combinations with one another across markets, as established in this record, in ways that the broadcast industry does not" and "[b]ecause of this market structure, if an MSO has a significant ED interest in a system, that interest enables the MSO to significantly influence or control a cable system's core functions, such as programming, the heart of the horizontal ownership rule" and "[t]hus, the ED interest by itself implicates the concerns of the rules without the addition of an additional prong [such as is required in the broadcast context]").

[26] *Broadcast Attribution Order* ¶ 38 (rejecting the argument that the ED exception should incorporate a 50% threshold "based on a control concept" and concluding instead that "attribution [under the ED exception] is not limited to relationships that permit control, but also extends to relationships that permit sufficient influence over core operations of the licensee such that they should be subject to the multiple ownership rules"); *Cable Attribution Order* ¶ 86 ("Our goal [in adopting the 33% ED exception] is not merely to attribute interests with the potential to control but also those with a realistic potential to exert significant influence."); *see id.* ¶ 129 (applying the ED exception in the particular context of the "LEC test"

(continued...)

Third, in adopting the ED exception, the Commission was exercising its general rulemaking authority and was very careful in doing so to preserve its discretion to vary from the exception on a case-by-case basis depending on particular circumstances and unique public interest considerations.[27] In the present case, where the Commission is addressing, in the context of a particular license transfer adjudication, an issue of first impression under sections 3(1) and 271 concerning the specific policy implications of allowing NewCo to hold a future interest in DataCo, it would make no sense whatsoever for the Commission to hamstring the exercise of its own public interest discretion in this or future cases by reflexively importing from the broadcast and cable contexts the industry-specific ED exception, instead of employing a case-specific and discretionary analysis of control that is informed by the policy concerns relevant to section 271. In other words, the Commission would be well within its discretion to apply the general rule to our option rather than a specialized exception developed in a different context.

Fourth, the very footnote 329 of the *Cable Attribution Order* to which AT&T ascribes so much weight conclusively establishes that the ED exception can have no logical application to the DataCo option at issue here. As noted above, footnote 329 was responding to a suggestion from Time Warner that "options, warrants, and convertible debentures should generally be treated as beneficial interests under our rules creating an attribution simply because the SEC defines them to be beneficial interests *if their owner can obtain voting stock through these securities within 60 days*." *Cable Attribution Order* ¶ 129 n.329 (emphasis added) (citing 17 CFR § 240.13d-3 and 15 U.S.C. § 78(*l*)-(n)). The SEC's Rule 13d-3 definition of "beneficial ownership" is designed to capture the ability to control the voting or disposition of securities,[28] and the 60-day rule reflects the SEC's conclusion that securities convertible into voting stock within 60 days provide an imminent – as opposed to attenuated – opportunity for the holder to exercise influence or control over the

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[26] (...continued)
on the ground that "an ED investment, given its size, by a LEC gives an MVPD" not control but "significant *access to the resources of a LEC*") (emphasis added).

[27] *Cable Attribution Order* ¶ 92 ("We believe that a bright-line ED test is superior to a case-by-case analysis because it permits the planning of financial transactions and minimizes regulatory costs. *Nevertheless, we retain discretion to review cases that present unique issues where the public interest requires such a review.*") (emphasis added); *Broadcast Attribution Order* ¶ 44 ("Of course, we retain discretion to review individual cases that present unusual issues on a case-by-case basis where it would serve the public interest to conduct such a review.").

[28] Interpretive Release on Rules Applicable to Insider Reporting and Trading, Release No. 34-18114, Fed. Sec. L. Rep. ¶ 26,062 n.17 (Sep. 23, 1981) (Rule 13d-3 "emphasizes the ability to control or influence the voting or disposition of" securities).

underlying securities.[29] The Commission stated that "[w]e do not believe that *these types of securities* [*i.e.*, securities that can be converted into voting stock within 60 days] demonstrate the type of current, active participation by a LEC envisioned by the LEC test, unless the amount of *these securities* that an investor holds is more than 33% of the total assets of a company." *Cable Attribution Order* ¶ 129 n.329 (emphasis added). Read in the context of the argument urged by Time Warner, to which the Commission was responding, footnote 329 implicitly indicates that the only circumstances where an option, warrant or convertible debenture might rationally be counted under the ED exception (even assuming that were allowed by the terms of the relevant attribution rules) is where the instrument is convertible into voting stock by a particular holder *within 60 days* (thus raising the possibility that that particular holder might have the potential to exert the sort of current influence the ED exception was intended to address).

Here, NewCo will decidedly *not be able to convert its option and take control of DataCo within 60 days* because NewCo's ability to do so will be directly contingent upon securing the necessary 271 relief, a condition precedent that will place a significant and uncertain time barrier on its ability to convert into a greater equity position. Indeed, even under SEC Rule 13d-3 – which AT&T essentially seeks to apply here – courts hold that an option or convertible security held by someone who cannot exercise it without first obtaining regulatory approval does not confer "beneficial ownership" within the meaning of Rule 13d-3.[30] Once again, the presence of this significant contingency on the exercise of NewCo's option interest alleviates any hypothetical concern that by holding the option, NewCo will be able to exert indirect control over the day-to-day management of DataCo.

II. Approval of the DataCo Structure Will Not Compel the Commission to Approve Any and All Option Arrangements Proposed By Bell Companies in Future Cases.

Finally, the approval of our particular DataCo proposal will not create a binding precedent compelling the Commission in future cases to approve other option arrangements that might, in theory, be proposed by other Bell companies. Three questions are relevant in assessing the potential precedential effect of our proposal:

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[29] *See* Filing and Disclosure Requirement Relating to Beneficial Ownership, Exchange Act Release No. 14,692, Fed. Sec. L. Rep. ¶ 81,571, at 80,310 (Apr. 21, 1978) ("The Commission is . . . mindful that as the point in time [at] which the right to acquire may come to fruition is extended into the future, the . . . right's ability to influence control is correspondingly attenuated. When sixty days or less are left until the right to acquire may be exercised, the Commission believes that the ability of the holder of such right to effect control is sufficient to warrant the imposition of an obligation to file under Rule 13d-1.").

[30] *See, e.g., Levner v. Prince Alwaleed*, 61 F.3d 8, 9-10 (2d Cir. 1995) (non-voting convertible preferred stock); *Transcon Lines v. A.G. Becker*, 470 F. Supp. 356, 369-71 (S.D.N.Y. 1979) (option).

(1) Are there practical considerations that make it unlikely that other Bell companies will propose substantially similar option arrangements?

(2) Are there case-specific facts about our proposal that distinguish it in terms of the policies and purposes of section 271?

(3) Are there unique attributes to DataCo and the Bell Atlantic/GTE merger that distinguish this case in terms of the Commission's general public interest review?

The answer to all three questions is yes.

First, as a practical matter, it is highly unlikely that a Bell company in the future would propose an option arrangement that is similar in material respects to our DataCo proposal. Here, GTE is voluntarily exiting from the business of providing traditional voice long-distance service to consumers within the Bell Atlantic region, and the DataCo proposal is limited to Internet backbone and related data and private line services. Thus, to be on all fours with our proposal, any arrangement proposed in the future could not include traditional consumer voice long-distance service. This limitation alone will make it highly unlikely that a similar proposal would be made involving a large interexchange carrier, such as Sprint, whose Internet and data businesses are thoroughly integrated with its traditional voice long-distance offerings. Shutting down Sprint's consumer long-distance service within an entire Bell region would not be a practical alternative (and, in any event, would be inconsistent with the public interest).

Similar practical considerations also make it unlikely that a smaller, independent Internet or data business that is not integrated with a larger IXC would enter into an option arrangement with a Bell company similar to the pre-paid option we are proposing. For the typical small Internet company, much of its value as a business comes from the prospect that it may be acquired. Such a company will not tie itself up in a long-term option arrangement that is subject to a substantial contingency without receiving the full value of the business up front. No Bell company, on the other hand, would be in a position to satisfy that requirement in the absence of the sort of larger merger synergies involved with the Bell Atlantic/GTE merger, because all of the value to the BOC of the option arrangement would be contingent and in the future, due to the restrictions imposed by 271. The Bell company's ability to offer value to the Internet company's shareholders, moreover, would be reduced even further if the BOC were to agree to the additional terms we are now including in our voluntary undertakings – terms that substantially limit the ability of the BOC to realize value from a sale of the option depending on the extent of 271 progress. These factors will make it highly unlikely that an Internet business that might otherwise wish to be purchased by a BOC could agree to such a pre-paid option arrangement, since the arrangement could never provide adequate purchase value to shareholders in the absence of broader merger synergies.

Second, the specific characteristics of DataCo make our proposal distinguishable from any future case in terms of the policies of section 271. As we have repeatedly emphasized, DataCo enjoys unique status as the only independent, top-tier Internet backbone network. This unique status means that NewCo will have an even greater incentive to fulfill the obligations of section 271 in order to secure a platform for immediate entry into the top ranks of peering Internet backbones. NewCo is unlikely to shirk its duties under 271 in favor of selling its option, since the cash value of the option could never compensate for the loss of DataCo's unique position on the Internet (a position that will be difficult to reproduce through other means). Given the unique status of DataCo, no other combination in the foreseeable future is likely to present the same positive incentives under section 271. In addition, the nature of the DataCo business, which is limited to the provision of Internet and related data services for enterprise and ISP customers, presents a far lower theoretical risk of discrimination than would a more traditional consumer-oriented long-distance business. To the extent any future option arrangement that might be proposed involves a different form of long distance service, the theoretical risks of discrimination would be different, and hence also the policy implications of the proposal for purposes of section 271.

Third, the unique attributes of DataCo and the Bell Atlantic/GTE merger distinguish this case from possible future cases in terms of the Commission's public interest standard. One direct benefit of our proposal is the preservation of DataCo as a strong, independent backbone operator and thus the protection of competition in the Internet backbone market in general. *See MCI/WorldCom Merger Order*, CC Docket No. 97-211, ¶¶ 142-61 (Sep. 14, 1998) (summarizing the competitive concerns raised by the aggregation of top-tier Internet backbones in the hands of a small number of IXCs). By preserving the ability of NewCo to reacquire DataCo and achieve the substantial vertical synergies of integrating Bell Atlantic's customer base with DataCo's backbone facilities, and by allowing DataCo to realize a portion of those benefits immediately (as and where permitted by section 271) through a contractual marketing arrangement with NewCo, our proposal, in the context of this merger, will produce unique and compelling public interest benefits. These benefits are unlikely to be reproduced by any future option proposal or merger.

CONCLUSION

For all of the foregoing reasons, and those contained in our Supplemental Filing, Response and March 14 Ex Parte, Bell Atlantic and GTE respectfully request that the Commission accept the DataCo proposal, as set forth in Exhibit A.

Respectfully submitted,

William P. Barr

cc: Dorothy Attwood
Rebecca Beynon
James Bird
Michelle Carey
Kyle Dixon
Jordan Goldstein
Johanna Mikes
Paula Silberthau
Lawrence Strickling
Sarah Whitesell
Christopher Wright

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July 22, 1999.

The Hon. STROM THURMOND,
Chairman, Subcommittee on Criminal Justice Oversight,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This letter responds to your questions regarding the Department of Justice's views and positions on 18 U.S.C. §3501 during my tenure as Attorney General in the Administration of President George W. Bush. This letter is based on my own recollection as well as consultation with people who served in the Department of Justice during the Bush Administration.

It was the position of the Department of Justice during my tenure as Attorney General that *Miranda* v. *Arizona's* procedural requirements and its per se exclusionary rule were not constitutionally mandated. We made arguments to this effect in the United States Supreme Court, *see, e.g.;* Brief for the United States as Amicus Curiae in *Withrow* v. *Williams,* No. 91–1030; Brief for the United States as Amicus Curiae in *Parke* v. *Raley,* No. 91–719. In some cases, the Department of Justice also participated as amicus curiae in support of the State in the lower federal courts. Our legal position in this regard was based in large part upon the report issued by the Office of Legal policy in the previous Administration and upon subsequent Supreme Court decisions which made it clear that the *Miranda* regime was not required by the Fifth Amendment.

We also took the position that 18 U.S.C. §3501 was constitutional as an exercise of Congress' authority to control the admission of evidence before federal courts. As the senior officer of the prosecuting arm of the Executive Branch, I believed that the Department of Justice should be prepared to use all of the legal tools at its disposal, within constitutional bounds, to seek the conviction of the guilty and exoneration of the innocent. This certainly included making a criminal defendant's voluntary statements regarding the crime available to the finder of fact. Accordingly, during my tenure, the United States Attorneys' Offices were authorized and encouraged to raise 18 U.S.C. §3501 as an argument for the admission of reliable evidence of guilt that would otherwise be kept from juries by the *Miranda* doctrine. As far as I am aware, no case during my tenure as Attorney General was a United States Attorneys' Office prohibited from relying upon section 3501 in any forum. .

In 1991, I instructed a Special Assistant to the Attorney General to undertake the task of locating a test case for the constitutionality of 18 U.S.C. §3501. Contacts were made with United States Attorneys' Offices to find an appropriate case where the issue could be raised and preserved for appellate review. Although no proper vehicle for pursuing the issue was generated prior to the end of the Administration, the effort demonstrates the Bush Administrations commitment to use and defend section 3501 and seek a definitive adjudication as to its constitutionality.

To summarize, during my tenure as Attorney General of the United States:

(1) We adhered to the position of prior Administrations that *Miranda's* procedural requirements and exclusionary rule were not constitutionally mandated;

(2) We took the position that section 3501 was a constitutional exercise of Congress' authority over the admissibility of evidence in federal court;

(3) We authorized the United States Attorneys' Offices to use section 3501 to promote the admissibility of reliable evidence of guilt in federal criminal prosecutions; and

(4) We stood ready to defend the constitutionality of the statute in the Courts of Appeals and the United States Supreme Court.

I hope this letter is of assistance to you and that it helps to clarify the historical record as to the position of the Department of Justice regarding the constitutionality of 18 U.S.C. §3501.

Sincerely,

WILLIAM P. BARR.

Senator THURMOND. Further, I wish to place in the record a copy of the following letters: a September 10, 1997, letter from Attorney General Reno reporting to the Senate that the Department of Justice will not defend the constitutionality of section 3501 in the lower Federal courts; a November 6, 1997, memorandum from Acting Assistant Attorney General John Keeney to all U.S. attorneys prohibiting them from invoking section 3501 without permission; a March 4, 1999, letter that I sent, along with Senator Hatch and others to Attorney General Reno on this issue, the April 15, 1999,

INTERNET FREEDOM ACT AND INTERNET GROWTH AND DEVELOPMENT ACT OF 1999

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

H.R. 1686 and H.R. 1685

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CONTENTS

HEARING DATE

Page

June 30, 1999 1

TEXT OF BILL

H.R. 1686 2
H.R. 1685 5

OPENING STATEMENT

Hyde, Hon. Henry J., a Representative in Congress from the State of Illinois, and chairman, Committee on the Judiciary 1

WITNESSES

Barr, William, executive vice president and general counsel, GTE Corporation, Washington, DC 19
Boggs, Tim, senior vice president for public policy, Time Warner, Inc., Washington, DC 64
Cleland, Scott, managing director, Legg Mason Precursor Group, Washington, DC 41
Jacobs, Tod, senior telecommunications analyst, Sanford C. Bernstein & CO., Inc., New York, NY 95
Kimmelman, Gene, codirector, Washington office, Consumers Union, Washington, DC 103
Rosenblum, Mark, vice president for law, AT&T Corporation, Basking Ridge, NJ 50
Salsbury, Mike, executive vice president and general counsel, MCI WorldCom, Washington, DC 57
Sten, Erik, commissioner of Public Works, City of Portland, Portland, OR 35
Vradenburg, George, senior vice president, America Online, Dulles, VA 24
Wasch, Ken, president, Software and Information Industry Association, Washington, DC 31
Windhausen, John, president, Association for Local Telecommunications Services, Washington, DC 88

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Barr, William, executive vice president and general counsel, GTE Corporation, Washington, DC: Prepared statement 21
Bork, Robert H.: Prepared statement 154
Boggs, Tim, senior vice president for public policy, Time Warner, Inc., Washington, DC: Prepared statement 66
Cleland, Scott, managing director, Legg Mason Precursor Group, Washington, DC: Prepared statement 43
Hyde, Hon. Henry J., a Representative in Congress from the State of Illinois, and chairman, Committee on the Judiciary: Prepared statement 11
Jacobs, Tod, senior telecommunications analyst, Sanford C. Bernstein & CO., Inc., New York, NY: Prepared statement 97
Jackson Lee, Hon. Sheila, a Representative in Congress from the State of Texas: Prepared statement 18
Kimmelman, Gene, codirector, Washington office, Consumers Union, Washington, DC: Prepared statement 105

Page

Mayo, John W., Senior Associate Dean and Professor of Economics, Business, and Public Policy at Georgetown University's McDonough School of Business: Prepared statement 151
Meehan, Hon. Martin T., a Representative in Congress from the State of Massachusetts: Prepared statement 132
Rosenblum, Mark, vice president for law, AT&T Corporation, Basking Ridge, NJ: Prepared statement 51
Salsbury, Mike, executive vice president and general counsel, MCI WorldCom, Washington, DC: Prepared statement 58
Sten, Erik, commissioner of Public Works, City of Portland, Portland, OR: Prepared statement 38
Vradenburg, George, senior vice president, America Online, Dulles, VA: Prepared statement 25
Wasch, Ken, president, Software and Information Industry Association, Washington, DC: Prepared statement 32
Windhausen, John, president, Association for Local Telecommunications Services, Washington, DC: Prepared statement 90

APPENDIX

Material submitted for the record 139

INTERNET FREEDOM ACT AND INTERNET GROWTH AND DEVELOPMENT ACT OF 1999

WEDNESDAY, JUNE 30, 1999

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to call, at 10 a.m., in Room 2141, Rayburn House Office Building, Hon. Henry J. Hyde (chairman of the committee) presiding.

Present: Representatives Henry J. Hyde, F. James Sensenbrenner, Jr., Bill McCollum, George W. Gekas, Howard Coble, Lamar S. Smith, Bob Goodlatte, Steve Chabot, Asa Hutchinson, Edward A. Pease, Chris Cannon, James E. Rogan, Lindsey O. Graham, Mary Bono, David Vitter, John Conyers, Jr., Howard L. Berman, Rick Boucher, Robert C. Scott, Melvin L. Watt, Zoe Lofgren, Sheila Jackson Lee, Maxine Waters, Martin T. Meehan, William D. Delahunt, Steven R. Rothman, Tammy Baldwin, and Anthony B. Weiner.

Staff present: Jon Dudas, deputy general counsel-staff director; Daniel M. Freeman, parliamentarian-counsel; Joseph Gibson, chief antitrust counsel; Sharee Freeman, counsel; Patrick Prisco, assistant to the deputy general counsel-staff director; Kirsti Garlock, counsel; Ray Smietanka, chief counsel; Jim Harper, counsel; Vince Garlock, counsel; Michael Connolly, press secretary; James B. Farr, financial clerk; Shawn Friesen, staff assistant/clerk and Cori Flam, minority counsel.

OPENING STATEMENT OF CHAIRMAN HYDE

Mr. HYDE. Good morning. The committee will come to order. Today the committee holds a hearing on H.R. 1686, the Internet Freedom Act, introduced by Congressman Goodlatte and H.R. 1685, the Internet Growth and Development Act, introduced by Congressman Boucher.

These two bills seek to enhance the growth of the Internet. They involve two related issues. The first has to do with cable broadband lines and whether their owners will be required to grant access to them on nondiscriminatory terms. The second is whether the regional Bell operating companies will be able to transport data over long distance lines within their regions, something they are currently prohibited from doing. The resolution of both of these issues will have profound consequences for the future of the Internet and more broadly the ways that we will communicate in the future.

This committee has a long and proud history in shaping telecommunications policy, and we were instrumental in passing the

landmark Telecommunications Act of 1996 into law. We intend to continue that tradition in our consideration of this legislation. We are the committee responsible for competition policy throughout the economy, and I can't think of a set of competition issues that is more vital to our Nation's future.

At the time that they were considering the 1996 act, the Internet was in its infancy. In a little over 3 years, it has gone from a technological marvel to a near necessity for millions of Americans. That tremendous growth has dramatically changed many of the assumptions we held when we were considering the act.

That may mean that we need to reopen the act; on the other hand, it may not. It does, however, mean we ought to take a hard look at that question. And that is what we are here to do today. Several of the contending parties have visited with me in the last several weeks, and I will say publicly what I have said to them privately. I come to these issues with an open mind. I have taken no position on either of the bills before us; but I am very interested to hear the arguments of all the witnesses today.

[The bills, H.R. 1686 and H.R. 1685, follow:]

106TH CONGRESS
1ST SESSION

H. R. 1686

To ensure that the Internet remains open to fair competition, free from government regulation, and accessible to American consumers.

IN THE HOUSE OF REPRESENTATIVES

MAY 5, 1999

Mr. GOODLATTE (for himself and Mr. BOUCHER) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To ensure that the Internet remains open to fair competition, free from government regulation, and accessible to American consumers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Internet Freedom Act".

TITLE I—ANTITRUST AND CRIMINAL PROVISIONS

SEC. 101. PROHIBITION ON ANTICOMPETITIVE BEHAVIOR BY INCUMBENT LOCAL EXCHANGE CARRIERS.

In any civil action based on a claim arising under section 1, 2, or 3 of the Sherman Act (15 U.S.C. 1, 2, 3), evidence that an incumbent local exchange carrier that has market power in the broadband service provider market has willfully and knowingly failed to provide conditioned unbundled local loops when economically reasonable and technically feasible under section 715(a) of the Communications Act of 1934, or restrains unreasonably the ability of a carrier to compete in its provision

of broadband services over a local loop, shall be sufficient to establish a presumption of a violation of such section 1, 2, or 3 of the Sherman Act.

SEC. 102. PROHIBITION ON ANTICOMPETITIVE CONTRACTS BY BROADBAND ACCESS TRANSPORT PROVIDERS.

In any civil action based on a claim arising under section 1, 2, or 3 of the Sherman Act (15 U.S.C. 1, 2, 3), evidence that a broadband access transport provider that has market power in the broadband service provider market has offered access to a service provider on terms and conditions, other than terms justified by demonstrable cost differentials, that are less favorable than those offered by such operator to itself, to an affiliated service provider, or to another service provider, or restrains unreasonably the ability of a service provider from competing in its provision of broadband services, shall be sufficient to establish a presumption of a violation of such section.

SEC. 103. PROHIBITION ON ANTICOMPETITIVE OR DISCRIMINATORY BEHAVIOR BY BROADBAND ACCESS TRANSPORT PROVIDERS.

It shall be unlawful for a broadband access transport provider to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to discriminate in favor of a service provider that is affiliated with a broadband access transport provider or to restrain unreasonably the ability of a service provider that is not affiliated with a broadband access transport provider from competing in its provision of any of the services provided by a service provider as set forth in section 105(3).

SEC. 104. PROTECTION FROM FRAUDULENT UNSOLICITED E-MAIL.

Section 1030 of title 18, United States Code, is amended—

(1) in subsection (a)(5)—

(A) by striking "or" at the end of subparagraph (B); and

(B) by inserting after subparagraph (C) the following new subparagraphs:

"(D) intentionally and without authorization initiates the transmission of a bulk unsolicited electronic mail message to a protected computer with knowledge that such message falsifies an Internet domain, header information, date or time stamp, originating e-mail address or other identifier; or

"(E) intentionally sells or distributes any computer program that—

"(i) is designed or produced primarily for the purpose of concealing the source or routing information of bulk unsolicited electronic mail messages in a manner prohibited by subparagraph (D) of this paragraph;

"(ii) has only limited commercially significant purpose or use other than to conceal such source or routing information; or

"(iii) is marketed by the violator or another person acting in concert with the violator and with the violator's knowledge for use in concealing the source or routing information of such messages;

(2) in subsection (c)(2)(A)—

(A) by inserting "(i)" after "in the case of an offense"; and

(B) by inserting after "an offense punishable under this subparagraph;" the following: "; or (ii) under subsection (a)(5)(D) or (a)(5)(E) of this section which results in damage to a protected computer";

(3) in subsection (c)(2), by adding at the end the following new subparagraph:

"(D) in the case of a violation of subsection (a)(5)(D) or (E), actual monetary loss and statutory damages of $15,000 per violation or an amount of up to $10 per message per violation whichever is greater; and";

(4) in subsection (e)—

(A) by striking "and" at the end of paragraph (8);

(B) by striking the period at the end of paragraph (9); and

(C) by adding at the end the following new paragraphs:

"(10) the term 'initiates the transmission' means, in the case of an electronic mail message, to originate the electronic mail message, and excludes the actions of any interactive computer service whose facilities or services are used by another person to transmit, relay, or otherwise handle such message;

"(11) the term 'Internet domain' means a specific computer system (commonly referred to as a 'host') or collection of computer systems attached to or able to be referenced from the Internet which are assigned a specific reference point on the Internet (commonly referred to as an 'Internet domain name') and registered with an organization recognized by the Internet industry as a registrant of Internet domains;

"(12) the term 'unsolicited electronic mail message' means any substantially identical electronic mail message other than electronic mail initiated by any person to others with whom such person has a prior relationship, including prior business relationship, or electronic mail sent by a source to recipients where such recipients, or their designees, have at any time affirmatively requested to receive communications from that source; and

"(13) the term 'Internet' means all computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.".

(5) in subsection (g), by inserting "and reasonable attorneys' fees and other litigation costs reasonably incurred in connection with civil action" after "injunctive relief or other equitable relief".

SEC. 105. DEFINITIONS.

For purposes of this title:

(1) BROADBAND.—The term "broadband" refers to a transmission capability in excess of 200 kilobits per second in at least one direction.

(2) BROADBAND ACCESS TRANSPORT PROVIDER.—The term "broadband access transport provider" means one who engages in the broadband transmission of data between a user and his service provider's point of interconnection with the broadband access transport provider's facilities. Such term shall also include a service provider who provides to itself, over facilities owned by it or under its control, the broadband transport of services between itself and its users.

(3) SERVICE PROVIDER.—The term "service provider" means a person who provides a service that enables users to access content, information, electronic mail, or other services. The term may also include access to proprietary content, information, and other services as part of a package of services offered to consumers.

(4) INTERNET.—The term "Internet" means all computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.

(5) BROADBAND SERVICE PROVIDER MARKET.—The term "broadband service provider market" includes the provision of broadband services over a single broadband access transport provider's facilities.

TITLE II—ADDITIONAL PROVISIONS

SEC. 201. ACCELERATED DEPLOYMENT OF BROADBAND SERVICES.

Title VII of the Communications Act of 1934 is amended by adding at the end thereof the following new section:

"SEC. 715. ACCELERATED DEPLOYMENT OF BROADBAND SERVICES.

"(a) BROADBAND SERVICES PLANS.—

"(1) PLAN REQUIRED.—Within 180 days after the effective date of this section, each local exchange carrier shall submit to the State commission in each State in which such carrier does business a plan to provide broadband telecommunications service in all local exchange areas in which such carrier has telephone exchange service customers as soon as such broadband telecommunications service is economically reasonably and technically feasible. The plan shall include all terms and conditions, including pricing, under which the services shall be provided. The test of economic reasonability and technical feasibility shall be made separately by the local exchange carrier for each local exchange, and the plan shall be considered certified 45 days after submission unless the State commission rejects the plan within such 45 days. Upon rejection of a plan, successive plans shall be submitted until approval is obtained. The plan shall be implemented within 180 days of the certification of the plan in each local exchange in which the provision of the service is both economically reasonable and technically feasible. Upon certification of its plan, the carrier shall be obligated by terms of the plan (including any modifications that it requests that are thereafter certified) but shall otherwise provide such services free of Federal and State price, rate, rate of return, and profit regulation. Upon a determination by the State commission that a local exchange is served by another provider of broadband telecommunications services, or any broadband

Internet access transport provider, or upon a determination by such State commission that the local exchange carrier makes broadband telecommunications services available to 70 percent of the access lines in an exchange, a local exchange carrier shall no longer be obligated by the terms of any such plan in such local exchange.

"(2) STATE MODIFICATIONS PROHIBITED.—Except upon request of the carrier, the State commission shall have no authority to modify any plan submitted pursuant to paragraph (1).

"(3) NO COMMISSION AUTHORITY.—The Commission shall have no authority with respect to the terms of any plan and shall have no authority with respect to the approval or rejection of any such plan.

"(b) SUPERSESSION OF OTHER REQUIREMENTS.—An incumbent local exchange carrier's provision of broadband local telecommunications services shall not be subject to the requirements of sections 251(c)(3) and 251(c)(4) of the Act in any State in which that carrier certifies to the State commission that—

"(1) in central offices in which it provides local loops that are conditioned for broadband services, it provides such loops to other carriers at least as quickly as it provides them for its own customers;

"(2) in central offices in which it does not currently provide local loops that are conditioned for broadband services, but in which such service is economically reasonable and technically feasible, it will provide such loops within 120 days of a request for such conditioning from another carrier; and

"(3) conditioned loops are provided upon such prices and other terms and conditions as the parties shall agree, or in any event of disagreements, as are determined through commercial arbitration, in which the commercial arbitrator shall establish the price based upon the cost of the loops and the costs for such conditioning that have been incurred by the local exchange carrier plus a reasonable profit.".

SEC. 202. ACCELERATED DEPLOYMENT OF INTERNET BACKBONE.

(a) INTERLATA INTERNET SERVICES.—Paragraph (21) of section 3 of the Communications Act of 1934 (47 U.S.C. 153(21)), relating to the definition of interLATA service, is amended by inserting before the period the following: ", except that such term shall not include services that consist of or include the transmission of any data or information, including any writing, signs, signals, pictures, or sounds related to the transmission of such data or information, by means of the Internet or any other network that employs Internet Protocol-based or other packet-switched technology".

(b) VOICE INTERLATA INTERNET SERVICES.—Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide, by means of the Internet or any other network that employs Internet Protocol-based or other packet-switched technology, two-way voice-only interLATA telecommunications services originating in any of its in-region States until such time as the Federal Communications Commission approves the application of such company for such State pursuant to section 271(d) of the Communications Act of 1934. The terms in this subsection shall have the same respective meanings given such terms in sections 3 and 271 of such Act.

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106TH CONGRESS
1ST SESSION

H. R. 1685

To provide for the recognition of electronic signatures for the conduct of interstate and foreign commerce, to restrict the transmission of certain electronic mail advertisements, to authorize the Federal Trade Commission to prescribe rules to protect the privacy of users of commercial Internet websites, to promote the rapid deployment of broadband Internet services, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 5, 1999

Mr. BOUCHER (for himself and Mr. GOODLATTE) introduced the following bill; which was referred to the Committee on Commerce, and in addition to the Committee

on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To provide for the recognition of electronic signatures for the conduct of interstate and foreign commerce, to restrict the transmission of certain electronic mail advertisements, to authorize the Federal Trade Commission to prescribe rules to protect the privacy of users of commercial Internet websites, to promote the rapid deployment of broadband Internet services, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Internet Growth and Development Act of 1999".

TITLE I—AUTHORIZATION OF ELECTRONIC SIGNATURES IN COMMERCE

SEC. 101. DEFINITIONS.

For purposes of this title, the following definitions shall apply:

(1) ELECTRONIC COMMERCE.—The term "electronic commerce" means the transaction or conduct of any business that is in or that affects interstate or foreign commerce and that is in whole or part transacted or conducted by electronic means.

(2) ELECTRONIC MEANS.—The term "electronic means" includes all forms of electronic communication mediated by computer, including telephonic communications, facsimile, electronic mail, electronic data exchanges, satellite, cable, and fiber optic communications.

(3) ELECTRONIC AUTHENTICATION.—The term "electronic authentication" means any methodology, technology, or technique intended to—

(A) establish the identity of the maker, sender, or originator of a document or communication in electronic commerce; and

(B) establish the fact that the document or communication has not been altered.

(4) ELECTRONIC SIGNATURE.—The term "electronic signature" means any electronic symbol or series of symbols, created, or processed by a computer, intended by the party using it (or authorizing its use) to have the same legal force and effect as a manual signature.

SEC. 102. VALIDITY OF ELECTRONIC AUTHENTICATION.

(a) VALIDITY OF ELECTRONIC SIGNATURES.—All electronic signatures that have been authenticated through the use of a means of electronic authentication that complies with subsection (d) shall have standing equal to paper-based, written signatures, so that—

(1) any rule of law which requires a record to be in writing shall be deemed satisfied; and

(2) any rule of law which requires a signature shall be deemed satisfied.

(b) VALIDITY OF ELECTRONIC RECORDS.—Electronic records shall not be denied legal effect, validity, or enforceability solely because such records are in electronic form.

(c) VALIDITY OF STATE LAWS.—Nothing in this section shall be construed to preempt the law of a State that enacts legislation governing electronic transactions that is consistent with subsections (a) and (b).

(d) MEANS OF ELECTRONIC AUTHENTICATION.—

(1) IN GENERAL.—For purposes of this title, a means of electronic authentication complies with the requirements of this section if it—

(A) reliably establishes the identity of the maker, sender, or originator of a document or communication in electronic commerce; and

(B) reliably establishes the fact that the document or communication has not been altered.

(2) METHODS OF PROOF.—A person may demonstrate compliance with the requirements of paragraph (1) by demonstrating that a means of electronic authentication—

(A) uses an identification methodology that is unique to the person making, sending, originating a document or communication;

(B) the identification methodology shall be capable of verifying the identity of such person; and

(C) the identification methodology is linked to the data or communication transmitted in such a manner that if such data or communication has been altered, the authentication becomes invalid.

TITLE II—ELECTRONIC MAIL ADVERTISEMENTS

SEC. 201. UNSOLICITED ELECTRONIC MAIL ADVERTISEMENTS.

Title VII of the Communications Act of 1934 is amended by adding at the end the following section:

"SEC. 715. UNSOLICITED ELECTRONIC MAIL ADVERTISEMENTS.

"(a) COMPLIANCE OF REGISTERED USERS WITH PROVIDER POLICY REQUIRED.—No registered user of an electronic mail service provider shall use or cause to be used that electronic mail service provider's equipment in violation of that electronic mail service provider's policy prohibiting or restricting the use of its service or equipment for the initiation of unsolicited electronic mail advertisements.

"(b) COMPLIANCE BY SENDERS WITH PROVIDER POLICY REQUIRED.—No person or other entity shall use or cause to be used, by initiating an unsolicited electronic mail advertisement, an electronic mail service provider's equipment in violation of that electronic mail service provider's policy prohibiting or restricting the use of its equipment to deliver unsolicited electronic mail advertisements to its registered users.

"(c) PROVIDER POLICIES NOT REQUIRED.—An electronic mail service provider shall not be required to create a policy prohibiting or restricting the use of its equipment for the initiation or delivery of unsolicited electronic mail advertisements.

"(d) CONTINUED PROTECTION FROM BEING TREATED AS PUBLISHER.—Nothing in this section shall be construed to limit or restrict the rights of an electronic mail service provider under section 230(c)(1) of this Act, or any decision of an electronic mail service provider to permit or to restrict access to or use of its system, or any exercise of its editorial function.

"(e) REMEDIES.—

"(1) PRIVATE ACTIONS BY PROVIDERS.—In addition to any other remedy available under law, any electronic mail service provider whose policy on unsolicited electronic mail advertisements is violated as provided in this section may bring a civil action to recover the actual monetary loss suffered by that provider by reason of that violation, or liquidated damages of $50 for each electronic mail message initiated or delivered in violation of this section, up to a maximum of $25,000 per day, whichever amount is greater.

"(2) ATTORNEY FEES.—In any action brought pursuant to paragraph (1), the court may award reasonable attorney's fees to a prevailing party.

"(3) NOTICE OF POLICY REQUIRED.—In any action brought pursuant to paragraph (1), the electronic mail service provider shall be required to establish as an element of its cause of action that prior to the alleged violation, the defendant had actual notice of both of the following:

"(A) The electronic mail service provider's policy on unsolicited electronic mail advertising and

"(B) The fact that the defendant's unsolicited electronic mail advertisements would use or cause to be used the electronic mail service provider's equipment.

"(f) DEFINITIONS.—As used in this section:

"(1) ELECTRONIC MAIL ADVERTISEMENT.—The term 'electronic mail advertisement' means any electronic mail message, the principal purpose of which is to promote, directly or indirectly, the sale or other commercial distribution of goods or services to the recipient.

"(2) UNSOLICITED ELECTRONIC MAIL ADVERTISEMENT.—The term 'unsolicited electronic mail advertisement' means any electronic mail advertisement that meets both of the following requirements:

"(A) It is addressed to a recipient with whom the initiator does not have an existing business or personal relationship.

"(B) It is not sent at the request of or with the express consent of the recipient.

"(3) ELECTRONIC MAIL SERVICE PROVIDER.—The term 'electronic mail service provider' means any person or other entity that provides registered users the ability to send or receive electronic mail and that is an intermediary in sending or receiving electronic mail.

"(4) INITIATION.—The term 'initiation' of an unsolicited electronic mail advertisement refers to the action by the initial sender of the electronic mail advertisement. It does not refer to the actions of any intervening electronic mail service provider that may handle or retransmit the electronic message.

"(5) REGISTERED USER.—The term 'registered user' means any person or other entity that maintains an electronic mail address with an electronic mail service provider.".

TITLE III—ONLINE PRIVACY PROTECTION

SEC. 301. ONLINE PRIVACY PROTECTION.

(a) INFORMATION COLLECTION REGULATIONS.—Any person operating a commercial Internet website shall clearly and conspicuously provide notice of its collection, use, and disclosure policies with regard to personally identifiable information, including—

(1) the personally identifiable information that the website operator collects from individuals visiting the website; and

(2) the uses that the website operator makes of the personally identifiable information, including whether the operator makes the information available to any third parties.

(b) ENFORCEMENT.—Any knowing violation of the requirements under subsection (a) shall be treated as an unfair or deceptive act or practice under section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

TITLE IV—BROADBAND DEPLOYMENT

SEC. 401. ACCELERATED DEPLOYMENT OF INTERNET BACKBONE.

(a) INTERLATA INTERNET SERVICES.—Paragraph (21) of section 3 of the Communications Act of 1934 (47 U.S.C. 153(21)), relating to the definition of interLATA service, is amended by inserting before the period the following: ", except that such term shall not include services that consist of or include the transmission of any data or information, including any writing, signs, signals, pictures, or sounds related to the transmission of such data or information, by means of the Internet or any other network that employs Internet Protocol-based or other packet-switched technology".

(b) VOICE INTERLATA INTERNET SERVICES.—Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide, by means of the Internet or any other network that employs Internet Protocol-based or other packet-switched technology, two-way voice-only interLATA telecommunications services originating in any of its in-region States until such time as the Federal Communications Commission approves the application of such company for such State pursuant to section 271(d) of the Communications Act of 1934. The terms in this subsection shall have the same respective meanings given such terms in sections 3 and 271 of such Act.

SEC. 402. ACCELERATED DEPLOYMENT OF BROADBAND SERVICES.

Title VII of the Communications Act of 1934 is further amended by adding at the end thereof the following new section:

"SEC. 716. ACCELERATED DEPLOYMENT OF BROADBAND SERVICES.

"(a) BROADBAND SERVICES PLANS.—

"(1) PLAN REQUIRED.—Within 180 days after the effective date of this section, each local exchange carrier shall submit to the State commission in each State in which such carrier does business a plan to provide broadband telecommunications service in all local exchange areas in which such carrier has telephone exchange service customers as soon as such broadband telecommunications service is economically reasonably and technically feasible. The plan shall include all terms and conditions, including pricing, under which the serv-

ices shall be provided. The test of economic reasonability and technical feasibility shall be made separately by the local exchange carrier for each local exchange, and the plan shall be considered certified 45 days after submission unless the State commission rejects the plan within such 45 days. Upon rejection of a plan, successive plans shall be submitted until approval is obtained. The plan shall be implemented within 180 days of the certification of the plan in each local exchange in which the provision of the service is both economically reasonable and technically feasible. Upon certification of its plan, the carrier shall be obligated by terms of the plan (including any modifications that it requests that are thereafter certified) but shall otherwise provide such services free of Federal and State price, rate, rate of return, and profit regulation. Upon a determination by the State commission that a local exchange is served by another provider of broadband telecommunications services, or any broadband Internet access transport provider, or upon a determination by such State commission that the local exchange carrier makes broadband telecommunications services available to 70 percent of the access lines in an exchange, a local exchange carrier shall no longer be obligated by the terms of any such plan in such local exchange.

"(2) STATE MODIFICATIONS PROHIBITED.—Except upon request of the carrier, the State commission shall have no authority to modify any plan submitted pursuant to paragraph (1).

"(3) NO COMMISSION AUTHORITY.—The Commission shall have no authority with respect to the terms of any plan and shall have no authority with respect to the approval or rejection of any such plan.

"(b) SUPERSESSION OF OTHER REQUIREMENTS.—An incumbent local exchange carrier's provision of broadband local telecommunications services shall not be subject to the requirements of sections 251(c)(3) and 251(c)(4) of the Act in any State in which that carrier certifies to the State commission that—

"(1) in central offices in which it provides local loops that are conditioned for broadband services, it provides such loops to other carriers at least as quickly as it provides them for its own customers;

"(2) in central offices in which it does not currently provide local loops that are conditioned for broadband services, but in which such service is economically reasonable and technically feasible, it will provide such loops within 120 days of a request for such conditioning from another carrier; and

"(3) conditioned loops are provided upon such prices and other terms and conditions as the parties shall agree, or in any event of disagreements, as are determined through commercial arbitration, in which the commercial arbitrator shall establish the price based upon the cost of the loops and the costs for such conditioning that have been incurred by the local exchange carrier plus a reasonable profit.".

TITLE V—ANTITRUST AND CRIMINAL PROVISIONS

SEC. 501. PROHIBITION ON ANTICOMPETITIVE BEHAVIOR BY INCUMBENT LOCAL EXCHANGE CARRIERS.

In any civil action based on a claim arising under section 1, 2, or 3 of the Sherman Act (15 U.S.C. 1, 2, 3), evidence that an incumbent local exchange carrier that has market power in the broadband service provider market has willfully and knowingly failed to provide conditioned unbundled local loops when economically reasonable and technically feasible under section 716(a) of the Communications Act of 1934, or restrains unreasonably the ability of a carrier to compete in its provision of broadband services over a local loop, shall be sufficient to establish a presumption of a violation of such section 1, 2, or 3 of the Sherman Act.

SEC. 502. PROHIBITION ON ANTICOMPETITIVE CONTRACTS BY BROADBAND ACCESS TRANSPORT PROVIDERS.

In any civil action based on a claim arising under section 1, 2, or 3 of the Sherman Act (15 U.S.C. 1, 2, 3), evidence that a broadband access transport provider that has market power in the broadband service provider market has offered access to a service provider on terms and conditions, other than terms justified by demonstrable cost differentials, that are less favorable than those offered by such operator to itself, to an affiliated service provider, or to another service provider, or restrains unreasonably the ability of a service provider from competing in its provision of

broadband services, shall be sufficient to establish a presumption of a violation of such section.

SEC. 503. PROHIBITION ON ANTICOMPETITIVE OR DISCRIMINATORY BEHAVIOR BY BROADBAND ACCESS TRANSPORT PROVIDERS.

It shall be unlawful for a broadband access transport provider to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to discriminate in favor of a service provider that is affiliated with a broadband access transport provider or to restrain unreasonably the ability of a service provider that is not affiliated with a broadband access transport provider from competing in its provision of any of the services provided by a service provider as set forth in section 505(3).

SEC. 504. PROTECTION FROM FRAUDULENT UNSOLICITED E-MAIL.

Section 1030 of title 18, United States Code, is amended—

(1) in subsection (a)(5)—

(A) by striking "or" at the end of subparagraph (B); and

(B) by inserting after subparagraph (C) the following new subparagraphs:

"(D) intentionally and without authorization initiates the transmission of a bulk unsolicited electronic mail message to a protected computer with knowledge that such message falsifies an Internet domain, header information, date or time stamp, originating e-mail address or other identifier; or

"(E) intentionally sells or distributes any computer program that—

"(i) is designed or produced primarily for the purpose of concealing the source or routing information of bulk unsolicited electronic mail messages in a manner prohibited by subparagraph (D) of this paragraph;

"(ii) has only limited commercially significant purpose or use other than to conceal such source or routing information; or

"(iii) is marketed by the violator or another person acting in concert with the violator and with the violator's knowledge for use in concealing the source or routing information of such messages;";

(2) in subsection (c)(2)(A)—

(A) by inserting "(i)" after "in the case of an offense"; and

(B) by inserting after "an offense punishable under this subparagraph;" the following: "; or (ii) under subsection (a)(5)(D) or (a)(5)(E) of this section which results in damage to a protected computer";

(3) in subsection (c)(2), by adding at the end the following new subparagraph:

"(D) in the case of a violation of subsection (a)(5)(D) or (E), actual monetary loss and statutory damages of $15,000 per violation or an amount of up to $10 per message per violation whichever is greater; and";

(4) in subsection (e)—

(A) by striking "and" at the end of paragraph (8);

(B) by striking the period at the end of paragraph (9); and

(C) by adding at the end the following new paragraphs:

"(10) the term 'initiates the transmission' means, in the case of an electronic mail message, to originate the electronic mail message, and excludes the actions of any interactive computer service whose facilities or services are used by another person to transmit, relay, or otherwise handle such message;

"(11) the term 'Internet domain' means a specific computer system (commonly referred to as a 'host') or collection of computer systems attached to or able to be referenced from the Internet which are assigned a specific reference point on the Internet (commonly referred to as an 'Internet domain name') and registered with an organization recognized by the Internet industry as a registrant of Internet domains;

"(12) the term 'unsolicited electronic mail message' means any substantially identical electronic mail message other than electronic mail initiated by any purpose to others with whom such person has a prior relationship, including prior business relationship, or electronic mail sent by a source to recipients where such recipients, or their designees, have at any time affirmatively requested to receive communications from that source; and

"(13) the term 'Internet' means all computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.".

(5) in subsection (g), by inserting "and reasonable attorneys' fees and other litigation costs reasonably incurred in connection with civil action" after "injunctive relief or other equitable relief".

SEC. 505. DEFINITIONS.

For purposes of this title:

(1) BROADBAND.—The term "broadband" refers to a transmission capability in excess of 200 kilobits per second in at least one direction.

(2) BROADBAND ACCESS TRANSPORT PROVIDER.—The term "broadband access transport provider" means one who engages in the broadband transmission of data between a user and his service provider's point of interconnection with the broadband access transport provider's facilities. Such term shall also include a service provider who provides to itself, over facilities owned by it or under its control, the broadband transport of services between itself and its users.

(3) SERVICE PROVIDER.—The term "service provider" means a person who provides a service that enables users to access content, information, electronic mail, or other services. The term may also include access to proprietary content, information, and other services as part of a package of services offered to consumers.

(4) INTERNET.—The term "Internet" means all computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.

(5) BROADBAND SERVICE PROVIDER MARKET.—The term "broadband service provider market" includes the provision of broadband services over a single broadband access transport provider's facilities.

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Mr. HYDE. I want to commend my colleagues, Mr. Goodlatte and Mr. Boucher, for their excellent work in bringing these issues before us. They are both well versed in high technology issues and they are a real credit to this committee.

I appreciate all of you coming today, and we look forward to your testimony. I now turn to the ranking member, Congressman Conyers, and then I will recognize the sponsors of these bills, Mr. Goodlatte and Mr. Boucher, for their opening statements.

Mr. Conyers.

[The prepared statement of Chairman Hyde follows:]

PREPARED STATEMENT OF HON. HENRY J. HYDE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

Today the Committee holds a hearing on H.R. 1686, the "Internet Freedom Act," introduced by Congressman Goodlatte, and H.R. 1685, the "Internet Growth and Development Act of 1999," introduced by Congressman Boucher.

These two bills seek to enhance the growth of the Internet. They involve two related issues. The first has to do with cable broadband lines and whether their owners will be required to grant access to them on nondiscriminatory terms. The second is whether the regional Bell operating companies will be able to transport data over long distance lines within their regions—something they are currently prohibited from doing. The resolution of both of these issues will have profound consequences for the future of the Internet, and more broadly, the ways that we will communicate in the future.

This Committee has a long and proud history in shaping telecommunications policy, and we were instrumental in passing the landmark Telecommunications Act of 1996 into law. We intend to continue that proud tradition in our consideration of this legislation. We are the Committee responsible for competition policy throughout the economy, and I cannot think of a set of competition issues that is more vital to our nation's future.

At the time that we were considering the 1996 Act, the Internet was in its infancy. In a little over three years, it has gone from a technological marvel to a near necessity for millions of Americans. That tremendous growth has dramatically

changed many of the assumptions we held when we were considering the Act. That may mean that we need to reopen the Act, but it may not.

It does, however, mean that we ought to take a look at that question, and that is what we are here to do. Several of the contending parties have visited with me in the last several weeks, and I will say publicly what I have said to them. I come to these issues with an open mind. I have taken no position on either of the bills before us, but I am very interested to hear the arguments of all the witnesses today.

I also want to commend my colleagues, Mr. Goodlatte and Mr. Boucher, for their excellent work in bringing these issues before us. They are both well-versed in high technology issues, and they are a credit to the Committee.

I appreciate all of you coming today, and we look forward to your testimony. I will now turn to the ranking member, Mr. Conyers. Then, I will recognize the sponsors of these bills, Mr. Goodlatte and Mr. Boucher, for their opening statements.

Mr. CONYERS. Good morning, Mr. Chairman, and my colleagues and all of the distinguished witnesses that are here. This is an important matter. And I would like to begin by reminding the members of the importance of this hearing. This represents one of the most critical segments of our economy, nearly a seventh of our entire gross national product, affecting everyone in every business thereby.

It has always been my position to support competition in all sectors to give consumers access to the greatest selection of options at the best prices. Unfortunately, to date I have not been impressed with the state of competition in the telecommunications industry.

The fact of the matter is that cable rates essentially deregulated under the 1996 act have gone up over 20 percent in 6 years, and the competition and innovation among the Bells have resulted in a wave of mergers and consolidations. Seven Bells to four. And the cable industry is in the process of being swallowed whole by the long distance and software industries.

The bill of my colleagues on the committee—and I too commend them—brings two critical communications issues before the committee. The first question is whether Congress should impose open access requirements on high-speed cable to the Internet. Part of this issue comes down to whether high-speed access is a unique monopoly service which can't be duplicated or whether it is one of many equally good routes to the Internet.

In addition, we need to consider what impact, if any, regulating high-speed cable will have on the ability of the cable industry to convert the technology into two-way telephone service which, of course, competes with the Bells.

The other huge question before us is whether we should relax the statutory restrictions on long distance service by the Bells so they can enter the field of long distance data transmissions. On this point, there seems to be some clarity in the observation that the Bells should fully open up their networks to local competition before they should be able to enter long distance.

The statutory requirement serves two purposes: first, it ensures that the Bells can't use their local phone monopoly to create a monopoly in long distance, and it creates a strong financial incentive for the Bells to open up their own networks to competition.

Data transmission represents half of all the traffic on the telephone network and will soon go beyond 90 percent.

So if we are to abandon the long distance entry tests for data, we will have to see very strong and compelling evidence that doing

so will not harm competition and will not negatively impact consumers.

And so I approach this hearing subject to these observations with great interest in the comments that will come from a very distinguished panel.

The telecommunications industry was, frankly, born into monopoly. And it took three antitrust suits to finally bring some semblance of competition to Ma Bell. Competition and antitrust were also at the heart of the long distance restrictions included in the 1996 Telecommunications Act.

So let's have at it, but let's remember that the consumers and our citizens should be predominant in the concerns that we resolve here this morning. Thank you very much.

Mr. HYDE. Thank you, Mr. Conyers. Mr. Goodlatte, the gentleman from Virginia.

Mr. GOODLATTE. Mr. Chairman, I want to thank you for holding this hearing today. Clearly the turnout that we have is evidence that either this is perhaps the most important issue related to the future of the Internet or at least we have struck a nerve. I want to welcome everybody today.

In my opinion, this is a tremendous issue and does very much relate to the future of the Internet. The promise and potential of the Internet is boundless, and we are just beginning to understand and realize how fundamental the Internet's impact on society will be. I hope that this will be the first of many Judiciary Committee hearings that will take a long-range view of the development of the Internet and our future as both a Nation and as an increasingly connected global electronic community.

Mr. Chairman, the legislation we hear testimony on this morning was introduced by Congressman Boucher and myself earlier this year because we felt we had no alternative. As we move from the current world of narrow band or slower speed Internet service, into the world of high speed or broadband Internet service, we recognize that the Internet is at a crossroads. One path continues to encourage the qualities that have made the Internet the revolutionary technology we enjoy today, freedom, competition, and consumer choice.

The other path is characterized by limited competition and higher prices, followed by inevitable attempts at burdensome regulations by aggressive Federal Government agencies. This path results when a company can abuse its market power to restrict the ability of businesses to compete on the Internet and restrict the ability of consumers to access the Internet provider and content of their choice.

The Internet as we know it, open, competitive and easily available to consumers, will cease to exist. That path, unfortunately, is the path we are on right now.

Congress must act now to ensure that the qualities that made the Internet a revolutionary tool for both business and users, deregulation, competition, and easy consumer access remain fundamental components of the Internet for future generations.

The first goal of our legislation is deregulation. The bill gets the FCC out of the business of regulating the Internet. It accomplishes this by eliminating existing FCC regulations that are inhibiting the

development and roll-out of certain types of broadband Internet service in nonurban and rural areas.

The second goal of our legislation accomplishes—the second goal our legislation accomplishes is to ensure consumer choice through open competition. Through the clarification of current antitrust law and the deregulation of restrictive regulations on the ability of phone companies to compete in the provision of nationwide data services, our legislation provides competition in both the Internet service provider and the Internet backbone markets.

Finally, our legislation encourages open consumer access for consumers by encouraging the roll-out of high-speed Internet service into rural and nonmetropolitan areas more quickly. The relaxation of existing regulations on the phone companies would allow them to more quickly enter the backbone market, rolling out high-speed service to more and more rural areas.

The bill also rewards the phone companies from meeting certain roll-out requirements by removing rate and price regulations. These requirements include conditioning local loops for high-speed service by competitors and filing plans with their State regulatory agencies for the predicted roll-out of broadband service.

The principles of free market competition, low government regulation, and open consumer access have guided the growth of the Internet. The environment that has nurtured this early growth must be preserved and strengthened to spur continued innovation and ensure that the Internet and information-based economy continue to flourish.

Our legislation will ensure that this environment continues to thrive in a way that avoids the heavy hand of government regulation while applying current antitrust law to ensure competition and protect both consumers and small businesses as we move into the 21st century.

Mr. Chairman, I think it is especially important that the Judiciary Committee has taken the lead on this issue in addressing it from an antitrust stand point because I think this is a place where we can truly speak for a competitive environment and work to continue to see the Internet grow. But in order to accomplish that, we must make sure that no company, no industry, dominates this market.

Thank you, Mr. Chairman.

Mr. HYDE. I thank the gentleman. The gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman. It has been my pleasure to work with my Virginia colleague, Mr. Goodlatte, in authoring two items of legislation which are the subject of our hearing today which taken together address the major challenges that confront the Internet in our time. If enacted into law, the legislation that we have put forward will strengthen the Internet and will assure its growth and development. And I want to thank Chairman Hyde for assembling today's discussion, which is focused on these two items of legislation.

Until the present time, congressional debate on matters that affect the Internet have been ad hoc. They have been for a single purpose only. The bills that Mr. Goodlatte and I have put forward provide the first comprehensive framework for debate by the Con-

gress of the major current Internet policy challenges. And I hope that today's hearing will be but the first formal step in a process that will lead to passage of these measures by the Congress during the course of this Congress.

These are the goals that we are seeking to achieve. First, we want to assure that all people who connect to the Internet can select the Internet access provider of their choice, whatever platform they have chosen for transport service. This open architecture is the model to which Americans have become accustomed. Most people connect to the Internet today using telephone lines. And under current law they can choose among an array of Internet access providers. If the telephone company that offers transport services also offers an Internet access service, the customer may choose the telephone company's Internet access service. But he is equally free to choose to purchase Internet access from some other provider.

Unfortunately, that requirement does not extend at the present time to the cable industry. And as cable companies deploy high-speed cable modem services, they are requiring that their cable modem transport customers purchase either @Home or Road Runner, their affiliated Internet access services. This arrangement threatens to close an Internet architecture that because of its previous openness has enabled the Internet to grow and develop. This arrangement will deny customers a free and fair choice. And this arrangement threatens the very existence of many of the some 5,000 Internet access providers found across the Nation today.

The legislation we propose would keep the Internet architecture open, would assure customer choice, and would enable Internet access providers to continue to reach their business base of customers.

As a second major purpose, our legislation will assure greater competition in the offering of Internet backbone services by permitting the Bell operating companies to provide data across LATA boundaries as long as the data does not consist of a voice-only long distance service. This provision is essential to assure adequate backbone services in many rural areas of the Nation and to protect the peering arrangements that keep Internet traffic flowing without charges among the various segments of the Internet backbone today. This insurance policy against a very real threat of concentration in the offering of backbone services will help to keep the prices for Internet connections for all Americans reasonable.

Our comprehensive legislation will also achieve these additional goals. By deregulating DSL services, we will strengthen the financial case for the deployment of this broadband offering to homes and to places of work across the Nation by telephone companies. This provision will help to increase the speed of Internet connections and address one of the major policy challenges that confronts Internet consumers today.

We propose to give new legal tools to Internet service providers to protect their facilities from onslaughts of spam. We propose to authorize digital signatures for all commercial transactions so that no party to a commercial transaction can disavow that transaction due to the absence of a physical written signature.

We propose new guarantees for the competitors of telephone companies in offering DSL services by making available to them recon-

ditioned loops at an earlier time so that they can in a more efficient way offer a competitive DSL service. And we propose a new right of privacy assuring that all Internet users will know what information is collected from them by Web sites, how that information is disseminated if at all by the Web site, and then have an opportunity to opt out of visiting the Web site without any information about them being collected.

These measures are carefully balanced. They are integrated each with the others, and together they will keep the Internet open and encourage its development.

Mr. Chairman, I thank you again for organizing today's discussion, and I look forward to hearing from our distinguished witnesses.

Mr. HYDE. Thank you, Mr. Boucher. Before I introduce the panel, Mr. Bryant, a member of our committee has been drafted by the Commerce Committee and apparently became a free agent and signed with them and is no longer with us. However, we came out number one in the draft, and we have his replacement.

So I would like to introduce the newest member of the committee, Representative David Vitter of the First District of Louisiana. Mr. Vitter is a graduate of Harvard University and the Tulane University Law School. He was also a Rhodes Scholar at Oxford. He practiced law for many years in Louisiana; he also taught law at Tulane and Loyola Law Schools. He served 7½ years in the Louisiana State legislature, where he was a champion of lower taxes, smaller government, and swifter punishment for criminals. We welcome him to the committee today. Mr. David Vitter.

Mr. VITTER. Thank you very much, Mr. Chairman.

Mr. HYDE. Our first and only panel today consists of 11 witnesses who have various perspectives on the bills we are considering. Our first witness is Mr. Bill Barr, the executive vice president and general counsel of GTE Corporation. Mr. Barr has a bachelor's and a master's degree from Columbia University and a law degree from George Washington University. After law school, he clerked for Judge Malcolm Wilkie of the D.C. Circuit. He has a long and distinguished career in public service, both at the Central Intelligence Agency and the Department of Justice, culminating with his service as Attorney General from 1991 to 1993. Before coming to GTE, he was in private practice with the Washington law firm of Shaw, Pittman, Potts and Trowbridge.

Our next witness is Mr. George Vradenburg, the senior vice president of America Online. Mr. Vradenburg is a graduate of Overland College and Harvard Law School. He has been a partner at the law firm of Latham and Watkins and has served in the legal departments of CBS and Fox. He joined AOL as its general counsel in 1997 and has been with the company ever since.

Our next witness is Mr. Ken Wasch, the president of the Software and Information Industry Association. Mr. Wasch, I hope I am pronouncing it correctly—is it soft, Mr. Wasch?

Mr. WASCH. Yes.

Mr. HYDE. Mr. Wasch is a graduate of Lehigh University and the State University of New York at Buffalo Law School. After law school, he spent 8 years with the Department of Energy. In 1984, he founded the Software Publishers Association; and he led that as-

sociation until this year, when it merged with the Information Industry Association. He is now the leader of the newly merged association that he represents here today.

Our next witness is Mr. Erik Sten, the commissioner of public works for the City of Portland, Oregon. Commissioner Sten is a graduate of Stanford University and served for many years as chief of staff to a city commissioner in Portland before being elected in his own right in 1996. During that time he became recognized for his work in the field of housing. As commissioner of Public Works he is responsible for, among other things, the city's Office of Cable Communications and Franchise Management.

Our next witness is Mr. Scott Cleland, managing director of the Legg Mason Precursor Group. Mr. Cleland has a bachelor's degree from Kalamazoo College and a master's degree from the University of Texas. He has a long career in government, serving in the State Department, the Treasury Department, and the Office of Management and Budget. He also has extensive experience in the private sector working with Booz Allen and Hamilton, Charles Schwab and Company, and Legg Mason.

Our next witness is Mr. Mark Rosenblum, the vice president for law of AT&T. Mr. Rosenblum is graduate of the University of Maryland and the University of Michigan Law School. Mr. Rosenblum practiced with the law firm of Sullivan and Cromwell before joining AT&T in 1984. He has been with the company since that time, rising to his current position last year.

Next Mr. Mike Salsbury, the executive vice president and general counsel of MCI Communications. Mr. Salsbury is a graduate of Dartmouth, and he has a JD and an MBA from the University of Virginia. He was previously the managing partner of the Washington office of the law firm of Jenner and Block. He came to MCI as its general counsel; and after its merger with Worldcom, he has had the same role with the newly merged company.

Our next witness is Mr. Tim Boggs, the senior vice president of Time Warner. Mr. Boggs is a graduate of the University of Wisconsin. He is also a veteran of the staff of this committee, and we extend to him a special welcome in that regard. He joined Warner Communications in 1982 and has been with the company in its various forms since then.

Our next witness is Mr. John Windhausen, the president of the Association for Local Telecommunications Services. Mr. Windhausen is a graduate of Yale University and the UCLA Law School. He has had a distinguished career in government, serving at the Federal Communications Commission and the Senate Commerce Committee. Since leaving the committee, he has worked at the Competition Policy Institute as well as teaching at Georgetown university.

Our next witness is Mr. Tod Jacobs, the senior telecommunications analyst at Sanford C. Bernstein and Company. Mr. Jacobs has a bachelor's degree from Northwestern University and a master's from the Columbia University Journalism School. Before becoming a securities analyst, he had a career in journalism and was nominated for a Pulitzer Prize and an Emmy Award. He joined his current company in 1989 and became a partner in 1995.

Our final witness is Mr. Gene Kimmelman, the codirector of the Washington office of Consumers Union, the publisher of Consumer Reports. He is a graduate of Brown University and the University of Virginia Law School. He served 2 years as the chief counsel of the Senate Judiciary Committee's Antitrust Subcommittee. He also has worked with the Consumer Federation of America and Congress Watch. He is recognized as a leading consumer advocate on telecommunications issues.

We welcome all of you and look forward to your testimony. And I would request that you try to confine your remarks to 5 minutes. The entirety of your statement will be received into the record and, of course, will be read and studied. But because we have so many witnesses it would be helpful if you could abbreviate your comments in general and leave time for questions.

Mr. CONYERS. Mr. Chairman, might all the members have an opportunity to submit any written introductory statements that they may not have made?

Mr. HYDE. Absolutely. Anyone who has an introductory statement it shall be received into the record at this point without objection.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF HON. SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

I would like to thank Chairman Hyde and Ranking Member Conyers for convening this important legislative hearing on two bills, H.R. 1685 and H.R. 1686, both of which touch upon broadband telecommunications issues that are one of the driving forces behind our thriving economy.

Before we can come to a resolution on these two bills, I believe it is in the interest of the Committee to examine how it is that we got here. *Simply said, what we are grappling with here today is the question of what Congress should do for an industry whose competition is technology-based, but where the technologies that drive competition are in a state of convergence.*

In a recent conversation I had with Federal Communications Commissioner William Kennard, we spoke of what it was that would bring us back to the Telecommunications Act of 1996, which I proudly worked on as a Freshman Member in this House. What would it take to make us revisit some of the principles that were laid down in that important piece of legislation? His answer was clear, and one with which I wholeheartedly concur—convergence would bring us back.

By convergence, I am describing the phenomenon that moves even as we sit in this Chamber. It brings together the technologies that bring moving pictures to our television sets and that allows us to speak with each other over the telephone. Both technologies have the capacity to carry high-speed data over the Internet, one through the use of cable modems, and the other through a technology known as DSL. And now, what we thought were disparate systems are competing directly with each other—one technology versus another.

The ramifications of this convergence are startling and have caused the business community to rethink what it means to be called a telecommunications company. It also gives Congress pause to think about whom should we think should be treated as a telecommunications company under the law. These bills will allow us to focus our discussions on these profound legal questions.

To me, these bills do not represent a radical departure from current policy. What they do, however, is expand the scope of our policies to uncharted territories. Part of the reason for that, and one of the honest impetuses for these bills, is the fact that, for now, cable systems are developing to be the platform-of-choice for broadband services.

If this trend continues, to the point where we no longer have technology-based competition—then I would not think it unconscionable that we apply some of the same regulations that currently exist on the phone networks to the new technology. I understand that this will have a significant impact on those who have invested a great deal of capital into cable and whom originally thought that their investment would give them the right to exclusively capture the Internet business of their cus-

tomers. But that is part of the reason why we are having this hearing here today—to gauge the magnitude of that impact.

Another aspect of this legislation that we will be looking into is whether Section 271 of the Telecommunications Act needs to be retooled in order to deal with the convergence of technologies that I described earlier. Part of the debate will focus on to what an exemption from Section 271 of the Telecommunications Act for data transmission would do to the delicate balance that I believe we achieved between local and long-distance phone companies in 1996. We need to know whether we will be allowing an end-run around the Act, or whether we are truly creating an opportunity for investment in our Internet backbone.

We also need to investigate the current status of the Internet backbone. Is its bandwidth adequate for the near and distant future? Do too few parties control it? Is there an adequate reason to prohibit local-access providers from purchasing segments of the backbone? Will new technologies rely on the backbone?

The bottom line is that whatever decisions we make, we must try to keep our eye on the best interest of consumers. We want to make sure that we are not making choices between factions of phone companies for their sake, but that we are making smart choices for our constituents.

I hope that the testimony today will allow us to make informed decisions on these bills as we move forward, and I look forward to working with all of you on this important issue. Thank you.

Mr. HYDE. Mr. Barr.

STATEMENT OF WILLIAM BARR, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, GTE CORPORATION, WASHINGTON, DC

Mr. BARR. Thank you for the opportunity to testify today, Mr. Chairman. And I would like to commend Congressmen Goodlatte and Boucher for their leadership on this critical issue. You know, when you think about it, there is no institution that is potentially as central to our economic and communal life as the Internet. It is more than just a method of communication; it is really a marketplace where buyers find sellers and commercial transactions are executed. And it is more than an entertainment media. It has become the primary means of the dissemination of opinions and ideas. It has really become very much a comment, a public comment and a public forum.

Now the principal constraint that has been operating on the Internet today is that, while the backbone of the Internet can carry rivers of data, the pipeline to the house can only carry a trickle. And there have been two solutions that have been developed, one by the phone companies, and one by the cable companies. These are technological solutions that can transform those pipes into high bandwidth pipes capable of pumping rivers of data into the home.

Now, this will effectuate the promise of the Internet. And people are desperate for it, desperate to get that high band width, because that is when video can come over, video, incidently, which competes with cable. That is how you can have real-time teleconferencing and other things like that.

How do we get that out to people as quickly as possible? Everyone here says we are for competition. Well, let that be the benchmark. We should be for anything that maximizes competition on the Internet because that ensures the widest and the quickest deployment of this technology; but it also ensures that the Internet will be diverse, will be innovative, and will continue to grow.

And that is what the Goodlatte-Boucher bill does. It maximizes competition on the Internet. This is the key point. The status quo is not full competition or competition. There are obstacles in place

today that constrain and limit competition. And what the Goodlatte-Boucher bill does is it eliminates those obstacles and it unleashes the forces of competition. I can't imagine a more deregulatory procompetitive approach to dealing with the Internet than this bill. It basically says that the Internet is a regulation-free zone; let the competition begin.

Now, what is the first obstacle? I said there were two. The first obstacle is that the cable companies are asserting that they have the unique right—no one else has this in the telecommunications industry—to engage in a grossly anticompetitive practice that violates a basic tenet of open access which has been the bedrock of maintaining competition in telecommunications industry.

And what this is is a simple tactic. It says if we own the local wire, then we can dictate to you what services you get over it and we can require that you only get our services over it. This is a form of improper tying that has historically curtailed competition in telecommunications markets. If a person has an advantage in one market and seeks to leverage it into another by saying if you buy product A from me, I am going to force you to buy product B. That is anticompetitive. That is not procompetitive, because you curtail competition in market B and you limit consumer choice.

If all the electric utilities today got together and said, hey, it is our electricity you are using, and if you want to use our electricity you have to buy your appliances from our subsidiary, you can't use any other appliances, that curtails competition in the appliance market. That is anticompetitive and has always been found anticompetitive.

Now this bill prohibits this tactic by requiring open access. And that open access is born of bitter experience over the past century.

These telecommunications industries of the past were not born into monopoly. What happened was at the beginning of the century, AT&T tried exactly the same tactic. They bought up the local pipeline and said if you want to get long distance, you have to buy our long distance product. And that led to a monopoly. We have been spending decades trying to undo it.

Same thing happened in cable. The cable companies in the 1980's said we own the pipeline; we are going to control the content. And that eliminated virtually the independent video programmers. And in both cases open access was approved by Congress but after the fact, after the damage was done. And what is stunning here is that the same two players, AT&T and the cable companies, are trying to do exactly the same thing in the Internet market, say we control the pipe, you have to use our content, you have to use our transportation system.

The second obstacle is that there is a direct prohibition, a direct prohibition and burdening of the telephone company's ability to come in and compete and provide their high bandwidth service. And just look at this—and this is how I will conclude—just look at this difference. AT&T is saying we need—if we are restricted to the revenue from local transport, then we have no incentive to invest in high bandwidth. We have no incentive.

So we not only need to compete in the vertical stream, but we have to capture that through a compelled tie-in with our customers. We have to say we need to force the customers to get into

our ISP, we have to get the backbone revenue, otherwise we don't have the incentive to deploy. But look what the rules are doing to the telephone company. The rules for the telephone company say you can't even compete, much less lock in.

All we are saying is let us compete in those markets. We are not asking for a lock-in; we are asking to compete in those markets. The bottom line is this: when AT&T and the cable companies say they want free competition, they want to compete but they want their competitors burdened so they can't compete. And second when they say they want competition, they want to be insulated from the traditional free market rules that apply to everybody else in the telecommunications industry.

Thank you.

Mr. HYDE. Thank you.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF WILLIAM BARR, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, GTE CORPORATION, WASHINGTON, DC

Thank you, Mr. Chairman, for the opportunity to testify before the Committee. I am Bill Barr, Executive Vice President and General Counsel for GTE.

Within the near future, high-speed or broadband Internet access will become the most important communications medium in the country. As a result, the Internet soon will become central not only to our economic vitality, but to our communal life. It will be the public commons, a forum for ideas, a marketplace, a medium of entertainment, a vast public library, and the primary means for the dissemination of news, opinion, and information.

The Internet market currently suffers, however, from severe constraints on competition caused by *ad hoc* and irrational government regulation that has been lifted from the telephone and cable television markets and haphazardly applied to the very different Internet market.

First, existing law prevents one set of competitors—local telephone companies—from competing freely in the Internet market, thus insulating cable companies from full competition.

Second, exploiting their insulation from full competition, cable companies are engaged in a classic anticompetitive tactic—tying their services together, which permits cable companies to leverage control from one market into others. Specifically, AT&T and the cable giants are requiring consumers who want broadband access transport also to purchase the cable company's affiliated ISP instead of the ISP of the consumer's choice.

The bills introduced by Congressmen Goodlatte and Boucher deal directly with these problems and are highly pro-competitive. The bills would break down the existing barriers to telephone company competition and simultaneously prevent improper cable company leveraging—and thus would ensure free, equal, and open competition on the Internet, which would greatly benefit consumers.

First, the bills would allow the local telephone companies, including the Bell companies, to compete freely in the Internet transport markets. I want to stress, however, that the bills would not in any way remove the requirements on the Bell companies to open their local telephone markets to competition in order to enter the long-distance phone market, but would simply free them to participate fully in the Internet market. *Second*, the bills would prohibit the cable companies' current anticompetitive practice of tying and would impose open-access requirements on all broadband access transport providers, cable companies and telephone companies alike.

1. GUARANTEEING OPEN ACCESS AND FREEDOM OF CHOICE

Let me turn first to open access.

The principle of open access is not newly minted: It has been the central tenet of the telecommunications industry for the last 15 years. The notion has been a simple one: You can install a driveway and get a fair return from the consumer for installing that driveway, but that does not give you the right to dictate to the household where they go on the highway.

That fundamental principle has been applied to open up the telephone markets and to protect independent programming in the video market.

That's why consumers today can choose their long-distance carrier. It's not dictated by the local company. Consumers have a choice. That's open access.

That's why cable company operators are not allowed to favor video programmers owned by the cable company in providing cable television service.

And that's also why consumers have a choice today when they use the telephone line to get to the Internet. They can choose their ISP—whether America Online or GTE Internetworking or Mindspring or one of the other ISPs in operation. Again, open access.

This policy of open access was not dreamed up in some utopian classroom. Rather, it is the product of bitter experience over the twentieth century. Twice in this century, large corporations successfully came to dominate key parts of the telecommunications industry through a simple two-step strategy. First, buy up a large percentage of the local pipelines into the home. Second, close off consumer access to any other provider of services—forcing the consumer to do business only with companies affiliated with the owner of the pipeline into the home.

In the first decade of this century, as the newborn telephone industry was exploding, AT&T bought up the bulk of local exchanges and forced its consumers to choose AT&T as the long-distance provider. Competition quickly withered away, and AT&T succeeded in establishing its monopoly.

Similarly, in the 1980s, cable companies used their control over cable access to try to take over video programming and content. The cable companies used their ownership of the wire to get a piece of the action on content and to require that content providers be affiliated. The Congress finally took steps to curb this practice in 1992 and require nondiscriminatory access.

In both of these cases, regulators *eventually* stepped in and required open and equal access. But the key point is that the regulators stepped in only *after* the damage had been done—*after* competition had been thwarted. Through a series of regulatory devices over the past 15 years, regulators have been struggling to recreate competition and to return to open access principles in these markets.

It's therefore ironic that the same companies that tried these tactics earlier—AT&T and the cable giants—are now combining into one huge firm and putting the same tactics into effect to try to dominate the Internet, which is the telecommunications marketplace of the 21st century. AT&T is buying a large percentage of high-speed Internet lines into the home and is also seeking to close off the consumer's ability to choose any ISP other than one controlled by AT&T.

Many cable companies, in offering Internet access, are compelling their customers to sign up for, pay for, and use their ISPs if they want to use a cable modem. Basically, customers do not have a choice. If they obtain cable modem service, they must choose the cable company's ISP.

The cable companies are enforcing their lock on the customer with three penalties. First, they are telling customers who want to use another ISP that they still have to pay for the cable company's ISP—in other words, a consumer who wants choice has to pay twice.

Second, beyond this financial penalty, they impose a performance penalty. They provide a direct connection to their own ISP, but the traffic of customers who want to reach another ISP travels on the public Internet, leading to a lower-quality connection. This is discrimination pure and simple.

Finally, by making customers go through their ISP, the cable companies can block competitive products from reaching their customers. A perfect example is the cable companies' anticompetitive limit on video streaming over the Internet—a restriction obviously designed to insulate their own television product from competition.

All that is required to end the cable companies' current monopoly leveraging is a simple legal mandate that cable operators deliver traffic on an open and nondiscriminatory basis to other ISPs. The bills offered by Congressmen Goodlatte and Boucher would accomplish that goal and thus would greatly promote competition and consumer choice.

Cable companies respond that, regardless of the policy justifications, it is not technically feasible for them to provide open access to other ISPs. But GTE has proved just the opposite in trials recently conducted in Clearwater, Florida. Open access to the cable system is technically feasible.

Open access is not regulation *of the Internet*, as some opponents suggest, but simply ensures *access to the Internet* and Internet *interconnection* to guarantee competition on the Internet and freedom of choice for the consumer. The principle of open access is a free-market principle that if imposed now, will avoid the need for truly massive regulation later. In that regard, recall that the Telecom Act of 1996 was largely necessary because of the failure to impose open-access requirements at the dawn of a previous communications medium: the telephone.

The policy of open access thus not only is necessary, but is necessary *now*. Those who are taking a "wait and see" attitude with respect to open access to the Internet are wrong. Once a firm gets a head start in closing off competition—as AT&T is attempting to do in the Internet access and ISP markets—the results can take years to undo. In fast-growing, network industries, anticompetitive tactics can lead to disastrous results very quickly. It is therefore imperative for legislators and regulators to act now to ensure open access.

II. REMOVING RESTRICTIONS ON LOCAL TELEPHONE COMPANIES IN INTERNET TRANSPORT MARKETS

Existing government policies are also hindering competition by crippling the ability of local telephone companies *even to compete* in the Internet market.

First, the FCC is interpreting the Telecommunications Act to prohibit the Bells from transporting data to the Internet backbone. The Bells' inability to compete in these Internet transport markets creates powerful disincentives for the Bells to deploy broadband DSL service. Many rural areas of the country have no nearby connections to the Internet backbone. In these areas, interLATA restrictions aimed at long-distance voice services have had the inadvertent effect of preventing the Bells from providing high-speed Internet services, including DSL access. The reason is elementary: There is little reason that a company would invest to provide DSL in a remote area if the company is blocked from carrying traffic on its own high-speed lines to the Internet. If the existing interLATA restrictions did not apply to IP data, the Bells would be able to bring high-speed Internet access to rural areas much sooner.

AT&T contends that, in order for it to have incentive to deploy cable modem broadband service, it needs not only to *compete* in all of the various Internet markets, but also to tie together its services in vertical markets, to leverage its power from one market to the next. All that the Bell companies seek, by contrast, is the ability simply to *compete* in the Internet markets.

The existing prohibitions on the Bell companies in carrying Internet traffic also prevent full competition in the backbone market. There is a strong public interest in competitive parity among major backbone providers. Indeed, it is only because of competitive parity that the major backbone providers have had an incentive to maintain high-quality peering arrangements with each other. Competitive parity among backbone providers is in serious peril, however. The Big-Three long-distance companies could soon dominate the market, discriminate against other backbone providers, and drive customers to their own backbones. This would enable the backbone provider to leverage downstream its backbone market power into the ISP and content markets.

Bell entry into the Internet backbone market would preserve competitive parity, however. With their resources, the Baby Bells could rapidly enter the backbone market and be treated as peers by the existing major backbone providers.

Second, under existing law, there is a regulatory overhang on all local phone companies because the FCC is threatening to impose the entirety of telephone regulation, including unbundling requirements, on telephone companies engaged in the Internet market. This is a further deterrent to investment in DSL: If a company cannot recover any meaningful profit from its investment because of onerous unbundling rules that were designed for an entirely different medium, common sense tells us that will deter investment. The existing regulatory posture yet again highlights the gross regulatory disparity that currently exists between cable companies and telephone companies and that thwarts the kind of real competition on the Internet that would benefit consumers.

In the end, the fundamental issue with respect to the Internet, as with all telecommunications, is how to allow the consumer to communicate with and obtain information from anyone anywhere in the world. There are only two ways this can occur: either (i) monopoly control of the entire network of wires and connections, or (ii) a network of networks governed by principles of interconnection, open access, and free competition. The choice between those two approaches for the Internet now faces this Congress. The choice must be made, and inaction itself will be a choice. Will Congress side with AT&T and the cable giants and allow a replay of the 20th century—this time in the Internet market rather than the telephone market? Or will the Congress heed the lessons of history and ensure open access, freedom of choice, interconnection, and competition on the Internet? We believe that the right decision is clear, that Congress should ensure open access and free and fair competition on the Internet.

Thank you.

Mr. HYDE. Mr. Vradenburg.

STATEMENT OF GEORGE VRADENBURG, SENIOR VICE PRESIDENT, AMERICA ONLINE, DULLES, VA

Mr. VRADENBURG. Thank you, Mr. Chairman, Ranking Minority Member Conyers. And I too want to commend Congressman Goodlatte and Boucher for introducing this legislation which addresses what we at AOL think is perhaps one of the most important issues regarding the future development of the Internet.

I want to take up on the theme, Mr. Conyers, that you raised, the consumer. One of the most remarkable things about what has happened on the Internet is the extent to which the consumers are taking on board this Internet phenomenon. They are adopting the Internet, far outpacing the predictions of anyone a few years ago; and they are adopting the Internet at a rate which exceeds the adoption of television, of radio, of any other medium in history. Every month 1.5 million Americans are joining the online world, bringing the percentage of the U.S. population now using the Internet from zero in 1990 to over 30 percent today.

In addition to the number of consumers coming online, businesses are going online as well. And with each new business comes some more competition in this space. What is remarkable is that there is competition at every level of the value chain. There is competition among 6,000 Internet service providers. There is competition among a variety—scores of portals and their millions of Web sites. And there is competition at a fierce level, a primitive level at every level of this value chain.

This competition has spurred enormous innovation and has brought consumer prices down. And attached to my testimony you will see exactly what the product has been for American consumers: falling prices, improving service.

Amazingly, all this power, all this competition and choice today is coming to residential consumers through one telephone line, a voice telephone system built for another purpose in another age. But all of this competition is coming through that one telephone line and that, Mr. Chairman, is the secret sauce of this Internet.

The single telephone line on which the Internet rests is open to all competitors on the same terms. As a result, there are virtually no barriers to entry into this marketplace. There are no last mile gatekeepers deciding who can get in and not get into the Internet business. The appeal of a product in the marketplace rather than who owns the wire is what determines success. And consumers can select the Internet service of their choice rather than the one chosen for them by the wire line carrier.

Now, the reason that the wire is open is a series of decisions in an antitrust context that the courts have made and this Congress has made over the last 30 years to assure that that infrastructure is open to all comers. And as a result, consumers are the drivers and the beneficiaries of this fierce, competitive, and open environment. The government has simply kept the playing field open and level. Soon the Internet is going to be available to broadband capacity, as Mr. Barr noted.

And in that world, Internet services are going to include voice, video and data services, all three of them in a convergent mix. And while today's broadband services—excuse me, narrowband services run over a single telephone wire, it is possible in the future that

these broadband services will run on a tapestry of multiple systems including telephone, cable, satellite, and wireless.

Yet over the next few years, the most likely carriers of these services are going to be our telephone and our cable systems. Yet those two systems have different histories, subject to different regulatory treatment by the government. Telephone system is open and transparent, pursuant to policies of antitrust courts and this Congress, and cable remains a regulated monopoly closed to competitive forces and notwithstanding the best efforts of this Congress to the contrary.

In an age of convergence when the Internet's digital technology is illuminating the historic distinction between voice and video and data, we can no longer pursue a fundamentally schizophrenic attitude between these two historic voice and video items. We must choose between competition, the choice of the antitrust courts in the telephone context and the 1996 act and the regulated monopoly, the path taken by the cable industry.

The adoption of an industrial policy specifically favoring one particular competitor or technology such as cable is fundamentally incompatible with a digital convergence that is happening in the Internet as well as the command of our national economic policy. The competitive economic outcomes and not government choice are the best protectors of the consumer welfare.

The bills before this committee go a long way toward remedying the situation. We commend Messieurs Goodlatte and Boucher for their approach. It is one that relies on our antitrust history, is forward looking, and is market driven. It is consistent with the government's policy over the last 3 decades to rely on competition and not regulation to enhance consumer welfare.

Every member of this committee is well aware of the most famous antitrust case in this Nation's history, the *United States* v. *AT&T*. That consent decree resolved the *AT&T* case and ushered in an era of consumer choice in long distance and telephone equipment that unquestionably has benefited every one of your constituents.

As we even the broadband world, real and substantial threats are emerging to the Internet access market. Strong, immediate, unequivocal congressional action is needed to preserve competition and openness. The Goodlatte-Boucher legislation does this by narrowly prescribing anticompetitive actions in this field. And we urge you to move quickly on that legislation, Mr. Chairman.

Mr. HYDE. Thank you Mr. Vradenburg.

[The prepared statement of Mr. Vradenburg follows:]

PREPARED STATEMENT OF GEORGE VRADENBURG, SENIOR VICE PRESIDENT, AMERICA ONLINE, DULLES, VA

INTRODUCTION

Chairman Hyde, Ranking Member Conyers, members of the Committee, good morning. Thank you for asking America Online to testify before the Committee today on two important pieces of legislation:

- H.R. 1686, "The Internet Freedom Act", introduced by Congressman Goodlatte; and
- H.R. 1685, "The Internet Growth and Development Act of 1999", introduced by Congressman Boucher, both Members of this Committee.

These bills, and this hearing, are important parts of Congress' ongoing consideration of issues that are critical to the future of the American economy and society as we move further into the Information Age. We hope you will act swiftly and decisively to prevent certain kinds of anti-competitive behavior that threaten consumer welfare by stifling competition in the market for Internet access.

THE INTERNET TODAY: COMPETITIVE MARKETS BENEFITTING CONSUMERS

How and Why the Internet Has Grown

Unlike any other communications technology that has preceded it, the growth of the Internet is a truly remarkable phenomenon. In only a few short years, the medium has literally transformed the way Americans communicate, engage in commerce, educate themselves and even participate in our democracy. An untold number of new entrepreneurs have discovered that if they build something on the Internet—a Website, a business or a new access service—thousands, even millions, will come. Always open for business, always open to new ideas, the Internet is perhaps the most dynamic force in our society and economy today.

It has become a cliché to call the Internet "revolutionary". But, as we've seen throughout the 20th century, revolutions come and go. The Internet's truly world-changing impact is *evolutionary*; it is quickly causing fundamental and lasting changes in the ways society, and the world economy itself, operates.

The impact of the Internet economy already is stunning. A recent University of Texas study concluded that today's Internet economy, measured by the value of goods and services flowing through it, is valued at $301 billion. Let me put that figure in perspective. The Internet economy already is bigger than the telecommunications sector ($270 billion) and is fast closing in on the auto industry ($350 billion). Yet, the Internet is in its infancy and your policy choices will have an enormous impact on its future.

The most significant aspect of this online phenomenon in many ways is the degree to which consumer choice and competition at all levels of the Internet marketplace have fueled its astounding growth. Consumers' Internet adoption rates are far outpacing the predictions of even the most aggressive analysts only a few short years ago—and far outpace the track record of any other medium in history. More than half of American households—a total of 53 million—now own PCs. And about one-third of American households now have access to the Internet. Every month, nearly 1.5 million Americans join the online world for the first time, bringing the percentage of the US population online from nearly zero in 1990 to over 30 percent today. Indeed, the number of online households in the United States grew by a factor of eight between 1994 and 1998.

In five years, nearly 60 percent of Americans are expected to be online. This same rapid growth path can be seen throughout the world, where the number of online users is expected to reach 250 million by the year 2002. As one would expect from all of these online users, traffic on the Internet is doubling every 100 days. Analysts are predicting that by 2002 consumers will spend nearly $43 billion a year online, compared to $8 billion last year.

The Internet often is referred to as a "network of networks". Its power and strength is rooted in its open architecture, one where all networks are voluntarily interconnected, where each network delivers its traffic to other networks in bartered peering arrangements and where, as a consequence, every person on any network can reach every other person on any other network. As more and more networks, of ever-increasing capacity, are added to this "network of networks", every consumer and business benefits.

Amazingly, all of this power is today delivered to residential consumers over a single "last-mile" infrastructure consisting of local telephone lines built for an entirely different purpose—namely, local voice service. Through this "last mile," more than 6000 competing Internet service providers, or ISPs, offer a wide variety of price, feature and service packages to residential and business customers alike. In just five short years, a system has emerged that serves over 90% of Americans with competing ISPs with local dial-up connections.

Competition among ISPs has been crucially important to the widespread adoption of the Internet by Americans. As explained in the attached charts, competition to offer consumers Internet access has brought prices for Internet access down to a greater degree, and much more quickly, than they ever would have come down in an environment with only a few providers. (See Exhibit A). ISP competition has raised the quality of Internet access service and expanded the range of Internet features available to consumers at all points in the Internet value chain. From the adoption of flat rate pricing to rapid innovation in business models, no ISP has been able to avoid the need to excel in this market.

Consumers are the drivers—and the ultimate beneficiaries—of this fierce competitive and open environment. There are virtually no barriers to entry into the Internet marketplace and no gatekeepers collecting tolls from new businesses. As a result, consumers have seen their product choices expand, have been granted access to a wealth of information historically available only to those with means, and have been empowered to participate in civic life in ways that were previously unimaginable.

The Multidimensional Broadband Future

Soon, the Internet will be available not only over today's "narrowband" technologies but also through "broadband" connections 100 times faster than today's access speeds. That transition is beginning even now.

As broadband becomes widely available, affordable and easy to use, we would expect all ISPs to use that technology to meet the needs of consumers, small businesses and the entire American population in new ways we have only begun to imagine.

Online shopping—and online selling—will explode as more sophisticated technologies expand the range of products and services available online and make it possible to view, tour, test and even "try on" a range of products.

Beyond online shopping will come the home office. Telecommuting—involving everyone from typists to traders—will come into the mainstream through broadband's capabilities, benefiting cities across the country through reduced traffic and pollution and giving businesses and employees much needed flexibility. One-person Internet-based operations will compete with multinational corporations, creating whole new local industries.

As broadband expands the capabilities of the Internet, its role will expand as society's "great leveler"—putting world-class resources, the widest range of products and services, and even access to the outside world at the fingertips of anyone capable of flipping a switch or dialing a telephone.

While today's Internet is built on a single telephone access platform, broadband Internet has the potential to be built on multiple access platforms—telephone, cable, satellite and wireless. AOL's vision for residential Internet access is one of a true "broadband tapestry." In a multiple-platform environment, consumer choice and competition can and should be enhanced, not limited. Internet rivals should be able to offer a wide range of new Internet applications, using different speeds and platforms. In fact, the consumer need not be aware of which access technology its Internet service provider is using—the consumer cares about service and applications, not technology.

Realistically, however, the next few years will see two-way broadband access to the Internet for the consumer marketplace will be offered primarily through two sources, both wireline—DSL through traditional phone lines and cable modems over cable systems. In the case of DSL, telephone companies offer non-exclusive and nondiscriminatory interconnection arrangements for these telecommunications services. We, and our Internet competitors, have entered into such arrangements with the prospect of higher speed Internet services and more robust applications becoming widely available in neighborhoods accessible by DSL by the end of the year. As I will discuss a bit later, cable however, poses some serious problems.

Other broadband access technologies will also become available at some point in the future that will permit Internet customers unprecedented choice and flexibility. In fact, just recently AOL announced an alliance with Hughes Electronics to help bring a hybrid form of high-speed Internet access through satellite to consumers by early next year. As a result, consumers will be able to benefit from affordable, convenient and faster Internet service even if they live in traditionally hard-to-serve communities like rural areas. But even this satellite-based system will continue to partially utilize the telephone network.

THE POLICY CHALLENGE: PRESERVING THE COMPETITIVE ENVIRONMENT

As stated above, competition, openness and consumer choice are the essential ingredients of the success of the Internet, whether consumers access the Internet through narrowband or broadband. In the telephone environment, the move from narrowband to broadband will preserve those elements. But the cable industry's intention to close their systems threatens the Internet's success by stifling consumer choice and competition in Internet access. Unlike in other broadband facilities, cable companies do not plan to offer access to Internet services. The cable industry insists that a customer purchase the cable-owned or affiliated Internet service before buying or accessing a competitive Internet service.

Two recent events underline the fact that the "closed system" model has been chosen by the cable industry solely as a means to exercise its market power in broadband to the detriment of competition:

- A GTE test over its cable system in Clearwater, Florida, demonstrates that cable systems are technically able to support competitive Internet access providers—despite cable industry claims to the contrary;
- The general counsel of the Nation's second largest cable company testified before a Congressional committee last week that his own company has the technical ability to offer open Internet access, but will not do so for business reasons.

This practice has at least three adverse consequences.

First, it eliminates competition in the access market, thereby challenging the Internet model that has kept prices falling and service quality rising over the last several years.

Second, it forces consumers to pay twice to get the Internet service of their choice, thus depriving moderate and low income families of the benefits of competition in cable-based Internet service.

Third, it discriminates in service quality between the cable-owned Internet service providers—whose content is directly accessible—and independent Internet service providers—whose content is only indirectly available through the Internet. To make matters worse, the cable companies have even stated their intention to preclude access to content otherwise available to the consumer on the Internet, material with which the cable system does not wish to compete, including video material longer than ten minutes.

The Congressional Choice

With the threat to Internet competitiveness looming, H.R. 1686 and H.R. 1685 mark an important step in ensuring that that Internet of today serves as the model for tomorrow. As both bills recognize, technologies are converging and all services—voice, data, video and others—are beginning to be offered over traditionally distinct voice or video platforms. As a result, old regulatory classifications will not be sustainable. Pro-competitive policies reflecting regulatory parity must become a clear priority. Congress should not favor one technology platform over another through public policy or regulatory disparities, or adopt or acquiesce to policies that hobble Internet deployment and use.

As is reflected in the two bills before this committee, Congress long has believed that its responsibility to preserve competition is broad based: the Nation's legal framework encourages competition at all levels, and ensures that market failures are minimized by proscribing specific kinds of conduct.

The most important way that Congress has acted to encourage competition and prevent market failures is by establishing a broad framework of antitrust laws that have operated for more than a century to preserve competition in all the Nation's industries and to preempt the ability of competitors with market power from exercising that market power to the detriment of consumers.

While the antitrust laws are often invoked to redress market failures after they occur, they are intended to encourage competition in all markets, whether they be emerging markets or mature markets. As the Supreme Court has said, the antitrust laws are "designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 4 (1958).

The antitrust laws are based on a foundation much more concrete than just a desire to ensure general notions of fairness in the marketplace. The Sherman Act reflects the assumption that competition is the best method of allocating resources in a free market and the Congressional judgment that ultimately, competition will produce not only lower prices but also better goods and services. Neither Congress nor the courts apply different standards to anti-competitive situations based on the age or maturity of the market—evidence of anti-competitive intent remains the touchstone.

Antitrust laws and principles have preserved and enhanced consumer welfare in countless industries, including the telecommunications industry and the mass media. Members with longer memories will recall that the antitrust laws required major changes in the ways that motion picture studios could be involved in the distribution and exhibition of their products. Antitrust concepts were applied to perceived discrimination by broadcast networks in the acquisition of independent television programming. Congress used antitrust concepts to prevent the cable industry from snuffing out emerging competition in satellite programming. The antitrust laws have been applied numerous times to correct real and potential problems with price fixing, technology transfer, and mergers and acquisitions.

And, every Member of this Committee is well aware of one of the most famous antitrust cases in our Nation's history. The consent decree that resolved the AT&T

case ushered in a new era of customer choice in long distance and telephone equipment that unquestionably has benefited every one of your constituents. In fact, Congress has sought to build on the benefits of the AT&T divestiture: the 1996 Telecommunications Act was enacted after a decade of effort to further stimulate competition in the delivery of telecommunications services. In that Act, Congress continued its historical efforts to ensure that all Americans have the best and lowest cost services in telecommunications through various initiatives aimed at promoting competition through open access for competitors. Clearly these principles of openness have enabled the Internet to develop and give in ways that would never have been possible in the closed environment of the pre-consent decree era.

As we move to the broadband world, real and substantial threats are emerging to the competitive Internet access market that necessitate strong, immediate and unequivocal Congressional action to preserve competition and openness in the Internet marketplace across all facilities.

The Goodlatte/Boucher legislation does this by proscribing specific kinds of anti-competitive conduct that would threaten the continuation of today's fierce competition in the Internet access market as we move to the broadband world. The legislation does so for the right reasons: to ensure that consumers have choices in prices and services, and to ensure that Congressional policy to mandate and encourage competition in the delivery of telecommunications services at all levels is not thwarted.

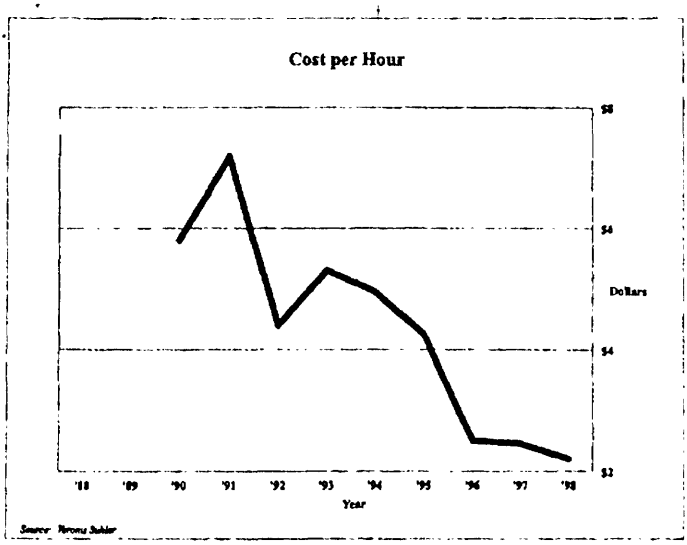
CONCLUSION

The goal of Congress in preserving and enhancing competition in Internet markets should be similar to how it is dealing with other Internet-related issues: to rely increasingly on the marketplace, and less on regulation, to provide the greatest consumer benefits. That is one important reason why antitrust policy is the right tool to address these issues: It focuses on existing or threatened market failures and tries to prevent them.

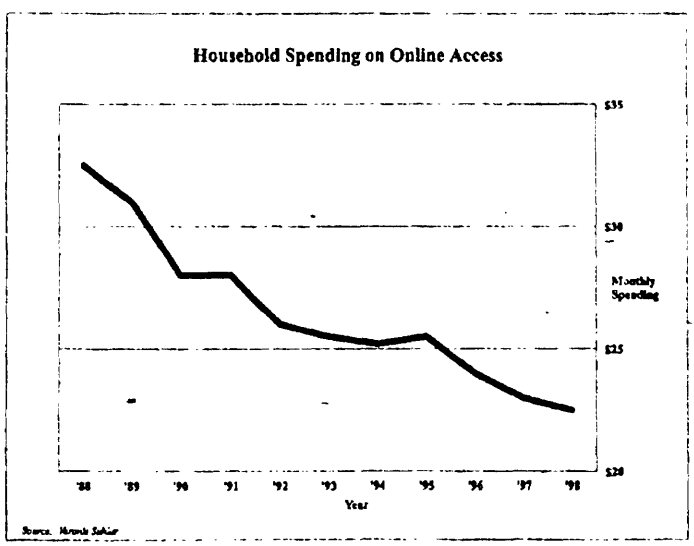
Right now, Internet access is a highly competitive market where entry costs are low and where business success is achieved by better products and services and lower prices. This Internet DNA of choice and competition—not the gatekeeper DNA of vertical integration—should be our guiding star. If gatekeepers want to play in the new Internet game, we should require them to play by Internet rules. We owe consumers no less.

Congress can do that in the best, simplest, and clearest way by passing the Goodlatte-Boucher legislation and establishing principles based on competition and choice for the Internet access marketplace.

Thank you again for inviting me to share our views. I look forward to your questions.



Online costs continue to fall..



...thereby lowering monthly household spending for Internet access (despite increased usage).

Mr. HYDE. Next Mr. Wasch.

STATEMENT OF KEN WASCH, PRESIDENT, SOFTWARE AND INFORMATION INDUSTRY ASSOCIATION, WASHINGTON, DC

Mr. WASCH. Good morning, Mr. Chairman and members of the committee. And thank you for the opportunity to testify before you today. The Software and Information industry Association was formed in January of this year through the merger of the former Software Publishers Association and the Information Industry Association.

We represent over 1,400 companies who produce valuable information and software products crucial to the growth of electronic commerce. Every few years the computer industry experiences the advent of new technologies that dramatically change how computers are used and how we access information.

While much has been accomplished in the last 15 years in terms of creating and enhancing this crucial infrastructure, the fact of the matter is, Mr. Chairman, that most people today access the Internet through 28.8 baud modems. These connections are much too slow to receive or send robust products such as complex interactive services or further convergence of voice, data, and video products that are in the marketplace today but generally available only to large businesses.

These products could easily be available to smaller enterprises and consumers as well and would ensure that the Internet becomes an even more valuable medium for U.S. consumers and an even greater engine of economic growth.

We are on the verge of a roll-out of broadband Internet services. As the principal representative of the code and content companies, SIIA is concerned that consumers be able to choose how they wish to access the Internet. Consumer choice, not controls by the government or of certain favored players, is the proven way to assure a competitive, vibrant marketplace.

Competition among all segments of Internet transport industries assures that consumers retain the freedom to select both the means by which they access the Internet and the service provider whose offerings of code and content best meets their needs. Internet transport providers such as telephone, cable, wireless and satellite companies should not be enabled—should not be able to engage in anticompetitive practices that frustrate or forestall consumer choice. Predominant carriers that are able to control unfairly the initial access to the Internet by bundling advanced communications services can also limit consumer purchases of Internet services, including the valuable code and content that customers want.

The ability of any provider of broadband services to gain an unfair advantage through a monopoly control of its services and intentionally preclude consumer access to multiple Internet providers is a worrisome development. Consumers may effectively be denied choice in terms of the content that would otherwise be readily and easily available to them. We echo the comments of Mr. Vradenburg, sitting to my left, that consumers will not be served if there are last-mile gatekeepers.

Let me be clear, Mr. Chairman. We are not concerned that certain Internet content will be blocked completely from access. Rath-

er, the industry believes it benefits no one if transport providers through unfair monopoly control can bundle services selectively and hinder consumers from viewing and purchasing online products and services. All ISPs have the ability to cache content so their customers can access it faster. In addition, ISPs frequently customize the first screen customers see when accessing the Internet.

However, we cannot minimize the impact of having content selection by the ISP, especially if the broadband service provider is the only transport service realistically available to the customer that the provider offers no choice.

Any broadband carrier that can exercise unfair market power that adversely affects the consumer choice of Internet service provider can also effectively foreclose the distribution vehicle to code and content products of all types.

Let's consider an example in a situation where, let's say, the opening screen of a favorite ISP promoted Visa instead of Mastercard or American Express as the credit card of choice or Reuters rather than Bloomberg as the favorite news source. The firm not selected for this preferential treatment would not necessarily be blocked from customer access, but it is clear that a tilting of the playing field can have an enormous impact on which products or services are even known to consumers, let alone used by them.

We would not be concerned if there existed a wide range of broadband providers and each makes his own independent selections. Now, the SIIA policy group had a very spirited debate concerning this issue, and we do not at this point take any position on the specific provisions of the Boucher-Goodlatte legislation. We have a series of questions we would like the committee to consider and those are contained within my written—my broader written statement.

In conclusion, the broadband marketplace must be competitive, allowing code and content providers the maximum choice in how they deliver and how consumers access products and services on the Internet. Thank you.

Mr. HYDE. Thank you, Mr. Wasch.

[The prepared statement of Mr. Wasch follows:]

PREPARED STATEMENT OF KEN WASCH, PRESIDENT, SOFTWARE AND INFORMATION INDUSTRY ASSOCIATION, WASHINGTON, DC

Good morning, Mr. Chairman and. Members of the Committee, and thank you for the opportunity to testify before you today as you consider H.R. 1685 and H.R. 1686. My name is Ken Wasch, and I am President of the Software & Information Industry Association (SIIA).

SIIA was formed in January of this year through a merger of the former Software Publishers Association and the Information Industry Association. SIIA represents 1,400 companies that produce valuable information and software products crucial to the growth of electronic commerce. Our members provide not only the products that ensure the continued growth of the Internet but also the online content and services that assure the Internet will be a marketplace where consumers can obtain the types of high-quality, reliable code and content that they demand. In many ways, the Internet is still in its infancy, and as the medium continues to mature, our member companies will continue to pave the way for every other industry that strives to take full advantage of electronic commerce. As such, SIIA and its members have long had a strong interest in promoting the deployment of competitive services to benefit their businesses and their customers, including competition in the

backbone of the Internet, those lines of communication so essential to the efficient and rapid functioning of networks.

Every few years, the computer industry experiences the advent of new technologies that dramatically change how we use computers and access information. The introduction of graphical user interfaces fifteen years ago made computers much easier for millions of individuals and businesses to use. The mouse was in; the "C" prompt was out. Companies that adapted to this change prospered, those that did not perished. The growth of local area networks ("LANs") in the late eighties and early nineties made it much easier to share information easily among users around the world and created even greater opportunities for both the information and software industries to offer new and more useful products and services. Once again, companies that failed to incorporate networking capabilities into their operational infrastructure were unable to compete with those that had recognized this shift.

The commercialization of the Internet in the mid-1990s marked perhaps the most important paradigm shift in recent memory and was strongly encouraged by our industry. Millions of Americans that had never used a computer now found access to the Internet to be a compelling reason to purchase a computer and get connected. The growth of the Internet has been nothing short of phenomenal, and has had an indelible effect on individuals and businesses alike. It has transformed how we communicate, access information, shop and handle our finances. As this medium continues to evolve and accessibility increases, more and more goods and services, especially information and software products. will be available online to consumers around the world.

Growth of commerce on the Internet has been possible because the government decided to step aside and encourage business to take the lead. Its rapid deployment has been dependent, first and foremost, on the construction and availability of a wide range of lines of communication and points of access. Much has been accomplished in terms of creating and enhancing this crucial infrastructure, but even more advances are on the horizon. The fact of the matter is, Mr. Chairman, that the Internet is still accessed by most people through narrow-band 28.8 baud modems. These connections are much too slow to receive or send robust products, such as complex interactive services or the further convergence of voice, data and video products that are in the marketplace today but generally available only to large businesses. Yet these products could easily be accessible to smaller enterprises and by consumers as well and would ensure that the Internet becomes an even more valuable medium for U.S. consumers and an even greater engine of economic growth.

We are on the verge of the next paradigm shift—the rollout of broadband Internet services. Broadband services hold significant promise, but in order to see the promise realized. it is essential that there be strong competition among those that provide initial points of access to the high-speed lines of communication that are being deployed across the nation. As noted above, the commercialization of the Internet—and the resulting economic benefits—were supported by sound government policies that encouraged competition in the telecommunications market. Likewise. the expansion of high-speed connections to the home can occur only if government acts carefully to assure that there is competition among Internet transport providers as well. As the principal representative of code and content companies, SIIA is concerned that consumers be able to choose how they wish to access the Internet. Consumer choice, not controls by the government or certain favored players, is the proven way to assure a competitive, vibrant marketplace.

SIIA believes strongly that greater broadband deployment and the resulting increase in Internet connection speeds to homes and businesses can only enhance the value of Internet services and products. In fact, without the widespread deployment of high-speed services, the future development of the Internet could easily be stalled. There is a role for both incumbent and alternative local telephone companies to play through more rapid deployment of advanced Digital Subscriber Line ("DSL") services in all areas of the country, both urban and rural. DSL technology offers faster access to the Internet utilizing the existing telephone infrastructure than the common, much slower dial-up services available to most consumers today. The broader availability of DSL services will greatly increase competition in the provision of Internet data transport by those that own or lease these lines, whether they be incumbent or alternative local telephone exchange companies. Expansion of DSL capabilities represents a huge step forward in consumer access to broadband services, just as emerging wireless and satellite services hold the promise of even more capabilities for high-speed Internet access.

This Committee foresaw the wisdom of policies encouraging competition among providers of land-line communications when it helped craft the *Telecommunications*

Act of 1996. Although the goals of that legislation have been slower to reach than some had hoped, in the three short years since the Act became law, its framework has encouraged new investment and innovation in a broad-range of communications service offerings. Companies—whether incumbent or local exchange carriers, long distance providers, and even cable, wireless or satellite service providers—see the reality of increased competition a short way down the road and are beginning to position themselves to the make the most of rapidly expanding market opportunities.

Our Association agrees wholeheartedly with the approaches taken by Congress in that Act and believes that a similar approach must be taken generally in regard to laws that may affect further development of the communications infrastructure underlying the Internet. Government interference must be minimized so that competition can become even more robust. The information technology industry—and by consequence Internet infrastructure—has grown at tremendous rates precisely because these business sectors have been free to develop without excessive government regulation. This development has. in turn, helped fuel the growth of the information and software industries, encouraging the provision of innovative products and services in even greater numbers to benefit both businesses and the consumer.

Competition among all segments of Internet transport industries assures that consumers retain the freedom to select both the means by which they access the Internet and the service provider whose offerings of code and content best meets their needs. Internet transport providers, such as telephone, cable, wireless and satellite companies, should not be able to engage in anticompetitive behaviors that frustrate or forestall consumer choice. Predominant carriers that are able to control unfairly initial access to the Internet by bundling advanced communications services can also limit customer purchases of Internet services, including the valuable code and content that customers want. The ability of any provider of broadband services to gain an unfair advantage through monopoly control of its services and intentionally preclude consumer access to multiple Internet service providers ("ISPs") is a worrisome development. Consumers may be effectively denied choice in terms of the content would be otherwise readily and easily available to them. Code and content companies that would otherwise be encouraged to offer greater and more valuable services will be forestalled from creating innovative products.

Let me be clear, Mr. Chairman. We are not concerned that certain Internet content will be blocked completely from access. Rather, the industry believes it benefits no one if transport providers, through unfair monopoly control, can bundle services selectively and hinder consumers in viewing and purchasing online products and services. It cannot be in the interest of our industry or our customers, if the competing, high-speed transport carriers use their position in the market to make decisions on access for the consumer, rather than making it easier consumers to exercise their own choices.

All ISPs have the opportunity to cache content so that their customers can access it faster. In addition, ISPs frequently customize the first screen customers see when first accessing the Internet. Customers can generally modify the first screen, and many do so. However, we cannot minimize the impact of having content selection made by the ISP, especially if a broadband service provider is the *only* transport service realistically available to the customer and that provider offers no choice in the ISP available to that customer. Any broadband carrier that can exercise unfair market power that adversely affects the consumer's choice of Internet service provider can also effectively foreclose the distribution vehicle to code and content products of all types.

Consider, for example, a situation where the opening screen of the favored ISP promoted Visa. rather than MasterCard or American Express, as the credit card of choice; or Reuters, rather than Bloomberg, as the favored news source. The firm not selected for preferential treatment would not necessarily be blocked from customer access, but it is clear that a tilting of the playing field can have an enormous impact on which product or service is even known to consumers, let alone used by them. We would not be concerned if there exists effectively a wide range of broadband providers and each makes its own independent selections. After all, each restaurant can select whether it serves Coke or Pepsi. Chains normally make those selections for all franchises, and consumers can choose to eat in a particular restaurant or go to another for comparable service. However, it would be intolerable if a single restaurant chain provided the only realistic opportunity for consumers' patronage and used its position in the marketplace to preclude their ability to choose one soft drink over another. The same holds true for access to information. As the technology paradigm shifts, we must watch closely to ensure that no one firm controls broadband access to American consumers and in doing so precludes choice in ISPs and the code and content services those ISPs offer.

Under current FCC regulations, incumbent local exchange carriers are already prohibited from engaging in such bundling. Congress was purposeful in this approach when it passed the *Telecommunications Act of 1996*, for it recognized that the monopoly controls enjoyed by incumbent local carriers—ones long sanctioned by law and financed by essentially all Americans who constituted the rate payers had to end, if further, innovative infrastructure development was to become a reality. The bills under consideration by the Committee today would apply the same unbundling rules to other providers of Internet transport, including cable, wireless, and satellite services, as a means of further enhancing competition.

In recent weeks, SIIA's policy group has engaged in a spirited and valuable debate on the issues that are the subject of today's hearing. Our members are united in the conviction that the creation of a regulatory system that influences the deployment of broadband services in the wrong way will only slow such deployment. We cannot support a policy that discourages and encumbers those who are making the huge investment necessary to provide such services. Further delays in deployment will only prevent more ubiquitous access to the many valuable information and software products that consumers are demanding in greater and greater numbers. At the same time, however, we cannot risk development of predominant carriers who can and will use their market power unfairly to preclude competition on the Internet. SIIA is not prepared at this time to comment on specific provisions in either bill under consideration today. However, we believe there are several crucial questions that this Committee and your colleagues in Congress must keep in mind in making your decision, and they are similar to the ones faced by you in crafting the *Telecommunications Act of 1996*.

First there is the question of technological capabilities, namely whether cable, wireless and satellite providers have the same capacity as do local exchange carriers to accommodate a multitude of access providers offering similar, competing products and services adapted to high-speed transfer of code and content. The second question relates to the nature and extent of the control over the communications lines that these carriers offer. Is the type of monopoly that local governments have granted to the cable industry, for example, and the manner in which it has been financed, comparable to the situation that Conaress corrected in relation to incumbent local exchange carriers under the *Telecommunications Act of 1996*? Third, Congress must make the determination whether the existence of alternative transport providers—including the whole gamut of telephone, cable, wireless, and satellite services emerging in the marketplace—offers sufficient competition and adequate reach to assure that consumers and smaller businesses have choices in how they achieve high-speed access to the Internet and the software and information services they desire. Finally. Mr. Chairman, SIIA believes Congress should determine whether there has been, or is likely to be, a failure of the Nation's antitrust laws and mechanisms to the point that possible monopolistic behavior in the Internet transport sector cannot be remedied.

In conclusion, let me be very clear that SIIA strongly believes consumers and businesses are best served by having a wide variety of choices for Internet access. We remain committed to the principle of minimal regulation of the Internet and healthy competition as the best means of assuring such choice. Policymakers should encourage the rapid deployment of broadband technology, a goal most easily achieved by eliminating wherever possible regulations that might otherwise reduce market incentives. The broadband marketplace must be competitive, allowing code and content providers maximum choices in how they deliver—and consumers access—products and services on the Internet.

SIIA and its member companies stand ready to assist the Committee in any way possible as you sort through these important issues. Clearly, this debate is one that will have effects reaching further than simply the interests of rival transport carriers, and the code and content industries must be part of the debate. Thank you again for the opportunity to appear before you today, and I will be glad to answer any questions.

Mr. HYDE. Commissioner Sten.

STATEMENT OF ERIK STEN, COMMISSIONER OF PUBLIC WORKS, CITY OF PORTLAND, PORTLAND, OR

Mr. STEN. Good morning, Mr. Chairman and members of the committee. My name is Erik Sten, and I am a city commissioner from Portland, Oregon. And under our form of government, I am

the lead elected official on cable and telecommunications matter. I would like to give you a local perspective on these issues.

In December 1998, the city of Portland was asked to approve the transfer, as were hundreds of cities across the country, of the TCI franchise to AT&T. In Portland, that is a two-step process. First, we have a citizens commission that looks at the issues. This is a group of everyday people from across the board who volunteer their time to look at what is in the public interest. They make a recommendation, and that comes to the Portland city council and we ultimately must approve all transfers.

Both our citizens commission and the Portland city council were excited about some of the opportunities that AT&T is bringing to Portland, we think. We are excited to have competition on local phone service that is needed in Portland. We are very excited to have high-speed Internet access available at the home. That is a product we very much welcome. But both our citizens commission and our elected officials came to the conclusion that we thought open access was necessary to provide the kind of service that Portland has become accustomed to.

We believe in competition. We believe in choice. And from our citizens' point of view—and I have talked to hundreds of businesses since this issue has been raging in Portland over the last 6 months—the idea of having one way to access high-speed cable Internet modems is not acceptable in Portland, Oregon. We have gone through the problems with monopolies in our city, and we simply believe that open access is the best approach.

It is a common sense position, and it has been supported across the board in Portland. I have submitted detailed written testimony that outlines our legal arguments and all of the thought we went through, but I wanted to share with you today three or four key points that continue to come up in Portland.

The first is this issue is not going to go away anytime soon. After buying TCI, or merging with TCI, AT&T also gained control of Paragon. So we used to have two cable systems in Portland; now we have one. And they are both controlled by AT&T.

This issue will not be resolved quickly and hundreds of cities across the country have been and will continue to be faced with the same problem Portland has, which is trying to come up with the right approach and trying to enforce local policies for competition and choice when there is no national structure in place. Now is the time for Congress to act, in our opinion, and to put an open access policy in place.

Secondly—and I suspect you have heard and will hear that local governments are trying to regulate the Internet. That is a term that has been thrown around a lot. Simply said, that couldn't be further from the truth. We have no interest in regulating the Internet, never have, never will. None of our regulations have anything to do with content. In fact, by providing open access and choice, we believe we are opening up the Internet and giving people in Portland the chance to subscribe to the kind of Internet provider they want, whatever it is. We have no interest in regulating the Internet, only the public facilities.

Thirdly, we do not favor different technical standards. You will hear the argument—and it has been bandied about—that if local

governments take action on these issues, you will have 30,000 technical standards. We haven't asked for, nor have we regulated, any technical standard. We believe that the technical standard should be decided by the cable industry and by the FCC. Our rule simply says we must have open access in Portland. It is legal and was upheld by a Federal district court after AT&T sued us.

Finally—and this probably the most important point I think for you to consider—this is not an issue that citizens saw coming. Even as the cable commissioner it is not an issue I saw coming, but it has been raging in our paper and our talk radio stations for 6 months. Obviously we were sued. It had a large impact. It has been very, very well discussed, and it is very, very important to local citizens. The more—whenever I am stopped on the street or in the grocery store, the response is always, keep fighting for open access. They have experienced monopolies in the past. They have experienced lack of choice.

And even if, as AT&T has threatened to slow down high-speed Internet access in Portland, people are willing to take a breath and fight to have open access and choice in the years to come, I believe you will continue to hear more from cities, more from constituents and more from your citizens as they begin to understand the importance of this issue.

In conclusion, what I would say is that we just firmly believe in Portland, Oregon, that open access is in the public interest; and we will remain firm despite the tremendous amount of pressure that has been put upon us.

I would like to share two incidents with you—and we have tried hard to work with AT&T. And as I said in my opening, we welcome many of their products and we welcome their investment in our community and have had a good relationship.

After our city council reviewed our citizens' recommendation that open access was the right approach and after we voted unanimously as a five-person city council to require open access when the transfer came before us, an AT&T representative remarked to the local paper and was quoted as saying, "I hope Portland has a very large legal budget." well, we don't, but we do have principles in Portland and we are willing to stand up for those principles.

AT&T sued us over this. We went to Federal district court. I am sure you have a copy. There is a 16-page opinion by a Federal district judge that is clear and unequivocal that we had the authority to do it. Now we are going to spend more and more local taxpayer dollars having this appealed. They will appeal it again after we win that case.

After we won the case, the court case, AT&T put out a written press release that said the real losers in this are the citizens of Portland and Multnomah County.

I will end by saying we believe strongly, as much as we like investing in our community, that no large corporation should be able to hold a community hostage and threaten not to put key public services in place because they disagree with local policy. If you take that as a backdrop, now is the time for you to act; now is the time for congressional policy.

I would like to commend Representatives Goodlatte and Boucher for this bill. This is very important. And it is important that you

act and take us out of this position of AT&T exerting its will on local communities despite local law. Thank you.

Mr. HYDE. Thank you very much, Commissioner Sten.

[The prepared statement of Mr. Sten follows:]

PREPARED STATEMENT OF ERIK STEN, COMMISSIONER OF PUBLIC WORKS, CITY OF PORTLAND, PORTLAND, OR

Mr. Chairman and members of the Committee:

I am Erik Sten, an elected member of the City Council of Portland, Oregon. Under Portland's Commission form of government, I am the lead elected official on cable and telecommunications policy issues. I am happy to be invited to address the important issue of "open access" to cable modem internet services. This is a very important issue in Portland, and I am particularly pleased that Representative Goodlatte and Representative Boucher of Virginia have introduced bipartisan legislation to achieve open access.

The "Internet Freedom Act of 1999" (HR 1686) provides an excellent start for Congressional consideration of this very important issue. In Portland, we have been surprised to find ourselves taking a leadership role on this issue and equally surprised that the FCC and Congress have up to now not been engaged in this critical area of assuring "open gates" to the Internet. Portland is very hopeful that, with the introduction of HR 1686, a strong signal is sent to the cable industry, and to the FCC, that Congress is poised to act on this important issue. This is particularly important if the cable industry continues to deploy cable internet access in an anti-competitive fashion, and if the FCC continues to take a "hands-off" approach in the face of all evidence to the contrary.

BACKGROUND

You may be aware that the City of Portland and Multnomah County have some recent experience deliberating on this issue. In late 1998, Portland and Multnomah County approved a change in control of local TCI cable franchises to AT&T. As one of the conditions of transfer, the City and County required an open cable modem platform or "open access" provision, that would permit subscribers to use third parties, unaffiliated with AT&T, to obtain high-speed access to the Internet via cable.

"Open access" in essence means that the cable operator's cable modem customers would not be forced to subscribe to the cable operator's own proprietary service, and could instead buy online service from the service provider of their choice. However, as the cable industry has structured the rollout of cable modems thus far, consumers will have to "pay twice" for their internet access if they decide not to use the cable operator's affiliate as their primary gateway. While the City certainly saw some significant benefits to the AT&T/TCI merger, we also concluded that if it was allowed to go forward without conditions, it could reduce competition in the provision of advanced cable services, such as Internet service. The night after we voted, The Oregonian reported that an AT&T lawyer had said he hoped we had a large legal budget.

In Portland, AT&T refused to accept the City and County ordinances containing the "open access" provision, and instead filed a lawsuit against the City and County. On June 3, 1999 we won the first round of that lawsuit.

On that date, Oregon Federal District Judge Owen Panner upheld the authority of the City and County to impose an "open access" condition as part of our cable transfer ordinances. That decision, which will now be tested in the appeals process, has received national attention and deservedly so. We believe strongly that the case was rightfully decided, and that Judge Panner will be upheld by the 9th Circuit Court of Appeals.

AT&T wrote in response to Judge Panner's decision, ". . . the real losers are likely to be the citizens of Portland and Multnomah County." Portland strongly believes that large corporations should not be able to dictate local policies by threatening citizens.

POLICY CONSIDERATIONS

In attaching an "open access" condition to the AT&T transfer, the Portland Council was acting to carry out longstanding pro-competitive policies that to us were just common sense. We did not want to repeat the mistakes of the early 20th century at this dawn of the next and create new monopolies in our rush to develop new technology. We have long understood that national policy in the U.S. directs us to promote competition, deregulation, and an open and accessible marketplace in commu-

nications and Internet access. While cable companies have control over much of the capacity on their system, this Congress wisely, and from the beginning, required operators to set aside channel capacity for use by others. The leased access provisions of the Cable Act are an example of such provisions. What is more, Congress made it clear that additional requirements could be imposed, where appropriate. It made it clear that the provisions of the Cable Act did not immunize operators from the antitrust or unfair competition laws. Localities were authorized to prevent mergers that would result in a reduction in cable service. The legislative history made it clear that localities weren't prevented from establishing third party access requirements for data services. Moreover, these provisions are consistent with a decisions the Congress and the states have made in a number of areas, where one entity controls dominant and critical facilities. So, for example, as states have moved to deregulate electricity, local power companies have been required to open their facilities to others so that competition can proceed fairly at the local level. In passing the 1996 Telecommunications Act, Congress imposed special burdens on incumbent local exchange carriers to open their networks to competitors. By the way, these are not "common carrier" requirements—they are not imposed on all common carriers, after all. Rather, they are requirements imposed given the current, critical nature of the facilities involved. Extending a similar, nondiscriminatory open-access policy to cable services is only common sense at a time when the cable industry, still a monopoly in most markets, has specifically declared its plans to roll out a major new platform for offering customers high-speed internet access.

Moreover, "mega-mergers" in both the cable and telephone industries are creating the specter of dangerous concentration in the ownership of media and technology. This is especially serious if ownership is concentrated among only a few companies who end up being the "gatekeepers" to the Internet. At this time, as you know, by the FCC's own method of counting, AT&T is poised on the brink of controlling almost 65%—nearly two/thirds of the cable TV households in the nation—as a result of its acquisition of TCI and its other pending acquisitions (e.g. MediaOne). Simultaneously, the cable industry has made no secret of its plans to ensure that only "one cable operator per city" will be the rule and not the exception throughout most of the nation. As of June 1, 1999, all cable services in Portland are now controlled by AT&T/TCI. If the cable industry has its way, then by this time next year only New York and Los Angeles will have more than one cable company operating within their borders.

None of this strikes us as in the public interest. This trend in the cable industry also means that an "open access" condition becomes more important than ever before, as HR 1686 properly recognizes. We are very hopeful that Congress will exercise its authority to act in this area. With more than a million cable internet modem subscribers projected by year end 1999, the timing on this issue has never been more important.

The timing is particularly important because of the contradictory messages we have been receiving from the Federal Communications Commission. Many of you are aware that the Chairman of the FCC has criticized the Portland decision. We believe the criticism is wrong, and based on misinformation about how the Portland condition would operate, and based on misinformation about what local governments are doing. We will be working with the FCC, if the Commission will work with us, to clear up these understandings. However, we see little prospect that the FCC will commence a rulemaking to actually investigate open access or that it could complete such a rulemaking in any reasonable time. More importantly, the cable industry has made it clear that *it does not believe that the FCC has legal authority to act in this area*. So, even if the FCC took action, the FCC would be facing some of the same challenges that Portland is facing. Congressional action now can prevent years of delay in opening up the Internet. And, as we all know, allowing AT&T and TCI to have such a headstart has enormous consequences in an Internet economy. One economic analyst, Scott Cleland, has suggested that it could skew investment in the Internet dramatically; that is not surprising, given that the status quo in our Internet economy assumes every competitor has open access to consumers. That is why we are very pleased that HR 1686 has been introduced.

Because the cable industry is widely promoting a number of misunderstandings about the "open access" issue, I thought I would share with you our candid thoughts on the current state of the issue, as follows:

1. *The issue is not going away.* This issue is not going to go away. No matter how much AT&T and the cable industry pursue their strategy of trying to isolate, confine, and minimize the Portland ruling, the issue is already spreading rapidly as governments and consumers realize the stakes. Many jurisdictions around the nation are looking seriously into this issue right

now, and more local action can be expected. Moreover, most knowledgeable and detached analysts agree with us that the 9th Circuit Court of Appeals will uphold Judge Panner's decision.

2. *Open access has nothing to do with "regulating the internet."* The cable industry's arguments that "open access" equals "regulating the internet." are patently wrong. They are wrong because open access is designed to open up, not shut down, internet access. A very dangerous cable industry bottleneck to high speed internet access will occur unless prompt action is taken. This becomes even more urgent when the FCC appears to be standing idly by on this issue. The lack of "open access" on the cable platform could in the long run damage internet development and accessibility far more than any short-term re-engineering necessary to implement open access.
3. *Cable modem internet access is growing dominant.* Cable modem technology has been known and used for more than a decade, by our city and many others. Since the Internet became more widely available in the 1990's, and as internet commerce has grown in the last two years, cable modem technology has now been developed and refined more than ever before to accommodate widescale Internet access. Analysts now project almost a million cable modem users by the end of this year. Yet, unless action is taken, those users and future users will be held hostage to the affiliated internet provider of the cable industry. This cannot be a good result for anyone, since it will naturally stifle innovation, frustrate price competition, and isolate cable modem customers from a truly competitive marketplace. The *Los Angeles Times* in March of this year cited a Forrester Research study that concluded that by 2002, cable modems will occupy 86% of the wireline broadband market, and that the slower and less widely-available broadband access from the telephone industry (known as Digital Subscriber Lines or "DSL") will occupy only 14% of the market. Clearly, the time to act to "open the gates" to the internet, is now.
4. *"Open access" will not impede internet investment in the long term.* Some investor groups led by the cable industry have vastly overstated the "threat to investment" which allegedly will occur if "open access" is required. A number of reputable economic studies have confirmed what common sense tells us: offering consumers a choice of high speed internet services from a variety of Internet Service Providers ("ISPs") should increase demand and enhance the business case for cable operators, not detract from it. Even the staff of the City of Los Angeles, who have initially put forth a slower approach than Portland would recommend, have agreed with us that demand for internet bandwidth is insatiable, and that "it is difficult to imagine how, in the long term, the winners will be anyone other than those who deploy their facilities despite the costs of complying with new regulations." Moreover, most U.S. cable systems are being rebuilt for competitive telephony and internet access even as we speak. This investment is in most cases already committed, and you can ask any Wall Street analyst if there has been caution or reticence in Internet-related investments lately, whatever regulatory environment is projected.
5. *Local governments do* not *favor differing technical standards.* The allegation by the cable industry that local governments want to impose "30,000 different technical standards" for the internet or for the cable modem platform is simply false, and appears designed to cloak a relentless demand for market domination.. Portland wrote its "open access" provision in a "technology-neutral" manner, as the federal court recognized. We simply required that the industry not discriminate against unaffiliated internet providers, and left the means of implementation to the cable industry and its engineers. We continue to recognize that developing technical standards is the job of the cable industry, and is best overseen by the FCC with assistance from interested local governments. But it is NOT the cable industry's job to—in effect—dictate national communications policy by means of selecting its own self-interested technology designed for maximum profit and monopoly marketplace share. Instead, it is the job of Congress, the FCC, and local government—working together—to support and take action to ensure the continuation of an open and competitive communications marketplace. That is precisely what current communications statutes provide for: authority for federal, state, or local governments to take action to promote competition. This is what Portland did, and this is what the federal court has upheld.
6. *Open access is important to local communities.* Citizens support open access. Nobody wants a monopoly to control high-speed access to the internet. Open

access is important to local businesses. The two largest internet service providers in the state are located in downtown Portland. They provide high paying jobs in an environmentally friendly industry. That's just the kind of business local governments want.

CONCLUSION

In the final analysis, "open access" on cable internet modems is not a new form of regulation. Instead, "open access" means open markets—not regulation. Open access means competition—and not monopoly. The essential nature of 'open access' is to encourage the continued growth of an unfettered, unimpeded, vibrant Internet—with many choices available on many platforms. Not only would we oppose any regulation that would produce an opposite result, but we are happy to be joined in this view by members of Congress from both parties, and by many major national industry and consumer groups.

It is my belief that the importance of this issue transcends the business plans of the cable industry, the ISP industry, and the telecommunications industry as a whole. The need for the Internet to remain open and competitive is a fundamental matter of national communications policy. It can and should be addressed both nationally and locally, just as the law now provides. However, because of the current environment, a unique opportunity now exists for Congress to assist local franchising authorities in providing the roadmap for ultimate national action on this critical issue. The Internet Freedom Act of 1999 is a positive step in the right direction.

Ultimately, the need for *Open Internet Access For All* can't be stressed too strongly. Home access to the Internet for most people for at least the next few years will continue to depend on the existing two wires already built to most homes in Portland and everywhere else: the telephone wire (narrowband), and the cable wire (broadband). Despite niche availability of wireless or other options yet unknown in some markets, most folks (rich and poor) will depend on the cable and telephone wires already connected to their homes. And these two wires will continue, in our best judgment, to provide the most common means of mass access to the Internet for most citizens.

Experts have explained to us that broadband cable is particularly suitable in terms of technology, speed, and capacity to carry the ever-more-dense Internet content (particularly multimedia) that is becoming a necessity (by any objective measure) for adequate access to the Internet now and in the immediate future. Oddly enough, however, what AT&T and TCI are telling you is that we should adopt policies under which the slower wire should be open, while the more robust facility should be the private domain of cable providers. I am pleased that Congress has recognized that special requirements should be imposed on incumbent local exchange carriers because of their market position; but I do not believe that we can ignore the market position of the cable industry.

If the current policy pronouncements of federal law have any real meaning, then open access is more than justified. Prompt action by Congress will contribute significantly to ensuring that all of our nation's cable networks are designed, constructed, and equipped for a competitive, open communications platform. In this way, the broad pro-competition policy language of national communications law can truly be fulfilled.

I have this final, substantive suggestion for you: should Congress adopt an "open access" provision, that provision should be as clear and simple as possible. If the provision effectively requires lengthy litigation to implement, many of the potential benefits may be lost.

Ultimately, the principle underlying "Open Access" is simple: *consumers should have choice*. This means choice for the widest possible variety of choices, prices, and providers for increasingly critical high-speed access to the Internet. We hope that Congress will step up and join us in upholding this simple principle.

Mr. HYDE. Mr. Cleland.

STATEMENT OF SCOTT CLELAND, MANAGING DIRECTOR, LEGG MASON PRECURSOR GROUP, WASHINGTON, DC

Mr. CLELAND. Mr. Chairman, thank you for the honor of testifying. The views expressed here are mine alone. I would also like to commend Congressmen Goodlatte and Boucher for their bills.

First, I have two brief insights from a market perspective. In general, investors are very wary of any legislation because what it

does is increase uncertainty. And they dislike uncertainty. However, the—and also the proposed legislation, I think, will probably have a marginal effect on the overall level of investment in broadband.

I don't think either open or closed access will substantially slow broadband deployment investment overall. However, it could have a very large effect over how investment moves between industries.

Second, I would like to offer some questions and some comments from the peanut gallery.

Why has cable closed Internet access to competitors and why are they limiting streaming video to 10 minutes? I believe that cable's deregulatory rhetoric is a Trojan horse designed to divert attention from what is really going on, and that is reducing the potential for more competition to cable.

The Goodlatte-Boucher bills recognize that there is more than one threat to the Internet than government regulation. There is also the threat of anticompetitive behavior by owners of scarce broadband conduit. While it is always wise for government to let markets work and not regulate, this committee also regulate—also recognizes that the market works best when everyone is free to compete and innovate. Both bills recognize that you do not have to compromise on competition or nondiscriminatory access in order to deregulate. The bills employ a wise nonregulatory antitrust enforcement approach.

Now, it appears from the tenor of this debate that somehow deregulation and infrastructure deployment are supposed to be more important public policy goals than promoting competition or protecting consumers. Now, I have been trying to find what congressional action or what FCC decision reordered those priorities—I can find none—what decision officially endorsed that the trade-off of the end of deregulation and broadband deployment justify the means of reducing competition and safeguarding consumer interest.

Now, if you listen to this debate a lot, one could get the false impression that cable was already deregulated and cable had no market power. Well, Congress in fact has found that the cable industry has anticompetitively used its scarce conduit control to stifle competition in several markets.

Congress created program access to foster DBS competition. Congress created must-carry access to foster broadcast competition. Congress created leased access to foster video programming competition. Congress created navigation device access to foster cable equipment competition.

Now, cable-open access for Internet, it doesn't appear to be a new or isolated problem.

Now, finally what is at stake in this debate? I think we are at a major fork in the road on this Nation's policy toward competition, toward convergence, toward Internet, and toward electronic commerce. Will the Nation continue down an open procompetitive road it has traversed for the last 30 years or will the Nation now divert to a less competitive road in the future?

In conclusion, I have four more questions. Very important first one is will the Internet technology be allowed to compete with cable? By way of analogy, think of the Internet as the next DBS. Will the government enable Internet competitors to compete

against cable with open access as the government enabled direct broadcast satellite to compete against cable with program access? Without an open access, there can't be competition.

We have 10 million DBS consumers in the last 6 years because of what Congress did in 1992. Open access offers a phenomenal increase in consumer choice for video programming. That is what it is all about. If somebody can be a competitive microprogrammer and offer different programming to consumers, consumers are going to love it.

Another question, will cable be allowed to corner part of the high-end residential e-commerce market? In other words, will scarce conduit market power be allowed to be vertically leveraged into Internet content and into e-commerce?

Third question. Will the government keep the unregulated Internet separated from the regulated infrastructure? Or are you going to allow cable to merge itself with the Internet in order to self-deregulate?

And the last question is, will the FCC continue a schizophrenic policy of hyperregulating the local telcos' last mile, while taking a look-the-other-way policy toward the cable's last mile? This sends the marketplace very mixed signals and will lead to skewed investment, a broadband duopoly, not a competitive marketplace.

Thank you, Mr. Chairman, for the honor of testifying.

Mr. SMITH OF TEXAS. [Presiding.] Thank you, Mr. Cleland.

[The prepared statement of Mr. Cleland follows:]

PREPARED STATEMENT OF SCOTT CLELAND, MANAGING DIRECTOR, LEGG MASON PRECURSOR GROUP, WASHINGTON, DC

Mr. Chairman, thank you for the honor of testifying before your Committee on "The Internet Freedom Act" and the "Internet Growth and Development Act of 1999."

I am Scott Cleland, Managing Director of the Legg Mason Precursor Group*. The views expressed here are mine alone. I request that my full written testimony be printed in its entirety in the hearing record.

By way of introduction, I am not a traditional Wall Street sell-side analyst who analyzes companies or recommends the purchase of stocks. For Legg Mason, I run an investment research group that tracks regulatory, technological, and competitive developments in the communications, technology and e-commerce sectors for large institutional investors. Unlike most of Wall Street, we do not focus on what will happen in the next quarter. We focus on trying to anticipate major investment-relevant change coming in the next three-18 months

In that context, I offer the following insights and observations in hopes that they will be useful to the Committee in its deliberations over "The Internet Freedom Act" and the "Internet Growth and Development Act of 1999."

I. INVESTMENT AND MARKET PERSPECTIVE

In general, investors are wary of almost any proposed legislation or regulation because it increases uncertainty—which investors dislike. However, investors are not much different from the old political adage "where you stand, depends on where you sit." Where investors stand on proposed legislation often depends on what they own in their portfolio. It is important for this Committee to appreciate that its action or inaction on this proposed legislation will have a marginal effect on the overall level of investment, but it could have a large effect on how investment dollars move around within the marketplace.

Market's Perception of Cable: I believe that the market's current very positive outlook for the cable industry rests on three primary assumptions at the heart of the open access debate.

(1) Cable enjoys the best broadband, multiple-service, consumer pipe to the home.

(2) The cable pipe won't be opened up to competition by the government.

(3) Cable will be able to vertically leverage its video market power and customer base into the Internet and e-commerce.

Moreover, the market largely assumes the best case right now about cable's story, that all the new proposed services will pan out in full. The market loves a growth story that faces little competition. In other words, the market views cable's glass as half full.

Market's Perception of Local Telcos: In contrast, I believe the general market perception of the local telcos has been different. Despite the local telcos' positive financial performance since the Telecom Act passed, investor fears of increased competition continue to cloud the local telcos' overall growth outlook. In other words, the market views the local telcos' glass as half empty.

For very different reasons, this Committee's proposed bills cut to the heart of both these industries' growth outlooks and the market's perception of them.

II. THE DEREGULATORY "TROJAN HORSE": IT'S ALL ABOUT PREVENTING COMPETITION.

Why has cable closed Internet access and limited streaming video to 10 minutes? Cable's deregulatory rhetoric appears to be a "Trojan Horse" to divert attention from the main event—reducing the potential for more competition to cable.

A. There's More Than One Threat to the Internet: Both HR1685 and HR 1686 recognize that there is more than one threat to the Internet than just government regulation—but also anticompetitive behavior by owners of scarce broadband conduit. While it is wise for the Government to let the market work and not regulate, this Committee has also recognized that the market works best when everyone is free to compete and innovate.

Both HR1685 and HR 1686 recognize that one does not have to compromise on competition and nondiscriminatory access to deregulate. The bills offer the Bells data deregulation without compromising the procompetitive principle that the Bells must still provide nondiscriminatory access to their "last-mile" facilities. *The Committee's bills take a nonregulatory antitrust approach:* "Prohibition of Anticompetitive Behavior or Contracts:" The bills oppose "restraining unreasonably the ability of a service provider from competing."

Who Decided to put Competition in the Backseat? It appears from the tenor of this debate that somehow deregulation and infrastructure deployment are now supposed to be more important public policy goals than promoting competition and protecting consumers. Once again, what congressional action or official FCC ruling reordered these priorities? What decision officially endorsed the trade-off that the "ends" of deregulation and broadband deployment "justify the means" of reducing competition and not safeguarding consumer interests?

B. Deregulatory Misinformation: If one were to listen to much of the current debate, one could get the false impression that the cable industry already was deregulated and that government did not believe cable had market power. In fact, Congress has effectively found that the cable industry has anticompetitively used its scarce conduit control to stifle competition in several markets.

Program Access: In the 1992 Cable Act, Congress found that cable was discriminating anticompetitively against satellite broadcasters, and legislatively obligated cable to provide satellite competitors with nondiscriminatory access and prices to cable programming. That "regulatory" "open access" to cable programming promoted competition and has provided more than 10 million Americans a competitive choice of video distribution supplier in about six years.

Must Carry and Retransmission Consent: The 1992 Cable Act policy was to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers." Congress recognized cable's market power over local TV stations, so Congress gave local TV stations the legal option to either choose "must carry" of their broadcasts or to choose a commercial negotiation through the legal process of retransmission consent.

Leased Access: "To promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public . . ." section 612 of the 1992 Cable Act obligated cable operators to make 10%–15% of their system capacity available for commercial use (resale) because competitors did not have sufficient alternative ways to distribute their product.

Competitive Availability of Navigation Devices: In the 1996 Telecom Act, Congress worried that cable's market power over cable equipment was stifling competition and passed section 629 to "assure the commercial availability to consumers . . ." of cable equipment. Cable can still sell equipment to consumers, but it can not charge a price that is "subsidized" anticompetitively by its cable service. Congress effectively created for consumers an "open access" market for cable equipment. It

also created a regulatory sunset of this provision when the FCC finds the market for video programming and video equipment is "fully competitive."

Continuation of an Anticompetitive Pattern? Few are now advocating "deregulating" cable from any of these procompetitive cable obligations described above. Is that because consensus still supports procompetition policies which protect against a widely appreciated pattern of cable anticompetitive behavior? Cable open access is not a new or an isolated problem. It is a continuation of a long and clear pattern of commercial behavior to reduce competition.

Internet access is a new market that largely came into being after passage of the 1996 Telecom Act. Both HR1685 and HR 1686 implicitly recognize that this new form of cable anti-competitive behavior may have to be addressed legislatively again.

III. WHY IS OPEN ACCESS IMPORTANT?

The issue of cable open access is much more than an industry squabble or a regulatory food fight. In fact, whether the cable plant is open or closed to competitive access is a *major fork in the road for this nation's policy towards competition, convergence, the Internet and electronic commerce.* Will the nation continue down the open pro-competitive road it has traversed for the last 30 years, or will the nation now divert to a new more closed and potentially anticompetitive road in the future? This is not just about ISPs and "last mile" access. It is even more importantly about vertical linkage of backbone, access, content, and e-commerce.

What's at Stake?

A. Will Internet technology be allowed to compete against cable? By way of analogy, will the government enable Internet competitors to compete against cable with open access as the government enabled Direct Broadcast Satellite (DBS) to compete against cable with program access in 1992?

In all the hype about the Internet and e-commerce, do not forget that about 99% of cable's revenues are still video-related. Cable does not want more programming competition from Internet players. Open access offers a massive increase in consumer video programming choice as technology develops over time (i.e., enabling users to stream video). Instead of having to buy entire packages of programming from cable, Internet competitors could offer micro-programming packages so consumers could buy only the programming they want, when they want it, and how they want it. Most consumers use and want only a fraction of the channels they are forced to buy in a package. If consumers could choose only what they want to see, ultimately no one would have to pay for programming they do not want or support. If consumers wanted to, they could dramatically either decrease or increase their cable bill depending on their *individual* viewing choices. Almost everywhere else in the economy, the Internet is empowering consumers with more choice. Closed cable access would allow cable video programming to increasingly become an island—impeding outside Internet innovation.

With open access, cable-broadband Internet Service Providers (ISPs) could become a very different industry than their telco-narrowband ISP brethren. *Higher speeds could create an entirely new and more competitive video marketplace.* Look at how the Internet and e-commerce has flourished because of local telco open access. Broadband Internet competitors on cable probably will be less like today's ISPs, which thrive primarily only on Internet access, e-mail, and customer service, but will also offer competitive programming as Competitive Internet Video Programmers (CIVPs).

B. Will Cable "Corner" the High-End Residential E-Commerce Market? Will conduit control content and e-commerce?

Competition Is an Antidote for Market Power: The government has used the introduction of competition to mitigate the potential for the local telcos to leverage their local market power vertically into adjacent markets.

- The government opened telephone customer premise equipment to competition, leading to a flourishing competitive market of multiple vendors for interoperable devices that hook up to phone lines.
- Since the late 1960s, the government has consistently maintained a policy of keeping the regulated communications infrastructure separate from the unregulated computer, data, and now Internet markets—by ensuring nondiscriminatory access to the network. The result is a flourishing competitive market of more than 6,000 ISPs and tens of thousands of e-commerce companies.

- The breakup of AT&T and the associated nondiscriminatory access policy has led to robust long distance competition and more than 10 national Internet backbones.
- The Telecom Act has promoted local competition and nondiscriminatory access, which has led to the creation of dozens of competitive local exchange carriers.

Bambis in the E-commerce Forest? Because there are multiple layers of competition and nondiscriminatory access policies between the local telcos' "last-mile" market power and the Internet, to date, e-commerce companies have not had to worry about a fair unfettered access to their residential customers. In other words, there are tens of thousands of e-commerce "Bambi" companies that currently don't worry about conduit players being able to steer their best customer segment away from them to a cable "preferred" provider. They focus on content, commerce and customers, and assume they will always have access to infrastructure and their customers. Most e-commerce "Bambis" are still naively unaware that there is danger in the e-commerce forest that could lead to the capture of their potential high-end customers by locking these customer into infrastructure and exclusive service before these e-commerce companies ever have a chance to sell to them.

Reducing Competition and Leveraging Market Power: Contrast the nondiscriminatory competitive approach of the telco "last mile" into 98.5 million American homes with cable's discriminatory attempt to reduce competitive access to the nation's other ubiquitous "last mile" into 66 million homes.

Cable's closed access policy enables cable to vertically leverage its market power more freely into e-commerce. Unlike the telecom competition that is designed to limit a local telcos' market power, cable is limiting competition to leverage its market power. For example, cable has contractually established a monopoly distributor of cable Internet access @Home/Road Runner, to ensure no competition from the 6,000 ISPs or the several dozen competitive local carriers. Cable also discriminates by not allowing competitive backbone providers to carry its Internet traffic. @Home/Road Runner also forecloses Internet video programming competition by limiting any streaming video to less than 10 minutes in duration. The absence of competition in cable's intermediary markets combined with ownership of a preferred content and e-commerce portal (i.e., Excite), provides cable the real potential for exercising its market power into the high-end residential e-commerce market.

If cable:

(1) continues to enjoy a dominant share of the residential broadband market (currently cable's *broadband* market share is 90%+);

(2) can prevent intermediary competition for competitive access; and

(3) can leverage exclusive Internet access with Internet backbone transport to gain a powerful incumbent "default" advantage over competitors;

then cable would be able to substantially lessen competition by effectively limiting their competitors' addressable market. In effect, cable could "corner" a substantial portion of the high-end residential broadband e-commerce market for itself and its "preferred" e-commerce partners.

C. Will Government Keep the Unregulated Internet Separate From Regulated Infrastructure, Which Has Been Key to its Success and Growth to Date? In other words, will the unregulated "virtual" world of the Internet and e-commerce remain separate from the regulated physical infrastructure businesses?

The Internet Is Separate: The Internet is simply a universal communications language that links any type of electronic device over any carrier's physical infrastructure, to deliver any type of information (text, data, graphics, voice or video). In effect, the Internet "delinks" communications from the physical technology. In the past, communications was driven by the physical hardware technology: phone, radio, TV, cable, wireless, or satellite. The Internet is *not* the *physical* infrastructure, but the *virtual* and boundaryless world of communications and e-commerce that rides *on top of* the various technologies.

Cable Self-Deregulation? Cable is trying to reverse more than 30 years of communications/computer regulatory separation by self-declaring that cable infrastructure and the Internet are one and the same. Cable is trying to "relink" its infrastructure to the Internet in order to cloak itself in the deregulatory rhetoric of the Internet. However, in Congress' much-touted deregulatory Internet policy statement in the Telecom Act, there is no mention of cable or any other infrastructure player. Despite the current confused debate, I can find no place in which Congress or the FCC affirmatively and officially decided that cable was the Internet and, therefore, cable infrastructure should be "unfettered by Federal or state regulation."

D. Schizophrenic Infrastructure Regulation Diverts Convergence. There could not be more of a stark regulatory contrast than the competitive policy the FCC applies to the telcos and to the cable industry. The FCC is polarizing residential broadband investment by hyperregulating the telco monopoly pipe using the broadest regulatory interpretation of the law and taking a laissez-faire approach toward the cable monopoly using the narrowest interpretation of the law. Apparently, the FCC has opposite definitions of competition depending on who is on the receiving end.

- Current "activist" telecom broadband competition policy is to:
  (1) demonopolize by promoting competition on an open, shared network at wholesale prices;
  (2) encourage access investment and innovation by Internet competitors; and
  (3) prevent the incumbent from anticompetitively cross-subsidizing or leveraging market power vertically.
- In contrast the current "look the other way and hope" cable broadband policy is the opposite:
  (1) it fosters a duopolization by allowing cable a closed proprietary network at retail prices;
  (2) it discourages competitive investment and innovation by Internet competitors; and,
  (3) it allows the incumbent to cross-subsidize and leverage market power vertically.

Long-Standing Open Access Precedent: Since 1966, the government has had an ongoing regulatory proceeding, Computer Inquiry, whereby it has tried to reconcile the convergence and interdependence of communications transport and enhanced data processing technologies *by keeping them separate* to the extent possible for regulatory purposes. Neither the 1992 Cable Act, nor the 1996 Telecom Act, nor the World Trade Organization Telecom Agreement specifically anticipated the emergence of cable as a primary broadband data "last-mile" carrier. In the absence of specific legal language, cable has lobbied furiously for political self-deregulation from the long-standing, bipartisan and international consensus supporting the promotion of competition to monopolies and the policy of nondiscriminatory access (i.e., open networks). I can find no vote or official policy decision whereby the government decided to reverse its consensus procompetitive, open network access policy and officially and explicitly decided that the cable "last-mile" should be closed to competition in order to spur deployment.

Mr. Chairman, thank you again for the honor of testifying before your Committee on this important subject.

Attachment: "Too Rosy an Outlook for Residential Broadband Competition?" and accompanying chart: "Precursor Watch℠: Residential Broadband Deployment Outlook."

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Scott C. Cleland
June 28, 1999

Too Rosy an Outlook for Residential Broadband Access Competition?

Summary: **TPG suspects that the current rosy deployment outlook for residential broadband access facility choice will fall short of expectations much as residential competition has disappointed since passage of the 1996 Telecom Act. Just as before, there are powerful industry, financial and political interests at play that promote and benefit from a rosy deployment outlook. However, just because the promoters' views are rosy does not make them realistic. There's not a lot of mystery about the prospects for the residential broadband market. All the potential competitors have either a government license or regulated rights of way, and they all have deployment markets and timetables. *Attached is a TPG summary of the universe of potential sources of residential facilities-based broadband competition and the likely reach and timetable of broadband deployment.* TPG would expect other feasibility surveys of deployment plans to yield healthy skepticism. The cable open access debate largely hinges on the prospects for alternative broadband deployment. The FCC apparently assumes that the market will create enough *nationwide* competitive alternatives (4 to 5+) to ensure that there would be no anticompetitive effects from a closed cable platform. Federal Judge Panner's recent Portland decision favoring local open access authority declared cable an "essential facility" for competitive ISPs.**

Outlook for Residential Broadband Facility Choice: Being generous, and using the FCC's "broadband" definition (200+ kilobits per second in both directions), TPG believes the best practical broadband deployment case for the next three years is that: about one quarter of the country might enjoy a choice of three broadband options (cable modems, DSL, and fixed wireless); roughly one-half of the country could enjoy a choice of cable modems and DSL; and about three-quarters of the country could have cable modems available. **The antitrust flip side of this best practical case is that: about one- quarter of the country won't have any broadband offering; about one-quarter will have one option—cable modems; about a quarter will have two options—cable modems and DSL; and about one-quarter will have three options—cable modems, DSL and fixed wireless.** TPG suspects actual deployment could be less.

Red Flags Questioning a Rosy Deployment Scenario: (1) Where is DSL? After years of hype and rosy projections, currently only about one of 15 residential broadband customers uses DSL. Moreover, the underwhelming deployment experience of ISDN (the telcos' former high-speed service—128 kilobits per second)—roughly 200,000 residential customers over the last 11 years could be a red flag for DSL projections. (2) Iridium? The most recent experience we have with new satellite offerings is Iridium, which may go bankrupt, having spent $5 billion to attract roughly 10,000 customers worldwide. (3) Fixed wireless? a) The reason Sprint and MCIWorldcom were able to purchase their fixed wireless cable spectrum is that the previous businesses that used that spectrum went bankrupt. b) Current deployment of fixed wireless has been slowed because the industry has had problems securing economical building roof rights to deploy antennae. The problem is serious enough that the FCC recently launched a *proposed* rulemaking. c) AT&T's $100 billion investment in cable broadband suggests that AT&T's believes cable broadband could be deployed faster and better than its own fixed wireless "Project Angel." (4) Tough questions? a) The official lobbying position of both the local telco and the cable monopolies is that they cannot afford to upgrade their existing facilities to two-way broadband if regulators force them to share their bandwidth with competitors. What does this suggest about the economic viability of a new entrant that has to build facilities from scratch without the cross-subsidy of an existing customer base? b) If AT&T truly believes there are plenty of broadband alternatives, what are AT&T's immediate plans for offering competitive broadband service to the 75% of American households where it claims it will not have cable properties? c) If the FCC truly believes there are going to be plenty of broadband options soon, a "no-opoly," why is the FCC planning to hyperregulate the local telcos' DSL spectrum and DSL offerings? And why is the FCC not trumpeting the benefits of DSL deregulation in order to spur DSL deployment?

Can't Ignore Economics: While it is not "politically correct" to still talk of "natural monopoly" economics, the cold reality remains that residential broadband facilities remain simultaneously highly capital-intensive up front and highly capital-inefficient over time because of the lack of geographic density and the lack of high-volume customers. Local residential competitive economics remain dismal unless an AT&T can assume very high penetration rates, cross-subsidize its video monopoly, and vertically leverage market power into e-commerce by preventing competitive Internet access. Ponder how the CLECs have shunned the residential market. Ponder how the FCC manufactured an *effective 75%* local service resale discount (UNEP); that speaks volumes about how acutely aware the FCC is of the lingering "natural monopoly" economics in the residential market. *(See attached chart)* * * * *

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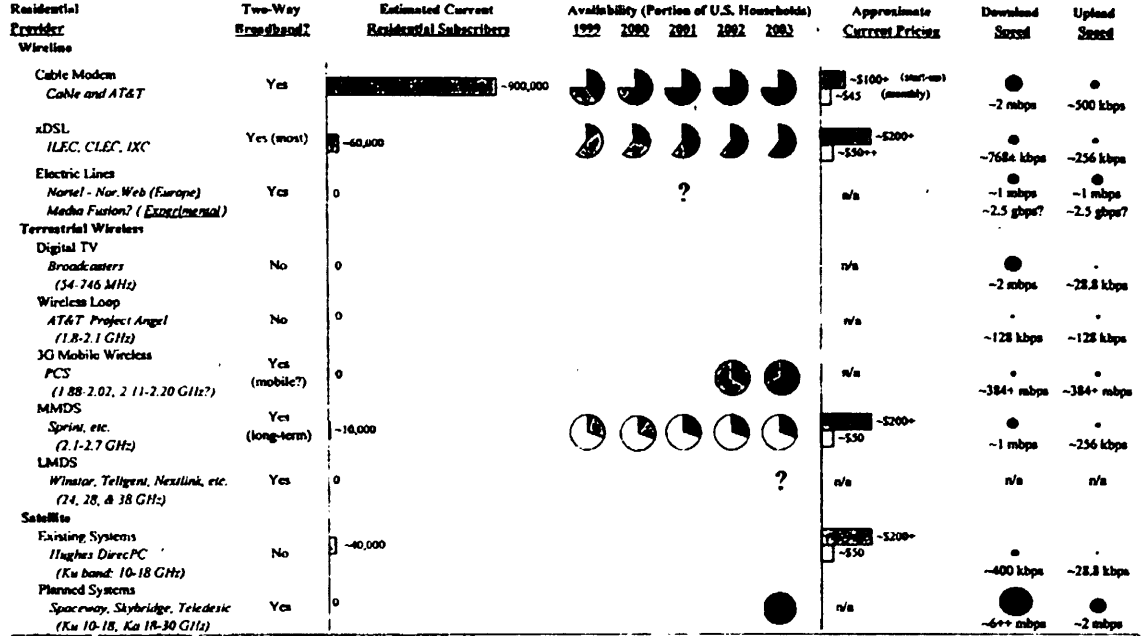
Precursor Watch® -- Residential Broadband Deployment Outlook



Key: Two-Way Broadband? FCC defines "broadband" as 200 kbps both ways. Availability: Assuming ~100m U.S. households, circles depict estimated portion: with access available (black); likely to have access available long-term (gray); and unlikely to be targeted for deployment (white). Pricing and Speed: We show a representative price/speed package, selected from a range of options, likely to have the broadest residential appeal. Circles depict the size (speed) of a representative "pipe."

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Mr. SMITH OF TEXAS. Mr. Rosenblum.

STATEMENT OF MARK ROSENBLUM, VICE PRESIDENT FOR LAW, AT&T CORPORATION, BASKING RIDGE, NJ

Mr. ROSENBLUM. Thank you, Mr. Chairman, members. It is a pleasure to be here today to discuss H.R. 1685 and 1686. AT&T is investing over $100 billion in cable systems to transform cable systems into new communications facilities that we think will bring new technology and services to our customers. Our plan is to use these facilities to compete in local telephone markets across the country, offering competition to the incumbent monopoly telephone companies, bringing lower price, better service, and for the first time real choice to millions of residential customers.

One of these new choices is the broadband Internet access service customers will be able to obtain from cable companies in partnership with firms like @Home and Road Runner. These providers have innovated and invested to build high-speed networks and bring new content to cable customers.

Contrary to some rhetoric, these networks are not closed. Customers can and do access any site on the public Internet through these new services. There is no limit whatever on Internet access or where customers can go on the Internet once they get these services. All they do is get an additional choice. And we think they get faster and better service than they could before.

Since AT&T unveiled its investment in cable, deployment of all types of broadband access facilities has skyrocketed. DSL technology, that is the technology that turns a telephone line into a broadband capable pipe, has been available for years, but it has only been in the past few months that Bell companies and GTE began accelerating their deployment and reducing the price for these services; and we think that is in response to the competition they sense coming from companies like AT&T.

Four Bell companies and GTE have announced that DSL service will be able to serve as many as 31 million consumers across the country by the end of this year alone. These emerging competitive forces are really the product of the competition from AT&T. The investment and innovation you see in the industry represent a huge consumer and competition success story made possible by the 1996 Telecommunications Act, of which we think Congress should be very proud.

What we are talking about today is bringing better service, better price, and more choices to customers. This is the promise of the Telecom Act, and I think it is the promise of the Sherman Act. These laws have unleashed the explosion in competitive investment by us and others, and it has made possible the competitive response by the incumbents that is really what is going to drive deployment of these new technologies to all customers.

If the past 3 years have taught us anything, it is that the certainty provided by the Telecom Act has stimulated this competitive investment, without which the competitive response would not have been made possible. We thus oppose allowing Bell companies to provide long distance data services now before they open their local markets to competition as the 1996 act requires.

In addition, we think the bill marks a sharp and unwarranted departure from established antitrust policy. Congress and the courts have uniformly recognized that the Sherman Act is a law of general application and special laws applying to special industries have generally been rejected. This bill, in contrast, would impose a special rule for a single industry creating a narrow inflexible market definition and would bypass relevant case law. It would deem individual broadband providers to have market power over their own facilities, even though broadband competes with narrowband and even though alternative suppliers can and do provide other broadband access capabilities.

The bill's unprecedented presumption of antitrust liability in suits involving broadband Internet access we think would lead to a litigation explosion. This would embroil the Federal courts in setting the rates, terms and conditions for Internet access, leading to regulation of the Internet that would seriously hinder the very innovation the antitrust laws are supposed to foster.

We think the discussion today really is not about whether cable Internet network should be open. The choices and technologies that competition will create assure that all firms have every powerful incentive you can imagine to offer services and features that customers want.

In our case, we have invested over $100 billion in a new technology to try to bring choice to our residential customers. Virtually all of these customers today, though, are already served by the incumbent telephone monopolies or by the dominant Internet provider, AOL. If we don't offer them the service they demand, they are simply not going to bring their business to us in the first place, and we will never recover on our investment. If we don't meet their needs, they won't come. This market reality should dictate the way that markets and technology and consumer services develop. We submit new laws that are not necessary.

I respect very highly what Commissioner Sten and his colleagues have done in Portland, but other cities around the country considering the same question came to the decision that it would be inappropriate to impose open-access requirements on cable providers preferring instead to stimulate the deployment of our facilities hoping that it would trigger deployment of competing facilities, and that has occurred.

Commissioner Sten says national policy is required. Our reason for opposing what happened in Portland, Mr. Chairman, is not to impose litigation costs on the people of Portland. They are our customers. We just think that we can't afford to have individual cities making individual choices in this very important area. We have got a market, it is working, and we think the customer demand should drive it. Thank you very much.

Mr. HYDE. [Presiding.] Thank you, Mr. Rosenblum.

[The prepared statement of Mr. Rosenblum follows:]

PREPARED STATEMENT OF MARK ROSENBLUM, VICE PRESIDENT FOR LAW, AT&T CORPORATION, BASKING RIDGE, NJ

It is a pleasure to appear before this Committee today to discuss H.R. 1685 and H.R. 1686. We commend the Committee for the leadership role it has played in the last three years in ensuring appropriate enforcement of the antitrust laws in the telecommunications industry.

Before passage of the Telecommunications Act of 1996 (the "Telecom Act"), investment in the cable and telecom industries was sluggish. Now, with the legal and regulatory certainty the Act provides, investors are flocking not only to cable providers and incumbent monopolies, but also to competitive local exchange carriers, wireless providers, and other telecom companies.

We at AT&T believe that government policies that encourage entry and investment by, and promote competition among, providers of broadband services promise enormous benefits to all Americans. AT&T has embarked on a mission of investing the widest possible deployment of broadband technology and services to consumers. For us, broadband technology is not merely an effort to promote high-speed Internet access, important though that is. Rather, we've always been a communications company, and our plan is to use our broadband capabilities to compete in *local* phone markets across the country, offering spirited competition to the incumbent monopoly local exchange carriers—all resulting in lower prices, better service, and more choices for millions of residential consumers. Our actions in the marketplace are fulfilling the promise of the Telecom Act. We will use cable technology to provide local phone service. We approach the issue of the proposed Goodlatte-Boucher legislation from this perspective.

If we have learned anything in the few short years that the Internet has become such an important part of the fabric of our national life, it is this: we cannot legislate technology. To do so would distort not only the workings of markets, but the development of technology itself. Further, it would stifle investment—the very investment that permits entrepreneurs to develop and market powerful and innovative new technologies. Competition among *technologies*, as well as among companies, will lead to the quickest possible deployment of broadband services. We certainly hope that high-speed access to the Internet through cable succeeds in the marketplace, but we know that will occur only through competition among cable, satellite, and DSL providers.

Yet the proposed legislation would violate the most basic antitrust principles by requiring Federal courts to ignore the reality of intense rivalry among alternative broadband technologies. It would thus *discourage*, rather than encourage, investment and competition and harm rather than help consumers. Of course, *any* attempt to replace the antitrust laws' traditional focus on case-by-case consideration of the relevant markets and the competitive forces in those markets with inflexible legislative determinations should be approached with great caution. But this is especially true in markets characterized by rapidly evolving technologies. There is simply no reason even to try to do so here. Market forces, buttressed by existing antitrust laws and specially-tailored regulatory protections—in particular, the Telecom Act provisions designed to prevent the incumbent local telephone companies from extending or abusing their monopolies—are a superior approach.

Since enactment of the Telecom Act, AT&T has led the telecommunications and cable industries in investing billions of dollars to upgrade cable facilities to provide Internet and local telephone services—a risky proposition given that the dominant local telephone monopolies and Internet providers have virtually all of the customers today. But we and others are making those investments on the understanding that the national policy embodied in the Telecom Act requires that we do our part to foster the local phone competition that is the central promise of the Act.

Preserving competitors' incentives to make these investments is not simply important in its own right. The mere announcement of our cable upgrades—and particularly AT&T's unrivalled public commitment to short-term and large-scale deployment—have, in turn, spurred the local telephone monopolies and others to finally deploy the broadband technologies they have had sitting on the shelves for years and, equally important, to enter into commercial arrangements with Internet providers (notably AOL) to bring even broader choice to consumers.

The proposed legislation, in contrast, would denying the cable companies that have largely stimulated these vibrant market forces the right to respond to market forces in balancing customer demands, technology constraints, and legitimate network congestion concerns and in pursuing commercially-negotiated arrangements of their own. Ironically, this could only discourage both cable investments *and* the long-overdue competitive response to those investments by today's dominant providers of Internet and local telephone services.

That would be a very high price to pay, particularly given the reality of the marketplace. Competition will ensure that consumer demands for the services they want are met. Any cable provider that fails to offer customers the services and choices they demand will simply lose in the marketplace. AT&T recognizes this reality, and having committed more than $100 billion of its shareholders' resources to acquire TCI and MediaOne and upgrade their cable facilities, is fully committed to making sure that consumers are able to access the content of their choice—a point our

Chairman, C. Michael Armstrong, has made publicly on numerous occasions. If we don't give consumers what they want, they will simply go somewhere else—or, more precisely, given that we are just getting started here, *stay* somewhere else, which is with the incumbent local phone companies.

Thus, the question here is not whether cable systems will be "open," but whether new facilities and services that offer the most viable near-term hope for legitimate local competition should be allowed to develop in accordance with customer demands and market forces—rather than through protracted and costly litigation that will discourage the very investment necessary to generate this rivalry and the ensuing consumer benefits.

The remainder of this testimony is organized in two parts. First, it discusses why we believe existing laws are more than adequate to address potential anticompetitive conduct in the broadband area and that the proposed legislation is fundamentally flawed. No new legislation is necessary to protect consumers of broadband services. Moreover, the proposed legislation is fundamentally flawed from the perspective of antitrust jurisprudence and economics. Second, we believe the proposed legislation would in fact retard the rapid deployment of broadband technologies both by placing unwarranted new regulatory constraints on cable companies and by removing existing protections against anticompetitive conduct by local telephone monopolies. By contrast, the best way to make sure that all consumers have access to a variety of broadband technologies and services, including both cable-based systems and systems provided by the local telephone monopolies, iis to allow market forces, constrained by existing regulatory protections, to continue working.

The Existing Antitrust Laws Are Working

Regardless of one's perspective on the appropriate role of government in the deployment of broadband, there would still remain many reasons to oppose attempting to change the Federal *antitrust* laws in the manner proposed in this legislation. From the perspective of antitrust law and antitrust economics, there are a number of serious shortcomings in this proposed legislation.

First, this bill imposes an inflexible statutory definition of the relevant "market" (the "broadband service provider market") which is inaccurate at best and more generally inappropriate. In the normal course, under well-developed case law, an antitrust plaintiff must prove that the defendant has the power to control prices and output and exclude competitors in a relevant market. The appropriate definition of the relevant market is thus the starting point of traditional antitrust analysis. To determine what the relevant market actually is, agencies and courts must consider the facts as to whether customers have alternatives that effectively prevent a firm from raising prices or limiting choice without losing business—in antitrust jargon, the "elasticities."

This bill, in contrast, would foreclose the usual role that economic realities and evidence play in this determination and force an artificial definition of the market. Not only does the bill decree that broadband services are the relevant market--even though broadband Internet access services plainly compete with narrowband services today—the bill further declares that the facilities of a *single* broadband access provider constitute the relevant market. In essence, this bill would bypass relevant case law and deem individual broadband networks to be "essential facilities" (*i.e.*, those that are essential for competition in the relevant market) *without finding any ability to exercise monopoly power and notwithstanding that those seeking access to such a network have alternative suppliers that can provide the same or similar high-speed capabilities*. This ignores long-developed precedent on the essential facilities doctrine by asserting a presumption of a Sherman Act violation based only on a broadband access provider's legitimate business decision.

Problems with this statutorily-mandated definition will grow even worse as technology evolves in the coming years and even more alternative for communications and broadband technology appear in the market. Rather than forcing Congress to perpetually revisit this question of the appropriate market definition, therefore, the easier and more logical course is surely to preserve traditional antitrust principles and analysis by letting administrative agencies and courts determine the relevant market in any enforcement or damages action.

Second, the bill's proposed new procedural rules in antitrust suits involving broadband Internet access threaten to sow considerable confusion and lead to a litigation and regulation explosion. For example, Section 102 of the bill establishes a presumption of a Sherman Act violation any time a cable company that provides broadband Internet access seeks to negotiate terms and conditions for access with one ISP that are in any way different from those offered to any other ISP. But the legislation is silent as to how this would work in practice. What does it mean to say this is a presumption? What evidence would suffice to rebut it? What happens

in Sherman Act cases after the applicability of the presumption has been established. More fundamentally, the procedure envisioned in the legislation would inevitably enmesh the Federal courts in all 50 States in setting, overseeing and administering the rates, terms, and conditions for interconnection between literally thousands of broadband and Internet providers. This is certain to be extraordinarily costly and cumbersome. It would also foreclose the very innovation that the antitrust laws otherwise seek to foster by preventing new firms with new ideas from investing in new approaches that may require different interconnection arrangements.

Stated broadly, we are seriously concerned that the proposed legislation would lead to sharply increased litigation, rather than healthy industry competition. The bill creates the "presumption" of a Sherman Act violation any time a broadband service provider merely offers more favorable terms or conditions to one ISP. This presumption would apply without regard to whether this access was the result of fair commercial bargaining between the parties or the need of broadband service providers to recoup their investments. In effect, the bill would establish a new cause of action for the more than six thousand ISPs every time a broadband provider enters into an agreement with an ISP.

Because the bill gives special advantages to plaintiffs, defendants would have the scales tipped against them. As noted above, the legislation is unclear regarding whether the presumption of a Sherman Act violation is rebuttable and how defendants may challenge the presumption in court. It follows naturally that accepted procedural devices for quick dismissal of meritless litigation, such as motions to dismiss or motions for summary judgment, would be difficult, if not impossible, for defendants to obtain. This would considerably increase the costs of litigation for *all* parties, as even meritless claims could proceed only to trial or settlement.

Finally, this bill marks a sharp departure from the philosophy that has animated antitrust jurisprudence for over a century. The Sherman Act was intentionally written in language that is somewhat simple and general to ensure that courts have adequate flexibility to respond to rapidly changing market conditions and to new economic developments regarding the nature of the competitive process in particular markets.[1] Moreover, courts have uniformly recognized that the Sherman Act is a law of general application and is for the "protection of competition, not competitors."[2] Historically, the Federal antitrust statutes have been laws of general application. Accordingly, courts have generally rejected special, narrow presumptions or exceptions. Similarly, Congress has appropriately rejected prior legislative proposals suggesting specific presumptions or exceptions covering the health care, transportation, and energy industries, even in the face of asserted public health and safety rationales.

In sharp contrast, this bill is written in industry-specific and frankly protectionist terms that are contrary to the pro-competitive spirit of long-standing Federal antitrust laws. Likewise, rather than giving competitors and courts the ability to respond to new market conditions and to economic developments, it artificially dictates the relevant market and decrees that each broadband provider's system is an essential facility. Not only is this approach unprecedented, but the legislation would prevent broadband access providers from demonstrating in court that actual competition exists between or among different broadband companies and technologies. In short, this bill would protect competitors at the expense of competition.

Surely Congress cannot desire this result: to adopt this legislation would retard the competition among technologies that lies at the heart of innovation. Any new technology, by virtue of its newness, its challenge to the established way of doing things, would be seen as a potential monopoly—a strong deterrent to innovation.

Towards the Broadband Future

Of equal importance to the consideration of the proposed legislation is the question of whether this bill would further or retard an important public policy goal: achieving the rapid deployment of all types of competing broadband technologies to consumers. AT&T has a strong interest, shared by many on this Committee, in ensuring that this broadband technology is deployed quickly and widely to all types

[1] "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, at the lowest prices, of the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political, and social institutions. But even were the premise open to question the policy unequivocally laid down by the Act is competition." *Northern Pacific Railway* v. *U.S.*, 356 U.S. 1, 4 (1958).

[2] *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962).

of consumers. Regrettably, this bill, while intended to spur the deployment of advanced telecommunications services, would actually undermine the pro-competitive policies of the Telecom Act in several important ways.

First, as explained above, competition, not regulation, provides the best incentive for broadband deployment. In fact, had this legislation already been enacted, we would not be witnessing the current dramatic explosion in competition to provide consumers with high-speed Internet access. Since cable companies have entered the broadband market, deployment of all types of advanced broadband services has skyrocketed. While DSL broadband technology has been around for years, the RBOCs and GTE began stepping up their deployment and lowering their prices *only* in response to the emerging competition from CLECs, cable companies, wireless, and satellite providers.

The FCC has noted that investment in broadband facilities by cable operators and CLECs "spurred incumbent LECs to construct competing facilities."[3] Wall Street analysts have likewise observed that competition from cable and CLECs is the primary force spurring incumbent LECs to increase their investment.[4] This appears to be the case in markets around the country, where the ILECs have lowered their prices and expanded their coverage areas in response to the entry of competitors.[5]

Indeed, four RBOCs (SBC, BellSouth, U S WEST and Bell Atlantic) and GTE expect to be able to offer DSL service to over *31 million* homes in their regions by the end of *this year*. Competition keeps driving deployment ever faster and prices ever lower. For instance, in January 1999, SBC accelerated its deployment timetable by two years and reduced its price for 384 kbps DSL service about 30% to $39 per month. Likewise, in May 1999, U S WEST dropped its price for 256 kbps DSL service 25%, to only $29.95 per month, making it a much more attractive offering.

Particularly since AT&T announced its intent to use cable systems to provide high speed Internet access, deployment of all types of advanced broadband services has skyrocketed. Having amassed a dominant share of Internet subscribers while ignoring demand for broadband Internet access for years, AOL has now announced a series of initiatives with the RBOCs to provide high speed access over telephone lines. Likewise, AOL has just announced a venture with Hughes to deliver broadband service via satellites.

Second, the proposed legislation would directly undermine the pro-competitive policies of the Telecom Act that have accelerated investment in new state-of-the-art local networks. As a direct consequence of the landmark Telecom Act, over 150 competitive local exchange carriers (CLECs) are in business today, providing new jobs and investing billions of dollars in the Nation's telecommunications infrastructure.

This progress, however, has not come quickly or easily and has still not brought meaningful local competition to the overwhelming majority of Americans. Rather than complying with the Act's market-opening requirements, the incumbent local exchange carriers (ILECs) have opted to delay the onset of local competition by challenging the constitutionality of the Act and appealing almost every state and FCC decision adverse to their interests, or by simply refusing to do what the Act plainly requires. The ILECs continue to control 97% of their local markets, and the very popularity of second lines devoted to data services has only served to reinforce this level of market dominance. Thus, new entrants and competitive companies continue to face an uphill battle as they work and invest to make local competition a reality.

After almost three full years of litigation, having now failed in that effort, the RBOCs and GTE are now asking Congress to reward their recalcitrance by making exceptions in the Act for the provision of data services, including across LATA (local access and transport area) boundaries. They claim that this legislative "relief" is needed to foster broadband deployment.

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[3] *706 NOI Report* ¶ 42 & n.84.

[4] *E.g.*, J.P. Morgan Report titled "DSL: the Bells Get Serious: 1999 Promises to be the Year of DSL Deployment, March 19, 1999: "We detect a dramatic change in the attitude of the local phone companies toward DSL deployment . . . [T]here are several forces driving the local phone companies to accelerate their DSL deployment. Most notable is the rollout of cable modems by cable companies . . ."

[5] *See, e.g.*, Mike Farrell, *PacBell to Lower DSL Rates in Calif.*, Multichannel News, November 23, 1998. In other markets where cable operators have initiated broadband service, the incumbent carriers quickly followed suit. For example, @Home launched service in San Francisco in September 1996 and San Diego in May 1997, and Pacific Bell followed in November 1997 and September 1998, respectively. *See Pacific Bell's ADSL-Internet Access Packages Now Available to 180 California Communities* (visited March 18, 1999) <http://www.sbc.com/PB/News>. Likewise, after @Home launched service in Phoenix in May 1997 and Denver in June 1998, US WEST followed in October 1997 and June 1998, respectively. *See US WEST Launches Ultra-Fast DSL Internet Service in Twin Cities; Continues Roll Out* (visited March 18, 1999) <http://www.uswest.com/com/insideusw/news/051398b.html>.

Yet this claim is based on several false premises.

First, the Act is *technologically neutral*; its pro-competitive policies apply equally to both voice and data. Recognizing that Americans deserve a competitive choice both when they use the phone and log on to a computer, Congress made no distinction between voice and data traffic in the Act. The Act, like the 1984 antitrust decree before it, encompasses *all* telecom services, and already provides the relief the ILECs seek—when they open their local monopolies to competition.

Second, granting "limited" relief covering data is functionally equivalent to granting total, unconditional relief from the requirements of Sections 251 and 271 to the ILECs. Over half of today's telecommunications traffic is data, and data traffic is growing at 30% per year, according to the Dataquest research firm.[6] Another estimate has data "outgrowing voice 15:1," noting that "90% of data is long-haul rather than local."[7]

In addition—as the ILECs well know—with the advent of Internet Protocol (IP) technology, the distinction between "voice" and "data" traffic, already blurred, is quickly disappearing. Indeed, voice and data are transported over the same network, not two distinct networks. As an SBC executive recently stated, "DSL is a bigger deal than high-speed access to the Internet; it's about renewing our networks."[8] This view is supported by industry analysis: one report affirms that "[t]he telecommunications industry is making a fundamental shift from circuit switched voice networks with data overlays to packet switched data networks with voice overlays."[9] Thus, although the proposed legislation would exclude voice-only services from this LATA relief, the reality is that under today's technology, there may be no such thing as a voice-only service.

Far from fostering broadband deployment in rural and other underserved areas, this legislation would actually hinder it. The ILECs have argued that legislative action is necessary for the deployment of broadband in rural areas. In actuality, however, large incumbent monopoly carriers have been abandoning their rural customers and selling off rural lines. U S WEST and GTE, in particular, have been active in selling off small rural exchanges to concentrate on urban and suburban markets; U S WEST alone has sold over 400 rural exchanges since 1994, while GTE is currently shedding 1.6 million lines, including all of its wireline exchanges in Alaska, Arkansas, Arizona, Iowa, Minnesota, Nebraska, New Mexico, and Oklahoma. Notably, one securities analyst noted observed that "[w]e believe the large ILECs would be inclined to divest more rural properties if they judged that they could do so without political fallout."[10] All this raises serious questions about the commitment of the RBOCs and GTE to serving rural customers, with or without the relief they seek in this legislation.

Moreover, the scope of this legislation is not limited to rural areas. For example, provisions in the legislation would bar competitors from leasing DSL-equipped lines from the incumbents, limiting their ability to compete at all in rural or other areas.

Conclusion

In short, the market, properly constrained by *existing* antitrust and regulatory protections, is working. Incumbent carriers are already responding to the pressure of even modest market entry by new competitors, and the benefits of this rivalry can only accelerate as new entry becomes more significant. In these circumstances, the proposed bill can only do harm. Government should not tamper with this evidence of a market that is working. Experience has shown that the best way to encourage broadband deployment is to encourage and ensure competition for local monopolies and Internet giants. In short, the Act is beginning to work just as Congress intended; now is not the time to reopen the Act.

We respectfully urge this Committee to promote quick and wide deployment of broadband technologies in the best way possible: by standing with the Act and existing antitrust laws and opposing efforts such as this legislation to rewrite them in furtherance of narrow interests that are in direct conflict with the public good.

Mr. HYDE. Mr. Salsbury.

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[6] Kenneth Kelly, "The Shift to Data by Two Major U.S. Suppliers," Dataquest, Sept. 14, 1998.

[7] Jack Grubman, "Review of Our Position on RBOCs: SBC & BEL will create most value," Salomon Smith Barney, March 9, 1999.

[8] Andrew Brooks, "SBC Accelerates Plans for High-Speed Net Lines," *The Dallas Morning News*, June 16, 1999, at 4D.

[9] Kenneth Kelly, "The Shift to Data by Two Major U.S. Suppliers," Dataquest, Sept. 14, 1998.

[10] Michael J. Balh f, CFA, and Tina T. Heidrick; "Harvesting New Value: The Rural Local Exchange Industry," Legg Mason Equity Research, Spring 1999, at 16.

STATEMENT OF MIKE SALSBURY, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, MCI WORLDCOM, WASHINGTON, DC

Mr. SALSBURY. Thank you Chairman Hyde, Congressman Conyers, and members of the committee for the opportunity to speak to you today about these two bills that seek to promote the growth and development of the Internet free from unnecessary regulation.

While MCI WorldCom wholeheartedly supports these goals, we cannot support either of these bills. Why? Not because MCI WorldCom opposes open access on cable TV systems, which we fully support, but because these bills would eviscerate a cornerstone of the Telecommunications Act of 1996, the requirement in section 271 of the act that the Bell operating companies must first open their local markets to competition before they are allowed to offer interLATA services.

Very simply, the threat to the growth and the development of the Internet lies in the ability to use a monopoly in one market, such as cable TV or local telephone service, to control high-speed access to Internet services. Section 271 requires that the Bell company monopolies must be eliminated before they could engage in any such conduct.

I would like to offer a few specific observations for the committee this morning. First, the Telecom Act does not prohibit the Bell companies from offering interLATA data services indefinitely, only until they open their local markets to competition. Once its markets have been open, a Bell company is entirely free to offer any interLATA service. The only reason Bell companies cannot provide interLATA data services today is that they have chosen to delay opening their local markets, prolonging their ability to earn monopoly profits. Congress should not reward this choice, which has cost consumers billions of dollars over the last 3 years.

Second, there is no question that local markets can be opened. Under the leadership of the New York Public Service Commission, we are hopeful that this—that the first State will have its local markets fully opened to competition before the end of this year.

MCI WorldCom has worked very closely with the New York commission to bring about this result. And, we are heavily invested in its success. The message to the other Bell companies ought to be to work to open your markets like Bell Atlantic is doing in New York. Holding out the prospect of legislative relief from section 271 before the Bells open their local markets only encourages further delays by them, and deters additional investment by competitive local exchange companies.

I would add that New York and several other States have required the Bell companies to offer high-speed Internet access facilities as an unbundled network element, something these bills would undo.

Third, there should be no illusion that the interLATA relief these bills would provide to the Bell companies can be limited to data services. Within a few years, all voice and data services will use the Internet protocol and will be indistinguishable to telecom switches. Thus, what these bills propose amounts to a total gutting of section 271 of the act.

Fourth, there is no public policy basis for interLATA relief as sought by the Bell companies. The Internet is vigorously competitive today. Virtually all consumers can choose from among many Internet service providers and connect to them with a local or toll-free call. More than 90 percent of all Americans can choose from four or more Internet service providers today, which is certainly more than you can say about local telephone service.

By the end of this year, estimates are that high-speed Internet access via DSL or cable modems will be available to about half the homes in America. And, while demand for Internet backbone capacity is growing rapidly, there is no shortage of capacity and new competitors like Qwest and Level 3 who are building new networks to meet this demand. Since the Telecom Act became law in 1996, Internet backbone capacity has grown from 1.2 terabits per second to 21.7 terabits per second, a nearly 20-fold increase.

MCI WorldCom is supportive of the other goals of H.R. 1685 and 1686, most importantly insuring that providers of high-speed Internet access via cable modems as well as incumbent local exchange companies offer open and nondiscriminatory access to their local facilities. There is no policy justification for permitting cable television operators to leverage their dominance in the delivery of video services to restrict consumers' ability to choose freely their Internet service provider. But, we cannot support any legislation that effectively would repeal section 271 of the act, the key provision for opening local markets to competition, and section 251 with respect to DSL services. Thank you.

Mr. HYDE. Thank you, Mr. Salsbury.

[The prepared statement of Mr. Salsbury follows:]

PREPARED STATEMENT OF MIKE SALSBURY, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, MCI WORLDCOM, WASHINGTON, DC

Good morning. Thank you, Chairman Hyde, and members of the Committee, for the opportunity to speak to you today about the far-sightedness of the Telecommunications Act of 1996, why that landmark statute is so much more than just a short-term experiment, and why it should be preserved just as important benefits to consumers are being realized. In particular, the provisions of H.R. 1685 and H.R. 1686 that would permit the Bell Companies to offer interLATA service before opening their local networks to competition would break Congress' 1996 promise to consumers, and to the telecom industry, to bring competition to one of the last remaining monopolies in America—the local telephone market. These bills offer a legislative solution to a non-existent problem, while ignoring the real problem: that three years after the fact, the local markets for voice and data services are not yet open. The solution to that very real problem is vigorous enforcement of the law Congress already has enacted, not new legislation seeking to reverse the pro-competitive provisions applicable to the local telecom markets.

I am the Executive Vice President and General Counsel of MCI WorldCom. In addition to being a large long distance carrier, MCI WorldCom is the largest of the facilities-based competitive local exchange carriers ("CLECs") and, through its UUNET subsidiary, is one of the world's largest Internet Service Providers ("ISPs"). More than anything else, except perhaps the singular vision and concerted efforts of entrepreneurs like Bill McGowan and Bernie Ebbers, MCI WorldCom owes much of its success—and, indeed, its very existence—to this nation's open and competitive telecommunications markets. These markets did not simply spring to life unassisted. It took the hard work of a whole host of policymakers—from Congress, to the Reagan Justice Department, to the FCC, to a tenacious district court judge—to pry open the previously closed, monopolistic markets for long distance services, information services, and telecommunications equipment. If nothing else, this history demonstrates that free markets do not always become free on their own. Often, government has a critical role to play in creating the necessary structure and ground rules that allow previously-closed markets to flourish with full competition.

The Telecommunications Act enhanced this legacy of competitive long distance telecommunications and information service markets by mandating the end to monopoly in the local market as well. Congress could have simply enacted, by itself, what is now Section 253 of the Act, which requires the state and local governments to remove barriers to entry in the telecommunications markets. But Congress wisely chose to go far beyond that simplistic approach. The '96 Act begins, as it must, by acknowledging the fundamental and undeniable advantages of local carrier incumbency—from massive economies of scale and scope, to pervasive company name recognition. In order to break the local phone companies' chokehold over the infamous "last mile" to and from nearly every home and business in America, Section 251 of the Act creates multiple pathways for competitive providers to enter the local market. Whether on a pure facilities basis, or through unbundled network elements ("UNEs"), or through resale, the Act leaves it up to the individual competitor to select the most appropriate business model—and then, simply, compete. The genius of the Act is that, once the incumbent LECs carry out their statutory obligations, many competitors will be able to use these pathways to devise new and innovative ways to provide low-cost, beneficial services to consumers.

Of course, it isn't quite as simple as that. Breaking the entrenched monopoly over the last mile is a formidable challenge to even the most nimble competitor. This is not surprising; after all, stretching back to the early 1980s, when the Reagan Justice Department crafted the landmark antitrust settlement decree that would become the Modified Final Judgment (MFJ), it was well understood that the Bell Companies and GTE, left to their own devices, would do what any other business in their enviable position would do, namely, through a variety of anticompetitive practices, to *first*, foreclose competition in their own markets, while *second*, extend their monopolies into adjacent markets, such as long distance and information services. As a result, the MFJ created a virtual wall of separation between the Bell Companies' monopoly local services—viewed by many then as a natural monopoly—and the newly-competitive world of long distance services, information services, and customer premises equipment. The Bell Companies were forbidden to enter that competitive world unless and until they could demonstrate they would cause no significant harm to competition.

Now, fully fifteen years after the MFJ was first put into place, it is safe to say that the long distance market is robustly competitive. At last count, over twelve hundred companies—from giants like AT&T, to mid-sized national facilities-based carriers, to the smallest resellers—are busily competing head-on to provide every conceivable option in long distance services. Long distance rates have plummeted more than seventy percent in that span, and are falling further all the time. Where the Sunday afternoon phone call to a distant relative once was viewed as a momentous and wallet-sapping proposition, today MCI WorldCom charges only a nickel per minute. Innovations such as competitive collect calling services and "10–10" services also have been developed. It is a similar success story with regard to the telecommunications equipment and information services.

In passing the Telecommunications Act, Congress both recognized the salient procompetitive lessons of the MFJ, and sought to go beyond them. It was no longer taken as gospel that consumers could never enjoy the fruits of competition in the local telephone market. Instead, Congress directed the FCC to establish rules that would end one of the last remaining monopolies in this country. In return, once the Bell Companies complied with those market-opening rules, they would no longer be limited by the long distance restrictions first imposed on them as part of the MFJ. Instead, the Bell Companies would be permitted to provide all long distance services—including interLATA services—within their home regions. It should be noted that, from day one, the Act has allowed the Bell Companies to provide local and long distance services anywhere *outside* their home regions, a significant opportunity that none of them has chosen to pursue. The Bell Companies hold the keys to long distance in their own hands—once they decide to comply with the law, the remaining interLATA restrictions will be gone.

As with the breakup of AT&T, it has taken concerted action by policymakers to bring competition to a local telephone market where none has existed before. And, while the final battle over monopoly is far from won, at least we can see promise of victory from where we stand. As just one example, today there are 146 facilities-based CLECs, serving some 4.4 million customers. This compares to just 13 competitive local carriers before the Act was enacted into law.

Through the Telecommunications Act, Congress provided the critical tools designed to ensure that access to last mile facilities is made available to competitors. Congress rightly recognized that only competition delivers the best technologies, the best service, and the best prices to consumers. Thus, Section 251(c) requires, among other things, that incumbent LECs provide access to their network elements on an

unbundled basis at cost-based rates. In this manner, the '96 Act ensures that new entrants will be able to use the incumbent LECs' local network where necessary, and that consumers would have the maximum possible competitive choices. Competitors are obligated to pay the ILECs for every element, facility, and service they use. In MCI WorldCom's view, Congress struck just the right competitive balance three years ago. We have endured three long years of protracted litigation, which ultimately has culminated in the U.S. Supreme Court upholding the pro-competitive policy choices made by Congress, and carried out by the FCC. It would be a grave mistake to upset that delicate balance crafted by Congress and the Commission just as consumers are beginning to see the fruits of competition.

Some may be surprised to learn that the Internet is another singular example of government's successful affirmative efforts to create a vibrant free market where none existed before. The federal government, at first unintentionally, laid the groundwork for today's Internet through a variety of government-sponsored programs. In the late 1960s, the U.S. Department of Defense initiated its ARPA project, culminating in the so-called "ARPANET" backbone. Through the 1970s and early 1980s, the Defense Department administered the ARPANET and allowed certain users of other research and academic networks, such as CSNET, to interconnect and utilize the ARPANET resources. In 1986, the National Science Foundation started up its own NSFNET backbone and chose the "TCP/IP" protocol—developed by Vint Cerf, now of MCI WorldCom, and Bob Kahn—the very *lingua franca* of the Internet. The government also ramped up its management role and bore many of the costs of deploying and maintaining the backbone infrastructure. Some ten years later, in 1995, the government officially abandoned its Appropriate Use Policy, under which the NSFNET could not be used for commercial purposes. Instead, the government ceased federal funding and privatized the NSFNET, leaving it open to any consumer or business to begin developing whatever commercial or non-commercial applications they chose. Without those efforts, the Internet would not exist today.

The end results of the government's overt decision to create and nurture the Internet space? The Internet is different from anything else we human beings have ever witnessed before. At some basic level, each of us is aware that the Internet already holds the key to our future. Its ability as a public "network of networks" to ubiquitously reach and connect everyone—from customers, employees, and suppliers to friends and family—is changing how we do everything. Consumer demand for services provided via the Internet appears unquenchable. For example, demand for Internet bandwidth doubles every 3 or 4 months. That is astonishing. The Internet already accounts for 50 percent of the traffic on the world's communications networks. By some estimates, the Internet will soak up 90 percent of all bandwidth by 2003, and 99 percent by 2004. In just a few short years, the Internet has become, in the words of the Council of Economic Advisors, "the engine that drives our economy."

On the supply side of the information services marketplace, business also is booming. For the past three years, MCI WorldCom has increased the capacity of its UUNET backbone by over 1,000 percent each year to handle peak traffic loads. Other backbone providers—from AT&T to Sprint to PSINet to GTE—also have increased their capacity, and still others—such as Qwest, Level 3, and Williams—are building entirely new nationwide networks designed specifically to handle Internet traffic. All in all, some forty-seven different backbone providers now are competing. As a result, all but three LATAs (194 out of 197) are served by 4 or more different Internet backbone providers, and the capacity of Internet backbone networks has exploded from only 1.2 terabits per second in 1996 to 21.7 terabits per second in 1999. You don't have know what a terabit is to understand that the capacity of the backbone networks have expanded twenty fold.

There also is good news with regard to one's ability to access the Internet. Consumers today reach the Internet almost exclusively through an ordinary telephone call, placed over ordinary copper lines. Because the incumbent LECs are required by the FCC to allow consumers to reach any ISP they choose, competition has flourished. In the case of MCI WorldCom, we offer dial-up access to the Internet through a local call to about 95 percent of the lines in the continental United States. UUNET alone has about 750 local points of presence all over the country. At last count, there were some 6,500 independent providers of Internet access, or ISPs, out there, through which more than 79 million Americans get their Internet service. Well over 90 percent of all Americans can choose from among four or more ISPs for local dial-up access, which is more than you can say for local telephone service. So, thanks again to the government's open market requirements, access to the Internet has become available ubiquitously to virtually all Americans.

The lesson here, regarding the long distance industry, the local marketplace, and the Internet, is what I would call the lesson of open platforms. Where policymakers

create and maintain open markets, where a multiplicity of providers and users can interact in a myriad of mutually beneficial ways, all will derive the full benefits of competition. This openness feeds on itself, multiplying the effect still further. Like the Internet itself, open competition in the Internet backbone and Internet access is in the best interest of consumers and competitors alike. Just imagine, if you could, how history would have been changed profoundly if the two graduate students who created Mosaic—the software underlying the world's first Web browser for Netscape—had been prevented from bringing the fruits of their innovation to the open platform of the Internet. The list of such examples goes on and on.

As I'm sure you are aware, there now is considerable market demand for higher speed access to the Internet, beyond the capabilities of the normal dial-up connections familiar to all of us. The latest telephone capability to be deployed to residential and small business customers is called Digital Subscriber Line ("DSL"), a decade old technology that competition is finally forcing the ILECs to offer consumers. On the cable side, so-called cable modems provide a similar high-speed, broadband connection to consumers. The good news is that both capabilities are being deployed by ILECs, CLECs, and cable companies on an expedited basis. The bad news is that, unless MCI WorldCom and other competitors can buy or lease access to the last mile facilities and services of the incumbent monopolies—both telephone and cable—consumers will have little or no choice for high-speed Internet services. In this regard, MCI WorldCom is certainly supportive of the efforts of H.R. 1685 and H.R. 1686 to ensure that open broadband access is offered by cable providers and by local exchange providers. The lesson of open platforms can be applied to these monopolies by maintaining the pro-competitive provisions of the '96 Act with regard to the ILECs, and applying fundamental nondiscrimination, interconnection, and resale requirements with respect to the cable companies.

MCI WorldCom is certainly doing its part to bring the promised benefits of the Information Age to its customers. For starters, we tripled our local network capacity last year. Where we can reach our customers' premises with our own facilities, we are providing them with high-speed Internet access using DSL technology. UUNET, our Internet company, has mounted the first, and biggest, national deployment of broadband DSL access to data, starting with 400 points of presence (POPs) late last year, with the aggressive goal of reaching at least 1,000 POPs by the end of this year. We are expanding our consumer service trials and partnering with other data CLECs so that we can provide the same innovations to consumers and small businesses. As soon as we can get to them, we can hit the ground running with fast, reliable, affordable service. We are not just limiting ourselves to the telephone network; we are also readying our networks to provide service through cable modems the same way we enable ISPs to do so through DSL technologies. We are also investing in fixed wireless technologies so we can reach consumers in suburban and urban markets.

And it is not just my company that is providing these services on a competitive basis. Data CLECs like Covad, Northpoint, Rythms NetConnections, and others are all at the cutting edge of bring these advanced services to the consumer.

This competition brings with it more good news. Competition is causing the incumbents themselves to deploy broadband services. In fact, the ILECs are accelerating their DSL deployment plans as a result of competitive pressure from cable modems and data CLECs, far surpassing their original intentions and announcements. Wall Street analyst SG Cowen said just two months ago that "if recent activity is any indication, 1999 could be a strong year for last-mile technologies—cable and XDSL. . . . Cable operators have stepped up the pace of deploying high-speed data services, forcing the incumbent LECs to draw up ADSL plans."

So, despite their protestations that they must have regulatory relief before they can deploy these advanced services in their territories, the Bell Companies are engaged in a massive rollout of these services. The companies' own press releases speak volumes about what is actually happening in the marketplace:

- In April of 1999, following an announcement that it would slash ADSL prices, SBC projected that its DSL deployment would reach 9.5 million homes by the end of this year.
- That same month, Bell Atlantic announced that 8 million homes in its region will have ADSL access in 1999 and increase to 16 million by 2000.
- Ameritech announced that it will have DSL service available to 70% of its customers by 2000.
- BellSouth will reach 5.1 million customers with DSL by the end of this year.
- US West is already offering its self-described "lightning fast" ADSL to 5.5 million customers in 40 cities across 14 states.

Only three years ago, the Yankee Group predicted that ADSL would be available to less than 4 million American homes by the year 2000. But, the above announcements mean that over 25 MILLION homes will be able to utilize DSL services by the end of 1999. That is quite an accomplishment. It is self-evident that competition is forcing the incumbents LECs to deploy DSL throughout their regions. In short, the Telecom Act is working.

Nonetheless, despite about the astounding achievements brought about by competitive markets, and the compelling need to create and maintain open platforms, we are now at a critical crossroads. Much of this hard-fought success hinges on keeping the last mile open to consumers, and open to competition. We have to resist the urge to excuse the incumbents from their competitive requirements under the Act, in exchange for their pie-in-the-sky promises of purported social good. In the past few months, the incumbent LECs have come up with some carefully-crafted myths they would have you believe to justify a rollback of the Telecommunications Act. None of them is true.

For example, the ILECs claim that maintaining and enforcing the Telecommunications Act's local competition provisions is tantamount to "regulating the Internet." This is nonsense. The Telecommunications Act's local competition provisions concern only the local telecommunications facilities and services that form the last mile between a customer and the telecom network. These facilities and services can be, and are, used for a variety of local telecommunications services, including traditional voice service, dial-up Internet access, and DSL service. The local competition provisions of the Telecom Act are necessary to keep Internet access from becoming completely dominated by the ILECs—to the detriment of consumers, and the Internet itself.

The incumbent LECs next insist that competitors shouldn't be permitted to utilize the network elements underlying advanced services like DSL, or subscribe to DSL services from the ILECs at wholesale rates. It is obvious why the ILECs would want to eliminate the UNE and resale pathways—this would force competitors to provide, install, and maintain their own advanced services facilities everywhere, a process that would take decades, cost billions, and strand much of the investment in local networks that consumers have already paid to the Bell Companies. In reality, however, competitors need all three competitive entry pathways promised by the Telecommunications Act in order to provide robust and ubiquitous DSL offerings. In particular, competitors such as MCI WorldCom need the UNE pathway to provide coverage for a nationwide customer base. The ILECs already own and control all central offices and remote terminals necessary to reach all potential customers, and enjoy considerable economies of scale, scope, and density, low-cost collocation in their own facilities, and unique access to Universal Service subsidies for high-cost residential customers. The resale of services and the leasing of facilities were instrumental in paving the way for facilities-based competition in the long distance industry—why would we choose to abandon that successful model now?

The ILECs also argue that they do not possess market power in the provision of "advanced services" such as DSL. The simple truth is that the ILECs have every monopoly-derived advantage in providing DSL service that they also enjoy in providing other local telecommunications services. DSL is a local transmission technology, compatible only with copper loops, and the ILECs obviously possess market power over local telecommunications services provided over copper loops. The infrastructure necessary to deploy DSL is exactly the same as is necessary to provide any other local telecommunications services. The ILECs continue to own and control all central offices needed to deploy DSL equipment and data transport facilities, all local loops needed to deploy DSL services, and all support systems needed to support DSL services. The ILECs also continue to have exclusive access to all residential customers. As DSL could eventually become the basic loop carrier technology of the 21st Century, the ILECs seek to extend their control over today's voice-dominated local loop to tomorrow's DSL-enabled loop.

Perhaps the single biggest myth perpetrated by the ILECs is that the Telecommunications Act of 1996 was only about voice, not data. In reality, the Act includes both telecommunications services and information services, in a technology neutral manner. Indeed, there is no sustainable legal, or logical, distinction between "traditional" local services and "advanced" local services. The Act nowhere makes any such distinctions, and any attempt to define a local service based on the types of technologies it employs, or the types of functionalities it provides, makes no sense. From a technical standpoint, there is no feasible way of enforcing a "data" versus "voice" distinction. Data "bits" and voice "bits" look exactly the same from the network's perspective. As I mentioned previously, data is quickly overtaking voice; today at least half of all traffic on the public network is data. In four years, data will comprise up to 90 percent of all traffic on the public network.

Further, Section 271 of the Act includes an express prohibition on the Bell Companies' provision of interLATA information services, and refers to both telecommunications services and information services. In particular, Section 271(g)(2) grants a narrow exception to the general prohibition by authorizing the Bell Companies to provide Internet services to elementary and secondary schools. This exception would be wholly unnecessary if the Act did not already prohibit the Bell Companies from providing interLATA information services. Significantly, the Bell Companies never contested the FCC's 1996 ruling on this point, or sought review by a federal appellate court.

The Bell Companies also complain that they require interLATA relief in order to be able to provide DSL to consumers, especially in rural areas. In truth, the Section 271 prohibition on the provision of interLATA services is completely unrelated to the Bell Companies' ability to deploy local telecom services like DSL. US West told Congress earlier this year that deployment of DSL capability requires installation of ATM switches, and that the interLATA restriction makes DSL cost-prohibitive because it artificially compels US West to place an ATM switch in each LATA. However, my understanding is that ATM switches are relatively inexpensive, generally on the order of $20,000 to $30,000 each. And, if a provider has ten percent or more of the DSL traffic in a LATA, installation of an ATM switch is virtually a necessity. Perhaps for these reasons, US West *already* has either deployed, or announced immediate intentions to deploy, a total of 127 ATM switches, including at least one ATM switch in 23 of 27 LATAs in which US West provides service. US West's own actions show that no interLATA relief is required for US West to do what it is already doing: installing ATM switches to provide DSL services to US West's customers.

Further, any claims by the Bell Companies and GTE that they will provide advanced services to rural communities seems unlikely. The Bell Companies have always served predominantly urban and suburban markets, leaving most rural exchanges to the independents. This bias against operating in rural markets has only increased recently. In the past few years, US West has sold off over sixty of its local exchanges in the more rural areas of Washington, Nebraska, Wyoming, and Idaho. Last year, GTE announced plans to sell up to 8 percent, or 1.7 million access lines, of its local exchange operations, mostly in low-density rural areas. It is difficult to discern any commitment by these large ILECs to serve rural markets with DSL services. Moreover, in many cases, the smaller independent LECs are well ahead of the larger ILECs in deploying infrastructure and providing advanced services such as DSL. In fact, by the end of 1997, rural LECs had installed over 40,000 route miles of fiber optic cable in states like Kansas, Oklahoma, Texas, South Dakota, Minnesota, and Iowa.

Finally, any blanket exemption from the LATA requirements of the Act for all data transmissions is unwarranted as a matter of national policy. Congress, in crafting the 1996 Act, carefully designed the only legally sanctioned incentives system for the Bell Companies. When the Bell Companies meet their local competition obligations, they are free to enter the in-region interLATA market. Elimination of even intrastate LATA boundaries for data telecommunications would completely undermine Section 271 by stifling the very incentives necessary to compel the Bell Companies to comply with the market-opening provisions of the Act. Excusing the Bell Companies from compliance with the fundamental interLATA requirements of the 1996 Act for data services would ignore the increasing convergence of voice and data, and the inability to exclude voice bits from data bits.

Enough debunking of myths. This country decided three years ago to reject the notion of natural monopolies in the local exchange, and to choose instead the path of free and open competition. In contrast, industrial policy, even in the pleasing guise of "deregulation," does not work. That form of government intervention is precisely what limits or even forecloses the opportunity for competition to develop—hurting the very constituencies it purports to serve. Broadband deployment in all parts of the country—urban, suburban, and rural—can only be accomplished by fostering, not frustrating, the beginnings of real competition.

The way to do that is to make sure that last mile facilities are not closed off to competition. Again, all of the infrastructure advancements I just talked about are irrelevant if competitors cannot reach customers, and customers cannot reach the ISP or telecom vendor of their choice. Competitors like MCI WorldCom must have non-discriminatory access to last-mile incumbent facilities in order to provide advanced, innovative new services and technologies that benefit consumers everywhere. This is not a discretionary item. We have residential long distance customers everywhere in the country. These customers tell us they want new choices for local phone service and Internet access.

The investment community also is counting on Congress not to overturn the '96 Act. Wall Street has come to expect legal certainty to ensure that there is a competitive environment for broadband. Investors know that the Internet is an increasingly central component to business models for carriers, ISPs, electronic commerce, and the information technology industry, and that the ultimate resolution of the broadband access issue will fundamentally impact the way different industries' business plans develop in the Internet space. None of those plans, I assure you, will or can be realized through a closed network. The financial markets need the law to be maintained, just as competitors do.

Reversing the antitrust-based principles, market rules, and safeguards set forth in the Act, and specifically designed to promote the development of competition, will only hinder broadband deployment and allow dominant incumbents, be they telcos or cable providers, to leverage their market power over the last mile to broadband access, and into the Internet.

In closing, I again appeal to you to safeguard the Information Age economy by enforcing the law and the principles of competition. Remember that incumbents have a long history of broken promises in connection with infrastructure programs and regulatory bargains. Nothing is worth the price of competition we have all fought so hard to win for American consumers. The Internet's phenomenal development has already demonstrated that Congress did the right thing in 1996 by focusing on opening up access to monopoly local distribution facilities. Policymakers will continue to play a critical role in enforcing the pro-competitive provisions of the Act, which hold the key to the future of broadband in America. To turn back now, and retreat from all the painstaking advances of the past three years, would be a disastrous blow to the future of telecommunications competition, and to the information economy that depends on it.

Thank you.

Mr. HYDE. Mr. Boggs.

STATEMENT OF TIM BOGGS, SENIOR VICE PRESIDENT FOR PUBLIC POLICY, TIME WARNER, INC., WASHINGTON, DC

Mr. BOGGS. Good morning, Mr. Chairman, Mr. Conyers. Thank you for your welcome. It is a pleasure to work with the committee from this side of the table today and to discuss broadband technology with you. At Time Warner we have had a long history of technological innovation and leadership, and we have long been interested in providing advance services to consumers over our cable network. Building on that foundation and as a result of the regulatory certainty created by the 1996 act, Time Warner is well into the process of upgrading all of its cable systems to a state-of-the-art hybrid fiber coaxial architecture.

From Greensboro to Cincinnati, Orlando to Milwaukee, from Boston to San Antonio, from LA to New York, when this is substantially completed by the end of the year, Time Warner will have invested over $4 billion of private capital upgrading its cable infrastructure providing increased capacity for both video programming and other new digital services as well as telephony competition.

Under the law, we are required to upgrade the entire community so rich and poor neighborhoods are reached by this capacity and we also wire all schools and libraries for free in our communities.

To make full use of the potential created by upgraded networks, Time Warner has teamed with Microsoft, Compaq, Media One, and Advance Newhouse to develop Road Runner an independent affiliate which provides an innovative mix of local and national content as well as high-speed connection to the Internet. Road Runner cable operator affiliates including Time Warner Cable, Media One and many, many third-party cable operators such as Media General in suburban Virginia are providing additional local content on the network. Road Runner's local online editors also assist schools,

libraries, and museums in developing their approach to the Internet.

The foundation of our Road Runner service is our upgraded cable fiber coaxial network. This network provides everyone the chance of reliability and capacity of fiber optics and results in an increase in the delivery of content to the PC @Home, at speeds up to 100 times greater than today's residential telephone line. Customers reach our Road Runner service and the Internet over the cable system without any need to dial into a local telephone number and the service is always on.

Of course, Road Runner service must allow customers access to any site on the Internet. Nothing on the Internet is off limits to a Road Runner customer including the sites of Internet service providers. As you know, most content on the Internet is free. But some content providers such as AOL charge for their services. And if a Road Runner customer chooses to subscribe to such service, she need only click on the AOL icon on her computer screen. She will obtain access to all AOL content, web access, e-mail and other services.

Road Runner customers similarly can reach any other ISP posted on the net with a single mouse click, and many of our customers do just that. In fact, if they choose to set up their PC in their home to avoid any interface with the Road Runner icons of any sort, they may simply do that. The service is designed to be customized by the customer.

The development of the Internet is the quintessential example of the power of the free market. It was Congress' respect for market forces over governmental interference that allowed the market to meet the needs of consumers to develop innovative new technology such as we are discussing today, to grow the economy and provide the ultimate forum for communication. No one competitor has the ability to stand in the way of the global phenomenon that is the Internet today.

For some to suggest that might be the case is nothing short of ridiculous. For, although Time Warner and other cable companies are investing billions of dollars in upgrading our infrastructure, cable modem service is still in its infancy with fewer than 1 million subscribers nationwide out of the current total 29 million residential Internet subscribers.

At this early stage in the development of broadband services, it would be a mistake for the government to choose and impose one business model on all broadband providers. Time Warner believes that cable companies and all players, be they satellite, wireless, or telephone companies with their dynamic DSL offerings should be encouraged to invest in the development of these new Internet access services through procompetitive policies that leave each one free to experiment and develop its own business strategy.

History tells us that consumers will be best served by government policies that spur the rapid roll-out of high-speed broadband services by multiple players and multiple technologies rather than by government mandates about business models which should be followed by the players in this field. Those companies that have urged the contrary approach are simply using the tired old Wash-

ington game of seeking to use the government to advance their own competitive advantages.

However, with respect to the FCC, Commissioner Michael Powell wisely stated in a recent speech on the issue, "competition policy should focus on the benefits and harms to consumers, not the effects on firms."

Unfortunately, the bills before you today ignore this advice as well as the procompetitive paradigm set in the 1996 Telecom Act. Rather than rely on the forces of a very dynamic market, these bills attempt to impose a one-size-fits-all platform and encourage companies to go to court rather than to participate in market development.

In order to continue to thrive, this uniquely American, but world-class, Internet market needs more risk takers and innovators, not more litigators and courtrooms. Mr. Chairman, the deployment of broadband services by cable is a wonderful development for consumers. Because of the investment and the risks undertaken by Time Warner, other cable companies, and our competitors the day in which families, schools, and libraries will have high-speed broadband access to anywh e the Internet has become a reality. This should be a call for celebration, not a call for regulation.

Mr. HYDE. Thank you, Mr. Boggs.

[The prepared statement of Mr. Boggs follows:]

PREPARED STATEMENT OF TIM BOGGS, SENIOR VICE PRESIDENT FOR PUBLIC POLICY, TIME WARNER, INC., WASHINGTON, DC

Chairman Hyde and distinguished members of the Committee, my name is Tim Boggs and I am senior vice president for public policy of Time Warner Inc. I appreciate the opportunity to appear today to discuss the deployment of our broadband service, known as Road Runner, and to discuss the future of broadband technology. I commend you for holding this hearing as we at Time Warner believe that the procompetitive direction set by this committee in the 1996 Telecommunications Act is critical to the future of our economy and the continued development of broadband technologies.

Time Warner has a long history of technological innovation and leadership and has long been interested in providing advanced services to consumers over its cable systems. In the early 1980s, Time Warner developed QUBE, the first interactive programming service offered over cable. In the early 1990s, Time Warner constructed the first hybrid fiber-coaxial cable network located in Queens, New York, and experimented with a variety of new services through its Full Service Network in Orlando, Florida. These earlier groundbreaking initiatives provided the foundation for the on-line services the company is now introducing across the Nation.

Building on that foundation and as a result of the regulatory certainty created by the 1996 Telecommunications Act, Time Warner is well into the process of upgrading all of its cable systems to a state-of-the-art, hybrid fiber coaxial architecture. When this is substantially completed by the end of next year, Time Warner will have invested about $4 billion upgrading its cable systems to provide increased capacity for both video programming and other new digital services, as well as telephony. Under the law we are required to upgrade the entire community, so rich and poor neighborhoods are reached by this new capacity, we also wire all schools for free.

To make full use of the potential created by upgraded plant and by digital technology, Time Warner teamed with Microsoft, Compaq, Media One, and Advance Newhouse to develop Road Runner, a new high-speed on-line service that provides local and national content. Road Runner is provided by Service Co., a privately held company headquartered in Reston, Virginia. The Road Runner service is jointly created by the Road Runner venture and its affiliated cable operators. Road Runner provides an innovative mix of local and national content, as well as a high-speed connection to the Internet. The joint venture provides content on a national basis from various sources including CBS Sportsline and Barnes and Noble. Road Runner's cable operator affiliates, including Time Warner Cable, Media One and third

party cable operators such as Media General in suburban Virginia, provide additional local content, among other things our local on-line editors also assist schools, libraries and museums in developing their content.

The foundation of our Road Runner service is our upgraded cable fiber-coaxial network. This network provides the enhanced reliability and capacity of fiber optics and results in an increase in the delivery of content to the PC at speeds up to 100 times greater than today's residential telephone line. Customers reach our Road Runner service and the Internet over the cable system, without any need to dial in to a local telephone number and the service is "always on."

The Road Runner service allows customers to visit *any* site on the Internet. Nothing on the Internet is off limits to the Road Runner customer, including the sites of Internet Service Providers. As you know, most content on the Internet is free, but some content providers, such as AOL, charge for their services. If a Road Runner user has installed AOL on her computer or if her computer came with AOL already installed, she need only click on the AOL icon on her computer screen. She will obtain access to AOL, and thereby obtain *all* AOL content, web access, e-mail and other services. Road Runner customers similarly can reach any other ISP posted on the Net with a single mouse click and many of our customers do just that.

We believe our Internet services provide subscribers with an enormous value. For about the same price as today's dial-up phone line plus an ISP, Road Runner provides consumers with Internet service that is faster and provides more immediate access to on-line services.

The development of the Internet is the quintessential example of the power of the free market. It was Congress's respect for market forces over governmental interference that allowed the market to meet the needs of consumers, to develop innovative new technologies, to grow the economy and to provide the ultimate forum for communications. No one competitor has the ability to stand in the way of the global phenomenon that is the Internet today. For some to suggest that might be the case is nothing short of ridiculous. For although Time Warner and other cable companies are investing billions of dollars in upgrading our infrastructure, cable modem services is still in its infancy, with fewer than 1 million subscribers nationwide out of the current total of 29 million residential Internet subscribers.

At this early stage in the development of broadband services, it would be a mistake for government to choose and impose one business model on all broadband providers. Time Warner believes that cable companies and other players—be they satellite, wireless, or telephone companies—should be encouraged to invest in the development of these new Internet access services through pro-competitive policies that leave each one free to experiment and develop its own business strategy. History tells us that consumers will be best served by government policies that spur the rapid rollout of high-speed broadband Internet services by multiple players and multiple technologies, rather than by government mandates about the business models such entities should employ. Those companies that have urged a contrary approach are simply using the tired old Washington game of seeking to use government to advance their own "competitive advantage". However, as FCC Commissioner Michael Powell wisely stated in a recent speech on this issue: "Competition policy should focus on the benefits and harms to consumers, not the effect on firms."

Unfortunately, H.R. 1685 and H.R. 1686 ignore this advice as well as the pro-competitive paradigm set by the 1996 Telecommunications Act. Rather than rely on the forces of a very dynamic market, these bills attempt to impose a "one size fits all" platform and encourages companies to go to court rather than participate in market negotiations. In order to continue to thrive, this uniquely American, but world-class Internet market needs more risk takers and inventors, not more litigators and courtrooms.

Mr. Chairman, the deployment of broadband services by cable is a wonderful development for consumers. Because the investment and risk undertaken by Time Warner and other cable companies, the day in which families, schools and libraries will have high speed broadband access to anywhere in the Internet has become a reality. This should be a call for celebration not a call for regulation.

As I've stated, upgrading cable plant and developing and deploying advanced services are expensive and risky ventures. Imposing new regulation on companies as some have suggested will not only slow development but will deter further investment of private capital. Therefore, Time Warner strongly urges policymakers to resist those attempts to determine through regulation how this market might develop. Such attempts fly in the face of history of Internet regulation and inevitably result in the freezing or slowing of technological development and would result in a more complex and costly service to consumers.

Time Warner also strongly believes that broadband policy must be set at the national level. As FCC Chairman Kennard, Commissioner Powell and others have

stated, these important policy questions cannot be answered hundreds or thousands of different ways by state and local authorities, and we therefore urge this Committee to keep a watchful eye on such developments.

Mr. Chairman, Time Warner applauds your Committee's interest in these issues and hopes you will continue your tradition of promoting market competition over regulation. I thank you again for giving me the opportunity to share Time Warner's views with you and look forward to your questions.

INTERNET ACCESS OVER CABLE: A CAUSE FOR CELEBRATION, NOT REGULATION

A TIME WARNER CABLE WHITE PAPER

I. INTRODUCTION

Time Warner Cable ("Time Warner") recently has started to offer consumers an exciting new high-speed on-line service called Road Runner. The Road Runner service provides an innovative mix of local and national content, as well as instant, high-speed access to the Internet. Time Warner's service is the culmination of years of work with technology providers and equipment manufacturers, and billions of dollars of investment in upgraded facilities.

Over the past few months, a number of Internet service providers (ISPs) have argued—to any regulator willing to give them an audience—that a common carrier regulatory regime should be imposed on cable operators like Time Warner when they enter the Internet access market. The technical details of these proposals have been sketchy and not always consistent. Some ISPs argue that cable operators should be required to "unbundle" the transport functions used for high-speed Internet access services. Others argue for so-called "equal access." The ISPs are equally vague when it comes to the legal authority of any regulatory body to impose these requirements. Nevertheless, they have advanced their arguments in every conceivable forum, from the halls of Congress to city councils across the country, hoping that if they repeat the arguments often enough someone might believe them.

The ISPs have launched this attack in an effort to hamper, through intrusive government regulation, a promising new development in the on-line services market. They have attracted attention by predicting that Time Warner and other cable operators will exercise bottleneck control over high-speed access to the Internet, somehow freezing out independent ISPs from that growing market segment. They suggest that enlightened public policy requires common carrier regulation that effectively would place the management of the cable system into the hands of the government, for the benefit of the dominant ISPs.

In this paper we analyze the ISP arguments and demonstrate why, as an economic, technical, and legal matter, the ISP cries for government regulation have no basis. A vibrant, competitive marketplace for on-line services is flourishing in the absence of regulation, with massive investment in new facilities, new services, and new companies. The incumbent ISPs recognize that these developments will create increasing competition and pressure for them to provide greater value to consumers. That is what is behind their efforts—to avoid, or at least delay, this new competition and its inevitable results.

The ISPs have skillfully crafted their arguments to create the appearance that their proposals are fair and equitable. But their position rests on four fundamental assumptions, each unfounded.

First, the ISPs have attempted to create the impression that customers of Road Runner and other cable on-line services cannot access the content provided by ISPs. The facts clearly show this is not the case; any Road Runner customer can obtain access to any content available on the Internet, including that of any ISP. Quite simply, *the system is completely open*. The real debate here is not about restrictions on access, but about ISPs attempting to mandate an inefficient business model that serves only their own commercial purposes.

Second, the ISP arguments assume that policies that benefit ISPs necessarily serve the public interest: what's good for America Online is good for America. But in this debate, the interests of the ISPs are ultimately anti-consumer. Government intervention in the marketplace does not come without a significant price. When the marketplace is working, as it is here, regulating one competitor for the benefit of other competitors harms consumers by increasing the cost of providing service. Moreover, if burdensome regulation is the reward for technological innovation and risky investment, the incentive of cable operators and others to continue investing and innovating will disappear.

Third, the type of regulatory requirements proposed by the ISPs would treat high-speed access over cable systems as a monopoly utility service. It is abundantly clear,

however, that there will be numerous options, high-speed and traditional, available to consumers.[1] Paralleling cable operators' rush to upgrade their networks to support on-line services, telephone companies are scrambling to provide their own version of high-speed access (DSL).[2] Wireless providers, satellite companies and electric utilities also are deploying broadband technology. Nothing about this competitive, constantly evolving market suggests that there would be any public benefit associated with imposing traditional utility regulation. Moreover, cable operators have not invested billions of dollars in facilities, and will not invest billions more, with the intention of becoming public utilities. Cable operators have never been in the business of merely providing a "pipe" through which others can deliver information. To eliminate the cable operator's editorial control over the product that is provided to consumers (whether video or Internet content) would be to destroy the essence of what it means to be a cable operator.

Fourth, the "solution" proposed by the ISPs is highly inefficient and would require ongoing government regulation. Some ISPs have characterized their proposals as merely seeking that the cable operator not discriminate among ISPs, but this benign characterization intentionally conceals the substantial operational and technical deficiencies with their proposals. Any non-discrimination requirement effectively would require Time Warner to provide direct physical connections to hundreds of ISPs. The ISPs fail to disclose that the equipment and software necessary to provide this type of access is just now being tested. And even if the common carrier approach advocated by the ISPs were technically possible, requiring cable systems to be configured in this way would create an operational nightmare. Eliminating the cable operator's control over management of the network would degrade the quality and increase the cost of high-speed access over the cable system.

Apart from the public policy infirmities of their arguments, federal law does not permit the regulatory regime the ISPs seek. The on-line service provided by Time Warner is a "cable service" under the Communications Act of 1934 (the "Act"), as amended by the Telecommunications Act of 1996 (the "1996 Act"),[3] and is subject to regulation only under Title VI of the Act. Nothing in Title VI grants the FCC or a local government authority to impose a direct access or unbundling requirement. To the contrary, these requirements would violate the prohibition on common carrier regulation of cable services, and cannot be reconciled with the federal policy of allowing the Internet to grow "unfettered by Federal or State regulation." 47 U.S.C. § 230(b).

Imposing common carrier regulation on Time Warner's on-line services also would run roughshod over Time Warner's constitutional rights. The Internet is a global medium, and requiring Time Warner and other cable operators to comply with a patchwork of inconsistent local regulation would strangle this promising new service in violation of the *Commerce Clause* of the United States Constitution. In addition, Road Runner and Time Warner are entitled to substantial protection under the *First Amendment* when they provide the Road Runner service to consumers. Finally, imposing an unbundling or direct access requirement would impair existing franchises in violation of the *Contracts Clause* of the Constitution.

In short, the case for mandating "common carrier" style access for ISPs to cable systems has not—and cannot—be made. Rather than paralyzing innovative, competitive new services through burdensome regulation, consumers would be better served if governments promoted further investment in broadband facilities through deregulatory measures.

II. BACKGROUND

A. The Development of the Road Runner Service

As the largest cable operator in the United States, with more than 12 million subscribers, Time Warner has long been interested in providing advanced services to consumers over its cable systems. In the 1980s, in Columbus, Ohio, Time Warner

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[1] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, CC Docket No. 98–146, FCC 99–5 at ¶4 (rel. February 2, 1999) ("*Section 706 Report*") ("as the demand for broadband capability increases, methods for delivering this digital information at high-speeds to consumers are emerging in virtually all segments of the communications industry—wireline telephone, land-based (terrestrial) and satellite wireless, and cable, to name a few").

[2] DSL stands for Digital Subscriber Line. DSL service provides high-speed connections using existing copper telephone wires. Like cable high-speed services, DSL services are "always on" and do not require any dial-up by the customer. The form of DSL service most commonly offered to residential customers is Asymmetric DSL, or ADSL.

[3] Pub. L. 104–104, 110 Stat. 56 (the "1996 Act").

broke new ground with QUBE, the first interactive programming service offered over cable. In the early 1990s, Time Warner constructed the first hybrid fiber-coaxial (HFC) cable network in Queens, New York, and experimented with a variety of new services through its Full Service Network in Orlando, Florida. These earlier groundbreaking initiatives provide the foundation for the on-line services the company is now introducing across the Nation.

Building on that foundation, Time Warner is well into the process of upgrading all of its cable systems to state-of-the-art HFC systems. When these upgrades are substantially completed next year, Time Warner will have invested $4 billion upgrading its cable systems to provide increased capacity, both for analog video channels and for new digital services.

Recognizing the capabilities of its upgraded broadband plant, Time Warner teamed with Microsoft, Compaq, MediaOne, and Advance/Newhouse to develop Road Runner, a new on-line service that provides local and national content specifically designed for its upgraded cable systems. The Road Runner service is jointly created by the Road Runner joint venture and its affiliated cable operators. The joint venture provides content on a national basis from various sources, including "peering" arrangements with many content providers. These peering arrangements enable Road Runner users to access many of the most popular web sites largely over its own high-speed national network, without any need to use the World Wide Web. Road Runner's cable operator affiliates, including Time Warner's cable systems, provide additional content locally.

High-speed access to the Internet is among the features of the Road Runner service. Road Runner customers can use the service to reach any and all sites on the Internet, including sites of ISPs. *Most sites on the Internet are free.* In some cases, however, a company may charge a Road Runner user an additional fee. America Online ("AOL"), for example, sells a service dubbed "bring your own access" for $9.95 a month. If a Road Runner user has installed access to AOL on her computer (or if her computer came with AOL already installed), she need only click on the AOL icon on her computer screen. She will obtain access to AOL, and thereby obtain *all* AOL content, web access, e-mail, and other services. Road Runner customers similarly can access any other ISP portal with a single mouse click.

B. The ISP Assault

Time Warner's offering of Road Runner's innovative service provides consumers with an additional choice in the burgeoning on-line market. Incumbent ISPs apparently recognize that cable operators have "built a better mousetrap" for on-line services, compared with the now "traditional" dial-up services. Fearing the impact of this developing competition, the ISPs have launched an all-out assault on the cable industry.

The ISPs understand, of course, that any Road Runner user can readily access any ISP's web site through the Internet. Yet they want more. Specifically, they seek to impose common carrier-style regulatory obligations that would give ISPs a right to physically connect to the cable system. The ISP assault on cable raises an obvious question: Why have incumbent ISPs—normally an entrepreneurial group—chosen to pursue an agenda that relies so heavily on government intervention?

Notwithstanding the ISPs' populist rhetoric, the answer has nothing to do with consumers and everything to do with preserving ISP profit margins. In the narrowband segment of the market, ISPs essentially obtain a preferred rate for the use of local telephone company facilities,[4] and consumers generally pay a flat-rate for unlimited local calling. These pricing constraints on local telephone companies enable ISPs to offer an "end-to-end" on-line service with only a minimal investment in facilities or equipment.

Absent the type of regulatory advantage they enjoy in the narrowband segment of the market, many ISPs fear there may a reduced role for them in the broadband segment of the market. They are undoubtedly worried that some consumers, once they are provided with the content and speed offered by Road Runner and other cable on-line services, will determine that the value added by the ISPs' services is not justified by their price. And even if cable customers choose to pay for content offered by an ISP, as many have, the ISPs fear the financial consequences of not being able to sell "access" that is provided largely on someone else's facilities.

That the ISPs are concerned about their role in the future does not mean that those concerns provide a basis for extending the anomalies of local exchange carrier

[4] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, CC Docket No. 96–98, FCC 99–38 at ¶5 (rel. February 26, 1999) (describing ISP exemption from interstate access charges paid by long distance carriers).

pricing to cable on-line services. The ISPs' fears ultimately reflect a lack of confidence in the value they provide to consumers. To succeed in the broadband marketplace will take more than simply reselling access over someone else's facilities. ISPs will have to develop new services that take advantage of the capabilities of HFC networks. They will have to make a serious effort to market their services to cable on-line customers. They may need to repackage, or reprice, the services they offer to cable on-line customers.[5] They can negotiate arrangements with broadband facilities owners.[6] They can add features to make their existing narrowband services more attractive. All of these approaches potentially benefit consumers because they increase options and avoid the inevitable costs of a regulatory solution.

Rather than rely on their ability to compete in the market, however, the ISPs have turned to regulators for protection. In advancing their arguments for regulation of cable on-line services, the ISPs barely even nod to fundamental policy questions:

- What do the ISPs' proposals do for consumers, as opposed to the ISPs?
- Would the ISPs' proposals reduce the incentives of cable operators and others to deploy high-speed services and to continue developing innovative new technology?
- What effect would a slow-down in the deployment of cable on-line services have on prices for ISP and other Internet services?
- What kinds of complicated, regulatory oversight would be necessary to implement the ISPs' proposals?
- Why is regulation necessary at all when there is no evidence that the marketplace is not functioning effectively?

In light of the ISPs' failure to address, let alone answer, the central questions raised by their proposals, it is easy to understand why the FCC has shown an unwillingness to accept them.[7] The FCC's "hands off" approach is in keeping with the conclusion that has been reached by every federal body that has examined the Internet—that this new medium has flourished because of the absence of regulatory intervention, not in spite of it.[8]

It is difficult to understand why the ISPs' proposals continue to have apparent life at any government level. But despite the FCC's recent determination that no action is required, a few local governments have been led to believe that a regulatory void may exist that they need to fill.[9] That the ISPs' arguments have obtained any traction at all demonstrates only that they have managed to concoct a message with some superficial appeal. Beneath the surface, however, the gaping holes in their arguments cannot be ignored. The Internet is not even remotely threatened by the decisions of Time Warner and other cable operators to provide their own on-line services. To the contrary, the "cure" proposed by the ISPs for this nonexistent market illness would itself seriously threaten the health of this emerg-

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[5] Such pricing issues commonly arise in other Internet contexts. For example, the on-line magazine *Slate* recently eliminated subscriber fees and became entirely advertiser-supported, a decision dictated by the market. *Slate* concluded that, given other Internet competition, consumers did not value its product enough to pay fees. No one has suggested that regulatory intervention is appropriate to support *Slate*'s original business model.

[6] AOL, for example, has negotiated agreements with Bell Atlantic and SBC Communications to provide its service over their DSL facilities. *See*, Press Release, *America Online and SBC Communications to Offer High-Speed Upgrade for AOL Members* (March 11, 1999); Press Release, *America Online and Bell Atlantic Form Strategic Partnership To Provide High-Speed Access For The AOL Service* (January 13, 1999).

[7] *See Section 706 Report* at ¶101; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations for Tele-Communications, Inc. to AT&T Corp.*, Memorandum Opinion and Order, CS Docket No. 98–178, FCC 99–24 (rel. Feb. 18, 1999) ("AT&T/TCI Order").

[8] *See* The White House, *A Framework for Global Electronic Commerce* (July 1997); United States Department of Commerce, *The Emerging Digital Economy* (April 1998); Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, OPP Working Paper No. 30 at 2 (August 1998) ("*Internet Over Cable*") ("Currently the over-arching consensus among domestic policy makers is that the government should recognize the unique qualities of the Internet, and avoid unnecessary regulation and undue restrictions on electronic commerce conducted over the Internet").

[9] For example, the City of Portland, Oregon, and surrounding communities have conditioned the AT&T/TCI transfer on AT&T's compliance with an "unbundling" condition. AT&T and TCI have sought a declaratory judgment from the local federal district court that the proposed condition is unlawful. Other cities, such as Los Angeles, have approved the TCI transfer, but opened proceedings to investigate this issue.

ing segment of the on-line marketplace. The ISPs' pleas for protection from competition must be rejected.

III. GOVERNMENT REGULATION WOULD DESTROY THE POTENTIAL FOR COMPETITION AND INNOVATION PRESENTED BY CABLE ON-LINE SERVICES.

Essentially, the ISPs' argument boils down to this: Without government regulation, consumers will not have a choice of broadband Internet service providers, and cable operators eventually will exercise bottleneck control in a way that would damage the Internet. The ISPs' plea for regulation is based entirely on speculation about how the on-line services market will develop in the future, and it ignores completely how well that market is working today, without government intervention. Imposing a direct access requirement on cable operators is not necessary to promote competition. Indeed, it would be counterproductive. The ISPs' proposals would raise the cost and diminish the quality of high-speed access over a cable system, with no material benefit to consumers. The ultimate effect of these proposals would be to deter investment in broadband facilities and delay the roll-out of innovative new services. The only beneficiaries of this result would be the ISPs themselves, who would be able to maintain their current dominant position in the on-line market, and thereby shield their prices from the impact of new competition.

A. The Marketplace Is Flourishing In The Absence Of Regulation.

1. The Growth of the Internet Has Been Nothing Short of Phenomenal.

The development of the Internet is the quintessential example of the power of the free market—the power to meet the needs of consumers, to develop innovative new technologies, to grow the economy, to provide the ultimate forum for communication. By any measure, this is a marketplace that is absolutely flourishing.

The ISPs argue that this incredible growth could be hampered by the introduction of cable on-line services because cable operators will become a bottleneck on the Internet. On its face the argument is ridiculous. It is simply impossible for a single company or industry to stand in the way of the global phenomenon that is the Internet today.

The ISP argument is particularly weak in light of the minuscule share of the on-line market held by cable operators. While Road Runner has just over 200,000 subscribers, and all cable on-line services combined have roughly 500,000 subscribers, AOL has 16 million subscribers, and is adding new subscribers at an astounding pace.[10] At its current rate of growth, *AOL adds the equivalent of Road Runner's entire subscriber base every three weeks.*

The ISPs overstate the minor role of cable operators in today's on-line marketplace by suggesting that broadband over cable will make narrowband on-line service obsolete. As much as Time Warner believes in the power of broadband over cable, to predict that it will be the dominant form of on-line service is pure speculation. Certainly the ISPs are telling the rest of the world a different story than they have told the regulators. AOL's chief executive officer recently predicted that 75 percent of on-line subscribers will still be using narrowband services five years from now.[11] Tremendous investment is being devoted to giving consumers access to the Internet at locations other than the home or the office.[12] Technology undoubtedly will change in other ways that are impossible to predict. And even if today's broadband technology becomes the dominant technology of the future, we explain below that cable is only one of many broadband options that will be available to consumers.

The beauty of the competitive market is that no one can predict how these events will play out. Winners and losers are not preordained. Thousands of companies are working to implement their visions of the on-line future, each striving to provide consumers with services they want at prices they are willing to pay. Left to its own devices, we have no doubt that the marketplace will continue to evolve to serve the needs of the public.

2. The Absence of Regulation Has Led to Substantial Investment in Broadband Facilities.

One of the more glaring deficiencies in the ISP argument is the assumption that cable will be the only significant broadband player in the residential market, and

[10] In April 1998, AOL announced that it exceeded 12 million subscribers. Less than one year later, the company announced that it exceeded 16 million subscribers. *See* Press Release, *AOL Surpasses 16 Million Members* (February 9, 1999).

[11] Diane Mermigas, *Still a Cyber-Pioneer: AOL Chief Targeting the 75% of Households That Aren't Online*, Electronic Media (November 9, 1998).

[12] *See, e.g., Yahoo, PageNet to Customize Wireless Services*, CNET.com, March 4, 1999 (joint venture to provide e-mail and other personalized content to paging customers).

therefore should be regulated as if it were a monopoly. As described in detail in the FCC's *Section 706 Report*, there is no shortage of players in the broadband marketplace. The Bell Operating Companies and GTE have invested billions of dollars upgrading their networks to accommodate, and capitalize on, the growing consumer demand for broadband services.[13] Bell Atlantic, BellSouth, and SBC, among others, have been aggressively marketing DSL services that will compete directly with cable modem services offered by Time Warner and other cable operators. Numerous competitive local exchange carriers (CLECs) have been building their own broadband facilities that will provide DSL services to consumers, and electric utilities have been aggressively investing in broadband capabilities.[14] Satellite companies already offer high-speed Internet access on a nationwide basis.[15] Wireless companies also have increased their involvement in the broadband segment of the market.[16] The growing competition in the delivery of high-speed data has been spurred, not hampered, by the cable industry's own efforts to be the first to market with these new services.

All this investment led the FCC to conclude that "[b]y the standards of traditional residential telecommunications, there are, or likely will soon be, a large number of actual participants and potential entrants in this market."[17] With respect to residential customers, the Commission found that the "preconditions for monopoly appear absent. . . . Although the consumer market is in the early stages of development, we see the potential for this market to accommodate different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio."[18] In this competitive environment, cable's development of on-line services should be applauded, not regulated.

3. Time Warner and Road Runner Already Have Every Incentive to Provide Services that Meet the Needs of Consumers.

A central theme of the ISPs' argument is that consumers will benefit from common carrier-like regulation of cable on-line services because they will have access to the ISP of their choice. Although the superficial appeal of this argument may explain why the ISPs have attracted the preliminary interest of a few local governments, scratching the surface reveals the false premise on which the argument is based. Simply put, through the Road Runner service, Time Warner provides its subscribers access to all content on the Internet, including any ISP content. Common carrier requirements will not give consumers access to any information that is not already available.

The only conceivable benefit that would justify common carrier regulation would be reduced costs or improved service. However, we explain in Section III below that imposing any type of direct access requirement on cable operators actually would lead to *increased* technical and regulatory costs for both cable operators and ISPs generally. Regardless who would incur these costs directly, ultimately they would be borne by consumers. In addition, we show below that a direct access requirement would degrade the quality of service provided to consumers.

Nor is the Road Runner service as offered by Time Warner today overpriced. Time Warner's Road Runner service is priced at approximately $39.95 for residential users. In comparison, a narrowband ISP customer today pays roughly $15–20 for Internet access, plus another $15–20 if the customer needs a second telephone line. Bell Atlantic charges $39.95 for its residential DSL service, and SBC charges $39.00 for its residential service.[19] Both SBC and BellSouth have promoted a bundled offering of DSL access with their own ISP service for a price of $49.00 and $49.95, respectively.[20] Obviously, neither the on-line service offerings, nor their prices, will be static. Time Warner fully expects that competition will force everyone in the marketplace to develop innovative new offerings, to include more functionality in their offerings, and to continue to be sensitive to the price of the finished product. As it

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[13] *Section 706 Report* at ¶42 ("BOCs and GTE, for example, have announced plans to offer broadband to approximately twenty million homes th s year")

[14] *Id.* at ¶¶55–56. At least some CLECs have made the decision not to offer access to multiple ISPs. *See, e.g.*, Monica Hogan, *New DSL Service Lauches in NYC*, Multichannel News (February 15, 1999) ("We feel that it's very important for us to have the one-to-one relationship with the customer.").

[15] DirecPC, which provides Internet access via satellite, makes a point of noting on its Web site that it is "here today and available to anyone nationwide."

[16] *See, e.g.*, Press Release, *Cisco and Motorola to Form Strategic Alliance to Build Internet-Based Wireless Networks* (February 8, 1999).

[17] Section 706 Report at ¶48.

[18] *Id.* at ¶48.

[19] *See* http://www.bell-atl.com/adsl/more—info/pricing.html; Press Release, *Southwestern Bell Plans Major Launch of New Lightning-Fast Service for Data, Internet Access* (January 12, 1999).

[20] *See* Press Release, *Southwestern Bell Plans Major Launch of New Lightning-Fast Service for Data, Internet Access* (January 12, 1999); http://www.bellsouth.net/adsl/cost.html.

has so far, an unregulated marketplace for on-line services will drive companies to meet the needs of consumers.

B. The Optimal Business Model(s) For On-Line Services Should Be Determined By The Marketplace, Not By Regulators.

1. The Preconditions for Regulation are Absent.

The heart of the debate over the ISPs' direct access proposals is whether cable operators like Time Warner should have the freedom to determine how to provide services over their facilities, and when and how to make future investments in those facilities. Or, as the ISPs suggest, should these decisions be made instead by regulators or competitors.

Time Warner's single objective is to provide consumers with an attractive mix of services at an attractive price. Time Warner is upgrading its cable systems, and deploying Road Runner, with this goal in mind. Absent evidence of market failure, there is no basis to interfere with Time Warner's choices regarding the services and facilities it deploys.

The incumbent ISPs advocate a fundamentally different approach. The ISPs' basic message—"*cable operators cannot be allowed to control broadband networks*"[21]—is stunning in the degree to which it seeks to appropriate the cable system for the benefit of ISPs. From their perspective, the cable system is simply a "pipe" that should be designed so that hundreds, or even thousands, of ISPs can obtain access on a regulated, common carrier basis.

But does it make sense for regulators to dictate the business model to be used by cable operators? Regulation is intended to simulate the results that would be achieved in a competitive market. We are not aware of any accepted theory in our society that would trumpet the need for regulation in the absence of a demonstration that the market is not operating properly. Telephone and electric companies have been heavily regulated over the past century, but only because they provided what were considered essential services, and because it was assumed these industries were "natural" monopolies that were incapable of supporting more than one facilities-based provider in a market.

These assumptions now appear to be no longer valid as to the telephone business. Without question they do not apply to high-speed on-line services. High-speed on-line services are offered by multiple facilities-based providers, and investment in new facilities is continuing at a rapid pace.[22] Far from being considered "essential," high-speed on-line services today have been compared to first-class air travel.[23]

Over the past two decades, state and federal regulators in both the telephone and the electric industries have been working to discard the nineteenth century model of public utility regulation, moving from the historically heavily regulated, single provider environment to a deregulated, competitive marketplace. Indeed, one of the primary purposes of the Telecommunications Act of 1996 was to hasten the movement away from regulation toward a fully competitive telecommunications industry. The basis for this transition is the recognition that regulation is always an imperfect substitute for competition, and that facilities-based competition should be encouraged. The 1996 Act was a seminal event in this transition to a deregulated competitive marketplace.

The incumbent ISPs' proposals to impose common carrier regulation on cable on-line services foolishly would reverse this shift away from antiquated regulation. We question whether enlightened public policy would dictate placing regulatory burdens on even the local exchange companies' provision of new high-speed Internet access services. But there surely is no justification to reverse the trend *away* from government control in order to add new regulations on the *cable industry*—an industry that has never been subject to the burdens of common carrier regulation.

Imposing an added regulatory burden on the cable industry's offering of on-line services is especially uncalled for in view of the "untouchable" nature of the Internet. To date, the Internet has been virtually unregulated, and both Congress and the FCC have recognized that the lack of government interference is one reason for its fantastic growth.[24] The incumbent ISPs have been vociferous in their arguments that the Internet should not be regulated by government at any level. It is more than a little ironic for them to argue, as they do, that regulators should "respect

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[21] This is a direct quote from the web site of the openNET Coalition, a lobbying group of ISPs and others. See http://www.opennet.coalition.org/what/ (emphasis in original).

[22] *Section 706 Report* at ¶4.

[23] Diane Mermigas, *Still a Cyber-Pioneer: AOL Chief Targeting the 75% of Households That Aren't Online*, Electronic Media (November 9, 1998).

[24] 47 U.S.C. §230; *Internet Over Cable* at 2.

the mandate of the 1996 Act to rely on market forces" and at the same time launch a no-holds-barred effort to impose burdensome regulation on cable on-line services.[25]

The competitive nature of the on-line services market today indicates that consumers' needs will be met. However, even if it turns out that demand for some services are not sufficiently addressed by the marketplace, the regulatory solution advocated by the ISPs is the wrong approach. Congress already has decided, in Section 706 of the 1996 Act, that any government intervention should be designed to "encourage the deployment" of broadband facilities by "methods that remove barriers to infrastructure investment."[26] The ISP approach directly contradicts the deregulatory approach Congress already has decided on for the broadband market.

2. The Public Interest Is Served when Providers Have the Flexibility to Meet Consumer Needs.

The ISPs suggest that market forces alone may not produce competition in the broadband segment of the market. In particular, they argue that they are disadvantaged because customers who purchase Road Runner solely for high-speed access will receive additional features that reduce the customer's need for services of another ISP. The argument that the Road Runner service includes too many features ignores the fundamental realities of a competitive marketplace. Time Warner's offering of Road Runner will be competing with DSL and other broadband and narrowband services. Including features that consumers desire is not a scheme designed to frustrate the incumbent ISPs, it is a matter of survival for a new entrant in a vibrant, competitive market.

Road Runner is no different than the ISPs in this regard. All ISPs offer an integrated package of services with different features.[27] Each ISP must make business decisions about whether it will own facilities, what type of browser capability it will offer, whether and how to present content, what type of e-mail functionality will be available, how much customer service support is needed, whether different levels of service will be available, and how to price the service. Each of these individual decisions is vital to the overall composition of the service and how it is perceived in the marketplace.[28]

In a competitive market, there is no reason to deny companies the discretion to make these important decisions, and to make changes as the market evolves.[29] The ISPs would generate a firestorm of protest if any regulator were even to suggest that they be required to offer the components of their services on a piecemeal basis. Yet this is precisely what the ISPs are advocating for cable on-line services. Even worse, the ISP proposal effectively would convert Time Warner from a retail provider of on-line services to a wholesale provider of transmission services. Certainly the ISPs realize that a bare transmission service, with no content or organization to make it useable, would be a far less potent competitor in the retail market.

Nothing taking place in the market suggests that this radical restructuring of cable operators' business plans is warranted. As expected in a competitive market, all providers are experimenting with different business models, and Road Runner is hardly alone in offering an integrated package of services. AOL's deals with Bell Atlantic and SBC allow it to offer a high-speed option for its subscribers. AOL customers who purchase this service will pay only $20.00 more than AOL's narrowband service, even though Bell Atlantic offers ADSL transmission on a stand-alone basis for $39.95, and SBC offers its ADSL service for $39.00. Telephone companies also are experimenting with bundling DSL connections with their own ISP services. SBC, for example, offers a bundled ADSL package with its own ISP service for $49.00.[30] The availability of all these different pricing options benefits consumers,

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[25] CC Docket No. 98-146, Comments of America Online at 4 (Sept. 14, 1998).

[26] 1996 Act, § 706(a).

[27] For example, AOL has many exclusive arrangements with content providers. Customers must take all of the AOL service, even components they have no use for, to get access to this exclusive content. AOL seems to want unbundling only for its competitors, but not for itself.

[28] The FCC has recognized that the regulatory status of on-line services is determined by looking at the whole service, not the individual elements of the service. *See Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, FCC 98-67 at ¶79 (rel. April 10, 1998) ("*Universal Service Report*") ("[I]t would be incorrect to conclude that Internet access providers offer subscribers separate services—electronic mail, Web browsing, and others—that should be deemed to have separate legal status.").

[29] AOL, for example, began as a closed, proprietary system which bundled access service with a range of original and licensed content, and only later decided to provide Internet access as a component of its service. AOL initially owned facilities as well, but later decided to sell its facilities and focus primarily on developing content.

[30] *See* Press Release, *Southwestern Bell Plans Major Launch of New Lightning-Fast Service for Data, Internet Access* (January 12, 1999); http://public.swbell.net/dialup.

and there is no reason regulators should deter this type of experimentation by mandating that cable operators or anyone else follow one particular business model.

In the end, the ISPs' complaint is really not about whether they have "access" to cable operators' high-speed data customers. They have that access today, and they will in the future. Their complaint is that Time Warner should not be able to control the services it provides, because those services may be too good. They fear that cable subscribers may choose not to link to their services because the value customers receive from doing so does not exceed the price that the ISP desires to charge. These fears do not justify regulation; they are proof positive that the marketplace is working.

3. Regulation Would Introduce Significant New Costs and Chill the Incentive for Future Investment and Innovation.

Replacement of the market mechanism in any situation does not come without enormous regulatory costs, and to suggest that such costs would not be present here is to be either naive or disingenuous. The notion advanced by the ISPs that regulation would be largely self-executing ignores the significant operational issues involved in providing on-line services. Some ISPs attempt to hide these operational issues by arguing for a "simple" requirement that cable operators not discriminate among ISPs. But a non-discrimination requirement effectively would obligate Time Warner to provide direct physical connections to any ISP. And implementing this requirement would necessitate developing a mechanism for comparing the price, terms and conditions under which each ISP connected to the system.[31] ISPs would undoubtedly challenge any kind of restrictions placed on the usage of the cable broadband system by cable operators, and they would expect regulators to be responsive to complaints regarding all manner of operational and pricing issues.

Imposing common carrier regulation on cable operators also would crush the incentive for companies to invest in broadband facilities and innovative services. The tremendous potential of cable on-line services today is not the result of luck or happenstance. It is the result of years of substantial investment and technological innovation by cable operators and their technology partners. To penalize cable operators for this effort, as the ISPs propose, would set a perverse precedent under which anyone who builds a superior network would risk that network being subject to burdensome government regulation.

A policy that penalizes investment and innovation would absolutely chill the incentive of cable operators to continue making these type of investments, and would provide a powerful reason to delay or cancel deployment of high-speed services. Furthermore, the cable industry is not working in a vacuum. To provide today's broadband services, and to continue to develop innovative new technologies and applications, the cable industry is heavily dependent on the continued commitment of technology companies (such as Road Runner partners Microsoft and Compaq) and the continued support of the capital markets. The technology community has made clear that even the threat of burdensome regulation is cause for great concern.[32] And the financial community has stated unequivocally that regulation would diminish the cable industry's access to capital.[33]

Common carrier regulation of cable operators would also reduce the incentives of other facilities-based providers to construct high-speed facilities. Certainly the fear that they too run the risk of burdensome regulation if they succeed in building a better network would be a substantial disincentive to invest and to innovate. The loss of the cable industry's momentum toward providing new high-speed services also would undoubtedly cause a similar slowdown in the efforts of competitors to keep pace.

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[31] In the telecom world, for example, tariff filing requirements and complaint procedures are considered essential to enforcing non-discrimination rules. *MCI* v. *AT&T*, 512 U.S. 218 (1994) ("The provisions allowing customers and competitors to challenge rates as unreasonable or as discriminatory would not be susceptible of effective enforcement if rates were not publicly filed.") (internal citations omitted).

[32] *See, e.g.*, Letter from John T. Chambers, President and CEO, Cisco Systems, *et al.*, to William E. Kennard, Chairman, FCC, CC Docket No. 98-146 (December 9, 1998) ("It is a simple but undeniable reality that new and unnecessary regulations will diminish the willingness of capital markets to finance the construction of new broadband networks.").

[33] For example, one analyst recently stated that the "remotest threat of success of the AOL argument" would sour Wall Street on the cable industry. *See* Communications Daily (December 21, 1998). FCC Chairman Kennard recently acknowledged the financial community's need for a stable, unregulated environment. See Remarks of William E. Kennard Before Legg Mason (March 11, 1999) ("I expect that you would be much more comfortable putting your money into companies who control their own destiny. Business decisions based on contracts. Not on government fiat.")

C. The ISPs Have Concealed The Significant Technical Problems With Their Unbundling Proposals.

The ISPs have failed to identify some obvious, and very significant, technical deficiencies in the common carrier model they are advocating for cable on-line services. It is not clear whether the ISPs' failure here results from a lack of understanding of how cable systems are used in providing on-line services, or simply the knowledge that an accurate explanation of the technical and operational issues would expose the massive level of government intervention that would be needed to implement their proposals.

If from the start someone were to build a network with the intention of providing direct access by hundreds of different ISPs, they would not deploy the same HFC systems that Time Warner is constructing today. More "channels" would be devoted to on-line services, and less to video programming. Different routers would be deployed. Undoubtedly other elements of the network would also be different.

But building a network that meets the needs of hundreds of ISPs would not be in the interests of consumers. The network would be far more expensive than the HFC networks built by Time Warner. *Yet it would provide no additional on-line content or services*, and it would interfere with the ability to provide other services, such as video programming.

If someone were trying to design a network to meet the needs of consumers, on the other hand, they would build an HFC network like those used by Time Warner and Road Runner. Each customer has the ability to use the capacity of the network when he or she needs it, including the ability to access any content on the Internet without hassle or delay. Customers who desire the content or features of AOL or any other ISP can configure their systems to give immediate access simply by clicking on the ISP's icon on their computer screens. So long as the system is properly managed, a shared broadband network is a very efficient way to bring high-speed services to multiple customers, without taking capacity away from video programming services.

The ISPs argue that it is technically feasible to provide direct physical connections to multiple ISPs, even with the HFC systems Time Warner and others are deploying. Even if we assume such a connection is technically possible (and today, at least, it is not), this is not the end of the inquiry. That something is technically possible does not mean it makes sense, either as a business matter or as a public policy matter. The important questions surrounding any technical issue of this nature, after the threshold question of technical possibility, involve how much it will cost, and what types of benefits or detriments it will produce. Here, the cost of regulation is tremendous and the benefits nonexistent.

One way to provide common carrier access would be for every ISP that obtains a customer served by the cable system to be allocated a certain amount of dedicated spectrum for its own use. Where Time Warner now allocates one or two channels to Road Runner, it would be obligated to allocate additional channels to other ISPs. Allocating channels in this way would be highly inefficient—the Internet equivalent of requiring all roads to have separate lanes for each car manufacturer. Whatever amount of spectrum were allocated to an ISP, the ISP rarely would need that much capacity at any point in time. Obviously, there would be questions about how many, and which, ISPs would be given this dedicated capacity, and how much capacity would be dedicated to this use.

However these questions were answered, it is apparent that dedicating network capacity to individual ISPs would require that the cable system allocate a huge amount of its limited channel capacity to high-speed data services, taking a large amount of spectrum away from Time Warner's primary business, delivery of video programming to subscribers. Allocating channels in this way might (arguably) serve the ISPs, but it would be to the detriment of all cable subscribers, including those that choose not to use the cable system for high-speed on-line services.

A second approach to providing direct connections to unaffiliated ISPs would be for each ISP to connect to the router located at the cable system headend. This connection would occur through the addition of a second router at the headend that would direct traffic to the customer's chosen ISP. The type of router needed for this task is still being tested for use with cable modems. The router also would need software that could identify a customer's ISP, much as a telephone switch identifies a caller's presubscribed long distance carrier. The software necessary to perform this function still is under development and has not been proven to work with cable modems.

Even if technology advanced to the point where this approach were technically *possible*, significant issues still would remain. First, deploying this technology would raise the cost of the service, without any additional benefit to consumers. Second, the number of ISPs that could be accommodated under this approach would be lim-

ited by the capacity of the routers, and the introduction of each additional ISP would create an additional drag on the speed and efficiency of the system. Each ISP's connection would create the equivalent of a separate on and off ramp on an interstate highway. Because there are thousands of ISPs, this would be no highway at all.

In any event, this approach is not technically practical for cable systems because it would jeopardize the cable operator's ability to manage traffic on the network. Cable HFC networks use a single shared distribution system to serve hundreds or thousands of subscribers. Like Local Area Networks ("LANs"), if cable networks are overloaded, they will perform much more slowly than desired, or may even crash altogether. Network usage that may be incompatible with the way the network is designed is likely to cause service degradation—not only to the individual user engaging in incompatible usage, but to *all* users. Applications like Pointcast (a "push" technology that constantly updates users' screen savers with breaking news or other data) have been known to affect the performance of LANs, and have been prohibited by some LAN managers. In a similar way, extensive use of the cable network for home-based Web servers can impact the speed at which other users on the same node are able to send or download information.

Because cable facilities are shared among many different subscribers, it is essential that the distribution on a cable network be carefully managed and controlled. Cable network managers must monitor the build-out and deployment of their systems to ensure that they have sufficient capacity to provide high quality service to the cable modems that have been deployed. The cable operator must make decisions regarding how many subscribers will be served by a particular node, and how many "channels" on the cable system will be devoted to Internet access activity versus other uses.

Technical decisions like these affect the performance of the network, and the consumer's satisfaction with the service. Cable operators make these technical decisions in an environment where they will be competing with other broadband facilities, each with its own unique characteristics. For example, the broadband transmission networks deployed by local telephone companies provide a dedicated circuit to a customer. As a result, a customer's use of that circuit does not impact other customers on the telephone network. Wireless and satellite facilities undoubtedly will have their own pros and cons. Regulation that hampers a cable operator's ability to manage its shared network turns a technical difference between networks into a quality difference between competing services. The important point here is that the free market gives each provider the incentive to develop services that capitalize on the strengths, and minimize the limitations, of its respective technology. Meanwhile, regulators cannot adopt a "one size fits all" mentality that ignores the technical complexities and limitations of different networks.

The Road Runner service has been designed with a full understanding of the capabilities, and the limitations, of the shared cable facility. Working together, Time Warner and Road Runner have the incentive and the ability to maximize the efficiency of the system. Maintaining Time Warner's ability to manage the network is an entirely rational, and perhaps the only, method by which to ensure quality.[34]

In a multiple ISP environment, any particular ISP would benefit from controlling the usage by its customers only if it could be assured that all other ISPs would do the same. Because ISPs would be competing with each other, however, a "tragedy of the commons" would result, where each ISP would have an incentive to overuse the common resource.[35] Each competing ISP would have an incentive to offer its customers an ever-increasing volume of service, including broadcasting of data and streaming video, without any incentive to limit that volume as the system became congested. Without the management provided by a single entity, the system would not be able to provide a consistent high-speed experience for its users.

Because of the incompatible incentives of Time Warner and the unaffiliated ISPs that would use its system, a mandatory direct access requirement necessarily would lead to disputes regarding the type of limitations that Time Warner could place on ISPs and their customers, and how those limitations were monitored and enforced. Cable operators and investors would necessarily face the risk that ISPs would call on regulators to order operators to purchase bigger routers or additional nodes, or to dedicate more capacity to on-line services (to deliver the same content), and less capacity to other services. In an environment where technology is constantly changing and improving, the danger of such an unprecedented intrusion into the business of a cable operator would itself deter investment in broadband upgrades, particu-

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[34] *See* Bruce M. Owen & Gregory L. Rosston, *Cable Modems, Access and Investment Incentives* at 19.

[35] *Id.* at 17.

larly if cable operators were subject to a different set of rules in every local community where they offered on-line services.

IV. THE FCC AND LOCAL FRANCHISING AUTHORITIES HAVE NO STATUTORY AUTHORITY TO IMPOSE COMMON CARRIER REQUIREMENTS ON CABLE ON-LINE SERVICES.

In advancing their proposals for common carrier access to cable on-line services, the ISPs have treated the issue of legal authority to impose those requirements almost as an afterthought. This tactic is perhaps understandable, because no legal basis exists on which the FCC or a local franchising authority could impose these requirements. The Communications Act contains no affirmative grant of authority for these requirements, and the ISPs' efforts to find legislative authority by analogy are plainly insufficient to justify the action they seek. Indeed, the Act specifically *precludes* common carrier regulation of cable operators when they provide services such as Road Runner.

A. The Communications Act Does Not Authorize Any Type Of Common Carrier Regulation Of Cable On-Line Services.

The ISP arguments to impose common carrier regulation on cable operators vary in some ways, but they all share one common characteristic—they provide no comprehensive legal analysis to support their proposals. Some ISPs have suggested that cable operators somehow can be brought under Title II regulation, others have stated that unbundling can be imposed under various provisions of Title VI, and still others have suggested that Section 706 of the 1996 Act provides the necessary authority. All of these assertions are wrong.

On-line services provided by a cable operator are cable services that are subject to regulation under Title VI, not Title II. Title VI provides no basis on which the FCC or a local franchising authority can impose common carrier regulation. To the contrary; Congress has explicitly prohibited common carrier regulation of cable operators when they provide cable services.

1. Title VI Provides No Authority for the FCC or a Local Franchising Authority to Impose Common Carrier Regulation.

a. Cable on-line services are subject to Title VI regulation. Cable services are regulated under Title VI of the Act. Prior to 1996, the Act defined the term "cable service" as "(A) one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service."[36] Under this definition, a cable service could include only subscriber interaction that was necessary to select programming. If a cable operator provided a service with more interactivity, it would not be considered a cable service, and would not be subject to the burdens, or the protections, of Title VI.

In the 1996 Act, Congress amended the definition of cable service to include subscriber interaction required for the "use" of programming. The legislative history indicates that Congress intended this amendment "to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services."[37]

As noted in a recent FCC paper, there is ample support for the idea that Congress intended to include cable on-line services within the new, expanded definition of cable service.[38] Certainly, the on-line service offered by Time Warner fits within this expanded definition of cable service. The Road Runner service includes a mix of national and local content specifically designed to be provided over cable systems, and is properly considered an "other programming service"—"information [made] available to subscribers generally."[39] Treating services like Road Runner as cable services under Title VI is entirely consistent with the manner in which those services have been developed by, and are offered by, cable operators.

Some parties have argued that cable on-line services are telecommunications services, and therefore subject to common carrier regulation under Title II of the Act. Whether directed at the cable system or at the Road Runner service, this argument is baseless. The term "telecommunications" is defined as "transmission, between or

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[36] "Video programming" is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). "Other programming service" is defined as "information that a cable operator makes available to all subscribers generally." *Id.*, § 522(14).

[37] *See* H Rep. No. 104–458, 104th Cong., 2d Sess. at 169 (1996) ("1996 Conference Report").

[38] *Internet Over Cable at 88; see also Implementation of Section 703 of the Telecommunications Act of 1996*, CS Docket No. 97–151, FCC 98–20 at ¶33 (rel. February 6, 1998).

[39] 47 U.S.C. § 521(14).

among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received." 47 U.S.C. § 153(43). The Road Runner service clearly does not fit within the definition of telecommunications because it is primarily an editorial product that includes local and national content chosen by Road Runner and the cable system. In addition, the FCC has concluded that the provision of Internet access, one of the functions provided by Road Runner, is not a telecommunications service.[40]

The argument that a Time Warner cable system provides a telecommunications service when it offers Road Runner also fails. Time Warner's agreements with Road Runner are comparable to the agreements it has with video program providers. Time Warner creates a service together with Road Runner and sells it to customers. Time Warner does not offer telecommunications to Road Runner or to its customers under this arrangement.[41]

b. Nothing in Title VI authorizes the imposition of common carrier requirements on cable on-line services. The FCC only may regulate to the extent it has been granted authority by Congress.[42] When Congress authorizes the FCC to regulate, the FCC must comply with the language of the statute.[43] In the absence of a statute giving the FCC the authority it needs to act, it has no authority. And Congress alone has the power to grant that authority.[44]

With respect to cable services, the FCC's authority is limited to the authority granted under Title VI of the Act. Title VI provides no basis for imposing a mandatory access or unbundling requirement on cable on-line services. Although provisions of Title VI require cable operators to provide access to unaffiliated parties, such as commercial leased access under Section 612 and program access under Section 628, the nature and extent of access that may be required is limited by the terms of the statute.[45] The statute does not include any unbundling or access requirements for on-line services.

Local franchising authorities also are constrained to regulate cable operators only to the extent permitted under Title VI. Section 636 of the Act specifically preempts "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act." 47 U.S.C. § 556(c). Title VI contains no grant of authority to local franchising authorities that would provide a basis on which to impose access requirements on cable on-line services.

The ISPs argue that the access requirements they are proposing are consistent with the access requirements already imposed under Title VI. But *consistency* with other requirements does not provide a statutory basis for the requirements proposed by the ISPs. The ISPs' attempt to find authority by analogy underscores that the requirements they are advocating *do not fit within any of the existing access requirements*—direct access by ISPs is *not* PEG, it is *not* leased access, it is *not* program access and it is *not* must carry. All the existing access requirements relied on by the ISPs as "analogous" or "consistent" with the access they seek were explicitly

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[40] *See, e.g., Universal Service Report* at ¶80.

[41] Furthermore, Title II applies only to telecommunications carriers, a term the FCC has interpreted to mean entities that offer telecommunications on a common carrier basis. *Universal Service Report* at ¶124. Even if Time Warner is considered to be providing telecommunications to Road Runner, it is doing so on a private carrier basis only, and cannot be forced to provide service if it chooses not to. *See Southwestern Bell* v. *FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (If a carrier "chooses its clients on an individual basis and determines in each case whether and on what terms to serve, and there is not specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service, and the Commission is not at liberty to subject the entity to regulation as a common carrier.").

[42] *See, e.g., FCC* v. *Midwest Video*, 440 U.S. 689, 695 (1979) ("The Commission derives its authority from the Communications Act of 1934"); *Louisiana PSC* v. *FCC*, 476 U.S. 355 (1986) (FCC has no authority to regulate intrastate depreciation rates); *Bell Atlantic* v. *FCC*, 24 F.3d 1441, 1446 (D.C. Cir. 1994) (FCC had no authority to require local exchange carriers to provide competitors with physical collocation in central offices).

[43] *See, e.g, MCI* v. *AT&T*, 512 U.S. 218 (1994) (authority to "modify" tariff filing requirements does not include authority to forbear from enforcing those requirements).

[44] *See MCI* v. *AT&T*, 512 U.S. at 234 ("our estimations, and the Commission's estimations, of desirable policy cannot alter the meaning of the federal Communications Act of 1934"); *Midwest Video*, 440 U.S. at 709 ("We think authority to compel cable operators to provide common carriage of public-originated transmissions must come from Congress.").

[45] *See Sierra East Telecom* v. *Weststar Cable Television*, 776 F.Supp. 1405 (E.D. Cal. 1991) (cable system with less than 36 channels has no leased access obligations under Section 612); *Echostar Communications Corp.* v. *Comcast Corp.*, Memorandum Opinion and Order, File No. CSR 5244-P, DA 99-235 (rel. January 26, 1999) (rejecting program access complaint based on finding that programming at issue was not satellite programming, or equivalent to satellite programming)

adopted by Congress, not by the FCC or local franchising authorities. Past attempts by the FCC to impose access requirements without statutory authority have been rejected by the courts.[46]

Analogies to the unbundling requirements imposed on local exchange carriers under Section 251(c) are equally flawed. Congress has specifically imposed unbundling requirements only on incumbent telephone companies, while refraining from imposing comparable requirements on any other type of entity.[47] The Supreme Court recently confirmed in *AT&T* v. *Iowa Utilities Board* that the FCC cannot ignore the language used by Congress in implementing unbundling requirements.[48] The unbundling requirements of Section 251(c) apply to incumbent local exchange carriers only when a failure to provide a particular unbundled network element would "impair" the ability of a requesting telecommunications carrier to provide service,[49] and they do not apply at all when a telephone company is providing cable service. 47 U.S.C. §571(b). Given the clarity with which Congress has expressed itself on the issue of who should be required to unbundle their networks, and when, it is clear that if Congress also believed an unbundling requirement should be imposed on cable operators, it would have made that explicit.

2. A Mandatory Direct Access or Unbundling Requirement Would Constitute Prohibited Common Carrier Regulation in Violation of Section 621(c) of the Act.

The essential premise underlying the ISPs' proposed unbundling and access requirements is antithetical to the structure of the Cable Act. Section 621(c) of the Act provides that "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." 47 U.S.C. §541(c). Any requirement that cable operators provide direct physical connections to ISPs would clearly be in the nature of common carrier regulation, and finds no basis in Title VI. A fundamental principle underlying Title II is that telecommunications networks can, and should, be interconnected.[50] In contrast, Title VI contains no interconnection requirements. The FCC recently reaffirmed "the distinctions Congress drew between cable and common carrier regulation" in rejecting arguments that AT&T should be subject to new access requirements following its acquisition of TCI.[51]

The ISPs have suggested that an unbundling requirement would not violate Section 621(c) because the imposition of such a requirement would be less extensive than the type of common carrier regulation that would be imposed if on-line services were fully regulated under Title II. The Fifth Circuit recently rejected an almost identical argument in striking down the FCC's requirement that Open Video Service (OVS) operators obtain pre-construction certification.[52] In *City of Dallas*, the court noted that the statute provided that an OVS operator would not be subject to the requirements of Section 214 of the Act. The court held that the Commission "should not be able to deny the regulatory relief these sections provide merely by pointing out that there are some differences between its new [rule] and the old one it is expressly forbidden to impose."[53]

The situation here is similar. Although it is true that a mandatory direct access requirement might not mirror Title II regulation in all respects, it inevitably would include a requirement to serve all ISPs indifferently, as well as regulatory oversight of the price, terms, and conditions under which cable operators would provide the access component of Internet access. A regulatory body would, at a minimum, have to establish complaint procedures, and basic principles on which to resolve complaints.[54] The ISP proposals could not be implemented without massive government intervention that would include many of the key elements of Title II regulation.

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[46] *See Midwest Video*, 440 U.S. at 708–09.

[47] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996), *reversed in part, Iowa Utilities Board* v. *FCC*, 120 F.3d 753 (8th Cir. 1997), *reversed in part sub nom. AT&T Corp.* v. *Iowa Utilities Board*, Case No. 97–826 (January 25, 1999).

[48] *AT&T Corp.* v. *Iowa Utilities Board, slip op.* at 21–24

[49] *Id.*; 47 U.S.C. §251(d)(2).

[50] *See, e.g.*, 47 U.S.C. §201(a) (requiring common carriers to establish physical connections with other carriers); *Id.*, §251(a) (requiring telecommunications carriers to interconnection with other carriers).

[51] *See AT&T/TCI Order* at ¶29.

[52] *See City of Dallas* v. *FCC*, Case No. 96–60502 (5th Cir. January 19, 1999).

[53] *Id., slip op.* at 18.

[54] If a cable operator were not permitted to charge a price sufficient to recover its investment and earn a reasonable return, any requirement to provide unbundled access would violate the

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The ISPs also ignore that the exemption in Section 621(c) covers more than just requirements imposed under Title II. When Congress has intended a statutory exemption to cover only specific provisions of the Act, it has explicitly stated as much.[55] In contrast, Section 621(c) is not a limited exemption from Title II regulation. It covers "regulation as a common carrier or utility," clearly indicating a much broader exemption that includes not only federal regulation under Title II, but also state and local common carrier regulation.

The legislative history of Section 621(c) confirms that Congress intended a broad exemption. The House Report prepared in connection with the 1984 Cable Act explains that a cable operator may not be "subject to rate of return regulation, or to the traditional common carrier requirement of servicing all customers indifferently upon request (except as otherwise provided in Title VI), to the extent the cable system is providing cable services. Nor would a cable service be subject to the regulation of rates, terms, or conditions, except as provided in Title VI."[56] As this passage illustrates, when a cable operator is providing cable services, it cannot be subject to *any* common carrier regulation—whether that regulation finds its source in Title II of the Act, the FCC's rules, or state law. Congress intended that any regulation of the rates, terms and conditions for cable services be based on Title VI, and nothing else.

The Supreme Court interpreted comparable language in *FCC* v. *Midwest Video*.[57] In that case, the Court struck down PEG and leased access requirements the FCC imposed on cable operators prior to the 1984 Cable Act. At the time, Section 3(h) of the Act provided that "a person engaged in . . . broadcasting shall not . . . be deemed a common carrier."[58] Although the Court had determined in a prior case that the FCC had Title I authority to regulate the cable industry because of cable's impact on the broadcasting industry,[59] it found in *Midwest Video* that Section 3(h) "forecloses any discretion in the Commission to impose access requirements amounting to common-carrier obligations on broadcast systems."[60]

The ISPs also have argued that a direct access requirement would not violate Section 621(c) because it would be consistent with other mandatory access requirements imposed on cable operators (*e.g.*, PEG access under Section 611, commercial leased access under Section 612, program access under Section 628) that have not been deemed to violate the prohibition on common carrier regulation. But their direct access proposal does not fit within any of the existing access requirements contained in the Act. These existing requirements, as well as the general prohibition on common carrier regulation, are part of a comprehensive scheme of access requirements that has been established by Congress. Only Congress has the authority to alter this regime by adding new access requirements (within constitutional limits).[61] Any imposition of access requirements beyond those expressly authorized under these provisions would impermissibly frustrate the decisions Congress has made in establishing this regulatory regime.[62]

3. Neither Title I of the Act Nor Section 706 of the 1996 Act Grants Authority to Impose Common Carrier Requirements on Cable Operators.

In the absence of explicit authority under Title VI, the only possible sources of authority to impose access or unbundling requirements would be Title I, or Section 706 of the 1996 Act. As we show below, neither of these statutory provisions authorizes the FCC to impose common carrier regulations on cable on-line services.

Takings Clause of the Fifth Amendment, which provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

[55] *See, e.g.*, 47 U.S.C. §541(b)(3) (exempting telecommunications services provided by cable operators from Title VI requirements); 47 U.S.C. §573 (exempting OVS providers from certain requirements of Title II and Title VI).

[56] H. Rep. No. 98–934, 98th Cong., 2d Sess. 60 ("1984 House Report").

[57] 440 U.S. 689 (1979).

[58] *Id.* at 699.

[59] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968).

[60] *Midwest Video*, 440 U.S. at 704; Id. at 707 ("That limitation is not one having peculiar applicability to television broadcasting. Its force is not diminished by the variant technology involved in cable transmissions.").

[61] *Id.* at 709 ("We think authority to compel cable operators to provide common carriage of public-originated transmissions must come from Congress.").

[62] *See, e.g., Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion."); *Echostar Communications Corp.* v. *Comcast Corp.*, (rejecting program access complaint based on finding that programming at issue was not satellite programming, or equivalent to satellite programming); *Time Warner Cable* v. *City of New York*, 943 F.Supp. 1357 (S.D.N.Y. 1996) (prohibiting use of PEG channels for non-PEG purposes), *aff'd*, 118 F.3d 917 (2d Cir. 1997).

Section 4(i) gives the FCC authority to perform any act "not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). But Section 4(i) "is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory authority."[63] The provisions of the Act are sufficiently specific with respect to the type of access requirements that may be imposed on cable operators, and with respect to the type of companies that are subject to unbundling requirements, that no ancillary jurisdiction exists to expand those provisions without violating the regime established by Congress.[64]

Nor is there support for the exercise of Title I jurisdiction over cable operators under the theory that regulation is ancillary to the Commission's Title II regulation of telecommunications used by ISPs. Congress has explicitly provided that cable operators cannot be subject to regulation as a common carrier when they provide cable services. 47 U.S.C. §541(c). The FCC cannot defeat the purpose of that prohibition by imposing common carrier regulation under the guise of Title I.[65]

Imposing an unbundling or mandatory access requirement under Section 4(i) also would be prohibited because it would be inconsistent with Section 230(b)(2) of the Act. Section 230(b)(2) provides that it is "the policy of the United States to preserve the vibrant free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*."[66] Time Warner is providing an "interactive computer service," and therefore the national policy established by Section 230 constrains the FCC's authority to regulate pursuant to Section 4(i).

Section 706 of the 1996 Act also provides no basis on which to impose unbundling and mandatory access requirements. Section 706(a) authorizes the FCC and the states to "encourage" the deployment of advanced telecommunications capability through "methods that remove barriers to infrastructure investment."[67] The methods urged by the ISPs would be completely inconsistent with congressional intent. Rather than encouraging deployment of advanced capabilities by removing barriers, a mandatory access or unbundling requirement would discourage infrastructure investment by imposing *new* regulations restricting a cable operator's ability to recover that investment and earn a return.

Section 706(b) requires the FCC to report on the deployment of advanced telecommunications capability, and to take action to accelerate deployment if it finds that deployment is not timely. The Commission recently released the report required under Section 706(b), concluding that "deployment of broadband capability is reasonable and timely."[68] With respect to access to cable systems, the FCC concluded that there was "no reason to take action on this issue at the present time."[69] Given these findings, Section 706(b) obviously provides no basis for imposing an unbundling requirement on cable operators.

4. Additional Provisions of Title VI Restrict Local Authority to Impose Common Carrier Regulation on Cable Operators.

Because Congress has established that a cable operator cannot be subject to common carrier regulation, any attempt by a local government to impose common carrier requirements on a cable operator's on-line services would be preempted.[70] Notwithstanding the clarity with which Congress has spoken on this issue, a few local governments have suggested that various provisions of Title VI can be read to give them the authority to impose the type of requirements proposed by the ISPs. These arguments are wrong.

a. Local governments are restricted in their ability to impose access requirements under Section 612. A direct access or unbundling requirement would be inconsistent with the commercial leased access provisions of Section 612 of the Act. 47 U.S.C. §532. Under Section 612(b)(1), cable operators are required to set aside channel ca-

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[63] *California* v. *FCC*, 905 F.2d 1217, 1240–41, n.35 (9th Cir. 1990).

[64] *AT&T* v. *Iowa Utilities Board*, *slip op.* at 21–24.

[65] *See Midwest Video*, 440 U.S. at 708–09; *City of Dallas* v. *FCC*, *slip op.* at 18.

[66] 47 U.S.C. §230(b)(2) (emphasis added). The term "interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. §230(e)(2). This definition is not mutually exclusive with the definition of cable service, *i.e.*, a service can be both a cable service under Title VI and an interactive computer service under Section 230.

[67] 1996 Act, §706(a).

[68] *Section 706 Report* at ¶16.

[69] *Id.* at ¶101.

[70] 47 U.S.C. §541(c); *Id.*, §556(c).

pacity for "commercial use" by persons unaffiliated with the cable operator. For purposes of Section 612, "commercial use" is defined as the provision of video programming. Under Section 612(b)(3), Congress explicitly prohibited local franchising authorities, "as part of a request for proposals or as part of a proposal for renewal," from requiring a cable operator to "designate channel capacity for *any* use (other than commercial use by unaffiliated persons under this section) except as provided in sections 611 and 637." 47 U.S.C. § 532(b)(3) (emphasis added). Cable operators are free, however, to "offer in a franchise, or proposal for renewal thereof, to provide, consistent with applicable law, such capacity other than for commercial use by such persons." *Id.*

The mandatory access requirements of Section 612(b) cover only video programming; there are no requirements imposed on cable operators with respect to "other programming." Two consequences flow from this provision. First, it is clear that Section 612 provides no affirmative basis upon which a local authority may impose a mandatory access or unbundling requirement. Second, any attempt by a local franchising authority to impose a mandatory access or unbundling requirement in connection with a franchise award or renewal would be prohibited under Section 612(b)(3). Any argument that the language in Section 612(b)(3) permitting a cable operator to "*offer* . . . capacity other than for commercial use" somehow authorizes a franchising authority to *require* additional capacity obviously ignores the plain meaning of the statute and would not withstand judicial scrutiny.

b. Mandatory access or unbundling may not be imposed as a condition of a franchise transfer pursuant to Section 613. Local governments have in a few cases suggested that they have broad discretion to impose conditions in connection with local approval of a transfer, particularly under Section 613(d)(2) of the Act. This position also is without merit.

Section 613(d) generally prohibits a franchising authority from preventing a person from owning a cable system based on that person's ownership or control of other media of mass communications. Section 613(d)(2) reserves local authority to prohibit a person from owning a cable system where the acquisition of the system "may eliminate or reduce competition in the delivery of cable service." Assuming a franchising authority could make the requisite finding that a particular transfer will reduce competition (a finding that seems highly unlikely in the typical transfer situation), any conditions imposed by a local franchising authority pursuant to Section 613(d)(2) must be consistent with the Act.[71] Because Congress has specifically prohibited common carrier regulation of cable operators when they provide cable services, there is no basis for imposing a common carrier access requirement on cable on-line services as a condition of approving a transfer.

c. Section 624 severely restricts local authority over cable on-line services. Section 624 of the Act establishes the parameters for local regulation of services, facilities, and equipment provided by a cable operator. The ISP proposals raise concerns under three different provisions of Section 624.

First, Section 624(b)(1) provides that a local franchising authority may not "establish requirements for video programming or other information services" in a request for proposals for a new franchise or a renewal franchise. 47 U.S.C. § 544(b)(1). The intent of this provision is to make clear that it is the cable operator that gets to decide what programming is provided to subscribers. A local franchising authority cannot interfere with that discretion by establishing requirements in a request for proposal.[72] The prohibition contained in Section 624(b)(1) eliminates any discretion on the part of a local franchising authority to impose any type of direct access or unbundling requirement in the context of granting a new franchise or granting a renewal franchise.

Second, Section 624(e) provides that a local franchising authority may not "prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or transmission technology." 47 U.S.C. § 544(e). Congress adopted this provision to "[prohibit] States or franchising authorities from regulating in the areas of technical standards, customer equipment and transmission technologies."[73] A mandatory direct access or unbundling requirement would violate Section 624(e) because it would

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[71] *See* C ble *Alabama* v. *City of Huntsville*, 768 F.Supp. 1484 (N.D. Ala. 1991) (City had no right to block transfer because Congress "has denied to local governments the authority to regulate ownership or control of cable systems where ownership or control of any other media of mass communications are a concern").

[72] 1984 House Report at 68 ("The cable operator may not be required, either directly or indirectly, as part of the franchise renewal or for a new franchise to provide particular video or other information services, or even a broad category of video or other information service.").

[73] 1996 Conference Report at 168.

effectively dictate that a cable operator deploy equipment capable of providing access to multiple ISPs. When Time Warner provides on-line services today, critical network management functions are handled by a router at the cable system headend. Under a mandatory direct access regime, the cable system would have to add a second router to direct traffic to ISPs, and it likely would be required to deploy bigger routers, or additional routers, than it otherwise would. The broad language of Section 624(e) plainly indicates that Congress did not intend local authorities to adopt this kind of intrusive regulation.

Third, Section 624(f) provides that a local franchising authority "may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title." 47 U.S.C. §544(f). As explained above, nothing in Title VI expressly (or even implicitly) provides for the unbundling or direct access requirements advocated by the ISPs. Section 624(f) makes clear that without express authority, these requirements may not be imposed by a local franchising authority.

V. THE UNITED STATES CONSTITUTION DOES NOT PERMIT THE FCC OR LOCAL FRANCHISING AUTHORITIES TO IMPOSE A MANDATORY ACCESS OR UNBUNDLING REQUIREMENT.

A. The Commerce Clause Prohibits A Local Franchising Authority From Requiring Mandatory Access Or Unbundling.

Local regulation of cable on-line services would violate the Commerce Clause of the United States Constitution. The Commerce Clause grants Congress the power "to regulate Commerce . . . among the several States."[74] It is well-established that this clause not only gives Congress broad authority to regulate interstate commerce, but the "dormant" Commerce Clause prevents state and local governments from imposing requirements that unduly burden interstate commerce.[75] A state or local requirement may violate the dormant Commerce Clause if the burden on interstate commerce is "clearly excessive in relation to putative local benefits."[76]

Local regulation of the Road Runner service is fundamentally incompatible with the national and international nature of the service. The Road Runner service includes both local content produced by the cable system, and national content that is available over the nationwide Road Runner network. Road Runner also enables consumers to access the Internet, and thereby communicate on a nationwide and worldwide basis. There can be no doubt that the Road Runner service is an instrument of interstate commerce protected by the dormant Commerce Clause. As one court has stated, "the novelty of the technology should not obscure the fact that regulation of the Internet impels traditional Commerce Clause considerations."[77]

The burden of any local requirement that Time Warner provide direct access to other ISPs would be "clearly excessive in relation to putative local benefits."[78] If this type of requirement could be imposed at the local level, the interstate services provided by Time Warner and Road Runner would be subject to a patchwork of disparate regulatory requirements. It would be virtually impossible for Time Warner to offer the service under these conditions.[79] Moreover, the common carrier-style regulation the ISPs seek to impose on Time Warner would constitute a fundamental change in the way the company does business. Time Warner would be required to invest in additional facilities to accommodate unaffiliated ISPs, and the features of

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[74] U.S. CONST. Art. 1, §8, cl. 3.

[75] *See, e.g., Oregon Waste Systems* v. *Dep't of Environ. Quality*, 114 S.Ct. 1345 (1994); *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

[76] *Pike* v. *Bruce Church*, 397 U.S. 137, 142 (1970) (requirement to package fruit in state where it is grown "put a straitjacket on the . . . company with respect to allocation of interstate resources"); *see also Pioneer Military Lending, Inc.*, 2 F.3d 280, 283 (8th Cir. 1993) ("The burden a state regulation places on a single firm's interstate activities can be excessive under the Commerce Clause.").

[77] *American Library Association* v. *Pataki*, 969 F.Supp. 160, 173 (S.D.N.Y. 1997); *see also American Civil Liberties Union* v. *Johnson*, 4 F.Supp.2d 1029 (D.N.M. 1998) ("The Internet is an instrument of interstate commerce"); *GTE Telephone Operating Companies*, Memorandum Opinion and Order, CC Docket No. 98-79, FCC 98-292 (rel. October 30, 1998) (finding that telephone company ADSL service is jurisdictionally interstate).

[78] *Pike*, 397 U.S. at 142.

[79] *See Cox Cable Communications* v. *Simpson*, 569 F.Supp. 507, 522 ("It is one thing to exempt intrastate services from Federal jurisdiction. It is quite a different matter to argue that by virtue of this exemption plant used in common for both intrastate and interstate services . . . can be subjected to a melange of regulations, determined by each of the 50 separate jurisdictions," *citing Telerent Leasing Corp.* 45 FCC 2d 204, 219-20 (1974), *aff'd sub nom. North Carolina Utilities Commission* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

the service offered by Time Warner would be adversely affected by multiple, unmanaged service providers accessing the cable operator's shared network.

The burden on Time Warner from this type of requirement would far outweigh any arguable benefit that local communities would receive under the ISP proposals. An unbundling requirement would not make available any information that is not already available because Time Warner's Road Runner service is completely open today, offering access to any Internet site. Furthermore, even if Time Warner could provide direct physical connections to multiple ISPs, doing so would result in significant costs. Regardless who incurred these costs directly, ultimately they would be borne by consumers. In the absence of any tangible consumer benefit, there is no justification for the substantial burden on interstate commerce presented by the ISP proposals.

B. Unbundling And Mandatory Access Requirements Cannot Be Justified Under The First Amendment.

1. The Provision of Cable On-Line Services is Protected by the First Amendment.

Unbundling and direct access requirements would seriously intrude upon the editorial autonomy of cable operators. The Road Runner service is an editorial product. Road Runner is entitled to substantial First Amendment protection in creating the service, and Time Warner is entitled to substantial First Amendment protection when it provides the service. By requiring cable operators to make their facilities available to unaffiliated ISPs, common carrier access requirements would impose a form of forced speech or association on the cable operator. Common carrier regulation of cable on-line services also presents the potential to interfere with Time Warner's provision of video programming services. If the purpose of such requirements is to override the editorial choices of Time Warner and Road Runner, strict scrutiny applies. Even if evaluated under the "intermediate" First Amendment scrutiny applied to such requirements as broadcast "must carry" rules, imposing common carrier requirements on cable on-line services would be unconstitutional.

The Supreme Court has made clear that "[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[80] Any access requirement would implicate the First Amendment to the extent that it "reduce[s] the number of channels over which cable operators exercise unfettered control."[81] The Court has explained that a cable operator's editorial discretion logically extends to its choice of which services to offer—or not to offer. "Cable operators . . . are engaged in protected speech activities even when they only select programming originally produced by others."[82] As Justice Breyer explained, "compulsory carriage . . . exacts a serious First Amendment price. . . . This "price" amounts to a "suppression of speech."[83]

The burden of proof to support any new access requirements is particularly heavy where, as here, unbundling proponents are seeking to impose new requirements without any evidence that the free market is not working. Not only are there no congressional findings that a problem exists, the FCC recently found the marketplace is working to provide multiple broadband options to consumers. In this competitive environment, there simply is no basis for intruding on the First Amendment rights of Time Warner and Road Runner.

2. Common Carrier Regulation of Cable On-Line Services Would Not Withstand Even Intermediate First Amendment Scrutiny.

As the Supreme Court made clear in its review of broadcast must carry rules, the government faces a significant burden to justify even content-neutral regulations that divest cable operators of control over their capacity. To justify any such requirements, the government must demonstrate that the "recited harms are real, not merely conjectural," *and* that any such rules will serve the stated interest "in a direct and material way" *and* the rules cannot restrict more speech than necessary to serve the stated interest.[84] After years of FCC and congressional investigations and litigation, the Court just barely found that the burden was met with respect

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[80] *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*").

[81] *Turner I*, 512 U.S. at 637.

[82] *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 570 (1995). *See also Pacific Gas & Electric Co.* v. *Public Utility Comm'n of Cal.*, 475 U.S. 1, 11 (1986); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

[83] *Turner Broadcasting System, Inc.* v. *FCC*, 117 S. Ct. 1174, 1204 (1997) (Breyer, J., concurring in part) ("*Turner II*").

[84] *Turner I*, 512 U.S. at 664.

to must carry.[85] But here, there is nothing to support the demands of unbundling or access for ISPs.

Proponents of unbundling face their greatest challenge in addressing the threshold question of any constitutional inquiry—whether the "need" for such access is based on anything other than speculation. The Supreme Court has made clear that the "mere assertion of dysfunction or failure in a speech market" is not sufficient to "shield a speech regulation from the First Amendment standards applicable to nonbroadcast media."[86] Alleging market dysfunction is virtually impossible in the case of Internet access services, especially since the FCC has already concluded that the market is served by a multitude of players who are developing diverse technologies for serving their customers.[87] The conjectural loss of competition is all the more striking here, where the principal proponents of unbundling are the dominant players in the market for Internet access.

It also would be very difficult for the advocates of unbundling to demonstrate that ISP access requirements would serve their asserted interests in a "direct and material way," as established precedent requires. Because Road Runner already provides customers with access to all content that is available on the Internet, including access to AOL and other ISPs, there is no information that would be made available through an unbundling requirement that is not already available without that requirement. There is no public interest to be served by unbundling or mandatory access requirements; there is only the special pleading of the policy's proponents. Existing market participants "have no entitlement that permits them to deflect competitive pressure from innovative and effective technology."[88]

Finally, unbundling advocates bear the burden of demonstrating that access requirements do not burden substantially more speech than necessary to further the stated interests.[89] Mandatory access requirements for cable on-line services would be both excessively burdensome and unnecessary. The impact of an unbundling or mandatory access requirement would be far greater than any existing access requirements imposed on cable operators. For example, while a cable operator must set aside capacity for must carry channels, the number of channels is limited, both by the terms of the Act and by the limited number of stations eligible for must carry status. In contrast, a requirement to provide direct access to ISPs creates the possibility of hundreds, or even thousands, of ISPs using Time Warner's facilities. Not only would this interfere with Time Warner's ability to provide on-line services, the extra bandwidth necessary to meet ISP demand potentially threatens Time Warner's ability to provide video programming services.

Any burden on speech is excessive if non-regulatory means are available that would serve the asserted interest.[90] In this case, Section 706 identifies a number of far less intrusive methods by which regulators may encourage deployment of high-speed Internet access services, such as regulatory forbearance (*e.g.*, limits on franchise fees for cable on-line services) and removing barriers to infrastructure investment. Any regulator serious about promoting the development of high-speed services should pursue these types of policies, rather than punishing innovation and investment through burdensome government regulation.

C. Imposition Of An Unbundling Or Mandatory Access Requirement By A Local Government During An Existing Franchise Term Would Violate The Contracts Clause.

It is well-established that a franchise is a contract that is protected from impairment by local government under the Contracts Clause of the United States Constitution.[91] As one court has stated, "[f]ollowing necessarily from the accepted doctrine that a franchise constitutes a contractual right is the inescapable conclusion that those contract rights are constitutionally protected from subsequent impair-

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[85] *See generally, Turner II*, 117 S. Ct. at 1189–1196.

[86] *Turner I*, 512 U.S. at 640.

[87] *Section 706 Report* at ¶4.

[88] *National Ass'n. of Broadcasters* v. *FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984). The FCC has long emphasized that "it is not the purpose of the [Communications] Act to protect a licensee against competition but to protect the public." *Inquiry Into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites*, 90 F.C.C.2d 676, 689 (1982).

[89] *Turner I*, 512 U.S. at 665.

[90] It is noteworthy that must carry rules were upheld based on findings that "[m]ost subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services." *Turner I*, 512 U.S. at 633 (quoting Cable Act, §2(a)(17)). Here, however, any subscriber may freely obtain access to AOL or another ISP, either through Road Runner or by other means.

[91] U.S. CONST., Art. 1, §10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts"); McQuillin, *Municipal Corporations*, §§34.06, 34.44.

ment by municipal authority. Further, the contract obligation between the parties would of necessity become impaired when an ordinance alters its terms by imposing new duties and conditions."[92]

The existence of a franchise does not preclude a municipality from reasonably exercising its police power to protect the public health, safety and welfare. But the police power is not absolute. There must be a "significant and legitimate public purpose behind the enactment of the regulation, and the regulation must not unreasonably intrude into the parties' bargain to a degree greater than is necessary to achieve the stated public purpose."[93] Among the types of provisions that courts have struck down as unduly burdening an existing franchise are increased fees,[94] imposition of a new permit requirement,[95] a diminution in the service area,[96] and a change in the term of the franchise.[97]

Under these standards, imposition of a mandatory access or unbundling requirement plainly would impair any existing Time Warner franchise in violation of the Contracts Clause. A requirement to offer unbundled transport service or to provide competitors with access to Time Warner's network is fundamentally different than any requirement contained in any Time Warner franchise, and not something Time Warner would have accepted in franchise negotiations.

VI. CONCLUSION

It would be a terrible mistake from a public policy perspective to impose any type of mandatory access or unbundling requirement on cable operators that provide on-line services. Common carrier regulation of cable on-line services would increase the cost and degrade the quality of service, while providing no material benefit to consumers.

Not only would mandatory direct access to cable operators' high-speed services be a foolish public policy, there is no legal basis on which the FCC or a local franchising authority may impose it. The Communications Act contains no grant of authority for such a requirement and it specifically prohibits common carrier regulation of cable operators when they provide services like Road Runner. At the same time, intrusive regulation of cable on-line services would violate the Constitution in multiple respects.

For any on-line customer of a cable operator, access to any site on the Internet, including any ISP site, is only a click away today. There is no reason to heed the ISP calls for a new regulatory regime for cable on-line services. Attempting to impose such a regime would stifle innovation, slow investment, and trigger litigation in which the cable industry must ultimately prevail. The downside of regulation is multifaceted, while there is no upside. This tempest exists merely because ISPs want to use an unnecessary and inappropriate regulatory tool for their own competitive ends.

MARC APFELBAUM, *Senior Vice President and General Counsel, Time Warner Cable.*

JAMES CHIDDIX, *Chief Technical Officer, Time Warner Cable.*

Mr. HYDE. Mr. Windhausen.

STATEMENT OF JOHN WINDHAUSEN, PRESIDENT, ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, WASHINGTON, DC

Mr. WINDHAUSEN. Thank you, Mr. Chairman, Mr. Conyers, and other members of the committee. It is a pleasure to be here as well. I am the president of ALTS, which is the Association for Local Telecommunications Services. ALTS is the leading national trade

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[92] *Brauer* v. *Iroquois Gas Corp.*, 381 N.Y.S.2d 166, 171 (1975) (rejecting attempt by city to enforce term limit and gross receipts fee contained in ordinance adopted after grant of franchise).

[93] *Brevard County* v. *Florida Power & Light Co.*, 693 So.2d 77, 81 (1997) (striking down ordinance that imposed a permit requirement on a franchisee not previously subject to such a requirement).

[94] *City of Hayden* v. *Washington Water Power*, 700 P.2J 89 (Id. 1985).

[95] *Brevard*, 693 So.2d at 81.

[96] *City of Tukwila* v. *City of Seattle*, 414 P.2d 597 (Wash. 1966).

[97] *Brauer* v. *Iroquois Gas Corp.*, 381 N.Y.S.2d 166, 171 (1975).

association representing the competitors to the local telephone companies. We are facility-spaced competitors. We are in one sense the companies who are where MCI was 20 years ago, only we are competing for local telephone service, not long distance. ALTS does not represent long distance companies.

We do not have a position, perhaps the only witness here that does not have a position on the cable open access issue. Our primary and principal focus is on the openness and unbundling of the local telecommunications marketplace. And I would like to state for this committee that our position is that we don't need new legislation to consider efforts to open up or exempt the phone companies from their obligations to open their local telephone network. We don't need new legislation. What we need is stronger enforcement of the existing legislation embodied in the Telecommunications Act of 1996.

ALTS as an association has been around for about 12 years, but it has only really taken off in the last 3 years since passage of that Telecom Act. As an association, we had 12 members in 1996. We now represent over 70 companies competing for local telephone service. And, in fact, there are now over 150 companies nationwide who have entered that market. Most of these companies did not even exist until the Telecom Act passed.

These companies, which I'll refer to as CLECs, competitive local exchange companies, have raised billions of dollars in capital. They have invested in infrastructure, they have invested in deploying their own fiber optic cable and switches, and we are providing new advanced high-technology broadband services to both business and residential consumers. All of this activity has taken place because of the passage of that 1996 act and because of that act's requirement, that is, the local telephone market be opened up to competition.

In fact, we are driving the deployment of broadband technologies in this country. We are the originators of the deployment of DSL services. And it is only because of the competition that our companies are bringing to the marketplace that the Bell companies and GTE are beginning to roll out their own DSL broadband services. They are doing so in response to the competitive threat that they are beginning to feel now from our companies.

Having said that, there is a lot more that can be done. We could do even more if we could truly get the telephone companies to comply with the obligations they currently have under current law to open up their networks. Three years later, 3 years after the Telecom Act passed, not a single one of the incumbent local telephone companies is in compliance. Not a single one of those local telephone companies has opened their networks to competitors. We constantly encounter systematic operational difficulties in obtaining access to that local telephone company network.

And as a result, our market share today is still small. We have approximately 5 percent of that local telephone marketplace. We are growing. We have doubled our market share each of the last couple of years, but the local telephone market is still very far from being competitive.

Now, we share the objectives of the authors of this legislation to promote broadband deployment. But our concern is that these bills

would, in fact, slow down the deployment of broadband technologies; they would not enhance it.

Why would they slow it down? For two principal reasons: first, they would give the phone companies exemptions from their requirements to open up their local network. They would slow down our ability to compete with them, and then they would slow down the telephone companies' roll-out of advanced technologies because they would not be facing the same competitive threat.

Furthermore, the bill would slow down the deployment of advanced broadband technologies by giving RBOCs, Regional Bell Operating Companies, premature entry into the long distance marketplace. As Mr. Conyers mentioned in his opening comments, about 50 percent of the traffic today is data traffic. If you allow the RBOCs to provide interLATA services for data, that removes a significant incentive for them to open up their networks. The goal of the Telecom Act of '96 was to get those phone companies to open their local networks first before they get into the long distance market.

So my suggestion is if you want to promote broadband deployment, the last thing you want to do is to grant exemptions that would allow the telephone companies to close down their networks. The telcos are not the solution; they are the problem. The solution is to continue to promote competition for local telephone services and to enforce the current act. Thank you very much.

Mr. HYDE. Thank you, Mr. Windhausen.

[The prepared statement of Mr. Windhausen follows:]

PREPARED STATEMENT OF JOHN WINDHAUSEN, PRESIDENT, ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, WASHINGTON, DC

Good morning Mr. Chairman and members of the Committee. My name is John Windhausen. For many years, I served on the staff of the Senate Commerce Committee, where I was fortunate enough to play a part in the drafting of the Telecommunications Act of 1996. Today, I am the President of the Association for Local Telecommunications Services ("ALTS"). ALTS is the leading national industry association responsible for promoting facilities-based competition for local telecommunications services. ALTS represents over 70 competitors for local service that build, own, and operate competitive local telecommunications networks. (ALTS does not represent the three traditional long distance companies—AT&T, MCI WorldCom, and Sprint.) In short, ALTS is the association that is trying like mad to bring about all the successful changes to the local telecommunications landscape that Congress intended back in 1995 and 1996.

A. INTRODUCTION

Thank you for the opportunity to discuss the bills sponsored by Congressmen Goodlatte and Boucher. While we share the objective of these bills—to promote broadband telecommunications capability for all Americans—ALTS must strongly oppose them. These bills would not speed up broadband deployment; they would do just the opposite. By exempting the incumbent local exchange companies (ILECs) from the market-opening provisions of the Telecommunications Act of 1996, and by giving the Regional Bell Operating Companies (RBOCs) premature long distance entry for data services, these bills make it substantially less likely that the incumbents will open their networks to competition. As a result, these bills would make it ever more difficult for competitors to raise capital, obtain collocation and other necessary elements from the incumbent local telephone companies, and deploy advanced broadband technologies to consumers. [1]

[1] ALTS has no position on the question of whether cable companies should be required to open their plant to competing internet providers. ALTS' sole focus in this testimony are the provisions affecting competition for local telephone services.

Furthermore, this legislation is likely to slow down deployment of advanced technologies by everybody, competitors and incumbents alike. Robust competition, as envisioned by the authors of the Telecommunications Act of 1996, is the strongest inducement to deployment of these technologies. If competitors are discouraged from investing in these capabilities, the incumbent local telephone companies will have no incentive to deploy them either.

To explain the ALTS position further, let me provide the Committee with some additional background.

B. THE TELECOMMUNICATIONS ACT OF 1996: A BRIEF REVIEW

Over the past 25 years, we have learned that monopolies do not best serve the public interest. Monopolies do not respond to customer demand; they offer few service choices; they do not innovate; they do not price competitively; and, they use their market power to squash new entrants. Over 20 years ago, federal policy makers moved to end AT&T's monopoly in the provision of long distance services and the manufacturing of telecommunications equipment. The results have been most impressive: prices have dropped tremendously, new services constantly come to market, and huge amounts of capital are being expended to upgrade plant with the latest technologies.

The Telecommunications Act of 1996, which many of you on this Committee worked hard to shape, sought to bring the same benefits of competition to the local telephone marketplace. After over a decade of work, the 1996 Act passed overwhelmingly, and was supported equally by the RBOCs and other ILECs, the long distance companies, and by the new entrants into local markets—the competitive local exchange carriers (CLECs) who ALTS represents.

The new Act focused on turning the last bastion of monopoly power, the local telephone markets for voice, data, and video services, into a competitive market. The Act thus requires the RBOCs to open the local market to competition first, and then allows them to enter the long distance market. The theory of the 1996 Act was to encourage the RBOCs to open their local networks to competition by granting them the right to enter the long distance market thereafter. Congress realized that, if the RBOCs were allowed into long distance first, they would have no incentive to open their local networks to competitors and the legislation would not achieve its purpose.

C. THE STATUS OF LOCAL TELECOMMUNICATIONS COMPETITION

Three years after passage of the 1996 Act, there is substantial real world evidence that it is beginning to work. Well over one hundred and fifty CLECs have entered the local market since the Act's passage. These companies are rapidly building high-speed voice and data networks serving residential and business customers. Collectively, CLECs have doubled their market share each of the past two years. Furthermore, CLECs have already deployed about 17% of the nation's fiber optic cable capacity.

CLECs are making particular progress in deploying advanced, broadband technologies. CLECs expect to deploy advanced DSL service to over two-thirds of the nation's population in the next two years. (DSL, which stands for Digital Subscribe Line, can provide data services to consumers over a copper wire over 100 times faster than a typical 56k modem.) Because of this competitive challenge, all the RBOCs and GTE announced plans to deploy their own DSL services.

Even though the Act is beginning to work, we are still far short of the robustly competitive local telecom marketplace that the authors of the Act envisioned. Collectively, CLECs serve about 3% of all the country's local telephone service customers, and collect about 5% of all local telecom service revenues. ALTS' goal is to garner 25% share of the local telecommunications marketplace by the year 2003. Clearly, our ambition is lofty, but the market is far from competitive today.

There are many reasons why the local telecommunications market still falls short of being robustly competitive. Competitors still encounter excessive and discriminatory regulation by municipalities. Many CLECs have difficulty obtaining access to buildings, which hinders the ALTS companies' ability to bring consumers the choices that are being promised them. Further, the court appeals mounted by the ILECs against the policies of the Federal Communications Commission (FCC) and state regulators have slowed down the implementation process. The FCC has not yet completed its reform of the universal service program that would allow competitors to compete for the subsidies that currently are handed out to the rural telephone companies. Each of these factors affects the pace of local telephone competition.

Perhaps the largest impediment to local telephone competition, however, is the RBOCs' and the other ILECs' refusals to open their markets to competition. To put it simply, they have not fulfilled their part of the bargain. They continue to discriminate against CLECs, often refusing to provide them with the same access to the network that they provide to themselves. *In fact, after three years, not a single telephone company has complied with the market-opening requirements of the 1996 Act. Not a single ILEC provides non-discriminatory treatment to CLECs.* Thus, CLECs continue to have difficulty ordering loops, collocating in central offices, acquiring number portability to allow consumers to switch seamlessly to a CLEC. All these problems delay the growth of competition. This is the problem the Committee should focus on solving. The Committee should not reward the ILECs for fighting the Act in a clear effort to preserve their local monopolies.

D. WHY THE RBOC/ILEC ARGUMENTS FOR AMENDING THE KEY LOCAL COMPETITION PROVISIONS OF THE 1996 ACT ARE WRONG.

Despite their failure to open their networks to competition, several of the RBOCs and GTE are now proposing that they be granted exemptions from the market-opening requirements of the 1996 Act. These companies propose several arguments to support what they call "regulatory relief". ALTS urges the Committee not to accept these arguments at face value. Most of these arguments are specious and simply wrong. The ILEC arguments can be summed up as follows: the Act was not meant to apply to data; the ILECs must be deregulated in order to encourage broadband deployment because broadband is not being deployed quickly enough; and, the RBOCs and other ILECs are in the same market position as new entrants when it comes to deploying data. Let me address each of these in turn.

1. *ILEC Argument:* The 1996 Act was not meant to apply to broadband data services. *ALTS Response:* The authors of the 1996 Act intended to promote competition for voice data and video services, which is why the Act applies to all "telecommunications services."

The allegation that the authors did not intend the new law to apply to broadband data services is sheer nonsense. The Act's definition of "telecommunications services" is unambiguous: there is no distinction between voice, video and data services. Nor should there be. The basic telephone network has been used to provide data services for decades, and the local telephone companies used their network to maintain a monopoly over voice, video and data services. For this reason, the 1996 Act directed the incumbent local telephone companies to unbundle their network into piece parts that could be used by competitors to provide any type of telecommunications services, without regard to content.

Further support for this conclusion can be found in numerous places. First, there are many other provisions of the Act that expressly apply to data and Internet services, including: the Exon indecency provision, the universal service e-rate program for schools and libraries, the section 271 (RBOC long distance entry provision) exception for delivery of Internet services to schools, and the recently used section 706, which requires the FCC regularly to examine the state of broadband deployment. Second, there are a plethora of statements made at the time the bill was passed about the new Act's potential to accelerate broadband deployment. Finally, there is the FCC's decision this past year that the Act applies equally to voice and data—a conclusion not overturned in the courts.

2. *ILEC Argument:* The ILECs need regulatory exemptions from the pro-competition provisions of the Act in order to give the ILECs sufficient incentives to deploy advanced broadband services. *ALTS Response:* In fact, the pace of broadband deployment is accelerating faster than ever before because of the passage of the 1996 Act.

The proponents of the new legislation contend that the nation's customers are being deprived of broadband services. Here again, their argument has no support. The rollout of broadband services is forging ahead just as the authors of the 1996 Act intended. Start-up entities have used the new law to enter markets and interconnect with and gain access to the RBOC's networks. Companies such as @Link, Logix, and McLeod Communications are rapidly deploying broadband data services in second, third and fourth tier cities and in rural areas. They then have taken technologies that the ILECs have long ignored, refined them, and rapidly brought them to market. In response to this new competitive threat, the risk-adverse RBOCs and other ILECs have finally woken up and responded. They too are deploying broadband. At any of the many Wall Street conferences held this year about the telecommunications industry, you would hear RBOC CEOs line up to tell about

their plans to expedite their broadband deployment. As a result, at the end of the 1st quarter of this year, both the competition and the ILECs were passing over 20 million customers, a huge leap in deployment. It is clear that we are the in the midst of a broadband gold rush all because of the new law.

This viewpoint is supported by statements of CLECs, ILECs, and Wall Street analysts. Here are just a sampling:

> We are aggressively expanding our nationwide footprint and adding subscriber lines. The demand for broadband service is very real, and we offer a high-speed alternative to over 11 million homes and businesses we reach today.
> Robert E. Knowling, Jr. , President/CEO, Covad Communications (a CLEC)

> Clearly, in the words of one our strategic allies, Cisco's John Chambers, we "get" it when it comes to data. We're in the data game to stay. Our overall data revenues grew 29 percent in 1998 to nearly $1.3 billion. We expect even more significant gains from the portion of that business focused specifically on Internet-related services.
> Sol Trujillo, President/CEO, US West

> ADSL [broadband services] to the rescue! All of the large LECs have announced ADSL roll-out plans. Certainly, the explosive demand for high-bandwidth services is motivation enough for large LECs to deploy ADSL quickly. Another important motivating factor is the threat of competition.
> Prudential Securities, March, 1999

> Our industry checks suggest that the rollout of xDSL is proceeding faster than expected.
> Morgan Stanley, May, 1999

3. *ILEC Argument:* The ILECs are new entrants in the data market, just as are the CLECs, and thus the ILECs' data services should not be regulated. *ALTS Response:* The incumbent local telephone companies continue to hold a monopoly over the loop and other local network facilities that are used to carry voice, video and data calls.

The RBOCs contend that because no provider has many broadband subscribers, the RBOCs and other ILECs have no market power in broadband and thus should not be regulated. This argument misses the reason why the ILECs are regulated in the first place: their "bottleneck" networks. It is this network—and not the services that ride on the network—that is the key focus of the market power inquiry. The authors of the 1996 Act understood this point in ensuring that the local network would be unbundled into piece parts that could be used for any telecommunications services that customers demand. Allowing the ILEC to exempt the parts of their network from the unbundling requirements will cause two harms: First, it will decimate data competition because competitors need collocation, access to the loop and other network facilities to provide competitive data services. Second, it would decimate voice competition as well, because voice competitors also rely on those same network facilities.

The RBOCs and other ILECs are not constructing new networks that will be used exclusively for data. Rather, just as they have done with previous upgrades of their network to accommodate new technologies, they are using their traditional network to provide broadband. As the RBOC SBC Communications says on its web page: "SBC's competitive advantage lies in the strength of its existing network. SBC's expansion of its data capabilities represents the emergence of packet-switching technology, which the company began implementing years ago into its existing network." The fact that the RBOCs are moving into data using their existing infrastructure should not be surprising. After all, they each have tens of billions of dollars already invested in these networks, and these networks reach every customer.

E. THE TELECOMMUNICATIONS INDUSTRY BENEFITS FROM REGULATORY CERTAINTY.

The 1996 Act gives great impetus for investment in advanced telecommunications facilities for two reasons: it opens markets, and it creates certainty. In three years, the Act has produced tens of billions of dollars of new investment. In the three years since passage of the 1996 Act, CLECs have raised more capital than all the previous years combined. Facilities-based CLECs are rapidly building new, sophisticated networks, and ILECs are upgrading their old ones. Those happiest with this development are customers, who finally have suppliers who want to meet their demands, and equipment vendors, who are selling everything they build and bringing out new products every day. So long as competition is allowed to develop and gain greater traction, this investment is sure to continue.

The opposite is also true. It should come as no surprise to the Members of the Committee that legislative activity to alter the Act , especially to roll back pro-competitive rules, will freeze this investment. As everyone knows, investors abhor uncertainty. Thus, there is a real downside to legislative activity so soon after new rules have been put in place.

F. SPECIFIC PROBLEMS WITH H.R. 1685/1686

There are at least four major problems with the broadband deployment approach proposed in the Goodlatte-Boucher bills.

First, the bills appear to require all local exchange carriers, incumbent carriers and competitive carriers, to develop plans to provide broadband services on an unregulated basis. The bills thus improperly treat all local carriers the same whether they have market power or not. This is in direct contrast to the 1996 Act, which only requires the incumbent local exchange companies to unbundle their networks because of their monopoly, bottleneck control over necessary facilities. The Goodlatte-Boucher bills would thus underregulate the incumbent provider, exempting them from the market-opening requirements of the 1996 Act, and overregulate the competitive carriers.

Second, the incumbent provider would not be subject to the unbundling requirements of section 251(c)(3) and resale requirements of section 251(c)(4) if it provides or promises to provide conditioned loops. As mentioned above, the ALTS companies are primarily facilities-based providers that depend upon the full range of unbundled network elements. In 1996, the FCC identified seven network elements that must be unbundled, and it may expand this list in the current proceeding undertaken to consider the remand from the recent Supreme Court decision. To exempt the ILECs from providing all the network elements on an unbundled basis based upon their provision of only one of these elements (loops) would deprive competitive, facilities-based companies of several of the necessary elements they need to compete. Furthermore, no exemptions should ever be granted today to the ILECs based upon their promises to provide anything in the future. We have enough experience of ILEC promises to know that these promises are often unfulfilled.

Third, these bills undermine the theory of the 1996 Act by immediately allowing the RBOCs to provide long distance data services. ALTS does not have major interexchange carriers as its members. So, we are not attempting to keep the RBOCs out of the long distance market to protect our long distance market share. Our support for section 271 stems from that fact that it is the only provision of the Act that gives the RBOCs an incentive to open their markets. It is common knowledge that today the telecommunications networks carry more data traffic than voice traffic and that the differential is expanding daily. Allowing them to provide long distance data services is thus no "incidental" exception. It goes to the very core of how telecommunications services are provided today. Allow them this "exception", and I can assure you the RBOCs will have almost no incentive to open their markets.

The final problem with these two bills is their effort to amend the antitrust laws. The telecommunications industry is already subject to the federal antitrust laws. These laws are well known and have proven effective. The new provisions proposed in these bills that apply to ILECs would weaken these already existing requirements.

These four problems—in conjunction with the need to enforce the existing Act and promote certainty—lead ALTS to oppose these bills.

F. CONCLUSION

This Committee played a lead role in developing the Telecommunications Act of 1996. The Act established the correct, pro-competitive, approach to deploying advanced broadband technologies. After much delay brought about by the reluctance of the ILECs to comply with the 1996 Act, it is producing significant benefits. We are on the verge of the true information superhighway reaching all homes and businesses. All it takes is strict adherence to the 1996 Act. We can then rely on competition to drive investment and innovation. If, however, you decide to undo the Act, there will be a significant cost: capital will dry up and broadband deployment will in fact slow. Don't let this happen.

Finally, to the extent the Committee wishes to take action to advance deployment of broadband services, we recommend the following actions:

1. Give the FCC the resources to enforce its rules; the ILECs should no longer be allowed to ignore them by trying to run out the clock;
2. Expand the FCC's legal authority to impose penalties on the ILECs for failing to open up their local networks;

3. Urge the FCC to complete its universal service proceeding; without subsidies that are explicit and available to competitors, it will be virtually impossible to bring competition to rural areas.

Thank you.

Mr. HYDE. Mr. Jacobs.

STATEMENT OF TOD JACOBS, SENIOR TELECOMMUNICATIONS ANALYST, SANFORD C. BERNSTEIN & CO., INC., NEW YORK, NY

Mr. JACOBS. Thank you. Mr. Chairman, Mr. Conyers, members of the committee, let me first give you two words on Sanford Bernstein, the company I work for. First off, we are almost unique on Wall Street in that we don't do investment banking. So my opinions are my own. I only have one set of clients, that is, global money managers. And I only have one mandate, that is, to try to give them good advice.

Now, relative to the debate taking place today, I think one of the problems when you get involved with debates like this is that you tend to get lost in the details and lose sight of the big picture.

What is the big picture? In my opinion, there are basically three related questions. One is what is the path to telecom competition in the local exchange? Two, what is the path to broadband competition? And three, how are those two issues related?

Now, relative to the goals, I think the Telecom Act is relatively clear. If you had a 9-year-old read the act, once he woke up from it, he would basically argue that there are two pieces in the act that are important. One is that the RBOCs are required to accommodate local competition, and two is that if they do so, they get into long distance as a reward.

How are we faring so far? If you look at the exhibit in my written testimony, what you will see is that on average the RBOCs, 3 years after the passage of the Telecom Act, have lost approximately 4½ to 6½ points of market share. Now, if you cut in a little bit more finely, what you find is that in residential they have lost only about 1 percent. So really all the action is taking place with respect to business customers. And it is simple to understand why. A business access line is about five times more profitable than a residential access line. They are also much more geographically clustered. It is almost impossible to economically, efficiently, go after the residential marketplace with facilities.

So what most of the carriers had hoped for was a viable resale option. Now, in 1996 the FCC attempted to push a strategy called UNE–P. UNE–P was effectively a very highly discounted form of resale. But the reality was that the RBOCs found UNE–P something that they couldn't accept. So they went to court led by Mr. Barr on this panel, and they were quite successful in overturning legally the mandate that the RBOCs offer UNE–P to their competitors. As a result, there was no effective other way to get into the local markets, especially for residential, other than facilities. Plain old resale, which is what we still have in front of us in most States, simply is not economically viable. That is why all of the long distance carriers pulled out of the residential markets.

Now with respect to all of that, there was only really one company who ultimately still had to make a decision to figure out how to get into residential. That is AT&T. The sad fact for AT&T is that

the company has a $23 billion portfolio of consumer long distance revenues. They are 60 percent market-share holders in the consumer long distance market. And the ultimate knowledge that AT&T had, was that eventually the RBOCs would get into the business and that since RBOCs will easily be able to bundle long distance service in with local service, and AT&T had no ability to bundle in local with long distance, that meant that AT&T was eventually going to get crushed by the RBOCs when the RBOCs entered those markets.

That sad fact is that's what drove AT&T to acquire TCI. Now, make no mistake about it, the concept of AT&T acquiring TCI is not that AT&T likes the cable business. To the contrary, this was a very expensive, highly dilutive, very complicated transaction for AT&T. Their stock got crushed for a number of months afterwards. The sad fact is, again, that AT&T for defensive reasons has moved into the cable business.

Now step two is AT&T is a national company. TCI is only regional with about 18 million homes passed. So AT&T couldn't stop with TCI if it was going to build out a national footprint to enter the local telephone markets. And thus AT&T pursued a number of resale deals with other cable companies.

Its inability to pursue those deals effectively was what drove the company ultimately to try to merge with Media One, which is pending currently. Media One happens to be a small company; but it is the key in many ways to AT&T's consolidation of a near-nationwide footprint. That is why the company was willing to overpay for Media One, in our opinion.

So point one in all of this is that in reality if what you are after is local telecom competition, there is only one company that will conceivably bring it to you because there is only one company incented properly to do so and that is AT&T with the cable telephone strategy.

Now, what does all of that have to do with broadband and open cable? The answer is everything. Because when you buy a cable company if you are AT&T, if you spend $3,300 to $3,400 per subscriber, then you pay $150 or $200 per home passed to upgrade to two-way; and then you pay $500 on average per home over the next few years to add telecom electronics to add an actual customer, there is no way you are going to get a return on capital just by getting hold of telephone and basic cable revenues. There is no way to do it. The only way you are going to get a return on capital and therefore the only reason you are going to go forward with the strategy and invest is if you are able to turn the platform into a broadband platform for multiple services including high-speed data. And that is exactly what AT&T is attempting to do.

Parenthetically, there are analysts on Wall Street currently who believe that AT&T will not be able to drive an adequate return even with high-speed data and everything that they are involved in.

So I think that the reality here that you are facing is a policy question, not a narrow legal argument. If you want to attain to local telecom competition, the only company that is going to do it for you because they are the only one incented—is AT&T. The only way they are going to be properly incented, because the only way

they will drive a return on capital is if they are incented properly in the broadband space as well.

As investors and as an advisor to investors, the first thing that any investor would do is to attempt to deny capital to AT&T in its strategy if we believed that there was uncertainty as to its ability to get a return on that capital.

The open cable issue, from my stand point, is a policy issue which creates more uncertainty around this build-out; and, therefore, I would be the first one to take away my buy recommendation on AT&T if I believed that the actual economic outcome is going to be an uncertain one.

Now, there are some concerns that other companies have. From AOL's perspective, will they get crushed if they get denied access on demand to the broadband platform on cable? So point one there, I think AOL has about 16 million customers at last count; cable has 800,000, so AOL doesn't seem to be in imminent danger of being wiped out.

Two, the company has successfully negotiated resale deals for broadband ADSL deployment with two RBOCs, and I think more deals are pending. So wherever the RBOCs are able to go, AOL will be able to go. And, three, Wall Street analysts, like myself, are all pushing companies like AT&T to negotiate with AOL because that is the smartest thing that they can do for a number of reasons.

Now, from the RBOC perspective, there is another issue. DSL has been around for a long time. The RBOCs didn't ever begin really pushing it aggressively until now. Why is that? Because cable is building out now. The other issue, since the RBOCs only reach 40 to 50 percent of their homes with DSL for a number of reasons is that they are going to have to spend somewhere—order of magnitude—near $10 billion or more to get ubiquity. Why would they want to deploy capital to do that? Simple. Because cable is doing the same thing.

So in my opinion, just to finish up, the real issue here is: where do you want the competition and do you want it? Cable will build out because they are incented to build out. If they lose the incentive, they won't build out. If they don't build out, the RBOCs won't build out. So essentially, I think what you are faced with is a policy choice between robust competition and two pipes into the home plus all the other pipes being developed or effectively no pipes.

Thank you very much.

Mr. HYDE. Thank you, Mr. Jacobs.

[The prepared statement of Mr. Jacobs follows:]

PREPARED STATEMENT OF TOD JACOBS, SENIOR TELECOMMUNICATIONS ANALYST, SANFORD C. BERNSTEIN & CO., INC., NEW YORK, NY

Mr. Chairman . . . Members of the Committee. Thank you for inviting me here today to address the "Internet Freedom Act" and "Internet Growth and Development Act of 1999." My name is Tod Jacobs, and I'm senior telecommunications analyst at Sanford C. Bernstein & Company. Bernstein is an investment management and research firm; one part of the firm manages about $90 billion in equity and fixed income funds. The other side, where I work, advises money managers globally on a number of key industries. My job is to forecast the growth and earnings and stock performance of the telecom industry as well as its largest companies, including the Baby Bells (RBOCs, or regional Bell holding companies), the large long distance carriers and several wireless carriers. Our firm is somewhat unique among brokerage firms in that we do not engage in investment banking; that is, we don't work for any of the companies we cover as analysts. We therefore avoid conflicts of inter-

est, and have the ability to speak our minds without fear of repercussion. My only clients are the analysts and portfolio managers charged with investing in telecom stocks. I am neither a lawyer nor regulatory expert nor engineer, but rather deal with all issues relevant to telecom investing. My only mandate is to be right. And for the record, I'm currently favoring long distance companies such as WorldCom, Sprint and AT&T, and have neutral ratings on the RBOCs. And indeed, I was quite bullish on the RBOCs from early 1997 through June of 1998, when AT&T announced its acquisition of TCI—a transaction that brought with it for the first time the specter of facilities-based local residential competition to the RBOCs. Also for the record, my colleague Tom Wolzien, who covers video media and online, currently has buy ratings on AOL and MediaOne, and neutral ratings on Time Warner and Cox

The bills before you have, in my opinion, been defined through three primary goals:

First, to unfetter the RBOCs relative to certain obligations they bear to provide discounted resale and unbundled access to their networks to competitors. Second, to fetter the cable companies with obligations that are quite similar to those that would be at the same time lifted from the shoulders of the RBOCs. Third, to loosen certain business-line restrictions shouldered by the RBOCs in relation to the transport of data services across LATA boundaries.

It's my intention to focus on the issue of open access to cable high-speed transport services, and then to touch on the issue of allowing the RBOCs into inter-LATA data services prior to letting them into inter-LATA, or long-distance, voice.

Exhibit 1. Resold and Unbundled Lines Lost Summary (000)

Bell South	3Q98	4Q98	1Q99
Resold	443	527	588
Unbundled	29	41	59
Total	472	568	647
Memo: Total Lines	23,595	23,751	24,089
Memo: Implied Share Loss	2.0%	2.4%	2.7%

Bell Atlantic	3Q98	4Q98	1Q99
Resold	487	619	725
Unbundled	55	69	85
Total	542	688	810
Memo: Total Lines	41,276	41,631	42,133
Memo: Implied Share Loss	1.3%	1.7%	1.9%

Ameritech	3Q98	4Q98	1Q99
Resold (est.)	390	395	400
Unbundled (est.)	100	105	110
Total	490	500	510
Memo: Total Lines	20,925	20,968	21,146
Memo: Implied Share Loss	2.3%	2.4%	2.4%

SBC	3Q98	4Q98	1Q99
Resold	748	803	896
Unbundled	47	57	79
Total	795	860	975
Memo: Total Lines	38,378	38,686	37,782
Memo: Implied Share Loss	2.1%	2.2%	2.6%

US WEST	3Q98	4Q98	1Q99
Resold	205	382	444
Unbundled	5	9	12
Total	210	391	456
Memo: Total Lines	16,408	16,601	16,771
Memo: Implied Share Loss	1.3%	2.4%	2.7%

Total RBOCs	3Q98	4Q98	1Q99
Resold	2,273	2,726	3,053
Unbundled	236	281	345
Total	2,509	3,007	3,398
Memo: Total Lines	140,582	141,637	141,921
Memo: Implied Total Share Loss	1.8%	2.1%	2.4%
Memo: Estimated Business Share Loss	3.3%	3.9%	4.5%
Memo: Estimated Residential Share Loss	1.1%	1.2%	1.3%

In many ways the problem with discussing these issues is that it's easy to lose sight of the big picture. We get lost in endless legal and technical discussions about the propriety of one set of rules versus another; and special interests tend to create one-sided distortions of the underlying reality. In my opinion, all these issues revolve around one basic question: what is the path toward competition—both with respect to telecom services and broadband services? And why and how are the two related?

Fortunately, we have something of a blueprint of the competitive goal—a fuzzy and at times contradictory one—but a blueprint nonetheless: namely, the Telecom Act of 1996. Despite endless wrangling around its details and implementation, if you had your 9-year old read it, once he woke up he'd tell you that there's a simple goal: the RBOCs need to open up the local exchange to competition. And in return, they'll be let into long distance. The truth is that any of us could this afternoon go and start a long-distance business from scratch in our garage that could easily serve residential and small business customers. It's local that's hard. And that's why the Act of 1996 was about opening local markets. And it appears that Congress believed that the RBOCs would not be properly incented to open up local if they first received approval to offer long distance.

Where are we in pursuing that goal? Not very far—it seems. In Exhibit 1, we present the RBOC lines lost to resale and unbundling as of the most recent quarter. Three years and one month after passage of the act, the highest market share losers so far are BellSouth and US West, with about 2.7% each lost to resale and unbundling, followed by SBC with 2.6%, Ameritech with 2.4% and Bell Atlantic with 1.9%. Not very impressive. What's more, if you cut more finely, you'll find that business line losses are in the 3–4% range, but that residential share loss is holding at about 1%. And while these numbers don't include loss to carriers serving customers on their own facilities, since the RBOCs can't or won't break out the data, we strongly believe that at best you're talking about an incremental 2–4 points of share loss. And at least 95% of that relates to business customers, again leaving residential to about 1%.

Why? First, because while business lines represent only about 35% of total access lines, they nonetheless drive about three quarters of RBOC profit due to the industry's strange and artificial pricing structure. Residential lines are nearly profitless, and are geographically dispersed, while subsidy-laden business lines are extremely rich, and are geographically clustered in small areas. So no one approaching the industry fresh as a competitor would ever try to attack the residential market, especially if it required the deployment of expensive facilities. Second, as we'll see, with the exception of AT&T, no single long distance company has sufficient consumer exposure, and therefore sufficient fear, to make the expensive investments necessary to enter residential on a large scale.

Now, the reality is that the initial market-opening strategy pushed by the FCC in 1996 and 1997—a highly discounted form of resale known as rebundling, or the unbundled network element platform (UNE–P)—would have drawn all of the LD companies into residential since it offered about a 35% average discount, which most could have at least broken even on. That's worth doing if the bundling in of a local service product serves to hang onto profitable long distance customers longer. But the RBOCs believed that even long distance entry wasn't worth the price of UNE–P. So they decided not to pursue it—and indeed had it overturned by the Eighth Circuit in mid-1997. And even though it would cost them long-distance entry, the RBOCs were content to grow earnings in double digits based upon the strength of the local markets. At the same time, numerous strategies were employed to skirt the 271 entry process: the Qwest joint-marketing deals with US West and Ameritech, and the famous "Bill of Attainder" arguments put forth in two circuits that attempted to have the inter-LATA restrictions declared unconstitutional.

For their parts, bereft of UNE–P, each of the major long-distance companies attempted to offer plain vanilla resale of local residential service—at about a third the effective discount of UNE–P—but quickly found that you couldn't lose a bit on the margin and make it up in the volume. So they stopped trying, and the industry entered a two-year truce, particularly with respect to residential.

The one with the problem, though, was AT&T. That is, the company knew well that eventually the RBOCs would enter long distance. When they did, they would easily add a long distance component to the existing local service. And AT&T, with its $23 billion consumer long distance business—unable to offer a bundle that included local service—would simply get crushed. That simple and sad reality led the company to purchase TCI—a strategy that caused the company to invest $40 billion and to dilute its earnings severely—in the process crushing the stock for several months—all in pursuit of a path into the home for local service.

Make no mistake about it. AT&T didn't buy TCI because it liked the cable business. It bought TCI for defensive reasons, for fear of getting crushed in consumer long distance by the RBOCs if it couldn't offer a bundle that included local service. Second, because AT&T is a national company and TCI is regional, AT&T couldn't stop with TCI. Thus, the company went about pursuing joint ventures with other cable companies in order to get access to enough homes to make a difference. But those deals were hard to come by, with only Time Warner coming close among large cable companies. And that's despite AT&T's willingness to pay upfront fees for access, and to foot nearly all of the capital expenditures—about $500 per subscribing home on average over the next 5 years, or somewhere between $9 billion and $12 billion, not including the cost of upgrading TCI's lines to support two-way digital services (another $2–3 billion) to roll out on a nationwide basis.

Moreover, it was the difficulty in clinching cable resale deals that forced the company to again dilute its earnings, this time spending $60 billion, to acquire MediaOne, which despite its relatively small footprint, nonetheless holds the key to cementing the national footprint, since it will ultimately lead to resale deals with Comcast and a finalization of the Time Warner deal. Taken in sum, the creation of this strategy is plainly and simply the first fruit of the Act of 1996—the only large-scale strategy being pursued by any telecom company that will bring residential competition to the local exchange.

What has this to do with open access to broadband cable? Everything. Because when you spend an average of $3,300–3,400 a subscriber to acquire cable companies, then add $150 a home passed to enable two-way services, then spend $500 a subscriber for those that take local telephone service, you've got to get a return on your capital. And the combination of basic cable and local telephone won't come close to driving that return. Only the inclusion of incremental growth services like high-speed data give you a prayer. And according to several leading analysts, even that won't be enough. So the fate of broadband services is critical. And to the extent that AT&T's ability to drive an adequate return on broadband services is threatened by the unknown economics that regulators and legislators could mandate in open cable access, Wall Street will deny AT&T and all other cable companies the capital to build the broadband pipe. I would be the first to downgrade my buy recommendation on AT&T through the creation of that uncertainty.

How do we respond to the concerns of the major players?

Argument: AOL could be denied access at will to the cable plant.

Let's note a few facts:

- The company currently has 16 million online customers versus under 800,000 at the cable companies in total; so clearly it will be some time before the company is marginalized by the activities of cable
- AOL has already struck resale deals for broadband xDSL access on a commercial basis, including volume discounts, with Bell Atlantic and SBC. We believe that more RBOC deals are in the works. So the company will have broadband access to tens of millions of homes over the next 12 months. That's not to mention commercial deals struck with satellite.
- AOL's service is a proprietary one. Customers of other Internet Service Providers (ISPs) are denied access to AOL's content; in addition the company appears to be opposed to any attempt to regulate the internet—except as regards open access to cable plant. So there is an issue of consistency.
- We believe that AOL can and should pursue commercial deals with cable, and that such deals could be extremely beneficial to both sides.
- Finally, any one of the ISPs, including AOL, could elect to invest capital and gain local franchise approval to overbuild the existing cable plants, just as Ameritech has done in parts of Chicago and Detroit and a number of municipalities have done elsewhere in the country.

Argument: the RBOCs are being treated unfairly since they have to unbundle and resell their plant while cable is not yet subject to similar obligations.

There *is* an inequity in the regulation of the two industries. But we would argue that the long-term solution to the problem is the eventual deregulation of the RBOCs in the high-speed data area, not regulation of the fledgling cable high-speed industry.

Several other key points:

(1) *DSL Deployment Depends on Cable Modem Deployment:* It is precisely the AT&T national cable-telephony strategy, along with the general aggressive investment posture of the other cable companies with respect to high-speed

data deployment that has driven the RBOCs to begin to aggressively deploy xDSL. Indeed that technology has been around for several years and the RBOCs have been very slow to deploy it until recently, especially since it represents the threat of cannibalization of the RBOC's $5 billion private line business, which offers similar speed services for a fraction of the price.

(2) *RBOC Push Toward Ubiquity Depends on Cable Modem Deployment:* Only 40–50% of RBOC access lines are currently addressable with xDSL given line lengths and the presence of certain splicing and multiplexing technologies on many access lines that preclude xDSL deployment. To address this problem, the RBOCs will have to spend $8–12 billion over the next several years to push fiber further down into the neighborhood to enable ubiquitous xDSL deployment. Such investments are only now being announced, and are clearly driven by the desire not to lose the market to cable modems. In the absence of a cable modem threat, these incremental investments are unlikely to be made, certainly not on the accelerated basis now being contemplated. Moreover, more aggressive RBOC spending will be met with further cable investment. Few things will prove better for the consumer than a battle to bring broadband to the home.

(3) *AT&T & Cable Open to Negotiations:* AT&T and other cable companies have made clear that they are open to commercial relationships with ISPs such as AOL. Indeed they'd be crazy not to strike deals, and Wall Street is pushing them to do so quickly, if only to end the reign of that killer of stocks called "regulatory risk"—but more so because it's good business to have as many people selling your services as possible if the terms are reasonable. A vibrant commercial resale market would obviate the need for regulated unbundling.

(4) *Why Regulate a Fledgling Industry Now When You Can Do it Later?* The real fear is that cable behaves with respect to broadband services the way it did in programming (where anti-competitive behavior led to regulation in the early 1990s). The FCC policy has been to say: "We'll leave you alone for now . . . but we're watching." This shot across the bow has, in our view, been noted by cable managements. We recognize, however, the need of the FCC to be assured that the technical systems being established today will not practically preclude regulation to counter any actual anti-competitive abuses should they occur years from now. It is in the province of the FCC to be certain that the design of the billions of dollars of hardware and systems being installed by cable now allow for the consideration of regulation of high speed data at the system level in the future if anti-competitive abuses occur. I know my colleague Tom Wolzien will be discussing this issue in his comments at the FCC on July 8th.

At the end of the day, the question comes down to one of a policy choice. In our opinion, the first goal of the Telecom Act is local—and especially residential local—competition. Without an ability to buttress with incremental broadband services the huge expenditures required (mostly of AT&T) to roll out competitive local telephone service, local telecom competition won't ever come. In turn, the presence of a vibrant cable investment posture in broadband services depends upon the perceived ability to generate returns on capital. To the extent that those returns could be curtailed by regulation, cable won't build. To the extent that the cable build is slowed or stopped, the RBOCs will slow their finally-accelerating broadband deployment—that's the rational thing to do. No one wants to deploy capital for the sake of being popular, especially when it dilutes earnings or risks cannibalization of other services. So in many ways, the choice is between two major broadband buildouts in competition (in addition to several niche competing access technologies like MMDS, LMDS and DBS and standard wireless) or no major broadband buildout. And with it, no local telephone competition.

Finally, on the subject of RBOC inter-LATA relief with respect to data services: Again, the question is one of policy goals. For the past 2½ years the RBOCs were mostly content to sit out long distance entry as long as local wasn't threatened. All that changed with the new AT&T cable-telephony strategy, which holds the possibility that AT&T could reach the consumer with a bundled offering (local, long distance, data and video) before the RBOC does. Now, numerous RBOCs have decided that UNE-P might be worth the price of admission to long distance after all.

What's the risk of allowing for an easing of the restriction on data? It depends on what you think is driving the RBOCs toward market opening. In our opinion, over the next 5 years, 60% of the growth in telecom services revenue will be driven by local and long distance data and Internet products. Local and long distance voice

products, on the other hand, will drive only about 15% of growth, despite making up two-thirds of the total telecom pie (Exhibit 2).

Exhibit 2. Domestic Telecommunications Services Revenues ($, mil.)

				Average Growth		Contrib. To Growth	
	1996	1998	2003E	96-98	98-03E	96-98	98-03E
Local Voice Services	79,330	88,715	95,154	5.8%	1.4%	27%	7%
Local Data Services	5,369	8,391	23,361	25.0%	22.7%	9%	16%
Long Distance Voice Services	72,375	76,161	83,582	2.6%	1.9%	11%	8%
Long Distance Data Services	9,549	15,800	42,294	28.6%	21.8%	18%	29%
Internet Services	1,617	4,430	18,959	65.5%	33.7%	8%	16%
Wireless Services	25,779	35,250	56,594	16.9%	9.9%	27%	23%
Total Domestic Telecom. Services	194,019	228,748	319,943	8.6%	6.9%	100%	100%

More to the point, focusing on inter-LATA services only (including long-distance voice, long-distance data and internet services—which RBOCs are precluded from offering), about 85% of all inter-LATA growth over the next five years is expected to come from data and internet products. Only 15% is expected to come from long-distance voice (Exhibit 3). Thus it should be rather clear that data is the key to inter-LATA growth in the future.

Exhibit 3. Focus on InterLATA Portion of Industry Revenue ($, mil.)

				Average Growth		Contrib. To Growth	
	1996	1998	2003E	96-98	98-03E	96-98	98-03E
Long Distance Voice Services	72,375	76,161	83,582	2.6%	1.9%	29%	15%
Long Distance Data Services	9,549	15,800	42,294	28.6%	21.8%	49%	55%
Internet Services	1,617	4,430	18,959	65.5%	33.7%	22%	30%
Total InterLATA Services	83,541	96,392	144,835	7.4%	8.5%	100%	100%

So the question is rather simple: if the RBOCs are allowed into inter-LATA data, thus gaining access to 85% of all inter-LATA growth even without access to traditional long distance voice—are they likely to be proactive in opening up the $90 billion local market in order to gain access to the other 15% of the growth? The answer to this question should help you determine the proper course of action toward achieving your policy goals.

Mr. HYDE. Mr. Kimmelman.

STATEMENT OF GENE KIMMELMAN, CODIRECTOR, WASHINGTON OFFICE, CONSUMERS UNION, WASHINGTON, DC

Mr. KIMMELMAN. Thank you, Mr. Chairman. On behalf of Consumers Union, I want to thank you, Mr. Conyers, members of the committee for inviting us. I want to particularly thank you for setting up a panel this way. I know it is unwieldy for the members to have this large a panel, but it truly is a democratizing process to have all the points of view present. So I commend you for structuring the hearing this way.

I want to take the opportunity—it doesn't happen very often—to indicate that I agree with virtually everything Mr. Barr said. We haven't often been on the same side of issues. And I find it a unique opportunity to hear Mr. Jacobs' "buy" and "sell" advice at a Judiciary Committee hearing. It certainly is not the norm.

And I concur in what Mr. Jacobs described as what appears to be what happened with AT&T. But I must indicate to you from a consumer perspective there really is something wrong, something fundamentally wrong when, in order for a cable company, whether it is owned by AT&T or anyone else, to move into new markets, to say it must price gouge cable customers or overcharge for high-speed Internet access.

And there is something equally wrong if a local phone company in order to expand into new markets has to say, oops, we can't stand by those obligations in a law passed 3 years ago to open up our networks to local telephone competition which is, I believe, what that whole law was designed to accomplish.

We have heard this morning a lot of very, very eloquent yammering about competition and billions of dollars in capital. But there is something really, really wrong when six of the eight large telephone companies are allowed by our antitrust officials to consolidate into two companies, together serving about two-thirds of all consumers and through acquisitions cable companies united into one company serving almost 60 percent of all cable customers.

And there is something even more wrong when, on the dollar side for the consumers, you see $3 or $4 billion of excess charges a year by cable companies above competitive pricing and you see $5 billion in new charges on people's monthly telephone bills since the Telecom Act was passed. So we believe it is time to revisit this law for consumers to seek modifications in the law, to stop these inappropriate rate hikes, and to correct what is going wrong.

I would suggest one very simple principle, consumer principle, for you as to consider in reviewing this legislation. We believe we need comparable public obligations for the transmission of the most important telecommunications, cable television and Internet services until vibrant competition develops throughout the market, not just for high-end customers but throughout the market for all consumers.

So we look very favorably on the portions of the Goodlatte-Boucher legislation that would subject the cable wire to comparable obligations to the telephone wire, and we believe that there is more that can be done to ensure fair pricing of cable services and high-speed Internet access.

On the other hand, we do have considerable concerns about the provisions in the legislation that we fear could enable local phone companies to circumvent many of the obligations in the 1996 act related to opening up their markets to local competition. I think Mr. Salsbury stated it quite succinctly and with the appropriate analysis.

So we look forward to working with the committee, with the sponsors of the legislation to improve this legislation to make sure it meets consumers' needs. And most importantly, we urge this committee to act to begin addressing the problems with the 1996 act. Please don't wait. With prices going up and up and up and consolidation gobbling up virtually every potential competitor in sight around these industries, we cannot afford to wait longer to address consumers' needs. Thank you.

Mr. HYDE. Thank you very much Mr. Kimmelman.

[The prepared statement of Mr. Kimmelman follows:]

PREPARED STATEMENT OF GENE KIMMELMAN, CODIRECTOR, WASHINGTON OFFICE, CONSUMERS UNION, WASHINGTON, DC

I. INTRODUCTION

Consumers Union[1] believes it is time for Congress to address the shortcomings of the Telecommunications Act of 1996.[2] With cable television rates soaring and many telephone charges on the rise, the majority of consumers are not receiving the benefits that Congress promised through elimination of traditional ownership and price regulation in telecommunications markets. We therefore welcome Representatives Goodlatte's and Boucher's interest in proposing legislation designed to deal with the realities of today's marketplace.

The Goodlatte and Boucher bills, H.R. 1685 ("Internet Growth and Development Act of 1999") and H.R. 1686 ("Internet Freedom Act") include important consumer protection provisions that would make the emerging world of high-speed Internet services more open to consumer choice and competition. However the bills also contain a number of provisions regarding digital services offered by local telephone companies, which we believe require significant modification to ensure that they do not open the door to anticompetitive or unfair practices. In addition to working with the bills' sponsors to address these concerns, Consumers Union will suggest additional changes to the Telecommunications Act which we believe are necessary to ensure fair pricing for cable and telephone services while we wait to see if these markets become more competitive.

II. RISING PRICES IN TODAY'S MARKET

Contrary to the goals of the Telecommunications Act, consumers face rising prices and extremely limited competitive choice for numerous television and telephone services. Since passage of the Act in February 1996, cable TV rates have risen about 23 percent, more than three times the rate of inflation during that period.[3] Despite significant growth in the satellite industry, the high price of purchasing a satellite dish, expensive installation charges and the inability to provide local broadcast signals have enabled cable to avoid price competition from satellite providers. On the other hand, the few consumers who have a choice of cable service from two providers (head-to-head competition from two cable companies or one cable and one telephone company) receive approximately the same programming, new services and infrastructure upgrades for about 14 percent less than cable monopolies charge.[4] If cable monopolies were limited to charging these competitive prices throughout the country, consumers would save about a $4 billion a year.

The picture for some telephone rates is starting to look almost as bad as for cable. Federal Communications Commission (FCC) pricing policies have resulted in new "line-item" charges on phone bills that will cost consumers almost $5 billion a year starting in July (See Attachment A). New universal service fees, subscriber line charges, federal access fees, and number portability charges are requiring the average single-line customer to pay $3.01 per month more, and consumers with two lines $7.39 per month more for phone service, before they place a call. These figures do not include new monthly minimum charges assessed by long distance companies like AT&T and MCI, which require consumers to pay $3.00 to $5.00 a month even if they make no calls, or less than $3.00/$5.00 worth of calls. While large-volume long distance users are finding competitive options and declining per-minute prices,

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[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about good, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with approximately 4.5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] Public Law 104–104, 110 Stat. 56 (1996)

[3] Source: Bureau of Labor Statistics Cable Consumer Price Index and Consumer Price Index—All Urban Consumers

[4] In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, REPORT ON CABLE INDISTRY PRICES, MM Dkt. No. 92–266, May 7, 1999, at 3

consumers who make less than 30 minutes of interstate long distance calls per month have seen their rates double since passage of the Act.[5]

III. MARKET CONCENTRATION

Failure of our antitrust authorities to take an aggressive stance against telecommunications and cable mergers has contributed to a bleak picture for the development of local telephone, cable and increased long distance competition. The Justice Department's Antitrust Division is in the process of allowing six of the eight big local telephone companies (GTE and the Bell Companies) to merge into two giant super-regional monopolies. After gobbling up Pacific Telesis and Ameritech, SBC will control about one-third of all telephone lines into consumers' homes. Similarly, with the acquisition of NYNEX and GTE, Bell Atlantic will control another third of the country's local phone lines. These were the companies that, during consideration of the Telecommunications Act, claimed they would be "seven new competitors" in long distance and other markets.

In response to this massive local telephone consolidation, AT&T has purchased substantial ownership stakes in cable television companies that serve about 60 percent of all households in the country. Through its merger with TeleCommunications Inc. and proposed purchase of MediaOne, AT&T will dominate not only the majority of cable wires, but also the major high-speed Internet access providers (@Home and Roadrunner) and control more than 60 cable television channels.[6] Despite AT&T's stated goal of expanding its cable business into the local telephony market, the fact that the underlying cable monopoly is not subject to any limits on pricing (unlike the local telephone monopoly) and is not subject to common carriage/nondiscrimination requirements (unlike the local telephone monopoly), makes this consolidation particularly troubling for consumers.

It is important to note that, while everyone expects the telephone and cable wires some day to offer the same set of services in competition with each other, they do not compete today! Without enormous infrastructure investments, elimination of technical barriers, and experimentation with network management of bundled services, cable and local telephone companies cannot effectively compete against each other. And no one else is even close to them, measured either by technical or financial standards, to serve as a mass market competitor for the most important telephone, television and Internet services. We may therefore be experiencing an enormous consolidation that, at best, yields a duopoly. What does this mean for consumers?

IV. THE DIGITAL DIVIDE

In a report we released with the Consumer Federation of America in February[7], we found that at least one-half and as many as three-quarters of all consumer do not generate enough revenue opportunity—because of their small local, long distance, wireless, cable and Internet consumption—to be attractive to the companies seeking to expand into these markets. This fact is unlikely to change in the foreseeable future. Therefore all the talk of deregulation designed to spur investment in new infrastructure and advanced services may do little or nothing for the needs and desires of the vast majority of the consumer market. Our report demonstrates that cable, local phone and long distance companies are only likely to compete for the top 20% of the consumer market. Market forces are not strong enough to prevent a growing world of telecommunications haves and have-nots.

V. IT IS TIME FOR CONGRESS TO ACT

If neither antitrust officials nor the FCC are willing to stop the telecommunications consolidation juggernaut, it is imperative that Congress step in to establish comparable public obligations for the two wires that may some day be in a position to compete for the most important telecommunications, Internet and television services. We believe the Telecommunications Act should be adjusted to:

(1) protect against inflated pricing of monopoly telephone and cable services;

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[5] Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, REFERENCE BOOK OF RATES, PRICES, INDICES AND EXPENDITURES FOR TELEPHONE SERVICE, June 1999 at Table 2.4.

[6] In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, FIFTH ANNUAL REPORT, CS Dkt. No. 98-102, Dec. 23, 1998 at Appendixes C and D.

[7] Dr. Mark Cooper and Gene Kimmelman, "The Digital Divide Confronts the Telecommunications Act of 1996," Consumers Union and Consumer Federation of America, February 1999.

(2) ensure that monopoly telephone and cable services do not subsidize other services;

(3) prevent either telephone or cable companies that have market power as a result of their transmission facilities from discriminating in any way against consumers or independent vendors who must rely on those companies' transmission facilities to offer services to the public; and

(4) ensure that low-volume telecommunications users (including long distance customers) are not overcharged for their limited communications needs.

VI. THE GOODLATTE AND BOUCHER BILLS

H.R. 1685 and 1686 offer a good starting point to begin addressing inappropriate regulatory advantages the cable wire has over the telephone wire. Consumers Union supports efforts to ensure that cable TV monopolies cannot use their dominance in the transmission of high-speed Internet access to discriminate against particular Internet service providers or inflate prices for consumers. The bills' prohibition on anticompetitive or discriminating behavior begins to address this problem. However, the legislation should be expanded to prohibit cross-subsidization and discriminatory practices by local telephone and other broadband access transport providers in services essential for making broadband access a viable mass market service (e.g., local telephone, video transmission).

The bills' provisions specifically related to broadband and Internet backbone services provided by local telephone companies need significant modification to meet consumers' needs. Despite the convergence of telephone, television, and data (including Internet) services through the enormous growth of digital transmission techniques, the legislation creates an artificial "no regulation" zone for transmission that mixes voice, data and video. This regulatory distinction is simply unworkable in a digital world.

In a world where virtually all service providers are attempting to offer consumers one-stop-shopping for local phone, wireless, long distance, fax, Internet and television services—mostly mixed together in digitized format—it becomes impossible to separate data and voice services for regulatory purposes.

Consumers Union supports preservation of the portions of the 1996 Telecommunications Act that will open local phone markets to competition. We believe that efforts to enhance deployment of broadband facilities by local phone companies must coincide with, and not replace efforts to open the local telephone market to competition. We therefore believe the broadband and Internet backbone provisions of the legislation should be modified to ensure that efforts to enhance local telephone competition would not suffer. And where competition does not develop, the legislation must also ensure that prices for the local phone service that connects Internet and other broadband applications remain reasonable and affordable to all consumers.

Rather than focus modification of the Telecommunications Act on distinctions between services—data, voice, video—that are disappearing, we suggest a different basis for revisiting the Act. It is now obvious that modest users of virtually all communications services—local phone, long distance, cable, Internet—are unlikely to benefit from the deregulatory, market opening provisions of the 1996 Act. In the foreseeable future, competition will not penetrate these low-volume markets, either for individual services or a bundle of these services combined. We therefore suggest modifications to the Act that ensure reasonable prices for local telephone, cable and long distance services where competition does not exist or is insufficient to keep prices down. Such an approach would place greater emphasis on Bell company entry into the residential long distance market, with appropriate public oversight, over deregulation of broadband and Internet backbone services.

VII. CONCLUSION

Consumers Union applauds Representatives Goodlatte and Boucher for initiating the process of adjusting the 1996 Telecommunications Act to deal with today's market realities. As consumers experience spiraling cable rates, rising monthly telephone charges, and the restricted choices that result from massive industry mergers, it is obvious that the Act is not meeting its competitive goals. While the Goodlatte and Boucher bills require significant modification, they provide an important starting point for addressing consumer needs in today's market.

ATTACHMENT A

June 9, 1999

Hon. THOMAS BLILEY,
United States House of Representatives,
Washington, DC

DEAR REPRESENTATIVE BLILEY: On behalf of Consumers Union, the Consumer Federation of America, and the Texas Office of Public Utility Counsel, we are writing to seek your help in puffing an end to the Federal Communications Commission's misguided pricing program that is driving up consumers' monthly telephone bills. With more than $1 billion a year in new charges slated to begin on July 1, 1999, added to almost $4 billion a year that has already been added to consumers' bills, we believe it is time for Congress to reverse these regressive, unfair rate increases that result from the FCC's policies.

Since passage of the 1996 Telecommunications Act, the FCC has embarked on policies that have added $3 a month to the monthly phone bill of the typical single-line residential long distance customer, and more than $7 a month to the monthly bill of consumers with two telephone lines. As of July 1, this will amount to a total increase of almost $5 billion per year on consumers' monthly phone bills, not including new minimum charges of $3–5 every month assessed by long distance companies like AT&T and MCI.

At the time the Commission initiated this pricing program, then Chairman Hundt stated that: "I don't think that Congress intended to have us raise residential basic dial tone . . . and I think I am reading Congress right on this." We agree with that assessment, and therefore cannot understand how the FCC can justify the fact that its regulatory actions are having the opposite effect—the very effect the agency knows Congress did not intend. This is nothing short of regulatory mismanagement at the expense of consumers and must be reversed.

Contrary to Congressional direction to devise a comprehensive pricing system that preserves universally affordable, reasonably priced telephone service, the Commission has embarked on piecemeal policies that are inappropriately robbing consumers of about $5 billion a year. Offsetting long distance rate reductions have not only failed to materialize for residential customers as a whole, but for the millions of consumers who make few long distance calls, these increases in monthly charges constitute the lion's share of their bill. And the FCC is likely to increase these charges to expand its universal service program. The Commission's pricing program calls for additional increases in monthly line charges for the next few years as well.

If Congress truly did not want to see monthly phone charges go through the roof, particularly for the majority of consumers who are relatively low-volume long distance users, something must be done to reverse the FCC's wrong-minded pricing program. We therefore ask you to take the lead in moving legislation that would put an end to this pricing program, and would require the FCC to go back to the drawing board and develop a comprehensive proposal to preserve universal service and move prices to cost without adding unfair charges on consumers' monthly bills.

Sincerely,

GENE KIMMELMAN, *Co-Director,*
Olivia Wein, Fellow for Economic Justice,
Consumers Union.

MARK COOPER, *Director of Research,*
Consumer Federation of America.

LAURIE PAPPAS, *Deputy Public Counsel,*
Texas Office of Public Utility Counsel.

New Charges on Consumers' Bills

Bottom of the bill price increases in the Federal jurisdiction since passage of the '96 Telecom Act charges as applied on consumer bills (residential customers only)

BASIS FOR ASSESSING CHARGES		TYPE OF CHARGE	CHARGES 96–98		CHARGES 1999		TOTAL 96–99	
Base	Number[1] (million)		Amount Monthly	Annual (million)	Amount Monthly	Annual (million)	Monthly	Annual (million)
Per Account	96	Universal Service[2]	$0.93	$1,070	$0.20[3]	$230	$1.13	$1,300
Per Line	123	Federal Access (PICC)[4]	$0.85	$1,255	$0.63[5]	$930	$1.48	$2,185
	123	Number Portability[6]			$0.40	$590	$0.40	$590
Second Lines	27	Subscriber Line Charge (SLC)	$2.50	$810			$2.50	$810
Total/Average	123	ALL	$2.02	$3,130	$1.18	$1,750	$3.31	$4,885
Typical One Line	69		$1.78		$1.23		$3.01	$2,490
Typical Two Line	27		$5.13		$2.26		$7.39	$2,395

1. Line count is mid-year 1999 estimate.
2. Universal service charge is AT&Ts's since it has the vast majority of residential accounts.
3. 1999 Universal service charge is estimate of new E-rate costs.
4. Presubscribed Interexchange Carrier Charge(PICC) is AT&T's charge.
5. PICC estimated for 1999 is weighted average of first and second lines.
6. Number portability is weighted average of all Bell Companies plus GTE.

Mr. HYDE. And before we go on to the questions, I would like to make a prayerful suggestion that we be mindful of the 5-minute limit. We have many members here who want to participate. If you spend your 5 minutes making a statement and then at the expiration ask a long convoluted question, then you have euchred us out of 10 minutes at least. And so again I appeal to the judgment of each member to remember they have 5 minutes and I try to cut you off at the end of 5 minutes, only so we can have maximum participation.

Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. And I want to thank all the witnesses. I don't think anybody on this committee would try to double 5 minutes into 10 minutes, but I am glad you made that observation anyway.

Gentlemen, there are some problems here that maybe we will need more than 5 minutes a round; we may need several rounds of 5 minutes to get at, because Mr. Vradenburg went to great pains to assure me that if it's competition and consumer protection that I want, that his approach and this bill's approach is the best.

I remain skeptical after having listened to all 11, 12. Mr. Kimmelman, leaves me almost in a state of mild shock, but that we can go into later. But the point here is two-fold. And I am going to direct these comments for as much as my 5 minutes will go to Mr. Jacobs and Mr. Salsbury and Mr. Boggs.

Isn't it true that, first of all, section 271 is going to be compromised? Isn't it also true that we should give enforcement a chance before we start legislating? And how do we have to pass this bill to get to the equality and the fairness in the marketplace and yet give the consumers a shot, which they are not getting now? And there you have it. And let's go at it as quickly as we can.

Mr. SALSBURY. Let me very quickly respond that from MCI WorldCom's perspective, this is not a good deal, trading the clear protection of saying that the RBOCs have to open their networks before they could enter these markets as opposed to having the opportunity to sue them later on if they do something wrong. That is a bad deal for consumers.

So I agree with what you said, Congressman Conyers. But, I would also say that what we are seeing now is we are on the verge of having the benefits of section 271 and the Telecom Act being achieved. And it would be a particularly inopportune time now, I think, to legislate.

Mr. CONYERS. Mr. Jacobs.

Mr. JACOBS. Thank you. When you mentioned section 271 being compromised, I assume you mean if the RBOCs are allowed to do data transport across LATA boundaries. In the written testimony I submitted, I put in two exhibits on the very last page. And these summarize our opinions about what the growth of the industry is going to be over the next 5 years.

What you will see there is that if you actually look at what is driving growth in the telecom industry in general, 60 percent of that growth in the next 5 years is going to come out of data and Internet products, whereas voice is going to drive very, very little growth at all.

And when you then look in more detail at what is going on with interLATA services, you have got voice services and data services and Internet services. If you look there, 85 percent of the growth in all interLATA services is going to be driven by data and Internet products with only 15 percent of the growth coming out of voice products in the next 5 years.

So the question is: What are the RBOCs really after in getting interLATA? Now, yes, you want to get in the voice business, even though it is not growing, because it is large. But if you want to talk about getting a piece of the growth, that is really the data products.

So my question to you is, again from a policy standpoint: If what you are after is trying to incent the RBOCs to open their markets, then the question is do you want to open them up to 85 percent of the growth in the market without having to do so first? That would be my point on that.

Mr. CONYERS. Tim Boggs, last sentence.

Mr. BOGGS. I will try to answer your concern about consumers, which I think really goes to the choice question. If we are concerned here today about the viability of DSL, the reality of opportunities for consumers to choose different options for broadband, different from cable, I would point to three developments in the last week.

One, the chief technology officer of AOL gave a speech in which he pointed to his expectation, strong expectation, that we consumers will face a blend of broadband opportunities: cable, DSL, and wireless. And he is putting his money where his mouth is. They have invested in the latter two, and they intend to see them happen.

Secondly, today, page 1, column 1 of the New York Times reports on the SBC deal with the FCC that permits them to acquire Ameritech. In the conditions of that deal, SBC, a company of market capitalization of $180 billion, has agreed to set up a separate subsidiary that will offer DSL aggressively to customers, has embrace d that business plan. They are not goofing around in their markets. We feel them breathing down our necks.

Thirdly, to quote Commissioner Powell at the FCC, a thoughtful guy—he has looked really carefully at this; he doesn't see that there is any doubt that this is a vibrant and competitive market and in his speech on June 15 to a bar association, he lays out his view of that. It is a dynamic speech. I will send you all a copy of it because he is right on target. This is a competitive market. Consumers are going to have choices.

Mr. HYDE. Mr. Gekas.

Mr. GEKAS. I thank the Chair. It seems that every time we turn around these days, particularly in our committee, we have problems revolving around the role of the FCC in a hundred different ways, including antitrust merger, whole host of things; and I have been personally dissatisfied with the inability to reach conclusions about it. I would like to try to reach a conclusion today on the roie of the FCC in the current situation which prompts the gentlemen from Virginia on my right and on my left to proceed along these lines.

General Barr, could you apprise me of what role does the FCC now play, in your view, hindering or putting hurdles in the way of the Boucher-Goodlatte approaches?

Mr. BARR. I think the FCC is contributing to the obstacles for competition in the Internet right now. This is—let me portray it this way: Telephone companies have a traditional market that they are serving. It is about a $100 billion market, and its share of telecommunications is rapidly declining. Cable has a $60-plus billion market. But we have both evolved to be able to serve a third and different market and that is the Internet. The Internet is probably around a trillion dollar market in the near future. MCI's own vice chairman says that by 2004, 99 percent of telecommunications is going to be Internet, telephony will be 1 percent.

So we started off as a penguin in our telephone market; they started off as an ostrich in their cable market, but we have evolved into ducks on the Internet. We want more ducks. That is what this is all about.

What the FCC has done is it said, hmm, we are not going to let the telephone companies be ducks. We are going to use this as an opportunity to take the old telephone regulations and apply them to the Internet. And so you cannot compete on an even footing on the Internet with the cable companies.

But then they turn around and say to the cable companies, oh, this is something different than cable. Even though you have open access rules that apply to you, there was supposed to be a design to have diversity of programming. We are going to let you evade those open access rules because we are now going to call this Internet.

So you have this gross disparity of treatment which is frustrating the ability of the only other competitor out there, the telephone companies, to come in and deploy high bandwidths.

Mr. GEKAS. So that when Mr. Goodlatte in his bill actually mandates that the commission will have no authority with respect to this, that it amounts to deregulation, that would take the FCC out of the open access question?

Mr. BARR. Absolutely. Let me just make a comment about this argument on section 271. It presents a very flat policy decision for this Congress. Yes, in our old market, we are still functioning as a telephone company on our public switch network, and we are prohibited by the bill from getting into long distance voice. And we still have those obligations and we are spending hundreds of millions of dollars to try to retrofit our system, so instead of serving one it can serve many suppliers. That, however, is a dwindling market which the long distance companies say themselves is going to be 1 percent of telecommunications by 2004.

And the issue you have to face is to get an extra ounce of leverage to open up this increasingly niched market and get the maximum leverage to have open access here on the old telephony business, you are going to sacrifice competition in the telecommunications market of the 21st century which is going to be 98 percent of the telecommunications.

So let the cable guys run wild with the Internet. Let them forget about open access, because we want to impose the ultimate pressure on the telephone companies to put in open access on the tele-

phone side. Open access is coming on the telephone side. But what can't wait is getting that open access rule today in place on the Internet. You heard them say—you heard them say, you have to have open access to begin with. You can't rely on litigation after the fact. And we agree. You got to have an open access rule on the Internet. Let's not make the same mistake with the Internet we made with telephone and cable.

Mr. GEKAS. Mr. Chairman, I yield back the balance of my time.

Mr. HYDE. I thank the gentleman. Mr. Berman.

Mr. ROGAN. Mr. Chairman, before you recognize the gentleman from California, may I make a unanimous consent request that the members of the panel be allowed to submit questions in writing, and then include those questions and answers in the record? Many of us have to leave before we will have a chance to do questioning.

Mr. HYDE. You mean members of the committee?

Mr. ROGAN. Members of the committee.

Mr. HYDE. Would like to submit questions? Surely. Without objection.

Mr. Berman.

Mr. BERMAN. Mr. Cleland, you said the nature of investments will shift if we pass this bill. How will they shift?

Mr. CLELAND. Well, right now the marketplace has three basic assumptions about the cable industry and that is number one they have the best broadband pipe into the home for data and for video. The second assumption is that they are not going to be open for competition, and the third assumption is that they are going to be able to leverage that power unfettered by any government enforcement.

And so the marketplace right now, I think, assumes that cable is high-growth monopoly and it doesn't get any better than that. So that is the marketplace perception right now. They don't believe that the Goodlatte-Boucher bill will have a chance of passing or that the regulators will ultimately open. So they see a very rosy outlook. And that if there is access required, there probably would be some type of pull-back because those assumptions would be proven to be faulty.

Mr. BERMAN. So that the opponents of that part of Goodlatte-Boucher are correct when they say this will hurt investment in us, but your argument would be is that they have an unfair advantage at this point. And so, yes, it will hurt, but it will hurt because it will equalize things.

Mr. CLELAND. Well, what it is it will shift. And the sense right now is that investment is encouraged by cable operators right now. It is not encouraged by Internet or electronic commerce players. So right now we have a policy that encourages investment by the very few and powerfully discourages investment by the world.

Mr. BERMAN. On the issue of the world that Mr. Jacobs describes where only AT&T can provide the real competition for local phone service, I wonder how does that make Mr. Windhausen feel, but—or I guess maybe Mr. Salsbury, since I understand part of your company is also getting into all of this, by the way. As you get into this and you chip away at this market share, is there anything that obligates you to provide access to all Internet service providers?

Mr. WINDHAUSEN. Well, first off, Mr. Berman, you are correct that Mr. Jacobs' statement that only AT&T is going to be able to be a competitor did not make me feel very good. I represent a lot of companies who are out there competing in that marketplace today. AT&T is certainly a very vibrant and strong competitor, but we have a lot of companies that can go toe to toe with AT&T in that local market place and are doing that today.

As to your substantive question about any obligation that we encounter, the answer is that all of our companies are common carriers. And that means that we have an obligation to serve the public and provide transmission for whatever traffic it is that consumers want to put on our systems.

Mr. BERMAN. And this would be true in DSL as well as in——

Mr. WINDHAUSEN. That is correct. DSL is just one of many data services that are out there—voice and data and video services that are on our network and we provide services to any consumer who wishes to put traffic on our network who wishes to do so, and we are legally obligated to do so.

Mr. BERMAN. I guess my last question, we have heard very little talk, just a brief reference at the end of the whole issue of the satellite role in Internet. And we did notice the AOL investment. And is this the third way? Is this a—tell us what the implications of this are in terms of broadband quick communication, speedy passage of data.

Mr. VRADENBURG. I think, Mr. Berman, that under the current state of technologies, the satellite has got a somewhat clever hybrid capability, that is, fast download speeds; but a telephone return path that does not represent a true two-way capability-like is potentially available on DSL and cable.

I think that potential true two-way capability off the satellite is probably 4 to 5 years away in the consumer marketplace. So I think that it provides a good but not fully comparable service, particularly to rural areas and other areas that may not be served effectively in the near term by DSL and cable modems. And I think in the longer term, there is a real prospect in 4 to 5 years, which is of course the entire history of the Internet to date, but in 4 or 5 years that there will be a two-way capability from the satellite.

Mr. HYDE. Mr. Goodlatte.

Mr. CLELAND. Mr. Chairman, could I add one point I think that would be of very much use to the committee and that is the chart that is at the end of my testimony. We show the whole broadband market, essentially the wire line, wireless, and satellite; and it shows what the opportunities are, where the subscribers are, and when and where it will be available. And that answers your question and also shows us how fast the pipes are and how much they cost. It is on one page. It is a very useful summary to get a big picture of what is going on.

Mr. HYDE. Thank you very much. Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. I want to commend all of the witnesses today for their contribution. I think this has been an excellent debate and discussion. Mr. Rosenblum, I particularly want to welcome AT&T. I want to make it clear that I welcome AT&T's investment in rolling out broadband services. I think

it is a tremendous opportunity, and I want to see your company and others continue to do that.

But I am very concerned about the model that I perceive that you are utilizing. For years AT&T has been up here on Capitol Hill telling us that local telephone companies should open their lines to foster competition. So how can you come up here today with a straight face and tell us that we should deny—that you should have the right to deny access to Internet service provider competitors, in fact, attempting to destroy competition in the Internet service market?

Mr. ROSENBLUM. Congressman, obviously I understand the question and sort of expected it; but to be honest with you I think there is a huge difference between what we are trying to do and what the incumbent telephone companies are doing.

In general, we have always come before the Congress arguing for competition and market forces. In the case of the incumbent local telephone companies in the 1996 Telecom Act, Congress made a judgment, which we wholeheartedly endorse, that because of the 100-year monopoly history of the local telephone business and the absolute importance to consumers of getting competition going in that market, a special set of rules and tools would be applied to those companies requiring them to unbundle, requiring them to provide access, at least until competition could develop and market forces would then take over to assure that consumers get——

Mr. GOODLATTE. Mr. Rosenblum, cable has not been around as long as telephone has, but as long as it has been around in almost every community in this country that it exists, it exists as a monopoly. So why should there be a distinction between the access to your lines which you want to have an exclusive bundling right and they don't? They have to open their lines up to America Online, they have to open their lines up to Roanoke.com, a small Internet service provider owned by a local newspaper in my district, or thousands of other Internet service providers around the country.

You want to have a completely different model where you say, you want our high-speed access to the Internet which is 50 times faster than what they can offer, great, you also have to buy our Internet service provider, or service @Home.

Why should you be treated differently when you come up here constantly; and, in fact, you are really arguing the same thing today with regards to the phone companies: don't cut them loose; don't let them compete. Make them do certain things to open up their line, but don't make us do it.

How do you defend that?

Mr. ROSENBLUM. Well, Congressman, let me defend it on two levels. First, I think it is not the case today that we are providing a closed platform, nor do we ever want to provide a closed platform. I think, as Mr. Boggs pointed out and as I tried to in my comments, anyone who uses these @Home or Road Runner services today can get on the Internet without any restriction or limitation and from the Internet get anywhere the Internet can take you.

Mr. GOODLATTE. But you have to pay extra.

Mr. ROSENBLUM. Well, you have to pay extra if someone else puts a Web site up that charges money. Some content providers like AOL have established Web sites that charge for access. Other

providers like Yahoo have Web sites that don't charge for access. It is really up to the Internet provider who establishes a Web site to determine whether that charge is imposed. As Mr. Boggs also said our customers can and do design the service——

Mr. GOODLATTE. But Web site operators are not necessarily Internet service providers. If you want to be an Internet service provider and compete head to head with @Home, you have got to compete at the disadvantage of telling your customers that you have to pay extra to do it if you are going to do it on the cable system, which is completely different than the narrowband because it is 50 times faster.

Mr. ROSENBLUM. Congressman, I understand the point. Right now there are literally thousands of Internet service providers of all sizes and shapes and descriptions. What they all seem to have in common is they rely 97 to 98 percent on narrowband dial-up access. A point that really shouldn't get lost here is when we succeed in deploying a telephony capability over this cable platform we are investing in, that will allow customers to have an additional choice of narrowband dial-up access. And that, like Mr. Windhausen's clients, will also be a common carrier service that will give customers choice of all ISP's and will also for the first time have this high-speed broadband choice.

Let me step back a little bit because I said there are two levels on which I wanted to defend this. And AT&T really is kind of a late comer to the cable industry, and we see it a little bit differently. We don't view this as a cable business or a monopoly. We see a cable industry and telephone industry that have spent many, many years assiduously not competing in each other's businesses.

Mr. GOODLATTE. My time is running out rapidly. Let me just say I understand why you would not want to see this as a monopoly. I hope you understand why a great many people in this room do see that as a monopoly and why the access to it being denied to open competition which the phone companies are required to provide and I think have spurred the growth of the Internet has a very different tenor than when you come here and say, well, it is really not a monopoly. It is a monopoly in terms of the access that you have and the bundling that you are attempting to do when you say that other folks can't get on the line with you. You are denying consumers choices when you say they have got to pay extra to get somebody else's service.

Mr. HYDE. Mr. Boucher.

Mr. BOUCHER. Thank you, Mr. Chairman. I also want to commend all the witnesses who have spoken with us this morning for their very thoughtful and carefully prepared statements. I think this has been a truly excellent opening discussion on the major policy challenges that confront the Internet today.

Mr. Barr, I would like to give you an opportunity and the time that I have, limited as it is, to respond to the statements that were made by a number of the witnesses this morning, objecting to the provisions in Mr. Goodlatte's and my legislation that would create more competition in the offering of backbone services, by enabling the Bell operating companies to offer data across LATA boundaries even in advance of getting permission under section 271 of the

1996 act to offer all services including voice-based long distance across LATA boundaries.

And as you answer that, let me just suggest a couple of areas where I think some information might be helpful. First of all, I am a representative of a rural district. And there are many parts of rural America, including my district, where it is frankly awkward to provide backbone services because of these interLATA restrictions.

How could the ability of Bell operating companies to deliver data across LATA boundaries promote more affordable backbone services and, therefore, more affordable Internet access in rural America?

Secondly, describe for us, if you would, the way in which a concentration and the ownership of the Internet backbone could threaten the peering arrangements that keep Internet traffic flowing for free and without charge among the various segments of the backbone and how our provision is an answer to that challenge.

If you would also please talk about how this provision is entirely consistent with our intent in passing the 1996 act, since we accept from these services across LATA boundaries that are voice-based traditional long distance; and then finally, if you would, comment on how you can segregate for purposes of enforcing our restriction on the offering of voice-based long distance, until section 271 approval is obtained, the data traffic on the one hand, the voice-based long distance traffic on the other. If there is an easy way to do it, we would like your description.

Mr. BARR. Starting with the last part of your question, the Goodlatte-Boucher bill continues to enforce section 271 requirements. But what it does—and this is very important—is it does segregate out the traditional telephone market from the Internet market. And it says that the telephone companies cannot sell voice-only products over the Internet. So it keeps that cabining of these two markets.

Then it brings competition into the Internet market. This is very important for people to understand. Because the heart of competition on the back bone—on the Internet is multiplicity of backbone providers. There are only two kinds of communications systems you can have. You can either have a monopoly, that ubiquity, or you can have a network of networks.

Think about the post office. How do I make sure that I can communicate and send a letter to anybody in the world or anywhere in the United States? You have one monopoly. The other way to do it is to have multiplicity of providers. But if you do that, they have to have agreements to transfer the traffic back and forth, the mail. And they have to have incentive to do that.

If one of them gets too large or if that market gets too concentrated, then they can close off that market and prevent other players from playing. Just think if there were one big 60 percent post office and then three or four 10 percents and that 60 percent post office said I am going to stop delivering mail to you guys. Everyone would then shift over to the big post office. This is the dynamic behind and the need to have many backbones. And this was the whole vision of the Internet.

Well, I tell you what. Because of the restrictions on the bulk of the industry, the local companies, from coming in and providing backbone service on the Internet, we have gone from 30 to five. And guess who the top three are? The IXE's. And, therefore, a lot of communities are not being served with backbone. For example, the whole State of West Virginia, they don't have a pop in it.

The way to get competition on the backbone is to allow the RBOCs into that business, allow them to carry that traffic. And then you will get more competition in the backbone, and that empowers every single level of the Internet to have more competition.

Mr. HYDE. Mr. Hutchinson. I am sorry. Mr. Chabot. I didn't see you down there.

Mr. CHABOT. Thank you, Mr. Chairman. Mr. Vradenburg, if broadband access is truly an essential facility, then shouldn't a garden variety lawsuit brought under section 2 of the Sherman Act solve the problem?

Mr. VRADENBURG. I think, Congressman, that in fact what we are confronted here with is a broader question about exactly how government policy in this area is going to be across these platforms. It does seem to me that we have a demonstrated example in the Internet of how openness has worked, and I think it is quick and easy to extend that.

We are not personally sort of in the litigation game. I mean, AT&T has warned us that, in fact, they may be in the litigation game. We have not been in the litigation game. We think this Congress ought to address this question quickly in a nonregulatory mode with a quick and simple solution to the problem by taking litigation out of the game and the uncertainty associated with that over a number of years.

Mr. CHABOT. You are not saying or are you—do you think antitrust laws, do you think they function properly? Do you think they need to be changed? If that is not your view of antitrust laws, why are you seeking legislation that would actually amend the Sherman act?

Mr. VRADENBURG. Well, Congressman, as we have indicated, we think that the antitrust act in its broad constitutional kind of scope is certainly adequate in the general proposition, but that, in fact, here we have a very precise question and a very precise problem and I think a fairly simple and clear answer.

This is a situation where the problem is big enough—big enough to be identified but still small enough to be solved. If one waited for several years for a piece of antitrust litigation to wind its way through the court and then tried to address whatever the outcome of that by whoever lost that lawsuit by legislation at that time, we would have passed this problem.

I think the inevitable consequence of Congress not acting quickly and in addressing this thing in a straightforward manner, as Congressman Goodlatte and Boucher have done, is that there will be continued consolidation around the wire line owners, continued acquisitions by AT&T and in the cable industry, continued consolidation in the telephone industry; and we won't have competition for the Internet that, in fact, we will be able to have if there is a quick, simple deregulatory and nonregulatory solution and Congressmen Goodlatte and Boucher have put forward.

Mr. CHABOT. By singling out Internet service providers as a protected class of entrepreneurs, won't the legislation generate momentum for other industries to seek special antitrust status?

Mr. VRADENBURG. Congressman, I think what this bill does is try to set out as a protected class consumers. Because what this will do is permit every Internet service provider, whether it be cable owned, telephone company owned, or independent of either the wire line carriers to be able to access every customer and for every customer in this country who is interested in broadband high-speed Internet service to access every supplier. And in that instance it does seem to me that the solution is straightforward and quick, nonregulatory and, in fact, will protect consumers, not any particular player.

If one looks at the world today and said who is the protected class of companies here, look at AT&T's position. AT&T is in the long distance business and, in fact, is protected by existing laws from any competition from the local telephone companies. And on the other side, AT&T now entering the cable business is protected by the government in its monopoly status. So right at the moment if there is a protected class of person, indeed person, for the existing structure and the asymmetrical structure of the regulatory system, it is one company: it is AT&T.

Mr. CHABOT. Mr. Chairman, if it has already been said—I have got a little bit of time and it bears saying again—I think this panel on all sides has been particularly enlightening here this morning. And I think all have done a very good job in espousing their point of view. I yield back the balance of my time.

Mr. HYDE. Thank you. Mr. Scott, the gentlemen from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Boggs you indicated if you sign up for cable access that you could get AOL. Do you get it automatically, Road Runner service?

Mr. BOGGS. Yes, sir.

Mr. SCOTT. Is there a separate charge for Road Runner?

Mr. BOGGS. If you would like I could go through the charges.

Mr. SCOTT. Well, I am with another cable service, and we get @Home with that service. Now what is wrong with a separate charge for Road Runner? And can you get Road Runner through the telephone high-speed access line?

Mr. BOGGS. The architecture that we have used for this system is designed to try to meet the mix of needs that a consumer in a particular community places on us. Remember first, it is primarily a video service. Congress had pressed us to have a reliable and efficient video service that doesn't present some of the complaints of the past.

Secondly, we are charged by our shareholders and by Congress to some extent with trying to provide telephone service over this same network. We are certainly encouraged by you and Congress to provide high definition television and digital television. So the capacity of this plant that we have built for this community is limited. It has some limits placed on it. We have designed it in such a way that we believe it can handle all of the traffic of the customers of that community, of all neighborhoods in the community for high-speed Internet access.

We do not believe that the architecture will permit us in an efficient and effective way to open up the plant for interconnections right at the head end of the cable system. However, every customer by using the Internet can bypass us entirely, can take all of the Time Warner content and just ignore it and go exactly to where they want.

Mr. SCOTT. I think the point has been made if there is not a separate charge for it, you get it; and if you wanted another service, you would have to pay for that extra.

Mr. BOGGS. Only if the other service provider chooses to charge you for it. Much of the Internet is free, of course.

Mr. SCOTT. Is there any prohibitions, any reason why you can't have a separate charge that you could avoid if you don't want Road Runner?

Mr. BOGGS. If you don't—if you think of Road Runner as both a content and a facility, the content is frankly minimal, and it has little cost associated with it. The expense to us is the building out of this network, maintaining the servers to keep it. Think of Road Runner as an access——

Mr. SCOTT. You can't do a separate charge for Road Runner?

Mr. BOGGS. No, sir.

Mr. SCOTT. This area—I don't know who this is going to be aimed at, but we have a quick-changing technology that requires a lot of research and development and investments in the pharmaceutical area. The way we encourage that investment is to give someone the absolute right to benefit from their investment for 17 years. And after 17 years anybody can copy it and use it. And that is supposed to be in the best interest of the consumer.

How does allowing someone who did not make the research and development investment get into the telephone or cable benefit, how does that encourage a long-term investment in this area? And whether or not the consumer is better off or worse off if you allow people who did not make the investment to get into the—to benefit from the investment?

Mr. KIMMELMAN. If I could just jump in I want to say that I don't think anyone is talking about not allowing people to charge a fair price for use of their facilities. The issue is whether you have the ability to prevent others from having equal access to consumers or consumers to have equal access to different vendors. I don't think there is any question of anyone being denied a fair return on their investment.

Mr. BARR. Can I respond to that? Because it is the same as the separate price issue that you asked. Which is the investment in the local transport. There is no question they are going to get paid for it no matter who uses it. The question is whether they can then leverage from that and say by the way, we have developed—Merck has developed this drug for cancer; and, by the way, if you want to get treated for cancer and want the drug, you also have to go to hospitals in which we have a financial interest.

There is no question they will get paid for the drug. They will get paid for the local transport no matter who uses it. We are willing to pay them the full cost of using that local transport.

Mr. VRADENBURG. Can I offer an additional word. About 40 percent, 50 percent of our costs are payments for infrastructure, that

is, of the 2,195 a significant portion of that we pay to a variety of long-lease line carriers and to the ILEC for business lines or CLECs. So we are every year paying billions of dollars for infrastructure costs.

What will help us drive costs down and consumer prices down is if we have competition in that infrastructure. And the only way to do that since, if we go out today and say we want some high-speed lines, we can go get DSL lines, we can get to the marketplace, but if we can get DSL lines and cable lines competitive with each other, we can drive down those local transport costs, drive down our costs, drive down costs to consumers. But at the moment we don't have any competition in that last mile.

We think we can get it with the Goodlatte-Boucher bill because that will mean that cable will sell us transport lines, telephone companies will sell us transport lines. If we can acquire them elsewhere, terrific; but in the end we get some competition in that last-mile facility.

Mr. HYDE. Mr. Hutchinson.

Mr. HUTCHINSON. Thank you, Mr. Chairman. I hope to ask three questions. Let me start with Mr. Jacobs.

Mr. Salsbury testified—I will read his statement and ask you to respond to it. He testified that the real problem is that 3 years after the fact, the local markets for voice and data services are not yet open. The solution to that very real problem is vigorous enforcement of the laws, not new legislation.

Is the problem with the RBOCs and their failure to open up the local market or is the problem the FCC?

Mr. JACOBS. I think that the problem has been that the RBOCs have perceived that for some period of time not to truly be in their interest to proactively open up. If you look at what happened when the FCC tried to push UNE–P—now, without talking about whether UNE–P is reasonable or not reasonable, one thing about UNE–P and, again, that is the highly discounted form of resale, that was going to incent MCI, Sprint, and AT&T all to attack the residential and the business markets. The RBOCs went to court to stop that because they believed it wasn't in their interest to open up the markets in that way.

Mr. HUTCHINSON. How are they doing now?

Mr. JACOBS. Well, now things have changed because now that AT&T is pursuing its strategy rather vigorously having already proposed to invest more than $100 billion in addition to all the costs of upgrades, etcetera. Now the RBOCs are pushing quite aggressively to get their long distance deals done. It is only within that context that UNE–P has arisen. It has arisen in New York State where Bell Atlantic agreed to UNE–P. And that is why MCI is serving the residential markets.

Mr. HUTCHINSON. Thank you. Same question to Mr. Barr. In your testimony you indicated that if the existing interLATA restrictions do not apply to data, the Bells would be able to bring high-speed Internet access to rural areas much sooner. Yet today the *Arkansas Democrat Gazette* reports that GTE is selling 213,000 phone lines in Arkansas at $843 million; the article states that GTE, like other major telephone companies, is shedding its less profitable

rural customers and concentrating on business data services, the Internet, and so on to urban customers.

How is this going to help the rural customers? Your vacating the lines in Arkansas, what does it portend for the future if you have this kind of access that you want?

Mr. BARR. The sell-off of some of our rural properties—we are still preponderantly a rural and suburban company. We only have two downtown areas. But that sell-off is because of FCC policies that are not providing for universal service payments. We are expected to serve rural areas below cost, but part of that quid pro quo was that we would get paid out of a universal service fund for the difference. That has been taken away from us and hasn't been replaced.

The Telecom Act said they had to do it very quickly, and they have already postponed doing any universal service reform until 2000. So that is a different issue. But look at the financial incentives for telephone company versus AT&T. We agree on something very fundamental, which is you cannot get a financial return if you can only look to the local transport revenues. You can't get a financial return.

So what is their solution? Their solution is you have to let us mandatorily capture all the vertical stream of revenues, lock in the customer, give them no choice, get all those ISP revenues, lock in the backbone revenues.

Over on the telephone side, though, we are required to look just to the local revenues by the FCC, and to go to Congressman Scott's point, the FCC has promulgated rules that if we make an investment we have to turn over to competitors at steep discounts. In fact, they just came out and said SPC has turn over ADSL at a 50 percent discount to competitors. Those are massive burdens.

Mr. HUTCHINSON. Are you saying that if this legislation passed, you would have a greater incentive to invest in the rural areas?

Mr. BARR. You could make money by building ADSL and also by transporting that data. That is exactly what AT&T is saying. The only difference is we are saying we don't have to lock our customers in. We don't have to guaranty ourselves those revenues. What we want to do is compete. Let everyone compete at every level including us.

Mr. HUTCHINSON. Is that a yes?

Mr. BARR. Yes.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Mr. HYDE. Thank you. Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I am reminded of a comment that I made to some of my lawyer friends about the difference between practicing law and being in Congress. And my response to them was in a trial you never ask a question you don't know the answer to. I get to ask questions I don't know even if the question makes sense much less know the answer to. So I am going to ask one here.

It always seems to me to be questionable—I am not saying that—I am not on one side or the other of this issue. But it seems to me to always be questionable to change a legal standard that has been out there for a long, long time. It seems to me that going back to these bills, that is what we are doing. We are changing a

presumption in the law that might or might not be justifiable. The question I have, is there such a changed presumption—would there be such a changed presumption if we were talking about AT&T getting access to DSL? What is the law?

I don't even know what DSL is, but I take it that it is the competitor to what we are here talking about. And it seems to me if it is fair to give this presumption, insofar as broadband is concerned, it would be fair to give the presumption insofar as DSL is concerned.

Now, I have no idea of whether such a presumption exists one way or another, but perhaps I could hear from—let's see. We had a couple of lawyers on this panel—I could hear from Mr. Barr on it. And then I can hear from—who is my lawyer on the other side? Mr. Rosenbaum. Give me your take on that, Mr. Barr, and then I will hear from Mr. Rosenbaum on the other side.

Mr. BARR. Both under existing law and under the Goodlatte-Boucher bill, telephone companies when they install the gizmos that create ADSL, which is the high-speed service, have to make those available to competitors including AT&T. So AT&T—there are two kinds of open access. One is the kind we are asking for them to engage in. It is called—I would call it open access "light," which at least just delivers the traffic to other people. Okay. We have to do that. But we also have an open access requirement; I call it open access "heavy."

Mr. WATT. You are answering a policy question. I am asking a legal.

Mr. BARR. We have the obligation.

Mr. WATT. You have an obligation, but is there a presumption if you don't do it, are you presumed to be in violation of the Sherman Antitrust Law?

Mr. BARR. That was the whole presumption in the Telecom Act of 1996.

Mr. WATT. Is there comparable language?

Mr. BARR. Yes, in this statute there is. In the Goodlatte bill we are subject to the same presumption.

Mr. WATT. Let me hear from Mr. Rosenblum. I am sorry I have been mispronouncing it.

Mr. ROSENBLUM. Congressman, I answer to just about anything. That is just fine.

There is no presumption of antitrust violation that attaches when telephone companies don't live up to their obligations under the Telecommunications Act. And I would respectfully submit that has been a very good thing for the incumbent local telephone companies, I think, as a number of the witnesses have discussed today. There has been a 3-year history of these companies not living up to their obligations under the Telecommunications Act, and there is no presumption of an antitrust violation that applies in that case.

What concerns us about this legislation, exactly as you have identified it, is it does change established laws by creating presumptions of antitrust violations that may not make a lot of sense. Normally in an antitrust case, you first look to see whether there is a relevant market, whether customers have substitute products or services, all of that would be—would be wiped off the books,

frankly, under the legislation; and a presumption of a violation would apply merely because a single broadband provider didn't offer the same terms for interconnection to one ISP. And that is our biggest concern with the antitrust provisions.

Mr. MCCOLLUM. [Presiding.] Thank you, Mr. Watt.

Mr. Cannon, you are recognized for 5 minutes.

Mr. CANNON. Thank you, Mr. Chairman. While there are some different views here, I am almost ecstatic that we are having this debate and the state of competition has gotten us to the point that we are actually talking about these issues here.

I would like to ask a few questions if the panelists could keep it relatively short and to the point. Mr. Vradenburg, you are company CEO. Speaking in support of the Internet, to the Tax Freedom Act, you said last fall it would be a big mistake to have 30,000 taxing jurisdictions impose their own laws, rules, and rates on the Internet. Why then does AOL believe that it would make sense to have a similar number of jurisdictions impose open-access schemes on the cable industry?

Mr. VRADENBURG. Congressman, we have advocated, as you know, an open-access regime publicly. And in fact, we would hope that an open-access regime would be adopted as the national policy. Failing any national leadership on this subject, it is clear that the consumers out there reflecting their views as citizens are urging cities to take a hold of this issue because they are not getting any response out of Washington. And they want choice and competition in their cable services.

Mr. CANNON. Thank you.

Mr. Jacobs, your firm has suggested that if the cable industry does not build out its broadband pipeline, the RBOCs likely will not meet the competitive challenge. Do you stand behind that assessment? And would the imposition of open cable obligations tend to retard cable's incentive to invest in these new broadband facilities?

Mr. JACOBS. Yes. The problem with open cable is when you have the government stepping in to set the prices, you have total uncertainty and you don't necessarily have the capability to get a return on your invested capital. If you are not going to get a return, your shareholders won't let you invest. If you just look at the plain and simple fact, ADSL is only now being aggressively deployed and further investments are now being made by the RBOCs to make it ubiquitous.

I don't think the time is totally coincidental that it is coming at the same time that cable is now just getting built out.

Mr. CANNON. But it is thrilling that it is coming. It is thrilling from both sides.

Mr. Cleland. I am skeptical of the wisdom of any policy that seeks to increase the regulatory burden on new entrants especially in an industry as complex as high-speed Internet access. Shouldn't our attention be focused instead on reducing regulatory burdens that prevent existing firms from competing in this marketplace?

If you agree, what suggestions would you offer to this committee to help us eliminate burdensome and anticompetitive regulation in the area of high-speed Internet access?

Mr. CLELAND. Well, I think in general we should be focusing on what the goal is and that is a competitive, freely competitive innovative marketplace. And deregulation is a very powerful tool that should be used aggressively in many instances. However, we also have a body of a century of antitrust law which says that there is something else to fear besides government regulation, and that is anticompetitive behavior by companies, by monopolies. So there is a balance.

I am very much, you know, a pro-deregulatory type of person. Let the market work. However, in certain instances small competitors can't compete unless the government enables it. John Windhausen's association would not be an association had the government not enabled the competitive local exchange industry to emerge in a local telco monopoly. The long distance industry would not exist had not the government broke up AT&T. And so they are not mutually exclusive. You need to look at them in tandem.

Mr. CANNON. Mr. Cleland, any legislation that mandates open access is unlikely to achieve that goal unless the law also requires that the price and terms and other conditions of the sale are reasonable. But doesn't that just pave the way for intrusive and burdensome price regulation?

Mr. CLELAND. Thanks for asking that question because everybody thinks that this leads down the line to common carrier regulation. There is a very simple nonregulatory solution, and that is one sentence that says we need open access on a nondiscriminatory basis.

Now, if AT&T did that, it would have to have @Home be charged, just like AOL, just like anybody else. AT&T would have complete freedom if they wanted to set $1,000 fee for everybody they could. It wouldn't sell any DSL. But if they wanted to sell a $10 fee, everybody could get it on the exact same terms. That is the issue here, they don't want to be able—you shouldn't allow yourself to self-deal when you are a monopoly. If there is one price, everybody should have the same price.

Mr. HYDE. [Presiding.] The gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. I have found this panel to be very interesting. I think all of us on both sides of the aisle agree that the best way to deploy broadband is to have vigorous competition in the marketplace. That's how we will deliver broadband. The only question is how to achieve that competition. This has been a very interesting discussion today. This morning the *San Jose Mercury News* had an editorial on this subject. I ask unanimous consent if I may, Mr. Chairman, to make this editorial a part of the record.

Mr. HYDE. Without objection.

[The information referred to follows:]

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SAN JOSE MERCURY NEWS

WHY CABLE SHOULDN'T BE SHACKLED IN THE FIGHT FOR INTERNET EYEBALLS

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The opinion of the Mercury News

THE titans of the media are racing to bring you a faster, lusher, video-rich Internet.

It's a full-scale, multibillion-dollar battle for market share and viewers' "eyeballs." The news last week that America Online will invest heavily in the satellite services DirecTV and DirecPC added another megaton to the arsenal of money.
In the next few years, if the competition plays out right for consumers, an array of providers will deliver the Internet by phone, cable or satellite, at speeds of up to 80 times today's 28K dial-up modem.

But if competition fizzles, the public could end up with a monopoly or a duopoly, with a few behemoths controlling the pipes or pathways -- perhaps even the content -- to your home.

That possibility has created a dilemma among regulators, who are split over what to do with cable, the industry that many observers predict will overwhelm the others in the delivery of high-speed data services known as broadband. Some local cable authorities, still scarred from past cable wars, want to clamp down now, on the assumption that cable will become an Internet monopoly. The Federal Communications Commission wants to let cable be until there is evidence of dominance or harm.

We say do both. Set some rules now but leave the market basically alone. Tighten the reins but give the industry enough cable to establish -- or hang -- itself, as it chooses.

Though a tiny player now, the cable industry appears positioned to come out on top. It's got a fat pipe to handle the Internet's voracious appetite for bandwidth, lines that pass by 95 percent of America's homes and businesses, and a large (if largely abused) customer base. It's also now got the might of telecommunications giant AT&T. In buying Tele-Communications Inc., the cable company for San Jose and much of the South Bay, and soon buying MediaOne Group, AT&T will be the nation's largest cable TV company.

AT&T-TCI has slowly begun unrolling its cable Internet service, though it hasn't reached San Jose yet. There's one catch: Customers can buy it only from one cable modem service, Excite@Home, which AT&T controls. Subscribers who want America Online or another Internet service provider (ISP) for e-mail and content must pay their charges on top of Excite@Home's $40 monthly fee.

Telephone companies don't have this built-in advantage; by law, they must open up their lines to all ISPs. That's why America Online, with 16 million members, and other ISPs and high-speed providers are flourishing. But Congress exempted the cable industry in the 1996 telecommunications law in order to encourage it to upgrade its system to enter the telephone and high-speed data markets.

The policy appears to be working. Whenever TCI or another cable company announces its Internet service, the local phone monopoly expedites the rolloutof digital subscriber lines, or DSL, telephony's high-speed equivalent, and sharply cuts the price. AOL's $1.5 billion investment in Hughes Electronics' satellites -- a direct response to being shut out of cable -- ensures another market option.

The Federal Communications Commission has taken a wait-and-see stance to regulation. It argues, with reason, that cable has signed up less than 1 percent of Internet users, so for now it obviously has no monopoly. The FCC also buys Wall Street's arguments that regulations would retard investment and slow development.

In response, AOL and the ISPs, armed with dire forecasts of cable's dominance, are waging a campaign in Congress and before local cable authorities. Give us equal access to compete and to preserve an unfiltered Internet, before it's too expensive to modify a built-out system, they argue.

Portland, Ore., was the first to agree and ordered TCI to open the franchise equally to all ISPs, with no price break for Excite@Home. Last month, in a decision that surprised the FCC, a federal district court said that Portland had the authority to act as it did.

We agree with the FCC that it, not Portland and thousands of localities, should set national policy for the cable industry. But we don't think that policy should be hands-off.

Instead, we favor a middle course, like the stance of the Los Angeles Information Technology Agency. Its report, released this month, recommends allowing cable companies to sell Internet linkups through their own ISPs, for now. But it advocates conditions that we believe the FCC should impose nationwide:

(box) Subscribers must have unrestricted access to all content on the Internet; they should be able to choose any site for a home page and, with a single click, get to any unaffiliated ISP. (Excite@Home currently allows this.)

(box) Unless for capacity reasons, there should be no time limits on downloading video. Time limits can be an excuse to ward off programming competition.

(box) There should be benchmarks for the FCC to consider requiring open access, if it appears that cable will establish a broadband monopoly.

The Internet will explode in richness in the next few years. How and who will deliver it to your TV and your computer is up for grabs. The FCC shouldn't pick and choose the winners, but it must protect consumers from dominance

Ms. LOFGREN. The editorial opposes the two bills that are the subject of this hearing. The editorial suggests, however, that there is a middle ground that is reflected in the Los Angeles Information Technology Agency Report and that ought to be pursued. Specifically, the editorial suggests that subscribers to cable broadband should have unrestricted access to all content on the Internet; that they should have the easy ability to choose their own home page; that there should be no time limits on downloading of video unless there is a capacity reason for such time limits; and that benchmarks ought to be set up for the FCC to consider down the line. On this last point, cable now has 1 percent of the market. You are not controlling the market at 1 percent. But at some point, it could be a concern. So maybe we ought to set some benchmarks.

I would like to hear, Mr. Jacobs, if you believe that this kind of a scheme would be a deterrent to the roll-out of broadband through the cable industry?

Mr. JACOBS. I think it is not impossible to assume that that could be helpful. I actually find that I am actually in agreement for once with the FCC and the way that they pursued this policy. I am not usually necessarily in agreement with them. But what they have done in this policy is they have sort of fired a shot across the bow of cable.

They have said, okay, you are incipient. You are brand new. We are going to give you a time to go and try and pursue your investments. But by the way, we always have the ability to come and regulate you if you behave in the Internet space the way you behaved in the programming space. I think that that is a fairly prudent strategy because you can always come in and regulate later. There is legitimate concern that perhaps billions of dollars would be spent creating proprietary systems that you won't be able to go back and reregulate later.

In fact, Mr. Barr has been one of the best proponents of showing that the systems are actually quite easy to open up. So in some sense he has actually argued the cable argument on that one, which I find a bit ironic. But I think the point is that it is in AT&T's and everybody else's interest to have as many people selling the service for them as possible. Negotiations, I believe, in the open marketplace will lead to that if they don't, come back and regulate them in 2 or 3 years.

Ms. LOFGREN. It seems to me as I listen to you, the question is not just where we end up, but also when we end up there. I am quite cognizant of the facts on this issue—as with so many other hi-tech issues—that we are very much in a transition phase. My friend John Dorr describes the Internet as the Big Bang. He says that we are at second 2—following the big bang—and I think that is a quite apt analogy. So what we do on this issue may just help for a short time. I doubt it is going to be the final answer.

The real concern I have is that we not take a misstep, that we not preclude the optimizing of opportunities through market forces, that we not misread the market forces.

I am wondering in terms of DSL—and I find this very frustrating—when it has been so slow to deploy. Only now, in my neighborhood in San Jose, is it being deployed. I am wondering if the deployment of DSL is providing competition. I am interested and en-

couraged that AOL is now pursuing satellite and wireless opportunities. I think this is a good development. I ask whether, in your judgment as a market analyst, Mr. Jacobs, whether this has been spurred, in part, by cable or by DSL?

Mr. JACOBS. I think AOL is a content provider. They are agnostic relative to what channels they get; they've got to get over every channel. The biggest threat to the company long term is that they get marginalized if they don't have broadband access. DSL is broadband access. The only question is: Will it be available to 100 percent of the market or only the current 40 to 50 percent that it can technologically address? That is a question of whether the RBOCs invest incrementally. They are now making such announcements that they are about to invest. I think they are going to wind up doing so as long as they are incented to. And the answer, by the way, technologically, if you offered me the different products, I would prefer DSL. It is a private line.

Ms. LOFGREN. It is a better technology.

Mr. JACOBS. It is a better technology. All of the bands. It is a better technology in the sense that cable technology is a shared medium. If your next-door neighbor is a bandwidth hog, then you won't be able to download your movies or your Web sites. So all things being equal, I think DSL is a better alternative.

Mr. HYDE. The gentlelady from California, Ms. Waters.

Ms. WATERS. Thank you very much, Mr. Chairman, and members. This is a good hearing, and it forces us to have to get involved and to pay attention and to learn all of the new technology so that we can be prepared to assist our constituents in whatever way that we can to make sure that there is easy access, affordability, and that they—well, basically that they have access and it is affordable and it is comprehensive.

I would like Mr. Barr to, again, tell me why there is something wrong with AT&T pursuing its strategy of acquiring cable companies such as Media One and why does that make them more able to provide services in ways that others can't and does this not give them the ability to have access in ways that the local telephone companies may not allow them.

Mr. BARR. AT&T can get access today over the telephone line because the regulatory requirements are that we provide both the line, and the bill provides for us providing condition loops to AT&T. There has been a two-step tactic that has been used twice before in this century: One, buy up a lot of local pipelines into the house; two, get a big footprint, which they are doing now with cable; and then two, adopt a closed system which says that you can only get our services over that system. And they did that in the beginning of this century with telephone.

And that is how you monopolize telephone. They said well, we don't want other people attaching telephones to this line so you have to use our telephone and you have to use our long distance. That is the only way we can get our investment back.

Same thing in 1980 with cable. This time they leveraged their power over the content, and they took control over the content. And there is virtually no independent video programmers around anymore. These guys now have a stranglehold on it. Then once they

get the positions in those markets, they can use it to reinforce their basic privacy over the pipeline.

The key point is—and I think a lesson was learned in the 1996 act and repeatedly in trying to deal with cable companies—is you got to acquire open access at the beginning. If you wait too long, there is an entrenchment and a distortion. Then it takes regulation to get rid of it.

Ms. WATERS. Let me hear from AT&T from that.

Mr. ROSENBLUM. Thank you very much. Apart from the irony of Mr. Barr representing a local telephone monopoly lecturing us on open markets and competition, I think what you have touched upon is absolutely right. As Mr. Jacobs pointed out in his testimony, although I am not sure the colorful rhetoric of AT&T being crushed is exactly the way I would have put it, we have invested a lot of money in cable systems. We are a newcomer to the cable business. We see cable not only as a way of distributing video but as a way of investing and building a brand new communications platform which everywhere we are successful will be no better than the second kid on the block.

We are going to be competing against monopolies who have 99 percent of the residential business today, companies like GTE and the Bell companies. We don't get our money back if we close our systems or if we turn our back on what consumers want. If AOL is able to get DSL service that gives consumers a choice of ISP's and consumers want that, we would be very, very ill-advised not to make sure consumers can also get what they want from us. We have an incentive to do that. I think the question today is not whether open or closed or competitive or noncompetitive, is right; it is do we need more rules and laws to achieve that or do we have the incentives we need already in place.

Ms. WATERS. Finally, Mr. Jacobs said that you are about to invest in ways that you are not going to be able to recoup your investment. Would you do that?

Mr. ROSENBLUM. Well, I guess I would certainly hope that we don't. But I think that the essence of what he said, at least to my way of looking at it, Representative Waters, is that we are taking a very big risk here. We are taking a very big risk to make this Telecommunications Act promise of competition a reality. No one else is investing the kind of money that we are in building the kinds of facilities for residential customers that we are now doing through the cable systems.

We are very optimistic about our ability to recover on our investment if you give us a chance to serve customers, but that means giving them what they want, not giving them what—not giving them what we tell them they want.

Mr. HYDE. The gentleman from Florida, Mr. McCollum.

Mr. MCCOLLUM. I apologize for missing some of the earlier hearing, but I am fascinated by the subject matter and have certainly perused a good deal of your testimony this morning, gentlemen. I must say that I am open minded about this matter. It is a matter of which both sides of the argument—and maybe there are three sides really—have a lot to say. And being somebody who likes to make the right decision, it makes it more difficult when you have

such good and persuasive advocates sitting here making those cases.

I have one question that probably because I was absent has been touched on briefly before. But I would like to revisit it for my own clarification and maybe ask Mr. Boggs and maybe Mr. Rosenblum to respond to this.

And that has to do with Mr. Barr's testimony and the points that he made that I thought were very explicit. I just would like clarification from your perspective where he says that many cable companies are compelling their customers to sign up, pay for, and use ISPs if they want to use a cable modem; and if they obtain a cable modem service, they must choose the company's cable, the cable company's ISP.

He goes on to say that there are three penalties for not doing this: Customers who want to use another ISP, they still have to pay for the cable company's ISP; in other words, they have to pay twice. Second, there is a performance penalty he says that traffic of customers who want to reach another ISP travels on the public Internet leading to lower-quality connection rather than on yours. And finally, he says by making customers go through the cable company's own ISP, they can block competitive products from reaching their customers.

I suppose, Mr. Boggs, I should direct that to you first. I only mention Mr. Rosenblum because I understand AT&T and Time Warner are kind of together collaborating these days on such matters. And I would like to know what your response is to what Mr. Barr has said. He said it very succinctly. And I don't know how succinct the answer has been to that.

Mr. BOGGS. I think it is a confused picture of what it is that Time Warner cable has built including throughout Florida where we have built a high-powered, high-speed network to serve the customers throughout the communities in which we have franchises.

This network permits our customers through the application of servers and interconnection facilities to get on to the Internet. It is in some ways an ISP itself. It also has local content that is provided by the cable company and by other local institutions: museums, schools and others.

If an individual is a customer of Time Warner cable and subscribes to the extra service called Road Runner, they may get access to anywhere in the network that they choose. If some other ISP or some other information provider, for example, Bloomberg News or some other site on the Internet chooses to permit that customer to get access to them for free, the customer enjoys that access.

If that third party chooses to charge them for that access, that is a choice that the customer can make with regard to that provider. It is not a choice that we have made to charge someone twice for something. We are charging them what we think is a fair price. By the way, it is usually about $40 per month in the marketplace. It varies somewhat from market to market. And it is a service that customers throng to when we roll it out in the community. We are now feeling some stiff competition from DSL. As Ms. Lofgren said, it is a challenging new service but we are not in the position of charging people twice for anything.

Mr. MCCOLLUM. Mr. Barr, do you want to respond to that before my time runs out here?

Mr. BARR. They are trying to confuse a site that you might go to like Yahoo versus an ISP. An ISP performs two functions. One, it is the intermediary that connects you to the backbone and helps you navigate over the Internet; and second, it provides you with content, some of its own content, but then it organizes other content. That is what an ISP is, like Mindspring, AOL, GTE.net.

What they have done is say, if you want to buy high bandwidth, you must pay the cost of our ISP, @Home. If you want to get to another ISP, forget this Yahoo nonsense, they are not an ISP. If you want to get to an ISP like GTE.net or AOL, you have to pay twice for their service. It is a double payment.

Mr. MCCOLLUM. Mr. Boggs, is that accurate? Do you dispute the characterization Mr. Barr has just given that?

Mr. BOGGS. No, I don't think it is accurate. I think the—in the provision of Internet services, there are lots of different services that are offered to a customer. There are many that are hybrid services that, in fact, have some ISP functions as well as having some content functions. And customers are free to choose them, using our network in any way that they wish.

People choose to become our customer, they are buying our service, they choose to make that purchase, that subscription, they are then free to make any other subscriptions that they wish to. If they choose not to buy our service and choose to subscribe to some other service, that is their choice. And they are making that choice every day of the week.

Mr. HYDE. The gentleman from Massachusetts, Mr. Meehan.

Mr. MEEHAN. Thank you, Mr. Chairman. I would like unanimous consent to submit a full statement into the record.

Mr. HYDE. Without objection.

[The prepared statement of Mr. Meehan follows:]

PREPARED STATEMENT OF HON. MARTIN T. MEEHAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. Chairman,

I would like to thank you for calling this hearing today. The issues presented by these two bills are very important to consumers and businesses alike as we reflect upon the success or failure of the 1996 Telecommunications Act and as we look forward to the state of the telecommunications industry as it evolves with changing technologies in the coming years.

It is self-evident to say that the telecommunications industry evolves and changes faster and with greater ramifications than any other sector of our economy. Internet use and access is booming; competition among Internet service providers is developing offering consumers real choices; the old phone company is unrecognizable and will become more unrecognizable still; and all of these developments make communications easier, cheaper and more reliable.

The importance of the bills that we are debating today, the "Internet Freedom Act" and the "Internet Growth and Development Act" cannot be overestimated. The two controversial provisions of the bills: allowing the regional bell companies to make long distance data transfers; and forcing the unbundling of the broadband cable lines strike me as watershed events in telecommunications policy if enacted.

My reaction to the two provisions differs. First, I will address permitting the regional bell companies (the "RBOCs") to compete in the long distance data market. Unfortunately, the promised sweeping changes contemplated in the 1996 Telecommunications Act, designed to present more choices, better service, and cheaper prices to consumers have not materialized. The reason for the lack of progress on this front can be and has been debated, but for my purposes, the only relevant point is that consumers have not seen the benefits. It seems that the only beneficiaries

have been the stockholders of the numerous companies who have been bought or who have merged since we passed the Act in 1996.

Permitting the RBOCs the ability to compete in data will spur investment in high speed DSL technology as the RBOCs will have an incentive to upgrade their networks. Consumers will benefit by receiving faster Internet service through a greater choice of providers.

Over half of today's traffic is data transmissions. Providing consumers with the fastest possible method for communicating data traffic is a necessity. This bill will incentivize the RBOCs to do just that.

Exempting data from the requirements of section 271 of the 1996 Telecommunications Act in light of the fact that no single RBOC has fulfilled the requirements of 271 in any single state gives me pause. I appreciate the argument that legislative relief would not be necessary if the RBOCs simply complied with the bill as envisioned.

On balance, however, the importance of consumers to receive better service and more choices outweighs my concerns. It is not wishful thinking to believe that given this relief, the RBOCs will still expeditiously pursue 271 compliance in every state.

Turning to the second major issue presented in this bill, the open cable access provision, my concerns here outweigh the benefits of the bill, at least in the short term. As in the data transmission section of the bill, my analysis focuses primarily on how it will affect consumers and their increased access to better, faster Internet connections.

In order for the companies currently investing in a broadband backbone to continue doing so, there must be a regulatory framework that encourages investment and innovation. At this point, the cable companies have invested untold dollars in providing cable service to their customers. Unbundling that network now when AOL serves millions more customers than its competitors is premature.

The FCC addressed this issue persuasively,when they reported,

> "We believe it is premature to conclude that there will not be competition in the consumer market for broadband. The preconditions for monopoly appear absent. Although the consumer market is in the early stages of development, we see the potential for this market to accommodate different technologies."

Congress does not need to wait until a monopoly is present to regulate the industry, but Congressional involvement at this early stage in the development of the Internet would be premature. I will be prepared to advocate opening the broadband backbone when the time comes; that time has not yet arrived.

Congress needs to address the two controversial provisions of this bill with a focus on how to best serve the consumers. Consumers will benefit by creating incentives for the RBOCs and the cable industry to continue deploying better and faster technology.

Mr. MEEHAN. I want to comment on two of the provisions we are discussing today. The first is allowing regional Bell companies to make long distance data transfers. The second is forcing the unbundling of the broadband cable lines. Obviously, these provisions have broad public policy implications. It seems to me—I support allowing the regional Bell companies to compete in the distance data market. Permitting the regional Bells the ability to compete in data seems to me is going to spur investment in high-speed digital subscriber line technology, and the company is going to have incentives to upgrade their networks. Consumers would benefit by receiving faster Internet service through an upgraded choice of providers.

With regard to the open cable access provision, my concerns here, at least in comparison—comparing them with the benefits of the bill, at least in the short term, are we have to develop a regulatory framework that encourages investment and innovation. At this point the cable companies have invested millions of dollars providing cable service to their customers. And if we unbundle the network, what does that mean for the short term? And it seems to be premature at this point.

And we have to look at this as how do we address these two provisions of the bill with a focus on how to best serve the consumer. Consumers obviously are going to benefit by creating incentives for the regional Bell companies and incentives for the cable industry to continue deploying better and faster technologies.

With all of this in mind, the number of mergers and investments in the telecommunications industry obviously are unparalleled in today's marketplace. Consumers in Massachusetts, for example, are impacted by the merger of Bell Atlantic and GTE and by AT&T's pending purchase of Media-One.

Mr. Barr, on behalf of GTE and, Mr. Rosenblum, on behalf of AT&T, could you please comment on the impact of these transactions; and I would also like to hear Mr. Kimmelman's response on behalf of the consumers.

Mr. BARR. You are talking about the major mergers?

Mr. MEEHAN. Yeah, at least as they affect Massachusetts and other States.

Mr. BARR. I think that the whole logic of the Telecom Act, really, was to promote some degree of consolidation, because if you tear away geographical restrictions and product line restrictions that have existed in the past—remember we sort of had a siloed telecom industry. Everyone was sort of operating within their own little silo. And the Telecom Act basically wants everybody mixing it up. And, therefore, it is logical that the most efficient way economically for companies to expand their geographic footprint and to expand their product line are through consolidations. That is the most efficient way that brings consumer benefits.

The problem will occur where mergers tend to bring together competing entities, existing competitors, and therefore diminish competition in some markets. But I wouldn't say generally that all mergers are bad. And you have to look at each merger as they come to see what its competitive impact is.

Mr. MEEHAN. Mr. Rosenblum.

Mr. ROSENBLUM. Thank you, Congressman. I guess because we don't favor any presumptions under antitrust laws, we also, like Mr. Barr, think mergers have to be viewed on their individual merits. And some are beneficial; some may not be.

I think, though, that two kinds of mergers you raised are very different in terms of their impact on customers. In the case of GTE and Bell Atlantic or Bell Atlantic and Nynex before, or Ameritech and SBC just in the news now, I think we are disappointed at least because I think the purpose of the Telecom Act was to stimulate competition between firms that had not traditionally competed with one another.

And in the case of local companies that merged, I think you see companies merging instead of competing with each other when they could have been competing.

Our merger and investment in the cable industry is designed to promote exactly I think the kind of competition that Telecom Act envisioned. We are not only using the investment to compete over facilities with the incumbent monopolies, but I would like to think that our participation in cable is turning the cable industry and the telephone industry finally to face each other as competitors.

Mr. HYDE. The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman. All the questions I had have been asked. I think Mr. Kimmelman wanted an opportunity to respond to my friend, Mr. Meehan's, question.

Mr. KIMMELMAN. Thank you, Mr. Delahunt. I was on a roll with Mr. Barr, but this is when I have to disagree with him. I think every merger should be judged on its own merits, but I think both of these are devastating. I think we are losing potential competitors, as Mr. Rosenblum points out; but unfortunately, I think the AT&T transaction while well intentioned on the telephone side can have devastating effects for rising cable rates and rising high-speed Internet access charges. We are just losing potential competitors to this consolidation.

Back to your original point, though, Mr. Meehan, I think you raised—if we were in a markup setting and not in the context of a hearing, I would suggest that you can phase in obligations. Ms. Lofgren indicated some ideas related to sending clear signals to investors.

Really, for both of the provisions that you are talking about, I think there is a problem, as Mr. Salsbury has pointed out, with in the future segregating data from voice. Everything is being digitized. Nothing is going to be purely one or the other. It is an enormous problem in having separate policy rules for something that can't be separated easily and policed.

So I suggest that you can deal with both of those provisions through transitions. And while there are a lot of people I like to shock—one of the last people in the world I like to shock is Mr. Conyers—but I have to explain that the purpose of the 1996 act was to promote competition for greater choice and lower prices for consumers. We are 3½ years into a law with cable prices soaring, $5 billion in new telephone charges because of poor antitrust enforcement, horrible regulatory policy at the Federal level. We need to do something here.

So whether it is phasing in some provisions, working them more carefully, we certainly have problems with some of the provisions in this bill. These markets will develop. The fact that data becomes the dominant driving force is interesting, but the fact that people who make less than 30 minutes of long distance calls today according to the FCC are paying twice what they were 2 years ago for those 30 minutes is outrageous.

And we have to do something to make sure we are not giving away all the reasonable prices and affordability of our old system as we try to grow that into a competitive Internet. So we just urge you to step in and put a lid on the ongoing monopolistic pricing practices.

Mr. DELAHUNT. Thank you, Mr. Kimmelman. And I will yield to the gentlelady from California. I do have one question, Mr. Chairman.

Ms. WATERS. Go. Take your question.

Mr. DELAHUNT. I find your analysis interesting because as you say, those who use less than 30 minutes of long distance time are now paying double, which indicates that the burden has shifted in terms of those least able to pay, and the market has become so much more attractive.

All these gentlemen here today are clearly interested in the fastest growing, most lucrative market, which is the transmission of data. I think for those of us who are in a policy-making role here, we ought to reflect on that.

I just have one quick question for Mr. Jacobs. Let me preface it with an observation. I am really interested to see what happens to the market today after your analysis is broadcast on C-Span and all over America. It will be interesting to see how AT&T does. In any event, you made an interesting point about UNE–P. I don't know if I am pronouncing it right. But litigation had commenced.

Can you tell us what happened to that litigation or did the market realities and the aggressiveness of some of the players outpace the litigation in terms of changing the status quo? Because I guess my answer is if we rely on the enforcement of the antitrust provisions, we are talking about an extremely——

Mr. HYDE. Does the gentleman require additional time?

Mr. DELAHUNT. If I could have an additional moment.

Mr. HYDE. An additional moment.

Mr. DELAHUNT. A chairman's moment.

Mr. HYDE. I have been very strict with everybody up until now. And I don't want to incur their wrath, but if unanimous consent is requested for another minute, why, they have a chance to object, and they haven't. So the gentleman has another minute.

Mr. DELAHUNT. Thank you, Mr. Chairman. In any event, if you could just describe the litigation and the changing market conditions and draw a parallel for us in terms of whether this is an efficient mechanism, i.e., litigation through the courts of appeals, et cetera, et cetera.

Mr. JACOBS. Litigation has been a fairly disastrous set of events for the industry. It has wildly delayed the onset of competition. UNE–P was attempted by the FCC as the primary way of getting long distance companies in the market. The RBOCs objected to it. They did the fair thing: They went to court; they had it overturned. That created effectively a 2½-year truce until the Supreme Court ruled on it. The Supreme Court ruled recently and now the components of that issue has been thrown back to the FCC. We haven't yet heard their ruling, so we don't know the fate of UNE–P.

The one place that UNE–P has come up is when RBOCs have decided that they are ready to get into long distance or eager to get in, such as the case in Texas and the case in New York. They have struck separate deals with their State public utility commissions to offer up UNE–P for limited periods of time for specific numbers of customers at these high discounted rates as a way of getting into long distance. So UNE–P is sort of a piecemeal issue right now. The RBOCs have not embraced it wholeheartedly, but they are using it to get into specific States into long distance.

Mr. HYDE. The gentleman from New Jersey, Mr. Rothman.

Mr. ROTHMAN. Thank you, Mr. Chairman. First I want to associate myself with Miss Lofgren's comments. I thought they were right on the money. The question for me is when does something become an essential facility? And who bears the burden of proving that? This may come as an odd thing for a Democrat to say, but people have described me as an odd Democrat and worse; but why shouldn't the presumption be that this is not an essential facility

yet if it has not yet reached 1 percent of the market? And if 1 percent is the right number, when DSL and wireless achieve 1 percent, are we going to declare them essential facilities also? Is that going to be good for America?

I am always tickled here in the House of Representatives by people who constantly rail against big government when it has to do with health care or food for poor people or public education or cleaning up the environment or, God forbid, gun control or gun safety. The big hand of government is terrible. But when it comes to benefiting their industry or their constituents, big government intervention is the right thing to do.

But I still think the presumption has got to be against calling this an essential facility, certainly at 1 percent. And again it may be an odd thing for a Democrat to say, but I am thrilled that the cable investors have invested all of their billions of dollars to create a system now that everybody wants to jump in on. Because it is going to provide consumers with so many options and opportunities, the same with DSL and wireless.

Will it encourage other entrepreneurs, capitalists, to expand beyond cable DSL and wireless to some unknown technology that we can't even yet contemplate if we at 1 percent of the market declare cable to be an essential facility? I think it might.

I have a question for the gentleman from Portland. If the cable people have to take on these other folks, you know, these paid franchise fees to the cities, will that make them no longer cable companies should they not pay their franchise fees? Or should we require the providers of these broadband services, the phone companies, satellite and wireless to pay franchise fees too or do we remove all of the franchise fees all together?

Mr. STEN. Thank you, Congressman. To address your first question quickly from a local perspective, small government not big government in Portland, Oregon, from our point of view I don't see how we could come to any conclusion except that these are essential. We for many, many years have franchised cable facilities because our citizens don't want 10 cable lines on the streets. We have one set of streets and they want one cable line.

Up until this year we have had two competing companies which both had a franchise geographic monopoly, TCI and Paragon; but by having two, we are able to work with both to see what would one company do for citizens, what would another not do. And we are able to negotiate over time good franchises.

Mr. ROTHMAN. Reclaiming my time. Did you get to the point where you would know when you want to make wireless and DSL essential facilities? Have you figured that out?

Mr. STEN. Well, wireless is a new one for local governments. On your franchise fee question, if I could finish up quickly on the last point, we now have one company that owns all of the cable systems in Portland. We have opportunities to say what we believe should happen. We are laboring under an assumption there is no Federal policy; local governments have the authority to exert open access requirements and we have.

Mr. ROTHMAN. I am just going to reclaim my time. I probably have 10 seconds. Just to say that for me the burden of proof would be on those who at 1 percent feel this is an essential facility and

to prove why this would not have a chilling effect on those who want to create new technologies and make the money the cable folks are presumably going to make now if they discover some other way to transmit data beyond those that we can think of today.

Mr. STEN. I don't mean to take all your time; I mean to answer the question. One hundred percent of the cable still is not 1 percent. In Portland it is 100 percent that is what we are dealing with. We charge a franchise fee on whoever uses the right of way.

Mr. ROTHMAN. So you couldn't give up the franchise fee for cable? Mr. Jacobs, do you have a comment?

Mr. JACOBS. Yeah, I quite agree that to call something an essential facility when it has 1 percent is sort of a misnomer. Secondly, as I understand it, an essential facility is when you don't have an alternative, not just a question of how much market share it has. DSL is an alternative and there are many new alternatives coming on to the market.

MCI WorldCom has, over the last couple of months along with Sprint, invested very dramatically in a technology called MMDS. It is a wireless technology. That is a function of chasing the exact same return on investment that cable is chasing and that the RBOCs are chasing.

Mr. HYDE. I am sorry. Mr. Cleland wants a minute.

Mr. CLELAND. If I could most respectfully challenge the 1 percent assumption. This is just assuming this is one Internet market. A video ISP is very different than a narrowband telco ISP because they offer completely different products. Over a narrowband dialogue, which is 30 million telephone users, you can't pull down TV programming, you can't pull down the Titanic. You can't pull down these multimedia or video things. It just isn't allowed. I mean, it isn't possible. So of the market, of the video ISP marketplace, cable has a 90 percent share of that very different market than the telco market.

Mr. HYDE. The gentleman's time has expired. All time has expired.

I want to congratulate this panel for staying here and for your illumination of a very complicated issue. You may wish to ask if we are going to mark this bill up. I have no answer for that. I don't say yes or no. I say we are going to assimilate all that you have told us today and think about it and talk about it. And the decisions will be made. But there is nothing imminent. So your anxiety quotient can diminish.

Mr. CONYERS. Mr. Chairman, could I add my compliments to this very distinguished panel. Their staying power is enormous. And I am very grateful.

Mr. HYDE. And the quality of their testimony.

Mr. CONYERS. Pretty good too.

Mr. HYDE. Very lofty. The committee stands adjourned.

[Whereupon, at 1:06 p.m., the committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, January 5, 2000.

Hon. WILLIAM BARR,
Executive Vice President and General Counsel,
GTE Corporation, Washington, DC.

DEAR MR. BARR: I appreciate your appearing before the Committee on the Judiciary to testify at the legislative hearing on H.R. 1686, the "Internet Freedom Act," and H.R. 1685, the "Internet Growth and Development Act of 1999" on Wednesday, June 30, 1999.

Members of the Committee have asked that you answer additional written questions for the record. I have attached a copy of the questions. I would appreciate your answering the questions in writing and returning your answers to the Committee for inclusion in the hearing record at your earliest convenience.

If the Committee can provide you with any additional information, please do not hesitate to have your staff contact Joseph Gibson by phone at (202) 225–3951 or by fax at (202) 225–7682. I appreciate your participation in our hearing.

Sincerely,

HENRY J. HYDE, *Chairman.*

cc: Hon. John Conyers, Jr.

QUESTIONS FOR MR. BARR

Question from Representative Meehan

Numerous antitrust decisions set forth the factors that are to be considered in determining what qualifies as an "essential facility." Included among these factors are a determination of the relevant market and an assessment of market power.

(a) Please explain how broadband access would be treated under these precedents, and whether and how the proposed legislation would treat broadband differently.

(b) Please explain what impact you think the proposed legislation would have on the extent and nature of antitrust litigation in this country.

Question from Mr. Rothman

If the cable industry, which carries data on a broadband network, is to be considered an "essential facility" notwithstanding the fact that they have only 1 percent of the ISP market, but on the theory that they are a medium that can carry a video broadcasting image as opposed to telephone wires, explain why at the same instance DBX and wireless carriers should also not be immediately declared essential facilities, because they too can carry a video image.

GTE CORPORATION,
Washington, DC, January 31, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN HYDE: Please find attached my answers to the written questions that you submitted to me by letter dated January 5, 2000, on behalf of members of your Committee in connection with your Committee's June 30, 1999, hearing on H.R. 1686.

Thank you again for permitting me to testify at the hearing.

Sincerely,

WILLIAM P. BARR, *Executive Vice President.*

cc: Hon. John Conyers, Jr.

Question from Representative Meehan

Numerous antitrust decisions set forth the factors that are to be considered in determining what qualifies as an "essential facility." Included among these factors are a determination of the relevant market and an assessment of market power.

(a) Please explain how broadband access would be treated under these precedents, and whether and how the proposed legislation would treat broadband differently.

(b) Please explain what impact you think the proposed legislation would have on the extent and nature of antitrust litigation in this country.

Answer from Mr. Barr

(a) The "essential facilities" doctrine is but one of many antitrust tools used to prevent anticompetitive abuses. Stated generally, the doctrine requires that a competitor share a facility with other competitors if (among other things) the facility is essential to competition and the facility is not practically or reasonably available from another source. The question in the context of broadband access, therefore, would be whether, within the relevant geographic market, a broadband access transport provider possessed a facility—a broadband line or network of broadband lines, for example—that provided, during a relevant time period, a monopoly means of broadband access to consumers and that was not practically or reasonably duplicable from another source.

The approach taken in section 102 of H.R. 1686 seems to me to be more analogous to the antitrust doctrine of unlawful tying than to the essential-facilities doctrine. Specifically, section 102 would prevent any broadband access transport provider that has market power from leveraging its power into the adjacent broadband service market and would instead require that that provider not discriminate against other providers of broadband services. As I explained in my testimony, this principle of nondiscriminatory access has been a central tenet of telecommunications regulation for the last 15 years or so. Its application to the newly developed broadband access transport market, far from treating broadband any differently, would be a major step towards consistency and regulatory parity.

(b) I have no particular view on the impact the proposed legislation would have on antitrust litigation. Insofar as increased litigation is necessary to deter or penalize genuine anticompetitive abuses, such litigation should be welcomed. Insofar as certain provisions of H.R. 1686 might be construed overbroadly and could be further refined to focus more clearly and specifically on genuine anticompetitive abuses, I would support any such refinement.

Question from Representative Rothman

If the cable industry, which carries data on a broadband network, is to be considered an "essential facility" notwithstanding the fact that they have only 1 percent of the ISP market, but on the theory that they are a medium that can carry a video broadcasting image as opposed to telephone wires, explain why at the same instance DBX and wireless carriers should also not be immediately declared essential facilities, because they too can carry a video image.

Answer from Mr. Barr

With all respect, I must first take issue with the premises of your question. Among other things, I believe that economic analysis compels the conclusion that broadband access constitutes its own market; that H.R. 1686 is better understood by analogy to the antitrust doctrine of unlawful tying than to the "essential facilities" doctrine; and that H.R. 1686's treatment of all broadband access transport providers (not just of the cable industry) is based not on their ability to carry a video broadcasting image but on their having a transmission capability in excess of 200 kilobits per second.

I therefore do not understand H.R. 1686 to declare anything to be an "essential facility". Instead, I understand it to act to prevent abusive coupling of Internet broadband transport with other Internet products or services. DBS and wireless carriers, to the extent that they have market power in broadband access to the Internet, would likewise be subject to such preventive measures.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, January 5, 2000.

Mr. TIM BOGGS, *Senior Vice President*
for Public Policy,
Time Warner, Inc., Washington, DC.

DEAR MR. BOGGS: I appreciate your appearing before the Committee on the Judiciary to testify at the legislative hearing on H.R. 1686, the "Internet Freedom Act," and H.R. 1685, the "Internet Growth and Development Act of 1999" on Wednesday, June 30, 1999.

A Member of the Committee has asked that you answer additional written questions for the record. I have attached a copy of the questions. I would appreciate your answering the questions in writing and returning your answers to the Committee for inclusion in the hearing record at your earliest convenience.

If the Committee can provide you with any additional information, please do not hesitate to have your staff contact Joseph Gibson by phone at (202) 225–3951 or by fax at (202) 225–7682. I appreciate your participation in our hearing.

Sincerely,

HENRY J. HYDE, *Chairman.*

cc: Hon. John Conyers, Jr.

QUESTIONS FOR MR. BOGGS

Question from Representative Meehan

Numerous antitrust decisions set forth the factors that are to be considered in determining what qualifies as an "essential facility." Included among these factors are a determination of the relevant market and an assessment of market power.

(a) Please explain how broadband access would be treated under these precedents, and whether and how the proposed legislation would treat broadband differently.

(b) Please explain what impact you think the proposed legislation would have on the extent and nature of antitrust litigation in this country.

TIME WARNER,
Washington, DC, March 31, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN HYDE: Thank you for allowing me to testify before your Committee at the legislative hearing on H.R. 1686, the "Internet Freedom Act", and H.R. 1685, the "Internet Growth and Development Act of 1999" on June 30, 1999. I hope my testimony was of assistance to you and the Committee.

On January 5, 2000, you wrote to ask me to submit a written response to a question posed by Representative Meehan for inclusion in the hearing record. Our response is enclosed.

I also would like to take this opportunity to apprise you and your colleagues on the Committee on some developments which have taken place since your hearing. As you know, on January 10, 2000, Time Warner and America Online announced a strategic merger designed to create this century's first fully integrated media and communications company capable of enhancing consumers' access to the broadest selection of high-quality content and interactive service. At the merger announcement, Steve Case (Chairman and CEO of AOL) and Jerry Levin (Chairman and CEO of Time Warner) also made clear that the new company would be committed to ensuring consumer choice of Internet Service Providers (ISPs) and content. Shortly thereafter, on February 29, 2000, the two companies announced a Memorandum of Understanding outlining the open access business practices under which Time Warner will offer consumers a choice of multiple ISPs, including AOL, on its broadband cable systems.

This announcement together with other recent developments in the marketplace confirm our view that the competitive marketplace is working to provide consumers with the broadest choice of Internet service providers.

Please do not hesitate to contact me with any additional questions or if I can assist the Committee in any other way.

Sincerely,

TIMOTHY A. BOGGS.

cc: The Honorable John Conyers, Jr.
Joseph Gibson, Chief Counsel

Question from Representative Meehan

Numerous antitrust decisions set forth the factors that are to be considered in determining what qualifies as an "essential facility." Included among these factors are a determination of the relevant market and an assessment of market power.

(a) Please explain how broadband access would be treated under these precedents, and whether and how the proposed legislation would treat broadband differently.

(b) Please explain what impact you think the proposed legislation would have on the extent and nature of antitrust litigation in this country.

Response

The "essential facility" doctrine in antitrust law has never been adopted by the Supreme Court, *see AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring in part and dissenting in part), and has been harshly criticized by commentators, *see* 3A Areeda & Hovenkamp, *Antitrust Law* §771c, at 176 (1996) ("the 'essential facility, doctrine is both harmful and unnecessary and should be abandoned"). Even those courts that have recognized the existence of the doctrine have emphasized its narrow scope. *See, e.g., Intergraph Corp.* v. *Intel Corp.*, 195 F.3d 1346, 1357 (Fed. Cir. 1999) ("the essential facility theory is not an invitation to demand access to the property or privileges of another, on pain of antitrust penalties or compulsion"); *Carribean Broad. Sys., Ltd.* v. *Cable & Wireless PLC*, 148 F.3d 1080, 1088 (D.C. Cir. 1998) ("[a] monopolist has no general duty to share his essential facility").

Nevertheless, to the extent that antitrust liability may be predicated on the essential facility doctrine, the general contours of that doctrine are: 11(i) a monopolist who competes with the plaintiff controls an essential facility, (2) the plaintiff cannot duplicate that facility, (3) the monopolist denied the plaintiffs use of the facility, and (4) the monopolist could feasibly have granted the plaintiff use of the facility". *Id.*; *see also MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 708 F.2d 1081, 1132–33 (7th Cir. 1983). of course, before these factors can even come into play, a court must find that a company is a monopolist, which requires a determination of the relevant market in which the company operates and an assessment of its market power. *See, e.g., TV Communications Network, Inc.* v. *Turner Network Television, Inc.*, 964 F.2d 1022, 1025 (10th Cir. 1992); *Consul, Ltd.* v. *Transco Energy Co.*, 805 F.2d 490, 494 & n.11 (4th Cir. 1986). Moreover, the essential facility doctrine does not condemn the company's monopoly itself; rather, it is addressed to the effect of that monopoly on competition in a related market. *See* 3A Areeda & Hovenkamp, *supra* §771a, at 172 ("the essential facility doctrine concerns vertical integration—in particular, the duty of a vertically integrated monopolist to share some input in a vertically related market . . . with someone operating in an upstream or downstream market").

Given these principles, it is not clear how the essential facility doctrine, if valid, could have any application to broadband Internet services at all.

The prerequisite for the application of the essential facility doctrine—the existence of a monopoly—is not satisfied. First of all, the vast majority of consumers who use the Internet access it through a narrowband service, and it is far from clear that narrowband and broadband Internet services should be classified as separate antitrust markets. Moreover, even if broadband Internet services do constitute a separate market, that market is characterized by intense and vigorous competition. Cable operators, telephone companies and others, including satellite operators, are aggressively rolling out broadband services all across the country. *See, e.g.*, Roger O. Crockett & Catherine Yang, "Faster, Faster, Faster", *Business Week*, Oct. 18, 1999, at 191. These companies are relying on a variety of technologies and are offering consumers and businesses a variety of service plans. Countless articles have been written comparing the pros and cons of each company's approach. *See, e.g.*, Peter H. Lewis, "Picking the Right Data Superhighway", *N.Y. Times*, Nov. 11, 1999, at G1. Perhaps most importantly, the development and deployment of broadband technologies is in its infancy. In the words of William E. Kennard, Chairman of the Federal Communications Commission:

> "The broadband market is fertile, but still undeveloped. The future is bright, but still glimmering in the distance. We are about 50 meters into a race that is sure to be a marathon.
>
> Sometimes people talk about broadband as though it is a mature industry. But, the fact is that we don't have a duopoly in broadband. We don't even have a monopoly in broadband. We have a NO-opoly. Because, the fact is, most Americans don't even have broadband."

William E. Kennard, "The Road Not Taken: Building a Broadband Future for America", Speech before the National Cable Television Association, June 15, 1999, *avail-*

able at http://www.fcc.gov/Speeches/Kennard/spwek921.html. In the absence of a monopoly in any relevant market, the essential facility doctrine cannot apply.

On its path to establishing "a presumption of a violation of [the Sherman Act]", H.R. 1685, § 502; H.R. 1686, § 102, the proposed legislation alters traditional notions of antitrust market definition and market power.

For example, the proposed legislation would require a court to forgo analyzing whether narrowband and broadband Internet services are in the same market. Standard antitrust principles relevant to defining a market, such as substitutability of use and cross-elasticity of demand, *see, e.g., Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962), are dispensed with in favor of a rigid determination that Internet services with "a transmission capability in excess of 200 kilobits per second" are in one market, H.R. 1685, § 505(1); H.R. 1686, § 105(1), and Internet services with a "transmission capability" that is one kilobit per second slower are in another. As a result, a court assessing a broadband provider's liability under the proposed legislation would not consider the substantial competition posed by narrowband providers, who continue to be the source of Internet services for the vast majority of Americans.

The proposed legislation also departs from traditional antitrust principles in that the relevant market in which to assess a defendant's liability is defined to include "the provision of broadband services over a single broadband access transport provider's facilities". H.R. 1685, § 505(5); H.R. 1686, § 105(5). Thus, in addition to carving narrowband providers out of the relevant market, the proposed legislation carves all competing broadband providers out of the relevant market as well.

The proposed legislation changes the analysis of competition and transforms by assuming all providers of broadband Internet services are monopolists, regardless of how many consumers they serve and how many other providers they compete with.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, January 5, 2000.

Mr. MARK ROSENBLUM, *Vice President for Law,*
AT&T Corporation, Washington, DC.

DEAR MR. ROSENBLUM: I appreciate your appearing before the Committee on the Judiciary to testify at the legislative hearing on H.R. 1686, the "Internet Freedom Act," and H.R. 1685, the "Internet Growth and Development Act of 1999" on Wednesday, June 30, 1999.

A Member of the Committee has asked that you answer additional written questions for the record. I have attached a copy of the questions. I would appreciate your answering the questions in writing and returning your answers to the Committee for inclusion in the hearing record at your earliest convenience.

If the Committee can provide you with any additional information, please do not hesitate to have your staff contact Joseph Gibson by phone at (202) 225–3951 or by fax at (202) 225–7682. I appreciate your participation in our hearing.

Sincerely,

HENRY J. HYDE, *Chairman.*

cc: Hon. John Conyers, Jr.

QUESTION FOR MR. ROSENBLUM

Question from Representative Meehan

Numerous antitrust decisions set forth the factors that are to be considered in determining what qualifies as an "essential facility." Included among these factors are a determination of the relevant market and an assessment of market power.

(a) Please explain how broadband access would be treated under these precedents, and whether and how the proposed legislation would treat broadband differently.

(b) Please explain what impact you think the proposed legislation would have on the extent and nature of antitrust litigation in this country.

AT&T,
Basking Ridge, NJ, March 6, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: In response to your correspondence dated January 5, 2000, enclosed is my response to the question submitted by Representative Meehan for the

record of the legislative hearing on H.R. 1686, the "Internet Freedom Act" and H.R. 1685, the "Internet Growth and Development Act of 1999" on Wednesday June 30, 1999.

I greatly appreciated the opportunity to testify before the Committee, and stand ready to provide additional assistance to you or members of the Committee. In addition, please feel free to call J.J. Johnson, AT&T Vice President for Congressional Affairs, at (202) 457–2255 if you have any questions or if you need any additional information.

Sincerely,

MARK C. ROSENBLUM.

cc: Hon. John Conyers, Jr.
Hon. Martin Meehan

Enclosure

Question from Representative Meehan

Numerous antitrust decisions set forth the factors that are to be considered in determining what qualifies as an "essential facility." Included among these factors are a determination of the relevant market and an assessment of market power.

(a) Please explain how broadband access would be treated under these precedents, and whether and how the proposed legislation would treat broadband differently.

(b) Please explain what impact you think the proposed legislation would have on the extent and nature of antitrust litigation in this country.

AT&T's Response

a. Under established antitrust principles, a facility is considered "essential" only if the facility provides a service that itself constitutes a relevant market and permits market power to be exercised in that market. *See generally* HERBERT HOVENKAMP, FEDERAL ANTITRUST LAW § 7.7 (1994) (citing cases). Further, courts have interpreted the essential facility doctrine to require a showing that no practical alternatives are available. *Id.* § 7.7a. *See also McKenzie* v. *Mercy Hospital*, 854 F.2d 365 (10th Cir. 1988); *Alaska Airlines* v. *United Airlines*, 948 F.2d 536 (9th Cir. 1991). By contrast, merely showing that alternative facilities are more costly is insufficient to establish that a facility is "essential." Under well-established precedents, there can thus be no finding of an essential facility where there are numerous providers competing for the same customers.

Even if broadband Internet access were the relevant market, it is clear that there is vigorous competition in that "market" and that cable modem service providers such as AT&T have no ability to exercise power in that "market." Accordingly, cable broadband Internet access facilities would not be deemed "essential" under existing law.

Even a cursory summary of the marketplace confirms that there are numerous providers of high speed Internet access. Digital Subscriber Line ("DSL") deployment exploded in 1999, and there are now *more* DSL-capable residences than cable modem-capable residences.[1] Further, DSL has been growing faster than cable modem service[2] such that (based on current trends and the predictions of some industry observers) DSL subscribership may overtake cable modem subscribership in the very near future.[3] At the same time, DSL prices have plummeted (and continue to fall). Multiple competitively-priced DSL offerings continue to spring up in every geographic area in which AT&T offers cable modem service.

But the ubiquitous telephone networks are not the only source of facilities-based competition to the cable networks owned by AT&T and other companies. RCN and others are overbuilding incumbent cable systems with their own hybrid-fiber coax networks. RCN, for example, recently announced that it will overbuild AT&T's cable systems in Portland and offer local and long distance phone, cable TV, and high speed Internet service over that new system.[4]

MCI WorldCom, Sprint, US WEST, NextLink, Winstar, Motorola, Teledesic, Lockheed Martin, Alcatel Espace, Loral and other industry heavyweights are investing tens of billions of dollars to deploy additional alternative broadband paths to residences that will be in place and offering service by the time broadband providers enjoy a substantial share of the Internet services market. MCI WorldCom and

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[1] Announcements by the major DSL network owners confirm more than 50 million DSL-capable homes at the end of 1999, as compared to less than 40 million cable modem-capable homes.

[2] Sylvia Dennis, DSL Taking Off Big Time, Newsbyte News Network (Aug. 17, 1999); http://www.uswest.com/news/012600.html.

[3] Vito Racanelli, AOL-Time Warner Deal Leaves Baby Bells Unjustly Shunned, Barron's (Jan. 15, 2000).

[4] Building a System to Rival AT&T, The Oregonian, B1 (Jan. 13, 2000).

Sprint will rely primarily on fixed wireless networks that can deliver much greater bandwidth than either cable modem or DSL services. With existing licenses, the two companies can reach 60% of U.S. households,[5] and in a recent press conference MCI WorldCom stated that it would begin providing broadband fixed wireless service within a year of closing its merger with Sprint.[6] NextLink, which will be able to reach 95% of customers in the top 30 markets, plans to offer broadband services via fixed wireless this year.[7] Winstar, flush with $900 million investment from a Microsoft-led consortium,[8] is also aggressively rolling out fixed wireless networks.[9] And US WEST just announced that it will launch a nationwide broadband wireless offering. Industry analysts predict fixed wireless companies to grow to a $7 billion industry by 2003.[10]

Satellite providers DirecPC and Echostar already offer Internet service with download speeds equivalent to the speeds shared network cable modem customers often obtain. DirecPC owner Hughes is investing $1.4 billion in a two-way broadband data satellite network, Spaceway, that will begin providing service in the United States by the year 2002 at multi-megabit speeds.[11] Teledesic, a global satellite concern funded by Bill Gates and Craig McCaw, is spending $9 billion on its "Internet-in-the-Sky" project, which will provide consumers with affordable, worldwide, ultra-fast Internet access, video-conferencing, and high-quality voice and digital data service beginning in 2003 using a constellation of 288 low-Earth-orbit satellites.[12] Other satellite-based providers, including Motorola, Lockheed Martin, Alcatel Espace, and Loral, expect to invest over $25 billion to establish broadband satellite services in the coming years.

Moreover, while this analysis establishes that there would be no "essential facility" *even if* broadband access were a relevant market, the reality is that broadband access is not now or in the foreseeable future a relevant market for antitrust purposes. Rather, broadband access competes with narrowband access, and both are in the same product market. Three key facts make this clear.

First, broadband service is priced competitively with narrowband service. When the Federal Communications Commission examined retail prices last year, it found that the total monthly cost of broadband Internet access via cable modem is *exactly the same* as the monthly cost of narrowband Internet access; moreover, the "total first-year costs" were actually lower with the cable modem.[13] This is no coincidence. Because they must win price-sensitive customers away from existing substitutes, AT&T and other broadband access providers are driven by market forces to price their services to compete with dial-up access.

Second, consumers use both narrowband and broadband for the same core applications. The vast majority of valuable Internet applications, such as e-mail and Web access, are available to users regardless of the specific ISP supplying the application, and the vast majority of content available to consumers over the Internet is not tailored to higher bandwidth speeds. Internet content providers can reach essentially the same set of consumers via narrowband or broadband access, and there is no difference between the Web sites that any consumer can access whether using broadband or narrowband. AOL and other narrowband services are also able to use caching to compete with broadband offerings.[14] Caching content locally reduces congestion and allows customers to access this content much more quickly than having to download the content from the public Internet.

Third, at the present time and for years to come broadband and narrowband will be competing for the same mass market of Internet subscribers. Of course, at one

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[5] Kelly Carroll, Alternative Access: MMDS may become Choice Conduit for Wireless Internet (Sep. 6, 1999); 1999: The Year Broadband Wireless Entranced the Industry, Wireless Today (Jan. 6, 2000).

[6] Ebbers Points to Rapid Digital Divide Crossing by MCI-Sprint, Wireless Today (Jan. 13, 2000).

[7] *See* http://www.redherring.com/mag/issue67/news-feature-du99-nextlink.html; http://www.nextlink.com/ra/news/archive/press/xpr_corp_011200-testing.html.

[8] http://www.winstar.com/press/1999/Templ.asp?fileid=1223996.

[9] *See* 1999: The Year Broadband Wireless Entranced the Industry, Wireless Today (Jan. 6, 2000); http://www.winstar.com/press/1999/0930992.asp.

[10] 1999: The Year Broadband Wireless Entranced the Industry, Wireless Today (Jan. 6, 2000), 58).

[11] http://www.mercurycenter.com.

[12] *See* http://www.teledesic.com/newsroom/05-21-98.html. *See also* In the Matter of En Banc Hearing on Broadband Services (July 9, 1998), Transcript Comments of Steve Hooper, co-CEO of Teledesic and Chairman of Nextlink Communications at 9–13 (http://www.fcc.gov/enbanc/070998/eb07O998.html).

[13] *See Report*, Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, 14 FCC Rcd. 2398, 2443–2444 (1999).

[14] *See* http://webmaster.info.aol.com/caching.html.

end of the spectrum are some customers who demand high-speed access and are not sensitive to price, just as at the other end there are those who want low-priced access regardless of speed. But both broadband and narrowband providers aspire to more than those "tails" of the distribution, and thus it is the competition for the marginal customer that counts for market definition purposes. Many millions of current narrowband customers might be persuaded to switch to broadband service—*if* competitive and attractive offerings are available.

For this vast majority of consumers, the choice between narrowband and broadband involves trade-offs that make the two modes of access close substitutes, and confirm that they are in the same relevant product market for antitrust purposes. A person deciding whether to replace dial-up access with a cable modem service will recognize that the cable modem service offers speed and "always on" advantages. But dial-up access has its own advantages: a dial-up customer can access the Internet and use e-mail from remote locations; a cable modem customer cannot. Dial-up service can use existing customer premises equipment. For those dial-up customers who do not purchase an extra telephone line, it is less expensive than cable modem service. And for those who do, although the cost is comparable, they obtain an extra line that can also be used for regular voice communications and faxes.

By contrast, consumers who purchase a cable company's on-line service cannot yet use that capability to make phone calls, hook up a fax machine, or dial up to an employer's server. Given these trade-offs, and the enormous number of Internet subscribers who will be choosing between access modes in coming years, it can hardly be doubted that there is substantial substitutability between broadband and narrowband Internet access services.

In fact, courts have routinely rejected claims that one product is in a separate market from another product just because it enjoys some advantages over that product. In the landmark case of *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 399 (1956), the Supreme Court rejected the claim that cellophane is in a different market from other wrapping materials because, "despite cellophane's advantages, it has to meet competition from other materials." In *FTC* v. *Owens-Illinois, Inc.*, 681 F. Supp. 27 (D.D.C.), *vacated as moot following completion of merger*, 850 F.2d 694 (D.C. Cir. 1988), the court rejected the claim that glass containers were in a separate market from metal and plastic containers. Despite obvious differences in features, and the fact that *some* customers would only purchase glass, there was *enough* competition between the different materials to include them in a single market. Similarly, in *United States* v. *Gillette Co.*, 828 F. Supp. 78 (D.D.C. 1993), the court refused to limit the market to fountain pens. Although some customers were devoted to fountain pens and would purchase nothing else, many other customers would "substitute other modes of writing," and the market was defined accordingly.

This bill would stand these well-established principles on their head. It imposes an inflexible statutory definition of the relevant "market" (the "broadband service provider market") which is inaccurate at best and more generally inappropriate. In the normal course, under well-developed case law, an antitrust plaintiff must prove that the defendant has the power to control prices and output and exclude competitors in a relevant market. The appropriate definition of the relevant market is thus the starting point of traditional antitrust analysis. To determine what the relevant market actually is, agencies and courts must consider the facts as to whether customers have alternatives that effectively prevent a firm from raising prices or limiting choice without losing business—in antitrust jargon, the "elasticities."

This bill, in contrast, would foreclose the usual role that economic realities and evidence play in this determination and force an artificial definition of the market. Not only does the bill decree that broadband services are the relevant market—even though broadband Internet access services plainly compete with narrowband services today—the bill further declares that the facilities of a *single* broadband access provider constitute the relevant market. In essence, this bill would bypass relevant case law and deem individual broadband networks to be "essential facilities" without finding any ability to exercise monopoly power and notwithstanding that those seeking access to such a network have alternative suppliers that can provide the same or similar high-speed capabilities. This ignores long-developed precedent on the essential facilities doctrine by asserting a presumption of a Sherman Act violation based only on a broadband access provider's legitimate business decisions.

b. The legislation would have a profoundly negative impact on the nature and extent of antitrust litigation in this country. First, the bill would create liability where liability should not and otherwise would not exist. As noted in response to part (a), the artificial and inaccurate legislative pronouncement that the facilities of a single service provider constitute the relevant market would impose antitrust liability and

treble damages on firms that have no market power. And as broadband technology evolves and the number of broadband alternatives continues to expand, this inflexible statutory definition would grow more and more obsolete—but would remain a fixture in the law.

Second, the new procedural rules that the bill would establish in this one type of antitrust case would create enormous confusion. The "presumption" of a Sherman Act violation that would be applied, for example, is entirely undefined. The proposed bill does not explain how this presumption could be rebutted, or how a Sherman Act case would proceed once its applicability is established.

Third, the bill would require the judiciary to assume the rule of regulators. Federal judges would be required to establish (and oversee) the rates, terms, and conditions for interconnection between thousands of broadband and Internet providers. This ongoing obligation would be highly burdensome to the courts and the parties, and would require the judiciary to assume responsibility well beyond its traditional areas of competence.

Fourth, and for all the reasons noted above, the bill would greatly increase the amount and cost of litigation, diverting resources that would otherwise be devoted to serving consumers through competition on the merits. By establishing the equivalent of a new cause of action along with a presumption of liability (notwithstanding the presence of facts that would otherwise preclude liability under the existing antitrust laws), the bill would expand enormously the incentive to litigate. And because the bill gives special advantages to plaintiffs by creating a presumption in their favor, it would be far more difficult to obtain dismissal or summary judgment of meritless cases.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, January 5, 2000.

Mr. GEORGE VRADENBURG,
Senior Vice President,
America Online, Dulles, VA.

DEAR MR. VRADENBURG: I appreciate your appearing before the Committee on the Judiciary to testify at the legislative hearing on H.R. 1686, the "Internet Freedom Act," and H.R. 1685, the "Internet Growth and Development Act of 1999" on Wednesday, June 30, 1999.

Members of the Committee have asked that you answer additional written questions for the record. I have attached a copy of the questions. I would appreciate your answering the questions in writing and returning your answers to the Committee for inclusion in the hearing record at your earliest convenience.

If the Committee can provide you with any additional information, please do not hesitate to have your staff contact Joseph Gibson by phone at (202) 225–3951 or by fax at (202) 225–7682. I appreciate your participation in our hearing.

Sincerely,

HENRY J. HYDE, *Chairman.*

cc: Hon. John Conyers, Jr.

QUESTIONS FOR MR. VRADENBURG

Questions from Representative Pease

1. Please summarize all predictions and/or discussions AOL has made in public during 1999 regarding or reflecting (1) its anticipated number of, or growth in, subscribers over any or all of the next five years; (2) its anticipated number or proportion of subscribers who will continue to use narrowband access; and (3) its anticipated number of subscribers who will use any of the broadband access arrangements in which AOL has announced its participation with local telephone or satellite providers.

2. Given AOL's support for unbundling access to broadband service offered over cable facilities, would you also support unbundling access to services offered via wireless cable or satellite?

Question from Representative Meehan

Numerous antitrust decisions set forth the factors that are to be considered in determining what qualifies as an "essential facility." Included among these factors are a determination of the relevant market and an assessment of market power.

(a) Please explain how broadband access would be treated under these precedents, and whether and how the proposed legislation would treat broadband differently.

(b) Please explain what impact you think the proposed legislation would have on the extent and nature of antitrust litigation in this country.

Question from Mr. Rothman

If the cable industry, which carries data on a broadband network, is to be considered an "essential facility" notwithstanding the fact that they have only 1 percent of the ISP market, but on the theory that they are a medium that can carry a video broadcasting image as opposed to telephone wires, explain why at the same instance DBX and wireless carriers should also not be immediately declared essential facilities, because they too can carry a video image.

AMERICA ONLINE INC.,
Dulles, VA, March 27, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN HYDE: Thank you for the opportunity to appear before the Committee on the Judiciary on Wednesday, June 30, 1999, to testify at the hearing on H.R. 1686, the "Internet Freedom Act" and H.R. 1685, the "Internet Growth and Development Act of 1999." This letter responds to your request that I provide answers to additional written questions for inclusion in the hearing record.

During this hearing, the issue of "open access" was widely discussed. Before addressing the specific questions set forth in your letter, I wanted to also include in the record an update on some important—and positive—marketplace developments related to the open access issue. On January 10, 2000, AOL and Time Warner announced a strategic merger designed to create the world's first fully integrated media and communications company for the Internet Century. At the time of the merger announcement, both Steve Case (CEO of AOL) and Jerry Levin (CEO of Time Warner) made clear that the combined company would support open access and implement it on the Time Warner Cable systems. Since that time, the companies have worked expeditiously to develop further details on how open access would be implemented so that consumers in Time Warner's local cable franchise areas would have choice and competition with respect to cable Internet services. The result of that effort was an a 11 point Memorandum of Understanding (MOU), announced by AOL and Time Warner on February 29, 2000. A copy of the MOU is attached.

At the heart of the MOU is the parties' commitment to ensuring that consumers will be able to choose from among multiple ISPs for high-speed Internet service over AOL Time Warner's broadband cable systems. Significantly, consumers will not be required to purchase service from an ISP that is affiliated with AOL Time Warner in order to enjoy broadband Internet service over AOL Time Warner cable systems. The parties also have committed to offer a diversity of ISPs. AOL Time Warner will not place any fixed limit on the number of ISPs with which it will enter into commercial arrangements. Moreover, AOL Time Warner will offer those ISPs the choice to partner on a national (*i.e.*, on all AOL Time Warner cable systems), regional, or local basis, in order to facilitate consumer choice among ISPs of different size and scope. While the MOU is subject to existing Time Warner obligations, AOL Time Warner is committed to providing a choice of ISPs as quickly as possible, and will work to try to achieve that goal even before its current obligations expire.

In short, we believe that our MOU, combined with AT&T's announcement that it also intends to provide consumers with the ability to choose among multiple ISPs over AT&T cable systems, demonstrates real progress in the marketplace. Since the announcement of the AOL Time Warner MOU, press reports suggest that another major cable company (Comcast) is moving toward a policy of offering multiple ISPs over their cable systems. As a result of these positive steps toward cable industry adoption of a multiple ISP model, implementation of open access nationwide is becoming no longer a question of if, but of when. Given this important progress in the marketplace, it appears that government intervention in this area is not necessary at this time. That said, Congress should continue its important oversight role in this area until we arrive at the day when open access is ensured across all platforms so consumers will enjoy the full benefits of competition and choice.

Questions from Representative Pease:

1. Please summarize all predictions and/or discussions AOL has made in public during 1999 regarding or reflecting (1) its anticipated number of, or growth in, subscribers over any or all of the next five years; (2) its anticipated number or portion of subscribers who will continue narrowband access; and (3) its anticipated number

of subscribers who will use any of the broadband access arrangements in which AOL has announced its participation with local telephone or satellite providers.

While AOL has not publicly made any recent predictions on these subjects, a number of independent analysts have made general forecasts. For example, Forrester Research predicts the following number of Internet penetrated households over the next several years:

2000 44.396 million
2001 51.254 million
2002 56.021 million
2003 59.808 million

Of these households, Forrester estimates the following number will have broadband service:

2000 4.749 million
2001 9.205 million
2002 15.855 million
2003 22.400 million

With the following number of households using narrowband service:

2000 39.647 million
2001 42.049 million
2002 40.166 million
2003 37.408 million

See Forrester Research; Consumers; Digital Decade (Jan. 1999).

Another analyst, Jupiter Communications, forecasts that in the year 2003, 77% of online consumers will be accessing the Internet through a dial-up connection, representing 52.3 million households. See Jupiter Communications; Trends and Outlook: Bandwidth Access and Strategies (Feb. 2000). Among consumers who were interested in receiving high-speed access, the Yankee Group found that 30% said they would prefer to receive the service from their telephone company, while 20% favored their cable provider. The remaining 50% said they still had no preference. See The Yankee Group, Cable Modems and DSL: High-Speed Growth for High-Speed Access (Jan. 2000).

2. Given AOL's support for unbundling access to broadband service offered over cable facilities, would you also support unbundling access to services offered via wireless cable or satellite.

The principles of consumer choice and competition that have characterized Internet access in the narrowband world can and should be preserved as multiple broadband access platforms emerge. Whether broadband access is provided over cable systems, or through a wireless cable, satellite or DSL platform, consumers should be able to enjoy affordable, convenient and faster Internet service from ?a choice of Internet Service Providers. AOL does not believe that consumers should be required to purchase service from an ISP affiliated with the owner of the platform over which they receive access. Just as the two largest cable operators have now committed themselves to the path of open access over cable systems, we look for emerging broadband industry leaders in all platforms, consistent with the available technology, to follow suit.

Questions from Representative Meehan:

Numerous antitrust decisions set forth the factors that are to be considered in determining what qualifies as an "essential facility." Included among these factors are a determination of the relevant market and an assessment of market power.

(a) Please explain how broadband access would be treated under these precedents, and whether and how the proposed legislation would treat broadband differently.

While AOL has been, and remains, committed to the goal of open access, AOL has never suggested that cable Internet access service be subjected to essential facilities or common carrier based regulation. We thus have not relied on these precedents regarding essential facilities or common carriers as the model on which open access should be based.

(b) Please explain what impact you think the proposed legislation would have on the extent and nature of antitrust litigation in this country.

Although H.R. 1686 and H.R. 1685 would allow a civil action under the Sherman Act, AOL has long hoped that open access would be achieved in the marketplace without the necessity of antitrust litigation. While antitrust laws redress market failures after they occur, the core principles underlying antitrust law seek to encourage competition and to prevent market failures from occurring in the first place.

Antitrust laws have thus sought to preserve and enhance consumer welfare across industries on a forward-looking or prophylactic basis by driving markets toward structures and practices which foster, not retard, competition. The policymakers supporting this legislation have sent a strong and loud message that business models which stifle competition and consumer choices shall not be permitted. By seeking to create procompetitive business models before market failures have occurred, this legislation is designed to reduce the incidence of market failure and to substitute forward-looking pre-market failure remedies in lieu of post hoc market-correcting litigation. And, just in the short time since this legislation was introduced, the marketplace has responded accordingly.

Question from Mr. Rothman:

If the cable industry, which carries data on a broadband network, is to be considered an "essential facility" notwithstanding the fact that they have only 1 percent of the ISP market, but on the theory that they are a medium that can carry a video broadcasting image as opposed to telephone wires, explain why at the same instance DBX (sic?) and wireless carriers should also not be immediately declared essential facilities, because they too can carry a video image.

AOL has not advocated essential facilities-based doctrine or regulation for the cable Internet access platform. AOL thus would not advance the notion of essential facilities-based doctrine or regulation for other broadband platforms on the basis that they are capable of carrying a video broadcast image. AOL, however, does believe that open access to all broadband platforms is vital for consumer choice and competition.

Again, thank you for the opportunity to participate in this hearing, and do not hesitate to contact me should you have any additional questions.

Sincerely,

GEORGE VRADENBURG, III.

Enclosure (1)
cc: Hon. John Conyers, Jr. (w/encl.)

MEMORANDUM OF UNDERSTANDING
BETWEEN
TIME WARNER INC.
AND
AMERICA ONLINE, INC.
REGARDING OPEN ACCESS BUSINESS PRACTICES
FEBRUARY 29, 2000

1. This Memorandum of Understanding ("MOU") sets out the commitments that AOL Time Warner will make to provide open access (i.e., to make a choice of multiple Internet Service Providers ("ISPs") available to consumers) on its broadband cable systems. It is the intention of the parties to enter into as quickly as possible a binding definitive agreement to provide broadband AOL service on Time Warner's cable systems, which will be used as a model for the commercial agreements that will be available to other ISPs.
2. AOL Time Warner is committed to offer consumers a choice among multiple ISPs. Consumers will not be required to purchase service from an ISP that is affiliated with AOL Time Warner in order to enjoy broadband Internet service over AOL Time Warner cable systems. AOL Time Warner intends to encourage actively other cable operators similarly to provide consumers with a choice of broadband ISP offerings.
3. AOL Time Warner will effectuate such choice for consumers by negotiating arm's-length commercial agreements with both affiliated (such as AOL) and unaffiliated ISPs that wish to offer service on the AOL Time Warner broadband cable systems. Pursuant to such commercial agreements, AOL Time Warner will partner with ISPs to offer consumers a choice of competing broadband Internet service offerings.
4. AOL Time Warner will not place any fixed limit on the number of ISPs with which it will enter into commercial arrangements to provide broadband service to consumers. AOL Time Warner will provide its consumers with a broad choice among ISPs, consistent with providing a quality consumer experience and any technological limitations in providing multiple ISPs on its broadband cable systems.
5. The terms of the commercial agreements between AOL Time Warner and ISPS wishing to provide broadband service will not discriminate on the basis of

whether the ISP is affiliated with AOL Time Warner. Thus, while the economic arrangements reached by AOL Time Warner and ISPs wishing to provide broadband service will vary depending on a number of factors (such as the speed, marketing commitments, and nature and tier of the service desired to be offered), AOL Time Warner will not discriminate in those economic arrangements based upon whether or not the ISP is affiliated with AOL Time Warner. In addition, AOL Time Warner will operate its broadband cable systems in a manner that does not discriminate among ISP traffic based on affiliation with AOL Time Warner.

6. AOL Time Warner will allow ISPs to provide video streaming. AOL Time Warner recognizes that some consumers desire video streaming, and AOL Time Warner will not block or limit it.
7. AOL Time Warner will allow ISPs to connect to its broadband cable systems without purchasing broadband backbone transport from AOL Time Warner.
8. Consistent with technological capability, AOL Time Warner will offer ISPs the choice to partner with it to offer broadband Internet service on a national (on all AOL Time Warner cable systems), regional or local basis, in order to facilitate the ability of consumers to choose among ISPs of different size and scope. AOL Time Warner is committed to bring the benefits of the Internet to all Americans, and will not allow ISPs to offer "redlined" service to only a portion of an AOL Time Warner cable system that is fully enabled to provide broadband service.
9. AOL Time Warner is also committed to allow both the cable operator and the ISP to have the opportunity to have a direct relationship with the consumer. Accordingly, both the cable operator and the ISP will be allowed to market and sell broadband service directly to customers. When AOL Time Warner's cable systems sell broadband Internet service to a customer, they will be entirely responsible for billing and collection. When an ISP sells broadband Internet service directly to a customer, it may, if it so chooses, bill and collect from the customer directly.
10. This MOU represents an initial step by Time Warner and AOL to articulate the terms, conditions and parameters under which a combined AOL Time Warner will offer consumers access to multiple ISPs on its broadband cable systems. It is the intention of the parties to continue to refine those particulars in a manner that is responsive to, and consistent with, the desire of consumers to have a choice among multiple ISPs offering broadband service and the still-evolving nature of the cable infrastructure.
11. All of the foregoing is subject to all pre-existing obligations of Time Warner, including without limitation Time Warner's agreements with Serviceco, LLC (d/b/a Road Runner) and its fiduciary and other obligations to its partners. However, Time Warner will endeavor to reach agreements and accommodations with third parties to which pre-existing obligations are due that would permit the full implementation of the commitments described herein as quickly as possible.

STEPHEN M. CASE, *America Online, Inc.*
GERALD M. LEVIN, *Time Warner Inc.*

PREPARED STATEMENT OF JOHN W. MAYO

My name is John Mayo. I am the Senior Associate Dean and Professor of Economics, Business, and Public Policy at Georgetown University's McDonough School of Business. For roughly the past twenty years I have studied, taught and written in the field of industrial organization economics, which includes the fields of antitrust and regulation. I have published roughly 50 journal articles, book chapters and monographs on microeconomic policy and have co-authored a comprehensive text on *Government and Business: The Economics of Antitrust and Regulation*. I have also served as an advisor on antitrust matters to both governmental agencies (e.g. the Antitrust Division of the Department of Justice and the Federal Trade Commission) and private corporations (e.g., AT&T, MCI). I was asked by AT&T to provide an independent assessment of H.R. 1686, the "Internet Freedom Act," and H.R. 1685, the Internet Growth and Development Act of 1999." I am receiving no compensation to provide you this assessment.

While the bills are undoubtedly motivated by a goal I deeply share—opening all telecommunications markets to competition—the bills suffer from a number of serious defects that will, I fear, create more mischief than remedy if the bills are passed. To facilitate my discussion I proceed section-by-section through the principal

areas of H.R. 1686 and H.R. 1685. (The section cites are to the identical provisions in each bill).

Section 101, H.R. 1686, Section 501, H.R. 1685—This section is well intentioned but suffers in two respects. First, the section relies exclusively on an *ex post* remedy—the imposition of a presumptive antitrust violation—rather than *ex ante* policies designed to eliminate the incentives for ILECs to engage in such antidiscriminatory practices. Economic theory indicates, however, that unless the incentives for discriminatory conduct by ILECs is eliminated by removal of the monopoly over local exchange bottleneck facilities, the ability to eliminate these anticompetitive practices, even with the "sledgehammer" approach being proposed, will be limited. Second, Section 101 (and its companion Section 501) is internally inconsistent with other sections of the bill. Specifically, while Section 101 is meant to address concerns that grow out of the ILECs' monopoly control over local exchange facilities, Section 102 (and its companion Section 502) acts in direct opposition by permitting firms with monopoly power to be deregulated.

Section 102 H.R. 1686; Section 502 H.R. 1685—This section is designed to prevent price discrimination on the part of broadband access transport providers. The specific language is akin to that adopted in the Robinson-Patman Act anti-price discrimination provisions. That Act disallows price discrimination where the effect is to adversely affect competition. Unlike the Robinson-Patman Act, however, the present bill fails to allow for the economically legitimate practice of "meeting the competition" which is a well-established defense in such anti-discrimination cases. The failure in this bill to allow for efficiency enhancing, pro-competitive measures to meet the competition is a serious flaw.

Moreover, the notion embodied in this section that differential "terms and conditions" will trigger a "presumption of a violation" unless "justified by demonstrable cost differentials" is likely to severally strain the ability of any modem corporation to defend itself against charges of discrimination. This may well be the intent of the legislation. Nevertheless, there should be no illusion that the typical cost accounting systems used by modem corporations could satisfactorily be used to extricate the firm from presumptive charges of discrimination even if differential terms and conditions were legitimately based upon cost or risk differentials.

Section 103 H.R. 1686; Section 503 H.R. 1685—The goal of this section, to prevent 46 unfair methods of competition" by broadband access transport providers, is unobjectionable. The section is, however, totally redundant. Specifically, it is an industry-specific application of Section 5 of the Federal Trade Commission Act of 1914 [Section 5(a)(1)], which states that"Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce,, are hereby declare unlawful." Accordingly, the practices the Goodlatte-Boucher legislation seeks to prevent in the specific instance of Internet access are already covered by general legislation. It seems to make precious little sense to move forward with industry-specific antitrust legislation to block practices that are already covered by general legislation.

Section 105(5), H.R. 1686; Section 505(5), H.R. 1685—This section legislatively defines the relevant market for antitrust purposes. This is perhaps the single most troubling feature of the bill. 'Specifically, there are at least two major problems with this characteristic of the bill. First, it totally usurps the application of sound economic analysis to derive the relevant market. In the context of the goal of promoting and protecting competition, a number of market definition issues would arise, but for the legislative preemption of the market definition embodied in this bill. For example, issues such as whether broadband access and narrowband access are in the same relevant product market are legislatively bypassed in the proposed legislation.

While the application of economic principles to identify the relevant market in antitrust proceedings is less than an exact science, it is a well-established procedure.[1] By legislatively dictating the relevant market, a dangerous precedent is set that runs the prospect of the legislative application of market definition that is inconsistent with sound economic analysis. This is especially serious in markets that are subject to considerable technological change such as telecommunications. Second, the precise language of this section seems to indicate that each provider of broadband access constitutes its own "market." Thus, each provider is, by definition, a monopoly. This is quite peculiar and contrary to sound application of antitrust economic principles.

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[1] See the Department of Justice and Federal Trade Commission Merger Guidelines, April 2, 1992.

Section 201, H.R. 1686; Section 402, H.R. 1685 (adding new Section 715 and 716, respectively, to the Communications Act)—This section requires each local exchange company[2] to submit "a plan to provide broadband telecommunications service in all local exchange areas . . . as soon as such broadband telecommunications service is economically and technically feasible." This feature of the bill is either a gross example of social planning or totally redundant. Specifically, if the bills intend to direct the investment activities of local exchange companies by fiat rather than allowing such companies the latitude to make those investment choices as the market dictates, then the legislative requirement to deploy these assets is contrary to our basic capitalistic principles that individual market agents should be allowed to direct resources to their highest valued use.[3] If, however, the law is meant to be substantially diluted by the qualifier that local exchange companies are required only where "economically and technically feasible" to deploy these resources, what is the need for the requirement at all? That is, if such investments are economically feasible (viz., profitable) and technically feasible, then the firms should have a voluntary economic incentive to make the investments that the legislation directs. Thus, under this interpretation, the requirement is unnecessary.

While the mandatory investment planning dimension of this section is troublesome, it is tremendously exacerbated by the fact that this section ties investment to regulatory treatment of ILECs. This is very poor policy. Either investment is a good idea, or not. (The choice should be made by companies not by legislative fiat.) And deregulation is either a good idea or not. (This should turn on the presence of effective competition in the market). But the idea of tying these two policies together so that deregulation is contingent upon investment, rather than the state of competition in the marketplace, virtually guarantees poor policy outcomes. Do you really want to create a situation where monopolies can "buy" (through investment) their way out of a regulation even if they retain monopoly power? I suspect not.

Section 715 (b) H.R. 1686; Section 716 (b) H.R. 1685 exempts ILECs from the pricing standards of the Telecommunications Act wherever a carrier meets relatively modest antidiscriminatory standards in the provision of conditioned local loops and where conditioned loops are provided "upon such prices and terms and conditions as the parties shall agree." While I fear the antidiscriminatory standards in this section are relatively toothless, my biggest concern lies with the exemption of the pricing standard and the replacement, if parties cannot agree on a price, with a "price based upon the cost of loops and the costs of such conditioning that *have been incurred* by local exchange carriers" (emphasis added). This reliance on historical costs as the basis for establishing future prices has been rejected by virtually all credible economists. Prices should reflect the forward-looking costs, not historical values. This is particularly true in markets such as telecommunications that have historically been monopoly-supplied and where historical costs are likely to be inflated. Prices that reflect historical costs are likely to send incorrect price signals to consumers for retail broadband services and will surely act to delay or deny entry to new rivals.

Section 202, H.R. 1686; Section 401, H.R. 1685—This section, which purportedly deals with "Accelerated Deployment of Internet Backbone" is in essence simply an exemption of the ban on the provision by RBOCs of interLATA telephony until such time as the RBOCs have fully satisfied Section 271 of the Telecommunications Act.[4] At least two serious problems arise with this proposed section. First, it is a gross misnomer. There is simply no evidence that prematurely granting the RBOCs interLATA authority will accelerate the deployment of Internet backbone facilities. Indeed, the recent rapid deployment of Internet facilities has occurred within the structure and confines of the Telecommunications Act with its requirements for interLATA re-entry for RBOCs. Second, the section essentially disembowels Section 271 of the Telecommunications Act. But Section 271 of the Telecommunications Act is based on sound economic principles that recognize that until the local exchange

[2] As written, this section appears to apply to all local exchange companies, including CLEC which have essentially no facilities in place. Imposition of a deployment plan for DSL for CLECs is perhaps an oversight and could be remedied through appropriate editing. If this language is not an oversight, then the Committee should know that the imposition of an investment plan on new entrants is likely to create considerable barriers to entry on new carriers in direct opposition to Section 253 of the Telecommunications Act of 1996.

[3] Note that in the presence of price cap regulation (predominant among larger ILECs), the fact that ILECs have a monopoly position should not distort their incentives for efficient investment (which could perhaps then warrant the bill's intrusion into the investment decision).

[4] In a world of digital telephony, any attempt to distinguish between data and voice telephony as exists in H.R. 1686 is at best likely to prove to be pure folly and, at worst, a gaping loophole in provisions of Section 271 of the Telecommunications Act.

market is open to effective competition, RBOCs will have both the incentive and wherewithal to engage in anticompetitive discriminatory practices against their interLATA rivals. Thus, the bill would, if passed, prematurely grant the RBOCs with interLATA authority even if they have significant amounts of monopoly power over the provision of local exchange bottleneck facilities. This would constitute very poor public policy.

I hope that these thoughts help you as you deliberate the merits of telecommunications policy. Naturally, I am happy to provide further assistance to the Committee if you find that desirable.

Washington, DC, July 29, 1999.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN HYDE: I would appreciate your including my attached statement on H.R. 1686 and H.R. 1685, introduced by Congressmen Goodlatte and Boucher, in the record of the Committee's June 30, 1999 hearing on the bills.

Best wishes.

Cordially,

ROBERT H. BORK

Enclosure

PREPARED STATEMENT OF ROBERT H. BORK

I have been asked by AT&T Corp. to provide the Committee with my views on H.R. 1686., which has been introduced by Representative Goodlatte.

As the Committee knows, Sections 101 and 102 of H.R. 1686 would establish new "presumptions" under the Sherman Act that certain conduct, if engaged in by telecommunications companies or cable companies, violates the antitrust laws. In particular, Section 102 would declare it a presumptive antitrust violation for a "broadband access transport provider" with market power that provides its subscribers with a high-speed Internet access and content service from an affiliated firm not to permit all unaffiliated Internet Service Providers ("ISPs") equally favorable access to its transmission facilities. And although its wording is somewhat unclear, Section 103 would likewise appear to suggest that failing to provide such access to unaffiliated ISPs would or could be an "unfair method[ ] of competition" and therefore unlawful under that provision as well.[1] Sections 102 and 103 apparently represent an effort to force access to cable facilities for ISPs.

The bill has at least four serious (in my opinion, fatal) defects:

First, it addresses a problem that does not exist and therefore produces unwise policy. The Internet access services market is working well and competition is vigorous.

Second, the bill badly distorts existing antitrust jurisprudence by amending the Sherman Act to substitute unsupported legislative conclusions for judicial trials of facts and law.

Third, the bill, if enacted, would inevitably lead to regulation of the provision of Internet access, regulation that would be conducted by courts, which are wholly unsuited for the task, instead of administrative agencies.

Fourth, the bill would subvert the purposes of the Telecommunications Act of 1996 by permitting Regional Bell Operating Companies ("RBOCs") to engage in long-distance service without first opening their local service monopolies to competition.

The net effect of H.R. 1686 would be to hobble free competition for the benefit of some competitors—the local telephone monopolies and some Internet service providers—to the detriment of consumers.

1. The bill makes the wrong policy choices. Imposing broad new regulatory obligations on cable operators will impede emerging competition both in the provision of broadband services and in the area of local telephony. Requiring cable operators to act as common carriers and carry the services of all ISPs would be profoundly unwise. There is no "market failure" here to correct. To the contrary, the market is working precisely as it should. Cable companies are making substantial investments

[1] H.R. 1685, introduced by Representative Boucher, contains identical provisions. My comments on Sections 101, 102, and 103 of H.R. 1686 apply with equal force to their respective counterpart Sections 501, 502, and 503 in H.R. 1685.

and undertaking significant risk in order to develop and bring to market innovative cable modem services that they believe customers will value. The threat of this embryonic competition, in turn, is speeding the deployment (and dropping the price) of parallel high-speed technologies (DSL) that local telephone companies have had for a long time but until recently have had no incentive to offer to their customers. In addition, a number of companies have begun to provide high speed Internet access using digital satellite transmissions. As a result, consumers today have more options and better and more affordable services from multiple types of providers.

Cable has no bottleneck over Internet access. Indeed, its Internet access services are subscribed to by only a small fraction of cable customers. Imposing this new access regime will not help consumers, but will retard investment, slow the roll-out of new services, and reduce competitive pressure on the telephone companies. Those are hardly worthwhile policy objectives.

2. Quite aside from the demerits of the policy contemplated by this bill, there is no conceivable basis for implementing that policy by effectively amending the Sherman Act. The antitrust laws already apply to telephone companies and cable companies, and there is no evidence that those laws are not functioning properly in this area. Proponents of these bills must believe that the practices they attack could not be shown to violate the antitrust laws as those laws are presently written and construed, else there would be no need for the bills. But that is an admission that those practices do not involve abuses of market power or restrain competition. It is damaging to the very concept of antitrust to include within it a law that is itself designed to inhibit competition and free markets.

Efforts to alter the antitrust laws in order to "tailor" them to particular industries or address specific controversies are almost invariably pernicious. The antitrust laws are written in general terms, and require courts to apply general economic principles to specific controversies in the context of particular litigated cases. They thus enable courts to take into account changing market conditions and evolving economic learning. Attempts to freeze the law by creating special presumptions and legislatively decreeing specific outcomes for particular industries are much more likely to reflect protectionist impulses than sound pro-competitive policies to prevent courts from recognizing unforeseen factual developments, as well as to create substantial implementation problems. That is certainly the case here.

To take a single example, the rebuttable presumptions established by the bill appear nowhere else in the Sherman Act, and would create enormous confusion. Section 102 provides that a "broadband access transport provider that has market power in the broadband service provider market" and that "restrains unreasonably" a competitor's ability to compete shall "establish a *presumption* of a violation" of the Sherman Act. "Market power" is nowhere defined and may, or may not, be the same concept as the Sherman Act concept of monopoly power. In any event, I cannot imagine how such a presumption would actually be applied. The bills are silent on how a court would proceed once the presumption has been established and what kind of evidence a defendant would have to introduce in order to rebut it. The formulation of market power (if that is the same as monopoly power) in a relevant market plus unreasonable restraint on competition is generally the formulation for the completed offense of monopolization under Section 2 if the Sherman Act, not merely a presumption. It is conceivable, therefore, that this aspect of H.R. 1686 would actually weaken the prohibition of the Sherman Act.

However these ambiguities may be resolved in the courts, the real point of the legislation appears to be improperly to establish as a matter of law one view of what are currently highly controverted economic facts. Even with lengthy and thoughtful legislative hearings, the result would be to rule out of court facts and complications that are presently unforeseeable. That is mechanical jurisprudence at its worst. In the ordinary rule of reason case, in order to determine whether conduct will harm consumer welfare, the decision-maker must resolve a number of empirical issues—such as a determination of the relevant market, existing and potential market participants, market structure (i.e., factors that facilitate collusion, predation, restriction of output, etc.), barriers to entry, and any efficiencies produced by the challenged conduct. This legislation would bypass that process by simply declaring that there is a separate "broadband service provider market" and that individual broadband networks are, in effect, "essential facilities." Those are highly controversial (and, I believe, mistaken) propositions, but in all events, they are determinations that should be made based on evidence presented in court, not by statutory decree. Indeed, the problems with making such determinations legislatively, and thereby freezing them into law, are particularly acute here in light of the rapidly changing nature of the technology used to provide Internet access and the intensely dynamic nature of this market.

3. Just as the legislation would require Congress to act beyond the role to which it is institutionally suited, it would at the same time force courts likewise to act beyond their institutional competence and become, in effect, Internet regulators. More specifically, Sections 102 and 103 of H.R. 1686 impose common carrier-type obligations on broadband access transport providers by requiring them to provide reasonable and nondiscriminatory access to any ISP that requests it. This means that courts, and ultimately juries, would be called on to decide—whenever a broadband access transport provider treats one ISP differently from another (including denial of access)—whether this difference in treatment amounts to "undue discrimination." This in turn requires an assessment of such factors as the cost of providing service to a particular ISP, security risks, financial stability, and technological compatibility. Not only would this thrust courts into the role of regulatory agencies, it would place upon juries tasks of such economic, technological, and financial sophistication that no confidence whatever could be placed on their decisions. Moreover, results would vary from jury to jury and court to court so that uniformity of regulation could be achieved only through review de novo by the Supreme Court. The result is certain to be a legal and economic morass that can only inhibit the progress of American firms to the detriment of our ability to compete with European and Asian companies.

Further, as I read H.R. 1686, it would require courts to engage in ratemaking, an area in which courts clearly have no business. The bill requires that a broadband access provider that is affiliated with an ISP provide access on nondiscriminatory terms to other ISPs. But this does not mean that a court can simply require the broadband access provider to charge the nonaffiliated ISP the same rates as the affiliated ISP. There may be, and are almost certainly will be, legitimate cost differences in serving the two companies due to such factors as term commitment, volume, and credit history. Similarly, the ISP may have contributed some of the capital assets that are necessary to provide broadband service in exchange for a lower rate. The access rates that a broadband service provider may charge must be set to reflect these differences.

The legislation appears to acknowledge this general principle by permitting an assessment of "cost differentials." But that only confirms that it would require courts to act as regulatory agencies rather than as courts, engaged in the ongoing supervision of the rates, terms, and conditions of "nondiscriminatory access" to ensure "fair" treatment at the behest of any and every individual ISP plaintiff. And it further confirms that, if there were any issue here that needs to be addressed, it should be addressed, if at all, under the regulatory statutes and by regulatory agencies rather than under the antitrust laws and by courts. We have had experience with cost justification defenses under the Robinson-Patman Act and the conclusion of almost all informed commentary is that many of the most important costs, not being directly quantifiable, are inevitably left out of the calculation so that discriminations are found where none actually exist. There is no need to plunge into this quagmire when, as I indicated earlier, there is no marketplace problem that requires any legislative or regulatory solution at all.

4. Finally, Section 202 of H.R. 1686 is seriously flawed from yet another antitrust perspective.[2] That provision would permit the RBOCs to provide data services across LATA (local access and transport area) boundaries without first opening up their local markets to competition as is required by Section 271 of the Telecommunications Act of 1996. This "limited" relief would swallow the rule. It is my understanding that over half of today's telecommunications traffic is data and that percentage is growing rapidly. Moreover, with the advent of Internet Protocol technology, the distinction between "voice" and "data" traffic is disappearing. Thus, this bill would allow the RBOCs immediately to capture the majority of the benefits from providing long distance services while having to do nothing to make their local markets more competitive. And given that long distance competitors still need access to the RBOCs' "last mile" facilities, the result will be less competition in both local and long distance markets.

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[2] Section 401 of H.R. 1685 contains the same language as Section 202 of H.R. 1686 and is therefore subject to these same criticisms.

tee and larger committee. I didn't sit through the last session and become intimately acquainted with the special counsel and Independent Counsel Act as other members did, but rather gained a perspective on the campaign trail, talking with citizens about their impressions, and about I think a very serious fear that our system was in jeopardy, both from the perspective of what seemed to be unbridled expenditures and from the perspective of an ever-expanding jurisdiction. It was communicated over and over and over to me during the last year that something had gone terribly awry.

Now, there are many proposals, among them, that we allow this to lapse, and what I want is to be able to provide assurances that, if we do so, those concerns of injustice will be addressed with that course of action, too.

Mr. GEKAS. We thank the lady.

Now, we are prepared to, at long last, hear from our distinguished guests. So as not to ruffle any feathers, we will do it alphabetically—Barr and Civiletti—in that order. So, General Barr, please feel free to proceed.

The normal rule is for the written statements, of course, to be accepted, without objection, for the record. The oral statements will be limited, generally, to 5 minutes, subject to the heavy hand of the chairman.

So, we now recognize the gentleman, General Barr.

STATEMENT OF WILLIAM P. BARR, FORMER ATTORNEY GENERAL

Mr. WILLIAM BARR. Good morning, Mr. Chairman and members of the subcommittee. Thank you for inviting me today to provide my views on the reauthorization of the Independent Counsel Statute.

I have been a consistent opponent of that statute, and have continuously called for its non-renewal. In my view, the vices of the statute are inherent in the statute itself, the very enterprise of the statute itself, not in the way various independent counsels have handled their job.

In that regard, I have my list of people who I think have done a good job and those who have done a bad job, and I am sure each member of this subcommittee has their list, and I think our lists may vary. But, in my view, the vice is inherent in the statute itself. I don't want to canvas them in detail today; they have been, I think, masterfully canvassed by Justice Scalia in his descent over 10 years ago. I think when you go back and read that dissent, all of us should be impressed with his impressions and his handling of that matter.

But, what in essence, happens under the independent counsel is you create what, as in the movie "Dr. Strangelove," is really a doomsday weapon. The legal process, the criminal process is a juggernaut, let us make no mistake about it. Once you put that juggernaut on the track and start moving, it is very, very difficult to stop it.

What the statute essentially does is remove the discretion from people who should be in the position to supervise that process, and so it just carries forward a juggernaut to its logical end. It removes the perspective, the judgment, the discretion that should be built

into prosecutorial decisions, questions of proportionality, questions of whether alternative sanctions exist. If a government official, an executive branch Cabinet Secretary, abuses his frequent flyer miles, you know, is that really something that—it may be a technical violation of Federal law, but is that something that we are going to prosecute the person over, or are we going to require reparations; and, if significant venality is resolved, perhaps resignation and just deal with it that way?

I have said publicly, you know, accidental technical violations of campaign finance law, making a call from an office, not contumaciously, but unknowingly violating the law, are we going to make a Federal case out of that and prosecute that? Normally, those judgments would be made by a politically accountable official, and the juggernaut would never get started, or if it had been started it would be turned off at the appropriate time.

But I think that the fact that we have created this doomsday weapon in the IC has had a number of consequences. Not only is it very unfair to the people that are in the cross hair, but I think it has contributed largely to the criminalization of our political life. Instead of having clashes over policies and philosophy, politics, in large degree in this town, has become a question of whether or not you can cast the actions of your opponents in a way that can trigger the Independent Counsel Statute, and then you call the fire of the Independent Counsel Statute down on your political opponents. Now, I have my views of when this game started, and you know, who is responsible for it, but that is irrelevant.

The fact is that what is now happening in our political process, and it is an unhealthy sign when we have all these legal pundits instead of people discussing policy. We have editorial writers, you know, opining as armchair prosecutors as whether certain conduct could be viewed as a conspiracy or an obstruction of justice and things like that, because we have essentially used the criminal process as a political weapon. I think there are a lot of reasons behind that, but one of the reasons is we have this weapon at hand.

Now, another concern I have here is that there is—this is all unnecessary in my view. There is an alternative to having a statutory independent counsel, and it is what we had in this country for 200 years before Watergate, and it is what we had in Watergate. And that is, that the Attorney General does have the ability in appropriate cases to bring someone in from outside the Department, and that is an important point to recognize. The choice here isn't between business as usual, that is, letting a case be handled in the bowels of the Justice Department by nameless people in the Public Integrity Section on the one hand, and bringing in a statutory independent counsel on the other. There are many cases, and probably most cases, involving executive branch officials that are petty things that should be handled business as usual, you know, abuse of car or something like that, of your official car. But in those cases that the public does require some assurance that the matter is going to be handled professionally, without political influence, fairly, thoroughly, the Attorney General can bring somebody in that will provide the public with that assurance. The Attorney General is the person that is in the best position to make that choice because it is the Attorney General who is ultimately accountable, and

pays the price if it is a bad choice; ultimately accountable for the selection of the individual and for the conduct of the investigation itself.

Now, I would suggest that it is wrong to look for a foolproof method. Looking for a foolproof method, in my view, is foolhardy. We could extricate crime in our society, or at least go a long distance, if we put a process in place that will detect and prosecute every violation of law, but will people want to pay the price of such a mechanism? No. We have adequate law enforcement; we can tighten it up a bit, put more resources into it. But we are not trying to create a foolproof mechanism; an adequate mechanism will do just fine.

And I think it is the same with policing the executive branch. We shouldn't be looking for a foolproof mechanism that sacrifices all other values and interest, public interest, to ensuring that every potential violation is detected and tracked down and prosecuted to the nth degree. The price we pay is too high for it; it is unnecessary; we have gotten through as a Nation without it.

I shutter to think what Abraham Lincoln, how he could have managed the Civil War; or FDR manage the delicate process of moving our country into confrontation with the axes' powers if he had an independent counsel hanging over his shoulder.

We can get through this without a foolproof mechanism, and I think the price we pay in deterring good people from going into government service, we will end up with worse executive branch government because of this contraption, not better, because mediocrity will go into the system, people who need the jobs for some reason or another, or have nothing to lose.

Also I think, as Justice Scalia points out in the timidity of the executive branch, we are in a situation now where no one wants to, you know, use the lavatory without getting a legal opinion from somebody; that is how timid people are getting because they are gun-shy because of this statute. So, I think the price we pay for this contraption is far too high.

The Attorney General can handle these things under existing authority, and there is, ultimately, the political sanction to be used if there is an abuse of the office. I would like to see the watchdog institutions we have in society step up and perform the primary role they are supposed to, not let the independent counsel handle everything, but take the time when you are confirming public officials like the Attorney General or, like, the head of the Criminal Division, and every executive branch official to really make sure we are putting people of integrity in those positions, and then continue vigorous oversight both by Congress and the press.

Thank you, Mr. Chairman.

[The prepared statement of Mr. William Barr follows:]

PREPARED STATEMENT OF WILLIAM P. BARR, FORMER ATTORNEY GENERAL

Mr. Chairman: Thank you for inviting me to provide my views on whether to reauthorize the Independent Counsel statute. I have consistently opposed that statute since its enactment. At the end of the Bush administration I urged the new Clinton administration and the Democratic leadership in Congress not to renew the statute.

It is my view that the vices of the statute do not arise from a failure in execution but are inherent in its very concept and necessary operation. The basic problem is not that particular counsel have abused their office; it is that the whole statute is inherently flawed.

I do not want to detail today all the particular problems with the statute. Opponents have by now offered a sufficient litany of those evils, and in my view they were best set forth over a decade ago by Justice Scalia in his prescient and unanswerable dissent in *Morrison* v. *Olson*. Rather, I want to focus on why the very concept of trying to create a single-mission prosecutor outside supervision of the Attorney General to investigate and prosecute high Government officials is flawed and leads to both the criminalization of our political system and the politicization of our criminal justice system.

Decisions as to whether a particular matter should be treated, in the first instance, as potentially criminal, whether it should continue to be pursued as a criminal matter, and whether it should ultimately be charged as a crime all require the exercise of discretion and common-sense judgment. The statute's whole enterprise is to remove discretion so that no one can stop the train. As long as something *can* arguably be viewed as potentially criminal, then, under the statute, it must be pursued through the criminal process to the bitter end. Once you have given a government official *one duty*—and that is to pursue a particular matter through the criminal process—you have taken the discretion out of the system. Do not expect the Independent Counsel to conclude that he should not pursue the one matter he has been charged with pursuing as a criminal violation. In essence, just like in the movie Doctor Strangelove, we have created a criminal law Doomsday machine. Once triggered, no one can stop it, and everyone is trapped by it - the Attorney General, the Independent Counsel himself, the target, and indeed the whole body politic.

The creation of this Doomsday weapon has had several fundamental and pernicious consequences.

First, it has contributed to criminalization of political disputes. Clashes over political philosophy and policies have been supplanted by the game of how to trigger this Doomsday machine against one's political opponents. Our political discourse has now been channeled into the concepts and categories of criminal law. Politicians and the media who cover politics spend their time conjuring up arguments why the actions of their opponents should be seen as potentially criminal.

Second, at the same time, in instances where-there is a legitimate role for the criminal law in policing Executive branch conduct, the statute has contributed to the politicization of that criminal process. At the same time that the Independent Counsel is too strong; it is also too weak. When the stakes actually become high, and the actual survival of an Administration may be at stake, and the Administration turns to its political weapons, the Independent is too weak to withstand political assault. Traditionally, a prosecutor who is within the ambit of the Justice Department is protected by the Attorney General and the institution itself For a President to take on a prosecutor, he has to take on the Attorney General and the Justice Department. A critical point in Watergate was that when the President turned on Archibald Cox, he had to take on the entire Justice Department, and that changed the entire dynamic.

Third, the existence of the Independent Counsel statute has tended to weaken the watchdog functions of those institutions that we should be primarily relying upon. Vigorous congressional oversight and media scrutiny of important matters play second fiddle to endless ongoing investigations into whether those concedingly serious matters happen to constitute a technical violation of criminal law. The robust oversight functions of congress and the media have essentially been preempted by the criminal process, and these institutions have been reduced to kibbitzers in the arcana of the legal system.

I believe, there is an alternative way of dealing with those cases which require the Executive branch to investigate itself That alternative was adequate for two hundred years before the Independent Counsel statute was passed and is adequate today. Most allegations of wrongdoing by Executive branch officials involve minor matters and can be easily handled by the Public Integrity Section of the Department of Justice. When an exceptionally sensitive case does arise, the choice we have is not between the independent counsel, on the one hand, and a business-as-usual investigation by the Department of Justice on the other. The Attorney General can and should provide assurance to the public that the matter will be vigorously and properly pursued without political influence. This has been accomplished by the Attorney General bringing in from outside the Department someone who has sufficient stature, background and judgment, as well as reputation for independence, to provide that measure of assurance. The Attorney General has every incentive to appoint the right person for the job - someone who will be fair and yet completely thorough—because it is the Attorney General who pays the price- if the public does not perceive this to be the case. When I served as Attorney General, I used this traditional appointment authority on three occasions—Judge Lacey on the so-called "Iraqgate" matter, Judge Bua on the so-called "Inslaw" matter; and Judge Wilkey

on the House Bank matter. These appointments did not wholly eliminate criticism - there was still sniping from some partisan quarters but, in the end, fair-minded people of both political parties recognized that these were good faith investigations and accepted their conclusions. Relying C)? on the Attorney General's appointment authority achieves all the goals of the Independent Counsel statute without all its vices.

Mr. GEKAS. We thank General Barr.

We will now hear from General Civiletti, after which we will recess for the purpose of responding to the vote on the floor. General Civiletti.

STATEMENT OF BENJAMIN R. CIVILETTI, FORMER ATTORNEY GENERAL

Mr. CIVILETTI. Thank you, Mr. Chairman, Mr. Nadler, other members of the subcommittee. I thank you for the opportunity to appear before you, and give you my views on this important issue, and I commend the committee and the chairman for its serious consideration of something that is not at all easy.

I am a trial lawyer essentially. I have been a trial lawyer for 37 years, trying civil cases and criminal cases on both sides of the fence, plaintiff and defendant, prosecutor and defendant. I have conducted any number of independent or private investigations and some public investigations where I have been engaged by one form of government or another, one particularly, the House Judiciary Committee of the State of Rhode Island, and the impeachment process of the chief justice at that time of Rhode Island. So, my views are based and come, so that I have full disclosure, essentially, from my experience as a trial lawyer, and partly as my experience in 4 years in the Carter administration in the Justice Department, I have concluded, after myself experiencing appointment of independent counsel, and also examining the 20 or so independent counsels that have been appointed, that the act has structural flaws, inherent structural flaws which make it undesirable, that it should expire, certainly should expire in terms of its present provisions. Essentially what it does, it creates and was meant to create a special situation. But, what has occurred is that irregularity in the process, in the way in which the act is triggered, in the time for the initial inquiry, in the 90 days for the preliminary investigation, it has created unequal justice instead of its intent, which was to create equal justice regardless of high position, and to make sure and assure the American people that investigations of high government officials were conducted fairly and with determination, and they didn't get any biased kinds of breaks.

But, instead, what has happened frequently, the process of inquiry reports determination of whether or not to appoint an independent counsel, or request the appointment of an independent counsel converts what would, in ordinary criminal proceedings, be an investigation with little publicity into a hubbub of publicity, painting the subject, creating a pre-bias before an investigation is even conducted, shifting issues to the nature, qualifications, basis of the independent counsel themselves rather than the issue, once charged, "Is this person guilty of this crime or not?"

Another irregularity, as compared to the process of the criminal law, is target first then investigate. In the criminal process, regardless of how high officials are involved, the question is has a crime

occurred, or is it likely that a crime has occurred, the investigation then goes about determining all of the circumstances of the crime and trying to find who the target is, or who the suspect is, or the best suspect, and to see if there is reasonable cause to indict, and then sufficient evidence to convict.

But, the Special Prosecutor Act or the Independent Counsel Act kind of reverses that process, and it picks a target, and then, essentially, says, "Now, what crime did that target—can we find a crime that that target committed?"

Another problem with the act in a similar regard is that ordinarily in the criminal process, whether it is the Department of Justice or State Attorney General or State's attorney in State proceedings, the prosecutor has a balance, limited resources, time, people and money, and therefore, sets priorities and standards, so that the most serious crimes are pursued first, those that harm the people the greatest. Minor crimes, or lesser crimes are treated with plea bargains or non-prosecution or some other mechanism. Here we don't have that at all; there is no judgment, no predetermined judgment as a result of an office's or a national set of priorities, so that there is no safeguard with regard to, as compared to the regular criminal process, there is no safeguard of balance.

Instead, to some extent and with some independent counsel, I guess, or the risk is, of course, that their success or failure depends upon their prosecuting any crime that can be found, of any nature. That is a concern. Of course, the act has worked reasonably well in a dozen circumstances, my guess is, where there have either been no prosecutions or successful prosecutions, and has worked more like the regular system. But in the other half dozen or more investigations, without regard to the quality or conduct of the independent counsel, the irregularity of the act has destroyed what otherwise has been known as due process.

Now, my suggestion is that there is an alternative, and that alternative is the one that Attorney General Barr referred to and that is the Attorney General's power under, I think, title 28, section 600 or so, to appoint a special counsel, as Judge Bell did in about 1977 for what was known as the peanutgate investigation, where he appointed Paul Curran. Curran, who was a Republican U.S. Attorney out of the southern district of New York, did a superb job, concluded his investigation within 6 months.

And that has occurred time after time going back historically to the 1920's and the 1950's in the Truman era when IRS investigations and scandals were prevalent all the way through Leon Jaworsky, and as you may recall and certainly strikes me because of its connection to Maryland, George Beall and the Attorney General's prosecution of Vice President Agnew at the time.

So, there is an alternative; it may have to be tinkered with; it has some of the same senses of irregularity, but not as many as the present statute, and it is far more or better subject to checks and balances and regularity than this statute.

Thank you very much.

[The prepared statement of Mr. Civiletti follows:]

PREPARED STATEMENT OF BENJAMIN R. CIVILETTI, FORMER ATTORNEY GENERAL

Mr. Chairman, Congressman Nadler and Members of the Subcommittee:

Thank you for the opportunity to testify about the reauthorization of the Independent Counsel Act. Let me also congratulate this Subcommittee for undertaking this series of hearings to explore the operation of the statute in a thoughtful and non-partisan manner.

The most recent statute authorizing appointment of an independent counsel was enacted in 1994 (28 U.S.C. §591–599) and is due to expire on June 30th of this year. During the course of my service as Attorney General of the United States in the Carter Administration from 1979–1981, it was my duty to request the appointment of the first two independent counsels—then called special counsels—under the first authorization statute, the Ethics in Government Act of 1978.

In addition to my personal experience with one of the predecessor statutes, I have watched the operation of the Independent Counsel Act (hereinafter "the Act") closely over the past 20 years. Much has changed in the operation of the independent counsel since the first Special Counsel, Arthur Christy, was appointed in 1979 to investigate whether the President's chief of staff had used a controlled substance. That investigation took six months and cost $180,000 and resulted in a grand jury return of no true bill. Independent counsels, of which there have been 20, now routinely take many years and spend millions of dollars to complete their work often under intense media and public scrutiny. In the past five years alone, seven independent counsels have been appointed and some of them have seen their original mandates significantly expanded. In addition, there has been considerable clamor for appointment of several more independent counsels in recent years.

Based on my experience and observations, I believe that the Act is hopelessly flawed and cannot be repaired. I, therefore, strongly recommend that it be allowed to expire as scheduled this year without reauthorization in any form. This view is based not on an assessment of the performance of any individual independent counsel or counsels, but instead is rooted firmly in what I believe are insurmountable inherent problems with the structure and operation of the Act. These flaws also lead to the development of a risk of misuse of the Act by fringe political extremists of every persuasion.

My opposition to the reauthorization of the Independent Counsel Act is rooted in five basic points:

1. The Act has failed to accomplish its intended goal to assure equal justice for all, regardless of position.

As originally conceived, the Ethics in Government Act of 1978 was intended to provide equal justice for everyone, regardless of one's high position in government or relationship to anyone in such a position. That statute (and its successors) established a system of investigation and prosecution whenever a conflict, or the appearance of a conflict, arose between the Attorney General and the President due to allegations against either of them or against other high-ranking members or friends of the Administration of which the Attorney General was a part. Supporters believed that this was the best way to assure the credibility of such an investigation while safeguarding the rights of the subjects of such investigations. Instead, the operation of the Act has resulted in just the opposite. For those individuals caught up in its operation, the Act has resulted in suspicion, taint and prejudice, in short, unequal justice. The operation of the independent counsel statute has become unfair and accords those subjected to it far less than the due process normally accorded in the criminal justice system.

This deprivation of due process exists in the following five ways:

a. The media and other public attention given to the issue of the appointment, or the request for an appointment, of an independent counsel *itself* taints the subject even before any investigation is commenced or charges filed. This publicity and accompanying allegations invariably damage the reputation of the subject, often beyond any repair, regardless of the ultimate result regarding appointment. This stands in stark contrast to the normal course of other criminal investigations in which there is usually no taint or bias against the subject at all, unless and until legitimate charges are brought and publicly filed.

b. In the usual course of events, a crime occurs and then the criminal process is invoked to search for and identify the perpetrator of that crime by investigation and development of evidence. Under the operation of the statutory scheme of the Independent Counsel Act, this process is turned on its head. First the *subject* of suspected activity is identified and only then are the mechanisms of the Act invoked to search for the crime. This reversal raises the specter of the fate of Jean Valjean in *Les Misérables* in which Inspector Javert's obsessive pursuit is of the person rather than of justice.

c. Individuals involved in the regular criminal justice process (as well as the public) can rely on a certain level of predictability of professionalism, competence and judgment on the part of investigators and prosecutors. These decision-makers have years, and often entire careers, of training, standards and experience that make them suitable for performing their duties. Under the Independent Counsel Act, however, there is no reliable selection process that assures that only the most qualified individuals will be given this tremendous responsibility. The lack of any selection standards creates variable and uneven qualifications and, therefore, no reliable predictability of results.

d. Ordinarily in the criminal justice system most crimes are pursued with the available and finite resources in accord with the priorities established through experience. Those well-tested priorities demand that those crimes that are most harmful to the public receive priority treatment and vigorous attention. On the other hand, those acts that are potentially criminal but may constitute insignificant conduct are given lower priority and fewer resources and often are not prosecuted at all. The Independent Counsel Act allows for no such prioritization as ordinarily required by the need to balance the nature of the conduct against limitations of resources and time by career professionals. Disparity in treatment, instead of being limited, is almost unchecked.

e. Finally, even when an independent counsel does not bring charges, the Act requires that a report be filed with the court. This report requirement, and the attention it generates, frequently subjects those individuals mentioned in it to serious criticism and damage despite the fact that they are not being charged with any offense. This sort of prosecutorial behavior would never be tolerated in the course of the usual criminal process.

Individually and collectively, these five points persuade me that the operation of the Independent Counsel Act denies those caught in its machinery with the due process of law to which every citizen is entitled and that this represents a failure of the Act to accomplish one of its principal intended purposes. It was intended to ensure that high-ranking officials did not get special treatment, not to subject them to unfair and unequal treatment.

2. The Act is subject to manipulation and abuse by irresponsible partisan politics.

The nature of the matters and individuals potentially subject to the Independent Counsel Act has made it vulnerable to abuse by the irresponsible. Partisan fringes of any and all political persuasion may use the Act to generate publicity and clamor intended to harass or embarrass political opponents by making allegations of criminality, often with little or no foundation. The effort to remove the politics from these investigations and prosecutions by appointment of someone ostensibly "independent" has failed. It has merely resulted in the shifting of the political pressure points to other places in the process such as to whether or not an independent counsel should be appointed as well as to the identity of the counsel and the conduct of his investigation. This politicization can do great mischief in a criminal process. By comparison, the ordinary criminal process is usually free of such routine attempts at politically-motivated manipulation

3. Use of the Act has expanded to conduct not originally intended to be covered.

Coming on the heels of the substantial corruption represented by Watergate, the Act was intended to provide a mechanism to address major crimes of corruption of government functions by high-ranking officials and those very close to them. Over the years the use of the Act has vastly exceeded its original purposes, both as to the kind of conduct and the type of individuals that have been the subject of independent counsel investigations. Clearly, the Act is no longer considered constrained to those purposes for which it was originally legislated.

4. The Act provides for little or no accountability for Independent Counsels.

The Act provides for little or no accountability for the independent counsel as compared to the continual series of checks and balances to which actors in the rest of the criminal justice system are subject. Although technically subject to the Department of Justice policies, the independent counsel is not subject to any of the usual restraints or restrictions imposed upon federal or other investigators and prosecutors. There is very little meaningful limitation on an independent counsel in terms of scope of conduct that can be investigated or crimes that can be charged. There are no limits in terms of length of an investigation or available resources. Even the conclusions they reach are not subject to accountability or checks. The authority given the Attorney General to remove the independent counsel for "good

cause" is too limited and too politically impractical. It provides for what, in effect, is a death sentence without acknowledging the reality that it would be almost impossible to impose, even if called for.

5. There is a better way to address conflicts of interest.

Finally, I believe that the Independent Counsel Act can be allowed to expire without fear that we will have no ability to deal credibly with allegations against high-ranking government officials because there is a reasonable alternative. When there is a conflict between the Attorney General and the subject of a criminal investigation, there can and should be appointment of a regulatory independent counsel in the Department of Justice by the Attorney General. Authority for this appointment exists under current Justice Department regulations (*See* 28 C.F.R. 600) and has been successfully invoked in recent years. Two examples include Attorney General Barr's appointment of a regulatory independent counsel to investigate matters related to BCCI and Attorney General Reno's appointment of Robert Fiske as regulatory independent counsel in Whitewater during the period in which the statute had lapsed. These are just two examples of the history of successful prosecutions under this model going back many decades to the Teapot Dome scandal in the 1920s, the investigation of the IRS in the 1950s, the Watergate investigation by Leon Jaworski and the investigation of the so-called "peanut scandal" by Paul Curran who was appointed special counsel by Attorney General Griffin Bell. Also, let us not forget that it was Attorney General Elliot Richardson's Justice Department that prosecuted Vice President Agnew before there was an independent counsel statute.

In closing, let me say that in 1988 the United States Supreme Court, in the case of *Morrison* v. *Olson*, 487 U.S. 654 (1988) ruled that the independent counsel statute was constitutional. But we should all acknowledge that just being constitutional does not necessarily make a statute a good law or a wise policy. The Independent Counsel Act is a flawed law and an unsound policy. It cannot be saved by modification at the margins. It should be allowed to pass into the province of legal historians.

I would be happy to try to answer any of your questions.

Mr. GEKAS. We thank you, General Civiletti. We ask your indulgence to remain in the chamber until we return from the votes that we have to cast on the floor, because we do want to ask you for your advice and for some answers to questions that are fomenting in the minds of the members.

With that, we recess until 11:10 a.m.

[Recess.]

Mr. GEKAS. The hour of 11:10 a.m., having arrived, this hearing will return to full session, pending the arrival of another member to make it a hearing quorum.

[Recess.]

Mr. GEKAS. The time of the recess, having expired, and noting the attendance of the gentleman from Arkansas, Mr. Hutchinson, together with the Chair, the quorum having been established, we will proceed with a round of questions for our distinguished panelists.

The Chair will indulge itself and allot itself the accustomed 5 minutes.

General Barr, I was struck by the fact that you feel that—you practically said that we ought to treat the allegations of wrongdoing almost on an ad hoc basis, not as soon as there is an allegation, immediately go to see what kind of prosecutorial mechanism we can establish, but rather to determine in kinds of discretionary ways the severity of the allegation, et cetera.

What was brought to mind immediately to me was the allegation against Hamilton Jordan of controlled substance misuse, or something like that, during the Carter administration. Of course, we should probably ask Mr. Civiletti on this. But, looking back on it and learning of the quick disposition of that, that was a teapot or

one that didn't quite rise to the level of something that should have been investigated. Do you agree that that is the kind of discretion that ought to be applied as to whether a case like that should have ever been the subject?

Mr. WILLIAM BARR. I don't recall enough about the details of that, but that strikes me as the kind of case that could have been handled within the Department. As I see it, there are cases that can be handled by career prosecutors in the Public Integrity Section, but there are cases and the political system itself will be the judge of which those cases are, which cases fall into this category, where the Attorney General I think should bring someone in from the outside that has independent stature, experience, a broader perspective, and sort of an independent power base, if you will, to supervise a case. The political process will dictate when that is appropriate, and will also assure that appropriate people are appointed.

So, when Janet Reno appointed Fiske from New York, I thought that was an appropriate decision. I did this three times during my own tenure on the so-called Iraqgate matter, which was a crock, and I didn't feel that it amounted to something that an independent counsel under the statute should look into. Nevertheless, I brought in Judge Lacey. I had asked Attorney General Civiletti, actually, to come in to do that, but he was tied up on a matter in private practice.

Mr. GEKAS. He was impeaching somebody. [Laughter.]

Mr. WILLIAM BARR. I also did it on the so-called Inslaw matter, which was even more of a crock because no one could ever understand what that one was about, but brought in Judge Buoa to do that. These were all people—and then on the House bank matter, Judge Wilkey. These were people who could come in and provide assurance that these matters were going to be handled without political influence. They conducted the investigations expeditiously, and carping did not disappear; there was still sniping, but basically, the job got done and we moved on.

Mr. GEKAS. You just reached out and found one of these individuals who was willing to serve?

Mr. WILLIAM BARR. Correct.

Mr. GEKAS. What do you think of the idea of having a kind of a board, perhaps, made up of American Bar Association membership or a special division of that organization to have a pool of people to whom the Attorney General can look for plucking one or two of them for these special tasks?

Mr. WILLIAM BARR. I would be opposed to that. I think it is an unnecessary embellishment in the sense that—I think the Attorney General has to exercise their judgment, and discretion upfront as to who the appropriate person is. Frankly, someone who spent the time getting onto one of these boards, I wouldn't necessarily think is the right person to appoint for one of these things. But, the Attorney General, I think, has to be—ultimately is responsible for the decision that is made, and also for the ultimate conduct of the investigation. And therefore, I think the Attorney General should be able to pick whomever they feel is the proper person, someone who isn't going to be a headhunter but at the same time, someone who will be thorough, and fair.

Mr. GEKAS. How did you get to Judge Wilkey?

Mr. WILLIAM BARR. I knew Judge Wilkey; I knew General Civiletti; I knew—and when General Civiletti couldn't do it, I had heard about Judge Lacey. He had been supervising union issues up in New Jersey.

Mr. GEKAS. So, you believe the Attorney General can simply, within its own discretion of the office, look to the world of the bar, and select judicious individuals.

Mr. WILLIAM BARR. Correct. I think it is a mistake to go to people who have one agenda, or to create an office that has a narrow agenda. I believe the kind of person who should be supervising these cases is someone who has broad-gauged experience, experience in the Department, experience with the prosecutorial function, experience beyond that, and who comes in just for that assignment, and is still subject to the supervisory authority of the Attorney General, although perhaps, not removable except for cause.

Mr. GEKAS. General Civiletti, what do you think of the proposition that we are contemplating of having, just as the Criminal Division head, an Assistant Attorney General, is subject to confirmation, the choice of the Attorney General to head a particular investigation as special counsel confirmable by the Senate?

Mr. CIVILETTI. I don't think it hurts much; I don't think it helps much, because the head of the Criminal Division—which I was the head of the Criminal Division for about a year and a half—really is the decisionmaker with regard to prosecutions and investigations. Ordinarily, he leaves it to the section chiefs, whether it is the Fraud Section or the Public Integrity Section, or whatever, but the Assistant Attorney General routinely and regularly has the authority to initiate, to insist on prosecutions, to reverse decisions, and that Assistant Attorney General is already a presidential appointee, and goes through the confirmatory process.

Mr. GEKAS. The time of the Chair has expired. We turn to the gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you.

I want to read some excerpts from today's op-ed piece by Archibald Cox and Phil Heymann, and ask you to comment on that first. It says, "The current statute's faults are twofold. First, politicians belonging to the party not in control of the executive branch are prone to demand the appointment of independent counsels for political reasons, as bombs to toss into the ranks of their opponents. Second, the relentless investigation directed at individuals," which you talked about before. It talks about "Similar dangers would arise if we relied upon special prosecutors appointed by the Attorney General." I would like your comment on that.

Then he says, "The best way to avoid these pitfalls is to assign the investigation, and prosecution against high officials to pre-existent, permanent unit of government, and to couple them with strong safeguards against outside influence. The most suitable unit is the Criminal Division," and then they suggest the following safeguards: "one, that the decision of the Assistant Attorney General, whether they involve starting an investigation, or ending one—must, with narrow exceptions, be final. Indeed, under Mr. Bell and Mr. Civiletti, all decisions concerning the prosecution of a particular case were ordinarily free from review, even by the Attorney

General himself. Second, if the Attorney General believes the prosecution's decision is plainly wrong, he or she should be able to reverse that decision, but only in the form of a public statement, giving the reasons."

He then says, "Mr. Bell strengthened the wall against influence by forbidding any communication about specific cases between prosecutors and Members of Congress, congressional staff members or White House officials. Any critical information could be communicated only through the AG, or to one of the most senior deputies. This rule should be expanded in any case involving the President, Vice President or Cabinet member, to bar even communications from the Attorney General, Deputy AG, or Associate AG, except to convey information like the involvement of sensitive, international relations. The rule would exclude from any role in prosecution virtually all Justice Department officials who might be personally or politically close to the President or other high-level officials under investigation."

One further safeguard for high level cases, they suggest, "Whenever the Assistant AG begins seriously to consider terminating an active investigation, he should be required to consult the panel of three of his predecessors, including at least one who was appointed by a President of the opposing political party. After that consultation, the Assistant AG should decide, but if he decides to discontinue the investigation without further action, he should be publicly required to state his or her reasons."

Could you comment—do you think it would be a good idea to leave this situation to the Criminal Division with or without these safeguards; what do you think of these safeguards; and, what do you think of the comment that a special prosecutor appointed by the Attorney General has the same basic problems as an independent counsel appointed now? In other words, maybe we should get rid of this special prosecutor appointed under section 28–2, under section 28, leave it to the Attorney, to the Assistant, to the Criminal Division with the safeguards outlined here, and perhaps some others. Could you just comment on both of them, Mr. Barr, first?

Mr. WILLIAM BARR. I am opposed to those recommendations, both elements. First, I think the supervision of cases should be done by someone who is not, does not have a narrow focus, but is broad-gauged, and not necessarily and exclusively coming from it from a position as prosecutor. All prosecutors have to be supervised, in my opinion.

Mr. NADLER. This doesn't leave it, then, supervised by the Assistant Attorney General in charge of the Criminal Division?

Mr. WILLIAM BARR. I think the Assistant Attorney General is a prosecutor, too, but requiring a unit with narrow focus, and giving them ultimate responsibility, in my view, is not the way to go.

And also, I think there are cases where you cannot count on the people in the Department of Justice, you know, the line people, or even the Assistant Attorney Generals to provide a level of assurance that this case is going to be thoroughly handled. You sometimes get offices that go after people; prosecutors are known—can sometimes become sort of head hunters; they get very focused, and are very vigorous and zealous. At the same time, I have seen cases

where I think career prosecutors are trying to please their supervisors, maybe by not bringing a case, or maybe by bring a case.

I think, ultimately, they have to be supervised, and I think they have to be supervised, ultimately, by someone who has a broader agenda, and is broader-gauged than just someone in charge of public integrity.

I think the idea of isolating, and providing insulation, for that reason, is bad. In my own experience, I have seen line career prosecutors go after political officials of the other party, in my case going after high level Democratic officials. I thought they were—had lost perspective and were on a vendetta, and I shut the case off. I would shut the case off for a Republican if people objected to it and thought it was partisan, let the chips fall where they may. There is a political process that imposes a check, but I would not say that just because a career prosecutor thinks something should pursue, we all should, you know, take that as gospel.

Look at Attorney General Reno's situation in the campaign financing. She didn't bring a big wig from the outside in; she brought in LaBella, a career prosecutor from California, very highly regarded in-house guy. Now, she ultimately disagreed with his conclusion. He said, "You need an independent counsel." She disagreed with that conclusion, and overrode him. Now, under this approach, in this editorial, whatever LaBella said would be gospel. Attorney General——

Mr. NADLER. No, she would be able to override him, but there would be another board—and she would have to publicly state her reasons. Cox and Heymann say that appointing a special prosecutor, even under the existing statute, is still subject to the fact that politicians belonging to the other party are, then, prone for political reasons, to ask for a special prosecutor to be appointed just as a bomb throwing, and, "second, the appointment itself, and the formation of a special staff dedicated to a single investigation encourages the relentless pursuit of every avenue, however far afield that might lead to the conviction of the high official. This almost irresistible tendency is encouraged by the fact that independent counsels have no way to demonstrate success or even to justify their existence, except for indictment, impeachment and conviction, and similar dangers would arise if we relied upon special prosecutors appointed by the Attorney General." Would you comment on that?

Mr. WILLIAM BARR. Well, first that hasn't been my—first, the divisive Attorney General appointment goes back in history. It is what we used up until Watergate; it was used in Watergate. So, it is not as if we haven't had experience with it, and yes, there are times where issues become politicized, but it is not the automatic doomsday weapon that we see with the IC Statute.

My own experience with direct deployments, I didn't have that problem. Did Bill Safire and other pundits attack me for doing it? Yes, but life went on; I survived the attacks. You know, you are never going to satisfy everybody. Basically, fair-minded people on both sides of the aisle said, "Yes, we are satisfied, this was a good investigation."

Mr. NADLER. Mr. Chairman, could I extend for just one further question?

Mr. GEKAS. Without objection.

Mr. NADLER. Thank you. Mr. Barr again, is it your testimony, then, that going back to the previous system, just getting rid of this statute, and do nothing other than what we had in the previous system, or is it your testimony that we should make some changes to the previous system?

Mr. WILLIAM BARR. I think there are a couple of changes that could be made to fortify the current Attorney General, the Attorney General's power.

I know Congressman Hutchinson was working on some proposals that would allow people to formally request the appointment of someone by the Attorney General, and have the Attorney General explain why that was not appropriate. Statutory protection in terms of not being able to be removed by the Attorney General, except for cause, and also other issues of conflict of interest.

When I went out to try to find people to bring in like General Civiletti to investigate cases, or supervise their investigation, you run into conflict—the general conflict of interest statute makes it virtually impossible for someone to come in from practice. That is why the current law deals with that in sections 594(i) and (j), and I think that those provisions should be adopted to give the Attorney General more flexibility in going out, and bringing somebody in.

I think, also, you have to address the issue of attorneys' fees. When the Justice Department investigates someone, generally they don't get their attorneys' fees. Under the statute, there is a provision for paying people their attorneys' fees if they are not indicted. I think the committee should take a look at that issue, particularly where the thing being investigated relates to public duties, the allegation relates to public duties. Like in any corporation, if you are investigated and charged, the corporation will indemnify you for your official acts, as long as they turn out to be criminal.

Mr. NADLER. Thank you very much.

Mr. GEKAS. The gentleman's time has expired and expired and expired. We turn to the gentleman from Arkansas, Mr. Hutchinson, but we want to acknowledge the attendance of the gentleman from Tennessee, Mr. Bryant; the gentleman from South Carolina, Mr. Graham; the gentleman from New York, Mr. Weiner. With that, we allot the customary 5 minutes to Mr. Hutchinson.

Mr. HUTCHINSON. Thank you, Mr. Chairman. I am grateful for the testimony of both Mr. Barr and Mr. Civiletti. I am in agreement with your testimony today regarding the difficulties of the current independent counsel law.

I want to focus on what we can do to strengthen the inherent powers of the Attorney General to appoint a special prosecutor. Mr. Barr, I think you outlined some suggestions that you had, primarily, to free up the conflict of interest provision so it is easier to bring on someone in a special prosecutor role. You cited 594(i) and (j), was that 28 USC or what——

Mr. WILLIAM BARR. I believe so, wherever the statute is codified. I think it is 594(i) and (j) are the provisions that provide a specialized conflict of interest provision relating to independent counsels, and I think they should be carried over for whoever the Attorney General appoints. Otherwise, they are special Justice Department employees, and they are subject to all the conflict of interest and

post-employment restrictions and so forth that a Government employee would be.

Mr. HUTCHINSON. Mr. Civiletti, you made a point that I have made, and I think what is very important is that whoever the prosecutor is in a conflict of interest circumstance, whether it is an independent counsel or a special prosecutor, that they have the ordinary and usual pressures upon them that serve as checks and balances in our system. Or that they have other cases that they are handling; that they have other priorities; and they have to decide what the priority for prosecutions are. Also, our natural pressure is not to extend an investigation too long. I think you phrased it in a different way, but I think we are speaking of the same thing.

Mr. CIVILETTI. Yes.

Mr. HUTCHINSON. If you have the old special prosecutor law, how do you encourage those type of natural pressures if you appoint a special prosecutor?

Mr. CIVILETTI. If you are appointing an independent counsel under the statute, the only way to get something like a regular prosecutor's pressures and considerations is to appoint someone who has that kind of experience and knowledge and professionalism so that you would hope that they would transfer that to the operation of the independent counsel's office.

If you are appointing a special—if the Attorney General is appointing, under 28–600, a special counsel because of a conflict of interest that doesn't fall within the act or if the act expires, then you can have a little more regularity because there is, although modest, a supervisory role of the Department of Justice over that special counsel, and you would hope, since it is an officer of the Department of Justice, that the person would become, if not already familiar, would become very familiar with the prosecutorial priorities, the resource questions.

Mr. HUTCHINSON. Let me ask it in a different way. Do you believe that you are better off having a special prosecutor, such as Mr. LaBella, who has other prosecutorial responsibilities (I guess you could pull him off and say, "This is your sole responsibility now to be a special prosecutor in this particular case") or do you think he should have other responsibilities, like pulling the United States attorney out who has other responsibilities, but he also has this particular case. Which one is a better direction to go?

Mr. CIVILETTI. It is a matter of balance. As Mr. Barr was saying, I think that it depends on the time, the nature of the case, the circumstances, whether you are better off with—for example, I appointed Dick Blumenthal, out of Connecticut, as the special counsel for an investigation of leaks in the Abscam case. He was outside the Department of Justice proper, and had a lot of integrity and was a former newspaper reporter so he was ideal for that kind of assignment.

On the other hand, Judge Bell appointed Paul Curran, who was in the opposite party, and for the peanutgate investigation.

So, it depends on all the circumstances.

Mr. HUTCHINSON. If you look at the current special counsel provisions, and the inherent power of the Attorney General, I have suggested that there be a consultation provision for Congress where Congress can ask the Attorney General that if there is a conflict,

and we believe there is a conflict, that the Attorney General respond within 30 days as to why there is not a special prosecutor appointed in a particular circumstance.

The second thing that I have suggested is that, in the event a special prosecutor is appointed, that that special prosecutor not be discharged except for cause. This would assure some level of independence.

One, do you agree with those, and two, are there any other tweakings that you think should be done for the special prosecutor provision that could strengthen it, but still stick within that system?

Mr. CIVILETTI. I agree with the second point that you made with regard to the special counsel.

The first point about, if I understand it correctly, about requesting the special counsel be appointed by the Attorney General, and then if the Attorney General resists, reporting to Congress as to the reasons for the resistance and so forth, I am not much in favor of that because, by nature, that becomes public, and the reasons for non-prosecution damage the individual anyway.

Congress does not have prosecutorial authority. If Congress wants the Attorney General to, under certain circumstances, to appoint a special counsel, then don't request it or request a report, say, "You shall appoint a special counsel under these circumstances, where there is a conflict of interest." In effect, take title 28–600 and make it a mandatory statute that the Attorney General has to operate under law, or something similar to that.

Mr. HUTCHINSON. Then you get into what triggers it, and what level of proof. I mean, I would——

Mr. CIVILETTI. Well, what triggers it now is simply, essentially conflict of interest that either pervades the Attorney General's office or pervades the Department of Justice.

Mr. HUTCHINSON [continuing]. Which makes the Attorney General politically accountable for whatever decision she makes. Mr. Barr, do you have a comment on that?

Mr. WILLIAM BARR. Well, I agree with General Civiletti that, I guess, theoretically and in principle, I am opposed to the provision that sort of insinuates Congress into that role. However, as a practical matter, it is going to happen anyway. Committees, the Judiciary Committee particularly, will sign letters and petition for the appointment. That is going to happen, and——

Mr. CIVILETTI. They don't need the law.

Mr. WILLIAM BARR [continuing]. They don't need the law to do that. Basically, they hold their press conference, demand the Attorney General do it, and the Attorney General then has to offer an explanation to the extent they can. To the extent the explanation is controlled by the political situation and the rights of the person, you know, the potential target.

So, I think in the real world, this happens and will continue to happen, and therefore, if Congress puts this in a statute, I am not going to, you know, have a tantrum over it.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Mr. GEKAS. The time of the gentleman has expired. We recognize the gentleman from New York or from Massachusetts, Mr. Delahunt, in order of their appearance at this hearing.

Mr. DELAHUNT. Thank you, Mr. Chairman. Let me, just at the outset, say that I tend to agree with both of your testimonies, I think particularly that of Attorney General Barr.

In response to the questions posed by my friend from Arkansas, and your comments regarding the insinuation of Congress into this process, this goes to the very heart of your statement earlier about the inherent flaws in the Independent Counsel Statute creating a criminalization of public discourse in this country, and I think, to some extent, this happens in any event. I think to create a mechanism that puts Congress into the mix is a mistake.

I also think, and I would be interested in both of your opinions about the role of congressional oversight upon the conclusion of investigations. Might it not be beneficial in serving as a check on independent counsels potentially abusing their authority, or not doing an adequate job? I don't know if you would agree with me but that, in my opinion, is the role of Congress—to hold oversight hearings into the conduct of the investigation, once it has concluded, so as not to interfere. That serves, if you will, as check on potential abuse as well as assurance to the public that the investigation itself will be conducted in a fair but vigorous and exhaustive fashion.

Just a suggestion, and again, I have to disagree with my friend from Arkansas about putting in the statute congressional involvement along the lines that he suggested. Mr. Barr, Mr. Civiletti?

Mr. WILLIAM BARR. I feel that one of the casualties of this overreliance on an independent counsel mechanism, and what I think is the criminalization of the political process, is that the institutions that should be our primary watchdogs have somewhat atrophied in that role. I think a vigorous congressional role in the appointment process, when they advise and consent on officials, and also in the continuing oversight function and, to some extent, the media watchdog function—somewhat atrophied, and everyone sort of stands back and kibitzes as to whether a particular conduct actually happens to meet a technical legal definition instead of whether or not conduct—you know, the impact of that conduct on our policies and on the polity.

Now, in terms of the oversight after the fact, I certainly don't have any objection to Congress exercising that vigorous oversight after.

Mr. DELAHUNT. My sense is that, if we did it, and if this statute should lapse and Congress exercised—this committee exercised its oversight responsibility, the special prosecutor or independent counsel, whoever was conducting the investigation, would have that in mind. It would serve to subliminally raise the awareness of those who accepted these very unenviable tasks that, at some point in time, they would have to answer.

Mr. CIVILETTI. When I was an assistant U.S. attorney in the early 1960's in the United States District for the District of Maryland, we prosecuted successfully two Congressmen for obstruction of justice for interfering with the investigation and criminal process. That probably tainted me at an earlier time to the view that the American people want a criminal justice system where politics do not determine whether somebody is prosecuted or not prosecuted.

Mr. DELAHUNT. Right.

Mr. CIVILETTI. They want it on the merits, fair and square. So that it seems to me the role of the Congress is to set the laws and say, "Here is what we think ought to be prosecuted, and investigated and oversight: if your priorities are right or not right; what are your priorities? What is your success rate? Why isn't it greater?" But to avoid going into depth in individual cases out of the Department of Justice and putting career prosecutors at risk of their decisions by being second-guessed publicly in the forum. So I think you can accomplish the oversight—I would prefer it to be on a regular basis rather than oversight of independent counsel.

Mr. DELAHUNT. Uh-huh.

Mr. CIVILETTI. Because I think it doesn't matter much.

Mr. DELAHUNT. Well, I guess I have a little bit of time left. I think that Attorney General Barr stated it really well. You indicated that you shut down an investigation of an individual because you reached that decision.

In the end, I think really what we are talking about is restoring confidence in the Attorney General to make those decisions based upon the tradition of sound, ethical, prosecutorial discretion, and taking the heat, and that is really what it is about.

I am concerned about possible tinkering if this statute should lapse with the statutory independent counsel, and creating the same problems; in other words, politicizing it. Because, over a period of time, as you gentlemen both well know, you in your previous lives as Attorney General, are going to be measured during the course of time, in terms of your integrity, your competence, and your ethics, and I think that that system worked and worked well.

Mr. WILLIAM BARR. Right. I think the important difference here is what are the consequences with the statutory versus an Attorney General-appointed prosecutor. And you put your finger on it in this sense, where political pressure builds on the Attorney General, and the appointment isn't dictated by the statute, the Attorney General can either take the heat directly because there is no automatic trigger that takes it out of the Attorney General's hand—just say, "This is nonsense, I am not going to prosecute someone for this, impeachment," okay, and take the heat.

Or, if it is something like Iraqgate where a lot of political pressure built up because it was an election year, then I felt that if I said "no," it was unfair to everyone involved because it would just continue to fester, and so I would look to someone like General Civiletti to come in because he and I together could take the heat. And maybe enough people over here would say they are satisfied.

But with the Independent Counsel Statute, it is a juggernaught and the consequences are—no one can stop it and take the heat; the thing is launched. That is the consequence of having the IC there.

So, Congress will always interfere and the price you pay, though, with an IC Statute is a juggernaught. The price you pay with the Attorney General doing it on their own is judgment, as long as you can take the heat. Whether or not you put it in a statute that Congress can kibitz doesn't bother me very much. I prefer it not to happen, but it is a little bit like saying, "I wish it didn't rain."

Mr. DELAHUNT. Right, or snow. [Laughter.]

Mr. GEKAS. The time of the gentleman has expired. We turn to the gentleman from Tennessee, Mr. Bryant, for 5 minutes.

Mr. BRYANT. I thank the chairman for continuation of this very good hearing. I thank the two distinguished gentlemen including my former boss, Attorney General Bill Barr.

I have looked back at this law and back at the, I guess, the origins and the context of the day, and I think that I agree with you this day that, perhaps, this statute is helplessly flawed.

But looking back years ago, in that day, it was, I guess, the best thing since sliced bread. We had the administration, the President, the public interest groups like the American Bar Association, all types of people saying that we needed this. And then, even as recently, I guess, as 1994 we had this Attorney General Janet Reno and this President saying that we needed it and we reauthorized it.

Something has happened, obviously, in the last several years that has, at least, given the perception that this IC law is helplessly flawed. I would suggest that what we have seen over the last few years, especially the last couple of years, through a combination, perhaps, of media and just the unparalleled scrutiny that we have today, particularly with television 24 hours a day almost, analyzing, critiquing, together with different people with different agendas, is, for instance, a different level where the independent counsel has been attacked, personally attacked. Without that counsel being able to appropriately and adequately respond to these attacks over a period of time, a sustained attack not only on the work that the independent counsel did, but the independent counsel himself. I understand all of this is politics; I understand people have to keep their TV shows on; I understand people have to sell their products and things like that.

There are people who actually don't like being prosecuted by an independent counsel, but I guess we all agree that, perhaps, we can look back at the preexisting law, and to me, that seems to provide some protection, some insulation from some of this. Because, as I think General Barr mentioned, it comes down to that particular Attorney General being able to stand in the kitchen and take the heat in these types of situations because you are always going to have the political power, political muscle, attempting to take advantage of a situation.

But now today, we have the added scrutiny of just unbelievable media attention to these kinds of things. But, if we were to go back, I think we have the power, the credibility of the Department of Justice and that particular Attorney General as a shield, again, as some type of insulation that might could stand up a little bit better, and to be able to handle that attack. Because I just think the situation as it exists now is probably unacceptable.

I am not inclined to want to reauthorize the law. I thought about different ways, and I know my chairman is sending a letter forward to the Attorney General suggesting, perhaps, some further explanation of their testimony here. But it just seems to me, once you have got someone who does not want to be prosecuted and who, perhaps, some of these ideas of term limits or limited scope or, perhaps, keeping the independent counsel in full-time position versus allowing them to go back and practice would, somehow, move this

process along, but yet we face the possibility of stonewalling and other issues.

I know I am rambling here, but I am expressing my thoughts, and I think, perhaps in many ways, agree with your testimony. I think you are both saying you have looked at it and the current independent counsel law cannot be remedied sufficiently; is that correct, General Civiletti?

Mr. CIVILETTI. Yes.

Mr. BRYANT. General Barr?

Mr. WILLIAM BARR. That is my view, too.

Mr. BRYANT. Is there anything, and I know you have alluded to this and I am in another committee, in and out, trying to cover both of these. But, is there anything we can do to enhance the Department of Justice, the Attorney General's ability to handle these types of investigations to, again, protect it, the Department of Justice, from these attacks of, perhaps, lack of trust that is growing in society, and that there is a conflict of interest there and the Attorney General cannot handle this, are there any other mechanisms we can put into law that would—perhaps you could submit something later if you think of it, but have you covered some of these ways we can make these prior existing situations stronger?

Mr. CIVILETTI. I think that Bill mentioned that the removal of the ordinary disabilities that apply to an officer of the Department of Justice for the special counsel enhances the opportunity of getting the right person to take those jobs if the disabilities are not so horrendous in terms of conflicts of interest or having to give up practice or whatever it happens to be.

Mr. NADLER. Excuse me, that is 594(i) and (j) you referred to before?

Mr. CIVILETTI. I'm sorry?

Mr. NADLER. That is 594(i) and (j) you referred to before?

Mr. CIVILETTI. Yes, right. If there are any other disabilities that they don't address, they could be expanded.

Mr. WILLIAM BARR. I would just say, in terms of strengthening the institution of the Department of Justice, you are never going to get away from occasional perceptions that it is inappropriate to let the Department handle a particular case on a business-as-usual basis. In terms of building up the institutional capital of the Department, I think Congress should be paying attention, a lot of attention, to who is confirmed for PAS positions and ensuring that quality prosecutors are being hired throughout the Department on a non-partisan basis.

I also think, and I mentioned this in my statement, one of the reasons I am opposed to the Independent Counsel Statute is because on those few cases that are very serious and should be handled criminally, and the dogs are on the trail and it could be the political fate of an administration, I think the independent counsel separated out of the Department is too weak. They can be, then, attacked. They don't have the institutional basis to defend themselves.

Think of what would happen in the Watergate case if Archie Cox was totally isolated, had not been selected by the Attorney General and was under attack by Nixon. You know, Nixon may have been able to take the guy out. As it was, he had to decimate his own

Department of Justice to take him out, with big consequences for them.

And so, I think the appointment and the bringing into the Department on a temporary basis, someone to supervise, actually—you know, from the standpoint in a good case, or a case that should be pursued, strengthens the office of independent counsel and ensures it will be pursued.

Mr. BRYANT. I think if I might make one quick comment to your last statement, "Think about what would have happened," I know there are some that would, in this room, that would disagree with me.

But I think we have a perfect example of how it did work in this particular case in the unprecedented attack on Independent Counsel Ken Starr. Thank you.

Mr. GEKAS. The time of the gentleman has expired. We turn to the gentleman from New York, Mr. Weiner, for 5 minutes.

Mr. WEINER. Thank you, Mr. Chairman, and I would just say to my good friend from Tennessee, you don't have to look far to find someone who has changed their views on this issue, and part of that is because there has been—this is not the first time we have encountered the same problems that we are seeing today. In fact, if you look at some of the transcripts from the hearings of the past times that we have reauthorized the act and tried to fix it, very, very similar debates kind of run through all of our consideration of this matter, and that kind of leads some of us to believe that it is fundamentally flawed.

I was interested in hearing, General Barr, you discuss the op-ed by Mr. Cox in today's paper. It seems like under the contraption that was created under his envisionment, would need almost Rube Goldberg to kind of negotiate the way through the maze, and I am not sure that that deals with the problems either.

Could you gentlemen respond to one thing that—it is not clear that doing away with the Independent Counsel Statute will actually fix, and that is this notion that has frequently concerned many of us that the direction of the investigations under the IC Statute is upside down, that you are investigating a person rather than a specific act. And what wound up happening in the Starr investigation, to a lesser extent than the Espey investigation, you started in one direction and wound up at the end of the investigation with an entirely different set of charges that were being brought. Would that be different under a special prosecutor if the Attorney General were left to his or her own devices? I mean, couldn't the same thing conceivably happen, that someone starts looking into something, and then they lead off into another path? Why would there be less of a problem if we do away with the Independent Counsel Statute in terms of that direction changing in an investigation as it went along?

Mr. WILLIAM BARR. I think there are two reasons: one, the initial selection; and two, the continuing supervision.

The initial selection, and that is why I think General Civiletti is absolutely right, in an individual case, the Attorney General is the one who has the incentive, the ultimate accountability of making sure the right person is handling that case. And that is why I say it shouldn't be a narrow-gauged prosecutor, but someone who can

bring general perspective to bear, to say, "Wait a minute, this is nonsense," or "Don't get off onto that bunny trail." Because, you know, the basset hound following the rabbit has his nose down in the track. You need to have someone who has a little bit more perspective sometimes, don't forget it. So you have to pick the right person. And with all due respect, the panel, the judicial panel, has no accountability. If people are not happy with what happens, they don't pay a price. And frankly, I don't think they necessarily have the experience to pick the right person, the right prosecutor, enough experience supervising prosecutors.

So, as Attorney General, my feeling was it is my obligation, and I am not going to be happy with anyone taking that decision out of my hands. I will pay the price if people don't like who I pick.

And then, the other reason is you have continuing supervision. If the Attorney General ultimately is willing to take the heat and say, "you are not going to go down that bunny trail," they can make that call.

Under the current system, no one is there to make the call. It is an automatic doomsday weapon; it just sort of goes along. And in fact, there are many elements in the law that encourage a product to come out at the other end, so if anything, the Independent Counsel Statute now puts such a premium on getting something at the end of the day that, I guess, it encourages that kind of deviation from the original path if that first path seems to be dry.

Mr. CIVILETTI. There are two reasons why the Attorney General-appointed special counsel is different in this regard than the Independent Counsel Act appointed by the court.

First, the Attorney General sets the scope, and sets the scope for the serious, necessary investigation where he had to recuse the Department of Justice, in effect, from doing it. Under the Independent Counsel Statute, the scope is subject to the three judge panel, and often the mistake if it is made, is to err on the side of breadth rather than narrowness.

Secondly, as the investigation is pursued, and suppose it is for bribery in the Department of State, and the investigator comes back and says, "We didn't find any bribery," or "We are still on the trail of bribery, but there were two assistant attorney generals, two assistant secretaries of state, who committed adultery." You know, that is a crime in the particular—and so the Attorney General, then, or the Assistant Attorney General of the Criminal Division says, "We have never prosecuted adultery in the Department of Justice, it is not a Federal crime, what are you talking about? No, we are not giving you that authority." So, as the suggestion is, the control mechanism initiating and then subsequently are there, and there is the power, of course, for the Attorney General to expand the investigation by referring second matters or third matters that come up to the same special counsel.

Mr. WEINER. I see. General Civiletti, can you just respond to one other element of this? It often goes without notice but you did mention in your testimony, and that is the way this thing takes on, even, a third life. After the charges have been brought, it has been deemed to be not warranted for their investigation or prosecution. Then there is this post report that needs to be produced, which in many cases, is a place where, frankly, damaging information gets

dumped to Congress and gets dumped into the public domain. That is, that it is frequently not discussed in this context since there are many other flaws with it. But is that something that is usually done in prosecutions, that if a prosecutor says, "We are not going to bring this action," they would then submit a report saying, "Here is all the stuff we dug up in the interim." And why was it that Congress included that post report, if you have any insight into that? I mean, that seems like something you would only want if you wanted to support a further prosecution.

Mr. CIVILETTI. It is not done in any regular investigatory, prosecutorial process. My guess is that it was suggested and then adopted by the Congress in order to have accountability, oversight and a prophylactic effect if the independent counsel knew that they had to file a report, that the care they took in investigating and justifying their actions would be greater.

But, it has the unintended consequence, most dramatically—I think most people would cite the *Meece* case, the second *Meece* case and the McKay report as being terribly damaging, terribly unfair, no opportunity to respond, and terribly troublesome.

Mr. WEINER. Thank you, Mr. Chairman.

Mr. GEKAS. The time of the gentleman has expired. We turn to the gentleman from South Carolina for a period of 5 minutes.

Mr. GRAHAM. Thank you, Mr. Chairman. A common theme here is the politicizing of potential criminal matters. When you are dealing with high public officials, I don't really know how to avoid that much, but I guess we can do a better job, at least try to.

The appointing authority, what is more political? The Attorney General making an appointment of investigating, picking the person to investigate their potential boss or colleagues or three Federal judges? What is more political?

Mr. WILLIAM BARR. You could say that the Attorney General is political, but political in a good sense, because the only kind of accountability that is important here is ultimate political accountability. That is what the framers believed when they talked about accountability, that the public has the ability to punish the person directly. And therefore, I believe appointments should be made by people who are accountable, and ultimately someone who is accountable to the people, who through the political process should be supervising investigations, and the judges aren't, plain and simple.

Mr. GRAHAM. Why wouldn't you want Congress more involved then, because we are politically accountable also?

Mr. WILLIAM BARR. Because of the separation of powers. They are accountable for the legislative function, making the law; the executive is accountable for the execution of the law.

Mr. CIVILETTI. Well, my response would be slightly different in that you can't isolate appointment by the Attorney General of a special counsel and appointment by the court of independent counsel, because prior to the appointment by the court, you may have 3 months, 6 months, 9 months of hubbub and publicity and accusations and charges as to whether or not even there should be a request for the appointment of an independent counsel. Whereas with the appointment by the Attorney General, there may never be any

discussion or public disparagement, and the Attorney General can simply appoint.

Mr. GRAHAM. Well, Mr. Civiletti, in your problems with due process is that the media and other public attention given to the issue of appointment or the request for appointment of an independent counsel self-taints the subject even before an investigation is commenced or charges filed. I don't see how in the world you avoid that, I don't care who does the appointing. If somebody's job it is to look at a person in high government office, why do you expect the media not to follow that?

Mr. CIVILETTI. Well, there are enumerable examples of the Department of Justice conducting investigations with grand juries of high public officials, not necessarily those under the act, but high public officials, about which there is no public debate, no public discussion until the charge is filed.

Now, that should be the rule, there will always be exceptions. But that should be the rule and the standard that we are trying to achieve, rather than the reverse.

Mr. GRAHAM. How much of the problems involved in this case flow from the fact that the person being investigated is the President?

Mr. CIVILETTI. I think a lot of them do, but——

Mr. GRAHAM. Would it be fair to say if a grand jury was investigating the President, regardless of how the appointment was had, that would be a significant media event?

Mr. CIVILETTI. Yes.

Mr. GRAHAM. Is it fair to say, Mr. Barr, that Congress consistently oversees the executive branch in its role of being a check and balance on the executive branch through oversight hearings.

Mr. WILLIAM BARR. That is a fair—I am not sure what the point is, though.

Mr. GRAHAM. Well, the point is, that to me, if you want to take politics out of the statute, whoever thought of three judges made some sense to me. We are about to abandon that. I know you have been consistently against this process and I admire you for that, but there is a lot of this that has to do with the fact that the subject of the investigation is the President. We have got to understand that the defects in——

Mr. DELAHUNT. Will my friend yield for just a moment?

Mr. GRAHAM. Sure.

Mr. DELAHUNT. I mean, is the gentleman yielding?

Mr. GRAHAM. Yes, absolutely.

Mr. GEKAS. Let us try to observe the request for yielding.

Mr. DELAHUNT. No, I did, I made the request and I saw the gentleman nod his head.

Mr. GRAHAM. I gladly yield.

Mr. DELAHUNT. But, I would just expand the question. I mean, the statute clearly covers more than just the President, as I think what we have seen in the past, whether it was Iran-contra or any of the other independent counsels also have been appointed. So, to focus just on an investigation of the President doesn't give our witnesses a full opportunity to respond to the structure of the statute itself.

Mr. GRAHAM. I am reclaiming my time, if I may. The point I am trying to make is that the administration, the American Bar Association and many people in the country came up here in 1994 and said, "We need this thing." The only thing that has happened since then is the investigation of the President.

The reason that we have the statute to begin with is because of what Richard Nixon did. When Richard Nixon was being investigated, he fired the folks, and we said, "that can't work." Then we had an island of time of 2 years from 1992 to 1994, and people felt uncomfortable not having this statute reauthorized.

One of your criticisms, Mr. Civiletti, is that there is no qualification criteria about appointment in the statute. You don't believe it is sufficient enough in terms of having qualifications placed upon the people doing the investigating; is that correct?

Mr. CIVILETTI. Yes.

Mr. GRAHAM. Can you give me one example of a person you thought wasn't qualified who was appointed under the statute?

Mr. CIVILETTI. No, because I haven't based it on individual performances. None of my testimony is based on individual performances. It is based on comparison between career prosecutors and the requirements of the statute.

Mr. GRAHAM. In the Starr investigation, how many career prosecutors were on his staff?

Mr. CIVILETTI. I would guess half a dozen.

Mr. GRAHAM. Would it be fair to say that most of the people who did the work were career prosecutors?

Mr. CIVILETTI. I would say they did 95 percent of the work, is my guess.

Mr. GRAHAM. Let us talk about scope for a moment. You start out with a land deal, and somebody gives you a tip that some of the characters involved in this case are about to commit perjury or obstruct justice in a lawsuit. Under your revision of this statute, would there be a mechanism to allow the independent counsel or special counsel to request to continue or to change the scope of the investigation?

Mr. CIVILETTI. Yes.

Mr. GRAHAM. Under the facts of this case, do you think that was wise?

Mr. CIVILETTI. Yes.

Mr. GRAHAM. Mr. Barr?

Mr. WILLIAM BARR. Yes, I do.

Mr. GRAHAM. I think my time is expired.

Mr. WILLIAM BARR. Could I just follow up on that?

Mr. GRAHAM. Yes, please

Mr. WILLIAM BARR. I personally have the perspective; I share your perspective that Ken Starr has done an admirable job. But, that is not the issue here. The issue, it seems to me, is that——

Mr. GRAHAM. Well, I am not so sure that is all true. But, I am just saying that the problems seem to be with the focus of the investigation, the person investigated more than the statute, to me. But you have been consistent, both of you have, about criticizing the statute. I admire that, but there seems to be a tremendous change.

When you look at the statute, the criticisms are real, but they are not penetrating to me, Mr. Civiletti. I think you are never going to avoid media involvement, regardless of how the appointment is had if it is a high public official. That the criteria for selection, the reason that we haven't had anybody you can point to is because the people in charge of selecting have done a pretty good job.

The three judges, to me, are less political than the Attorney General. I do want to make it better, but I want us to be honest with the Nation as to why we are having this debate now, not by you all too, but by the Congress and make sure we don't over emphasize.

Mr. WILLIAM BARR. But, Congressman, I believe as I said, there are a couple aspects of what is political. Part of politics is a good part, which is accountability. I don't think having an investigation going on by someone who is not accountable and not selected by accountable people is a good thing.

Second, under the IC Statute, the politics in the bad sense, make the fundamental intervention right at the beginning, and that is, that you are heading down a criminal track right from the beginning, and that is where politics comes into play under the IC.

Mr. GRAHAM. Now, tell me how is that so?

Mr. WILLIAM BARR. It is the hair trigger, it is the hair trigger. Yes, there are Presidents that are investigated, but there are a lot of other people who are investigated for nonsense. It goes on two or 3 years when the thing could have been just dealt with in a few days right up front. They are not receiving the same kind of justice as other Americans, and that is because of politics.

Mr. GRAHAM. But, you are talking about stopping an investigation once somebody has determined, "Yes, we need to look." You are talking about the politics of stopping, and the politics of starting. Now, tell me how the politics of stopping can be improved upon.

Mr. WILLIAM BARR. I am not sure I really understand what you are saying. What I am saying is the decisive intervention of politics occurs under the IC Statute when you start the juggernaut moving down the track, where that would not happen with Tom, Dick, or Harry. That is where politics comes into play under the IC Statute, and that is why people are treated unfairly.

Mr. GRAHAM. Well, I don't mean to belabor the point, but no matter how you start an investigation of a high public official, somebody somewhere is going to stop it, is what you are saying. You don't see a stopping mechanism in this statute?

Mr. WILLIAM BARR. No, there is an automatic start, and there is no stopping mechanism.

Mr. GRAHAM. Okay. You are saying the Attorney General should be able to say, "that is enough," and accept the political consequences?

Mr. WILLIAM BARR. I think, first, the Attorney General can make a decision whether something should even be handled as a criminal matter.

Mr. GRAHAM. Well, how does it work under our current statute?

Mr. WILLIAM BARR. Well, for example, if a Cabinet Secretary is accused of abusing something, you know, $200 worth of govern-

ment property, it is a Federal crime, even though the guy can make reparations and in an appropriate case, resign. That is nonsense.

Mr. GRAHAM. How many nonsense cases have you been aware of under the——

Mr. WILLIAM BARR. The majority of cases that come up under this statute are of that type.

Mr. GRAHAM [continuing]. Are nonsense?

Mr. WILLIAM BARR. Yes, in my opinion, should not be handled under the Independent Counsel Statute.

Mr. GRAHAM. Why?

Mr. WILLIAM BARR. Because they can be handled up front with common sense and judgment. They do not merit 2 to 3 years of investigation.

Mr. GRAHAM. Can you give me a list of those cases?

Mr. WILLIAM BARR. I can't give you a list of——

Mr. GRAHAM. Not now, but just give me a letter about the cases you think were not——

Mr. WILLIAM BARR. I will say a lot of them occurred on my watch where—you know, I was in an election year, and I was told I received more requests for independent counsels than all my predecessors combined, and they were against Republicans, okay. But, I think some of the cases that are going on now are nonsense.

Mr. GRAHAM. Okay, I would like some examples.

Mr. WILLIAM BARR. Well, I think the agriculture thing is way out, went way beyond common sense, although the prosecution of Durenburger, or the threatened prosecution of Durenburger was excessive, in my view, as well. I think, you know, spend 2 or 3 years to decide whether Cisneros, you know—he obviously didn't tell the whole truth in the interview. Why spend 3 years on that? He has resigned. Those are two examples.

Mr. GEKAS. The time of the gentleman has expired and the time of the committee has expired with respect to the votes that are pending on the floor.

We are very, very gratified at your willingness to appear before us and to give your testimony. It will go a long way in the final decision made by this committee. As a matter of fact, in a side bar conference held by the Chair and the ranking member, we have already started to cogitate some of the proposals or comments that you have made, so we want you to leave this table knowing that you have made an impact on the process. We thank you very much.

This committee stands in recess until 12:30 p.m., at which time I ask the members to please come back; Mr. Graham, to please come back, because the next panel contains one witness who has to be back in her classroom at 1 p.m. At the request of the ranking member, 12:35 p.m., until which we stand in recess.

[Whereupon, the subcommittee recessed, to reconvene at 12:35 p.m., the same day.]

Mr. GEKAS. The time of the recess having expired and noting the attendance of a hearing quorum, we shall proceed with the business at hand.

The second panel is now taking its place at the witness table, and it is made up of distinguished individuals who, in years past, have contributed in one way or another to our congressional life and to society in general. Julie Rose O'Sullivan has been a profes-

(3) Not only did Congress not give the Secret Service immunity from testifying, Judge Johnson wrote in reference to the United States Code, "under section 535(b), Congress imposed a duty on all executive branch personnel to report criminal activity by government officers and employees to the attorney general. . . . Secret Service employees are not only executive branch personnel subject to 535(b), but they are also law enforcement officers."

(4) Wrote Judge Johnson: "The court is not ultimately persuaded that a president would put his life at risk for fear that a Secret Service agent might be called to testify before a grand jury" on a rare occasion.

In all respects, the judge's ruling was sound and correct. Only Mr. Clinton's most vapid defenders can believe that "the presidency" is somehow harmed by calling upon Secret Service agents to tell the truth about possible felonious actions.

[From the Tampa Tribune, May 23, 1998]

SECRET SERVICE AGENTS AND THE LAW

In plenty of palaces in the backwaters of the world, a dictator's bodyguards never testify against the boss. It is outrageous that such an issue should even be under debate here.

Yet the Justice Department is arguing that Secret Service agents assigned to protect the president shouldn't be allowed to answer questions by the special prosecutor investigating possible obstruction of justice in the Monica Lewinsky episode.

The White House argues that if Secret Service agents had to tell what they might have seen while guarding the president, it would destroy their "relationship" with him and damage their ability to protect him. The president would "push the agents away," says Justice Department lawyer Gary Grindler.

That assumes the president is doing things he wouldn't want a grand jury to know about. Requiring agents to see no evil would require them to help obstruct justice, which is to say make them assist their boss in the commission of a crime. For officers sworn to uphold the law, such a position is untenable.

Whitewater prosecutor Kenneth Starr is right that absolutely nothing in federal law allows for such a privilege. In our form of government, no one is above the law. Starr points out that federal law actually requires employees of the executive branch to report any evidence of a crime.

Even the president himself can be subpoenaed to testify. Surely his bodyguards don't deserve more protection than he does.

If the president, in his desperation to avoid embarrassment or worse, is allowed to turn the Secret Service into the Silent Service, he will have done the country a great disservice.

[From the Washington Times, May 26, 1998]

THE PRESIDENT'S TOUGH TIMES IN COURT

Things certainly have all been going Kenneth Starr's way, legally speaking, in his attempts to carry out a thorough investigation of possible perjury, subornation of perjury and obstruction of justice by Bill Clinton, Vernon Jordan and Monica Lewinsky.

U.S. District Judge Nora Holloway Johnson found in Mr. Starr's favor when she rejected the demonstrably preposterous White House claim that conversations Mr. Clinton had with aides Bruce Lindsey and Sidney Blumenthal about how to deal with the President's Lewinsky problem were covered by executive privilege.

Judge Johnson also came down on Mr. Starr's side in rejecting Miss Lewinsky's claim that Mr. Starr had made an immunity deal with her on which he then reneged. An appeals court last week refused to overturn that decision, which leaves Miss Lewinsky with the delicate task of squaring her sworn testimony that she and Bill Clinton had no sexual relationship with her statements on the Linda Tripp tapes that she had indeed had such a relationship, that she was prepared to lie about it in her sworn deposition, and that she hoped Mrs. Tripp would do the same.

And, putting another chink in the Clintons' stone wall, last week Judge Johnson agreed with Mr. Starr that there is no legal basis for granting a hitherto unheard of "protective function privilege" to Secret Service agents who guard the president, and that the state's interest in gathering evidence in a criminal case must outweigh qualms about any damage that might be done to the trust between a president and his guards. Actually, Judge Johnson cut right to the heart of the issue in the particular case of this particular president.

"The court is not ultimately persuaded," wrote the judge, "that a president would put his life at risk for fear that a Secret Service agent might be called to testify before a grand jury about observed conduct or overheard statements. . . . When people act within the law, they do not ordinarily push away those they trust or rely upon for fear that their actions will be reported to a grand jury. . . . It is not at all clear that a president would push Secret Service protection away if he were acting legally or even if he were engaged in personally embarrassing acts. Such actions are extremely unlikely to become the subject of a grand jury investigation."

In other words, as has been suggested before in this space, a president could feel free to do a lot of things in front of his Secret Service detail—short of breaking the law, that is—without conjuring up the spectre of the grand jury. Only a president who had broken the law would have reason to worry that the agents guarding him might be asked to testify against him.

President Clinton himself, clearly distraught about the ruling, warned that it would have a "chilling" effect—and went on to commit the kind of inadvertent honesty that may be becoming a habit (such as his statement at his recent press conference that he is the last person in the world who ought to comment on the question of character). Thinking to chastise Mr. Starr for demanding Secret Service testimony, the president said after the ruling, "I don't think anyone ever thought about [Secret Service agents testifying] because no one ever thought that anyone would ever abuse the responsibility that the Secret Service has to the president and to the president's family. . . . But we're living in a time which is without precedent, where actions are being taken without precedent, and we just have to live with the consequences."

Mr. Clinton and his various legal problems in a nutshell, no?

GEORGE WASHINGTON UNIVERSITY,
LAW SCHOOL,
Washington, DC, May 25, 1998.

Hon. JANET RENO,
Attorney General of the United States,
U.S. Department of Justice, Washington, DC.

DEAR MADAM ATTORNEY GENERAL: I am writing on behalf of four former United States Attorneys General, who have asked me to assist them in the on-going controversy over the proposed "protective function privilege." In deference to the Court and your office, the former Attorneys General have been highly circumspect in their public statements on this issue despite their strong concerns about the proposed privilege. After the May 22, 1998 decision by the Court, however, these concerns have become more acute with the possible appeal of the decision rejecting the proposed privilege. It is to the question of an appeal that I wish to convey the view of former Attorneys General William P. Barr, Griffin B. Bell, Edwin Meese III, and Richard L. Thornburgh.

It is the collective view of the former Attorneys General that the decision of Chief Judge Norma Holloway Johnson was legally and historically well-founded. Moreover, any appeal would likely result in an opinion that would only magnify the precedential damage to the Executive Branch. While Secret Service Director Lewis Merletti has already stated his intention to appeal this matter to the United States Supreme Court, it falls to you and Solicitor General Seth Waxman to make such a decision. For the reasons stated below, the former Attorneys General encourage you to exercise your authority to forego an appeal in this matter.

The former Attorneys General take no position on the merits or underlying allegations of this investigation. However, the former Attorneys General have watched the on-going confrontation between the White House and the Office of the Independent Counsel with increasing unease and concern. As the investigation becomes more embroiled in claims of executive privilege, the danger of lasting and negative consequences for both the Executive Branch and the legal system has grown considerably. In an area with little prior litigation, we have already seen a series of new rulings on issues ranging from attorney-client privilege to presidential communications to civil liability of sitting Presidents. While many of these rulings were not unexpected, they constitute significant limitations for future presidents. Despite their unease, the former Attorneys General have avoided any direct involvement in the crisis and waited for the decision of the trial court in the hope that an appeal would not be taken after the widely anticipated rejection of the proposed privilege.

As you know, during their service over the last two decades for both Democratic and Republican administrations, the former Attorneys General have played central roles in the development of executive privilege principles and advocated the rights of the Executive Branch on numerous occasions. While strong supporters of executive privilege, they feel equally strongly that such privilege claims must be carefully balanced and cautiously invoked in litigation. Certainly, such claims should not suddenly emerge from the fog and frenzy of litigation with no historical antecedent or legal precedent. In adopting such common law privileges, the Supreme Court relies upon "historical antecedents" and evidence that the privilege is "established" and "indelibly ensconced in our common law." *United States* v. *Gillock*, 445 U.S. 360, 366, 368 (1980). Accordingly, common law privileges develop slowly within the federal system through general acceptance and recognition. Judge Benjamin Cardozo described this gradual process as developing "inch by inch" and "measured . . . by decades and even centuries." Benjamin N. Cardozo, The Nature of the Judicial Process 25 (1921).

In comparison, rather than developing a new privilege by precedential inches, the

proposed protective function privilege represents a great leap—in the wrong direction. This proposed privilege was suddenly crafted to meet the immediate demands of a criminal investigation. Rather than offering "historical antecedents," the proposed privilege would spring fully grown without prior recognition or development in the common law. Rather than emerge through general acceptance, the privilege would be created amidst sharp divisions and opposition among the Bar and legal academics. Moreover, a protective function privilege appears to be designed to permit what is expressly disavowed in established privileges, specifically (1) a general claim of privilege that is not directly tied to specific presidential communications or policy processes, and (2) a refusal to supply information in criminal inquiries as a matter of common law.

Not only is there an absence of any prior judicial recognition of this privilege, the proposed privilege would conflict with the traditional view of the obligations of federal employees in supplying information in criminal proceedings. As noted by the United States Court of Appeals for the Eighth Circuit in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 919 (8th Cir. 1997) (citing 28 U.S.C. §535(b)(1994)) "executive branch employees, including attorneys, are under a statutory duty to report criminal wrongdoing by other employees to the Attorney General." Courts have repeatedly stressed that law enforcement personnel have an obligation running to the public to disclose any evidence of crime and the failure to do so would be grounds for removal, or even prosecution, in some circumstances.

While the proposed privilege refers to the protective function of the Secret Service, it is important to note that the actual physical protection of the President, and information relevant to protective functions, is not at risk of disclosure. Existing common law privileges and statutory sources protect security-related information. Most security-related documents and information would be easily shielded from disclosure under the military and state secrets privilege. In addition to this established privilege, classification laws impose heavy restrictions and procedures for the disclosure of such information. Thus, the protective function privilege would not serve any direct protective function in the withholding of sensitive information.

Ironically, as to non-security related information, the proposed privilege cannot possibly achieve its objective of assured confidentiality since it shields only a small percentage of the federal employees who witness presidential communications and conduct. Specifically, the proposed privilege would not prevent the identical communications from being revealed by legal staff, political staff, administrative staff, household staff, retired security staff, or state or local security officers. For example, in the Oval Office, a pantry is staffed by employees who can be (and have been) called as witnesses in criminal investigations. As public employees, these employees must give relevant testimony to criminal investigators. Likewise, White House lawyers, secretaries, and administrative staff can be (and have been) called to testify in criminal investigations. These "unprivileged" employees would hear the same communications presumably overheard by Secret Service agents. Even security staff would not be completely barred from disclosures under a protective function privilege. The President is often guarded by a host of state and federal law enforcement personnel beyond the relatively small contingent of Secret Service personnel. As a result, this proposed privilege would achieve little in terms of added guarantees of nondisclosure for the President but would change much of our traditional view of the Secret Service and its function.

In the end, all that will be achieved is an alarming anomaly in which every public employee in the White House, from office secretaries to cabinet secretaries, would be required to give evidence of criminal conduct with the sole exception of the law enforcement officers stationed at the White House. Only the personnel trained to enforce federal law would be exempt from the most basic fulfillment of public employment. This would be a considerable, but hardly a commendable, achievement.

The proposed privilege would be equally unique in its invocation and application. Unlike the standard executive privilege protecting presidential communications, the proposed privilege would be invoked by the Secretary of the Treasury rather than the President of the United States. Not only would the new privilege invest this single cabinet officer with unique and troubling authority, it allows a political appointee of a President to create a major barrier to a criminal investigation that is, by statute, meant to be independent of the Executive Branch. *Morrison* v. *Olson*, 487 U.S. 654, 661 (1988). Such exclusive and unilateral authority claimed by the Secretary of the Treasury is completely unprecedented and unanticipated in our history.

Even if successful on appeal, this privilege would be secured at a tremendous and prohibitive cost for the traditions of the Secret Service. Created as a law enforcement agency, the new privilege would shift an obligation running currently to the public in favor of an obligation running to the personal household of the President. This creates a unit more closely analogized to a Praetorian or palace guard and introduces a dangerous ambiguity for law enforcement officers. Secret Service agents are law enforcement professionals, not members of a personal household guard. Moreover, a new privilege would create a legal morass for future cases for other law enforcement officers. Federal law enforcement Officers, including United States Marshals, currently guard hundreds of dignitaries, judges, and other officials. The status and controlling duties of these individuals would become hopelessly and dangerously ambiguous under a protective function privilege. Currently, there is a clear line for protective personnel. Their jobs require them to protect the physical safety of those officials in their care but their status as law enforcement officers require them to share any relevant criminal evidence. This has been a bright-line rule under which federal enforcement personnel have served for many decades without objection.

The common law cannot guarantee a President that his conduct will never be the subject of criminal investigation. However, few Presidents have ever been the subject of criminal allegations and even fewer have faced criminal inquiries. The likelihood of future court-sanctioned inquiries into either criminal or non-criminal conduct of the President is extremely remote. In any area where a President may fear possible allegations of criminal conduct, the chilling effect of a criminal inquiry would be a positive, not a negative, influence. Put simply, it is not in the public's interest for their President to feel comfortable discussing possible criminal information in front of any public servant, let alone a law enforcement officer.

The former Attorneys General are deeply concerned about the inherent dangers in recognizing a special privilege for the Secret Service. To that end, the former Attorneys General have asked me to prepare an *amici curiae* brief opposing the privilege for their consideration, should an appeal be taken in this case. The immediate question, however, rests with your evaluation of the relative merits and costs of an appeal from the Court's decision. There are clearly many competing interests weighing into the decision of an appeal in the case. In making this decision, I hope that the unique perspective of your predecessors will assist you in the coming days.

Respectfully,

JONATHAN TURLEY,
Professor of Law.

ELLIS ISLAND MEDALS OF HONOR AWARDS CEREMONY

HON. DAN BURTON

OF INDIANA

IN THE HOUSE OF REPRESENTATIVES

Friday, June 19, 1998

Mr. BURTON of Indiana. Mr. Speaker, I submit the following:

ELLIS ISLAND MEDALS OF HONOR AWARDS CEREMONY—NECO CHAIRMAN WILLIAM DENIS FUGAZY LEADS DRAMATIC CEREMONY DEDICATD TO LATE MEDAL RECIPIENT, ERIC BREINDEL AND LINDA EASTMAN MCCARTNEY

Ellis Island, NY, May 9—Standing on the hallowed grounds of Ellis Island—the portal through which 17 million immigrants entered the United States—a cast of ethnic Americans who have made significant contributions to the life of this nation, among them Senator George Mitchell; New York Times photojournalist Dith Pran; College Football's All-Time Winningest Coach Eddie Robinson; and the U.S. Olympic Women's Hockey Team today were presented with the coveted Ellis Island Medal of Honor at an emotionally uplifting ceremony.

NECO's annual medal ceremony and reception on Ellis Island in New York Harbor is the Nation's largest celebration of ethnic pride. This year's event was dedicated to the memory of Eric Breindel, a 1994 Ellis Island Medal recipient and Linda Eastman McCartney.

Representing a rainbow of ethnic origins, this year's recipients received their awards in the shadow of the historic Great Hall, where the first footsteps were taken by the millions of immigrants who entered the U.S. in the latter part of the nineteenth century.

"Today we honor great ethnic Americans who, through their achievements and contributions, and in the spirit of their ethnic origins, have enriched this country and have become role models for future generations," said NECO Chairman William Denis Fugazy. "In addition, we honor the immigrant experience—those who passed through this Great Hall decades ago, and the new immigrants who arrive on American soil seeking opportunity."

Mr. Fugazy added, "It doesn't matter how you got here or if you already were here. Ellis Island is a symbol of the freedom, diversity and opportunity-ingredients inherent in the fabric of this nation. Although many recipients have no familial ties to Ellis Island, their ancestors share similar histories of struggle and hope for a better life here."

Established in 1986 by NECO, the Ellis Island Medals of Honor pay tribute to the ancestry groups that comprise America's

sponsibility for long distance and information industry services. Mr. Allen has also served as president of Wisconsin Bell and Illinois Bell.

Mark Rosenblum has been the vice president for law and public policy at AT&T since January 1994. He is responsible for the development, analysis, and litigation of AT&T's position related to implementation of the 1996 Telecommunications Act.

William Barr was the Attorney General of the United States during the Bush administration. He was named executive vice president and general counsel of GTE in June 1997.

John Shapleigh has been executive vice president of Brooks Fiber Regulatory and Corporate Development Activities since its formation in November 1993. Brooks Fiber Properties is one of the leading competitive local exchange companies in the United States. Prior to this, he served 3 years as commissioner of the Missouri Public Service Commission.

Gene Kimmelman is the codirector of the Washington, DC, office of Consumers Union, which publishes Consumer Reports magazine. He is a recognized expert on deregulation and consumer protection issues, particularly in the area of telecommunications. Prior to joining Consumers Union, he served for 2 years as chief counsel and staff director for the Antitrust Subcommittee of the Senate Judiciary Committee under my predecessor, Senator Howard Metzenbaum from the State of Ohio.

We welcome all of you and we will start, with no particular significance to this, to my left and your right with Mr. Allen. Good afternoon and thank you for joining us.

We are going to try to maintain, if we could, a 5-minute rule. That will take us roughly 25 minutes to go through the panel with your opening statements. We will accept any written statements that we have and make them right now a part of the record. We would ask you to take approximately 5 minutes to make your opening statement and then we will be able to have some time to move to questions.

Mr. Allen, thank you very much.

PANEL CONSISTING OF BARRY K. ALLEN, EXECUTIVE VICE PRESIDENT, AMERITECH CORP., CHICAGO, IL; MARK C. ROSENBLUM, VICE PRESIDENT, LAW AND PUBLIC POLICY, AT&T CORP., BASKING RIDGE, NJ; WILLIAM P. BARR, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, GTE CORP., WASHINGTON, DC; JOHN C. SHAPLEIGH, EXECUTIVE VICE PRESIDENT, BROOKS FIBER PROPERTIES, INC., ST. LOUIS, MO; AND GENE KIMMELMAN, CODIRECTOR, WASHINGTON OFFICE, CONSUMERS UNION, WASHINGTON, DC

STATEMENT OF BARRY K. ALLEN

Mr. ALLEN. Thank you, Mr. Chairman, Senator Kohl. On behalf of Ameritech, I appreciate the opportunity to be here today.

I would like to begin by stating the not so obvious, and that is the Telecommunications Act of 1996 is a good law. You did your job. We are doing ours. The problem with the law is that it has only been half implemented, and that is the local half. To under-

stand why, we believe you have to return to the original principles that you used when you established the law.

The first principle was to open up all telecommunications markets to full competition. At Ameritech, contrary to what you have heard and certainly will hear today, the local markets are open. I have a chart here I would ask you to look at. Let me just say that this chart reflects the increase in competition in our region. Thirty-eight companies today actively provide local service. The number of customers that are served by those competitive companies have grown from 41,000 at the end of last year to over 300,000 in just 8 months; 3,000 more consumers each day in our region are now choosing a local provider other than Ameritech.

Let us look at one example, the State of Michigan. If you live virtually anywhere in the State of Michigan today, you can call another telephone company and change your local telephone service. Chairman Hundt recently said that he did not know anyone who had an alternative choice for local service. You heard him say again today he does not know hardly anyone, so he is modifying his comments a little bit. But if he would go back home to Ann Arbor, where he was born, he would find that he has eight companies there that would serve his local service needs. That is competition.

But unfortunately, real competition is being curtailed. Long distance companies can and do offer local service, but full competition in long distance has been delayed. Senator DeWine, if you were in your office in Columbus and wanted to make a call to Toledo, or Senator Kohl, if you were in your Madison office and wanted to call Milwaukee, British Telecom/MCI can connect and complete that call. Ameritech cannot. I find that very, very frustrating.

To understand why that is brings us to the second basic principle that guided the law that you wrote and passed and that was we should rely on market forces and not Government regulation. This is where the intent of the law is being second guessed.

There has been a propensity by the FCC and elsewhere to regulate our entry into long distance well beyond the original intent of the statute. We have worked hard to satisfy the FCC. Ameritech's most recent application for long distance in Michigan was 10,000 pages. That is longer than the Tax Code.

Last month, in response to our application, we received back the 200-page road map that you referred to later. Interestingly enough, the congressional checklist of 14 items that we have to pass to get into the long distance business will fit on 1 page. You referenced the length of this document earlier, Senator DeWine, and you were right on. It is a very detailed road map and it reflects the micromanagement and overregulation that we see today.

Congress, we do not believe, intended that, contemplated it, or desires it. These regulations can now be used as a road map or they can be used as a roadblock. We will file again and we will follow the road map. We will dot all the i's. We will cross all the t's. But what must be avoided is the temptation and the tendency of the FCC to set additional hurdles. Enough is enough.

To avoid this fate will take the leadership of this committee, it will take the leadership of the upper echelons of the FCC, the Department of Justice, and it will take the leadership of the industry

as a whole to break the regulatory gridlock that we seem to be in. To get there, here is a suggestion.

Choose a few States, like Michigan, like Illinois, where competition is in full swing. Test the waters. Let me predict, you will see price competition, you will see innovation, you will see consumers driving the market, not regulators. In short, you will see what Congress asked for.

We are halfway there in the Ameritech region. Local competition is a reality. Now what is required is the leadership to finish the job. We are ready. Customers are waiting. Thank you very much.

[The prepared statement of Mr. Allen follows:]

PREPARED STATEMENT OF BARRY K. ALLEN

Mr. Chairman and members of the Subcommittee:

My name is Barry Allen. I am Executive Vice President of Ameritech Corporation. Our operating companies provide telephone service in Illinois, Indiana, Michigan, Ohio, and Wisconsin. I am pleased to have the opportunity to testify on the present status of Congress's efforts to bring the benefits of competition to consumers of local and long distance telecommunications services.

INTRODUCTION

Mr. Chairman, we hear a lot of griping about the Telecommunications Act of 1996. But Ameritech thinks Congress passed a good statute that, if fully implemented, would achieve its procompetitive, deregulatory objectives. The problem is that the Act has been only half implemented. We're here today to say that it's time to implement the entire Act and bring the benefits of vigorous competition to consumers of all telecommunications services.

The 1996 Act had two primary objectives. First, Congress sought to open up the local telecommunications marketplace to competition by all carriers that want to compete. Second, Congress sought to expand and enhance competition in long distance by permitting the Bell operating companies ("BOCs") to offer long distance services. These two objectives are, of course, designed to foster a single vision—a seamless telecommunications marketplace driven by consumer demand rather than by regulatory design in which consumers reap the benefits of competitive prices and a vast array of innovative product and service options.[1]

Congress's first objective has become a reality in Ameritech's region. The local exchange is now open to any carrier that wishes to provide local telecommunications services. Indeed, more than 30 carriers already have come into the states in Ameritech's region, and they are competing and winning away our customers in increasing numbers. Ameritech also has entered into more than 60 approved interconnection agreements with competing carriers, which enable these carriers to provide local service and compete on nondiscriminatory terms and conditions. These carriers can interconnect their facilities with Ameritech's and obtain any network elements they need at cost-based rates, or, if they prefer, they can purchase entire services for resale from Ameritech at wholesale discounted rates. All the terms and conditions of these agreements have been approved by the public service commissions in Ameritech's region, and competitors are actively using them to provide local service and compete for customers.

Unfortunately, a different story must be told about the status of Congress's second objective—the Bell operating companies' entry into long distance and the invigorated long distance competition it is certain to bring. There has been no movement on this front. Ameritech, of course, stands ready to provide the benefits of additional competition to long distance customers in its region. Indeed, Ameritech was ready years ago, as the Department of Justice and FCC recognized when they endorsed our Customers First plan. Ameritech supported the 1996 Act because it provided a clear roadmap for dismantling the barriers to entry that hampered the full flowering of competition in all telecommunications markets. And we had every reason to believe that, by this time, Ameritech would be bringing the benefits of vigorous com-

[1] As the Conference Report put it, the purpose of the 1996 Act was "to provide for a procompetitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 113 (1996) (emphasis added).

petition to long distance customers. Yet, more than a year and a half after passage of the Act, we remain on the sidelines.

Frankly, we're frustrated. Congress passed a fine statute, in which we read this message: "If you open up your local exchange markets to competition, you will have a right to compete in long distance." That's not a complicated message, and there need not be armies of lawyers fighting over its meaning. We've met our part of the bargain. We have opened our local exchanges to competition, expending enormous resources to comply with every statutory requirement and the numerous additional nonstatutory requirements imposed by the FCC after passage of the 1996 Act. As a result, competing carriers are free to compete for customers in our region and many are actively doing so. It is time to satisfy the second objective of the 1996 Act and permit us to bring competitive prices, innovative services and products, and consumer choice to long distance customers in our region.

Mr. Chairman, passage of the 1996 Act represented Congress's understanding that competition for telecommunications services is a good thing. Such competition is developing rapidly in the local exchange market in Ameritech's region, limited only by the business, strategic and litigation decisions of competing carriers.[2] If you want to quicken the pace at which competing carriers offer local exchange services, you can best do so by sending a signal to the FCC that it's time to stop imposing new regulatory preconditions to competition—that it's time to open all markets to competition by permitting BOCs like Ameritech to compete in long distance. Once we have the ability to compete for both local and long distance customers, the long distance companies will direct their enormous resources toward competing for local customers rather than keeping BOCs like Ameritech out of the long distance business. There is nothing to gain—and a great deal to be lost—by waiting. Let us compete in long distance, and we guarantee that the benefits—for all consumers of telecommunications services—will be obvious.

THE LOCAL EXCHANGE IS OPEN TO COMPETITION

The 1996 Act conditions BOC entry into long distance on the opening of the local exchange to entry by competing carriers. The local exchange in each of the states in Ameritech's region *is* open to competition—the culmination of extensive efforts by Ameritech, Congress, state legislatures, and federal and state agencies. This did not occur overnight. Nor did it occur without the inevitable operational and technical problems that were to be expected in such a complex undertaking. But Ameritech devoted enormous resources to the resolution of those problems—as well as to the task of meeting the numerous additional regulatory preconditions to BOC entry into long distance that the FCC created following passage of the 1996 Act. And let me assure you that, as a result of these efforts, the local market is open in a manner that permits competitive entry, and such entry is taking place at an accelerating pace.

Ameritech began preparing for local competition well before passage of the 1996 Act. In its pioneering Customers First plan, announced in March 1993, Ameritech voluntarily implemented much of what the 1996 Act was later to require. Customers First—developed in consultation and cooperation with the FCC and DOJ—proposed a trial removal of all barriers to competition in the provision of both local and long distance services in the Chicago and Grand Rapids areas. As part of Customers First, Ameritech began unbundling its network and established a business unit focused exclusively on helping competing carriers process orders and establish service. For that reason, we were well positioned to move quickly after passage of the Act to further open up the local exchange to competition by all carriers.

State legislatures and public service commissions in Ameritech's region also foresaw and helped foster a competitive local exchange prior to the 1996 Act. For example, as early as 1986, the Illinois General Assembly revised the Illinois telecommunications laws to encourage local exchange competition.[3] Recognizing such measures, the Senate Commerce Committee highlighted Illinois as one of the states that had "taken steps to open the local networks of telephone companies."[4] Subsequently, in 1995, the Illinois Commerce Commission approved Ameritech Illinois'

[2] Proof of this openness may be found on Wall Street, where the market is racing to fund the growth of new local competitors. A recent Bear Stearns report reveals that over $9.4 billion of the $11.7 billion invested in selected competitors since 1992 has poured in over the last year and a half. This rocketing investment speaks volumes about the market's perception of the ability of new entrants to compete.

[3] *See* 220 ILCS 5/13–103(b).

[4] Senate Commerce, Science, and Transportation Committee Report on S. 1822, "Communications Act of 1994," 103d Cong., 2d Sess. 5 (Sept. 14, 1994).

proposal to unbundle its network.[5] Similarly, the Michigan legislature substantially revised that state's telecommunications laws in 1991 and again in 1995 to promote local competition in the provision of telecommunications services.[6]

Once the 1996 Act was passed, Ameritech redoubled its efforts to open up its territory to local competition. Among other things, it entered into more than 60 interconnection agreements with competing carriers; unbundled its local network, making its network elements, products, and services available to all takers on a nondiscriminatory basis, at competitive rates, and on terms and conditions consistent with the Act; and expanded its operations, hiring hundreds of personnel and developing new systems and software to process orders from competing carriers. Today those efforts are bearing fruit in the region Ameritech serves, particularly in Michigan and Illinois. As I noted earlier, there are more than 30 active competitors in Ameritech's region, and these carriers are rapidly expanding their operations throughout the region, particularly in the more populous areas.

Moreover, competing carriers are using all three statutory paths to enter the local exchange market—interconnection of their facilities with Ameritech's network, purchase of unbundled network elements, and resale of Ameritech's services. The extent of interconnection is indicated by Attachment A, which shows the number of end-office integration trunks that competing carriers have purchased from Ameritech, each of which is capable of handling 15 individual lines. Thus, for example, competing carriers currently have interconnection capability to serve approximately 334,000 lines in Michigan, 586,000 in Illinois, and over 1.1 million regionwide. The extent of entry via unbundled network elements is indicated by Attachment B. As of August 31, 1997, approximately 50,000 loops had been sold in Illinois and Michigan alone. As for resale, Attachment C proves that growth in resold lines has been dramatic over the past several months and shows no signs of abating: as of August 31, 1997, over 250,000 lines (not including more than 100,000 Centrex lines) had been resold in Ameritech's region. Moreover, as indicated by Attachment D, competitors are serving customers in nearly every wire center in Illinois and Michigan.

There is plenty of additional evidence that the local exchanges in the region Ameritech serves are open to competition. According to information supplied by Ameritech's competitors themselves, they will have deployed 47 switches in the region by the end of 1997 and at least 97 switches by the end of 1998. Each of these switches will have the capacity to serve up to 80,000 lines. Thus, Ameritech's competitors will have the switching capability to serve approximately 3.75 million lines this year, a number that will skyrocket to over 7.75 million lines by the end of next year.

What do all these statistics mean? They mean that the local exchanges in the region that Ameritech serves are open to competition. They mean that other carriers can compete to provide telephone service to every customer in our region—if they choose to do so. And they mean that competing carriers in fact are taking advantage of this open market opportunity to capture local service customers and to position themselves to do so at an ever increasing rate in the future. Indeed, as of August 31, 1997, competitors were serving approximately 120,000 lines in Michigan, 130,000 lines in Illinois, and over 300,000 lines regionwide. See Attachment E.

Mr. Chairman, Ameritech recognizes that those who want to put off indefinitely the attainment of Congress's goal of opening all markets to additional competition will say that Ameritech's entry into long distance is still premature. After all, they will suggest, didn't the FCC recently conclude that there remain certain deficiencies in Ameritech's operations support systems and in the implementation of performance standards for competitor access to those systems? I have three responses to these steadfast supporters of a regulated telecommunications marketplace. First, due to its bureaucratic rules, the FCC made its decision based on historical, not current, data. Second, the FCC simply ignored the Michigan Public Service Commission's finding that Ameritech had unconditionally satisfied 11 items of the 14-item competitive checklist prescribed by Congress and that Ameritech could satisfy the remaining requirements before the FCC made a final determination on Ameritech's application. Finally, and most important, common sense establishes that the local exchanges in Ameritech's region are open to competitive entry. For, if the local markets were not open to competitive entry, how did more than 30 competing carriers (including the most vociferous advocates of the "prematurity" theory) enter the market in Ameritech's region and commence the provision of local telephone service?

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[5] Illinois Bell Telephone Company: Proposed introduction of a trial of Ameritech's Customers First Plan in Illinois, No. 94-0096, and related Nos. 94-0117, 94-0146, 94-0301, Order, at 47 (Ill. Commerce Comm'n April 7, 1995).

[6] *See* Mich. Comp. Laws §§ 484.2101 to 484.2605.

CONSUMERS ARE THE REAL VICTIMS OF DELAY IN OPENING LONG DISTANCE SERVICES TO ADDITIONAL COMPETITION

The 1996 Act says that Ameritech may provide long distance services in any state in its region once the local exchange in that state is open to competition. Yet, despite the fact that Ameritech demonstrably has opened the local exchanges in its region to competition, Ameritech is still waiting for the opportunity to service its first in-region wireline long distance customer. But before looking into why Congress's goals have been thwarted, we should keep in mind the real victim of legal barriers to long distance competition—the American consumer.

The long distance market has long been dominated by a triumvirate of entrenched carriers—AT&T, British Telecom/MCI, and Sprint. Congress recognized that a BOC like Ameritech, with its experience, resources, and technological know-how, is uniquely poised to provide vigorous new competition in the long distance market. Ameritech's entry will stimulate competitive pricing, new and innovative product options for consumers, and a race among carriers to provide superior customer service and convenience. Moreover, Ameritech will bring these benefits to a broader range of consumers than the big-volume, high-margin customers targeted by the long distance giants. As economist Marius Schwartz recently explained in his testimony on behalf of the Department of Justice, a BOC, such as Ameritech, "is unusually well placed" to provide "more competition in long-distance services" to "residential and low-volume business customers."[7]

Furthermore, Ameritech will enter the long distance market with a zero market share. Ameritech will have no choice but to adopt procompetitive strategies—offering consumers one-stop shopping with more and better services at competitive prices—if it wishes to win customers away from the entrenched long distance carriers. This in turn will force the existing long distance carriers to adopt more pro-consumer strategies to protect their customer base. Whichever carriers prove to be most effective, the sure winners in this struggle will be consumers. Their enjoyment of the fruits of competition should not be further delayed by regulatory gridlock.

THE DELAY IN DISMANTLING THE BARRIERS TO COMPETITION IN LONG DISTANCE: A FAILURE TO FOLLOW THE CONGRESSIONAL ROADMAP

Mr. Chairman, in February 1996—shortly after the 1996 Act went into effect—the FCC said this in connection with Ameritech's Customers First plan: "Ameritech, in concert with the Illinois and Michigan commissions, has taken steps to remove the most significant barriers to competitive entry in exchange and access markets." The FCC continued: "The evidence also indicates that competitive carriers with substantial capacity and a track record of successful competition in other markets have begun to interconnect with Ameritech's local network within the Chicago and Grand Rapids LATAs, and to offer competing exchange and access services."[8] And, as I indicated earlier, during the one and one-half years since the Act was passed—and since the FCC made these statements—the market-opening initiatives of Ameritech, as well as the local exchange services being offered by Ameritech's competitors, have dramatically increased. Under these circumstances, it simply defies common sense to suggest that Ameritech has failed to open the local exchange markets in its region to competition.

Yet, as you know, last month the FCC denied the application of Ameritech Michigan to provide long distance services. It is true, of course, that the Commission praised Ameritech's efforts to comply with the Act and open its local exchange to competition. As Chairman Hundt put it, "I recognize and applaud the steps that Ameritech and the State of Michigan have taken to open the local market in Michigan to competition."[9] But Ameritech is not seeking plaudits for its efforts. It is seeking the opportunity—an opportunity to which it has devoted itself since long before passage of the 1996 Act—to provide consumers in its region with the benefits of additional competition in both local and long distance services. And the critical question is why—despite Ameritech's intense, longstanding efforts—consumers in Ameritech's region continue to be deprived of those benefits.

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[7] DOJ Evaluation, Application of SBC to Provide In-Region, InterLATA Services in Oklahoma ("DOJ SBC Evaluation"), ¶61.

[8] In the matter of Ameritech Operating Companies, FCC 96-58, 11 F.C.C.R. 14028 (Feb. 15, 1996).

[9] In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC 97-298, Memorandum Opinion and Order ("Ameritech Section 271 Order"), p. 201 (Aug. 19, 1997) (Statement of Chairman Hundt).

Ameritech is convinced that the failure to achieve full and fair competition in all telecommunications services cannot be attributed to fundamental flaws in the 1996 Act. The root of the problem, we believe, is that those who benefit from maintaining legal barriers to long distance entry refuse to accept the straightforward criteria that Congress established for determining the timing of BOC entry into long distance services. In concrete terms, when Ameritech Michigan filed its application to provide long distance services, the carriers that would benefit most from the status quo flooded the Commission with a host of objections that were irrelevant to—indeed flatly inconsistent with—the roadmap for long distance entry prescribed by Congress. In addition, while we commend the FCC's recent attempt to provide the BOCs with a roadmap to long distance entry, we believe that in assessing future long distance applications the FCC must adhere more closely to the deregulatory purpose and structure of the long distance entry roadmap that Congress itself has established. Let me give a few examples.

Impermissible "metric" tests: The most common refrain of competitors in response to Ameritech Michigan's long distance application was that Ameritech should be denied entry into the long distance business until local competition had reached some undefined level vaguely characterized as "fully effective local competition." But Congress rejected proposals to incorporate such a "metric" test into the Act.[10] As the Department of Justice has explained, "[a]lthough Congress required that local markets be open to competition before BOC long distance entry," Congress made clear that BOC entry need not wait "until local competition has become fully effective."[11] Rather, Congress specifically "envisioned a transitional period after entry before local competition became fully effective."[12] As Congress properly recognized, imposing a "metric" test for BOC entry into long distance would place control over the timing of BOC entry—and the benefits to consumers from additional competition from such entry—in the hands of carriers seeking to limit the scope of competition. In short, under the Act, the key to BOC entry into long distance is not the amount of competition, but the opportunity to compete, in local exchange services. And, as I have demonstrated, competing carriers now have that opportunity, and are taking advantage of it daily to compete for customers in Ameritech's region.

Undaunted by the 1996 Act, Ameritech's competitors reiterate their pre-Act complaint that, absent a "metric" test, Ameritech might be tempted to engage in anticompetitive conduct that would somehow harm long distance providers like AT&T and British Telecom/MCI. To begin with, it is absurd to suggest that an entrant like Ameritech poses any threat to the entrenched long distance providers that still control more than three-quarters of the long distance market. In any event, had the long distance providers read the 1996 Act, they would have noticed that Congress established a pervasive regulatory scheme, including a separate subsidiary requirement, to protect against any risk that Ameritech's entry into long distance could cause competitive harm during any transitional period before local competition became fully effective. As the Department of Justice has observed, the statutory safeguards (which have been augmented by elaborate FCC regulatory safeguards) "would have been unnecessary if Congress had wished to require fully competitive local markets as a precondition to long distance entry."[13]

Ameritech is pleased that, to date, the FCC appears to have resisted competitor attempts to revive a "metric" test that Congress specifically rejected.[14] However, regulators are human, and competitor efforts to rewrite the Act are unceasing. Congress therefore should send a clear signal to the Commission that it should continue to resist the metric test mentality that drives all objections to Ameritech's efforts to bring the benefits of additional competition in long distance services to consumers in its five-state region.

Impermissible attempts to "jump-start" local competition by ignoring the statutory differences between resale and network elements: It bears repeating that Ameritech is entitled to bring the benefits of additional long distance competition to consumers

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[10] *See, e.g.*, 141 Cong. Rec. S8321-22 (daily ed. June 14, 1995); 141 Cong. Rec. H8454 (daily ed. Aug. 4, 1995).

[11] DOJ SBC Evaluation, p. 44 & n. 53

[12] DOJ SBC Evaluation, p. 44 & n. 53.

[13] DOJ SBC Evaluation, p. 44 & n. 53.

[14] In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, CC Docket No. 96-149, FCC 97-222, Second Order on Reconsideration (rel. June 24, 1997) ¶5 ("Congress recognized that section 271(d)(3) approval might be granted in a particular state before the local exchange market in that state became fully competitive and, Congress chose 'to respond to the concerns about anticompetitive discrimination and cost-shifting that arise when a BOC enters the interLATA services market in an in-region state in which the local exchange market is not yet fully competitive * * * through the structural requirement of a separate affiliate'").

in the states in the region that it serves once it has opened the local exchanges in those states to competition. And it is simply irrefutable that the Michigan local exchange is open to competition. Nonetheless, Ameritech recognizes that—despite its market-opening efforts and the demonstrable transformation in the competitive landscape of the local exchange in Michigan—the amount of local competition may not rise to the level that many observers anticipated. But, Mr. Chairman, the investment, strategic and litigation decisions of other carriers are not within Ameritech's control. And it is clear that many of the major carriers, like AT&T and British Telecom/MCI, have adopted entry strategies that depend upon the success of their efforts to persuade the FCC to deny any BOC long distance application until that BOC permits the long distance carriers to enter the local exchange market on terms and conditions that are actually contrary to those prescribed by Congress in the 1996 Act.

For example, the Act permits a competing carrier to obtain for resale the end-to-end service that Ameritech provides to its retail customers, but mandates that the competing carrier pay for that service at the wholesale price prescribed by the Act. By contrast, if a competing carrier wants to provide its own service over a network that it constructs or designs to provide that service, it may acquire unbundled network elements from Ameritech for that purpose at cost-based prices.[15] The major long distance carriers, however, are unwilling to accept the rules of entry that Congress prescribed. Rather, they have made clear to the FCC that it can expect them to commence large-scale entry into the local service market only if they obtain by regulatory fiat what the Act prohibits—namely, end-to-end service for resale at unbundled network element prices rather than the wholesale prices mandated by the Act.

Thus, the major long distance carriers are biding their time, salivating at the prospect of successfully gaming Congress' pricing regime and entering the local exchange market for a song, instead of at the competitive rates mandated by the Act. AT&T Vice Chairman John Zeglis made this clear in remarks to the investment community earlier this year, crowing that, in Pennsylvania for example, persuading the FCC to eliminate the pricing distinction between resale and unbundled network elements would enable AT&T to capture "a $33.50 revenue stream for $16.03 cost of goods sold, a discount of 52 percent"—more than double the wholesale discount for resale services authorized by the Act and the Pennsylvania state commission.[16]

What is remarkable is that the major long distance carriers have, to date, been successful in persuading the FCC to ignore the critical statutory distinction between local entry via resale and local entry via unbundled network elements. The "virtual resale" gambit described by AT&T's Vice Chairman is directly contrary to the Act's pricing regime. As the federal court of appeals for the Eighth Circuit recently ruled, the statutory provisions governing competitor entry through the purchase of unbundled network elements require the competitor to make an up-front investment in those facilities and take on a number of business risks that are not involved in the purchase of ready-made services for resale. Allowing carriers to purchase for resale Ameritech's end-to-end service at unbundled network element rates—and thereby avoid the accompanying up-front investment and business risks—is a plain violation of the Act, and Ameritech is confident that AT&T's "virtual resale" ploy will be rejected by the courts.

Moreover, the FCC's endorsement of AT&T's attempt to circumvent the Act endangers the development of any form of competitive entry and discourages investment by anyone in this country's telecommunications networks.

And this is not just a BOC talking. Time Warner, a facilities-based potential competitor of both Ameritech and AT&T, recently warned that the impermissible "virtual resale" strategy being pursued by AT&T and British Telecom/MCI (with the support, to date, of the FCC) would give those carriers an unfair advantage over competitors like Time Warner by permitting them to "obtain the more favorable network element prices while avoiding the risks associated with purchase of unbundled network elements." Time Warner also cautioned that permitting AT&T, British Telecom/MCI and others to disregard the rules of entry established by Congress would "discourag[e] investment in alternative networks which, over the long-term,

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[15] Compare Section 252(d)(1) (pricing of unbundled network elements) with Section 252(d)(3) (pricing of resold services).

[16] AT&T Investment Community Meeting Transcript at 4 (March 3, 1997).

will be the most significant competition to ILECs [incumbent local exchange carriers]."[17]

Ameritech can understand the FCC's desire to increase the pace of competition in local exchange service. But yielding to long distance carrier pressure to adopt "jump-start" strategies that violate the Act is not an appropriate way to achieve that goal. Rather, the Commission can properly accelerate the efforts of AT&T, British Telecom/MCI and other long distance carriers to contend for Ameritech's local service customers by permitting Ameritech to contend for their long distance customers.

Impermissible encroachment on state jurisdiction: In establishing the roadmap for opening all telecommunications markets to additional competition, Congress sought a careful balance between state and federal interests. In denying Ameritech Michigan's long distance application, however, the FCC has indicated that, in at least two respects, it does not consider itself bound by the jurisdictional lines drawn by Congress.

First, Congress authorized state commissions to determine whether interconnection agreements adopted following arbitration between competing carriers satisfy the requirements of the Act. The FCC, however, has said that, in ruling on a BOC's long distance application, it is free to reject the state commission's determination that the terms and conditions in the interconnection agreements between a BOC and its competitors, including performance standards adopted by a state commission in an arbitration decision, comply with the standards prescribed by Congress.[18] This is simply unacceptable! The 1996 Act was designed to accelerate the pace at which all markets, including the long distance market, would be open to additional competition. This goal can never be achieved if opponents of BOC entry into long distance are permitted to relitigate issues that state commissions have resolved pursuant to the authority vested in them by Congress.

Second, Congress gave the state commissions, not the FCC, jurisdiction to determine the prices that a BOC charges its competitors for access to local telephone facilities. And the United States Court of Appeals for the Eighth Circuit recently confirmed that Congress meant what it said, and vacated FCC rules in which the Commission asserted authority to determine the rates involved in the implementation of the local competition provisions of the Act. However, in denying Ameritech Michigan's long distance application, the FCC indicated that, even if a state commission sets prices that it finds comply with the cost-based standards in the Act, the Commission will nonetheless reject a BOC long distance application unless those prices satisfy the FCC's preferences regarding appropriate pricing standards. Again, the FCC's refusal to accept the Congressional scheme is unacceptable. It places BOCs in an untenable Catch-22 between the state commissions and the FCC, and erects a completely unauthorized regulatory barrier to increased competition in long distance services.

Excessive micro-management of the deregulatory scheme established by Congress: In denying Ameritech Michigan's long distance application, the FCC concluded that Ameritech Michigan came up short with regard to certain operational and performance matters. Due to the Commission's procedures, some of its findings are attributable to its reliance on stale information—and Ameritech is confident that the information it will provide the Commission in connection with its next long distance application will establish beyond dispute that Ameritech's operational support systems and performance record satisfy the requirements of the Act. It should come as no surprise, however, that Ameritech disagrees with the Commission's finding on other operational and performance issues that the record was insufficient to support Ameritech's position.

Nevertheless, we want to commend the Commission for its attempt to provide Ameritech with a "roadmap" of the agency's expectations with respect to future long distance applications. And, given its intensive, longstanding efforts to open all markets to additional competition, Ameritech is confident that—despite the FCC's perhaps over-zealous attempt in its 200 page "roadmap" to regulate in minute detail all aspects of the post-entry relationships between a BOC and its competitors—Ameritech's efforts to enter the long distance business will soon be rewarded.

But as any navigator knows, a map that is too crowded with detail is a confusing (if not misleading) guide, and too many potholes make a road impassable. And we want to say forcefully today that enough is enough. Once we comply with the FCC's current roadmap, we should not face—the next time we apply for long distance authorization—a new set of obstacles in a shifting regulatory maze. Basic fairness dic-

[17] Comments of the Ohio Cable Telecommunications Association and Time Warner Communications of Ohio, L.P., Pub. Util. Comm'n of Ohio, Case No. 96-922-TP-UNC, at 4, 6 (Aug. 25, 1997).

[18] Ameritech Section 271 Order, ¶ 142.

tates that the BOCs are entitled to know what they are expected to establish to gain entry into the long distance market. Moreover, given the number of regulatory hurdles that the FCC has added to the straightforward checklist requirements imposed by Congress, there inevitably will be some imperfections in performance and some disagreements between the BOCs and their competitors arising out of the interconnection process. But Congress intended this to be a reasonable process, not a game of "gotcha!" by Commission bureaucrats, and Congress surely did not intend to delay long distance entry until the BOCs obtained a seal of approval from their competitors. Therefore, Ameritech strongly encourages Congress to send a clear signal to the Commission that, at a minimum, no new regulatory roadblocks be placed on the road to long distance competition, and that the numerous existing regulatory requirements be applied with common sense to new commercial relationships between the BOCs and their competitors in the ever evolving telecommunications marketplace.

THE SOLUTION: LET AMERITECH IN AND GIVE COMPETITION A CHANCE

So long as Ameritech is kept out of long distance, consumers of long distance services will be deprived of the benefits of enhanced competition. Community and consumer groups in Ameritech's region have recognized this. In Michigan, for example, the United Homeowners Association wrote to the FCC that "[h]omeowners in Michigan should not have to wait any longer to realize the benefits of meaningful competition in the long distance market."[19] And the National Association of Commissioners for Women wrote that "Ameritech's entry into the long distance market will mean lower rates and better service for consumers in Michigan."[20] Despite these unquestionable benefits, the long distance giants vigorously oppose BOC entry because they fear competition. They want to maintain their stranglehold over the provision of long distance services for as long as possible while they skim the cream from the local market.

Mr. Chairman, we recognize that you are hearing today a variety of viewpoints on this subject. You may be wondering who is right: Will BOC entry into long distance, as Ameritech believes, accelerate competition in all telecommunications markets, bringing untold benefits to consumers? Or will it bring, as Ameritech's competitors and other naysayers contend, undefined disasters?

We think Congress clearly chose the first approach in passing the 1996 Act. And there is only one way to tell whether Congress got it right or wrong—experience, a method of dispute resolution that is inestimably more valuable than the quibbles of lawyers and bureaucratic regulators. We urge Congress to tell the FCC: "Instead of erecting additional obstacles, let Ameritech demonstrate the impact of competition. If Ameritech's entry into long distance leads to a retreat from open competition in the local exchange, you have the authority to withdraw its authorization. But let's not foil the purpose of the 1996 Act—accelerated competition in all telecommunications markets—before it has had a decent chance to be realized."

Ameritech's competitors, of course, will complain that there is a risk that Ameritech may attempt to close its open markets after it is allowed into long distance. But I can assure you that Ameritech is committed to competition, and, in any event, Congress has already dealt with that risk by including safeguards in the 1996 Act that address it effectively. First, Ameritech cannot refuse to interconnect with competing carriers because the Act mandates that BOCs provide access and interconnection to all requesting carriers. Second, this access and interconnection cannot be inferior in quality to that which Ameritech enjoys because the Act requires that it be nondiscriminatory. Third, Ameritech cannot charge these carriers supracompetitive prices because the Act requires cost-based prices that must be approved by the state commissions. Fourth, Ameritech cannot play dirty tricks on its competitors because the Act provides for severe penalties if a BOC tries to do so. Moreover, these protections are shored up by overlapping safeguards in state telecommunications laws and regulations, effectively removing any ability that a BOC might have to engage in anticompetitive conduct.

Moreover, these requirements are not abstractions. They are embodied in concrete contracts between Ameritech and its competitors, each of which provides for detailed performance measures and reports, as well as specific remedies for noncompliance. The state commissions have abundant authority to monitor and enforce Ameritech's compliance with these agreements. And, of course, the competing carriers them-

[19] Comment on Application of Ameritech Michigan to Provide In-Region, InterLATA Services in Michigan, p. 2 (June 10, 1997).

[20] Comment on Application of Ameritech Michigan to Provide In-Region, InterLATA Services in Michigan, p. 1 (June 10, 1997).

selves, armed with their battalions of lawyers, will monitor Ameritech like hawks, readily detecting any shortcomings and flying to the enforcing bodies with any grievances. There is simply no way that Ameritech, even if it so desired, could block or obstruct competition in the local exchange. To the contrary, the 1996 Act has cleared an unobstructed path for any carrier that wishes to compete.

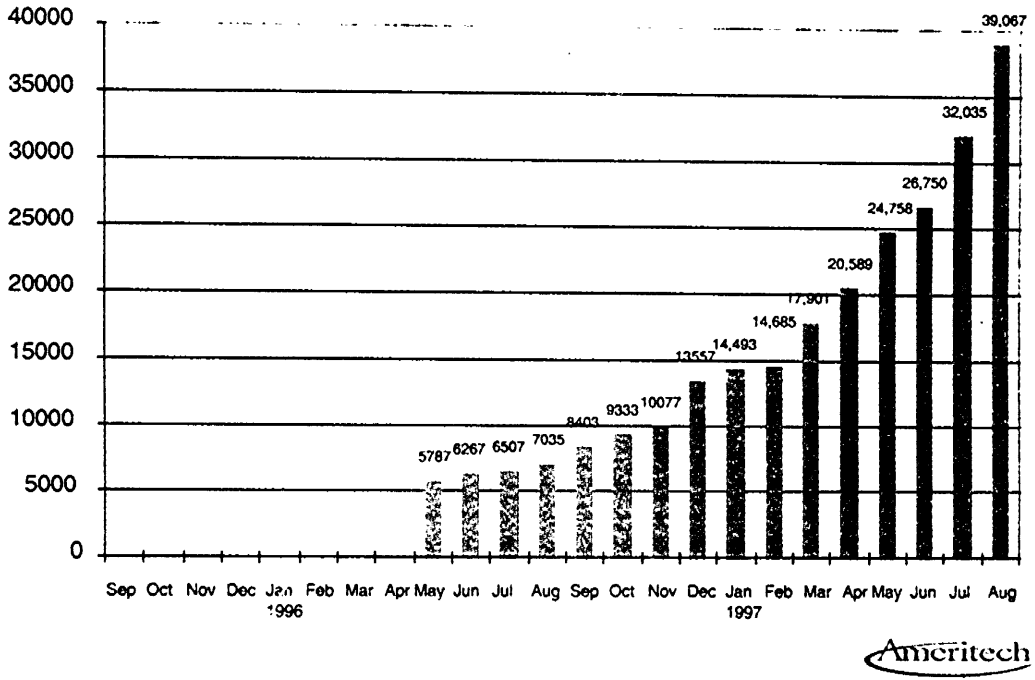
Ameritech has been working for years for the opportunity to prove that freedom to compete will benefit, not harm, consumers. Congress, too, worked for years to develop a process by which that purpose could be achieved, and it passed a statute to facilitate it. We respect the efforts of the FCC to carry out its responsibility under the Act, but we think that in the course of doing so it may have lost sight of the Act's deregulatory purpose. Just one of the FCC's many orders pursuant to the Act (its First Report and Order in Docket 96–98) contains well over 1,400 paragraphs.

Enough ink has been spilled and enough attorney hours have been accumulated. It is time to clear away the fog and let the refreshing air of competition perform its curative role, as Congress intended by passing the 1996 Act. Local exchange competition is developing rapidly in Ameritech's region. All carriers wishing to compete are free to do so on the reasonable and nondiscriminatory terms that Congress incorporated in the 1996 Act. Local exchange competition can be pushed into still higher gear by letting Ameritech into long distance. Once we are actively competing for long distance customers, by offering attractive service packages and other consumer benefits, the long distance giants will rush into the local exchange marketplace like bears after honey. Ameritech's entry into long distance should not be held hostage to the business decisions of its competitors. Nor should long distance customers be deprived of the competitive prices, innovative services, and creative packaging that Ameritech's entry will bring, simply because Ameritech's competitors are adept at manipulating the regulatory process. Ameritech's local exchange markets are open to competition, and, pardon the expression, Ameritech is ready to rumble with the big guys.

CONCLUSION

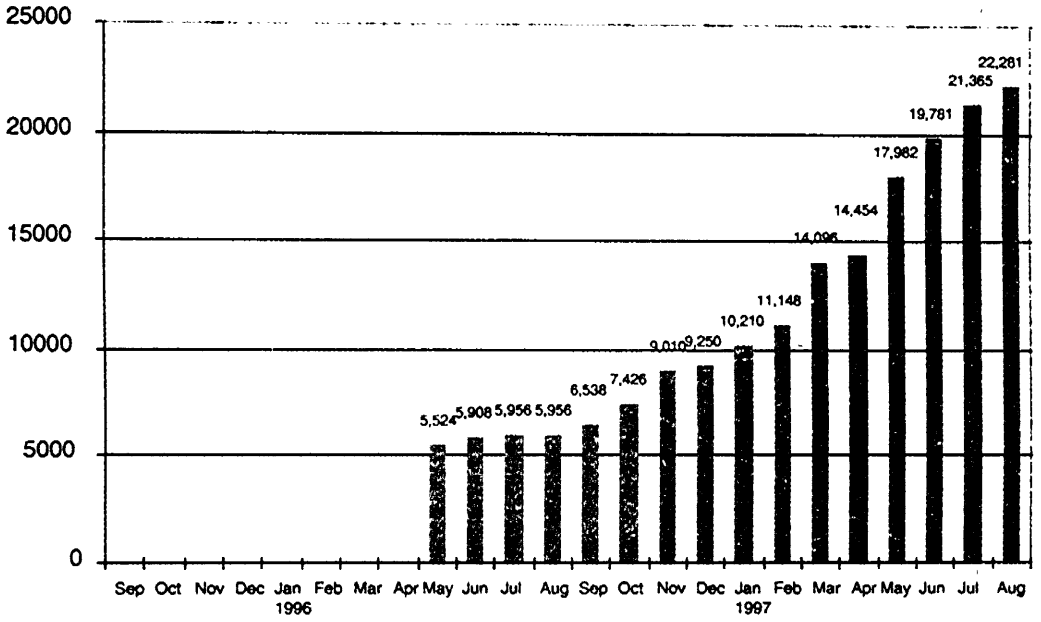
Mr. Chairman, on behalf of Ameritech, I want to thank you and the members of this Subcommittee for the opportunity to testify today. Ameritech applauds the measures that Congress has taken to propel competition forward in the telecommunications industry. And I urge Congress today to continue to show this leadership in promoting competition in all telecommunications services by sending a clear signal to the FCC that it should (1) take a common sense deregulatory approach to all BOC long distance applications; (2) apply standards to those applications that will encourage more competition and more investment, which in turn will produce more jobs, more innovative services and more consumer choice; and (3) implement immediately Congress' mandate that there be new competitive entry in both the local exchange and long distance markets.

Ameritech Illinois end-office integration trunks dedicated to exchanging local traffic with competitors



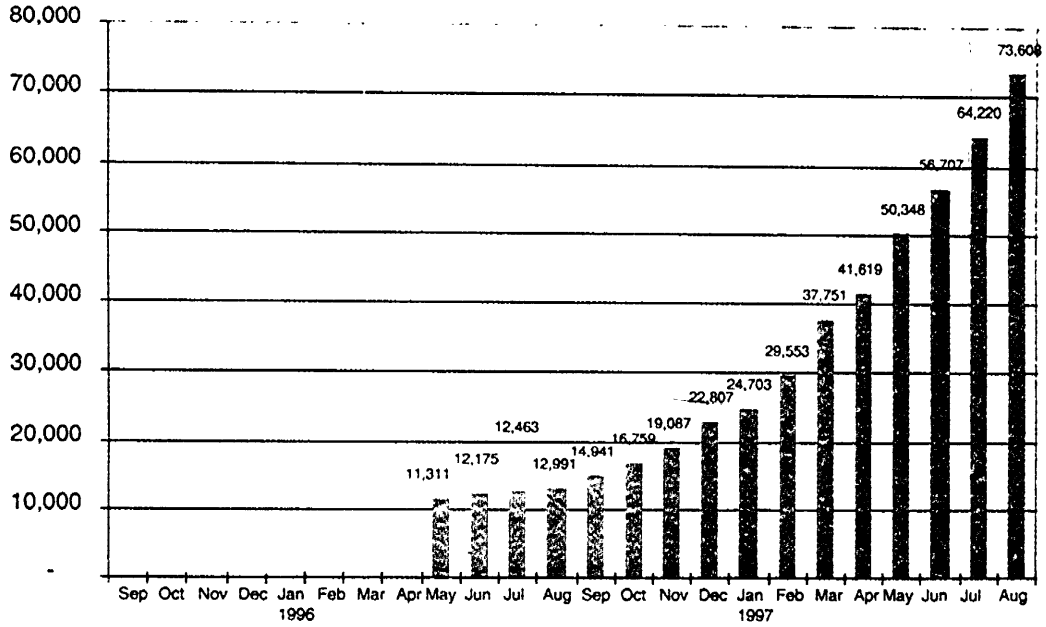
Ameritech

Ameritech Michigan end-office integration trunks dedicated to exchanging local traffic with competitors



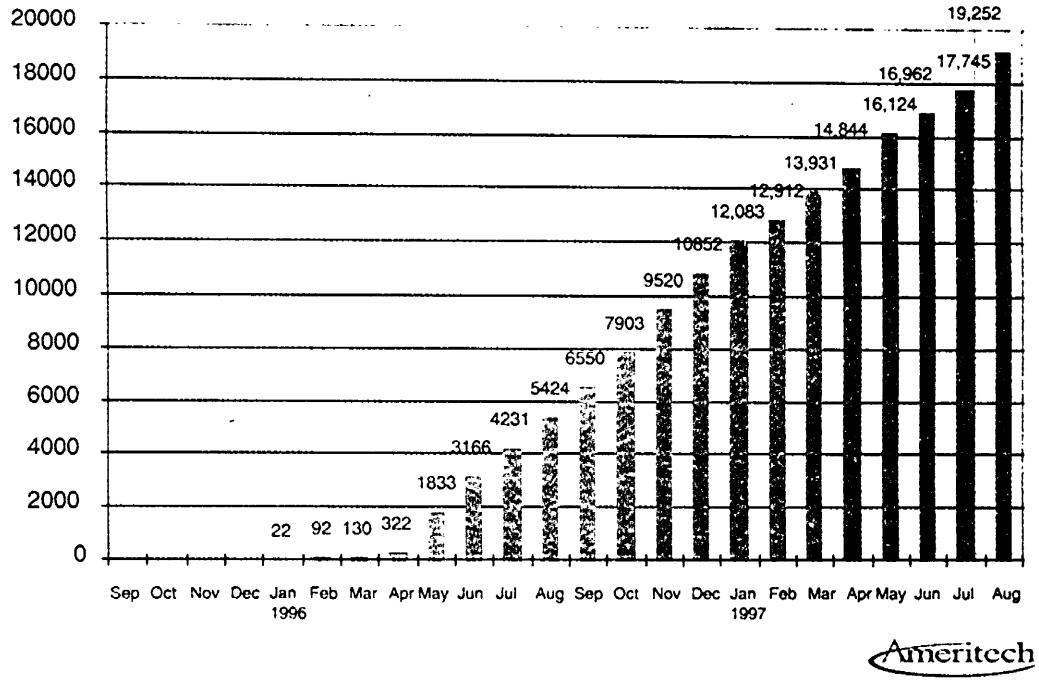
Ameritech

Ameritech 5-state region end-office integration trunks dedicated to exchanging local traffic with competitors



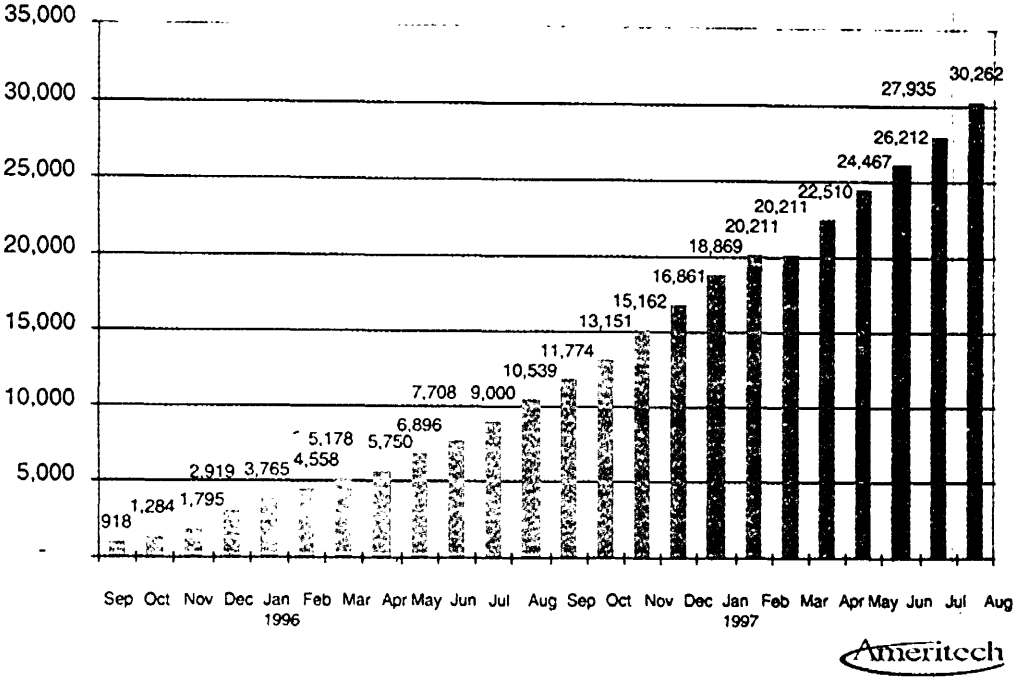
Ameritech

Ameritech Illinois unbundled loops leased to competitors

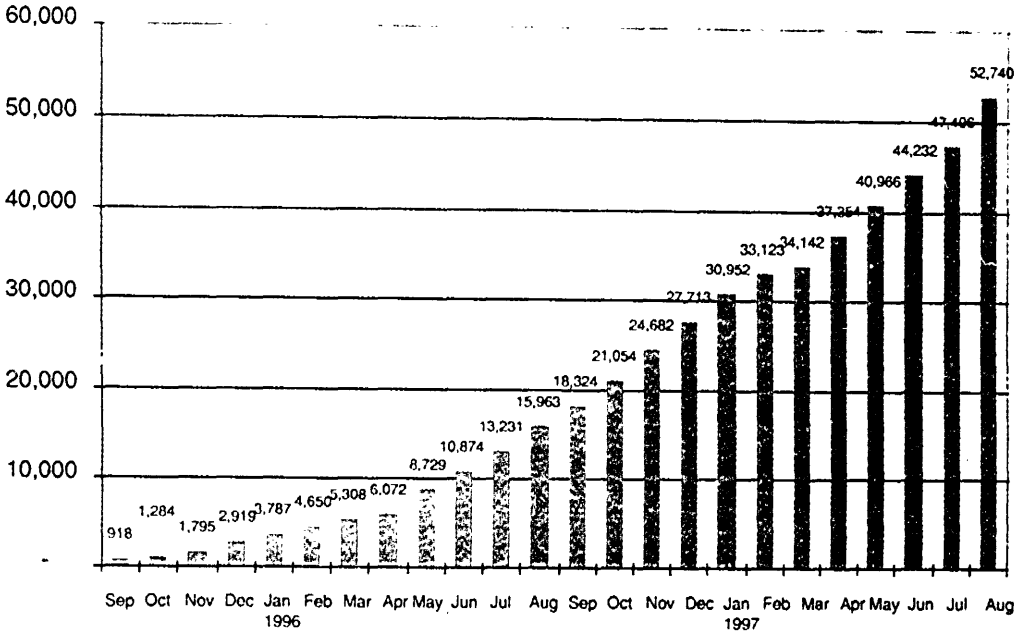


Ameritech

Ameritech Michigan unbundled loops leased to competitors

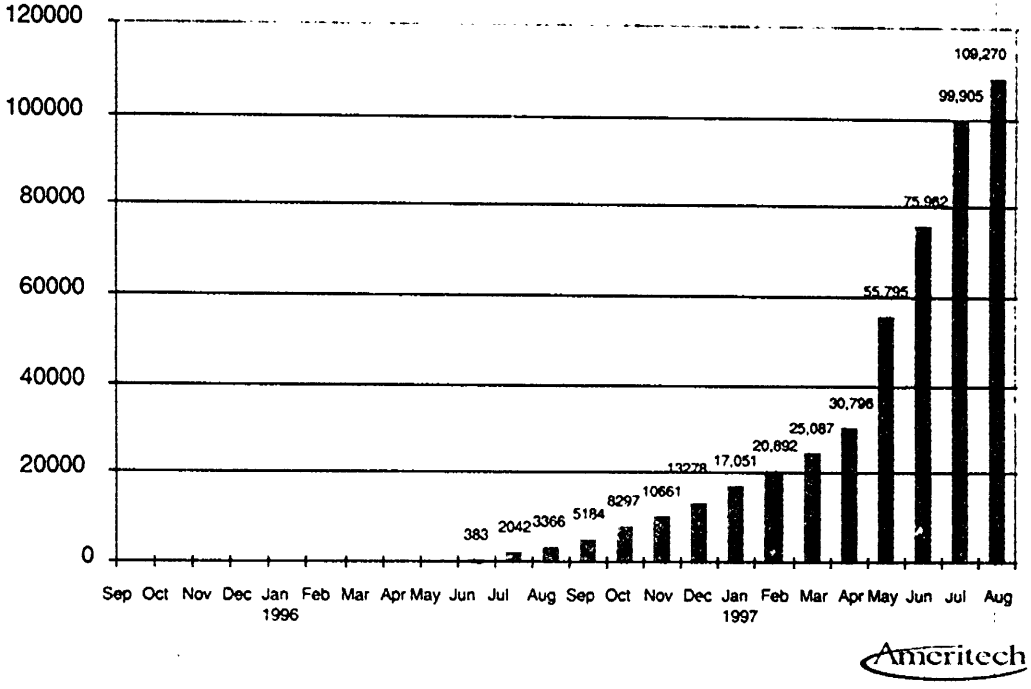


Ameritech 5-state region: unbundled loops leased to competitors

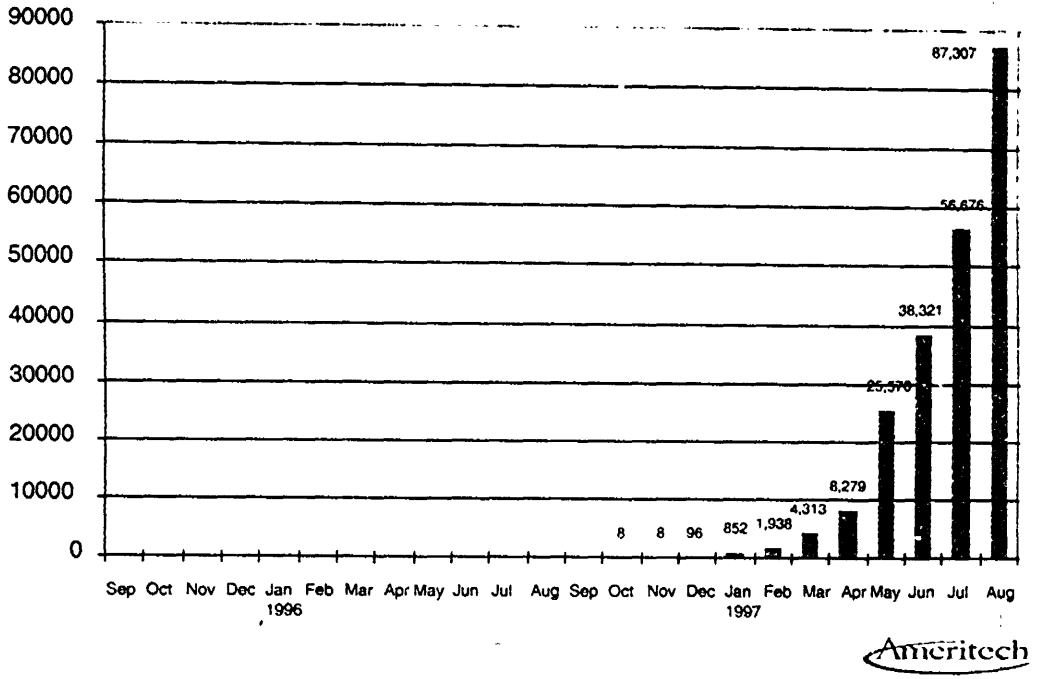


Ameritech

Ameritech Illinois lines sold to competitors for resale



Ameritech Michigan lines sold to competitors for resale



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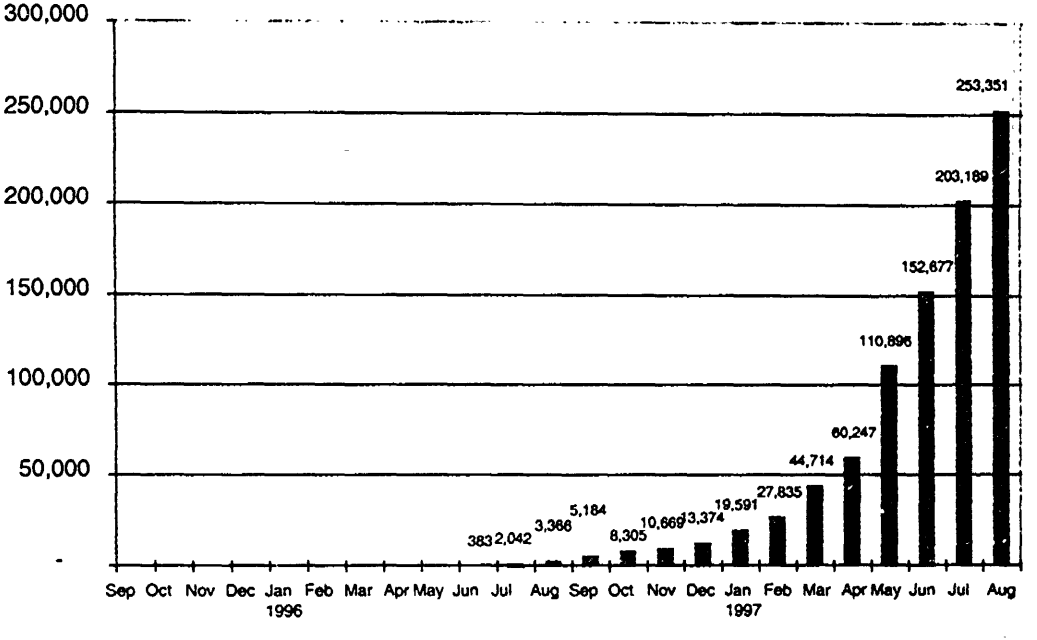
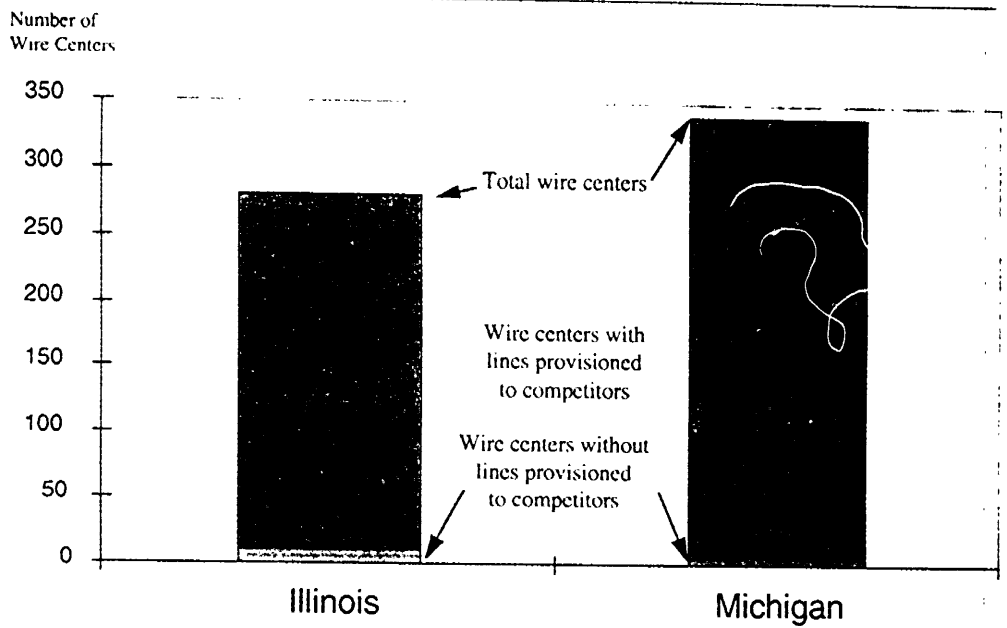
Ameritech 5-state region: lines sold to competitors for resale



Ameritech

Attachment D

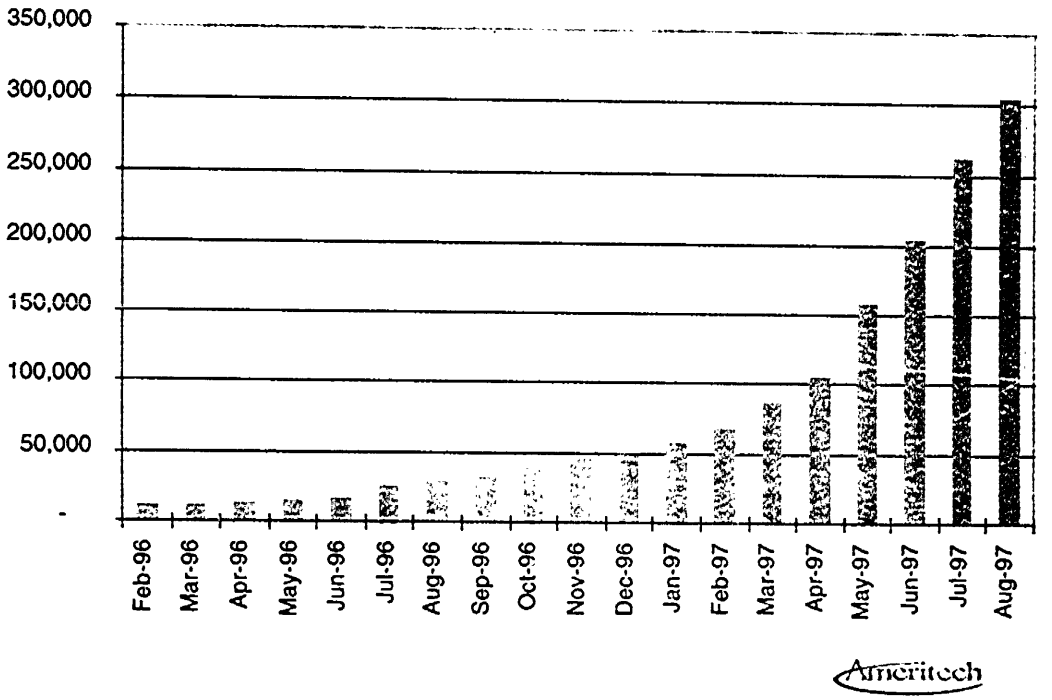
Ameritech is provisioning lines to competitors in most of its wire centers



Ameritech

Attachment E

Competitor lines in the Ameritech region (excluding CLEC self-provisioning)



Senator DEWINE. Mr. Rosenblum.

STATEMENT OF MARK C. ROSENBLUM

Mr. ROSENBLUM. Thank you, Mr. Chairman, members of the subcommittee. AT&T appreciates the invitation to participate today and we very much welcome the subcommittee's interest and participation in the important process of bringing local telephone competition to American consumers, which we think is the primary goal of the 1996 Telecom Act.

The most significant fact today is that about 19 months after the act passed, the monopoly local telephone companies still control about 99 percent of their local markets and that does mean that virtually no American customers today have a choice of who provides their local telephone service.

Senator DEWINE. Mr. Rosenblum, could you just pull that microphone a little closer? You have to really get into it.

Senator SPECTER. Mr. Chairman, might I make just one comment?

Senator DEWINE. Yes, sir. Senator Specter.

Senator SPECTER. I want you to know that the absence of more members here does not indicate a lack of interest in this subject. I regret that we cannot stay. We have the Governmental Affairs hearing, which is right down the hall.

I commend our distinguished chairman and ranking member for scheduling this hearing on this very, very important subject. Sometimes there is an inference, because there are not very many Senators here, that there is no concern about what is going on, but there is a lot of concern. We will be working with staff and reviewing the record and staying abreast of this very important issue. I just wanted to make that brief comment and I join my colleagues in thanking you for coming here.

Senator DEWINE. Thank you very much. That is a point certainly very well taken.

Mr. Rosenblum.

Mr. ROSENBLUM. Thank you. I will try to speak up.

The question with the 99 percent control of the local markets still in the hands of the local monopolies is why is competition not developing more quickly and we have some views on that. The first and probably strongest view, and in this regard, I agree with Mr. Allen, it is not the fault of the Telecommunications Act. We do not think there is any flaw in the act. We supported it when it was signed. We still support it today. The law that Congress crafted sets a clear and a fair national policy that sweeps away the legal barriers to local competition and sets the economic conditions that we think would promote feasible entry by local providers.

By the same token, we think the FCC and the Justice Department, from whom we have just heard, as well as many State commissions have really done remarkable work, as well, in their own respects, resolving the countless arbitrations and fleshing out the rules that are inherent in the statute to make sure that the incumbent monopolies and their would-be competitors can enter markets and trade information as they must.

On our part, we think AT&T and other new firms have been working very diligently to enter these local markets, as we prom-

ised. We have devoted enormous resources to the task and we know that our future success as a company literally depends on our ability to enter these local markets and offer our customers end-to-end service. We know this because our customers tell us this every day.

Congress recognized that this job would be complex, it would not be easy, and that no one could readily duplicate the local carriers' massive and costly local networks, least of all overnight. In fact, under the best of circumstances, it would probably be unrealistic to have expected broader local competition so soon after the act passed.

Congress established three ways for new local companies to enter the local telephone business. One of them was by reselling the incumbent local company's services. Another way was by being able to lease all or part of the incumbent's network facilities in order to provide its own services and features over those facilities. And the final way was literally by interconnecting stand-alone network facilities of its own.

Making these entry paths a reality involves long negotiations, arduous arbitrations, meeting a tremendous number of technical and administrative challenges, and making extensive planning and investment decisions. Before this can happen, AT&T and other potential new entrants also need answers to some fundamental questions about what the terms and conditions, the ground rules, if you will, will be under which we will be able to provide service and obtain service from the incumbent local companies.

These questions include, will the prices we have to pay for the incumbent's facilities and services be fair? Will we actually be able to lease the combinations of the network facilities that the statute and the FCC's rules give us? Are the local carrier's computer systems able to speak reliably to our computer systems, as they need to be in order to exchange information for ordering, processing, billing, and maintaining service? And maybe most importantly of all, will customers really be able to choose a new local phone company whenever and wherever they want without having to suffer delayed or degraded service?

AT&T believes the act and the FCC's rules pave the way for entry by providing the clear and consistent national answers to these questions that Congress intended. We think the incumbents, however, have pursued a broad strategy to generate uncertainty and inconsistency in these key areas by litigating against the act rather than implementing it.

Several incumbent companies sued the FCC in the Eighth Circuit claiming that implementation of the act was only for the States and the Eighth Circuit agreed with those arguments, at least to the extent of pricing, but in the wake of that decision, many incumbents have renounced their earlier commitments about pricing and the provision of the least network elements.

The interconnection and other decisions made by the States after the Eighth Circuit ruling, however, are themselves now the subject of countless legal challenges brought by the incumbents in Federal courts all across the country, and as you know, one large incumbent has now filed a suit claiming that key provisions of the act itself are unconstitutional, even though that company applauded the act when it was passed.

This pattern of constant challenge and resistance diverts resources that we think could best be spent by all parties on trying to bring the benefits of competition to customers and it has also denied us the stable, consistent rules we need in order to execute a broad entry plan.

In our experience, real progress toward implementing the act has occurred when the efforts to dilute the act have been firmly rebuffed, and this is where Congress and the subcommittee, we think, can play a valuable role.

First, Mr. Chairman and other members, we urge that you make it clear that the basic requirements for local competition, as set forth in the act and the FCC's good work, not be made negotiable or optional by any party and that you reaffirm that these rules will be enforced. Above all, we ask that you do not reward the efforts of the litigators to undermine the act by indicating that enforcement will be relaxed.

Second, Mr. Chairman, we think you can encourage the Department of Justice, which is the Federal Government's law firm, to participate actively in the various court challenges now going on across the country, at a minimum, to seek a prompt and consistent and proconsumer set of decisions that can bring us back on the track we think the act set.

Finally, we would urge that the subcommittee consider changes to the law itself to reduce the venues for all of these litigators and establishing at least all appeals of the Telecom Act in a single court, and we would suggest that would be in the D.C. circuit. We think that is the court that has the greatest experience in the area and, of course, it is already the court that Congress designated to hear other important issues under the Telecom Act.

Mr. Chairman, these hearings are an important part of the process of reaffirming and achieving the core goal of the act. We thank you and the other members for your work to bring the benefits of competition to consumers and I would be happy to answer your questions later. Thank you.

[The prepared statement of Mr. Rosenblum follows:]

PREPARED STATEMENT OF MARK C. ROSENBLUM

Thank you for the opportunity to testify before this Subcommittee on some of the issues surrounding the implementation of the 1996 Telecommunications Act and, in particular, on the efforts to introduce competition into the historically monopolized local telephone markets. These are matters of critical concern to AT&T, for bringing competition to the local exchange, and becoming a leading supplier of "end to end" services, is one of our most important business objectives.

The 1996 Act embodies a national policy to support competition in the provision of local exchange service. Congress recognized that such competition will bring enormous benefits to consumers in the form of lower prices, new and innovative services, and more responsive providers. Experience in other sectors of the telecommunications industry, such as the long distance market, as well as in other industries, amply demonstrates that competitive markets are infinitely better than monopoly markets in delivering consumer benefits. The enactment of the 1996 Act and the adoption of a new national policy to promote local competition thus were enormous achievements.

Of course, these pro-competitive changes have not yet been attained. This should not, in itself, be too surprising, because the process of opening the local market to competition would be an inherently complex and protracted one even with the full participation and support of all parties. Nonetheless, new entrants like AT&T have been experiencing substantial obstacles that should not have arisen. Every new entrant is dependent on the incumbent local exchange companies for the interconnec-

tions and access arrangements that would allow it to provide service, and the incumbents have proven unwilling to provide the arrangements that the Act requires and that we need.

These difficulties are compounded by the fact that many of the incumbent local companies have flooded the courts with complaints and appeals, challenging virtually every rule that might lead to meaningful competitive entry. These legal actions are pending all over the country in numerous federal courts of appeals and district courts. The uncertainty these actions have generated regarding the terms and conditions upon which new entrants will be able to obtain the necessary arrangements has had an enormously debilitating effect on the pace of entry. Those actions have diverted precious time and resources from new entrants' own tasks of preparing to offer local service and have created a substantial risk of inconsistent decisions from multiple courts. There is no practical way for a potential competitor to develop and execute a business plan for something as complex as local entry, when the framework and terms on which entry will be permitted are constantly under challenge and subject to dramatic and adverse change with each new legal ruling. Particularly for new entrants like AT&T, who aim to offer local service nationwide to business and residential customers, the value of reliable, consistent implementation and enforcement of local competition standards cannot be overstated.

More ominously, if incumbent local carriers succeed in erecting unique barriers to entry in some States, local competition and its benefits will tilt toward consumers in other States that have faithfully implemented the Act. Inconsistent interpretation and implementation thus could create consumer benefit "haves" and "have nots"—exactly what Congress sought to prevent by adopting a national policy embodied in federal law. For us, this only highlights the critical importance of uniform, national enforcement of the Act. These are important questions that this Subcommittee can address, as I will explain in the remainder of this testimony.

I. WHY IS LOCAL COMPETITION NOT DEVELOPING MORE QUICKLY?

As has been widely noted, the promise of local exchange competition has not yet been realized. The incumbent monopolists continue to control about 99 percent of the local markets. In stark contrast to the long distance market, there is virtually no place in the country where multiple providers are vying for the local exchange business of residential customers, offering those consumers the type of innovative services, discount plans, and customized offerings that are the hallmarks of competition. Instead, consumers remain captive to the incumbent providers, and have no opportunity to take their business elsewhere by choosing an alternative carrier. Congress is therefore right to be concerned with any unnecessary delays in competitive entry into local markets.

So why is there not more local competition, a year and half after the passage of the Act? At the outset, I want to emphasize that the lags in entry are not a reflection of a fundamental flaw or failure in the Act. The Act was a carefully crafted and appropriate framework for opening local markets to competition, and removing restrictions on entry into other telecommunications markets. The Act offers new entrants to the local exchange the opportunity to interconnect their facilities with those of the incumbent local providers, to use the elements of the incumbent providers' networks to provision their own competitive local services, and to resell the services of the incumbent local providers—all necessary, if the history and economies of monopoly are to be overcome in local markets. In return, the Bell Operating Companies would be authorized to provide long-distance service to customers in their own regions, and to engage in the manufacture of telecommunications equipment. But these rewards would, appropriately, be obtained only after their local markets had been irreversibly opened to competition, and their ability to impede competition in local, long distance, and equipment markets eroded. This framework is sound.

Nor can fault be found in the work of the FCC, the Department of Justice, or most State commissions. The FCC has worked, in perhaps unprecedented fashion, to meet or beat the ambitious congressional deadlines for implementing the Act, and done so in a manner faithful to the letter and spirit of the Act. Likewise, most State commissions have moved heaven and earth to meet Congress's ambitious time frames, and also largely in a manner that comports with the letter and spirit of the Act. And all the while, the Department of Justice has also worked assiduously with the regulators and the industry to implement faithfully its responsibilities under the Act.

Finally, the competitive carriers that are seeking to enter local markets cannot be blamed for any delays in competitive entry. To the contrary, those carriers are committing enormous attention and resources to that effort. AT&T alone has di-

vested its equipment, computer, and other businesses so that we can focus on our core goal of providing a complete portfolio of local, long distance, wireless, and other services that we believe consumers seek. In our initial steps to meet this goal, we are installing new switches and other facilities designed to carry local service in several locations. We are modifying our existing long distance switches to enable them to provide local service to business customers with direct trunks as part of an offering we call AT&T Digital Link, which is now being offered on an outbound basis in 47 States. As announced several months ago, we are also developing a new technology that we hope will allow us to offer innovative local services over "wireless loops," i.e., a wireless connection between the customer's house and AT&T's switches. And, most daunting of all, we are constructing the enormous back-office computer systems needed to order, provision, repair and maintain, and bill for local services and for bundled packages of local, long-distance, and other services. AT&T must have such systems in place regardless of whether it resells local company services, uses local company facilities, or builds its own networks, and AT&T cannot build these systems without the cooperation of the incumbent providers.

And this brings us to the two basic reasons why local competition is not developing more quickly. First, the task of introducing competition to these historically closed markets is an enormous and difficult one that could not, even under the best of circumstances, have been accomplished by now. The provision of local telephone service is an order of magnitude more complicated than other telecommunications services. In order to provide local service, the incumbent monopolies, over a period of many years, have constructed extraordinarily extensive and complex networks that reach every home and business, and today include more than 154 million access lines and 23,000 switches. No competitor can duplicate those networks. Indeed, the incredible expense necessary to construct a local network, and the associated economies of providing local service, are why the local exchange has historically been thought to be a natural monopoly—and it is only recently that we have begun to believe that there may be ways for competitors to offer alternatives to the incumbent local companies. For these reasons, in passing the 1996 Act Congress properly established the other entry vehicles described above—interconnection, purchase of unbundled network elements, and resale—to make competition possible.

But local entry is still an intensely difficult process. It requires extensive regulatory activity to gain the authority and approval of the tariffs necessary under State law to provide local service. It requires extensive negotiations, and contested arbitrations (which often amount to extensive litigation), between new entrants and the incumbents to hammer out the details of interconnection agreements. And there are a tremendous number of technical challenges that must be overcome so that competing local carriers can pass traffic and other information back and forth between their networks. It would thus take some time to bring competition to the local exchange even if all parties were working together in good faith in an attempt to achieve that objective.

But they are not, which brings me to the second and more important obstacle to local competition. The incumbent local exchange carriers have in many instances proven to be resolutely unwilling to take the steps required by the Act that would make their markets truly open to new entrants, and that would thereby threaten their monopoly control. They are refusing to provide potential competitors with many of the nondiscriminatory interconnections and arrangements that are mandated by the Act and the FCC's regulations, and that are critically necessary to provide competitive services. They have resorted to numerous strategies to avoid truly opening their markets: they withhold essential cooperation from competitors to slow competitive entry; they incessantly use legal process to delay their obligation to open their markets and to create uncertainty, inconsistency, and instability in the interpretation and application of what are supposed to be uniform national requirements; and, in the end, when they lose those legal battles, they often simply defy the explicit orders of regulators.

No firm can plan and implement a complex and costly entry strategy in such an environment. Some of the most basic issues regarding the terms under which entry can proceed, a year and a half after passage of the Act, remain in a state of flux and uncertainty. For example, the incumbent providers continue to challenge the prices under which they are obliged to provide interconnection and other necessary arrangements, and the manner in which they must provide competitors access to their network facilities. Moreover, the prospect of numerous different courts and commissions adopting different and potentially conflicting rules on these issues, such that the terms of entry may vary substantially from State to State, further complicates efforts to bring competition to these markets. And the prospect that some of the incumbents will continue to disobey those rules whenever those rules

threaten—as they are supposed to—the continuation of the incumbents' monopolies, renders it difficult, even today, to predict when broad based entry will be possible.

II. THE CHALLENGES IMPOSED BY THE INCUMBENTS' CONDUCT

Achievement of the objectives of the 1996 Act depends crucially upon compliance by the incumbent local exchange carriers with their statutory and regulatory duties. For most of the industry's history, the local exchange was regulated as a natural monopoly. Regulators had concluded that competition for local exchange service was not feasible, because the massive economies of scale and scope associated with providing telephone service meant that the incumbents could always provide service at the lowest cost, and it would be economically impossible for other carriers to duplicate the incumbents' facilities and successfully compete.

The 1996 Act took a very different approach. It rejected the notion that the local exchange was necessarily a natural monopoly, and took affirmative steps to introduce competition into the local markets. It preempted all state-law exclusive franchises and other barriers to entry. But it did not stop there, for Congress recognized that the barriers to local exchange competition were not only legal but also economic. Congress understood that, even if it were lawful to do so, it would remain uneconomic for potential competitors to build fully redundant local networks. The 1996 Act therefore mandates, as described above, that the incumbent LECs permit competitors to interconnect with their networks, to purchase their unbundled network elements at cost-based rates, and to resell their services at an appropriate wholesale discount. The result of these provisions is that competitors have a number of potentially feasible avenues for local entry short of building prohibitively expensive redundant networks—avenues which did not exist prior to the Act. This should allow local competition to develop for the first time, by giving new entrants a foothold in the market, and allowing their local businesses to develop as dictated by consumers and the marketplace.

The critical feature of this regime, however, is that, especially in the near term, it renders potential competitors exceptionally dependent on the incumbent monopolists' compliance with, and implementation of, their statutory duties to grant those competitors access to their facilities and services on reasonable and nondiscriminatory terms and prices. And our experience in the first year and half of the Act's implementation has vividly demonstrated the incentives the incumbents have to protect their monopolies and withhold that compliance. I will describe, for illustrative purposes, some of the difficulties that the incumbents have interposed to effective implementation of the Act. I have grouped these concerns into four broad categories: (1) use of the incumbent providers" network elements; (2) difficulties with the interfaces needed to pass information back and forth between the new entrant and the incumbent; (3) the exorbitant prices that incumbents are attempting to charge for network elements and for so-called "non-recurring costs"; and (4) the war of legal attrition some of the incumbents are waging.

A. Use of the incumbent providers' network elements

Both the Act and the FCC's rules expressly permit new entrants to purchase access to unbundled network elements—i.e., components of the incumbents" networks—to be used to provide local services to customers in competition with those incumbents. Section 251(c)(3) expressly requires the incumbent local exchange carriers to provide access to their network elements, and to do so "in a manner that allows requesting carriers to combine such elements in order to provide * * * telecommunications service." This includes the option of purchasing all of the unbundled elements—in what has become known as the unbundled network element "platform"—and using them in combined form to offer an end-to-end service.

This is a substantially more promising means of entry than simply reselling the incumbents" services, and presents far more opportunities for broad-based and meaningful competition with incumbent LECs. When we act as resellers, we are prisoners of the LECs" services; we can mimic what they offer, but we can't offer consumers anything new or different. We cannot, for example, activate switch features that the incumbent chooses not to use in its own retail offerings, we cannot create different flat-rate service territories, and we cannot create new and more attractive packages of retail offerings. When we compete through combinations of the LECs" unbundled network elements, by contrast, we can use those elements ourselves to create significantly more potent alternatives to the LECs" services. We can activate switch features that the incumbent would otherwise let lay dormant. In addition, competing on an equal cost basis with the incumbent, we can use the same network elements as the incumbent to create marketplace offerings that we think will better meet consumer needs, and lead to more efficient use of the network. Further, unlike resale, combinations of network elements permit us also to provide ac-

cess services. The FCC is thus relying on competition through unbundled network elements and the platform to bring down the massively excessive prices the incumbent local exchange carriers charge long-distance carriers for access—prices which, because of the absence of competition, are forcing long-distance carriers and their customers to pay billions of dollars more each year than they should.

Of course, just as competition through unbundled network element combinations presents greater business opportunities than competition through resale, it also presents greater business risks for the new entrant. In particular, it requires a greater financial commitment with greater uncertainty as to whether and to what extent that commitment will be recovered. It also requires the new entrants to build more complicated—and thus more costly—"back office" ordering and billing systems. But we wish to take those risks, because we regard these combinations as the key to mounting a successful challenge to the incumbents" monopoly control of these markets.

The incumbents apparently share the view that these combinations present the most significant vehicle for competitive inroads by new entrants. Before the FCC, they opposed, unsuccessfully, rules requiring that they make the "platform" of network elements available to competitors. Before the Eighth Circuit, they appealed, again unsuccessfully, the rules the FCC adopted on this issue. And most problematically, although the FCC's rule guaranteeing competitors' right to purchase such combinations has now been in force for over a year and has now been affirmed, many local carriers have defied and continue to defy that rule to this day.

For example, for almost a year, Ameritech adopted demonstrably untenable interpretations of the FCC rules in order to nullify its obligation to provide new entrants with shared interoffice transport as a network element. The principal effect of this interpretation was to render the most important network element combinations useless to competitors, and provide a legal fig leaf for noncompliance. Even now, after the FCC and State commissions have reaffirmed these obligations and made them crystal clear, it remains uncertain whether the incumbent LECs will comply.

GTE, in particular, is starkly flouting its obligation to permit competitors to purchase network element combinations. GTE has now gone to each of its State commissions asking that its interconnection agreement with AT&T be "reformed" in such a way as to effectively nullify its statutory duty, and contractual commitment, to provide network element combinations. GTE claims that it has the legal right—and states that it will exercise this asserted right—to go to the trouble and expense (which would be reimbursed by new entrants) to disconnect unbundled elements that are already connected in its own network before providing them to new entrants, which it would do for the sole reason that the new entrants would then have to bear the additional cost of reconnecting them.

What would this mean in practice? It would mean, for example, that if a competitor ordered from GTE as network elements the combination of the loop (the wire that connects the customer's home and the local provider's switch) and the network interface device (the small box outside the home to which those wires connect), GTE could, at the competitor's expense, actually dispatch a technician to the customer's home to disconnect the loop from the network interface device—solely to force the competitor to dispatch its own technician to reconnect them. GTE also asserts that it could disconnect other network elements—those within its central office, for example—that it would be infeasible for competitors to reconnect. Such conduct would be blatantly anticompetitive, and would be for the sole purpose and effect of making competition more difficult (or impossible) and more costly. It would also be a direct violation of numerous FCC rules that were upheld by the Eighth Circuit. But we must now litigate that issue in numerous States.

B. Operations support systems

Another central area of concern involves the need for nondiscriminatory access to operations support systems (OSS) and OSS interfaces. The incumbent local companies already have in place extensive operations support systems for their own use. These are the back-office computer systems that allow the incumbent to take orders from customers, issue internal orders for the purpose of establishing service, actually establish or provision that service, generate information for billing, troubleshoot for maintenance purposes, and perform certain repair functions. For local competition to develop, competitors must not only construct their own operations support systems, but must also obtain the sustained and extensive cooperation of the incumbent to construct electronic interfaces with the incumbent so that the two companies can efficiently exchange pre-ordering, ordering, provisioning, billing and maintenance information back and forth between their networks.

Constructing these interfaces is an extremely complicated task. The incumbent's existing systems are very complex, and they each use their own unique codes and

conventions. Thus, the two networks can talk to each other only if the interfaces are based on the same idiosyncratic codes and conventions that are already built into the incumbent's systems. And because those codes and conventions differ from LEC to LEC, and sometimes from State to State within the same LEC, an entrant like AT&T that seeks to compete broadly must obtain separate interfaces to numerous different types of systems. Moreover, the interfaces are now needed to perform functions that did not exist in the monopoly world—for example, switching a customer from the incumbent to the new entrant. As a result, it takes a great deal of time, effort, and painstaking trial and error to develop these interfaces. And as is quite obvious, the construction of such interfaces is heavily dependent on the efforts of the incumbents, who alone understand how their own computer systems operate and who control access to those systems. OSS interfaces cannot conceivably be developed without sustained effort by the incumbents to design, develop, test, de-bug, and implement them in conjunction with new entrants.

These interfaces are absolutely critical to the development of competition, and to the ability of new entrants to provide consumers with the level of service they deserve and expect. For AT&T, this was dramatically illustrated when we tried to enter the California market earlier this year through resale. As far back as the fall of 1996, AT&T provided Pacific Bell with forecast information, and Pacific Bell assured us that its OSS interfaces could handle the volume of orders we would be sending them. At the beginning of the year, AT&T instituted a marketing and advertising campaign in California and actively sought customers, based on Pacific's assurances that its systems could handle AT&T's orders. Pacific's systems turned out to be completely inadequate, however, despite AT&T's efforts to work with Pacific to resolve the problems. Even though AT&T was sending only a few hundred orders per day to Pacific—well below Pacific's stated capacity—a backlog of AT&T orders grew steadily through the early part of this year until the average daily backlog reached an alarming 8,715 in March, and exceeded 11,000 at one point in April. At that point, AT&T was forced to suspend all of its marketing and advertising efforts, and the backlog slowly decreased after AT&T stopped actively seeking new customers.

No entrant can possibly conduct business in such an environment. Moreover, the number of orders AT&T sought to process, and that was sufficient to completely overload Pacific's systems, was an absolutely trivial amount. To place it in context, Pacific has more than 15 million access lines in California. AT&T's orders in California were a tiny fraction of what Pacific would have to process in a truly competitive market—in the competitive long distance market, customers nationwide switched carriers about 50 million times in 1996 alone—and yet even that drop in the bucket was too much for Pacific to handle.

As AT&T's experience with Pacific shows, broad-based entry is simply impossible without nondiscriminatory OSS and functioning, electronic OSS interfaces. And in the absence of adequate OSS and OSS interfaces, consumers will be the losers. In the short term, those that choose to obtain local service from new entrants rather than the incumbent monopolists will see their service degraded in terms of timeliness, efficiency, and quality. And in the medium and long term, because no consumer will stand for such treatment, no competitor will be able to maintain a customer base or realistically challenge the incumbent's monopoly control of the market.

We have therefore emphasized the importance of strong rules on OSS, and substantial joint testing of OSS interfaces between new entrants and the incumbents. The FCC's recent order denying Ameritech's application for long-distance authority in Michigan made several extremely helpful points, including the need for OSS and OSS interfaces that support competition through both resale and unbundled network elements, for electronic rather than manual processing of competitors' orders, for sufficient capacity in the incumbents' systems to support the large volumes of orders that a competitive market will generate, and for nondiscriminatory access that ensures that competitors' customers can receive the same level of timeliness, accuracy, and quality as do incumbent carriers' customers. The bottom line is that customers should be able to switch local carriers as easily and quickly as they can switch long distance carriers today. In that regard, we strongly support, over the incumbents' opposition, the petition recently filed at the FCC by LCI and the Competitive Telecommunications Association seeking a set of enforceable performance measures by which the FCC and State commissions could determine whether the OSS and OSS access that incumbents will provide to new entrants is genuinely nondiscriminatory.

C. Unreasonable prices

The prices at which new entrants will be able to obtain access to the incumbents' facilities and services are plainly among the most crucial terms of entry. Excessive prices will make it impossible to compete. Many incumbent local companies, however, continue to fight tenaciously to impose network element rates and prices for services for resale that are highly inflated, that seek to continue their recovery of monopoly profits, and that would choke off the prospects for competition.

This is a tactic that has been employed across the board, but for illustrative purposes, I will focus here on one species of excessive charges which the incumbents have sought to levy—the addition of exorbitant "non-recurring charges" on top of the rates entrants must pay for the network elements themselves. The network element rates already reflect the costs to construct, maintain and operate all of the facilities that an efficient incumbent would need to provide basic local telecommunications services—that's the whole idea of these long-run forward-looking pricing approaches that State commissions nationwide have approved. But incumbents seek literally billions of dollars more in these so-called "non-recurring" charges that often do not remotely reflect any costs actually incurred by the LEC. And just like any other business, AT&T or another potential competitor's entry decision turns on all the costs of entry, not just the monthly rates for network elements. These inflated non-recurring charges are therefore an enormous entry barrier. Unfortunately, the regulators so far have not done much at all to constrain these new charges.

Indeed, many of these so-called "non-recurring" charges are not "non-recurring" at all. Rather, incumbents seek to impose them again and again, every time a new entrant adds a new customer, buys network elements to serve that customer, "combines" the elements to provide service, and leases space on the incumbent's premises to locate necessary equipment. Often, the charges are completely trumped up and bear no relationship to any costs that would be incurred by the incumbent. For example, incumbents in many major markets seek to charge $50 to over $200 for "processing" every individual customer service order, notwithstanding that the transaction should be entirely electronic with no human intervention by the incumbent and thus impose trivial costs—if any—upon it. Other examples are no less egregious. Southwestern Bell seeks $500,000 to "design" and provide a 100 or so square foot "cage" in one of its central offices. Pacific Bell seeks a separate non-recurring charge for each network element even when the new entrant would order them combined as they currently exist in Pacific's network, and Pacific therefore incurs no such costs in providing them in combination.

When you add all of these charges together, the bottom line is that competitors would not profitably be able to serve many customers, and those customers would remain captives of the incumbent monopolist and enjoy none of the benefits promised by the Act. For example, in California, if Pacific Bell gets its way, every time AT&T signs up a customer for service through network element combinations, AT&T would have to pay the following fees:

Link Service Order	$37.31
Port with Loop Service Order	6.80
Link Connection Charge	111.65
Port with Loop Connection Charge	91.49
Total	247.25

By any standard, these charges are not only inflated, but in many cases should be completely inapplicable. When the loop and the switch are already connected and are ordered in combination, for example, Pacific generally incurs no costs to connect them, but nonetheless seeks "connection" charges from new entrants. It is not difficult to see the effect such prices would have on competition. Even assuming that AT&T could hope to keep the average customer for two years (in the highly competitive long distance industry there is a much quicker customer turnover rate), that means that AT&T would pay more than $10 a month in non-recurring charges from which the incumbent Pacific would be completely exempt. Efficient competition is obviously impossible in these circumstances.

D. Legal war of attrition

Finally, the local exchange carriers have initiated an endless stream of legal challenges in an attempt to fend off competitors. For example, all of the large local carriers challenged the FCC's Local Competition Order, issued in August of 1996. These local carriers challenged every significant rule that the FCC promulgated in that order—rules concerning rates, the platform, network elements, resale, dialing parity, and almost everything else. As a result of the pendency of the Eighth Circuit appeal, new entrants have been operating against a backdrop of uncertainty with

respect to what the terms and conditions of entry would actually be for most of the past year. And some of LECs have likewise initiated similarly massive attacks on the State arbitration decisions by filing suit against those decisions in multiple federal district courts, further extending that uncertainty.

GTE has essentially declared all-out war on all regulators, both federal and state, that are trying to enforce the terms of the Act. GTE even asked 20 states to exempt it entirely from complying with the local competition requirements under a provision of the Act that is designed to apply only to small rural carriers (and GTE was naturally rebuffed). More consequentially, GTE sued the FCC and claimed that implementation of the Act was purely a matter of State authority. It prevailed before the Eighth Circuit on that claim with respect to pricing, and, unless and until the Supreme Court reverses the Eighth Circuit, pricing decisions in arbitration proceedings regarding interconnection agreements will be committed to the States. But after it obtained from the Eighth Circuit a stay of the FCC's pricing rules, GTE saw its pricing theories—which seek to impose manifestly excessive prices on new entrants for access to GTE's facilities—uniformly rejected by the States as well. So GTE's support for federalism has turned out to be short-lived, for it has now sued eighteen State commissions in federal court over agreements with AT&T alone, challenging their arbitration decisions as inconsistent with federal law. GTE's zeal to tie these matters up in court was so powerful that 12 of those cases were dismissed as premature. We are confident that all those challenges will be unsuccessful, but merely litigating them creates enormous delay and instability in the process of bringing competition to these markets, and extends the time in which GTE can continue to enjoy the benefits—and consumers suffer the consequences—of its monopoly. Thus, even when the LECs lose these suits, they "win," by substantially delaying the day on which they will have to comply with their obligations and provide facilities and services to their competitors on terms that will make competition with their monopolies workable.

The willingness on the part of some parties to make frivolous legal claims under the Act is also vividly underscored by SBC's recent suit claiming that Sections 271 through 275, which set the terms under which the Bell Companies will be permitted to enter the long-distance, manufacturing, and other related markets, are unconstitutional. The filing of this suit was, by any measure, extraordinary. SBC lobbied for years to transfer jurisdiction over the "line-of-business" restrictions from the MFJ court to the FCC, and publicly praised the Telecommunications Act of 1996 as providing substantial opportunities for it to enter new markets. SBC and the other Bell Companies then went to the District Court in Washington, D.C., and asked, without opposition, that the MFJ be vacated on the ground that it was now superseded by these new provisions in the Act. SBC now says that even while it lobbied for and praised the 1996 Act, and advised the Court that its provisions would supersede the MFJ and that the MFJ should therefore be vacated, SBC believed that those provisions were unconstitutional and unenforceable. We are confident that this suit will be unsuccessful, for the claims are demonstrably frivolous, but it vividly illustrates the waste and diversion of resources that the litigation campaign against the Act is generating.

III. THE IMPORTANCE OF ESTABLISHING THE RIGHT INCENTIVES

The difficulties in securing compliance with the market-opening measures of the Act highlight the importance of the proper enforcement of Section 271 of the Act. Section 271 bars the Bell Operating Companies from the long-distance market unless and until they demonstrate, among other things, that they have irreversibly opened their local markets to competition. Enforcement of Section 271 is necessary both (1) to create the essential incentives for the Bell Operating Companies to comply with the local competition provisions of the Act, and (2) to ensure that, to the extent they resist compliance and hang on to their monopolies, they at least cannot leverage those monopolies so as to diminish competition in the long-distance market.

As this Subcommittee knows, the Bell Companies have been barred from the long-distance market since their divestiture from AT&T, pursuant to the terms of the MFJ, in 1984. The basis of the MFJ was the finding that the Bell Operating Companies, if permitted to offer long distance service while their monopolies remained intact, would have both the ability and incentive to leverage their monopoly power into the long distance market and frustrate long distance competition. Therefore, the Decree provided that the "line of business" restrictions on the Bell Companies would be removed only if the Bell Companies lost their monopolies, or if technological or other changes in their markets meant that the Bell Companies could no longer use their local monopoly power to impede long distance competition. But

nothing in the Decree was designed to foster that outcome; none of its provisions was directed to making local markets more competitive.

The 1996 Act takes a different approach in numerous respects. In particular, it takes affirmative steps to transform the local monopoly markets into competitive markets. But it continues the linkage between the opening of the local markets and Bell Company entry into long distance. At the end of the day, if the Act works as intended, we should see both competitive local markets and Bell Company entry into long distance markets—but it is absolutely critical that these events occur in that precise sequence, because there is otherwise no prospect whatsoever of local competition.

The overriding reality is that long distance entry is the only incentive the Bell Companies have to open their local markets to competition as the Act requires. As the Chairman of Ameritech has pointed out in reference to GTE, which already has long distance authority, "the big difference between us and them is that they're already in long distance. What's their incentive" to cooperate? "Holding the Line on Phone Rivalry: GTE Keeps Potential Competitors, Regulators' Price Guidelines, at Bay," Washington Post, October 23, 1996, pp. C–12, C–14. Bell Companies will have precisely the same perverse incentives as GTE once they too are permitted to provide long distance service. If its local markets have not been opened prior to a Bell Company's entry into long-distance, those markets certainly won't be opened afterwards.

The Bell Companies' unwillingness to open their markets is thus delaying their own entry into the long distance market. But, as Congress recognized in the Act—and as the antitrust courts recognized before it—that must be so until the Bell company local markets are irreversibly opened to competition. The FCC's recent order denying Ameritech's Section 271 application for Michigan sent a commendable signal that it would demand genuine compliance with the requirements of the Act and with the statutory preconditions for long-distance entry. We hope, and believe, that this signal will have a salutary effect. In all events, a firm and consistent approach in these areas is crucial if the Act's objectives are to be attained.

IV. WHAT SHOULD BE DONE NOW?

In light of the difficulties I have outlined, what steps can be taken now by this Subcommittee, the Department of Justice, and the FCC to address these problems and effectuate the core purposes of the 1996 Act? I want to close by making a few suggestions.

Reaffirm and enforce the act's letter and purpose.—Federal and State regulators must continue vigorously to enforce the provisions of the Act. The legal challenges and extralegal defiance we have encountered have delayed and diluted prospects for local entry, and market entrants need a stable and predictable regulatory climate to justify investing the enormous sums and time necessary to enter the market. The worst thing now would be to reward the incumbents' efforts to undermine the procompetitive goals of the Act, by acceding and relaxing enforcement of the Act. The incumbent local companies must understand that no amount of delay or maneuvering will relieve them of the conditions established by Congress. Only then will we be able to see progress. Indeed, in our experience, the resoluteness of the FCC and the Department of Justice has begun to bear fruit with some of the Bell Companies, and through their efforts there has been progress on some important issues.

Encourage the involvement of the Department of Justice in relevant legal proceedings.—The Subcommittee could use its oversight to encourage the government's lawyers—the Department of Justice—to participate in appeals of arbitration decisions and other litigation concerning the Act across the country. Because the Act assigns appeals of State arbitration decisions and State decisions approving Statements of Generally Available Terms to the various federal district courts within the State from which those appeals arise, there is again a heightened risk of inconsistent judgments that will create a patchwork of differing rules throughout the country. In order to further the goal of uniform and faithful interpretations of the Act's procompetition requirements, we would hope that the Justice Department would play an active role in participating as intervenor or *amicus curiae* in as many of those proceedings as possible so as to urge consistent interpretations of the Act.

Establish venue for all appeals in the D.C. Circuit.—As already explained, the framework and provisions of the Act are fundamentally sound, and we therefore do not have major proposals for legislative action to accelerate local competition. Some minor modifications in the Act's implementation provisions, however, could be constructive and should be considered. In particular, as described above, the local companies have brought an array of legal challenges to virtually all of the FCC's rules implementing the Act, and these appeals have created, and continue to create, sub-

stantial uncertainty as to the terms and conditions under which potential local competitors can enter the market. Naturally, the appeals that the incumbent local carriers have already brought must run their course. Nonetheless, the local companies have created mischief by bringing actions in multiple courts of appeals regarding overlapping matters. The need to establish consistent and uniform interpretations of the Act's provisions strongly counsels in favor of legislation to establish a single venue for challenges in the Court of Appeals. The statute already establishes a special role for the D.C. Circuit, because that Circuit is the exclusive forum for appeals for all orders on Bell Company long distance entry under Section 271, and most other FCC orders under the Act may be appealed either to the D.C. Circuit or the circuit in which the petitioners resides. As those and numerous other venue provisions for regulatory statutes recognize, there are economies in consolidating appeals in the circuit in which the agency and the Justice Department are located, and in the Court of Appeals that has developed special expertise in administrative and regulatory law. Consolidating all appeals under the 1996 Act in that circuit would substantially promote stability and predictability in the development of the law.

We very much appreciate the opportunity to share our views on these issues with the Subcommittee. We look forward to continue working with the Congress, the FCC, the Justice Department, and industry participants to help promote the important objectives of the 1996 Act.

Senator DEWINE. Mr. Rosenblum, thank you very much.

Mr. Barr.

STATEMENT OF WILLIAM P. BARR

Mr. BARR. Good afternoon, Mr. Chairman, Senator Kohl. I appreciate the opportunity to be here this afternoon.

I would like to make two prefatory points. The first is really one that was made by Joel Klein, and that is competition is something that inherently takes time, particularly in opening up a market that has been a monopoly. After all, MCI scratched away for years and years and years to build up any appreciable market share against AT&T and here we are 18 months away from the passage of the statute and people are already getting impatient that we do not have some kind of appreciable shift and immediate shift in market share and I think that is unrealistic.

The second point I would like to make is a point really that was made by the chairman of AT&T, Chairman Allen, when he said that his strategy for entering the local market was to be like a bank robber and go where the money is. The money in our industry is concentrated in a relatively few number of customers, mainly business customers. This is an industry, unlike long distance, where the revenue is very maldistributed among customers. You might have 10 percent of the customers really generating 60, 70, 80 percent of the revenue for a local company. So, obviously, you are going to have the initial competition going to the revenue, where the margin is, and those are business customers.

I think most residential customers in the country, certainly in GTE's areas, pay below cost. They are paying below cost and are being subsidized by business. Obviously, it is going to be a long time in coming unless we come up with a universal service system that is fair before competition hits a lot of those residential customers.

So I think when people sit up and say, well, gee, you know, only 1 percent of the lines have shifted so far, that is not bad. The other thing is that not seeing residential customers benefit in the first round does not surprise me.

I do not think the ILEC's, and certainly not GTE, have done anything to delay competition. There are three modes of entry. There

is facilities-based competition, where people come in and build their own stuff. The day the act was signed, people could come in and do that and they are doing it. Companies that want to put in facilities, that is, investment, create jobs, create innovation, they are out there. They have the ability to do it. Nothing, GTE or anyone else, can stop them, and that is how we are losing our customers today. We are losing customers to facilities-based entrants who are coming in and taking away our business customers because of the high rates that we are required to charge our business customers to keep local rates low.

The second mode of entry is resale. Buy it from us, slap your label on it, and resell it. Those resale rates are in effect in most States, and certainly in all of our big States, they are there. They have been set. The Eighth Circuit litigation did not delay them from being set. The States set interim rules and now they are looking at more permanent rates. The rates are there. Anyone who wants to come in and resell can resell.

We have 600 people. We put up two centers and have 600 people sitting there to take orders from the long distance companies and other would-be entrants who say they want to resell. Based on their projections, we have assumed how much manpower and so forth we are going to need. We have 50 orders from AT&T, all AT&T employees. That is how many lines AT&T has asked to resell, 50 from GTE.

So the whining about the ILEC's getting in the way of this thing is just a smokescreen. The rates are in effect. Go use them. We have challenged some of the rates in court, where we feel the rates were not properly set, but we have not sought a stay. We have not sought to have that process stopped. But we want the States in their next round to take into consideration our objections to the way they set rates. AT&T has also challenged some States when they think the States got it wrong. But again, that has not stopped the process.

The third way of entry is unbundled network elements. That is where you lease elements. Those rates are in effect, also, in most States, certainly in all of our big States. They are in effect. They can be used. We have not received any unbundled network element requests from AT&T, zero. I think we have received one from SBC, or a group from SBC, another ILEC. But by and large, the new entrants who want to rely on unbundled network elements themselves do not have the systems in place that they could support that system, and I think if you were to ask them and they were to be honest, they would say that they are not going to be ready to use that mode of entry until sometime next year.

So the delay has not come because of litigation. There is no stay in place. The rates are in effect and would-be entrants who want to come in with their own facilities are free to do it, and they are doing it, and entrants who want to retail stuff that they buy from us wholesale, the rates are there. Let them use it.

Now, I agree with everything that my colleague from Ameritech, Mr. Allen, said, and I would like to say that we also think the real problem here is that the act has been half-implemented and this is what, really, all the litigation really boils down to, when you

strip away some of the more peripheral issues and focus on the core.

What all this is about, what all this fight is about is that the statute said that you have to come in with some system of universal service to equalize the distorted rates that have grown up in the incumbent's market, because if you open up the incumbent's market and you still have these subsidies running from business to residential, then you will just have cherry-picking and those subsidies will be diverted.

So the statute says, put in place a system of universal service and do not put it all on the back of the incumbent. That has not been done. We are sitting here 18 months beyond the statute and it has not been done and that is the basic problem with what is happening now. People are closing their eyes to the need to take out the implicit subsidies, the imbedded subsidies in the existing market, because unless you do that, you cannot have competition. Thank you.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF WILLIAM P. BARR

I appreciate the opportunity to offer my views on the important topic before this Committee today, and I thank Chairman DeWine and the other members of the Committee for inviting me to appear.

GTE supports the procompetitive goals of the Telecommunications Act of 1996. Over time, genuine economic competition in the local and long distance telecommunications markets will bring Americans higher quality services at lower real prices and will spur investment and job creation.

GTE has faithfully and vigorously undertaken to implement the 1996 Act. Among other things:

GTE has opened up its local exchange markets to competition. GTE already has in place well over 200 interconnection agreements with some 70 competitive local exchange carriers (CLECs), and hundreds of other agreements are moving through the pipeline.

GTE is moving outside its existing local service areas to compete for customers in the service areas of neighboring incumbent local exchange carriers (ILECs). Neighboring ILECs are also invading GTE's service areas to compete for GTE customers.

GTE is offering long distance services in all 50 States and has already brought the benefits of increased competition in the long distance market to more than 1.3 million American households and businesses. Like hundreds of other independent local exchange carriers, GTE was never part of the alleged conspiracy by AT&T to leverage its local market power into the long distance market and therefore has been free to provide long distance services.

GTE is a leader in providing additional high-value services—such as wireless, Internet access, and video—to its customers.

GTE has challenged actions by the FCC and other regulators that are not faithful to the 1996 Act and that would undermine the development of genuine economic competition.

To be sure, there have been some obstacles on the road to genuine economic competition. Without doubt, the most serious of these obstacles has been the FCC. In particular, the FCC has taken three actions that threaten to thwart the emergence of real competition.

First, in what may be the most brazen power grab ever by a federal agency, the FCC last year attempted to usurp the pricing authority that the 1996 Act leaves with state commissions and to require GTE and other ILECs to hand over their networks and services to their competitors at bargain-basement prices. Had this FCC power grab gone unchecked, no competitor would have had any incentive to invest in its own network facilities, since it could always have acquired them more cheaply from the ILEC. Worse, the FCC's prices would have created the false façade of competition, as CLECs operating essentially as parasites on the existing network would have had an artificial cost advantage over the ILEC. Under such conditions, genuine economic competition in the local telephone market would never have developed.

Fortunately, GTE, together with a number of States and other ILECs, successfully challenged the FCC's power grab in the U.S. Court of Appeals for the Eighth Circuit. It is worth noting, though, that the FCC is using the section 271 process—which governs Bell operating company entry into long distance—to seek to circumvent the Eighth Circuit's ruling.

The second major FCC threat to competition comes from the FCC's failure to implement Congress's mandate to reform universal service. For decades, regulators have pursued the universal service goal of affordable telephone service for all Americans by pricing certain services—e.g., business services—above cost so that basic residential service could be priced below cost. In the 1996 Act, Congress recognized that competition would never come to many residential markets unless this implicit cross-subsidy were funded explicitly, since no one is going to compete for residential customers who are paying below cost. Congress therefore mandated in section 254 that the FCC establish specific, predictable, and sufficient mechanisms to preserve and advance universal service.

The FCC's universal service order, issued in May of this year, utterly fails to satisfy this congressional mandate. Indeed, far from funding universal service costs explicitly, the FCC in fact has stripped away from the States hundreds of millions of dollars of universal service support. The prospects for competition in rural areas are particularly hard hit by this FCC action. In addition, by leaving in place the preexisting system of implicit subsidies, the FCC invites CLECs to cherry-pick high-value customers and thereby exposes the universal service system to the threat of collapse. GTE and others will therefore again look to the courts to ensure that the FCC does not succeed in subverting the 1996 Act.

Third, by sending the message that it will condition Bell operating company entry into the long distance markets on entry by AT&T and MCI (rather than carriers generally) into the local markets, the FCC has encouraged AT&T and MCI to try to game the system. In order to protect their long distance market shares for as long as possible, AT&T and MCI have made the tactical decision to delay entering local markets, all the while diverting attention by complaining that their entry is being impeded. This tactical delay has, of course, been reinforced by the fact that neither company appears to have its act together to enter the local market.

In sum, the FCC has refused to follow Congress's blueprint for developing vibrant competition in the local and long distance markets.

Senator DEWINE. Mr. Barr, thank you very much.

Mr. Shapleigh.

STATEMENT OF JOHN C. SHAPLEIGH

Mr. SHAPLEIGH. Thank you very much, Mr. Chairman, Senator Kohl, Senator Thurmond. My name is John Shapleigh. I am an executive vice president with Brooks Fiber Properties, headquartered in St. Louis. I think my role here today is to represent the companies that did not even exist 4 years ago but have nonetheless created business plans to build fiber optic networks, install switches, and begin to compete with the incumbent telephone companies all across the United States.

I am here today representing Brooks Fiber, headquartered in St. Louis, with networks in 44 U.S. cities, primarily the midsized and smaller markets. I am also representing other facilities-based competitive local exchange companies, or CLEC's, that are members of the Association for Local Telecommunications Services, or ALTS.

I would like to leave the committee basically with four points, and I will expand briefly on each one. First of all, the act is working for facilities-based carriers. Competition is on the way and the act does not need changing.

Second, the real key to competition under the act is the existence of facilities-based carriers, which the act has helped out a great deal.

Third, we do face very real problems out there. We face problems with States, building owners, power companies. Our primary prob-

lems are with the incumbent local monopoly telephone companies, or ILEC's, as they are sometimes referred to.

And then, finally, there are some solutions, and happily, I will be able to leave the committee having offered some solutions to the problems that we face, as well.

First of all, the act is working and really does not need any change at this particular time. I agree with the earlier comments indicating that this is a relatively long road here and we are only 18 months into it.

Today, 100,000 or more residences or businesses throughout the United States, hundreds of thousands, actually use telephone companies other than the local monopoly incumbent telephone company. This pales in comparison to the tens of millions that are still on the local phone company, but the numbers are growing. Hundreds of cities, including Ohio, Wisconsin, and South Carolina, have benefited from the investment, the billions of dollars that my company and others have put into fiber optic networks, local switches, and beginning to sell and market our services to residences as well as businesses.

In 1998, it is largely believed by industry observers that there will be over 1 million customers, residential and business both, that will be using competitive local telephone companies, and the key thing to remember here is this is just the beginning of exponential growth, in our opinion. In other words, it is a very capital-intensive business. It is very complex. It takes a while to get the systems in place. But once they are, the ramp-up can be quite appreciable, so that really by the year 2000, there will be more consumers that have a choice in local service than had a choice in long distance after a similar time period in the long distance industry.

My second major point is that facilities-based competition is really the key and as you go forward in observing progress under the statute, I hope not only will you look at resale and unbundled element use but the facilities that are being built out there. After all, it was only after MCI, Sprint, and WorldCom built their networks that true competition with the incumbent in long distance really began, where consumers truly get lower prices, more innovation, more reliable networks, and more customer-friendly service. There is language in the act about facilities-based competition. I believe Congress put it in there for a purpose.

Now, what are some of the problems we are facing out there? Before I get to the incumbent telephone companies, let me just mention that the cities across America are extracting large fees from competitors for merely placing our fiber networks in their streets that are not charged to the incumbent telephone companies. This is a tremendous economic barrier to us.

Building owners are refusing to let the consumers in their buildings have the choice of competitors by holding up a big stop sign at the door and either not letting us in or charging us high prices when the telephone company is in without any charges.

Finally, the power companies have carefully read your statute and said, I am sorry, if you want to go litigate it, that is fine. We are not going to let you on our poles or in our conduits, not all of them, but some of them.

But the primary problems are with the regional Bell operating companies, where, let us just take an example of a rather large network outage caused by Ameritech in Michigan, causing our customers—we lost approximately 20,000 calls. Once that happens to a customer, what are the chances they are going to want to continue to use a competitor in the future?

The actions of the RBOC's are causing blockages when their customers attempt to call our customers. Right now, the RBOC's are refusing to pay the competitors large amounts of money, that will amount to millions of dollars, for local traffic where they are supposed to, under our contracts and the law, compensate us for those calls. These are calls to Internet service providers.

Finally, there is no parity in the installation times between their customers and our customers in terms of when we need their role.

The solutions, just to be very brief, consist really of stepping up the efforts at the FCC and the Department of Justice. The FCC, I think, got off to a good start with their Ameritech order. They need to particularly focus on the OSS systems, the performance standards, and enforcement so that after long distance is granted to an RBOC, there will not be any backsliding or going back.

And then finally, when they review future mergers, we think it is entirely appropriate to do as the FCC did with Bell Atlantic-NYNEX and impose conditions consistent with the Telecom Act.

Again, thank you very much for the opportunity to be here.

[The prepared statement of Mr. Shapleigh follows:]

PREPARED STATEMENT OF JOHN C. SHAPLEIGH

Mr. Chairman and members of the Committee, my name is John Shapleigh. I am an Executive Vice President of Brooks Fiber Properties, Inc., based in St. Louis, Missouri. I am responsible for the corporate development and regulatory affairs for Brooks Fiber and serve on the board of directors and as a past Chairman of the Association for Local Telecommunications Services (ALTS). Thank you for the opportunity to express to you today the views of Brooks Fiber and other facilities-based competitive local exchange company (CLEC) members of ALTS on the status of local telecommunications competition under the Telecommunications Act of 1996, and the need for the FCC, U.S. Department of Justice, state regulators and courts to continue to implement and enforce the Act, and to vigorously curtail the anti-competitive behavior of the incumbent monopoly local exchange telephone companies (ILECs).

THE TELECOMMUNICATIONS ACT OF 1996 IS WORKING AND DOES NOT NEED TO BE CHANGED

In eighteen short months, the Telecommunications Act of 1996 (the "Act") has been very successful in introducing the benefits of local telecommunications competition to residential and business consumers across America by establishing the necessary statutory framework. The FCC, through its "trilogy" of interconnection, access reform and universal service reform orders, and the states, through their CLEC certifications and cost proceedings, have now also established the regulatory framework under the Act.

Prior to passage of the Act, the development of local telecommunications competition had progressed slowly with state regulatory support, particularly in New York, Michigan, Illinois, California and other early-adopting states, as well as under the under the 1993 and 1994 "interconnection decisions" of the FCC. Competitive fiber optic networks were being built and dedicated local transport services and private network services were being provided, mainly to large long distance interexchange carriers (IXCs), large corporate customers, universities and governments.

However, no competitor had begun the widespread deployment of the local switches necessary to bring the benefits of competition to smaller businesses and residential consumers. Not many states had authorized competitive local services, including

"plain old telephone service" (POTS), and the incumbent monopolies were very effective in blocking the development of local competition.

Competitors only had access to early stage equity capital from venture capital investors and relatively small amounts of debt from equipment vendors eager to sell their equipment. Only two companies had access to the public markets. Invested capital and total competitor revenues amounted to only a few hundred million dollars in a total local telecommunications market of over $90 billion.

Today, hundreds of thousands of residential and business customers in selected areas have a real choice for their local telephone service and can elect to purchase lower cost, higher quality, more reliable and more customer friendly local telephone services from the new competitors, despite the numerous anti-competitive actions of the incumbent monopoly telephone companies.

Recent industry analyst reports illustrate that more than a dozen CLECs now provide local dial tone POTS and other services to hundreds of thousands of residential and business customers across the country.

Some customers are served entirely "on net", meaning that the customer is reached entirely over the new entrant's fiber optic network and switch. Other customers are reached through a combination of the new entrant's facilities together with the ILEC's unbundled network elements (UNEs), principally "unbundled local loops", which are the connections from the ILEC central office (where the ILEC local switch is located) to the customer premise. Finally, customer are also reached through "total service resale" of the ILECs local services, where only the ILEC facilities are used to access the customer at a discount from the ILEC retail rate, with the new entrant being the billing party to the customer.

CLEC customers generally receive their local service at lower rates and, if the CLEC is facilities-based, will experience higher quality, more reliable and friendlier customer service, all of which is necessary for the new entrant to provide if it is to succeed in winning over the ILEC customers.

While not yet highly visible to the public, its elected representatives and the FCC, the huge positive impact of this landmark legislation is already being seen in hundreds of U.S. cities, large and small, ranging from New York City, Chicago and San Francisco to Springfield, Massachusetts, Grand Rapids, Michigan and Fresno, California.

Major cities (MSAs 1–25) have two, three and sometimes four or more CLECs constructing networks, installing switches and selling competitive services. Mid-size cities (MSAs 26–75) have at least one, often two and sometime three CLECs in operation or under construction. Even smaller cities (MSAs 76–125) generally have at least one new entrant building a competitive network.

In the more rural areas of Iowa and middle Illinois, one of the nation's more successful competitive long distance entrepreneurs is now providing competitive local service as well, initially by reselling the ILEC and soon through newly constructed facilities.

If one looks below the surface, it can be seen that the facilities-based competitive local exchange companies (CLECs), including Brooks Fiber and other members of ALTS, are busy building the thousands of miles of fiber optic networks and installing the hundreds of switches that will cause the exponential growth in competitive local telecommunications competition that is about to explode around the United States, so that by 1998, just two years after the Act was passed, over one million residential and business consumers will have local telephone service from a company other than the incumbent telephone company.

The FCC's fiber deployment reports show tens of thousands of route miles of non-ILEC local fiber cable have already been deployed, with more going in every day. This deployment is accelerating, not slowing down. In addition to CLECs, electric companies, cable TV companies and even some cities are installing fiber optic telecommunications cable at an ever-increasing rate.

Industry analysts reports indicate the new entrants should have over one million customers by as early as next year. While this is a relatively small number compared to the millions of ILEC customers, it represents the beginning of exponential, not straight line, growth.

This number will ramp up very quickly to many millions, so that five years after passage of the Act, more residential and business consumers will have competitive local service than had competitive long distance service after a similar period of competition in that industry.

This exponential growth will lead to a very rapid ramp up in non-ILEC customers in 1998 and beyond. There is every reason to believe that the CLECs will grow even more quickly than the long distance competitors over a decade ago, primarily due to the wisdom of Congress in passing the Act, which made local competition the official law of the land and mandated federal and state regulators and courts to take

actions that will facilitate the rapid growth of competitive local telecommunications services.

THE KEY IS "FACILITIES-BASED" COMPETITION UNDER THE ACT

In particular, the Act has allowed the facilities-based competitors to raise billions of dollars and install thousands of miles of state of the art digital fiber optic networks, and hundreds of local dial tone telephone switches, in order to compete with the ILECs, including the regional Bell operating companies (RBOCs) and GTE.

Prior to passage of the Act, CLECs were able to raise over one billion dollars, based on the actions of a few forward-looking state regulators and the FCC interconnection decisions.

After the Act became law, competitors have been able to raise between over $10 billion for network construction, switch deployment and the sales, marketing and operating expenses necessary to begin to compete with the ILECs. While this is still a relatively small amount compared to the ILEC investment of well over $100 billion, it is also just the beginning of exponential growth in fund raising capability, if the Act is implemented properly by the FCC and state regulators.

Language carefully placed in the Act by Congress recognizes the importance of facilities-based local competition, as opposed to simple resale of the ILEC unbundled network elements or end to end services, which is also permitted under the Act. Just as in the long distance industry, true choice, lower prices and higher quality local networks and services can only really occur when there exists a choice in facilities. It was only after MCI, Sprint and Worldcom built their own networks, in addition to AT&T's, that the true benefits of competition became available to the nation's residential and business consumers.

The Act contemplates three methods by which new local telephone competitors can access their customers. First, a new competitor can build its own network all the way out to a customer and serve that customer entirely with its own network, except in cases where the customer calls an ILEC customer, in which case the call is handed off to the ILEC through interconnection facilities for termination on the ILEC network.

Second, a new competitor can order "unbundled network elements" (UNEs) from the ILEC to reach its customers. At Brooks Fiber, we not only build our own network out to our own customers, but also to most of the ILEC central offices, which are locations spread throughout a metropolitan area where the ILEC has its own switches. We then "collocate" inside the ILEC's central offices, as permitted under the Act, and can then access its customers through the ILEC's "unbundled loops" which are the copper wire pairs or fiber optic connections from the ILEC's central office out to the customer premises.

Third, a new competitor can engage in "total service resale" (TSR) of the ILECs end to end service, using none of its own facilities, but becoming the billing company to their customers.

In the early days of long distance, there were many companies that merely resold the incumbent's WATS and other bulk services. While this did help cause the appearance of competition, consumers only realized a small portion of the benefits of competition because, after all, it was really just the same service that they had received before, just billed from a new company.

With truly facilities-based local competition, consumers have a choice of a completely different company with a completely different network, prices become more competitive more quickly, and carriers compete on reliability, innovation and friendly customer service.

CURTAILMENT OF RBOC ANTI-COMPETITIVE BEHAVIOR BY THE FCC AND STATES IS NEEDED

The Act is working and does not need to be changed. Yet, there are still barriers that need to be surmounted for local competition to reach the potential created by the Act.

States (through their cities and counties), power companies and building owners continue to discriminate against new entrants by imposing fees and other requirements that are not imposed on the incumbent telephone companies. All of the incumbent monopoly telephone companies, including in particular, GTE which already has long distance authority, and U.S. West which apparently is less interested in long distance, engage in regulatory and judicial gamesmanship, as well as noncompliance with interconnection agreements and provisions of the Act.

States, through their cities and counties, impose charges on CLECs which in some cases are far higher than those imposed on ILECs operating in the very same com-

munity. At Brooks, we have had to pay so-called franchise fees of over 5 percent when the local telephone company is paying nothing for access to city streets.

In addition, cities sometimes impose buildout and other requirements on CLECs that are not imposed on ILECs, and require portions of the CLECs fiber optic cable asset to be provided to the city for its own use. This discrimination by cities can make it prohibitive for a CLEC to enter a market or, once its enters, to compete fairly with the ILEC.

In addition, despite very clear language in the Act which requires electric companies to make their poles and conduits available to CLECs, they simply refuse, knowing that the expense and delay of a regulatory or court battle will deter a CLEC from insisting on this nondiscriminatory access which the Act requires. In some cases, the electric company appears to be discriminating in favor of its own telecommunications subsidiary, likely a violation of antitrust laws.

Therefore, what is needed is for the Congress, the FCC, state commissions and courts to "just say NO" to the RBOCs and other monopoly telephone companies in three ways.

Never has a proper role for government been so clear. The new competitors, with no market power, cannot yet impose market discipline on the monopoly telephone companies. Just as it was entirely proper and necessary for the government to control the pricing and conduct of these monopolies when they were the only providers of local telephone services, it remains entirely proper, and very necessary, for the government to continue strong oversight of these monopolies until they lose market power—i.e., "demonopolization before deregulation"—and, in the case of the RBOCs, no entry into long distance until they have met the requirements of the Act and have stopped their anti-competitive conduct.

The first "no" is "No, you have not lived up to either the spirit or letter of the Act with your violations of interconnection agreements, anti-competitive activity and, in some cases, even violations of federal and state antitrust laws."

One RBOC Chairman and CEO has publicly declared war on the Act by belatedly challenging its constitutionality more than one year after its passage. One has to wonder what message is being delivered to the employees of that company—cooperate and comply with the spirit and intent of the Act—or defy it?

Brooks Fiber has had to sue RBOCs for breaching interconnection and other agreements that the RBOCs voluntarily entered into! While Brooks has experienced success with the regulators and courts in these situations, our experience is that the RBOCs frequently "game the process" by requiring competitors to incur the expense and delay of commission and court proceedings.

Virtually every RBOC is currently violating its interconnection agreement with Brooks Fiber and other CLECs by failing to pay reciprocal compensation on Internet Service Provider (ISP) traffic, despite that fact that all state commissions that have ruled on the issue have found it to be local traffic for which local reciprocal compensation must be paid.

This concerted pattern of conduct among the RBOCs goes beyond a mere violation of their voluntary agreements, however. It is so highly anti-competitive that it appears to be a violation of federal and state antitrust laws. It is a case of a monopoly doing the one thing clearly designed to injure a new entrant—withholding of millions of dollars which it owes in order to economically injure the new entrant and reduce its ability to raise additional capital and become a more effective competitor.

These facts, as well as those underlying the recent private antitrust lawsuit by Electric Lightwave against U.S. West, may lead this committee, other congressional committees dealing with the nation's antitrust laws, the Department of Justice (DOJ) or state attorneys general to consider informal or formal investigations into RBOC and other ILEC anti-competitive behavior.

In addition, DOJ and the FCC should consider imposing conditions on GTE and other ILECs in the event of future mergers, in order to further the purposes of the Act, such as a requirement to comply with the provisions of Section 271 of the Act, similar to the FCC's conditions on the Bell Atlantic/Nynex merger.

The second "no" is "No, you cannot go into the long distance business until you have met the requirements of the Act, honored your agreements and ceased these anti-competitive activities."

It is simply beyond comprehension how the RBOCs can expect approval to enter the long distance business when they are not doing what the Act requires and what their interconnection agreements require, in addition to other highly anti-competitive activity designed to cripple or slow the development of local competition.

The FCC's order rejecting Ameritech's entry into long distance in Michigan was a good step forward in further spelling out the requirements of the Act. However, follow-up by the FCC is critical, especially with respect to operational support systems (OSS), performance standards and measurement, enforcement and the stand-

ard under which it is in the public interest for an RBOC to enter the long distance business. We hope the FCC works with the states on these matters, in order to avoid the costly, delaying effects of court appeals.

Should Ameritech and other RBOCs be allowed into long distance when they have hindered and delayed local competitors? When they discriminate against the new entrants and their customers? When their own actions lead to major blockages and outages for the customers of competitors? When they are withholding millions of dollars in reciprocal compensation payments to competitors despite the fact that several state commissions have condemned this practice?

Even when Ameritech or other RBOCs meet the so-called 14-point checklist, they must meet the other requirements of the Act as well, including the public interest test. It simply cannot be in the public interest to allow RBOCs to enter a new market that they wish to enter as long as they are defeating the purposes of the Act by opposing local competition in practice, despite what they may claim in public.

And the third "no" is "No, we will not amend the Telecommunications Act and change the rules in mid-stream, which would jeopardize the huge investment already made by the new entrants."

CLECs and other competitors have in good faith invested billions of dollars in local telephone networks and switches, in order to fulfill the goal of facilities-based competition in local telecommunications markets. Most CLECs are not yet to cash flow break even, and need to accomplish the original objectives in their business plans before Congress or the regulators change the rules.

Congress should be extremely skeptical of requests to change a finely tuned and well-balanced statute, simply because its proper enforcement is allegedly causing discomfort to one or more of the affected parties.

Other positive developments today include state regulatory action on local telephone customer balloting set for 1998 in Connecticut and the "fresh look" opportunities for consumers in Ohio. These and other competition-friendly actions should be adopted throughout the country as soon as possible.

In 1998, Connecticut consumers will be able to vote for their choice of local telephone service provider, just as in the last decade they were able to vote on their long distance provider. In Ohio, consumers that have been locked up by the incumbent monopoly into long term local service agreements will be able to take a "fresh look" once competition becomes available, without imposition of the normal onerous ILEC financial penalties.

In Connecticut and New York, two ILECs have been separated into a network company and a retail telephone company, with the idea that the network company must treat all competitors with parity, including the retail company. While there are many risks with this approach if not implemented properly, we hope that other ILECs and state regulators look a this option.

THE ACT IS SUFFICIENT—ACTIVE FCC, STATE REGULATOR AND JUDICIAL ENFORCEMENT IS NEEDED

The Act has established a necessary and sufficient statutory framework. What is needed now, in addition to more time for competitors to enter a market that has been a monopoly for over 100 years, is for the FCC, DOJ, state regulators and courts to force the RBOCs and other monopoly telephone companies to comply with the spirit and letter of the Act.

Members of Congress, the FCC and state commissions should be proud of the legislative and regulatory framework that they have established, which has allowed local telecommunications competition to blossom in just eighteen short months since the passage of the Act. With speedy additional FCC, DOJ and state regulatory implementation and enforcement actions in the next few years, local telephone competition will grow more robust, become irreversible and provide virtually all residential and business consumers with the competitive choice in local telephone services that Congress intended.

JOHN C. SHAPLEIGH, EXECUTIVE VICE PRESIDENT—REGULATORY AND CORPORATE DEVELOPMENT, BROOKS FIBER PROPERTIES, INC., ST. LOUIS, MO

Mr. Shapleigh has been Executive Vice President in charge of Brooks Fiber's regulatory and corporate development activities since its formation in November 1993. Brooks Fiber is a competitive local exchange company (CLEC) which how has state of the art SONET digital fiber optic networks and local telephone switches in operation or under development in 44 U.S. cities in 21 states.

Mr. Shapleigh has 22 years of entrepreneurial, management, regulatory, government policy and legal experience. He is the immediate past Chairman and pre-

viously served for two years as President of the Association for Local Telecommunications Services (ALTS), the national trade association for local telecommunications companies. He also served for one year as Associate Administrator of the National Telecommunications and Information Administration (NTIA) in the U.S. Department of Commerce, a key federal telecommunications policy position where he directed NTIA TELECOM 2000: Charting the Course for a New Century, a comprehensive review of 18 telecommunications, mass media and information industries, including telephone, television and cable television; three years as Vice President and General Counsel of LDX Net and WilTel, developers of regional fiber-optic telephone networks, positions involving the negotiation of over $100 million in debt financing agreements and oversight of all federal, state and local regulatory matters; and three years as Commissioner, then Chairman, of the Missouri Public Service Commission.

He has an A.B. degree from Dartmouth College (Senior Honors) and a J.D. degree from the Washington University School of Law (Law Quarterly). He is a recipient of the President's Award of the Missouri Bar Association.

BROOKS FIBER PROPERTIES, INC., ST. LOUIS, MO

Brooks Fiber Properties, Inc. (BFP) is one of the leading competitive local exchange companies (CLECs) in the United States, providing of competitive local telecommunications services in numerous mid-sized U.S. cities. Formed just four years ago, Brooks Fiber is among the fastest growing and financially strongest in the marketplace. With fiber optic networks in operation or under development in 44 metropolitan areas in 21 states across the country, competing directly with the regional Bell operating companies, BFP is on target for reaching the goal to be in at least 50 markets by the end of 1998.

BFP is a public company traded on the NASDAQ under BFPT. BFP was founded by Robert A. Brooks to build and operate fiber optic networks required by the convergence of voice, data, video and computer technologies. The company was created to meet the high speed digital transmission needs of residential and business customers into the next century.

Brooks Fiber Properties' mission is to provide residential, business, government and carrier customers with a broad array of innovative voice, data and video telecommunications solutions on the company's state-of-the-art digital fiber-optic networks and local telephone switches, backed by the highest quality customer service. The Company's telecommunications services are provided over digital SONET fiber optic networks which employ advanced, redundant electronics and dual path architecture to ensure reliable and secure telecommunications. BFR's networks are monitored 24 hours a day, seven days a week through the Company's network operations and control centers in St. Louis, Missouri and Grand Rapids, Michigan.

The Company's diverse product line includes the most reliable high-capacity services on the market, such as fiber-based self-healing metropolitan area networks, providing economical voice, video and data connections, broadband video conferencing, native-speed LAN/WAN interconnection, ATM, frame relay and local exchange switched services, including local telephone dial tone services.

Senator DEWINE. Mr. Shapleigh, thank you very much.

Mr. Kimmelman.

Senator THURMOND. Mr. Chairman.

Senator DEWINE. Senator Thurmond.

Senator THURMOND. I have been called back to my office. I have a few questions and I will submit them for the record.

Senator DEWINE. We will submit those to the witnesses. Thank you very much.

[The questions of Senator Thurmond appear in the appendix.]

STATEMENT OF GENE KIMMELMAN

Mr. KIMMELMAN. Thank you, Mr. Chairman, Senator Kohl. On behalf of Consumers Union, I appreciate the opportunity to testify and I appreciate you holding hearings on the Telecommunications Act because, unlike my colleagues here this afternoon, consumers are not so optimistic about what is happening.

Consumers are not getting what they were promised. They are getting things like this. This is a Baltimore Sun article from the other day saying cable rates are going up $3.10 a month in November, a 10-percent increase. Consumers have seen cable bills go up almost 12 percent since February 1996, when this law was enacted, greater rate increases in real terms than ever before in history.

Consumers in many States have been threatened with local rate increases, and in the first year of this law, in 1996, long-distance rates in the basic schedule went up faster than they had in the 3 previous years. Some of that has been undone this year by the FCC by reducing that rate increase, but that is hardly a major decrease, as was promised.

The broad-based competition that all of you heard about, that is nowhere in sight, and it is not, as Mr. Barr says, a question of the pace. Part of the problem is that we may be going backward, not forward.

Every industry, as you know, comes up here and exaggerates when they want legislation passed. That is not new, but this set of industries may top them all. I do not recall the Bell companies coming before this committee or the rest of Congress saying Pacific Telesis and SBC were going to get married when you passed this law, that Bell Atlantic and NYNEX had a prenuptial agreement. I recall them saying there were going to be seven new long-distance competitors if you move forward. That is what I recall.

I do not recall the two largest cable companies, TCI and Time Warner, that serve more than half of all subscribers in the country to cable and own the lion's share of programming, saying that they were going to get together, bridge through Ted Turner, and they were going to create a giant venture, basically amalgamate their power, and raise cable rates three times faster than inflation. I do not recall that. I recall them saying, we are the other wire. We are going to compete with the phone companies.

And I do not recall the long-distance companies saying that the only way to make money in this business was by merging with a Bell company. I do not recall that at all. I recall them coming up here saying, we are going to make major investments in the local phone market.

Sure, sometimes market conditions change, especially in a dynamic industry like telecommunications, but look at the market. Computer prices, down. Fiber optics, down. Switches, down. Look at the market in general. Could it be more stable? Could it be doing any better than anyone would have expected? There is no market shakeup here that is leading to them backtracking.

I am afraid, Mr. Chairman and Senator Kohl, that Congress was scammed a bit by a lot of telecommunications companies that wanted rules relaxed, that wanted ownership limits extinguished, not to compete but to amalgamate their power and expand their monopoly markets.

Mr. John Malone, CEO of TCI, said to the Wall Street Journal this year, and I am quoting Mr. Malone,

> If you read our annual report last year, you would think we are ⅓ data, ⅓ telephone, and ⅓ video entertainment, instead of 100 percent video entertainment and two experiments.

The Journal reporter goes on to say,

With the zeal of a convert, he has a new sermon. "The old cable industry is a perfectly good business to be in and should not be penalized for failing to deliver on its promises," he says. Moreover, telephone companies have retreated as video competitors to focus on the long-distance business.

That is from the Wall Street Journal.

Well, this tactic of switch-and-bait seems to have succeeded because along domes Rupert Murdoch who says, I want to compete with the cable industry. I am going to take them on. I testified with him April 10 in the Senate Commerce Committee and this is what he said to the committee.

SKY plans to come to market this fall. Up-front costs will be low. We will compete head-on with cable. SKY will overcome its most difficult hurdle, will bring viewers their local broadcast stations as part of a basic package, will invest $3 billion in capital to bring consumers a better choice now.

It is fall. SKY is gone. There is no competition. SKY is nowhere in sight. Mr. Murdoch has joined with the cable companies on a satellite venture, combining licenses, buying new programming, getting carriage of his programming. He is happy, but consumers get no competition.

So, Mr. Chairman, this is what we believe consumers need with this kind of market entrenchment rather than competition development. We need tough antitrust enforcement, much tougher than what we have seen so far from the Antitrust Division. We need vigilant FCC oversight. We need a crackdown on the video business, cable companies particularly, much more than what we have seen from the FCC. We need to put a lid on cable rates. We need to stop monopolistic practices and we need to jump-start true competition.

We need you in Congress to finetune the 1996 act, freeze cable rates, put an end, put a moratorium to mergers among the telecom giants so consumers have some fair chance of seeing some competition develop. Thank you.

[The prepared statement of Mr. Kimmelman follows:]

PREPARED STATEMENT OF GENE KIMMELMAN

INTRODUCTION

More than 18 months after enactment of the Telecommunications Act of 1996,[1] many of the promises that were designed to justify telecommunications deregulation have disappeared, and many of the expectations created by the law remain unmet. Major industry players have reneged on self-serving predictions, leaving consumers at risk of paying inflated prices to companies that disregard the competitive "green light" signal that Congress sent them. Consumers Union[2] believes consumers will come out losers under the Telecommunications Act unless Congress, antitrust enforcement agencies and regulators fine-tune and vigorously enforce mechanisms designed to bring consumers the fruits of competition.

[1] Public Law 104-104, 110 Stat. 56 (1996).

[2] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports with approximately 5 million paid circulation, regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

I. Pricing trends

So far, consumers have not fared well under the Act. In response to industry exaggerations about the likely pace of competition in a less regulated environment, the Act promoted excessive price deregulation and relaxation of ownership limitations before consumers receive increased choice in the marketplace. As a result, cable rates have shot up more than three-times faster than inflation since passage of the Act.[3] In the long distance market, it took a $1.7 billion regulatory cut in prices—not competition—to begin to counteract for basic long distance rate increases in 1996 that were the largest in the previous three years.[4] Dramatic rate increases for local phone service are also under consideration. In April 1996, most local telephone companies filed comments at the Federal Communications Commission (FCC) indicating that a deregulated, "efficiently" priced local phone market would lead to an average of a $10/month increase in consumers' phone bills.[5] While the FCC has not followed this recommendation, states face considerable pressure to raise local phone rates. In addition, the FCC has interpreted the Telecommunications Act to call for the deregulation of payphone rates this year, expecting the price of payphone calls to rise about 40 percent, from 25 cents to 35 cents.[6]

II. Mergers

Simultaneously, consolidation and concentration of ownership within communications industry sectors may ultimately reduce rather than expand competitive options and diversity of media voices for consumers. Under the Act's relaxed ownership rules, television and radio station sales nearly doubled between 1995 and 1996,[7] significantly concentrating media ownership in fewer hands. A number of examples illustrate this dangerous consolidation:

After Westinghouse took over CBS Inc., it purchased Infinity Broadcasting, giving it ownership of CBS's television stations and enough radio properties to pull in more than 30 percent of advertising revenue in the top ten markets,[8] and as the Washington Post says, "The deals just keep on coming in the red-hot radio business." Recently Hicks, Muse, Tate & Furst Inc. announced the purchase of SFX Broadcasting Inc., giving Hicks a total of 344 stations, the largest radio group in the nation.[9]

Rupert Murdoch's News Corp. became the biggest player in television by expanding its ownership to 22 stations through the acquisition of New World Communications Group Inc.[10]

After abandoning efforts to compete with the cable industry, cable industry leaders helped Murdoch win the bidding to purchase the Family Channel, get carriage of his news channel on Time Warner's cable systems, and allowed Murdoch to join their cartel of cable owners who run the Primestar satellite venture.[11] Now, in conjunction with Tele-Communications Inc. (TCI), Murdoch is expanding his sports programming empire by purchasing a large share of Cablevision Systems Rainbow Media Holdings, combining 18 regional cable sports channels, the Fox national TV network, Madison Square Gardens, the New York Knicks, the New York Rangers and Los Angeles Dodgers in one ownership circle.[12]

Tribune Company expanded its television reach to one-third of U.S. households through the purchase of Renaissance Communications.[13]

Time Warner Inc. and Turner Broadcasting merged, combining the nation's two largest cable owners (since John Malone of TCI will own more than 9 percent of Time Warner), serving about one-half of all cable subscribers, and owning many of the most popular cable programming networks (Malone's TCI will be somewhat in-

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[3] The Bureau of Labor Statistics reports that the cable consumer price index has risen 11.7 percent since February 1996 when the Act became law, while the general CPI rose 3.6 percent.

[4] Mark Landler, "Big Restructuring of Phone Charges Approved by F.C.C.," New York Times, May 8, 1997, and "Rates Increased 5.9 Percent by AT&T, Its Biggest Rise in Nearly 3 Years," New York Times, Nov. 28, 1996.

[5] Mike Mills, "Phone Firms Seek Higher Local Rates," Washington Post, May 7, 1996.

[6] Federal Register Vol. 61, No. 195, Oct. 7, 1996 at 52307-52323.

[7] Jube Shiver, Jr., "Was Telecommunications Reform Just Another Act?" Los Angeles Times, Feb. 3, 1997.

[8] Mark Landler, "Merging Voices That Roar: Is a Radio Deal Too Big?" New York Times, June 21, 1996; and Neil Hickey, "So Big," Columbia Journalism Review, Jan./Feb. 1997 at 24.

[9] Paul Farhi, "Tex. Firm Crafts Biggest Radio Group in U.S." Washington Post, Aug. 26, 1997.

[10] Hickey, op. cit., at 24.

[11] Mark Robichaux and John Lippman, "Murdoch Sets Satellite-TV and Cable Deals," Wall Street Journal, June 11, 1997.

[12] Paul Farhi and Leonard Shapiro, "A Sporting Chance To Be No. 1," Washington Post, June 24, 1997.

[13] Hickey, op. cit., at 24.

sulated from Time Warner through a consent arrangement to be policed by the Federal Trade Commission (FTC)).[14]

TCI is continuing to expand its dominance over the cable market through transactions with Cablevision Systems Inc. and News Corp. that will give TCI substantial ownership of cable systems serving about one-third of all cable subscribers and dozens of popular cable channels, including the regional sports networks that Rupert Murdoch is amassing.[15] Despite the FTC's efforts to keep TCI and Time Warner separate, Ted Turner managed to get a Time Warner board seat for Bank of New York's (BONY) J. Carter Bacot, who "is close to Tele-Communications Inc. CEO John Malone, who sits on BONY's board."[16] Now TCI and Time Warner are planning additional joint ventures that may further unite their cable systems, which blanket more than 50 percent of the market, in a combined strategy to block potential competition.[17]

In the telephone industry, a similar trend toward consolidation is unfolding. Instead of seven Regional Bell Operating Companies entering the long distance market to compete against the likes of AT&T, MCI and Sprint, there will be five or fewer long distance entrants. SBC Communications Inc. and Pacific Telesis have merged, along with Bell Atlantic and NYNEX.

In the case of geographically adjacent companies like Bell Atlantic and NYNEX, consumers lose as two potential entrants into the long distance market shrink into one, and two likely local phone service competitors join together. This merger combines local phone monopolies from Maine through Virginia, with a built-in long distance network serving almost 40 percent of phone lines. As the FCC pointed out in expressing substantial competitive concerns about this merger:

> 8. With respect to the proposed merger of Bell Atlantic and NYNEX, we conclude that the proposed merger will eliminate Bell Atlantic as a likely significant independent competitor in the market to provide local exchange and exchange access services, and bundled local exchange, exchange access and long distance services, to residential and smaller business customers particularly in LATA 132 and the New York metropolitan area (including northern New Jersey), but not limited to that area. We conclude that Bell Atlantic did plan to enter LATA 132 and other NYNEX territories, and that Bell Atlantic should be considered a competitor to NYNEX, but for the proposed merger * * *
>
> 9. The proposed merger likewise eliminates NYNEX as a possible entrant into Bell Atlantic territories * * * the merger eliminates any prospect of NYNEX competing with Bell Atlantic in the southern half of the northeast corridor between Virginia and Maine, and in particular any prospect that NYNEX would have entered northern New Jersey either on its own initiative or as a competitive response to Bell Atlantic entry into New York.
>
> 10. We also conclude that Bell Atlantic, as an independent entity, possesses competitively significant assets and capabilities that otherwise would enable it to compete with NYNEX. Bell Atlantic and NYNEX are two of the five likely most significant market participants that would compete to provide local exchange and exchange access or bundled local exchange, exchange access and long distance telecommunications services to residential and small business customers in LATA 132 and the New York metropolitan area. These five most significant competitors have, or are likely to speedily gain, the greatest capabilities and incentives to compete most effectively and soonest in the relevant market during implementation of the 1996 Act * * *. Although Bell Atlantic's arguments in support of the application's focus on whether Bell Atlantic would have entered New York City de novo in competition with NYNEX, the proposed merger in fact eliminates these significant capabilities from any form of competition with NYNEX, whether de novo entry, through acquisition of a smaller, existing entrant, or via joint venture. Indeed, the record reflects the fact that, prior to the merger, Bell Atlantic had entered into some joint ventures as a means of offering service not only in New Jersey, but in New York as well.
>
> 11. Merging a dominant market participant, in this case NYNEX, with a participant ranked no less than fifth by competitive significance in terms of its impact in the relevant market, in this case Bell Atlantic, has two predictable effects. First, such a merger strengthens NYNEX's market power against competi-

[14] In the Matter of Time Warner Inc., Turner Broadcasting System, Inc., Tele-Communications, Inc., and Liberty Media Corp., FTC File No. 961-0004, Complaint, Sept. 12, 1996.

[15] Mark Robichaux, "Cablevision May Acquire TCI Customers," and "Fox-TCI Nears Pact to Buy 40 Percent of Cablevision Sports for $850 Million," Wall Street Journal, June 9, 1997 and June 20, 1997.

[16] David Lieberman, "The media conglomerate's power players," USA Today, May 12, 1997.

[17] "Cable Venture Formed by 2 Industry Giants," New York Times, Sept. 4, 1997.

tive erosion by one of the most significant market participants. Second, the merger would by its own terms increase the likelihood of coordinated action among the remaining four most significant market participants to increase prices, reduce quality or restrict output * * *.[18]

12. Cognizant of the uncertainty as to the pace and extent of the lowering of barriers to entry, and taking the merger on its terms alone and without any other considerations, we believe that Applicants have failed to carry their burden of showing, under the public interest standard, that entry would be sufficiently easy to mitigate the potential harms to competition from merging the leading and no less than fifth most significant participant in the market for providing telecommunications services to residential and small business customers. Applicants also have not carried their burden of demonstrating, under the public interest standard, that efficiencies generated by the merger will mitigate entirely the potential competitive harms * * *.

Unfortunately for consumers, the Justice Department failed to challenge this consolidation of local phone monopolies, leaving the FCC to impose conditions on Bell Atlantic that are unlikely to expand meaningful consumer choice or unleash vibrant competition along the eastern seaboard.

III. Cross-industry competition?

While some of last year's telecommunications mergers could ultimately enhance competition, this massive industry consolidation has been accompanied by an immediate retrenchment—rather than an increase—in cross-industry competition. After years of clamoring to offer competition to the cable industry, the local telephone companies—fully unshackled by the Act to enter the video market through four different streamlined approaches[19]—have done more backtracking than competing against cable. Although Ameritech and BellSouth have made some effort to expand into video, the much ballyhooed Bell company Tele-TV initiative went from a major potential competitor to the dust-heap last year:

> Sixteen months ago, Mr. Grushow agreed to take over the programming arm of Tele-TV, a television joint venture owned by Bell Atlantic, NYNEX and Pacific Telesis. The three companies had set a lofty goal: to develop an interactive alternative to cable television * * *.
>
> The Baby Bells originally planned to roll-out Tele-TV to 30 million homes in six of the nation's seven largest markets by the end of the century * * *.
>
> But after repeated delays in technology and a tectonic shift in regulations, the Baby Bells now admit that getting into television is only one of several priorities. Having completed his design for Tele-TV, Mr. Grushow wonders how many people will ever see it.[20]
>
> Tele-TV, the high-profile programming alliance owned by three Baby Bells, has been ordered to slash its budget, slow down hiring and delay development of interactive fare—ostensibly the reason the unit was formed—for at least another year.[21]
>
> Bell Atlantic Corp., NYNEX Corp., and Pacific Telesis Group are taking steps to shut down Tele-TV, * * * they have basically abandoned their hopes of leading the way on development of the next generation of interactive fare amid technical difficulties, rising costs and vast changes in the market.[22]
>
> The Bell company pull-back from aggressive video competition has also occurred in the wireless market. The FCC has found that the only operational wireless system owned by a local phone company is a 42,000 subscriber system in California.[23] Last year Bell Atlantic abandoned a digital trial in Fairfax, Va.,[24] and in conjunction with NYNEX, appears to have bailed out of wireless altogether:

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[18] In the Applications of NYNEX Corp. And Bell Atlantic Corp. For Consent to Transfer Control of NYNEX Corp and its Subsidiaries, Before the FCC, File No. NSD-L-96-10, Adopted Aug. 14, 1997 at 6-8.

[19] Pub. L. 104-104, 110 Stat. 56 (1996); see also In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report, CS Dkt. No. 96-133, adopted by the FCC Dec. 26, 1996.

[20] Mark Landler, "Baby Bells' TV Developers Are on Hold and Frustrated," New York Times, Aug. 5, 1996.

[21] Leslie Cauley, "Baby Bells Push the Pause Button Again on Tele-TV Interactive Unit," Wall Street Journal, June 7, 1996.

[22] Leslie Cauley, "Bell Atlantic, NYNEX, PacTel to Close Tele-TV," Wall Street Journal, Dec. 6, 1996.

[23] Third Annual Report, op. cit., at para. 72.

[24] Id., at fn. 224.

> Bell Atlantic Corp. and NYNEX Corp. said they plan to "suspend" their agreement with a small wireless cable operator, CAI Wireless Systems Inc., * * *. The move sets the stage for the two Bells to bail out of that business altogether as they pursue other opportunities.
>
> The Friday announcement amounted to an about-face for Bell Atlantic and NYNEX, which last year had hailed their pact with CAI as instrumental to speeding delivery of video entertainment and information service to millions of customers in the Northeast. [25]

Interestingly, most of the Bell companies now believe they are better off investing their money in the long-term opportunity to move into the long distance business—even though not a reality until statutory guidelines are met—instead of the immediate chance to compete with cable. For example, at the time they announced their proposed merger with NYNEX, Bell Atlantic officials expressed relief that their previous "pact" with cable giant TCI "foundered," as market analysts described the logic for the Bell companies to pull back from a video competition strategy:

> "The reason that long-distance carries the day over television is that it is just so easy," said William C. Bane, a telecommunications consultant at Merger Management Consulting in Washington. "The problem with them getting into cable TV is that they don't have the plant," he added, referring to the miles of high-capacity cable typically required for video networks.[26]

The large cable companies have gone through a similar backtracking from their previous aggressive talk about competing against local telephone companies. Almost exactly two years ago, as Congress began deliberations on the Telecommunications Act, the Senate Commerce Committee received testimony from the cable industry stating unequivocally that "* * * cable television companies are the most likely competitors to local phone monopolies * * *".[27] Not only did cable claim it was the personification of telecommunications competition, it asserted that relaxing or eliminating cable rate regulation, to increase cable's cash flow, was necessary to make competition happen:

> If you look at the entire structure, the competitive theory of the broad legislation in front of this committee, the theory is that you are going to allow the Regional Bell companies to move into manufacturing, information services, burglar alarm services, cable, other areas, and that their potential for anticompetitive behavior is going to be checked because they are going to have competition. And then you look around, and who is going to provide that competition?
>
> And I would submit to this committee it is us. We are the other wire, and if we do not have the financial and investment environment to make those investments, those tens of billions of dollars, then the end result is that this committee and this Congress will have opened up a Pandora's box in terms of extending the regional phone companies' monopolies, and you will never close it again.[28]

Despite a strong cash-flow resulting from relaxed regulation of cable rates,[29] the largest cable companies have virtually abandoned immediate efforts to compete with local telephone companies. For example, Time Warner has already indicated it plans to substantially scale back both Orlando (futuristic Full Service Network) and its ambitious plans for the telephone business, a move that is expected to save the company about $100 million next year in capital expenditures. "Our strategy to approach the telephone business is something we are reassessing," a Time Warner spokesman confirmed.[30]

Shockingly, the most aggressive cable CEO, John Malone, has announced a full retreat from telephone competition:

> John Malone, chief of the nation's biggest cable company, Tele-Communications Inc., has a stunning admission to make. His widely hailed vision for TCI's future as a multimedia powerhouse straddling television, telephones and the Internet, isn't working.

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[25] Leslie Cauley, "Bell Atlantic, NYNEX Plan to Suspend Agreement With CAL Wireless Systems," Wall Street Journal, Dec. 16, 1996.

[26] Mark Landler, "A Sticking-to-Their-Knitting Deal," New York Times, Apr. 23, 1996.

[27] Statement of Decker Anstrom, National Cable Television Association Before the Committee on Commerce, Science, and Transportation U.S. Senate, Mar. 21, 1995, S. Hrg. 104-216 at 5, 8, and 25

[28] Id., at 115 (emphasis added)

[29] Third Annual Report, op. cit., at 11-16

[30] Eben Shapiro, "Time Warner Expands Plans For Cost Cuts," Wall Street Journal, Oct. 10, 1996

> It is too ambitious, over hyped, and impossible to carry out on schedule, he says * * *. "The company got overly ambitious about the things it could do * * *"
>
> He is abruptly revising his longstanding promise that TCI was set to become the powerful lord of the new information superhighway, using cable to deliver phone service, the Internet, and other futuristic interactive goodies.
>
> If you read our annual report last year, you'd think we're one-third data, one-third telephone and one-third video entertainment, instead of 100 percent video entertainment and two experiments," he says * * *
>
> With the zeal of a convert, he has a new sermon. The old cable industry is a perfectly good business to be in, and shouldn't be penalized for failing to deliver on all its promises, he says. Moreover, telephone companies have retreated as video competitors to focus on long-distance business.
>
> Right now, we've got zero revenue from residential telephone service, diminishing revenue from high-speed Internet, and $6 billion in revenue from video entertainment," he says.[31]

With cable companies virtually abandoning entry into the local phone business, the long distance companies that hope to challenge the local Bell monopolies attempted to pick up the slack. However, long distance expansion into local telephony has proven to be a big flop: "Sixteen months after the Government opened the $100 billion local phone market to no-holds-barred competition, a new study has found that fewer than half of 1 percent of Americans receive their residential phone service from a competitor to the monopoly provider."[32] After threatening to build facilities to enter the local market, AT&T is in full retreat, attempting to buy an existing local monopoly rather than compete to enter that market:

> A year ago, AT&T Corp. Chairman Robert E. Allen declared war on the local phone monopoly, vowing to bend billions of dollars to erect rival networks that would capture one-third of the $100 billion-a-year business in just four years.
>
> Today, AT&T has made scant progress in delivering on that promise, serving fewer than 100,000 customers in a handful of markets. Its much-touted local invasion has turned out to be far more expensive and complicated than it originally envisioned.
>
> No wonder, then, that AT&T is deeply involved in merger discussions with Bell giant SBC Communications Corp. * * *
>
> He [Mr. Allen] also noted that AT&T's foray into local service has "found the course muddy, and traction's not easy to get * * *. No company can afford to build local networks quickly all across the country."[33]

And AT&T is not the last example of competitive dreams disappearing virtually over-night. This spring, Rupert Murdoch's News Corp. Proposed a major competitive assault on the cable industry by attempting to combine his satellite capacity (jointly owned with MCI) with the satellite system of EchoStar Communications Corp. As Mr. Murdoch described the venture to the Senate Commerce Committee on April 10 of this year:

> * * * DBS still has not made major inroads against cable. Why? For three major reasons: the minimum $700 up-front outlay required for current DBS services is too expensive; current DBS services do not easily or economically serve multiple TV sets in the home; and the DBS program package does not include local broadcast stations * * *
>
> Subject to merger approval, SKY plans to come to market this Fall with a service that does overcome these limitations * * *
>
> The up-front costs for SKY subscribers will include only around fifty dollars to purchase the dish itself, plus a fifty dollar refundable deposit per converter box and a reasonable installation charge. With that, consumers can receive hundreds of channels of digital pictures with CD quality sound.
>
> Finally, SKY will overcome the most difficult hurdle. We will bring viewers their local broadcast stations as part of the basic package * * *
>
> Charlie Ergen and I are truly excited about the pro-competitive service we want to bring to market in a few short months. For the first time, when consumers choose between cable and DBS offerings, the choice before them will be

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[31] Mark Robichaux, "Malone Says TCI Push Into Phones, Internet Isn't Working for Now," Wall Street Journal, Jan. 2, 1997 (emphasis added).

[32] Mark Landler, "Monopolies Still Rule the Local Phone Markets," New York Times, May 22, 1997.

[33] John J. Keller, "For AT&T, Building Local Service Is Tough Job, Wall Street Journal, June 11, 1997.

between two equivalent service to multiple sets in the home and equivalent sign-up costs. * * *

* * * SKY is willing to risk a three billion dollar capital investment to bring consumers a *better* choice *now.* * * *

If you give the legal authority to compete, the rest is up to us.[34]

Now it is Fall, and there is no SKY. As abruptly as this competitive threat appeared on the horizon, it vanished and was transformed into an effort to expand cable's control over potential satellite competition. The cable industry did not take kindly to Murdoch's competitive efforts and launched a counterattack:

As the cable industry descends on New Orleans today for its annual trade show, it is launching a legal, political and advertising assault aimed at blocking or at least slowing down the new service, reviled in cable circles as "the Death Star." Although SKY is scheduled to begin operating next year, it must clear regulatory hurdles involving market concentration, foreign ownership and copyright violations. The cable industry plans to exploit all these in a bid to topple SKY.

The cable industry will marshall its forces against rival Rupert Murdoch's plan to beam hundreds of TV channels—including local TV stations—into people's homes via satellite, cable giant Ted Turner declared yesterday.

We're going to make it as tough for him as we possibly can. Kind of like the Russian army did with the German army," said Mr. Turner, Time Warner Inc. vice chairman * * *.[35]

Murdoch quickly backed out of the EchoStar deal, and joined forces with the cable companies—TCI, Time Warner, Comcast, Continental Cablevision (now part of US West) and Cox Communications—that control the PrimeStar Partners' satellite television service.[36] If this transaction is approved by antitrust and regulatory authorities, the cable industry will control massive satellite capacity that could have been used to offer competition—as Mr. Murdoch originally proposed—to the cable industry.

Given these dramatic, virtually simultaneous retreats by both cable and telephone companies from the pro-competitive promises that made before passage of the Telecommunications Act, it should come as no surprise that consumers have no confidence in these companies' new promises. While satellite video providers are beginning to make inroads in the television market, and new wireless technologies offer the potential for local telephone competition, consumers are left paying inflated prices and bearing the risk that they—and not the industries that profits from unfulfilled promises—will come out the losers under the Telecommunications Act.

IV. Making the Telecommunications Act work for consumers

Unless Congress is prepared to fine-tune the Telecommunications Act by putting a lid on rates for monopoly services and a moratorium on mergers until competition develops, the only way to bring down prices for consumers is through aggressive antitrust and regulatory action to implement the Act's principles.

The FCC must act to reduce cable rates to a reasonable level, prevent monopolistic practices by the cable industry, and to protect universal telephone service as it brings phone rates down to today's market costs. If the Commission squeezes the fat out of prices for connecting consumers to the local telephone monopolies' potential competitors, affordable local phone service can be preserved and long distance rates should drop significantly.

For telephone service, the key to bringing these benefits to the American people is to follow a steady pricing transition designed to eliminate the inherent advantages an incumbent monopoly has over consumers and new market entrants. No one has articulated the nature and degree of this local telephone company advantage better than BellSouth did when it sought to compete as a new local telephone provider abroad:

The timing of, terms and conditions for, and pricing of, interconnection determine which firms capture the available rents. Hence the dominant incumbent, if it fails to accept the benefits which flow from a competitive market, can and will rationally use interconnection negotiations to delay and restrict the benefits

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[34] Statement of Rupert Murdoch before the Senate Commerce Committee on Multichannel Video Competition, April 10, 1997 (emphasis added).

[35] Jeannine Aversa, Associated Press, "Cable Industry Takes Aim at Murdoch's Satellite," Washington Times, March 20, 1997.

[36] John Lippman and Mark Robichaux, "News Corp. Wins Tentative Pact to Join Cable Firms in Satellite-Dish TV Service," Wall Street Journal, May 27, 1997.

of competition. This enables it to perpetuate the rents which it obtains as a successor to a monopoly franchise at the expense of competition and innovation.

A dominant incumbent can limit both the scale and scope of its competitors, raising their costs and restricting their product offerings. In addition, it can divert or delay competition and innovation to protect its current revenues and give itself time to prepare and introduce similar products or service by exercising control over standards for connect and local numbers * * *

It has very powerful incentives to include monopoly rents in the price of complementary network services in order to perpetuate and increase its monopoly profits. It similarly has very powerful incentives to reduce the ability of its competitors to claim market share.[37]

As a result of inadequate price regulation in response to the local telephone monopolies' advantages as described by BellSouth, consumers as at risk of paying vastly inflated local and long distance rates. Consumers Union, the Consumer Federation of America, and the American Association of Retired Persons have asked the FCC to cut nearly $8 billion out of local telephone companies' connection charges to eliminate inefficiencies, misallocated costs and above-market profits that are keeping phone rates above competitive levels.[38] So far, the FCC has only scratched the surface (with a $1.7 billion price cut) in bringing prices down to cost.

When attempting to complete with local telephone monopolies abroad, BellSouth and US West have identified the same sources of price inflation as consumers have in evaluating the Bells' local monopolies in this country.[39] For example, if regulators limited the Bell companies to profits comparable to those earned by similarly situated companies under current market conditions, consumers would save $5–6 billion/year.[40] If equipment deployed primarily to provide business or competitive services—like Centrex, SS7 and ISDN for businesses, excess fiber optic lines and switching capacity—were not allocated to basic residential service rates, consumers would save $3.00–4/month on their phone bills.[41] Finally, if general overhead, marketing, long distance and enhanced service costs were not-allocated to basic phone service, local costs would be reduced by more than $2.00/month for each residential subscribers.[42]

By squeezing these excesses out of charges that consumers and potential competitors pay to the local telephone monopolies, the FCC would save enough money to finance the universal service program called for under the Telecommunications Act, maintain current local rates and bring long distance rates down significantly. The local telephone companies would receive regulated revenues that cover current "off the shelf" prices for the equipment necessary to provide ubiquitous service, plus the opportunity to expand their revenues through unregulated services and lines of business opened to them under the Act.[43] Table 1 shows that, while the Bell companies earned about twice the national average return on equity in 1996, the two local phone companies that have entered long distance more than doubled their returns last year. As J.P. Morgan points out, "How often is it that an industry wakes up one day, finds its addressable market expanded by 40 percent and can launch the new service without noticeable dilution and achieve positive earnings by the second year?"[44]

Pronouncements from the largest long distance companies make it clear that consumers should see both local and long distance rates decline if the Telecommunications Act is appropriately implemented. AT&T has promised that, in the 37 states that are moving toward market prices for interconnecting calls, they will offer every

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[37] BellSouth New Zealand, Submission: Regulation of Access of Vertically-Integrated Natural Monopolies, A Discussion Paper, Sept. 29, 1995 at 2 and 10 (emphasis added).

[38] Initial Comments of the American Association of Retired Persons, Consumer Federation of America, and Consumers Union, in the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, and Usage of the Public Switched Network by Information Service and Internet Access Providers, CC Dkt. Nos. 96–262, 94–1, 91–213, and 96–263 before the FCC, Jan. 29, 1997 at 11.

[39] Rely Comments of the American Association of Retired Persons, Consumer Federation of America, Consumers Union, and the Texas Office of Public Utility Counsel, in the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, and Usage of the Public Switched Network by Information Service and Internet Access Providers, CC Dkt. Nos. 96–262, 94–1, 91–213, and 96–263, before the FCC, Feb. 14, 1997 at 11–16, 21–24.

[40] Initial Comments of the American Association of Retired Persons, op. cit., at 21, 34–43.

[41] Id., at 25.

[42] 25–26.

[43] In the matter of Federal-State Joint Board on Universal Service, CC Dkt 96–45, Recommended Decision Adopted Nov. 7, 1996, at 27–33.

[44] Id., at 30.

consumer local phone service at or below current local rates.[45] MCI made a similar promise for the markets it is entering.[46] In addition, both AT&T and long distance rate reductions for consumers.[47] Regulators must take the steps necessary to make these companies deliver on their promises.

CONCLUSION

Without rigorous intervention by policymakers, the industry promises of growing consumer choice in telecommunications and cable may never materialize. Without tougher antitrust enforcement, industry consolidation will wipe out the potential for broad-based competition. Unless the FCC brings the charges for connecting consumers to competing telephone companies down to current market prices, consumer will continue to face inflated local and long distance rates under the Telecommunications Act. Also, to stop skyrocketing cable prices, Congress must direct the FCC to clamp down on cable rates and monopolistic practices until head-to-head competition develops in the video business.

TABLE 1.—RETURN ON EQUITY EARNED BY LOCAL EXCHANGE COMPANIES

Company	Return on equity	
	1995	1996
New entrants into long distance		
GTE	22 8	40 2
SNET	16 6	41 6
Regional Bell operating companies		
Ameritech	28 6	28 8
Bell Atlantic	28 1	23 9
Bell South	13 2	21 6
NYNEX	17 9	19 9
Pacific Telesis	47 9	41 6
SCB	30 8	30 7
US West	34 1	31 8
Large LEC average all industry	26 9	29 6
Business Week 1000 (Mean)	15 7	16 8

(Source Business Week, Mar 3, 1997)

Senator DEWINE. Let me thank our panel very much.

I think what we will do, if it is all right with Senator Kohl, is go to 8-minute sequences and I will start the first 8 and we will just go back and forth. I have a number of questions and I am sure Senator Kohl does, as well.

Let me start with you, Mr. Allen. We have heard a lot about this, and you have referenced yourself, this so-called roadmap that is quite lengthy and I wonder if you want to comment on that. This was the roadmap that was issued by the FCC when it denied Ameritech's applications, of course, in the State of Michigan. Do you believe that this decision provides Ameritech with the guidance that you need? You heard the testimony of Mr. Hundt. I would also ask you when you expect to refile.

Mr. ALLEN. My response would be that we do accept it as a roadmap. We intend to follow it as our roadmap. As I said, we will cross every t, dot every i. It is a very complex roadmap. It is one we have been reviewing for the last 3½ weeks. Embedded in it is tremendous minutia in detail that makes our entry even more complex.

We do not have the patience of the Department of Justice. We do not agree that this should be a long road. Congress passed a bill

[45] Remarks of Robert E. Allen, Chairman and CEO, AT&T, National Press Club Feb. 4, 1997.
[46] MCI Press Conference: "One Year After Telecom Act," Washington, D.C. Feb. 6, 1997.
[47] Remarks of Robert E. Allen, op.cit.; and Keynote speech of Bert Roberts, Chairman MCI, to the Federal Communications Bar Association, Feb. 13, 1997.

that said, open up the local markets. We have opened up the local markets. Our shoulders have been to the wheel. Frankly, our heads have been right on the windshield and we are at a point right now as we have opened the local market and on a daily basis 3,000 customers choose other competitors. The intent of the law was to also allow us into the long-distance business.

That document is the roadmap. We will follow it. It is very complex, very detailed, and frankly, we are not sure if it is months or now years to get in. It is going to be a very expensive road, a very complex road for us to make the changes that are inside that document.

Senator DEWINE. I want to make sure I understand. Your testimony is that this is the roadmap, so you have to follow it.

Mr. ALLEN. That is correct.

Senator DEWINE. But it is going to take you a long time to follow it, to get to your destination.

Mr. ALLEN. It is going to take us longer than we thought, that is correct, and we think that is unfortunate, given the spirit of the law, which was if we opened up the local market, we would have the opportunity to get into the long-distance market, and a gap period we did not believe was envisioned by you or anyone else.

Senator DEWINE. I do not want to dwell on this, but what specifically is wrong with this roadmap?

Mr. ALLEN. There are several things. If, as Mr. Barr said, if you look at the overall pricing that is in there, the original intent of Congress was to set up a construct for you or a company, the DeWine Telephone Co., to come in and either resale our lines or to buy various elements of our lines. Our competitors have used that language now to their advantage and come in and tried to get the FCC, and have convinced the FCC, to allow a rebundling, which enables a double discount. We totally disagree with that. The eighth circuit court has disagreed with that. We have appealed that and will go back and continue to pursue our interest, along with others. In the meantime, we will comply and move forward because we believe that is in our best interests.

Senator DEWINE. I would like to give you an opportunity to respond to a comment that was made by Mr. Shapleigh, and also anyone else on the panel who would like to respond to it. We can do that right now. I will try to paraphrase, and I hope I do not misquote you.

But it was basically to the effect that the RBOC's generally are litigating unfairly, but maybe more importantly, welshing on interconnection agreements and just making life very difficult. Mr. Shapleigh, is that a fair statement or do you want to rephrase it?

Mr. SHAPLEIGH. I could expand for all afternoon on that statement, but that is——

Senator DEWINE. But that is it. I want to give them a chance to respond. I want to make sure I have stated your comment correctly.

Mr. SHAPLEIGH. And if the chairman permits, I would like to respond to Mr. Allen's earlier comments on the roadmap.

Senator DEWINE. We will get to that in a minute.

Mr. SHAPLEIGH. Thank you.

Senator DEWINE. Remind me of that. Mr. Allen.

Mr. ALLEN. We have an interconnection agreement with Brooks. We take that agreement very seriously. We are providing service to Brooks Fiber today at parity with our own retail operations. If I look at Brooks Fiber's recent quarterly report that I happen to have here, their chairman says, "We are extremely pleased to report the sequential growth rate for the second quarter dramatically accelerated to 28 percent, excluding acquisitions." He then goes on to talk about "the success in Grand Rapids continue to exceed our original expectations."

Brooks Fiber is a very good competitor. They are tough in the marketplace. They are winning customers. That, as Mr. Shapleigh said, is what this act is all about. They are in Grand Rapids and other places and we do our best every day to serve them in a way and in the spirit of the law and the contract.

Senator DEWINE. Does anyone else want to respond to Mr. Shapleigh's comment?

Mr. SHAPLEIGH. Mr. Chairman, at the appropriate time, if I could respond to Mr. Allen's comments.

Senator DEWINE. Just go right ahead.

Mr. SHAPLEIGH. Thank you very much. Today, I would applaud Ameritech on progress that it has made. However, as we sit here, they are in violation of their interconnection agreement in several very material ways. We have substantial disagreement with the company's implementation of our interconnection agreement with respect to the installation times between their customers and our customers, with respect to the standards that they use with respect to their own customers and our customers, and with things just as simple as this.

It was just on September 2 when our customers experienced an outage of significance. Twenty-thousand calls were lost. One of our customers said, and this was echoed by others, "You know, this never used to happen before when we had service just with Ameritech, but now that Brooks is on the scene, Ameritech seems to be having certain problems come up that they did not have come up before, and as a result, Brooks customers are penalized."

Beyond not living up to their interconnection agreement and implementing that properly, they are engaged in anticompetitive activity. One thing is they are going around locking up the customer base on long-term contracts before competition comes in. The last I heard, I was not aware monopolies were allowed to do that.

They are also failing to make millions of dollars in payments for reciprocal compensation, both in violation of the interconnection agreement and, I believe, rulings of regulatory bodies and the act itself requiring reciprocal compensations to be made. They have unilaterally said they are not going to pay on calls from their customer base into Internet service providers.

This is just the beginning of a very long list of where we do not believe they are ready for prime time, either under their interconnection agreement or in their compliance with the act. I do applaud them on the progress that they have made today.

Senator DEWINE. Mr. Allen, do you want to respond?

Mr. ALLEN. No. I think this is a classic case where the law set up provisions for us to arrive at interconnection agreements as a result of negotiation, mediation, or arbitration, and in the case of

Brooks Fiber and many others, we did just that. We have those agreements. There are provisions in place where we have disputes, to have those resolved. The Michigan Public Service Commission does that on a routine basis if we have differences.

As Mr. Shapleigh knows, we sit down on a routine basis, review our performance, and today, we do exceed the criteria that is in our contracts. We take those contracts seriously and we want to provide good service to Brooks Fiber. They are our customer.

Senator DEWINE. Mr. Allen, you talked about the progress that has been made or where the state of the market is in Michigan and I wondered if you could go a little south of Michigan and tell me a little bit about what is going on in Ohio as far as local competition and how you see that market.

Mr. ALLEN. I would be glad to. The reason that I have alluded to Michigan and Illinois today is because there is, frankly, more competition in Michigan and Illinois than there is in our other three States. Ohio is a State where there is growing competition. We have 10 active competitors in the State of Michigan today. However, the level of intensity is not as great as it is in Michigan or Illinois.

Senator DEWINE. I am sorry. Say that again.

Mr. ALLEN. In Ohio, we have 10 competitors and the level of intensity is not as great as it is in Michigan or Illinois.

Senator DEWINE. How would those be—and I do not want to take the committee's time to get everything about Ohio out today, but I do have some interest in it—how was that spread out? You talk about 10, but that is spread in what areas?

Mr. ALLEN. I would say, at this point, those are in the major metro areas and balanced between facility-based and resale, fairly evenly split.

Senator DEWINE. It would not have reached Cedarville yet, though?

Mr. ALLEN. I do not know specifically about Cedarville. I would assume——

Senator DEWINE. I understand, but urban areas, primarily.

Mr. ALLEN. Yes. Urban areas, clearly. Is Cedarville where you live?

Senator DEWINE. That is where I live.

Mr. ALLEN. As you might guess, I have been very well briefed today. There are four competitors in your backyard.

Senator DEWINE. That is good. We have four choices.

Mr. ALLEN. That is right.

Mr. KIMMELMAN. Mr. Chairman, could I just interject here before Senator Kohl starts?

Senator DEWINE. Yes.

Mr. KIMMELMAN. I cannot speak to the individual negotiations between Brooks and Ameritech here, but I can only speak to the incentives and there are terrible incentives here of an incumbent monopoly. I would like to quote you something that is going to sound like Mr. Shapleigh. It is not. "The timing of terms and conditions for pricing of interconnection determine which firms capture the available rents. Hence, the dominant incumbent, if it fails to accept the benefits which flow from a competitive market, can and

will rationally use interconnection negotiations to delay and restrict the benefits of competition."

It sounds kind of like Mr. Shapleigh, does it not? It is not. It is Bell South. But it is not Bell South as the Bell South we know here. It is Bell South in New Zealand, where it entered the market as a competitor. That is the problem, Mr. Chairman.

Senator DEWINE. Senator Kohl.

Senator KOHL. Mr. Rosenblum, did you not say that local is 99 percent monopoly controlled?

Mr. ROSENBLUM. Senator, yes, I did. So far as we know, the number of consumers in this country who can choose local alternatives for telephone service is less than one percent.

Senator KOHL. All right. Mr. Allen, you said the problem is not local. The problem is long distance.

Mr. ALLEN. That is correct. One of the things——

Senator KOHL. But wait a minute. You are saying opposite things, is that correct?

Mr. ALLEN. We are saying opposite things. I am saying the local market——

Senator KOHL. Who is the liar? I am just kidding. [Laughter.]

I would like to take just a minute of my eight. First, Mr. Rosenblum and then Mr. Allen, will you tell us why Mr. Allen is not describing accurately the condition, and then Mr. Allen, I would like you to respond.

Mr. ROSENBLUM. Yes, and let me begin, Senator, by saying that AT&T also recognizes that Ameritech has been unlike most of the incumbent LEC's in the sense that it has been working harder and longer at the job of opening its markets. This is something we have publicly acknowledged. It does not mean the job is done, and I think that is the respect in which I disagree with Mr. Allen.

His point was that the markets are open. We have done our part. Now let us into long distance. Every State commission in the Ameritech region that has considered the question and every Federal Communications Commission and Department of Justice analysis, as well as our own, shows that there still are significant gaps in the extent to which the Ameritech markets are open, even though they have come a long way.

So I think that the difference between us is in how completely open to competition those markets are. I would submit, Senator, that the number of customers that can be switched, that have switched, is a relevant factor. I applaud Ameritech for being able to make as many choices available as they claim to have made.

The fact of the matter, though, is that when large companies like AT&T have tried to enter markets in Illinois and Michigan and Ohio just as a reseller of service, we have discovered that the automated systems that Ameritech has made available in order to send information back and forth, which we need to do in order to resell their service, literally cannot handle the volumes. Problems develop. I think this is probably inevitable, but it has to be solved and I think the real test of an open market is when it is not the incumbent provider that has its hand on the throttle, being able to determine how many customers can exercise choice.

Senator KOHL. Mr. Allen.

Mr. ALLEN. Again, I would say 99 percent, 1 percent, I do not relate to because I think those are figures that do not relate to the Ameritech region and certainly do not relate to the charts that I showed you earlier, where competition has increased in the last 8 months up to a level of over 300 customers and now 3,000 customers a day make an alternate choice in our region.

If you look at the ad that AT&T has in your local newspaper here called Roll Call, they talk about calling them for local competition. So far, the local phone monopolies have failed to answer. They have dialed the wrong number. In Michigan and in Illinois, we do have significant competition and the point here is that the law did not have a metrics test. It did not say we had to lose so many customers and our competition had to gain so many customers before we entered the business. There is no metrics test. They said we had to open the market. We have opened the market and we should have the right to get into the long distance business.

Senator KOHL. Mr. Rosenblum, why is AT&T not investing more in building its own local networks? If Brooks Fiber can do it, why cannot you?

Mr. ROSENBLUM. Senator, we are investing in building local networks, but I think we have a slightly different situation than Brooks. If we were a new company starting up—as Mr. Shapleigh said, his company did not exist 4 years ago and owes its very life to the Telecommunications Act and some of those other events—if we were in that position, we would probably be pursuing a very different course right now.

Both the blessing and the curse of AT&T is that it has got a very long history and a very large size. We have many millions of customers today whom we serve with the largest network in the world, which takes an awful lot of investment just to maintain for the purpose that we have traditionally used it, which is the toll traffic. We also have a national presence and our customers have come to expect from us that when they do business with us, they will be able to get a certain level of quality and service that they have associated with their long distance purchases from us.

We are literally not in a position, Senator Kohl, to make the investment necessary to build out local networks quickly enough to serve all of our residential and business customers across the country and so we are choosing to do what I think the act clearly provides for us, which is take advantage of three different entry paths.

Where it makes sense, we will try to build. In that regard, we have announced that we are actively pursuing and very hopeful about a new technology that could replace the local wired telephone network with a wireless technology that is sort of a derivative of cellular. That is not yet ready for prime time, but we are very excited about it.

We are also trying, and with some success, reselling local incumbent services to 100,000 or more customers, and I would point out in response to Mr. Barr, those are almost exclusively residential customers, not just big business customers, so we are not playing a reverse Robin Hood.

And most importantly, our strategy is to try to buy pieces of the incumbent network elements so that we can combine them and provide service that way, which involves an investment of sorts, be-

cause we have to buy at a fair economic price those network elements.

Senator KOHL. Mr. Allen, why is Ameritech not trying to compete locally against Bell Atlantic or GTE?

Mr. ALLEN. To date, we have spent a great deal of time right in our own backyard trying to make sure that we got ready for local competition, we opened up our market, and our focus has been and continues to be to ensure that we are the best full-service communications provider in the upper Midwest.

Senator KOHL. Why do you not go out and compete against GTE and Bell Atlantic?

Mr. ALLEN. I am sure at some point, we will. Right now, our resources are limited. We are focusing all of them on trying to ensure that we get into the long-distance business, which is our top priority.

Senator KOHL. Mr. Barr, when you were here, was it in 1990?

Mr. BARR. Yes, Senator.

Senator KOHL. When you were here before this committee, you had three lovely children.

Mr. BARR. Thank you.

Senator KOHL. I think it was Mary, Pat, and Meg, is that right?

Mr. BARR. Right, Senator.

Senator KOHL. How are they doing?

Mr. BARR. They are doing well. They speak of you often. [Laughter.]

They still have the Bucks hats that you gave them.

Senator KOHL. That is great. Say hello for me.

Mr. BARR. I will.

Senator KOHL. Mr. Barr, what do you think of Mr. Rosenblum's explanation? How do you respond to what he said?

Mr. BARR. His explanation for——

Senator KOHL. I asked him——

Mr. BARR. About not investing?

Senator KOHL. Right.

Mr. BARR. I think AT&T has made the decision that if they can get an interpretation of the statute whereby they can have the incumbent make the investment and subsidize them with below-cost wholesale prices, they will ride piggyback on the incumbent and not have to make their own investment.

MCI is making some investment now. We have only five colocation requests from AT&T. We had 29 from MCI. We have lost customers to MCI through facilities-based competition by MCI. So I think it is a business decision by AT&T that if they can get other people to make their investment for them and get a subsidy to come into the market, that is how they are going to do local service.

Mr. ROSENBLUM. Senator, if I could respond to that briefly.

Senator KOHL. Yes. Go ahead, Mr. Rosenblum.

Mr. ROSENBLUM. Thanks. I think, although it is a business decision by AT&T, in the way I described it and to some extent in the way Mr. Barr described it, it is not AT&T trying to stretch or interpret the statute. The statute could not be more clear that anyone who wants to enter a local market has, among other things, the option of buying the incumbent's service at a wholesale discount from

the retail price and that is what we are trying to do in some cases. Our preferred course of entry, though, would be through investing in network elements, which we would have to lease at a very different pricing and higher pricing structure from the incumbent.

The reason we have not been able to do that with GTE, frankly, is that since the eighth circuit decision, they have refused to negotiate with AT&T about even beginning work on the systems necessary to support that, and the reason why we are not interested in pursuing resale to a greater extent from GTE is because they have, on average, about the highest access charges of any incumbent local company in the country and, on average, the lowest wholesale discount, so we would be caught in a price squeeze if we tried to do it in a big way.

Senator KOHL. I have one last question before I turn this back to Mr. DeWine. Mr. Kimmelman, are you suggesting that you are concerned that these companies, in their own best interest and the best interest of their shareholders, find it most expedient not to compete with each other but to maximize profits, each in their own areas, because that is the way people run businesses in this respect and try and make money, which is certainly not immoral or illegal, but that is just the way this thing shakes out?

Mr. KIMMELMAN. That is exactly right, Senator Kohl. I think they all came into Congress and said, we are ready to compete. We are ready to break down barriers. We are ready to go into each other's markets. In reality, there is more money to be made by slow-rolling the process, preserving a monopoly if you can preserve it, holding on to it as long as possible and not running the risk of entry into another market, where there will be retaliation.

Senator KOHL. And you stay away from my market and I will stay away from yours?

Mr. KIMMELMAN. That is what I am fearful is developing. And going back, again, this is not trying to state that competition should go at a particular pace. As you can see, there is internecine warfare here from the courts to the marketplace to the arbitration rooms. I do not know how you figure all that out. You cannot predict a pace. But certainly, rates should not go up while that is happening, and also, certainly, the markets should not be allowed to consolidate and eliminate potential competitors while all that is happening. That is totally contrary to what was desired.

In the quote I read before from Bell South in New Zealand, if I had continued, it would have sounded like Mr. Rosenblum in terms of the incentives of the incumbent and the ability to overprice and overcharge and why you need regulators to step in. So these companies all say different things, depending on where they are, what country, whether they are the monopolists, whether they are the challenger.

I think the basic point here is not to try to guess the timeframe of competition but to try to make sure that we are keeping prices reasonable and as many competitive forces moving forward and not retrenching.

Senator KOHL. Mr. DeWine.

Senator DEWINE. Mr. Allen, I want to clarify some testimony, and maybe I did not quite understand. You talk about the progress being made in Michigan, and I think you said Wisconsin, as well.

Mr. ALLEN. Illinois.

Senator DEWINE. Illinois. You are also, of course, in Ohio, where else, Indiana?

Mr. ALLEN. Wisconsin, Illinois, Indiana.

Senator DEWINE. OK. The States that are not quite as far along, such as Ohio, my understanding from your testimony would be that the local competition, that there is competition such as you would find in, as you referenced, Green County, my home county. Competition is at the commercial level, is that correct? I mean, that is where we are finding the competition and we are finding it also in the urban areas, is that correct or not?

Mr. ALLEN. The heavier competition is clearly in the urban area.

Senator DEWINE. Is that residential as well as commercial?

Mr. ALLEN. It is a blend of residential and business. There is no question that competitors are coming in and trying to acquire, as you would expect them to, high-volume, high-dollar customers, be they consumers or businesses. There is competition of those same customers, high-dollar customers, in suburban and rural markets. It is more selective, but it is there. Clearly, the competitors are coming in and not trying to serve all the customers. They are trying to come in and serve high-dollar, high-volume customers, as you would expect them to.

Senator DEWINE. I am just trying to get a snapshot of one of these States, and I want to make sure I understand that snapshot.

Mr. ALLEN. I understand what you want.

Senator DEWINE. You and I were having fun going back and forth about my home community, which obviously is a rural community. It is not relevant whether it is mine or whether it is someone else's, whether it is Cedarville or whether it is Ripley, OH, or wherever it is. It does not matter. The point is, what is the prospect for competition there?

Mr. ALLEN. If you look at our five States, I would describe them as follows. One, Illinois and Michigan, we have robust competition, as evidenced by the chart. Wisconsin and Ohio, we have growing competition, and in Indiana, we have embryonic competition.

An important point to remember, though, is that the congressional act that was passed does not call for any particular level of competition——

Senator DEWINE. I understand.

Mr. ALLEN [continuing]. Before we are allowed into the long-distance business.

Senator DEWINE. No. I understand that.

Mr. ALLEN. The problem I have is when I stand in a garage in front of our installers and repairmen in Ohio or Wisconsin or Indiana, much less Michigan or Illinois. Our people look at us and say, I do not understand this. You told us if we opened up the local market and we negotiated contracts with our competitors, when they came in, we would be able to get into the long-distance business. Why can we not do that? I have 6,000 people in Wisconsin, 16,000 in Ohio. They do not get this. Why are we opening up the local market if we are not going to get in the long-distance business?

Senator DEWINE. You testified that you were losing 3,000 a day, is that how you——

Mr. ALLEN. We are now.

Senator DEWINE. You are now, and that would be spread—is that just in one State or is that your total?

Mr. ALLEN. That is all States, heavily dominated by Michigan and Illinois.

Senator DEWINE. Mr. Rosenblum, I believe Mr. Barr stated that you are not actively trying to sign up GTE customers, is that correct?

Mr. ROSENBLUM. I believe he did state that, yes, Mr. Chairman.

Senator DEWINE. Well, you are the lawyer today, are you not? We have a room full of them. You guys are good.

Mr. ROSENBLUM. I wanted to be careful on that one, Mr. Chairman.

Senator DEWINE. Yes, that is good. [Laughter.]

Let me rephrase the question. Is that true? Is it a true statement? I know he said the statement, but is what he said accurate, in your opinion, at least?

Mr. ROSENBLUM. Mr. Chairman, it is not accurate. It is not true.

Senator DEWINE. That is plain. OK.

Mr. ROSENBLUM. A better characterization would be that we are not able as we would like to pursue customers in GTE territory for the reasons I described earlier. GTE has truly been among the leaders in litigating against key parts of the act, including especially the parts of the act that contemplate that new entrants like us can buy the unbundled network elements in any combination we choose. They won a victory, to some extent, in the eighth circuit and have been since that time refusing to deal with us on what we have asked for in order to enter their markets.

As I said before, dealing with them as a reseller of their service is not economically viable, given the relatively high access charges and the relatively small wholesale discounts they have achieved in their States.

But our goal is to provide local exchange service to all of our customers and all of anybody's customers, from residential up through business, everywhere in the country. We do that today with our long-distance service. Our customers are nationwide across all residential and business groups and we do not foresee changing as a company our mission in that regard.

Senator DEWINE. Mr. Barr, do you want to respond in any way?

Mr. BARR. I am not sure what he means by they are unable to proceed in the way they would like. They have not requested any unbundled network elements from us. There are unbundled network element prices in effect. We have not litigated to delay those from going into effect. They are in effect today.

I think if Mr. Rosenblum was honest with you, he would say that they are not ready to put into place their unbundled network element platform. They do not have their act together yet. I think that is the reason for the delay.

On the litigation side, the reason, as Mr. Allen averred to, there has been a dispute over how much of these unbundled network elements you can get and who has the obligation to link them together. We said we did not have the obligation to put them together, that the person who buys them has the obligation to put them together. The FCC disagreed with us. We asked the eighth

circuit about that. We won that point and now we are trying to get our agreements to conform to that because we were forced to enter into agreements with the opposite provision and we did it under protest and we won the case. So we are trying to get the contracts reformed.

I would like to just make an overall point referring to your previous line of questioning. Actually, I think the whole discussion of competition is a misnomer because I do not think what is happening out there is competition. We are losing customers, big business customers—and, incidentally, we are taking customers away from some of the RBOC's, so we are competing with the RBOC's and we have pledged to be in seven RBOC markets by the end of this year and we have established a CLEC to do that.

Senator DEWINE. How far along are you on that? I mean, what does that mean? You are competing there and you are into those markets? Could you quantify that?

Mr. BARR. We have started taking large business customers away from PacTel. We have taken some away from US West. SBC has taken a customer away from us. We are getting ready to counterattack.

Senator DEWINE. But do you have any feel for numbers there, though?

Mr. BARR. The large customers I am talking about are dozens of customers, but——

Senator DEWINE. But large is the point?

Mr. BARR. Yes, big companies, which is the—but the point I want to make is this. What is going on is price arbitrage right now and raiding the kitty of universal service. In a typical GTE State, it might cost us $25 to serve a customer. A business customer, residential customer, it is still about $25, let us say. The residential customer may be paying $15, particularly in rural areas.

The difference has been made up over time. The States require us to get that return. The reason they can tell us to only charge $15, below cost, is because we are charging the businesses $45, $60, $70, and that is the pricing scheme that is in effect now and it relied upon a monopoly to have this cross-subsidy, because obviously you cannot get away with $60, $75 in a competitive market if it only costs you $75, but that is what we are required right now to do under State regulation.

So when the new entrant comes in, it only costs them $25 to serve that business. There might be $15 or $20 of margin in our price that is paying for Aunt Tillie, to keep her price low, because we have to serve everybody—everybody—but the new entrant does not have to serve everybody. They come in and they cherry pick, and by charging a little bit below what we charge—let us say we are charging $70 and they charge $65—they walk away with the customer and all that margin that went to keep Aunt Tillie's bill low. So they have diverted the subsidy from keeping the universal service plan, in keeping residential rates reasonable, and the subsidy is now channeled into the pocket of the new entrant.

That is what is happening and that is what has the ILEC's mad. The statute says that should not happen, that you have to have a universal service plan in effect that everyone contributes to. The

new entrants are not contributing to universal service at all today. They are walking away with the subsidy.

Senator DEWINE. Senator Kohl.

Senator KOHL. Mr. Barr, you are one of the two telephone companies to get into cable. Could you tell us what the investment mountain is on that?

Mr. BARR. I do not have the details on that. As you say, we are in two markets, St. Petersburg and Thousand Oaks. It is very costly to do that because we are o erbuilding. That is, we are putting in facilities. No one passed a statute saying that we can piggyback onto the cable system. We have to put in our own system.

We have been very successful in competing and signing up customers. In fact, we found that there is a lot of dissatisfaction with the cable companies and sometimes we have not even had to market. People see us digging up the street and they come out and they say they want to switch. So I think over time, as we get our costs down and learn more about the deployment of the system, it is going to be an excellent business for phone companies, but I cannot give you the specifics on the investment.

Senator KOHL. If there is one thing I hear across my State, and my colleagues say the same thing, it is that people's cable rates are going up like crazy. I think there is substantiation for that. I think Mr. Kimmelman has said that we legally here in Congress ought to put a moratorium on cable rate increases for some period of time.

Any and all of you, what are we going to do about cable rate increases? They are killing your image and they are hurting the politicians, too.

Do you want to make a comment, Mr. Barr or Mr. Allen?

Mr. ALLEN. I would be glad to comment. We have entered the cable business. We are the largest growing cable company in the upper Midwest. We now have 50 franchises approved. We are actively serving 30 franchises, and interestingly enough, where we compete, prices have gone down. So what you want is just what the act called for, and that was competition.

Most importantly, though, it is important that we have access to programming. You can imagine, if we are providing cable service in Ohio and we cannot provide Fox and have a local football game on, or the same in Chicago with the Bulls. So the real issue for us is access to programming. I will assure you, we will continue to compete and where there is competition, price drops.

Senator KOHL. Are you looking to televise a basketball team in Wisconsin? [Laughter.]

Mr. ALLEN. We consider any opportunity to——

Senator DEWINE. That was the correct answer.

Mr. SHAPLEIGH. Senator Kohl——

Senator KOHL. Yes, Mr. Shapleigh.

Mr. SHAPLEIGH. If I could comment on cable companies, the committee should be aware that the cable companies are extremely active in going into the telephone business. In fact, one of the largest CLEC's, facilities-based carriers, is TelePort, which is owned by three or four of the largest cable companies, plus they go into it individually. Cox has a major investment in a telephone plant. Right across the river here in northern Virginia, Jones Intercable has a

switch and is providing switch services to people. So there is some investment there.

If I might just pick up on one point very briefly on universal service, the new entrants, in fact, do fall under the universal service regime just set up now under universal service reform by the FCC. We will be full participants in funding the pool of money that will be available for universal service in this country and that has been the position of our industry from the beginning. We are members of the industry and will contribute just like everybody else does.

Senator KOHL. Mr. Kimmelman.

Mr. KIMMELMAN. Could I just add, I want to urge Mr. Barr's company, Mr. Allen's company on. Please come in. We are seeking your help in putting a lid on rates just because the competition is not there across the country. I think the FCC found that where there was overbuilding, where there were two wires, rates on average were 28 percent lower than where there was just one cable company.

I think Mr. Allen is also on to another problem. Mr. Chairman, I hope that you might devote some attention to a future hearing to this on cable issues. The lion's share of cable programming is owned by the cable companies. The FCC found that cable companies own, the major companies, the top 8, own 63 of 65 major cable programming networks. Of the top 13 networks, 8 of them are owned by cable companies.

Now, they say the price of programming is going up. Well, the price of programming is going up. They get more money from customers. They put it in the pocket of the cable company and then they ship it over to their programming affiliate. That does not look like a legitimate price increase.

The problem is probably even bigger than just access to the programming. It is the price of the programming itself. Network TV is still watched by more than 60 percent of consumers. Prices for network programming went up 2 percent last year. When you have to buy a channel on its own, a premium channel, HBO, prices went up 2 percent last year. The other programming, 19 percent.

There is something wrong here with the bottleneck of cable-owned programming and a few large cable companies controlling the systems. So we are hoping these gentlemen's companies will get in and offer consumers choice, but we would urge you to look more carefully at the programming issues, the other monopolistic practices in the cable industry and at least help us by putting a lid on rates until these folks can get their systems up and running.

Senator KOHL. Thank you, Mr. Chairman. I have no more questions of this panel.

Senator DEWINE. Thank you very much.

Mr. Kimmelman, will the FCC rates for interconnection promote the right type of competition, that is, facilities-based?

Mr. KIMMELMAN. Well, as I think you have heard this afternoon, Mr. Chairman, it depends how you define what is facilities-based competition. They will certainly promote a certain type of unbundled network elements that take advantage of the incumbent monopolist network, but also, I believe there is an incentive there for the new entrants to build. But if you are looking for a com-

pletely built system, from start to finish, I think the AT&T's of the world have the exact same problems that the GTE's of the world have going into the cable business. It is very expensive, takes a long time.

I think that the FCC is on the right track here, given the way the market is developing. The problem you have here is, contrary to what was sold to Congress by the proponents of this legislation, you do not have a market-driven competitive system. You have very much a regulatory restructuring of an industry in the hopes of developing competition. So the market forces are not really driving this. A lot of it is being driven by these regulatory decisions, now all tied up in courts. It is very, very difficult. Until you get the market pushing the process, you are going to have the glass half full/half empty fights for a long time.

Senator DEWINE. The system you have described, that should not come as a shock to anyone, based on our past history, should it?

Mr. KIMMELMAN. No, it should not, Mr. Chairman. This is going to be a very tedious process and this is why I go back to the fundamental issue, and telephony, I think, is not exactly the pace of competition. You can open networks. You can say, please come. You cannot force entrepreneurs to do what you would like them to do in the policy process. The market has to create that pressure.

So you can set the framework. The most important thing is to make sure that you have the mechanisms, I believe, to protect consumers—reasonable prices, reasonable choice—and to prevent industries from consolidating and taking competitors out of play. So it is antitrust, it is preventing mergers, it is preventing consolidation until these processes get played out.

Senator DEWINE. Does anybody else on the panel want to take a shot at that? Mr. Barr? Either one of you. We will give both of you a chance.

Mr. BARR. I agree with—is it Shapely or Shapleigh?

Mr. SHAPLEIGH. Shapleigh.

Mr. BARR. Shapleigh. I agree with——

Senator DEWINE. We have done it both ways today.

Mr. SHAPLEIGH. "Shapely" is usually applied to my wife and daughters. [Laughter.]

Mr. BARR. I would like to agree with something he said, which is the whole thrust of the statute was to induce facilities-based competition. That is where you get real competition. The other two means of entry were meant by the statute to be stepping stones to that. Resale was supposed to let them build up a client base, a customer base that would make it more effective for them to build out to them, so it was a stopgap measure. I believe unbundling was there so they did not have to come in with everything at once. They could lease a switch. They could put in some transport, put in their own switch.

But the FCC has come along and set the discount so low on unbundled elements, in our case, a 60-percent reduction, way below cost, and allowed the stringing together of all the unbundled elements, so you are really just buying a whole system. You are not putting in anything of your own. That will prevent investment by either the incumbent or the newcomer. It is not going to generate

competition. If the wholesale price is set too low, you stifle competition and all you have is a relabeling game going on.

Senator DEWINE. Mr. Shapleigh.

Mr. SHAPLEIGH. In answer to your original question on the FCC setting interconnection rates, it was not until the FCC set interconnection rates in August of last year that we got anywhere with the RBOC's in negotiating interconnection agreements. When the FCC came out with their order, despite the later action of the eighth circuit, that is what specifically led to the conclusion of successful negotiations in the case of Brooks.

There is a real role, Mr. Chairman, for the FCC and the Department of Justice as we are trying to move from a 100-percent monopoly to competition. They cannot just abandon and get rid of regulation right away. You have to manage that process for a little while longer, and then at some point, as Mr. Kimmelman points out, the market is more divided. The market forces can take over and at that point we will have true competition.

Senator DEWINE. Anyone else? Mr. Rosenblum.

Mr. ROSENBLUM. Mr. Chairman, I would also like to jump in on that a little bit. First of all, I think that in AT&T's case, we see that something like facilities-based competition is the ideal result. We do not foresee being a competitor in the local exchange merely on the basis of slapping our brand name over somebody else's service. The reason why customers want the choice in the local exchange is so they do not have to buy the same incumbent company's service in the future, and in the long term, that is not the way we are going to succeed in providing it.

That being said, the statute does not, in our view, favor facilities-based competition over others or set the other two entry vehicles as mere stepping stones to facilities-based competition, even though, Mr. Chairman, that is probably the way we planned to do it. This is the same argument that GTE has made before. This is not an argument against the FCC. The act, in our view, could not be clearer that all three entry paths are given equal treatment, and when this was argued to the eighth circuit last year, even the eighth circuit agreed that the argument was incorrect and that the act equally protects all those entry paths.

Senator DEWINE. All right.

Mr. KIMMELMAN. Could I just add, Mr. Chairman?

Senator DEWINE. Yes, Mr. Kimmelman.

Mr. KIMMELMAN. As a reminder, when the long distance market was opened up, it certainly was not this pin-dropping fiber optic network overnight. You may recall there were an awful lot of people cherry picking and picking off customers from AT&T and probably thousands a day at some point. It took a long time. There was a lot of resale. There was a lot of network sharing. The skewed distribution of revenue that Mr. Barr referred to in the local market, of very few customers generating a lot of revenue, it is not as skewed but it is quite skewed in long distance. About 10 percent of customers generate about 40 percent or 45 percent of the revenue.

So it was the same problem in long distance and we got there by, step by step, going from working off of the AT&T monopoly network, breaking it apart, and ultimately getting market forces driv-

ing facilities-based competition. We now have multiple fiber optic networks across the country for long distance.

Senator DEWINE. Mr. Shapleigh, Brooks Fiber is not exactly a household name or word, or at least it has not become that yet. With your somewhat limited resources and, forgive me, lack of name recognition, how have you managed to succeed in entering so many local markets? You touched on that a little earlier, but I would like you to go into that.

Mr. SHAPLEIGH. Starting out at 50,000 feet, Senator, I think, frankly, it was the wisdom of Congress in enacting the Telecom Act of 1996, realizing that if you open the markets and unleash what America is the best at, which is the entrepreneurism fueled by the capital markets, if you just gave companies like Brooks Fiber the chance, then we would find a way to bring needed services to a market which is demanding those services. So I think that is part of it.

I also think it has been the actions of the FCC and the State commissions operating under the act as it stands today. The Department of Justice, while I believe they need to step up their efforts, even to the point of investigating some of the activities of the incumbent monopolies, they have done a very diligent job in this area. I know I get a lot of calls from the FCC and the Department of Justice. They are working hard.

I think technology has a certain amount to do with it. The cost of fiber in the electronics has come down so it is economically feasible and I just think after 100 years of monopoly, there is some demand out there, as well. I promise you, we are more of a household name in Grand Rapids, MI, than we are in the U.S. Senate at this point.

Senator DEWINE. I wonder if we could get back, in conclusion, to some specifics. Senator Kohl asked about your entry into the cable market and I will tell you that when I travel in Ohio and when I read some of our mail and get calls, some of the most irate people are people who are talking about the cable system, and it is not always rates. I mean, it has to do with things such as you will be at your house at 9:45 a.m. and if you are not there at 9:45 a.m. and you are there at 9:48 a.m. when our people come, well, we will see you in 2 weeks. It is things such as that, and that is a real live case that we have in Ohio and we get a lot of these. I get a lot of irate constituents about that.

I do not come away from this hearing with much of an understanding or feeling of how each of your companies, those that are moving into trying to get into cable, how far you are into it. We are not asking you for trade secrets, but it would be interesting to know how many households each one of you are into, those of you who are getting into households, and where are they. Mr. Allen.

Mr. ALLEN. Again, I will be glad to start here. First of all, we will come to your home and we will come within any 2-hour period that you would like.

Senator DEWINE. Well, 2 hours and 45 minutes are better than 15 minutes, I guess.

Mr. ALLEN. We will put covers over our shoes when we walk into your house to stay clean and I will assure you, we would be glad to have you as a customer.

Senator DEWINE. Not where I live, you will not, but that is another story, or maybe you will.

Mr. ALLEN. We have been very aggressive over the last couple years.

Senator DEWINE. How many households are you into, though? That is the question.

Mr. ALLEN. We passed now over a million households, and I am pleased to say that where we have adequate programming, as we discussed earlier, which is really the big issue, we have been successful, on average, of getting in 3 out of 10 homes, so we are doing well.

Senator DEWINE. Three out of—I am sorry.

Mr. ALLEN. Three out of ten homes that we pass.

Senator DEWINE. What does that mean? I do not know what that means. You are in 3 out of 10 homes——

Mr. ALLEN. That we pass. Where we provide service, we have been successful at winning 3 out of 10 customers.

Senator DEWINE. Where you provide cable service.

Mr. ALLEN. Where we provide it. We are now in 30 communities. We are approved in 50 and we are moving as fast as our little legs will take us.

Senator DEWINE. And you are at 1 million customers, you say, cable?

Mr. ALLEN. We pass 1 million customers.

Senator DEWINE. You pass?

Mr. ALLEN. Correct.

Senator DEWINE. Who else wants to give us enlightenment on this?

Mr. BARR. We have, as I say, two communities. I do not know how many homes are passed, but we have 30,000 customers in our 2 communities that we serve. In addition, we have invested approximately half-a-billion dollars in a nationwide high-speed data network capable of handling video and we are in a joint venture with other LEX and Disney to provide Americast service over our video, so that is a way of developing content.

Senator DEWINE. Mr. Rosenblum.

Mr. ROSENBLUM. Mr. Chairman, we are not in the cable TV business right now for the reason we are not yet in the local telephone business, which is we inherited the part of the Bell system that does not include those wires into people's homes and businesses, but we are trying to figure out how to overcome that now.

Senator DEWINE. Mr. Shapleigh.

Mr. SHAPLEIGH. Not in the cable business.

Senator DEWINE. Plans.

Mr. SHAPLEIGH. No plans. It has been tough enough competing with 100-year-old monopolies.

Senator DEWINE. Senator Kohl.

Senator KOHL. No questions.

Senator DEWINE. Thank you all very much. You have been very patient and kept your good humor and we appreciate both qualities and appreciate the information.

I think one of the things that we can do and one of the obligations of this committee is to have oversight. I think, frankly, Congress does not do enough of it. We pass laws and then we do not

look back and see how we are doing. So this committee will continue to be very active in regard to oversight. We may want to have a separate hearing, for example, later on in regard to cable. We may want to look at that. Senator Kohl and I will confer about that, as well as the other members of the committee, and take a look at that.

But I think that it has been described very well, I think, by all five of you, as well as the two previous individuals to testify, Mr. Hundt and Mr. Klein, that this is not an easy task. No one ever thought it was going to be easy. We all have, at least from a broad philosophical point of view, the same goal, and that is more competition. We all know competition is good. It is a question of how we get there. We start with a culture and climate and a long, long history that has not been very competitive, so we knew it was going to be difficult.

But not only does the FCC have a role in trying to prod and push and make sure that continues on, I think the Justice Department does, as well. But in addition to those two, I think this subcommittee does and I think this Congress does and we intend to continue to do that.

So again, we appreciate your testimony and appreciate you being here with us today. Thank you very much.

[Whereupon, at 3:45 p.m., the subcommittee was adjourned.]

also understand that Bell Atlantic's average basic rate is $11.69. Is this true? Would this mean that new entrants will lose money on every subscriber? Is this a nationwide situation, or is it confined to my own region?

Question 5. We passed the Telecom Act so that the local consumer would reap the benefits of increased competition in the local and long distance market, yet things have not changed all that much. Have we given the local companies enough incentive to open up their markets to more competition? Have the local and long distance companies fully complied with the law as it now stands?

Question 6. I have heard some concerns from local Internet Service Providers that upon entering the Internet service business, some Regional Bells have tried to raise access rates and use their monopoly status to make it difficult for these other local providers to compete. Even though they may have to charge their own ISP the same rate as the others, they still have a strong incentive to charge the higher rate. Are these concerns valid? Even if this has not actually happened, how can we ensure that local monopolies cannot use their control of access lines to gain an unbeatable competitive advantage in the Internet service? Because of the nature of these unlimited access plans, Internet Service Providers are using a large amount of resources—should we be charging them more because of this, or are there other ways of dealing with this problem?

Question 7. Now that I've mentioned one problem regarding the Internet, this raises a broader concern. When we passed the Act, did we adequately provide for the way modern technology is putting new stresses on the system and shifting cost burdens in new and unpredictable ways? Do we need to amend the Act to take into account the way in which consumers are now using telephone lines to access the Internet, often with unlimited service plans and little incentive to hang up when they are not using their service?

RESPONSE OF BARRY K. ALLEN TO A QUESTION FROM SENATOR THURMOND

AMERITECH,
Chicago, IL, November 7, 1997.

Hon. STROM THURMOND,
U.S. Senate,
Washington, DC.

DEAR SENATOR THURMOND: Thank you for the opportunity to testify on September 17, 1997 before the Subcommittee on Antitrust, Business Rights and Competition. This letter responds to your written question in relation to that hearing. I have repeated your question for convenience.

Question. If Ameritech gets into long distance in its local market, does it have immediate plans to attempt to get into providing long distance in markets outside of its established local service region?

Answer. The Telecommunications Act of 1996 authorized Ameritech and other Regional Bell Operating Companies to provide long-distance service outside of their local service areas upon enactment. Pursuant to this authority, Ameritech offers long-distance service outside its region on a limited basis. We do not plan to immediately increase such offerings upon receiving in-region, long-distance authority.

I hope that this answer will help to facilitate the Subcommittee's tremendously important function of overseeing the implementation of the Telecommunications Act of 1996. If I can be of any further assistance to the Subcommittee, please do not hesitate to contact me.

Sincerely,

BARRY K. ALLEN,
Executive Vice President.

RESPONSES OF BARRY K. ALLEN TO QUESTIONS FROM SENATOR HATCH

AMERITECH,
Chicago, IL, November 7, 1997.

Hon. ORRIN G. HATCH,
Chairman, Senate Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for the opportunity to testify on September 17, 1997 before the Subcommittee on Antitrust, Business Rights and Competition. This letter responds to your written questions in relation to that hearing. I have repeated your questions for convenience.

Question 1. One puzzling question is, why aren't more Bells competing, as opposed to merging, with each other? Do you have any plans to compete with other regional Bell companies, especially those adjacent to you? Why or why not?

Answer 1. Ameritech does intend to compete with other Regional Bells in their home markets. Just this week Ameritech proudly announced its intent to compete with Southwestern Bell Telephone Company, the incumbent local provider in the state of Missouri. Pending tariffing approvals by the state Public Service Commission, Ameritech will offer local phone service, long distance cellular, paging and wireless data services to residential customers in the St. Louis metropolitan area. I am also aware that BellSouth has applied for certification to be a local competitor in eight states, including Illinois and Ohio, which are in Ameritech's region. Further, SBC is offering customers in Texas an alternative to GTE.

Ameritech's primary focus is on providing its existing customers with a full menu of communications services: local, long-distance, cable, Internet, cellular, paging and security monitoring. We believe long-distance is a critical component of that menu. Therefore, we are focusing our resources and efforts on opening the local market to competition and obtaining authority to offer in-region, long distance service.

Question 2. Are all of your operations support system functions provided to competitive local carriers being done so in substantially the same time and manner as your company provides those functions to itself? What evidence can your company point to in supporting this assertion?

Answer 2. Yes, all our operations support systems provide prompt service to competing local carriers as required by the Act. Our competitors receive access to the same databases and information used by our retail units necessary to place an order within a time frame that is at parity with the access that Ameritech provides to itself Ameritech has made substantial investments to educate competing carriers about how to interface successfully with our systems. Moreover, we are continuously improving and upgrading our systems' effectiveness. Since April 1997, Ameritech has increased by almost eight-fold the number of employees who handle the approximately 5,000 service requests that we now receive each day from competing local carriers. As the number of service requests grows, Ameritech will continue to deploy the resources necessary to meet that demand.

Question 3. I understand that you have a separate subsidiary formed to provide customers with local and long-distance service. Does this subsidiary have support systems that interface with your local telephone operations? Do these systems work better than those you have with your competitors?

Answer 3. Ameritech does have a separate subsidiary, Ameritech Communications, Inc. ("ACI"), set up to provide customers with long-distance service. Such a separate subsidiary is required by the Telecommunications Act.

Just as competing local exchange carriers interface directly with Ameritech's support systems for local telephone service, ACI will also establish its local telephone service interfaces by connecting to these same or equivalent support systems. None of Ameritech's interfaces with ACI advantage it over, or discriminate against other competitors. In addition, ACI will pay the same access charges that its long-distance competitors currently pay to connect their long-distance traffic to Ameritech's local network.

I hope that these answers will help to facilitate the Subcommittee's tremendously important function of overseeing the implementation of the 1996 Telecommunications Act. If I can be of any further assistance to the Subcommittee, please do not hesitate to contact me.

Sincerely,

BARRY K. ALLEN,
Executive Vice President.

RESPONSES OF BARRY K. ALLEN TO QUESTIONS FROM SENATOR TORRICELLI

AMERITECH,
Chicago, IL, November 10, 1997.

Hon. ROBERT G. TORRICELLI,
U.S. Senate,
Washington, DC.

DEAR SENATOR TORRICELLI: Thank you for the opportunity to testify on September 17, 1997 before the Subcommittee on Antitrust, Business Rights and Competition. This letter responds to your written questions in relation to that hearing. I have repeated your questions for convenience.

Question 1. I understand that not a single Regional Bell Operating Company has received approval to provide long-distance service.

Some of the long-distance carriers suggest that the delay in the approval process may be due to an attempt by the RBOCs to stifle competition. Do you have any reason to believe that this is the case?

Answer 1. As far as Ameritech is concerned, nothing could be further from the truth. The facts support the widely held view among regulators, including the Department of Justice and the Federal Communications Commission, and others in the industry that Ameritech is doing more than any other local exchange company to open its local market to competition.[1] For example, Ameritech has executed more than 70 interconnection agreements with major long-distance carriers, including AT&T, Sprint and MCI, and with other competitive local exchange carriers (CLECs) across its five-state region. In just 10 months, the number of customers served by our competitors has grown from 41,000 to 460,000. In addition to these 460,000 customers, we estimate that our competitors use their own facilities to serve several hundred thousands more within our region. These facts clearly demonstrate that Ameritech faces significant competition. Accordingly, we believe that the delay in the approval process is in large part the result of micromanagement by regulators and the imposition of gratuitous regulations not required by the Act.

Question 2. In New Jersey, I understand that the Board of Public Utilities set the price that new entrants must pay Bell Atlantic for the local loop at $16.20. Yet, I also understand that Bell Atlantic's average basic rate is $11.69. Is this true? Would this mean that new entrants will lose money on every subscriber? Is this a nationwide situation, or is it confined to my own region?

Answer 2. Ameritech has no information with regard to the local loop cost structure for Bell Atlantic or any action taken by the New Jersey Board of Public Utilities. In the Ameritech region, new entrants pay an average loop rate of approximately $9.52 for unbundled loops, which is far less than Ameritech's true economic cost to provision those loops.

Question 3. Although local competition has opened up, the Regional Bells have seemingly not chosen to compete with one another. Why have these companies chosen not to compete despite their obvious know-how? Why did Bell Atlantic merge with NYNEX, for instance, instead of trying to serve the disgruntled New York consumers with the same efficiency and quality that they have given New Jersey?

Answer 3. Ameritech does intend to compete with other Regional Bells in their home markets. Just this week Ameritech proudly announced its intent to compete with Southwestern Bell Telephone Company (SBC), the incumbent local provider in the state of Missouri. Pending tariffing approvals by the state Public Service Commission, Ameritech will offer local phone service, long distance, cellular, paging and wireless data services to residential customers in the St. Louis metropolitan area.

Ameritech's primary focus is to provide its existing customers with a full menu of communications services. We believe long-distance is a critical component of that menu. For this reason, we have focused our resources on opening the local market to competition and obtaining authority to provide in-region, long-distance service.

Although it is not a requirement of the Telecommunications Act, I am aware that BellSouth has applied for certification to be a local competitor in eight states, including Illinois and Ohio, which are in Ameritech's region. Further, SBC is offering customers in Texas an alternative to GTE.

Finally, Ameritech has no information, and therefore I am unable to comment on why Bell Atlantic and NYNEX merged.

Question 4. We passed the Telecom Act so that the local consumer would reap the benefits of increased competition in the local and long distance market, yet things have not changed all that much. Have we given the local companies enough incentive to open up their markets to more competition? Have the local and long distance companies fully complied with the law as it now stands?

Answer 4. I must respectfully disagree that things have not changed since passage of the Telecommunications Act. In Ameritech's region much has changed. Local competition is no longer a theory, it has arrived. As I stated in my testimony, 38 companies now provide local service in competition with Ameritech. The number of customers served by competitors in Ameritech's region has grown from 41,000 to 460,000 in just 10 months. 3,000 consumers each day are now choosing one of Ameritech's competitors for local service.

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[1] This is borne out by a United States Telephone Association study showing that a little less than half of the local competition that exists nationwide takes place in Ameritech's home region. It's also supported by the oral statements made at the September 17 subcommittee hearings by Joel Klein, Justice Department, and Reed Hundt, the chairman of the FCC.

I believe the Telecommunications Act of 1996 is a good law. The problem is the law is only half-implemented—the local half. The law was designed, however, to open all telecommunications markets to competition, and that includes the long-distance market. There has been a propensity at the FCC and elsewhere to regulate our entry into long distance well beyond what is required under the statute. It is time for regulators to stop micro managing and let the markets work. You will then see exactly what the Act you passed intended: innovations, more jobs and opportunity, and competitive prices.

Question 5. I have some concerns from local Internet Service Providers that upon entering the Internet service business, some Regional Bells have tried to raise access rates and use their monopoly status to make it difficult for these other local providers to compete. Even though they may have to charge their own ISP the same rate as the others, they still have a strong incentive to charge the higher rate. Are these concerns valid? Even if this has not actually happened, how can we ensure that local monopolies cannot use their control of access lines to gain an unbeatable competitive advantage in the Internet service? Because of the nature of these unlimited access plans, Internet Service Providers are using a large amount of resources—should we be charging them more because of this, or are there other ways of dealing with this problem?

Answer 5. There is certainly no basis for the claim that Ameritech is raising service rates in order to limit the ability of Internet Service Providers (ISPs) to compete. Ameritech has no special pricing rules for ISPs; this group of customers pays the same rates as other customers that purchase these services, including Ameritech's own ISP. Since these rates are tariffed at the federal and state levels any price increase would affect both ISP and non-ISP users of such services. Moreover, regulations do not permit Ameritech to raise prices indiscriminately. Increases must either be approved in tariffs or must comply with price cap flexibility restrictions. Aside from regulatory safeguards, the marketplace for these services is already extremely competitive, thus ensuring that ISPs would be provided such services on reasonable and nondiscriminatory terms and conditions.

In some cases more than 90 percent of Ameritech's local traffic that it "hands off" to CLECs and for which CLECs seek compensation is that traffic which they in turn direct to ISPs. Under reciprocal compensation agreements that we have with CLECs, we are required to pay each other for local calls that we handle and terminate over our respective networks. Ameritech believes that ISP and other forms of enhanced service traffic are access, not local traffic. Ameritech, therefore, contends that it should not have to pay CLECs reciprocal compensation for these calls. Ameritech further opposes the continuance by the FCC of its exemption for ISPs, which insulates them from paying access charges to local phone companies, like Ameritech, for handling that traffic. The growth in Internet traffic has been largely responsible for generating additional and significant traffic loads on the public switched telephone network, thereby increasing its susceptibility to service outages. At a minimum, the providers of these services should be required to pay access charges just like other providers do so that they can access local telephone networks and offer their services to more consumers.

Question 6. Now that I've mentioned one problem regarding the Internet, this raises a broader concern.

When we passed the Act, did we adequately provide for the way modern technology is putting new stresses on the system and shifting cost burdens in new and unpredictable ways? Do we need to amend the Act to take into account the way in which consumers are now using telephone lines to access the Internet, often with unlimited service plans and little incentive to hang up when they are not using their service?

Answer 6. As I stated earlier, the Telecommunications Act of 1996 is a good law. By emphasizing market-based solutions rather than regulation, the Act affords carriers a sufficient amount of flexibility to utilize technology as cost efficiently as possible. Ameritech does not believe at this time that the Act needs to be amended to compensate for the anticipated results of a deregulated marketplace, including increased customer demand and new technologies that implicate the allocation and sharing of costs.

I hope that these answers will help to facilitate the Subcommittee's tremendously important function of overseeing the implementation of the Telecommunications Act of 1996. If I can be of any further assistance to the Subcommittee, please do not hesitate to contact me.

Sincerely,

BARRY K. ALLEN,
Executive Vice President.

RESPONSES OF MARK C. ROSENBLUM TO QUESTIONS FROM SENATOR HATCH

Question 1. One of the most difficult, but important, policy questions in the telecommunications area is how to ensure low-cost residential telephone service in non-urban areas, where it generally is much more expensive to provide that service. This is an issue that is especially important in rural states, including Utah, and an issue in which I have taken particular interest. Please explain in detail what efforts AT&T is making to support so-called "universal service" at a reasonable price? In your view, how should the burden of providing below-cost residential, local service be shared amongst various providers?

Answer 1. AT&T has been an active participant before the FCC and state regulatory commissions in advocating and supporting policies to achieve the 1996 Telecommunications Act's goal of promoting local competition while advancing universal service. Today, the long distance industry and its customers carry the entire burden of funding universal service, i.e., making local telephone rates affordable for subscribers in high cost areas and for low-income consumers, through vastly inflated access charges paid to incumbent monopoly local exchange carriers. In the 1996 Act, Congress recognized that continuing the present system is fundamentally incompatible with the Act's goal of opening local markets to competition.

In Section 254 of the Act, Congress thus provided the basic framework for a new competitively neutral system of ensuring universal, affordable service. It directed the FCC to work with the states to create a system in which all universal service subsidies are explicit, funded by all carriers, and available to all eligible new entrants in local markets. The Act gives both the FCC and the states the ability to maintain universal service at affordable rates, including in those non-urban areas where it is generally more expensive to provide telephone service.

In its May 8, 1997 Universal Service Order, the FCC established a high cost fund, supported by assessments against carriers' interstate retail revenues, that provides support for subscribers living in high cost areas. The federal fund is designed to provide 25 percent of the funds needed for "high cost" subsidy; each state has the option to establish its own intrastate mechanism for the remaining 75 percent support. The FCC also expanded the Lifeline program to ensure that low-income subscribers will be able to obtain universal service at rates that are affordable to them.

AT&T's strong preference would have been for the FCC to adopt a unified federal fund that includes both interstate and intrastate revenues in the funding base and that provides 100 percent of the support required for high cost areas. However, the states did not reach agreement on this issue, and the Joint Board declined to make a recommendation to the FCC to include intrastate revenues in the funding base. That is how the 25/75 allocation arose.

In these circumstances, AT&T has urged a compromise proposal whereby each state could include interstate revenues billed in its state, along with intrastate revenues, in the funding base for its intrastate funding mechanism, provided that there are corresponding reductions in intrastate access charges in that state. This will ameliorate any impact of a smaller federal fund on any given state.

AT&T has also urged the FCC to reexamine its current policy exempting "enhanced service" providers (including Internet providers) from the duty to contribute to universal service funding mechanisms.

Question 2. Many have suggested that AT&T and other long distance companies are actually refraining from aggressive entry into the local markets so as to forestall the day when the regional Bells gain access into the long distance market—a strategy which appears to be more sensible in light of Mr. Hundt's statements that, in his view, long distance entry should not be granted to a local Bell until a major long distance player has entered the relevant local market. How would you respond to these claims? Please provide for me the extent to which AT&T has actually sought interconnection in particular local markets.

Answer 2. No company has less incentive than AT&T to "refrain[] from aggressive entry into the local markets so as to forestall the day when the regional Bells gain access into the long distance market," and AT&T is pursuing no such strategy. Survey after survey confirms that customers overwhelmingly want the opportunity to choose a single provider for all their telecommunications needs. As the carrier with the greatest number of customers, AT&T has the most to gain by seeking viable means to enter local markets as promptly and broadly as possible—and the most to lose if it followed the delaying strategy suggested by some. To the contrary, it is the Bell companies that hold the keys to long distance authorization (and, regrettably, to AT&T's viable local entry). If the Bell companies comply with their legal obligations, and irreversibly open their markets to competition, they will obtain authority to provide long distance services, regardless of whether the long distance providers choose to enter their local markets. This is clear for at least two reasons.

First, the FCC has interpreted Section 271 of the Act to ensure that Bell company long distance authority will not depend on entry into local markets by particular long distance companies. Thus, the FCC construed the requirement that Bell companies actually provide each of the checklist items to require only that a Bell company be presently ready to furnish an item if no competing provider has requested that item. In addition, the FCC determined that the requirement that a Bell company face a facilities-based competitor can be satisfied by a provider that does not achieve a specified level of geographic or market penetration, or utilize any facilities other than the Bell company's unbundled network elements. as a result, the long distance companies could not, consistent with these findings, delay Bell company entry into the long distance market by declining to enter local markets.

Second, the long distance companies are not the only carriers seeking to provide local exchange services in competition with the Bell companies. Competitive access providers, wireless providers, and numerous other would-be local services providers are working to enter local markets. These companies have no significant long distance business to "protect," and no conceivable reason to delay their entry into the lucrative local markets, other than the hurdles being raised by the incumbent providers. Because entry into local markets by these companies alone could trigger long distance authorization for the Bell companies, the long distance carriers have no incentive to delay their own local market entry.

In this regard, entry by the Bell companies and GTE into each other's markets could confirm that the incumbent providers have opened their markets to competition. It is telling that these large and sophisticated carriers, with vast local service experience, and, in many cases, geographic proximity to each other's markets, have declined to enter each other's markets.

For its part, AT&T sought certification to provide local service in each of the 50 states and the District of Columbia shortly after passage of the Telecommunications Act of 1996. AT&T also requested, pursuant to the terms of the Act, access and interconnection from the Bell companies, GTE, and SNET, who together serve the overwhelming majority of customers. This request triggered negotiations with the incumbents to set the terms of AT&T's entry into the local markets using each of the three modes of entry established by the Act (i.e., resale, unbundled network elements, and competitive facilities). The negotiations were detailed and difficult, and in each state arbitration proceedings were needed to force the incumbents to open their markets more fully than they would otherwise have done. In many states, however, critical terms such as pricing and the availability of unbundled network elements are still not set, making the timing and sequence of AT&T's local market entries uncertain. And while the opening of the local markets to competition has turned out to be much more difficult and costly to accomplish than anyone, including new entrants and incumbents, imagined, the single largest barrier to entry remains the reticence of the incumbent providers to implement the Act's checklist requirements in ways that could lead to meaningful erosion of their local monopolies.

Question 3. Explain why you believe is so important that the RBOCs provide you with automated support systems for orders and other customer service information? Why won't manual systems suffice?

Answer 3. Automated support systems are essential to meaningful competitive entry into local markets, because only automated systems can afford competing carriers the speed and accuracy in the processing of orders and information that they need to offer efficient, high quality local exchange services. Specifically, regardless of how a carrier chooses to enter local exchange markets—whether through the resale of the local exchange carrier's services, the use of the local exchange carrier's unbundled network elements, the use of competing facilities, or, most likely, some combination of these entry vehicles—the new entrant will remain critically dependent on the incumbent provider in connection with the pre-ordering, ordering, provisioning, maintenance, and billing for services, facilities, interconnection, and number portability.

As actual marketplace experience proves, only automate support systems can provide the accurate and timely information and processing that would be required to support the volume of orders that would be generated in a competitive market. By contrast, manual processing introduces delay and error in the processing of new entrant orders, and makes more difficult the expansions in system capacity that would be needed to support growing competitive entry. Thus, both the FCC and Department of Justice have property found that manual processing significantly undercuts an incumbent provider's ability to provide the nondiscriminatory access and interconnection required by the Act.

These concerns are, perhaps, most starkly illustrated by AT&T's own experience in California. When AT&T sought to resell the services of Pacific Bell earlier this year, Pacific Bell's systems proved wholly inadequate, notwithstanding months of

advance notice and demand forecasts, on-going work with Pacific Bell, and assurances from Pacific Bell that its systems could handle the forecasted demand. Even though AT&T was sending a only few hundred orders per day to Pacific—well below Pacific's stated capacity, and an insignificant portion of Pacific Bell's 15 million access lines in California—significant backlogs developed to the point of forcing AT&T to suspend its marketing efforts. Yet AT&T's orders reflected only a tiny fraction of the demand that Pacific Bell would face in a truly competitive market—and, indeed, only a fraction of the demand that Pacific's systems routinely handled for its own local customers.

RESPONSES OF MARK C. ROSENBLUM TO QUESTIONS FROM SENATOR TORRICELLI

Question 1. I understand that not a single Regional Bell Operating Company has received approval to provide long distance service. Some of the long distance carriers suggest that the delay in the approval process may be due to an attempt by the RBOCs to stifle competition. Do you have any reason to believe that this is the case?

Answer 1. No Bell company has yet received authority to provide long distance service in its region because no Bell company has yet irreversibly opened its local markets to competition. There are two reasons for this.

First, the opening of the local markets to competition has turned out to be much more difficult and costly to accomplish than anyone, including new entrants and incumbents, imagined. Apart from the extensive regulatory activity required to gain the authority and approval of the tariffs and interconnection agreements necessary to provide local service, there are a tremendous number of technical challenges that must be overcome to enable competitive entry. It would thus take some time to bring competition to the local exchange even if all parties were working together in good faith in an attempt to achieve that objective.

Second, and most importantly, however, the incumbent local exchange carriers have in may instances proven to be resolutely unwilling to take the steps required by the Act that would make their markets truly open to new entrants, and that would thereby threaten their monopoly control. They quite simply have failed to provide potential competitors with many of the nondiscriminatory interconnections and arrangements that are mandated by the Act and the FCC's regulations, and that are critically necessary to provide competitive services. They have resorted to numerous strategies to avoid opening their markets: they withhold essential cooperation from competitors to slow competitive entry; they incessantly use legal process to delay their obligation to open their markets and to create uncertainly, inconsistency, and instability in the interpretation and application of what are supposed to be uniform national requirements; and, in the end, when they lose legal battles, they often simply defy the explicit orders of regulators.

These efforts to stifle competition lie at the heart of why no Bell company has yet obtained long distance authorization from the FCC. And that is as the Act contemplates. Section 271 of the Act is designed to provide the Bell companies incentive to comply their obligation to open their local markets to competition, as well as to protect the long distance market and its consumers from their ability to leverage their local monopolies so long as they refuse to relinquish those monopolies.

Question 2. In New Jersey, I understand that the Board of Public Utilities set the price that new entrants must pay Bell Atlantic for the local loop at $16.20. Yet I also understand that Bell Atlantic's average basic rate is $11.69. Is this true? Would this mean that new entrants will lose money on every subscriber? Is this a nationwide situation, or is it confined to my own region?

Answer 2. Initially, an arbitrator appointed by the New Jersey Board of Public Utilities ("BPU") to conduct an arbitration between Bell Atlantic and AT&T pursuant to section 252 of the Act calculated the average monthly loop rate that AT&T must pay Bell Atlantic at $11.76. The BPU, however, subsequently (and, in our view, improperly) determined to replace the arbitrator's rate with the $16.21 average loop rate referenced in your question. In addition, as reported by Bell Atlantic, the average monthly basic revenue it receives is $11.70 for residential lines and $17.41 for business lines.[1]

However, the actual monthly cost of providing local service for new entrants is actually much higher than the BPU-established $16.21 rate, because new entrants must also use and pay for other network elements, whether provided by Bell Atlantic, by other firms, or built by the new entrant. New entrants will also incur their own retail costs. In addition to the loop rate, the BPU-established rates that new

[1] These revenue calculations include the average basic rate, the subscriber line charge and the charge for tough tone service.

entrants must pay when purchasing other network elements from Bell Atlantic. For example, it established a monthly switch port rate of $1.90 (displacing the arbitrator's $1.10 rate) and a switch usage rate of 0.432 cents per minute (more than doubling the arbitrator's rate of 0.2 cents).

Based on our calculations, the BPU's decision means that AT&T will incur costs of roughly $24 per line per month for residential customers and $29 per line per month for business customers. Under these circumstances, it will obviously be more difficult for any new entrant to compete successfully in the New Jersey local exchange market using network elements purchased from Bell Atlantic than it would have been under the arbitrator's decision.

The BPU's ruling, however, does not necessarily mean that a new entrant will lose money on "every" subscriber. In its Local Competition Order, the FCC had determined that, under the Act, competitors could order combinations of unbundled elements from incumbent LECs, and could use those unbundled elements to provide, among other things, their own vertical features and access services. Thus, had the FCC's rules remained intact, some of the disparity between costs and revenues that exist as a result of the New Jersey BPU's decision could be eliminated through vertical service and access revenues that a new entrant purchasing combinations of unbundled elements could achieve. However, the Eighth Circuit's decision on rehearing in *Iowa Utilities Board* v. *FCC* threatens the viability of this approach to market entry. That is because, under the Eighth Circuit's October 14 ruling, incumbent LECs are now free to disassemble already combined elements in their networks and to require competitors to reassemble the elements themselves, for no reason other than to increase the costs of new entrants.

It is too early to determine whether the pricing disparity exacerbated by the New Jersey BPU will become a nationwide problem. Like New Jersey, most states initially set favorable cost-based recurring rates for unbundled network elements, and AT&T is hopeful that these rates will continue. In a number of states, however, nonrecurring charges (such as installation and order processing charges) have been set at levels that could also inhibit competition. Pacific Bell in California, for example, has imposed an amalgam of nonrecurring charges that total $247 per line for competitors that purchase unbundled elements.

Question 3. Although local competition has been opened up, the Regional Bells have not chosen to compete with one another. Why have these companies chosen not to compete despite their obvious know-how? Why did Bell Atlantic merge with NYNEX, for instance, instead of trying to serve the disgruntled New York consumers with the same efficiency and quality that they have given New Jersey?

Answer 3. As the question suggests, there is no legal obstacle to a Bell company, such as Ameritech or Bell Atlantic, entering the market to provide local and access services in the territory served by another Bell company, such as BellSouth or Southwestern Bell. That no Bell company has chosen to provide competing local or access services in the territory served by another Bell company is compelling evidence that the incumbent's markets are not, in fact, open to competition. More specifically, like any other potential entrant, a Bell company that seeks to enter the territory served by another Bell company would be completely dependent on the incumbent's compliance with its obligations to provide, in a nondiscriminatory manner at cost-based rates, interconnection and access to unbundled network elements, and service for resale at wholesale rates, as Congress mandated in the Telecommunications Act of 1996. Potential entrants, however, including especially AT&T and other carriers that are perceived to present the most significant competitive threats, have encountered extraordinary resistance on the part of the incumbents from complying with these legal obligations. Thus, one very real possibility is that each Bell company realizes that it would encounter similar obstacles were it to attempt to enter another's territory.

An alternative explanation is that the Bell companies believe that entry into another's territory would invite entry into its own territory by the incumbent with which it is seeking to compete. In order words, Bell companies believe that the potential benefits of entry into another's territory are outweighed by its costs, as well the risk that such entry would threaten its monopoly in its own territory by provoking entry by the other company. Of course, this alternative explanation underscores the importance of facilitating entry by firms other than the Bell companies, because this "risk" of mutual competitive entry is precisely the type of consumer benefit the Act aims to provide.

Question 4a. We passed the Telecom Act so that the local consumer would reap the benefits of increased competition in the local and long distance market, yet things have not changed all that much. Have we given the local companies enough incentive to open up their markets to more competition?

Answer 4a. The Act's terms are the law and the local companies are obligated to comply with them. However, it is simple common sense that the monopoly local exchange companies would not quickly or easily relinquish their local monopolies. The local companies, then, have every incentive to retain control over the increasingly lucrative local markets. Thus, in addition, Congress wisely included an added incentive for the Bell companies—the largest and most powerful local companies. That incentive was the ability to provide long distance service within their regions upon a showing that their markets were truly open. This incentive, however, still leaves the actual timing of when the local markets are opened to the RBOCs, rather than to the market's competitive forces. Thus, while AT&T believes that the in-region long distance "carrot" will eventually be a crucial means to pry open the local markets, it still leaves the RBOCs with too much control over their markets. Evidence of this control is clear. Even with their added incentive, the RBOCs have dragged their feet in implementing the Act's requirements, and used the regulatory and legal process to slow the arrival of meaningful local competition. And despite the promising opportunities for local competition the Act was intended to create, no incumbent local carrier has to date made any meaningful inroad into another company's local territory.

Question 4b. Have the local and long distance companies fully complied with the law as it now stands?

Answer 4b. AT&T has certainly complied fully with the law as it currently stands. In some instances, however, the incumbents have flatly refused to provide new entrants with checklist items required by the Act. For example, the incumbents have refused to provide AT&T with unbundled network elements as required by the FCC's interconnection rules issued in August of last year, claiming that the FCC's interpretation of the Act on this matter was incorrect. Instead, they put forth an alternative interpretation, which was recently accepted by the Eighth Circuit Court of Appeals in its review of the FCC's rules. The incumbents have not done the systems development and other work necessary to make the unbundled elements available even under their interpretation, however. As a result, more than twenty months after the passage of the Act, the incumbents are still denying new entrants the ability to use one of the three forms of entry contemplated by the Act.

Question 5a. I have heard some concerns from local Internet Service Providers that upon entering the Internet service business, some Regional Bells have tried to raise access rates and use their monopoly status to make it difficult for these other local providers to compete. Even though they may have to charge their own ISP the same rate as the others, they still have a strong incentive to charge the higher rate. Are these concerns valid?

Answer 5a. Although there is certainly a valid basis for concern that the RBOCs will use their monopoly power to harm competitors who depend on them for access service, the considerations involving ISPs are unique.

In 1983, the FCC exempted "enhanced service providers" ("ESPs")—a class of carriers that includes ISPs—from payment of carrier access charges and instead required that ESPs be treated as if they were end users of local services. This was done, at the urging of the ESP community, to shield that burgeoning industry from the exorbitant access charges that were laden with subsidies and other uneconomic loadings. The tremendous growth of the Internet industry in recent years has underscored the price advantage that ESPs enjoy as a result of this exemption. Incumbent LECs believe that they are providing access to ISPs at below-cost prices; CLECs are discouraged from offering competitive, broadband access services because of the below-cost access that ISPs currently obtain from the incumbents; and long-distance carriers see the ISPs entering the market for voice and fax services in competition with their own traditional long distance calls, which bear the full access burden. Although there is strong doubt as to whether the incumbent LECs are suffering financially from the price break that they are giving to ISPs (the growth in second phone lines to residences has been unprecedented in the past year and has provided ILECs with an embarrassment of revenues), the ESP exemption undoubtedly offers ISPs an unfair advantage over providers of traditional telephony. AT&T agrees that ISPs should pay their share of access charges—at cost-based rates, and the FCC should adjust access prices accordingly to avoid any further windfall to the ILECs. Payment of cost-based charges will cause Internet prices to increase only minimally—by approximately 50 cents per month per subscriber. Economic pricing of access to all users will prompt rational entry and pricing decisions by all players in the market.

Question 5b. Even if this has not actually happened, how can we ensure that local monopolies cannot use their control of access lines to gain an unbeatable competitive advantage in the Internet service?

Answer 5b. The most practical and reasonable means—indeed the means intended by Congress when it passed the Telecom Act—to ensure that local monopolies cannot use their control of access lines to obtain an anticompetitive advantage in the provision of Internet services is to ensure that CLECs are able to make meaningful inroads into the local service market, thereby offering reasonably priced, innovative local access services to Internet providers. This can be accomplished, as the Congress has already determined, through mandating CLEC access to the ILECs' unbundled network elements at cost-based prices. Unfortunately, the Eighth Circuit's recent decisions have thrown high obstacles in the way of would-be competitors to gain a foothold in the local service market. The impact of these rulings will be to discourage competitive entry of CLECs not only for the provision of innovative high-bandwidth services demanded by ISPs, but also for the provision of basic local services to consumers.

Question 5c. Because of the nature of these unlimited access plans, Internet Service Providers are using a large amount of resources—should we be charging them more because of this, or are there other ways of dealing with this problem?

Answer 5c. The "unlimited access plans" offered by ISPs—which permit their customers to remain on-line with their computers for hours at a time—reflects the ISPs' exploitation of a "loophole" in the Commission's access charge rules. Those rules—which require telecommunications service providers to pay the ILEC for their use of the ILEC's local access facilities—do not apply to ISPs, who use local access facilities in virtually the same manner as telecom carriers—that is, to carry traffic from a subscriber's premises to the ISP's local switch and onward to the call's destination, which for Internet services is more often than not interstate or even international. This "ESP exemption"—which frees ISPs from the link between usage of the local network and paying for the local network—creates an attractive opportunity for those ISPs to pass on this virtually "free ride" to their customers. However, this increase in usage of the local network is not without costs. The ILECs are beginning to identify pockets of congestion, which will increase as use of Internet services continues to increase. Moreover, the great disparity in price that consumers are beginning to see between traditional phone/fax calls and calls that they are now able to place over the Internet will precipitate a spiral of declining usage of the traditional networks, as those calls migrate to the Internet where their incremental price is zero. This leaves fewer minutes on the public network for recovery of critical subsidies such as Universal Service—a fund for which, by the way, ISPs will be the direct or indirect beneficiaries of $2.6 billion (57 percent of the Fund). These disturbing trends can be reduced if the Commission were to eliminate the loophole that it created with the ESP exemption and promptly reduce access charges to their true cost for all access customers—thus placing ISPs and traditional telecom carriers on the same pricing footing.

Question 6a. Now that I've mentioned one problem regarding the Internet, this raises a broader concern. When we passed the Act, did we adequately provide for the way modern technology is putting new stresses on the system and shifting cost burdens in new and unpredictable ways?

Answer 6a. With cost-based pricing by the ILEC and fair implementation of the Act's competitive entry rules, adequate opportunities could exist for the proliferation of the broadband technology services demanded by business customers, ISPs and consumers. Unfortunately, the Commission and the Courts have taken actions that impede CLEC entry: by maintaining the ESP exemption, the FCC has discouraged CLECs from innovating because they would be forced to compete with ILEC-provided below-cost services; and by holding that the FCC has no authority over pricing, and vacating the FCC's rule requiring ILECs to provide combinations of unbundled network elements at cost-based rates, the Eight Circuit's decisions misread the plain words of the Telecom Act and limit the FCC's ability to ensure competitive entry.

Question 6b. Do we need to amend the Act to take into account the way in which consumers are now using telephone lines to access the Internet, often with unlimited service plans and little incentive to hang up when they are not using their service?

Answer 6b. In light of these FCC and Court actions which thwart Congress' intent in these areas, the Act could be strengthened to remove the specific obstacles to meaningful local service competition and rational pricing for Internet services. First, Congress can amend the Act to make clear that ILECs are indeed obligated to provide to CLECs unbundled network elements in combined form when they provide those elements in a combined form to themselves. This is clearly consistent with Congress' intention to afford CLECs access to those elements that is "equal" to the access that the ILECs themselves enjoy, and will eliminate the disruption to customers that the Eighth Circuit's interpretation will undoubtedly create. Second,

Congress can eliminate by statute the ESP exemption and require that information service providers pay for access at cost-based rates. And finally, Congress can require information service providers to contribute to the Universal Service Fund in the same manner as telecommunications carriers.

RESPONSE OF MARK C. ROSENBLUM TO A QUESTION FROM SENATOR THURMOND

Question. Mr. Rosenblum, you state in your prepared testimony that incumbent local companies are engaging in an extensive legal assault on the implementation of the Telecom Act. How have such legal actions slowed the pace of companies like AT&T being able to get into the local telephone service market?

Answer. Since the Act was passed, the incumbent local companies have filed legal challenges to nearly every significant decision by the federal and state agencies given the responsibility by Congress for the Act's implementation. In many cases, the incumbents have used the tendency of these challenges as an excuse to disregard their duties under the Act and binding agency rules and orders that have not been stayed by any court.

The Act required the FCC to issue regulations implementing its local competition provisions within six months of its enactment. 47 U.S.C. 251(d)(1). The FCC did what Congress had directed, but the Bell companies, GTE and most other incumbent telephone companies then appealed virtually every regulation that the Commission had adopted. Although many of the incumbents' claims were rejected, they did prevail on several key issues. For example, although Congress directed the Commission to implement all provisions of Section 251, including the requirement that incumbent LECs provide interconnection and access to unbundled network elements at cost-based rates, the incumbents managed to persuade the Eighth Circuit Court of Appeals to firs stay, and then vacate, the FCC's pricing rules on the ground that the Act gave the states exclusive authority over pricing. (The Eighth Circuit also ruled that although the FCC is authorized to and may adopt rules governing subjects other than pricing, it has no authority to enforce them.) AT&T believes that these aspects of the Eighth Circuit's decision are based on an erroneous reading of the statute, and increase the costs and difficulty of entry by requiring potential competitors to litigate pricing and other issues in 50 different states and more than a hundred federal district courts.

The absurdity of this situation, moreover, is compounded by the litigation strategies pursued by the incumbents following their "victory" in the Court of Appeals. Subsequent to the Court's decision to stay the FCC's pricing rules, the vast majority of state commissions, in separate proceedings, adopted pricing rules that were very similar or identical to those adopted by the FCC. Having persuaded the Court of Appeals to vacate the FCC's pricing rules on the ground that pricing was a matter reserved for the states, many of the incumbent telephone companies, including Southwestern Bell, U S West and GTE, then turned around and challenged these state decisions in multiple federal district court suits, and argued that pricing was a federal matter and that the states were entitled to no deference.

In sum, the local telephone companies have used an array of legal challenges to block implementation of the Act. This ceaseless litigation, and the enormous uncertainties it creates, increases both the cost and complexity of entry into local telephone markets. The Eighth Circuit's holdings that the FCC has no authority to adopt pricing rules or enforce other provisions of the Act have substantially abetted this outcome.

RESPONSE OF WILLIAM P. BARR TO A QUESTION FROM SENATOR THURMOND

Question 2. Mr. Barr, GTE has initiated and participated in numerous legal challenges to the implementation of the Telecom Act and the FCC's enforcement of the Act. Can you assure us that all of your efforts are designed to promote competition rather than being an attempt to delay long distance companies from getting into local service markets?

Answer 2. Absolutely. GTE's legal challenges are designed to ensure that the Telecommunications Act of 1996 is implemented as written by Congress. GTE believes that implementation of the Act as written will promote competition. Where regulators have deviated from the text and purpose of the Act in a manner that injures GTE's interests, GTE will seek legal redress. GTE is proud that it, together with many States, led the successful effort in the U.S. Court of Appeals for the Eighth Circuit to overturn the FCC's unlawful pricing rules.

RESPONSES OF WILLIAM P. BARR TO QUESTIONS FROM SENATOR HATCH

Question 1. Why hasn't GTE, as an incumbent local service provider, sought to enter the local markets adjacent to the markets in which you already compete?

Answer 1. GTE in fact has entered local markets adjacent to its existing markets, and it is a key part of GTE's strategy to continue to do so. In order to move out-of-franchise faster and farther, GTE has just launched an effort to acquire MCI. A combined GTE–MCI would be powerfully pro-competitive, as it would have the skills, resources, and commitment to invade RBOC territories nationwide—for both business and residential customers—in a manner that neither company singly could hope to accomplish.

Question 2. There are some who have questioned GTE's commitment to open, competitive markets, in light of the company's fairly aggressive litigation strategy. There are some who have suggested that this gives the impression that your company is less receptive to competition than many who supported the 1996 Act would have envisioned. How would you respond to this contention?

Answer 2. Those who would make such a contention are either badly mistaken or self-serving. GTE's legal challenges are designed to ensure that the Telecommunications Act of 1996 is implemented as written by Congress. GTE believes that implementation of the Act as written will promote competition. Where regulators have deviated from the text and purpose of the Act in a manner that injures GTE's interest, GTE will seek legal redress. GTE is proud that it, together with many States, led the successful effort in the U.S. Court of Appeals for the Eighth Circuit to overturn the FCC's unlawful pricing rules. I would note that we were criticized for that effort, but I believe that the Court's ruling is full vindication of our position. I would further note that our detractors have been curiously silent when AT&T and other competing local exchange carriers have filed court actions seeking review of FCC or state commission action.

Question 3. In your brief to the 8th circuit, you argued that incumbents' operational support systems are not "network elements" to which new competitors are permitted access. Some would say that this particular argument was somewhat of a stretch. While I can certainly appreciate zealous advocacy, I also think Congress is depending on incumbents to cooperate in implementing the Act. Where incumbents control the underlying systems and databases, it seems to me that incoming competitors can't, for example, assign a customer a new phone number, or commit to a schedule for providing or repairing a service, without reasonable access to the incumbent's systems and databases. Given this, how can real, sustainable competition develop without such access?

Answer 3. GTE has not refused to provide essential information such as telephone numbers and mutual scheduling of provisioning or repair. What we have opposed is for the new carriers to be given blanket access to all our operating systems at the bargain-basement prices that the FCC established for network elements. Real, sustainable competition can and should develop without competitors being given this blanket access. Indeed, if new competitors are going to be anything more than simple resellers—and if jobs, investment, and innovation are going to result from the 1996 Act—it is imperative that they develop or acquire many of their own systems.

RESPONSES OF WILLIAM P. BARR TO QUESTIONS FROM SENATOR TORRICELLI

Question 1. I understand that not a single Regional Bell Operating Company has received approval to provide long distance service. Are the Regional Bells trying to get into the long distance market and failing, or are they purposefully stalling in order to block local competition, as some of the long distance carriers suggest?

Answer 1. I believe that the Regional Bell Operating Companies are trying to get into the long-distance market.

Question 2. Although local competition has been opened up, the Regional Bells have so far not chosen to compete with one another.

One of the arguments for the Telecom Act was the potential for competition between RBOCs. Given that context, why have we seen so little competition between the Baby Bells?

Why did Bell Atlantic merge with NYNEX, for instance, instead of trying to serve the disgruntled New York consumers with the same efficiency and quality that they have given New Jersey?

Answer 2. I am not fully familiar with the state of RBOC-to-RBOC competition nor with the reasons for RBOC behavior.

Question 3. In New Jersey, I understand that the Board of Public Utilities set the price that new entrants must pay Bell Atlantic for the local loop at $16.20. Yet I

also understand that Bell Atlantic's average basic rate is $11.69. Is this true? Would this mean that new entrants will lose money on every subscriber? Is this a nationwide situation, or is it confined to my own region?

Answer 3. I am not familiar with decisions of the New Jersey Board of Public Utilities, but I am informed that the $11.69 average rate that you cite is the average basic residential rate. This would mean that Bell Atlantic is being required to serve the average residential customer at a price well below its costs and to support this customer with an implicit cross-subsidy from its other operations. Such a situation is not confined to New Jersey but is typical in many parts of the country. Competitors will generally not use unbundled network elements to offer service to residential customers whose rates are being kept below cost, unless the customers also purchase substantial high-margin toll and vertical services (such as call waiting and call forwarding). That is precisely why Congress, in section 254 of the Telecommunications Act of 1996, mandated universal service reform that would replace implicit subsidies with explicit subsidies. This is the only way to ensure that competition reaches most residential markets. Unfortunately, the FCC and most (if not all) States have failed to carry out Congress's mandate. (GTE is bringing legal challenges in an attempt to remedy this failure.)

Of course, competitors, as an alternative to using unbundled network elements to serve residential customers, could obtain Bell Atlantic's basic residential service at the $11.69 retail rate less a wholesale discount and then resell it to residential customers.

Question 4. We passed the Telecom Act so that the local consumer would reap the benefits of increased competition in the local and long distance market, yet things have not changed all that much. Have we given the local companies enough incentive to open up their markets to more competition? Have the local and long distance companies fully complied with the law as it now stands?

Answer 4. I agree with Assistant Attorney General Joel Klein and others that, even in the best of circumstances, it would be far too early to judge the success of the Act in bringing about competition. Not only do local companies have enough incentive to open up their markets; they are also legally required to do so. GTE has faithfully implemented the Act and has brought the benefits of competition to its 1.5 million long-distance customers.

Question 5. You have accused Ameritech and other RBOCs of suffering from "Stockholm Syndrome" and caring too much about what the federal regulators think. At the same time, judging from the recent FCC application and what we've heard here today, Ameritech's consumers in Michigan and Illinois seem to have far more competitive choices than do consumers residing in regions served by GTE. What incentives do you currently have to cooperate with us in bringing about the local competition for which we have asked? How can we be assured that GTE and others will not delay development of this local competition?

Answer 5. Let me first clarify that GTE's accusation of Stockholm syndrome was directed only against Ameritech and was in response to a court pleading in which Ameritech, while agreeing that an FCC order had "glaring flaws" and was unlawful, opposed a stay of that order in the apparent belief that a stay would trigger vindictive and arbitrary retribution from the FCC. GTE stated then, and I will restate now, that vigorous competition is impossible if regulators wield so much arbitrary power that companies like Ameritech are afraid to assert their legal rights and instead attempt to curry favor with the regulators. That said, GTE cares profoundly what federal regulators think, and GTE is committed to do its best to ensure that their thinking is faithful to the Act and to its procompetitive purposes. GTE has overwhelming legal and economic incentives to open its markets to competition and not to delay development of local competition: the Act requires GTE to do so, and GTE would risk severe penalties if it did not faithfully comply with the Act.

Given the fact that GTE's service areas are generally much more suburban and rural than Ameritech's and the fact that the FCC's failure to implement proper universal service reform has a more negative impact on such areas, it is no surprise that competitors are focusing their efforts more heavily in Ameritech's service areas.

Question 6. I have heard some concerns from local Internet Service Providers that upon entering the Internet service business, some Regional Bells have tried to raise access rates and use their monopoly status to make it difficult for these other local providers to compete. Even through they may have to charge their own ISP the same rate as the others, they still have a strong incentive to charge the higher rate. Are these concerns valid? Even if this has not actually happened, how can we ensure that local monopolies cannot use their control of access lines to gain an unbeatable competitive advantage in the Internet service? Because of the nature of these unlimited access plans, Internet Service Providers are using a large amount of re-

sources—should we be charging them more because of this, or are there other ways of dealing with this problem?

Answer 6. I am unfamiliar with the concerns you raise regarding the RBOCs in your question. Generally speaking, Internet service providers purchase local access services on the same basis as our other business customers. Indeed, GTE's Internetworking business, which provides retail Internet services to consumers, purchases its access facilities out of the same GTE telephone tariffs as does any small business. The rates, terms and conditions for these services continue to be closely regulated by state Commissions. So it's not clear to me how one class of customers, say ISPs, would be treated fairly than another customer buying from the same tariff.

We should look at all options to address the increasing demands placed by all data services on the switched voice network. While I doubt there is one easy answer, I believe that a variety of approaches—technical, pricing and provisioning—will help to mitigate this problem in the future.

Question 7. Now that I've mentioned one problem regarding the Internet, this raises a broader concern.

When we passed the Act, did we adequately provide for the way modern technology is putting new stresses on the system and shifting cost burdens in new and unpredictable ways? Do we need to amend the Act to take into account the way in which consumers are now using telephone lines to access the Internet, often with unlimited service plans and little inventive to hang up when they are not using their service?

Answer 7. Network stress is a serious issue. While telephone companies do receive some compensation for the access services provided to Internet service providers, the present rate structure system imposed by regulators does not provide for adequate cost recovery for recent investments and expenses incurred to alleviate network congestion. I would agree that regulators need to review existing rate structures to ensure that they permit sufficient and timely cost recovery while at the same time not unduly burdening the prices that ISPs pay for local facilities.

job that comports with this law and unleashes competition but still protects high cost in rural areas.

Mr. HUNDT. Well, I can tell you this. the electricity bill at the FCC was three times greater in 1996 than in 1995, so I know we are trying.

Senator DORGAN. Mr. Hundt, thank you very much.

Mr. HUNDT. Thank you very much.

Senator BURNS. Our electricity bill is not getting any cheaper, either.

You have been a real marathon man, and I would just like to say we have got some questions. I am going to submit them to you in writing, and if anybody else does not have any more questions we would excuse Mr Hundt, and look forward to seeing the next panel, which I will introduce.

Thank you very much for coming.

Mr. HUNDT. Thanks a lot.

Senator BURNS. The next panel consists of Mr. Bill Barr, who is senior vice president and general counsel of GTE Corporation, Ms. Anne Bingaman, president, LCI Local Services Division for CompTel, Ms. Gail McGovern, vice president, Consumer Services Division of AT&T, and Mr. Roy Neel, president, United States Telephone Association.

If those folks will come to the table, and we will look forward to taking their testimony at this time.

If we could have a little order in the hearing room, we will continue with this panel.

Mr. Bill Barr, president and general counsel GTE Corporation. Thank you for coming today.

STATEMENT OF BILL BARR, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, GTE CORPORATION

Mr. BARR. Thank you, Senator. I would like to make three points. First, I would like to explain how——

Senator ROCKEFELLER. Mr. Chairman, could we have order in the hearing room, please?

Mr. BARR. First I would like to explain how the FCC has bored two big holes in the good ship universal service, and how their proposed solution really amounts to bailing it out with a thimble. But let me just say at the outset, Senators should not be misled into thinking that the rules are not going to be applied to rural areas.

The chairman said they would not be applied to small rural companies, which only serve a very small percentage of rural areas. Most rural customers are served by the large companies like GTE, U.S. West, Bell South, Southwestern Bell, that have high rural—the customer base is highly rural.

Now, the first point is that the implicit subsidies right now are what fund universal service. Take a typical example of a State where the average cost of providing service may be $30, residential customers may pay $15, business customers may pay $75. It is that difference between $30 and $75 for the business customer that is funding universal service. That is the implicit subsidy.

Now, the Telecom Act did two things that were designed to protect universal service, and it is very clear. First they say you have to go to an explicit mechanism that is competitively neutral. Sec-

ond, the act says to the extent there are implicit subsidies, that the incumbent is required to embed in its rates, we cannot let new entrants come in and exploit that situation and cherry-pick away those sources of the subsidy.

Now, what the FCC has done in its rules is first, and I will describe this later, it has come up with a wholly inadequate, as far as we can tell, universal service fund, and second, it does not just allow cherry-picking of the existing sources of the subsidy, it invites cherry-picking.

How does it do this? It builds a new pathway right to that business customer who is being served at $75 and is providing a $40 or $45 subsidy. The statue said, look, if a competitor wants to piggy-back onto the incumbent, and wants to provide service to that customer by using the incumbent service or the incumbent's network, the statute provides for a wholesale price in a way that reflects that subsidy. The FCC rule says no. A competitor can come along and can serve that customer by leasing the incumbent's network on an end-to-end basis, under the fiction of purchasing separate unbundled elements priced at this hypothetical TELRIC level, which is about half of the actual cost.

So what does that mean? That means that AT&T or British Telecom can go to that business customer, and based on a $15 wholesale price from the incumbent, offer to drop the price to the customer by $5 or $10 to capture the customer. They offer a $70 or $65 price to that business customer, and walk away with that customer. The margin is the difference between $15 and $65. Fifty dollars goes to Basking Ridge or to London, instead of paying for the subsidy.

That is what the FCC rule does. It creates this big gap and this big pressure on universal service by taking the business subsidy that exists today and transferring it over to the shareholders of the new entrants.

The second problem is on access charges. The same FCC rules I have just described have made access charges basically irrelevant. We can quibble all we want about how to structure access charges and whether they should be reformed, and yes, there should be changes in access charges, but the fact is that the FCC has now provided a mechanism to bypass mechanism of access charges. The FCC says if you go through this fictional unbundling process at a TELRIC rate a competitor does not have to pay access charges because it is fictionally handing the traffic off its own network, even though that network is leased from the incumbent at a TELRIC rate.

So not only does the competitor take away the $75 customer by using the arbitrage that the FCC has created, but then it takes all the access charges that that customer would have contributed to universal service.

So to argue about access charges misses the point. The FCC has already created a bypass vehicle of access charges. Access charges will not be around to support universal service under the FCC rules. It is as if the FCC said to people who built a bridge, you will be able to cover your cost, but you have to let 90 percent of the private vehicles that go across that bridge pay half of what it costs,

but you can charge four times the cost to all the commercial vehicles. That describes the situation we have today.

But what the FCC has now done is say, OK, but now we want the incumbent to build a second tier to the bridge, and if the commercial vehicles that have been paying the $4 on the top level get a little ticket from AT&T and MCI they can go on the bottom level, and pay 50 cents.

So you can argue what the tolls or access charges are going to be on the top level for the rest of your lives. The bottom line is that the people who are paying into universal service now can bypass it and go on the lower level. That is what has happened to the existing structure, and that puts tremendous pressure on the universal service fund.

Now let us talk about what the FCC is talking about for a universal service fund. First, they are not basing the amount of the fund on actual costs. They are basing them on these models, and from what we saw in the interconnection order, these models come up with half the cost of what these networks actually cost to build and operate in the real world.

You do not have to take my word for it. For 60 years State commissions, and Federal commissioners have been determining the costs and what revenues are necessary to cover those costs, who should pay them, and who should not be subsidized.

So for 60 years regulators have been determining these costs, which equate to about a $20 billion subsidy today and the local telephone models confirm that it is in that magnitude of over $20 billion, and lo and behold, now AT&T comes up with a model and says, well, no, it is actually $7 billion.

According to AT&T, for 60 years, all the regulators have gotten it wrong on what the costs are; it is actually $7 billion.

What is the price we pay if the FCC cannot come up with the right model to determine what the cost is instead of relying all on of the cost data that has been assembled for 60 years?

One, it will put tremendous upward pressure on the rates for rural and residential rates. Second, to the extent the costs are not covered by those customers, the quality will go down, because you get what you pay for. Costs have to be covered by somebody.

Third, it will result in the ghettoization of America's telecommunication system, because no one is going to provide the investment in the service and the innovation, and certainly competitors are not going to come to customers where there is no covering of the costs of serving those customers, so it is essential to have those rates set right if you want competition to reach everybody.

Now, GTE has proposed a solution to this problem on the universal fund. It does not require models. It uses the marketplace to determine what the proper level of support is, and it targets the support to the communities that need it and to the individuals that need it. Let companies bid over what level of support is necessary, and if they get it wrong, it is their tough luck.

Use a market mechanism not only to establish what the proper level of subsidy is, but it is a dynamic system that drives that subsidy level down as new technology comes on and people can provide it more cheaply.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF BILL BARR, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, GTE CORPORATION

Thank you, Mr. Chairman, for the opportunity to provide my views to the Committee on universal service and implementation of the Telecommunications Act of 1996.

American consumers today enjoy a public telecommunications network without equal in the world. A little over a year ago, the 104th Congress enacted the Telecommunications Act of 1996, a law that GTE and most others agreed would provide Americans with even greater benefits from the public telecommunications network. I am here to explain to the Committee why the FCC's actions in the wake of this legislation jeopardize the fundamental policy of universal service.

UNIVERSAL SERVICE

Americans are used to having the best local telecommunications system in the world. They enjoy local telephone service that is very reliable, available everywhere, provided via a high-quality network that undergoes continual modernization, and is characterized by a steady proliferation of new services. The average consumer can get unlimited use of this network for a monthly fee that is no more than the price of a single tank of gasoline. Local telephone service is an exceptional bargain.

This is the enviable result of "universal service"—a social policy that the United States has pursued for the last 60 years. The policy of universal service seeks to ensure that every American has available basic residential phone service at a relatively low, "affordable" rate. This means that Americans pay significantly less for residential service than it costs local phone companies to provide that service. In other words, residential service is generally sold at a loss. Indeed, whereas basic residential service costs on the average anywhere from $30–50 a month to provide, Americans pay only about $10–25 a month for that service.

Thus, universal service policy results in a massive gap between the local companies' costs of providing basic service and what they are allowed to charge for that service. USTA estimates this shortfall amounts to a total of over $20 billion. This shortfall has been funded through subsidies created by deliberate decisions of state regulators and the FCC over the last six decades. To achieve the massive subsidization necessary, the commissions have derived funds through the following means:

Inter-customer cross-subsidies

Businesses pay local service rates that are often several times higher than residential rates even though the cost of providing local service is approximately the same for business and residence. Typical is the case of Texas, for example, where the state public utility commission has determined that GTE's monthly loop cost is $25.49 on average, but residential customers pay only $10.60 to $18.40 per month. The difference is made up in part by business customers who pay $42.45 per month for local service that consists of a single line, and up to $71.15 for a PBX trunk.

Urban customers, including residential subscribers, generally pay rates that are higher than rates paid by customers in smaller communities, thus subsidizing residential rates in rural areas.

Inter-service cross-subsidies

There are three types of non-basic services that subsidize basic residential service. These non-basic services include intrastate long distance calls; vertical services such as call-waiting, call-forwarding, and three-way calling; and interstate access service.

As to interstate access service, federal and state regulators have determined that, because long distance traffic uses the local network, that traffic must pay for a portion of the cost of the local network. Joint federal and state rules have assigned 25 percent of local network costs to be covered by interstate long distance traffic. The local network's costs are recovered in an "access charge"—essentially a toll charge—that long distance companies pay for handing off a long distance call to the local network. Although the access charges pay 25 percent of the real costs of the local network, to the extent that percentage overstates actual long distance usage, these charges may be said to subsidize basic rates.

Explicit funding

The FCC has developed three explicit subsidy programs to help defray costs in rural areas and support customers who might otherwise not be able to afford telephone service. These funds are the Lifeline, Link-Up, and the High Cost funds. The total of these funds, which are paid by long distance carriers, is approximately $776

million annually. This is obviously a tiny fraction of the full cost of universal service. Most of these funds go to local phone companies whose costs to provide local service exceed 115 percent of the national average.

Extended depreciation periods

To keep rates even lower, state and federal regulators have artificially extended the period over which local phone companies have been able to recover their investments in network plant and equipment. Instead of recovering investment over a 8- to 20-year depreciation schedule, for example, regulators have traditionally insisted upon a 11- to 30-year time frame.

The critical point is that all today's cross-subsidies that have been used to fund universal service have depended on regulators maintaining an exclusive franchise for the local phone company. Through the use of exclusive franchises, federal and state regulators were able to ensure that incumbents could recoup the revenues from businesses and other high-value customers to keep residential rates low.

Ordinarily, government has no right to require a commercial entity to sell its products or services below cost. In pursuing universal service, however, federal and state governments have essentially "paid for" low residential rates by restricting entry into the local phone market, thus allowing the companies to charge above-cost rates for other services.

IMPACT OF COMPETITION

Opening up the local phone market to competition will make this system of implicit subsidies untenable. When new entrants come into the market, incumbent phone companies simply cannot continue to charge high, subsidy-generating prices for business and non-basic services. The Telecommunications Act of 1996 recognized this fact and determined:

- Universal service funding must be explicit, i.e., the charges must be readily observable and not included in other rates.
- Every telecommunications carrier—local and long distance—must contribute equitably.
- Companies cannot be denied the opportunity to recover their investment and their contributions to universal service.
- Companies obligated to provide universal service should be sufficiently compensated, and the companies benefiting from this compensation should bear the same obligations.

Specifically, the Telecommunications Act took two steps to ensure that universal service would be preserved in a competitive environment. First, Section 254 requires that any subsidization be achieved through explicit, competitively neutral mechanisms such as universal service funds. Section 254(d) contemplates a federal fund that sets a national "affordability" benchmark and provides support for companies whose costs of providing local service exceed that benchmark. Under Section 254(f), every State is obligated to require each new entrant to contribute in a competitively neutral and equitable way to maintaining universal service.

The second step the statute took to protect universal service was to ensure that, unless and until explicit mechanisms were in place, new entrants who are reselling the incumbent's services or network could not take unfair advantage of the implicit subsidies embedded in the incumbent's prices. The statute accomplishes this by requiring that, when a new entrant is reselling a service with a subsidy component, the new entrant continues to pay that embedded subsidy through the wholesale rate. This is accomplished in Section 254(d)(4) which sets the wholesale rate as the retail rate minus avoided cost: "The rate should reflect whether, and to what extent, the local dialtone service is subsidized by other services, such as toll service, long distance access, subsidized through the pricing for other features, such as call forwarding and call waiting, or subsidized through explicit subsidies from a universal service fund." (H.R. Rep. No. 204, 104th Congress, pt. 1 at 72).

Further, the statute requires that, when a new entrant uses the incumbent's network elements, the entrant must still contribute to the subsidy by paying the incumbent all its costs of providing the element plus a reasonable profit. Obviously, in the absence of an explicit funding mechanism, part of the incumbent's "costs" remain the subsidy costs, and under Section 252(d)(1) of the Act these costs must be recovered in the wholesale network element price. In short, the statute is clear that, if the FCC and the states, by failing to make all subsidy costs explicit, keep subsidies embedded in retail prices, those costs must remain in wholesale prices as well.

In sum, the statute intends to move rapidly to an explicit, competitively neutral subsidy system and to ensure that new entrants cannot exploit the implicit subsidies in incumbents' rates to cherry-pick the most profitable customers.

THE FCC'S DIRECTION

To date, the FCC's approach in its interconnection order defeats the intent of the statute, and can only be characterized as a direct assault on universal service. The FCC's approach undermines universal service in at least four respects.

First, for a substantial period prior to the creation of explicit funding mechanisms, the commission rules not only allow but invite new entrants to cherry-pick the high-value customers who are currently subsidizing universal service. The FCC rules allow new entrants to come into the market without contributing to an explicit funding mechanism. Then the rules allow those companies to circumvent and avoid paying their share of the implicit subsidies embedded in the incumbent's prices. The rules do this through an absurd interpretation of the statute's unbundling provisions. Under the FCC's interpretation, a new entrant is allowed to lease the entire network from end-to-end under the "fiction" that it is merely leasing unbundled network elements. The FCC then sets wholesale prices based on the so-called TELRIC hypothetical methodology. This methodology not only sets wholesale prices far below real-world costs, but completely omits the subsidy cost that is embedded in the rates.

The destructive impact of these rules is significant. For example, using Texas again, the price for a PBX trunk in one of GTE's larger cities is $71.15—about twice the cost of providing the trunk. The contribution to universal service is thus approximately one-half the revenue. The Act provides that a new entrant can resell the PBX trunk for the retail price ($71.15) minus avoided cost, which includes marketing and billing, but includes the contribution to universal service.

Under the FCC's approach, however, the new entrant can provide the same local service by "fictionally" leasing the unbundled network from end-to-end at the commission's TELRIC price for Texas of $23.22—a difference of $48—and capture the PBX customer by only providing a modest discount from GTE's price of $71.15. This permits the new entrant, typically a large corporation such as AT&T or British Telecom, to pocket almost all the $48 margin rather than having the revenue flow to support universal service.

But even this understates the degree to which the FCC's interconnection order will undermine universal service supports. The FCC's approach also enables the new entrant to bypass access charges for long-distance services and to obtain vertical services as part of the bargain-basement price for the switching element. The effect is to deprive incumbents of the important subsidy supports from these sources.

The second general assault on universal service arises from the FCC's docket on access charges, the fees long distance carriers pay when they use local networks. The commission has undertaken, on its own initiative, to slash access charges in a move proclaimed by FCC Chairman Reed Hundt as "the biggest tax cut that any agency in Washington has delivered for the American people in the last decade." But access charges are fees that are supposed to cover the real costs of operating a real network. As in its previous ruling, the FCC appears poised to give new entrants a substantial windfall—in this instance, freeing them from a large portion of the universal service support they have been providing.

Third, the FCC appears intent on restructuring the universal service system to deliberately underestimate the cost of providing service and to avoid replacing implicit subsidies. Although the final rules on universal service are not due until May, a Federal-State Joint Board has recommended the commission adopt a universal service funding mechanism that uses the same hypothetical TELRIC-type approach to measuring costs. If unchanged, the result will be the same: the model will compute the cost of local service to be one-half its actual cost. It will appear, therefore, that the need for universal service support is much less than is necessary. The commission thus appears ready to define away the actual cost of local service, which could cause it to assert that very little support is required for universal service.

Fourth and finally, the Joint Board proposal suggests new entrants will receive full universal service subsidies without bearing full universal service obligations. Under the Board's proposal, new entrants can go into high-cost areas and effectively cherry-pick only the high-value customers, but still receive support payments for each customer. In other words, new entrants are being subsidized by the universal service fund to serve customers who are fully capable, in most cases, of paying the full freight.

At the heart of the FCC's approach is its reliance on hypothetical cost models instead of real world costs. The agency has relied in large part on a computer construct devised by AT&T and MCI which purports to estimate the cost of building a hypothetical network today. This scheme is highly speculative and wildly understates the costs of building and operating the network. As a few examples of how ludicrous and biased this construct is:

- The construct estimates all manholes will cost $3,000 to build. The actual costs of a manhole is $7,000 to $10,000. The construct did not include any cost of excavation and backfill for a manhole because "the costs vary too much depending on soil condition." Therefore, these costs were ignored.
- The construct estimates the price of a local switch at $86 per line. The actual cost of a new switch is $183 per line, and for an addition to an existing switch the cost is $248 per line. No manufacturer offers a switch at $86 per line.
- The construct depreciates the switch over 16 years. AT&T and MCI depreciate the same switch over eight years. The construct cuts the depreciation costs in half by doubling the useful life of the switch.
- The construct assumes that laying and burying a 250-wire cable along a right-of-way costs only one-fourth as much as burying a 1000-wire cable. Of course, the cost of digging up the street is the same regardless of the cable's size.

Based on this AT&T–MCI construct, the FCC has hypothesized that the costs of the local network are one-half of what they actually are. Thus, the net effect of this TELRIC methodology is to undervalue our network by half. Put another way, if AT&T or MCI wants to compete with GTE by using our facilities, under the FCC's approach we would only be able to charge them one-half as much as it costs us to build and operate those facilities.

The logical corollary of the FCC's reliance on hypothetical costs, one must conclude, is that federal and state regulators have not done their jobs for the past 60 years in evaluating the rate bases and revenue requirements for local companies. The notion that the real cost of our network today is only half of its actual cost would mean that both federal and state regulators have been consistently missing the mark by 100 percent.

By giving new entrants the means to cherry-pick high-value customers, bypass access charges, and avoid their universal service obligations, the FCC will place tremendous pressure on rural rates. Over time, prices will unnecessarily have to go up. If they do not, then people will get what they pay for, i.e., service will deteriorate as companies limit their investment.

Inevitably, the FCC's manipulations will create a class system for telecommunications. Under the commission's approach, competition and related price cuts will come only for the high-value customers; pressure to increase prices will fall on the average residential and rural customer; new investment and innovation will be driven outside the core network and be directed to benefit high-value customers; the capability of the core network will inevitably suffer. One could not imagine a more disappointing outcome for the Telecommunications Act of 1996.

THE SOLUTION

Over two years ago GTE proposed a comprehensive proposal that promoted universal service and competition.

One aspect of our proposal was to place greater reliance on the use of vouchers, or universal service credits, to target support to needy individuals. We believe that wide use of these vouchers will ensure that subsidies are provided only to those who need them.

In addition, GTE proposed a unique way of directing subsidies to high-cost regions. GTE proposed dividing the country into small-area tracts, determining the cost of service in each of those tracts, and allowing carriers to bid through an auction process for how much support above the benchmark they would need to provide service in a given tract.

The critical factor of this universal service proposal is that, instead of relying on wild estimates of the amount of subsidy necessary to provide universal service, the necessary support is determined in a sure-fire manner by the market. Under GTE's plan, there is no mystery about costs; costs are established with certainty through an auction process.

By letting the market determine the level of funding for universal service through such auctions, GTE's plan satisfies a number of important principles outlined in the statute. This plan:

- Provides an environment for fair and open competition by being both competitively and structurally neutral;
- Provides funding to any eligible telecommunications carrier that commits to provide universal service throughout a defined geographic area;
- Permits multiple carriers in the same geographic area to offer service and to benefit from the support mechanism;
- Provides funding in a carefully targeted manner to those with financial need and high-cost geographic areas;
- Minimizes funding needed from federal-state sources, encouraging carriers to be more inventive and efficient in their delivery of telecommunications services;
- Limits regulatory intervention to that necessary to ensure universal service;
- Enhances rural competition by encouraging new companies to enter and aligning support levels with true costs in an area.

If the regulators are unable, or unwilling, to implement the current legislation on a more competitively neutral basis, then the Congress should move in to preserve universal service and, at the same time, encourage competition.

Senator BURNS. Thank you very much, Mr. Barr. Next is Ms. Anne Bingaman, who is president, LCI Local Services Division for CompTel. Welcome.

STATEMENT OF ANNE K. BINGAMAN, PRESIDENT, LCI LOCAL SERVICES DIVISION (FOR COMPTEL)

Ms. BINGAMAN. Thank you very much, Mr. Chairman, Senators. Let me say outright to my friend Mr.——

Senator BURNS. You had better pull that microphone right up. You have got to get right into it. Thanks.

Ms. BINGAMAN. OK. There we go.

Senator BURNS. There you go.

Ms. BINGAMAN. Let me say outright to my friend Mr. Barr, and he is my friend, he is dead wrong. GTE is the poster child for what will happen if long-distance entry is allowed by the RBOC's before competition actually develops.

GTE under Mr. Barr's direction has engaged in scorched earth litigation tactics. They have appealed every State decision. They moved to stay the FCC decision, and they have done that all the time they are in long distance, because they were exempted from the requirements of this act that they open their local network to competition before they got into long distance.

Now, Mr. Barr as a result of that has an extremely profitable company, 10 percent increase in per-share earnings 1997 over 1996.

The reward for long-distance entry for GTE is that they want to have it all. They want long-distance entry. They want 30 to 40 percent market share of long-distance while keeping competitors out of their local market. They want to have a gold-plated cost system recovering on historic cost rather than forward-looking economic costs, which every economist will tell you is the right way to base it.

Why do they want that? Because their historic costs have been inflated. They have been building out networks with fiber optic in preparation for competition. They have been inefficient monopolists, and that is OK as long as you have a monopoly system, but we are not going to a monopoly system. We are going to a competitive system.

What these people want is competition in the long-distance market, i.e. a huge share of the long-distance market, keep competitors

out of their market with scorched earth litigation tactics, and that is exactly what it is, and then they want to raise the cost to competitors of getting access to what is clearly an essential facility, which the Congress found, the FCC found—he acts as if this is some sort of property of GTE.

This has been built at ratepayers' expense. It is an essential facility. Every one of these phone companies has a vast ubiquitous network which cannot be duplicated. It cannot be. There are 23,000 local switches which are essentially complicated computers, and the law very clearly said competitors should have access to those networks at cost-based prices plus a reasonable profit.

That is a principle of antitrust law that is many decades old. The Congress recognized it. It would be absurd to say that AT&T, MCI, Sprint, LCI, my company, and all these others should duplicate these networks, so that Congress very clearly said, and the FCC properly followed up with it by saying we should have access to those networks at cost-based prices to compete with them, and the cost, the FCC found, should be forward-looking TELRIC costs because those are competitive costs. The costs that Mr. Barr wants to have recovered are the high monopoly, monopolist costs which are gold-plated and result from a lot of fiber optic put in to advance the network.

So gentlemen, let me just say, there is much more to this story than you would hear from a worthy colleague on this panel, worthy member of the Justice Department previously, and the competitors to the GTE and the RBOC's need precisely what the FCC gave us and what the Congress gave us, which is access to their networks at forward-looking cost-based prices, not paying their historic embedded gold-plated prices.

So that is what I have to say. [Laughter.]

[The prepared statement of Ms. Bingaman follows:]

PREPARED STATEMENT OF ANNE K. BINGAMAN, PRESIDENT, LCI LOCAL SERVICES DIVISION (FOR COMPTEL)

EXECUTIVE SUMMARY

CompTel is committed to the goal of ensuring that all Americans have the opportunity to obtain quality telecommunications services at reasonable prices and supports efforts to implement universal service reform in a competitive, full-service environment. As a result of the 1996 Telecommunications Act, policies which have long presupposed a monopoly provider of local telephone services must now be redesigned around a new paradigm of local service competition. The Federal State Joint Board on Universal Service has taken a significant first step.

Central to the goals of universal service reform are the Act's requirements that federal universal service support mechanisms are explicit and that they operate in a non-discriminatory, competitively neutral manner. Thus, in structuring mechanisms to support universal service, the FCC must not benefit or burden a class of market participants out of proportion to the extent that it participates in the telecommunications marketplace. Similarly, support funds from the universal service mechanisms must be available to all who meet clearly identified, objectively applied criteria.

CompTel generally supports the Joint Board's recommended changes to the high cost and low income support funds, and how to collect support contributions from telecommunications providers.

With respect to the unresolved issues of whether providers should contribute to the universal fund on the basis of their interstate revenue, or on the basis of both their interstate and intrastate revenues, CompTel believes that the FCC has discretion to determine the relative size of each provider's contribution on the basis of their total interstate and intrastate revenues. Not only does the statute give the FCC the discretion to do so, but CompTel believes that as a policy matter, carrier

contributions should be determined on the basis of interstate and intrastate revenues, in order to avoid disproportionately burdening non-incumbent local exchange providers with universal service funding obligations.

CompTel strongly supports the FCC's decision to initiate its proceeding to implement access reform. There can be no doubt that the incumbent local exchange carriers' switched access rates are priced grossly in excess of costs. CompTel urges the FCC, as a first priority in bringing cost-based rates to access, to prescribe cost-based rate levels based upon Total Service Long Run Incremental Costs ("TSLRIC") for terminating access rates, which are not now, and are not likely in the future to be, subject to competitive pressures.

CompTel believes that the provisioning of unbundled elements at cost-based prices to new local exchange entrants is critical to create a competitive marketplace for local services. Today, no ILEC has in place systems and processes to seamlessly and instantaneously provide unbundled network elements in large numbers and, for the time being, the ILEC remains the ubiquitous network through which the vast majority of telephone consumers must be reached. CompTel, therefore, has urged the FCC to make clear that such ILEC provisioning systems are a necessary competitive quid pro quo to Bell entry into in-region long distance service. If network elements are made as readily available and simple to use as access services are today, it may be possible that market competition may act to drive originating access rates toward their costs.

Good Afternoon Chairman McCain, Senator Hollings, and Distinguished Members of the Committee. My name is Anne K. Bingaman. I am Corporate Senior Vice President of LCI International and President of LCI's Local Telecommunications Division. LCI International is the fastest growing of the nation's major long-distance carriers with annualized revenue exceeding $1 billion. Founded in 1982, LCI is headquartered in McLean, Virginia, and currently employs over 2,400 employees in 45 locations nationwide. LCI competes in all segments of the industry by offering long-distance service to business, residential and wholesale customers and, most recently, providing local phone service to business customers. As head of LCI's Local Telecommunications Division, I lead the company's ambitious plan to provide local telephone service in U.S. markets. In that capacity, I am responsible for LCI's relationships with all local exchange carriers and state public utility commissions as they relate to local competition. To date, LCI has received permission in 21 states and the District of Columbia to offer local telephone service, and the company has applications pending for approval in 8 other states. LCI also is negotiating with most of the Regional Bell Operating Companies ("RBOCs") and major independent telephone companies for interconnection, local service resale and the purchase of unbundled network elements. Most recently, LCI entered into a regionwide local resale agreement with BellSouth Corporation and a local resale agreement with Ameritech in Ohio.

I am honored to appear before the Committee to testify on universal service and access charge reform on behalf of the Competitive Telecommunications Association ("CompTel"). CompTel is the national industry association of competitive telecommunications providers, with approximately 200 members offering a full variety of telecommunications services. LCI is a carrier member of CompTel and H. Brian Thompson, LCI's Chairman/CEO, serves as Chairman of the 1997 CompTel Board of Directors. Like LCI, many CompTel members are aggressively pursuing a strategy of entering the local exchange service market under the pro-competitive policies of the landmark Telecommunications Act of 1996. .

UNIVERSAL SERVICE FUNDING AND REFORM

CompTel is one hundred percent committed to the goal of ensuring that all Americans have the opportunity to obtain quality telecommunications services at reasonable prices, and enthusiastically supports efforts to implement universal service reform in a competitive, full-service environment. Section 254 of the 1996 Telecommunications Act represents an historic change in this country's long-standing policy of promoting the universal availability of telephone services. As you are well aware, universal service has long been pursued by federal and state regulators, but always through policies which presupposed a monopoly provider of local telephone services. Now, under the 1996 Act, universal service policies must be redesigned around a new paradigm of local service competition. The Federal-State Joint Board on Universal Service in its recommendations to the FCC has taken a significant first step along that path.

As one element of what the Federal Communications Committee ("FCC") has termed the "competition trilogy," federal universal service support mechanisms must be reformed to preserve and advance the goal of providing universal access to afford-

able telecommunications services while also promoting the development of competition in local telecommunications services. The Act specifies that federal universal service support mechanisms should ensure access to telecommunications services by consumers in rural, insular and high-cost areas, by low-income consumers, and by elementary and secondary schools, libraries and healthcare providers. Central to these goals are the Act's requirements that federal universal service support mechanisms be explicit, rather than the current implicit subsidies, and that they operate in a non-discriminatory, competitively neutral manner. In structuring each mechanism to support universal service, the FCC must be careful not to diminish competition by disproportionately burdening one segment of the telecommunications market with support obligations or by favoring one class of market participant—namely, monopoly incumbents—with sole eligibility to receive support payments.

As you know, the 1996 Act requires the FCC to issue a final order on universal service funding and reform by May 8, 1997 (CC Docket No. 96–45). The FCC currently is considering the comprehensive analysis and recommendations rendered by the Federal-State Joint Board on Universal Service on November 8, 1996. CompTel commends the Joint Board on its thorough explication of the issues that must be addressed in order to implement Section 254. CompTel supports the general thrust of the Joint Board's recommended changes to the high cost and low-income support funds, and how to collect support contributions from telecommunications providers. CompTel agrees with the Joint Board's analysis that, for non-rural areas, the High-Cost Fund should support only the forward-looking economic costs of offering the supported services and that a cost proxy model should be used to identify such costs. By focusing on the forward-looking costs of an efficient provider—rather than the embedded or historical costs of particular carriers—the FCC can ensure that universal service funding needs will be kept at reasonable levels as required by the statute and that it does not grant special privileges to ILECs, who may operate inefficiently, as monopolies often do for the very reason that they have not been subjected to the heat of competition. Use of a cost proxy to identify costs satisfies the statute's requirements to be competitively neutral, because it establishes the level of support without giving preferential treatment to a particular carrier's costs or network design and technology. Thus, every eligible carrier operating in an area would receive support on the same basis and at the same level. In addition, CompTel agrees that a revenues-based assessment is appropriate and is consistent with the goals of universal service.

I have been asked to give CompTel's views on how to improve upon the Joint Board's recommendations. One of the most central principles to the success of universal service reform is to ensure that the funds are identified, collected and distributed in a competitively neutral manner. Furthermore, under the Act all contributions must be "equitable and nondiscriminatory." Thus, no support mechanism should benefit or burden a class of carriers out of proportion to the extent that it participates in the telecommunications marketplace. Similarly, competitive neutrality requires that support funds from the universal service mechanisms be available to all who meet clearly identified, objectively applied criteria, and that support be based on the number of eligible customers the provider serves. Finally, mechanisms should be technology-neutral and should not be limited to any one network architecture.

One significant issue which the Joint Board left for further comment is whether providers should contribute to the universal service fund on the basis of their interstate revenue, or on the basis of both their interstate and intrastate revenues. CompTel believes that the FCC has discretion to determine the relative size of each provider's contribution on the basis of their total interstate and intrastate revenues. While the statute expressly limits the universe of contributing carriers to "every telecommunications carrier that provides interstate telecommunications," it does not limit the FCC's ability to determine the mechanism by which those providers will contribute, other than requiring that contributions be "equitable and nondiscriminatory." Moreover, we at CompTel strongly believe that the FCC, as a policy matter, should determine carrier contributions on the basis of interstate and intrastate revenues, in order to avoid disproportionately burdening non-incumbent local exchange providers with universal service funding obligations.

CompTel further supports an interpretation of Section 214(e) of the 1996 Act that clarifies that purchasing unbundled network elements ("UNEs") from an ILEC and combining such elements to provide the supported services clearly satisfies the statute's requirement that an eligible carrier use "either its own facilities or a combination of its own facilities and resale of another carrier's services." In purchasing unbundled network elements, either separately or in combination, a carrier pays the full cost of the network facilities it purchases from the ILECs. The carrier steps into the shoes of the ILEC, and bears the responsibility for the customer relationship.

If a purchaser of UNEs provides the service to the high-cost subscriber but only the ILEC can draw upon universal support, there will be a tremendous economic disincentive for any new entrant to come into a high-cost area in the first place. Providing service over unbundled elements in many cases may be the only way that rural customers will have choices of local service providers, given the high cost—by definition—of constructing new local exchange facilities in those areas. In addition, CompTel supports the Joint Board's recommendation against adding any eligibility criteria not included in the statute.

ADVANCED SERVICES FOR SCHOOLS AND LIBRARIES

As you know, Section 254(h) of the 1996 Act expanded the concept of universal service to include support for "advanced telecommunications services" provided to elementary and secondary schools and libraries. CompTel agrees with the Joint Board's recommendation that both interstate and intrastate revenues should be used to support the discount for K–12 schools, libraries and healthcare providers. The Snowe-Rockefeller-Exon-Kerrey provision is subject to the statute's requirements that contributions to universal service support should be "equitable and nondiscriminatory." Moreover, as previously discussed, there is no reason to distinguish between the revenue basis used to support the Section 254(h) discounts from that used to fund the high-cost and low-income support mechanisms. All of these programs are funded by the same class of carriers—providers of interstate telecommunications services.

In addition, CompTel has challenged our membership to become partners in NetDay97 and NetDay2000. We want to position CompTel and its member companies as industry leaders in telecommunications services and innovation who promote technology and education to benefit America's children and future workforce. NetDay97, scheduled for April 19, 1997, is a volunteer federal/state initiative to create the inside wiring infrastructure for every public and private school in the nation. This nationwide barnraising will substantially impact the technology plans to all schools, districts, counties and states. Its goal is to facilitate community activism and collaborations necessary to connect every K–12 classroom to the world. NetDay2000, moreover, will identify, highlight and develop incentive and affinity programs to assist educators in acquiring the necessary technologies, training and tools to use electronic resources effectively. NetDay2000 is a unique opportunity to become involved in our communities, our schools, and our neighborhoods. We actively encourage voluntary efforts like NetDay to help achieve the technology and education components of Goals2000.

ACCESS CHARGE REFORM

CompTel strongly supports the FCC's decision to initiate its access charge reform proceeding (CC Docket No. 96–262). There is broad consensus in the industry today that the ILECs' switched access is priced at seven to ten times its costs. The FCC has proposed three possible approaches to access charge reform: a "market-based" approach, a "prescriptive" approach, or some combination of the two. Because the FCC's goal for access charge reform is to foster competition for services and to enable the marketplace to eliminate the need for price regulation, CompTel believes that market-based access charge reform can occur only after a true, fully-functioning competitive market for local exchange telephone services, including interstate access, has developed, and even then only in the case of originating access charges.

CompTel urges the FCC, as a first priority in bringing cost-based rates to access, to prescribe cost-based rate levels based upon Total Service Long Run Incremental Costs ("TSLRIC") for terminating access rates, which are not now, and are not likely in the future to be, subject to competitive pressures. Competitors typically cannot influence whom their customers call. As a result, there is no reason to expect that terminating access will experience significant competitive pressure.

CompTel strongly believes that the FCC and states must continue their efforts to ensure that the unbundled network elements regime is fully implemented in order to create the competitive marketplace that might allow for market-based access reform for originating access. Even though Congress laid the legal groundwork, the simple fact is that today there exists no competitive market for local services and, therefore, no competitor can hope to avoid access charges except in the most limited circumstances. The ILEC remains, for the time being, the one ubiquitous network through which the vast majority of telephone consumers must be reached and today no ILEC has in place the systems and processes to seamlessly and instantaneously provide unbundled network elements in large numbers. CompTel believes that the provisioning of unbundled elements at cost-based prices to new local exchange entrants is critical to create a competitive marketplace for local services.

CompTel has urged the FCC to make clear that such ILEC provisioning systems are a necessary competitive *quid pro quo* to Bell entry into in-region long distance service. Such a clarification will provide the necessary incentives for RBOCs to complete the software programming and systems work still underway that will be necessary to enable competitors to provide unbundled combined network elements at cost-based prices. If network elements are made as readily available and simple to use as access services are today, it may be possible that market competition may act to drive originating access rates toward their costs, and the FCC could defer a fully prescriptive approach to originating access until it can gauge the success of local competition using this model. It is absolutely imperative, therefore, that the FCC intensify its efforts to ensure that the combinable unbundled network element regime is fully implemented, as a prerequisite to deferring a prescriptive approach for originating switched access reductions.

CompTel's access reform proposal makes significant progress toward achieving cost-based switched access rates in the near term. It is grounded in the realities of today's marketplace, and can be readily implemented by the FCC without lengthy or burdensome additional proceedings. In addition, it incorporates the hard work of state commissions in arbitrating agreements under Section 251(a) of the 1996 Act; and, it mitigates any contentions of rate shock by ILECs by avoiding an immediate, across-the-board, flash-cut approach. We urge policymakers to adopt this targeted approach.

Thank you.

Senator BURNS. Pretty plain. We did not have any trouble understanding that.

Representing the U.S. Telephone Association, Mr. Roy Neel. Thank you for coming, Roy.

STATEMENT OF ROY NEEL, PRESIDENT, U.S. TELEPHONE ASSOCIATION

Mr. NEEL. Thank you, Senator. I am sorry there are not more Senators here. We are finally getting a dog-fight.

Senator BURNS. They always miss the most exciting part of the day, anyway.

Mr. NEEL. That is right.

Senator the U.S. Telephone Association represents more than 1,000 local telephone companies. We employ nearly a half-million men and women who have been building facilities and providing affordable and high quality telephone services to every family and business wherever they live and work.

Now, that is an important distinction, and it is one thing that distinguishes the local telephone company industry from Ms. Bingaman's company, and our other witness from AT&T and MCI and all the long-distance companies, and that should be of concern to you, because that is what universal telephone service is all about. It is not about simply serving high volume, profitable business centers. It is about serving everyone in Gardner, MT, in Harrisville, WV, in Standish, ME, and so on.

But the question here is, when is all this competition supposed to flow to all of those communities? When is it going to come? Well, it is not likely to come any time soon, and with it we know there will be no universal service social responsibilities for these new so-called competitors.

Long-distance companies have flatly stated—flatly stated—that they intend to go only after high-volume affluent markets, those who spend a lot of money on telecommunications services, especially in urban areas.

Let me just read to you a couple of things from this industry. We did not make these up. These are direct quotes.

From Bob Allen, AT&T chairman: It is logical that bees follow honey and banks are robbed, because that is where the money is, and our focus will be on concentrated markets in major cities. How many major cities do you have in your States, Senator, with concentrations of business customers?

Further, David Arnecke from AT&T says, You go where the money is and you work your way down the money chain from there.

Harry Bennett, another AT&T vice president, says, And for the rest of the country, we want to use other people's assets and capital everywhere we can.

Bert Roberts from MCI says, We'll certainly go after those parts of the market that we consider most profitable. It will be business. It will be just certain areas of the residential community.

A British Telecom executive, Alfred Moffitt, says, There's a lot we can bring to the table in terms of accelerating MCI in the local loop, such as how to leverage other people's infrastructure—read, the local telephone company's infrastructure—that has been resold, and how to look at the approach of business versus residential. He added that British Telecom's—read MCI's—long-term plans don't include penetration much below the top 30 percent of residential customers at all.

Now, that is as strong a message as we are going to get about the commitment of these companies toward universal service. Unfortunately, the FCC is giving AT&T and these companies simply a license to steal, using Bob Allen's comment about robbing banks.

Does that sound like a commitment to universal service? No. This plan, these business approaches toward your constituents, and probably 45 million to 50 million rural constituents in this country, is little more than economic and geographical red-lining—economic and geographical red-lining.

Specifically, here is what could happen. The FCC maintains the current system of paying for universal telephone service and maintaining and upgrading the network and fails—if it eliminates the current system and fails to replace it with some kind of competitively neutral, revenue-neutral system, billions of dollars will be taken from local telephone customers and moved over to the corporate coffers of AT&T and MCI and others.

One of two things could happen. States could be forced to increase local rates, or, if local companies are not allowed to fully recover their costs, investment in an upgraded network could dry up.

Of course, we know State regulators are going to be reluctant to raise local rates. At least 34 States have freezes in place. They do not allow local rates to increase. So the pressure to balance the books will fall directly on the local telephone company's ability to invest in your communities.

It is the situation all through the company. Telephone companies are investing millions, billions, $20 billion a year in facilities in communities, hiring real people, not just doing marketing plans.

If the FCC gets this wrong, eliminates these supports to pay for universal service, they will eliminate the ability of local companies to keep doing what they have done for decades—install switches and poles, hire people, provide basic service to everyone at affordable rates.

Ask these long-distance companies, the resellers, the competitive access providers and so on, and all these other companies clamoring for a competitive advantage through this below-wholesale pricing scheme the FCC has unveiled, ask them if they will make offsetting investments in your States.

Will they put their profits from all this cream-skimming back into the communities in the form of jobs and equipment and facilities? Will they serve everyone, wherever they live, and will they maintain a commitment to your communities if it turns out to be a little more difficult and costly than they thought?

The answer, of course, is no, they will not do it.

What do they want? They want to drive access charges down to virtually nothing. They want to keep down their payments into any universal service fund. They want to keep the size of that fund minuscule, and they want to continue to get these special wholesale prices.

There is nothing in the law—I am sorry, Ms. Bingaman—that requires the FCC to order below-cost prices, and to ignore the real costs of providing these services. There is nothing that requires that, and that is why this interconnection order has been challenged. It may be what the long-distance companies want, to get this special competitive advantage, but remember, the local companies have been lowering access charges for years.

I have got a chart here I would just like to show you briefly. Over the last 5 years, the local companies have lowered access charges by $9 billion—by $9 billion. Ask the long-distance companies what happened to all that money. Where did it go? It did not go to reduce long-distance rates for about 50 million people who do not take advantage or cannot take advantage of these discount pricing plans.

Part of your focus today is on telecommunications for education. Senators Snowe and Rockefeller, you deserve a lot of credit for moving this ambitious initiative into law. The fact is, everyone is committed to getting schools and libraries wired and served with all this state-of-the-art equipment.

The fact is, local companies have been quietly doing this work for decades, and they will spend more than $2½ billion over the next 5 years working with schools and rural areas and inner cities to bring them into the 21st Century. That is a real commitment, and real follow-through, not simply a flashy public relations event designed to impress policymakers, but rather an effort to spend the money and do the tough work.

Local companies will be doing this. They have done it before. They will do it in the future. But if regulators load up some kind of educational fund with mandates that they are unwilling to pay for, and costs are not able to be recovered, universal basic telephone service will be squeezed, and students and teachers will end up with one more empty promise.

So a few years from now when you are holding a town meeting in one of your smaller communities and some elderly couple or school teacher or truck driver asks you, what the hell happened to the telephone system, are you prepared to tell them, well, we had to blow it all up and give a special break to AT&T and MCI-British

Telecom so we can claim to have competition, whatever the consequences?

Well, that is the effect of these recent FCC decisions. they can slow this train wreck down. They can do the right thing. They can produce a funding mechanism that allows these companies to recover full costs. They can put in place a rural transition plan that keeps the current levels of universal support level and provides incentives to invest in rural areas.

So if they get it right, all these things can happen, as Chairman HUNDT SAID. Long-distance rates can drop not just for the affluent. Investment in jobs and facilities can continue, and affordable telephone service will continue. But if they get it wrong, I would not want to go to that town meeting.

Thank you, Senator.

[The prepared statement of Mr. Neel follows:]

PREPARED STATEMENT OF ROY NEEL, PRESIDENT, U.S. TELEPHONE ASSOCIATION

Mr. Chairman, My name is Roy Neel. I am president and CEO of the United States Telephone Association (USTA). USTA represents approximately eleven hundred small and mid-size local telephone companies, some of which serve only a few hundred customers. Our membership also includes the RBOCs and GTE, each of which serves millions of customers. I appreciate this opportunity to make the following observations about how the history of this industry brought us to the place we are today, and about pending regulatory decisions that will affect the future of universal telephone service and the network that has been developed to provide that service to our customers.

The legislation that USTA and its companies endorsed in the last Congress established the principle that customers of universal service should pay rates that are just, reasonable and affordable. This goal was achieved in the past through implicit subsidies from a variety of sources that kept residential rates low. The debate now centers around questions about how much of a subsidy is flowing to basic service; what mechanisms should be used in lieu of this implicit subsidy; what is the federal and state role in dealing with the subsidy; and over what time period to make the transition. In order to answer these questions, it is vital to understand the steps taken by regulators and the industry through the years that created the subsidy flow we have today, and exactly how the subsidy from interstate access charges works.

As the Federal Communications Commission structures a new universal service fund from this regulatory maze, it must move with caution. If the old system of implicit subsidies is not replaced by a universal service funding mechanism that ensures companies who contribute to the fund may recover their costs, then the quality of our current system will be threatened. The likely result of a system that does not ensure cost recovery will either be a reduction in infrastructure investment, a reduction in the current quality of service, or a marked rate increase. If the subsidies are eliminated and no sufficient and sustainable universal service mechanism is in place, the consequences for the American people will be severe. Infrastructure investment will slow, service will deteriorate and basic rates will increase.

I. HISTORY

At the root of today's subsidy framework is a United States Supreme Court case which was decided in 1930. At that time, only one-half of one percent of telephone calls were interstate long distance. However, the same local telephone plant was used for local calls, intrastate long distance and interstate long distance. Despite this negligible percentage of interstate calls, in 1930 the US Supreme held in the case of *Smith* v. *Illinois* that the costs of the "interstate" plant had to be separated from the "intrastate" plant.These interstate costs were to be recovered in the interstate rates; otherwise the intrastate service to which the exchange property was allocated would bear an undue burden. Thus, the Supreme Court in 1930 created what we now call "separations."

Pursuant to this process of dividing costs between interstate and the states, it soon became obvious to regulators that the rapidly declining cost of providing interstate long distance service permitted them to allocate more intrastate costs to interstate long distance, and therefore allow low local telephone rates to be maintained.

In 1970 regulators actually adopted a plan that allocated interstate long distance costs in a way to allow those costs to triple the rate of actual interstate use. By 1981, 26% of the costs were being allocated to interstate even though relative actual use amounted to only 8%. Long distance rates were inflated in order to provide the money to cover the costs of this allocation. The plan was implemented in the name of universal service. Consequently, residential subscribers were receiving local telephone service at prices that were below cost, due in part to a substantial subsidy from the interstate service; and long distance users were paying more in order to subsidize local service.

This system worked well when AT&T was the sole provider of interstate long distance. Local service could be subsidized so that its rates could remain low. However, when competition for interstate long distance service arrived in the 1970s, the dilemma of cost sharing became apparent. AT&T demanded that the new long distance carriers such as MCI and Sprint be required to subsidize local service just as it was being required to do. Consequently, the FCC began intense work on the access charge issue in the early 1980's—and in 1982 proposed a plan where traffic sensitive costs would be paid by long distance carriers and non-traffic sensitive costs (i.e. the loop) paid by end users. This end user charge is now known as the subscriber line charge or "SLC." The "SLC" first proposed by the FCC in 1982 would have been $7.00 per month.

Due to strong Congressional opposition to the SLC, the FCC lowered the amount of this charge. Instead of the proposed $7 per month SLC on every line, the FCC ultimately adopted a SLC of $6 per month for multi-line business users. The residential and single-line business SLC is today capped at $3.50 per month.

Notwithstanding the lower charge, the SLC ultimately resulted in the removal of billions of dollars from the "per minute" access rates paid by long distance carriers. Today, approximately $7 billion is collected through SLC charges each year. As a consequence of the imposition of the SLC and the deregulation of customer premises equipment and inside wiring, the second half of the 1980s showed unprecedented declines in access charges and interstate long distance prices. However, these changes still left interstate service bearing a disproportionate share of the costs of the common plant used to provide local and long distance service. That is the continuing subsidy support to local service which is now at the heart of the access charge and universal service debate. If access charges are reduced as AT&T and MCI have advocated, and universal service is to be sustained as Congress intended, then a replacement mechanism must be created to ensure it has adequate funding.

II. UNIVERSAL SERVICE AND THE 1996 ACT

While the concept of Universal service has been discussed for years by the courts and the FCC, the term was not included in the Communications Act until added by the '96 Act last year. The concept of affordability is also now embodied in Section 254 (b)(1) which provides that quality services must be available at just, reasonable and affordable rates. Section 254 requires Universal service to be "preserved and advanced," and mandates rates that are "affordable." To implement these requirements, a Federal-State Joint Board was convened pursuant to the Act to make recommendations to the FCC concerning what steps would be necessary to implement these new requirements.

A major aspect of § 254 is the requirement that explicit subsidies must replace implicit subsidies to the maximum extent possible. This requirement applies not only to the implicit support coming from interstate access charges, but also to the implicit subsidies that are a part of state rate structures. Intrastate toll provides a subsidy to basic exchange service; business services provide subsidies in many states; and "vertical services" such as call waiting and call forwarding are over priced by regulation with the overage used to subsidize local residential service.

The 1996 Act's overall framework calls for explicit universal service support mechanisms to be funded by contributions from all providers in interstate telecommunications services. These contributions are to "preserve and advance universal service." The idea was not only to create a new explicit subsidy framework consistent with a competitive market-place, but to broaden the base of support, so that all carriers would pay their fair share to maintain universal service.

III. INTERCONNECTION ORDER

While we have no assurances that the complex universal service situation will be resolved satisfactorily this Spring, the FCC has already severely undercut the implicit support for universal service both at the federal and state level. I am referring, of course, to the Interconnection Order. USTA believes that the FCC's first major effort to implement the provisions of the 1996 Act significantly deviated from

Congressional intent, and will be harmful to universal service. Our concerns arise primarily from two aspects of that Order: first, what we call sham unbundling, and second, the pricing standards for interconnection and network elements known as TELRIC.

We understood the 1996 Act to mandate that our incumbent local exchange carriers (ILECs) be required by § 251(c)(3) to provide requesting carriers with unbundled network elements which would be priced based upon cost. If a requesting carrier wanted all aspects of a service, or complete service, our companies would be required to provide such services under the resale provisions of the Act [§ 251(c)(4)]. These resold services were to be priced at their wholesale rate's higher rate than the rate charged for the sum of the individual elements of such service. USTA did not object to this approach as embodied in the '96 Act; it seemed reasonable, nondiscriminatory and pro-competitive.

Pursuant to the Act, if a competitor such as a cable company only needed access to our switches, because it already had its own local loops, then ILECs would be required to provide switching as an unbundled network element. Under that circumstance, the competitor would need this unbundled network element (switching) to complete its service. However, the FCC's Interconnection Order allows ILECs' competitors to totally evade the resale provisions of the Act by permitting them to purchase all of the unbundled network elements that comprise a complete service at the lower TELRIC-based rates and under the guise of unbundled network element access. Under the FCC Order, the resale rate may be avoided even though no physical assembly/reassembly is required or actually occurs. We describe this as sham unbundling because the network elements necessary for the complete service are different from the complete service only in terms of the price paid and the § 251 paragraph under which the request is made. This process mandated by the FCC amounts to a fiction—what in reality is resale is called unbundled access.

We understood facilities-based competition to be one of the goals of the 1996 Act. However under the circumstances described above, there is no incentive for anyone to construct their own facilities. If a competitor can purchase all the necessary elements at TELRIC rates, which are substantially below actual cost, and recombine these elements into their own retail (complete) service, why would any rational person invest the money to construct their own facilities? The FCC interconnection order has effectively written the resale provisions out of the 1996 Act.

The pricing standard established by the FCC for these network elements is a critical factor that makes sham unbundling so damaging. Paragraph 620 of the FCC's Interconnection Order requires two things: first, it requires prices for interconnection and unbundled network elements to be based upon its TELRIC cost methodology and "not on embedded cost;" and second, it requires that in arbitration over interconnection arrangements states must set prices for interconnection and unbundled network elements on the basis of TELRIC. Although the FCC's TELRIC theory has been stayed by the 8th Circuit Court of Appeals, the Commission's reliance upon it has permeated other implementation proceedings.

Recombined Elements and TELRIC Prices = Local Rate Increases

Why is all of this important to the Committee and important to universal service? The answer is that our local competitors are not seeking to serve all customers, but are targeting business customers and high volume residential customers—those who use vertical services (e.g., call waiting, call forwarding), and a high volume of long distance service. If our competitors can purchase complete services under the guise of unbundled network elements, at bargain basement prices and convince the FCC to slash interstate access changes, then they will avoid paying any share of the implicit subsidies now included in rates.

Chairman Hundt has often stated that the Interconnection Order was simply one part of a "Trilogy" to be supplemented by an Access Charge Order and the Universal Service Order. These proceedings were to be used to smooth out any rough spots or imbalances caused by the Interconnection Order. However, now we have seen the Access Charge NPRM and the Joint Board Recommendation on universal service; and far from allaying our fears, these two documents only heighten them.

IV. ACCESS CHARGES

Access Charges and the Cost of Universal service

Interstate access charges have been over-priced due to long-standing government policy to support universal service. As I previously explained, more economically efficient pricing is required by the competitive marketplace, and so the implicit subsidy in access charges must be replaced by a universal service mechanism under § 254 of the 1996 Act.

When it was announced in 1982 that the AT&T antitrust settlement resulted in the Bell operating companies being divested from AT&T and its long distance operations, questions were raised about the attendant impact on local rates for all telephone companies because industry-wide separations and settlements, which included the interstate subsidies, would end. State regulators and consumer groups were outraged and claimed that as a consequence of divestiture, local phone rates would double or triple. For instance, Senator Riegle stated in hearings before this Committee on the "AT&T Proposed Settlement" on February 4, 1982 the following:

> In Michigan today, Mr. Chairman, there is a great sense of alarm by rank and file citizens, and, I might say, across party lines about the impact of the Justice Department action in this case. The concern is essentially focused on the issue of what's going to happen to local phone rates. Are people going to find themselves facing 200 or 300 percent increases over the period of the next 2 or 3 years in their local phone service?

In response to these concerns, Charles L. Brown, AT&T Board Chairman, and Assistant Attorney General, William Baxter, testified at the hearing as follows:

> Mr. BROWN. The new decree contemplates that tariffs will be filed which could be the means of support for the local exchange companies. The FCC currently has an access charge plan under review which is consistent with the decree requirements and would provide such support for local exchange rates.
>
> The Bell System has a long standing commitment to service which we must continue to honor to be successful in today's competitive environment. The companies which will be divested must be strong if they are to meet this commitment in the future.
>
> Mr. BAXTER. In the agreement with AT&T, there is provision for access charges. In the future the local operating company will impose charges on long-distance carriers, through these access charges, for the service of either originating or of terminating long-distance calls within the exchange area. Those access charges are subject to the regulation of the local public utility commission on intrastate calls, intrastate long-distance calls, and they are subject to the regulation of the Federal Communications Commission on interstate long-distance calls. And those regulators have the authority to set those access charges wherever they choose to set them, and there is not the slightest doubt in the world that if they wish to do so, they can set them high enough to recapture for the local companies precisely those revenues that would have been received through the separations process under the old way of doing things.

Thus, Mr. Brown and Mr. Baxter advised the public not to worry; access charges could be used to continue to subsidize local service. The access charge plan described by Mr. Brown was, in fact, implemented along with the subscriber line charge. The FCC's access charge plan has gone largely unchanged since that time and it clearly contemplates the use of access charges to support universal service. In short, although the government, through the divestiture, eliminated the previous system of subsidies, regulators, in order to ensure rates would not soar, created the access charge mechanism.

ILECs Should Be Able to Recover Their Legitimately Incurred Costs

The FCC TELRIC theory described earlier enables the recovery of only forward-looking costs. The FCC has already tentatively concluded that if their market based approach will not result in the development of efficient competition, that its goal for prescriptive access reform must focus on interstate access rates based on some form of TELRIC pricing method. If the FCC adopts TELRIC as the pricing standard for interstate access, how does the Commission intend to address the actual (embedded) costs that our companies have incurred thus far? These are costs that were lawfully incurred by ILECs, and with the approval of government regulatory bodies.

V. UNIVERSAL SERVICE

If the over-arching goal of the 1996 Act was to preserve and advance universal service at affordable rates, and the FCC acts to preclude access charges from providing universal service support, then the only place left to look is the universal service mechanisms contained in §254. It appears that the FCC's overall scheme, however, contemplates wringing all of the subsidy out of the federal system of access charges, establishing federal support mechanisms inadequate to the task of replacing them, and then passing on the responsibility of universal service at affordable rates to the states. The likely result will be less investment in the network and higher rates. If access charges are taken to some form of TELRIC pricing, as has been suggested by the FCC, there will be a dramatic decline in the revenues avail-

able to ILECs to maintain, not to mention enhance, the nation's telecommunication infrastructure.

ILECs are currently the only telecommunications carriers in this country who are willing and able to provide universal service. Our local competitors are interested only in high volume business and high volume residential customers. In other words the only active competition, today is for high volume customers. This will continue for sometime in the future.

Universal service Funding for Schools and Libraries

Section 254(h) was a significant aspect of the universal service plan adopted by the Congress. While we agree with the very positive goals of this subsection, they will in fact add to the overall cost of providing universal service. The Joint Board has determined that $2.25 billion per year is the amount that will be provided for these purposes. Is this a realistic goal on a realistic timetable? We do not know how the current universal services support will be continued, if at all, much less how a new obligation will be funded. Where does the money come from to pay the costs for this program? We also would urge you to consider whether you did in fact include inside wiring (internal connections) as one of the services that you intended to be included in the services to be provided to the schools.

Internet

The FCC has tentatively concluded that Internet service providers should not be required to pay current interstate access charges. We agree. But we need to work together to ensure that the public network evolves to accommodate Internet traffic in an efficient way. The network congestion problem experienced by several of our companies is a result of Internet service and users maintaining connections between them for very long periods of time compared to normal voice calls. With flat-rated local service, there is little incentive to use the network efficiently. To the extent that any network users, including information service providers such as Internet service providers, fail to pay for network resources they use, the costs are recovered from others. We have urged the FCC to establish the simple principle that all network users should pay for what they use. We should work together to apply this principle to Internet service providers in order to encourage the growth of these services without burdening other network users.

VI. RURAL TRANSITION PLAN

USTA believes that areas served by rural telephone companies are an important subset of the Universal service problem. Although they cover less than 5% of the nation's access lines, rural telcos serve over 40% of our nation's land area. If the FCC adopts the Joint Board recommendation on the support for universal service in rural America, two unintended consequences will beset rural consumers. First, as support precipitously declines from its present level, local rates will be forced up. Second, there will be no incentive to invest in needed improvements to the telecommunications infrastructure in rural areas. Data only from rural companies engaged in study area acquisitions over the last three years shows a commitment to nearly $350 million in network upgrades. Any disincentive on investment will not only impact consumers in the form of service that is not reasonably comparable to urban areas, but will also indirectly affect rural citizens, because the stimulatory effect that investment in rural telecommunications has on rural economic development will be lost. USTA along with the rest of the local telephone industry has submitted a transition plan to the FCC that addresses these problems with minimal additional burden to Universal service. Unless the Universal Service Transition Plan for rural LECs is adopted by the FCC, these companies will be unable to recover their investment costs and will discontinue making such commitments to their customers.

VII. CARRIER CLASSIFICATION FOR UNIVERSAL SERVICE

Finally, USTA is concerned that an additional threat to universal service results from the FCC's classification of carriers. The Commission recognizes the interrelationship between the Interconnection, Access Reform and the Universal Service proceedings and aptly refers to it as a "Trilogy." However, the Commission identifies, and thus treats different classes of incumbent LECs differently in each of these proceedings. This different classification of carriers poses an additional threat to universal service. The 1996 Telecom Act recognized the wide array of incumbent LECs—rural carriers, mid-size carriers (those with less than 2% of the nation's access lines) and the remaining LECs—GTE, Sprint and the 7 RBOCs.

The Commission, in its Interconnection Order recognized the three classes identified in the Act, yet ignored them for purposes of the Access Reform and Universal

Service proceedings. In the Access Reform proceedings, the Commission attempts to establish rules for price cap and non-price cap companies, but in the Universal Service proceeding, the Joint Board addresses rural and non-rural LECs. The net result of this approach is an inefficient and uneven regulatory scheme that threatens universal service.

The FCC should recognize the wisdom of the Act that Congress passed and seek continuity within the proceedings that compromise the "Trilogy." Notably, the Competition Policy Institute (CPI) issued a position paper last fall which recommended a trifurcated transition schedule for universal service calculations: 7 years for rural carriers, 4 years for mid-sized "2%" companies and immediacy for incumbent LECs larger than 2%. While I do not endorse CPI's proposal in its entirety, it correctly builds on the classifications established by the Act and thus provides a more harmonious approach to universal service than the medley of classifications currently proposed by the Commission.

VIII.CONCLUSION

Our competitors argue that any unforseen expenses created by competition should be borne by the local telephone companies and their customers. Mr. Chairman, our companies designed, built and maintain the finest telecommunications network in the world. In fact, the quality service provided by US telephone companies is the envy of the world. Our companies created this technology and have maintained this infrastructure notwithstanding that we are one of the most heavily regulated industries in the country. Furthermore, while the rates of others in this industry (i.e. the long distance and cable companies) have increased in the last year, our rates have remained stable.

We've been here for the American public for a long time and intend to stay here. However, only a transition to the new competitive marketplace that is fair and balanced in the treatment of all providers will ensure our continued high quality and universally affordable service.

Senator BURNS. Thank you, Mr. Neel.

Ms. McGovern, Vice President, Consumer Services Division, for AT&T, welcome to the fight.

STATEMENT OF GAIL MCGOVERN, EXECUTIVE VICE PRESIDENT, AT&T CORPORATION

Ms. MCGOVERN. Thank you very much. Thank you very much for inviting me to the fight.

I have some prepared remarks that I want to share with you today, but I cannot resist the opportunity to also respond to what some of my colleagues have just said. First of all, as I indicated, I am the head of the consumer business at AT&T. And I want to state that I have yet to meet a consumer that I am not interested in serving.

Second, I would love to aggressively be in local service. But it is very difficult when you are dealing with a group of unwilling suppliers. And as my colleague to my right had some fun, interesting quotes, I have a few myself.

This is from Bell South's Director of Advertising: We have got competition coming and we have got to slam the door on their fingers—unquote.

This one is from SBC in Business Week: We want to make our welcome mat smaller than anyone else's.

So it is very difficult to provide customers what they are interested in when this is what your suppliers are up to.

Next, I would also like to say that I find it curious that we are under criticism for wanting to reuse assets in this industry. Because every single one of these RBOC's are reusing long distance assets. They are bragging to my colleagues on Wall Street that they are getting long distance prices at a penny a minute and re-

selling them with 80-percent margins, where I am getting a rate for TSR that they are saying is only a 20-percent margin. So I find the math curious here.

And I also would like to applaud what Ms. Bingaman said, because this is gold-plated service. For the first 10 years of my career, I worked for Bell Pennsylvania. And I cannot recall a single conversation that I had where we were talking about customers or we were talking about driving down costs. We were talking about plant and equipment. So I do not think that my colleagues are necessarily that consumer-oriented as they would lead you to believe.

And I hope you ask me a question about that chart, but I do not want to use up all of my time with this rebuttal. But I am very interested in discussing long distance rates as well.

In any event, I can tell you that consumers are very anxious to buy their local service in a competitive marketplace. They like the way how competition has transformed the long distance market. And they want more choices, better prices, and new technologies in local service as well.

What the FCC does to reform universal service and access charges this spring will be critical to whether local competition, and therefore lower rates, succeeds as a national goal. I will take universal service first, and then I will describe the link to access reform.

Universal service is part of AT&T's heritage, dating back to when our President, Theodore Vale, first coined the phrase "universal service" in 1907 to describe what he had as a vision for the future. The question before the Commission is how to size and pay for the universal service obligations under the Telecommunications Act without forcing a general increase in prices, and without abandoning the Act's goal of increased competition. Continuing with the present system is not an option.

Today the long distance industry and our customers are carrying the burden of funding universal service. We do this by paying hugely inflated access charges to the local exchange carriers. These charges are supposed to cover the local carrier's cost of connecting long distance calls and the cost of universal service. But, in reality, these exorbitant charges go way beyond the cost of doing both.

The challenge is to create a new universal service system that is competitively neutral and allows all Americans affordable access to quality services. The Congress provided the basic framework. It said that the FCC must work with the States and create a system in which all subsidies are explicit, they are funded by all carriers, and available to all competing eligible carriers.

But the 1996 Act complicates this challenge by increasing the scope, and therefore the overall size, of the subsidies. The bulk of this new spending is estimated by some at about $3 billion. And it is supposed to support subsidies for the schools, the libraries, and the rural health care providers.

Is this good? Yes, in general, this is good.

AT&T thinks that schools, libraries, and rural health providers deserve some universal service funding. Ultimately, however, the consumers will pay the price tag. Consumers understand that while universal service is a worthy goal, the funding is essentially a tax. We believe consumers are willing to pay a reasonable

amount for universal service, as long as the burden is fairly apportioned, targeted, and the program is well managed.

One way to erode public support for universal service would be to require rate hikes to pay for it. Yet that is what will happen this July unless the Commission does the right thing and reduces access charges to economic cost. Here is the math.

The long distance industry today pays about $20 billion in access charges to the large local phone carriers. By our calculations, the true economic cost is roughly $5 billion. Another $5 billion or so is all that is needed to fund universal service so local rates will not rise. That leaves $10 billion in unwarranted payments.

Consumers will not be better off at all if all the FCC does is offset any new universal service spending. The Commission should give consumers a real rate cut and put the rest of the $10 billion back in the customers' pockets by cutting access charges to economic cost. The local exchange carriers will not do this themselves. They did not in 1996, and they will not do it now unless the FCC tells them to.

AT&T will not hold on to any access reductions. The FCC has found that we have a solid record of passing all access reductions through to our customers by lowering long distance prices. In fact, our average revenue per minute, which is the real price, has declined by 60 percent more than access reductions between 1994 and 1996.

I know if I do not pass these access reductions on to my customers, I am going to lose business to my competitors. AT&T has pledged to flow through all access savings that result from the FCC's access reform. And, quite frankly, I do not have a choice. The market is telling me I have to do that.

We recognize, though, that the smaller rural carriers in high-cost areas may be more vulnerable when their access charges are reduced to economic cost. The solution is simple: reduce all local carriers access charges to economic cost, but let the smaller carriers recover the difference between their old rates and the new rates through the Universal Service Fund. This proposal should only apply to the smaller rural carriers, those with under 100,000 lines. GTE and the other large carriers that happen to be in rural areas do not need special government help. They can reduce cost.

It would prolong their monopolies, it would undermine local competition, and it would harm consumers. Local carriers should have to do exactly what AT&T had to do and is still doing—cut costs, write off unproductive assets, and compete for their customers in the marketplace.

Thank you very much.

[The prepared statement of Ms. McGovern follows:]

PREPARED STATEMENT OF GAIL MCGOVERN, EXECUTIVE VICE PRESIDENT, AT&T CORPORATION

Thank you for the opportunity to testify regarding the Federal Communications Commission's implementation of the Telecommunications Act of 1996.

In implementing that Act, a fundamental, overriding issue now facing the Commission is how to fund the increased universal service obligations that the Act created, as well as the additional obligations that the Commission apparently would like to create, without forcing a general increase in rates, and without abandoning the Act's goal of increased competition.

The promise of the Act is that it offers the possibility of competition—and therefore lower rates to consumers and businesses—in markets that have historically been monopolies. The development of competition is being undermined, however, by the fact that the local exchange carriers or "LECs" are still permitted to charge prices for exchange access services that are far above economic cost. In the past regulators have tolerated above-cost access charges because they were thought to be necessary to subsidize universal service. However, as Congress, the FCC and several state commissions have recognized, such excessive access charges are fundamentally incompatible with the goal of fostering local competition. Because competitors depend on the local monopolies for access, the incumbent can "price squeeze" its competitors by maintaining above-cost access rates while lowering its prices in competitive markets. To eliminate these distortionary and anticompetitive effects, access charges must be driven to cost now.

The challenge, therefore, is to find a new way of funding universal service that does not rely upon competitively harmful and excessive access rates. In November, a Federal-State Joint Board that was convened under the new Act recommended that universal service be funded through competitively neutral contributions assessed on all telecommunications carriers and disbursed through the Universal Service Fund or "USF". That recommendation has broad support in the industry. The Board's proposal has thus laid the groundwork for removing all subsidies from access charges and replacing the old system with one that is truly competitively neutral.

The elimination of these anticompetitive subsidies is complicated, and made more so by the need to increase the scope and, therefore, the cost, of universal service obligations. For example, the 1996 Act mandates universal service funding in several new areas, such as subsidies for telecommunications services provided to schools, libraries, and rural health care providers. The Federal-State Joint Board has also recommended that the existing Lifeline program be expanded. As a result, the Joint Board recommended several billion dollars in new universal service spending, over and above existing support payments.

This increase in universal service support underscores the link between access reform and universal service reform and the need for access reductions. Unless the FCC orders reductions in access charges, the increase in universal service contributions will inevitably lead to billions of dollars in rate increases. That would not be in the public interest. Access reform should lead to substantial reductions in access charges, which AT&T and MCI have committed to flow through to customers through reductions in their long distance bills. Therefore, the FCC should reduce access charges by an amount necessary to offset the new spending required for universal service support, and should further reduce access charges to economic costs, so that consumers can immediately receive the full benefits of cost-based pricing.

Let me now address these two related subjects—universal service and access reform—in more detail.

I. UNIVERSAL SERVICE

AT&T strongly supports universal service and always has. Indeed, every year AT&T pays billions of dollars to support universal service through the FCC's existing universal service mechanisms.

The existing methods for funding universal service, however, are fundamentally incompatible with the goal of encouraging competition. Under the existing system, the subsidies for universal service are funded principally through a portion of overpriced access charges. Long distance companies and their customers, moreover, are today the only carriers that contribute to universal service support. The LECs, by contrast, not only do not contribute, but they price access charges without regard to their economic cost and universal service fund subsidies to earn exorbitant monopoly profits on access. These above-cost rates harm American consumers in three ways: they lead to artificially high long distance rates; they discourage usage and they become barriers to local competition.

Above-cost pricing facilitates anticompetitive price squeezes, which directly undermine the development of competition. Such a price squeeze can result whenever the incumbent LEC seeks to compete with another company, such as a long distance company, that purchases access from the LEC. The LEC can put unfair competitive pressure on its rival simply by increasing the price of access (or refusing to reduce the price as quickly as the market would otherwise dictate), and then undercutting the rival's prices in the end-user market. The resulting losses will ultimately drive the rival out of the market, which will then leave the LEC free to increase its rates to monopoly levels.

For these reasons, the FCC has recognized that the existing access charge system must be changed. The challenge now is to find an alternative method for funding universal service subsidies that is competitively neutral and does not create a risk of price squeezes.

In the universal service proceeding currently pending before the FCC, a broad consensus has emerged in the industry on how that competitively neutral system should be designed. The new system would have four basic features:

First, all implicit subsidies must be stripped out of access charges. Access charges must be set at forward-looking economic cost.

Second, the funding for universal service should come from a percentage surcharge on all telecommunications services. Such a surcharge would be competitively neutral, unlike today's system, in which only the long distance carriers fund universal service. Moreover, a broader contribution base will allow the obligation to fund universal service subsidies to be spread over a larger group of carriers and services.

Third, the subsidy for providing service in high cost areas should be determined by comparing the forward-looking economic cost of providing service in the relevant geographic area to a nationwide benchmark affordable rate. In any geographic area where the cost of providing service exceeds the national benchmark rate, the local service provider would receive the difference in the form of payments from the Universal Service Fund.

Fourth, the subsidies must be "portable." That is, any LEC that wins a customer in a high cost area should be eligible to receive the universal service subsidy for that customer, whether the LEC is the incumbent or a new entrant. The portability of subsidies is necessary to maintain competitive neutrality in high cost areas and to attract new firms to compete in high cost areas. If the incumbent were the only firm eligible for the subsidy, then no other firm could hope to enter the market profitably, and customers in that market would be denied the benefits of choice and competition.

Although there are disagreements about the particulars of some of these proposals, most industry participants—including incumbent LECs, would-be competitors to the incumbent LECs, long distance carriers, and state commissions—agree that the universal service system must be fundamentally changed and that the new system must have these basic features. If the FCC adopts this basic framework, then the system for funding universal service will become much more competitively neutral.

As important as that is, however, competitive neutrality is not the only important pending issue with regard to universal service. Another major issue concerns the overall size of the subsidy.

This issue is especially important in light of the 1996 Act's significant expansion of the scope of universal service obligations. For example, the Act requires that new universal service funding be provided for schools, libraries, and rural health care providers. The Federal-State Joint Board has recommended that the FCC establish a $2.25 billion per year fund for schools and libraries alone. Another fund for rural health care providers will likely run to $250–500 million per year. In addition, the Joint Board has recommended that the existing Lifeline program for low income households be expanded, which will cost an additional $450–600 million per year. In total, the Joint Board's recommendations will require several billion dollars per year in new universal service funding.

As an initial matter, I should note that AT&T strongly supports these new universal service goals, where they are needed to extend or maintain service. AT&T has been actively involved in improving public education through such programs as the AT&T Learning Network and by participating in "Net Days" to help bring to our schools the benefits of the information age. Expanding the universal service program to provide telecommunications services subsidies to schools, libraries, and rural health care providers is entirely appropriate and in the public interest.

These additional billions of dollars in new universal service funding, however, must ultimately be paid by consumers. Generally speaking, consumers understand that universal service is a worthy goal, but they also understand that the funding for universal service is a surcharge or tax. Consumers do not mind paying this tax as long as the overall spending for universal service remains at a reasonable level and the program is well managed.

This raises two questions. First, is it necessary to increase universal service funding by several billion dollars? For example, the Joint Board has recommended that the USF should be used not only to fund discounts for telecommunications services for schools and libraries, but also to fund discounts for other services such as Internet access and inside wiring. The funding for these other services accounts for more

than half of the proposed $2.25 billion schools and libraries fund. The FCC must not allow the USF to grow so large that public support for universal service erodes.

Second, if the FCC does require several billion dollars in new funding, where will the money come from? It will have to come from a rate increase, unless the FCC acts now to reduce access charges by at least this amount or more. As I will explain more fully in a few moments, access charges are currently more than $10 billion above economic cost even after removing the existing universal service subsidies. The FCC should immediately reduce access charges to cost to offset the additional billions required for universal service support and to allow a long distance rate reduction. Otherwise, rate increases will be inevitable.

In this regard, we recognize that small rural LECs in high cost areas have special concerns, and that it would be appropriate for the FCC to address those concerns through some special rules. In particular, these small LECs may have a limited ability to keep local service rates low if access charges are reduced to cost. Although these LECs will be eligible for subsidies from the USF, some small LECs may remain especially vulnerable because of a relative lack of resources or limited ability to expand into other markets. Therefore, AT&T supports the creation of a special fund, within the USF, that would provide additional compensation for such small LECs. AT&T recognizes that small carriers in high cost areas may need a larger subsidy during the transition to competition. The Joint Board has proposed that small LECs should receive special treatment for a period of three years, followed by a three-year transition to support based on forward-looking economic cost, and this appears to be a reasonable proposal.

These rules, however, should apply only to LECs that are truly small—i.e., LECs that serve fewer than 100,000 lines. All other LECs—including large LECs like GTE and U S WEST that happen to serve some customers in rural areas—should be compensated from the USF on the basis of forward-looking economic cost. The large LECs are some of the largest, wealthiest corporations in the world, and do not need special help from the government to cope with the transition to competition. Unlike the truly small LECs, companies like GTE have enormous resources, as well as abundant opportunities to expand into other markets (like long distance) to recover their costs. The special fund should be reserved for the small LECs that really need it.

It also bears emphasis that the small LECs' concerns should be dealt with through larger subsidies from the USF, and not by keeping rural access charges artificially high. Above-cost access charges in high cost areas would have pernicious effects on long distance rates as well as competition in that market. Nationwide long distance carriers are subject to a statutory ban on geographic deaveraging of rates. Therefore, if small LECs in high cost areas were permitted to charge high rates for access, the national carriers would be forced to raise nationwide rates to uneconomic levels. This would put the national carriers at an artificial disadvantage in relation to regional carriers that choose not to serve high cost areas. The result would be a disincentive to serve high cost areas, which would be contrary to the public interest and to the goals of universal service. Therefore, all access charges—including those in high cost areas—must be driven to forward-looking, economic cost, but small LECs could be made eligible for relatively larger subsidies from the competitively neutral USF.

II. ACCESS REFORM

With that background, let me address the access reform issue in more detail. To begin with, it is important to understand that there is no dispute within the industry that access charges are far in excess of the economic cost of providing access. Today, long distance carriers pay approximately $20 billion in access charges to the largest LECs (including both switched and special access). The economic cost of access, however, is only about $5 billion. AT&T estimates that universal service should require approximately $5 billion. Therefore, the LECs every year take in $10 billion in pure monopoly profits, over and above what would be necessary to foster universal service goals.

This state of affairs should end immediately, and access charges should be set at economic cost. First, the $5 billion necessary for universal service funding should be removed from access charges and should be collected from all telecommunications carriers on a competitively neutral basis as discussed.

Second, the $10 billion in monopoly profit should be removed from access charges and returned to consumers in the form of reduced long distance rates. The FCC has found repeatedly in the past that AT&T (and the other long distance carriers) have passed through reductions in access charges to consumers. Indeed, AT&T's average revenue per minute—which is the real measure of AT&T's prices, not its basic

rates—has declined by 58 percent more than access reductions during the period 1994–96. Consumers have benefited greatly from these price reductions, and those benefits should now be extended. Indeed, consumers are substantially overdue for a reduction, because the FCC did not require any reductions in access charges at all in 1996. AT&T has already pledged to pass through to customers any access charge reductions that the FCC orders in the pending access reform proceeding, and reiterates that pledge today.

Reducing access charges is also necessary to protect competition. The fact that LECs today are permitted to charge above-cost access charges creates a number of serious distortions in the market. For one thing, billions of dollars in excess access charges lead directly to billions of dollars in excess long distance charges. Consumers should not have to bear this burden any longer, and indeed, as I mentioned earlier, AT&T is committed to flow any reductions in access through to its customers.

As I also explained earlier, excessive access charges are also directly incompatible with the development of competition because they allow incumbent LECs to execute anticompetitive price squeezes against their rivals. As customers increasingly demand "one stop shopping" for bundles of local exchange and toll services, the incumbent LECs can use price squeezes, not only to thwart competition in long distance markets, but also to protect their local market, by offering lower prices for end-to-end service than its competitors can match.

The LECs are able to charge these excessive access rates only because they still have a monopoly in the exchange access market. The very fact that access charges are $10 billion above economic cost is dramatic confirmation that the incumbent LECs face no competition for access services. In a competitive market, such excessive rates could never be sustained. Indeed, AT&T is a very sophisticated consumer of access services and is constantly searching for alternatives to the incumbent LECs' excessive access charges. Yet AT&T still ends up purchasing almost 99% of switched access from the incumbent LECs. In almost every case, the incumbent is the only game in town.

Therefore, access charges must be reduced to economic cost now. The lack of competitive pressure on access charges is important because the FCC is currently considering two alternative proposals for reducing access charges. Under one proposal, the FCC would order access charges to be reduced to economic cost. Under the other proposal, the FCC would do nothing and simply allow supposed "market forces" to reduce access rates.

The so-called "market-based" approach to reducing access charges to cost is guaranteed to fail, however, because even though competition in local telephone markets may begin to emerge, such local competition in its early stages is unlikely to put any pressure on access charges in the near future. This is true for at least two reasons.

First, there is very little facilities-based competition today. Although facilities-based competition could be expected to put some competitive pressure on access rates, building competing networks is an enormous and costly undertaking. Substantial facilities-based competition, therefore, is probably still years away. For example, although AT&T recently announced a new technology that will lead to a facilities-based alternative to the incumbent LECs' network that uses wireless digital loops, it will take many years for AT&T to complete such a vast project.

Second, local service competition will have no effect on the price for what is known as terminating access, that is, the access necessary to terminate a call at the receiving end. The reason is simple: the calling party pays the terminating access charge, but it is the called party who chooses the terminating access provider. Because the called party does not pay for terminating access, he or she has no incentive to reduce terminating access costs. Therefore, even if we could expect local service competition to put pressure on originating access rates, there is no reason to expect that such competition would put competitive pressure on terminating access prices.

For these reasons, access charges are subject only to negligible "market forces." Therefore, the so-called "market-based" approach to reducing access charges is inadequate. Indeed, the "market-based" approach is misnamed; a more accurate name would be the "monopoly protection" approach.

Therefore, AT&T believes the FCC should order access charges to be reduced immediately to economic cost. Almost everyone except the incumbent LECs, including the state commissions of Missouri, Washington, Texas, and Florida, supported this proposal in the FCC's pending access reform proceeding. As the Washington state commission bluntly told the FCC in the access reform proceeding, "We do not believe that sufficient competitive forces exist for local exchange and access services . . . to warrant exclusive reliance on a market based approach."

When and if access charges are reduced to cost, the large LECs will still have ample opportunities to recover those lost revenues from other sources. First, these LECs will continue to receive legitimate universal service subsidies directly from the USF. (As I explained earlier, small LECs can be further protected through relatively larger subsidies from the competitively neutral USF.) Second, reducing access charges to cost is likely to stimulate demand for access services, which will result in a larger economic pie for all telecommunications carriers.

Certainly, the large LECs are not entitled to any more than this. When the long distance market was opened to competition at the time of divestiture, it was never even contemplated that AT&T would get make-whole payments from new entrants to cushion AT&T from losses in the long distance market. The same should hold true today for the large LECs (especially considering the opportunities the Act provides to enter new markets like long distance).

The bottom line, however, is that subsidies must be stripped out of access charges. They distort competition and keep long distance rates too high. If competition is to develop, the prices for all monopoly telecommunications services must be cost-based. Consumers should not have to wait any longer for the substantial benefits that would flow from an immediate reduction in access charges to cost-based levels. Especially in light of the increases in universal service funding that are required by the Act, access charges should be immediately reduced to economic cost, so that implementation of the 1996 Act results in a real rate reduction for consumers—not a rate increase.

Senator BURNS. Thank you, Ms. McGovern.

As Senator Inouye suggested at the opening of today's hearings, I am going to ask each one of you if you would just maybe thumbnail some suggestions on how you would make this conversion to competition, make sure that the service—what you propose—would ensure that we are going to have the kind of service in rural areas that we can expect from everywhere else, and keep the rates constant and still develop competition.

I am going to give you an opportunity to do that, and then we might drag out that old chart again there, Ms. McGovern. We are going to have a little fight here. And I would just ask, Mr. Barr, just give me a thumbnail sketch.

I think what we are—tell me if I am wrong—say yes or no—we are having a hard time determining what costs are, especially in access charges—is that right or wrong?

Ms. BINGAMAN. Wrong. I do not think it is hard at all, Senator I think the costs are exactly what the FCC said in its August 1996 order, which is TELRIC costs, which is forward-looking economic costs, not historic, embedded, gold-plated monopoly costs. That is the fundamental difference. And I do not think there is a problem with it.

Mr. Barr has done one whale of a job, and I compliment him with all my heart, as a lawyer, but I do not think he is remotely right on his arguments. Because he is arguing for historic, embedded, monopoly—historic costs which were put in on a rate-of-return basis—the more you invest, the more you make. And that is the costs he is trying to recover.

Mr. BARR. Well, actually, under our proposal, Anne—since the question was directed to me, I think I will respond.

Senator BURNS. OK. [Laughter.]

Ms. BINGAMAN. No, I thought it was directed generally.

Mr. BARR. Under GTE's proposal, arguing about costing models are irrelevant. I think the first step is to put in place a universal service fund, a national universal service fund, that covers all actual costs. Because I agree with what Senator Dorgan said about universal service being a national policy.

Then I think what we can do is rely on the market to determine, with a surefire certainty, what the costs of service are in those areas. We break the areas down into small census blocks so we target support really where it is needed. And there are basically 250 households in a census block. Then we set a national benchmark of what an affordable rate is. And companies can then come in and say how much additional support they would need to serve that community.

The starting point is what the support levels are now. If a company thinks that it can provide service with less support, they come in and say, we will do it with less support. And that uses the market mechanism. You do not have to rely on models to determine what costs are. Companies will tell you what the costs are.

Now, that puts in place a dynamic process that will tend to drive down support levels as new technologies come on and companies become more efficient. This auction process has been proposed to the FCC for 2 years. The FCC has sat on their haunches and is saying they do not have time to look at an auction, because they only have 2 months.

Ms. MCGOVERN. May I make a comment about the auction process?

The rhetoric sounds like we are letting the free market system work. But, in actuality, that is not the case. The auction process would so completely give the benefit to the incumbent RBOC that there would be no process at all. And at the end, the incumbent RBOC would still be the RBOC, and there would be no incentive to provide new innovation to drive down costs. And it sounds like Milton Freidman at work, but it is not. Because the incumbent RBOC has the embedded base.

Mr. BARR. But our proposal applies to resellers as well. So the notion that the RBOC has an inherent advantage is nonsense. What is really going on here is I have not heard anything yet from these long distance companies—one a reseller and one who has announced that it is going to be a reseller rather than facilities based—as to how they are going to contribute to universal service. All of their arguments are designed to evade making any payment.

There are only two ways you can contribute to universal service. And the way they have done it in the past is in the price. And what they are saying is, if it is still embedded in the price—and it is embedded in our prices by regulation—they want to side step it. They do not want to have to recognize it.

Forget what my arguments are as to what my costs are for GTE. They are saying they do not want to pay the subsidy. They do not want to pay the subsidy. They want to walk away from universal service and leave it in the hands of the incumbent carrier.

Ms. BINGAMAN. Respectfully, that is just not true. We are completely willing, able and desirous—earnestly desirous—CompTel and our members—of stepping forward and paying universal service costs and prices on both intra and interstate. We agree completely with that point—as the FCC determines it—after it considers the Joint Board Recommendation.

My written testimony says that. I say it flatly. I cannot imagine where the idea is coming from that we are not willing to pay universal service. We are paying today.

To give you an idea of access charges and what it means to a small company, LCI's total revenues are $1.1 billion. We pay $500 million of that in access charges to GTE RBOC's and rural telephone companies. Almost half of our gross revenues are direct payments over to RBOC's and local exchange companies. And a lot of that funds universal service, but a lot of it does not. A lot of it is plain cream, fat, profits, right on top, right on the bottom line for these companies. And that is our problem with it.

So we are in favor of universal service payments that are targeted to the amounts needed, but not excess payments to these people to inflate their profits.

Senator BURNS. I am going to switch over now to—I will come back to that question and to give me a thumbnail.

Senator Rockefeller.

Senator ROCKEFELLER. Thank you, Mr. Chairman.

Let me just ask—well, I am actually going to ask just one question.

Senator BURNS. That is all you have to ask of this panel, and then you start a fight.

Senator ROCKEFELLER. And you already answered it, Ms. Bingaman. The compelling thing for me in terms of universal service and its obligations to our country under a new system—not the old system we have been living with, but the new system we are going to have to learn to live with as it unfolds—is that we can afford to do what we have to do. And you have basically said that the only way that that can be done is by using the inter and intrastate, both, in the fund.

Ms. BINGAMAN. We believe that strongly, Senator. We believe that the Act states that flatly. In Section 254(b)(4) it seems to us very clear. And that is our strong belief, yes.

Senator ROCKEFELLER. And I take it that you, too, Ms. McGovern——

Ms. MCGOVERN. Likewise.

Senator ROCKEFELLER. And what about you, Mr. Neel?

Mr. NEEL. Senator, the local telephone companies believe that the issue is not so much what the mechanism looks like but that it be adequately funded. And the problem here is that there is a great dispute about how much money should be in the fund, period—the combination of the two funds. It is a $23 billion problem a year. And someone is going to have to pay for this. There is no free lunch. This competition-at-any-cost scheme has a price to it.

So the issue is not so much whether it is interstate or intrastate, big, small, Federal. It is, is the fund adequate and will the companies required to provide universal service be able to fully recover their costs?

This so-called TELRIC model has been so refuted.

Senator ROCKEFELLER. You said to fully recover their costs. Let me just read you this paragraph. I mean, again, I go back to my statement that we all saw a lot of you and a lot of the folks like you last year. And I do not know how many millions and millions of dollars was spent on lobbyists from the telecommunications industry to get something called deregulation of telecommunications.

Now, I do not think that that was because you wanted to be able to sort of introduce new forms of crimp or stinginess into the possi-

bilities of your companies. I think that is because you saw out there a gigantic world of opportunity, which included mergers and acquisitions, which included new technologies, which included the entire future of the United States, and that this was something you all wanted so badly. It was like the 1849 Gold Rush to California.

Mr. NEEL. But, Senator——

Senator ROCKEFELLER. I have not finished.

Mr. NEEL. All right.

Senator ROCKEFELLER. And, therefore, that when that came through on a 98-to-1 vote, I think it was—and that was the conference report—and Snowe-Rockefeller along with that, and with Bliley and Morella holding a colloquy, since the House did not actually act itself on Snowe-Rockefeller that they would definitely want that included—Bliley saying he would want that included. And of course it was in the conference report.

I now want to read this statement to you from 254(b)(3) and just ask you to say if you agree with it, and how, under your interpretation of it, you would pay for what it seems to suggest. You have heard this before:

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular and high-cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates that are charged for similar services in urban areas.

One, do you agree with that? Second, how do you propose to make it work?

Mr. NEEL. Well, Senator, I absolutely agree with it. It is not only the vision, it is the reality. And basically, that is what has been happening. The only way to perpetuate this kind of support for the entire country and not just those areas that will be skimmed by AT&T and MCI and others will be to make sure the fund is adequate to serve everyone, that everybody contributes a fair share.

You have got to remember, local telephone companies are going to end up contributing half or more of any universal service fund—$6 billion to $8 billion in a $14 billion fund. So the fund has got to be adequate.

Competitively neutral—and by that you have got to be able to fully recover those costs. And there is $200 billion in the ground right now. And Ms. Bingaman and Ms. McGovern would just wish that away, and the FCC possibly as well.

How does that money get recovered and who pays? Who pays are local telephone customers in your State, Senator Burn's State and everyone else. Because they are the ones that are going to be affected. They are not going to get the benefit of all this touted competition. And they are going to be stuck with infrastructure that cannot be modernized because the support systems are not there to pay for it.

So whatever the mechanism is for delivering the funds, it has got to be enough, it has got to be competitively neutral.

Senator ROCKEFELLER. It has got to be enough?

Mr. NEEL. It has got to be enough.

Senator ROCKEFELLER. And so you would do that by having a fund which was solely interstate, which is what Mr. Barr believes?

Mr. NEEL. Not necessarily. It could be interstate and intrastate. It is not that big an issue for us as an industry. Companies disagree, but whoever it comes from, if it is going to support local service from interstate/intrastate, we can quibble about the mechanisms, but that is not the central question.

Senator ROCKEFELLER. Well, it is not exactly a quibble. It is the difference between $70 billion and $200 billion.

Mr. BARR. Senator, I did not say it should be restricted to interstate.

Senator ROCKEFELLER. I have it down here that you did.

Mr. BARR. No, just the opposite.

Senator ROCKEFELLER. If you did not, then I would apologize.

Mr. BARR. Yes, I believe that the first step is that we have to create a robust national universal service fund that pays and is sufficient to cover——

Senator ROCKEFELLER. Inter and intra?

Mr. BARR. And I believe it should be inter and intra.

Senator ROCKEFELLER. Good.

Mr. BARR. And if there is legal doubt on it—and the statute is not clear on it, but I do think that the FCC has a better argument here than they did on setting wholesale rates in the States—they should not hold back, in my view on this. But if they need clarification, then they should get legislative clarification. But that is the right policy. That is a national policy. And it has to be sufficient.

Senator ROCKEFELLER. That is good.

Now, let me—and I appreciate that. And I stand corrected and apologize. Anything else you want me to do? [Laughter.]

To Mr. Neel again. You want to be made whole. That then somehow, in talking with folks that you represent, seems to lead—and I know my time is out, Senator Burns—that it leads to sort of a voluntary approach. And I have been approached by at least one telephone company saying, well, the way we really should do this is set up a voluntary fund, which the telephone companies would put up, which would be about, oh, $400 million to $450 million. And then we get the Communication Workers of America to do all the labor. And that is the way we put in Snowe-Rockefeller.

Do you think that that is a particularly useful approach?

Mr. NEEL. It could be. It may not cover the entire problem. But I would say this, that voluntary mechanisms, where different industry groups come together, local, long distance and others, you know, with the States and everyone else, to create a funding mechanism for education that is not bogged down with a lot of bureaucratic rulemaking and litigation that we always have. That is always going to be a better solution than having it mandated out of Washington.

Senator ROCKEFELLER. That is ideological. Now the Telecommunications Act is already passed and was signed by the President. OK, so Snowe-Rockefeller-Exon-Kerry has got to happen. And all of it has got to happen, not just most of it or a part of it.

You know perfectly—and then I cease on this—you know perfectly well that a one-time expenditure of $450 million, and then something called CWA, which is certainly a magnificent group,

which has been very nice to me, thank you—but the idea of their doing—I mean I just do not think their representation in Utah and Idaho is massive, or, I would suggest in the State of Wyoming, which needs all of this—it is a one-time expenditure, depending upon voluntary labor, as opposed to a $2.25 billion serious approach to the competitive future of America.

Mr. NEEL. Well, Senator, I did not say that would be the only solution, that you could just get it all done with that piece of a voluntary plan. I mean we are supporting what you are trying to do. The only point I am making here is that whatever mechanism you choose, do not let the funds for education—I mean make sure there is enough there to pay for mandates that you are insisting on.

And I think what has been proposed is just a good-faith effort not only from the local telephone industry—it may come from others—to try to figure out creative solutions to this problem, where there are—you know, you do not have to get bogged down in a lot of administrative and legal procedures. That is the only point I am making.

Senator ROCKEFELLER. And I would just seriously question the real intent of that, simply because getting bogged down is something that we do very well in America, but we still manage to overcome it.

Second, you are talking about a one-time infrastructure solution. The $2.25 billion, which was voted 8 to nothing by local, you know, directors—public service commissioners, as well as the FCC, 8 to nothing. Every one of them voted for it. Now, they had to think about rate increases in their States, but they voted for it. Because they knew it was the right thing for America's future. And it comes year after year after year after year, unlike a $450 million, one-time voluntary effort. I am not being critical. I am just saying there is one heck of a difference between the two approaches.

Mr. NEEL. Well, I understand. If you are suggesting that the only thing that would ever have to be done for education is that one-time expenditure, of course that would not do the job. I do not think we have an argument on that. I mean, you ask if doing that, period, was a good idea. If you do that to replace everything else that you could do for education, it is probably not adequate.

Senator ROCKEFELLER. Thank you. I apologize to the chairman.

Senator BURNS. What for? [Laughter.]

Senator ROCKEFELLER. The usual thing.

Senator BURNS. Do we all agree, everybody at this table, what we think the cost of the universal service would be? [Laughter.]

Ms. BINGAMAN. No. But I think we agree—what I heard agreement—although Mr. Neel hedged a little bit—certainly Mr. Barr, Ms. McGovern and myself all agree that whatever that cost is set at by the FCC, it should be borne by both intra and interstate telecommunications providers.

Senator BURNS. In other words, it is unanimous that inter and intra—it makes no difference?

Ms. BINGAMAN. I would ask you to pin Mr. Neel down on that a little bit. I thought he waffled. [Laughter.]

I thought the other three of us were pretty clear.

Mr. BARR. Actually, the statute I think says it has to come from interstate providers of service. So you just cannot reach into a purely intrastate provider.

Senator BURNS. That is true.

Mr. BARR. The question is what revenues you can then get from someone who is providing long distance, Anne.

Ms. BINGAMAN. I would read to you, Mr. Barr, 252(b)(4) equitable and nondiscriminatory contributions: All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of——

Mr. BARR. That does not address the Federal fund. That does not address the Federal fund.

Ms. BINGAMAN. What does it address?

Mr. BARR. The language on the Federal fund says it has to come from people who provide interstate service. And the issue is, can you also reach intrastate revenue under the statute? But there is disagreement. There is disagreement, I think, on the cost of what the subsidy is in several respects.

First, they say that you forget about the fact that we have already invested. For example, some States have required us to put digital service throughout the State, in rural areas and so forth. Our opponents call that gold-plated, but these were things that we were obligated to do. And now they are saying that this is an Act that has no memory and we should not be entitled to recover any of those investments; that you can only recover on a forward-looking basis.

And we say that we should also be entitled to recover the historic investment we have made, the recovery of which has been artificially stretched out by long depreciation periods in order to keep residential rates low. But put that aside.

There is then a disagreement of what the forward-looking prices are. And our opponents have models that basically say that it is $5 billion or $7 billion that pays for all of universal service today. And my point is that that is totally contrary to what people were saying last year, before the Act was passed, when all the States—State after State, Federal regulators—if you look at the numbers, where they determine what the prudently incurred investment was, year after year, and what revenue is necessary to pay for it, they said it was more like $20 billion.

Now, it does not surprise me that someone who wants to get subsidized to come into the market is going to say, oh, you do not have to worry about these subsidy costs; actually, they do not really exist. And the reason—you know, why did we allow the local companies to charge businesses four and five times costs? That apparently was gratuitous. We did not have to do that all along.

So for 60 years, people have been completely out of their minds and been 200 percent away from the mark. Now, who are we to believe, what the regulators said last year and for the previous 60 years, or this year, when they are looking for a way of pushing down the subsidy costs?

Ms. BINGAMAN. Well, let us face it. We are in a totally different paradigm this year versus last year. For the past 60 years, you have had a monopoly, where the cross-subsidies were implicit and

put there for purposes which were social, which the universal service fund is now designed to replace.

Mr. BARR. Correct.

Ms. BINGAMAN. And so to talk about 60 years ago versus this year, I do not think hits the mark.

Mr. BARR. No, Anne, but the costs are the costs. And if you have to replace the costs that were in implicit rates, the question is, how much does the explicit fund have to be? And we are saying the implicit costs have been $20 billion. And lo and behold, this one should be $20 billion.

Ms. BINGAMAN. Mr. Barr, if you will forgive me, the costs are not the costs. The fact is the local telephone companies, as Ms. McGovern stated with Pennsylvania Bell, have basically been as they wished, on a rate-of-return basis. And this statute excludes rate of return as cost, as I am sure you remember. They have been encouraged, in effect, by rate-of-return regulation for the last 60 years in a monopoly setting, to gold plate the system. That is No. 1.

No. 2——

Mr. BARR. But——

Ms. BINGAMAN. Wait a minute. Just wait a minute. No. 2, they have been allowed to invest in competitive fiber optic networks at huge costs to the ratepayers, which are to be used directly to compete against long distance companies when they are allowed into long distance. They have huge competitive investments which they are now seeking to recover. And the fact of the matter is, costs are not costs.

Costs, under a monopoly system, were at the discretion, and virtually the total discretion, of the local monopoly telephone company. And as long as it was a monopoly and there were ways to get higher prices from business users, it could work. Costs are not costs. A dollar is not a dollar when it was invested by these people under a system which, in effect, paid them for every dollar they invested. It guaranteed them a rate of return.

And that is the problem you have got right now. And that is why, if you translate the old system into a new competitive paradigm, you will destroy competition. And the FCC understands that, as do, I might add, the five economists from the Department of Justice, who wrote the FCC on December 2, 1996, stating exactly that the TELRIC cost model the FCC had adopted, the forward-looking model, was precisely the correct one to encourage competition.

Mr. BARR. Well, can I respond?

Senator BURNS. I am going to let Mr. Barr rebut. And then I am going to hand it back to the chairman here, who has been very busy.

The CHAIRMAN. Please, Mr. Barr.

Mr. BARR. First of all, in recent years, we have not been under rate of return. We have been under price caps, whereby we have to return frequently and share any efficiencies that we get with the ratepayers, and we have caps on what the prices are.

Second, even under rate-of-return regulation, although it pleases you to call it gold-plated, the fact is that the extent of investment was not controlled by the incumbent. The incumbent had to serve. That is part of universal service, which you are going to have to learn about if you get into the local business. Which is that when

someone wants service, you have to provide it regardless of the cost.

Moreover, State regulators were telling us what we had to put in. Anyone in the phone business will tell you that the issue has not been that we have wanted to throw money into the network. It has been we are being told, you have to make this digital, we want digital stuff; your service is not good enough here, you have to upgrade it.

And then there are prudency reviews and determinations of what are prudently incurred investments on a year-by-year basis. But we do not have to worry about debating if costs should or should not be included. Because our proposal, based on auctions, uses a market mechanism to determine what the appropriate costs of the subsidy are. And it basically makes companies come in and bid for levels of support.

And if a company says we can do this cheaper, that drives down the subsidy level. So I say let the market—let us throw these models to the wind and let the marketplace determine what the appropriate level of the subsidy is through auctions.

Ms. MCGOVERN. May I make an observation?

The CHAIRMAN. Absolutely

Ms. MCGOVERN. I believe, with all due respect to my two colleagues, that what they really want is to have their cake and eat it, too. They pushed really hard for this bill. And yet they still want to be treated like a regulated monopoly when it comes to local service. They still want a guaranteed rate of return for local service. They are doing absolutely everything to prevent the long distance providers to become viable local service providers.

They are crying over the TELRIC .rates, and yet they very artfully negotiated long distance wholesale rates at about a penny a minute. They object to the long distance industry utilizing their assets, but they have not built out long distance assets. And I find it very ironic that when they attempt to enter overseas, that what they are asking for is forward-looking prices that resemble economic costs, and yet they object to that sort of model being applied in the U.S.

The CHAIRMAN. Mr. Neel, I am sure you want to respond to that.

Mr. NEEL. Well, there is a lot of stuff to respond to. This gold-plating stuff is nonsense. U.S. local telephone companies are just about the most efficient in the world. They have the lowest cost per access line in the world just about. That is one thing.

This idea of monopoly stuff, both AT&T and LCI and all the companies know that the fact is there is already extensive competition where the money is—that is why the robbers go to the bank—in local business service. Throughout this country, competitors have taken away 10, 20, 30, 40, 50 percent of the business market, revenues that could go to support other local residential service here. So it is not only about the residential customer.

The reason there is a monopoly is because these companies, you know, they may not ever get out there and serve rural America in particular. So this idea of monopoly for the services that really count is just nonsense. So, you know, I think that is really important. And it is an issue that ought to be looked at when we are talking about, well, there is no competition.

Also, there are hundreds of privately negotiated agreements—hundreds in arbitration. The long distance rates that Ms. McGovern refers to were negotiated. AT&T agreed to those rates. No regulator forced those on AT&T, unlike the regulatory fiats we may be facing with the so-called TELRIC pricing. So the situation is very different there.

Ms. BINGAMAN. Could I just mention one thing?

The CHAIRMAN. Ms. Bingaman, I think it is only fair that you are allowed to speak again. [Laughter.]

Senator BURNS. Since you started this fight.

Ms. BINGAMAN. I want to mention one thing here that has gone unsaid, and I think is important to say. Our company, LCI, has 1.5 million residential consumers of long distance service. We would love to offer those people local service bundled.

Why would we like to? Because it reduces churn drastically. Because it would enable us to get new customers. Residential consumers are fully 35 percent of our company's gross revenue.

OK. Why are not we doing it? I will tell you why. These companies do not have in place the operating support systems to process the orders. And let me tell you what is going on today. To pick one company, Pac Bell. We are faxing orders to Pac Bell, trying to put through local service. AT&T said in a press conference 3 weeks ago, 450 a day is the maximum Pac Bell can process. Bell South has a fax-based system. Ameritech has an he electronic system partially but not completely. Nynex's is different.

The fact of the matter is, when you are talking about competition in the local market, it is not there yet. And we will serve residential consumers like that.

I have people in my company who are desperate for us to get the interfaces with the Bell companies. We cannot get it until they give it to us. So I challenge Mr. Neel totally and completely on this statement that we do not want to serve residential customers. They are 35 percent of our gross revenues. We desperately want to serve them. We cannot do it because they do not have the interfaces.

They can switch 40 million long distance customers a year; we can switch perhaps 15,000 local customers. And let me say, this is not totally an act of will on their part, because the fact of the matter is this is a new undertaking. The United States has jumped off a cliff, in a way, with the promise of local competition. It takes electronic interfaces. It takes computer interfaces. These are complicated systems. They have never been invented. The Bell companies never had to invent them because they never had local competitors to switch customers to. It did not exist.

This thing is a matter of months old and it is nascent. And people who say, gee, where is all this local competition? I will tell you, it is on the fax room floor at Pac Bell. [Laughter.]

And that is a big part of the problem.

Are we going to get through that? Yes. I think we will get through it. But we are not going to get through it in a month. Because this is complicated stuff. And so I think that should be said. That is something that has gone unsaid.

And on Mr. Neel's point that we are not serving residential customers, let me tell you, we cannot wait to do it. We have a million and a half of them, 200,000 in California, which we would be slit-

ting our throats if we tried to offer local service to, because the orders could not be processed.

The CHAIRMAN. Well, Ms. Bingaman, I will not launch my own tirade, but you did trigger something when you said this is complicated stuff. It really is complicated stuff, and there was no reason in the world why it should have been so complicated. And if people like you and others had sought real deregulation rather than protection of your own industry, we might not have had such complicated stuff.

And the predictions that were made at the time the bill was signed—not that this is complicated stuff and wait a few years, or months or years, it was that rates are going to go down, everything is going to be fine, everybody is going to be in everybody else's business. And it is not true.

Now, it may—now, let me finish, Ms. Bingaman—it may be sometime next year or 10 years or in a millennia or maybe in the 22d century. But the fact is now, phone rates are up, long distance rates are up, cable rates are up, and the consumer is paying more. Meanwhile, seven regional Bell operating companies and GTE show their total returns for the fourth quarter of 1996 ranged from 8.7 percent to GTE's high of 19 percent. The average total return was 12.1 percent.

This contrasts with a total return of only 8.3 percent for the Standard & Poor's 500. Perhaps more importantly, the telephone companies' operating margins ranged from 21.6 to 28 percent during this period, et cetera, on and on.

The profits are up. Everybody is making more money in all of your businesses, except for the consumers, who are paying more money.

Ms. BINGAMAN. Well, Senator, let me——

The CHAIRMAN. I asked you to let me—twice now.

Ms. BINGAMAN. OK excuse me. I am sorry.

The CHAIRMAN. So I am not happy with any of this situation. I am not taking anybody's side. But I know who is paying more money and I know who is paying higher cable rates, and I know who is paying higher phone rates. And that is the consumers, and they were promised they would not pay higher rates at the passage of this bill.

Now, you can explain it all away, and I am sure you have a very cogent and compelling explanation, but the bill was flawed. Otherwise, they would be paying less, as almost immediately happened when we deregulated the airline industry. And instead of giving the regulatory body a whole huge amount of additional power, we did away with it, in the form of the CAB.

So, now I would be glad to hear your response or any of the other panelists.

Senator ROCKEFELLER. And, Mr. Chairman, it practically did away with the State of West Virginia at the same time, when we deregulated the airline industry. I have to say that.

The CHAIRMAN. I thought that the airline industry deregulation was a problem in West Virginia. Well, anyway. [Laughter.]

Ms. BINGAMAN. There was no universal service mechanism in airline deregulation in effect.

The CHAIRMAN. Excuse me, Ms. Bingaman, there is essential air service, which is subsidized, and we have increased it over the last 3 years. So there is indeed a quote, universal service. It is called essential air service. Go ahead, please.

Ms. BINGAMAN. Yes. But I do not think it is nearly the scope of the Snowe-Rockefeller effort to get universal service for rural areas. I think it is a limited fund. It was needed. It came about recently because of the problems of small communities being cutoff.

The CHAIRMAN. Recently? Ms. Bingaman, you are getting out of your area of expertise. EAS is not a new program. Please.

Ms. BINGAMAN. OK. Let me get back to my area of expertise.

The CHAIRMAN. Thank you. [Laughter.]

Ms. BINGAMAN. Let me say to you, Senator, on the subject of long distance rate increases, LCI has not increased its rates in 3 years. We have matched every rate anyone else has offered. Our rates, in effect, for the last 3 years, are still the best rates for the consumers.

My understanding of AT&T's rate situation, I do not speak for them—but my understanding, based on the FCC's December 1996 report, is that if you look at average per-minute rates for consumers for long distance—and I am talking average rates, not posted rates or claimed rates, but average per-minute rates—have dropped 19 percent in the last 4 years and 4 percent in the last year.

For my company, we have not raised rates. That is just the simple fact of the matter. And I will tell you honestly, Senator it has actually been a shock to me to get out in private industry and see the—I guess you would call it the work ethic. I do not know, I mean it is tough duty out there. I mean it really is. That is all I can say.

The CHAIRMAN. I will refrain from any comment about that. [Laughter.]

Ms. BINGAMAN. I will tell you, very honestly, it surprised me a little bit. I did not realize how few resources and how stretched companies really are, trying to do this. I can just tell you for a fact that is the truth. There is no gold-plating in our company. We are not raising rates. And we are struggling to make earnings per share improve. And we work at it.

The CHAIRMAN. And, again, I think it is important, in fairness, for you to mention you are all playing the hand you are dealt. You are all living with the legislation that was passed. And so it is very difficult, in my view, to be too critical of you trying to live with this very complex piece of legislation.

Maybe we could just go down the line, Mr. Barr, Ms. McGovern, and then Mr. Neel.

Mr. BARR. I agree that there has been unnecessary delay. And I think the reason is because the sine qua non of real competition is getting a universal service fund that is competitively neutral and has explicit subsidies in it and getting it in place. And I believe that the FCC has dragged its feet on that.

There have been proposals out there about how to do it from a number of different sources for a long time. And I do not think they are even going to have their act together in May. I think they are twiddling around with these hypothetical models, and they are

going to come out with interim rules, which is going to continue the uncertainty. There will not be a clear, predictable and sufficient mechanism in place.

I believe that our proposal, which reduces subsidies by disciplining the process, by putting more reliance on vouchers, or virtual vouchers—that is, credits, universal service credits, that targets the individuals that are needy. And then, by limiting support to the narrowest possible physical area—so it may not be downtown Vail that gets a subsidy, but outlying areas that maybe deserve it—and then using a market mechanism to establish it and drive it down, in a dynamic process.

Because if the FCC gets this wrong—if the FCC, in trying to determine what these costs are, in looking into their crystal ball and listening to AT&T's economists, gets it wrong, what are the consequences?

The consequences are you are not going to have enough support. So that will put price pressure on residential rates to go up. Because someone is going to have to pay for it if there is a shortfall.

Second, if it is not paid for, you are going to have quality go down. You get what you pay for. And the quality of the system that serves rural America and residential customers will go down unless the support is there. And you will have a two-tiered or ghettoized system or redlining, as my colleague Roy Neel says.

And you will not bring the benefits of competition out to everybody, which was the purpose of the statute. So these people who are saying, oh, you know, we will just pick a number and we will have these models and so forth, they are playing a big risk about whether or not most of America is going to be able to participate in the benefits of this legislation.

Thank you, Senator.

The CHAIRMAN. The present FCC proposal, if it goes through, will that reduce or—what will it do to your rates?

Mr. BARR. I think it will put tremendous pressure on the States because we are talking about dealing with $4 billion of the existing subsidy. And that is going to leave the States holding the bag.

The CHAIRMAN. Before I get to Ms. McGovern, do you disagree or agree with that statement, Ms. Bingaman, that it would put great pressure on——

Ms. BINGAMAN. I have to tell you the truth, Senator. I am not sure I understood it. As I conceive what we are talking about here, the long distance companies today paid $20 billion in access revenues to Mr. Barr's company and the RBOC's and to rural phone companies—$20 billion.

Now, the figures I have heard for universal service, which we have stipulated here, should be shared by both long distance and intrastate revenues, do not exceed that by much at the high side, and are probably less than that. And so, for the life of me, I cannot see what the major problem is here.

What you have right now is a huge amount of money being taken from consumers in an implicit tax on long distance rates paid to RBOC's and GTE. And what we are saying is, everyone should pay it. The rates should be lowered. The fat should be taken out of the system and out of the access charges and universal service, at whatever rate the FCC determines. It should be paid fully, without

any question, and with Snowe-Rockefeller, paid fully. And I think there is plenty of money to do that, as shown by the $20 billion that we alone are paying right now.

The CHAIRMAN. Ms. McGovern, you obviously agree?

Ms. MCGOVERN. Well, I agree with what Anne just said, but there are about four topics all floating around at the same time right now, so I am going to try to quickly address all of them.

We started off talking about long distance rates. Mr. Chairman, if you were to call from Phoenix to Charleston in 1984, you would have paid $4.42 for a 10-minute call. Today you would pay $1.50. That is a third of what you would have paid in 1984. Prices are coming down in long distance. We offer a 15-cent-per-minute rate, called One Rate, that anybody can enjoy.

So prices are coming down. The average price per minute is absolutely coming down in the long distance industry.

Next, I want to also address the notion of delay. Our customers truly want long distance and local on a single bill. They are telling us that it never should have been separated in the first place. My consumers are telling me every day, put wireless, long distance, online service, and local on a single bill that is convenient, that is easy to read, that is easy to use.

That is what I get paid to do—to satisfy those customers. And I can tell you that I have got a lot of orders sitting on the floor at Pac Bell as well. I do not know if the delays are because I have an unwilling supplier or if the delays are because it defies the laws of physics to get some of these systems to talk to each other. But, nevertheless, my mark ramp at one point was five times the size that Pac Bell could accommodate. And I had to start backing off my marketing plans, because I did not want to disappoint consumers.

So the delay has to do with these systems interfacing and the kluge way these two industries are trying to satisfy consumers.

And the last topic that came up was the whole notion of quality will go down. You know, competition makes quality go up. AT&T wrote off about $6.7 billion of old assets. We completely redeployed our network into digital technology. Our unit costs went down. Quality went up. And that is what happens when you are in a competitive industry.

The CHAIRMAN. Mr. Neel.

Mr. BARR. Can I point out, Senator, that quality goes up if you have two products competing. You need two products to compete. And you need competition. Our point is that unless you have universal service support covering cost, no one is going to come in to compete.

The CHAIRMAN. Mr. Neel, could I say that I wish that all the members of the committee were here to listen to this very informative and important debate, and I will urge them, if they get a chance, to watch if it is replayed somewhere. Because it is very helpful, I think, to me, and I think that my two colleagues would agree.

Go ahead, Mr. Neel.

Mr. NEEL. Well, the original question a while back was about the bill being deregulatory or not. You are exactly right. The bill did not adequately deregulate. Local industry fought for aggressive de-

regulation in that legislation and it did not come. It is the major flaw in that legislation that there is not sufficient deregulation.

The local Bell phone industry is the most regulated piece of the telecommunications industry. It is a fact. The companies represented here today, LCI and AT&T, have virtually no regulation. The regulatory burdens on local companies are monumental. So that is an important issue.

And there was not sufficient deregulation—not to mention the barriers placed to competition in this oligopoly of long distance companies here, which is a real fact. So there is not enough deregulation in that law. And I would hope that the Congress, working with the Commission, hopefully, could go back and revisit that. Cut out some of this unnecessary paperwork. Let all these companies compete on a fair playing field.

The CHAIRMAN. Well, I am sorry we have taken all this time. Is it your turn, Jay?

Go ahead, please.

Senator BURNS. We have already refereed this fight. [Laughter.]

The CHAIRMAN. All right. Could I just say how extremely informative that this has been. I hope that in the future we will have more panels like these, where we get a discussion. I think it is the most informative way for us to understand—through this kind of point, counterpoint. And most of us, frankly, are not as knowledgeable about the complexities of this very complex situation as we should be. And I think this panel has been very informative. And I am going to go back and watch on television what I missed in the earlier part.

And I thank you very much. And I regret to tell you that this will probably not be your last appearance before this committee. Thank you very much. Thank you for being here.

Senator BURNS. In fact, I can guarantee that. We are going to have another hearing with regard to this. Because I think America has to know, and this is the only way we get that information out. And we thank you.

Senator ROCKEFELLER. We have another panel. Could we have silence please? We have another panel.

Senator BURNS. We have one more panel to go.

Senator ROCKEFELLER. We have another panel. Take your jokes outside.

Senator BURNS. We have got one more panel to go here. We have Mr. Anthony Wong, who is a school board member of Cecil County, MD, public schools, and he is also with the National School Board Association and the Education and Library Networks Coalition, from Elkton, MD. And we want to hear from him because it is very important. Because it is the heart of what a lot of us in rural areas and rural States are excited about.

We had the most important person here the last one of the day.

Mr. WONG. Well, thank you.

Senator BURNS. But you got to witness the rest of the fight.

Mr. WONG. I sure did.

Senator BURNS. It is interesting that we have that dialog with the principals, because that is the way I like to see things and to get the ball rolling and then listen to the debate. And then we make our decisions from that.

So, Mr. Anthony Wong, if we could have some order in the chambers, why, we welcome you here today. We think you represent the heart and soul of what we are talking about when we start talking about telecommunications.

STATEMENT OF ANTHONY WONG, BOARD MEMBER, CECIL COUNTY PUBLIC SCHOOLS, ELKTON, MD, ON BEHALF OF THE EDUCATION AND LIBRARY NETWORKS COALITION AND THE NATIONAL SCHOOL BOARDS ASSOCIATION

Mr. WONG. Thank you very much.

Mr. Chairman, members of the committee, my name is Anthony Wong, and I am a local school board member from Cecil County Public Schools, in Elkton, MD. I am pleased to be here on behalf of both EdLiNC and the National School Boards Association.

EdLiNC is a coalition of over 30 major national organizations, representing both public and private schools and libraries, as well as children and the life-long learners they serve. EdLiNC has gather the expertise of parents, teachers, school and library administrators, local government leaders, and others, to work specifically on securing much needed affordable access to technology.

Through the National School Board Association, I am also representing my fellow 95,000 local board members nationwide. We are responsible for governing our schools, balancing our local budgets and making tough policy decisions. Just like each of you, local school board members represent and are accountable to the communities that have elected us. Most recently, we have been faced with the awesome task of bringing our schools up to speed with current technology. We are looking to accomplish this task in a fiscally responsible way, with limited resources.

We can only do this by establishing working partnerships with other levels of government and with the private sector. The Telecommunications Act, and the Snowe-Rockefeller-Exon-Kerry provision, represents such a partnership. I would like to applaud the Congress for enacting this provision that is nothing short of historic. It stands to make a very real and needed difference in the lives of school children and the lifelong learners in Cecil County and nationwide. Moreover, this is vital for the future of our Nation.

It is the essential for preparing the work force of tomorrow, and ensuring that this country can succeed in this increasingly technological world marketplace. We also believe that the FCC and the Federal-State Joint Board are doing an outstanding job with the implementation. They have tackled a difficult issue and created a recommended decision that is strong and balanced.

The decision adheres to several crucial principles. First, discounts are deep enough to be truly affordable to all. Second, while we had recommended a fund that grew based on need, like the overall universal service fund, the $2.25 billion cap fund will address the needs of our schools and libraries and greatly enhance our country's future. Schools and libraries are able to choose the services that are most economical, and which make sense for their local educational mission. There is no one-size-fits-all technology.

Four, access to the Internet, a vital learning tool is included. And five, services are brought directly to the classroom, where students learn. This is a critical point. Having only access in the principal's

TRUST FUNDS

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REPORT OF THE HOUSE TASK FORCE

ON THE

DEBT LIMIT AND MISUSE OF THE TRUST FUNDS

Prepared for The Honorable Newt Gingrich,

Speaker of the United States House of Representatives

by the

House Task Force on the Debt Ceiling & Misuse of the Trust Funds

Chairman, Congressman Nick Smith

1530 Longworth HOB

Washington, D.C. 20515

February 12, 1996

HOUSE TASK FORCE ON THE DEBT LIMIT AND MISUSE OF THE TRUST FUNDS

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REPORT TO THE SPEAKER

Executive Summary

The House Task Force on the Debt Limit and Misuse of Trust Funds was formed under the direction of House Speaker Newt Gingrich on November 30 1995. The task force examined three issues: (1) whether the Secretary of Treasury exceeded his authority when he disinvested the Civil Service Retirement and Disability Trust Fund (CSRDF); (2) whether the Secretary was misleading in his statements regarding the consequences of congressional failure to pass a debt ceiling increase; and (3) what congressional response Is appropriate given the recent circumstances surrounding the debt limit.

The first conclusion of this report is that the choice of a debt suspension period of twelve months was outside the scope of the law. While the Secretary is given clear authority to disinvest the CSRDF, the law was intended to protect the trust fund, not provide an outlet for the Treasury to fund general fund expenditures.
The language of the law would allow the Secretary to sequentially determine its ability to meet pension fund payments. It does not allow an unspecified lengthy declaration in order to generate enough cash to bypass congressional authority over the amount of debt that the U.S. government can issue.

The second conclusion is that the Secretary clearly could have been more forthcoming in his statements regarding the likely outcome of not passing an increase in the debt limit. An enumerated power of Congress under Article I of the Constitution is to borrow money on the credit of the United States. Congress determined that the debt limit increase should be linked to legislation which put into place policy changes consistent with the debt increase. The Secretary argued for a debt limit increase not linked to any policy related to the budget. In the debate over the budget, the Secretary did not specify either to Congress or the public that failure to increase the debt limit would lead to disinvestment of certain trust funds, rather than a cataclysmic default. The Treasury, months prior to the date when the debt ceiling was reached had planned for the actions they took to ensure interest payments were made. The failure of Treasury officials to be forthcoming on this issue needlessly clouded the debate over a balanced budget and the linkage between debt and spending.

The third issue addressed by the report is congressional response to Treasury's actions of disinvestment of trust funds and sale of certain assets. While Congress has raised the debt limit 77 times since 1940, the recent experience demonstrates that clarification of the law is needed, as is specific congressional direction. The options which have been discussed during the debt limit debate, including disinvestment of trust funds, sale of assets, and delaying income tax refunds, should be directly addressed by the Congress, rather than left open to interpretation. Establishment of a bright line debt limit, through closure of options, should consider what flexibility should be given to the executive branch to manage cash during a period where the debt is at the limit established by Congress.

TASK FORCE ON THE DEBT LIMIT AND MISUSE OF THE TRUST FUNDS

REPORT TO THE SPEAKER

TABLE OF CONTENTS

Page

TRUST FUNDS

Section I: The Effects Of The Federal Debt

Introduction 1
Historical Perspective 1
The effect of the Debt-Public Choice Theory 2
The effect of the Debt-The Economy 3

Section II- Guide to the Legal Issues Surrounding
The Disinvestment of the Civil Service Retirement
and Disability Trust Fund

Introduction 5
Discussion 7
The Secretary's Authority over the CSRDF 8
The Nature of the Period 10
The Length of the Period 13
Use of the Disinvested Funds 16
Other Potential Limits on the Secretary's
Ability to Raise Cash 17
Conclusions 18

Section III: Secretary Rubin's Recent Activities
Regarding the Debt Ceiling

Introduction 19
Secretary Rubin's Raid on Retirement Funds Triggers 19
Armey/Saxton Request
The Clinton Budget 20
Administration's Default Charade Based on Misleading Statement 22
A "Cynical Political Strategy:" Planned Gridlock 23
Long Term Damage to the Administration's Financial Leadership 24
Conclusion 25

Section IV: Congressional Response

Introduction 25
Response to Disinvestment of the CSRDF 26
Bright Line Debt Limit 27
Options to Avoid the Debt Limit 27
Definition of Debt Subject to Limit 30
Enforcement 31
Flexibility 31
Debt Ceiling and the Budget 32
Conclusion 34

Appendices:

Letter from Speaker Newt Gingrich to Representative Nick Smith,
November 30, 1995

Letter from Edwin Meese and William Barr to

Newt Gingrich and Robert Dole, December 29, 1996.

Letter from James Baker, Nick Brady, and
Donald Reagan to Robert Rubin, January 4, 1996

Task Force Activities

TASK FORCE ON THE DEBT LIMIT AND THE MISUSE OF TRUST FUNDS

REPORT TO THE SPEAKER

SECTION I: THE EFFECTS OF FEDERAL DEBT "What is prudence in the conduct of every private family can scarce be folly in that of a great kingdom." Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations

Introduction

The issue of government debt has long been discussed by economists. Adam Smith devotes the final chapter of his An Inquiry into the Nature and Causes of the Wealth of Nations[into the Nature and Causes of the Wealth of Nations[1] to the subject. James Buchanan and Richard Wagner kicked off the discussion of a constitutional amendment requiring a balanced budget with their seminal work, Democracy in Deficit: the Political Legacy of Lord Keynes.[Keynes.[2] DRI/McGraw-Hill recently released a report on the economic impact of balancing the Federal Budget.[impact of balancing the Federal Budget.[3] While some may argue correctly that the real issue is the size of government, nonetheless, unbridled accumulation of debt has an affect on the willingness of a democratically-elected Congress to control the growth of government. The size of the federal debt is affecting budget priorities by increasing interest payments, and slowing economic growth. As the debt limit is now a primary tool for affecting the accumulation of debt (See Section IV below), it is useful to briefly examine why the size of the United States debt is hampering our economic system and weakening our political system.

Historical Perspective

The federal debt is surely one issue that needs to be placed in historical perspective. In 1792 the federal government had total income of only 88 cents per capita and ran a budget deficit of 38 percent of revenues. (See Section IV below.) The next year, as became the custom, the government reduced expenses, increased tax receipts, and showed its first surplus. The deficit did not reach 38 percent of revenues again until exactly 200 years later, 1992.

At the beginning of the Revolutionary War, the national debt amounted to $ 80 million. However, the federal government ran only two deficits between the Revolutionary War and the War of 1812. By 1811, the total debt had fallen to about half of its 1795 level. By 1815, the effects of the War of 1812 had ballooned the debt to $ 127 million. By 1829 the debt was reduced to less than $ 50 million. Andrew Jackson then proceeded to eliminate totally the federal debt. The federal treasury had a positive balance on January 1, 1835. [[1] The University of

Chicago Press, 1976, Part 11, Bk. V, Ch. III. [[2] New York: Academic Press, 1977. [[3] Economic Impact of Balancing the Federal Budget", October 1995, Principal Investigators: David Wyss, Mark Lasky, Kristina Frenyea.

Depressions and the Civil War turned this positive balance into a debt of almost $ 3 billion by 1866. For the next twenty-eight years the federal government ran surpluses, whittling the national debt by two-thirds. The period surrounding World War I was similar, with the debt rising during the war and being reduced during the 1920s. The Great Depression and the advent of the Roosevelt-Keynesian revolution changed the pattern. From 1792 to 1930 there were ninety-three surplus years and forty-six deficit years. From 1930 on there have been only nine years where the federal government did not run a deficit.

While one can mark the beginning of continuous debt accumulation from the Roosevelt administration, it is only fairly recently that the debt has exploded when the nation has not been engaged in fighting a war. The gross federal debt was $ 316 billion when President Clinton graduated from high school. It did not reach the one trillion dollar mark until 1982. Today we are discussing how far to raise the debt limit above its $ 4.9 trillion level, and this does not include some debt which is not subject to limit.[debt which is not subject to limit.[4]

When we consider the hidden costs of government and the long-term obligations that are disguised in most accounts of the federal government's debt, we cannot overlook the unfunded liability for federal pensions. In its September 30, 1994, report on the Civil Service Retirement System, the Office of Personnel Management reported that federal pensions have an unfunded accrued actuarial liability of $ 540.1 billion. In combination with the $ 491.4 billion unfunded liability for pensions owed to the nation's veterans, these obligations of the federal government easily surpass one trillion dollars. As the Concord Coalition observed in its 1995 report on federal pensions, "To the extent that the government's pension promises are considered unbreakable, they will have to be paid off-- just like the national debt. Yet these liabilities are currently off the books."[the books."[5] [[4] The debt not subject to limit includes the unamortized discount on Treasury Bills and zero-coupon Bonds of slightly more than $ 74 billion, $ 15 billion in Federal Financing Bank bonds issued pursuant to 31 U.S.C. 3 101, and $ 589 million of miscellaneous debt. [[5] Peter G Peterson, "Introduction," in Neil Howe and Richard Jackson, The Facts about Federal Pensions (Washington: The Concord Coalition, 1995).

The Effect of the Debt-Public Choice Theory

Nobel Laureate James Buchanan and his colleague Richard Wagner developed the argument for a balanced budget amendment in their 1977 work.[work.[6] The thrust of their argument is that candidates for Congress who promise extra spending and new programs without raising taxes will defeat candidates who support tax increases to pay for new programs or who offer no new programs. The reason is that the issuance of debt to fund such programs is a hidden way of paying for them. Government debt issuance will result in higher interest rates and lower private investment, thus leading to slower economic growth. However, this linkage is too subtle for the average voter to discover. If the interest rates get sufficiently high so that attention is brought to deficit spending, then the Federal Reserve will monetize the debt by Fed purchasing Treasury securities.

Federal Reserve purchases of Treasury securities directly expand the monetary base. The expansion of the monetary base increases the supply of money. The increase in the supply of money reduces the purchasing of money, which is another way of describing inflation. Inflation reduces the real wealth of those that were holding wealth in the form of dollar-denominated assets, such as retirement savings. In this way the resources necessary to accomplish the government programs are obtained from economic actors. This linkage is complicated, and thus disguises the real cost of government programs. For example, as a result of the hidden unfunded liability of federal pension programs, the true costs of the federal payroll are understated by approximately 30 percent. This leads to a greater demand for government services and a greater growth of government than would be the case if the true cost were made known. This leads Buchanan and Wagner to argue for a balanced budget amendment to restore what they feel was the implied fiscal constitution prior to the acceptance of the Keynesian notion that public debt is a useful tool to enforce macroeconomic policy.

The Buchanan-Wagner analysis demonstrated how public debt leads both to the eventual collapse of the monetary system and all the attendant effects on the economy, as well as to an enlarged government. The solution proposed

by Buchanan and Wagner is to restore the implied fiscal constitution that existed for the first 180 years of the Republic through a balanced budget amendment. Whether this is the correct solution may be open to reasonable discussion, however, the cost of increased federal spending should be made explicit rather than masked through the debt process.

The Effect of the Public Debt- The Economy

Decades ago, Nobel Laureate Milton Friedman. through his explanation of the "crowding out "effect, refuted the Keynesian arguments that deficit spending enhanced the economy.[arguments that deficit spending enhanced the economy.[7] The basic point is that government borrowing displaces or "crowds out" private sector borrowing. [[6] op cit. [[7] See Robert Gordon (ed.), Milton Friedman's Monetary Framework, University of Chicago Press, 1974.

When this happens, there is less physical and human capital in the economy. Less capital means that workers produce less than they otherwise would and thus have lower earnings. Wages and production are less than when government does not borrow to finance its transfers and services.

There have been recent attempts to measure the effect of the public debt on the economy. A study prepared by DRI/McGraw-Hill measured the effect of balancing the federal budget by the year 2002.[2002.[8] The study is based on the Balanced Budget Act (H.R. 2491), which would result in a balanced budget in the year 2002. DRI estimates that the 30 year Treasury bond yield would be 270 basis points lower under the Balanced Budget Act. This would result in fixed mortgage rates which are 2.7 percentage points below what they otherwise would be. Annual savings for a $ 50,000 mortgage would exceed $ 1000. Housing starts would rise by 65,000. The seven year accumulated Gross Domestic Product in constant 1987 dollars exceeds the baseline more than $ 200 billion.

The Heritage Foundation published a paper by two economists who used the Laurence H. Meyer and Associates macroeconomic model to project the effects of the balanced budget plan as passed by the Congress.[Congress.[9] They concluded that a balanced budget would yield an additional $ 32.1 billion in real disposable income over the period 1995 through 2002. Over the same period there would be an additional $ 66.2 billion in consumption expenditures, an additional $ 88.2 billion in real non-residential fixed investment, and an additional 103,700 housing starts.

The International Monetary Fund estimated that a balanced federal budget would have reduced interest rates in the United States on U.S. Treasury bills by more than two percentage points in 1984.[Treasury bills by more than two percentage points in 1984.[10] Federal Reserve Board Chairman Alan Greenspan has estimated that balancing the federal budget could lower interest rates by a like amount. The Congressional Budget Office estimates a balanced budget would lower interest rates by about 1.2 percentage points, and would increase GDP in the year 2002 by half a percentage point, or nearly $ 50 billion.[billion.[11] [[8] op cit. [[9] "What a Balanced Federal Budget with Tax Cuts Would Mean to the Economy," William Beach and John Barry, The Heritage Foundation, Washington D.C. 20002, November 14, 1995. [[10] Fiscal Deficits and Interest Rates in the United States: An Empirical Analysis, 19601984, Vito Tanzi, International Monetary Fund, Staff Papers, December 1985. [[11] "The Economic and Budget Outlook: December 1995 Update," Congressional Budget Office, Washington D.C.,

While the exact increase in GDP over a seven year period cannot, of course, be estimated with a great degree of certainty, what is certain is that GDP, wages, and personal income will all be higher than they would otherwise be. To quote a recent Congressional Research Service report, "As displacement (by government borrowing) of capital formation continues over the years, it is having more sizeable restraining effects on private-sector output levels, productivity, and living standards."[productivity, and living standards."[12]

SECTION 2: THE LEGAL ISSUES SURROUNDING THE DISINVESTMENT OF THE CIVIL SERVICE RETIREMENT FUND

Introduction

On November 15, 1995, the Secretary of the Treasury ("Secretary") declared a "debt issuance suspension period" and disinvested the Civil Service Retirement and Disability Trust Fund ("CSRDF" or "the Fund") of $ of $ 39.8 billion

("the disinvestment").[of $ of $ 39.8 billion ("the disinvestment").[13] This was done to allow the Treasury was to make a sizeable debt interest payment due that day.[day.[14] It accomplished this by replacing government securities known as Treasury "specials" with non-interest bearing IOUs.[known as Treasury "specials" with non-interest bearing IOUs.[15] The effect of this was to lower the amount of debt that counts toward the federal debt ceiling imposed by Congress. Therefore, it was able to issue new, marketable debt.[issue new, marketable debt.[16]

This had three effects. First, it restored the debt level to where it has previously been. Second, it put $ 39.8 billion in the Treasury's cash account. Finally, it will ultimately increase the debt of the United States because these IOUs must be replaced with the Treasury specials as soon as the Treasury can again issue new debt.[debt.[17] As a result, it now appears that Treasury will have enough cash to last through mid-March.[cash to last through mid-March.[18] However, Secretary Rubin has stated that he does not have any further options than those he has taken that would extend Treasury's ability to continue paying bills past that date. He also announced that he was extending the debt issuance suspension period from 12 to 14 months, and thus taking an additional $ additional $ 6.4 billion.[additional $ additional $ 6.4 billion.[19] [[12] "The Federal Debt: Who Bears Its Burdens?", Wm. Cox, Congressional Research Service, 10-25-95, EB92049, p 8. [[13] Humbled Prophet, Economist, Nov. 18, 1995, The Secretary also disinvested approximately $ 18 billion from the Government Thrift Fund. The Role of Federal Retirement Funds in Financing Federal Spending During the Debt Issuance Suspension Period, CRS Memorandum from Carolyn Merck, December 27, 1995 ("Merck"), 1. [[14] Joint Economic Committee, The Sky is Falling 1 (rev. ed. November 27, 1995) (unpublished manuscript). [[15] In reality, this is done by changing entries in a computerized ledger. Physical paper is no longer used to represent obligations of this nature. [[16] Merck, supra note 1. [[17] 5 U.S.C. 8348 0) (3) (1986). [[18] This extension of the "drop dead" date was made possible by the passage of legislation enabling the Treasury temporary "off the books" borrowing power equal to one payment of Social Security obligations. Secretary Rubin has testified that his actions of November 15th disinvesting the CSRDF as well as the G-fund would allow Treasury to operate until late December. He under-invested a $ 14.5 billion payment into the CSRDF on December 29, which allowed Treasury to operate through the end of January and possibly into early February. Statement of Treasury Secretary Robert E. Rubin Before the House Committee on Banking and Financial Services (December 13, 1995) 6-7 (available from the committee).

A number of legal opinions have been released regarding various issues surrounding Secretary Rubin's disinvestment of the trust funds.[funds.[20] Because there are no regulations or cases directly on point, the legal issues are mostly statutory. [[19] Letter from Secretary Rubin to Speaker Gingrich (January 21, 1996).

Some of the documents whose conclusions are summarized include:

Memorandum from Edward S. Knight, Treasury Department General Counsel, to Secretary Rubin dated November 15, 1995, "Certain Authorities of the Secretary of the Treasury respecting the Civil Service Retirement and Disability Fund" ("Knight").

Memorandum from Walter Dellinger, Assistant Attorney General - Office of Legal Counsel ("OLC"), to Edward S. Knight dated November 10, 1995, "The Secretary of the Treasury's Authority With Respect to the Civil Service Retirement and Disability Fund" ("Dellinger").

Memorandum from the Joint Economic Committee, "Secretary Rubin's Misuse of Federal Pension Funds to Avoid the U.S. Debt Limit," ("JEC"). "Authority to Tap Trust Funds and Establish Payment Priorities if the Debt Limit is Not Increased", CRS Report 95-1109 A. Nicola, Thomas J. and Rosenberg, Morton, November 9, 1995. ("Nicola et al."). [[20] In addition, House Ways and Means Committee Chairman Archer has sent a letter to Secretary Rubin questioning the Treasury's authority in this matter and warning of a potential constitutional crisis. Wall St. J., Dec. 27, 1995, at 40.

Discussion

The Constitution grants to Congress the power to borrow money on the credit of the United States.[the credit of the United States.[21] As a result the executive branch's authority to borrow money is defined by Congress through

statute.[statute.[22] Until 1917, this power was granted on a loan by loan basis. Congress authorized individual amounts to be borrowed, and set the terms by statute. The executive had no ability to borrow on its own. In 1917, due to the financial exigencies created by World War I,[I,[23] Congress passed the First Liberty Bond Act. This was amended that same year in the Second Liberty Bond Act, which established a ceiling on how much the executive branch could borrow while leaving the details to the executive.[the details to the executive.[24] Today, the Congress attempts to control the national debt by establishing legal ceilings on the borrowing authority.[borrowing authority.[25]

In order to alleviate the burden of the debt ceiling, the House of Representatives enacted House Rule XLIX, the so-called "Gephardt Rule." Under the Gephardt Rule, when Congress enacts a budget resolution that requires raising the debt ceiling, the House automatically passes a joint resolution doing so by the needed amount. This avoids a separate vote on the debt ceiling by a legislative technicality. The 104th Congress suspended the Gephardt Rule through fiscal year 1996 and passed a "sense of the House" statement in the FY 1996 budget resolution, H.Con.Res. 67, which also calls for its permanent repeal. Several bills which would accomplish the latter are pending.[pending.[26]

The sentiment in Congress favors retention of the debt ceiling as a tool to limit spending and borrowing. The current situation arises because of certain actions taken by the executive branch in regard to certain federal government trust funds established to pay pensions to federal employees. [[21] "The Congress shall have the power To borrow Money on the Credit of the United States," U.S. Const. art. I, 8, cl. 2. [[22] The current executive borrowing authority resides at 31 U.S.C. 3101-3112. [[23] "The law was initially adopted to facilitate wartime planning and execution and to accommodate the Treasury's need for flexibility in financing growing Government activities," The Debt Limit, CRS Report #IB93054, 1. [[24] supra, note 11. 25 This amount is currently set at $ [25] This amount is currently set at $ [25] This amount is currently set at $ 4,900,000,000,000. 31 U.S. C. 3101 (b) reads:

The face amount of obligations issued under this chapter and the face amount of obligations whose principal and interest are guaranteed by the United States Government (except guaranteed obligations held by the Secretary of the Treasury) may not be more than $ 4,900,000,000,000 outstanding at one time, subject to changes periodically made in that amount as provided by law through the congressional budget process described in Rule XLIX of the Rules of the House of Representatives or otherwise.

The Secretary's authority over the CSRDF

Under normal circumstances, the Secretary is required to invest funds not "immediately required for payments from the fund" in non- marketable, interest-bearing securities of the United States." The amounts invested count against the federal debt limit imposed by Congress.[Congress.[28] However, a 1986 amendment explicitly authorizes the Secretary to disinvest the CSRDF in limited amounts and circumstances.[circumstances.[29] This statute provides that he may disinvest if he determines that a "debt issuance suspension period" ("the period") occurs.[occurs.[30] A debt issuance suspension period is defined as:

any period for which the Secretary of the Treasury determines for purposes of this subsection that the issuance of obligations of the United States may not be made without exceeding the public debt limit.[limit.[31]

The amount available to disinvest is limited to:

to the extent necessary to obtain any amount of funds not exceeding the amount equal to the total amount of payments authorized to be made from the Fund under the provisions of this subchapter or chapter 84 of this title or related provisions of law during such period.[period.[32]

Currently, benefits being paid out by the CSRDF equals $ 3.2 billion per month.[billion per month.[33] The Secretary made an initial determination that the period would last one year.[that the period would last one year.[34] Thus, he obtained approximately $ 39 billion in extra borrowing authority under this statute. This was done to avoid defaulting on bond principal and interest payments due on November 15th and 16th.[interest payments due on November 15th and 16th.[35] However, by doing so, several questions have been raised about the propriety of the

length of the period (which determines the amount which can be disinvested) and the uses to which the disinvested funds may be put.

The purpose of the 1986 amendment was to protect the CSRDF rather than to give the Secretary powers to fund the government in case the debt limit was reached. After the period is over, the Secretary must reinvest all funds and take whatever steps needed to make the fund whole as if it had never been disinvested or underinvested. The 1986 amendments, according to OLC, were in anticipation "that the CSRDF might incur financial losses as a result of actions taken by the Secretary during a debt limit crisis."[Secretary during a debt limit crisis."[36] Its purpose was to "mitigate those losses and ensure that, after the expiration of the debt limit crisis, the Fund would be placed in the financial position it would have been in had the actions taken by the Secretary not occurred."[occurred."[37] [[26] See, e.g., H. Res. 138, 104th Cong., 1st Sess. (1995) (introduced by Rep. Smith (R-MI)), H. Res. 28, 104th Cong., 1st Sess. (1995) (introduced by Rep. Steams (R-FL)) and H.R. 215, 104th Cong., 1st Sess. (1995) (introduced by Rep. Crapo (R-ID)). [[27] 5 U.S.C. 8348(c). [[28] 5 U.S.C. 8348 (d). [[29] 5 U. S.C. 8348 (k). On December 14, 1995, the House passed H.R. 2621 which would explicitly prohibit the Secretary from underinvesting or disinvesting any government trust fund for purposes of artificially altering the level of debt counted towards the debt limit. [[30] Id. [[31] 5 U.S. C. 8348 0) (5) (B). [[32] 5 U.S.C. 8348 (k) (2). [[33] Dellinger at 2. [[34] Factual Determination o the Secretary, November 15, 1995. Also, see, Letter from Robert E. Rubin to Rep. Jim Saxton (November 22, 1995). [[35] The administration has adopted a broad definition of "default." It seems to interpret any delay of any payment due any payee as constituting a default. Treasury Undersecretary John Hawke has argued against prioritizing payments on such grounds. "Prioritization is simply another term for default." Hawke, Debt- limit Brinksmanship Threatens America's Economy, Insight, Nov. 6, 1995, at 18-19. Treasury Secretary Rubin has asserted that such would be unprecedented. Ibid. However, this is not the case. During the 1950's the government was forced due to the lengthier congressional recesses to delay payments due and owing to defense contractors for work in progress. Robinson, The National Debt Ceiling: An Experiment in Fiscal Policy, 41 (1959). Such actions would constitute a "default" under the current definition apparently adopted by the Treasury. [[36] Dellinger at 4. [[37] Ibid.

The Nature of the Period

Several issues arise regarding the length of the debt limit suspension period. The first goes to the nature of the period. Is it something that the Secretary declares is in existence during which he may disinvest an amount equal to payments as they become due (a contemporary period)? Or may he project that the period will exist for a certain length of time and immediately disinvest all payments which would occur during the period (a projected period)?

To use an example, suppose that the conditions for a debt issuance suspension period occurred between March 1 and July 1. Would the Secretary be able to only disinvest payments of $ 3.2 billion as they came due until the period ended? Or would he be able to predict on March 1 how long the period would last and disinvest all payments scheduled to be made during the projected period on March 1?

The Administration has taken the latter position. Secretary Rubin apparently asked his counsel to analyze the legality of a one year debt suspension period and whether he could disinvest a full year's worth of payments immediately.[year's worth of payments immediately.[38] He then proceeded to do so.[so.[39] CRS has indicated that the amount of redemption is not limited to one month's payments "since the Secretary is authorized to determine the 'debt issuance suspension period' during which sales and redemption are to be made."[redemption are to be made."[40]

OLC shares this conclusion. It does acknowledge, however, that:

It could be argued that the term "debt issuance suspension period" cannot properly refer to a specific period of time set by the Secretary based on his reasonable assessment of when, after being prevented on account of the debt limit from issuing obligations of the United States, Treasury will be able to issue those obligations, but must, instead, refer to that length of time that follows the Secretary's initial determination of his inability to issue obligations of the United States during which the conditions that gave rise to the determination remained in effect.[rise to the determination remained in effect.[41] [[38] Knight at 1. [[39] Merck, supra, note 1. At a hearing held

by the House Banking and Financial Services Committee on December 13, 1995, Secretary Rubin indicated that his counsel had advised him that a period of 14 months would have been reasonable. Notably, this is the length of time between November 15th, 1995, and the next inauguration. [[40] Nicola et. al. at 4. [[41] Dellinger at 9.

While OLC finds this theory "plausible" it concludes that the interpretation allowing the Secretary to project the period's length forward in time "is more consistent with the statute's text and structure.[structure.[42] Further, even if it is ambiguous, OLC notes, Treasury is free to interpret it freely under the doctrine of Chevron v. National Resources Defense Council.[National Resources Defense Council.[43]

Two former Attorneys General have concluded that what OLC terms the "alternative" interpretation is, in fact, the proper one. In a joint letter to the House Speaker and Senate Majority, they state "The statute plainly envisions that the Secretary determine when a 'debt issuance suspension period' has come into existence and then authorizes the Secretary to disinvest the amount of monthly payments as long as the period lasts and as the payments become due." Further, they note that 5 U. S.C. 8348 "contemplates that disinvestment occur only when necessary to avoid exceeding the debt limit." Therefore, they conclude, "Immediate disinvestment of amounts equal to aggregate future payments before they are due does not meet this standard.[future payments before they are due does not meet this standard.[44]

Although the statute is not worded clearly, its text, structure and intent militate strongly against the administration's reading, which would render the CSRDF governing statute illogical and subject to capricious manipulation by the Secretary contrary to the cannons of statutory construction.[statutory construction.[45] First, it makes sense to limit the Secretary's discretion in the context of a contemporary rather than a projected period. The Secretary is in a perfect position to judge his capacity to issue new debt without violating the limit. He knows the cash on hand and the current financial needs of the Treasury. This makes him the ideal government official to determine whether "issuance of obligations of the United States may not be made without exceeding the public debt limit" at any given time. However, when he adopts a projected period, he is predicting what Congress and the President will do in regards to raising the debt ceiling. [[42] Dellinger at 9. [[43] 467 U.S. 837 (1984). Chevron requires that courts reviewing executive action give deference to an agency's statutory interpretation. This must be distinguished from the underlying analysis of whether the agency has acted in accord with the law. Arguably, an agency should interpret the law objectively as best it can rather than pose the question, "what can we get away with in the courts?" [[44] Letter from former Attorneys General William Barr and Edwin Meese to Speaker Newt Gingrich and Senate Majority Leader Bob Dole (December 19, 1995) (emphasis added). [[45] "Legislative enactments should be never be construed as establishing statutory schemes that are illogical, unjust or capricious" Bechtel Construction v. United Brotherhood of Carpenters, 812 F.2d 1220, 1225 (9th Cir. 1987).

However, he enjoys no advantage when making this decision vis a vis other observers. Worse, his position as the nation's chief financial officer creates a conflict of interest in making any prediction in this regard. Because his role requires that the Secretary pay the obligations of the United States in a timely manner, he has an incentive to engage in creative analysis. Therefore, given that the Secretary has an institutional advantage in determining a contemporary but a disadvantage in determining a projected period, it is to be inferred that the contemporary period is the correct one.

Further, the amounts of future payments from the CSRDF, while predictable, cannot be determined with absolute precision. Therefore, the Secretary is forced, by the administration's interpretation, to estimate future payments. This requirement, which cannot be made with precision, casts further doubts on the administration's interpretation of 5 U. S.C. 8348.

Next, the purpose of 5 U.S. C. 8348 is useful to determine the meaning of a period. The "purpose of a statutory provision is the best test of the meaning of the words chosen." Cawley v. United States.[States.[46] The legislative history of 5 U.S.C. 8348 makes clear that the protection of the CSRDF, and not the financing of the government during a debt ceiling impasse, was the goal of the section. In order to appreciate the need for 8348, a brief background on the debt ceiling impasse of 1985 is necessary.

In 1985, there was a similar impasse between House Democrats and a Republican White House. Treasury, in anticipation of having its borrowing ability curtailed by an approaching debt ceiling, began to take "extraordinary measures." When it actually ran up against the limit, the Treasury underinvested the CSRDF to avoid going over the debt limit. Further, it limited its disinvestment to amounts needed to make current payments to beneficiaries.[to make current payments to beneficiaries.[47] Unlike other trust funds, the CSRDF did not have the statutory provision allowing disinvestment for the purpose of paying beneficiaries at the time.[disinvestment for the purpose of paying beneficiaries at the time.[48] Therefore, there were no provisions for reinvesting the fund and restoring lost interest. To ensure that the CSRDF would not lose interest in the future from similar activities, Senator Slade Gorton introduced an amendment on the Senate floor containing explicit provisions for disinvestment. At that time he stated:

I would like to address the provision regarding the disinvestment of the Social Security and civil service retirement funds. Time and time again retirees in my State have expressed fear over the fact that money could be borrowed from the trust funds, get used for other programs and never be repaid. I believe this amendment will absolve these fears because it lays everything out in black and white and guarantees that if there is ever a need to borrow from the trust fund, that the money borrowed will be repaid in full - with interest.[that the money borrowed will be repaid in full - with interest.[49]

The record contains other, similar, statements. Especially interesting was then Senator Albert Gore's:

Like the Social Security trust fund, the civil service retirement and disability fund is a dedicated trust fund and as such, its assets may only be used to provide benefits to civil service retirees.[may only be used to provide benefits to civil service retirees.[50]

If the administration's reading is correct, it would allow the immediate emptying of the CSRDF if the Secretary was willing to project a period of sufficient length. However, from the hearing and floor statements, it is evident that the protection of the CSRDF was the goal of 8348. Nowhere in the legislative history is it suggested otherwise. Given the legislative intent of the section, the administration's reading of 8348 is outside the range of permissible administrative interpretations. [[46] 272 F.2d 443, 445 (2nd Cir. 1959) (opinion of Judge Learned Hand), cited with approval in, U.S. v. Bacto-Unidisk, 394 U.S. 784, 799 (1968) fn. 18. Executive branch decisions made pursuant to statute must be exercised "consistently with the structure and purposes of the statute that delegates the power." Chamber of Commerce v. Reich, - F.3d (D.C. Cir. 1996), 1996 WL 39538, *8. "According to a centuries-old rule of interpretation, an enactment is to be construed in light of the evil it was designed to remedy, and the rule has often been applied by federal courts." R. Berger, Federalism: The Founders Design 128 (1987). [[47] The Civil Service Retirement Trust Fund:- Hearing Before the Subcomm. on Compensation and Employee Benefits, 99th Cong., 1st Sess. 1 (1985) [1 (1985) [hereinafter Hearings] (statement of Rep. Rose Mary Oakar). [[42] Id., at 10.

The Length of the Period

Next, if the Secretary has acted properly in projecting a period and disinvesting all payments due during that period, what limits exist on the projected period?

The Administration concedes that the Secretary's determination must be "reasonable.[must be "reasonable.[51] The Justice Department characterizes the Secretary's discretion as "broad" but "not unlimited.[Secretary's discretion as "broad" but "not unlimited.[52] [[49] Cong. Rec. S24903 (daily ed. September 19, 1986) (statement of Senator Gorton). [[50] Cong. Rec. S 18732-3 (daily ed. September 19, 1986) (statement of Senator Gore). [[51] See Chevron at 844. Also, see, American Telephone and Telegraph v. U.S., 299 U.S.232,235-237 (1936), and Batterton v. Francis, 432 U.S. 416, 424-426 (1977). [[52] Dellinger at 2. There is no source of guidance other than the statute regarding the method of determining the length of the period. Therefore, OLC concludes that there is no public notice and comment period necessary. However, the Secretary must base his decision on a "factual record."[record."[53] OLC concludes that because the setting of the period constitutes agency fact finding, it is to be upheld as long as it is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance of law."[in accordance of law."[54] Further, Treasury counsel has also concluded that the determination must be fact based." Therefore, it is undisputed that the Secretary cannot simply use whatever length of time will provide him with

enough cash to run the government. Rather, he must make a fact based, reasonable and good faith, or non-arbitrary, determination of how long the period will run.

Next, what factors may be used by the Secretary in making a factual determination of the period's length?

Treasury Counsel has concluded that the factors used are left to the discretion of the Secretary.[the discretion of the Secretary.[56] Yet, as mentioned above, the conclusion must be "fact based."[conclusion must be "fact based."[57] He concludes that the factors the Secretary identified he would use, namely 1) the seriousness of the impasse between the Congress and the President over acceptable terms for an increase in the public debt limit; and 2) the Secretary's uncertainty as to when he will be able to issue obligations of the United States without exceeding the public debt limit.[United States without exceeding the public debt limit.[58] OLC has opined that "it is appropriate for the Secretary to take into account public statements made by Congressional leaders and the President concerning their willingness to take the steps necessary to cause an increase in the debt limit.[increase in the debt limit.[59]

Assuming that these factors are appropriate to use in setting the length of the period, it must next be asked whether they justify the year length set by the Secretary. Treasury Counsel concludes that they do. Regarding the first factor ("seriousness of the impasse"), he notes: "Members and the leaders of the Congress have made numerous unequivocal public statements that they will not vote in favor of an increase in the current public debt limit unless the President agrees to certain conditions, and that a debt payment default by the United States is acceptable to them. The President has publicly stated that the conditions imposed by those members of Congress are unacceptable to him."[to him."[60]

Regarding the second factor identified by the Secretary (when he will be able to issue new debt obligations), Treasury Counsel concludes again that the Secretary is justified in setting a one year period. This is because there is existing a "complex and fluid situation," which "could continue through the next general election." Therefore, Treasury Counsel concludes, "You cannot be certain that you will be able to issue obligations of the United States during the period that begins today and ends 12 months from today..."[period that begins today and ends 12 months from today..."[61] Although Treasury counsel concedes that it is possible that the period could last less than 12 months, the legal question involved is "whether it is reasonable for the Secretary to conclude, based on the information available to him today and the factors that he has identified as being relevant" that he will be unable to issue debt obligations for one year.[obligations for one year.[62] [[53] Dellinger at 8. [[54] Dellinger at 8, citing 5 U.S. C. 706(2)(A). [[55] Knight at 7-8. [[56] Knight at 7. [[57] Knight at 7-8. [[58] Knight at 8. [[59] Dellinger at 9. Once again, the fact that the Secretary is not in a particularly good position to determine this is evidence that the administration has misinterpreted the meaning of the period under 5 U.S.C. 8348. [[60] "Knight at 8. Specifically, Treasury Counsel notes that the Debt Limit Coalition, a 151 member group of House Members, sent a letter to the President stating, "we … will not vote to increase the debt ceiling until legislation is enacted ensuring the government is on a true glide path to a balanced budget by 2002 or sooner," Letter to President Clinton (June 30, 1995). The letter was drafted by Reps. Chris Shays (R-CT), Nick Smith (R-MI), Jon Christensen (R- NE) and Joe Scarborough (R-FL). [[61] Knight at 9. The statute, however, calls for a determination of the period during which cannot issue new debt without exceeding the debt limit, not the period during which he is unsure whether he could. This is further evidence that the Secretary failed to follow the letter of the statute and that his determination was not made in compliance with it. [[62] Knight at 9, ffi. 22.

There are several problems with this analysis. First, it is highly misleading to represent the public comments of various participants in the budget fight as being a complete guide to how long it will be before the debt ceiling is raised. It is also necessary to ask how long other debt limit crises have lasted. The longest amount of time during which the period would have applied in recent years had it been invoked is only several weeks." Most, however, have only lasted a few days. Given the real, historical record, Secretary Rubin's determination is not reasonable as required.

The question then remains, why did he set it at one year? The answer appears that this was the length of time needed to produce the revenues that he felt were necessary.[revenues that he felt were necessary.[64] It is too much of a coincidence to believe otherwise. On January 22, 1996, the Secretary announced, in the same letter

where he discussed his current cash needs and requested an extension of the debt ceiling from Congress, that he was going to extend the debt issuance suspension period from 12 to 14 months. This was done without an explanation of why he feels that it will suddenly take 14 months rather than 12 to obtain new borrowing authority. That Secretary Rubin backed into his one year determination rather than made it based on objective facts is now inescapable. Therefore, even if his determination met the reasonableness test, it still fails Chevron's requirement that his determination not be arbitrary. In reality, the Secretary's determination fails all of the requirements outlined by his own counsel. [[63] There may have been longer such periods, especially in the 1950s. However, this appears to be due mainly to the fact that Congress took substantially longer recesses during the session than they do now and would not always raise the debt ceiling before they left. [[64] The Secretary maintains that he was unsure that there would be an increase in the debt ceiling for a year. Merck at 4, fn. 3.

Use of the Disinvested Funds

Questions have been raised about whether the proceeds of CSRDF disinvestment may be used for general fund purposes or for payments to fund beneficiaries only. The Joint Economic Committee has argued that the latter is the case. Its argument rests on the legislative history of 5 U.S.C. 8348 (k).

Although no language specifically binds the Secretary in such a manner, JEC notes that the original language in the Senate did contain such a restraint. However, this language was removed in conference committee. Rather than being evidence that this indicated an intent to allow the general use of the disinvested funds, JEC concludes that there was a different motive for the removal of the restrictive language:

Since the Federal Reserve system could not distinguish which payments are for civil service benefits, the best way to ensure the disinvested funds were limited to civil service benefits was to limit the amount of disinvested funds to the total needed during the debt suspension period.[suspension period.[65]

Further, former Treasury Department Deputy Assistant Secretary Robert Zoellick has observed that the use of trust fund assets to pay general treasury obligations "undermine[general treasury obligations "undermine[s] the meaning of trust funds and the purpose of the debt limit."[and the purpose of the debt limit."[66] CRS has opined that the disinvested funds are not so restricted

It may be noted that the purpose for which the proceeds of sales or redemptions are to be utilized is not specifically limited to payment of benefits due under the program. This is underlined by the last sentence of the subsection which allows sales or redemptions even if there are sufficient funds available at the time of the sales to timely pay benefits.[timely pay benefits.[67]

Not surprisingly, the administration has taken the same position:

When sufficient uninvested cash exists in the CSRDF to pay benefits, the Secretary may use debt issuance capacity freed up by his redemption of Fund investment assets to increase, through the issuance of obligations of the United States, the amount of cash available in Treasury's general cash account.[Treasury's general cash account.[68]

And:

Any debt issuance capacity under the public debt limit that would be made available from such redemptions may be used to issue new debt obligations of the United States to obtain additional funds for the Treasury's cash account.[Treasury's cash account.[69] [[65] JEC at 8. [[66] Statement of Robert Zoellick Before the House Committee on Banking and Financial Services (December 13, 1995) 11 (available from the committee) [[67] Nicola et. al. at 4. [[68] Dellinger at 6. [[69] Knight at 10.

Other Potential Limits on the Secretary's Ability to Raise Cash

Most who have examined this issue have concluded that the debt ceiling itself does not place an independent limitation upon the Treasury in this case. Therefore, assuming that the Secretary has acted legally under the

statute governing the CSRDF, the fact that the debt limit is effectively circumvented is irrelevant for legal purposes. This is because Congress itself has created this "loophole" in 5 U.S.C. 8348. If the Secretary has acted properly under the statute, he cannot be faulted for using it. In effect Congress itself has done the disinvesting because it will have delegated its borrowing authority under the Constitution. Therefore, if the Secretary acted properly under the statute, he is not otherwise bound by 31 U. S.C. 3 101 (b).[3 101 (b).[70] [[70] See Dellinger at 16, and Knight at 2. JEC has issued a dissenting opinion. Because it believes that the Secretary may only use the funds to pay current obligations which would presumably diminish the CSRDF's liabilities, the effect would not be to circumvent the limit. Therefore, they conclude that a disinvestment which would ultimately require under existing statutes that the debt level exceed the limit is a violation of the limit itself JEC at 10. OLC also argues that the contingent liability created by disinvestment is not the type of liability taken into account by the debt ceiling. Dellinger at 16.

Conclusions

(1) The Secretary is empowered to disinvest the CSRDF when he makes a reasonable, fact based determination, that he is unable to issue obligations of the United States without exceeding the public debt limit.

(2) The amount of money that he may disinvest is not unlimited.

(3) The Secretary's power to disinvest is limited to the amount of payments due from the CSRDF during the period of time when he is unable to issue obligations of the United States without exceeding the public debt limit.

(4) The debt issuance suspension period commenced when declared by the Secretary on November 15, 1995.

(5) The debt issuance suspension period will end when the Secretary makes a determination that he can once again issue obligations of the United States without exceeding the public debt limit or for 14 months after its commencement, whichever is first.

(6) The amount available for disinvestment is limited to payments only as they come due and payable.

(7) The Secretary could reasonably be considered allowed, under the statute, to disinvest $ 3.2 billion at the beginning of every month.

(8) By disinvesting in excess of the amounts as they become due and owing, the Secretary has exceeded his authority 5 U. S.C. 8348 (c) and (k).

SECTION III: SECRETARY RUBIN's RECENT ACTIVITIES REGARDING THE DEBT CEILING

Introduction

After weeks of histrionic Administration warnings about how failure to raise the debt limit would bring default and catastrophic economic consequences, President Clinton chose to veto a temporary debt limit increase on November 13, 1995. Failure to raise the debt limit would not have triggered default because the Administration had already identified available means of managing the situation, despite its repeated public warnings to the contrary. The Clinton Administration position was thus revealed as an attempt to mislead Congress and the public based on financial assumptions it knew to be false.

As veteran political correspondent Donald Lambro observed five days before the debt limit was reached, a House JEC staff report had already pointed out that, the "White House warnings of a default are a 'charade.' It concluded the president has plenty of authority to defer or slow down spending, or use cash assets such as pension fund reserves to meet debt payments." This report, The Clinton Administration's Debt Limit Charade, went on to point out that the Administration had fostered the situation by failing to defer or rescind unnecessary discretionary spending to alleviate the situation. The report also emphasized that the Administration's default ruse was a distraction from the central issue: Republican insistence on a balanced budget, as opposed to the Clinton Administration's preference for higher deficit spending and debt accumulation.

TRUST FUNDS

Early in November it became evident that the White House's public posture was stiffening as it prepared in advance for the President's veto of the debt limit increase. This even more aggressive attempt to heighten the crisis atmosphere was not a preparation for default, as it may have appeared to some at the time, but reflected the determination of Administration officials to maximize partisan political advantage from the fallout and confusion of the coming veto.

The events of the last few days have made it clear that the Clinton Administration prepared in advance to veto the debt limit and Continuing Resolution (CR) as the first media event of the 1996 election campaign. As one Clinton Administration official stated on the front page of the New York Times, "That's his re-election campaign," an aide said. "He's prepared to fight all winter on that line." This statement exposes the Clinton Administration strategy to foster and sharpen the confrontation over the veto of the debt limit and CR legislation to kick-off the President's re-election effort, and keep its opponents off balance. Initially the Administration had the upper hand because only it knew the exact timing and content of actions to be taken to evade the debt limit -- after distracting public opinion for months with disinformation about default. Once the focus returned to the central issue of deficit spending, the Administration's position started to erode-

Secretary Rubin's Raid on Retirement Funds Triggers Armey/Saxton Request

On November 15, 1995, Treasury Secretary Robert Rubin announced his plan to disinvest the "G" fund of the federal employee Thrift plan, and the Civil Service Retirement and Disability Fund, in order to create room under the debt ceiling for issuance of new debt. This circumvention of the debt limit essentially evades a constraint rooted in Article I of the Constitution which states: "The Congress shall have Power … To borrow Money on the credit of the United States." The Secretary's actions permitted the issuance of over $ 60 billion of additional debt, enough to finance monthly federal deficits through January.

In response, on November 17, House Majority Leader Dick Armey and JEC Vice Chairman Jim Saxton sent Secretary Rubin a letter requesting information regarding when Treasury staff first examined the financing options presented by the retirement funds. Inflammatory public statements about default by Secretary Rubin, White House Chief of Staff Leon Panetta, and other Clinton Administration figures had created the impression that the administration was pursuing a deliberate attempt to disrupt the financial markets to undermine its opponents.

The Administration documents received under this request suggest that plans for the disinvestment of the retirement funds have been underway at least since June 27, and were not a last minute decision. In other words, the accessibility of the retirement funds had already been identified and shared with "appropriate officials" in the Executive branch well before prominent Administration officials claimed that a veto of the debt limit would lead to default. The critical document signed by Secretary Rubin triggering the disinvestment was typed without a date, which was only filled in by hand on the 15th of November.

The Clinton Budget

The entire controversy over the debt limit arises from the preference of the Clinton Administration for higher deficit spending and debt accumulation. This was made clear in the detailed budget submission made by President Clinton last February. Only after the Congress acted in producing balanced budget plans did Clinton attempt to cover himself by releasing a sketchy outline of what he called a 10-year balanced budget plan, but what in fact would have left $ 200 billion deficits according to the Congressional Budget Office (CBO). A review of the official budget submission clearly shows how unimportant high deficit spending is to the Clinton Administration.

The levels of deficit spending would hardly be affected under the official February Clinton budget submission. As the graph below shows, the Clinton budget recommended deficits growing to a level of $ 318 billion by 2002, with $ 2 trillion added to the national debt over the same period.

Deficit Spending Under the Congressional Budget

Resolution vs. Clinton and the CBO Baseline [[DELETED -- LINE GRAPH]

TRUST FUNDS

The official February budget submission is a useful guide to what the Clinton Administration would regard as an appropriate level of deficit spending in the absence of a public relations problem created by congressional actions to balance the budget. The upward trajectory of deficit spending under President Clinton's recommendation reflects the low priority this Administration has assigned to fiscal responsibility.

This section of this report is based on a JEC review of internal Treasury documents regarding what the Treasury describes as its "debt limit strategy." Many of the documents most relevant to this inquiry were heavily censored (redacted) in an attempt to withhold damaging information from Congress, the press, and the public. As in many other cases the withholding of information raises serious questions about what the Administration is attempting to conceal. The JEC inquiry has uncovered Treasury Department documents that reflect a methodical and coordinated Administration plan for a budget and debt limit standoff prepared many months before the confrontation actually occurred.

The budget impasse was sparked on November 13, 1995 with President Clinton's vetoes of continuing appropriations resolutions and debt limit increase legislation. While neither veto was critical, both occurred in an atmosphere of crisis generated by many warnings from Administration officials that a government default with catastrophic results would follow. Indeed, these Administration officials had carefully nurtured this default crisis for many weeks, using it to focus attention over a confrontation with Congress that might otherwise have been forgotten.

For example, according to a September 13, 1995, L.A. Times article, Secretary Rubin "warned that a fiscal disaster could occur unless the debt ceiling is raised by Nov. 15." A week later the Sacramento Bee reported that Secretary Rubin had claimed that unless the debt limit was raised, a default could result and "cause profound damage to our country." White House chief of staff Leon Panetta made an even more pointed allegation that the Republican position would "let the country go to hell and basically default."

These Administration statements regarding default were an attempt to scare the financial markets, mislead Congress and the public about the Treasury's financial position, and portray congressional Republicans as extremists. By focusing attention on default, the Administration raised a disagreement about legislation to the level of a confrontation over default of the U.S. government, with horrific consequences for the U.S. economy. The Administration strategy to resist congressional efforts to balance the budget by characterizing these efforts as extreme continues to this day. As planned, the protracted budget impasse has served as a convenient platform for the President's reelection campaign. To date, the outcome of the Administration's strategy has been the one it sought: gridlock.

Administration's Default Charade Based on Misleading Statements

The central problem with the Administration's repeated warnings that reaching the debt limit would result in a catastrophic default was that these assertions were disingenuous. As noted in a November 7 JEC report, there was never any real prospect of a default.

Although a complete response to a document request has yet to be made, the documents made available provide enough information to permit several conclusions. First, the use of retirement trust funds was not a last minute or snap decision borne of desperation. Treasury documents establish that this option had been identified and considered as early as last June, at least 4 months before the decision was formally announced It is clear that the retirement funds were identified very early as a target of opportunity.

In a June 27, 1995 memo to Secretary Rubin, a political appointee listed as one preliminary option "Notifications to trust funds of potential actions." As the debt limit was approached this same memo specifies "Notice to Executive Director of Federal Employees Retirement system of upcoming inability to reinvest G-Fund," and "Notice to public trustees of Social Security and other trust funds of possible inability to invest receipts." It is clear from these documents that use of the Social Security trust funds; as well as the retirement funds, was considered by Treasury to circumvent the debt limit as earl as June, 1995.

TRUST FUNDS

An August 25, 1995 memo to the Treasury General Counsel mentions a meeting with Justice Department attorneys on "the mechanics of investing and disinvesting trust fund receipts." A similar September 1, 1995 memo describes a meeting with "attorneys from the Department of Justice for briefing on various operational issues related to the investment/disinvestment of the various governmental trust funds.

From these documents it is clear that issues regarding use of the retirement trust funds to circumvent the debt limit were thoroughly examined several months before the Secretary's actions of November 15. The Treasury staff carefully prepared the Secretary and methodically planned the execution of his actions anticipated for announcement in November. At the same time that the Treasury Secretary and other high Administration officials kept these preparations private, they were publicly making inflammatory statements about how disagreement over the debt limit would trigger default. These public statements are contradicted by the meticulous planning undertaken to circumvent the debt limit far in advance. Statements suggesting that inaction on the debt ceiling could trigger default were misleading, given the numerous ways to circumvent the debt limit identified by the Treasury staff. It is extremely difficult to believe that these spurious public statements were made without the belief that they were false.

A "Cynical Political Strategy: " Planned Gridlock

President Clinton has recently accused his opponents of a "cynical political strategy" in connection with the budget impasse. The implication is that the impasse and government shutdown is a desired outcome of these opponents, rather than simply the result of Presidential vetoes reflecting disagreement between two branches of government. However, the Treasury documents indicate that the "debt limit strategy" was carefully designed as part of a larger overall Administration strategy.

The Administration debt limit strategy appears to have been a plan for a prolonged budget standoff in resistance to congressional efforts to balance the budget. A memo to Secretary Rubin dated June 27, 1995, includes a nine page attachment as "Outline of Debt Limit Strategy." This Treasury document outlines different scenarios defining the circumstances under which trust funds would be used to circumvent the debt limit. Obviously this Treasury document was an Administration action plan for a budget and debt limit stand off with Congress. Not only does the Treasury document prepare the Administration for a confrontation with Congress, perhaps more importantly, there is no indication that any compromise or accommodation with Congress was under consideration by the Administration.

Although this document was initially subject to extremely extensive redaction, it is also clear that the Administration's "debt limit strategy" was to be implemented in close coordination with other Administration offices outside of the Treasury Department. For example, heading IV of this document calls for "Close project management throughout phases." Under this heading are "Ongoing briefings and centralized messages" directed toward to administration officials, members of Congress, the media and the public.

Of the ten pages of this critical June 27 Treasury document, well over 95 percent had been redacted. The text of the cover memo was entirely redacted, as well as 6 other pages subjected to the same treatment. In other words, in 7 of the 10 pages the text had been entirely deleted. Only the Administration knows exactly why over 95 percent of its debt limit strategy was hidden from Congress, the press, and the public, but the magnitude of the redactions suggests a massive effort to prevent disclosure of relevant information. The complete text was finally revealed to House lawyers only after numerous requests.

This document contains no indication of any desire for a negotiated outcome avoiding a confrontation with Congress and a budget impasse. As "cynical political strategies" go, the private preparation of a "debt limit strategy" to finesse the debt limit, while publicly making deceptive statements about how inaction on the debt limit would trigger default, is the most cynical possible. Moreover, the apparent references to top Administration officials in one other document indicate that this strategy was coordinated at the highest level of the Clinton White House.

Long Term Damage to the Administration's Financial Leadership

As a result of the above actions, the Administration has seen a decline in respect by many market participants. As early as November, 1995, the Economist Magazine labelled Secretary Rubin a "humbled prophet."[prophet."[71] Doomsday, it notes, "is a great event." Therefore, "One does not simply reschedule it, therefore, without a good explanation." Despite the Secretary's explanations and further forecasts of doom following default after he disinvested the trust funds on November 15, 1995, "Financial markets reacted to the revised timing Just as they had to the original one. They ignored it." The real threat, according to the article, was not the possibility of default, but rather "someday, the mountain of debt might actually have to be repaid."

Although Wall Streeters might be expected to make any disparaging comments anonymously, many did not. Despite Secretary Rubin's claims that we might default in November, Robert Pirie, Senior Managing Director of Bear Steams stated, "everyone on Wall Street knew we wouldn't."[wouldn't."[72] The day after the first "drop dead" date of November 15, 1995, Louis Crandall, a New York economist with Wrightson Associates and publisher of the Money Market Observer noted, "This has become farcical."[become farcical."[73] More recently, Secretary Rubin stated that we would surely default after March 1, 1996. A typical reaction was that of Joseph W. Duncan, Chief Economist at Dun & Bradstreet, "Having said it before and not having actually hit the wall, the market is saying, "ho-hum."["ho-hum."[74] Although default would lead to a downgrading of U.S. debt securities, states Standard & Poor's executive managing director Henrick Kranenburg, the rating agency doesn't expect a default. Many share the view of Edward J. Fetner, president of the equity investment management firm of Lynch & Mayer that, "Some agreement will be reached or some new Rubin trick will be developed to further defer facing the music."

Those who remain anonymous are even more critical of the Secretary. This is in part due to Administration efforts to strong- arm Wall Streeters into towing its line on the debt ceiling.[arm Wall Streeters into towing its line on the debt ceiling.[75] At a meeting with Treasury officials to discuss Administration tax proposals, "There was a subtle message that we [proposals, "There was a subtle message that we [the Administration] need more help from you people [Wall Streeters [need more help from you people [Wall Streeters] [on the debt limit]," according to an attendee who represents "one of Wall Street top investment banks. Others have been more direct. "Rubin is the most political secretary we've had in decades, perhaps ever. He's sacrificed some credibility in order to stay on the Clinton team."[sacrificed some credibility in order to stay on the Clinton team."[76] Summing up Wall Street's reaction to the March 1, 1996 drop dead date, the Washington Post reports that it "was received in some parts of the financial community with slightly less skepticism than a prediction of a Super Bowl victory for the execrable New York Jets."[a Super Bowl victory for the execrable New York Jets."[77]

Conclusions

The JEC investigation of the Treasury Department has uncovered what appears to be an Administration preparation for gridlock conceived by June, 1995, if not before. Treasury documents obtained by the JEC reveal that use of the trust funds, including the social security trust fund, to evade the debt limit, has been under consideration since early last summer. A meticulously prepared strategy was planned and coordinated with other Administration officials, based on the expectation of a prolonged budget stand-off with Congress, at least 4 months before the November vetoes. Moreover, the public statements by Administration officials that inaction on the debt limit would lead to default were misleading. As a result, the Administration's standing in the financial community has been severely diminished. [[71] "Humbled Prophet," The Economist, November 18, 1995. [[72] "The Markets Don't Lie," The Standard, December 4, 1995, 10. [[73] "Rubin Spoke, but Wall Street Heard Wolf " Wash. Post, Jan. 24, 1996. [[74] "Rubin Spoke, but Wall Street Heard Wolf " Wash. Post, Jan. 24, 1996. [[75] "Treasury Tax Plan Irks Wall Street Executives," Wash. Post, 12/15/96. [[76] "The Markets Don't Lie," The Standard, Dec. 4 1995, 10. [[77] "Rubin Spoke, but Wall Street Heard Wolf " Wash. Post, Jan. 24, 1996.

SECTION IV. CONGRESSIONAL RESPONSE

Introduction

Between June of 1940 and the present, the debt limit has been increased 77 times.[increased 77 times.[78] Yet today we are faced with a lack of clarification as to what actions the Secretary of Treasury may take when the debt ceiling constrains Treasury's ability to borrow. Indeed, there is some controversy over the role of the debt limit. The

time seems appropriate to establish clear limits on how Congress' authority to borrow under Article I is to be administered by the executive branch.

The immediate concern is, of course, the disinvestment of CSRDF, as well as the disinvestment of the Thrift Savings Plan's government securities. Section II has discussed the legal issues involved in the Secretary's declaration of a debt suspension period of one year. However, given Secretary Rubin's action, Congress may wish to respond through the legislative arena. The purpose of this section is to provide an overview for Congress in considering such response. [[78] Budget of the United States Government, Historical Tables, Fiscal Year 1996, U.S. Government Printing Office, Wash. D. C., Table 7.3.

Response to Disinvestment of the CSRDF

One response to the disinvestment of the CSRDF, as embodied in H.R. 2621, which was introduced by Chairman Bill Archer and passed the House on December 14, 1995, is to not allow disinvestment of any trust funds if the primary purpose is to circumvent the debt ceiling rather than pay beneficiaries. It specifically repeals the disinvestment provisions which were used by the Secretary as discussed in Section II. Under H.R. 2621, obligations held by "covered trust funds" (which make up the bulk of the trust fund revenue) could be redeemed in order to make current payments to beneficiaries where these payments would not otherwise be paid due to the debt limit. In such a case, the Secretary could issue corresponding debt obligations to the public in order to obtain the cash needed to pay beneficiaries. Notification to Congress of the Secretary's intended action would be required.

Upon notification, the Comptroller General would be required to make a finding that the necessary requirements had been met and provide recommendations to each House as the Comptroller considers "necessary and appropriated

Section II provides a discussion of the intent of the 1986 amendments to the CSDRF. The legislative history indicates that Congress intended to allow disinvestment in order to ensure payments to beneficiaries could be made when the debt limit was binding. This was in response to the 1985 Treasury actions to prematurely disinvest both Social Security and CSDRF securities in order to make room to sell marketable securities to raise the cash for benefit payments. The recent disinvestment of the CSDRF was made to circumvent the debt limit and raise cash to make general obligation payments. Passage of H.R. 2621 puts on record the House position that no trust fund should be used to generally circumvent the debt limit. Should it become law then at least one major issue regarding the debt limit would be settled.

Another question is should Congress specifically disallow the early disinvestment of trust funds such as occurred in 1985 in the case of Social Security? As an example, suppose a Social Security payment of $ 25 billion was due on March I and that the Treasury was at the debt limit. A disinvestment of $ 25 billion from the Social Security Trust Fund could be made on March 1, but Treasury could not disinvest $ 25 billion on February 25 in order to sell marketable securities in the amount of $ 25 billion which would settle on the March I payout date. One mechanism to accomplish this in an indirect fashion would be to prohibit the sale of marketable Treasury securities should a trust fund be disinvested.[securities should a trust fund be disinvested.[79] This would effectively prohibit the disinvestment of trust funds by eliminating the incentive to do so.

Bright Line Debt Limit

The latter approach leads to a discussion of a bright line debt limit scenario. One aspect of the current situation has been the uncertainty of when Treasury might not be able to make interest payments or redeem obligations as these become due. As discussed in Section III, much hue and cry of impending default was made as late October approached, then again as November 15 approached, and now the Secretary of Treasury is ringing alarm bells about March 1. The evidence is that there is not, under current statute, a bright line where the Congress is aware that if it does not increase the debt limit the Treasury will not be able to meet its financial obligations.

Options to avoid the debt limit

There are several options that Treasury has used, and may use as the debt limit again becomes binding. These include the followings

(a) Further disinvestment of the Civil Service Retirement Trust Fund

Section II contains a thorough discussion Treasury's ability to pursue this action. We have just discussed possible Congressional response in the context of H.R. 2621.

(b) Disinvestment of other trust funds

In testimony before the House Banking and Financial Services on December 13, 1995, Secretary Rubin stated that he did not have authority to disinvest any other of the 189 trust funds. A General Accounting Office Report of 1985 stated, in response to the early disinvestment of the Social Security Trust Fund that occurred in 1985: "We conclude that, although some of the Secretary's actions appear in retrospect to have been in violation of the requirements of the Social Security Act, we cannot say that the Secretary acted unreasonably given the extraordinary situation in which he was operating."[given the extraordinary situation in which he was operating."[80] Given the uncertainty with regard to how much disinvestment of Social Security and the other trust funds would be allowed, if any, in order to provide benefits, Congress may want to provide specific guidance. [[79] Since the trust funds would have to be disinvested to make payments to beneficiaries if revenue to the fund is ever less than required payments to beneficiaries, the language would have to be crafted to allow disinvestment under these circumstances, Otherwise, the assets would have to be held into perpetuity. [[80] Comptroller General of the United States, B-221077, December 5, 1985, GAO/HRD-86-45, Washington D.C., Page 1.

The Secretary has disinvested that portion of the Thrift Savings Fund known as the "G Fund". This is the portion held in government securities. Because these securities mature on a daily basis, the amount that Treasury has disinvested has been determined by what is necessary to keep the debt at its limit. The amount the Secretary authorized for disinvestment was $ 21.5 billion. This action was taken pursuant to a 1987 statute authorizing disinvestment of the fund, Even though there is language requiring the restoration of these funds along with foregone interest, the net result of disinvestment of this fund to pay general fund obligations is to make the fund less secure. If this were not the case, then the credits which replaced the government securities in the fund should be counted under the debt limit. In either case, Congress may wish to rethink the provision allowing the G Fund to be disinvested to make ordinary payments of the government.

(c) Delaying Income Tax Refunds

There are approximately $ 90 billion in income tax refunds. The Internal Revenue Code does not require Treasury to refund excess income tax payments until 45 days after the filing deadline. Even then, Treasury could further delay if it makes interest payments on the delayed payment. There are some macroeconomic problems with delaying refunds, for example, disposable income would be lower for the first and second quarters and this could result in a short term negative real GDP growth (recession). Congress may wish to prohibit the delay of income tax refunds if its purpose, or primary purpose, is to circumvent the constraints of the debt limit.

(d) Federal Financing Bank Assets

At this time there are slightly more than $ 83 billion in Federal Financing Bank (FFB) assets which are held by Treasury. Some of these assets might be securitized and either sold to the general public or to trust funds. The market might require some time to review the asset package and thus such an action might have to be taken with considerable lead time. In a letter to the Speaker of the House, Secretary Rubin has stated that $ 9 billion of these assets can be sold to trust funds.[to trust funds.[80] These include the obligations of the Postal Service and the Tennessee Valley Authority. It is questionable what other assets might be sold from the FFB and not become counted against the debt limit. Again, Congress may wish to either prohibit the sale of assets of the FFB if such action is to avoid the debt limit, or it may wish to specify clearly what assets would count against the debt limit and under what circumstances. [[81] Letter from Secretary Robert Rubin to The Honorable Newt Gingrich, Speaker of the U.S. House of Representatives, January 22, 1996.

(e) Sale of Gold

Treasury has gold reserves valued at approximately $ 100 billion at market rates. At present, the U.S. gold reserves are pledged as collateral for "gold certificate" loans from the Federal Reserve. This gold, however, is valued at the statutory rate of $ 42.22 per ounce. Treasury would have to raise about $ 1 1 billion in net cash to pay the Federal Reserve for the certificates, but this would net cash of more than $ 80 billion. However, as one Wall Street analyst put it: "This is obviously a far-fetched scenario. Dumping that much gold on the open market is clearly out of the question, both because it would be disruptive and because the Treasury would be undercutting itself by swamping the market.[swamping the market.[82] There might be some central bank that would be willing to swap some of their dollar reserves for gold in an off- market transaction, but the net cash gain would be much less than the $ 80 billion. 31 U.S. C. 5116 currently provides for the Secretary of the Treasury to sell gold to the market to reduce the debt. This language might be interpreted to allow selling gold to reduce the debt in order to provide room to sell more debt. If Congress does not wish to allow the sale of the gold stock in order to avoid adding to the debt, it should enact specific legislation prohibiting such action.

(f) Use of Foreign Exchange Assets

Prior to the existence of the G Fund in the Thrift Savings Plan, Treasury regularly failed to fully invest the Treasury securities held in the Exchange Stabilization Fund when the debt limit became binding. This occurred several times, including, according to the Department of Treasury, in 1980, 1984, 1985, 1986, and 1989. The language of the Exchange Stabilization Act would have to be read broadly to allow this, but the precedent exists." Secretary Rubin has already announced his intention to disinvest the Exchange Stabilization Fund of $ 3.5 billion U.S. Treasury securities.

There are three ways Treasury could use the approximately $ 10 billion worth of Japanese yen and $ 6 billion worth of Deutsche marks it has in the Exchange Stabilization Fund: (1) sell them on the open market; (2) sell them directly to other central banks; and (3) swap them with the Fed under a warehousing arrangement. It is unlikely that Treasury would dump these holdings on the market, as foreign currency markets can be quite volatile. There is ample precedent for central bank currency swaps. The Bank of Japan is probably holding more dollars than it would like, and the Bundesbank and the U.S. entered into off market trades in both 1991 and 1992. The problem here would be the effect on perception of the dollar's strength by currency traders. The third option avoids market problems, but would make the Fed nervous. Under a warehousing arrangement, the Treasury would undertake a long-term repurchase agreement with the Fed, selling foreign currency to the Fed and buying it back on a forward basis.

If the Congress wishes to require that the Exchange Stabilization Fund be used solely for its titled purpose, then it should add language specifically stating this intent.

While the ability of Treasury to legally use these methods of creating a grey area of default around the debt ceiling ranges from legally certain to highly questionable, there are political and market constraints that also come into play. For example, while it is clearly legal for Treasury to hold income tax refunds until 45 days after the due date of the return, economic conditions may preclude such an action. Should taxpayers become aware of such a strategy, political repercussions may be such that this avenue of preserving cash might not be useable.

Congress, could create more of a clear line of when the debt limit is being reached in at least two ways. One is to limit the legal options of the Secretary of Treasury to continue to issue debt once the debt limit is reached and/or to limit the sale or exchange of assets to raise cash. The former would include disallowing disinvestment or underinvestment of trust funds, as discussed above. The latter would be to put into effect by specific legislation precluding, for example, the sale or transfer of any Treasury assets, including the Federal Financing Bank. A problem with this approach is there may be good reason to allow Treasury to alter its portfolio of assets through purchase, sale, and exchange. A less restrictive policy might allow the sale of assets under certain conditions, or preclude the sale only under certain conditions. The difficulty here is the inability of Congress to foresee what conditions may appear in the future, and what innovative ways the Treasury might interpret the statute. Quite possibly, the latter was the case with the 1986 amendments to CSRDF. A possible solution is to disallow sales,

exchanges, or other transferences, the primary purpose of which is to circumvent the debt limit. This requires careful drafting in order to allow normal transactions while at the same time precluding actions that would infringe upon Congress' authority over the issuance of debt. [[82] "Debt Ceiling Preview-Part II: Alternative Sources of Cash," The Money Market Observer, Wrightson Associates, New York, NY, September 15, 1995, p. 4. [[83] U.S.C. 5302.

Definition of debt subject to limit

A second option would be to create a more inclusive definition of what constitutes debt subject to limit under Title 31. Current law captures the vast majority of public debt. Of the total public debt outstanding of $ 4.988 trillion, $ 4.899 trillion is subject to the debt limit under Title 31. The problem is that the debt created through disinvestment of the trust funds may not qualify as debt under the current definition. Treasury's position clearly is that the $ 75 billion of debt it created through the disinvestment and underinvestment of the CSRDF and the G fund does not count against the limit.[limit.[84] The Treasury is eventually required to reinvest these credits and restore any foregone interest. In that sense the credits created through the disinvestment and underinvestment process must eventually be paid along with the interest that is accruing on these credits. It certainly could be within the realm of reasonableness to count such obligations under the debt limit.

The negative to this is it would not be possible to disinvest trust funds during a period where the debt limit was binding even to cover the situations where a trust fund might be disinvested three days early in order to allow the sale of Treasury securities which would settle in time to make payments to beneficiaries. However, one might also argue that the reason for a binding debt limit is precisely to foreclose options. 84 This includes the disinvestment of the CSRDF of $ [84] This includes the disinvestment of the CSRDF of $ [84] This includes the disinvestment of the CSRDF of $ 39,8 billion authorized on November 15, disinvestment of the G Fund of $ 21.5 billion authorized on November 15, and underinvestment of the $ 14.5 billion interest payment due the CSRDF on December 29.

Enforcement

An issue which arises, regardless of which method of dealing with prohibiting unauthorized debt issuance by the executive branch, is the enforcement mechanism that ought to be provided. Should ordinary citizens have standing to sue for grievance or to pursue temporary restraining orders? Should members of Congress have standing? Whatever enforcement mechanism that is chosen should serve to swiftly correct a violation. Debt limit arises on average last for less than a month. Any mechanism which would take longer than a week or two to resolve would be relatively ineffective.

Flexibility

Another issue is the effect of creating a "bright line" debt limit. There may be some value in allowing enough flexibility to the Secretary to avoid a certain "default," defined as failure to make interest payments on outstanding debt. One way of doing this is to allow the Secretary the authority to manage the cash in times of a debt limit crisis. This could be done subject to priorities established by the President in his role as chief executive officer. In this way, as the options which have been used, or have suggested could be used, to allow the Secretary to continue to issue debt once the debt limit is reached are closed off, the "default" threat is diminished. Most businesses and households would manage their cash when their credit limit has been reached in such a way as to pay their priority bills before their other bills. H.R. 2098 would provide this flexibility.

Legislation such as H.R. 2098, which provides the Secretary with cash management authority brings up two obvious issues. First is whether the executive branch already has this authority. Second, is whether this may provide too much power to the President. With regard to the first, as with most of the debt ceiling issues that are discussed in this report, the area is grey. An argument can be made that the President already has such authority. The basis for this position is that when faced with conflicting statutory requirements, the President is free to resolve the conflict in a manner that in his Judgement best serves the national interest. Thus, if the debt limit statute requires him to stay within the debt ceiling and the Anti- Impoundment Act requires him to make payments, he may choose which payments to delay. On the other hand, a 1985 Senate Report states that Treasury is not authorized

to decide which payments to make because all appropriations bills stand equal, and thus Treasury must make payments on a first-in, first-out basis.[make payments on a first-in, first-out basis.[85] This is the position that Secretary Rubin has taken in both written and oral communication with this Congress. If the current administration takes the position that it may not prioritize payments, then regardless of legislative opinions to the contrary, the result will be payments on a first-in, first-out basis should the debt limit constrain the government's ability to honor obligations. [[85] "Increase of Permanent Public Debt Limit," Senate Finance Committee Report 99-144, 99th Congress, September 26, 1985.

The second issue is whether this provides too much power to the executive branch. Obviously the question of "too much" is a political judgement. However, those who believe that Treasury already has such power should not be concerned, as H.R. 2098 is merely clarifying the existing situation. Given the current confusion, an administration could probably assert the power if it wanted to do so. Second, the executive branch would be able to neither make payments not authorized already by Congress, nor delay ad infinitum payments, otherwise it would be impounding funds. A third point is that the alternative, first-in, first-out results in a cash management strategy which is interior to what is possible if the chief financial officer is able to make payments according to the priorities of the chief executive officer. Of course, it is possible for the executive branch to choose a cash management strategy which is interior to first-in, first-out. The responsibility for such a poor strategy, would of course, fall on the executive branch.

In 1985, Congress allowed the Federal Financing Bank to issue $ 15 billion in securities which did not count against the debt limit. While these securities have permanently remained outside the limit, Congress might provide flexibility by allowing some debt issuance to not count against the limit on a temporary basis when the debt limit has become a binding constraint. An example would be to allow the sale of securities, the revenue from which is used to make payments to beneficiaries, to be exempt from the debt limit for a brief period or until trust fund securities are disinvested in a like amount. This would be to fit the situation described above, where the disinvestment of Social Security Trust Fund assets occurs on the date the payments to beneficiaries are due, but new obligations to raise the cash for the payments must be issued a few days earlier to allow for a timely settlement date. This would result in a different timing of debt issuance, but would not result in greater total debt.

Debt Ceiling and the Budget

A final point is how the debt ceiling fits into the appropriations process. Secretary Rubin has argued, citing a Congressional Budget Office Study, that the debt limit is an anachronism. It should either be abandoned or raised without question because the debt increases necessary to fund the government are the arithmetic result of prior spending and tax decisions of the Congress.

Thus, it is unfair to withhold debt authority from the executive branch when Congress makes the spending decision.

While the above argument has appeal at first blush, one needs to realize that the current Congress makes the decision about what the pattern of debt will be in the future. The current Congress, however, no longer directly controls the amount of spending that will occur in the near future. This is because of the growth of entitlement programs. In 1955, nearly 9/1 0 of the federal budget was discretionary programs. Today only about 1/3 of the budget is discretionary. Congress can only alter the spending pattern to match its wishes with regard to the time-path of debt by amending statutes which authorize the entitlement programs. Although it is true that through budget reconciliation Congress does authorize mandatory spending, and can thus make changes, Congress recently offered such legislation under the guise of the Balanced Budget Act of 1995. This legislation was vetoed by the President. Unlike an appropriations bill, which if vetoed results in no spending and no additional debt, a veto of a reconciliation bill, or changes in mandatory spending through new authorizing legislation, results in continued spending under the old program. The result is that, in the case of mandatory spending, Congress cannot effect a change and alter the time path of debt without the consent of the President, unless it has a two-thirds majority to override the President's veto.

Due to the inextricable link between the entitlement programs and the future debt of the federal government, there is an inextricable link between the budget bills and the debt limit. To argue that the debt limit is not to be tied into the budget process is to miss this vital point. Congress's last hold on its authority to borrow money under Article 1,

Section 8 is the debt limit. Because the amount of debt that will be needed in the future is directly related to the amount of spending that will occur, the authority to borrow under Section 8 is tied directly to Congress' authority to spend under Article 1, Section 9. It is quite appropriate to link budget bills to debt limit increases.

Historically, this has been the case. Indeed, with the decrease in the share of the budget that is accounted for by discretionary spending, the linkage has become ever closer. In 1993 H.R. 2264 raised the debt limit in the Omnibus Budget Reconciliation Act, which included a tax increase of $ 250 billion. In 1990, H.R. the debt limit increase incorporated the Omnibus Reconciliation Act of 1990, which also included large tax increases. In 1987 and 1985 the debt limit increases were included in the debate over Gramm-Rudman I and II. In recent years, a clean permanent increase in the debt limit simply does not occur.

One obvious solution to this Is to reinstate the ability of Congress to substantially control the appropriations process on a year-to-year basis. Several proposals exist for altering the budget process. Representative Steve Largent (R-OK), is leading a task force that will introduce a budget process reform package this Congress. This Budget Process Reform Task Force should consider the growth of the non-discretionary part of the budget and its affect on the debt as it prepares its legislation.

Conclusions

The Task Force has found that the actions of the Secretary of Treasury have been improvident and have raised questions whether he attempted to affect market responses in order to alter the position of Congress on budget legislation. His designation of a debt suspension period of initially twelve months, extended to fourteen months, was not within the bounds and intent of the Civil Service Retirement and Disability Trust Fund Act. The result of this designation was the creation of additional debt that was not approved by Congress and thus threatens the constitutional separation of power over the borrowing authority of the United States. Legislation to clarify what actions can be taken by the Secretary of Treasury during the time that the debt limit is binding should be enacted. In particular, the disinvestment of trust funds should be limited to funding payments to beneficiaries and the cash management responsibility of the Secretary should be established. Finally budget process reform should be undertaken with priority given to Congress' enumerated power over the spending and borrowing of the United States.

NEWT GINGRICH

6th/Georgia

OFFICE OF THE SPEAKER

UNITED STATES HOUSE OF REPRESENTATIVES

WASHINGTON, D.C.

November 30, 1995

The Honorable Nick Smith

1530 Longworth House Office Building

Washington, D.C. 20515

Dear Mr. Smith:

I would like you to chair a task force to review the Administration's looting of key retirement trust funds, increasing America's actual debt by $ 61 billion without the consent of Congress. This justifies a thorough investigation. Many people have serious concerns about the use of these trust funds -- without congressional approval -- for general government spending.

I appreciate your leadership on issues involving the debt limit as we work to achieve a balanced budget. Your research and issue briefings have been very helpful to the leadership and Republican members.

Please advise me of your recommendations for membership on this task force. I hope you will assist the Majority Leader as he coordinates hearings on this issue, and I look forward to seeing the findings of the task force as you investigate the disinvestment and under-investment of government trust funds.

Your friend,

Newt Gingrich

Speaker of the House

December 29, 1995

The Honorable Newt Gingrich

Speaker, House of Representatives

H232 Capitol

Washington, D.C. 20515

The Honorable Robert Dole

Majority Leader

U.S. Senate

Washington, D.C. 20510

Dear Mr. Speaker and Majority Leader Dole:

We are concerned about a pattern of actions which infringes upon congressional authority over borrowing and spending. This pattern includes unauthorized use of the Exchange Stabilization Fund to defend the Mexican peso, misleading statements regarding default, and excessive use of the disinvestment authority under the Civil Service Retirement Trust Fund Act.

Specifically, we are concerned with the decision by the Administration on November 15 to disinvest the Civil Service Retirement and Disability Trust Fund (CSRDF). The way for this action was paved by an opinion of the Office of Legal Counsel advising that 5 U.S.C. 8348 should be interpreted to allow the Secretary of the Treasury to make a prognostication of how long into the future he may face an unraised debt limit and then to disinvest immediately the full amount of all prospective future payments from the fund.

We believe that the OLC opinion is clearly wrong. The statute plainly envisions that the Secretary determine when a "debt issuance suspension period" has come into existence and then authorizes the Secretary to disinvest the amount of monthly payments as long as the period lasts and as the payments become due. Although the OLC opinion acknowledges that this is a "plausible" interpretation, it is in fact the only construction that can be squared with the statutory language itself.

The statute specifically contemplates that disinvestment occur only when necessary to avoid exceeding the debt limit. Immediate disinvestment of amounts equal to aggregate future payments before they are due does not meet this standard. Moreover, under the definition of "debt issuance suspension period," the contingency that the Secretary is called on to assess is the ongoing likelihood that certain further debt issuance will breach the then-current debt ceiling--which is essentially a computational judgment. Nothing in the language suggests that the Secretary is authorized to assess future contingencies about future debt ceiling changes--when they might occur and by how much. Judgements that are inherently broadly subjective and unknowable. Finally, OLC's opinion is

grossly inconsistent with the purpose of the statute. That purpose is clearly to protect the CSRDF. Under OLC's interpretation, however, the Secretary is allowed to take action that directly threatens the fund and treats it as a piggy bank designed solely to allow an administration to circumvent the debt limit. This is preposterous.

Even under OLC's opinion, we believe that the disinvestment decision goes too far, It has all the markings of being result- oriented and, hence, arbitrary and capricious.

Secretary Rubin has used an interpretation of the 1986 law that appears to be contrary to the whole purpose of the statute. The resulting action could actually weaken the trust fund and in addition it disregards congressional control over borrowing. Our concern is that the Secretary will continue unabated in his actions to usurp the enumerated powers of Congress granted under Article 1, Sections 8 and 9 of the U.S. Constitution.

We have spoken to Congressman Nick Smith and other members of the Task Force on the Debt Limit and Misuse of the Trust Funds. We recommended to them the close examination of the Secretary's actions with regard to the debt limit in the context of the pattern of behavior mentioned above. This would include detailed congressional questioning of Mr. Rubin on what he is considering in the event the debt limit is not increased by the end of January.

We also recommend that legislation be enacted which produces a bright line barrier with regard to what the executive branch is authorized to do under the debt ceiling legislation (Second Liberty Bond Act). Another option would be to include all obligations of the federal government under the debt limit. The task force and other members will no doubt consider others.

We hope the Congress takes strong action to enforce the debt ceiling and prevent this kind of cynical legerdemain.

Sincerely [signed [[signed] [signed]

William Barr Edwin Meese

Former Attorneys General of the United States

January 4, 1996

The Honorable Robert E. Rubin

Secretary of the Treasury

Department of the Treasury

Washington, DC 20220

Dear Mr. Secretary:

As former Secretaries of the Treasury, we understand the pressures you confront as a statutory debt limit approaches. During our respective tenures, we were also compelled to take temporary actions in order to preserve the credit of the United States.

It now appears that by the beginning of February you will be required to take broader actions, including perhaps extraordinary and unprecedented measures, to avoid the effect of the statutory debt limit. This will be a fateful step, and one that could, in our view, raise serious legal, perhaps even constitutional issues.

We believe this moment should be avoided at all costs. As the principal financial officer of the United States Government, you have great credibility within the current Administration. We urge you to use this influence to move the nation toward an agreement on a balanced budget in seven years. Not only would such an agreement be in this country's long-term interests, but it will make the unprecedented steps you are contemplating unnecessary.

Very truly yours [signed [[signed] [signed]

James A. Baker III Nicholas P. Bundy [[signed]

Donald T. Reagan

TASK FORCE ON THE DEBT LIMIT AND THE MISUSE OF TRUST FUNDS

Activities

December 5: Announcement of Formation of Task Force at Press Conference

December 13: House Banking Committee Hearing with Secretary Rubin

December 20: Task Force Legal Expert Round-table with Former Attorney General and Treasury Officials

January 5: Task Force Meeting with Undersecretary John Hawke and Treasury Officials

January 24: JEC Presentation of Treasury Documents to Staff and Members

February 1: JEC Presentation of Treasury Documents to Public

February 1: Task Force Meeting to Discuss Draft of Report

February 8: House Banking Committee Hearing with Secretary Rubin

February 12: Release of Task Force Report at Press Conference

Load-Date: February 13, 1996

End of Document

Mr. ELLIS. Well, I would just add to that. We have 17 interconnection agreements, and they are negotiated one by one and they are private negotiations under the auspices of the States. In some of those agreements, the parties have negotiated both standards of performance and even liquidated damages.

But on this point, I will go back to what I said before. We, for many years, have looked at the whole area of interconnection, particularly with the number of customers—and that is what I will call them, carriers—that we have. We have performance standards, we have capabilities. They can come in and online monitor the quality of the access. This is an area we get rated by the FCC. They rate us, all the carriers.

At predivestiture, pre-1984, there could have been arguments, but this has not been, I submit, in the relatively—well, I will use 8 years—this has not been an area of controversy.

Senator FEINGOLD. Is this the kind of thing you would agree to, then, as a condition for merger?

Mr. ELLIS. It is absolutely not the kind of thing we would agree to as a condition for merger. We believe, unquestionably, this merger should be held to the same standard that the AT&T–McCaw merger was, that the MCI–BT, that the Sprint—I could go down the whole list, Disney, and so on—the law ought to be the same for everyone. What I am saying is under the act that was passed by Congress, that is a matter for private negotiations and it has worked. We have had 17 agreements with big and small, including people like Time Warner and MFS. So I am saying the process was working. The problem has come up because of FCC has gone off and tried to reregulate the system with a 700-page, single-spaced order. That is the problem.

Senator FEINGOLD. Mr. Chairman, we will pursue this again another time and I thank you very much for the extra time.

Senator THURMOND. Thank you, gentlemen, for your appearance.

We will now have the second panel come around—Mr. Michael Salsbury, Mr. William Barr, and Mr. Robert Atkinson. We will give each of you 5 minutes to make an opening statement, and please confine it to 5 minutes. You can put your entire statement in the record.

Mr. Salsbury, you may start.

PANEL CONSISTING OF MICHAEL H. SALSBURY, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, MCI COMMUNICATIONS CORP., WASHINGTON, DC; WILLIAM P. BARR, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, GTE CORP., STAMFORD, CT; AND ROBERT C. ATKINSON, SENIOR VICE PRESIDENT, LEGAL, REGULATORY AND EXTERNAL AFFAIRS, TELEPORT COMMUNICATIONS GROUP, INC., STATEN ISLAND, NY

STATEMENT OF MICHAEL H. SALSBURY

Mr. SALSBURY. Thank you, Mr. Chairman and members of the committee. My name is Michael Salsbury and I am executive vice president and general counsel of MCI Communications Corp. It is a privilege to testify before this committee today, and permit me at the outset, Mr. Chairman, to acknowledge the exemplary leader-

ship of members of this committee to ensure that the act recognized the critically important role of the Department of Justice in protecting and promoting competition in telecommunications markets.

Development of competition in the long distance industry since the breakup of the Bell System in 1984 pursuant to the MFJ is an extraordinary American success story. The changes spurred on by DOJ and the FCC gave American consumers and businesses multiple choices for long distance telephone service. Both large and small entrepreneurial companies now compete vigorously in the long distance industry.

The long distance cartel referred to by Mr. Young at this point has more than 500 members, has so far escaped detection by Federal and State competition authorities, and to date has been visible only to local exchange monopolists and their paid experts. Since 1984, long distance prices have declined almost 70 percent. Innovative long distance services, such as virtual networks, fax, and the Internet, have been introduced. Call quality has increased and customer service has improved dramatically.

Unfortunately, the MFJ did not address competition in local telephone service markets. These markets remain monopolies dominated by the seven RBOC's and GTE, which provide more than 99 percent of all the local telephone services in their service territories. Compared to the 42 million times customers changed their long distance carriers last year, no more than a handful of customers could obtain local service from more than one carrier.

Against this background, the intent of the act was, first, to pry open local telephone markets to competition and to reform and advance universal service arrangements so as to eliminate the current massive subsidy flows; and, second, once local markets were opened and effectively competitive, to promote further diversity and choice in long distance by permitting the RBOC's to enter the long distance market within their regions.

For the act's goals, two things are critically important. First, Federal and State regulators must implement the act in a manner consistent with Congress' procompetition intent. The FCC is off to the right start with its interconnection order issued last month. Yet, much of the implementation effort lies ahead. Because not one of the RBOC's or GTE has entered into a single interconnection agreement that meets the requirements of the act and the FCC's rule, the act now requires each State separately to outline those agreements in lengthy arbitration proceedings. This process will, no doubt, be further complicated by the appeals from the interconnection order filed by each of the RBOC's and GTE.

The second critical factor is DOJ's continuing role in ensuring that the evolution to competition in local markets does not jeopardize long distance competition either by premature entry of the RBOC's into the long distance market while they still remain monopoly power or by combination of RBOC monopolies that can delay and possibly frustrate development of local competition entirely.

We have met with representatives of the Antitrust Division and can report that they are preparing to carry out their statutory responsibilities in reviewing the RBOC applications for long distance

entry. The proposed mergers of Bell Atlantic and NYNEX and of SBC and Pacific Telesis, however, are very troubling and should be opposed. If permitted to proceed, these mergers would impede the development of local competition in each of these RBOC's regions and would create a substantial likelihood that the resulting mega-RBOC's would leverage their local monopolies to gain market power in the long distance market.

Although local telephone service remains a highly concentrated market, in no instance have RBOC's ever competed with each other in the provision of regular telephone service. In fairness, in the past State laws have often prevented that, but the act eliminated all such legal constraints. With the prospect of increased revenues and profits from the out-of-region business of their customers alone, one would expect to see demands for interconnection from other RBOC's and the beginnings of RBOC competition. After all, who better to compete in local service markets than the experienced, well-financed companies that have been doing it for 100 years?

Why, for example, wouldn't Bell Atlantic, which provides residential service to many New York executives, not try to win the telephone service of their businesses away from NYNEX? If Bell Atlantic wasn't interested in New York and SBC wasn't interested in the business in California, why are they buying these companies? This is, in fact, the justification Bell Atlantic gave some years ago when it tried to merge with TCI. At that time, Bell Atlantic's economists said that the only possible purpose and consequence of the merger would be to mount a direct competitive challenge across the board to the incumbent telephone companies, predominantly other BOC's. They are not saying that now. Why not?

I just might quickly conclude. The reason is that if they go into the other territories and demand interconnection, the other—if Bell Atlantic went into NYNEX' territory or if Southwestern Bell went into Pacific's, then the other companies would retaliate. They would demand interconnection from the other company and they would immediately start competing against each other, bringing local competition that much quicker. The answer to the monopolists' dilemma, Mr. Chairman, was to merge, not compete.

Thank you.

[The prepared statement of Mr. Salsbury follows:]

PREPARED STATEMENT OF MICHAEL H. SALSBURY

EXECUTIVE SUMMARY

It is a privilege to testify before the Committee on the state of competition in the telecommunications industry following enactment of the Telecommunications Act of 1996. I'd like to acknowledge the exemplary leadership of members of this Committee to ensure that the new law recognized the critically important role of the Department of Justice (DOJ) in protecting the promoting competition in the telecommunications marketplace.

MCI is uniquely situated to speak about competition in the industry because more than 25 years ago we successfully challenged the Bell System monopoly and brought competition to the long distance industry. We have experienced first-hand the anti-competitive shenanigans that an incumbent monopoly can engage in to frustrate new entrants that are trying to interconnect with its network and compete for customers. We know why it so necessary not only to have fair rules of the game but why you need the referees on the field for enforcement.

The Act holds the potential to spur the same kind of consumer benefits in the monopoly local market that long distance competition brought. Today, consumers have

many choices in long distance providers and rates have fallen nearly 70 percent over the last decade—the same long distance call that cost $1.77 (in 1994 dollars) ten years ago, would cost less than 58 cents today. The same is not true in the local telephone market dominated by the seven Regional Bell Operating Companies (RBOC's) and GTE. Their monopoly power and their ability to act anticompetitively is why the new rules of the game and the enforcement mechanisms are critical to realizing the goal of full competition in every telecommunications market. My testimony focuses principally on two areas of concern—the implementation of the Act and how the proposed RBOC mergers will harm competition.

Seven months after the passage of the Act, little in the local marketplace has changed. Consumers only have one choice for their local service provider. The incumbent monopolies, while crying that they are facing competition, are doing everything possible to thwart new entrants and kill its development. Within a month of the Federal Communications Commission's (FCC) issuance of new local competition rules, the incumbent monopolies have begun an enormous legal battle seeking to block the implementation of the Act. The monopolists' tactics of stall, disrupt and delay are exactly why we must have fair rules and good enforcement of the rules and playing conditions. In the near term, regulation must play its role as a substitute for competitive processes until true local competition—and market forces—fully develop.

The FCC is off to a good start in issuing its August 1 local competition rules, but these rules are only one part of a three part trilogy of necessary reforms. The trilogy must include:

National Local Competition Rules—Adoption of national rules to foster local competition throughout the U.S.

Universal Service Reform—A competitively-neutral universal service plan that increases the number of Americans on the network, provides access to basic and advanced services, eliminates hidden subsidies, ensures that all players contribute in an equitable manner and ensures that local service remains affordable in all areas of the country.

Access Charge Reform—Reform of access charges which currently result in long distance companies paying nearly half of every dollar to incumbent local monopolies. These charges are seven times the cost of providing access. Competition will not develop unless these charges reflect the true price of providing access to the incumbent's network.

As noted, the Act recognizes DOJ's preeminent role in safeguarding national pro-competition policies. In this regard, DOJ must critically examine the proposed mergers of Bell Alantic/NYNEX and SBC/PacTel. MIC views these proposed mergers as inconsistent with the pro-competition intent of the Act and in violation of our national antitrust principles. These mergers should be opposed. If these RBOC mergers were allowed, our nation would lose two powerful and resourceful competitors, both of which would likely be new entrants into the local markets now being served on a monopoly basis by their merger partners. Bell Atlantic-NYNEX would control 25 percent of the nation's access lines to customers and SBC-PacTel would control 21 percent. In other words, two huge monopolies would have bottleneck control of more than 45 percent of the nation's phone lines. These combined "mega-RBOC's" would also have a much greater ability to engage in anticompetitive activity if allowed to provide interLATA long distance service in their huge new intraregion markets because of the large proportion of calls on which they control both ends of access (i.e., calls that both originate and terminate within the new larger regions).

Assuming that the efforts of incumbent monopolists to thwart it fail, the development of local competition promised by the Act, one properly implemented, can produce the same kinds of consumer benefits that competition in the long distance market produced following the break-up of the Bell System—and more.

Mr. Chairman, actions taken by the FCC and DOJ in the coming months will in large part determine whether or not the Act's competitive goals—and the benefits to consumers that competition brings—are realized. To date, we have seen the RBOC's going to court, refusing to sign interconnection deals that meet the Act's competitive checklist, and doing all in their power not only to retain, but in the case of these proposed mergers, to expand their monopolies. I commend you for your diligence in publicly examining issues and I appreciate this opportunity to appear before the committee.

Good morning, Mr. Chairman and members of the Committee. My name is Michael H. Salsbury. I am Executive Vice President and General Counsel of MCI Communications Corporation. It is a privilege to testify before this Committee on the

state of competition in the telecommunications industry following enactment of the Telecommunications Act of 1996 (Act).

Permit me at the outset, Mr. Chairman, to acknowledge the exemplary leadership of members of this Committee to ensure that the new law recognizes the critically important role of the Department of Justice (DOJ) in protecting and promoting competition in the telecommunications marketplace.

No one can question MCI's long-standing commitment to achieving full and fair competition in all telecommunications markets. MCI was the pioneer of competition in the telecommunications industry—first in long distance and now in local telephone markets. MCI has grown from a tiny upstart challenging the Bell System to an industry leader. In the process, MCI has become a diversified communications company offering consumers and businesses a range of services including long distance, wireless, local access, paging, Internet access, and more. MCI will continue to provide the innovative services our customers demand, including local telephone service, but can do so only if the Act is properly implemented and if regulators prevent anticompetitive behavior on the part of incumbent monopolies. In order to become a facilities-based competitor to the incumbent telephone monopolies, MCI created a subsidiary, MCImetro. If the right rules are in place and arbitrations with the Regional Bell Operating Companies (RBOCs) are successful, by early next year, MCImetro will have grown to operating local switches in 24 markets in 20 states.

INTRODUCTION

For decades, the telecommunications industry was dominated by the former Bell System monopoly. Twelve years after the break-up of the Bell System, long distance is a highly competitive market with hundreds of competitors and prices that have decreased nearly 70 percent. The local telephone markets, however remain monopolies dominated by the seven RBOCs and GTE. The Act holds enormous potential for bringing competition to these monopoly markets, and while MCI is optimistic that this historic legislation will achieve that goal, it is far from a foregone conclusion. Several critical events must occur before that will even be possible. My testimony will focus principally on two areas that require special attention: implementation of the Act (a "trilogy" of key regulatory decisions) and the proposed RBOC mergers.

First, the Act must be properly implemented by both federal and state regulators in a way that is consistent with Congress' pro-competition intent. While the Federal Communications Commission (FCC) if off to the right start with the August 1 release of its local competition rules, much of the Act's implementation lies ahead. Not a single state has arbitrated an interconnection agreement pursuant to Section 252 of the Act. Moreover, FCC decisions in two key proceedings—universal service and access charge reform—are still months away. These two items, together with successful implementation of local competition rules, form what the FCC has labeled a "trilogy" of key decisions needed to launch local competition and preserve long distance competition. If successfully executed, this trilogy promises to bring lower prices and innovative telecommunications services to all Americans.

Second, certain pending industry mergers will harm competition and impede achievement of the Act's goals. The Act opens to competition a $500 billion communications and information market with exploding growth potential. Many players in this market, including MCI, have and will form alliances to offer innovative new products and services and increased geographical reach. We do not assert that such economic activity should be discouraged. To the contrary, joint ventures and mergers may strengthen competition in the market. Not all mergers, have such beneficial results.

MCI views the proposed mergers of Bell Atlantic with NYNEX and SBC Communications (SBC) with Pacific Telesis (PacTel) as inconsistent with the pro-competition intent of the Act and in violation of our national antitrust principles. These mergers should be opposed. If these RBOC mergers were allowed, our nation would lose two powerful and resourceful competitors, both of which would likely be new entrants into the local markets now being served on a monopoly basis by their merger partners. Bell Atlantic-NYNEX would control 25 percent of the nation's access lines to customers and SBC-PACTel would control 21 percent. In other words, two huge monopolies would have bottleneck control of more than 45 percent of the nation's phone lines. These combined "mega-RBOCs" would also have a much greater ability to engage in anticompetitive activity if allowed to provide interLATA long distance service in their huge new intraregion market because of the large proportion of calls on which they control both ends of access (i.e., calls that both originate and terminate within the new larger regions).

Assuming that the efforts of incumbent monopolists to thwart it fail, the development of local competition promised by the Act, once properly implemented, can

produce the same kinds of consumer benefits that competition in the long distance market produced following the break-up of the Bell System—and more.

LONG DISTANCE COMPETITION BENEFITS THE ECONOMY & CONSUMERS

Mr. Chairman, the development of competition in the long distance industry since the break-up of the Bell System is an extraordinary American success story. The changes spurred on by the DOJ and the FCC gave American consumers and businesses multiple options for long distance telephone service. Both large and small entrepreneurial companies now compete vigorously in the long distance industry.[1]

The development of a highly competitive long distance industry has been a boon for the U.S. consumer. A 1995 study[2] by Dr. Robert Hall of Stanford University confirmed what the world already knew—that long distance competition created hundreds of new businesses as new carriers entered the market, stimulated an unprecedented surge in technological innovation, and caused call quality to soar as long distance companies criss-crossed the nation with fiber optic networks that today comprise the Information Superhighway. In addition, and perhaps most importantly, competition drove real long distance prices to American consumers down by almost 70 percent between 1985 and 1995. The same long distance call that cost $1.77 (in 1994 dollars) ten years ago, costs less than 58 cents today.

Notwithstanding the facts, the RBOCs argue that the long distance industry is not competitive.[3] This view appears to be motivated more by a desire to influence public policy than by a reasoned and impartial evaluation of the facts; it is notoriously wrong. Since 1995, while the RBOCs were spreading their propaganda to policy makers, many on Wall Street realized that the firms in the long distance industry were vigorously fighting for market share through price competition, quality improvements, and new and innovative service offerings.

FCC figures also demonstrate vigorous long distance industry competition. AT&T market share measured by revenue slipped almost one percentage point in the first quarter of 1996 to 55.1 percent, continuing the downward trend from 90 percent at divestiture in 1984; 67 percent in 1989; and 61 percent in 1993. Measured by traffic revenue, AT&T's share is now approaching 50 percent.

Change in market share, however, does not tell the whole story. Market share reflects only net customer turnover; if AT&T loses a customer to one long distance competitor but wins one from another, its market share remains the same. The actual turnover is a more accurate barometer of competition and it demonstrates extreme rivarly—long distance customers changed carriers over 42 million times in 1995, with a faster pace of turnover exhibited in the first quarter of 1996. In addition, smaller carriers continue to gain an increased share of the market. The FCC reports that "third tier" carriers have increased their share of the market revenue fivefold, from less than three percent in 1984 to more than 14 percent in 1995. The ability of new entrants to rapidly build market share is reflective of an open and competitive, rather than a non-competitive, market.

In addition to presenting misleading facts on market share in the long distance industry, the MacAvoy study's core conclusions are based on an analysis of long distance prices and costs that is totally flawed. According to the study, long distance prices are well above costs and the margin has been increasing over time. The two fundamental problems with the analysis are its pricing and cost data. There are several problems with the pricing analysis. First, it overstates consumer rates by ignoring important residential discount plans—such as the MCI "Sure-Savings," the AT&T "True Savings," and other discount plans. Second, it makes incorrect calling pattern assumptions.

It assumes that 85 percent of residential calls are made during the day, which is flatly incorrect and causes a gross overstatement of average residential prices. Third, it overstates business rated by ignoring business contract tariffs. Incredibly, the cost data leaves most of the costs incurred by long distance companies out of the equation—that analysis excludes billing, promotion, advertising, and most net-

[1] In Utah and South Carolina, 27 long distance companies provide customized service to consumers and small businesses. In Texas, more than 100 companies offer a variety of long distance services. More than 70 companies compete in Pennsylvania and Illinois. In California, Michigan, Ohio, New York, Wisconsin, and Florida, more than 50 long distance companies are today offering service.

[2] Long Distance: Public Benefits from Increased Competition, 1995.

[3] The RBOCs are promoting the findings of a book by a paid economic consultant (Paul W. MacAvoy, *The Failure of Antitrust and Regulation to Establish Competition in Markets for Long-Distance Telephone Services* (Cambridge, MA: The MIT & AEI Press, 1996)) which concludes that the long distance companies have "stabilized" their market shares and have gotten so good at "signaling" what their prices will be that competition is not effective at lowering prices. Unless and until, of course, the RBOCs gain entry into the long distance market.

work costs. With the data errors corrected, the conclusions reached are the opposite: long distance prices have fallen dramatically over the last decade and that decline has outstripped the decline in access charges by a wide margin.

LOCAL TELEPHONE MARKETS ARE STILL DOMINATED BY MONOPOLIES

In marked contrast to the vigorously competitive long distance industry, there was no meaningful competition in local telephone markets when the Act was signed into law in February. Until preempted by Section 253 of the Act, local competition could not exist because most state prohibited competition by law or regulation. The House Commerce Committee Report noted that "the seven BOCs control over 80 percent of the local telephone network," "the top 10 telephone companies control over 92 percent of the local telephone network," and "in the large number of markets for local telephone service there was no instance where any of the top 10 telephone companies compete with one another."[4] Although a key objective of the Act is to bring full and open competition to the local market, little has changed in the last seven months. The $95 billion local telephone market is still dominated by monopolies.

In any given geographic area, only one company provides the conectivity that allows users to communicate with one another through the telephone. Anyone who wants telephone service–local or long distance–has to rely on the local telephone company to provide that conectivity. The RBOCs continue to monopolize both aspects of local telephone service in their serving areas: local exchange (calling friends and family across town) and exchange access (connecting you to your long distance phone company for long distance calls).

The RBOCs claim that they have been facing significant competition for exchange access traffic. Long distance companies pay about 40 percent of every revenue dollar for access. Approximately 99.4 percent of those dollars go to the local telephone monopolies. Industry-wide, long distance companies' payments to local monopolies last year exceeded $20 billion. MCI's access payments alone exceeded $5 billion. Compared to the billions of dollars paid to the RBOCs, MCI paid only $25 million—less than four tenths of one percent—to competitive access providers, or competitive local exchange carriers (CLECs). Competition in this market is far from a reality. Moreover, the RBOCs continue to experience growth in their access traffic volumes. In the last three years local telephone company access traffic has grown by more than seven percent a year. Even in two states where the presence of CLECs would be most likely to erode local telephone company access business—Illinois and New York—interstate access traffic growth for Ameritech and NYNEX has been about the same as the rest of the country.

The tiny pockets of emerging competition, which the RBOCs prefer to show through a magnifying glass to overstate their importance, do not today provide consumers with choices for local telephone service. Ironically, at the same time the incumbent monopolies are crying "competition," they are doing everything possible to squelch its development.

Monopoly behavior stifles competition

The RBOCs and GTE are doing everything possible to stifle competition in court, in the regulatory process, and in the marketplace. Barely a month has passed since the FCC issued its new local competition rules and the incumbent monopolies have already initiated a legal battle against the implementation of the Act. GTE and Southern New England Telephone (SNET) have sought to stay the effective date of the FCC's local competition rules, arguing that they will be damaged if the rules take effect. Last week, US WEST, Bell Atlantic, NYNEX, PacTel, and BellSouth petitioned the U.S. Court of Appeals for the District of Columbia to overturn the FCC's order, as did GTE. SBC filed a similar petition in the Court of Appeals for the Fifth Circuit in New Orleans. Although MCI believes that the stay applications will fail, this is yet another example of the incumbent monopolies' attempt to impede the competition process.

While the Act creates affirmative obligations on the part of the RBOCs to open their markets to competition, the interconnection agreements that have been signed between the RBOCs and their potential competitors are few and interim in nature and with companies interested primarily only in terminating traffic over the RBOCS' networks. Not one of the agreement addresses of all the local competition issues that Congress mandated.

The fact is, of the forty or so interconnection agreements that have been negotiated very few even address all fourteen items of the competitive checklist set forth

[4] H. Rep. No. 104–204, 104th Cong., 1st Sess., at p. 50 (emphasis added).

in Section 271 of the Act. Those that do fall short either in the pricing requirements of the Act, or by requiring certain restrictions on resale or unbundled elements.[5]

MCI and other new entrants have been forced to sign limited interim agreements to interconnect with the incumbent monopoly's network. Since these agreements are deficient, key elements—such as pricing terms for resale of local service—must be renegotiated. Because negotiations with the RBOCs have led nowhere, MCI and new competitors are forced to go to arbitration. MCI has filed for arbitration in 28 states. TCG, MFS and AT&T have all filed petitions requesting arbitration with the RBOCs.

A competitive marketplace naturally works against such anti-competitive abuses. When several vendors compete for MCI's business, they are responsive to our needs. But when MCI and other competitors must still rely on the monopoly RBOCs to reach our customers, bad things can happen. Consider these two examples:

Bad Faith Dilatory Tactics.—The RBOCs have used delaying tactics since passage of the Act to stifle competition. In April, we sent each RBOC (and each state commission) our Term Sheet, listing the items we needed from them in order to provide local service. The RBOCs' response was to refuse to talk to us without a gag order on the negotiations, forcing us to seek mediation. Recently, with the leadership of the Michigan Public Service Commission, Ameritech retreated from that position and has begun to talk to us. But, we spent from March to July without engaging in any serious pricing negotiations based on their unreasonable insistence on putting MCI under a gag order.

Refusal to Negotiate.—Bell Atlantic has refused to negotiate an interim agreement in New Jersey, despite agreeing to one in Pennsylvania. While we are ready to begin service and offer competitive choices to New Jersey customers, our switch there lays dormant because of Bell Atlantic's refusal to negotiate. Similar inconsistent positions have been taken in different states by US WEST and GTE. In addition, Bell Atlantic has refused to provide us with any pricing/costing information unless we agree not to disclose it to anybody.

Such behavior is not indicative of a competitive market. It represents the tried and true tactic of a monopolist—deter, disrupt, and delay. It is nothing but a flagrant attempt by the RBOCs to preserve their monopolies. If successful, these delaying tactics would mean that consumers would have to wait years for the benefits local competition will bring: lower prices, more choices and better service. This pro-monopoly behavior is inimical to the purposes of the Act and demonstrates the importance of regulators, both federal and state, managing the transition to competition. Before discussing the FCC's challenge in implementing the Act, I'll briefly describe the "navigational tools" regulators need.

NAVIGATIONAL TOOLS NEEDED TO JUMP START LOCAL COMPETITION

In the months ahead, regulation must play its role as a substitute for market forces until true competition arrives. Regulatory oversight is needed to ensure that the proper safeguards are in place during the transition from a single-provider monopoly market to a competitive one. Regulators should employ a simple and straightforward set of navigational aids to set the course toward true competition in local markets by asking, of each regulatory action: Does it create an environment that promotes investment and the development of an array of new services? Does it establish prices that mirror a fully competitive environment? Does it provide vigilant oversight against anti-competitive practices?

These are the navigational aids that will lead to open, competitive markets. Enforcement measures must be simple, yet allow for decisive and swift action by aggrieved parties (presumably new entrants). The measures should not require constant policing or modification and should incorporate incentives and disincentives for just and reasonable resolution of complaints. They must also allow state and federal regulators to render fair and unambiguous decisions that may be implemented without untoward delay or confusion. Vigilant oversight means:

Establishing specific deadlines.—For example, both the new entrant and the incumbent telephone company should know the number of days by which an order for unbundled network elements must be filled.

Specifying what will—and will not—satisfy the rules.—In other words, ambiguity in the rules will only serve to delay competition.

[5] For example, MFS has signed Section 252 agreements with the following RBOCs: SBC, Ameritech, NYNEX, and Bell Atlantic. The agreements do address most issues but have shortcomings with respect to specific terms and conditions such as resale (restrictions apply; not priced based on avoided cost pricing, etc.) or access to network elements.

Establishing and enforcing easily-calculable penalties for non-compliance.—Parties should be clear that unacceptable actions will be met with inescapable and severe reactions. An adjudicatory proceeding bogged down with questions of intent and motivation is slow and arduous, which creates an incentive for delay. On the other hand, easily-applied sanctions that penalize unacceptable and discriminatory behavior will create the appropriate incentives for compliance. For example, pursuant to the Act, any carrier caught "slamming" will lose any charges that it unlawfully received. Similarly, any local competitor that fails to satisfy a customer's order to change his/her local service provider should also forfeit all charges assessed to the customer since submission of the order (including access charges). Ineffective enforcement in implementing rules will significantly delay local competition.

So far, the FCC has made a good start in its implementation of the Act, but many challenges lie ahead.

IMPLEMENTATION OF THE ACT: THE CRITICAL REGULATORY "TRILOGY"

Recognizing that the transition from monopoly to competition could not occur overnight, Congress established a detailed schedule and sequencing of key events in the Act that, over the next few years, have the potential for unleashing the full force of telecommunications competition on the U.S. economy. As Congress provided and the FCC has recognized, three events—the regulatory "trilogy"—form the cornerstone of future telecommunications policy:

National Local Competition Rules.—Adoption of national rules is needed to foster local competition throughout the U.S.

Universal Service Reform.—A competitively-neutral universal service plan that increases the number of Americans on the network, that provides affordable local service as well as access to basic and advanced services, that ensures that all carriers contribute on an equitable basis and that eliminates a system of hidden subsidies that are as outmoded as the rotary dial phone is necessary to achieve high levels of usage while denying monopolies corporate "welfare" payments.

Access Charge Reform.—Cost-based access prices are necessary to achieve the policy of bringing competition to all telecommunications sectors.

Like any literary trilogy, each part must not only stand on its own strength, but must also be viewed relative to the whole to be fully understood.

The FCC's national local competition rules

On August 1, the FCC completed its work on part one of this policy trilogy—its local competition rules. It passed those rules on to the state commissions for implementation as part of the negotiation and arbitration procedures to open local markets to new entrants. From MCI's perspective, the steps thus far, while not perfect, have been largely positive and pro-competitive:

National Rules.—While MCI will have to engage in state-by-state entry negotiations and arbitrations, we now have firm ground beneath our feet in the form of national rules that define a baseline of local competition requirements. States retain flexibility to add to the basic rules that the FCC outlined.

Adoption of an Economic Cost Methodology.—A forward-looking economic cost methodology is the hallmark of a competitive market and this is what the FCC selected. Such a model provides incumbent telephone companies with a reasonable profit and enables them to recover a share of joint and common costs.

Default Prices.—Even those states that lack resources to evaluate cost studies right away may jump start local competition. States remain in the "driver's seat" and can select their own prices consistent with the FCC's cost methodology.

The FCC still faces considerable challenges in completing the next two parts of the trilogy. In a competitive marketplace, there is no place for guaranteed profits and unneeded subsidies. Competition in both the local and long distance markets will be adversely affected if competitors are forced to pay incumbent monopolies outrageously inflated access charges that are seven times above the cost. Achieving competitively-neutral universal service reform and reducing access charges to cost are two necessary steps in truly moving forward the pro-competition agenda.

The need for universal service reform

Local competition rules will be effective only to the extent that the current system of local telephone subsidies is made rational, explicit, and available to all competitors.

FCC adoption of competitively-neutral rules to promote competition.—Current universal service subsidies, which are based on the local telephone company's historical costs, would protect it from the market discipline on its prices that competition should provide. As long as the universal service funding mechanism involves subsidies that are internal to the incumbent monopoly, potential competitive providers

of local service—even if more efficient—would find it difficult to compete with the incumbent.

All carriers must pay into the fund.—Universal service contributions should be made on an equitable basis by all providers of telecommunications services, based on their relative revenue shares, net of payments to other carriers. Recovering universal service support from all carriers would eliminate current incentives for carriers to avoid those services that pay for the universal service programs.

Ensure affordability of local service.—A competitive market will, over time, drive down today's above-cost price of local telephone service to economic cost. Today, the cost of serving low income consumers and customers in high cost areas likely exceeds rates that those customers are willing to pay or rates that regulators find acceptable. The universal service fund subsidies must bridge the "affordability gap" until competition drives prices sufficiently low. In addition, rates set at economic cost may be unaffordable for low-income consumers.

The need for access charge reform

As the FCC has recognized in other contexts,[6] the RBOCs have the ability and the incentive to squeeze their competitors by overcharging them for key inputs (i.e., access to the local networks to reach customers) that competitors need to originate and terminate calls. Given the size of the revenue generated from access charges—long distance company payments exceeded $23 billion in 1995—the RBOCs' incentives to act anticompetitively are significant and undeniable. MCI has filed studies with the FCC demonstrating that access charges today are approximately seven times their economic cost. The total interstate switched access charge is now about three cents per minute for the use of RBOC facilities which, according to Hatfield Associates, cost less than four-tenths of a cent per minute to provide.

Local access is the most lucrative line of business for the RBOCs, with margins about three and one-half times more than the long distance industry, helping to make the RBOCs among the wealthiest corporations in the world. They have the highest operating cash flow margins of any U.S. industry—greater than oil companies, electric utilities, and drug companies, and much greater than the long distance industry. Two companies with second quarter revenues similar to MCI's, GTE and BellSouth, are twice as profitable as MCI. The other RBOCs' margins are similar. Why? Because they operate in sheltered monopoly markets. They are rich enough to invest heavily in foreign telephone markets—and to offer premiums to acquire each other.

If the RBOCs were allowed to enter the long distance market before the access charge regime is reformed, the current outrageously high level of access charges would give them a tremendous—and tremendously unfair—advantage. Competitors can't be saddled with inflated access charges that subsidize the RBOCs' entry into long distance if real competition is to be created in local markets and retained in long distance. Even if an RBOC is required by law to "impute" the above-cost access payments (as the Act requires of an RBOC long distance affiliate), all the RBOC is doing is moving the money from its long distance side of the business to the access side of its business. The long distance business, to the extent it continues to rely on over-priced RBOC-provided access, would be imperiled. The only pro-competition solution requires that access charges be reduced to cost immediately. MCI would much rather give that money to our customers through lower rates than hand it over to the RBOCs. In fact, MCI has publicly committed to flow access reductions through to our customers and your constituents.

THE PROPOSED RBOC MERGERS WILL HARM COMPETITION

The recent announcements of two pending RBOC mergers are alarming and ought to be opposed. By choosing the route of consolidation rather than competition, SBC and PacTel, and Bell Atlantic and NYNEX provide further compelling evidence of their ambition to thwart the development of competition in their local monopoly markets. It is not coincidental that these mergers were announced only two months after passage of the Act. The new law significantly increased the vulnerability of each RBOC to competition in its core local markets and permitted each to offer out-of-region long distance services. That vulnerability and that opportunity created a clear and present danger that the RBOCs would actually compete with each other in local markets. Rather than compete in each other's markets, four RBOCs have announced their plans to consolidate and head off competition.

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[6] Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, Report and Order, CC Docket No. 94–97, Phase I, 10 FCC Rcd 6403 (1995).

The mergers, if approved, will frustrate local competition. Indeed, the RBOCs specifically defend the proposed mergers principally on the ground that they will not reduce current levels of actual competition.[7] The mergers do nothing more than increase the number of local monopoly markets controlled by any single entity and, they argue, are therefore entirely inoffensive. This view rests on a fundamental misconception of the antitrust laws. Antitrust law is concerned not primarily with the status of competition now but, rather, with the outlook for competition in the future. The proper question is not whether the proposed mergers will make the markets less competitive (they couldn't possibly be), but whether they will stand in the way of making those markets more competitive.

The mergers should be blocked under section 7 of the Clayton Act

Antitrust law demands a dynamic, not static, analysis to answer such questions. A forward-looking analysis is especially crucial here because we are at the dawn of a new telecommunications era. There is no stable historical baseline against which to measure the likely competitive consequences of the proposed mergers. The relevant markets are characterized by rapid technological change, the dismantling of regulatory barriers to competition, and the imposition of federal policies specifically designed to open these markets to competition. Section 7 of the Clayton Act prohibits mergers when there is a reasonable probability that there would be less competition in a given market after a proposed merger than there would be absent the merger. In MCI's view, this is not a close call. It is extremely likely that local markets in SBC's, PacTel's, Bell Atlantic's, and NYNEX's regions will see markedly less competition in the foreseeable future if the mergers are consummated than if they are blocked. It is our hope and expectation that DOJ will advance the cause of competition, consistent with antitrust law, the 1996 Act and the interests of consumers nationwide, by moving to block these proposed consolidations.

Numerous factors, alone and collectively, will make realization of the Act's promise, particularly the development of local competition, substantially more difficult if the RBOCs are permitted to merge with each other. Briefly stated, the mergers would have several anti-competitive consequences in telecommunications markets, including (but not limited to):

Eliminate Key Potential Local Competitors.—Because the merging RBOCs would be very likely to enter each other's markets absent the proposed mergers, allowing the mergers will eliminate especially advantaged competitors.

Diminish Opportunities for Non-RBOC Entry.—By eliminating or reducing the prospects for competitive entry into one RBOC's territory by other RBOCs, the mergers also reduce the prospects for successful entry by non-RBOCs that would otherwise benefit from the pathbreaking efforts of the out-of-region RBOCs.

Enhance Opportunity for Anticompetitive RBOC Coordination and Collusion.—The mergers enhance the ability and incentive for the remaining RBOCs to collude in a strategy of mutual nonaggression, thereby entrenching existing anti-competitive market allocation.

Increase Likelihood of RBOC Anticompetitive Harm in Local and Long Distance Markets.—By capturing a significantly larger share of the access market in the combined regions, two "mega-RBOCs"—possessing bottleneck control of over 45 percent of the nation's phone lines—would substantially shrink the remaining market available to potential entrants. In addition, by increasing the number of long distance calls that originate and terminate entirely in-region, the mergers would enhance the "mega-RBOCs'" access charge advantage as well as their ability to effect nonprice discrimination against their long distance rivals, thereby strengthening their positions in the long distance market and, as a consequence, raising the barriers to successful entry into their monopoly local markets.

Elimination of key potential competitors

The mergers substantially reduce potential local competition. But for the mergers, RBOCs would be particularly likely to enter each other's market. It is essentially indisputable that Bell Atlantic and NYNEX would enter each other's markets to compete head-to-head if they were prevented from merging. As Bell Atlantic Chairman and CEO Raymond Smith noted noted in an announcement of the proposed Bell Atlantic acquisition of NYNEX, "[O]ur two regions are really one big market,

[7] See Joint Application of Pacific Telesis Group and SBC Communications Inc. To the California Public Utilities Commission, April 26, 1996.

with all the major urban areas up and down the east coast and lots of communities of interest."[8] Wall Street and newspaper analysts concurred.[9]

Similarly, SBC's foreign interests and aspirations provide substantial evidence that SBC was a likely entrant into PacTel's region. SBC's intentions of being a significant carrier of international traffic between the U.S. and Latin America and Asia cannot be achieved without a strong presence in California. Even more significant is SBC's ownership and control of Telmex, the Mexican telephone monopoly, that is frustrating efforts of new entrants to compete in Mexico. Because approximately 50 percent of U.S.-Mexico traffic originates and terminates in the combined SBC-PacTel regions, SBC's control over local markets in both regions would enable it to foreclose a substantially greater share of the U.S.-Mexico market that it could at present. An SBC-PacTel merger would solidify Telmex's power against its rivals to the detriment of U.S., consumers who call Mexico. SBC and PacTel acknowledge this in their application to the California PUC for approval, describing the California, Texas, Mexico region as a natural community of interest. In order to secure its control over this community, SBC would be compelled to challenge PacTel in California if it could not achieve the same result through merger.

The elimination of an RBOC as a competitor is significant given that they posses unique advantages. In particular, the RBOCs have large advantages in trained personnel, access to and knowledge of operational support systems, favorable treatment as large customers of vendors of switches and other telecommunications equipment, an existing relationships with large corporate customers. In addition to operational, architectural an experiential factors, the RBOCs enjoy substantial financial advantages over other potential local competitors. As noted earlier, the RBOCs are among the wealthiest corporations in the world and have the highest cash flow margins of any U.S. industry.

The RBOCs are not the only firms potentially capable of bringing competition to local monopoly markets, but they do posses unique resources that, if brought to bear out-of-region, would have a powerful effect on the development of local competition. Consumers in all four of these RBOC regions will feel the loss of potential entry that these mergers entail. These mergers will impede the development of competition in those local markets; prohibiting them will accelerate it. Under Section 7 of the Clayton Act, the choice is clear.

Mergers diminish opportunity for non-RBOC local entry

Insofar as the mergers eliminate one potential entrant from each of these four RBOCs' local markets and increase the likelihood that other RBOCs will forebear from entering those local markets, they also hamper entry by non-RBOCs by extinguishing a crucial source of pro-competitive pressure in each of these markets upon which those other potential competitors must rely. This is true for several reasons. First, an RBOC's inside knowledge of local network capabilities and limits gives it an unusual ability to achieve pro-competitive state regulatory action. Entrants to a local market are better able to rebut the potentially obstructionist arguments of the incumbent RBOC before a state PUC if the entrants' rank include another RBOC.

Second, an entering RBOC can be more effective in negotiations with the incumbent RBOC than other entrants because it knows that what technical capabilities the incumbent possesses. This will benefit all new entrants because, under section 252(i) of the Act, all entrants can avail themselves of the terms and conditions of an agreement made between the incumbent and any one the them. All entrants suffer when the strongest of potential entrants chooses not to enter. Thus, the reduction of RBOC competitors also dampens the competitive prospects for non-RBOCs.

Mergers enhance opportunity for anticompetitive RBOC coordination and collusion

The proposed mergers enhance the ability and the incentive for the remaining RBOCs to forbear from entering each other's markets, thereby entrenching and formalizing a territorial market allocation that exists as a result of the antitrust con-

[8] Raymond W. Smith, Merger Announcement, Employee Video Conference (Bell Atlantic Media Relations Home Page)

[9] Analysts predicted that "each company's core business would be less susceptible to competitive entry because both Bell Atlantic and NYNEX would have likely been aggressive in attaching each others service territories given the geogrpahic proximity." Dean Witter, Bell Atlantic to Merge with NYNEX, April 22, 1996 (Guy W. Woodlief); see also Salomon Brother, Bell Atlantic/NYNEX Merger Creates Opportunity, April 22, 1996 (Jack B. Grubman). Press reports were similar: The April 22 Wall Street Journal reported that "Bell Atlantic and NYNEX * * * serve adjacent regions and could have turned into each other's worst competitive nightmare. By combining each eliminates a hearty rival * * *." The New York Times, of the same date, observed that "[A]s NYNEX gazes across the Hudson at the most aggressive Bell company in the country, merging now probable seems a lot more appealing than the prospect of fighting later."

sent decree that broke up the Bell System in 1984. Since divestiture, the RBOCs have carefully avoided competing in one another's core local exchange businesses. The 1996 Telecommunications Act has, however, eliminated those legal and regulatory barriers that may have dissuaded the RBOCs from competing against each other in the past. There should be a strong presumption here against extending the anticompetitive effects of this territorial allocation by, in effect, making those allocations permanent through mergers.

More generally, successful RBOC mutual non-aggression and forbearance from entry into one another's markets is much more likely with fewer competitors because coordination is easier.[10] The consequences of retaliation are more severe as the number of RBOCs decreases. Each has more to lose and an increased incentive to maintain the status quo. Additional RBOC consolidation, which these mergers will likely stimulate, further increases the prospects of coordinated territorial allocation.

Indeed, recent testimony by Bell Atlantic's own experts confirms this point. Alfred Kahn and William Taylor endorsed Bell Atlantic's proposed merger with TCI largely on the ground that the resulting entity's plan to bring facilities-based competition to other RBOCs would provoke the "mutual interpenetration of previously exclusive market territories" that appeared to be the most promising road to true competition.[11] The TCI merger was not consummated and three years later—within two months of the Act's enactment—Bell Atlantic proposes to merge with another RBOC, the most likely and formidable rival in its local markets, instead of competing head-to-head as it had earlier proposed.

Mergers increase likelihood of anticompetitive harm in local and long distance markets

The entry, upon authorization, of the "mega-RBOCs" into long distance will significantly inhibit the development of competition in the local market by shrinking the amount of access charges potentially available to other would-be entrants. The merged RBOCs will rely entirely on themselves to provide access to their long distance services within the merged region. Hence the shift of an important share of long distance traffic from independent long distance carriers to the RBOCs will reduce the potential business available to an independent local carrier. Because access revenues are such an important part of the local market—more than $23 billion in 1995—the reduced size of the local access market will substantially limit the incentive perceived by the potential entrant to the local market, thereby reducing both the number of and viability of local competitors. For example, if SBC does not merge with PacTel, then when SBC seeks to provide long distance service terminating in PacTel's region, it will shop for the most advantageous access pricing for terminating traffic. New local entrants that provide access would vigorously compete for SBC's business. The merger would remove SBC as a customer for those new competitors in PacTel's local market, making entry considerably more difficult.

The mergers solidify the proposed "mega-RBOCs'" power in the local markets by enhancing the strength they would exercise in the long distance markets if and when they are authorized to provide interLATA service. Because of its monopoly control over the bottleneck local loop, such an RBOC will have strong incentives to engage in non-price discrimination against its long distance rivals. The harm resulting from non-price discrimination against MCI and other long distance competitors were a principal justification for divestiture.[12]

RBOCs can discriminate in a number of ways; consider a few examples. An RBOC can refuse or delay interconnection on the basis of unsupported claims of technical infeasibility. Or an RBOC can provide degraded connections to competitors and selectively provide superior services to their own affiliates. An RBOC can discriminatorily use sensitive information MCI and others must provide when establishing new access arrangements. An RBOC can also refuse to develop access modifications we need, or delay such modifications to give its affiliate time to "catch up." One last example: an RBOC can make available services to its affiliate before releasing similar services to long distance competitors. In a variety of ways that are both highly effective and difficult for regulators to detect and police, the RBOCs can

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[10] See, e.g., *Hospital Corp. of America* v. *FTC*, 807 F.2d 1381, 1387 (7th Cir. 1986) (Posner, J.), *cert. denied*, 481 U.S. 1038 (1987).

[11] Kahn & Taylor Affidavit, at para. 22.

[12] See *United States* v. *Western Electric Co.*, 900 F.2d 283,301 (D.C. Cir. 1990) ("BOC entry into the interexchange market * * * would of course provide an incentive to deny equal access and to cross-subsidize if possible"). *See also* Motion to Vacate, Affidavit of Jeffrey M. Perloff and Larry Karp (submitted in support of motion to vacate), ¶ 111 ("The major potential advantage that the RBOCs have in the long-distance market is through restricting access to other long-distance carriers.")

and will withhold the cooperation necessary to permit long distance competition to continue to flourish.

As discussed earlier, the RBOCs can engage in price discrimination against their long distance rivals as a result of the grossly inflated access charges. Both price and nonprice advantages are magnified on all long distance calls for which the RBOC controls the local bottleneck at not just one, but both, ends. The effect on the access charge advantage is straightforward: it doubles. The only pro-competition solution requires the reduction of access charges to cost.

MCI estimates indicate that the SBC-PacTel merger would increase the percentage of long distance calls that are wholly intra-region for those two carriers by approximately 20 percent. The proposed Bell Atlantic-NYNEX merger would produce even greater increases in intra-region traffic. The number of long distance calls originating and termination in Bell Atlantic's region would increase by nearly one-third and NYNEX would have about a 50 percent increase.

The mergers' effects on intra-region long distance are significant because the likelihood that any given customer will purchase its long distance service from its local RBOC increases in proportion to the percentage of that customer's long distance calls on which the RBOC can engage in price and nonprice discrimination at both ends. The mergers present a distinct threat to competition in the long distance markets in the Bell Atlantic, NYNEX, SBC, and PacTel regions.

The danger to local competition is even more acute because many customers will prefer to purchase their local and long distance services from a single carrier. Any mechanism that enhances the attractiveness of an RBOC's long distance service—whether or not that mechanism is anti-competitive—will make it harder for new entrants to woo the RBOC's customers away for the provision of local service. Insofar as customers value "one-stop shopping," every long distance customer that an RBOC captures raises the barrier to entry into the RBOC's local markets. Because those markets are already monopolies, a merger that increases an RBOC's ability to gain long distance customers is necessarily anti-competitive.

Each of the factors discussed above will make it more difficult for local competition to develop. Some will have a more substantial effect than others. Collectively, all these factors ensure that the mergers would have a profoundly negative effect on the development of local competitive and risk significant harm to the already competitive long distance market.

CRITICAL ROLE OF DOJ IN PROMOTING COMPETITION

Mr. Chairman, the FCC's completion of the local competition regulatory "trilogy" and thorough DOJ scrutiny of pending RBOC mergers are critical to achieving the Act's goal of fully competitive telecommunications markets. The Act specifically recognized the appropriateness of DOJ's review of such mergers.

Equally important is DOJ's careful review of RBOC applications to enter the in-region long distance market under Section 271 of the Act. Premature RBOC entry would not only harm an already competitive long distance market, but would also impede the development of local competition. The RBOC's control of access to virtually every business and residential customer in their regions could be leveraged anticompetitively in both markets.

Before authorizing RBOC entry into the long distance market, the FCC, in consultation with DOJ, must establish that the petitioning RBOC has met the Section 271 competitive "checklist" of market-opening requirements and that the RBOC faces facilities-based competition for local services to both business and residential customers. In making its evaluation, Section 271 specifically states that DOJ may use any standard it considers appropriate and DOJ's evaluation must be accorded substantial weight by the FCC. As the guardian of our nation's competition policies, DOJ has the expertise and experience necessary to protect consumers and competitors from the anticompetitive conduct of the RBOC monopolies. MCI again acknowledges the leadership of many members of this Committee for ensuring that the Act includes an appropriately important role for DOJ.

CONCLUSION

Mr. Chairman and members of the Committee, the Telecommunications Act of 1996 provides an historic framework that may unleash virtually unlimited opportunities for companies to provide new services in environment replete with customer choice both in features and price. The details of how the framework is implemented, however, are critical. The result will either pave the road to competition or will provide an impenetrable roadblock. The FCC must complete the regulatory trilogy and the DOJ must stand guard against anticompetitive proposed activities.

Last month, the FCC made a good start when it issued the local competitive rules. Early next year, it will complete the trilogy by issuing regulations implementing needed reforms on universal service and on access charges. The Act calls for a competitively neutral universal service mechanism. The subsidies that all competitors will pay to this fund must be equitable and explicit and must be coupled and reform of the existing access charge system which presently requires some potential competitors to pay charges that are seven times above the RBOC's actual cost. Both of these rulemakings are critical to ensure that no one player in the marketplace—especially an incumbent monopoly—is at a significant, unfair advantage to its rivals.

Of equal importance, the DOJ must continue to play its traditional role as the guardian against anticompetitive economic activities in this country. The members of this Committee are to be commended for insisting that the final legislation included an important and appropriate role for the DOJ in reviewing RBOC entry applications. Together with the DOJ's long-standing antitrust role, this is critical to ensuring that competition in the telecommunication field will flourish. Proposed monopoly mergers, such as those envisioned by Bell Atlantic and NYNEX and SBC and PacTel are the antithesis of competitive that the legislation envisioned. The Act did not envision the growth and consolidation of existing monopolies, but rather the opening of monopoly markets.

Mr. Chairman, I appreciate having the opportunity to testify today. I applaud the Committee for its attention to and oversight of these important competition issues.

Senator THURMOND. Mr. Barr.

STATEMENT OF WILLIAM P. BARR

Mr. BARR. Thank you, Mr. Chairman. I am privileged to appear here today before the committee. As you know, I represent GTE Corp., and in a way we don't have a dog in this fight because we are not involved in a merger. We are a local exchange company. We are not part of the Bell group. We operate in 28 States, and after the legislation has passed we have now started offering long distance. We are in 20 States offering long distance, adding 6,000 customers a day to that line of business.

In addition, we have filed to compete against other LECs. In Texas, we have filed to compete against Southwestern Bell. In California, we have filed to compete against PacTel, and we have filed to compete in Virginia and Pennsylvania against Bell Atlantic. So from a narrow business perspective, it is not in GTE's interest to see these two mergers occur, to the extent that they create more formidable competitors for us. But we are not here to plead a special case and try to derail potential competitors. What we are trying to do is help this committee's assessment of the antitrust implications of these mergers.

I see no basis for concern from an antitrust standpoint. Clearly, as far as the local exchange is concerned, the proper analysis is for potential competitors, and I have heard the four companies involved saying they did not have plans and I take them at face value, and certainly the Justice Department will review the documentation. But even that is not the critical issue. The critical issue is whether or not they are singularly suited and uniquely qualified to be the principal competition of each other, and that clearly is not met.

The test really is, does the prospect of developing competition up in NYNEX's market rest really on the shoulders of Bell Atlantic, and to suggest that it does is simply nonsense. It has no bearing in the real world. There are numerous existing entrants already and there are numerous potential entrants that pose a far greater competition threat to NYNEX and Bell Atlantic than those two companies do, and the same with respect to SBC.

As far as the interLATA market is concerned, the argument really is another dusted-off version of the antiquated bottleneck argument that somehow they will unfairly leverage their position in the local market to gain advantage in interLATA. Let me just say that now that we have equal access in effect, now that we do have emerging competition, and now, on top of those things, that we have a 14-point checklist that the RBOC's have to meet before they are allowed into long distance, that argument of the bottleneck really evaporates. We are not talking about a bottleneck anymore.

Let me just say that there has been some skepticism about whether or not there is actual competition in the local market, and I would like to use Senator Leahy's example because I think it really offers a very good illustration.

The fact is, Senator, here on Capitol Hill you do have a choice of what phone to use. I was very amused that Mr. Ebbers was sitting here acting as if there was no local competition. This is a very profitable center here, Capitol Hill. You can imagine all the calls that are made from here. Well, the fact is Bell Atlantic doesn't serve it. It was taken away by MFS. It is being served by a CAP. That is where the margin is, that is where the competition is.

Now, up in Vermont, I don't know for a fact, but I would bet that you are being subsidized, that the money you pay every month for local phone service is not covering the cost. The person who is picking up the difference is a business in Vermont, such as Ben and Jerry's, and I bet you right now Ben and Jerry's has a choice and I bet you there are CAP's and they are trying to get Ben and Jerry's business. No one is interested in your business, Senator, because you are not paying costs.

Senator LEAHY. Both Ben and Jerry can afford it a lot better than I can. [Laughter.]

Mr. BARR. OK. Let me just say that I think the overall point shouldn't be lost. I think we are in a time warp, and my overarching concern about how you are looking at telecom deals is don't get locked in the mindframe of 1984 and the theoretical problems that were identified then. Look at what is happening today, and, I think, when you see what the FCC order, it is a radical overturning of what Congress tried to do in the Telecommunications Act.

What it does is it says that—where Congress said that when people come in and try to set up competition and set up facilities and they want to piece together a network, they have to pay the cost to the incumbent facility-based LEC, the FCC has come along and said, no, you are able to pay a very deep discount, more than 40 percent, for their facilities. This really converts the local exchange company into a wholesale platform, and when you look at who is going to be powerful in the game of packaging services that are essentially bought from a wholesale provider and labeling them, it is the companies with the brand names and the customers, and those companies are the IXE's principally right now.

With that, I will stop my prepared remarks.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF WILLIAM P. BARR

I appreciate the opportunity to offer my views on the important topic before this Committee today, and I thank Chairman Hatch and the other members of the Committee for inviting me to appear.

Let me begin by noting that GTE currently provides wireline local exchange service in 28 States and wireless service in 16 States. The States that GTE serves includes States that will be part of the combined Bell Atlantic-NYNEX region, States that will be part of the combined SBC-Pacific region, and local service areas in which LDDS Worldcom-MFS is or will be competing. Presumably, these mergers are being undertaken because the merging parties believe that they will garner efficiencies from merging. To the extent that the mergers make them more effective competitors, it is not in GTE's interest to welcome any of these three mergers. The question being addressed by this Committee, though, is whether any of these mergers presents serious antitrust concerns, and, as the general observations that I will outline indicate, I believe that it is clear that they do not present any such concerns.

I have four general—and interrelated—observations that I believe ought to inform antitrust analysis in the telecommunications industry today:

1. In many places, and especially in key markets, the so-called local bottleneck, on which so much of antitrust regulation of local exchange carriers was premised, has been opened up wide. In enacting the landmark Telecommunications Act of 1996, Congress recognized what the marketplace has shown: the local exchange market is, in many places, no longer characterized by the economics of natural monopoly. In other words, competing local carriers can profitably enter the market and provide services to the consumer. Therefore, the traditional antitrust concern that a local exchange carrier might leverage its power in the local exchange market into other product markets has been dramatically lessened.

2. In addition to actual new entrants in the local marketplace, there is a legion of powerful potential new entrants, including those entities currently operating as interexchange carriers, competitive access providers, and wireless providers. In short, an incumbent LEC serving an attractive service area faces a broad array of competitive threats. While an adjacent LEC—that is, a LEC serving an adjacent service area—may also be a potential entrant, there is no reason to believe that such a LEC has any significant overall advantage over other entrants, and there is therefore no reason to believe that the competitive threat from that adjacent LEC's actual or potential entry will significantly affect the development of competition.

3. Local exchange carriers are subject to pervasive regulation by both the FCC and state public utilities commissions. Such regulation is more than adequate to prevent and detect any anticompetitive abuses by local exchange carriers. Indeed, the real danger to competition is that excessive, onerous regulation will prevent incumbent local exchange carriers from competing on a level playing field with the new entrants. The Federal Communications Commission's recent rules purporting to implement the Telecommunications Act of 1996 highlight this danger. Contrary to the pro-comeptitive, deregulatory intent of Congress in enacting the Act, the 668 pages and 3,276 footnotes of the FCC's First Report and Order require incumbent LECs to subsidize their competitors through below-cost pricing and force incumbent LECs to operate their networks for the benefit of competitors. Under the FCC's system, it make no sense for any competitor to develop its own network. Instead of real competition that spurs investment, creates jobs, and improves services, the end result of the FCC's rules will be a scheme of contrived "Potemkin competition" in which so-called competitors merely rebrand services purchased below-cost from a severely handicapped incumbent LEC and create the false appearance of competition.

4. Recent academic research strongly indicates that the long-distance market is currently characterized by oligopolistic pricing by the three leading interexchange carriers (AT&T, MCI, and Sprint). To the extent that any merger increases the prospect for vigorous competition in the long-distance market in the long run, it ought to be viewed very favorably by antitrust authorities.

What all of these observations together suggest is that the proper role of antitrust with respect to mergers and acquisitions of local exchange carriers will be a limited one. Such transactions will not typically present any serious antitrust concerns, and one ought especially to be highly skeptical when such concerns are voiced by powerful industry competitors.

Senator THURMOND. We will be glad to hear from you, Mr. Atkinson.

STATEMENT OF ROBERT C. ATKINSON

Mr. ATKINSON. Thank you, Senator Thurmond and Senator Leahy. Teleport Communications Group [TCG] is pleased to testify

today on the impact of mergers of Bell operating companies on local exchange competition.

As background, TCG is the Nation's leading competitive local exchange carrier, or CLEC. We operate in California in competition with Pacific Telesis, in Texas and Missouri in competition with Southwestern Bell, and in most of the States in the NYNEX and Bell Atlantic regions. From 10 years of experience, we draw the following conclusions about these mergers.

The BOC mergers, we believe, will cause chaos, confusion, and distraction within the resulting Big Bell, leading to substantially worse operational performance by that Big Bell. In particular, service intervals, quality and reliability are likely to deteriorate substantially, at least for a number of years. This will be terrible for all consumers.

Ironically, because BOC's will continue to control unique essential services and facilities for the foreseeable future, CLEC's are becoming more dependent on the performance of the BOC as they grow and expand. Consumers hold CLEC's accountable when a BOC service or facility used by the CLEC fails. Consequently, a substantial deterioration of a Big Bell's operational performance will increase a CLEC's costs, hurt its reputation, and impair the CLEC's ability to compete effectively and to provide consumers with an alternative to the Big Bell's poor retail services.

The Telecommunications Act requires a BOC to provide competitors with performance quality no worse than it provides to itself, but this is not a competitive safeguard if the BOC's quality is deteriorating. Moreover, traditional regulatory processes have proven to be very inadequate for encouraging BOC's to provide high-quality services to competitors.

CLEC's and consumers should not be dragged down if the Big Bell's performance goes down. Therefore, as a minimum, BOC mergers should be conditioned on the Big Bell maintaining operational performance for CLEC interconnections at levels no worse than today's mediocre performance. Of course, a condition requiring steadily improving BOC performance in providing interconnections would promote better service to consumers and more effective competition.

BOC's must be subject to swift, certain and substantial penalties for imposing poor performance on their competitors. A BOC that does not expect its service to deteriorate as a result of the merger should not object to a condition requiring only the status quo. But opposition to such a condition implies that the Big Bell expects its performance to deteriorate or that it intends to use its control of essential monopoly network elements to competitively disadvantage CLEC's. Alleged consumer benefits of BOC mergers cannot occur so long as CLEC's are subject to anticompetitive behavior on the part of the Big Bell. The existing monopoly will simply become further entrenched if a Big Bell is permitted to control its competitor's service quality and costs.

Thank you for allowing me to make these brief remarks and I look forward to responding to your questions.

[The prepared statement of Mr. Atkinson follows:]

PREPARED STATEMENT OF ROBERT C. ATKINSON

Good morning Chairman Hatch and members of the committee. TCG is pleased to testify today on the key subject of mergers and competition. I am Bob Atkinson, TCG's Senior Vice President for Legal, Regulatory and External Affairs. TCG is the nation's leading competitive local exchange carrier, serving 51 major markets with state-of-the art fiber optic backbone networks supplemented by wireless facilities. We provide local exchange access services to long distance carriers, intra-LATA toll service, and switched local exchange services. We do business in California in competition with Pacific Telesis, in Texas and Missouri in competition with Southwestern Bell, and in most of the states in NYNEX and Bell Atlantic's regions.

My message is very simple. Mergers are desirable if consumer benefits result. Mergers of two giant telecommunications companies each having 99% of their market are not likely to benefit consumers so long as the relevant markets remain monopolized.

TCG is a company that has begun to "demonopolize" the markets of every Bell Operating Company (BOC). TCG can do this quickly if the BOCs—and especially any merged BOCs—are compelled to treat TCG in a pro-competitive manner, all the time, forever. The way to assure this was explicitly recognized in the Telecommunications Act of 1996: The incumbent local exchange carriers, who must now interconnect with their competitors, must treat their competitors at least as well as they treat themselves. [Sec. 251(c)(2)(C)][1]. TCG therefore believes that any BOC merger should be conditioned on the observance by the BOCs of explicit performance standards in making their essential facilities available to competitors. The standards must have teeth in them, so that the BOCs will have the financial incentives to achieve them.

The proposed mergers of Bell Atlantic with NYNEX and Pacific Telesis with SBC, like any mergers of huge corporations, initially are going to create chaos in those corporations. There can be no doubt that the BOCs will be distracted from their daily operations as they blend their disparate corporate cultures, operation support systems, billing systems, etc. Inevitably following a restructuring of such magnitude, employees will be focussed on internal concerns. In a truly competitive market, TCG might in fact be advantaged by the resulting chaos, to the extent that it will diminish our rivals' ability to provide good local exchange and exchange access service to its customers. But, the local telecommunications markets are not fully competitive, and one consequence of chaos within the BOCs could be very damaging to TCG: It will make it even more difficult for the huge entity of the merged BOCs—I'll call them the "Big Bells"—to provide good service to TCG.

I know this will be a problem post merger, because it is a problem now. TCG already has had years of bad experience in interconnecting with BOCs, particularly NYNEX and SBC. They fail to turn up circuits on time, they fail to complete construction on time, they fail to deal with trouble reports on time.[2] I believe that BOCs post merger, will be even less likely to make it easy for their competitors to obtain from them in a timely fashion the essential network facilities the competitors must have in order to compete with them. The potential harm to TCG caused by such failure is greater as TCG expands its switched business.

Contrary to what you might expect, this expansion, which requires the interconnection of more and more TCG facilities with BOC facilities, will for a transition period make all supposedly competitive local exchange carriers more, not less, dependent on BOC service quality. The technology and capabilities of incumbent LECs will become more, not less, critical to TCG. When a BOC fails to turn up a circuit, TCG customers blames TCG, not the BOC. The chain of telecommunications service in our world of interconnected networks is only as strong as its weakest link. TCG backs it reputation as the carrier with the highest possible service quality by monetary guarantees to our customers—if our service quality falls below the standard we promise, we don't charge the customer. If the BOC link in the chain fails, TCG suffers financially and our reputation can also be impaired.

The BOCs' ability to raise their rivals' costs through delay and error is the greatest threat to full competition in the local exchange market. This may be intentional, or it may be accidental, but whatever the cause, the effect is anticompetitive. This ability is not constrained at all now. Although TCG has complained to both state

[1] An incumbent LEC has the "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection * * *"

[2] For example, Between March 1996 and July 1996, despite assurances from NYNEX that performance would improve, it did not. Of the six performance measures that TCG monitors quarterly, all but one were rated Unacceptable, compared to objectives set by TCG and NYNEX.

and federal regulators, the plain fact is that regulators, given the procedures they are legally required to follow, cannot fix TCG's problems quickly enough to mitigate all the harm that a BOC can cause TCG. Since Big Bells will have a much, much larger pie at stake,[3] after the proposed mergers, their incentive to continue dilatory behavior and foist inefficiencies on their competitors can only increase.

Interconnection agreements between BOCs and competitive local exchange carriers may provide such safeguards, but the BOCs, once they have merged, and once they have achieved entry into the interLATA market, will lack any incentive to honor the agreements. SBC, Pacific Telesis, NYNEX and Bell Atlantic know from experience, that the traditional regulatory process is completely ineffective when it comes to compelling them to treat competitors fairly. Thus, it is clear that the BOC mergers must be subject to a reasonable safeguard outside the traditional regulatory process to prevent such anticompetitive conduct.

The merging BOCs should enter into a Consent Decree providing for significant performance standards, together with meaningful penalties for their failure to meet the standards. The BOC must, by the intent of Congress, offer and interconnecting local exchange carrier service quality at least as good as what it offers itself. As required by the FCC ruling in Docket 96–98, standards assuring high quality in interconnection and interoperability must be referenced to the internal standards of the BOC. They must be subject to objective measurement.

Because we believe that the disruptions of the mergers will cause the BOCs' own internal performance to deteriorate, it is not good enough to reference the internal standards of the Big Bell after the merger. Rather, at least the standard realized prior to the filing of the Hart-Scott-Rodino request should be provided to TCG. Then Big Bell's service to TCG can't get worse, post merger, if the internal reference standards of Big Bell get worse. When Big Bell's service quality improves above that pre-merger level, TCG and all other interconnecting local carriers should receive the same quality.

If the BOCs claim, as they are now doing in the context of negotiations with TCG, that they have no such internal standards, then they have to develop them. The BOCs do have standards for service to their customers, and since the Act also requires that the quality of service offered CLECs must also be at least as good as what it offers any other carrier or any customer, they can adapt those to their internal practices as well.

But a standard is meaningless if failure to meet it results in a slap on the wrist. We have seen how ineffectual public utility commissions' fines for poor retail service have been: the BOCs pay the penalty, and make another promise, but service doesn't get any better. The same behavior cannot be allowed with respect to peer carrier service, for the result would be to curtail the opportunity for the peer carriers like TCG to protect the public from monopoly abuse by developing alternative networks and service offerings. Thus, a BOC or a Big Bell must face a hefty penalty if it fails to meet its performance standard. The penalty amount should grow larger for each incidence of the same failure. A Big Bell should be subject to at least twice the penalty of either of the merging BOCs would have been subject to, to reflect the greater value to Big Bell of impairing rivals' service over a much larger territory.

I have attached an illustrative list of minimum standards that TCG believes to be reasonable and appropriate.

How could a company of good intention object to this proposal? If the Big Bell—or any BOC, for that matter—intends to live up to the requirements of the Telecommunications Act, it should have no difficulty in committing to strict performance standards. If the Big Bell intends to meet the standards, and intends to incent its employees so that they will treat competitors as well as they treat themselves or other customers, the Big Bell should be perfectly willing to enter into such a Consent Decree. And if a Big Bell opposes tough performance standards in a Consent Decree, doesn't that show the Big Bell's intent to use its control of essential monopoly network elements to competitively disadvantage its peer local exchange carriers?

Mr. Chairman, I have only one other suggested condition for any BOC mergers. As a threshold matter, all of the conditions required by the Act for BOC entry into the interLATA market should be satisfied before a merger is approved. The Section 271 requirements speak the Congressional intent that BOCs not be allowed to expand vertically until local markets are arguably open to competition. The BOC mergers are in essence vertical expansions from a geographical standpoint.

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[3] To put the size of the proposed Big Bells into perspective, consider that Bell Atlantic and NYNEX will have, in local telecommunications alone, approximately 40 million access lines, revenues of nearly $24 billion—apparoximately 25% of the approximately $100 billion national revenues from local telecommunications—and EBITDA of over $11 billion.

In conclusion, TCG is entering new markets. We are adding switches at an impressive clip. We have signed interconnection agreements—pursuant to the Telecommunications Act of 1996—with two of the BOCs that are subjects of proposed mergers: NYNEX in New York, and Pacific Telesis. (Notably, however, the merger partner of each of these BOCs has been totally unwilling to enter into a negotiated agreement.) By November 8 we will have a negotiated or arbitrated agreements with all of the BOCs. Thereafter, TCG will be able to plan ahead with better knowledge of its monetary costs for interconnection and for use of BOC or merged BOC network elements. But, TCG should not have to plan for the costs of substandard performance quality in providing those essential functions and capabilities.

Thank you for the opportunity to present TCG's view.

ATTACHMENT 1.—INTERCONNECTION PERFORMANCE MONITORING

(For illustrative purposes only)

For each type of facility, Performance Standards should be set for:

Installation

Number of Installs
Time taken for Install
Percent on time

Quality of Service

Number of Failures
Percent Availability
Mean Time to Repair

Grade of Service

Bit Error Rate
Blocking Rate

ATTACHMENT 2.—SUMMARY OF NYNEX PERFORMANCE FOR TCG (JAN. 1994–MARCH, 1996)

Three Examples of "Report Cards" maintained by TCG to measure the performance quality of the BOCs with whom TCG interconnects:

Private Line Percent Availability—Declined;
Private Line Failure Rate—Increased;
Mean Time to Repair—Increased.

In addition to the above, performance measures in TCG's current report card are:

Scheduled Dispatches for Repair;
Pro-Active Status Updates when Outages Occur;
Service Improvement Plan;
Escalation Call Backs.

Senator THURMOND. Thank you very much. We thank all of you for coming.

Now, we will ask questions and each Senator will have 7 minutes.

Would each of you please give us your views on concerns raised about whether effective local competition will ever develop for business and residential customers, despite the best efforts of the Congress?

Mr. SALSBURY. Senator, I do believe that effective local competition will develop, first, for businesses and then for residential customers. I think it took about 10 years in the long distance industry. It probably will take a similar time in the local industry, maybe shorter because of some technological innovations that are coming along, but I do believe it will enter.

It is a fantastically lucrative market right now. If you compare the local market, which is around $100 billion in revenues and about a 50-percent profit margin, to the long distance market, which is smaller and about $75 or $80 billion and only has about a 15-percent profit margin, we look forward to entering it and we want to do it as quickly as we can.

Senator THURMOND. Mr. Barr.

Mr. BARR. Mr. Chairman, prior to the enactment of the Telecom Act, the main inhibition, I think, were the built-in subsidies. There is competition for business traffic. There won't be substantial competition for residential traffic until there is rebalancing of rates. Congress' law, I think, did promise substantial competition, or accelerating competition across the board, but I think it has been sabotaged by the FCC.

My concern is that what you will see develop in the local market is the incumbent LEC relegated to a wholesaler, unable to compete as a retailer because they have to provide every service, every efficiency they gain at a very substantial discount below cost. Then what will happen is the IXEs, who are essentially in a oligopolistic market at this point, can use their power to come in and replicate that in the local loop and this is how it will occur.

We have to remember that AT&T, for example, has more customers than the RBOC's combined. This isn't like MCI trying to scratch its way into AT&T's business. These customers are sitting there inside each RBOC's territory, and my concern is that when they are able to have the brand name that they do, which is a legacy of the monopoly in the first place, and they are able to retail facilities at a substantial discount below cost, they are going to be able to seize market share really based on that market power that they have developed as a result of their prior monopoly and because of their position in the long distance market.

Senator THURMOND. Mr. Atkinson.

Mr. ATKINSON. Thank you, Senator. I think you have to distinguish between resale competition and facilities-based competition. I think it is clear that in the immediate future you will see lots of resale competition, but that is pretty illusory kind of competition because a reseller who is simply just reselling the incumbent RBOC's services has effectively become a sales agent for the RBOC, not a competitor.

Facilities-based competition, on the other hand, is what leads to the substantial consumer benefits of competition because that is what really puts pressure on the incumbent. The development of facilities-based local exchange competition is going to take quite a few years simply because it takes a long time to deploy facilities ubiquitously up and down every street in every community across the country.

Nevertheless, I am quite optimistic that even the facilities-based local exchange competition will develop, but that will be perhaps as long as a decade from now. In the meantime, I think policymakers particularly have to be not misled by the apparent resale competition and mistake that resale competition for facilities-based competition.

Senator THURMOND. Mr. Salsbury, what similarities or differences do you see between MCI's early efforts to break into the monopoly long distance market and your current efforts to break into monopoly local markets?

Mr. SALSBURY. Well, right off the bat, Senator, I can see I have a lot more enemies than I did before. I only had one before. I think the big difference is that we were able, once the MFJ came about, to confront a dominant supplier that had no underlying physical

reason for its dominance. In other words, AT&T had a market share in excess of 90 percent, but it was not because of the facilities or anything else that they owned and it was relatively simple to replicate the network that AT&T had. It took a number of years and a lot of money, but there were not any real barriers to doing that.

This situation where we confront in the local business companies that are well entrenched, that have a far higher asset base and investment than AT&T did—it is very difficult to replicate any of their facilities. It often entails digging up streets and it takes a lot of time and a lot of money, and we have an entrenched group of monopolists that are very opposed to that competition.

I smiled when I heard Mr. Barr twice talk about we are trying to relegate them to the role of wholesalers. I don't really know what he thinks happens in the long distance industry. We are wholesalers and, in fact, Mr. Barr's own company is providing long distance service by reselling what they buy at wholesale from Mr. Ebbers' company. They get discounts of 80 or 90 percent from us and it hasn't seemed to bother us at all. That is competition.

Senator THURMOND. Mr. Barr, you stated in your written testimony that more efficient competitors are not in the interest of GTE. Does GTE expect any of the merging Bell companies to start offering local phone service in competition with GTE in any of the regions GTE serves?

Mr. BARR. Well, as I said, Senator, we have already filed to go into their territory and they have filed to come into our territory. So I think it is safe to assume that that reflects some potential direct competition outside our existing franchise.

To follow up on a point that Mr. Atkinson made, because I completely agree with him, the critical thing is getting facilities-based competition. That is absolutely essential. People should not be deceived by reseller competition. There is nothing wrong with reselling, there is nothing wrong with wholesaling, but if you set the prices so low, which the FCC has done—the FCC says that they are pricing our system based on the best technology that could be put into place and the most efficient design that could be put into place today.

Well, if that is the case, why would anyone want to invest their own money in those facilities if they can buy them so cheap from the incumbent LEC? What you get then is potential competition, not real competition, and that is our concern. So I agree more with Mr. Atkinson's point that it is important to foster facilities-based, and I was very amused when the FCC came out and they were asked specifically at the press conference whether their order discourages facilities-based competition or encourages it and they couldn't come up with the answer. I understand now they finally have an answer, which is we didn't know Congress wanted us to encourage facilities-based competition, as if there is any other kind of competition.

Senator THURMOND. My time is up.

Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman. General Barr, good to have you back here.

Mr. BARR. Thank you.

Senator LEAHY. You probably have spent more time in your life before this committee, or parts of it, than you would like to think about, but it has always been helpful to the committee when you have been here.

Mr. BARR. Thank you.

Senator LEAHY. Could I go into the Ben and Jerry's versus the Leahy household, because I find that kind of intriguing? I hate to tell you how many lines I have coming into my old farm house up in Vermont, between the Senate switchboard and the fax machines and computers and everything else, but there is no question that Ben and Jerry's, 5 or 6 miles from where I live, have it a lot different.

I ask this because the Vermont Public Service Board issued a report in January talking about competition and what it might do, and they said that residential rates might go up as much as $10 per household per month to make up for the increased competition and the lower rates for business. We are a rural State and for most people that would be a big bite.

Could you comment on what you might see happening to rural rates, or rates in rural areas like Vermont, with something like the NYNEX-Bell Atlantic merger, or in my State or elsewhere? I am asking the same question, really, of Mr. Salsbury and Mr. Atkinson.

Mr. BARR. I don't see the Bell Atlantic-NYNEX merger really affecting it. I think that what has to happen and what is not happening now is there has to be a decision on universal service which allows for the rebalancing of rates, but then protects the rural customer against paying unaffordable amounts by providing an explicit and rational system of subsidies that everyone contributes to so the local company is not the only one subsidizing the rural customer and therefore having a disadvantage so someone can come in and skim the cream.

So we need that universal service issue addressed to protect the rural customer as we rebalance rates to make sure they are not paying more than an affordable amount. Moreover, the statute has in it a rural exemption. I think you may have been among those to support it.

Senator LEAHY. Yes.

Mr. BARR. We certainly support it because we have a lot of rural properties.

Senator LEAHY. I was a supporter of that.

Mr. BARR. Right, and GTE in many of the States is a very rural company, and that provides an additional protection so that the local decisionmaker, the State, can make sure that jump-starting competition is balanced with the interests of the rural customer. But I think we have to get very quickly to the issue of universal service, how much do we expect people to afford. Let's get an explicit subsidy in place, because I think you can see right now until that is done, the local exchange company is operating at a tremendous and unfair disadvantage because we rely on the subsidy paid by Ben and Jerry, but then MFS can come along and just take them away because they don't have to rely on that subsidy.

Senator LEAHY. Mr. Salsbury, do you agree with General Barr?

Mr. SALSBURY. Some of the things he said. I do agree that for certain customers, I would say that it depends, of course, on population density, how far you are from the serving telephone central office; the length of the local loop, which is the primary cost element in your local telephone service. For customers in less dense areas who are a long distance away, usually a population density of around one person per mile, those customers will need universal service support in order to have their telephone service brought down to the national average, which is, I think, somewhere between $18 and $20 per month.

I think most of the other customers already today—local services is more than compensatory. I would expect the rebalancing that Mr. Barr spoke about to really involve a lowering of rates, certainly very substantially for business customers, and certainly for residential customers, too. They have been paying too much for too long. But this will follow from the universal service reform.

I would add, Senator, that the act really gives three ways for local competition to develop. It is very clear on that. One is resale, one is the use of unbundled network elements, and one is facilities-based competition, construction of new facilities. I know Mr. Barr and Mr. Atkinson have focused on the last one, but the other two are certainly fully legitimate and are the ways that one would enter the market on a mass basis quickly. They provide the most hope for residential customers in the near term.

The wonderful thing about competition, Senator, is that people are very inventive when they see a big pot of money on the table, and that is what local telephone service is. Right now, the overall profit margins for local service are around 35 percent. That is quite a good deal higher than they are for long distance and we are anxious to get in that area. I would certainly assume that rural areas would have competition more slowly than the urban areas, but I certainly think it will be there.

Senator LEAHY. Mr. Atkinson, what do you feel?

Mr. ATKINSON. I think that universal service proceeding at the FCC certainly is a very important step to making sure that rural consumers continue to get high quality service. As long as the rural consumer effectively has access to that subsidy and can direct that subsidy to any carrier, I would expect a dramatic increase in the number of entrepreneurial high technology companies that actually go to rural areas to pursue the subsidy amount and to introduce new technologies that lower the cost and improve the performance of rural telephone service. So I think an open universal service system will be a magic key to bring better quality and lower-cost service to rural areas.

Senator LEAHY. The Bell companies under the law have some interconnection and unbundling requirements. Now, I assume if the Bell companies start merging, they are going to be focusing a lot on that merger. Does that interfere in any way with carrying out their obligations, some regulatory, some contractual, to opening up a local loop?

Mr. ATKINSON. Well, certainly, that is the gist of my testimony, Senator. Based on our experience, over the 10 years that our company has been in business, we have been dealing with the Bell companies and periodically they reorganize internally and have dif-

ferent departments do different things. And every time they have an internal reorganization, their performance, their quality, their responsiveness to us falls on the floor.

I just have to imagine that something as huge as merging these two companies will exacerbate those historic bureaucratic problems to the point where it may make unbundled loops totally unusable because every unbundled loop is going to have to be hooked up and an order placed and processed by the telephone company, and if just the bureaucratic problems, the operations support systems that have to be merged and all those problems just inevitably are going to develop, unbundled loops and unbundled elements become actually unusable and worthless, and that impairs the development of the local exchange competition and that is a serious problem. That is why our suggestion is that at least the mergers should not go forward unless the BOC's are willing to guarantee that they will maintain the existing level of service.

Mr. BARR. Can I follow up briefly on that, Senator? I think it would create greater incentive for the RBOCs to meet their checklist so they can move into the long distance market. I mean, they are going to be focused on that because right now that is the carrot hanging out there for them. So I don't think it will inhibit them from carrying out those obligations.

I think that we can't lose sight of some basic realities in the marketplace, and Jim Young talked about this. You ask 10 people who their local telephone company is. Probably four will say it is AT&T. Even before AT&T got into wireless, when you asked people who the best wireless company was, 6 out of 10 said it was AT&T, before AT&T was even in the wireless business. AT&T has a massive brand and you can't lose sight of the fact that that is the legacy of the monopoly.

They also have customers—60 percent of the customers in our territory and in the RBOC's territory are AT&T customers. You may be an AT&T customer, Senator. When you get a letter from AT&T—and it is this simple—if you got a letter from AT&T that said you don't need two bills anymore, we are not going to send you a separate long distance bill, we will give you everything on this one AT&T bill, and then you got one from your local carrier saying the same thing, what makes the local carrier so powerful there?

I will tell you now, Senator, AT&T is the one with the market power in that situation, and that is what is going to happen. Because of the FCC rules and the inhibitions and the restrictions being placed on the LECs in their own territory and the fact that this is a brand-name game, that is what is going to happen.

Senator LEAHY. Thank you.

Senator THURMOND. Mr. Salsbury or Mr. Atkinson, what is your response to the argument that there was no particular reason for initially dividing the Bell System into seven Bell operating companies instead of five, so there should be no objection now to the proposed consolidations?

Mr. SALSBURY. I will take that first, Senator. I am sure glad they did divide it into seven rather than one. I think really the merger analysis that would be applied now is a market power analysis. Is there a substantial reason to believe—is it substantially likely that allowing these companies to merge would decrease competition in

the local markets or the long distance markets? As I said, Senator, there is a substantial reason to believe that.

First, with respect to local markets, these are the most likely competitors against each other. They know the answers. They know how the network is put together. They know what to ask for. I certainly think we are feeling our way and doing the best that we can as quickly as we can, but we don't know everything about the local business. They know it. The same way with them coming into the local distance business; we know much more about it than they do.

I would minimize somewhat the brand argument that Mr. Barr pointed out because the AT&T was not a legacy of the monopoly. That was all after the divestiture. They invested in that, they created that over the last 12 years. The brand before divestiture was the Bell System.

I really do believe that as we go forward, we will see competition develop slowly, but these mergers, if they are allowed to go forward, will impede it. The question should really be asked, is it any more likely that competition will be developed in these markets with these mergers. As I said, for reasons I said before, these are the best, most likely competitors, so I think the answer has to be no.

Senator THURMOND. Senator Leahy, do you have any more questions for the second panel?

Senator LEAHY. I do, but I will submit them for the record. I know we have a time problem, Mr. Chairman.

[The questions of Senator Leahy are located in the appendix.]

Senator THURMOND. We will now move on to the third panel. Thank you, gentlemen, for your presence.

We welcome Mr. Peter Huber, Mr. Robert Crandall, Mr. Robert J. Binz, and Mr. Dale Hatfield. You can now make opening statements of 5 minutes each, starting with Mr. Huber.

PANEL CONSISTING OF PETER W. HUBER, SENIOR FELLOW, MANHATTAN INSTITUTE FOR POLICY RESEARCH, NEW YORK, NY; ROBERT W. CRANDALL, SENIOR FELLOW, BROOKINGS INSTITUTION, WASHINGTON, DC; RONALD BINZ, PRESIDENT, COMPETITION POLICY INSTITUTE, DENVER, CO; AND DALE N. HATFIELD, CHIEF EXECUTIVE OFFICER, HATFIELD ASSOCIATES, INC., BOULDER, CO

STATEMENT OF PETER W. HUBER

Mr. HUBER. Well, it is an honor to be sitting in the chair just vacated by a representative from MCI. Almost 10 years ago today, an issue arose under the divestiture decree, which was whether legally a Bell company had a right to go into another Bell company's territory to provide local exchange service. It wasn't clear whether that was permitted under the divestiture decree or not. MCI adamantly opposed it. They said it wasn't allowed under the divestiture decree; the Bell companies should be strictly barred from entering each other's markets under the divestiture decree.

As recently as a year ago—I have been participating in these hearings for almost as Long as I can remember and I do notice that all this sudden realization that Bell companies are natural com-

is the former general counsel of the Texas Department of Corrections.

What I would propose is that in the order of introduction, each of you make your opening statements, and then we will proceed to questions at the end of the panel and hopefully have other members here by then when the votes probably will be over.

So we will start with Attorney General Barr. Thank you for being here today.

PANEL CONSISTING OF WILLIAM P. BARR, FORMER ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC; PAUL T. CAPPUCCIO, KIRKLAND AND ELLIS, WASHINGTON, DC; JOHN J. DIIULIO, JR., PROFESSOR OF POLITICS AND PUBLIC AFFAIRS, PRINCETON UNIVERSITY; LYNNE ABRAHAM, DISTRICT ATTORNEY, PHILADELPHIA, PA, ON BEHALF OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION; MICHAEL GADOLA, DIRECTOR, OFFICE OF REGULATORY REFORM, STATE OF MICHIGAN; ROBERT J. WATSON, COMMISSIONER OF CORRECTION, STATE OF DELAWARE; AND STEVE J. MARTIN, FORMER GENERAL COUNSEL, TEXAS DEPARTMENT OF CORRECTIONS

STATEMENT OF WILLIAM P. BARR

Mr. BARR. Thank you. It is a pleasure to be here, Mr. Chairman, on this important topic. I have a prepared statement which I ask to be entered in the record, and I will try to be brief with just some overview remarks.

Senator ABRAHAM. Without objection, it will be entered.

Mr. BARR. Part of my central program as Attorney General was to stress the essential need for prison capacity in any criminal justice system. I believe that the key addressable element of violent crime in our society is the violent crime committed by chronic habitual offenders. I believe this is the largest part of predatory violence and it is the most preventable part of the problem, and that we have to have adequate prison capacity to incapacitate these violent offenders.

As I tried to get this message out and worked with State and local officials on this issue, I constantly heard that one of the central problems that was faced at the State and local level was the Department of Justice itself and the fact that the Department had been a key player in hamstringing State and local officials in operating and managing their prison resources.

So I started to look into the problem, and Mr. Cappuccio, who is here with me today, was spearheading that effort at the Department of Justice when I was there. We found that in the 1970's and 1980's, really, during the heyday of judicial activism and sort of soft-headed constitutional law in many areas of the law, there was a flood of litigation under the eighth amendment challenging prison conditions.

In many of those cases, the litigation was appropriate. Conditions were unconstitutional and the beginning of that litigation was fully justified. But in many cases, we also found that the Federal courts, assisted by the Department of Justice, had applied incorrect standards in determining an alleged deviation from the Constitu-

tion, overall circumstances or totality of circumstances tests, and had really not been rigorous in determining whether there was indeed a Federal constitutional violation.

In other cases, we found that courts sort of confused what the eighth amendment required with what was sort of sound penological practice at the time, or what the best practice was thought to be in correctional circles, and attempted to run prisons according to those standards.

We found that in remedying eighth amendment violations, or alleged violations, many of the courts went far beyond what the Constitution required. They started specifying diets and exercise programs. I think the *Ruiz* case down in Texas is probably the best example of judicial overreaching. I personally visited the Texas prison system where the judge was specifying the materials that had to be used for tables and chairs, the length of shelving that was required in the prisoners' cells, and so forth.

Most pernicious of all, many courts were actually capping prison populations and forcing the turning-out violent predators back out onto the streets without any real analysis of whether this was essential to alleviate an unconstitutional condition.

This judicial micromanagement of the prison system had substantially raised the costs of prison construction and precluded the use of existing space. For example, many courts had prohibited double-bunking, as if double-bunking was per se unconstitutional. We now know it isn't. They specified the size of cells. In many situations, the required size of cells was much bigger than what we currently had in the Federal prison system, which during my tenure was operated at about 165 percent capacity.

I also believe that there was an overly aggressive use during the 1970's and 1980's of consent decrees in prison litigation, and I thought the Department had misused consent decrees in two ways; one, in putting into those consent decrees conditions and standards that were plainly in excess of constitutional requirements. I think that some of your examples in your opening statement, Senator Abraham, are good examples of the kinds of things that the Justice Department was putting in consent decrees and clearly are not mandated by the Constitution. They may be good or bad practice as a policy matter, but they are not mandated one way or the other by the eighth amendment.

The other way I thought the Department was misusing consent decrees was really using these suits as sort of an occasion, a triggering event that was used to take control and impose on prisons sort of perpetual obligations and perpetual supervision, rather than using a case for what it should be, which is resolving a particular dispute, eliminating the unconstitutional violation and then terminating the case. Rather, they were using consent decrees as a regulatory tool for keeping perpetual supervision over the systems.

I took a number of actions in early 1992 when I became Attorney General, and some of the details are set forth in my testimony and Mr. Cappuccio's testimony. Basically, I directed that the Department should not initiate or continue prison litigation unless it was necessary to remedy a specific deprivation of a prisoner's basic human needs, the standard set forth in the *Seiter* case.

Second, I directed that the Department should not seek remedies that go beyond remedying the discreet constitutional violation. Third, I directed that the Department should not encourage or support ongoing supervision of a prison system unless plainly necessary.

Let me say—and I don't hold me exactly to this, but I think when I took office, prison systems or part of prison systems in 43 States were being run under judicial decrees. My view was that State officials can be trusted to run the prison system and that we should not encourage ongoing supervision or micromanagement by the judiciary.

Fourth, I directed that once a violation was cured, then the decree should be terminated and the litigation should be ended. Let me just say in the *Michigan* case, I think the Department was wrong in not appealing. If the parties to a suit agree that there is no longer a controversy, there is no controversy. There is no article III basis for a continued Federal court role. If someone wanted to then make a claim and invoke the power of the court and point to a violation, they are free to do so, but that case should have been settled on the basis that was agreed to by the Department when I was there as Attorney General.

Fifth, I took the position that the Department should now actively support States in modifying their consent decrees under the *Rufo* case and that we should come to the aid of the States who wanted to reopen their decrees. Two States and one city took me up on that. Texas and Michigan were the States and Philadelphia was the city, and I know you will be hearing more about the situation in Philadelphia from Lynne Abraham, the District Attorney.

The courts fought us tooth and nail on each of these cases, and obviously when we left the Department this effort petered out, to put it charitably. Our experience, though, suggests to me that there is need for clear legislative standards and this cannot be left to the comings and goings of administrations and the peccadillos of particular Federal judges, but we do need a clear, uniform standard on this.

I generally support the proposals in the STOP legislation. I think that the Department has pointed to two concerns. I think they are easily addressable. One concern is the requirement that the overcrowding be a primary cause in order to justify a cap. I think that the word "primary" there is ambiguous, and it is almost metaphysical whether overcrowding or unsanitary conditions, for example, or lack of plumbing are the primary cause. What is the primary cause?

I think that could be more artfully drafted, and basically I think everyone knows what we are saying, which is that unless there is—you have to show there is no other way of remedying the violation—for example, putting in new plumbing—before you can resort to something like caps.

The second problem with the STOP legislation that the Department refers to is the automatic retroactive termination of existing decrees; that is, decrees that are in effect today and the fact that that might run afoul of the *Plaut* case. I think that that, again, we can address relatively easily in the legislation. I agree that the way

it is drafted now does raise constitutional problems, but I do think it is possible to require the courts to revisit at a certain date.

If the decree has been, for example, in existence for 2 years—the existing decrees I am talking about, not prospectively—revisit those decrees and terminate those decrees unless it can point then to an ongoing constitutional violation. I think that that would be constitutional because I think you must be able to point to a violation. It is OK to say to a court you have to point to a violation today to keep a decree in effect because if they can't point to a violation, if there is no ongoing violation, then I think essentially the article III basis for use of the Federal power has evaporated.

So, in conclusion, I think this is a critical part of solving the violent crime problem in the United States, bringing some rationality to the judicial micromanagement of the prison system. I think there is a need for statutory standards and I think a lot of the proposals that are before this committee deserve urgent attention.

Thank you.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF WILLIAM P. BARR

Thank you, Mr. Chairman. I am pleased to be here today to testify in support of this committee's important efforts to help the Justice Department and the States to protect our society by incarcerating habitual violent criminals.

I thought what I might do today is describe for you what, during my tenure as Attorney General, I saw as the challenge facing the Federal Government and the States in providing adequate prison capacity in this country, and then to discuss briefly some of the principles that I believe should guide legislative reforms in this area.

Study after study shows that there is a small segment of our population who are repeat violent offenders and who commit much, if not most, of the predatory violent crime in our society—you know the profile—these offenders typically start committing crimes when they are juveniles, and they keep on committing more, and more serious crimes through their adult years.

When arrested and released before trial, these habitual offenders go right on committing crimes.

When given probation, instead of a prison term, they go right on committing crimes.

When let out of prison on parole and early release, they go right on committing crimes.

In fact, the only time we are sure that these chronic offenders are not committing crimes is when they are locked up in prison.

We can debate a lot of things about prisons: Can they rehabilitate criminals? Do they deter offenders? But, there is one thing that is beyond serious debate: *Imprisonment incapacitates chronic violent criminals.* For every year an habitual offender sits in his prison cell, there are scores, perhaps hundreds, of fewer violent crimes committed on our streets.

Now, it is obvious that, in order to pursue a successful strategy of incapacitating habitual violent offenders, the Federal Government and the States must provide adequate prison space to incarcerate these career criminals. That was a central part of my message, particularly to state officials, during my tenure as Attorney General.

As I travelled the country with this message, I heard consistent refrain from State corrections officials: The ability of the States, to operate their prisons effectively and efficiently has been hamstrung by the involvement of the Justice Department and the Federal courts in the day-to-day operation of State facilities. After hearing these complaints enough times, I asked my staff to look into them, and to develop recommendations for alleviating inappropriate burdens on the States.

I believe that both the problems that we identified and the solutions that we attempted to implement internally at the Justice Department in 1992 provide an appropriate starting point for this committee's consideration of legislative reform in this area, particularly reform of the Department of Justice's and Federal courts' role in litigation challenging the conditions of confinement in State prisons.

What we found was this:

First, the 1970s and 1980s saw a flood of litigation in the Federal courts by State prisoners challenging poison conditions as violating the eighth amendment's prohibition of "cruel and unusual punishment." In some instances, Federal court intervention was appropriate because the conditions in State prisons genuinely did fall below the constitutional minimum—amounting to "cruel and unusual punishment." In many cases, however, the lower Federal courts applied incorrect constitutional standards to justify their intervention in some cases, courts applied a vague "totality of the circumstances" or "overall conditions" standard to find that the State system was in violation of the eighth amendment. In other cases, courts improperly equated the eighth amendment's minimalist protection against "cruel and unusual punishment" with a requirement that States follow what was thought to be current sound penological practices.

Second, we found that, in remedying alleged eighth amendment violations, many lower Federal courts often went far beyond what the constitution requires—issuing orders with respect to the particulars of prisoners' diets, exercise, visitation rights and health care. Most burdensome of all, many courts imposed limitations, or caps, on the populations of state prisons and local jails.

As a result of these extra-constitutional requirements, we saw that the cost of a prison bed space in many State institutions was far above what was necessary to comply with the Constitution, and in some instances, was even higher than cost in the Federal prison system. But even more troublesome was the effect of the arbitrary population caps imposed by some courts. In 1991, while I was Attorney General, the Federal prison system operated at approximately 140 percent of design capacity, and did so in compliance with the Constitution. Many States, however, are required by judicial order or decree to operate *at,* or even *below,* design capacity. At the time, we calculated that if the States could operate at levels at or near the level of the Federal prison system, the States would have room for nearly 300,000 additional inmates, which translates into a savings of approximately $13 billion in prison construction costs. While not every State may be able to operate at the same level as the Federal system, it seems clear that the potential for savings from removing arbitrary court-imposed population caps is *enormous.*

The *third,* and perhaps most disturbing, problem that we found was the Justice Department's overly aggressive use of consent decrees in the prison litigation context. I'll let Mr. Cappuccio speak to this problem in more depth, as I understand it to be the focus of his testimony. But let me just briefly outline the problem:

In my view, in the past, the Justice Department has used consent decrees in two ways that, in the context of prison litigation, are inappropriate:

First, in the past, the Department has insisted on including in consent decrees requirements that quite plainly go well beyond the protections of the Constitution. In fairness to the Department, in many cases those decrees were negotiated at a time when some lower courts thought that the eighth amendment required more ambitious improvements by the States than the Supreme Court has subsequently held that amendment requires. But the fact remains, that Federal court decrees in this area are rife with requirements that go well beyond the minimum protections provided by the eighth amendment.

Second, in the past the Department has used the occasion of a lawsuit alleging discrete eighth amendment violations impose nearly perpetual obligations on, and supervision of, State prison systems. By and large, the Department and the Federal courts have lost sight of the fact that Federal interference with the authority of the States to run their own corrections system may legitimately last only so long as is necessary to remedy the specific eighth amendment violation alleged in the Government's or prisoner's complaint. Such a lawsuit should not, however, be used as an excuse to impose continuing supervision of the State system beyond the time it takes the State to remedy the discrete constitutional violations alleged in the complaint.

Perhaps most troublesome and burdensome of all is the *combined* effect of these two missteps. By first insisting on decree provisions that require more than the eighth amendment guarantees, and then, attempting to enforce those extra-constitutional provisions after the underlying constitutional violation has been remedied, the Department and the courts have, in some cases, succeeded in imposing on the States in near perpetuity burdensome and expensive requirements that the Federal Government had no authority to impose on the States to begin with.

To remedy these problems, in early 1992, I set forth the following general principles and specific guidelines to govern the Justice Department's involvement in prison litigation. I believe these principles, which I imposed as a matter of the Department's prosecutorial discretion, are also appropriate guideposts for any legislative reform in this area.

First, as the Supreme Court has recently made clear in cases such as *Wilson* v. *Seiter,* the Federal courts have no authority to hold that prison conditions are unconstitutional unless it is proven that prison officials have acted with "deliberate indifference" to "the minimal civilized measure of life's necessities." It is not an eighth amendment violation merely because the overall conditions in a prison are bad or substandard where no specific deprivation of a human need is demonstrated.

Accordingly, I directed that the Department should not initiate poison litigation, or intervene in on-going prison litigation, unless necessary to remedy specific deprivation of a prisoner's basic human needs—deprivations that rise to the level of cruel and unusual punishment,

Second, in remedying constitutional violations, the courts are not free to order prison officials to improve conditions beyond the basic necessities required by the Constitution. As the Supreme Court has recognized, the Constitution "does not mandate comfortable prisons," and the courts may not require prison officials to follow what some may think are sound correctional practices.

Accordingly, I directed that the Justice Department should seek to remedy constitutional violations, but should not seek to impose on the States—through litigation or consent decrees—additional burdens not required by the eighth amendment or other applicable Federal law.

Third, the business of running prisons belong to the appropriate State officials, not to Federal judges, Justice Department officials, or special masters. The fact that a court finds a constitutional violation does not justify court or Justice Department supervision of prisons either direct or through the appointment of a special master. The duty to vindicate inmates' constitutional rights does not confer on the courts or the Justice Department the power to manage prisons. Where a court finds a constitutional violation, it should give the State an appropriate opportunity to remedy the violation without ordering more specific relief and without attempting to take control of the State prison system.

Therefore, I directed that the Department of Justice should not encourage or support court supervision of State prisons, either directly or by the appointment of a special master, except as a last resort where it was plainly necessary to remedy a continuing constitutional violation that a state failed to remedy.

Fourth, once a State has cured a specific constitutional violation identified by a court, ongoing remedial decrees should be terminated. Court decrees should not operate in perpetuity once the State has come into compliance with the requirements of the Constitution, neither continuing court supervision nor permanent conditions and limitations are appropriate. Moreover, many States are operating under decrees that were negotiated at a time when some courts thought the eighth amendment requires more than it does. Under the Supreme Court's decision in *Rufo* v. *Inmates of Suffolk County Jail,* courts must stand ready to reopen, modify and/or vacate decrees where a State seeks modification based on the change of the underlying constitutional law.

To effectuate these fundamental limits on consent decrees, I directed that the Department should support termination of a consent decree as soon as a State has remedied past constitutional violations and there is no indication that the State will revert to prior unconstitutional practices. In addition, I directed that, where a consent decree or other judicial order remains in effect, the Department should consider whether to support State's request for modification of such decree either because of a change in the governing constitutional law or to the extent necessary to remove restraints on the State not required by the Supreme Court's recent interpretations of eighth amendment.

After announcing these new guidelines, I offered States and localities living under Federal-court consent decrees opportunity to have the Department review their case to determine whether they were entitled to relief. Two States (Texas and Michigan) and one major city (Philadelphia) took me up on the offer. Over the next several months, after staff reviewed these cases, we began to make significant progress in freeing these States and localities from unwarranted Federal-Government intrusion in the management of their prisons and jails.

The task, however, was more challenging than I thought, and more difficult than it should have been. Even with the support of the Department—which was a plaintiff in the Michigan action and a long-standing intervenor in the action—the Federal judges in those cases resisted our attempts to return complete control to the States' even though it was clear that both States were in compliance with the Federal Constitution. Before the task was completed, administration turned over and we left the Department.

It seems to me that the difficulty we faced in implementing these common sense guidelines makes legislation in this area all the more important. Codifying these principles in legislation would achieve two important goals: First, it would ensure

a more consistent application of the fundamental principles governing prison litigation that would not depend on the inclinations of the particular administration in power. Second, many of these limitations can, and should, be imposed not merely on the Executive Branch, but also on the courts. Since nothing in these principles would in any way undermine the ability of the Federal courts to remedy genuine constitutional violations, it would be entirely within the power of Congress to impose these common sense limits on the courts.

Senator ABRAHAM. Thank you very much.

Mr. Cappuccio?

STATEMENT OF PAUL T. CAPPUCCIO

Mr. CAPPUCCIO. Thank you, Mr. Chairman. I also have extended written testimony that I have submitted to the committee and, if you would, I would like it to be made part of the record and I will just briefly summarize that testimony now.

Senator ABRAHAM. It will be.

Mr. CAPPUCCIO. I had the privilege of working for Attorney General Barr at the Justice Department and one of my primary responsibilities was to assist in a review of ongoing Federal court litigation concerning the conditions in State prisons and local jails. As part of that task, Mr. Chairman, I visited a number of prisons, a number of jails, very many from your State. I think I took the entire tour of the Michigan facilities. I have also been through Texas facilities and facilities in Philadelphia, and some of these trips were actually inspection tours that the Civil Rights Division was conducting.

Based on that experience and some of my other work with the Department, I left with some serious concerns about how the Department was conducting prison litigation and, in particular, concerns about the use of consent decrees in prison litigation. I would like to address those problems briefly and then talk about some commonsense solutions.

Mr. Chairman, I start from the proposition that, at least in theory, consent decrees are good things. They avoid the enormous expense of litigation which could last for years and they allow the parties to agree on relief and to avoid potentially much more intrusive court orders. So I begin with the bias that we should continue to encourage the use of consent decrees, provided, however, we can control some of the adverse consequences that have sort of come up in practice. That is what I would like to talk about today, is some of the practical problems with them and ways to fix them.

I identify a number of problems with the Government's use of consent decrees in my written testimony, but I want to focus on just three this morning. First, and perhaps one of the more serious ones, is under the current law there is little or no limitation on the scope of relief or the scope of requirements that can be imposed on a State in a consent decree. That is a consequence of a case decided by the Supreme Court called *Local 93* v. *Cleveland* which says that the parties to a consent decree can agree to relief that is broader than necessary to remedy a Federal violation. In fact, the Supreme Court has held that the parties can agree to relief that the court itself could not impose after full litigation.

In large part, as a result of this rule, I saw a repeated pattern in many of these negotiated decrees of going well beyond what I think a fair court would rule the eighth amendment requires, and

you see this in at least three different respects. Some of these decrees went into specifying all manners of prison life—the diets of prisoners, their exercise rights, health care, visitation rights, all sorts of other things.

I think some of the examples, Senator Abraham, that you gave in your statement today are good examples of decrees getting into specifics that go well beyond what the eighth amendment minimally requires. Even more troublesome, as Attorney General Barr pointed out, is many decrees impose quite arbitrary population caps and space requirements, and those levels generally are much lower than the levels that the Federal Bureau of Prisons has been operating with successfully for many years.

Still other decrees, I think, go beyond the Constitution by, in effect, replacing the narrow constitutional standard, whether the State is depriving a prisoner of the minimal necessities of life, and replace that narrow constitutional standard with more openended and vague standards, like the State of Michigan shall provide sound care; the State of Michigan shall provide adequate recreational facilities and safe conditions. These broader standards and more openended standards end up replacing the constitutional standards, and the State ends up agreeing to do much more than it would have had to do if the court was ordering it to fix a violation.

A second problem relates to the duration of these decrees, and it sort of dovetails with the first. Some of these decrees have been going on for many, many, many years. Again, the problem is the parties will agree and the court will approve quite broad and openended relief, such as sound conditions and adequate recreation, and then for the next decade or so the Justice Department will monitor whether, in its view, the State is living up to those rather openended obligations.

The result is situations like Michigan where, by my calculation, the Justice Department has been in there something like 11 years, maybe more, even though—and this is based on my own personal experience—even though if you walked through those prisons, you would be hard-pressed to see anything that you would call a systemic constitutional violation. There may be incidents of guards doing things wrong, but I don't think a fair person could walk through the Michigan prisons and say they are not providing prisoners with the bare necessities for life.

Nevertheless, because these consent decrees impose these openended obligations, the Justice Department continues to enforce the decree and hasn't let go. In fact, I think we need to give a lot of credit to the career people at the Justice Department for their tenacity and hard work and all that, but if I would criticize them in one area, it is for hanging in there too long. I mean, I think we have to keep in mind the notion of a lawsuit. The notion of a lawsuit in Federal court ought to be the Federal Government gets in, fixes a problem, and then leaves. We have lost sight of that.

A final problem, I think, is sort of democratic process problems. I think it is bad, particularly given the duration of these things, for one administration to be able to bind successor administrations in a consent decree. I think that is the problem that Philadelphia

has, and Ms. Abraham will be talking about that. That, I think, is unhealthy.

There are also sort of collusive budgetary problems. When I went around the country, I noticed that, oddly, while senior State officials often opposed continuing consent decrees, the local correctional people didn't mind them so much, and the reason for that was it was guaranteeing their budget. That seems to me to be an evasion of the democratic process.

Well, then, quite briefly, how do we fix all this? How do we save consent decrees, while at the same time fixing these problems, and at the same time not infringing on the constitutional role of the courts?

I guess I would begin by saying it would be enormous progress in this area if the committee could get the Justice Department merely to agree that it will adhere to the five commonsense guidelines that Attorney General Barr announced in January of 1992. They are in my testimony and they are in his. I have the originals right here. If anyone reads those and thinks they are controversial, I don't think they are being serious about reform in this area. If the Department would agree to those guidelines and enforce them internally seriously, we would come a long way. I think legislative reform is also appropriate here, and I will just end by saying I also support most of what is in the STOP legislation, with the few tinkerings that the Attorney General talked about.

Thank you.

[The prepared statement of Mr. Cappuccio follows:]

PREPARED STATEMENT OF PAUL T. CAPPUCCIO

Thank you, Mr. Chairman and Members of the Committee, for inviting me to testify today.

I served as an Associate Deputy Attorney General at the Justice Department under Attorney General Barr. Shortly after he become Attorney General, General Barr offered State and localities that were involved in Federal court litigation concerning the conditions in their prisons and jails the opportunity to have the Department review their cases to determine whether Federal intervention should be terminated or modified. A number of States and cities took General Barr up on that offer—including the States of Texas and Michigan, and the city of Philadelphia—and I was assigned the job of assisting in that review.

In carrying out this task, I had the chance to see first hand how prison conditions litigation is carried out at the Federal level. I came away from that experience with decidedly mixed feelings. On the one hand, I could not help but admire the dedication and tenacity of the career staff at the Civil Rights Division in doing what they believed was right. On the other hand, I came away convinced that in several instances over the last 20 years, the Department of Justice had overreached in pursuing, or continuing to pursue, prison conditions litigation, and improperly intruded into the legitimate domain of the States and localities to manage their own correctional facilities.

In my testimony today, I would like to focus, very briefly, on just one area of prison conditions litigation that, based on my experience, I believe needs reform. Specifically, I would like to focus the committee's attention on some of the problems with the use of consent decrees in prison litigation.

Of all the things that need fixing, why complain about consent decrees? After all, the *theory* of the use of consent decrees in institutional litigation is that they are decidedly good things. Consent decrees allow the parties to agree to remedy an alleged violation of law without the crushing expense of litigation, and, when properly used, they allow the defendant institution to agree to a remedy that it has some role in shaping and implementing, rather than be subjected to more intrusive court orders.

But there is often a difference between theory and practice. Based on my experience, in *practice* the use of consent decrees in the prison litigation context has often

turned out to be more burdensome for States and localities than full-blown litigation would have been. Indeed, just the other day, I was speaking with one State official who told me that, based on that State's experience with a Justice Department consent decree, the State would have been better off if it had fought the lawsuit in court to the end.

I. PROBLEMS WITH THE USE OF CONSENT DECREES

As I see it, the problems that have arisen from the use of consent decrees in prison litigation lie in several different areas. These problems can, in my view, be corrected by a combination of responsible Executive Branch conduct and sensible legislation that is respectful of the constitutional functions of the Federal courts.

(1) One problem with the widespread use of consent decrees in this area is that, in practice, they give the Government some incentive to pursue cases that it likely could not (and should not) win in a full-blown court proceeding under the governing constitutional standard.

As the committee is aware, over the last several years, the Supreme Court has clarified that the eighth amendment is not violated unless prison officials have acted with "deliberate indifference" to "the minimal civilized measure of life's necessities." *see Wilson* v. *Seiter,* 501 U.S. 294 (1991). Based on my experience, some of the cases that the Government pursued and resolved by consent decree nay well have been cases in which the Government could not have established this difficult standard in court.

The device of the consent decree, however, allows the Government to force the States and localities to agree to take action in marginal or weak cases. The threat of expensive and time-consuming litigation, the unequal resources of Justice Department versus the States and localities, and the possibility of drawing an activist judge are too much for most States and cities to stand up to, so they end up agreeing to consent decrees in some cases that most likely do not rise to the level of genuine eighth amendment violations.

While such overenforcement may be good in some other areas, in the context of prison litigation, it has costly implications for States' rights and the rights of law abiding citizens.

(2) A *second* problem with the use of consent decrees in prison litigation concerns the scope of the relief that may be included in a consent decree. Under Supreme Court jurisprudence, the parties to a consent decree can agree to "broader relief than the court could have awarded after a trim." *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland,* 478 U.S. 501, 525 (1986). In many consent decrees in this area, the relief contained in the decree goes well beyond either the minimum requirements of the eighth amendment, or even what a Federal court could have ordered after a trial on the merits.

A number of the decrees that I reviewed while at the Justice Department specified, either by their terms or through mandatory implementation plans, the details of all manners of prisoners' diets, health care, exercise and recreation, and the like. In several instances, the particulars of what these decrees required seemed quite plainly to exceed what could reasonably be thought to be required by the eighth amendment. Perhaps even more troublesome, however, several of these decrees imposed arbitrary numerical caps on the number of prisoners that the State or locality could incarcerate in its facilities that were well below the level at which the Federal bureau of prisons has been successfully operating.

Thus, in many instances, the burden on a State or locality imposed by a consent decree has turned out to be greater than what a court could have ordered after full blown litigation because the terms of the decree go beyond strictly remedying the constitutional violation alleged.

(3) A *third,* and in my view more serious, problem with the use of consent decrees in prison litigation concerns their duration. In many instances, the Justice Department and the courts have, in my view, not known when to let go. Instead, they have maintained intrusive supervision and micromanagement of state correctional facilities well beyond the time when the State has cured the underlying constitutional violation.

The vast majority of consent decrees in this area contain no explicit durational limit. Accordingly, termination of the decree is governed by Federal rule of civil procedure 60(b), which provides for termination of a court decree when the purposes of the litigation have been fully achieved.

Termination under rule 60(b) should be straight-forward when the underlying constitutional violation is remedied by an easily-identifiable, objective event. However, in the prison litigation context, the determination of when conditions cease to be "cruel and unusual" is somewhat more subjective, and this difficulty is

compounded by the fact that the Government often includes in consent decrees somewhat vague and open-ended requirements, such as the provision of "adequate" medical care or "safe" conditions. As a result, in cost instances, the Federal courts have not usually terminated prison consent decrees when they should—when the specific and particular constitutional violation alleged in the original complaint has been remedied.

As a consequence, it is entirely unsurprising to see States and localities bound up by consent decrees (and the intrusive court or government supervision they entail) for longer than a decade, and well past the point that a reasonable person would conclude that there was any genuine ongoing eighth amendment violation. Thus, for example, Michigan has lived under a consent decree with the Justice Department for over 11 years, and Texas has lived under some form of negotiated decree even longer. And based on the review that I was involved in, I do not believe that either State was currently in violation of the eighth amendment on system-wide basis, or even close to that line.

(4) A *fourth,* and perhaps the most serious, problem with the use of consent decrees in this area relates to the inappropriate ceding of State and local government power. Precisely because of the uncertain and nearly perpetual duration of many of these consent decrees, the effect of pressuring (or even allowing) State or local officials to enter into a consent decree governing the management and operation of their correctional facilities is to cede for the indefinite future a significant aspect of local governmental power to the Federal Government, the courts, and/or even to private plaintiffs.

This strikes me as decidedly unhealthy in a couple different respects: First, the practical consequence of the use of consent decrees in this area is that one administration of a State of local government can bind successor administrations to remedies (and expenses) that go beyond the minimum that the Constitution requires. That necessarily infringes upon the essence of local democracy the right of the voters to change their minds and elect officials who will do things differently. Second, consent decrees can encourage semi-collusive arrangements between the plaintiffs and those correctional officials who (understandably) want a larger share of the State's budget. By agreeing, in near perpetuity, to specific and detailed requirements in a consent decree, corrections officials can ensure that the State will fund their agency fully for the foreseeable future. Such arrangements evade the democratic budgetary process.

II. COMMON SENSE REFORMS

In my view, these problems with consent decrees are serious and must be addressed. But to say that there are problems with consent decrees in this area is not to say that their use should be (or even could be) prohibited altogether. Rather, in my view, there are some obvious and common sense reforms that can and should be implemented in this area that would allow all involved to enjoy the benefits of consent decrees without much of their current pitfalls.

(1) Many of the problems with consent decrees can be avoided by responsible Executive Branch conduct. Shortly after becoming Attorney General, General Barr announced new guidelines to govern the Justice Department's participation in prison conditions litigation. Those five simple guidelines were:

(a) The Department should not initiate or intervene in prison litigation—including by entering into a consent decree—unless necessary to a specific deprivation of a prisoner's basic human needs, *i.e.,* unless necessary to remedy a genuine eighth amendment violation.

(b) In resolving prison litigation—by consent decree or otherwise—the Department should seek to remedy the constitutional violation, but should not seek to impose on the States or localities additional burdens not required by the Constitution or other applicable Federal law.

(c) Where an existing consent decree or other judicial order remains in effect, the Department should consider supporting a State's or locality's request to modify the decree to the extent necessary to remove restraints on the State or locality not required by the Constitution.

(d) The Department should not encourage continuing court supervision of State prisons or local jails, either directly or by a special master, unless such supervision is plainly required as a last resort to remedy a continuing constitutional violation.

(e) And finally, as soon as a State or locality had remedied past constitutional violations (and there is no specific indication that the State or locality will revert to such unlawful practices) , the Department should support

termination in a timely manner of all litigation and consent decrees that limit the ability of the State or locality to run its own prisons and jails.

If these 5 common sense, and I believe uncontroversial, guidelines were strictly adhered to by the Department, many of the evils associated with prison litigation and consent decrees in which the United States is a party would be substantially alleviated. Of course, such reforms would not necessarily cure the problems with consent decrees resolving prison litigation initiated and controlled by private plaintiffs.

(2) Legislative reform is also called for in this area. indeed, in my view, three different types of legislative reform are worth considering in more depth:

(a) First, I see no reason why the Congress should not impose some presumption of a durational limit on prison condition consent decrees that are enforceable in the Federal courts. It seems to me entirely justified to put a limit on the duration of relief (provided, however, that the consent decree can be extended if the constitutional violation has not been substantially remedied); or, at a minimum, to require the courts to consider periodically over the life of a decree whether partial or full termination is warranted under rule 60(b).

(b) Second, I believe that it would be entirely appropriate for the Congress to specify that, in approving consent decrees, a Federal court must determine that the relief contained in the decree is narrowly tailored to remedy the constitutional (or other Federal) violation alleged, and does not contain broader requirements that unnecessarily intrude upon the legitimate governmental functions of States and localities. In my view, such a provision would present no serious separation of powers concerns, provided it was carefully crafted, because it would not in any way prevent a Federal court from doing what was necessary to remedy a genuine constitutional violation. Indeed, such a provision would not be different in kind from the requirement in the Tunney Act that requires a Federal court to determine that a consent decree is in the public interest before approving it.

(c) Finally, the Congress may want to consider reaffirming and making more explicit what I believe the law already requires—that as soon a State or locality can demonstrate to a Federal court that it has remedied the constitutional violation alleged in the underlying complaint, and there is no imminent risk of that violation recurring, a consent decree should be terminated. That is so even if the consent decree contains additional provisions that may go beyond what the Constitution requires. A Federal court cannot enforce a decree when the underlying Federal violation has been fully remedied, and the parties have no right to attempt to confer upon the court the jurisdiction to enforce their own agreement with the contempt power of the court.

* * * * *

All of these reforms can be accomplished without intruding on the responsibility of the federal courts to remedy constitutional violations. In this regard, I note that the draft bill that the committee staff sent to me addresses a number of these reforms. Although the language of the bill may need some tinkering both to be effective and to ensure an appropriate respect for the courts, it seems to me that the committee is headed in the right direction.

Senator ABRAHAM. Thank you very much.

Mr. DiIulio?

STATEMENT OF JOHN J. DiIULIO, JR.

Mr. DiIULIO. Thank you, Mr. Chairman. With your permission, I would like to just summarize portions of my 11-page written testimony.

Senator ABRAHAM. Please, and we will submit your full testimony for the record.

Mr. DiIULIO. Thank you.

Make no mistake, revolving-door justice is a reality. The facts and the figures on the public record support the American public's crime fears. The testimony you will hear today from Ms. Finnegan, the testimony you heard earlier from Senator Hutchison, and the

testimony that could be given by literally millions of crime victims and their families, including my own, is not merely anecdotal, as is sometimes claimed. Nor are these tales of criminals who are released from custody and who maim and kill merely sensational. Rather, as I will attempt to show very briefly, they are reflective of the systemic realities of revolving-door justice in America today.

Let's take a look at just some of the hard facts, just the tip of this iceberg. In 1992, there were over 10 million violent crimes committed in America, but only about 641,000 of these violent crimes led to arrests, barely 165,000 to convictions, and only about 100,000 to prison sentences which, on average, would end before the criminal served even half his sentence behind bars.

Indeed, fully 60 percent of convicted criminals with one violent felony conviction, 45 percent with two, and 41 percent with three are not even sentenced to prison. Even those convicted of homicide and released from prison in 1992 had served, on average, only about 6 years on sentences of about 12.5 years. Of the 4.9 million persons under correctional supervision in America in 1993, about 72 percent were not incarcerated.

What I would like to stress here and beg for understanding is that while some prisons may indeed be overcrowded, and while overcrowding may create in some conditions a need for judicial action, the Nation's streets are now overloaded with serious convicted criminals who are out on probation and parole. This is not a myth. This is a reality.

In 1991, for example, recent research shows that of those persons convicted of a violent crime and presently under correctional supervision, 372,000 were in prison while nearly 600,000 violent convicted criminals were out at that point on probation or parole. What happens on probation or parole? We all know the statistics about 33-percent recidivism rates, about only a fifth of probation violators who are ever sentenced to jail for their failure to comply. We know about over 90 percent of all convicted criminals who do go to prison get paroled after serving only 35 to 40 percent of their sentenced time behind bars.

Nearly a third of parolees who are in prison for a violent crime and nearly a fifth who are in prison for a property crime are rearrested within 3 years for a violent crime. Too often, that violent crime is murder. Of death row prisoners in 1993, 68 percent had a history of felony convictions, including 9 percent with at least one previous homicide conviction. Moreover, 42 percent were in custody, mostly on parole, at the time they murdered.

Indeed, ongoing research reveals that up to a third of those convicted of murder over the last many years were in custody on probation, parole, pretrial release, at the very time they did the murder or murders for which they were convicted. For example, between 1990 and 1993, Virginia convicted some 1,411 persons of murder, 33.5 percent of whom had an active legal status at the time they did the crime. Likewise, between 1987 and 1991, prisoners released early from Florida's prisons committed well over 15,000 crimes, including 346 murders. Indeed, about a third of all violent crime is committed by persons who are technically in custody when they find their latest victims.

Once and for all, let us lay to rest the fatally false notion that most prisoners are mere drug offenders or technical parole violators. Based on a scientific survey representing 711,000 State prisoners in 1991, the U.S. Bureau of Justice Statistics found that fully 94 percent of State prisoners were violent or repeat criminals. This same analysis, by the way, has been run with data representing three previous data sets stretching back to the 1970's. In every case, the figure was 90 percent or more.

Studies I have done with Harvard economist Ann Piehl likewise document that in the year prior to their incarceration, State prisoners commit an average of a dozen serious crimes, excluding all drug crimes. Likewise, a recent National Bureau of Economic Research study reported that incarcerating each State prisoner reduces the number of crimes by approximately 13 a year, and a recent analysis published in the Journal of Quantitative Criminology, which is good for insomnia, I suppose, suggests that prisoners commit between 17 and 21 indexed crimes a year when they are on the loose.

Parolees do not return to prison for nothing. This is a popular myth, a myth that has been promulgated especially with regard to the increase in the California prison population, the Nation's largest, over the last 5 or 6 years.

In three separate blue-ribbon commission reports in California, it was asserted that the main factor fueling the growth of that State's prison population was the return to prison of mere technical parole violators. That, we now know from recent research, is totally and demonstrably false.

In California, in 1991, some 84,194 persons were admitted to prison, but only 3,116 of them, 3.7 percent of total admissions, were technical parole violators. The other 42,834 parole violators, representing 51 percent of total admissions and 96 percent of all parole violator admissions, had been convicted of thousands upon thousands of new crimes, including 255 newly convicted of murder. In sum, Mr. Chairman, it is absolutely and abundantly clear from all the empirical data on this subject, from all the real studies and research, that America does have a world-class problem of revolving-door justice.

I have no comparative advantage here in discussing the constitutional or legal issues involved with the STOP provisions. I am not a lawyer; I do not want to be, I do not pretend to be. But I would urge this Congress to avoid getting lost in what most Americans, I think, would consider to be rather empty legalisms on this subject, especially with regard to such issues as prison crowding.

As I summarize on pages 9 and 10 and 11, I believe, of my written testimony, as all the best studies indicate, and I cite several there, such inmate housing practices as double-celling and open-bay dormitories are neither constitutionally impermissible nor automatically dangerous to institutional order and well-being.

In conclusion, the rise of judicial intervention has had precisely the adverse public safety and other consequences detailed by the National District Attorneys Association, lamented by legions of local police, and testified to by countless crime victims.

The responsibility to act on this stretches, obviously, to both ends of Pennsylvania Avenue. At a recent White House dinner I at-

tended, President Clinton participated in a 3-hour discussion of crime and violence in America. It is clear that both President Clinton and leaders in this Congress care deeply about America's crime problem and are concerned about the demographic time bombs that are waiting to go off in just a few years.

What remains unsettled, however, is whether our institutions, beginning with this Congress, can work to protect decent, law-abiding citizens from violent and repeat criminals released early because of prison caps. With these hearings, Mr. Chairman, I am heartened that that might happen, and I thank you for inviting me to testify.

[The prepared statement of Mr. DiIulio follows:]

PREPARED STATEMENT OF JOHN J. DIIULIO, JR.

These Senate hearings on crime could prove to be among the most important that Congress has ever held. If Congress acts wisely, it can help to end the insanity of revolving-door justice in America. Moreover, it can help to restore public trust and confidence in the criminal-justice system, and, in turn, in the moral authority of government itself. At stake in your deliberations is not only the fate of proposals to reinforce or revise provisions of the 1994 federal crime bill. At stake is the very capacity of our representative institutions to honor the will of a persistent popular majority of the American people, a majority that encompasses Americans of every race and region, and of every demographic description and socio-economic status.

I believe that your deliberations should be guided by three sets of principles.

First, America does have a deep, documentable, and morally disastrous problem of crime without punishment.

Second, the problem of revolving-door justice is due largely to the influence over the criminal-justice system exercised by activist judges, as well as by the disproportionate influence over criminal-justice policy exerted by those who insist (and, in some cases, have insisted for decades) that many or most incarcerated criminals should be released from custody or placed on probation or parole.

Third, this Congress does have the constitutional writ, the moral responsibility, and the policymaking capacity with which to begin to set America's criminal-justice system straight, enhancing public safety while bolstering public confidence in our political process.

THE REALITY OF REVOLVING-DOOR JUSTICE

Revolving-door justice is a reality. The facts and figures support the American public's crime fears. Ms. Finnegan's testimony here today, the testimony offered in the House last February by the father of slain Philadelphia police officer Daniel Boyle, indeed, the testimony that could be given by literally millions of crime victims and their families, including my own, is not merely anecdotal. Nor are the tales of released criminals who maim and kill merely sensational. Rather, they are reflective of the systemic realities of revolving-door justice in America today.

Earlier this year, the U.S. Bureau of Justice Statistics (BJS) released what is the first fully reliable data set on criminal victimization in America in a given calendar year. The product of BJS's outstanding 10-year effort to perfect its National Crime Victimization Survey (NCVS), the data revealed that in 1993 Americans suffered some 43.6 million criminal victimizations, 11 million of them violent crimes. Thus, fully a quarter of all crimes committed in America in 1993 were violent crimes.

Given that American citizens are now suffering well over 10 million violent crimes each year, how many predators really do go to prison for violent crimes, how long do they actually remain behind bars, and what is their complete criminal profile?

In 1992 about 3.3 million violent crimes were reported to the police. About 641,000 led to arrests, barely 165,000 to convictions (over 90 percent of them the result of plea bargains), and only 100,000 or so to prison sentences, which on average ended before the convict had served even half his time behind bars. Indeed BJS data show that fully 60 percent of convicted criminals with one violent felony conviction offense, 45 percent with two felony conviction offenses, and 41 percent with three felony conviction offenses are not sentenced to prison. Even those convicted of homicide and released from prison in 1992 had served, on average, only 5.9 years on sentences of 12.4 years.

And of the 4.9 million persons under correctional supervision in America in 1993, about 72 percent were not incarcerated. Between 1980 and 1992 the nation's incarceration rate per 100,000 residents increased from 139 to 344. But over the same period the number of persons sent to prison per 1,000 crimes increased from 128 to only 148.

Likewise, from 1980 to 1993 the nation's prison population increased by 184 percent but its parole population increased by 205 percent. A recent study by Professor Joan Petersilia of U.C. at Irvine, formerly research director of RAND's criminal justice program, found that in 1991 of those persons convicted of a violent crime and presently under correctional supervision, 372,000 were in prison while nearly 600,000 were on probation or parole.

Revolving-door justice in corrections begins with revolving-door justice at the time of arrest. In 1992, 63 percent of the 51,000 felony defendants in the nation's 75 largest counties were released before trial. Among the released defendants, 27 percent had one or more prior felony convictions. About a third of those released were rearrested on a new charge, failed to appear in court as scheduled, or committed some other violation that resulted in the revocation of their pretrial release.

Within three years of sentencing, nearly half of all probationers are convicted of a new crime or abscond. Among probationers with new felony arrests, 54 percent are arrested once, 24 percent are arrested twice, and 22 percent are arrested three times or more.

The popular belief that the nation's 4 million community-based convicted criminals can get away with murder is true both figuratively and literally.

As a recent article in *Science* by Dr. Patrick Langan revealed, about 90 percent of probationers are required to do one or more things as a condition of their community-based status—pay restitution to victims, stay under house arrest, perform community service, participate in substance abuse counseling, and so on. But about half of them never comply with the terms of their sentences, and only a fifth of the violators ever go to jail for failure to comply.

Similarly, over 90 percent of all convicted criminals who do go to prison are paroled after serving only 35 to 40 percent of their sentenced time behind bars. Nearly a third of parolees who were in prison for a violent crime, and nearly a fifth who were in prison for a property crime, are rearrested within three years for a violent crime.

Between 1977 and 1993 about a third of a million Americans were murdered. Over the same period, however, 225 persons were executed for murder while 1,789 persons convicted of murder had their death sentence lifted as a result of commutations, higher court decisions, or other reasons.

At the end of 1993, some 2,716 persons were on death row. Available criminal history records reveal that 68 percent had a history of felony convictions, including 9 percent with at least one previous homicide conviction. Moreover, among death row inmates whose legal status at the time of the capital offense was reported, 42 percent were "in custody" at the time they murdered. About half of them were on parole. The other half were on pretrial release, probation, or had escaped from prison.

In many jurisdictions, about a third of those convicted of murder over the last many years were "in custody" at the time they did the murder or murders for which they were convicted. For example, between 1990 and 1993, Virginia convicted 1,411 persons of murder, 33.5 percent of whom had an active legal status at the time they did the crime. More broadly, since 1986 in Virginia, over half of all murders, 76 percent of all aggravated assaults, and 81 percent of all robberies have been the work of repeat offenders. The data on other states are much the same. For example, between 1987 and 1991 some 127,000 prisoners were released early from Florida's prisons. Within a few years of their parole, they committed over 15,000 violent and property crimes, including 346 murders.

Indeed, about 12 percent of all persons arrested for all violent crimes are out on pretrial release for a previous charge, 7 percent are on parole, and 16 percent are on probation. Thus, about a third of all violent crime is committed by persons who are technically "in custody" when they find their latest victims.

In sum, we have reached the point in this country where the criminal penalties for crime in general, and for violent crime in particular, are neither swift, nor certain, nor severe, and where more is invested in finding out how many convicted sex offenders get what type of ineffective treatment behind bars than in how many rape victims, assault victims, and murder victims could be spared by ending or at least pumping the brakes on revolving-door policies and practices.

And yet, despite all the data I've just summarized, despite the mountains more that document the same revolving-door reality, and despite the public's justifiable outrage, one continues to hear and see reported as fact the fatally false notion that most prisoners are "mere" drug offenders, "technical" parole violators, and other un-

fortunate souls who did little criminal harm to society when they were free, and would do no harm to society if they were released from prison tomorrow morning.

Such anti-incarceration notions are errant nonsense at best, and do not merit the academic, media, judicial, and legislative attention that they continue against all reason and morality to receive.

Based on a scientific survey representing 711,000 state prisoners in 1991, BJS found that fully 94 percent *of state prisoners were violent or repeat criminals:* 49 percent were serving time for a violent crime, 62 percent had been convicted of one or more violent crimes in the past, and all but 6 percent had a previous sentence to probation or incarceration. Nearly a quarter of violent prisoners had victimized more than one person, and 20 percent had victimized a minor.

Studies I have done with Harvard economist Anne Piehl and published in *The Brookings Review* document that, in the year prior to their incarceration, state prisoners commit an average of a dozen serious crimes, *excluding all drug crimes.* Likewise, a recent study by Dr. Steven Levitt of the National Bureau of Economic Research reported that incarcerating each prisoner reduces the number of crimes by approximately 13 a year. And a recent analysis published in the *Journal of Quantitative Criminology*—not exactly beach reading, but quite relevant here—suggests that prisoners commit between 17 and 21 index crimes a year when on the loose.

By the same token, a recent study of "mere" federal drug-law violators revealed that the average quantity of drugs involved in their cases was 183 pounds for cocaine traffickers and 3.5 tons for marijuana. In 1991, only 2 percent of those admitted to federal prisons were convicted of simple drug possession. In the states, most drug-law violators, like most prisoners generally, are recidivists who have done a mix of property and other crimes.

Likewise, a recent study by Professor Petersilia examined the oft-repeated claim that the growth in California's prison population has been driven by the return to prison of "technical" parole violators who had done no more than failed to phone their parole officer or failed a urine test. She found that in 1991, 55 percent of the 84,194 persons admitted to California prisons were indeed parole violators. But only 3,116 of them—3.7 percent of total prison admissions—were technical parole violators. The other 42,834 of them—51 percent of total admissions, 96 percent of all parole violator admissions—were returned to prison because they had committed and been convicted of thousands upon thousands of new crimes, including 255 newly-convicted of murder.

In sum, the Pope is Catholic, frogs do not have wings, and America has a world-class problem of revolving-door justice.

COURTS AND CRIMINALS

But why? Why does this problem persist against all public concern, all evidence, and all laws intended to bring it under control? For example, in the 1970's and 80's many states passed wave upon wave of mandatory sentencing and truth-in-sentencing-style reforms. Yet by 1988, most prisoners still served a third or less of their time in confinement, and violent offenders were released after serving 43 percent of their time behind bars. By 1992, that number had moved in the right direction—up!—but only to 48 percent of time sentenced, time served. Why?

A huge part of the answer concerns the role that activist judges, mainly but not exclusively at the federal level, have come to play in America's criminal-justice system. Earlier this year, a Florida felon who had 13 previous convictions for robberies, burglaries, theft and drug crimes was indicted for killing an aspiring major-league pitcher and father on a West Palm beach street. Because of a judicial order to relieve "overcrowding" in Florida's prisons, the felon was on his fourth so-called conditional release when he was booked for the cold-blooded murder.

Since the first filing of prison overcrowding litigation on the grounds of cruel and unusual punishment in 1965, similar lawsuits have been brought in at least 47 states. Twenty-five years later, 1,207 state correctional facilities were under court order or consent decree, 264 of them ordered to limit their populations, and hundreds of others under specific orders governing staffing, food services, recreation, counseling programs, and other matters. In its own January 1993 prison project "status report," the ACLU trumpeted the overwhelming success of prisoner-plantiffs in 64 out of 70 major overcrowding cases. By late 1994 some 39 states and 300 of the nation's largest jails operated under some form of federal court direction. Indeed, the entire prison system was under court orders in nine states, and overcrowding litigation was pending in many more.

In 1990 I edited a book entitled *Courts, Corrections, and the Constitution* (Oxford University Press), which examined the impact of court intervention on prisons and jails. I believed then, and I believe now, that some instances of court intervention

are both constitutionally required and morally imperative. Most federal judges act responsibly to balance public safety, prisoners' rights, and other important public values.

But in far, far too many cases over the last three decades, federal judges have issued reckless orders that unduly jeopardized public safety and imposed great human and financial costs on citizens.

In December of 1994, the National District Attorneys Association (NDAA) passed a resolution that took dead aim at the undue influence exercised by judges who impose prison caps that invite released criminals to do murder and mayhem on the streets. The NDAA resolved that "federal court orders in prison litigation often have severe adverse effects on public safety, law enforcement and local criminal justice systems." Last February, the House strengthened relevant provisions of the 1994 federal crime bill by adopting Title III of the Violent Criminal Incarceration Act.

The Stop Turning Out Prisoners or STOP provision cuts to the heart of what's wrong here by making prison caps a remedy of last resort. In essence, STOP would stop federal judges from issuing sweeping orders, as they do now, and releasing dangerous criminals without ruling on constitutional claims or holding a trial on the allegations.

Those who opposed the kindred provision of the 1994 crime bill, and who are rallying now to stop STOP, would like us to accept the entirely disingenuous argument that the judges in question aren't imposing anything on anyone. They attempt to hide behind the fact that many such court interventions occur via so-called consent decrees, which are signed by mayors or other duly-elected public officials.

But the process by which activist federal judges have gained control of substantial portions of the nation's justice system is hardly the disinterested, thoroughly apolitical, arms-length, judicially-tempered process conjured up by the anti-STOP coalition. *Government by federal consent decree is not government with the consent of the governed.* Anyone who doubts this should take a look at recent books and articles on the subject, most pointedly the essay in the Summer 1995 issue of *Policy Review* by Philadelphia Assistant District Attorney Sarah Vandenbraak.

Better still, they should read *Federalist* Paper No. 78, wherein Alexander Hamilton tried to assuage the fears of those early Americans who worried about an imperial federal judiciary. The judiciary, promised Hamilton, would have "no influence over either the sword or the purse," and could "take no active resolution whatsoever." If Hamilton could return to Philadelphia today and talk to Mayor Rendell, District Attorney Abraham, or other city officials who for years have been battling the jail cap imposed by Federal District Court Judge Norma Shapiro, he would have to concede that the Anti-Federalists were only too right to worry. Likewise, Senator Hutchison and others who have witnessed Federal District Court Judge William Justice's control of the Texas prison system know that judges in these cases have gone way beyond remedying specific, documentable violations and exercised enormous influence over both prison populations and public expenditures. In Texas, since 1980 the prison population has about doubled, but inflation-adjusted per prisoner spending has increased ten-fold. As a result of court orders and consent decrees," in many states today half or more of every prison dollar goes to prisoner services, amenities, and things other than security basics.

The anti-STOP coalition would like nothing better than to have this Congress focus on side issues and get lost in empty legalisms. And from prison crowding to parole, the anti-STOP coalition would like this Congress to believe that the plural of anecdote is data. But it is not. The empirical evidence on the relationship between prison population densities and levels of violence and other problems behind bars is ambiguous or non-existent. To cite just four examples:

1. A 1986 BJS study of over 180,000 housing units at 694 state prisons found that the most crowded prisons had a rate of homicide lower than that of less crowded prisons, and concluded that there was no clear evidence that crowding levels were directly related to the incidence of homicide, assault, or major disorders. (C. Innes, Population Density in State Prisons (BJS, December 1986)
2. A 1989 survey of the empirical literature on prison crowding concluded that, "despite familiar claims that crowded prisons have produced dramatic increases in prison violence, illness, and hostility, modern research has failed to establish any conclusive link between current prison spatial and social densities and these problems." (J. Bleich, The Politics of Prison Crowding, CA Law Review, 79, 1989)
3. A 1990 review of the empirical literature on crowding and other "pains of imprisonment"—produced, incidentally, by scholars whose other work some STOP opponents have cited in support of prisoner rehabilitation programs—flatly challenged "the validity of the view that imprisonment is universally painful," and added that from "a physical health standpoint, inmates appear more healthy than

their community counterparts." (J. Bonta and P. Genreau, Reexamining the Cruel and Unusual Punishment of Prison Life, Law and Human Behavior, 14, 1990)

4. An exhaustive 1994 review of the empirical literature on crowding, one that revised the author's own much-cited 1985 research on the subject, concluded plainly as follows: "Despite the prevailing sentiments about the harmful effects of crowding, there is little consistent evidence supporting the contention that short- or long-term impairment of inmates is attributable to prison density." (G. Gaes, Prison Crowding Reexamined, The Prison Journal, 74, September 1994).

Such inmate housing practices as double-celling and open-bay dormitories are neither constitutionally impermissible nor automatically dangerous to institutional order and well-being. Institutional leadership and management are among the crucial intervening variables that determine how, if at all, crowding affects conditions. But too many judges have totally ignored the empirical evidence and used false, unproven, and unprovable arguments about crowding to justify sweeping interventions.

CONGRESS IS CONSTITUTIONALLY RESPONSIBLE

In conclusion, the rise of judicial intervention has had precisely the adverse public safety and other consequences detailed by the NDAA, lamented by legions of local police, and testified to by countless crime victims.

I am not a lawyer, and I do not want or pretend to be. Nor do I specialize in constitutional theory or such topics as consent decree draftsmanship or prisoners' rights. But I fail to see how STOP would prevent any real violation of federal law or any unconstitutional deprivation suffered by a particular prisoner in a particular place at a particular time from being addressed as necessary by federal judges.

I will readily concede, however, that like most Americans I place victims' rights ahead of prisoners' rights, and public safety concerns ahead of legal abstractions. I remain, by turns, amazed and appalled at how so seemingly simple and straightforward an exercise of democratic will—anti-crime laws passed by duly-elected officials—can be weakened or gutted time and again by irresponsible judges and a well-organized and influential band of policy elites who dismiss public concerns about revolving-door justice as reactionary.

But as I have attempted to show, the public's concerns are rational, not reactionary. This debate is not about "get-tough" politics. It's not about "judge-bashing." It's about the moral and constitutional responsibility of Congress to respond to the will of a persistent popular majority, and to check and balance federal courts that trifle with public safety and drain the public purse.

As the late great Princeton constitutional law scholar Edward Corwin argued, the Congress and the Congress alone vests judicial power in "such inferior Courts" as it "may from time to time ordain and establish." The explicit language of Article III, Section 2 of the Constitution furnishes Congress with more than enough authority to enact STOP and STOP-like provisions into federal law.

But while Congress should not duck its responsibility to act, neither can it act alone.

At a White House dinner I recently attended, President Clinton participated in a three-hour discussion of crime and violence in America. It's clear that both President Clinton and many leaders of both parties in Congress care deeply about America's crime problem, and are concerned about the demographic crime bombs that are set to explode in only a few years.

What remains unclear, however, is whether our representative political institutions, beginning with this Congress, can work to protect decent, law-abiding citizens from violent and repeat felons.

In 1993 and 1994, only one public institution received lower ratings from the public than did the Congress itself, namely, the criminal-justice system. By passing STOP without any major changes, and by passing other measures that help to lock the revolving-door, this Congress can begin to save innocent lives and rehabilitate public trust in government.

I thank you for inviting me to testify.

Senator ABRAHAM. Thank you very much.

District Attorney Abraham, I have just been informed that another vote has started, and in that there are no other members here, what I would like to ask somebody with the same name as me is to give me a few minutes to run over, cast what will be 2 votes, and then we will start again, because I think every panelist

deserves the opportunity to address at least one member of this committee and convey their testimony.

Ms. ABRAHAM. My pleasure.

Senator ABRAHAM. So I will be back soon and the hearing will stand in recess for a few minutes. Thank you.

[Recess.]

Senator ABRAHAM. The committee will come to order, please. For the benefit of the panelists and the audience, we have 2 votes left and we will continue now with District Attorney Abraham's testimony. I will probably have to leave at the end of it and cast those final 2 votes, but I think we will be able to get those 2 done a little quicker.

So at this point, if you would continue.

STATEMENT OF LYNNE ABRAHAM

Ms. ABRAHAM. Thank you, Mr. Chairman and Senator Biden. My name is Lynne Abraham. I am District Attorney of Philadelphia, and in addition to appearing in my own right, I am appearing also on behalf of the National District Attorneys Association.

I would appreciate it if the Chair would move into the record a letter sent to the Honorable Orrin Hatch from Michael Barnes, now the new President of the NDAA, and make that a part of the record.

[The letter referred to follows:]

NATIONAL DISTRICT ATTORNEYS ASSOCIATION,
OFFICE OF THE PRESIDENT,
Alexandria, VA, July 25, 1995.

The Hon. ORRIN G. HATCH,
Chairman, Senate Committee on the Judiciary,
Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN HATCH: As the new President of the National District Attorneys Association I want to express our appreciation for your continual efforts in exploring new and enhanced methods of assisting local law enforcement in fighting crime and protecting the citizens of our communities. The work you are embarking upon, in amending the Violent Crime Control and Law Enforcement Act of 1994, can only refocus public interest in the abilities, and needs, of local communities in fighting crime. In reviewing what we believe needs to be done to remove obstacles to our efforts, one area for Congressional effort is readily apparent.

The almost continual intervention and interference by federal courts in prison litigation has had an adverse effect on our ability to protect our communities. Court orders stemming from the unwarranted intrusion by federal judges has resulted in the release of dangerous criminals back to our city streets; has resulted in the squandering of scarce resources to meet the whims of self-designated monitors; and has usurped the authority and responsibilities of locally elected officials.

Our Association strenuously urges the Congress to adopt legislation that would establish uniform provisions limiting federal court orders and consent decrees that affect local prisons and jail facilities; that would limit any permissible injunctive or equitable relief to those that are least intrusive and burdensome to local government and with the weight to doubt being given to the needs of public safety; that would give local prosecutors and other law enforcement officials standing to challenge the intervention of federal courts; that would provide for the modification or vacation of court orders where unconstitutional conditions have been corrected or where prior findings are no longer valid; and provide measures to protect prisoners rights to obtain prompt determinations of legitimate challenges to the constitutionality of prison conditions.

As a career prosecutor, and speaking on behalf of my peers from across the country, there is nothing more frustrating to a local law enforcement official then to end a lengthy criminal investigation and criminal trial only to see a convicted felon essentially walk free because of judicial overreaching. Our criminal justice system is a mockery when prisoners rights and comforts imperil the law-abiding citizen.

The members of the National District Attorneys Association and I look forward to continuing to work with you in our mutual efforts to make this country a safe and decent place to live and raise our families.

Sincerely,

MICHAEL P. BARNES,
PRESIDENT, NATIONAL DISTRICT ATTORNEYS ASSOCIATION,
Prosecuting Attorney, South Bend, IN.

Ms. ABRAHAM. Since I am going to digress from the previous notes that I submitted on behalf of my testimony, I would ask that the Chair also admit my testimony in whole so that I may speak to some of the issues that perhaps some of the other speakers have not touched.

I also wanted to thank publicly former Attorney General Bill Barr who, during his tenure, very graciously and wholeheartedly entered into Philadelphia's problems with the prison cap and was of significant assistance to us.

I think that all of the people who have appeared before me have talked about several of the things that are of interest to them, and I thought I would put a little more human face on it. This past Saturday, I took 25 of my 1st-year assistant district attorneys across the city to see how what they are doing impacts upon Philadelphia, and also to get them familiar with what they are going to deal with as assistant district attorneys.

One of the places that we visited was a shooting gallery and crack house in a drug-infested, crime-ridden neighborhood where the house that we entered was without any kind of heat, light, or electricity. It was the flop house for 30 or 40 drug addicts. It is filled with bugs and garbage and lice, some of which were carried off on my assistants. We met 4 drug addicts there, one of whom was very close to needing to be carried to the hospital because he was losing his leg because of sepsis caused by drug injections.

I couldn't help but think that if any or all of the people that we saw in that house were arrested, two things would happen. Number one, they would join the prison suit complaining about the inhumane conditions of the prison, even though they lived in such conditions. The second thing is that they would be released right back to that house to live that night because they would be part of the prison cap problem.

Since I have become district attorney in Philadelphia, I have been waging a very hard campaign to rid Philadelphia, and indeed with the STOP Act I hope every jurisdiction, of the kinds or prison caps that we have been suffering. In 1970 in this country, there were no prisons or jails under sweeping court orders, but by 1990, 508 municipalities and over 1,200 State prisons were subject to court orders or consent decrees, many of which contain prison population caps.

In our case, in particular, the Federal judge sitting on our prison cap issue and our consent decrees has never made a finding of a constitutional violation. There has never been a trial on the issue. There has been nothing determined that would violate any constitutional right, but what has happened is that at least 600 prisoners a week are released from our prisons. They don't have to post bail. They frequently don't appear.

As a matter of fact, as a running feature in the Philadelphia Daily News there is a series called "Back on the Street," and what

it does every week is it features a person, and sometimes more than one person, who has been released under the cap. It lists the 500 or 600 people who have been released, and it gives you the name of the person and it tells you how many cases this person has failed to appear from before.

We have people with 6, 7, and 8 cases open; 11, 12, 15, and sometimes 20 people who fit into this category of having 10, 11, and 12 failures to appear. One, in particular—a defendant has 8 open felony cases, including robbery, burglary, and criminal trespass. He had 7 prior failures to appear last year. He is a fugitive from other States. He has 5 Social Security numbers, 5 addresses, and 6 different names. This man will never show up in our court. The only way he will show up is if he is arrested and incarcerated. This group of people is similar to the many, many hundreds who have gone through our prison system and been released.

In addition to the wholesale release of prisoners, the issue of how you can be released is really quite simple. Instead of considering the defendant's failure to appear, what his charge is, his history of criminal conduct, the only thing that we worry about is a charge-based system. In other words, the only question that the bail commissioner asks is what is this defendant charged with today, not any of those other factors that are traditionally considered by judges.

If the defendant is charged with what the Federal judge has deemed to be a nonviolent crime, that person cannot be held for bail or go to jail, no matter how many times he has failed to appear. Some of these so-called nonviolent offenses are stalking, carjacking, robbery, burglary, drug-dealing, vehicular homicide, manslaughter, terrorism threats, and gun-dealing. A person cannot be detained pretrial, no matter how many time he has previously failed to appear, and in this absurd situation drug dealers who carry loaded Uzis on a street corner cannot and will not be sent to prison under our present prison cap because carrying a loaded Uzi by a drug dealer is not considered a violent offense. Therefore, we have that issue.

In the 18-month period that we tracked, and of the thousands of defendants who were released onto the street because of the prison cap, some of these people have been arrested for a variety of crimes, including 79 murders. One of the people who has been with us in this fight throughout this issue on the STOP bill is Patrick Boyle, who is here today right in the front row, in the tan suit. Mr. Boyle is the father of young Danny Boyle, a 21-year-old police officer who stopped a defendant who had been in a stolen car who was released under the prison cap. The defendant shot his son and killed him right on the street and right through the stolen car window because he did not want to be arrested and he did not want to go back to prison.

This is not the only case of that kind. In Atlanta just a few months ago, a person released under a prison cap in Atlanta shot and killed an Atlanta Braves replacement ball player during spring training because he was released from the Atlanta prison because of the prison cap even though he was himself a career criminal. In addition to the 79 murders of people who are released under the cap, we had another almost 1,000 robbers, almost 2,500 new drug-

dealing charges, almost 750 burglaries, 3,000 thefts, 90 rapes, and several thousand assaults.

The STOP Act, it seems to me, Mr. Chairman and members of the committee, is an important Act for our citizenry. The STOP Act does several things. It properly prevents consent decrees, which are nothing more than hammers imposed upon us by unfortunately too frequently activist Federal judges who intrude themselves unnecessarily, and sometimes, unfortunately, in perpetuity, into State matters.

Full compliance with these mandates is impossible. The decrees underestimate the sheer magnitude of the problem. They don't anticipate changing conditions. Political support is certainly lacking and, of course, it binds one administration after another, each one pointing the finger at the previous administration that it wasn't his or her fault, that the cap or consent decree was there before. Of course, the cost not only in monetary terms, but in human terms is absolutely astronomical.

It seems to me that STOP is an appropriate way to address the issues. There may be some tinkering with some of the language, as suggested by Attorney General Barr, that we might wish to look at, but STOP is not a violation of the separation of powers since we can change in Congress the substantive underpinnings of how the courts will adjudicate matters because the laws will change. It certainly won't deny access to the courts, but it certainly does limit remedies and the length of time for those remedies.

Since my light is red, I would be happy to answer any additional questions at such time as the Chair wishes to ask me, and I appreciate the opportunity to be here.

[The prepared statement of Ms. Abraham follows:]

PREPARED STATEMENT OF LYNNE ABRAHAM

Good Day, I am Lynne Abraham, the District Attorney of Philadelphia. I am also a member of the Board of Directors of the National District Attorneys Association. I am delighted that the Senate Judiciary Committee has invited me to speak today about prosecutors' concerns.

While Congress has before it a number of federal issues that are critically important to prosecutors, I would like to focus on the question of what the federal government can do to help states run their own criminal justice systems in order to ensure justice for both, for the victims of crime and those who commit crimes.

Over the last 25 years, we in law enforcement have seen a dramatic change in prisoner release practices. In 1970, there were no prisons or jails under sweeping court orders. By 1990, 508 municipalities and over 1,200 state prison were subject to court orders or consent decrees, many of which contained prison population caps. Unfortunately, the federal courts, often with the intention of improving prison conditions, have intruded unnecessarily into the state criminal justice systems and completely undercut their ability to dispense justice and protect the public.

A Justice Department study of 79,000 felony probationers found that 49 percent of them were rearrested for another felony within their state while on probation. Half of these arrests were for a violent crime or a drug crime. Another study shows that 35 percent of *all* persons arrested for violent crimes were, at the time of their arrest, on parole, probation or pre-trial release. All too often these chronic violent offenders are on the street because of pressure from the federal courts.

From the day I took office as District Attorney over four years ago, I have been trying to rid the City of Philadelphia of a prison cap that has gutted the Philadelphia criminal justice system and has convinced our residents that crime pays big-time. After inmates in our local prisons filed a lawsuit complaining about the prison conditions, a federal judge, who made no finding of any constitutional violation, began overseeing what has now become an eight-year-old program of wholesale re-

leases of up to 600 criminal defendants per week to keep the prison population down to what she considers an "appropriate level".

In this same federal lawsuit there has never even been a trial. In fact, a different federal judge recently found that the conditions in even Philadelphia's very oldest and most decrepit facility—Holmesburg Prison—were still constitutional. Unfortunately, the prior mayoral administration did not even put up a defense to this lawsuit—it simply folded its cards and agreed, under pressure from the federal judge, to enter two consent decrees providing for the ongoing release of huge numbers of inmates.

These two consent decrees mandate federally ordered releases of criminal defendants awaiting trial. Instead of individualized bail review, where Philadelphia judges would consider all of the factors relating to a defendant's dangerousness and risk of flight, we have a "charged-based" system for determining who may enter the prisons. In other words, the only question asked is "what is the defendant charged with today"? If the defendant is charged with what the federal judge calls "non-violent crimes", he cannot go to jail no matter how dangerous he is and no matter how obvious it is that he will flee and not show up for his trial. Some of these so-called non-violent offenses are stalking, carjacking, robbery with a baseball bat, burglary, drug dealing, vehicular homicide, manslaughter, terroristic threats and gun charges. A person cannot be detained pretrial *no matter how many times* he has failed to appear in court. In this absurd system a drug dealer carrying a loaded Uzi is deemed "non-violent". The defendant's prior convictions, his history of failing to appear for court, his mental health history, his lack of ties to the community, even if he is in the country illegally, and his drug or alcohol dependency are deemed completely irrelevant under these federal decrees.

Unfortunately, criminal defendants know the system and know that Philadelphia judges no longer have any power to compel a defendant to appear for his trial. The federal interference with our state bail system has been catastrophic:

- Before the federal prison cap began, Philadelphia had approximately 18,000 outstanding bench warrants (that is, arrest warrants issued when a defendant fails to show up for trial and becomes a fugitive). Now, we have almost 50,000 bench warrants and virtually no one out on the streets looking for these fugitives. Why bother—if arrested, they will all be released again to the streets because of the cap.
- In an eighteen month period, thousands of defendants who were on the street because of the prison cap have been arrested for new crimes, including 79 murders, 959 robberies, 2,215 drug dealing charges, 701 burglaries, 2,748 thefts, 90 rapes, and 1113 assaults.
- In 1993 and 1994, over *27,000 new bench warrants* for misdemeanor and felony charges were issued for defendants released under the prison cap. This represented 63 percent of all new bench warrants issued in 1993 and 74 percent of all new bench warrants issued for the first six months of 1994.
- The rate of failure to appear in court is higher for prison cap defendants than for defendants released under our traditional state court bail programs. A 1992 study established the following failure to appear rates: drug dealing 76 percent; burglary 74 percent; theft 69 percent. By contrast, the failure to appear rate for aggravated assault—a crime for which defendants cannot be released under the prison cap—was just 3 percent. The fugitive rate nationally for defendants charged with drug dealing is 26 percent in a year. In Philadelphia, however, our FTA rate of 76 percent is three times the national rate.

But these statistics do not reflect the incalculable losses to our community caused by criminals confident in their belief that the criminal justice system is powerless to stop them. The murder of even one citizen is too high a price for these ill-conceived consent decrees but we have seen over 100 persons in Philadelphia killed by criminals set free by the prison cap. Nationally, with well over 3 million probationers and parolees, many states will not seek to return violators to prison because of the impact parole or probation revocations have on the prison population. Even when parole or probation violators are sent back to prison, they are often released again to comply with a federally-ordered prison cap—a real Catch 22.

Unfortunately, the prison caps also cause needless financial losses to our citizens and businesses. Businesses suffer thefts, losses not covered by insurance deductibles, increased security and surveillance costs, and increased insurance premiums. How can we hope to attract retail businesses to urban areas when store owners know that professional thieves and burglars have a "get-out-of-jail-free card"? Prison caps are not simply a law enforcement issue—they are, in turn, inextricably tied to the financial viability of a city. Fear of crime and the belief that law

enforcement is ineffective are the synergies behind citizens arming themselves in record numbers. The notion is widespread, firmly fixed and accurate that federally-ordered prison caps create nothing more than recycling programs for criminals.

Philadelphia is, by most accounts, an extremely attractive terminus in the drug trade. The Philadelphia International Airport is now a favored location to send out-of-state couriers. Under the prison cap, we cannot hold a drug smuggler in prison unless he is caught with more than 50 pounds of marijuana or more than 50 grams of cocaine. So the drug cartels and their minions need not even have to suffer the inconvenience of putting up any money to bail out the courier—none is required.

One case involving a drug dealer out of jail because of the prison cap. Undercover detectives from Montgomery County, which is adjacent to Philadelphia, arranged a drug deal in a parking lot along the road that forms the border between Philadelphia and neighboring Montgomery County. Before the deal took place, the defendant tried repeatedly to move the deal to the Philadelphia side of the street because, the defendant explained to the undercover detectives, he could go to jail in Montgomery County but not in Philadelphia. The defendant nevertheless completed the deal on the Montgomery County side of the street and, yes, he did go to jail out there. He would not if he had completed his drug deal on the Philadelphia side of the street.

While the prison cap has encouraged defendants to commit more crimes and to thumb their noses at our court system, one must keep in mind that individualized bail review—as opposed to the cap's "charge-based" system—is essential for reducing the overall costs to the criminal justice system.

The consent decrees in this case raise extremely disturbing questions about whether any federal court ought to intrude so unnecessarily into one of the most basic functions of state government—its criminal justice system. The federal judge, of whom I am speaking, has controlled 224 million dollars in bond funds for the construction of a new state prison and the new state courthouse, even though there is not a single prison bed in the courthouse. The federal judge even insisted that the Bond Indenture contain language requiring her approval of routine construction matters. Every single construction change order has required federal court approval. Recently, for example, the Philadelphia court system wanted to expand one room in the courthouse for court interpreters. This change, if done during the construction phase, would have cost $5,000. But the federal judge did not like the proposal, so she rejected it. This change will now be completed post-construction—at a cost to Philadelphia taxpayers of $30,000.

The federal court has micro-managed the Philadelphia criminal justice agencies to a fare-thee-well—there have been debates over the placement of flag poles on our prisons, whether the state judges' new chairs should be scotch-guarded, the candle watt power of the light fixtures, and the choice of art work at the prisons. Even if some of these issues are important, the fundamental question is who should be in charge of the debate—the federal judge or state officials?

This raises a most disturbing aspect of federal consent decrees in prison conditions lawsuits. With a consent decree, one state political administration can arrogate unto itself powers it does not have under state law. It can make political decisions, embody them in the federal court order, and then insulate that policy from change by the next duly elected mayor. Indeed, as it stands now, prison caps can be—and have been—forced upon states for as long as twenty years, with no power vested in the state to be relieved of the burdensome weight of the decrees.

We, the current mayor, other law enforcement officials and I are attempting to rid ourselves of the prison cap, even though I have no standing to challenge any of the issues I have spoken about today. But we cannot take the naive view that this step alone will solve the problem. Elimination of the prison cap is only the most immediate action that can be taken to increase the effectiveness of law enforcement. Law enforcement in a large urban area is tough enough; federally-enforced prison caps undermine our efforts. Restricting federal court interference with individualized bail review, the state judges' power to punish those defendants who willfully refuse to appear for their court hearings or who violate probation or parole, is an essential step in returning to our state criminal justice system the ability to dispense justice.

In Philadelphia, we are committed to devoting adequate resources to ensure appropriate prison conditions for inmates and safety for our correctional officers. Humane conditions are essential not only because they prevent a federal takeover of our prisons but, more importantly, because we are morally required to regard the rights of all members of our society, even those who break the law. But we must also recognize that resources devoted for prisoners come at the expense of other programs essential for our law-abiding citizens. None of us has the luxury of housing prisoners in conditions that far exceed the standards of humane treatment when we

do so at the cost of depriving needy, law-abiding citizens of essential and fundamental government services.

In Philadelphia, a new 2,000 bed prison is about to open. Because Holmesburg Prison, our oldest facility, will be closing, we will have a net gain of only 400 prison beds. These beds, which will be filled in a matter of days, are too costly to be squandered by rigid adherence to outdated and ill-advised consent decrees that preclude the full use of available prison space.

For these reasons, the National District Attorneys Association, a bi-partisan organization of prosecutors from across the country, has unanimously endorsed a resolution recognizing the severe, adverse effects of federal prison conditions litigation and strongly urging Congress to strengthen the provisions of last year's Crime Bill limiting remedies in prison litigation. On February 10th of this year, the House passed H.R. 667, which included provisions that would accomplish the major goals endorsed by the National District Attorneys Association. Senator Hutchison's Senate Bill 400 contains these same provisions. I strongly urge the Judiciary committee to include in the 1995 Crime Bill these provisions establishing reasonable and necessary limits on prison court orders.

I genuinely appreciate the invitation to speak here today. I entreat you to help all of us in law enforcement with this overwhelming problem. With Congress' help we may finally have an effective criminal justice system in Philadelphia that our citizens have the right to expect but long ago gave up hope of ever seeing.

Thank you.

NATIONAL DISTRICT ATTORNEYS ASSOCIATION

RESOLUTION

WHEREAS, federal court orders in prison litigation often have severe adverse affects on local criminal justice systems because of the premature release of dangerous pretrial detainees or sentenced prisoners;

WHEREAS, such federal court orders are often entered pursuant to a consent decree in the absence of a finding that detainees or prisoners have been subjected to unconstitutional conditions:

WHEREAS, such federal court orders often result in substantial federal court supervision of local and state prisons and jails exceeding that necessary to ensure constitutional prison conditions;

WHEREAS, such federal supervision often results in an inordinate percentage of state and local funds being diverted to improve prison conditions at the expense of law enforcement programs designed to protect the public:

WHEREAS, federal injunctive relief often remains in effect even after prison conditions clearly meet constitutional standards:

WHEREAS, such supervision often results from federal consent decrees whereby one political administration attempts to bind future political administrations to policies concerning prison and criminal justice administration:

WHEREAS, such consent decrees are contrary to one of the most fundamental principles of our nation that the electorate is free to compel political changes when it disagrees with the policies of elected officials:

WHEREAS, on September 13, 1994 President Clinton signed into law the Violent Crime Control and Law enforcement Act of 1994 (hereinafter the 1994 Crime Bill):

WHEREAS, Section 20409 of the 1994 Crime Bill amended Title 18 of the United States Code by adding a new section. § 3626 entitled "Appropriate remedies with respect to prison crowding" (hereinafter "Prison Remedies Provision "):

WHEREAS the Prison Remedies Provision of the 1994 Crime Bill provides (1) that a federal court shall not hold that prison crowding causes an Eighth Amendment violation unless a particular identified inmate proves that he has been subjected to cruel and unusual punishment: (2) that a federal court shall not order a prison population ceiling unless it is necessary to remedy a constitutional violation: and (3) that state and local governments are entitled to periodic reopenings of outstanding prison orders and consent decrees:

WHEREAS, attorneys opposing local criminal justice officials have attempted to prevent enforcement of this provision on a wide variety of grounds, seizing upon alleged ambiguities in the language of the Prison Remedies Provision to assert that this legislation violates the separation of powers doctrine, does not apply to local detention facilities, does not apply to consent decrees entered prior to its enactment, does not require the reopening of consent decrees, and, at most, codifies existing law;

WHEREAS, the Congressional sponsors of the Prison Remedies Provision clearly intended that this legislation would place substantial restrictions on a federal court's ability to enter excessive injunctive relief in prison cases, intended that it apply to local detention facilities, intended that it apply to all outstanding consent decrees in prison cases, and intended for local jurisdictions to have the immediate right to vacate prison cap orders in cases where there had been no finding of a constitutional violation:

WHEREAS, at least one federal judge has expressed the opinion that the Prison Crowding Remedies provision should not be interpreted as the Congressional Sponsors intended it to be; and

WHEREAS, there has been a historical reluctance of the federal courts to disturb federal injunctive relief in institutional prison litigation or modify federal injunctive relief on an expeditious basis.

BE IT NOW RESOLVED, that the National District Attorneys Association urges Congress to ensure comprehensive relief for local and state governments who have been adversely affected by federal court orders entered in institutional prison litigation. The National District Attorneys Association urges that this comprehensive legislation accomplish the following goals:

(1) establish a uniform provision limiting federal court orders and consent decrees affecting all state and local prisons or jails including those facilities that house pretrial detainees, sentenced prisoners, or a combination of prisoners:
(2) establish these limitations in those federal proceedings, such as civil actions filed pursuant to 42 U.S.C. § 1983, where Congress clearly retains the right to limit federal remedies without raising an arguable separation of powers claim:
(3) limit the federal courts injunctive and equitable remedies to those that are the least intrusive means to remedy a constitutional violation, with substantial weight being given to any adverse affect on the public safety or the operation of a state or local criminal justice system:
(4) provide for the prompt modification or vacation of orders where the inmates are not currently subject to unconstitutional conditions, or where the prior findings or orders for injunctive relief are no longer current:
(5) permit law enforcement officials whose duties may be adversely affected by prison population reduction measures to have standing to challenge such measures:
(6) establish time limits for court rulings on such motions: and
(7) protect prisoners rights to obtain prompt judicial determinations of legitimate challenges to the constitutionality of prison conditions and continued enforcement of any measure necessary to protect those rights.

BE IT FURTHER RESOLVED, that the attached proposed amendments to 18 U.S.C. § 3626 would accomplish the foregoing goals endorsed this day by the National District Attorneys Association.

BE IT FURTHER RESOLVED, that the National District Attorneys Association strongly urges Congress to enact legislation in accordance with this Resolution.

Adopted by the Board of Directors, December 3, 1994 in Longboat Key, Florida.

Senator BIDEN. Mr. Chairman, the light has been red for 5 minutes, but I have never known you to stop for a red light, Lynne. It is good to have you here.

Ms. ABRAHAM. I learned at the feet of a master, Senator Biden, so thank you.

Senator BIDEN. I know you did. It is good to see you, Lynne. Thanks for being here.

Ms. ABRAHAM. My pleasure.

Senator ABRAHAM. Just to inform the panel, happily, one of the votes has now been voice-voted, so we only have one left. There are about 5 minutes left and I think perhaps, before we go ahead on the balance of the panel, it might be better for everybody if we recess temporarily, go vote, and then we can at that point have clear sailing.

Senator BIDEN. And then hopefully at that point have no more interruptions.

Senator ABRAHAM. Thank you all very much. We stand in recess again.

[Recess.]

Senator ABRAHAM. The committee will come to order again, and I thank witnesses and I thank the audience and the huge press corps that continues to join us over here on this vital topic for their indulgence. [Laughter.]

I think Senator Biden will be joining us. I passed him on the way coming up here, but we had had from the outset known that Attorney General Barr would have to leave at about 1 p.m., and I had at least one question that I wanted to ask you before you left and the panelists who have not yet testified have agreed to hold until we get through with any questions for him. Then I gather everybody else can stick around for a bit and we will go through the normal question format.

Mr. Barr, I would like to ask your opinion, having now witnessed both from inside the Justice Department as well as from a distance here the CRIPA statute and how it has come into play, how it interrelates with the normal rights that prisoners might have to bring lawsuits under any conditions. I would just like to get your view as to its efficacy and worth at this point, if you think we need it.

Mr. BARR. I think, on balance, Senator, we do need a statute like CRIPA. I think it is important, however, that it be accompanied with the kinds of guidelines that are being discussed here so that we don't have Federal agencies like the Department using it really as a vehicle for taking over the functions of State officials, and also some rigor in determining when a Federal constitutional violation really does exist. I think if we get some ground rules in that area, I still think it is an important protection for prisoners.

Senator ABRAHAM. Thank you.

Senator Biden, as I indicated, Mr. Barr has to leave at 1 p.m. and if you had questions for him, I thought maybe we would do that now.

Senator BIDEN. Well, I do, and I will be brief.

It is good to see you, General.

Mr. BARR. It is good to see you, sir.

Senator BIDEN. As I know you know, but others should know, too, I truly enjoyed working with you when you were Attorney General. You were one of the best I have ever worked with, and there have been a lot of Attorneys General since I have been here, and I mean that sincerely.

Mr. BARR. Thank you, sir.

Senator BIDEN. I have a number of questions. I will send a couple to you in writing. I won't overburden you. I know you are busy as can be, but let me ask you two constitutionally related questions, and if you don't have an answer off the top of your head, I would be delighted to have it in writing.

I am intrigued by this legislation. I think Lynne Abraham is the single best district attorney in the country. I mean, I really mean that. She prosecutes more cases in one year than the entire Federal system does in a year, and that is not to suggest that other big cities don't have similar caseloads. The fact that both of you are here supporting this gives me reason to take a much closer look at it, but I have a couple of questions. I have an open mind about it and I would be curious to know what your view is.

As I understand it, the STOP legislation terminates currently existing consent decrees; not just future consent decrees, but currently existing consent decrees. These are contracts between two parties, contracts between the Federal Government and the State or the locality. Is there any constitutional impediment, as has been suggested by U.S. District Court Judge Milton Schader to Senator Hatch? He says potential constitutional problems involving the impairment of contracts exist.

Do you see any potential constitutional problems protecting against government actions which impair the right to contract here? In fact, in some contexts, government action interfering with contracts could be construed as a taking under the takings clause. Do we have any of that problem, or is that an unreasonable concern or a concern that is so distant that it is not worth us spending much time thinking about?

Mr. BARR. Well, recognizing this is off the top of the head, as I said in my opening extemporaneous remarks, I do have some concerns over the provision of the STOP proposal that would terminate existing decrees almost automatically and retroactively, but that is really under the *Plaut* decision relating to the legislative power's ability to upset final judgments of courts.

Senator BIDEN. That was my second question. I have a similar concern on separation of powers.

Mr. BARR. I guess I haven't thought about the contract provision, although my view of a consent decree is that it is not a contract. It is a consent decree which implicates the article III power of the court. It has some attributes of a contract, but ultimately you are asking a Federal court to enforce it. That means there should be an underlying Federal case or controversy. So I think the right analysis is to look at the *Plaut* case and what burden that puts on retroactively upsetting a consent decree rather than the contracts clause.

My proposed solution to the *Plaut* problem would be to say that when these things are revisited on a 2-year basis, or what have you, a judge still must make a determination that there is an underlying violation still there because my view is once the Federal violation goes away, I don't care what the parties have agreed to. There is no longer a proper article III remedial function being performed by the court and I think the case should then be terminated.

Senator BIDEN. I have several more questions, but I know the General has to leave by 1 p.m. and I will refrain. Thanks an awful lot.

Mr. BARR. Thank you, Senator.

Senator ABRAHAM. Thank you very much for being here today. I appreciate it very much.

At this time, we will continue with the panel and their testimony, and it is Mr. Gadola's turn. Thank you for being here.

STATEMENT OF MICHAEL GADOLA

Mr. GADOLA. Thank you, Mr. Chairman. Mr. Chairman, I would ask that my written testimony be made a part of the record as well.

Senator ABRAHAM. Without objection.

Mr. GADOLA. Mr. Chairman, I appreciate this opportunity to convey the State of Michigan's perspective on the topic of prison reform. In my previous incarnation, I was deputy counsel for the governor in the State of Michigan and had some fair involvement with prison litigation in that capacity.

The Michigan perspective is necessarily colored by Michigan's experience, which is unfortunately not unique, with the Civil Rights of Institutionalized Persons Act, or CRIPA, as it is enforced by the Civil Rights Division of the U.S. Department of Justice. That experience began in 1982 when the Justice Department launched an investigation of the conditions in various Michigan prisons. This investigation culminated, or should I say led to, the Justice Department's simultaneously filing in 1984 a CRIPA action against the State and various State officials, an entry of a consent decree and an accompanying State plan for compliance that were designed to address the Civil Rights Division's myriad concerns about Michigan's penal institutions.

The consent decree and State plan permit the Civil Rights Division attorneys and the Federal district court in Michigan to delve into such constitutional enormities as whether food being served to prisoners in segregation is scraping the top of the meal slot when being delivered to whether food debris has adequately been cleaned from an electric can opener in a prison mess hall.

I brought with me a series of compliance reports that the State has prepared during the tortuous course of this litigation that outline the unbridled extent to which the Federal judicial and executive branches have delved into the minutest details of the administration of Michigan's prisons.

The bill of particulars that is the State plan for compliance and attendant court orders allow for a situation in which the State of Michigan advances the ball down the field to satisfy the demand of the moment, only to have the court and/or the Justice Department move the goal posts further away by an equal distance. The State thus negotiates with itself in its futile efforts to bring an end to this enormously costly litigation.

But my primary purpose in speaking to you today is not to delve into the minutia that is the *U.S.A.* v. *Michigan* consent decree. It is rather to ask that you think about what message the Michigan experience with CRIPA, the Civil Rights Division, and the Federal court sends to all States. To understand this, it is important that you understand where Michigan found itself in January of 1991 when my boss, John Engler, became governor of the State of Michigan.

The Federal district court had found Michigan in contempt of court for its failure to comply with the various requirements of the decree and had imposed $10,000-per-day fines on the State. The new administration's response to the state of affairs was to purge the contempt and to seek compliance with the terms of the decree in an honest effort to terminate the need for further litigation.

This approach met with initial success when the Justice Department, after conducting its own investigation of the conditions in Michigan's consent-decree institutions, concluded that Michigan had attained the objectives of the decree in the areas of medical

care, fire safety, sanitation, and others, with the exception of mental health.

In April of 1992, the parties stipulated to the dismissal of all consent decree issues, with the exception of mental health care. It appeared that Michigan's vigorous and expensive efforts at compliance had resulted in the hoped for outcome. The Federal district court, however, refused to dismiss the most onerous decree requirements. Michigan thus found itself in the anomalous situation of not being able to dismiss a lawsuit that the parties themselves agreed should be dismissed.

Michigan appealed the court's refusal to take the parties at their word, hoping against hope that the Justice Department would rally to the defense of the stipulation that it had entered into less than a year previous. In fact, not only did the Justice Department fail to support the stipulation on appeal, it filed a brief with the Sixth Circuit Court of Appeals supporting the district court's ability to refuse acceptance of its own stipulation with Michigan. Following this Justice Department flip-flop, the sixth circuit upheld the district court's ruling.

Allow me to share two further indignities that Michigan has suffered that demonstrate the counterproductive message that the Michigan experience sends to the States. In its effort to purge contempt in early 1991, the State entered into a stipulation that included, at the court's insistence, a requirement that the State operate mental health bed space equivalent to 3.2 percent of its prison population, with 1 percent of that total consisting of acute care beds.

To attain compliance with this and other consent decree requirements, the State converted a former prison facility into a 400-bed, state-of-the-art mental health hospital, at a cost of approximately $30 million. The State also instituted a new treatment regime and, in a revolutionary move, turned administration of its prison mental health program over to the State's Department of Mental Health.

Given current population projections, the 1-percent acute care requirement would force Michigan to fully staff approximately 400 acute care beds by the end of this year. The only problem with this requirement is that patient caseloads do not justify opening this number of beds. The current acute care caseload is below 300 patients, in part due to the State's success in treating inmates. The State's motion to modify this requirement were denied, and earlier this week the sixth circuit denied the State's motions for stay, which now forces the State to open and fully staff acute care beds for patients that do not exist.

The patent absurdity of this situation faces Michigan with a choice between defying a Federal court order or spending millions of scarce taxpayer dollars treating imaginary prisoners. I put it to you that the taxpayers of Michigan or any other State would demand that any elected policymaker who made such a decision be promptly examined by one of the newly hired psychiatrists and ensconced in one of the newly created beds. Again, Michigan's efforts at compliance have been met with an unrelenting refusal to give the State any credit for managing its own affairs in this arena.

What has been Michigan's latest reward in its continuing struggle to hit the moving target that is the *U.S.A.* v. *Michigan* consent

decree? It was announced to State officials in 1994 that the Civil Rights Division would be launching yet another CRIPA investigation, this time of the State's women's prisons. Thus far, I am happy to report the State has successfully resisted the Justice Department's heavy-handed efforts to pry its way into our facilities on the basis of generalized prisoner complaints. In fact, two Federal district judges in Michigan have denied the Civil Rights Division's efforts to tour these facilities prior to filing suit.

To help demonstrate the absurdity of the allegations the Civil Rights Division is making in its investigation of the State's women's prisons, the Federal Bureau of Prisons periodically houses female inmates at one of the facilities subject to the investigation. As recently as last fall, the Bureau gave the facility a glowing report on all measures of performance.

The Civil Rights Division alleges that the prisoner grievance system denies female inmates their constitutional rights, but the Justice Department recently certified that system pursuant to the procedures set forth in CRIPA itself. It would appear that the left hand does not know what the right hand is doing at the Justice Department with respect to Michigan's prisons housing female inmates, which I believe calls into question the true motivation of the Division in this investigation.

Now, I would ask you, members of the committee, what does the Michigan experience say to States involved in CRIPA litigation? Michigan's sincere efforts at compliance and the attendant expenditure of millions of taxpayer dollars have left it in no better position than it found itself in in January of 1991 when the court was imposing $10,000-per-day fines upon the State. If the wages of compliance are the same as those one would presume for continued unrepentence—namely, Justice Department flip-flops, court orders bearing no basis in reality, and seemingly vindictive attempts to impose another consent decree on the State—then why should the State be motivated to comply?

The message to the States seems to be that there is no benefit to be derived from complying with the demands of the Justice Department and Federal courts and CRIPA litigation. I suggest to you that this particular consent decree has outlived its usefulness and that the CRIPA statute as a whole deserves serious reform.

Thank you very much.

[The prepared statement of Mr. Gadola follows:]

PREPARED STATEMENT OF MICHAEL GADOLA

Mr. Chairman and distinguished Judiciary Committee members, thank you for providing me the opportunity to communicate the great State of Michigan's perspective on the issue of overhauling the nation's prisons. For better or worse, prisons are particularly big business in Michigan. We incarcerate more people per capita than any other northern, industrial state. The current budget for our Department of Corrections is $1.3 billion dollars. In Washington terms, that is probably not much, but in Michigan it is extremely significant. In point of fact, Michigan now spends 15 percent of its general revenue funding to operate its prison system. In 1980, corrections spending represented only 3 percent of the general revenue fund. Why the tremendous increase in resources committed to corrections? The reason is simple: our prison population has skyrocketed over the past 15 years—from 15,148 prisoners in 1980 to 38,815 prisoners as of July 21st this year. During that 15 year time frame, Michigan has spent in excess of one billion dollars on net prison construction.

Because of the explosive growth in our prisoner population and in prison spending, Michigan has, in part out of fiscal necessity, become a national leader in prison reform. The State's Community Corrections and Boot Camp programs are just two of the innovate, reasonable and cost-effective alternatives to traditional incarceration which have been independently implemented by the state. Michigan is also proud of its efforts to run a high quality, humane and constitutional prison system. Nearly all of our correctional facilities are fully accredited by the American Corrections Association. We have what may be the most extensive training program in the nation for corrections officers. Our rate of prison violence is among the lowest of any state. Michigan spends an average of $4000 per year, per prisoner for health care, including nearly $1700 for mental health services.

Despite these and other pertinent facts (several of which I will note below), several federal laws, whether by their plain words or through judicial interpretation, have enabled both the Civil Rights Division of the Justice Department and federal judges to micro-manage the day-to-day operations of innumerable Michigan prisons. Such federal micro-management of a purely state function has resulted in more than a decade of protracted litigation which has cost Michigan taxpayers hundreds of millions of dollars since 1984. The Committee now has the unique and important opportunity to remedy the abuses caused by certain federal laws, while preserving the level of constitutional rights to which a prisoner is entitled.

The federal statute which has been most frequently utilized to micro-manage Michigan's prisons is the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA). As you are aware, CRIPA as written provides limited power to, and one would have thought, fairly clear directions as to the role of the Attorney General: the Attorney General may *only* initiate suit against a state if the Attorney General personally verifies that he/she "* * * has reasonable cause to believe that any state * * * is subjecting [prisoners] to egregious or flagrant conditions which deprive persons of any rights * * * secured-or protected by the Constitution * * * causing such persons to suffer grievous harm, and is pursuant to a pattern or practice of resistance to the full enjoyment of such rights * * *" This is a very high threshold. Congress also placed clear requirements upon the Attorney General with respect to prefiling disclosures and the offering of federal assistance to states, as a means of limiting federal intrusion into state matters and to reduce, to the extent possible, adversarial litigation.

Moreover, Congress properly attempted to limit the remedies which the Attorney General could seek in any CRIPA action to: "* * * equitable relief as may be appropriate to insure the minimum corrective measures necessary to insure the full enjoyment of those rights * * *" As Michigan's unfortunate history with the Justice Department's Civil Rights Division and federal court interpretation of—CRIPA reveals, the Congressional limitations initially placed within the statute are not being adhered to by either of these two branches of the federal government. Instead, CRIPA is being used by federal officials as a vehicle to insure that state prisons are operated in a manner which these officials believe they should be operated, disregarding the Congressional directive of limiting federal authority to enforcing the minimum corrective measures necessary for the enjoyment of constitutional rights. To taxpayers and to all law-abiding citizens, the abuse of CRIPA is a crime.

In 1982, the Justice Department's Civil Rights Division investigated several Michigan prisons and concluded that unconstitutional conditions existed. In July 1984, and on the same day that federal court litigation had been instituted by the Attorney General, a Consent Decree was entered into by the parties to remedy the concerns raised by Justice. As the District Court itself had noted, the Consent Decree was entered into *as a means to end the litigation* (see *United States* v. *Michigan*, 680 F.Supp. 928 (WD Mich. 1987)) and alleviate certain minimal constitutional concerns raised by Justice. This is consistent with CRIPA's original intention that the Attorney General safeguard prisoners' threshold constitutional rights through minimum corrective measures.

Since 1984, however, the Attorney General and the Federal District Court have strayed far from the limited constitutional purposes of CRIPA and the Consent Decree. The Consent Decree, rather than settling the CRIPA suit as intended, has provided Civil Rights with a vehicle to pursue a course of litigation (with the admiration and full support of the Federal District Court) to micro-manage the Consent Decree prisons. What has resulted in the *USA* v. *Michigan* case is the federal government (more specifically the Executive and Judicial branches) pursuing litigation to insure that food served to prisoners is a certain temperature, that a certain number of light fixtures and electrical outlets are in each cell, and that food loaf not be served to prisoners under certain circumstances. These patently absurd rulings with which Michigan has had to comply or appeal are all verifiable and reported in the volumes of the Federal Supplement. See *USA* v. *Michigan, supra*, 680

F.Supp. at p. 1004; *USA* v. *Michigan*, 680 F.Supp. 270, 277 (WD Mich. 1987). What is lost in all this litigation is one simple fact. Prison is not a vacation, and not a home away from home. Prison is punishment.

Of course, the Consent Decree was agreed to by the state, and has proven successful in certain areas specifically provided for in the Decree. The problem lies in the Court and Civil Rights Division's continued pursuit of prison intervention by delving into the minutia of prison operations all in the name of enforcing the general provisions of the Decree.

During the eleven years of its continuing jurisdiction over the CRIPA Consent Decree, the Court has ordered the hiring of numerous independent experts to administer compliance with the Consent Decree. Unlimited access to prisons, prison personnel and documents are granted to these experts, each of whom are paid excessive hourly or daily rates at the expense of Michigan taxpayers. These experts, who have a significant financial incentive if the Court continues monitoring these Michigan prisons, have assisted the Court in making rulings on such constitutionally significant decisions as the handling of laundry and the frequency with which laundry must be done. See *USA, supra.*

I state the obvious when I say that what was lost upon the Executive and Judicial branches is the Congressional pronouncement that CRIPA remedies are to be *narrowly* tailored to remedy, in the least restrictive manner, *constitutional* violations. Issues like whether a prisoner's diet includes food loaf, or whether food served to prisoners is at a certain temperature, do not raise to constitutional significance; rather, they provide clear examples of the federal judiciary improperly delving into the state's exclusive role of managing the day to day affairs in its own prisons. In fact, in *Sandin* v. *Connor*, 1995 U.S.L.W. 4601, the U.S. Supreme Court recently cited the *USA* case as an example of impermissible federal micro-management of prison operations which occurs under the guise of enforcing constitutional rights.

I am sorry to report that the trivialization and abuses of CRIPA continue to this day. Most recently, the Court in *USA* has granted the Civil Rights Division request for access to a prison *not* covered by the Consent Decree, and which did not even exist in 1984. Furthermore, over the past year, the Civil Rights Division has been conducting an investigation of two Michigan women's prisons, alleging the existence of unconstitutional conditions. This investigation is apparently continuing despite the fact that one of the prisons has been *approved* by the Justice Department's *own* Federal Bureau of Prisons to house federal women prisoners, and both are fully accredited by the American Correctional Association. The Civil Rights Division has also alleged that Michigan's grievance procedure violates Due Process; at the same time this allegation was made, this same Justice Department awarded full certification of the procedure under CRIPA.

On July 28, 1994, the Justice Department filed suit against Michigan, seeking unlimited access to these women's prisons for purposes of its investigation, a tactic employed in other states as well. In a letter dated May 9, 1995, Governor John Engler asked Attorney General Janet Reno to prevail upon her staff to "* * * follow the CRIPA statute and provide the requisite notice of the specific concerns involving the Michigan facilities prior to issuing a complaint." The Governor went on in the letter to remind the Attorney General that "* * * the CRIPA envisions cooperation through reciprocal exchange of information." Michigan has always been willing to cooperate with federal officials regarding legitimate concerns related to its prison operations, but we have steadfastly insisted that those officials comply with the spirit and intent of CRIPA before the state would consider going to the rather extraordinary step of facilitating a free-ranging inspection of any of its correctional facilities. And indeed, two Federal District Judges have concurred with Michigan's decision to deny Justice Department access to the women's prisons in question. Both District Judges held that CRIPA does not provide pre-litigation access to a state facility without state consent. However, even this principle, seemingly made clear by Congress in the statute and its legislative history, has been subject to differing interpretations across the country.

Costs for compliance with the requirements of the *USA* Consent Decree, as interpreted by the Court and Justice, are staggering. Since 1984 Michigan has spent over $225 million to comply with the initial terms of the Consent Decree as well as the supplemental requirements ordered by the Court. The Michigan Department of Corrections has hired innumerable staff whose sole responsibility is to ensure compliance with the Consent Decree.[1] These excessive costs and the micro-management

[1]The Department has been ordered to submit to the Court and its experts bi-annual and quarterly compliance reports on mental health issues, non-mental health issues, and out-of-cell activities. I have brought copies of several such reports for the Committee to examine, as the

Continued

of Michigan prisons are the direct but unforeseen result of the misinterpretation and misuse of CRIPA by the federal courts and Civil Rights Division. The best suited remedy to alleviate these serious abuses is to amend—CRIPA, to make explicit what was initially intended by Congress, and to limit the statutory power of the Attorney General in pursuing CRIPA actions.

For example, an amendment making it explicit that the Attorney General does not have a pre-litigation right of access to a state facility in the absence of state consent. Such an amendment will not only preserve the law as intended by Congress in 1980, but will also preserve state sovereignty, another important issue recognized by CRIPA but ignored by Justice and the courts. A CRIPA amendment providing that the Attorney General shall not institute a suit unless he/she has clear and convincing cause to believe a violation of the statute exists should be adopted to protect states against frivolous suits brought at federal taxpayer expense. Currently, the Attorney General only needs reasonable cause to believe a violation exists.

Other amendments which I believe would remedy the abuses spawned by CRIPA can be found within the Contract With America's "Taking Back Our Streets" proposal, which includes: continuing the requirement of dismissing a suit for 180 days when the prisoner has not exhausted available remedies, but eliminate the judicial discretion in ordering the dismissal; adding a provision allowing a judge to dismiss *sua sponte* a prisoner complaint which fails to state a claim; and, with respect to pre-litigation issues, amendments requiring (1) the Attorney General to provide a state with the specific facts which allegedly constitute unconstitutional misconduct—including the names of prisoners subject to the alleged misconduct—and (2) enabling a judge to review the substance of an Attorney General certification, which would reduce the number of federal suits by providing the full disclosure of facts necessary to make a preliminary determination as to the validity of any allegations and whether there is a need for voluntary compliance to remedy actual constitutional violations.

With respect to Consent Decree cases, an amendment placing specific time limits on the duration in which the Attorney General may litigate CRIPA consent decree cases—such as three years unless specific unconstitutional conditions are proven to exist—would ensure that the Attorney General and the courts no longer lure states into voluntary compliance plans only to turn around and create decades of costly and constitutionally unnecessary litigation. While federal judges may serve for life, consent decrees should not be a lifelong burden on states. Given the history of consent decree litigation in this country, most especially in Michigan, only with such an amendment will states have any incentive to enter into voluntary agreements which save costs for everyone and expeditiously alleviate the unconstitutional conditions which Congress has sought to remedy through CRIPA. Under current law, no state would enter into a consent decree when doing so inevitably continues and expands litigation and reduces resources otherwise available for the prison system.

Thank you for allowing me to express Michigan's strong concerns on these important topics. If we can be of further assistance in your efforts, we would be pleased to help.

Senator ABRAHAM. Thank you, Mr. Gadola, and thanks for your patience in waiting.

Mr. Watson, thank you also for your patience and waiting here.

Senator BIDEN. Mr. Chairman, if I may interrupt, Mr. Watson is from Delaware and I am glad he is here, but his patience is legendary. Thanks for waiting.

STATEMENT OF ROBERT J. WATSON

Mr. WATSON. Mr. Chairman, I would request that my written statement be entered in the record, also.

Senator ABRAHAM. It will, without objection.

Mr. WATSON. Let me depart a moment from my prepared testimony just to say that with regard to control of crime, Delaware, being a small State, has taken considerable action in this area. We

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reports evidence the absurd detail in which Justice and the Court have become involved in prison operations. These reports just as clearly establish the amount of taxpayer supported work which is required of Michigan to prove compliance with these extraordinary orders.

abolished parole and we have enacted truth in sentencing. I think we are one of the few States that complies with the 85-percent requirement of the crime law. We have had a three-strikes-and-you-are-out bill for 17 years that has been in use.

We have 5 levels of sentencing, really, to protect the public by allowing judges to craft sentences that are more responsive to what they see in the defendant, and they generally combine them—some prison time, some halfway house time, then some intensive supervision and on back to the community. So I just say that as a preliminary comment because there are some other distinguished colleagues in the room you will hear from later who will speak about other matters before the committee. So I will defer to them to talk about those issues.

I am here to speak about the matters before you that relate to STOP. I think as one of the prior panelists said, he has found corrections commissioners generally see those with some favor because of the consequence on our budgets, and I think that is true. That has been my experience.

I also think that by abolishing the access to consent decrees as an initial move or a preliminary move, the States really lose the right to get in and to resolve things when we consider that to be appropriate. It does not take away the option of the State to take a matter to trial if that is how we see the matter should go. It also, I think, adds costs to local government.

STOP requires that almost all lawsuits involving conditions of confinement in prisons, jails, and detention facilities would have to go to trial, and that just means that local governments can't settle these suits without admitting liability and opening themselves to countless other actions.

I was in the Oregon Department of Corrections for approximately 30 years, and in that time was the head of the department for 10. Seven of those 10 years, we were in Federal court on a lawsuit that dealt with the totality of conditions in the prisons. That was overturned. Then we had to go back to trial on every single condition, and in the end we lost and had a long order entered by the court, which in subsequent years I have seen very closely resembled what could have happened had we entered into a consent decree and dealt with those matters.

The ironic thing is that in the case and in matters that have occurred since, the strongest evidence the attorneys for the inmates have is our own requests for improvements to the prison system that we document for them year after year, improvements that need to be made. As you know, legislatures have limited funds and tend to defer to other matters in many instances of a much higher priority, and I would agree with that. But nevertheless, when these lawsuits come forward, it is not unusual to have subpoenaed your budget requests for the last several years, or matters that go to accreditation and what those circumstances find.

So, in hindsight, it looked as if we would have been far better off than spending 7 years and wasting the court's time and ending up at the end of that time with something that could have been negotiated and probably was a mistake. So in subsequent lawsuits there, we did settle some others by consent decree, and in others

we went to trial. We felt that we were right and, for the most part, won those.

But I think where we go after a settlement with no chance of winning, we ire the courts. We bring about increased attorney's fees. Our attorneys don't work for anything either, plus all the time it takes from our staff, and they are always key staff, to appear in court.

Under the provisions of STOP, as you have heard, they self-destruct every 2 years, and I can tell you after 42 years in corrections and 18 heading State departments, you don't get things corrected in 2 years. It takes several years, usually, to deal with the matters that get brought before the Federal courts.

We have a consent agreement in Delaware that is not before the Federal courts, but it has been around since 1988. We had hearings over the last 2 days, again, about a number of issues that for the most part I would generally agree need attention. We don't think we are in contempt of court. We don't think they are unconstitutional, and that is the argument with the judge.

But those things take time to resolve, and to have these things self-destruct every 2 years—and perhaps the suggestion earlier of a review would be a way to deal with that, but I think it will interfere with measured efforts to move forward. Quite often, we will go the legislature and we have to go with a 3-year plan, and sometimes it is a 5-year plan so they can allocate money over a longer interval of time. Judges have found those acceptable. The 2-year self-destruct, I think, is a problem and it increases our expenses.

It does require a commitment on behalf of the legislature to make these things work, and quite often we can't get their attention without some action by the court. So, again, I think the provisions of automatically terminating are a problem.

So how do we deal with this thing? I think our best approach, of course, is to have professional staff so they can do the job that has to be done in the prisons, and to do it in a way that we all want done. Professionals in corrections would then avoid having to deal with unconstitutional prisons. Again, it is a money problem, and quite often it is a training issue that has to be gone over and over and over again. The professional standards of the field require individuals to be trained every year. So it requires ongoing monitoring and if you miss, then it could be an issue that would have to go back to trial again, which I think is probably again a mistake.

An inordinate portion of our budget, I think, would be shifted to defending these suits and I think it would delay improvement if we did that. I think it stops courts from having access to more information in a timely way. I just have to say that when these issues have arisen, as a corrections person I have more to say about the court orders and the consent decrees than I do when it goes to trial. That is really an issue that gets up in the air.

When it is a consent decree, I go personally and our key staff sit down and say here is what is possible to do and here is the time schedule it would take to do it, contingent upon funding. If you go to trial, it is the lawyers taking over, and they argue legalities and they argue forever and it takes a long time to get these matters settled. I much prefer a consent order that I have had substantial say in what it looks like, when it happens, and how we are going

to do it. So I think that is a serious consideration that is lost by the STOP legislation.

These cases are complex. They are burdensome, they are politically sensitive. You read about them in the paper. They generate all kinds of mail going to the courts and to my office and to legislators and to everyone. I haven't found a judge yet that really likes them. I know the judge that we got so acquainted with in Portland, OR—after the hearing, we would often go to speak at the bar association or some organization and I would be introduced as the head of the department of corrections and he would introduce himself as really the head of the department of corrections.

That was really the way it was. His role became so involved. After hearing every detail of all those prison conditions and the testimony that was brought forth and the issues that were brought by experts from both sides, I think he was really an expert after the end of that trial after all those years.

I would close by saying that prisons are not a bastille anymore. At prisons all over the country, volunteers come by the hundreds. In our small State, about 500 volunteers a month come in. They help with things like education and religious services and vocational training, and on and on, and I think those individuals are entitled to assurance that the prisons are safe. I think they are safer with a ready access to consent decrees than if that issue was abolished, and again, good staff, a good grievance system, and finally access to the courts, if all else fails. I think passage of STOP would complicate this process and make it more difficult to settle legitimate claims.

I would just close by saying that prisons are not ideal places to live. They will always be subject to challenge. As a person who has spent 42 years in the field, I urge this committee to not make my job more difficult by taking away from the States this important tool. It is cost-effective and humane, and I think our goal to manage safe prisons and the right to settle these things at our option and go to trial when we have to and settle when we don't should be left alone.

Thank you.

[The prepared statement of Mr. Watson follows:]

PREPARED STATEMENT OF ROBERT J. WATSON

Good Morning. Thank you for giving me the opportunity to testify before this Committee regarding legislation that is currently under consideration by this Congress.

My name is Bob Watson. I am the Commissioner of Correction of the State of Delaware, a position I have held for over eight years. I have worked in the field of corrections for 42 years, beginning in Oregon in 1953 as a Correctional Officer in the State's maximum security prison. After working my way up through the ranks, I was appointed head of the Oregon Department of Corrections in 1976, a position that I held for 10 years before moving to Delaware.

I have also been an active member of a number of national corrections organizations, having served as President of the Association of State Correctional Administrators, Chair of the Commission on Correctional Accreditation, and Chair of the Congress of Correction. I am also a recipient of the American Correctional Association's E.R. Cass Correctional Achievement Award.

My purpose in being here today is to offer you my views regarding the "Stop Turning Out Prisoners Act," a bill known as "STOP." This proposed legislation is of serious concern to me for a number of reasons. First and foremost, it has the practical effect of depriving state administrators of the right to settle prison condi-

tions litigation by whatever means they consider most appropriate under the circumstances. This significantly compromises states' rights and creates an enormous potential fiscal impact on the states.

By prohibiting courts from approving and enforcing orders that do not include a finding of liability, STOP requires that almost all lawsuits involving conditions of confinement in prisons, jails and juvenile detention facilities will have to go to trial. This means that local government defendants cannot settle suits—even when they deem it to be in their best interests—without admitting liability and opening themselves up to countless actions for damages that they would be unable to defend.

The Oregon Department of Corrections was sued in the late 1970's regarding a variety of conditions of confinement. We spent nearly seven years in Federal Court defending the conditions that were alleged to be unconstitutional, giving many hours of testimony on each of the issues raised. We lost that lawsuit in part because the conditions were clearly unacceptable and in part because our own documents—for example budget requests, accreditation applications and our own professional attempts to make improvements—revealed that we were aware of the existing problems. Our state legislature has many priorities and prisons and detention centers are not always at the top of the list. For this reason, it is not uncommon for important requests for funding to be repeated year after year, underscoring our knowledge of the need for improvement. In that case, we spent tax dollars in defense of a situation that was not defensible and, in the end, the court entered an order that required necessary improvements to be made over time—a situation that in hindsight could have been achieved far less expensively and far more effectively through the negotiation of a consent decree.

In subsequent lawsuits that were filed during my ten years as head of corrections in the State of Oregon, we settled some issues and cases, and went to trial on those issues that the parties were unable to resolve by agreement. We settled when in our assessment we had no chance of winning, and by negotiating a settlement we avoided a finding of liability and minimized the financial burden on the State that would have resulted from trial, as well as from the countless damages actions that would have been filed by individual prisoners on the basis of a court finding of liability. The decision to litigate or to settle out of court without admitting liability should be left to state and local officials to make, not imposed on states by the federal government.

Under the provisions of STOP, judicial findings of liability will self-destruct every two years, requiring repeated full-blown trials on the merits. Thus, STOP will interfere with officials' measured efforts to eliminate unconstitutional conditions and will result in huge expenditures of money and judicial resources. Many of the improvements that are required to bring conditions up to constitutional standards take years to implement. They also require a commitment on behalf of legislators to provide the necessary funding. A two-year limit on court ordered relief will create a tendency to delay necessary improvements, adopt only temporary fixes, and/or devote all of the Department's resources to litigating the same issues over and over every two years.

By way of illustration, federal lawsuits often challenge a prison's staffing component by claiming, for example, that there are insufficient correctional staff to safeguard prisoners from violence at the hands of other prisoners. However, if a court orders a remedy for this problem, and the state elects to hire additional staff, but does not require the staff to undergo an adequate training program, we can make a temporary fix, which will do nothing to solve the underlying problems. In the short term this may appear to save money. In the long term it will lead to more litigation and far greater expense. Tax dollars that would have to be spent on the repeated defense of prison conditions suits that would result from temporary fixes would be much more effectively spent on implementing long-term, well-planned improvements.

Professional corrections staff do not want to run unconstitutional prisons. They want to improve conditions where necessary but will be undermined in their attempts to do so if their state legislators and Department of Corrections are required to divert a significant portion of the Department's budget to defending cases that should be settled.

Various of the STOP bill's other provisions are equally misguided. As a result of the intervention provisions in this bill, corrections officials, state and local executives, and State Attorneys General will lose control of litigation. Local sheriffs, district attorneys, or individual legislators who intervene as defendants can turn good faith, coordinated efforts to meet constitutional requirements into political circuses.

STOP also deprives courts of the benefit of court monitors appointed to monitor compliance and serve as mediators during the remedial stage. Magistrates are not permitted to perform these functions and, as a result, courts and states' attorneys

will be required to conduct repeated compliance hearings. Most monitors that are appointed by the courts have significant corrections experience or expertise in the specific areas covered by the court order—for example medical care—and can work with corrections officials during the remedial stage, offering practical suggestions and working out problems based on their expertise in the area in questions. This vital role of court-appointed monitors would be lost if this provision of STOP were enacted. The attorney's fee provision of the bill would exacerbate this problem by limiting plaintiffs' attorneys' role in the remedial phase of litigation—a loss of expertise at a crucial stage in prison conditions litigation and a significant erosion of the nation's commitment to safeguarding the civil rights of all persons.

STOP would also seriously impede the federal judiciary's ability to enforce the constitutional and statutory rights of adults and juveniles by removing the power to issue emergency relief. Federal courts do not willingly become involved in the operations of prisons and jails—these cases are complex, burdensome, politically sensitive, generate a lot of prisoner mail, and continue for a much longer period of time than most litigation. In all my years in the correctional field, I have yet to come across a judge who likes these cases. Nonetheless, the courts perform an essential role in protecting the rights of prisoners. The importance of this role is even more pronounced in the context of emergency life and health-threatening conditions. A court must be able to respond to a proven emergency, such as a TB outbreak, without holding a full-blown trial. The power of the courts to act quickly without the delay of a trial, when there is an imminent danger, is one of the most important safeguards offered by our legal system. Restricting the ability of the courts to respond to such emergencies raises not only civil liberties concerns but also serious management problems for those of us working in the corrections field.

A prison is not an isolated bastille populated solely by prisoners and staff. Due to limited funding, and efforts to bring the community into corrections, members of the local community visit prisons on a daily basis to assist with church services, the provision of educational and vocational programs, and an array of other programs. In Delaware, more than 500 volunteers visit our prisons each month. In larger states with similar policies, the number of volunteers could be in the thousands. We owe the protection of the courts to all those inside our prisons and to the communities to which they return.

We are also responsible for the safety and security of these volunteers, as well as that of staff and prisoners. STOP will make our job more difficult in this area as well. Good prison management requires an effective and respected process for the resolution of prisoners' claims. An orderly process for the resolution of claims helps to relieve the frustration and anger of prisoners who feel they have genuine problems that require resolution. Well-trained staff are the first step in responding to legitimate prisoner claims; a formal grievance system is the second step. Overloaded state and federal courts are already insisting that states implement certified grievance systems that reduce the courts' workload by resolving prisoners' claims out-of-court. The final step, when all else fails, is for the prisoner to sue the governor and corrections staff in court. Passage of STOP would complicate this process by making it more difficult to settle legitimate claims out-of-court and by diverting scarce tax dollars from the important areas of staff training and prison maintenance to litigation, thereby adding to the inevitable tensions of prison life.

This proposed legislation is extremely costly and comes at a time when tax dollars are particularly scarce. The Judicial Impact Office of the Administrative Office of the U.S. Courts has estimated that the potential annual resource costs of STOP could be more than $239 million and 2,096 positions, of which at least 280 would be judicial officers. At least $95 million could be incurred if just 50 percent of existing prison conditions consent decrees and court orders were refiled in federal court subsequent to their termination under this bill. Many more millions of dollars in resource costs could be incurred by the judiciary if all the plaintiff members of a class were required to testify as to how the alleged prison conditions affected them specifically. On top of all of this are the countless dollars that states will be required to expend to conduct a trial in almost every case, and every two years thereafter. The vast majority of these expenditures would be for no good purpose and could be saved by leaving well enough alone.

Prisons are not ideal places to live, and they should not be. However, conditions will always be challenged, sometimes with good cause. As a person who has spent 42 years in the field of corrections, eighteen of which have been spent heading up departments in two states, I urge this Committee not to make my job more difficult by taking away from the states an important tool in the cost-effective, humane, and safe management of our prisons—the right to settle litigation when we determine it to be in our own best interests.

Senator ABRAHAM. Thank you very much, Mr. Watson.

Last but not least, Mr. Martin, and thank you for your indulgence and patience here today.

STATEMENT OF STEVE J. MARTIN

Mr. MARTIN. Good afternoon, Mr. Chairman and Senator Biden. A housekeeping matter. May I likewise move my written statement to be part of the record?

Senator ABRAHAM. It will be so included.

Mr. MARTIN. Then one additional request, if it doesn't violate protocol. I have some correspondence from colleagues in Texas, former board members and a former director of the Texas prison system, that I think would be relevant and helpful to the committee. If I could also move that?

Senator ABRAHAM. Without objection, they will be entered into the record.

[The correspondence referred to follows:]

RAYMOND K. PROCUNIER,
Gardnerville, NV, April 19, 1995.

Hon. ORRIN G. HATCH,
U.S. Senate,
Washington, DC.

DEAR SENATOR HATCH: I urge you to read this letter with care as it is based on my more than 40 years of experience in the field of corrections. I served as Director of Corrections in California from 1967 to 1975 under then-Governor Ronald Reagan. I also have served as Director of Corrections in Utah, Virginia, and Texas. In Texas and California. I managed the two largest state prison systems in the United States.

I am not soft on crime, and I am not soft on corrections conditions. I support the death penalty, for example, and have presided over executions in Virginia and Texas.

I am writing about two pieces of critically important legislation that are pending before the United States Senate and that are of enormous importance to American correctional professionals.

One of these is section 103 of S. 3, introduced by Senator Dole and others. Section 103 corresponds to Title II ("Stopping Abusive Prisoners Lawsuits") of H.R. 667, which the House of Representatives has passed. Section 103 would reduce frivolous or malicious individual lawsuits filed by prisoners. Based on my experience in corrections, passage of this legislation will reduce the financial resources dedicated to unnecessary litigation, reduce the time corrections officials waste in court, and improve the operation of inmate grievance systems. Therefore, I strongly urge you to vote *in favor of* section 103.

Just as strongly, however, I urge you to vote *against* S. 400, which is pending before the Senate Judiciary Committee and which has not yet been incorporated into S. 3. S. 400 ("Stop Turning Out Prisoners") is identical to Title III of H.R. 667, which the House of Representatives has passed. Unlike section 103 of S. 3, however, S. 400, if passed, will be harmful to corrections.

S. 400 would:

- deprive federal and state courts of jurisdiction to enforce existing or future consent decrees in class actions involving prison and jail conditions;
- cause the court's remedial decrees to automatically self-destruct every two years, requiring class actions to be re-litigated every two years;
- permit any federal state, or local official who "is or may be affected" by class action litigation involving prison conditions to intervene as a defendant;
- prohibit any state or federal court from issuing preliminary relief (*e.g.*, a temporary restraining order or a preliminary injunction) until a full trial on the merits of the action has been completed; and
- eliminate, for all practical purposes, the court's authority to appoint a special master or court monitor to engage in informal monitoring and mediation processes, even when State officials determine the appointment of such a court monitor is in the State's best interests.

I believe that good prison administrators avoid litigation by running lawful and professional correctional institutions and systems. If they do this, they avoid the need to enter into consent decrees. Indeed, as Director of Corrections in four systems, I have not been required to negotiate and enter into a consent decree to settle class action litigation.

On the other hand, I have served in systems (Texas being the best example) that had fallen below constitutional standards before I became Director. I also have served in systems that had settled class action litigation through consent decrees before my appointment.

I do not argue that all class action lawsuits against prison officials are meritorious. I also have seen some consent decrees in which State officials agreed to terms they should have refused. Unfortunately, however, many lawsuits are valid. I have testified in some lawsuits on behalf of prisoners, and for the state in others. Most important, when meritorious suits are filed, it is imperative that State officials, including the Director of Corrections, maintain control of the litigation. When they deem it appropriate to do so, these officials must be permitted to settle a case by entering into a consent decree.

Thank you for reading this letter and considering my views. The issues I have discussed are of vital importance to the American corrections profession.

I urge you to *support* section 103 of S. 3.

I urge you to *oppose* S. 400, whether it becomes part of S. 3 or is offered as an amendment during floor debate on S. 3.

Sincerely yours,

RAYMOND K. PROCUNIER.

HARRY M. WHITTINGTON,
ATTORNEY AT LAW,
Austin, TX, July 19, 1995.

Hon. ORRIN HATCH,
Chairman, Senate Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: From 1979 to 1985, during the ten-year *Ruiz* litigation, I served as a member of the Texas Board of Corrections, and I was the liaison between the Board, the State Attorney General and the Special Master appointed by the Federal Court. In this role I participated in extensive negotiations which led to the settlement of the class action suit brought by inmates to enforce their constitutional rights against the State of Texas.

Though my legal practice in Austin, Texas, since 1950 had not included any civil rights matters, I soon learned that the State of Texas was exposed to serious liability for the manner in which it had been operating its prisons. Much of the information I obtained came from my own investigation of the treatment inmates were receiving, and I was astounded to learn that so many state officials were either unaware of the prison conditions or unwilling to recognize the obligation of Texas under the U.S. Constitution.

In recent years I have observed that most political candidates in Texas are basing their campaigns on "law and order" and attempting to discredit all or us who had any part in the settlement of the *Ruiz* litigation. Most of the politicians have failed to understand the complex issues which were involved and also have very limited knowledge of the operational aspects of correctional institutions. Anyone who was familiar with Texas prisons and wanted to see them operated in a safe, humane and constitutional manner would agree that the needed reform would not have occurred without the intervention of the Federal Court.

As I read Title III of House Resolution 667, I am concerned that such legislation is no more than an attempt to allow states to flaunt the U.S. Constitution under the guise of preventing the early release of convicted felons. Moreover, this legislation would seriously impede the progress which correctional institutions have already made throughout the nation. I am disappointed that my two friends and fellow Republicans from Texas are supporting the bill which has been incorrectly titled as the "Stop Turning Out Prisoners" Act.

The last time we met in Austin you helped us elect Chief Justice Tom Phillips to the Supreme Court of Texas. He is running for re-election and so far does not have an opponent.

I hope to have the opportunity to see you again soon when I am at Snowbird.

Best regards.

Yours very truly,

HARRY M. WHITTINGTON.

ROBERT D. GUNN,
PETROLEUM GEOLOGIST,
Wichita Falls, TX, July 24, 1995.

Hon. ORRIN HATCH,
Chairman, Senate Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: I am a longstanding, active supporter of the Republican party in the State of Texas. In 1981, Governor William Clements appointed me to serve on the Texas Board of Corrections, the governing agency of the Texas Department of Corrections. I was a member of the Board for five years, and served as Chairman from 1983 thru 1985.

It is from these perspectives that I am writing to urge you and the other members of the Senate Judiciary Committee to oppose S. 400, popularly known as the Stop Turning Out Prisoners Act (STOP). In brief, this proposed legislation, if enacted, will create chaos in state correctional systems that are attempting to operate lawfully while discharging their duties to protect the public.

As you may know, Texas was the site of a prison-condition class action called *Ruiz* v. *Estelle*. Until I became a member of the Board of Corrections, I did not realize the depth of the problems in the correctional system in Texas. To name a few, inmates performed the function of guards, three or four prisoners lived together in 45 square feet cells, prisoners were brutalized by other inmates and by staff, and living conditions—by any standard of measurement—were generally intolerable. What is most important is that TDC officials, having misled the Board and the Attorney General for a time, attempted to defend these conditions and surely would not have corrected them but for the intervention of the federal court.

Following a finding of unconstitutionality (after a trail of more than 150 days), the federal court appointed a special master. One of the primary functions of the special master was to help the Board and agency officials negotiate, rather than litigate, remedial plans that were acceptable to the State. Through this informal process, the State of Texas gained much more than it would have through continued litigation.

Without questions, the efforts of the Board and the Governor would have been adversely affected had county sheriffs, troubled by TDC's necessary steps to control its population, been permitted to intervene as defendants in the lawsuit. We and the Attorney General of Texas would have lost all control over the litigation.

Finally, nothing of value could have been accomplished in *Ruiz* if the State had been required to go back to court every two years. Although one can argue that we could simply have repeated admissions of liability to avoid this problem, concerns about the extend of the State's legal exposure, as well as the realities of practical politics, would have forced renewed conflicts in court.

Ruiz was a painful experience for the State of Texas. We emerged from that lawsuit, however, with a constitutional and better managed Department of Corrections. In the last analysis, the court and the special master were not our adversaries, and their cooperation and patience with our efforts redounded to the benefit of our state.

I hope that you and your fellow committee members will take these views into account as you consider this uninformed legislation. Frankly, I would not have expected a bill of this kind to be supported by any senator or congressman truly committed to leaving state concerns in the hands of appropriate state officials, subject only—of course—to the rule of the Constitution we all revere.

Sincerely,

ROBERT D. GUNN.

CONSORTIUM FOR CITIZENS WITH DISABILITIES

Dear Senate Judiciary Committee Member, On behalf of America's people with disabilities, we urge the members of Congress to stop the so-called STOP bill ("Stop Turning Out Prisoners "), S. 400/Title III. H.R. 667.

The bill would drastically undermine protection of the rights of many people with disabilities, both physical and mental; limit the discretion of responsible officials; and overload the courts.

It would "stop" reasonable protection of the rights of people with disabilities in instances such as the following, all of which illustrate actual conditions cases brought under federal law:

- Provision of minimally adequate medical and mental health services, including suicide prevention, in juvenile facilities, jails and prisons.

- Provision of special education for young people with developmental disabilities who are confined in juvenile facilities, jails and prisons.
- Protection of the rights of people who are deaf to fair treatment and equal access to rehabilitation in juvenile facilities, jails and prisons.
- Promoting effective access to such basic facilities as toilets and bathing, and access to rehabilitation programs by confined people with mobility impairments.
- Provision of adequate protection against the spread of tuberculosis, which is easily transmitted in the institutions and poses a particularly deadly threat to those with compromised immune systems.

The bill would undermine the following protections:

- The courts ability to grant emergency remedies when warranted by such urgent conditions as epidemics.
- Consent decrees resulting from settlement agreements regarding alleged substandard conditions in juvenile facilities, prisons, and jails. Settlement agreements deliberately avoid admissions of a violation of law. Hence, government officials are more willing to enter into settlement agreements to avoid exposing themselves to alleged violations. They would rather improve conditions than be required to pay money damages. To date, hundreds of cases have been settled without having to be tried.
- The ability to discover violations, making future enforceable settlements impossible to achieve.
- Court orders would be limited to two years, even after trial, requiring retrial of cases that have been resolved if more than two years are needed to achieve compliance with the law. Two years is often not long enough to achieve compliance in institutional cases.
- The role of court-appointed masters in enforcing orders in conditions cases, grossly tying up the time of courts which rely on masters as their monitors.

This bill would have the effect of placing people in juvenile facilities, jails and prisons further outside the protection of the law than they are today. It would virtually abolish the ability of responsible officials—federal, state and local—to settle conditions cases when they feel it is wise to do so. It would multiply the workload of the courts.

We are joined in other letters opposing "STOP" by a long list of people and organizations not among the "usual suspects" on prisoners' rights matters. They include Michael Quinlan, who headed the federal Bureau of Prisons under Presidents Reagan and Bush; present and former correction commissioners of Idaho, Minnesota, Oklahoma, Washington and Wisconsin; the American Bar Association; the American Friends Service Committee; the Asian Law Caucus; the Bishop of the Episcopal Diocese of New Jersey; the Lutheran Office for Governmental Affairs, ELCA; the National Black Police Association; The National Center for Lesbian Rights; the National Conference of Black Lawyers; the National Commission on Correctional Healthcare; the National Muslim Political Action Committee; the Union of American Hebrew Congregations; and the United Methodist Church, General Board of Church and Society.

We urge you to oppose the "Stop Turning Out Prisoners Act." Thank you for considering our views on this critical issue.

Stop STOP!

Sincerely,

Bazelon Center for Mental Health Law,
National Parent Network on Disability,
Federation of Behavioral Psychological and Cognitive Sciences,
National Association of School Psychologists,
National Association of Protection & Advocacy Systems,
American Association on Mental Retardation,
Justice for All,
Paralyzed Veterans of America,
National Association of Developmental Disabilities Councils,
The Learning Disability Association,
National Mental Health Association,
National Head Injury Foundation,
American Psychiatric Association,
National Association of Social Workers,
American Psychological Association.

March 9, 1995.

DEAR SENATOR,

We urge you to oppose the "Stop Turning Out Prisoners Act" ("STOP ") (S. 400; Title III of H.R. 667). The STOP bill violates the guiding principle of this country that all people, even the least deserving, are protected by the Constitution. This legislation would create a dangerous precedent for stripping constitutional rights from groups of individuals who are in public disfavor.

The bill seeks to deprive the federal courts of the power to remedy proven constitutional and statutory violations. It requires the termination of judgments two years after issuance, regardless of whether the underlying violation is ongoing. This provision would prohibit a court from continuing to enforce a court order even in the face of an ongoing tuberculosis epidemic that threatens staff and prisoners. Similarly, the legislation deprives the courts of their power to issue temporary emergency orders in appropriate circumstances. Equally unwise is the provision that usurps the traditional power of the courts to appoint special masters.

Furthermore, the bill calls for the immediate termination of all settlement agreements, known as "Consent Decrees," in prison and juvenile conditions cases and prevents parties from entering into such Decrees in the future by requiring a court to make constitutional findings before approving agreements. Since the purpose of settlement is to remove the need for such findings, the bill essentially prevents settlements in these cases. This would necessitate the reopening of final orders in numerous cases around the country and would force states and municipalities to litigate cases that they would prefer to settle, thereby increasing their expenses and exposure to a fee award. States and municipalities are entitled to determine their own best interests. Similarly, the provision that amends 42 U.S.C. § 1988 to limit the fees that can be awarded to plaintiffs' attorneys forbids a state or municipality from entering into a settlement agreement that includes a fee provision. States and municipalities are entitled to conclude that such an agreement is preferable to the exposure to a far greater fee award after trial. The bill would also significantly increase the burden on the federal courts by necessitating a lengthy trial in each and every case.

We urge you to oppose the "Stop Turning Out Prisoners Act." Thank you for considering our views on this critical issue.

Sincerely,

THE UNDERSIGNED ORGANIZATIONS AND INDIVIDUALS:

Organizations

Alabama Prison Project,
Alliance for Justice,
American Civil Liberties Union,
American Friends Service Committee, Pacific Mountain Chapter,
Asian Law Caucus,
Berkeley Constitutional Law Center,
California Lawyers for Civil Rights,
Center for Community Alternatives,
Citizen's United for the Rehabilitation of Errants (CURE),
Come Into the Sun,
The Correctional Association of New York,
Criminal and Juvenile Justice International,
Criminal Justice Consortium,
Criminal Justice Policy Foundation,
D.C. Prisoners' Legal Services Project, Inc.,
Delaware Council on Crime and Justice,
Families Against Mandatory Minimums,
Florida Academy of Public Interest Lawyers,
Florida Justice Institute,
Fortune Society, Inc.,
Justice Services Program, Travellers' Aid Society of Rhode Island,
Juvenile Justice Center,
Koinonia Prison and Jail Project,
Kolodinsky, Berg, Seitz & Treeher, Daytona Beach, Florida,
Legal Aid Society of the City of New York,
Legal Services of Louisville,
Legal Services for Prisoners, Inc.,
Legal Services for Prisoners with Children,
Lewisburg Prison Project,
Louisiana Crisis Assistance Center,

Lutheran Office for Governmental Affairs, ELCA,
Lynn, Scott, Hackney & Sullivan, Boise, Idaho,
Massachusetts Correctional Legal Services,
Middle Ground Prison Reform,
National Association of Criminal Defense Lawyers,
National Black Police Association,
National Center for Institutions and Alternatives,
National Center for Lesbian Rights,
National Conference of Black Lawyers (NACDL),
National Council on Crime and Delinquency (NCCD),
National Islamic Prison Foundation,
National Lawyers Guild, PA Chapter,
National Legal Aid and Defender's Association (NLADA),
National Muslim Political Action Committee,
National Prison Project of the American Civil Liberties Union Foundation,
National Network for Women in Prison,
National Rainbow Coalition,
National Women's Law Center,
Nevin, Kofoed & Herzfeld, Boise, Idaho,
New Jersey Association on Correction,
New Jersey Prisoner Self-Help Clinic,
Patterson, McHugh & Cautz,
Pelican Bay Information Project,
Pennsylvania Legal Services, Institutional Law Project,
Prisoners' Legal Services of New York,
Prison Law Office, San Quentin, CA,
Project COPE (Congregation Offender Parnership Enterprise),
Public Advocates,
Robinson & Quintero, New Mexico,
Rosenthal & Drimer, Syracuse, New York,
The Sentencing Project,
Southeast Mississippi Legal Services,
Southern Center for Human Rights,
Southern Poverty Law Center,
Spriggs & Johnson, Tallahassee, Florida,
Union of American Hebrew Congregations,
The United Methodist Church, General Board of Church and Society,
The Women's Prison Association,
Youth Law Center,

Current and Former Correctional Administrators

Warren Benton, former Commissioner of Corrections for the State of Oklahoma,
Allen Breed, former Director of the National Institute on Corrections of the Department of Justice and criminal justice consultant,
Robert L. Cohen, M.D., former Medical Director of the New York Detention Facility, Rikers Island,
Walter Dickey, former Commissioner of Corrections for the State of Wisconsin,
Michael Hennessey, Sheriff of the City and County of San Francisco,
Patrick McManus, former Secretary (Commissioner) of Corrections for the State of Kansas and Assistant Commissioner of Corrections for the State of Minnesota,
Dr. Jeffrey Metzner, former Chief of Psychology, Colorado State Penitentiary Eugene Miller, prison and jail security expert, former Director of Jail Operations Project for the National Sheriffs' Administration and former corrections facilities administrator for Alaska Division of Corrections,
J. Michael Quinlan, former Director, Federal Bureau of Prisons,
Chase Riveland, Secretary (Commissioner) of the Department of Corrections for the State of Washington,
Steven M. Safyer, M.D., former Medical Director of Montefiore-Rikers Island Health Services, New York City,
Ellen Schall, former Deputy Commissioner of New York City Department of Corrections, and former Commissioner of New York City Department of Juvenile Justice,

Dr. Steven S. Spencer, former Medical Director of the Corrections Department for the State of New Mexico,
Richard Vernon, former Director of Corrections for the State of Idaho

Other Individuals

Douglas Reed Ammon, Pensacola, Florida,
Michael Barnhart, Attorney, Detroit, Michigan,
Lynn Blais, University of Texas School of Law,
Jeffrey O. Bramlett, Attorney, Atlanta, Georgia,
Mark R. Brown, Stetson University College of Law, St. Petersburg, Florida,
Benjamin Currence, Attorney, U.S. Virgin Islands,
Michelle Deitch, Attorney, Austin, Texas,
Mark Donatelli, Attorney in New Mexico prison litigation,
The Right Reverend Joemorris Doss, Bishop of the Episcopal Diocese of New Jersey,
Dan Foley, Attorney and Hawaii Corrections Expert,
Yale T. Freeman, Attorney, Miami, Florida,
Stacy Gillman, Attorney, Sarasota, Florida,
David Glantz, Attorney, Miami, Florida,
Ralph Goldberg, Attorney, Atlanta, Georgia,
Michael Keating, Attorney and Corrections Expert,
Eric Latinsky, Attorney, Daytona Beach, Florida,
Douglas Laycock, University of Texas School of Law,
Dan Manville, Attorney, Detroit, Michigan,
John B. Morris, Jr., Attorney, Washington, D.C.,
Richard Rosenstock, Attorney, Santa Fe, New Mexico,
Scott Rudnick, Attorney, Susquehanna Legal Services, Pennsylvania,
The Reverend Theodore Schroeder, Evangelical Lutheran Church in America, St. Louis, Missouri,
Joseph Schuman, Leader, Ethical Culture Society, Bergen Co., New Jersey,
Kim Scouller, Attorney, Louisville, Kentucky,
Jeffrey Segall, SE Regional Vice President, National Organization of Legal Services, Workers, Local 2320, UAW,
Brenda Bernstein Shapiro, Attorney, Miami, Florida,
Robert Smith, Attorney, Orlando, Florida,
Thomas M. West, Attorney, Atlanta, Georgia.

February 8, 1995.

DEAR CHAIRMAN HATCH AND MEMBERS OF THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE: I am writing to express opposition to the "Stop Turning Out Prisoners Act," Title III of H.R. 667. In my capacity as the director of the Federal Bureau of Prisons from 1987 to 1992, I have been intimately involved in prison conditions litigation. No administrator wants to operate an unconstitutional facility. The community, staff and prisoners alike are better served when we assure minimally decent conditions in our nation's prisons. My experience, as well as the experience of correctional administrators around the country, is that prison conditions litigation has often helped administrators improve conditions in their facilities.

I believe that the bill is extremely misguided for two reasons. First, by requiring a court to make factual findings before approving a Consent Decree, the bill essentially prevents federal, state, and other governmental entities from entering into settlement agreements in prison conditions litigation. These entities are entitled to determine that settlement is in their best interests. Requiring them to go to trial, and thereby exposing them to a much greater attorney fee award, encroaches on their autonomy. Preventing states from settling, once they have determined it to be in their best interests, is bad policy.

Second, the provision that requires federal courts to use Magistrates instead of special masters or monitors in prison conditions litigation is extremely impractical. Masters and monitors serve an extremely important role in prison litigation; their duties are complex and time consuming. These individuals have typically worked in the correctional field for several years and have developed expertise in correctional management. Replacing them with Magistrates who are already overworked and have no special expertise in prison management would create inordinate delays, misguided correctional policy, and an onslaught of further litigation.

I urge you to oppose this bill or, at a minimum, to hold hearings at which the views of correctional administrators and others can be heard. Thank you for consideration of my views.

Sincerely,

J. MICHAEL QUINLAN.

Mr. MARTIN. I really appreciate the opportunity to make this appearance because I think that what is under consideration before you in terms of the STOP Act really puts us on the edge of a very seminal point in the history of American corrections, certainly, in the last half century.

I say that because of this. The honorable D.A. from Philadelphia made reference to there were no prison system cases before 1970. I believe she said there were no systems under court jurisdiction. A very ready answer for that, a very plausible answer for that—that is because of a case that was handed down by the tenth circuit in 1954, styled *Banning* v. *Looney*, which basically stood for the proposition that Federal courts were not empowered to intervene in the affairs of prison matters, and that became known as the hands-off doctrine. The hands-off doctrine remained firmly in place through about the 1970's.

Now, what is interesting, and I believe very notable for this committee, and I would urge you revisit or to acquaint yourselves with it, is what happened when the insulating effect of the hands-off doctrine was removed. It subjected prisons across this country to judicial scrutiny. What, in turn, did that judicial scrutiny produce? Well, it produced a litany of horrific conditions that anyone that is involved in this area under consideration of this act should become acquainted with.

We have had a number of horrific statistics set out before us. We have had the horrible tragedy of Mr. Boyle, and my heart certainly goes out to you, as I think any right-minded person would. But I would remind this committee that there was a litany of horrific conditions that emerged from conditions litigation in the 1970's and 1980's.

Just a few brief examples, but hopefully they are colorful enough that they will illustrate that serious and horrific conditions likewise existed when these systems were insulated from scrutiny. You had the Tucker telephone in Arkansas. You had inmates in Mississippi that routinely carried and wielded shotguns with live rounds, and frequently fired that lethal weaponry at other inmates. We had the bat in Texas, which was a huge piece of oak that officers used. Corporal punishments were the rule of the day. Inmates routinely died from inadequate health care. Conditions were such that infectious disease was routine.

The spate of litigation during that time—I believe most of the commentators and scholars familiar with this area of law would agree that the judicial intervention brought about the reform to a large extent of American prisons across this country, and that is why there was some reference made that 43 States had active cases. Well, you have to ask yourself why? How did that come about? You cannot put it all in terms of renegade activist judges. You cannot put it in terms of renegade irresponsible plaintiffs' attorneys. There had to be a basis in fact; factual findings had to be entered.

So what I would ask the committee is to visit the history of this issue, when the prisons were insulated from judicial review, because it is my view that the practical effects of some, if not all of these provisions will serve to insulate systems and jails from judicial scrutiny. Now, that may be the very intent. It is my impression, at least to some extent, that that is the precise intent of this legislation.

I would just urge a great deal of caution before you adopt—and I will speak to specific provisions momentarily—wholesale provisions across the board, regardless of the merit of a particular case. Let me just go into one quick example because it is fresh—the automatic termination of existing consent decrees. That provision, as written, treats all existing consent decrees alike.

I have been involved in corrections not nearly as long as the Commissioner from Delaware, but almost a quarter of a century. I have never seen two consent decrees or two sets of prisoner jail conditions alike. How in the world would you pass something that, in my view, is almost folly that says we are going to go and find every consent decree that exists in America in prison and jail operation and terminate them?

A lot of what has been said today has been couched in terms of population caps. Now, if this provision is directed at that, it is much too broad. It is going to catch up a lot of conditions that exist in prisons and jails that don't have anything to do with population caps. The point here is that a number of the provisions impress me as being overly sweeping, as being arbitrary.

For instance, I would urge the committee to demand or request why the 2-year period was selected for the consent decree revisit. I mean, where did that 2 years come from? Again, I would agree with our colleague, Mr. Watson, that 2 years in the life of a large bureaucracy like a prison or a jail system is a very brief span of time.

These consent decrees and institutional reforms—I believe, again, most commentators would agree it is complex, it is methodical, and it is slow. So, at best, what you are going to be doing—if you have a commitment and you are moving forward with a compliance agenda, you are going to have needless interruptions that will slow that process down by its very nature.

Let me move quickly through some of the provisions to make my point on the insulation. The removal of special masters—again, Professor DiIulio out of his book recognized that in complex litigation of this type, they provide the eyes and ears of the court, and their on-site presence to assist the court, report to the court, et cetera. If you remove that on-site presence of the Federal court, you insulate that defendant governmental entity from possibly accurate reporting, possibly reports that are disguised. A number of things could happen, but the effect is an insulating effect.

The provision that prohibits the award of attorney's fees for plaintiffs' attorneys during the remedial phase of the litigation—again, plaintiffs' attorneys have a tremendous stake in the remedial effect. That is the essence of their case. They tend to be very diligent and very aggressive in providing direction and oversight. If you pass a provision wherein they will not be able to get attorney's fees, you have, in effect, made it very, very difficult for them

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to maintain that activity during the remedial phase. Again, the effect of that is to insulate the defendant governmental entity from that appropriate direction and oversight.

The last provision that I would like to specifically comment on is the prohibition of preliminary or emergency relief absent a finding, which would obviously require a full-blown hearing. I have been in institutions in which conditions were so severe that I believed that death was imminent. In one particular case, I observed a very, very crowded holding cell that I described later in court as a human carpet. A week after I made that observation, 4 inmates died, were taken to the hospital and died from an infectious disease outbreak. This provision, as I understand it, the way it is written, would have made it very, very difficult to have gone in and gotten a TRO or a preliminary injunction to have remedied that condition immediately.

So let me conclude my remarks by just simply urging that you not adopt provisions that are arbitrary and have an across-the-board, wholesale application. Number one, that will send, I think, the wrong message to many correctional administrators because I have got a suspicion here that we are at least on the edge of legislating to the extreme. We are hearing these cases of Michigan and Philadelphia, and I am not intimately involved with those and I have heard some things that I find very bothersome that the D.A. has said, and the gentleman from Michigan. But I have also been involved in hundreds of cases, like cases, over the past 15 years and those cases sound out of the norm to me.

I know there have been some representations made about the *Texas* case here today, but I don't know of an agency official, from the governor to the lieutenant governor to the speaker of the house to the board chairman to the director of prisons, sitting behind me, that has moved to rid themselves of the consent decrees in the *Ruiz* case. They are elected officials. They have not done so.

So my last point is that there are things that can be done in terms of expediting and eliminating some bizarre situations, but across-the-board, wholesale, arbitrary provisions, such as automatic drop-dead date after 2 years of a consent decree, I think, are very ill-advised and will be in the long term very counterproductive, if not set the stage for us to return to that time of the mid-century of the hands-off doctrine, which I would suggest was in part responsible for a lot of the extreme conditions we saw in the later decades of the 1960's and 1970's.

Thank you, sir.

[The prepared statement of Mr. Martin follows:]

PREPARED STATEMENT OF STEVE J. MARTIN

Good Morning. My name is Steve Martin. Thank you so much for inviting me to share with you my views regarding the legislation that this Committee has under consideration. I began my career in corrections in 1972 as a prison guard for the Texas Department of Corrections. After going to law school, I began working with the Department in various positions, among them Chief of Staff to the Executive Director of the Department I ultimately became General Counsel to the department and its governing board. I left in 1985 and joined the visiting faculty at the University of Texas School of Law, where I taught a seminar in institutional reform litigation. While at the law school, I also worked as a Special Assistant Attorney General advising that office on Correctional litigation matters. Since 1987, I have worked as

an attorney and corrections consultant on prison and jail litigation involving hundreds of confinement facilities across the United States.

My primary purpose here today is to urge you not to pass the Stop Turning Out Prisoners Act, otherwise known as "STOP." If passed, the bill will wreak havoc in states, counties, and Correctional systems across the Country. As a preliminary matter, unlike the "frivolous lawsuits" bill that is also under consideration by this Committee, STOP is directed at *all* adult and juvenile prison and jail litigation, even litigation that raises meritorious constitutional and statutory claims. No matter how egregious the conditions, no matter how valid the claim, the provisions of STOP will prevent states from settling litigation, will call for court orders to self-destruct every two years, and will disallow the use by Courts of special masters or monitors with expertise in prison operations.

In my capacity as General Counsel for the Texas Department of Corrections, I assisted in the defense of a longstanding piece of litigation known as *Ruiz* v. *Estelle*. I do not wish to devote the valuable time that I have been given here today to the details of the *Ruiz* litigation, but a brief description of the case will allow me to illustrate the grave problems with the STOP legislation. *Ruiz* began in 1972 with the filing of a civil rights action by eight prisoners detailing a wide variety of constitutional claims in a pro se pleading. At the time, the system was beset by high levels of prisoner-on-prisoner violence and staff brutality, inhumane medical care, and overcrowding so extensive that, at one time, prisoners were housed three and four to a 45-square-foot cell.

After a 1980 trial that took 159 days, Judge William Wayne Justice of the Eastern District of Texas issued a 248-page opinion finding that Conditions in the system were Unconstitutional. The Texas Department of Corrections appealed the ruling and, in 1982, the United States Circuit Court of Appeals for the Fifth Circuit affirmed *in toto* the court's factual findings but held in abeyance certain court-ordered remedies and affirmed others. The primary remedial framework in *Ruiz* was the result of a court-imposed decree. The much discussed consent decrees entered in the case were for the most part simply compliance plans to implement the court's remedial decree. After the 5th Circuit ruling, the plaintiffs moved for further relief, seeking to impose a single-cell requirement on the prison system, a requirement the appellate Court had held in abeyance. This prompted the parties to negotiate a major consent decree in which the system was allowed to double cell its general population inmates. In return for the double ceiling, the prison board agreed on pre-determined capacities at these particular prisons. Those critics of the caps in the Texas case often forget that a court imposed single-celling requirement, which we avoided by entering into a consent decree, would have reduced our capacity by half.

Notwithstanding this long and complicated history, I can say strongly and unequivocally that *but for* the sustained intervention of the federal court in the unconstitutional operation of the Texas prisons, the system would have continued to operate in the disturbing manner that I described Previously. Admittedly, in hindsight, there were many points along the path of the litigation at which the parties, and even the Court, might have conducted themselves differently. Most significantly the department could have elected to settle the litigation at the outset, rather than defending a system that was unlikely to pass constitutional muster. Instead, the State spent millions of dollars defending against the litigation, and was ultimately required to undertake measures that were similar to those proposed by plaintiffs at the outset.

This brings me to the first of my several concerns about this legislation—that it usurps what have heretofore been the prerogatives of state and local jurisdictions to determine that settling litigation is in their best Interests. If the State of Texas were to find itself in the same circumstance today that it was in at the time the *Ruiz* litigation was filed, the STOP bill would have *required* the State to expend millions of dollars on legal costs; the Texas Department of Corrections would not even have had the option of resolving the litigation by negotiating an agreement. The consequences of this are made worse by the fact that negotiated settlements, in my view, are better tailored to achieve remediation than court-imposed remedial schemes.

It is equally indefensible for Congress to legislate the termination of all existing settlement agreements—known as consent decrees—in prison conditions cases. I know all too well that consent decrees are the product of endless hours of negotiations between the parties, carefully tailored to a particularized set of actual circumstances. Simply terminating these decrees arbitrarily by legislative fiat will undo all of that work, and immediately require departments of corrections around the country to prepare for trial in each case that is affected.

The decision to settle a case by a consent decree must be left to correctional officials and State Attorney Generals who are familiar with the conditions in the sys-

tem or facility at issue. It is indefensible for Congress to simply strip the states of this option. To suggest that Congress would be doing the states a favor by passing this legislation is misguided. If a state wishes to go to trial rather than to settle a case, it has that option under current law. And if a state wishes to settle a case rather than to go to trial, it has that option too. I urge you to leave it this way.

I have been told that this legislation has been advocated for by the District Attorney in Philadelphia because a consent decree that applies to the Philadelphia jails has, she alleges, resulted in the release of some persons who would not have been released if the decree was not in place. I would like to inform the Committee that no court order or consent decree in the States of Texas, Washington, Colorado, or Wisconsin, that has capped populations in one or more institutions, has required that inmates be released earlier than the normal release at the conclusion of their sentence. Instead, the Legislatures in all four states responsibly provided additional capacity. This is true in most jurisdictions across the country. Those few jurisdictions suffering court-imposed early release conditions are generally those in which the funding bodies have refused to provide sufficient resources to meet constitutional minima. Indeed, it is my experience that Governors and Legislatures in states that have experienced prison disturbances or been subject to major prison litigation are more likely to be responsive to providing adequate resources.

The second of my concerns, related to the first, is the enormous fiscal impact that the bill would have on state and local governments. On its face, this bill misleadingly appears to relieve states and local jurisdictions of litigation; In fact, it would significantly *increase*, rather than decrease, the litigation expenditures that states will be required to incur. This is so because states and localities will be required to go to trial in every case, even in those cases that they believe they will lose.

It is important to realize that Departments of Corrections elect to settle those cases that they have determined they are likely to lose at trial. They do so because, if they go to trial and, as expected, the court finds that the plaintiffs' rights have been violated, that finding opens the door to numerous damages actions by individual prisoners, and precludes the system from mounting a defense. This bill would require a state to go to trial in almost every case, even those that the state knows it will lose, and consequently exposes the system to Countless damages awards. The Costs to the states that will result from those damage awards would far outpace the costs they presently incur by settling such litigation.

There are only two ways under this bill that a trial could be avoided, neither of which is satisfactory. First, a state could agree to a finding of liability that Was incorporated into the court order granting relief to the plaintiffs. Such a finding would create the same problems that I mentioned previously with regard to a post-trial finding of liability, namely, that it would expose the state to countless individual lawsuits by prisoners for damages, and the admission of liability would prevent the state from asserting a defense. For this reason, prison conditions settlement agreement do not include admissions of liability and, instead, typically include a provision to the contrary.

The other manner in which trial could be avoided would be if the parties agreed to settle the case with a non-enforceable settlement. The House of Representatives passed an amendment to the STOP bill that specifically exempts non-enforceable settlements from the bill's coverage. The Senate version of the bill does not include such an amendment but, even if one were passed, this option is problematic for several reasons. First, plaintiffs' attorneys are unlikely to agree to a non-enforceable settlement agreement precisely because it is non-enforceable. For example, in a juvenile facilities case in Colorado, the plaintiffs' attorneys recently turned down a settlement offer from the state because of the threat of the passage of STOP. Second, this solution only delays the manifestation of the problems with the bill. If a non-enforceable settlement agreement is not successful in resolving the disputes between the parties, the suit will simply be revived or reinstated by plaintiffs' Counsel, thereby creating the very same problems that discussed previously. Finally, a non-enforceable settlement is simply not a viable option in most cases, particularly where the defendants are resistant to remediation.

For these reasons, the bill will result in a trial being held in almost every prison and jail conditions lawsuit around the country. And after the state conducts the trial, it will have to do so again, and again, and again, every two years until the problems are fixed. This is because of the provision that calls for court orders to automatically self-destruct every two years. Institutional remediations by its very nature, is a slow process. The Texas prison system had literally institutionalized unconstitutional practices, some of which had been occurring for generations. Such practices are not eliminated without the enforcement of well designed remedial plans for a sustained period of time. At the very least, the Committee should require

an explanation as to why two years was selected, a figure that to me seems quite arbitrary. Having been involved for the last 15 years in prison and jail litigation, I can categorically state that I have never seen two cases alike. To apply a hard-and-fast two year rule to every case is, at best, counter productive and, at worst, pure folly.

I recognize the concern behind this bill that some prison conditions litigation seems to go on terminally. So that there is no confusion, I would like to let the Committee know the current law on consent decree modification and termination—law that I think should adequately address any reasonable concerns. The Supreme Court established in *Rufo* v. *Inmates of Suffolk County*, decided in 1992, that a consent decree can be modified if a change in circumstances warrants a revision. The year before, in *Board of Education of Oklahoma City* v. *Dowell*, the Supreme Court held that a court should dissolve a decree once a system has achieved compliance with the court's orders and is likely to remain in compliance. This body of law has resulted in the termination of many prison consent decrees; that others have remained in place for a long period of tame is no reason to change this law.

This is so because the longevity of prison conditions cases is by no means due to federal court resistance to releasing defendants; rather, the longevity of these cases depends on the extent to which a prison system resists the implementation of remediation. The Texas case offers a classic example of this phenomenon. The Texas prison officials for a time vigorously resisted implementation of the court's orders. In my view, had these officials known that the remedial decrees would terminate after two years, the reforms would have never been institutionalized or, at a minimum, the implementation would have been even more protracted and expensive than it was because the Department's resources would have been significantly impaired by the requirement that they litigate the issues in Court every two years. These resources are much more wisely and effectively spent on remedying the infirmities of a system.

I would like to briefly address some of the other problems with this bill Section (a)(1) of the bill is extremely vague and, at a minimum, should be clarified. In its current form, it suggests that a court will have to hear from every single class member before the court will be able to issue relief that affects the class. If that is what is intended by the legislation, its absurdity cannot be overstated. The class action device was designed precisely to avoid this consequence, not to mention the amount of time and resources that a state would need to devote to even a single case. It is beyond dispute that there are facilities in this country that are beset with unconstitutional conditions that affect all prisoners housed in the facility. Indeed, the class action rule under which these cases are typically brought—Federal Rule of Civil Procedure 23(b)(2)—already requires, as a prerequisite to certification of the class, that the court find that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." In such circumstances, that purposes will be served by requiring the defendants, and a federal court, to hear testimony from every single inmate?

This same section, section (a)(i), would also prevent a Court from issuing any relief until after it finds a violation of law, thereby preventing a court from entering any form of emergency relief, such as a temporary restraining order or a preliminary injunction. Emergencies arise in prison operations, and terrible consequences could result if the federal courts were stripped of the ability to respond appropriately, for example, to an imminent tuberculosis outbreak. I have been involved in litigation in which no emergency relief was granted and inmates literally died from infectious disease. I have been in cellblocks in which crowding was so extreme that inmates formed a human carpet. Conditions such as these do not abate with the passage of time.

The provision that for all practical purposes eliminates a court's authority to appoint a court monitor to engage in informal monitoring and mediation of the remedial process would likewise severely retard implementation of the court's remedial orders. It is important to remember that prison conditions cases are often particularly complex. Again, using the Texas litigation as an example, prison officials early on during the remedial phase, repeatedly concocted superficial remedial plans, some of which were intended to continue the very practices that the Court had ordered to be ceased. The Court monitor, who was actually on-site to monitor these plans, was able to accurately report on remediation and to detect those instances in which facially valid plans were inadequate. The on-site presence of a court representatives was clearly critical in the Texas litigation, especially during times when prison officials were defiant of the Court's orders.

Admittedly, some court monitors and special masters in prison conditions cases, as in other types of cases, may have abused their position. But legislate against

those abuses; don't legislate against the use of masters and monitors altogether. For example, this Committee may wish to consider passing legislation that requires the federal courts to issue an Order of Reference for each appointment that limits the monitor's duties and compensation and requires the monitor to submit periodic reports, at intervals established by the court, regarding his or her fees and expenditures for approval by the court; and the Committee may wish to consider passing legislation that requires the federal courts to give the parties an opportunity to object to the findings, recommendations, fees or expenses of a court-appointed monitor. Simply forbidding the use of monitors altogether would deprive the courts of the vital assistance provided in these cases by individuals with special expertise in prison operations. This provision brings to mind the old adage of "throwing out the baby with the bath-water."

Another provision of the STOP bill that would clearly have adversely affected the Texas litigation is that which prohibits court-awarded attorneys' fees for work done during the remedial phase. As I have often said in writing and speeches over the years, institutional prison reform cases are not won or lost in the courtroom, but rather, in the remedial phase. Complex remediation requires vigilant and sustained direction. Such direction can best be provided by attorneys representing the plaintiff class. Had the plaintiffs' attorneys been effectively prevented from providing direction, due to their inability to recover fees for their work, the remedial framework that was ultimately implemented would have been significantly compromised.

Finally, the provision that allows wholesale intervention by any party potentially affected by any relief limiting a prison's population will clearly cause litigation of this nature to be more costly and protracted. More importantly, it will require federal courts to become immersed in the entire spectrum of local criminal justice affairs, a result that even the proponents of STOP would take issue with.

I would not represent myself as a constitutional scholar, but I know from the reading that I have done thus far, that there are legitimate claims of unconstitutionality that would be fertile ground for litigation for many years to come. Attached to my testimony is a letter signed by 250 constitutional law professors asserting that the STOP bill raises serious constitutional concerns, as well as an analysis done by a local law firm called Covington & Burling that reaches the same conclusion. The uncertainty that will result while the constitutionality of the legislation is being litigated will cause a great deal of confusion regarding, for example, whether a consent decree will be honored, whether a court order remains in effect, and whether states will have to devote the majority of their Department of Corrections' budgets to litigation efforts.

In summary, it is my opinion that this bill unfairly and unwisely strips states and localities of the right to respond appropriately to litigation regarding their own correctional systems. The only option that this bill leaves to the states—going to trial in most, if not all, cases—is an extremely expensive one. And by depriving the federal courts of the traditional tools they have used to ensure compliance with their orders—such as the appointment of special masters with special expertise in prison operations; the enforcement of a court's orders until they are complied with; the issuance of temporary restraining orders and preliminary injunctions to respond to proven emergencies; and the ability to award attorney's fees for work done by plaintiffs' attorneys in the remedial phase of litigation—we would have inadvertently set the stage for the return of our prisons to the horrific conditions of the past.

Prior to the 1960s, judges reacted to prisoners' challenges by adhering to the idea that courts were without power to interfere in prison affairs. This rule of law was often referred to as the "hands off doctrine." I would invite the Committee to examine the history of America's prisons—the conditions that existed when the "hands off," doctrine was in place; and the changes that took place over the course of the dismantling of that doctrine. Passage of this act will create a setting in which we will be destined to repeat the failures of the past.

Also, I would like to share some brief thoughts on the "abusive lawsuit" bill. I share the concern that appears to have engendered this frivolous lawsuits legislation, although I believe that the courts are already equipped to respond to those concerns. In 1989, I wrote a law review article detailing the efforts of the Fifth Circuit Court of Appeals to respond to frivolous lawsuits. While I favor reasonable pleading standards, screening mechanisms, and even the imposition of sanctions for abuse, I urge the Committee to strike a balanced approach that does not single out prisoners as a class to be subjected to greater obstacles in seeking redress than all other persons who file lawsuits. The Committee should keep in mind that legitimate prisoner claims and disputes need to be addressed in an appropriate forum, and so long as this exists, I believe that unlawful means of protest, such as prison riots and work stoppages, are less likely to occur.

Thank you for giving me the opportunity to share my opinions with you.

Senator ABRAHAM. Thank you all very much. I think what we might do is this. I will start off here, and maybe since it appears there will just be two of us during this question phase, maybe we will just alternate until we have each either exhausted our questions or exhausted you, maybe at about 10 minutes apiece.

Let me just begin asking generally this. I think one issue that several of my colleagues who aren't able to be here today but who are concerned about this issue have raised—and it was sort of touched on, I guess, by Mr. Watson—was the whole notion of giving States or communities flexibility; that the STOP legislation would somehow be in contravention of the whole notion of federalism because we would be usurping a lot of the authority that States ought to have and the latitude to enter into choices regarding whether they get into a consent decree or litigate a matter to its fullest.

But it is my impression from getting into some of the allusions made by the initial panelists that there are circumstances that have prompted States to enter into consent decrees where, in fact, there wasn't a tremendous zeal to do so on the part of the State, but rather other factors that sort of forced their hand. It kind of touches on the issue that Senator Biden raised about the contract. I mean, in a sense, a contract is an important document if it was entered into willingly by both parties, but if it was a contract made under duress, as has been suggested, then that is a different story.

So I wondered if maybe Mr. Cappuccio could begin commenting on circumstances that might cause people to enter into consent decrees where, in fact, that wasn't the desire necessarily, but it was coerced in some way or another.

Mr. CAPPUCCIO. Sure, Senator. Let me start by making clear, I think, what my position is here, and I think also, if I can speak for Attorney General Barr, what he thinks. I don't think it is necessarily a good thing to prohibit States from entering into consent decrees unless there is a violation shown first.

I think I agree with some of the panelists at the end that it takes away a lot of discretion from the State and a lot of discretion to avoid expensive litigation if you say, if there has been no finding, a consent decree should automatically be terminated. I think, therefore, I would oppose that provision, but I think you can put other safeguards in place. Why do you need the other safeguards, which is really the point of your question?

I wouldn't say that these are situations where we have collusive lawsuits, but you do have situations where you don't necessarily have true adversity on both sides of the case. The reason for that is that corrections officials quite naturally and quite understandably want a larger piece of the budget. So what I have seen in my experience, while I certainly would not characterize any of it as collusion, I see that oftentimes the interests of the corrections officials are not so different from the interests of the plaintiffs. They want to get a piece of the budgetary pie.

Now, what do you do to protect against that going to far, and how can it go too far? Well, look, no one is suggesting that we shouldn't remedy constitutional violations. You have to do that. The Constitution requires it. The Justice Department is very serious about it. But what you want to make sure does not happen is

that the corrections officials agree to a lot more and to broader things because they want a piece of the State's budget.

What can you do to ensure that doesn't happen? I think the provision in STOP, which I very much support, that says that before a court approves a consent decree, it needs to determine that it is narrowly tailored to the alleged violation—that is a very important safeguard against this problem of not enough adversity.

I think, really, the situation we see now is virtually indistinguishable from the theory of the Tunney Act. Now, you and I are probably too young to remember when the Tunney Act came around.

Senator BIDEN. Whoa, whoa, wait a minute now. Let's ease up here a little bit, all right? I mean, I was with you up to that point. [Laughter.]

Mr. CAPPUCCIO. Surely, Senator Biden is too young.

Senator BIDEN. Thank you. Please proceed. [Laughter.]

Mr. CAPPUCCIO. The idea of the Tunney Act was this. The Congress said, look, in antitrust cases we are afraid about the Government entering into consent decrees that are too soft with companies. Think of Microsoft for an example, the big flack about Microsoft. So what the Government said in the Tunney Act was before a court will approve a consent decree and enforce it with the contempt power of the court, we are going to make the court make a finding, and that finding should be that the consent decree is in the public interest—a very general finding.

I think an important safeguard here which is included in the STOP Act is before a court approves a consent decree between corrections officials and plaintiffs, it ensures that it is narrowly tailored, or you can pick another word, reasonably tailored, to remedy a constitutional violation, or at least the constitutional violation alleged, and that it is not doing all sorts of other things.

Senator BIDEN. Is the phraseology "to remedy a constitutional violation" part of your recommendation, or is that already in the STOP Act? To be honest, I don't know.

Ms. ABRAHAM. I think they use the words "Federal right."

Mr. CAPPUCCIO. I am not an expert on this. I just received the Acts a couple of days ago. I think the House bill differs from the Senate bill. I think the House bill says "to remedy a Federal right," and the Senate bill says "to remedy a Federal right claimed."

Senator BIDEN. And what are you recommending?

Mr. CAPPUCCIO. "Federal right claimed."

Senator BIDEN. It seems to me the precise language is relatively important.

Mr. CAPPUCCIO. Correct.

Senator BIDEN. So what is your specific recommendation?

Mr. CAPPUCCIO. Narrowly tailored—well, I am not sure I can answer the question specifically. I can tell you what I want to do.

Senator BIDEN. OK.

Mr. CAPPUCCIO. I want to make it narrowly tailored to what the court finds would be a constitutional violation if the facts are as alleged.

Senator BIDEN. Thank you. That is what I thought you meant.

Senator ABRAHAM. Thank you. Let me just move ahead here and ask Ms. Abraham if she would also comment on the question I

originally posed, whether there were circumstances that might cause local officials to enter into these consent decrees even though they weren't necessarily desirous of doing so.

Ms. ABRAHAM. There are certain things, and some of them are politically motivated. It is more expeditious to enter into a consent decree than to fight it out in court, and sometimes rather than look like you are bad guy—"Prisoner Files Lawsuit"—and I have never had this; I am just telling you what I perceive to be one of the issues that is brought up.

Rather than have the local governmental body look like they are the bad guys, wanting to deny the rights of oppressed people in prison and be recalcitrant in their desire to make changes, and look as they are forward-thinking and reform-minded as part of a total political package, it seems as though it saves money up front, it saves political capital, and you just sort of agree that you won't fight it and you will just enter into some consent decree.

The problem with entering into the consent decree is that it doesn't anticipate changes. For example, when Philadelphia entered into its consent decree 8 or 9 years ago, we didn't have the scourge of crack. We couldn't anticipate what effect that would have on our prison system. So, number one, we can't anticipate future events. Number two, the person who enters into the consent decree—it is behind him or her. He or she can go on to the next item on his agenda and leave to the next person in office the problem of trying to fix it.

I think also what happens is that when we allow Federal courts, absent findings of constitutional violations, to put a hammer to the heads of succeeding generations of office-holders and limit access to intervenors who have a legitimate claims, like prosecutors, to intervene to show that there are changed circumstances, I think you have a problem.

Finally, I think also the issue of the master that was brought up by Mr. Martin—one of the great problems about prison masters is that they are the eyes and the ears of the court, to the exclusion of everybody else. They hold private, secret discussions with prisoners. There is no record kept. There is no attempt or allowance on the part of the parties to come in and make their statements.

The master is appointed by the court as his or her own personal watch dog at public expense, without any accountability, any record, any access to the records by the complaining people, such as the mayors of the cities, and so forth, and then makes the recommendations to the judge and the judge makes a finding based on something that you have no information on. So this is really like a star chamber proceeding.

We believe that an important provision of the STOP Act is that a master—first of all, a Federal magistrate should do it, not a master. We don't want anybody being the foot soldier of the judge. The second thing is that even if it is a master, that that master, as a last resort, if it is not a magistrate, hold public hearings where there is a record, a proceeding, and an attempt made, at least, to have access to the record by people outside of the prison, such as judges, D.A.'s, mayors, and other intervening or interested parties.

Senator ABRAHAM. Would any of the other panelists like to comment on the pressures that might cause somebody to get into one

of these against maybe their preference? Anybody can answer, really. Mr. Watson?

Mr. WATSON. Yes, Mr. Chairman. I think that the comment that there were politicians who wanted to look as if they wanted to settle, I think, is not a representation of my experience now. I think that probably was true in the 1960's when, as many panelists have said, these things started to unfold. There was an interest in, you know, what is this thing about civil rights for prisoners. That was a new ball game for everyone, and I think a lot of mistakes were made and we are living with those mistakes.

My contention is, however, that I don't see many politicians now, certainly not in our State, who want to do anything but get pretty tough on crime and are, as a matter of fact, very much opposed to looking as if they are wanting to settle things and look good that way. It is the opposite.

Senator ABRAHAM. Anybody else? Mr. Gadola?

Mr. GADOLA. Senator, I would say in answer to your initial question, if the current system is the model of federalism, as has been alluded to, I guess I am ready and the State of Michigan is probably ready for the alternative.

I think I would agree with Ms. Abraham when she said that there are probably political motivations, and in Michigan's case I am quite certain there were certain political motivations for entering into that decree. The problem becomes that at least in Michigan's case, and I am sure with a lot of other States and localities, the decree is so openended and not related to specific constitutional violations that we find ourselves caught in this morass of detail from which we are not able to escape. That is where Michigan currently finds itself.

Senator ABRAHAM. Mr. DiIulio, do you want to respond?

Mr. DIIULIO. All I would add is I can't speak to the political motivations or lack thereof, although there is a fair amount of descriptive work on the subject. I mean, the practical effect in every case going back to 1965, the first major overcrowding litigation, the 64 of the 70 major overcrowding litigations that have been won by prisoner plaintiffs—the practical effect in every case at the end of the day, whatever people's motivations or calculations may have been, is that the corrections department ends up with more resources, more money, and more staff to deal with fewer inmates, which correctional officer unions, and so forth, tend to like.

You have seen that to some extent in the Philadelphia case where one of the groups that is not happy with STOP or STOP-like provisions is the correctional officer unions, for obvious reasons. No one begrudges them that preference, but I think that is the obvious bottom line and has been for the last 3 decades in these cases.

Ms. ABRAHAM. I begrudge them that. [Laughter.]

Senator ABRAHAM. In this round, and then we will go to Senator Biden, I just have sort of a broader question just to put this in perspective. One of the things I think we always have to ask when we are looking at legislation of this type is exactly how many of these problems are out there, and the one thing that none of the testimony has at least focused for me is this. How many of these consent decrees are currently operational, and how many cases that—let's just take, for example, the Michigan case and the Philadelphia

case, which maybe are the extremes, but how many out there, you know, have fallen into this kind of pattern?

I think in trying to piece together a bill here that is a sensible response, it is sort of important, I think, to get a feel for what we are contending with. Does anybody have——

Ms. ABRAHAM. Senator, I think in my prepared testimony, I—and there was a typographical error in my prepared testimony, but I said, "By 1995, 108 municipalities and over 1,200 State prisons," it should read, not "prisoners," "were subject to court orders or consent decrees."

Senator BIDEN. Federal court orders?

Ms. ABRAHAM. Well, some were Federal, some were not, but many of them were Federal.

Senator BIDEN. Well, it is a big deal, though.

Ms. ABRAHAM. Oh, indeed.

Senator BIDEN. All we have the authority to do is affect Federal.

Ms. ABRAHAM. Of course.

Senator BIDEN. So I think the question we need to know is how many affect Federal—how many would be affected by this legislation, is another way of putting it.

Ms. ABRAHAM. I can't answer that question, and I can try to find out the answer for the committee if you would like me to. I am not prepared to answer that right at this moment.

Senator ABRAHAM. We would submit that in written form.

Ms. ABRAHAM. Would you?

Senator ABRAHAM. Of course.

[The questions referred to are located in the appendix.]

Senator ABRAHAM. I am just trying to get a handle on those numbers. Mr. DiIulio?

Mr. DIIULIO. If you look at what the Bureau of Justice Statistics puts out in its annual counts of these things, the statistic that the district attorney just cited was a 1990 statistic, the same statistic that I have in my testimony as well. At that time, 264 of the 1,207 prison facilities that she mentioned were under specific orders to limit their populations.

As to the question of what number is under Federal court order, if you look at some of the ACLU's status reports on the subject and you look at some of the other data, it is sort of like the problem that Attorney General Barr raised this morning with the metaphysics of defining what represents an order and what takes effect under what circumstances.

The statistic is that by October of 1994, 39 States and 300 of the Nation's largest jails operated under some form of Federal court direction. I do not have here with me the precise breakdown of how many were overcrowding, and so forth, but that statistic I have. The entire system was under such orders in 8 or 9 States and overcrowding litigation pending in many others.

Senator ABRAHAM. The last part of my question was this. It was earlier suggested that no judge likes to have these under their domain, although I am not sure that I necessarily agree with that. It is my impression some judges may like to have this. But be that as it may, the instances that we have heard about here from Michigan and Philadelphia—are these totally aberrational or is there at least a significant number of similar kinds of problems of this type

where we have widespread early releases, and so on? Does anybody have an ability to answer that?

Mr. Martin?

Mr. MARTIN. Mr. Chairman, I would like to at least take a stab at it. I think in answering that, it depends on who you ask. I am just totally blank.

Senator ABRAHAM. I realize it is obviously tough. I am just trying to get a feel, though. Again, it goes back to the question of how serious the problem is. Obviously, we have now got a sense that quite a few States in some way or another are operating in response to court orders and consent decrees. But my question is, are these two aberrational or are there other similar instances where the results of these have led to widespread early release or other sorts of responses that—Mr. Cappuccio, do you want to answer that?

Mr. CAPPUCCIO. My knowledge is a bit out of date because I have been out of government now for almost 3 years. But my sense was, while there were a lot of States involved, we have pretty much talked about the worst States, and I don't know if I would call that aberrational, but it is not the norm either.

There is one theory, though, which would broaden this out even more, and that is I am not sure the problems we have talked about today are necessarily limited to prisons. You know, if you had AT&T and the telephone companies in here today, they would have some view on consent decrees, too.

One of the things that the committee may want to consider is whether there isn't another sort of broader bill in here somewhere where we generally think about, when Federal courts get involved in remedying any Federal violations, how far they go and when you reopen them.

Senator BIDEN. We could put busing into that category as well.

Mr. CAPPUCCIO. You could. In fact, I guess the Supreme Court has had a couple of cases on that recently.

Senator ABRAHAM. Any others? Mr. Gadola?

Mr. GADOLA. Senator, I don't think they are aberrational at all. I can cite two examples from the State of Michigan, neither of which is a CRIPA lawsuit, but I think they both demonstrate the longstanding nature of these lawsuits and the inability of the State to get out from under the aegis of judicial control.

We have a class action lawsuit brought on behalf of female inmates in the State of Michigan, the *Glover* case, which has been extant since 1978; a companion to the *U.S.A* v. *Michigan* lawsuit, *Haddix* v. *Johnson*. That lawsuit, in front of a different Federal court in Michigan, has been around, as *U.S.A.* has, since 1984, and the judge presiding over that particular lawsuit recently indicated that he would expect that case to continue into the year 2000. So I think this is not aberrational, at least not in the case of Michigan.

Ms. ABRAHAM. I think also, if I may, Senator, there are a couple of other States, I think, that feature—besides Michigan and Pennsylvania, Florida and Massachusetts. I think there is a court order now that applies to a jail that has been closed in Boston. If you would like me also to submit some information about the fact that—obviously, we wouldn't come to the Federal Government to ask the Senate to act on a bill that would apply only to State issues. Some States have limited the effect of consent decrees. Some

of them have outlawed them because they don't want them. They want other kinds of ways to fix this problem, or at least address it.

I know that if we didn't think this was an important issue—if this was just an aberration for Pennsylvania and Michigan, we wouldn't have been working for over 4 years to get something done in the Congress. This is something that I think this whole country is going to feel the pinch of, and it is either because of some perception on the part of prisoners interpreting Supreme Court cases like, you know, *Monroe* v. *Pape* in the 1960's or the Civil Rights Act, and so forth.

Anything that you are going to allow prisoners to take advantage of is going to necessarily involve the Federal process because I think their chances of success in the Federal process are much likely of success than the State process, and I think that is where people look to go. I think after we give you some information, you will find that we wouldn't be sitting here today if we felt that—I can't speak for Michigan, but I think I get the drift of what Mr. Gadola was saying. We wouldn't be here if we were the only two States, and neither would all these people behind us be here.

Senator ABRAHAM. Well, we are just going to alternate rounds here and I have had more than my share for a while, so let me turn it over. Senator, did you want to make an opening statement?

Senator BIDEN. No. I would like permission to put my opening statement in the record, if I may, Mr. Chairman.

Senator ABRAHAM. Without objection.

[The prepared statement of Senator Biden follows:]

PREPARED STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Today, the Judiciary Committee convenes this hearing to discuss a number of issues relating to our Nation's State prisons and county and local jails.

As I have stated at every judiciary committee hearing we have convened this year relating to the crime issue, it is my hope that we will build on the achievements of the 1994 crime law.

It is counterproductive to retreat on last year's progress—our attention now must focus first on achieving full implementation of the crime law—including the various prison provisions—and on identifying additional areas, not addressed in that law, where action can be helpful to the fight against crime.

The 1994 crime law contained the first-ever direct Federal grant program to help States and localities *build and operate prisons*—providing $9.7 billion over six years, all fully paid for by eliminating 272,000 Federal bureaucrats.

The overriding goal of the prison grant program was to help States *take violent offenders off the streets and keep them behind bars for as long as possible.*

The law promotes this goal in several ways:

- *First,* almost $4 billion is set aside in a program designed to encourage States to move to a "truth-in-sentencing" system modeled on the Federal system many of us worked on years ago. The program would require that States keep all second-time violent offenders in prison for at least 85 percent of their sentences.

Ultimately, I hope the States will move to keep all violent offenders behind bars for at least 85 percent of their sentences, just as we do in the Federal system. But right now, States are keeping offenders behind bars on average for only 48 percent of their sentences.

But the cost to the States of nearly doubling the amount of time prisoners spend behind bars is, to put it mildly, staggering. I am told that requiring States to keep *all* violent offenders in prison for 85 percent of their sentences would add approximately $60 billion over the next five years to their prison costs.

It makes no sense to think that States will spend $60 billion to get $4 billion from the Federal Government. For this reason, we set a more modest—but attain-

able—goal in the 1994 crime law. we reasoned that it would be better to offer help States could afford to accept, instead of an empty promise.

- *Second,* the law gives the States the flexibility to build either secure prisons or military-style boot camp prisons for non-violent offenders as a cost-effective means to free-up expensive prison cells for violent criminals.

Based on the most recent data available (1992), we know that almost 30,000 *violent* offenders do not spend a day in prison because there is no space for them. At the same time, 160,000 *non-violent* offenders are taking up secure prison spaces.

The flexibility provided by the 1994 crime law allows States to maximize their prison dollars by moving these non-violent offenders to cheaper space—making room for more violent offenders.

- *Third,* the law gives States the flexibility to support the operational costs of prisons—this is particularly important because some States have prisons built, but no funds to open them.
- *Fourth,* the law also requires consultation between the State and counties and local governments—because the Nation's jails are run almost exclusively by counties and cities;
- *Finally,* the law requires assurances that States develop correctional plans which recognize the rights and needs of crime victims, train corrections officers in dealing with violent prisoners, put prisoners to work, educate prisoners, treat drug-addicted prisoners, and assess the danger prisoners may pose to society before they are released;

Earlier this year, the House passed a bill—H.R. 667—which would change many of these features.

Most notably, it added a new "truth-in-sentencing" standard, the effect of which would be that few States would qualify for any of the dollars. Just how few is made starkly clear by a Justice Department report released this week.

This report, "Violent Offenders in State Prison: Sentences and Time Served," is based solely on data provided by the States themselves. The report indicates that only 1 of the 27 States that provided data would meet the new standard proposed by House republicans—and that is my home State of Delaware.

Now, perhaps other States which did not report information could clear the new hurdle. But, based on the data from the 27 States—which reports that violent criminals serve 48 percent of their sentence—it does not seem likely that many of the non-reporting States will meet this new test.

This hearing will also address some key issues relating to litigation by prisoners. All of us want to keep violent offenders behind bars for as long as possible. And all of us want to limit frivolous and abusive prisoner lawsuits.

In fact, a provision in last year's crime law gave States added authority to dispose of prisoner complaints before they could be filed in Federal court. This year, we are faced with several additional proposals to limit prisoner litigation, and I believe we should take a close look at them.

One of these is a new proposal designed to limit the scope of Federal court involvement in prison conditions lawsuits, about which I have serious questions. The eighth amendment to the constitution, which prohibits cruel and unusual punishment, defines what conditions are unacceptable.

The courts have the responsibility of determining in specific cases whether that standard is met. And, where there is a violation of the eighth amendment, our Constitution requires the courts to fashion a remedy.

The proposed legislation would limit the courts' traditional role in correcting constitutional violations. I question whether this is appropriate.

I am also concerned that this legislation would appear to terminate existing consent decrees—contracts between litigants and the States—and would severely limit any future consent decrees.

All of us want to help States improve the effectiveness and efficiency of their prison systems. All of us want to see violent offenders in jail where they can no longer threaten us.

I look forward to discussing how best to meet these goals with our witnesses today. Thank you and welcome.

Senator BIDEN. Let me compliment you on conducting these hearings. You have only been in the Senate a little while now and you have impressed everyone, including me, with what is not always the case with us who come here, your thoughtfulness and

your insight on a number of these problems. I compliment you on that and the way you are conducting this hearing.

As I said, I am sympathetic to this legislation. My staff will be checking out—Lynne, you have enough problems without having to do our work for us and figure out what the rest of the Nation is doing. Anything you have would be helpful, but we can find out the answers to the questions that were just asked.

I would make the point that Mr. Watson made about the change in tone of politics today. In my State, there is a majority of the members of the State senate who have petitioned and introduced legislation and cosponsored it to bring back the whipping post. So if anybody thinks that in my State—by the way, we had the whipping post, where you actually got strung up to the post and got whipped in the courtyard in front of everyone else, until the year 1968. I think the last whipping was in 1964, and there is a call to bring it back. So, if anything, a kinder, gentler, more prisoner-oriented mood does not prevail in my State.

So I have clean hands here, I want to talk about two things here. One is how the STOP legislation fits with truth in sentencing, because they do relate in terms of impact. They don't relate in terms of the law, but they relate in terms of impact.

I want to make it clear I am a little like Brere Rabbit on the idea of the Republican proposal for truth in sentencing. You know, don't throw me in the brambles, but if you do, Delaware gets all the money. So I want to be real clear about it. We do our job in Delaware and we do meet the 85-percent requirement. We don't have to build any more prisons to get the money, and if you make it an 85-percent requirement, I promise you we are going to get your money and we are going to try very hard to get it.

I want to be up front about that. I make no apologies for it, so no one later says, well, Biden didn't fight; even though his crime bill didn't have the truth in sentencing, Biden didn't fight this change, and it looks like the reason he didn't fight it was because Delaware benefits. The answer is right, and right, and right.

So, having said that, let me ask in a less parochial vein, Ms. Abraham, your main problem with the effect of the consent decree is the caps, right? I mean, that is the beginning, middle, and end for you. You helped me write that crime bill. I use the example you gave me years ago where you pointed out, and I use it constantly, I think it is almost every Friday, or almost every Friday, the court of common pleas judges or someone sits down there and they decide, you know, who do they free, Barabbas or Jesus.

I mean, they get a list of people and they are told they have to go down—I am not being facetious. I mean, that is the essence of the problem. They have to put out on the street people who are hardened criminals who are recidivists who end up getting arrested again, but they have no choice because of the existence of the court order. So I think I have an appreciation, and having adopted Philadelphia as my second city, I think I have a sense of the problem, but it relates to the prison caps, right?

Ms. ABRAHAM. It not only relates to the prison caps for new offenders who are, of course, presumed innocent, but that cap also affects probation violations and who gets sent to prison even at sentencing.

Senator BIDEN. It is across the board.

Ms. ABRAHAM. It is across the board. It impinges and impacts on crime and the perception of crime in major American cities, the prison cap does.

Senator BIDEN. Now, let me ask you a question. I am not suggesting that I want to make this change in the legislation, but let me just ask it to you. The question was raised by Mr. Martin about all consent decrees. There are consent decrees in here that relate to conditions that nobody in the world, nobody in the civilized world, would consider should be abandoned, and that is relate to things like no heat in prison cells, like guards that smash the heads of prisoners routinely against walls. I mean, there are consent decrees relating to training for prison guards, consent decrees relating to length of hours they work, consent decrees pertaining to lighting in prisons and the effect dungeons, in effect.

If we altered this legislation to say only those consent decrees which related to prison caps would be automatically reopened, which this legislation calls for, would you have a problem with that?

Ms. ABRAHAM. I think the STOP Act is much broader than just consent decrees or caps.

Senator BIDEN. It is. That is why I am asking.

Ms. ABRAHAM. I think that there are other orders other than caps that need to be addressed, and that is why the legislation was drafted the way it was.

Senator BIDEN. I understand.

Ms. ABRAHAM. I think it would be totally selfish and utterly self-serving for just Philadelphia, since my problem is the cap. There are other problems across this Nation that I think STOP addresses that don't necessarily——

Senator BIDEN. But quite frankly, Lynne, the only one that puts people back out on the street is the caps, and I don't give a damn about the rest. I just don't want these people out on the street.

Ms. ABRAHAM. Well, sometimes, as a way of enforcing, or forcing, depending on your view of things, reform, the court will order a moratorium on prison admissions until, let's say, something is finished; let's say the kitchen is redone or something of that sort. But the hammer that most judges have over prisons like mine is some kind of either prevention of people getting in or release from prison. So, for me, and I am only speaking for me, the cap is the major problem, but there are other problems as well.

Senator BIDEN. Professor, you know your stuff in this area. You have written a lot about it and you are well respected. One of the things that came up 5 years ago, and even earlier, that I found myself having to argue against was a similar argument that three of you made today about, "interfering" with the ability of States to enter into consent decrees with Federal courts, and it went like this.

Everybody knows that the attorney general of the State of Delaware and the attorney general of Michigan and the D.A. of Detroit and the D.A. of Philadelphia and the D.A. of New York—this is how the argument went—enter into these awful plea bargains, letting these awful people out on the street. There was a proposal here in a crime law—and I see a Philadelphia Congressman behind

you; he may remember it when he was here—a proposal that said we are going to outlaw plea bargaining, because there were a number of studies written about, in plea bargaining, the same incentive exists for a D.A. that exists for a prison official, the same exact one; one, their batting average, especially if they are elected; two, their incredibly overcrowded workload.

If we eliminated plea bargaining, Lynne, you would go out of business.

Ms. ABRAHAM. Any district attorney who says he or she is going to eliminate plea bargaining is a fool or a liar, one or the other.

Senator BIDEN. I am with you. Now, the problem I have is the conceptual one. I sat here for 3 years arguing against the attempts of some of my friends, tough law and order folks, saying we are going to get tough and we are going to make sure that we have no more plea bargaining because if someone is accused of first-degree rape, the cops must have had a reason to accuse him of that and to allow them off on simple assault or to allow them off on whatever is an outrage and they are just going back out in the community. There are all these statistics to show that people with whom D.A.'s have to plea bargain, I would argue have to plea bargain, go out and commit a significant number of crimes.

Now, my question is how, conceptually, do we make the case, professor, that it is appropriate for me to intervene between a governor, a mayor—by the way, Mr. Watson, when he ran the prison system in Oregon, had no authority to do anything by himself. He may have been involved in it, but the governor had to sign off on it. He has no authority in the State of Delaware that the governor doesn't have to sign off on. -

So I am inclined to vote for this legislation, but I am thinking, OK, I vote for this and I tell the governor he can't enter into plea bargaining, in effect. That is what it is. How do I not turn around and say, by the way, the attorney general has no authority to enter into a plea bargain? Same motivation, Mr. Cappuccio, same exact motivation as the prison official may have. Can you make a distinction for me, professor?

Mr. DIIULIO. Senator, you are a special legislator because you demand that kind of conceptual clarity. That is one of the things that I think is often lacking from legislation.

There are tradeoffs involved in all of this. I think the reason why, if you look at the public opinion survey data on this, most people are willing to have prosecutors make those tradeoffs—they don't like plea bargaining; it is considered by many people to be the seamy side of the justice system. But it is almost without exception, if you look at the survey data, that people believe that big-city prosecutors, like my friend, District Attorney Abraham here—when they make those tradeoffs, the primary value in their calculation is public safety. It is not second, third, or fifth; it is first.

Senator BIDEN. Well, let me interrupt you there. In all the data I have seen, the public overwhelmingly opposes plea bargaining and overwhelmingly would support legislation to eliminate plea bargaining. You may have different data than I have and I would like to see some submitted.

Mr. DIIULIO. No; I would be shocked and amazed if that were not the case.

Senator BIDEN. That is the only point I am making.

Mr. DIIULIO. Yes.

Senator BIDEN. So the public thinks that.

Mr. DIIULIO. Obviously, in this case the public is uncomfortable and is opposed to the notion that people are committing three and four crimes and are getting off with one. But the reason we had the move to mandatory sentencing, in my view, in the 1970's and into the early and mid-1980's was because people were saying this justice system involves an irreducible minimum of discretion. Somebody has got to exercise the discretion.

The 10 million violent crimes committed in 1992, the third of them reported, the 165,000 of them resulting in convictions, the 100,000 that went to prison—we are not ever going to have a system that is going to invest the human and financial resources necessary to go after every criminal and incarcerate every criminal, nor would most people at the end of the day want to do that. So discretion is going to be exercised. The question always becomes who is going to do the sorting, who is going to exercise that discretion.

I think from my perspective, Senator, the conceptual point you raise leads me to the conclusion that most people are more satisfied to have prosecutors exercise that sort of discretion than unelected, unaccountable Federal judges who intervene in cases in local and State jurisdictions and who do not, and this is what we are really talking about here, put public safety first.

Senator BIDEN. Well, I think you are comparing apples and oranges. The prosecutor is to the governor what the State judge is to the Federal judge. It is not the prosecutor to the judge. The fact of the matter is the prosecutor doesn't make a deal with anyone other than the defendant, which then can be overruled by the court. In my State, you can make a plea bargain the court will not allow to be had in my State. I don't know about the State of Pennsylvania.

Ms. ABRAHAM. Well, excuse me, Senator. All plea bargains are subject to the court accepting the plea, so the court must accept it.

Senator BIDEN. Right, OK, that is what I am saying. So it is the same in your State. I just didn't want to speak for every State.

The point is the Federal judge is located in the same spot in this deal between the governor and a Federal court as the prosecutor is between himself or herself and the State court. The person in question is either the defendant or the prisoner, and so I just have great difficulty—by the way, the data I have been—I share your view about who is going to look at the public safety, but the truth is prosecutors, if you notice, nationwide have not experienced an overwhelming embrace by the American public.

All of them that have run for higher office have gotten beaten, by the way. It tells you a little something about what has happened in terms of where the public thinks prosecutors are. Now, I am not being critical because I am supportive. I don't think there is a single person here in the U.S. Senate who has been more supportive—there are many as supportive—of State and local and Federal prosecutors as I have been. I am not making the case that they aren't responsible. I am making the case in terms of what the public perceives.

In my State, I promise you the people of my State would be more certain that the governor of my State is going to protect their interests relative to prisoners than they think the attorney general would because they know the attorney general wants resources. They know the attorney general, which is the prosecutor in my State—we have no D.A.'s—the attorney general in my State wants more personnel, wants more authority. So every State differs.

I don't want to beat this to death, but I find it difficult for me, and that is why I am so intrigued by what you have suggested, sir. I think if this legislation lays out a predicate—and, unfortunately, I was here when *Tunney* was here. That is how old I am, but I got here when I was 30. The predicate that you are suggesting exists, and that is that there has to be a finding that there is a reasonable prospect that a constitutional violation exists. Then I am much less concerned about me interfering in the State's affairs.

Here we are with this entire movement out there coming from the center-right saying, Federal Government, stop dictating to the States, except when it comes to morals and when it comes to stiffer, meaner, harsher, better punishment. Here we are telling the States, by the way, you, governor—if I vote for this as it is now, I have to go back to my governor and say I don't think you are competent; you are not competent; I don't trust you because you make deals; I don't trust you to make a deal with a Federal court judge. There is no getting around that. That is what it says.

That is what you have all said. You have said these guys, prison officials—and that is what the gentleman from Michigan has implied that a previous administration, whoever it was, Democrat or Republican, entered into this consent decree. It was a political deal. So I have got to sit here as a U.S. Senator and say my governor, who probably knows as much or more than any of you at the table about governing and has an exemplary record—and the one before him, Mike Castle, and the one before him, Governor duPont—that these guys aren't smart enough, aren't honest enough, aren't decent enough, aren't capable enough to decide whether or not they want to enter a decree with the Federal court.

No governor—and, Lynne, you know this—and no mayor, I don't care who they are, is going to let a prison official seal their political fate for them. There ain't a one. Not a single one in America is going to let a prison official say, by the way, this is the consent decree I entered with the Federal court.

Ms. ABRAHAM. Senator, I am not here to quarrel with you. You know I have a great affection for you personally on a personal level, as a Senator, and for the institution of the Senate, and I am not here to argue about perceptions. It depends, first of all, on your view of who people really trust, and some people do trust their local prosecutor more than their mayor and more than their governor.

Senator BIDEN. That is true.

Ms. ABRAHAM. Second of all, when it comes to some of these litigations, the moving party, the plaintiffs, whoever they may be, do not move against the district attorney. They file their lawsuit where the district attorney has nothing to do with it. It is against the mayor or the body of government.

Senator BIDEN. I understand, but you would acknowledge, Lynne, I have to make a judgment. Again, I want to vote for this because I know your problem. I really do. I don't know it as well as you do; not just you. I mean you and your colleagues.

Ms. ABRAHAM. Sure.

Senator BIDEN. I want to vote for this, but there is no getting around it. I have got to say to every governor in the Nation, well, you know, we in the Senate don't trust you enough to make a judgment as to what is best for your State, and that flies in the face of everything that is happening here saying send it back to the States.

My time is up. If I can just ask one more question and then yield, we are going to hear a lot of testimony, and we have—I didn't hear it because I stayed on the floor voting—about truth in sentencing. I want to state for the record, because apparently I am so old people wouldn't remember this, that I am the guy that wrote the Federal sentencing legislation. You are looking at him right here. I am the guy that authored it. I am the guy that authored the Speedy Trial Act. No one else can take blame or responsibility for it. I am the guy. I did it and I am proud of it. At a Federal level, it works very well.

The reason why people don't want to come to Federal court is they go to jail, they go to jail, because Federal politicians, as bad as we are, met our responsibility. It is easier to meet it than State court folks. We came up with the money for prisons. We came up with the money for judges.

The reason I wrote the Speedy Trial Act, Lynne, is I read the statistics. People waiting to go to trial were committing crimes at a faster rate than people who were not already arrested and waiting to go to trial. That is the reason I wrote the law. It wasn't born out of civil liberties. It wasn't born out of any of that. They were committing crimes. So it is working.

Now, we are going to hear, and we have heard from governors and State and local officials talking about they want to be tough on crime, but they don't have the nerve to go back to their officials and say, you want us to put people in jail, it is going to cost money. They all come down here and say, look, balance your Federal budget; by the way, send us the money so we don't have to do this; we want money.

My own governor, God love him, a political ally, makes a speech about balancing the budget and then says to me, you are going to send me $24 million for prisons, right? There is $24 million of Federal money going to the State of Delaware to build prisons over the next 5 years. In the State of Pennsylvania, it is probably going to be more like $350 million.

We have got to have a little truth in legislating here. If we want these folks to go to jail, let's pay to have them go to jail. You don't want us to federalize it, you don't want us to take over all your crimes. You want to have local authority. Let the folks in Harrisburg step up to the ball, like they did in Texas. They doubled them since 1990. They still have a problem and they still can't meet the 85-percent problem.

Now, here is my question. If, in fact, we go to truth in sentencing requiring the States to come up with keeping their folks in prison

for 85 percent of the time sentenced, and the average is 42 percent—Mr. Gadola, do you know what it is in Michigan, average time?

Mr. GADOLA. No, I don't.

Senator BIDEN. I think it is around 40 percent. Correct me if I am wrong. We are getting it now.

If you think you have got a problem now, you wait until we pass this truth in sentencing legislation. You will not get any money in Michigan federally until—the good news is you are going to be able to go to your governor and say, governor, I have got good news for you and bad news. The Federal Government has a pot of $10.2 billion out there for States to have money for prisons. The bad news is, to get our piece of that, you have got to double the prison space in the State before you qualify to get any of that. Or, governor, you have got to cut in half the sentences listed on the books.

You are even worse, 37 percent. You are not nearly as good as Delaware. Pennsylvania is not nearly as good as Delaware. By the way, Delaware is wonderful. Do you know why we are wonderful? We have 750,000 people.

Ms. ABRAHAM. Small State, small population.

Senator BIDEN. We have the second highest incarceration rate—we are not proud of it, but the second highest incarceration rate of any State in America, after Texas. We are tough. We are small. It is easier to be tough when you are small.

But the point I am making here is do you folks, any of you—I want to go down the list and just get a yes or a no—do you support STOP and the Federal requirement that before you get a penny out of the Biden crime law for prisons, you have got to have 85 percent average incarceration time for a sentence? Do you know what I mean? If the statute in Michigan says 10 years for robbery, you have got to have them in 8.5 years.

I will start with Mr. Martin and work our way down. Mr. Martin, do you support it?

Mr. MARTIN. No, I don't, but Mr. Collins——

Senator BIDEN. Well, he is going to testify next and I know he doesn't support it. I know Republican Governor George Bush doesn't support it. He has got his hands full already.

Mr. Watson, do you support it?

Mr. WATSON. No, Senator.

Senator BIDEN. You get more money. Say yes and we will get more money.

Mr. WATSON. Let me put on the hat as a State corrections administrator. That is one of the positions that we have taken unanimously, I believe, that that is something that for many States just isn't worth it, if that is what it takes to qualify for the Federal funds. The field isn't level. Some States have an 80-year sentence for a certain crime, where in another State it is 12. So to have each of them serve 85 percent is unfair from that perspective.

Senator BIDEN. Mr. Gadola, do you support truth in sentencing?

Mr. GADOLA. Senator, that is certainly a sad statistic that you cited from the State of Michigan and that is, I think, why——

Senator BIDEN. I didn't cite it to be critical.

Mr. GADOLA. I understand, but just to make my point, I think that explains why the legislature passed and the governor recently

signed into law truth in sentencing legislation in Michigan that would permit us to meet that 85-percent requirement.

Senator BIDEN. Over how long a period of time?

Mr. GADOLA. Well, the governor has appointed a sentencing guidelines commission, similar to what was done at the Federal law. They are required to make recommendations back some time in 1996; I think at the conclusion of that year. The legislature then has the ability to adopt or reject those recommendations.

Senator BIDEN. I will make you a bet the recommendations come back with lower sentences.

Mr. GADOLA. They may very well.

Senator BIDEN. Which makes sense, I might add.

Mr. GADOLA. They may very well.

Senator BIDEN. Lynne?

Ms. ABRAHAM. Senator, speaking for myself and not the governor of Pennsylvania nor the National District Attorneys Association——

Senator BIDEN. I would like to see you as governor of Pennsylvania.

Ms. ABRAHAM. Well, he is a good man.

Senator BIDEN. Right.

Ms. ABRAHAM. I think the people of this country and the people of my State really want truth, whether it is in sentencing or anything else. I think they would be willing to pay the price if it meant that they could feel free of predatory criminals. I think they are so fed up, they are arming themselves in record numbers. They are scared to death.

I think it is about time that I stop having to send my cases down to my Federal prosecutor because there is pretrial detention, a trial within 60 days, long sentences for felons in possession, and the like. I would like to be able to do that myself rather than having to foist those cases onto my local Federal prosecutor because our jails are full and everybody thumbs their nose at the system. So I would support it. Yes, I would.

Senator BIDEN. Professor?

Mr. DIIULIO. I am of the view, Senator, that without STOP or a STOP-like provision, truth in sentencing legislation is going to go the way of mandatory sentencing legislation; i.e., 15 years from now we will be talking about 37 percent here, 42 percent there, for the reasons that have been put on the record here today.

That is why I do support what the House did back in February in splitting that pot of money 50 percent for States that just move in the direction without hitting 85 percent. Fifty percent of that money goes to States to have the incentive to continue to put violent repeat criminals behind bars for longer terms, and the other 50 percent to give an incentive to States——

Senator BIDEN. You know we do that under present law anyway. That is now the law, not the same breakdown. It is for violent offenders, second time, and so on.

Mr. DIIULIO. Yes; well, I think we have been here before, but with provisos about the need to develop a more integrated approach to corrections planning, alternatives to incarceration, and so on, which is not in the House bill.

Mr. CAPPUCCIO. With the caveat, Senator, that I am totally unqualified to opine on this——

Senator BIDEN. That doesn't stop any of us.

Mr. CAPPUCCIO. I would support the concept, although I don't necessarily think it is doing it the right way. States ought to pay for their prisons, and Attorney General Barr when he was Attorney General gave that speech 3 times a week. If you are serious about preventing crime, States have to invest in prisons. The corollary to that seems to be the Federal Government shouldn't give money away to the States if they are not going to use it to lock people up and keep them off the street.

That being said, it strikes me that there is a bit of a chicken-and-egg problem here, and you have alluded to it. You can't get more money to lock people up until you have locked them up, at which point you probably run afoul of all sorts of Federal decrees. We have to figure out a way around that problem.

Senator BIDEN. That last was a little gratuitous—afoul of Federal decrees. All you have got to do is build more prisons and she has got no problem with Federal decrees.

Mr. CAPPUCCIO. That is right. You have to come up with your own money.

Senator BIDEN. Right.

Mr. CAPPUCCIO. I am not sure that one rule for every State is going to be feasible. With that, I support it.

Senator BIDEN. I thank the Chair for allowing me to go over my time.

Senator ABRAHAM. Before we proceed, I would like to just also indicate that we have entered into the record a correspondence at the request of the chairman of the committee that was sent to him from Michael Barnes, who is the prosecuting attorney in South Bend and President of the National District Attorneys Association with respect to this legislation, the STOP legislation.

I also would just observe—I may or may not be right about this, but I am sure that the population of Delaware is one reason that you have reached these standards. But from what Lynne Abraham has said, it also might be the case that if I was planning criminal activity, I would not do it in Delaware. I would go to Philadelphia where it sounds like things are——

Senator BIDEN. Unfortunately, they are coming from Philadelphia to do in Delaware.

Ms. ABRAHAM. Senator, we will give your normal get out of jail free card, which everybody has in Philadelphia. [Laughter.]

Senator ABRAHAM. Mr. Cappuccio, let me go back to the consent decree issue one more time. Senator Biden, following up on some of the earlier questions, raised the question of how much authority States ought to have and why we, in an era in which we claim we are going to try to relinquish more Federal authority and let States do more things for themselves, would be considering this type of an approach.

I guess the thing that brought me initially to this issue and I guess drove home to me the importance of at least hearing more about it is the experience we have had in Michigan because there the State doesn't want to be part of the consent decree, and neither does the Department—or at least as of 1992, did the Department

of Justice. So, surely, it would seem to me, and I would like your comments, that when both DOJ and the State and its officials have concluded that the consent decree's purposes have been met, that ought to suffice, it would seem, to bring it to an end. It hasn't, but I guess I would like your thoughts on at least that exception.

Senator BIDEN. That is a good point.

Mr. CAPPUCCIO. Sure. I agree fully. I think the importance here is to keep in mind the framework and the perspective of a Federal lawsuit and what is a Federal lawsuit. When I was at the Department, I kept saying to myself, what do you need to do? You need to remedy real constitutional violations. You need to get in there and fix it and when you are done, you need to go home because you are not in charge. That was sort of the mind set that I had, though I am not sure it is always the mind set that has prevailed at the Department of Justice.

In the case of Michigan, what we saw was it was really undisputed that an enormous portion of what the original consent decree covered was not longer at issue. I forget the particular provisions that were involved—fire safety. I forget whether medical was covered or not. I know mental health wasn't.

The philosophy of Attorney General Barr, consistent with what I said and consistent with the Supreme Court's decision in *Freeman* v. *Pitts,* is as aspects of the system come into constitutional compliance, let them go. So what we tried to do in Michigan is say, all right, there is no dispute as to these 4 categories; that is it, it is over as to that, and we will just have a separate settlement agreement/consent decree on the other thing.

The idea that some Federal judge thinks he can say no to that, I think, is offensive to the notion of judicial power in article III. Again, it goes back to a lawsuit. When the parties to a lawsuit decide the controversy is over, it is over. It is not up to that Federal judge to keep it going. I think he had no authority to keep it going, and I am deeply, deeply saddened and disappointed that a couple of days after we got thrown out of office the Justice Department for some reason flipped position on this. I think that that is disappointing.

Senator BIDEN. Can I interrupt on that point?

Senator ABRAHAM. Sure.

Senator BIDEN. But it is on point, Mr. Chairman. In last year's crime bill that we passed—so much of it, a lot of people aren't aware of the specifics of it, and you may or may not be. In title 18 of the law now, section 3626, subsection (c), refers to periodic reopening and it says, "Each Federal court order or consent decree seeking to remedy an eighth amendment violation shall be reopened at the behest of the defendant for recommended modification at a minimum of 2-year intervals." That is now the law.

Ms. ABRAHAM. Well, it doesn't define what "reopening" means. That is one of the problems. It is a little bit mushy.

Senator ABRAHAM. That was sort of the direction I was kind of going to go in here because I know that there was an effort in the 1994 bill to try to address the early releases and some of these consent decree problems. We are here today to try to figure out whether—it is early in this process, admittedly, but whether or not peo-

ple who have to deal with this on the front lines feel that we have gotten to the point that we have addressed it effectively.

Could at least Ms. Abraham and Mr. Gadola and anybody else who would like to, but you two obviously have been right in the middle of these——

Ms. ABRAHAM. Well, just briefly about the 1994 crime bill, the crime bill of 1994 addresses eighth amendment claims. There is a difference between an eighth amendment claim for sentenced prisoners and a due process claim for pretrial detainees who are incarcerated.

In looking at that act, the language is somewhat ambiguous and it doesn't really specify what is needed for relief and it doesn't define "reopening." The problem is that for Federal judges who are inclined to do what Mr. Cappuccio said—OK, fellows, you have accomplished what you have set out to do and now it is time for you to pack up and leave—that is fine.

But, unfortunately, there are a number of loopholes in the act and judges who are not so inclined to say, OK, you have accomplished what you have set out to do, go home—they will find the loopholes in the act, and that is why we are back here. We wouldn't be back here in light of the crime bill of 1994 if there weren't what we perceive most respectfully to be an ambiguity in language and a need to make certain definitional changes in tightening up. We wouldn't be sitting here today if we had the problem solved.

Senator BIDEN. Lynne, have you made a motion to go back to court to reopen since the crime bill?

Ms. ABRAHAM. Well, I have to tell you something interesting, Senator Biden. The answer is yes, but I have been found to have no standing because the prisoner sued the former mayor.

Senator BIDEN. Right.

Ms. ABRAHAM. On top of that, in light of what Mr. Cappuccio said, not only has our Federal judge in question had a new prison built, which was—I am not arguing that we didn't need it. We did, but she had control of the whole Federal courthouse that was built which doesn't have one prison cell in it. Her name was on the bond indenture. No change order could be entered. She decided where the flag poles went, whether the furniture got scotch-guarded—fantastic.

Senator BIDEN. I have got that, but could the mayor file? Does he have standing, the present mayor?

Ms. ABRAHAM. The mayor is stuck with the consent decree. He has attempted to get it changed.

Senator BIDEN. Has he attempted to reopen under the new law?

Ms. ABRAHAM. Oh, sure. We have been fighting and fighting and fighting. Of course, as soon as the crime act came down—as his promise was, the very day that the crime bill was signed—we were in Washington for the signing, as you remember—the next day, he walked into court and filed a motion to intervene. But, you see, the judge isn't really moving quickly on it, doesn't have to because there is no time limit on it, and she just puts the motion aside and doesn't rule on it.

Senator ABRAHAM. Would others want to comment on the new bill and what we need to look at or what your experience has been?

Mr. GADOLA. I certainly would. The problem that Michigan faces is that the standard we would have to meet to get out from under the control of the Federal court in our CRIPA lawsuit is not a constitutional standard. We would have to satisfy the court that we have satisfactorily dealt with the very detailed requirements of the State plan for compliance and the associated orders; in other words, all of the minutia that I think you, in particular, Senator Abraham, are familiar with, and some of the things that I detailed earlier.

So it is not enough for us to say that we are complying with constitutional standards. We would have to satisfy the court that we have dealt satisfactorily with each one of these individual myriad State plan requirements. There is a provision dealing with sanitation in the consent decree and the State plan for compliance. Now, it is not good enough for us to say or to agree with the Justice Department, apparently, that the State of Michigan is not violating the constitutional rights of any inmates with regard to sanitation. Rather, what we would have to do is satisfy the court that the temperature of the water in the showers is a certain temperature, and on and on, ad infinitum.

Senator ABRAHAM. Mr. Cappuccio? I am just going to go down the line here if there are any others who want to comment. We will just start over here with Mr. Cappuccio.

Mr. CAPPUCCIO. I think Mr. Gadola put his finger on the problem, and part of what I tried to talk about in my opening statement is one of the things we have to control with consent decrees—and, again, I am not in favor of abolishing them—is that open-ended standards in the consent decree end up replacing the constitutional standard.

What I think we need to find a way to do is to say, after some period of years when this has been going on, it can't go on any longer unless, and it is an important "unless," the Constitution is being violated or the minimum isn't met. I think that is what rule 60(b) requires today, but not every court is in agreement with me on this, and I think if Congress made that clear, it wouldn't be a radical change, but, boy, it would be an important one, and that is if, at any time, Mr. Gadola can come into a court and say here is our evidence and we are not violating the Constitution, you have got to let him go. You have got to let him go even if one of his predecessors was silly enough to agree to a lot more, including professionally trained barbers and hot water temperatures within 6 degrees of 110.

Ms. ABRAHAM. Chunky peanut butter.

Mr. GADOLA. And chunky peanut butter.

You know, you have got to keep your eye on the ball. The ball is remedying constitutional violations, and at some point if he can come in and say I am not in violation of the Constitution, that ought to be the standard on reopening and he ought to be let go.

Senator ABRAHAM. Mr. DiIulio?

Mr. DIIULIO. I think this brings us right back to Senator Biden's incisive conceptual question. I mean, this really cuts right to the heart of it, OK, because what happened on Halloween, which was when Judge Shapiro ruled on the motion, was it that this is not good enough; Congress cannot do whatever it wants. The implica-

tion, I guess, was that the Federal judiciary in these cases might be able to do whatever they wanted. I don't know, but it is the context here we are talking about.

When the prosecutors exercise discretion, you end up with fewer violent repeat criminals in custody and fewer costs. When the judges exercise discretion, you end up with fewer violent and repeat criminals in custody and higher costs. That is why, getting back to the question asked earlier by Senator Abraham, the STOP provision or a STOP-like provision deals mainly, in my view, through the prison cap provision with public safety, but it goes beyond public safety and would restrain the growth in costs that have occurred as a result of the interventions.

I mean, the *Texas* case is, I think, a perfect example here. Between 1980 and 1994, the Texas prison population about doubled. Yet, real inflation-adjusted cost per prisoner went up tenfold. Now, in those increases you see the influence of the *Ruiz* orders, as I think former Texas Director Lane McCotter, who is sitting here in the audience today, and others would testify. So I think that is why the 1994 crime bill provision didn't quite do the trick. I think it is clear that that was not medicine that was strong enough.

Senator ABRAHAM. Mr. Watson or Mr. Martin?

Mr. MARTIN. I would add one element to Mr. Cappuccio's recommendation, and that is, in addition to the constitutional findings, that there is a reasonable expectation that that constitutional condition will continue. That simply would be a codification of the current *Freeman* and *Dowell* cases that, as you know, relate to desegregation. If there is a reasonable expectation that that will remain constitutional, then it is time for the Federal court to fold its tent and go home.

Senator ABRAHAM. I have an awful lot of additional questions and we have a whole additional panel, so I am going to turn it back to Senator Biden here and submit a group of additional questions to all of you because I do want to get your thoughts on how we ought to proceed on a number of other matters.

[The questions of Senator Abraham are located in the appendix.]

Senator ABRAHAM. Senator Biden?

Senator BIDEN. Mr. Chairman, you have already been generous with me in the time you have allotted. I will not ask any additional questions to be answered now. I would ask one broad question to each of you and, with your permission, Mr. Chairman, I would like to submit some questions in writing.

Senator ABRAHAM. Please do.

Senator BIDEN. My broad question for you to contemplate to answer in writing, and I will put it in writing as well, is is there a way to remedy without the act the existing section which reads "reopen" along the lines which appeal to me very much which Mr. Cappuccio said, and I thought he was nodding his head in agreement with Mr. Martin's additional suggestion.

It seems to me we may be able to fix what is really in everyone's craw, including mine, the problem of the court staying on long after it has outlived its reason for being involved in the first instance. I don't know whether that can be done. I have no pride of authorship about that, but I am open to and would invite any suggestions you have.

As most of you are lawyers, we can argue in the alternative. We are trained to argue in the alternative. This in no way prejudices, if you answer that question fully, your view that you are for the act and not this shorter fix. But if you conclude that a more targeted fix may be workable, then I would appreciate your input. It may not do all you want, but can we improve subsection 2, "Periodic Reopening?"

I think Lynne makes a point about what constitutes reopening and, to put it another way, when you can close. Mr. Cappuccio, I agree with you. It seems to me that an attorney general, a district attorney, a mayor, or a governor should be able to go back into Federal court and say, look, there are no existing constitutional violations; notwithstanding that the consent decree went beyond that, we want you to reopen this and we want you to fold your tent unless you conclude, judge, that there is an existing constitutional violation.

Due process can be a constitutional violation. I am not hung up on it being the eighth amendment. You may be correct that this should have said—it says "remedy any eighth amendment violation," and it should say "remedy any constitutional violation." There may be ways to fix it. I would just like you to look at it.

I thank you, Mr. Chairman, and let me say that I am very, very parochial. We are really proud of Mr. Watson. He has brought some real talent and expertise from the West Coast back to the East Coast and we appreciate him being there for real.

Mr. WATSON. Thank you.

[The questions of Senator Biden are located in the appendix.]

Senator ABRAHAM. I want to thank the whole panel both for the long period of time you have been willing to sit through today and for your insights because this is very helpful particularly, I think, to those of us who want to see if we can't handle this problem in a way that is satisfactory to all. So thank you very much for coming and we will dismiss you at this time. Thank you.

What I would like to propose is this for some of us who have been sitting for quite a while here, and I know there are a few who would like to take a brief break. I think what we will do is reconvene with the next panel at 2:45. We will stand in recess until then.

[Recess.]

Senator ABRAHAM. Before we start this panel——

Senator BIDEN. Mr. Chairman, I apologize for keeping you waiting. I didn't know you were waiting on me.

Senator ABRAHAM. I was, and I would explain to our panel and those few remaining guests here today that we have Boys Nation in town.

Senator BIDEN. In light of past history, I figured I may be speaking to a future President, so I wanted to be very polite so they remember me. The only commitment I ever ask from these kids is that when I bring my granddaughter by years from now and they are told by their secretary Joe Biden is in the outer office, they won't say Joe who? That is the only commitment I ask and I have got that commitment, so I apologize for holding you up.

Senator ABRAHAM. Before we begin the panel, I just want to say we are trying to cover several diverse, unrelated to some extent

Mr. HYDE. Thank you, I appreciate that. Very good.
Mr. Barr.

STATEMENT OF WILLIAM P. BARR, FORMER ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, AND GENERAL COUNSEL, GTE CORP.

Mr. WILLIAM BARR. Thank you, Mr. Chairman and distinguished Members of the committee.

I am honored that you invited me here today to discuss terrorism and H.R. 1710.

I think it is possible to exaggerate the terrorist threat we face. I do feel that there are a number of factors today that do mean that we are going to find that terrorism, both from foreign and domestic groups and individuals, is a persistent challenge that we face, and while we have substantial resources and authorities now to combat it, I do think that there are some measured and reasonable steps that we can take that will markedly increase the FBI's ability to deal with terrorists, to detect them, to interdict them and ultimately to perhaps deter them.

And I know that there are some who believe that you cannot deter terrorist groups, and I know from my own firsthand experience at the Department of Justice, that there are some groups in the world that have decided that it is not best to carry out terrorism in the United States because of their perception of the vigor and effectiveness of the FBI here at home. And, therefore, I think it is critical for all of us to ensure that we are doing whatever can be done to keep our guard up consistent with our constitutional principles and our cherished freedoms.

I think 1710 is a superb piece of legislation. I think it is balanced and reasonable. I think it will substantially enhance our ability to deal with terrorism. But at the same time, it does preserve our free traditions and our constitutional liberties.

It draws upon some important proposals that were made as early as the Bush administration as well as proposals made by this administration. It has some new provisions, and in several cases, I think it significantly improves upon previous proposals.

Two broad points I would like to make at the outset, and one is sort of echoing you, Mr. Chairman, I don't think this is—as it is sometimes presented in the media—a rush to judgment or knee-jerk reaction precipitated by recent events. These ideas have been around for years and carefully considered, and this bill reflects the collective judgment of successive Republican and Democratic administrations and the people in the Department of Justice and other law enforcement agencies about improvements that can be made that will assist us.

The second overarching point is there is no diminution that I can see of our constitutional liberties in this legislation.

When American citizens or domestic targets are involved, the fourth amendment requirement of probable cause remains in effect and there is no effort here to circumvent that standard. Most of the investigative tools, the new investigative tools that are dealt with in this legislation are directed at foreign groups, foreign agents, foreign counterintelligence—foreign intelligence and terrorist activities.

I would like to just run over a few specifics. Resources are provided for in this legislation. I think that that is critical. I think that the FBI has been sorely treated on the resources front over the past few years, and would have been in very bad shape indeed had it not been for the bipartisan effort here in Congress last year to increase the FBI's budget. And I think what we need is a sustained commitment to ensure that the FBI has the resources it needs.

I was shocked during Desert Storm when I had responsibility for conducting the counterterrorist activities here in the United States, that it would take us longer to get a response team to a hostage crisis occurring here in the United States, far longer, than it would to get the Delta Force any place in the world.

Up until last year, or a little over a year ago, we did not have the capacity here in the United States to rescue hostages on a 747 in the proper manner because we did not have sufficient resources. Now that has been made up for recently and we do have the capacity today.

But I think what this points out is—and that was a situation that existed during Desert Storm, what that points out is we can't allow this to be a one-shot deal. We have to make sure that we have the resources. It is important that we are providing for the digital telephony aspect here and ensuring that we will still have the ability to conduct electronic surveillance in a digital environment.

I think it is still important for this committee to look at the whole technology areas, as a number of Members have mentioned. Right now, I think it is sort of a mess inside the executive branch. You have all of the law enforcement agencies with their budgets doing duplicative systems, and so forth. There is a need to create some kind of a mechanism where the technology, the R&D budget are reviewed and coordinated so that we are putting our money and our resources into some of these very promising technologies, and that is not being done within the executive branch today.

On the investigative techniques, I would just like to mention two of them. As I say, most of them, the ones relating to the common carrier records, the consumer records, and what is the third there—well, there is a third one, all relate to foreign counterintelligence reviews.

The ones that relate to wiretapping of domestic entities or individuals are really nothing more than the application of existing law with respect to other criminal activity and ensuring that it applies to counterterrorist activity; namely, the emergency wiretap authority for 48 hours. If there is an area where the emergency wiretap is appropriate, it should be from the counterterrorist environment where the activity is directed at inflicting substantial damage to property or human life.

And also the roving, the so-called roving wiretap authority, which is perfectly consistent with the fourth amendment protections, and just recognizes the way technology behaves nowadays and recognizes that it is not a telephone, an inanimate object, that has the privacy right. It is an individual that has the privacy right, and once you have the probable cause to believe that an individual

is engaged in criminal activity, you should be able to intercept that individual's communications.

I think the way posse comitatus is dealt with in this legislation is excellent. As you know, Mr. Chairman, I feel that the existing law would cover the kind of technical support we are talking about. But I also believe that the Defense Department would require some kind of specific explication of that in statute, and I think this statute does a good job of limiting the military involvement which we all think is an important thing to do, but, at the same time, making it clear that the resources of the military should be available in that kind of catastrophic risk environment.

A few words about the immigration provisions. Again, I think the provision in this bill are very balanced and sound, and very much needed. I think that if the American people knew how the immigration laws tie the hands of law enforcement officials in dealing with foreign terrorism, they would be shocked and dismayed.

The provision that draws the most fire is the special court provision. I do think it is necessary. As you know, a variant of this was proposed under the Bush administration. I think this bill improves upon that and contains some additional protections for permanent resident aliens and I think that is an improvement.

I would like to suggest to the committee that one area that might be profitable to look at that could be a good programmatic way of dealing with foreign terrorism that wouldn't require really changes in the law—just in the way we operate—has to do with screening people overseas.

One of the screens that we have traditionally had was granting of visas. For someone to come to the United States, they had to go into a State Department consular office and get a visa with somebody eyeballing and checking out an individual before they came to the United States.

Now, as you know, for most of the large countries in the world and the industrialized countries in the world, we waive visas through the visa waiver program. So people coming from those countries do not have to get a visa.

Over 70 percent of the people who arrive by air to this country come from just six airports in the world, and if we put some INS presence in those airports to do prescreening of passengers, which those countries would love to see because it is considered a boon to tourism. And we have this now from Canada. You know that you don't have to go through the full-blown immigration and customs in the United States because you are screened right there in Toronto or Montreal.

If we did that in those six airports, then we could as a substitute for the visa process and checking people against computer data banks, we could greatly cut down on the number of people that show up in this country that have to be excluded and deported and detained, and so forth, because they shouldn't be coming into this country.

The main obstacle to this, and I hope Abe Sofaer doesn't jump at me for this, has been the State Department who doesn't like to have a bunch of people from other agencies stationed overseas. That is the bureaucratic impediment to it. But it would be a very cost-efficient way and save a lot of costs, because you wouldn't need

detention space, but would also add to our security, and I would encourage the committee to look at that.

With that, let me conclude and just say that I think, echoing you, Mr. Chairman, this is a bill that really should enjoy wide bipartisan support. This is not an area for politics. This is a very measured, carefully drawn bill that strikes the right balance.

Mr. HYDE. Well, I certainly thank you, Mr. Barr, for those excellent words.

[The prepared statement of Mr. William Barr follows:]

PREPARED STATEMENT OF WILLIAM P. BARR, FORMER ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, AND GENERAL COUNSEL, GTE CORP.

Dear Mr. Chairman and distinguished members of the House Judiciary Committee, it is an honor to have been invited here to testify about the critical topic of terrorism and to express my strong support for H.R. 1710, the "Comprehensive Antiterrorism Act of 1995." The legislation, in my view, should enjoy wide bipartisan support.

Recent events have dramatized a fact that the American people, I think, have intuitively understood and law enforcement has known for a long time: the United States is not immune from terrorist attack. I agree with these experts who foresee a continuing, and probably heightened, threat of terrorist attacks by both foreign and domestic individuals and groups. Of course, we should be careful not to exaggerate or sensationalize the risk; I think it is unlikely we will undergo a sudden wave of large-scale attacks. But, a number of factors have coalesced in recent years which do presage that terrorism will be a persistent danger. These will run the gamut from isolated fanatics who plant a crude pipe bomb to well-organized groups capable of carrying out catastrophic attacks.

There is no doubt that American law enforcement and intelligence agencies have substantial resources and capabilities to deal with the terrorist threat today. Indeed, American agencies, particularly the FBI, have an enviable record to date in addressing terrorist threats. Nevertheless, in my view, existing resources and authority are not fully adequate. While I see no need for sweeping changes, there are clearly additional reasonable steps that should be taken to enhance our ability to deal with terrorism. Obviously, we cannot provide absolute security. But I think there are prudent steps we can take today that will markedly increase the FBI's ability to detect and interdict terrorist plans before they are carried out. Ensuring that our anti-terrorist capabilities are robust will also help deter some terrorist activity. From my own experience at the Department of Justice, it was clear to me that there are foreign groups who, until now, have chosen not to carry out attacks in the United States, but have focused elsewhere, because of their perception of the FBI's vigorous and effective anti-terrorist capabilities. I believe it is critical that whatever can be done to keep our guard up should be done, consistent with our constitutional principles and our free traditions.

In this regard, I believe H.R. 1710 is an excellent bill. It is a balanced and reasonable proposal that will substantially enhance our ability to counter terrorism, while at the same time preserving our cherished liberties. The bill draws upon some important proposals made under the Bush Administration, as well as proposals made by the current Administration, and in several cases significantly improves upon them.

Before I get into some specifics, I would like to make a few overarching points.

First, this is not, as some suggest, a knee-jerk or ill considered overreaction to a specific event. Most of these proposals were not thought of overnight. By-and-large most of them have been on the table for some time and reflect the combined wisdom and experience of both Republican and Democratic Administrations who have had to grapple with these problems. Consequently, the proposals are not sweeping changes, but measured and modest steps.

Second, the proposals do *not* involve any erosion of constitutional liberties. On the contrary, they are designed to ensure that the government carries out its constitutional obligations to protect Americans in the exercise of their freedoms and to preserve the structure of our free government. There is *no* change in the constitutional standards that protect citizens from improper government intrusion into their private affairs.

And *third,* having worked closely with the FBI and the personnel at the Department of Justice, I have the utmost confidence that law enforcement agencies today will carry out these responsibilities with integrity and with sensitivity for constitu-

tional liberties. I think the leadership and the rank and file are men and women who are deeply dedicated and committed to our Constitution and to protecting and serving the citizens of this country, and they have no desire to harass or to intrude into the private affairs of law-abiding and nonviolent political groups.

Now let me turn to some specifics of H.R. 1710.

Title III of H.R. 1710 ensures that certain appropriate investigative tools are available to law enforcement in terrorism cases. In my view, none of these provisions involve an erosion of privacy rights. For the most part, these provisions simply ensure that perfectly constitutional and sensible investigative techniques that are authorized in various other types of cases are equally applicable to terrorism cases. In all cases, these proposed authorities conform to constitutional guarantees.

I have noticed, for example, criticism of the proposal in section 308 to allow temporary emergency wiretaps in terrorism cases—with the suggestion made that this represents a wide expansion of powers. These criticisms are unjustified. Emergency wiretap authority exists under current law with respect to a range of criminal activity, including "conspiratorial activities characteristic of organized crime." 18 U.S.C. § 2518 (7)(a)(iii). This existing authority is subject to substantial safeguards, including the requirement that the government must promptly establish "probable cause" and obtain a court order. Existing emergency authority has been sparingly used and I am not aware of any indication of abuse. It is clearly appropriate that the same emergency authority that applies with respect to Mafia conspiracies also applies to terrorist conspiracies which, by their nature, are directed at the destruction of life and property.

Similarly, section 309's authorization of "roving" wiretaps is reasonable and fully in accord with constitutional safeguards. While this concept sounds sinister, it is really quite sensible and in many cases essential. In earlier days when the wiretap statute was first enacted, wiretaps were targeted at a specific telephone. Today, however, with increased mobility, cases arise where the government clearly has "probable cause" to believe that a particular individual is involved in criminal activity (and therefore as a constitutional matter, has the right to intercept the individual's communications) but cannot establish in advance the particular phones that individual may use. Section 309 simply allows the government to obtain a warrant that authorizes following the targeted individuals' communications rather than staying anchored to a particular telephone. Still, section 309 imposes safeguards by requiring pre-approval by a top Justice Department official and a showing that it is impractical to identify a particular phone. This is perfectly in line with constitutional protections. After all, the right to privacy guaranteed under the Fourth Amendment is an *individual's* right to privacy; it is not an inanimate object's (a telephone's) right to privacy. Section 309's concept of roving wiretaps targeted at particular suspects rather than specific phones should not cause alarm.

There has been much comment on the proposal to amend the Posse Comitatus Act to allow military assistance in terrorism cases involving chemical or biological weapons. On the one hand, the tradition that the army should not directly carry out law enforcement actions is one we all treasure; on the other hand, I can tell you, based on my own direct experience, that the threat of biological or chemical terrorism is a real one and that law enforcement would likely need to call on the technical and logistical assistance of the military to deal with any future attempted attack. Section 312 of H.R. 1710 is a wise and carefully crafted provision that strikes the right balance. It continues to prohibit direct law enforcement actions by the military, while still allowing "technical and logistical assistance." It is thus faithful to the principles of the Posse Comitatus Act, while recognizing the reality of our obligation to take every practical step to prevent a biological/chemical catastrophe. My own view is that this provision really only clarifies existing law; it reflects how the Posse Comitatus Act would be interpreted today in the event of an attack. Moreover, it is comparable to other existing exceptions to the Posse Comitatus Act that Congress has already authorized for counter narcotics activities. 10 U.S.C. §§ 371–375.

Title V of H.R. 1710 contains a number of important provisions relating to the immigration laws. Existing law simply does not give law enforcement the tools to deal effectively with alien terrorists who are either present in or entering the United States. I learned this first hand during Desert Storm and several other episodes while I was at the Department of Justice. The reforms proposed in H.R. 1710 are similar to ones initially proposed under the Bush Administration and now by the Clinton Administration.

The provision that has drawn the most fire is the special court for removing alien terrorists. This proposal grew out of actual cases. It is imperative we deal with the Hobson's choice that exists where we have clear evidence that a particular alien in the country is a dangerous terrorist and, yet, we are relying on information that we cannot disclose without creating equal danger to the American people and dis-

closing sources that we may need to continue to monitor these terrorist groups. Section 601 of H.R. 1710 sets forth a very balanced and reasonable way of dealing with that Hobson's choice. Indeed, Section 601 adopts safeguards beyond those proposed by the Administration and well beyond what is required by the Constitution. In the case of a permanent resident alien, an attorney for the alien would be permitted access to the classified information upon which the Government's decision was based. This should remove any objection to this removal procedure.

In sum, H.R. 1710 would significantly enhance the ability of law enforcement to deal with both foreign and domestic terrorism. It does this without undermining our cherished constitutional liberties. It deserves the bipartisan support of this Congress.

Mr. HYDE. Our next witness is Abraham Sofaer who served as legal adviser to the Department of State from 1985 to 1990, and previous to that, he was U.S. district judge for the Southern District of New York.

He was a professor of law at Columbia University Law School and currently he is a George P. Shultz Distinguished Scholar and Senior Fellow at Stanford University's Hoover Institution

Welcome, Judge Sofaer.

STATEMENT OF ABRAHAM D. SOFAER, GEORGE P. SHULTZ DISTINGUISHED SCHOLAR AND SENIOR FELLOW, THE HOOVER INSTITUTE, STANFORD UNIVERSITY

Mr. SOFAER. Thank you, Mr. Chairman.

It is a privilege to be here to testify before you and this distinguished committee.

I have submitted written testimony in advance of my testimony here today. So I will try not to repeat what I have said there, but merely summarize it and perhaps stress the two points that I consider to be the most important points that I, at least, feel I can contribute.

Law reform is critical in the fight against terrorism and Bill Barr has been the leader of the Nation, in effect, in reforming the law, both domestic and international, along with Congress.

My own efforts in the State Department were focused on working to change international law, or to at least fight for interpretations of international law that made sense to States that believed that people should not be using violence to bring about political objectives.

Violence, it turns out, has in the last 30 or 40 years, or perhaps even longer, Mr. Chairman, been treated as permissible, almost, in many international legal circles. As long as the purposes of the violence were political.

There was almost a willingness to tolerate violence, to understand it, because of the causes of misery, et cetera, in the world, that led to violence according to many people who spoke in the U.N. on this subject, particularly during the 1960's and 1970's.

As a bipartisan matter, we have fought those notions. Senator Moynihan and Ambassador Kirkpatrick, for example, were leading fighters against this idea. And during my time in the State Department, I was spurred on, I might add, by the story I give in my testimony about how Secretary Shultz almost threw me out of his office physically when I informed him that piracy, the concept of piracy in international law might not cover the *Achille Lauro* incident because it was politically motivated, as opposed to financially motivated, according to a Harvard Law School study in the 1930's,

which many contended was adopted and implemented and read into the international conventions on the subject.

So, we worked for change, and we got the Maritime Convention passed, with Egypt's and Italy's help, which makes illegal all maritime acts of violence, regardless of purpose. We also changed the laws of extradition materially in many treaties to eliminate or narrow the political offense exception.

We did a number of things that gave us the ability to bring the U.N., even, to the point where last December in a little noted fact in the world, but nonetheless for us who participated so vigorously in this effort, a significant fact, the U.N. General Assembly voted to outlaw all forms of terrorism, regardless of cause. And, obviously, we are not relying on the U.N. to tell us that is the right thing to do, but it is nice to see the U.N. come around to our point of view on that subject.

The appalling pattern relating to terrorism is now, I think, corrected in most respects, but not with regard to the use of force. There is still out there, Mr. Chairman, a large number of nations and scholars—particularly scholars, less so political leaders—who take the view that the self-defense power of a nation is very limited, and we in the Reagan administration addressed this issue, because we were primarily concerned in connection with terrorism with prevention above all else.

The key point I suppose of my testimony, in fact, Mr. Chairman, is that with acts of terror of the dimension that we have experienced recently in the World Trade Center bombing and in the Oklahoma bombing, prevention is what we should be seeking above all else.

It is important, but not necessarily significant that we have caught the perpetrators of the World Trade Center bombing. I know I say that with some expectation of being clobbered by people who think that it is a great story that we run them down and by fine investigation we found out who did it and we put them in prison.

But the fact of the matter is they almost blew the World Trade Center building down into the streets of Manhattan. First of all, it was a catastrophe, as it was. But could you imagine the catastrophe that could have been caused and could still be caused by these kinds of people?

So, the most wonderful things about this bill—and, in fact, I think it is a quality that permeates this bill, are the elements that are preventive. I noted that Congressman Barr was concerned about some of the provisions in the bill because they seem to be unnecessary. I agree that most of these provisions probably are technically unnecessary in the sense that existing law could be read, might be read, probably would be read in differing degrees of certainty, to cover the conduct.

But why take the chance? Surely we can have investigations and prosecutions in many situations where we don't have jurisdiction to prosecute. But how about prevention? Surveillance: the reason the FBI engages in surveillance is not just to make cases, it is to keep cases from happening. It is to capture people before they kill Americans and destroy our property.

The same thing is true of immigration. And I can only tell you, Mr. Chairman, and I have to remind you that the leader of the group, the alleged leader of the group that planned the World Trade Center bombing, that planned the bombing of the United Nations in New York, was in this country because of the failure to enforce our immigration laws efficiently.

And, so, there was a failure to prevent in that instance. And I also read in the press that when people were arrested for the Kahane murder, there were documents in Arabic that referred to some of these schemes before they occurred. And that there weren't Arabic translators available to the FBI to translate these documents.

I don't know what the story is on that, Mr. Chairman, I have only seen it in the newspapers and I know the unreliability of such stories. But the fact is that that is a key area in which I would recommend the committee look, perhaps not in passing this bill, because you don't have the time. But certainly at some point to determine how well is the FBI conducting its primary mission of prevention?

And that is why, Mr. Chairman and members of the committee, I mention at the end of my testimony the need for looking at this technology dimension, which Congresswoman Lofgren also mentioned while she was here. When I was in the State Department, I was amazed that we seemed to be very primitive in our approach to preventing terrorist acts.

And I got briefed on what was going on in the scientific area, and frankly, Mr. Chairman, I have not seen publicly discussed some of the things I was told about in 1986, told about as being really there. And I must say, Mr. Chairman, in all honesty, I found a lot of resistance to my inquiries. I was sort of pushed away from the subject. Not because I was not trusted, but because there was a sense I had that this is none of your business, this is being done in a military arena and we are taking care of it and it is being—well, I haven't seen any evidence of it.

Mr. HYDE. Judge, would you permit a comment?

Mr. SOFAER. Yes, sir.

Mr. HYDE. I hate to interrupt you, but you are on a very important point. We all feel uncomfortable when we tread where angels fear to go, and some of these areas are very sensitive. But I was just looking at correspondence from the Justice Department. Today, there are 433,414—that is my recollection—cases pending in a backlog on refugees.

Now, in an era of computers, supercomputers, and technological advancement, to have a—and that backlog has been standard for years. About 400,000-plus cases undealt with, pending, backlog: that is crazy. And I just want you to know this committee is going to exercise oversight in a vigorous way and we welcome suggestions from you.

Mr. SOFAER. I think General Barr has just made a suggestion that is brilliant. He says that we should, in the seven major airports around the world, out of which we get 70 percent of all the people that come to America, put in a technologically up-to-date system for screening people so we don't have literally thousands of people coming to America who don't belong here. And then we have

to build facilities to put them in and spend all kinds of money that we would not have to spend by having an up-to-date system. I would think, Mr. Chairman, just one or two major changes like that could have a huge impact.

Mr. HYDE. Professor or Judge Sofaer, that bill, as it will be drawn, will be known as the Barr initiative.

Mr. SOFAER. Good, I approve. So I won't go further in that. But you would say that I particularly urge you to read the portion—switching now from the notion of prevention through technology and law changes, to the notion of prevention through deterrence. I would like you to look at my testimony with regard to a hypothetical bombing of the World Trade Center dimension.

The people who bombed the World Trade Center are irrelevant. They are totally irrelevant, Mr. Chairman. There are people willing to be blown up in bombings for causes all over the world, just as there are soldiers willing to run up a hill and get killed for their countries.

I am not comparing them to honorable soldiers doing honorable work, but the fact is people can be motivated by patriotism, by religious zealotry, or whatever, to let themselves be killed, let alone let themselves fall into the tender trap of the U.S. Immigration Service, or the U.S. Department of Justice where we haven't been able to execute anybody for so many years. But even the death penalty is not a deterrent for this kind of thing, Mr. Chairman. We have to go back and get the people who send people here to kill Americans or kill Americans abroad.

It is not enough to consider terrorist acts in the United States as being the only thing that Americans are concerned about. The FBI is concerned about killing hundreds of Americans in a plane abroad or in an ambassadorial facility.

And we need to get every level of participant in the terrorism against America all the way up to the Nation itself. And this principle is not a partisan principle.

I was very happy to see President Clinton bomb Iraq, and the rationale that he gave when he bombed Iraq precisely tracked the five principles that we had laid out in the Reagan and Bush administrations for the exercise of self-defense, in situations where we have state-sponsored terrorism.

You have civilians running around acting in accordance with the wishes of an intelligence service, acting in accordance with the wishes of head of state, and they try to kill an American because he is an American.

He happened to be a former President, but it was an attack on America because of that, and that is what President Clinton said. And he was right. And we have the right to use force that is necessary and proportionate in those situations to be able to feel confident that those acts will be deterred.

And the reason I say this, Mr. Chairman—and I will end with this point—the criminal law is not a suitable vehicle for achieving the end of deterrence in state-sponsored terrorism.

We should not—we cannot use a criminal court to prove that a state has attacked us. The kinds of evidence that we get about state-sponsored terrorism is often not usable in a criminal court.

And even if it were usable, the President of the United States might not want to use it for countless reasons. Does that mean that we should be left without any capacity to deter that kind of criminal conduct?

I would say, sure, it is criminal to attack America and Americans. But it is much more than criminal. It is war. And it is a violation of the U.N. Charter, and it is something that we have to do much more to counter than merely prosecute people. And what scares me, what scares me about the FBI is not that the FBI is not competent. They are. Or vigorous or great patriots. They are.

What scares me is that they have historically done their work in the context of criminal cases, making criminal cases.

It is only recently, and Bill will confirm this, that they became involved in international affairs as a routine matter, I supported Attorney General Meese's effort to establish a DOJ office in Rome. That was the first DOJ office.

We need to get the Department of Justice thinking much more along the lines of performing a national security service and focusing, as I have said, above all on prevention.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Sofaer follows:]

PREPARED STATEMENT OF ABRAHAM D. SOFAER, GEORGE P. SHULTZ DISTINGUISHED SCHOLAR AND SENIOR FELLOW, THE HOOVER INSTITUTION, STANFORD UNIVERSITY

Chairman Hyde, and members of this distinguished committee. It is a privilege to testify before you on the Comprehensive Antiterrorism Act of 1995.

My prior experience, relevant to this subject, began with my service as a Federal prosecutor under Robert Morgenthau in the Southern District of New York, between 1967 and 1969. Terrorism was a substantial problem at the time, both internationally and domestically. As a district judge between 1979 and 1985, I often passed upon the sufficiency of requests for wiretaps and other forms of intrusions. From 1985 to 1990, I served as legal adviser to the Department of State, in which capacity I gave legal advice to the Secretary of State and others about terrorism, and also testified before Congress, wrote articles, and gave speeches on the subject.

The relationship between law and terrorism is a subject that has long been one of my abiding concerns. I joined George Shultz in the State Department on June 10, 1985. Only four days later, TWA 847 was hijacked. We all worked hard to try to get our people back safely, without compromising our principles. I'm sure your hearts still ache, as mine does, for young Robert Stetham, who was murdered in cold blood. We faced other horrible assaults as well—among them, the seizure of the *Achille Lauro*, attacks at the Rome and Vienna Airports and at the La Belle Discotheque in Berlin, hostage-taking in Lebanon, and the bombing of Pan Am 103. Many innocents were killed in each of these attacks.

I vividly remember being called up to Secretary Shultz's office after the *Achille Lauro* was seized. He asked me what laws were available on which we could rely to try to get the culprits arrested, extradited and prosecuted. I told him then that it was uncertain that the seizure would be considered "piracy," because a Harvard study in the 1930s had suggested that "politically" motivated seizures of vessels should not be treated as piracy, a suggestion that some claimed had found its way into governing international conventions.

Secretary Shultz was outraged. "What good is the law?" he exclaimed, almost throwing me out of his office. His reaction worsened when the Italians helped Abu Abbas escape, instead of extraditing or prosecuting him. The Secretary was right, of course, and his outburst led me to examine the manner in which international law treated terrorism.

I found an appalling pattern in international legal doctrine of inordinate tolerance towards political violence. I described this pattern in an article published in *Foreign Affairs*, and spent the next four years working to reverse these rules and attitudes.

We accomplished a great deal. with the leadership of Italy and Egypt, we developed a new treaty that made criminal all forms of maritime violence. We reversed the "political offense" doctrine in many of our extradition treaties with foreign states. We developed understandings with our allies that rejected the most objec-

tionable aspects of the protocols additional to the Geneva Protocols on the Laws of War. Perhaps most significantly, we appear to have succeeded to some extent in delegitimizing the abhorrent view that acts of terror can be justified by their causes. After years of fighting this notion, going back to the articulate leadership in the United Nations of Senator Moynihan, Ambassador Kirkpatrick and others, the General Assembly, in December 1994, adopted a resolution condemning all acts of terrorism, regardless of cause. While little that the UN does is unambiguous, this resolution lays to rest some thoroughly disreputable notions.

Improvements in international law relating to terrorism have had positive consequences. Terrorists are more frequently arrested, extradited, and prosecuted than ever before. Thanks to the work of Ed Meese and his successors, the Department of Justice has played an increasingly effective role in combating international terrorism. I worked with Attorney General Meese in getting the Department of State to support the first DOJ office abroad, in order to regularize and make more efficient its routine international operations. I strongly support the continuation of this process, and of the stationing of FBI personnel in key locations. Congress has also played an important role, providing a jurisdictional basis for arrests and prosecutions in connection with many forms of terrorist activity.

Law reform is also needed domestically. The pending legislation contains many useful and some essential provisions. It has my enthusiastic support. In general, moreover, I support the committee's version of provisions suggested in the Department of Justice bill. This should not be surprising. The draft will improve as it moves toward adoption, and I would expect the department to cooperate fully with this committee.

I will avoid covering the obvious, and focus instead on my few, but real, concerns with the proposed legislation. Then, I will discuss briefly what I regard as the most serious national security issue facing America today: the threat of state-sponsored attacks, and particularly the use of weapons of mass destruction, against American nationals and property.

My principal concerns with the proposed legislation relate to its expansion of Federal criminal jurisdiction and its investigatory provisions. First, it would be entirely appropriate to extend Federal jurisdiction to all serious attacks on Federal employees if the need for such a law is established. As far as I can tell, however, the need for such a law is purely theoretical. Our states are doing a good job of prosecuting murders and attempted murders. Congress should add to the burden of the Federal courts and prosecutors, and to the number of Federal prisoners, only where a need exists to do so. Most of the extraterritorial provisions conferring jurisdiction are sound, and needed. I doubt, however, that the mere fact that a U.S. national was or "would have been" aboard an aircraft that is attacked is a sufficient basis for jurisdiction. Even if it is technically sufficient, it would seem preferable as a matter of comity and practicality to restrict the cases in which the U.S. asserts jurisdiction to those in which the American national is actually targeted because he or she is an American.

In sections 301, 308 and 309 the bill enhances the potential use of wiretaps in terrorism investigations. I frankly doubt that these provisions are necessary, but the committee should accept the Government's request for these clarifying amendments. The bill's modification of the exclusionary rule is also warranted as a general principle. The use of illegally seized evidence would still be precluded, but only where the seizure involved bad faith. Any deliberate violation of a persons rights should be considered as bad faith.

Even if the committee agrees to adopt the provisions proposed by the Government to enhance their investigative capacities, an inquiry should nonetheless be made into whether the new authority could have helped prevent the recent bombings. I frankly doubt it. My experience as a prosecutor and Federal judge often exposed me to the process by which Federal investigators obtain approval for wiretaps and other forms of searches. Among the most memorable of these experiences was serving as the judge who reviewed the warrant and wiretap requests of the government in a major terrorist investigation involving three different organizations. The operation was, in fact, supervised by then-assistant U.S. Attorney Louis Freeh. Director Freeh undoubtedly recalls that he had ample authority in that investigation to pursue and prove and prevent criminal activity, without any of the new powers now being sought.

In this regard, the committee should check on the types of activities the FBI was in fact conducting, even before the tragic Oklahoma City bombing. My guess is that you will determine that the FBI has been able all along to infiltrate and surveil groups which can reasonably be suspected of supporting violent acts against Federal officials and/or facilities. In connection with the bombing of the World Trade Center, the press contains some discussion of certain documents which the FBI seized but

failed to translate which could have provided important information before the bombing occurred. The committee should form a judgment on that matter, based if necessary on evidence received in closed session. Such an inquiry might well reveal, in fact, that the Bureau has for some time actively investigated "hate groups" and "militias," and that the additional powers conferred in the committee's bill may be desirable, but are insufficient in that they do not address deficiencies in the Bureau's handling of the information it obtains.

The most important contribution of the pending legislation is its focus on the prevention, not merely the prosecution and punishment, of terrorist acts. As terrorist attacks become more deadly and costly, the need to prevent them from occurring becomes critical. And the threat from such attacks is growing, as the means for making and delivering weapons of mass destruction proliferate. Experts have been predicting for about two decades that states that sponsor terrorism, and groups capable of financing such acts, would enhance their capacity to cause destruction. that in fact has happened.

The primary task of our Government, in such a context, is prevention. Every such attack that occurs must be regarded as a failure, for which all who are responsible are held responsible. We are captivated by and admire the efforts made to find and punish those responsible for such attacks, especially since every move of each of the players is now on television throughout the world. But let us face the fact that government has failed in its primary responsibility once such acts occur. The damage the perpetrators inflict far surpasses the damage we can thereafter inflict upon them through the legal system. Criminal punishment, even the death penalty, cannot be considered a significant deterrence. Those who plan and implement such acts are often crazed people, who commit suicide in the process, or accept any punishment imposed upon them with equanimity. The sponsors and facilitators of such acts—those who develop the polices, who hire the terrorists, who smuggle the devices and explosives—are often legally immune from criminal punishment, or remain safe as a practical matter by taking refuge in sympathetic countries.

These attacks must be stopped, not merely punished. And while it may be impossible to stop them all, we must try to stop them all in order that we fail only where we could not possibly have succeeded.

This committee should make sure that the FBI, and all other agencies responsible for dealing with terror, within the U.S. and abroad, understand their overriding obligation to prevent, not merely prosecute and punish, acts of terror. The committee should pursue the lines of inquiry I have suggested in order to be sure that they are in fact perfor ing this duty at the highest possible level of competence and urgency.

Fighting terrorism effectively is not merely an issue of criminal justice. It is often also—indeed primarily—an issue of strategic concern. Consider for a moment the World Trade Center bombing. No one would question the need to prosecute the perpetrators of such a criminal outrage. Let us assume, however, that the culprits in such a bombing include: a driver who is killed in the blast; his immediate supporters, who are arrested through excellent police work; those who suppled them with explosives, devices, passports, weapons, money, and other means to commit the act, some of whom are diplomats stationed in New York or Washington, D.C.; and those who planned, ordered, and paid for the operation, including members of a national secret service, ministers, and perhaps even the head of a state.

The driver is gone, but is dispensable. Others are available to take his (or her) place in future attacks.

The immediate supporters may be arrested and punished, but they will probably be uncooperative, and in any event are unlikely to know the ultimate sources of their support. They, too, are replaceable.

The suppliers may be tracked down, but they will plan to avoid being caught in the U.S. or any nation likely to cooperate with the U.S., or they will have diplomatic immunity, which will prevent their prosecution and even their interrogation.

The ultimate planners are likely to remain forever beyond the reach of criminal law enforcement, either because they have head of state or other forms of immunity, or because the information we obtain about their involvement would not be usable or sufficient in a criminal prosecution, or extradition request.

Viewed in this perspective, which I believe is realistic, you can see how insignificant it may be that the actual perpetrators of a terrorist act are captured and prosecuted successfully. Of course such prosecutions must be pursued, and may lead back to some of the more responsible people involved. But it is always going to be highly unlikely that the criminal law will operate satisfactorily as a means of deterring such conduct. States sponsor such terrorist attacks because they fear our capacity to defeat them if they act openly, through the use of their Armed Forces. They

also rely, here as elsewhere, on interpretations of international law to protect them from being held responsible for the consequences of their conduct. Dealing with state-sponsored terrorists thus may often require governmental action that goes beyond enforcement of the criminal law.

During the Reagan administration, we thought these issues through rather carefully, and we reached, announced, and acted upon certain conclusions which bear repeating. First, we made clear our intent to exercise the "inherent right of self defense" preserved in article 51 of the U.N. Charter, which provides that "nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the security council has taken measures necessary to maintain international peace and security."

Second, relying on customary practice, including the consistent behavior of U.S. Presidents, we insisted that an attack on an American outside the territory of the U.S., undertaken because the victim is an American, could be considered an attack on the U.S. under article 51.

Third, we also insisted that the right of self defense included the right to take all measures necessary to stop attacks on Americans, even if the measures taken were more serious or continued for a longer period than those of the aggressor.

Fourth, and with regard to responsibility, we took the view that terrorist organizations and states could be held responsible for the acts of individuals where appropriate proof is present. We concluded that "the U.S. should apply to terrorist organizations the same standards of responsibility that are applied in any legal system that deals with such issues." President Reagan warned after the killing by terrorists of Americans in Rome and Vienna: "by providing material support to terrorist groups which attack U.S. citizens, Libya has engaged in armed aggression against the United States under established principles of international law, just as if he [Qadhafi] had used its own forces." And that is precisely how President Reagan treated the next attack, at the disco in Berlin.

Fifth, the strict requirements of proof applied in criminal trials have no place when dealing with issues of national security. The U.S. may learn something about a terrorist group that is authoritative, but which it could not, or would not, use in a public proceeding. An act of self defense is not a tactic in a legal dispute. It is a measure that a state takes in order to protect interests more fundamental than anything that is litigated in any court. A nation's national security interests cannot be abandoned merely because of evidentiary or jurisdictional limitations.

These principles, Mr. Chairman, are not partisan. They have been consistently applied by Presidents of both parties, including President Clinton. Once President Clinton became convinced that Iraq had attempted to assassinate former President Bush during a private visit to Kuwait in April 1993, he ordered a strike by 23 precision-guided Tomahawk missiles on the Iraqi Intelligence Control Center in Baghdad. He pointedly stated that he had acted under article 51 of the U.N. Charter, exercising the Nation's inherent right of self defense. He referred to the plot as "an attack by the government of Iraq against the United States," even though it had been planned to occur in Kuwait and therefore did not threaten U.S. territory. He also treated this planned attack on President Bush as an act of revenge, "because of actions he took as President." The attack was therefore "an attack against our country and against all Americans." The President held Iraq responsible for the attack, even though it was to be conducted by civilians, some 14 of 16 of whom were not even Iraqi nationals. It was enough that "there is compelling evidence" that Iraq was responsible, even though some of the evidence could not be revealed. Any lesser measure, he found, would be futile, and the target was proper because the secret service had participated in planning the attack.

In principle, therefore, the scope and propriety of self defense are matters on which our leaders agree. But these principles have seldom been acted upon in recent years. We have tended increasingly to treat terrorist bombings—even when we believe them to have been state-sponsored—as crimes, requiring painstaking investigation, and (where possible) prosecution. This committee should recognize the limits to which the U.S. can rely on criminal law as an effective weapon against terrorism. No amount of legislation, no new power or authority, can substitute for force in situations calling for the Nation's defense.

Even with regard to random acts of terror which have no state sponsor, reliance on criminal law may be of questionable value. Certainly we should support the speedy trial and punishment of the culprits. But who in his right mind would not give up the chance to convict and punish those involved in some devastating act of terror in order to prevent the tragedy from occurring in the first place? Measures such as the tagging of explosives, and the exclusion or deportation of aliens who support terrorist groups, may well enable the Government to prevent tragedies.

I have two suggestions in this regard. First, the time may have come for the U.S. to press for narrow but important limitations on diplomatic immunity. We should be able to devise rules and procedures on which the entire world can agree to prevent and punish abuses of the privileges afforded diplomats and their pouches.

Second, the most effective measures for preventing acts of terror are usually technological. Metal detectors have saved countless lives. More sophisticated detectors for explosives will continue to make airline travel and other important industries viable. When I served as legal adviser, I urged the administration to undertake a "terrorist defense initiative" to develop devices that would enable civiled nations to return to relative normalcy. Secretary Shultz authorized me to be briefed on the research projects then underway, and I was impressed with some of the ideas that were being pursued. Perhaps this committee should seek to be briefed on those ideas, and to determine whether they have been adequately supported and exploited.

Mr. HYDE. Well, thank you very much, Judge Sofaer, and Mr. Barr, General Barr. Those were two very excellent commentaries on this important legislation and most welcome.

The gentlelady from Colorado, do you have any questions?

Mrs. SCHROEDER. I just got here, Mr. Chairman, I apologize and I will read the testimony.

I appreciate both of you being here.

Mr. HYDE. The gentleman from New Mexico, Mr. Schiff.

Mr. SCHIFF. I would like to ask both gentlemen—and I think you have testified very strongly, both of you, on behalf of H.R. 1710, which we mark up Wednesday—is there anything that leaps out at you, though, first, that we should be taking out of that bill; and second, separately leaps out at you that is not there and should be in the bill? And I now yield to both of you or either of you to respond.

Attorney General Barr.

Mr. WILLIAM BARR. Nothing leaped out at me of the substantive provisions that I think should be deleted from the bill. There are some things that perhaps I would put in the bill, but I understand the question of jurisdiction of different committees and so forth that might not make that timely or appropriate.

Mr. SCHIFF. Thank you.

Judge Sofaer.

Mr. SOFAER. I have made some comments in my written testimony, and I will stand by those; but I would say generally the most important thing I would do if I were editing this bill is, I would narrow the jurisdictional provisions so that the Federal courts are not continuously encouraged and U.S. attorneys are not continuously encouraged to do things that our State prosecutors and State courts are doing very, very well.

I just think some of these definitions are too broad, such as including all Federal employees in the definition of what would be considered a terrorist act. It includes millions of people potentially, and I would try to narrow those provisions and leave criminal law enforcement in its ordinary sense to the States.

Mr. SCHIFF. I have no other questions. Thank you, gentlemen.

I yield back, Mr. Chairman.

Mr. HYDE. Thank you.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you. Mr. Barr, you were here earlier when Mr. Skaggs was testifying. Were you here earlier when Mr. Skaggs was testifying?

Mr. WILLIAM BARR. Yes.

Mr. SCOTT. Do you have any comments on his IG proposal?

Mr. WILLIAM BARR. Yes. I would oppose the special IG proposal and it is difficult for me to do that, because I have such great respect for Congressman Schiff, who I usually agree with on things. But I think it would be a bad proposal.

First, I am concerned about its constitutionality and really what it implies for how we conduct business in the executive branch. If—I notice the bill says that this is an independent office and that this office is going to enforce constitutional standards against the Attorney General. In my view, you can—you know, that really means having a second Attorney General who is not subject to the President of the United States.

I think there can be one standard of what the—one standard applied in the executive branch, ultimately one judgment reached within the executive branch, ultimately by the President, as to what is constitutional; and you can't have another person in real time monitoring investigations and raising their own view of what the Constitution may or may not require.

I think it is impractical—also, as to American citizens or domestic persons in the United States, nothing in this bill gets us away from a warrant requirement. We are still going to article III judges who are independent of the executive branch, and getting them to approve ahead of time warrants to conduct intrusive investigations. And so you do have that check upfront when domestic persons are involved.

I also think, as a practical matter and given my experience with Inspectors General—and I have intensive and extensive experience with Inspectors General—I think this would be a bureaucratic nightmare and would have a very adverse, chilling effect on conducting perfectly appropriate, but sensitive investigations and reviews by the Department of Justice and the FBI.

Mr. SCHIFF. Would the gentleman yield on that?

Mr. SCOTT. Yes.

Mr. SCHIFF. I just want to say that if there is—and I appreciate your remarks, too—and it isn't often I don't think, Attorney General Barr, that we don't agree, but that happens on any issue.

Mr. SCOTT. Congressman Schiff, let me reclaim my time and make a general statement and then yield all my time.

I just wanted to point out that we have the national defense letter, the emergency wiretaps and the listing of organizations that aren't subject to the article III judges.

I yield the balance of my time to the gentleman.

Mr. WILLIAM BARR. But the listing is done by the President of the United States. It is not an investigative technique; it is very analogous to IEEPA. The emergency wiretap, you have to go to court and get a warrant within 48 hours, so you are going to an article III judge and telling the judge what you have, and that is where the constitutional protection comes in. And the other one you mentioned in here is targeted on agents of a foreign power. It is a foreign—it is a foreign counterintelligence review where you don't have a criminal investigation going on necessarily. I am not saying that there shouldn't be a review, but it is subordinate of the President, or isn't it? If it is subordinate of the President, you al-

ready have someone. That is the Attorney General. If it is not subordinate of the President, then you have war going on in the executive branch. I think that is unconstitutional, as well as being inefficient.

Mr. SCHIFF. If the gentleman will yield, let me say, first, it is of course intended to be subordinate to the President. Further, it is not intended to create a position with the specific power to stop anything or to—or whose approval is required. It is intended to be a monitoring official because, after all, when there is an emergency wiretap provision, you can do them over and over and over again for 48 hours and you don't have to account to anybody for them, if I understand that power.

And the purpose here—and I would appreciate your advice on the matter; I am not glued to the wording of this one bill. The purpose is to set up an official whose sole purpose is to monitor where is the direction of Federal antiterrorism investigations going, to be sure, as best we can internally, that they are aimed at terrorists, not simply at political dissidents.

Mr. WILLIAM BARR. I think, first, as to citizens, you have ongoing monitoring of all intrusive techniques that implicate the Constitution by article III judges. You have to continue to go before an article III judge who monitors the investigation in a specific district court ahead of time.

In addition, I think—as to foreign programs, I don't think there would be any objection. I think it is done now, but if it isn't, it should be, and that is the Oversight Committees, the Intelligence Committees can delve very deeply, and they have the security means to do it, into the investigation of foreign persons and foreign groups and the number of wiretaps authorized and so forth, and that can be done by the Intelligence Committees here in Congress.

And, finally, to the extent someone in the executive branch has that responsibility, I do believe they should be subordinate—the Attorney General is the responsible person to ensure that the Constitution is complied with and the other laws of the United States are complied with and the Attorney General has investigative arms like the Office of Professional Responsibility.

There is an Inspector General within the Justice Department, but there is also the Criminal Division and the Civil Division. And I think, rather than create a pan-executive branch official and another layer of watchdog, that the thing to do is to give the Attorney General broader jurisdiction, cutting into other agencies as well.

Mr. SCHIFF. Well, I just want to reiterate that certain things are not subject for an article III judge—this national security letter, which for the first time, according to Deputy Attorney General Gorelick, would be used to look for motel and hotel records, for example.

Mr. WILLIAM BARR. Of agents of a foreign power.

Mr. SCHIFF. Well, of people you accuse mentally of being agents of a foreign power. They may or may not be agents of a foreign power. That is the point here.

Let me just conclude, because the time is up. I accept your reservations, and I don't feel that there is one way to do this; and certainly I don't want to create, and neither does Congressman Skaggs, a bureaucratic nightmare, to use your view; but I feel very

strongly that before we go back and bring internal surveillance back to where it was before we pushed it away in the 1970's, because of abuses, we should have some way of closer monitoring it. Really, that is all our bill is about.

I yield back, Mr. Chairman. I thank the gentleman for yielding.

Mr. HYDE. I thank the gentleman. The gentleman is recognized—have we recognized him? All right.

The gentlelady from California.

Ms. LOFGREN. No questions, Mr. Chairman.

Mr. HYDE. The gentlelady has no questions.

The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. Gentlemen, I appreciate your assisting us today.

Judge, your name is pronounced "So-fair"? I have read it many times, but never heard it pronounced.

Mr. HYDE. It is a critique of the service on the bench, "So fair."

Mr. SOFAER. I have got a lot of good print on that, Mr. Chairman.

Mr. GOODLATTE. Judge, I was interested in your comments about the need to recognize that in dealing with international terrorism, the judicial system may not at all be well suited to handling many aspects of that in terms of the appropriate response by this Government and that many times a military response in taking it back to the source of the act is appropriate.

Do you conclude from that that a non-U.S. citizen is entitled to—leaving the Government aside, but the actors on behalf of that Government are entitled to not the same due process that a U.S. citizen is entitled to?

Mr. SOFAER. Well, they would be entitled to due process to the extent that they were brought to court to answer to charges. But that doesn't mean we couldn't kill them outright, just as we kill people on the streets of America, rather than allow them to kill an American citizen who is an innocent person.

Mr. GOODLATTE. I am not disagreeing with you.

Mr. SOFAER. I am just making the analogy. I am not afraid of the analogy at all. I believe in killing people who are about to kill innocent people.

Mr. GOODLATTE. Fair enough.

Now, do you—with all of the discussion about—let me take that to the next step—about some groups and organizations in the United States and in relation to the Oklahoma City bombing, or I guess no group has been established, but obviously there were some conspirators. Do you see anything about the current set of affairs in the country and the activities of any groups that would cause us to find it necessary to apply that same standard to these activities of U.S. citizens, or do you think that there is no need for anything——

Mr. SOFAER. Well, thinking back a little ways to the Symbionese Liberation Army in California, I remember a group that went around shooting people at bus stops deliberately. Now, I would think that the Government of the United States could take pretty strong action with regard to a group like that if that action was designed to prevent them from killing more people. Obviously, you don't use killing as a substitute for trying people, if you can cap-

ture them; but if you can't capture them, which is more often true of foreigners than of Americans, you have to do what you can.

Mr. GOODLATTE. But if you—I mean, obviously if somebody is in the act or about to engage in the act of killing somebody, as you say, you are going to act with whatever force is necessary to prevent that.

Mr. SOFAER. Right.

Mr. GOODLATTE. On the other hand, if you are responding to a foreign terrorist act with a deliberate decision to respond sometime later with a retaliatory act, that is a quite different set of circumstances. Do you see any need for that type of activity on the part of the U.S. Government with regard to any activity by any groups in this country?

Mr. SOFAER. No. I think in that case you would use probable cause; you would have all the judicial standards applicable.

But, you know, I want to say, Mr. Congressman, that the emergency power is a reality. It is part of our constitutional history. If an Attorney General were faced with the problem of doing something that was in fact not consistent with existing legislation—perhaps even questionable, constitutionally—and genuinely believed that the action was necessary to save, say, 100,000 American lives in a major subway or a building or something of that sort, I would be surprised if the Attorney General failed to act in that way, because I think ultimately he or she would respond to you, and that you would be the ultimate judge of this as to that Attorney General's good faith in acting in that manner.

You can't totally divorce the domestic from the foreign in that regard. I mean, our ultimate aim in all of this—when you are talking about killing of this dimension, our ultimate aim has to be prevention.

Mr. GOODLATTE. I take it you would be speaking in those terms in terms of something like what has been happening recently in Japan——

Mr. SOFAER. Yes.

Mr. GOODLATTE [continuing]. Where you have widespread and apparently well-organized terrorist activities going on of an unpredictable dimension that might require that type of activity?

My question is, do you see anything in the current set of affairs when we talk about different militias and other groups around the country that would be in any way analogous, that would call upon the Attorney General or anyone else that would take that type of activity in the country today?

Mr. SOFAER. Well, no. But I would say that it is very, very important to infiltrate these groups to know what they are doing, what they are planning, because they talk mean, they talk about doing things that are ugly and hateful; and I think that if they talk so badly that it amounts to probable cause, then they ought to be surveilled, they ought to be—I mean a roaming wiretap is a way to keep track of someone who is smart enough to run from phone to phone when he is planning something illegal. This is a Presidential idea that is to give this power and it is supported by the chairman and the rest of this committee, so I don't understand why this idea has come into so much criticism. It is a perfectly reasonable, rational thing to do.

Mr. GOODLATTE. Well, I——

Mr. HYDE. The gentleman's time has expired.

Mr. GOODLATTE. I agree with you.

Mr. HYDE. I thank the gentleman.

The gentleman from Tennessee, Mr. Bryant.

Mr. BRYANT of Tennessee. Thank you, Mr. Chairman. Let me add my welcome also to the two of you.

General Barr, section 312 is somewhat of an expansion of the use of military in providing assistance in the biological and chemical areas. I know this is—you don't have to convince me, but I do hear concerns from some people that they are scared of this type of expansion. But this is a very limited expansion, is it not?

Mr. WILLIAM BARR. That is right, Congressman. This is extremely limited, and I think concern about this particular provision, as drafted, is completely unjustified. In fact, today—under existing law, Congress has already provided very limited areas where the Defense Department could support law enforcement activities in the counternarcotics area. And I cite those in my testimony; they are in title X. But the involvement that the military has there in supporting our counternarcotics efforts are very analogous to this very limited window.

Now, as I said, I think this really just sort of recognizes what—how the statute would be construed in extremis if we were faced with a biological catastrophe. And I do not think that this is unrealistic; I do think that biological and chemical attacks are a very real threat. They were very definitely during the Desert Storm war, that we were faced with massive catastrophe, and we needed clean-up crews and we needed people with the proper suits on to deal with disarmament of weapons and so forth.

Does anybody really think that American officials would sit around and allow hundreds of thousands of casualties to occur because—arguing about whether that constituted technical support or law enforcement activity? They would save lives. And what this does is makes sure that everyone would be on sound ground.

Mr. BRYANT of Tennessee. It also has a provision in it, does it not, that clearly says that this will—military forces will not be used to directly apprehend or arrest actual law enforcement activities?

Mr. WILLIAM BARR. That is right. This bill, I think, contains some helpful language that makes it clear what the intent is.

Mr. BRYANT of Tennessee. Judge, do you have any comments on that particular aspect of this proposed bill?

Mr. SOFAER. I concur with Mr. Barr.

Mr. BRYANT of Tennessee. Thank you.

I yield back the balance of my time.

Mr. HYDE. Thank you, Mr. Bryant.

The gentleman from Georgia, Mr. Barr.

Mr. BARR of Georgia. Thank you, Mr. Chairman.

I apologize to both witnesses. I was running a little bit late. I had to testify before a base realignment and closing commission; otherwise, I definitely would have been here. But I have read the written materials and, as usual from both gentlemen, they are outstanding, and I appreciate the background they have provided.

If I could, General Barr, follow on Mr. Bryant's line of questioning with regard to section 312 involving military assistance, I had

a meeting one day last week with another Member of Congress and we were talking a little bit about the Senate bill. Are you familiar with the bill that the Senate passed just last week? That touches on posse comitatus?

Mr. WILLIAM BARR. No, I am not, Congressman.

Mr. BARR of Georgia. OK. The one thing that worried me a little bit, and I don't have the language, but the way this other Member of Congress was explaining it, the military would have the ability or the authority, I think he was saying, under the bill that was passed by the Senate last week to shoot somebody if it became necessary in the course of their carrying out the limited authority to provide technical and logistical assistance.

Would your reading of the language in the chairman's bill here provide for such authority?

Mr. WILLIAM BARR. Not as law enforcement officials, but on the other hand, if a military soldier, you know, if a soldier is carrying out an act of technical support and comes under fire, someone comes up to them and tries to shoot them, then obviously they could protect themselves, and also could protect other innocent—like any citizen, could protect any innocent person who is in extreme danger of life and limb.

Mr. BARR of Georgia. OK.

Mr. WILLIAM BARR. Their mission would not be to do that, their mission would be to provide technical support. Just like, for example, apprehension. I mean, any citizen can apprehend an individual as a citizen. You know, tackling someone who has seen the person run by them, and the fact that these people wear a uniform doesn't mean that if the guy is walking right next to them they couldn't tackle them and hold them for law enforcement officials to make the arrest.

Mr. BARR of Georgia. But what you are saying, and you may be right, that perhaps the existing authority that our military has in that sense is actually broader than what is in the language of section 312, which specifically excludes arrest or apprehension authority.

Mr. WILLIAM BARR. Well, no, I think what that says is that their mission cannot be apprehending and they cannot execute an arrest.

Mr. HYDE. Would the gentleman yield to me for one second?

Mr. BARR of Georgia. Certainly, Mr. Chairman.

Mr. HYDE. Quoting from section 908, subsection 4—this is the Senate bill—"the Attorney General and the Secretary of Defense shall jointly issue regulations concerning the types of assistance that may be provided under this subsection. Such regulations should also describe the actions that the Department—the actions that Department of Defense personnel may take in circumstances incident to the provision of assistance under this subsection." And here is the relevant language, "such regulation shall not authorize arrest or any assistance in conducting searches and seizures that seek evidence related to violations of this section, except for the immediate protection of human life."

Mr. BARR of Georgia. OK. That sounds like the language that this other Member was referring to.

Mr. HYDE. Right.

Mr. BARR of Georgia. Thank you, Mr. Chairman.

Mr. Barr, you were also here I know earlier today and listening to the comments of Deputy Attorney General Gorelick and some of the questioning that we had surrounding her testimony. And one of the questions that was posed to her is, is there any concern on the part of the administration, or have they reached any conclusion, that investigating and apprehending and prosecuting and convicting whoever is responsible for the bombing in Oklahoma—whether the existing laws and procedures and regulations would impair their ability. And I think she said, no. I think she said, no, that they feel confident that under existing laws, rules, regulations and policies, et cetera, that it would be possible and they certainly anticipate doing that.

Does it basically boil down to—and I know you pretty much addressed this throughout your written testimony—does it boil down to the fact that while there may not be anything that is absolutely essential for the Government to have the ability to investigate and bring to justice individuals who commit acts of terrorism, this will simply strengthen and make it easier and somewhat more efficient for the Government to do that, or are we getting into some new authorities here?

Mr. WILLIAM BARR. Well, I would say that my ability to deal with foreign terrorist threats in the United States that were very real were definitely hampered, particularly during Desert Storm, by the absence of some of the provisions that are in this bill today—in specific, very real cases. So while the Oklahoma City case might not have given rise to these provisions, I think our experience dealing with foreign terrorists, real experience, has given rise to these measures—has made us see these gaps have to be filled.

I also think that we have to remember that we can't always sit—we don't have the luxury of sitting back and saying that we have to directly experience a shortfall in our legal authority before we do anything about it. I think if we can reasonably expect a particular area or a particular threat and understand that our laws may not be adequate, we have to act with that kind of foresight rather than say, gee, we should have had a law that says X, Y, or Z, because I think that is the way we can stay ahead of the terrorist threat; and as long as we stay within our constitutional bounds, and I think this bill does, I think that is what our job is, really.

Mr. BARR of Georgia. Do you have any concern, as you look through some of the—and there were three that I have before me here and three different bills' definition of terrorist or terrorism, actually, I think. Do you have any problem with what seem to be, I think, fairly broad definitions? Are those necessary? Do you have any problems with the definitions that we see in all three of the bills, 896, 1635, and 1710?

Mr. WILLIAM BARR. I personally do not have difficulty with these definitions because these are the definitions used throughout the law, and I think it would create greater mischief to define it differently here than we have in a number of other contexts in the law. The one that you specifically pointed to which—is that on page 50—that mentions the State law violation in addition to Federal law violation.

Terrorism is a very difficult thing to define and any definition is going to have some give in it; and it is conceivable that someone

would take an act that was violative of State law that we would not ordinarily think of as terrorism, or feel is the kind of offense that should be treated as the local level and be able to fit it into this definition in a very aggressive stretch of the law. I think there is that possibility under that definition. However, I haven't seen that done.

I think we have had these definitions out there for a while and I think that, absent one that is too confining, this is an adequate definition. In other words, I am not—I would have to see some language of an alternative, but my concern would be that it would be too restrictive also.

Mr. BARR of Georgia. OK. Thank you. I appreciate the chairman's indulgence for some additional time.

Mr. HYDE. Well, I thank the gentleman very much for his contribution.

Gentlemen, before we release you, I might—I would like to ask one question collectively to both of you.

Critics of this bill have argued that membership in a presidentially designated terrorist organization should not be a ground for excluding anyone from the United States. Do you see any constitutional infirmity in the policy decision to exclude from entry into the United States any foreign national who is a known member of a known and designated terrorist organization? Membership alone?

Mr. SOFAER. No. I see no——

Mr. HYDE. You see no——

Mr. SOFAER. Absolutely not.

Mr. HYDE. How about you, General Barr?

Mr. WILLIAM BARR. I think it depends upon the alien's prior contacts and relationship with the United States. You know, on one extreme, there is clearly—I think there would be a problem if you have a permanent resident alien who goes over to visit his grandma in another country, tries to come back in, and is excluded. I think that would raise a constitutional question.

On the other hand, somebody who has no nexus with the United States, tries to come in, I don't think there would be a constitutional issue raised.

Mr. SOFAER. I thought it was the latter group that you were speaking of.

Mr. HYDE. So did I.

Well, thanks, both of you, for outstanding contribution. As always, you have been most generous and helpful with your time. Thanks again.

Mr. HYDE. We have one more panel of distinguished witnesses, James P. Fleissner, professor at Mercer University School of Law in Macon, GA; Bruce Fein, Esq., former Associate Deputy Attorney General; and Gregory Nojeim, Esq., who is legislative counsel for the American Civil Liberties Union.

Bruce Fein is a legal scholar specializing in constitutional issues. He has authored approximately 1,000 articles on the law and public policy, and is currently a weekly columnist for the Washington Times. He is a syndicated columnist for the Legal Times, and a frequent guest columnist for USA Today. He has written on the constitutions of over 10 foreign nations and has testified before many

different committees of Congress; and I remember Mr. Fein very well from his service on the Iran-contra investigating committee.

So welcome, Bruce Fein.

STATEMENT OF BRUCE FEIN, FORMER ASSOCIATE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. FEIN. Thank you, Mr. Chairman. I was asked to address primarily the due process concerns that are raised by the provisions in H.R. 1710 relating to the deportation of aliens. And that is, I think, bifurcated in part in the provisions that distinguish between who are permanent resident aliens and those who are just in the country, but have not been given permanent resident status.

Generally speaking, I think the provisions are beyond constitutional reproach. There are a couple of exceptions that I would like to make.

The Supreme Court has held for over 50 years that almost nowhere in the law is there more discretion within the executive and the legislative branches than over the issues of deportation and exclusion of aliens. When the Supreme Court wrote those words, we were in the midst of a very cold war that was verging on hot war. Indeed, there was a hot war at the time, namely in Korea. And of course the Communist threat there, which was the specific issue addressed by the Supreme Court, was exceptionally acute, I think, and well recognized.

We had recently overcome the Berlin blockade, their coup attempts and coup successes in Czechoslovakia. This was at the time of the Rosenberg trial, the Alger Hiss trial, Klaus Fuchs. There was clearly a background of congressional and political recognition, something which the Supreme Court took judicial notice of, of a very severe problem with aliens in the country attempting to subvert our form of government.

Now, one thing that differentiates this bill from those declarations of the Supreme Court is the absence, at least at present, in H.R. 1710 that make findings that would be pertinent to the danger created to U.S. citizens, to the national security of the United States by the threat of terrorism committed by aliens.

Just as an outside observer, there seems not to be a self-evident conclusion that the nature of the problem was on a par with the Communist threat many years ago. The FBI has reported over the last 11 years that there has been one incident of international terrorism in the United States. That is not a large number.

There may be the kinds of cases that Attorney General Barr referred to where he felt there was a clear and present danger of a terrorist act that he felt was handicapping him in dealing with it. But those certainly aren't on the record at present and aren't made part of the findings of the bill.

The reason why I raise this at least apparent discrepancy being the danger of the Communists that led to the Supreme Court decisions on deportation many years ago and the alien problem in the United States is because it may well be constitutionally different when the Supreme Court addresses the current problem with aliens, suggesting that maybe the language in those old cases was written too broadly. That is the one caveat I have about my general statement concerning the authority that is given to the United

Mr. MCCOLLUM. I don't doubt that for a minute.

I want to ask Attorney General Barr if he would proceed. And if you could, because of the time constraints, summarize, it would be appreciated. Thank you. Mr. Barr.

STATEMENT OF WILLIAM P. BARR, FORMER ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. WILLIAM BARR. Yes, good morning, Mr. Chairman, Chairman Hyde, and distinguished members of the committee. It's an honor for me to have been invited here to testify about this critical topic of terrorism and whether there are steps we can take, or should be taking, to meet it. And it's a topic that should enjoy wide bipartisan support, in my view.

I'd like to commend Attorney General Reno and her team and Director Freeh and the FBI for the exceptional job that they're doing in responding to the Oklahoma City bombing. And I was delighted to open the paper this morning and see that that investigation is being overseen by Larry Potts and that he was just honored by being named the second in command at the Bureau. There's no finer person or agent in the FBI than Larry Potts, and I applaud Attorney General Reno and Director Freeh for making that excellent appointment.

I agree with the prior panel that we are going to face a continuing, and perhaps heightened, threat of terrorism both from foreign and domestic groups. I think we have to be careful not to exaggerate the threat. It's unlikely that we're going to undergo, as far as I can see, a sudden wave of large-scale terrorist attacks, but there are clearly a number of factors that have coalesced that I do think presage a persistent danger in this area, running the gamut from isolated fanatics with crude pipe bombs to well organized groups that are capable of carrying out catastrophic attacks.

There's no doubt that American law enforcement has very substantial capabilities and resources to deal with terrorism today. However, in my view, these existing resources and, to some extent, authorities are not fully adequate. I don't see the need for any sweeping changes, but I do think that there are some additional reasonable and measured steps that can be taken that will enhance our capability to deal with terrorism. We, obviously, can't promise ultimately absolute security, but we can increase the FBI's ability to detect and interdict terrorist activity. And to some extent, that does have a deterrent effect. I know there are some that sneer and say, well, you can't deter terrorists. I don't think that's entirely true.

I know, based on my own experience at the Department, there are groups overseas today who up until now have determined that they will not attempt to carry out terrorist activities in the United States because of their perception of the FBI's vigorous and effective antiterrorist program. And so I think it's critical that we keep our guard up as best we can and constantly reassess whether there's more we can be doing consistent with our constitutional principles and free traditions.

Before I get into some specifics, I'd like to make just a few overarching points. The first is there seems to be this image, at least in some of the media, suggesting that there's been a rush to

judgment and overheated reaction to a specific event and that we're about to adopt sweeping changes relating to the investigations of domestic groups. That's not accurate, in my view.

I think some of the more substantial changes relate to international terrorism and were proposed prior to Oklahoma City. I think most of the proposals on the domestic front—and I'll get into specifics in a moment—are modest steps, largely involving resources, or filling obvious gaps in the law. For example, the fact that there might be jurisdiction over a bomb threat if it comes in the mail or on the wire, but not otherwise or covering certain employees and not others, or taking perfectly constitutional and lawful techniques that are authorized widely and applying them to certain other areas where they can be equally productive.

Also, I don't think there's a rush to judgment here. I think a lot of what is being talked about has been on the table for quite a while and reflects the collective experience and judgment of both Republican and Democratic administrations at the Department of Justice that have had to deal with these problems.

The second overarching point is that none of these changes, even those to the scope of authority, in my view, involve the erosion of constitutional liberties. I think that the core safeguards remain sacrosanct under these proposals, and only where there's probable cause of criminal activity can the Government intrude into the zone of privacy that's protected under the fourth amendment.

A third overarching point I want to make is that this is sometimes presented as balancing constitutional rights on the one hand with sort of physical security interests on the other. I don't think that's the case. I think there are constitutional interests on both sides, because I think terrorism, violence, and the fear that it spawns will also affect our constitutional liberties. If a local law enforcement officer is intimidated from going to investigate a group that is advocating violence and practicing bombing, and so forth, because he's intimidated, that's a diminution of our constitutional liberties. And if the minorities in a particular community are intimidated, told that when we take over, you're going to be the first to go, and they start doubting the ability and the will of government to come in there and deal with organized armed groups that may be trying to intimidate people like that, again through violence, that's a diminution in liberty as well.

The last overarching point I want to make is that, to the extent delicate judgments are required—and make no mistake about it, judgments are required in this area, I have worked very closely with the FBI and the personnel at the Department of Justice, and I have the utmost confidence that law enforcement agencies today will carry out these responsibilities with integrity and with sensitivity for constitutional liberties. I think the leadership and the rank and file are men and women who are deeply dedicated and committed to our Constitution and to protecting and serving the citizens of this country, and they have no desire, as the previous panel said, to harass or to intrude into the private affairs of law-abiding and nonviolent political groups.

I think, in fact, that the wiretap experience, the statistics on the wiretap, and also the self-restraint exercised by the Bureau under the Attorney General's guidelines show that that as an institution,

the Bureau and the other law enforcement agencies can be trusted. Does that mean we don't need safeguards at all? No, we do need safeguards, but what it does mean, I think, is that the palpable threat today is not the threat of a renegade FBI; the real threat today, in my view, is the emergence of violent groups that think they can operate outside the law and believe that the Government has no legitimacy.

Now let me turn very briefly to addressing some specific issues. Prior to Oklahoma City, the administration proposed the antiterrorism legislation. Some of their proposals were drawn from legislation that we introduced in the Bush administration. Some of them are embodied in Senator Dole and Hatch's bill, and I believe that some of them are under consideration in the bill that Chairman Hyde discussed. Most of these measures, the pre-Oklahoma City measures, deal with international terrorism, and I believe that they're important; they should be adopted. We clearly need a broad basis, a comprehensive basis for dealing and establishing Federal jurisdiction for international terrorism, and we do have to include terrorism offenses as a RICO and a money-laundering predicate.

The provision that has drawn the most fire is the special court for removing alien terrorists. And I think, as the administration rightly points out, that is there to deal with the Hobson's choice where we have clear evidence that a particular alien in the country is a dangerous terrorist and, yet, we are relying on information that we cannot disclose without creating equal danger to the American people and disclosing sources that we may need to continue to monitor these terrorist groups. And this, I think, is a very balanced and reasonable way of dealing with that Hobson's choice.

Now since Oklahoma, there's been some additional proposals put on the table. I've seen the administration's factsheet. I have not had a chance to review their language. I've seen some of these provisions in Senator Dole's and Hatch's bill. And I think, by and large, as a concept, these are sound and much needed. Now some of them do just deal with resources and organizational issues, and I'd like to just discuss those briefly.

A thousand new agents, I think this is critical. I believe the FBI has been grossly shortchanged in terms of resources, and I think we should well to just review what's going on here. I know while I was at the Department of Justice we constantly fought for additional resources, and we were able to get some additional resources for the Department of Justice out of the appropriations process, nowhere what we thought we needed, but still at least some increases.

I think for the first 2 years of this administration there were cutbacks in the FBI, and, in fact, last Congress it was a bipartisan group of Congressmen and Senators that intervened to increase the number of agents and resources going to the FBI over the objections of the administration. And up until the bombing in Oklahoma City, the FBI was slated this year for cutbacks, not increases, and then after the bombing we now have a proposal for a thousand new agents.

I say this only for this purpose: I think it's time to have a sustained commitment to giving the FBI the resources they need to do their job and not just react to specific circumstances. And if you

look over the past 10 years, you will see the kinds of statutes and all the legal obligations of the FBI have skyrocketed, and their agent force has stayed relatively level. And it's time to take a serious look at the resources and the expectations that we have for the FBI. I think we do need these 1,000 agents at a minimum.

The Center, I think there's a dire need to coordinate counterterrorism activities and to fuse intelligence, but I think my concern with the Center is it's dancing around two important issues. It's not really coming to grips with two issues.

The first issue is someone clearly has to be in charge. They have to be in charge of the overall counterantiterrorist program, and someone clearly has to be in charge of the investigations. And problems happen, and to the extent there are mistakes made, it's usually because no one's in charge. And, in my view, the Attorney General and the FBI have to be given a clear mandate to coordinate the overall program and to run specific investigations, and that has to be a clear directive. When I hear talk about someone's going to be at the head of the table and there's going to be a partnership, and so forth, that is bureaucratic talk for a bureaucratic nightmare and a lack of coordination, in my view.

The second issue it dances around is whether you really do need a separate domestic and foreign center. I think that there's a strong case to be made that you need one Terrorist Center, Counterterrorist Center, and the FBI is the logical agency to be in that position because it is the only agency that has the responsibility for investigating both domestic and foreign. It has the crosswalk between using foreign intelligence and domestic intelligence in determining—and it's very sensitive judgments that have to be made here—when it's appropriate to transfer some intelligence from one side of the house to the other. They're the only agency in government that can do that, and I'd be interested in Director Webster's views on this because I think he's been in both the Bureau and the CIA and would have the best perspective, but I think it deserves some discussion.

I think that digital telephony is absolutely critical. I now work for GTE, and, therefore, obviously, our company has a financial interest in this, but these are views I had when I was still Attorney General and I didn't know the election results. And that is, we really have to deal with the issue of digital telephony, make the investment for the FBI.

And I think encryption is absolutely critical as well. My views on that were clear before I left office, and I'm glad to hear the responsiveness to Director Freeh's views on the encryption problem. We have to come to grips with it.

This raises an issue that is not being addressed in the legislation that I think this committee should look at, and that's something that you raised, Congresswoman Lofgren, and that is the whole issue of technology. There's a lot to be gained here. There are a lot of things, advantages, that technology can now bring us, biometric measurements, enhancing our ability to trace forensic—to handle forensic evidence, and so forth, bomb-sniffing devices, screening of luggage on aircraft. There's no coordination of this law enforcement technology in the executive branch of government, and there's duplication going on. There's turf fighting going on. There's no overall

strategy, and there are no resources really being committed to it that should be. And, in my view, this committee could really advance the ball by encouraging a process whereby the FBI, or particularly the Attorney General, would be able to convene a council to ensure that this is being adequately handled.

There's talk in the administration's proposal of a Presidential decision directive from the National Security Council. It's very vague as to what it's going to do. I would encourage this committee to look very carefully at any PDD that comes out on terrorism, both domestic and foreign terrorism. I was blessed to be able to deal with Brent Scowcroft and Bob Gates, who recognized really the paramount role of the Justice Department when it came to investigating these things, but I think if my experience in government is any indication, when you throw this process into the NSC, you'll start getting the State Department, the CIA, the NSC staff, the Treasury Department. Everyone wants a piece of the action, and you may end up with a situation where, again, you don't have anyone in charge.

And, remember, when there's an incident overseas, the FBI is the investigative agency. They may not be the responding team, but they do investigate the incident and they are both the responding team and the investigator in the United States, and they have to play a central role. And I have had experience with the State Department and other agencies coming in and trying to crowd it out, and usually those situations have ended up to no good.

On the new authority, let me just say there are proposals for new authority. I believe you do have to expand the list of crimes that you can use electronic surveillance for. We're not talking about changing constitutional standards. Probable cause—probable cause—that a felony is being committed, that is the constitutional standard. We're adhering to that, but I do think that we constantly have to look at what kinds of crimes should warrant, not as a constitutional or legal sense, but really as a prudential matter, using this technique. And I do think we have to expand the list, and I think that's in the Republican version in the Senate and I think the administration's version as well.

There's something called roving wiretaps. It sounds very sinister. It's actually very sensible and necessary. In the old days a wiretap was targeted at a phone, a specific phone, and what this says is you really have to target the wiretap at a person because a person now uses a lot of different phones, including groups that use seriatim wireless phones. And that makes a lot of sense, even constitutionally, because the right of privacy is the individual's right of privacy; it's not an inanimate object's right of privacy. So I think it's a very sensible approach and should not cause alarm.

Posse comitatus, I think it's an interesting question that you raise, Congressman Schiff, as to whether we really need the language and whether there's ample authority now. My suspicion is that the Defense Department will insist on some clarification, that they will be very conservative and defensive in this area, and, therefore, you have to make it clear to the military that they can do certain things before they will do it.

Finally, let me just say something on the Attorney General's guidelines. I think these guidelines have served us well. They pro-

vide standards and safeguards for domestic investigations. I don't think the case has been made for any substantial change to these guidelines, and I don't think anyone has proposed it. I think there are areas where subjective judgments have to be made. There are inherently some gray lines there, and I think it's important that we back the FBI and make our backing clear to the agents in the field, that we now expect them to do certain things, and that goes for backing from the Justice Department as well. I think it can be more broadly interpreted, but we must back those agents.

As far as the core requirement, the core requirement is in those guidelines that you need to have criminal predication, a reasonable indication of criminal activity, to conduct a full-blown investigation. No suggestion of a change there. I don't think one is warranted.

Where you start getting into some gray zones—and I know George Terwilliger has some thoughts on this—it's in the preliminary inquiry area, and there I think we may not need any changes, but, on the other hand, there are very tight time tables. There's some cumbersome procedures. There are things built into the guidelines which sort of could trigger some premature terminations of preliminary inquiries. And I think that there may be some need for some changes on the margin, but I think that these can be worked out by the Department and the FBI, but I would encourage this committee to review those very carefully.

I just want to make one final point in closing, and that is, more than anything else we can do with terrorism in this country and, more important than anything in this legislation, is that we can all maintain the clarity of a fundamental principle, a fundamental line that we have in our society, and that line is where dissent crosses over to the use of violence. We cannot countenance—we cannot countenance—any blurring of that line.

One of the reasons Martin Luther King is a genuine hero in this country, and there are many, but one of them is because he dedicated his life to the proposition that, no matter what the cause, there's never a justification to have a recourse to violence. It's beyond the pale.

And that's why it's OK to have robust political debate in this country. That's why we don't have to worry so much about the robustness of our debate, because there is that ground rule that we don't cross that line. And we can't permit the fuzzing of that line, and we can't permit people to fly air cover for people who try to fuzz up that line. And when people take the position that they're in an armed hostility with the Federal Government, that crosses the line, and we can't allow this notion that violence is OK when it's couched as self-defense against the Government. When law enforcement agents execute arrests, when they serve warrants, when they conduct searches pursuant to judicial warrant, it is the duty of a citizen to peaceably submit to that law officer and raise any legal claims they have later in a court of law, and there's no right to shoot at a Federal law enforcement officer or any police officer.

And the effort to demonize law enforcement, to equate them to storm troopers, and to suggest that they do not act for legitimate government is very pernicious because it blurs that line of no violence in our political process. So I categorically reject it, and I

think that every official should categorically reject it, and that's the best thing we can do to combat terrorism in our society.

Thank you.

Mr. MCCOLLUM. Thank you, Mr. Barr.

Judge Webster.

STATEMENT OF WILLIAM H. WEBSTER, FORMER DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, AND FORMER DIRECTOR, CENTRAL INTELLIGENCE AGENCY

Mr. WEBSTER. Thank you very much, Mr. Chairman.

Am I on here [referring to the microphone]?

Mr. MCCOLLUM. You weren't. I'm not sure if you are now or not. Now you're on.

Mr. WEBSTER. Now I'm on. Thank you.

I appreciate very much the opportunity to appear before this committee to talk about domestic terrorism. I have filed with the committee as my formal statement an article that I wrote last week which was widely distributed through the Los Angeles Times syndicate, and it represents both my perspectives on events which occurred during my almost 14 consecutive years as Director of the FBI and then Director of Central Intelligence, and my views on improving our capabilities while preserving the ordered liberty that has been the hallmark of our Republic. And I'll briefly summarize those here.

But as a Lincoln buff, I can't help but recall that 130 years ago, at almost this time, the President of the United States was assassinated and a number of his Cabinet officers were targeted for assassination or kidnapping. I made a study of the investigation that followed and contrasted it, which I will not subject you to this morning, to the methodology that is now used under the Presidential assassination statute which you gave us some years ago and which was used at the time that President Reagan was shot.

Over 2,000 people were arrested, Mr. Chairman, all of the cast of "My American Cousin." In fact, the writ of habeas corpus has been suspended during that time. At that time they did not have fingerprints; they did not have electronic surveillance; they did not have a modern forensic laboratory, no DNA. Many of the modern tools that we use as professionals have kept apace of what the Supreme Court calls emerging standards of decency or increasing requirements for the protection of individual liberties, and I think it should continue in that path.

Terrorism takes many forms and it changes its methods, and we should keep that in mind as well. The methods that you authorize our law enforcement agencies to use have a good deal to do with how effective they can be in dealing with a problem and maintaining the confidence of the American people that they are, in fact, able to protect them and at the same time respect their constitutional freedoms.

Returning now to the state of terrorism, I think, Mr. Chairman, our citizens now understand, by watching the media and reading the press, how much damage can be done by a few violent people determined to make a political statement. Effective law enforcement has kept the number of terrorist events low over the years. When I came to the Bureau in 1978, we were experiencing 100 a

year of different levels of intensity. By the time I left in 1987, we had reduced those numbers to four or five. Last year, I understand, there were no terrorist incidents in this country.

Nevertheless, we have seen the damage and the injury escalate sharply in New York City and in Oklahoma City, and we have to contend with that. The greatest success is in preventing the bomb from going off in the first place. The next best alternative is to conduct swift, effective investigations to apprehend terrorists before they can repeat their crimes. For the first, we require the best intelligence we can have. For the second, we need to facilitate investigations through new and improved forensic techniques and greater access to information that will help investigators develop leads, identify suspects, and support criminal prosecution, as well as a structure to coordinate the work and information of many agencies.

Time is crucial in dealing with terrorists. Clearly, there must be one already-designated lead agency with clear authority to act, coordinate, and direct the necessary resources. A model for that is in the Presidential assassination statute.

We do have a good record. Our Attorney General guidelines can from time to time be adjusted and have that flexibility without legislative change, and they can be improved to meet changing circumstances. In my view, this does not require legislation. I really doubt that legislation with respect to operations is wise for it lacks that flexibility.

But to the extent that current laws may unreasonably impede the investigators, or if new legislation is required to protect investigative techniques from being lost through technological developments, I favor corrective legislation. This includes, for example, the question of access to digital telecommunications and the hope that you will help the FBI solve the problem of dealing with crypto communications. I think the answers are there. They require cooperation from the private sector, but I certainly supported the legislation that you gave us last year to require that the telecommunications companies provide a window for court-authorized electronic surveillance, even when it's on digital because the law enforcement agencies currently do not have the current technical capability to make that connection without the window. Nothing changed in terms of human liberties. The same requirements for probable cause and a court order are still there, but it was a recognition that we were not physically or technically able to keep up with some of the technology that was there without some legislative help, and I'm grateful that you provided it.

I urge you to analyze carefully the real needs of law enforcement and to support them fully. I'd also urge you to do that in relation to the threat as we know it and not engage in repressive measures in reaction to the anger, hurt, and anxiety that followed in the wake of Oklahoma City. That is the ultimate goal of the terrorist: to cause the Government to react severely and undermine popular confidence in the Government, and it must not happen here.

You may recall the words of Margaret Chase Smith spoken on the floor of the Senate during the dark period in the sixties and the early seventies when she said that, given a choice between repression and anarchy, the American people would reluctantly choose repression. We don't want that choice. The answer is to

equip our law enforcement agencies with the ability to lawfully carry out their responsibilities and protect the American people. And if you reinforce the tools, I can guarantee that the law enforcement community will do the work that the American people expect of them in the way that the Constitution intends and requires.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Webster follows:]

PREPARED STATEMENT OF WILLIAM H. WEBSTER, FORMER DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, AND FORMER DIRECTOR, CENTRAL INTELLIGENCE AGENCY

I appreciate very much the opportunity to appear before this Subcommittee to discuss domestic terrorism. Due to my own time constraints I seek your indulgence to offer in lieu of a formal statement a reprint of an article that I wrote last week and which was widely distributed through Los Angeles Times syndicate. It represents both my perspectives on events which occurred during my almost fourteen years as Director of the FBI and then Director of Central Intelligence and my views on improving our capabilities while preserving the Ordered Liberty that has been the hallmark of our republic.

In brief, Mr. Chairman, our citizens now understand how much damage can be done by a few violent people determined to make a political statement.

Effective law enforcement has kept the numbers of terrorist incidents low, but we have seen the damage and injury escalate sharply in New York and Oklahoma City. The greatest success is in preventing the bomb from going off in the first place. The next best alternative is to conduct swift, effective investigations to apprehend terrorists before they can repeat their crimes. For the first, we require the best intelligence we can have. For the second, we need to facilitate investigations through new and improved forensic techniques and greater access to information that will help investigators develop leads, identify suspects and support criminal prosecution, as well as a structure to coordinate the work and information of many agencies.

Time is crucial in dealing with terrorists. Clearly, there must be one already designated lead agency with clear authority to act, coordinate and direct the necessary resources.

We have a good record. Our Attorney General Guidelines can be adjusted and improved from time to time to meet changing circumstances. This does not require legislation. I doubt that legislation with respect to operations is wise, but to the extent that current laws may unreasonably impede the investigators or if new legislation is required to protect investigative techniques from being lost through technological developments, I favor corrective legislation.

I urge you to analyze carefully the real needs of law enforcement and support them fully. I would also urge you to do so in relation to the threat as we know it and not engage in repressive measures in reaction to the anger, hurt and anxiety that followed in the wake of Oklahoma City. That is the ultimate goal of the terrorist and it must not happen here.

If you will reinforce the tools, law enforcement will do the work the American people expect in the way the Constitution intends and requires.

WILLIAM WEBSTER

(The Washington Times, April 28, 1995)

Balancing security and freedom

In the wake of the most destructive terrorist attack ever committed on U.S. soil, two questions will be increasingly on the minds of most Americans: What does the future portend? And will our law enforcement agencies — especially the FBI — be up to the challenge in a democratic society?

While all the pieces of the Oklahoma tragedy have not yet been assembled, some things are increasingly clear and not likely to be changed by new facts. First and foremost, the many acts of courage and compassion and the absence of panic in Oklahoma City speak volumes about the character of our citizens, their preference for order and their confidence in the many agencies working swiftly in the aftermath of the explosion — the investigators, police, firefighters, rescue workers and those rendering first-aid and medical care to the injured.

The almost total absence of panic, the calm and effective leadership provided by the president, the governor and the mayor should give little satisfaction or encouragement to those who might contemplate similar acts of violence against our institutions or our citizens.

Second, the speed and professionalism with which the FBI and other law enforcement components have advanced the investigation, from bits and pieces of forensic evidence to the identification and apprehension of some suspects in the case, reflect the firm determination of our government at all levels to keep pace with the increasing capacity of terrorists to inflict harm.

The challenge of the future will be to protect our citizens from terrorist violence without sacrificing the liberties that our system of government was designed to preserve.

More than two centuries ago, Edmund Burke, the great British statesmen, defined his vision of liberty with order. In the years that followed, the pendulum has sometimes swung too far on one side of the equation or the other, yet ordered liberty has been central to our society as we value it and to our individual freedom as we cherish it. The terrorist puts that precious balance, so carefully considered in our Constitution, at risk.

There are very few laws that directly define and prohibit terrorist acts. Most such acts are prosecuted through other laws that prohibit certain kinds of specific conduct. Terrorism is most generally understood to be the use of violence to obtain political objectives through fear and intimidation. No matter how it is clothed in claims of worthy purpose, it is always criminal.

Around the world, the principal targets of international terrorists continue to be US citizens, US facilities and US property located abroad. Much of this activity for many years was considered to be political and therefore beyond the reach of international institutions such as the United Nations and Interpol. Largely through U.S. efforts, this view has changed and acts of criminal violence against innocent citizens away from the scene of the conflict are now condemned as criminal.

As a consequence, civilized nations are now more willing to deny sanctuary and to pursue and apprehend fleeing terrorists within their boundaries. Intelligence agencies now cooperate more readily with one another to deal with this common threat to ordered liberty. (One of the as-yet-untold stories is how so many nations worked together during the Gulf war to defeat the terrorist teams sent abroad by Saddam Hussein, and with such good results.)

In this country, international terrorism has been kept to a very minimum, although there have clearly been links between terrorist groups abroad and sympathizers in the United States. The World Trade Center explosion is the most recent example.

Statistically, however, the numbers are small. Distance plays a role, as does the obvious advantage to the terrorist of attacking Americans in parts of the world where there is less protection. Likewise, the investigative capacity of the FBI has been a major deterrent to the international terrorist.

Domestic terrorism — our "home-grown" groups — have functioned at different levels of effectiveness over the years, but have largely been brought under control. In 1978, when I became director of the FBI, we were experiencing about 100 terrorist incidents per year from a wide variety of organizations. The two most active and violent groups at that time were the left-wing Asala and the right-wing Justice Commandos for Armenian Genocide, both protesting Turkish involvement in the 1915 slaughter of Armenian nationals. Croatian and Serbian groups were carrying on their homeland feuds. Puerto Rican independence groups were also active. Remnants of the activists of the 1960s were still functioning. Militia-type groups opposed to taxes, government interference and often advocating white supremacy were attracting followers willing to resist law enforcement and prepared to die in defense of their right to bear arms against the authority of hated government.

By 1987, when I left the FBI, the annual number of domestic terrorist incidents had shrunk to a mere handful. During this period, and continuing today, the FBI had worked to improve its response capability with local strike teams and a national Hostage Rescue Team. Of equal importance, the FBI improved its intelligence capability in order to "get there before the bomb goes off."

During the 1960s and early 1970s, the FBI came under intense criticism for its infiltration of various organizations of dissent and protest, often under pressure from government officials to "do something about it." Out of this period came a series of congressional inquiries and reports that recommended substantial limitations on the FBI's investigative powers in domestic security cases.

Attorney general guidelines were promulgated by then-Attorney General Edward Levi, prescribing the quantum of information required to open investigations on suspect groups, to engage in surveillance of group members, to insinuate informants into the groups and otherwise employ sensitive techniques. Separate guidelines were issued for investigating suspected international terrorist activity. After almost a decade of experience, these guidelines were liberalized under Attorney General William French Smith. In the main, these guidelines have served the nation well. A balance had been struck to protect both society and individual privacy interests. The FBI responded by increasing its forensic skills and counterterrorist training. New laboratory techniques, better tracking records, computerization of files and fingerprints, and development of undercover skills all contributed to more effective handling of these sensitive investigations, in conformity with attorney general guidelines. Plots were uncovered and steps taken to neutralize them.

In one undercover operation, we used a special agent who had lost an eye as a paratrooper in Vietnam to defeat a plot to assassinate Prime Minister Rajiv Gandhi of India while in this country. The terrorists did not realize their "hit man" was a government agent. The special agent, who had been awarded the Congressional Medal of Honor, had once more served his country well.

Terrorists have certain advantages over the average criminal. They usually work in small, cellular groups to lessen the likelihood of being penetrated. They can pick their target and their moment to strike. Still, the FBI, with help from other agencies, has been able to detect the planning of such activities in a number of cases and prevent them from happening. In other cases, good investigative skills have brought the perpetrators to justice and prevented similar events from happening in the future.

The capacity to inflict major harm with readily available materials by small groups with little expertise has already been demonstrated. Steps must be taken to protect the security of key facilities and key personnel without the appearance of a nation under siege. Our response capability must be constantly updated. Our intelligence capability must be enlarged and improved. But in all this we must remember that the terrorist wins when he causes repressive responses, when he undermines public confidence in those whose duty it is to protect them. We must not let this happen.

In the aftermath of the Oklahoma tragedy, there will be strong cries to "unleash the FBI." Greater access to certain information, such as financial information about suspects, would be useful. Current legislation requiring telecommunication companies to provide a window for court-authorized electronic surveillance will protect a vital investigative tool from being lost to digital technology.

Perhaps the most useful action at the federal level would be a clear directive that the FBI is the lead agency in terrorist incidents and investigations, and a [illegible] needed cooperation and [illegible] from other agencies. Speed is important and turf issues should be eliminated ahead of time. Rational refinements in the guidelines, not wholesale elimination, may be appropriate. Justice Department interpretations should not be unduly restrictive.

Beyond this, the FBI does not need to be "unleashed." It must not be seen as authorized to infiltrate organizations merely because they are regarded as suspicious or hostile to the policies of those in power. The tools can be improved, but the Constitutional requirements must be respected and observed. This is the best formula I know for the preservation of Ordered Liberty in America.

William Webster is a former director of the FBI (1978-1987) and director of the Central Intelligence Agency (1987-1991). He is currently on the six-person commission assigned to investigate security at the White House.

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Mr. MCCOLLUM. Thank you very much, Judge Webster.
Mr. Terwilliger.

STATEMENT OF GEORGE J. TERWILLIGER III, FORMER DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. TERWILLIGER. Thank you. Thank you, Mr. Chairman. Thank you for inviting me to appear. It's particularly a pleasure to be here in the distinguished company my friend and colleague, Bill Barr, and, of course, Judge Webster.

It's also a pleasure to be here in front of the committee with Mr. Bryant and Mr. Barr. There are many distinguished backgrounds among the members of this committee, but I think it is especially useful to the Subcommittee on Crime to have two former U.S. attorneys sitting as members of the committee, and I hope that my perspective will be useful in this hearing, as perhaps theirs is generally.

I did have the honor of serving at both the very lowest levels of the Department of Justice—my first job was as a law clerk, in fact—and serving at very high levels as the Deputy Attorney General with a lot of stops in between. I have been involved in the terrorism issue from a number of different perspectives in the Justice Department, and, obviously, now as a citizen.

It is a common and tragic element of all terrorist acts that there is injury and death to innocent people. The death of the innocent people at Oklahoma City has clearly cast a pall of vulnerability over our country, and that these acts occur in the broader context of a current and very keen national concern with unacceptable levels of violence in our society seems to me to only exacerbate this sense of vulnerability.

Nonetheless, I think we can be very proud of how our citizens have responded to these acts of criminal violence and terrorism, such as what occurred in Oklahoma City, and the outpouring of support that we have seen both for victims and for the work of the law enforcement officers on whom we depend.

Justice Black has written, "that the Constitution does not confer upon any group the right to substitute rule by force for rule by law." We have created an empowered government and the institutions of government to apply and provide that rule of law and give vitality to our cherished system of ordered liberty.

I don't think we can make a definitive judgment about the significance to our liberty and to our Nation, in fact—we can't make a definitive judgment about what happened in Oklahoma City until we have definitive information. We do know enough, however, I think, at this point to know that we need to address certain aspects of how the Government deals with the threat of terrorism both from abroad and within.

I think the President, the Attorney General, the Deputy Attorney General, and the Director of the FBI who was here this morning, and their colleagues and advisers, do deserve high praise for their response and handling of this crisis situation. I also join Mr. Barr in commending very highly the appointment of Larry Potts, with whom I have worked in crises situations in the past, as Deputy Director of the FBI. Mr. Potts is a most capable individual, and I will sleep better at night knowing that he is pulling the second oar

there, and, as no doubt Mr. Barr would tell you, it is, of course, the deputies who do all the heavy lifting in major organizations.

I basically agree with the thrust of the legislation that was introduced and will rely on my statement, prepared statement, that I submitted for most of the details of that, in the interest of time, Mr. Chairman. I do have two points that I would like to make, though, about the legislation and the issues that have been discussed here this morning.

I certainly think it is appropriate for military resources to assist civilian law enforcement where the military has knowledge or expertise that domestic law enforcement agencies lack. I don't think, however, we should do anything that could be read as altering the basic principle that Armed Forces personnel should not engage directly in domestic law enforcement functions. To borrow a phrase from the military jargon, the command and control of any domestic law enforcement function should remain in the hands of domestic law enforcement authorities.

And, finally, I would like to just briefly address this issue of current guidelines which we have discussed here this morning. I think if we can draw any conclusion from the discussion and discourse we've had so far, that is that there is some confusion, and certainly I would have to say, and perhaps there are others on subsequent panels that can address this, from the perspective of the street agents and the U.S. attorneys in the field there is confusion about what kinds of investigations are allowed and what sort of information is required in order to begin such an investigation. Let me just briefly summarize at least my perspective on how I see the current system working.

The current guidelines and the practices under the guidelines governing FBI authority to investigate domestic terrorism established a bifurcated process. On the one hand, the FBI may conduct a preliminary inquiry of relatively short duration where there is not yet a reasonable indication of criminal activity. The FBI may only conduct a full-fledged investigation when more objective evidence of criminality is in hand, defined by this reasonable indication standard.

Perhaps at first blush this system seems adequate, and I certainly heard the Director here say today that he thought the current guidelines authority was appropriate. Obviously, I would defer to his read of the guidelines and his need for further authority. However, it seems to me that if there is confusion about the guidelines, then it is incumbent upon the Government to resolve it. It seems to me also that if there is confusion, what we ought to resort to is a known legal standard rather than a reinterpretation or some new iteration of an interpretation of the guidelines.

I don't think under the current circumstances—and, again, I say this with all due deference to the Director and to the Attorney General—I think under the current system the problem is that the FBI cannot conduct an indepth investigation of the activities of a person or group without strong objective evidence of criminal activity. It seems to me that common sense, as well as experience, teaches us that criminal activity is most often covert. It is, therefore, illogical to condition the authority to investigate on the existence of the very predicate of criminality that an investigation is designed to

uncover. I do think that slight modifications to existing policy governing the FBI's investigative authority could remedy this problem without violating or threatening any constitutional rights, including those guaranteed by the first amendment.

The standard that I would suggest—and this is—the basis for this is explained in my written statement—is that of reasonable suspicion, which is a well-known constitutional standard as defined by the Supreme Court. It seems to me that if a law enforcement agency has a reasonable suspicion of potential criminality, particularly potential violence on the part of a group, they should be able to investigate that to either confirm the suspicion or dispel it and move on to something else.

Whatever framework is used to govern the investigations into the threat of domestic terrorism, I think it is incumbent upon the Government and the Congress, where it is necessary for the Congress to act, to provide sufficient resources, latitude, and legal tools for the FBI to do the job that we rightly expect it to do.

Mr. Chairman, I thank you for the opportunity to comment today.

[The prepared statement of Mr. Terwilliger follows:]

PREPARED STATEMENT OF GEORGE J. TERWILLIGER III, FORMER DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. Chairman, and members of the Committee, it is an honor to have the opportunity to testify today. I hope that the perspective gained from my experience as a federal prosecutor, as Deputy Attorney General and as a lawyer in private practice can be useful to the Committee as it considers the important matter of combatting violence undertaken for political purposes, which we commonly define as terrorism. While at the Department of Justice, my responsibilities and assignments included investigating domestic and international terrorism, prosecuting terrorism cases and supervising policy and operational tasks in the Department of Justice counter-terrorism program.

Over the last decades, Americans have been both witnesses to and victims of terroristic acts. A common and tragic element to almost all terrorist acts is injury and death to innocent people. The death of innocents at Oklahoma City and in other terrorist acts has cast a pall of vulnerability over our national sense of well-being. That these terroristic acts occur in the broader context of unacceptably high levels of criminal violence in our society only serves to magnify this sense of vulnerability. Moreover, the deaths of innocents at the hands of terrorists produces an understandable urge to mete out swift justice to, and seek retribution against, those responsible. At the same time, our citizens have responded to acts of criminal violence and terrorism, like that at Oklahoma City, with an outpouring of support for victims and law enforcement personnel alike.

We cannot truly assess the significance of the incident at Oklahoma City until we are able to determine the reasons, however irrational they might be, why it occurred. We would be ill-served by making hasty judgments about motive and responsibility for this monstrous act. We can, however, draw several conclusions from what we already know. It is apparent that those associated with the bombing at Oklahoma City hold government generally, and the national government particularly, responsible for problems that they perceive in our society. Whatever their complaints may be, there simply is no justification for their unconscionable assault on innocent citizens and the rule of law.

Justice Hugo Black has written "[T]he Constitution does not confer upon any group the right to substitute rule by force for rule by law. . . ." We have created and empowered government to provide the rule of law that gives vitality to our cherished system of ordered liberty. The use of force, whether by a street criminal or a terrorist, threatens all of our liberties. Our law enforcement institutions and personnel are indispensable elements in the protection of our liberty. Therefore, it is incongruous to suggest that resistance to or combat with law enforcement authorities can ever be justified in the name of protecting liberty. Our constitutional system provides ample means to redress grievances concerning alleged governmental ex-

cess. Consequently, every citizen has a duty to respect and comply with the valid exercise of police power authorized by a statute or a court.

A definitive judgment about the true significance of the Oklahoma City bombing to our country must await definitive information. In the meantime, however, it is appropriate to address the governmental response to the threat of political violence, or terrorism. Until the Oklahoma City incident brought the issue of domestic terrorism to the forefront, our main concern, based on recent history, has been on the threat of foreign terrorists and the pernicious issue of domestic support for the operation of foreign terrorist groups. The World Trade Center incident notwithstanding, our track record in combatting foreign-born terrorism on our soil has been remarkably good.

The President, the Attorney General, the Deputy Attorney General and the Director of the FBI, and their colleagues and advisors, deserve praise for their response to this latest incident. The legislation offered before the Oklahoma City incident, and that outlined since, continue a process begun by past administrations to detect and deter terrorism. Clearly, it is a bipartisan objective to prevent violence and intimidation from perverting our political processes and undermining our liberties.

Likewise, all would agree that the government's response to detecting and deterring terroristic acts in the wake of the incident at Oklahoma City should be measured and deliberate. Obviously, all would agree that the government should not threaten liberty in the name of protecting it. With these considerations in mind, we should address whether we have sufficiently empowered government to secure our liberty against the threat of terrorism.

I basically agree with the thrust of the legislation that previously has been introduced and the legislation the President has outlined, with one caveat concerning military involvement in domestic law enforcement that I will address momentarily.

In my judgment, those aspects of the legislative proposals regarding the acquisition of information by the government during an investigation can pass constitutional muster. The Supreme Court has made clear that the Fourth Amendment protects only reasonable expectations of privacy Government access to credit reports, telephone toll records, travel records and the like do not threaten contemporary notions of privacy in our information-rich society. Likewise, the constitutional standard of "probable cause" is a prerequisite to conducting any electronic surveillance. Allowing the use of electronic surveillance for additional categories of crime in no way lowers this threshold of probable cause.

Every criminal enterprise worth investigating involves communication between the participants. Where legal thresholds are met, it is appropriate to intercept those communications to prevent the success of criminal ventures and to bring to justice those committing criminal offenses. It is worth noting that the fruits of electronic surveillance, in my judgment and experience, can do much to foster fairness and justice in the adjudication of criminal matters. I believe it is preferable to rely on the recorded communications of an accused, as opposed to relying on the memory of witnesses recounting what an accused has said at critical junctures in an alleged criminal scheme.

As to the proposed changes in the *posse comitatus* restrictions, it is appropriate for military resources to assist civilian law enforcement where the military has knowledge or expertise that domestic law enforcement agencies lack. We should not, however, alter the basic principle that armed forces personnel should not engage directly in performing domestic law enforcement functions. To borrow a phrase from military jargon, the "command and control" of any domestic law enforcement function should remain in the hands of domestic law enforcement authorities.

Included in the legislation are proposals designed to address circumstances where aliens in the United States are providing financial or other support to terrorists overseas. The easy conclusion is that we must curb such activity. The more difficult issue is how to do so. Oftentimes, information revealing domestic support for terrorism abroad is a product of sensitive intelligence sources or methods. Disclosure of the source or method may well compromise and curtail the receipt of further valuable information about terrorist organizations and plans. It seems appropriate, therefore, to use a process that limits disclosure while at the same time balancing the need for confidentiality and the need for fairness.

The requests for increased personnel and resources to combat terrorism seem appropriate and justified. One of those requests would establish a counter-terrorism center in the FBI to act as a "fusion center" of information, or intelligence, regarding terrorism. Given the diffusion of relevant information among various agencies, this is a prudent step.

A certain amount of debate and controversy already has arisen as to what information the government should be able to collect and maintain. In my judgment and experience, current policies governing investigation of domestic terrorism do not per-

mit the FBI sufficient latitude to do the maximum possible under the law to detect and deter terrorism. This state of affairs is not the result of either the existing Attorney General guidelines or existing FBI practices standing alone, but rather the combination of the two. The latitude provided in regard to foreign-born terrorism is, at least as a practical matter, greater than that provided to deal with domestic terrorism.

Current guidelines and practices governing FBI authority to investigate domestic terrorism establish a bifurcated process. The FBI may conduct a "preliminary inquiry" of short duration where there is not yet a "reasonable indication of criminal activities." The FBI may conduct a full-fledged investigation only when objective evidence of criminality is in hand. At first blush, this system may seem adequate. The problem, however, is that it does not permit the FBI to conduct an in depth investigation of the activities of a person or group without strong objective evidence of criminal activity. Common sense as well as experience teaches that criminal activity is most often covert. It is, therefore, illogical to condition the authority to investigate on the existence of the predicate of criminality that the investigation is designed to uncover.

Slight modifications to existing policy governing the FBI's investigative authority can remedy this problem without violating constitutional rights, including those guaranteed by the First Amendment. It is appropriate to authorize the FBI to monitor and maintain information about a person or group where there are articulable facts that support a reasonable suspicion that the person or group may be engaged in or planning violence or other criminal acts. This familiar constitutional standard is different from the more objective "reasonable indication" terminology of the current guidelines. Its use also would obviate the need for the bifurcated system provided by the current guidelines.

The "articulable suspicion" standard is a fixture in Fourth Amendment law. As established and applied by the Supreme Court, it recognizes that a police officer who, based on his or her training and experience, has a reasonable suspicion supported by articulable facts that criminal activity may be afoot, can investigate further and even temporarily detain a citizen. Under this law, the objective of the police action is either to allay the suspicion or determine further facts supporting probable cause for more intrusive investigation, or for arrest. See *Terry* v. *Ohio*, 392 U.S. 1 (1968). It is equally a fixture of Fourth Amendment law that a police officer on the street needs no justification whatsoever to approach a citizen and make inquiry. I have no doubt that law enforcement officers will attest that these powers are fundamental to good police work.

It is appropriate to analogize the application of these basic principles to the law enforcement task of detecting and deterring domestic terrorism. If articulable reasons exist to suspect criminal activity, including violence, on the part of a person or group, then the FBI should be permitted to investigate those suspicions to dispel or confirm them. There is no reason why a law enforcement authority should be prohibited in such circumstances from using relatively non-intrusive investigative techniques to gather readily available information to which no reasonable expectation of privacy attaches. This would include literature distributed for general consumption or consumption by the members of a particular group as well as commonly available data such as that found in credit reports and telephone bills. Likewise, the authorities should be able to seek to interview persons knowledgeable about the suspect activities. Anyone who speaks outside the confines of a recognized privilege does so knowing that their words may be repeated to others, including law enforcement officers. If satisfied, the reasonable suspicion standard also should permit a law enforcement officer, consistent with constitutional and policy safeguards, to assume an undercover role in order to advance an investigation.

We could engage in protracted debate about alleged excesses of the past involving the use of governmental investigative authority. Whatever the merits of such claims of abuse, I think we should give ourselves credit for maturation and recognize that our understanding of the proper role of government and its law enforcement authority has become both more sophisticated and more clear. Nonetheless, our basic constitutional framework of checks and balance provides prudent guidance on how to conduct investigations while at the same time minimizing the risk of abuse and promoting trust in government.

In addition to the reasonable suspicion standard, both Executive accountability and Congressional oversight can provide further safeguards against abuse of investigative authority. For example, authorization for investigation by a Department of Justice official predicated on the articulable suspicion standard is one means to provide such accountability. Reports filed with appropriate Congressional committees regarding investigations into domestic groups could provide a means of Congressional oversight.

It could be argued that the administrative burdens imposed by additional accountability and oversight may lead to less than full utilization of expanded investigative authority. However, in an era where distrust of government is an issue, these additional safeguards may be prudent. Moreover, given the nature of the perceived threat, it is unlikely that an investigation would not be undertaken because of the minimal burdens imposed by such safeguards.

Whatever framework is used to govern investigations into the threat of domestic terrorism, it is incumbent upon the government to give law enforcement authorities sufficient latitude to counter the threat, without infringing our most cherished notions of personal liberty.

Mr. Chairman, thank you for the opportunity to present my views. I hope they will contribute to the Committee's consideration of the subject matters at issue. I would be pleased to answer any questions that you or members of the Committee may have.

Mr. MCCOLLUM. Thank you very much, Mr. Terwilliger.

I'll be brief in my questions, but I do have some. I particularly want to ask a question of Judge Webster related to what Mr. Barr was talking about.

In Steve Emerson's column in the Wall Street Journal on the 25th of April he says, "The FBI as now constituted is not an intelligence-gathering agency, but rather a law enforcement agency, the best in the world, as demonstrated by its quick arrest of the alleged Oklahoma culprits. It does not have a terrorism data base like the CIA's."

Mr. Barr suggested that we should have an intelligence center, if we have one, as I gathered it, that would be combining both foreign and domestic in one roof, but it sounds like an intelligence-gathering function for the FBI. You've worn both hats, Judge Webster. Does the FBI have a role in gathering at least domestic intelligence, and could you or should we put terrorism under one roof, and should that be the FBI or should we continue to divide foreign and domestic terrorism questions as far as law enforcement is concerned?

Mr. WEBSTER. Mr. Chairman, the FBI has, and has had, an important role in the gathering of intelligence. The only difference between the gathering of its intelligence and that conducted in the Central Intelligence Agency is that it has an ultimate law enforcement purpose. It looks for criminality and for actions that can be punished under our criminal laws, but it gathers intelligence to support those indications. It may start with informants. It may come through some form of existing electronic surveillance. It may be observed, but it begins in an intelligence base.

I think I would dispute Mr. Emerson's view that they do not have an intelligence data base. Through all the years that I worked, including the—I'm thinking of the Armenians at the beginning, the terrorist group, the largest and most active, two of them, Asala and the Justice Commandos, and the Croatians or the Serbs, the Puerto Ricans—I could go through a whole litany. We knew quite a bit about each of those organizations as they began to become more violent. It was through that kind of intelligence that we were able to work on the Capitol bombing here, the Armed Forces Resistance, the United Freedom Front, and other domestic organizations engaged in violence.

In relation to a number of things around the world, the FBI and the CIA have worked to combine their intelligence and respective functions effectively. You may recall the apprehension of a known

terrorist off the coast of Cyprus in which the initial intelligence was provided by the CIA in watching the activities of the terrorist in the Sudan, and the FBI then took responsibility for making the apprehension and arrest in the open sea and bringing this fellow back to justice.

Many of those things have gone on. In the gulf war, both the FBI and the CIA participated together in gathering intelligence and working with their respective liaison capabilities around the world to head off Sudam Hussein's terrorist teams.

Mr. MCCOLLUM. But now, Judge Webster, as opposed to the intelligence-gathering question, which I guess I kind of combined with the other one, and you've answered it very well, obviously, the FBI does have a role and it is a coordinated one with the CIA. Attorney General, former Attorney General Barr suggested, with respect to terrorism law enforcement activities, if we're going to have a terrorism center, it should be an all-in-one place and it ought to all be under the FBI. Do you concur in that? Do you differ with that? Do you have a view? Have you thought about it?

Mr. WEBSTER. I don't have a mature view of it. I think, clearly, that there is an advantage to establishing a center in this country with other law enforcement agencies focused on the problem particularly of domestic intelligence and also domestic terrorism, and also international terrorists functioning in this country. Whether or not that should be combined or coordinated with the Counterintelligence Center, which has been very effective abroad and is run by the CIA, is something that I think needs a lot of study and careful consideration.

But the FBI should move into coordinating the activities of other law enforcement agencies, so that things do not drop between chairs. The CIA should at least participate in that Center. Whether it should consolidate where the two missions diverge, I don't know the answer to that. I'd say move along on this, but be very careful to make something that works.

Mr. MCCOLLUM. Well, I'm going to—thank you—I'm going to restrict myself so that we can move along. And let me announce that, as we have had a protracted period and we're not yet to the third panel, I'm going to stay here as long as it takes to give a fair hearing to all three panels. I know that some of my colleagues on the Republican side will have to leave somewhere around 12:30, and I'm going to try to expedite the opportunity for them to ask questions, but for everybody here who will be involved, the hearings will proceed as long as we need to to have the 5-minute rules and ask the questions of our three panels.

Mr. Schumer.

Mr. SCHUMER. Thank you, Mr. Chairman.

First, I'd like to make a comment. On the previous panel there were a number of questions about whether these militias could or should be regulated, and the answer was maybe by the State governments. I think the point I made in my request to the chairman and the request that Ranking Minority Member Conyers and I and the subcommittee are making is we ought to find out about these militias before anything else. There's been a lot written. But we all know that doesn't often get at the stuff, and that's why we need some kind of hearings on those.

I'd also like to compliment Attorney General Barr for his comments on intemperate language about law enforcement. I'm just utterly amazed by these types of language——

Mr. HYDE. Would my friend yield to me just for a clarification?

Mr. SCHUMER. Sure, please.

Mr. HYDE. I agree with what you're saying, but are you suggesting the FBI be permitted to penetrate these militia, have members go in and report on what they're doing? How do you get a look at them? They're private organizations and that's the dilemma.

Mr. SCHUMER. It is a dilemma, and what I was suggesting—maybe it was before the chairman came in—is that this committee——

Mr. HYDE. I've been here all morning.

Mr. SCHUMER. I'm sorry. Then what I was talking about is my request not that the FBI penetrate them at this point; they may or may not, depending on what they're doing and how it fits into the guidelines, but that this committee, this subcommittee, have some hearings on the militias. We're having a hearing, it was announced, on Waco. And my point is that I am far more worried about the danger the militias may—underlining "may"—pose to the—and some of the groups even further over to the right—to America than I am about the dangers of the FBI and the ATF. But I'd like to just get to my question. I'd be happy on the gentleman's time to resume the dialog.

I think that really needs to be said by all of us in every part of the political spectrum. We're not going to, obviously, clamp down on such speech. But the right of a free nation, and the obligation often, is when there are intemperate remarks, to come back and say these are awful; these are intemperate. Take those remarks that G. Gordon Liddy and others are saying. All of a sudden, people are saying, oh, well, let's understand what G. Gordon Liddy is all about. And, you know, he's talking about killing Federal agents. That's a horrible, horrible thing. And the first obligation, which has no first amendment problems, is that every one of us ought to be saying this is absurd and this man ought to be rebutted at every step of the way, instead of being made into, oh, what an interesting, controversial figure he is.

I'd like to go to my question. Mr. Terwilliger, you dealt in your testimony with the guidelines, and I think I understand what's going on here. That is that in the interpretation of the Attorney General, of the Justice Department and others, the guidelines allow you to go, say, up to here. But the FBI, not wanting to get close to the guidelines, has said we're only going to go up to here. And now what I read Deputy Attorney General Gorelick is saying is, OK, you people, pardon me—have the ability to go right up to here. But that may not be the best way to go. Because, first, the line is never as clear as we would like it to be, and, second, you don't want people to risk stepping over the line and going back to the days where there were problems.

And so perhaps—underlining "perhaps"—the best solution in this kind of thing is to clarify the guidelines, change them, but get some kind of independent review—this is my pitch here—before a group is investigated, whether it be an article III judge or somebody else.

And I think this tends to work in a lot of the areas, some which have been specified in the bill, but in other cases as well.

I'd like to know what each of the panelists think of the general concept of an independent, say, article III judge review, as it works in wiretaps, and specifically in the case of the guidelines, if we find they have to be clarified, changed, or whatever.

Mr. Terwilliger, you spoke the most about it, and then I'd like each of the panelists to comment.

Mr. TERWILLIGER. Thank you, Mr. Schumer, and I'll try to be brief here.

I think, first of all, the general concept of having the decisionmaking on these kinds of close judgment calls about whether to investigate a domestic group which may be engaged in some first amendment activities as well as criminal activities, the authority for that kind of decisionmaking I think is best diffused a little bit, for two reasons. One, I think that it will promote the use of the authority to its maximum benefit, and, two, I think it will promote trust in government if people do not have the impression that somewhere in the secret confines of the executive branch this decision is being made.

However, I think you and I would probably disagree about the concept of using an article III judge or someone else. I'm pretty much a purist when it comes to executive function, and I think it is purely a function of the executive to make the decision to initiate a criminal investigation and to pursue it; utilize a certain statutory means and resort to the courts for authorities for warrants, and so forth, but I think I would have a strong reservation about that.

However, I think executive accountability and some congressional oversight, not unlike the oversight that's provided to the intelligence agencies for some of their more sensitive operations, could accomplish the same thing.

Mr. WILLIAM BARR. I understand what you're driving at, Congressman Schumer, but I also would be opposed to judicial review or having some third-party review. Judicial review is appropriate where you're——

Mr. SCHUMER. Third branch or third party?

Mr. WILLIAM BARR. Any third party——

Mr. SCHUMER. Any third party? You want to keep the decision within the FBI itself?

Mr. WILLIAM BARR. Or the Department of Justice.

Mr. SCHUMER. The Justice Department, OK.

Mr. WILLIAM BARR. The courts particularly can apply a constitutional standard to a set of facts. That's their function. So if you have a probable cause standard and the executive branch has to meet it, that's the kind of decision that a judge is appropriate to decide.

But you don't have that in the prudential judgment calls that are involved in whether to start an investigation, and I think, therefore, it would intrude into the function of the executive and I agree with what George said.

Mr. WEBSTER. Congressman Schumer, I agree with Attorney General Barr. The court comes in normally on probable cause issues, and on lesser standards it's better to have a series of levels of review within the Department of Justice which are prescribed in

the guidelines. Certain kinds of things require a higher level, even at the FBI, before somebody runs out and does something silly.

Also, those time frames are designed to say there comes a time when, if you haven't gotten anything, the chances are you need something more, but let's stop now. I used as one example because it was during my watch, although I knew very little about it, the CESPIS investigation, which involved an inquiry into a group of religious leaders, whether or not they were sanctioning or supporting funding going to insurgencies in El Salvador. No law was broken. No guideline was broken. They followed them assiduously, but they kept extending the inquiry and, finally, somebody said, "Why are we doing this? Why are we spreading this net when nothing is there?"

Senior supervision is vitally important and is provided for in the guidelines, including departmental supervision. So I think the construct there is reasonable. What's important is clarity, and I have never felt that agents would step back 20 feet from doing something unless they had been badly burned and were asked to do something that was not clear. The guidelines ought to be clear, and they ought to know they will be fully protected if they are within the guidelines, and they're expected to act aggressively in situations like terrorism.

Mr. MCCOLLUM. Mr. Schiff.

Mr. SCHIFF. Thank you, Mr. Chairman. I'll be brief with respect to the time.

I want to state, first of all, my fundamental agreement with former Attorney General Barr about the fact that when lawful authority is presented, it is the duty of citizens to lawfully submit to that authority and argue any claims they might have in court. Since we've discussed the Waco incident—apparently, we'll be pursuing it further—I have the belief that as far as most of the people who died there is concerned, that that was the result of Mr. Koresh's refusal to come out and surrender at a certain point, and certainly his keeping a number of people, including obviously children, in that circumstance, it was inherently dangerous.

However, I just have to add that that still does not relieve law enforcement of its responsibilities to conduct itself in a manner that is consistent with a democratic society, and in both Waco, at least at the beginning certainly, and at Idaho, which you're familiar with, I'm sure, the Government has self-acknowledged that there were mistakes and shortcomings and problems. So I think that there is a legitimate area for this subcommittee to look at, even if we say other blame goes with other individuals. That's certainly true. I think it doesn't free the Government agencies of their responsibility.

I want to just mention one other issue, and that is the subject of the militias which has come up here regularly. I have no opinion at this time about whether this subcommittee should have a hearing on the militia movement. I don't know that much about the militia movement. What I do know suggests to me that it is not a homogeneous group by any stretch of the imagination. It ranges, I think, from some individuals who basically have a gentlemen's club, so that they can put on uniforms of a higher rank than they

ever earned in the regular military, to those groups which certainly are antisocial.

I just hate to see us launch into a hearing that connects a movement or a group of individuals with terrorism based upon what I've seen thus far is news media insinuations. And that's why I asked Director Freeh, "What does it mean when it's stated that Mr. McVeigh has ties to militias and some of the other suspects have ties to militias?" Are you saying militia groups were behind this? And Director Freeh declined to answer for an acceptable reason. This is an ongoing investigation. But I think there ought to be a core of information before us that justifies a hearing that by its very existence connects groups to illegal activity before we just say we want to haul you in and find out what you're doing, or next time if the unibomber strikes another industrial representative, do we have to call in those people who attack industrial groups and say, "What are you up to?"

I'm just saying there ought to be sufficient reason to have a hearing. There may be sufficient reason. I'd just like to see it.

With the time I have left, if any of you gentlemen wish to respond, you're most welcome to; otherwise, I'll yield back to the Chair.

Mr. TERWILLIGER. Mr. Schiff, I would just have one very brief response about the question of militias. I think your cautionary statements here this morning about not painting with too broad a brush about these organizations are well founded. On the other hand, I think there is a corollary to the principle that Mr. Barr enunciated before concerning the duty of every citizen not to resist or to submit to law enforcement authority, and that is those of us individually or who as part of a group who join into the political process, wherever we be on the spectrum from left to right, also have an obligation to respect the freedom of that process and to keep it free from intimidation.

There have been sufficient reports, I think, and this is not a historical anomaly by any means; it's occurred on both the left and the right, but there have been reports which suggest that these militia groups do tend to engage in some intimidation, both of law enforcement authorities—some of these militia groups—and the political process, and I think that's something worth keeping a very close eye on.

Mr. SCHIFF. Well, let me just conclude by saying that, to the extent there can be a reasonable core linkup to the subject at hand, which is antiterrorism, and any group, whether they're called militias or not, I would support having hearings on it, but not simply because a group is adverse to the political views of Members of Congress.

Mr. MCCOLLUM. Thank you very much, Mr. Schiff.

Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Barr, did I understand one of your overarching points was that only with probable cause of a crime should the U.S. Government intrude into the privacy of U.S. citizens?

Mr. WILLIAM BARR. What I was saying was I think the changes that are being discussed do not erode any of the constitutional safeguards in place. The core safeguard is that we're all protected with

some privacy right, and before the Government can intrude into that, they have to meet a constitutional standard. The fourth amendment standard is probable cause. Other things, like pen registers, bank records, where people by their actions bring third parties into their lives, they don't require—they don't have the same constitutional level of protection. What I'm saying is the core constitutional protections are respected in the various proposals that are being made.

Mr. SCOTT. Can you go over how in the case of the pen register you can get around the problem? Why should you be able to get around the probable cause standard to determine who someone is calling, because that would seem to me to be an area where you would have an expectation of privacy?

Mr. WILLIAM BARR. Well, no, I think the law is very clear; the case law is very clear that you don't have the expectation of privacy with the question of who you are calling. The content of your communication, you have it, but not your traffic. And the reason for that is that you have brought a third party into that process; namely, the telephone company, to hook you up to a particular number. They have the information.

Mr. SCOTT. We've kind of discussed the question of an investigation, and I think what we're getting into now is what an investigation means. And if you have a reasonable suspicion of crimes, you would expect law enforcement to look into it, and what "look into it" means can mean various—you get into various stages. You suggested the pen register is one stage and actual listening into the conversation would be another level.

Mr. WILLIAM BARR. No. I think under the Attorney General's guidelines, it contemplates sort of two different levels. The full-blown investigation where you can use full-blown investigative techniques requires a reasonable indication of criminal activity. So if you start an investigation along those lines and you want to use a wiretap which has certain additional constitutional requirements, then you have to meet the probable cause standard. Reasonable indication would not be enough for a wiretap——

Mr. SCOTT. But in an investigation you can go around and pick up information that may not be an invasion of privacy; you're just looking in trying to develop your case.

Mr. WILLIAM BARR. Right.

Mr. SCOTT. It's when you have—when you really have to intrude like the wiretap that you would need the probable cause standard to protect the innocent.

Mr. WILLIAM BARR. That's correct, where at the lower level, like a preliminary inquiry, you don't need the same criminal predicate and, therefore, you can use less intrusive means that don't implicate constitutional rights.

Mr. SCOTT. But if you want to use the intrusive means, then just because you're having an investigation doesn't mean you have the right to do a lot of the things that would be more intrusive.

Mr. WILLIAM BARR. Right. You must meet the constitutional standard, and there's nothing in this proposal that I've seen that would change that.

Mr. SCOTT. And you would want a predicate crime to be—we got into a little dialog—I'm sure you were here—when a tax protester

would be subjected to an investigation, and then the predicate crime became murder. Well, you didn't need the tax protesting.

Do you have any comment on that, what kind of predicate crimes we ought to be using to initiate the investigations?

Mr. WILLIAM BARR. OK, it's not a question of initiating investigations. The issue is, what's the standard for using a wiretap in a criminal investigation? And my view is that—one school of thought is if you have any felony, if you have probable cause to believe that any felony is underway, then constitutionally you can use a wiretap, and there's no doubt about it. But Congress for prudential reasons has not expanded it yet to every felony, but has picked and chosen the felonies to apply it to, and the issue is as a prudential, not as a constitutional matter, but just as a judgment, well, how many felonies should be included in that. It's a constitutional tool; how many felonies should it be used with respect to, and I think that list has to be broadened. There's an argument for applying it to all felonies.

I think what Deputy Attorney General Gorelick was suggesting is that certain things like tax, tax evasion, if it's connected with a broader investigation, might be a predicate for a wiretap. After all, you know, Al Capone was investigated and charged with income tax fraud even though he had a lot—he had other problems.

Mr. MCCOLLUM. Thank you, Mr. Scott. Your time is up.

Mr. Buyer.

Mr. BUYER. Thank you, Mr. Chairman.

First of all, may I apologize for not being here during the first panel. It was my opportunity to chair my first own subcommittee this morning on veterans' affairs. So I apologize for not being here.

The—let me make a few comments, first of all; then I have some questions. First of all, if there's ever a moment in time for cause of reflection, it is now. I think some of our own life experiences, if we always made a decision based on the emotion of the moment in our personal life—take, for example, Mr. Barr, if you always had to make a decision based on that emotion in your personal life, how many good decisions would you have made in your lifetime? Probably not very many. And in your business world, if you always had to make a decision based on the emotion of the crisis management of the moment, how many good business decisions would you have made in a lifetime? Well, I submit if that analysis is not good for our personal lives and it's not good for the business world, I submit that it is not good government to exercise decisions of state craft based on the emotion of the moment. It should be done based upon a thoughtful process of deliberation and reflection with our intellect and responsiveness to people.

So if there's ever a moment in time for pause and reflection, it's now, and legislation should be gauged through the essence of time, not only how it would have applied to the past, but to the present and to the changes in the political climate in the future.

So when I hear Mr. Schumer make his comments about his militias today, I immediately think about the 1960's. Why did we make changes in the law? Because of the investigations that were occurring of leftist activist movements. To me, you see, there is no difference between the deplorable, despicable acts of the bombing that occurred in Oklahoma City and the killings of Kent State or the

burning of an ROTC building or the riots on campuses. There is no difference, but some like to say that it's different, based upon political motivations of the essence of a political movement at the time in the country. It should not be.

Mr. SCHUMER. Would the gentleman yield?

Mr. BUYER. Sure, I'll be happy——

Mr. SCHUMER. There were countless hearings about what happened then. All we're asking for here is hearings so we get some knowledge about what happens now. That seems reasonable. No one says let's move quickly. I know we're over the 100 days, so we should be deliberate and careful. But the bottom line is very simple, and that is that we don't know enough; everyone admits we don't know enough. There could be, may not be a danger here, and we ought to look into it.

Mr. BUYER. Well, reclaiming——

Mr. SCHUMER. And, believe me, on any side of the political spectrum.

Mr. BUYER. Well, thank you. Reclaiming my time, I mean I can see why you would be very defensive. I mean, there are people in the country today who are outraged about the intrusions of government and whether—how government got so big and nonresponsive to people. If the mainstream America was so upset that they threw people out of power, how did that affect—how did that affect extreme? And so I think we have to be very aware of that.

So let me—Judge Webster, this is a very good opportunity for me to have you here and be able to talk with you. I think it would be very naive for those of us to ignore being able to put together a data intelligence base apparatus that would be very helpful and cooperative not only in our international abilities to accumulate data, but also domestically. And when I think—I think it would be very naive for us to say that there are three major groups out there of circles, and the circles never touch. Say, for example, a drug cartel, the international mafia, and radical trends, national fundamentalist terrorist organizations who operate under the guise of religion, OK, who are supported and aided and abetted by countries whose actions are almost tantamount to war. They do coordinate and sometimes communicate with each other, do they not, Judge Webster?

Mr. WEBSTER. There are many accommodations of convenience where one can serve the other's interest, and sometimes we have straight old narcoterrorist, and they do cross. And I think that it's legitimate, because we are talking about crime as well as threats to our national security, it's legitimate for us to try to understand how those organizations interplay.

Mr. BUYER. I do have a question. In this bill—have all of you had a chance, opportunity to read this bill?

Mr. WILLIAM BARR. Whose bill is it, which one?

Mr. BUYER. Oh, I'm sorry, this is the President's bill that he sent over.

Mr. WILLIAM BARR. As I understand, it just got here. I haven't——

Mr. BUYER. Is this the first one?

Mr. WILLIAM BARR. Yes.

Mr. BUYER. He sent over a second one? All right, let me—is the provision on terrorist fundraising prohibitions also in the second one? No?

Mr. MCCOLLUM. If the gentleman would yield to me—they're different bills. One is designed for international terrorism; the other domestic.

Mr. BUYER. Oh, OK, this is the one on international terrorism.

Mr. MCCOLLUM. That's right.

Mr. BUYER. I know that, say, for example, whether it's in the 1960's or in the future, if there were—if the United States were at war and there were those here in our society who disagreed with the United States being at war and organizations sought to aid and abet the enemy of the United States, would that come under these provisions? Could we go after and use all that data base apparatus and go after them? I mean, would they come under the definitions of——

Mr. WEBSTER. Well, I have the assumption that any data base must itself be legally acquired, and any information in that data base may be lawfully acquired and lawfully used. There will be some restriction. CO-INTEL-PRO is an example of a system that got off the trolley by using information to discredit through covert means the reputations of suspects and cause dissent and do other things, and we learned a bitter lesson in that respect. I think it was over 10 years ago, longer than that, that I said we were out of that business forever, and I think we are. But we cannot say in national security issues that we cannot use the information for other legitimate purposes. So we acquire it through regulated legal means and you disseminate it through regulated legal means, not to suit the political purposes or desires of the person in power.

Mr. BUYER. Thank you very much, Mr. Chairman.

Mr. MCCOLLUM. Ms. Lofgren.

Ms. LOFGREN. Thank you. I realize we're running late. So I'll just ask two quick questions.

Because we're running late, you may not be able to get too thoroughly into the testimony of the next panel, but I did have a chance to read the statements. And one of the things in the statement of Dr. Smith that I found very interesting is the suggestion that, in addition to our law enforcement approach, that we bring in sort of multi—I assume—multiskilled teams to assess growing social movements and to determine why they are growing and what fair response can be given, not just a law enforcement response.

And I was thinking about your comment, Mr. Barr, that somebody needs to be in charge. It's like an incident team; somebody's got to be in charge. I very much agree with that, but who else is on the team? And oftentimes I think we look at situations filtered through where we're sitting, and one of the thoughts I've had, and I'm really actually quite serious about this, is the really irrational behavior that seems to be exhibited by some of the people that we're seeing on TV. I mean, if we had individuals who believed that space aliens were hovering over them and were arming themselves, we would bring in a mental health professional to deal with that, but if that same individual says it's black helicopters from their own Government, then it becomes some kind of a free speech issue. And so I'm wondering, what role should professionals not in

law enforcement have in dealing with some of these individuals who appear to be paranoid in the clinical sense and to have severe mental disorders.

Mr. WILLIAM BARR. Well, when I talked about someone being in charge, I was talking about the law enforcement response, and I think there has to be a clear division between law enforcement and essentially social work or other kinds of things to ameliorate social conditions. That is not to say that a law enforcement team, responding to a crisis, shouldn't have psychologists and others added who could deal with the paranoid personality, or what have you, but if—and that is done now. The FBI teams have people on it that can deal with all manner of psychopaths.

But if you're talking about a response to terrorism as a problem that sort of tries to get to root causes and——

Ms. LOFGREN. No. Actually, I'm meaning more not a flabby root cause sort of analysis, but if you have an individual that is under observation, and properly so—I mean, you can do an arrest or you can do a mental health conservancy, and under the law of many States these people would qualify to be committed.

What is the appropriate response and do you think that we ought to pull in some other disciplines to make those evaluations? In some cases, this may not be purely a law enforcement issue.

Mr. WILLIAM BARR. Well, I think the FBI has tremendous capabilities, and perhaps Judge Webster would comment on those, in this area to assess personalities, including psychological profiles, and so forth. And there may be some people out there who, in my view, from a legal standpoint, if someone is legally culpable, I don't care how colloquially crazy they are, but if they're legally culpable, they should be punished as a criminal. On the other hand, if someone really is legally insane, then they should be treated on the insanity track, and that's a judgment that's usually made after they're apprehended.

Ms. LOFGREN. Could I ask one quick question on technology? And I know there's been a lot of discussion of the digital world and, obviously, it was easier for law enforcement to deal with an analog world. However, encryption and technology to overcome that is wildly unpopular in Silicon Valley, and not by people who are terrorists or who are involved in any kind of really even government activities, but just unpopular from the free spirits that inhabit Silicon Valley, and they really have the capacity, I believe, to defeat almost anything we can put up technologically.

What is your thought, any of you, on how we—whether we even attempt to keep up with that game or whether technologically it's a losing battle?

Mr. WEBSTER. Well, I think that Director Freeh has made the point that the technological progress and the ability to encipher and use digital technology to prevent overhears, while it might be legitimate in a highly competitive business to keep your competitors from finding out what you're doing, nevertheless impedes the ability of law enforcement to engage in practices already sanctified by the law and supervised by the courts. It doesn't do any good to have the right to place a wiretap if you can't, in fact, place it. I think it's important that the law enforcement continue to have the physical capability, and if that means requiring the manufacturers

to put a window, figuratively speaking, in the system, so that they can get in and listen, when they're lawfully able to do so, we've got to do that.

I know of no major organized crime investigation, no major terrorist investigation, no major drug investigation, and, indeed, no major corruption investigation that did not involve the successful use of electronic surveillance. It's a capability that's vitally important to our law enforcement community in the big picture and in the big cases and I think we need to spend the money and require the private sector to accommodate those needs.

Mr. MCCOLLUM. The lady's time has expired.

Mr. Bryant.

Mr. BRYANT of Tennessee. Thank you, Mr. Chairman.

I would like to ask the distinguished panel to answer the same question regarding the Posse Comitatus Act in terms of Deputy Attorney General Gorelick testified this morning that she felt an expansion of that or a limitation, I guess, of that to include allowing military troops to go beyond the nuclear weapons, but into biological and chemical weapons, to come in domestically and investigate those types of cases because of their unique expertise. What does each of you think of that? Judge Webster.

Mr. WEBSTER. I think that she did not intend this to be a sweeping statement I think what she really wanted—and she can speak for herself—but what she really wanted to say is they have certain knowledge that's important to understanding the picture. But after our experience with Yellow Fruit and a number of other efforts by the military to engage in law enforcement/intelligence gathering, I think that the law enforcement community does not want to see much of that and that the military does not want to see much of that.

As far as posse comitatus is concerned, one has to ask himself, under what sets of circumstances would the current capabilities and prospective capability of law enforcement be outrun by the nature of the threat? That's why we put in a hostage rescue team, because we didn't really believe that the Jaysogs and delta teams, and so forth, which are designed to end situations without as much regard for saving the hostages and the civilians involved wasn't the right way to go. Furthermore, politically, the Carter administration at that time really declined to declare in advance that they would waive posse comitatus. Even in the Los Angeles riots, when President Bush waived posse comitatus by bringing in some of the regular military in the process, there was a lot of scurrying around for a couple of days figuring out whether or not they could do what they were expected to do there.

So I'd say be very cautious as you approach this. Take advantage of what they know and identify those situations where the FBI and others could not deal with the situation. Develop memorandums of understanding. But I really think in this country and with our traditions it should be a last resort.

Mr. WILLIAM BARR. The Posse Comitatus Act is a criminal statute, and what that means is that the military is very skittish about providing any kind of support. And when I started out at the Department as the Assistant Attorney General for the Office of Legal Counsel, I'd have to write monthly opinions telling the Defense De-

partment it was OK to do certain things under the posse comitatus, like use sniffer dogs down on the border even though they weren't going to be handled by military handlers, things like that.

And so I think what's happening here is there's probably a consensus that we don't want the military to be involved in the actual investigation, but we do want to be able to draw upon technical assistance in biological and chemical attacks or potential attacks, and that technical assistance, not getting involved in the actual investigation itself, I think is necessary, and I think the reason that we are being asked to clarify that is basically because of the military skittishness, which I don't begrudge them because it is a criminal statute, and if something went wrong, they'd be on the line.

Mr. TERWILLIGER. I couldn't agree more with both what Judge Webster and Mr. Barr have said, Mr. Bryant. I would only add that if our country ever does face an imminent threat of biological terrorism or nuclear terrorism, for that matter, we're going to want to be able to put—bring all our resources to bear, military and nonmilitary alike. I think we should be able to do that, and if we need to change some things to make it clear that that's possible, let's do it, but at the same time let's make it clear that any such operation that's occurring on our soil that is a law enforcement function will be under law enforcement control.

Mr. BRYANT of Tennessee. I yield back the balance of my time.

Mr. SCHIFF [presiding]. I thank the gentleman for yielding back.

Ms. Jackson Lee is recognized.

Ms. JACKSON LEE. Thank you, Mr. Chairman. I appreciate the presentation of all the witnesses.

And if I might ask former FBI or CIA Director, Mr. Webster. You mentioned the fact that we need tools and the focus that the FBI would have as the most effective single agency that could coordinate our efforts against terrorism. Tell me in terms of us looking toward legislation, if you had to narrow it to the tool, law enforcement tool, where should we put most of our emphasis?

Mr. WEBSTER. Thank you. If I could just repeat because it's so important, I think we should establish a lead agency for this work. I think, clearly, that responsibility for all the reasons that have been said, should be with the FBI. And I think the FBI is best suited because if its relationship with the Department of Justice to be sure that other agencies outside the Department of Justice are conforming to law and respecting privacy rights that exist.

In terms of the tools, I think that greater access to records that are not protected by privacy laws ought to be provided or you should take a good look at the privacy laws to see whether they are unreasonably impeding law enforcement. Those records are available under many other circumstances and are vitally important in tracking. The importance of the tracking part is demonstrated both in New York and in Oklahoma City in terms of the axle identification that permitted them to find out where that vehicle was made, to whom it was sold, find the rental agreement. That sort of thing was opposed by the automobile industry for many years because of the cost, but how vitally important it is.

Similarly, there has been opposition to putting taggants in black powder explosives, so that we might track back the source of those explosives, and I hope very much that the Congress will make that

possible because it's been resisted by a number of groups and by the businesses involved. I don't think the cost is excessive, and it permits tracking to find out who is—forensic evidence to find out who is responsible.

It's very important that digital telecommunications and encryption capabilities be made subject to the right of law enforcement on a proper showing to penetrate those barriers and listen to what a court authorizes them to listen to.

Those are some of the tools that occur to me now. There will be other forensic tools that will come along, and they should be put to a very sharp test in relation to privacy rights, but taking into account the difficulty of a post-terrorist incident investigation, with cellular groups working closely together it's important that every available lawful tool, including everything in modern technology that can be lawfully used, be made available. But I gave you the ones that I think are on the top of my list right now.

Ms. JACKSON LEE. I thank you, and I'm going to ask two very quick questions to the other two witnesses, but if I might ask you a brief one as a followup. I think most Americans either might be surprised or probably not surprised that there's probably less privacy than we've had, as they say, over the last 50 years, and I think we're all exposed to a certain amount of nonprivacy from the Social Security number to the ability to link your accounts.

One of the most sensitive areas, of course, is your financial accounts, your bank records. What would be your litmus test to go to that extent? Would it be the crime? Would it be some other activity that would then generate the need for that as it relates to terrorism?

Mr. WEBSTER. Well, there are a whole wide range of crimes in law enforcement where financial records are key, but if you could find, for instance, that money was coming into the United States to aid a terrorist activity, that would be very important to know, and it has happened and continues to happen. If you could find that money was going outside the United States to aid a terrorist activity in a friendly country, that would be important to know. If you could find that there was an element of control by another group that was engaged in criminal activity not yet identified, that would be important to know. If someone had made a large investment in ammonium nitrate, that would be nice to know as soon as possible. Those are just examples of the kinds of investigative uses that could be made of it.

Ms. JACKSON LEE. Thank you.

If I can just ask the question to these two witnesses, both of you have acknowledged the concept of reasonable suspicion, and I'd simply like to hear how that would apply under the facts we now have about present-day militia.

Mr. TERWILLIGER. The reasonable suspicion standard, Ms. Lee, is one that is well known to every police officer in the country. It's in the sort of age-old test that goes back nearly 30 years now in a Supreme Court decision. If a policeman, based on his training and experience, sees activity which reasonably indicates and which he can articulate a factual basis for that reasonable indication that criminal activity is afoot, then he can take steps or she can take steps to investigate that further.

All I'm suggesting in m prepared remarks and what I alluded to in my preliminary state ent is that that would be a good standard to use in these guideli es in the preliminary phases of a case to allow the FBI to use relatively nonintrusive techniques to investigate any group, whether it be a militia or the Black Panther Party, that may be espousing violence as some kind of a tool of either social or political change.

It seems to me that what we have to recognize—and we've really been dancing around this question a little in this debate for some time——

Ms. JACKSON LEE. And I'd like to get Mr. Barr to answer as well. So if you could summarize——

Mr. TERWILLIGER. I'll sum up then. I think that what we have been dancing around is the question of the need for a law enforcement authority, such as the FBI, to collect intelligence as opposed to merely collect evidence of a crime. Intelligence is what you gather in order to know whether a crime has been or is being committed; evidence is what you gather in order to prove it.

As the Director said on Capitol Hill on the Senate side a couple of weeks ago, intelligence is not a dirty word. If we want them to prevent terrorism, we've got to give them the latitude on some basis to go out there and collect that information.

Ms. JACKSON LEE. Mr. Barr, if you would directly respond as it relates to the militia and the facts that we generally know publicly today?

Mr. WILLIAM BARR. I can't answer that comprehensively because I think there are a lot of different types of militia and people out there, and also reasonable suspicion is a concept that is very fact-bound, but I think that proclamations about willingness to engage in violence or, indeed, the right to use the violence against the Government, coupled with the capacity to do it and some overt act such as training and preparing for something, depending again on the particular circumstances, could create reasonable suspicion.

Ms. JACKSON LEE. Thank you.

Mr. MCCOLLUM [presiding]. Your time's up, Ms. Lee.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman.

The administration has proposed a new Domestic Counterterrorism Center to coordinate intelligence relating to terrorism. And I'd ask, would you gentlemen please comment on any problems that you've either seen when you were in office or since you've left relative to the coordination between the FBI and the BATF?

Mr. WILLIAM BARR. The ATF?

Mr. CHABOT. Yes.

Mr. WILLIAM BARR. I personally think that there's an endemic problem in government, and every administration will stand up and say how great the partnership is and how great the cooperation is, and sometimes it is, but it takes a hell of a lot of effort to get there, because there are a lot of law enforcement agencies scurrying about trying to get into the lime light and take control because they believe they have a particular jurisdictional hook in it. I think that's why Judge Webster and I are saying that a very im-

portant principle is to have a clear lead agency. And I think that there are jurisdictional fights all the time that are not good for an investigation.

Mr. TERWILLIGER. We don't have enough time for me to relate the number of turf fights that I have refereed between law enforcement agencies over 16 years in the Department of Justice, and let me say that some of those involved righteousness on both sides of the issue. It is a product of something, though, that Congress could do something about, were it so inclined. There is competition for budget dollars, scarce budget dollars, between law enforcement agencies. Where the appropriations come out of two different appropriations subcommittees due to the fact that the agencies are in two different departments, that competition for dollars is exacerbated.

It also seems to me just very logically and simply that the Attorney General is the chief law enforcement officer of the United States. Therefore, the law enforcement functions of the Federal Government, the authority to conduct those functions ought to be vested in the Attorney General and her subordinates and not in other places.

Mr. WEBSTER. There are many data bases, and when you think about a common data base, you're not talking about everything being in common. Some things can be shared with other law enforcement agencies and intelligence agencies, and some cannot, to protect sources and methods.

I seem to recall that down in EPIC Center, which was the DEA's intelligence collection base in El Paso, the FBI participated, but with respect to its organized crime file, which was so sensitive at that time, they managed that by placing an FBI special agent there in charge of their data base and responsive to legitimate requests, but who did not hand over a key to the data base to anybody that happened to be participating in the Center. Those are an example of ways you can work this out but get the job done as long as, as Attorney General Barr says, it's clearly understood that you have a lead agency and that agency has the authority to compel resources.

Mr. CHABOT. Some have suggested that the coordination could be improved if the BATF was merged into the FBI. Would any of you gentlemen like to comment on that, what you think about that suggestion?

Mr. WILLIAM BARR. I personally favored and proposed it. I think the Secretary of the Treasury should generally worry about the economy and the Treasury and should worry about collecting revenue and associated legal violations. I think the Attorney General is the chief law enforcement officer, and I think explosions and guns and chasing gangs around the streets belong in the Department of Justice, and I think that that's where the BATF should be and I think that, in fact, was proposed early in this administration but nixed. I don't say that because, by the way, of any disrespect for the BATF.

Mr. WEBSTER. I made the same proposal to then-Deputy Attorney General Heyman when he was in office. Many of the regulatory functions that are carried out by BATF can be handled by assigning it to some other branch, either in Treasury or the Department.

Mr. CHABOT. OK. For the record, I think that that's something that we should perhaps further pursue and would like to continue to look into that effort.

Thank you very much. I'll yield back the balance of my time.

Mr. MCCOLLUM. Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

I want to pursue for a minute or two Mr. Terwilliger's reasonable suspicion language that he outlines on pages 10 through 13, I think, of his testimony. And I don't want to engage in a semantic discussion, but I hear you saying that, first of all, the standard that the FBI is currently using you would advocate should be changed to a reasonable suspicion standard; is that correct?

Mr. TERWILLIGER. In part; what I am suggesting for consideration—and "advocacy" may be too strong a word, but what I'm suggesting for consideration is that, because there is so much confusion on the part of agents and supervisors of agents as to what they can and cannot do under the current guidelines, rather than reinterpret them, let's scrap them and go to use of a standard that is familiar to both lawyers and law enforcement officers alike. The problem is that there really is no standard for the so-called preliminary inquiry under the current guidelines.

Mr. WATT. OK. First of all, let me make sure I'm clear whether your opinion is that the adoption of a reasonable suspicion standard would, in fact, be a lower standard than the FBI is currently using or it would not be a lower standard.

Mr. TERWILLIGER. Well, it is probably a lower standard than a reasonable indication of criminal activity, but I'm not sure that on plain verbiage that there's a lot of difference there. I think that it is a more clear standard to the agents who have to interpret it than the current standard, which has engendered considerable confusion——

Mr. WATT. OK. Let me go forward because then your next step beyond that—well, you in your earlier answer to a question distinguished between the gathering of intelligence and the gathering of evidence, and I take it that this lower standard would trigger a gathering of intelligence information which I think you describe at the bottom of page 12 as including gathering of literature distributed for general consumption, and then you progress on page 13, in the middle of the page, to a point where this reasonable suspicion standard would get you to permitting a law enforcement officer to assume an undercover role in order to advance an investigation. So, basically, this standard then gets you into infiltration, and so forth.

I guess the question I'm asking is whether Mr. Barr and Mr. Webster believe that there should be a change—agree with Mr. Terwilliger that there should be a change in the FBI's standard or whether you think that this lowering of the standard is—might create some dangerous problems? That's the question I'm trying to get to.

Mr. WILLIAM BARR. I would not like to see a higher threshold to a preliminary investigation put in the guidelines, and if reasonable suspicion is higher than what currently is in there, I'm not sure I would go with it. If it's the same or lower, fine.

Mr. WATT. You wouldn't mind lowering the standard for the FBI's intrusion into people's lives, but you wouldn't want it any higher? Is that what I'm getting——

Mr. WILLIAM BARR. Well, remember that a preliminary inquiry does not use intrusive means of investigation. So I'm not sure checking data bases and——

Mr. WATT. Well, now wait a minute now. On page 13, Mr. Terwilliger is talking about this standard permitting a law enforcement officer to "assume an undercover role." That's pretty intrusive, I would think.

Mr. TERWILLIGER. What I have written there is simply a statement of what a law enforcement officer could do today, what the FBI could do, if there were no guidelines whatsoever. Everything that is written there is what is permissible under the Constitution as interpreted by the Supreme Court and other courts. There is no constitutional right implicated particularly under the fourth amendment by the use of an undercover law enforcement officer as opposed to simply debriefing an informant.

Mr. WATT. So let me just be clear and I'll wrap up, Mr. Chairman. If one of these militia groups has said anything about using violence in defense of the Government, you then believe that should trigger an investigation which should then trigger an undercover operation into this thing, and that would be——

Mr. TERWILLIGER. No——

Mr. WATT [continuing]. Sufficient?

Mr. TERWILLIGER. Not at all. I think that the fact pattern that you posit, the hypothetical, is far too simple a basis to make the kinds of judgments you're talking about. I do think that the FBI ought to be able to collect the kinds of statements you're talking about, keep those on file, find out who the people are that are running this organization, and then if further facts justify it, go further with different sorts of investigative techniques to find out if there is a crime behind that kind of rhetoric, but the rhetoric alone to me is not a justification and it's not a reasonable suspicion of criminal activity, as you describe it.

Mr. MCCOLLUM. Thank you, Mr. Watt.

I know, Judge Webster, you've got to catch a plane. Mr. Barr is the last questioner, but whenever you have to go, feel free. We understand that.

Mr. WEBSTER. Thank you very much, Mr. Chairman.

Mr. MCCOLLUM. Mr. Barr.

Mr. BOB BARR. Thank you, Mr. Chairman.

And, Director Webster, I take no offense if you do have to leave.

Mr. WEBSTER. Thank you.

Mr. BOB BARR. I'd like to state for the record with Mr. Barr here that our career paths have crossed several times; they remained parallel for a while and then he went on to bigger and better things. But I'd like him to know that in each and every instance in which we've been confused or I've been confused with you over the years, it's always worked to the advantage of my reputation. [Laughter.]

Mr. BOB BARR. I don't think you could say the same, but it's tremendous having this panel here today. I very much appreciate the tremendous perspective that we've had on this problem.

Is the current, Mr. Barr, is the current definition of terrorism that the FBI uses in its investigative role, is it adequate?

Mr. WILLIAM BARR. No one has suggested to me that it isn't. A number of the proposals here trigger off or use the INA, the Immigration and Naturalization Act language for terrorism. I found that sufficient, but I'm open to any suggestion that it has to be clarified.

Mr. BOB BARR. It seems to me that it is also. I never had any problem with it. And in looking through various materials that we have before us here, it seems to me an adequate definition because, of course, it is tied to the unlawful use of force or violence in furtherance of political or social goals. I think that it is, but I just wanted to see if you had heard anything otherwise.

With regard to the Attorney General's guidelines, last revised in 1989, on domestic terrorism, it's my recollection—and I just have some notes here; I don't have the specific language before me—that investigations can be initiated only when facts or circumstances reasonably indicate that a Federal crime has been, is being, or may be committed. It's that "may be" language that I think may be troubling to some folks, including some in my district. Is that where we get into a discussion of reasonable suspicion or am I confusing different criteria for different purposes?

Mr. TERWILLIGER. I think, Mr. Barr, that you're absolutely right. As a practical matter, that's where we would get into a discussion of using reasonable suspicion as a predicate to investigate further, to either confirm or dispel that suspicion, and if confirmed, then go on to further investigation.

Obviously, if a crime has been committed, if we know that, then we don't have to worry about reasonable suspicion. We have all the probable cause we need to proceed with the most intrusive investigative techniques.

Mr. BOB BARR. With regard to posse comitatus, I'm just a little bit confused and I don't think it's anything that you all have said, but just trying to deal with so much in such a short period of time here. Is it necessary to obtain benefit or to have the benefit of particular expertise that the military may be possess, not to investigate crimes, but to provide support to existing Federal law enforcement agencies? Do we need to really change the law in order to do that?

Mr. WILLIAM BARR. I think as a practical matter it should be changed because I think it has—one, to give the military comfort and, two, to constrain the extent to which that authority would be used. The military has traditionally asked for clarification and, as you know, there are other areas in the posse comitatus area where we've provided very specific authorization; for example, the use of military crews during training for certain antidrug activities, and so forth. It's always fairly clearly defined. So I don't think this would be a major departure from our practice in the past, but I think as a practical matter, in order for the Justice Department to be assured that the military will respond promptly, I think we should probably get some language in there.

Mr. BOB BARR. OK. Mr. Terwilliger, I know you touched on this in your preliminary remarks. Would you agree with that assessment?

Mr. TERWILLIGER. Absolutely. It really is—I think all are in agreement, including this administration and its proposals, that we do not want the military performing directly primary law enforcement functions, but that their assistance can be invaluable and that if the law needs some amendment in order to make it crystal clear that they can legally provide that kind of assistance, then we should do so.

Mr. BOB BARR. OK. I'm—for the record, I don't want anything to be implied into my question because I have no notion yet whether or not we really need to do that, but I just wanted to clarify whether you all felt it was necessary to do that.

I'd just like to conclude by indicating, Mr. Barr, that I appreciate your remarks concerning providing sustained resources to the FBI. I know when I was involved in law enforcement with the Department of Justice, it was a continual battle, and it's not Republican or Democrat. There are budgetary constraints that tug at any administration, and law enforcement is not immune from those at all. And I think it is very, very important to provide the—to make a decision as a people that we want to have a sustained capability within the bounds of whatever laws Congress decides that ought to be, but to say, yes, you're authorized for this much, but then, again, to hold back and not allow them to hire creates the problems and the perception of problems, as we've seen with the inability of the prior witnesses to really articulate what we need more resources now and we didn't a week ago or 2 months ago. And I think it is important to recognize that we need to provide sustained resources in whatever areas and to whatever extent the Congress deems necessary, and I think it's important to remember that.

Thank you.

Mr. MCCOLLUM. Thank you, Mr. Barr.

And I want to thank our panel of witnesses today. I know that Judge Webster had to run just a moment ago to get the plane, but we very much appreciate former Attorney General Barr, you, and Mr. Terwilliger and Judge Webster for being here. You contributed to our effort, and thank you again.

Our final panel of witnesses today, a four-person panel, is a mixed panel, and I'm going to introduce them in the order in which I anticipate asking them to testify, and again would ask them to summarize so that we can get through this in an orderly fashion.

Our first witness is Thomas Halpern, the associate director of factfinding for the Anti-Defamation League. Mr. Halpern coordinates the league's efforts to monitor and counteract antisemitism, racism, and extremism of both the far right and the far left, including activities of armed militias, the Ku Klux Klan, Neo-Nazis Skinheads, and Louis Farrakhan's Nation of Islam. He has spoken on extremist group activity and the Anti-Defamation League's role in combating extremism before law enforcement conferences and around the country.

Our next witness is Ira Glasser, who has been executive director of the American Civil Liberties Union since 1978. Previously, he was director of the New York City Civil Liberties Union. Prior to his affiliation with the ACLU, Mr. Glasser was a mathematician and a member of the science and mathematics faculties of Queens College and Sarah Lawrence College. In addition, he's also been the

Dr. William Niskanen, Jr. is the chairman of the Cato Institute and was a founder of the National Tax Limitation Committee. Unfortunately, because of ill health, Dr. Charles Schultz is unable to be with us this morning, but his statement will be made a part of the hearing record.

Gentlemen, your written statements will also be made a part of the hearing record in their entirety and so I respectfully request that you try to limit your oral testimony to 5 minutes and the Chair recognizes William Barr.

STATEMENT OF WILLIAM P. BARR, FORMER ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. BARR. Good morning, Mr. Chairman and distinguished members of the committee, good morning. Appreciate the opportunity to testify before this distinguished committee on the balanced budget amendment.

Let me just initially say something about the argument that we hear that first you have to designate the cuts that are to be made under this amendment. I think that is putting the cart before the horse, given the very nature of this exercise.

In my view, the balanced budget amendment is a structural reform that is meant to address a structural imbalance that has developed over the years. Until now, special interests, in particular spending measures, have been able to overwhelm the public's diffuse interest in controlling or protecting against excessive borrowing, and the budget amendment is intended to level the playing field, and its purpose is to create a structure that makes it hard to borrow and therefore forces hard choices to be made.

It seems to me that if one suggests that we have to make those hard choices first and specify cuts that are to be made, it is really designed to mobilize the special interests to prevent the reform from taking place and to keep in place a system that has worked to their advantage. This is a debate over basic principle, a basic structural principle, the basic rules that should govern the process, and therefore it seems to me that it is inappropriate to turn attention to the specifics that may evolve in the future.

After all, when the framers were discussing whether there should be a Presidential veto in the Constitution, they didn't start saying, well, let's see when that veto might be used in the future.

The second general point I would like to make is that, at least from a legal standpoint as the debate is taking shape, there is an effort to cram the amendment between Scylla and Charybdis. On the one hand there is the suggestion that there is going to be very heavy judicial involvement and judicial micromanagement of the budget process, but then when it is said that safeguards can be put in place that would prevent this and the courts will only, in fact, play a limited role, the suggestion is made, well then it is a paper tiger and really is an academic exercise.

I think both of these propositions are false. As my statement sets out in more detail, the judicial role under the amendment should be extremely limited. First, the statute can be crafted so it will not create opportunities for judicial intrusion, as I will describe in a moment. Moreover, even where potential cases do arise, under longstanding constitutional doctrines, the courts' role will be lim-

ited. Few suits can be brought under judicial principles of standing which requires a plaintiff to have a specific concrete injury to himself that is not shared in general by other taxpayers or by citizens at large.

Second, even in the unusual case where standing could be established, the current doctrine of the Supreme Court makes it clear that there would be the utmost deference to the political branches and particularly the Congress in the way Congress goes about achieving a balanced budget. And finally, even where a violation were found, there are principles of constitutional law that would restrain the courts from fashioning overly intrusive remedies. So I am confident that this is not an occasion where the courts are going to use this amendment to usurp the powers of the political branch.

Moreover, I think that the amendment itself equips Congress to deal with that situation by giving Congress broad authority to provide for the enforcement of this amendment, and if it eventuates that courts are playing an inappropriate role, that particular provision arms Congress with the ability to provide appropriate safeguards and define the scope of the judicial role.

Even though the courts will have a limited role, I believe that the balanced budget amendment will be very effective without extensive judicial enforcement.

First, I think the political branches themselves understand the Constitution to place constraints on their activities, and indeed judicial enforcement has been the exception, not the rule, when it comes to the political branches obeying the dictates of the Constitution.

Recently, for example, the Supreme Court ruled that the Senate has absolute discretion in how it conducts its impeachments. It does not require the Senate to provide due process or anything else and the Senate could with impunity under the Constitution run complete kangaroo courts. And as the Supreme Court said, we rely on the oath of office of the Senators to ensure that those procedures in the Senate are going to be conducted fairly, and they have throughout history.

And finally, I think the ultimate check here against violation of this amendment is a very potent one, the political check.

Let me close by pointing to two practical aspects of the balanced budget amendment that I think are key and which make it essentially self-enforcing and which I think would limit mischief that could be done by the courts. The heart of the amendment is section 6. That limits the public debt. That is a self-enforcing mechanism, and it is a very potent and effective mechanism.

As a practical matter, I cannot think of an instance in the constitutional history of the United States where the political branches, particularly the Congress, have directly violated a vote requirement set forth in the Constitution. It will require a three-fifths vote to increase the debt, and I cannot imagine a circumstance where Congress would increase the debt without taking that three-fifths vote.

Moreover, this is not a kind of provision that can be circumvented. In the real world—on the street—this provision bites because the U.S. Government could not as a practical matter raise

a nickel by issuing paper in violation of the Constitution. No institutional investor would invest in that kind of unenforceable paper, so this provision, which is at the very core of the amendment, will bite in the real world. If courts were to disappear from the earth tomorrow this provision would still be effective and would still control borrowing.

The second provision is section 1. That is the provision that deals with the balance in a particular fiscal year. Now, it is important to remember that section 6, the limitation on the debt limit, also enforces section 1. No matter what kind of gamesmanship Congress tries to engage in under section 1 in any given fiscal year, section 6 places a limit on the public debt and stands there like a stonewall, so, again, section 1 has a built-in, self-enforcing mechanism.

The notion that we need courts to do it or that courts will be called upon to do it, I think, is a phantasm. Moreover, it is important to make clear, I think, in the language of the Constitution, and this is my principal advice to the committee, that section 1 is really meant to dictate the result that has to occur at the end of the fiscal year. That is, by the end of the fiscal year outlays cannot exceed receipts unless Congress by a three-fifths vote has specified the amount of the deficit for that fiscal year.

That allows the political process to stay in play throughout the entire fiscal year without groups or without courts coming in and trying to dictate specific approaches to be taken by Congress, because there are a whole range of things that Congress can do up until the last day of the fiscal year, whether it be cutting spending or whether it be adopting a resolution by three-fifths, so I think it is important, as the Senate amendment does, to make it clear that you are not dictating the process to be carried out in section 1. You are dictating the result, and you are leaving it up to Congress to provide a process that will achieve that result, and I think if you do that in this amendment, then you will avoid and really prevent opportunities for judicial mischief.

Thank you.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF WILLIAM P. BARR, FORMER ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. Chairman and distinguished members of the Committee: I am honored to have been invited today to testify on the Balanced Budget Amendment.

You have asked me to discuss whether judicial enforcement of the Amendment would result in undue interference by the federal courts in the budget process. My statement today will largely parallel my January 5, 1995, testimony before the Senate Judiciary Committee concerning the Senate's version of the proposed Amendment.

In my view, though it is always difficult to predict the course of future constitutional law development, the courts' role in enforcing a properly crafted Balanced Budget Amendment will be quite limited. I see little risk that the Amendment will become the basis for judicial micromanagement or superintendence of the federal budget process. Furthermore, to the extent such judicial intrusion does arise, the Amendment itself equips Congress to correct the problem by statute. On balance, moreover, whatever remote risk there may be that courts will play an overly intrusive role in enforcing the Amendment, that risk is, in my opinion, vastly outweighed by the benefits of such an amendment.

I believe there are two overarching reasons why the courts' enforcement role under the Amendment will be strictly limited. First, there are practical considerations involving the contemplated operation of the Amendment that will prevent courts from assuming an intrusive role. Second, there are basic doctrinal constraints

that will tend to prevent the courts from becoming unduly involved in the budgetary process. These doctrinal constraints are three: (1) the limitations on the power of federal Courts contained in Article III of the Constitution—primarily the requirement of standing; (2) the deference courts would owe to Congress, both under existing constitutional doctrines, and particularly under section 8 of the Amendment itself, which expressly confers enforcement responsibility on Congress; and (3) the limits on judicial remedies running against coordinate branches of government, both that the courts have imposed upon themselves and that, in appropriate circumstances, Congress may impose on the courts.

I. Practical Limitations

Let me turn first to the practical considerations that will limit judicial intrusiveness.

The various versions of the Balanced Budget Amendment that have been debated over the years have in common two basic provisions designed to limit Congress' ability to borrow money to fund deficit spending. It is these two limitations on Congress' borrowing power that could potentially create new opportunities for courts to intrude themselves into the budgetary process. (Provisions imposing additional limits on the raising of revenue, in contrast, present no such new risk of judicial interference, since the courts today already may entertain claims that revenue bills do not comply with clear constitutional procedures.)

The first of the two provisions limiting the borrowing power is a cap on the public debt. Section 6 of the House version of the Amendment contains such a provision, as does section 2 of the Senate's proposed Amendment. In either case, this provision is straightforward: It sets an overall limit on the public debt and prohibits Congress from borrowing in excess of that limit unless Congress approves an increase in the public debt by a three-fifths majority. Such a provision would be extremely potent, since it would erect a clear barrier to deficit spending that would be essentially self-enforcing, even if the courts play little or no role. We can expect that Congress would obey this clear voting requirement, just as Congress today honors similar statutory debt limits. More importantly, as a practical matter, it would be impossible for the United States to raise funds by selling debt in violation of a debt ceiling; it is inconceivable that investors would buy such unenforceable instruments. Because the only question raised by section 6 would be whether Congress had approved a particular increase in the debt limit by a three-fifths vote, this provision offers little room for judicial micro management or mischief.

The second basic provision limiting Congress' borrowing power is the requirement that outlays for a given fiscal year not exceed receipts unless authorized by a three-fifths vote of Congress. This mandate is contained in section 1 of the House Amendment and in section 1 of the Senate Amendment. The principal enforcement mechanism for such a provision is, in fact, the overall debt limit discussed above. This overall cap would impose a hard and fast limit on Congress' ability to enlarge the national debt through deficit spending, regardless of any gamesmanship that may occur during a particular fiscal year.

It is absolutely critical, in my view, that a Balanced Budget Amendment be carefully crafted so that it does not invite judicial intervention in the course of a fiscal year. The Senate version of the proposed Amendment accomplishes this objective by simply mandating an end result—that total outlays for a fiscal year shall not have exceeded total receipts unless Congress has approved a specific excess by a three-fifths vote—and by leaving it entirely to Congress to design the procedures and means for achieving that end result. A violation of this mandate could not occur until the close of the fiscal year at issue; up until that time, the political process would still be very much in play, and a wide variety of policy choices could be made to achieve compliance—ranging from spending cuts to mustering the required three-fifths vote to approve greater deficit spending. Furthermore, section 6 of the Senate proposal would allow Congress to rely on estimates of outlays and receipts in adopting legislation to implement and enforce the Amendment. All of these provisions combined make it clear, under the Senate Amendment, that prior to the end of the fiscal year no case would be ripe for a court to decide. And after the fiscal year had closed, assuming a court did have jurisdiction (which would be subject to the constraints I discuss below), the court would be limited to providing declaratory relief, since the violation would then be in the past.

Although section 1 of the House version is designed to achieve the same basic objective as the Senate's proposal, I believe it would create unnecessary risks of judicial intervention by attempting to specify a process for achieving the end result. Section 1 of the House Amendment would require Congress to adopt a specific statement of receipts and outlays "[p]rior to each fiscal year" and would mandate that

"actual outlays do not exceed the outlays set forth in such statement." Although Congress could approve an excess of outlays over receipts by a three-fifths vote, section 1 can be read as requiring that such a vote accompany the initial adoption of the statement of outlays and receipts, since Congress could only amend that statement thereafter "provided revised outlays are not greater than revised receipts." Thus, in the unlikely event that a plaintiff had standing and the case were justiciable, the procedure created by section 1 could conceivably open the door for a court to order mid-fiscal-year injunctive relief where it could be shown that a particular action would cause outlays to exceed those specified in the operative statement adopted by Congress.

While the risks of judicial meddling may be slight, I would suggest that those risks could be obviated altogether by rewording section 1 of the Amendment in such a way as to make clear that it would require a balance of outlays and receipts at the close of the fiscal year, not a running balance throughout the year which could invite judicial intervention. The Amendment could also be revised to make it clear that Congress would be given the principal responsibility for putting in place enforcement procedures to ensure that this result is achieved. Pursuant to its authority under section 8, Congress could always define by statute the President's role in the process, as Congress has previously done under the Budget Control Act.

II. Article III Limitations

While, as described above, the opportunity for judicial intrusiveness can and should be limited by the structure of the Amendment, there are other significant constraints on judicial overreaching.

Article III of the Constitution confines the jurisdiction of the federal courts to "Cases" or "Controversies." As an essential part of this case-or-controversy limitation, any plaintiff who hopes to invoke the judicial power of the federal courts must demonstrate sufficient "standing."

Although the Court has not been completely consistent is defining this doctrine, its fundamental principles remain clear. At an irreducible minimum, a plaintiff must show three things to satisfy the standing requirement: (1) "injury in fact"—that he personally has suffered some concrete and particularized injury; (2) "traceability"—that the particularized injury was caused by, and is fairly traceable to, the allegedly illegal conduct; and (3) "redressibility"—that the relief sought will likely redress the plaintiffs injury. *E.g., Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992); *Valley Forge Christian College* v. *Americans United For Separation of Church & State. Inc.*, 454 U.S. 464, 482–83 (1982); *Simon* v. *Eastern Kentucky Welfare Rights Organizations*, 426 U.S. 26, 38, 41 (1976).

Basically, we can anticipate two kinds of court challenges relating to the borrowing limitations in the Balanced Budget Amendment: (1) a claim that a particular budgetary action (such as a spending or borrowing measure) violates section 1 or 6 of the Amendment or its implementing statutes by "unbalancing" the budget or by exceeding the applicable debt limit, or (2) a claim that one of the implementing mechanisms enacted by Congress pursuant to section 8 of the Amendment is itself in violation of section 1 or 6. In either case, I believe, few plaintiffs would be able to establish the requisite standing to invoke federal court review.

The "injury in fact" requirement alone would be an imposing hurdle. It is fundamental that, to establish "injury in fact," a plaintiff cannot rely on generalized grievances and burdens shared by all citizens and taxpayers, but rather must be able to show a particularized injury he has distinctively sustained. No private citizen or group would have standing to obtain judicial enforcement of the Amendment solely by virtue of their status as a citizen or taxpayer. Their supposed injury—the burden of deficit spending and increased debt is shared by all taxpayers and is precisely the kind of "generalized grievance" to which the judicial power does not extend. As the Supreme Court recently reiterated: "As an ordinary matter, suits premised on federal taxpayer status are not cognizable in the federal courts because a taxpayer's 'interest in the moneys of the Treasury . . . is shared with millions of others, is comparatively minute and indeterminable; and the effect upon future taxation, or any payments out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for [judicial intervention].'" *Asarco, Inc.* v. *Kadish*, 490 U.S. 605, 613 (1989) (quoting *Frothingham* v. *Mellon*, 262 U.S. 447, 487 (1923)).

Moreover, even in the case where a plaintiff could establish "injury in fact" by showing, for example, that a specific budgetary action causes particularized and distinct harm to him—it would still be difficult for that plaintiff to satisfy the remaining two elements of Article III standing—the traceability and redressibility requirements. Given the myriad components of any budget, most plaintiffs would be unable to show that the putatively illegal conduct—the unbalancing of the budget or the

breaking of the debt ceiling—was "caused" by, and hence is fairly traceable to, the particular spending measure that has allegedly harmed them. Moreover, a plaintiff would be hard put to demonstrate redressibility because the political branches would have numerous ways to achieve compliance with the Amendment—other than by eliminating the specific measure harming the plaintiff. There would thus be no legitimate basis for a court to single out and strike down the specific spending measure to which the plaintiff objects.

I should for a moment address the case of *Flast* v. *Cohen*, 392 U.S. 83 (1968), where the Supreme Court, 27 years ago, allowed a taxpayer to mount an Establishment Clause challenge against federal aid to parochial schools. is the only instance where the Court has departed from its rigorous restriction on taxpayer standing. *Flast* plainly has no application to the present context and would not authorize general taxpayer standing to seek judicial enforcement of the Balanced Budget Amendment. First, the Court has never identified any constitutional restriction on the powers of Congress other than the Establishment Clause that might support an exception to the general prohibition on taxpayer standing. Moreover, by its terms, *Flast* is limited to cases challenging congressional action taken under its taxing-and-spending power (Art. I, Sec. 8, Cl. 1 of the Constitution) when the expenditure of tax revenue is made for an illicit purpose. In contrast, sections 1 and 6 of the Balanced Budget Amendment limit Congress' owing power (a separate power, enumerated in Art. I, Sec. 8, Cl. 2) and contain no restriction on the purposes of congressional expenditures. The Court has expressly declined to extend *Flast* beyond the exercise of Congress' power under Art. I, Sec. 8, Cl. 1 to other fiscal provisions. *See, e.g., Valley Forge Christian College*, 454 U.S. at 480. And finally, in subsequent cases, the Supreme Court has consistently reaffirmed the need for all plaintiffs to demonstrate particularized injury, thus casting doubt on the continued vitality of *Flast*. I cannot see the Court resurrecting and extending *Flast* in the context of the Balanced Budget Amendment.

There remains the question whether, by virtue of their office, Members of Congress can establish standing where a private citizen could not. The Supreme Court has never recognized congressional standing, and forceful arguments have been advanced against it. *See Barnes* v. *Kline*, 759 F.2d 21, 41–51 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated as moot sub nom. Burke* v. *Barnes*, 479 U.S. 361 (1987). Those lower courts that have allowed congressional standing have limited it in ways that would greatly restrict its use in efforts to enforce the Balanced Budget Amendment. First, Members must demonstrate that they have suffered injury in fact by dilution or nullification of their congressional voting power. In addition, Members must still satisfy the other requirements of Article III standing, including the traceability and redressibility requirements. And finally, under the doctrine of "equitable discretion," recognized by the D.C. Circuit, Members must show that substantial relief could not otherwise be obtained from fellow legislators through the enactment, repeal or amendment of a statute. *See Melcher* v. *Federal Open Market Comm.*, 836 F.2d 561, 563 (D.C. Cir. 1987).

Even if the legitimacy of congressional standing, in principle, were ultimately accepted by the Supreme Court, I would expect that doctrine would have narrow application in the context of the Balanced Budget Amendment. Even if a circumstance arose where a Member could meet the first two requirements, it seems that, absent a serious and clear abuse, the equitable discretion doctrine would militate strongly against allowing congressional standing. Such a case would not be like the Pocket Veto cases where the Executive has allegedly "nullified" a Member's vote; here it would be Congress itself that has taken the challenged action. If the doctrine of "equitable discretion" has any force, it should apply to limit judicial actions by individual Members who wish to challenge enforcement of the Congress' own budgetary decisions, since the real grievance of the congressional plaintiffs in such a case would be the failure to persuade their fellow legislators of the correctness of their point of view. *See Moore* v. *United States House of Representatives*, 733 F.2d 946, 956 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985); *Riegle* v. *Federal Open Market Comm.*, 656 F.2d 873, 881 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

It is obvious from this discussion that I view Article III's standing requirement as a principal safeguard against undue judicial activism in this area. But I would be the last to say that the standing doctrine is an ironclad shield against judicial activism. The doctrine is malleable and it has been manipulated by the courts in the past. There is a clear trend, however, toward narrowing the parameters of constitutional standing. *See Lujan* v. *Defenders of Wildlife, supra; Valley Forge Christian College, supra*. Furthermore, we can anticipate that the congressional budgetary process is not likely to be a field where the courts would be eager to stretch the doctrine. The federal budget and the public debt limits do not typically implicate sensitive individual rights, and thus there may be less temptation for courts to

apply the standing requirements more loosely. In addition, courts are not expert at fathoming the ins and outs of budgetary arcana, and there is no reason to ink they would be so inclined to enter that thicket as to manipulate standing principles to do so. Nevertheless, the possibility remains One way to minimize the risk of such judicial activism is for Congress to take care in the wording of any particular statutes that are enacted in implementing the Amendment so as not to give rise to colorable claims of standing or private rights of action.

Before moving on, I should also point out for the Committee one area that I believe does hold some potential for mischief and that Congress may wish to address. That is the area of state court review. The constraints of Article III do not, of course, apply to state courts, which are courts of general jurisdiction. State courts are not bound by the "case or controversy" requirement, even when deciding issues of federal law, including the interpretation of the Federal Constitution. *Asarco, Inc.*, 490 U.S. at 617. Accordingly, it is possible that a state court could entertain a challenge to a federal statute under the Balanced Budget Amendment despite the fact that the plaintiffs would not satisfy the requirements for standing in federal court. Absent an applicable provision in federal law for exclusive jurisdiction in the federal courts, the state court in such a circumstance would have the authority to render a binding legal judgment. *Ibid.* The only avenue for federal review would be by certiorari to the Supreme Court, which has held that it may exercise its discretionary jurisdiction in such cases "if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for . . . review, where the requisites of a case or controversy are also met." *Id.* at 623–24.

To avoid the possibility that a federal statute or the federal budgetary process itself might be entangled in such a state court challenge, I would suggest that Congress include a provision for exclusive federal jurisdiction in any implementing legislation enacted pursuant to section 8 of the Amendment. Such a provision should be carefully worded so as not to create inadvertently any implied right of judicial review in federal court and so as not to affect any of the otherwise applicable limitations on justiciability discussed in this statement.

III. Judicial Deference

Let me now turn to the second factor that will constrain judicial overreaching. In those cases where standing is established and the court proceeds to review the merits of a claim under the Balanced Budget Amendment, there is no reason to believe that the court would readily second-guess decisions made by the political branches. On the contrary, following long-established doctrine, as well as the Amendment's own explicit dictates, a reviewing court is likely to accord the utmost deference to the choices made by Congress in carrying out its responsibilities under the Amendment.

This judicial deference would be strongest in cases challenging the implementing mechanisms adopted by Congress. The Balanced Budget Amendment, in essence, mandates certain results (balanced budgets and capped debt), and section 8 requires Congress to put in place mechanisms to achieve those results. It is well-established that where the Constitution requires a certain "end," Congress will be given the widest latitude in selecting "means" to achieve that end. Thus, for example, the courts have accorded broad deference to Congress in its selection of appropriate enforcement mechanisms under section 5 of the Fourteenth Amendment. *See Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). And in the context of the apportionment process, where the Constitution mandates in fairly precise terms that Representatives shall be apportioned among the several States "according to their respective Numbers" (Art. I, Sec. 2, Cl. 3), the Supreme Court has deferred to Congress' choice of the method for apportionment, even though a State adversely affected could demonstrate that another method might yield a more accurate result. *See U.S. Dep't of Commerce* v. *Montana*, 112 S. Ct. 1415, 1429 (1992).

The need for deference would be even more compelling in cases under the Balanced Budget Amendment, since the language of the Amendment explicitly confers on Congress, in mandatory terms, the responsibility for implementing the Amendment. Unless the implementing and enforcement provisions adopted by Congress are plainly incompatible with the Amendment, it is unlikely a court would substitute its judgment for choices made by Congress.

Even in challenges to specific budgetary actions—for example, a claim that a particular spending measure threatens to unbalance the budget—the courts would tend to defer to the judgments of the political branches, except where a constitutional violation is clear. Not only do courts start with the general presumption that Congress has acted constitutionally, *see Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984), but that general rule of deference is substantially rein-

forced by the Amendment's explicit assignment of implementation responsibility to Congress in section 8. This implementation responsibility will inherently involve discretionary and expert judgments. It is precisely when reviewing these kinds of technical fiscal issues—matters uniquely within the province and expertise of the political branches—where the courts are most inclined to defer to the sound judgment of the Congress and the Executive.

In sum, then, even where the courts reach the merits of a claim under the Balanced Budget Amendment, we are far more likely to see deference to Congress than heavy-handed second-guessing by the courts. This is not to say that courts will ignore clear instances of abuse; however, it is precisely in such cases—in which the violations are not arguable but palpable—where judicial intervention is most appropriate.

IV. Limitations on Judicial Remedies

For the reasons outlined above, I am confident the courts will entertain very few suits challenging congressional actions under the Balanced Budget Amendment, and that, when and if they do, the courts will be inclined to defer to the judgments of Congress and the Executive in the budget area. Assuming, however, that a court might entertain such a suit and might declare a particular budgetary action unconstitutional as a violation of the Amendment, there are still further judicial constraints making it unlikely a court will order intrusive remedies in such a case. As I see it, these constraints fall into two categories: prudential considerations that will limit a court's exercise of its remedial powers and limitations created by section 8 of the Amendment itself.

First, courts are appropriately wary of becoming too deeply involved in superintending decisions and processes that are essentially legislative in character, and for that reason, any court—most certainly the Supreme Court—will hesitate to impose remedies that could embroil it in the supervision of the budgetary process. Indeed, in the context of the Balanced Budget Amendment, the choice of any specific remedy—for example, an order specifying a particular adjustment of expenditures to bring the federal budget back into compliance with the Amendment—would invariably require the court to displace Congress by making a policy decision that is inherently legislative and therefore inappropriate for the courts. I believe it far more likely that a court faced with a violation of the Amendment would take the less intrusive route of simply declaring the particular action at issue unconstitutional and leaving it to Congress to choose the appropriate remedy.

There are plenty of cases in which the Supreme Court has followed this route. For example, in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Court declared the composition of the Federal Election Commission unconstitutional as a violation of the Appointments Clause, but stayed the Court's judgment to "afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms" that would remedy the violation. *Id.* at 143. And recently, in *Harper* v. *Virginia Dept. of Taxation*, 113 S. Ct. 2510 (1993), where the Court retroactively invalidated a discriminatory tax that had been levied by Virginia, the Court refused to order a refund of the amounts improperly collected and held instead that the fashioning of an appropriate remedy was properly left to state authorities. *See id.* at 2519–20.

Even in cases where there has been a proven violation of the Fourteenth Amendment, the Court has required the same respect for a legislature's ability to devise remedies involving the exercise of the legislature's taxing authority. In *Missouri* v. *Jenkins*, 495 U.S. 33 (1990), the Court confirmed that "the imposition of a tax increase by a federal court," even as a remedy for racial segregation by a state school district, must be "an extraordinary event." *Id.* at 51. "In assuming for itself the fundamental and delicate power of taxation," the Court held, "the District Court not only intruded on local authority but circumvented it altogether. Before taking such a drastic step the District Court was obliged to assure itself that no permissible alternative would have accomplished the required task." *Ibid.* According to the Court "the very complexity of the problems of financing and managing a . . . public school system suggests that . . . the legislature's efforts to tackle the problems should be entitled to respect" and that "local officials should at least have the opportunity to devise their own solutions to these problems." *Id.* at 52 (internal quotation marks removed). The Court in *Jenkins* upheld the district courts power to order a local school district to levy its own taxes because such a levy was the only means by which the school district could raise funds adequate to comply with the courts desegregation order. *See id.* at 55–58. That could never be the case with any potential violation of the Balanced Budget Amendment, which imposes limitations on deficit spending and the public debt, rather than an obligation to raise revenues. There

will always be a myriad of policy choices available to Congress for avoiding infringement of the debt cap and balanced budget requirement.

Jenkins is also readily distinguishable from the context of the Balanced Budget Amendment on the ground that *Jenkins* did not involve "an instance of one branch of the Federal Government invading the province of another," but instead involved a court order "that brings the weight of federal authority upon a local government and a State." *Id.* at 67 (Kennedy, J., concurring in part and concurring in the judgment). The distinction is critical because under Article I, Section 1, "[a]ll legislative Powers" granted under the Federal Constitution are vested in Congress, and the enumeration of legislative powers begins by providing that "[t]he Congress shall have Power To lay and collect Taxes" (Art. I, Sec. 8, Cl. 1). Based on these provisions, the Court has stated that "[t]axation is a legislative function, and Congress . . . is the sole organ for levying taxes." *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340 (1974). *See Missouri* v. *Jenkins*, 495 U.S. at 67 (Kennedy, J.).

A second source of limitations on the courts' exercise of their remedial powers is found in the Amendment itself. Under section 8, which provides that "Congress shall enforce and implement this Article by appropriate legislation," Congress will have the authority to adopt remedies for any purported violation of the Amendment. Congress, for example, could provide for correcting a threatened budget imbalance or overspending through sequestration, rescission or other devices. In addition, section 8 logically gives Congress the power to limit the types of remedies that might be ordered by a court. This power is consistent with Article III, delegation of authority to Congress to define and limit the jurisdiction of the federal courts, and would allow Congress, for example, to deny courts the ability to order injunctive relief for violations of the Amendment. Congress has adopted such limitations in other contexts. *See e.g.*, Norris-LaGuardia Act, 29 U.S.C. 101–115 (prohibiting courts from entering injunctions in labor disputes); Federal Anti-Injunction Act, 28 U.S.C. § 2283 (prohibiting federal courts from enjoining state court proceedings); Tax Injunction Act, 26 U.S.C. § 7421(a) (prohibiting suits to restrain the assessment or collection of taxes).

These powers given to Congress will compound the courts' self-imposed prudential concerns, with the result that the courts will be even more hesitant to order intrusive remedies for ostensible violations of the Amendment. Courts regularly defer to remedies that have been crafted by Congress. This deference is shown even in cases involving the vindication of individual rights. The Supreme Court, for example, has held that Congress may adopt procedures limiting the remedies available in so-called *Bivens* actions, which are actions brought against federal officials for the violation of an individual's constitutional rights. *See Bush* v. *Lucas*, 462 U.S. 367, 388–90 (1983) (no *Bivens* remedy for violation of federal employee's First Amendment rights where Congress has provided remedial procedures under civil service laws). Similarly, in devising a judge-made remedy for violations of the Fifth Amendment privilege against self-incrimination in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court recognized that "Congress and the States are free to develop their own safeguards" to redress violations of the privilege and that such alternative remedies would be respected by the courts. *See id.* at 490. Moreover, even if Congress does not exercise the authority granted to it under section 8, the courts will undoubtedly be aware of Congress' ability to limit the relief that courts may grant, and this awareness in and of itself will likely check any tendency on the part of the courts to develop their own creative remedies for violations of the balanced budget requirement.

V. The Amendment's Efficacy

Some have suggested that the federal courts' limited role in enforcing the Balanced Budget Amendment makes the Amendment a "paper tiger." Their premise is that, unless the courts are there to coerce compliance at every turn, the political branches will flout their constitutional responsibilities. These critics do not argue for a greater role for the courts so much as they dismiss the Amendment as a feckless exercise. In my view, this critique is mistaken: it is based on a distorted view of the Constitution and ignores the practical experience of over two centuries.

First, of course, the point is not that the courts will never be there; it is that we need not fear an avalanche of litigation, with the courts regularly reviewing fiscal decisions and effectively usurping the proper functions of the political branches. Where the judicial power can properly be invoked, it will most likely be reserved to address serious and clear cut violations.

More importantly, Members of Congress and Presidents seek to conform their actions to constitutional norms, not because of external threats of judicial coercion, but

primarily because of their own fidelity to constitutional principles. After all, it is not only judges who must take an oath of allegiance to the Constitution. Just as the vast majority of citizens obey the law because they want to—not because they fear the police—so too those who serve in the political branches feel constrained by constitutional requirements and strive to obey them, whether backed by judicial sanction or not. Congress, for example, has dutifully provided for a census every ten years since the 1790's, as required by the Constitution, without court order. Even in an area as unreviewable and murky as the War Powers, the political branches strive to comply with constitutional norms. And the Senate has always administered responsibly its sole power to try cases of impeachment, without allowing such trials to degenerate into Kangaroo courts, even though the exercise of that power is not subject to the check of judicial review. *See Nixon* v. *United States,* 113 S. Ct. 732 (1993). As Judge Williams put it in the *Nixon* case:

> If the Senate should ever be ready to abdicate its responsibilities to schoolchildren, or, moved by Caligula's appointment of his horse as senator, to an elephant from the National Zoo, the republic will have sunk to depths from which no court could rescue it. And if the senators try to ignore the clear requirement of a two-thirds vote for conviction, they will have to contend with public outrage that will ultimately impose its sanction at the ballot box. Absent judicial review, the Senate takes sole responsibility for its impeachment procedures as a full-fledged constitutional actor, just as the framers intended. *(Nixon* v. *United States,* 938 F.2d 239, 246 (D.C. Cir. 1991) (footnote omitted), *aff'd,* 113 S. Ct. 732 (1993).)

For over 200 years, day after day, the business of government has gone forward in prescribed channels, with judicial enforcement the exception, not the rule. The Balanced Budget Amendment will be effective without judges hovering at Congress' elbow; the Congress will carry it out and it will achieve its intended results.

Finally, we can rest assured that the Amendment will be policed through the most effective enforcement mechanism of all—the watchfulness and wrath of the American people. *Cf. United States* v. *Richardson,* 418 U.S. 166, 179 (1974):

> In a very real sense, the absence of any particular individual or class to litigate [claims for violation of the Statements and Accounts Clause, Art. I, Sec. 9, Cl. 7] gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. . . . [T]hat the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III in jurisdiction does not impair the right to assert his views in the political forum or at the polls.

The requirements of the Balanced Budget Amendment are not like those of the Appointments Clause or the Emoluments Clause, which could be violated with virtually no political fallout. Rather, they touch upon one of the core political concerns of the people. Does anyone seriously maintain that Congress could thumb its nose at a constitutional balanced budget requirement with impunity? Or play fast-and-loose with it and escape political retribution? It is precisely in areas like this, where the political check is so potent, that we can safely trust in its efficacy.

Thank you, Mr. Chairman.

Mr. HYDE. Thank you very much, Mr. Barr.

Dr. Niskanen.

STATEMENT OF WILLIAM A. NISKANEN, CHAIRMAN, THE CATO INSTITUTE

Mr. NISKANEN. Mr. Chairman and members of the committee, may I make three points in my remarks. First, I strongly support the objectives of the contract version of the amendment, including the three-fifths vote for both an increase in the public debt and for an increase in taxes. Moreover, I have supported such an amendment over the very long period of time in which there was a rea-

sonable expectation that a Democratic majority of Congress would choose the means by which the amendment would be implemented. So I would be comfortable with the outcomes, not necessarily in every detail but in general, whether Congress is controlled by the Democrats or by the Republicans.

Second, for all of my longstanding endorsement of a constitutional amendment with these general provisions, I have several severe technical reservations about the language of the contract version of the amendment. Let me briefly summarize those.

First, sections 1 and 2 are expressed in terms of estimates or forecasts of outlays and receipts. That puts an extraordinary amount of responsibility on people much like myself in CBO and in the Joint Committee on Taxes to resolve the uncertainties, and it also in effect delegates to employees of Congress the decisions as to whether a supermajority vote is required on these two matters. That is a situation that is an invitation to controversy and is a wholly unnecessary way to express the amendment.

Second, the amendment does not include a protection against unfunded mandates. In addition to the merits of the case for protection against unfunded mandates, my own judgment is that some protection is a necessary condition for the amendment to be ratified by three-fourths of the States.

My own judgment is that the worst possible outcome is for Congress to report out a weak version of the amendment to get Congress off the hook of the generally broad popular support for such an amendment, and then have it die in the States for failure to address the particular concerns of State and local governments.

Third, the amendment does not constrain Congress from approving measures that would lead to a deficit or increased receipts in the subsequent fiscal year. The special vote required is only specific to the immediate fiscal year, but Congress, of course, takes many actions that would affect the deficit and taxes in subsequent years.

In addition, the section 1 provision requires that actual outlays be constrained to the forecasted outlays. In a recession that would require cutting a variety of discretionary programs to offset the automatic increase in entitlement outlays.

Last, the amendment in the contract version is extraordinarily wordy. It has several redundant sections and several sections that I think can be eliminated entirely.

In summary I strongly support the objectives of the proposed amendment, but I urge the committee to consider an alternate model addressed to our shared objectives. I have prepared such an alternate model. I have been working on these matters for roughly 20 years and have been an advisor to all of the amendments that have been brought to Congress in that period of time. Let me read my particular proposal very quickly. It totals 125 words and addresses the several problems that I have mentioned and that of several other members of the panel.

Section 1, Congress may not increase the limit on the public debt of the United States without the approval of three-fifths of the Members of each House. That is in effect section 6 of the contract version. As Mr. Barr expressed, it is the one solid enforcement mechanism that is independent of estimates in this whole process.

Section 2, Congress may not levy a new tax or increase the rate or base of an existing tax without the approval of three-fifths of the Members of each House. That again abstracts from any problems of estimating whether a particular tax bill increases receipts. It also provides an extraordinary stability to the structure of the Tax Code that would reduce the amount of rent-seeking and rent-defending activities that is characteristic of most tax legislation.

Section 3, State and local governments must be compensated for the necessary additional costs of any new Federal mandate specific to these governments. In the absence of such compensation, State and local governments need not implement such mandates. That protects State and local governments from the necessary additional costs of new Federal mandates that are specific to such governments. At the same time, it protects the Federal Treasury in several ways. It applies only to new mandates. The costs that must be reimbursed are only the necessary additional costs of meeting the mandate, not whatever the State government charges for it. And third, it is specific to mandates that are for State and local governments, not for laws of general application.

Section 4, sections 1 through 3 of the article shall be suspended in any fiscal year during which a declaration of war is in effect. I am strongly in opposition to the idea that one may declare an emergency by majority in a way that would suspend a constitutional supermajority.

Section 5, this article shall be effective beginning in the second fiscal year after ratification.

One hundred twenty-five words, consistent with the crisp and majestic language of most of our Constitution and its amendments. I think it addresses the major concerns of those who have supported these types of measures over the many years.

Thank you.

[The prepared statement of Mr. Niskanen follows:]

PREPARED STATEMENT OF WILLIAM A. NISKANEN, CHAIRMAN, THE CATO INSTITUTE

Mr. Chairman and members of the committee, you face a rare opportunity to draft and approve a major change in the federal fiscal constitution. I have worked to promote this opportunity for over 20 years as a founder of the National Tax Limitation Committee, a member of the committee that drafted Proposition 1 in California, the chairman of the committee that drafted the Headlee amendment in Michigan, and as an adviser and supporter of each of the proposed federal amendments considered by Congress beginning in 1982.

At previous hearings on the proposed amendments, most of my testimony developed the case for new fiscal rules. For the first time, that no longer seems necessary. Public opinion polls have long indicated more than 75 percent support for a balanced budget amendment. The legislatures of more than 30 states have endorsed a resolution requesting Congress to approve a balanced budget/tax limitation amendment and authorizing a constitutional convention to draft such an amendment if Congress fails to act. More than two-thirds of the Senate approved a proposed amendment with strong provisions on federal deficits, taxes, and new uncompensated mandates in 1982. A similar amendment with a stronger balanced budget rule, a weaker tax rule, and no mandate provision failed to pass the House by only seven votes in 1990. For the first time in 40 years, Republicans now have a majority in both the House and the Senate. The Contract with America commits the House to a balanced budget/tax limitation amendment as its first order of business. And most of the governors would support the amendment if it includes a ban on new uncompensated mandates.

A longer paper that summarizes the case for new fiscal rules has been submitted for the record. My testimony today addresses the issues affecting the language of the proposed amendment.

THE CONTRACT PROPOSAL

My first comments are specific to the amendment proposed in the Contract, a version similar to that proposed by Representatives Barton and Tauzin last year.

1) Section 1 requires a three-fifths vote to approve a budget for the next fiscal year in which estimated outlays are higher than estimated receipts. Section 2 requires a three-fifths vote to approve any bill that would increase estimated receipts, presumably in the next fiscal year. These two primary substantive provisions would create several problems:

These provision, in effect, would delegate an extraordinary authority to force a supermajority to those responsible for preparing the *estimates* of total outlays and receipts. At best, such estimates are subject to some unresolvable uncertainty, and the authority to force a super majority vote would increase-the controversy about these estimates.

These provisions would not constrain Congress from approving measures that would lead to a deficit or increased receipts in a subsequent fiscal year.

The Section 1 provision that actual outlays not exceed estimated outlays would require reducing some discretionary outlays to offset the increase in entitlement outlays during a recession.

2) Sections 1 and 6 are redundant. There is no apparent reason to require a supermajority vote on both an expected deficit and on an increase in the debt limit.

3) Sections 3, 5, 7, and 8 are unnecessary. Sections 3 and 5 can be implemented by statute. Section 7 does not add to the rule that any member can force a roll call vote. Section 8 is probably inconsistent with the separation of powers.

4) Section 4 is unduly complicated, an invitation to abuse, and a self-contradiction. A declaration of war should automatically waive the substantive provisions. Congress should not be able to waive these provisions on a mere emergency resolution. And if "Congress may waive the provisions of this Article," this would also waive this waiver provision.

5) This proposed amendment does not provide any protection of state and local governments against new unfunded mandates. In addition to the merits of the case, some mandate protection is almost surely necessary for the amendment to be ratified.

6) Finally, the proposed amendment is unduly long and quite inconsistent with the crisp and majestic language that is characteristic of the Constitution and existing amendments. In summary, I strongly support the objectives of the proposed amendment. For the above reasons, however, I urge this committee to consider an alternative model addressed to our shared objectives.

A PROPOSED "FISCAL RESPONSIBILITY" AMENDMENT

The arithmetic of the federal budget indicates that two new fiscal rules would be sufficient to address the concerns about total spending and the deficit: total outlays minus total receipts equals the deficit, which in turn equals the increase in the public debt. Rules that limit any two of these variables also limit the others. The considerations that bear on the design of a proposed amendment include the choice of which two variables to limit, whether the limits should be on the expected or actual levels of these variables, and the voting rule required for changing the limits. And one additional rule, of course, would be necessary to address uncompensated mandates.

The most efficient way to summarize the issues that bear on the choice of these rules is to start with my preferred version of a fiscal amendment and then to explain my reasons for choosing the specific proposed rules. I have been involved in the design of proposed fiscal amendments (a few of which have been approved) for over 20 years, and the following proposed amendment reflects this experience and some evolution of my views. This proposal also reflects my reverence for constitutional language. The first five words of the First Amendment, I suggest, are among the most beautiful phrases in the English language: "Congress shall make no law. . . ."

THE FISCAL RESPONSIBILITY AMENDMENT

Section 1. Congress may not increase the limit on the public debt of the United States without the approval of three-fifths of the members of each House.

Section 2. Congress may not levy a new tax or increase the rate or base of an existing tax without the approval of three-fifths of the members of each House.

Section 3. State and local governments must be compensated for the necessary additional costs of any new federal mandates specific to these governments. In the absence of such compensation, state and local governments need not implement such mandates.

Section 4. Sections 1 through 3 of this Article shall be suspended in any fiscal year during which a declaration of war is in effect.

Section 5. This Article shall be effective beginning in the second fiscal year after ratification.

The primary consideration that leads me to prefer a focus on debt totals and increases in tax rates is to avoid the problems of a direct vote on the budget totals. Congress does not (and should not) vote to approve the actual levels of total outlays, receipts, and the deficit, because each of these variables is subject to both estimation errors and forecast errors. Since 1976, based on the Congressional Budget Act of 1974, Congress has voted to approve a budget resolution establishing target levels of total outlays, receipts, and the deficit and the allocation of outlays among the major programs. This resolution, however, has no force of law and has not been sufficient to constrain the growth of the budget totals. Requiring a supermajority rule to approve the budget resolution would only increase the controversies about possible biases of the forecast of outlays and receipts. My preference is to focus the supermajority votes on two types of bills that Congress has addressed since the dawn of the Republic: the bill to authorize an increase in the limit on the public debt and on any bill to increase any tax. These rules are substantially invariant to changes in budget accounting and national income accounting, avoiding the problem of other more formulate versions of these rules.

A firmer limit on the public debt would constrain annual deficits without requiring either an estimated or actual balance of outlays and receipts in any fiscal year. Moreover, this approach would ease the problems of transition from the current large deficit to an expected balance; prior to the effective date of the amendment, Congress could set a limit on the public debt that would permit a transition to an expected balance over a period of years. At such time that an expected balance is in prospect, the limit on the public debt should be set to permit borrowing to finance the unexpected increase in outlays and decline in receipts that has been characteristic of U.S. recessions. There is a legitimate concern that a limit on the public debt would be "gamed" by declaring some types of borrowing to be outside the limit or by forcing an increase in the limit to avoid an outlay reduction or tax increase during a recession, but this problem seems smaller than our current deficit problem.

My proposed tax limit would require a supermajority vote to increase any tax, which would avoid the controversies about whether a specific tax change or set of tax changes would increase total receipts. Of course, the federal tax code is far from perfect, and this proposed rule would also increase the vote required for a revenue-neutral tax reform. This seems like a small price to pay, however, to reduce the continuous rent-seeking and rent-defending costs of a tax code that is subject to frequent revision. This proposed limit would provide a much needed stability to the structure of the tax code. My preference would be to include tariffs in this limit, but not user fees. This limit would also be subject to some gaming, Primarily affecting the definition of user fees, but again this problem should be relatively minor.

Although not explicit, the proposed super majority rules to increase the debt limit or any tax is effectively three-fifths of each House *plus* the president. If the president does not support these changes, of course, the Constitution already authorizes the president to force a two-thirds rule on both issues. The amendment must use the same supermajority rule for both the debt limit and taxes to avoid a bias in the source of new financing.

The objective of the mandate rule, of course, is to prevent the federal government from exploiting the state and local tax base for federal purposes. The specific wording of the proposed rule is also chosen to prevent state and local governments from exploiting the federal tax base. Compensation is required only for new mandates after the effective date of the amendment. Compensation must cover only the necessary additional costs of meeting a mandate, not whatever a state or local government might spend for this general objective. And compensation is required only for mandates that are specific to state and local governments, not for laws or regulations of general application to which individuals and private organizations are also subject. The proposed rule would be enforced primarily by allowing state and local governments to not implement the mandate if the prescribed compensation is not made.

The case for the last two sections of the proposed amendment is simpler. Any potential aggressor should be warned that these limits would be suspended upon the declaration of war; this would also increase the incentive to force a declaration of war as a condition for authorizing a major military activity. And some lag between

ratification and the effective date of the amendment is necessary to permit the administration and Congress to adjust to the new fiscal rules.

My thanks for your attention. You have a unique opportunity to put our fiscal house in order. Now is the time for a new fiscal constitution. Do it right. Seize the day!

Mr. HYDE. Thank you, Dr. Niskanen.

Dr. Martin Anderson.

STATEMENT OF MARTIN ANDERSON, SENIOR FELLOW, THE HOOVER INSTITUTION

Mr. ANDERSON. Thank you, Mr. Chairman. After I received your invitation to testify, I reviewed my balanced budget amendment research file, which I have been accumulating for the last 15 years, and what struck me was the timelessness of the arguments on both sides, many of which have been repeated here this morning.

For the better part of two decades the arguments for and against have not changed. The only thing that is different is the size of our national debt, the size of our annual interest payment, and the size of the Federal deficit. The arguments and concerns on both sides of this important issue have been crystal clear for many years.

The great benefit of a sound and balanced budget amendment in the Constitution would be the sure and certain knowledge that Congress would, without question, control the growth of spending so that the Federal budget would be balanced within a reasonable period of time and would keep it balanced from then on. If that happened, there would be a sea change in business confidence as more and more people came to believe and trust in the fiscal integrity of our Government.

Just knowing that the taxpayers' money was going to be spent carefully and that the budget was really going to be balanced I believe would have a powerful, positive impact and would be translated quickly into lower interest rates, more new jobs, less inflation, and higher economic growth. Maybe the most interesting question is why something so obviously good for our economy and so politically popular with the American people has been stymied for so long.

I think the arguments fall into two categories:

Category one, the amendment won't work. We are constantly warned that such an amendment would be subject to easy evasion by smart and crafty lawyers and accountants who would argue over the meaning of words such as "outlay" and "budget," conjure up false revenue and spending forecasts and, in short, use every subterfuge known to undermine the intent of the amendment. I don't believe it.

If there is any concern the opponents of a balanced budget amendment have, it is the palpable fear that it would work only too well. Perhaps what should be said to those who would argue the amendment would be ineffective is, "OK, for argument's sake, I will accept what you say, but seeing as it would not make any difference, humor me and vote for it." The truth is that a constitutional amendment requiring a balanced budget and limiting Federal spending would be fiscally powerful.

If the Constitution says that outlays should not exceed receipts, everyone will know exactly what it means and all branches of gov-

ernment will respect that command with the same deference and diligence accorded all other parts of the Constitution.

To argue otherwise has always seemed to me to be a slur on the integrity of the American people and especially so on the integrity of our elected and appointed Government officials. As a matter of fact, would those who argue that such an amendment should not be added to the Constitution because it could be easily circumvented have argued back in 1789 that it made no sense to add a short paragraph that said "Congress shall make no law respecting an establishment of religion or abridging the freedom of speech or of the press or to petition the Government for redress of grievances?" I mean, after all, how does one define religion or freedom of speech? What is the press? What does it mean to assemble peacefully?

If the Founding Fathers had held the meaning of the constitutional words in the same kind of contempt implied by many of the opponents of a balanced budget amendment, perhaps today we would not be petitioning our Government for a, "redress of grievances," in fiscal matters.

Finally, category 2, the amendment will work. We are at the same time constantly warned that such an amendment will work all too well. Some seem to fear that any control of the growth of spending will be entirely at the expense of social welfare programs. Others seem just as convinced that spending restraint will come almost exclusively out of the national defense. Still others believe we will see little in the way of spending control and lots in the way of draconian tax increases to attempt to balance the budget.

Now, economically they cannot all be right at the same time, but they are on to something. The often unspoken premise behind the call for a balanced budget amendment is the cry from the people in the wilderness outside the Washington beltway to limit Federal spending. With a rare exception here and there, those who want this budget balanced want it balanced by controlling and cutting Federal spending, not by raising any tax rates.

That is why it is so important that the words of any balanced budget amendment embody the idea of limiting Federal spending as the only legitimate route to a balanced budget. There are few who would even attempt to argue that the American tax burden is too light. Since 1980 alone annual Federal tax revenues have increased $837 billion—from $517 billion in fiscal year 1980 to $1,354 billion in fiscal year 1995. From today until the end of this century, Federal taxes are forecast to increase automatically by an average of $80 billion a year.

The issue that permeates the whole question of a balanced budget amendment is spending, not taxes, and the problem is that the current rules of the economic political game make it virtually impossible to balance the budget. I would argue it is similar to the old economic example of a half dozen people who go out to dinner and beforehand agree to split the bill evenly among themselves regardless of what any particular diner orders. Given that set of rules, every dinner partner has a strong incentive to order the most expensive dish on the menu even though the total bill would far exceed what any one of them wishes to pay for dinner.

The solution is to change the rules. Let each person pay only for what he or she orders or agree beforehand on the total amount that could be ordered. That is precisely what a balanced budget amendment would do: Change the rules.

Let me just close by saying that maybe the person who said it best was a fellow named Ronald Reagan in his second inaugural address. "We must act now to protect future generations from Government's desire to spend its citizens' money and tax them into servitude when the bills come due. Let us make it unconstitutional for the Federal Government to spend more than the Federal Government takes in."

Thank you.

[The prepared statement of Mr. Anderson follows:]

PREPARED STATEMENT OF MARTIN ANDERSON, SENIOR FELLOW, THE HOOVER INSTITUTION

After I received your invitation to testify today I reviewed my balanced budget amendment file—a three foot long file that I have been accumulating since the late 1970s, a file of analyses and writing, of articles and news clips, both pro and con.

What struck me was the timelessness of the arguments on both sides. For the better part of two decades the arguments for and against have not changed. The only thing that is different is the size of our national debt, the size of the annual interest payment, and the size of the federal deficit.

The arguments and concerns on both sides of this important issue have been crystal clear for many years.

The virtues of a balanced budget achieved by sensible spending control are not seriously questioned. The certain prospects of just moving toward a balanced budget as of a certain date would have an enormous psychological effect on our economy.

Economists have a difficult time incorporating uncertainty into the mathematical forecasting models they build. And large and growing projected deficits hang like a black cloud over investment decisions that individuals and businesses must make. A lot of what passes for Keynesian economics today is not very good economics, but on some things John Maynard Keynes was right on target. He emphasized in his book, *The General Theory of Employment Interest and Money* that "economic prosperity is excessively dependent on a political and social atmosphere which is congenial to the average businessman." That was written sixty years ago and it is still right.

The great benefit of a sound balanced budget amendment in the Constitution would be the sure and certain knowledge that Congress would, without question, control the growth of spending so that the federal budget would be balanced within a reasonable period of time—and would keep it balanced from then on. There would be a sea change in business confidence as more and more people came to believe and trust in the fiscal integrity of our government.

Just knowing that the taxpayers' money was going to be spent carefully and that the budget was really going to be balanced would have a powerful, positive impact that would be translated quickly into lower interest rates, more new jobs, less inflation, and higher economic growth.

Perhaps the most interesting question is why something so obviously good for our economy and so politically popular with the American people has been stymied for so long. The arguments against this mandate for fiscal responsibility seem to fall into two categories:

1) It Won't Work. We are constantly warned that such an amendment would be subject to easy evasion by smart and crafty lawyers and accountants who would argue over the meaning of words such as "outlay" and "budget," conjure up false revenue and spending forecasts and, in short, use every subterfuge known to undermine the intent of the amendment.

I don't believe it.

If there is any concern the opponents of a balanced budget amendment have, it is the palpable fear that it would work only too well. Perhaps what should be said to those who argue that the amendment would be ineffective is: "O.K., for argument's sake, I'll accept what you say but, seeing as it would not make any difference, humor me and vote for it."

The truth is that a constitutional amendment requiring a balanced budget and limiting federal spending would be fiscally powerful.

If the Constitution says that outlays should not exceed receipts everyone will know exactly what it means and all branches of government will respect that command with the same deference and diligence accorded all other parts of the Constitution.

To argue otherwise has always seemed to me to be a slur on the integrity of the American people, and especially so on the integrity of our elected and appointed government officials.

Would those who argue that such an amendment should not be added to the Constitution because it could be easily circumvented have argued in 1789 that it made no sense to add a short paragraph that said "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the government for redress of grievances?" After all, how does one define "religion," or "freedom of speech?" What is the "press?" What does it mean to "assemble" peaceably?

If the Founding Fathers had held the meaning of Constitutional words in the same kind of contempt implied by many of the opponents of a balanced budget amendment perhaps today we would not be petitioning our government for a "redress of grievances" in fiscal matters.

(2) It Will Work. We are also—at the same time—constantly warned that a balanced budget amendment will work all too well. Some seem to fear that any control of the growth of spending will be entirely at the expense of social welfare programs. Others seem just as convinced that spending restraint will come almost exclusively out of national defense. And still others believe we will see little in the way of spending control and lots in the way of draconian tax increases to attempt to balance the budget. Economically they can't all be right, but they are on to something.

The often unspoken premise behind the call for a balanced budget amendment is a cry from the people in the wilderness outside the Washington Beltway to limit federal spending. With a rare exception here and there, those who want this budget balanced want it balanced by controlling and cutting federal spending, not by raising any tax rates.

That is why it is so important that the words of any balanced budget amendment embody the idea of limiting spending as the only legitimate route to a balanced budget.

There are few who would even attempt to argue that the American tax burden is too light. Since 1980 alone, annual federal tax revenues have increased $837 billion—from $517 billion in FY 1980 to $1,354 billion in FY 1995. From today until the end of this century federal taxes are forecast. to increase automatically by an average of $80 billion a year.

Isn't an $80 billion tax increase every year, on top of a base of $1.35 trillion dollars, enough?

Most Americans would probably say yes.

The issue that permeates the whole question of a balanced budget amendment is spending, not taxes. Today our political institutions are unable to override the combined political power of people with special economic interests, even though taking the national point of view would benefit all. The current rules of the economic political game make it virtually impossible. And that is exactly how many economic special interest groups would like to keep it.

Today what we have is similar to the old economic example of a half dozen people who go out to dinner and beforehand agree to split the bill evenly among themselves regardless of what any particular person orders. Given that set of rules, every dinner partner has a strong incentive to order the most desirable, most expensive dish on the menu—even though the total bill may far exceed what any one of them wishes to pay for dinner.

The solution is to change the rules. One possibility would be to have each person pay for only what he or she ordered. Another would be to agree beforehand on the total amount that could be ordered. The result in each case would be a lower bill for everyone.

That is precisely what a balanced budget amendment would do: change the rules. Perhaps Ronald Reagan said it best in his second Inaugural Address:

> We must act not to protect future generations from government's desire to spend its citizens' money and tax them into servitude when the bills come due. Let us make it unconstitutional for the Federal Government to spend more than the Federal Government takes in.

In summary, I can't think of anything that would do more to ensure the future economic prosperity of this country than to add a few simple, clear words to our Constitution that would mandate fiscal responsibility.

Mr. HYDE. I thank the gentleman. Mr. Barr, you have to leave. Of course, everybody has to leave fairly soon, but let me ask you some questions about enforcement. What if the President doesn't submit a balanced budget under section 3? What if Congress doesn't adopt the statement of receipts and outlays prior to a fiscal year as required in section 1, what happens? Who would enforce those provisions? Would any citizen have standing? What are the sanctions? Can taxpayers sue to force Congress or the President to act?

Mr. BARR. I would say that it is very unlikely that a citizen would be able to show standing to bring a lawsuit to enforce either of those provisions because in both cases they have a generalized grievance. Moreover, to the extent that they can show a specific impact on them, then the other aspects of standing would not be established because you would be unable to show how a specific action by the court could redress the particular harm which they are alleging. But I would like to make a broader point, which is section 1 really tries to set forth the process to be used through the course of a fiscal year.

You start with a statement and under what conditions that statement can be revised and so forth, culminating in the end of the fiscal year where things are supposed to be in balance or you have a three-fifths vote specifying the deficit. One of my concerns about this particular language in this resolution is that by specifying all of the processes like that, it does suggest that there may be occasions where deviations may trigger some kind of enforcement external to the political branches.

That is why I think it is important to craft this from a legal standpoint to state that the result that must be achieved is at the end of the fiscal year and allow Congress to adopt the procedures to get there, recognizing that they have broad discretion to do so, they can rely on estimates to do so, and that that political process is in play up until the end of the fiscal year.

It is only then that a violation of section 1 would occur, and at that point to the extent someone could show standing, they would be able to come in and get a declaratory judgment from the court, but that would not put the court in the position of trying to micromanage the budget and make decisions that are best left to the political branches.

Mr. HYDE. You raised a concern that a suit could be brought in a State court to challenge the balanced budget amendment and thus the Federal court standing requirements be circumvented. Could Congress by statute preclude such State court jurisdiction or would we have to do this through specific language in the amendment, and if so, could you suggest or submit language?

Mr. BARR. Yes, in my prepared statement I point out that under our system State courts would have jurisdiction ordinarily, in the absence of any direction from Congress, to adjudicate questions under the Constitution. They are not bound by the same constrictions that Federal courts are in terms of standing and other limitations, and so conceivably you could have a situation where State courts got into the act and tried to intervene in the middle of the budget process, and that could be protected against in statute, not necessarily in the constitutional language itself. That could be pro-

tected against by Congress in the enforcement legislation and implementing legislation providing for exclusive Federal jurisdiction, which is done in many cases.

Mr. HYDE. Mr. Barr, I am unhappy with the word "receipts" in the text. In 1990, this committee processed legislation that did become law aimed at enhancing our ability to go to court and collect debts. It was about Federal court remedies, garnishment, notice to debtors and the rest. Wouldn't that be a bill to increase receipts under H.J. Res. 1 requiring a three-fifths vote for passage?

Mr. BARR. My understanding is that it would be, I think that the language should really go to increases in revenue rather than to increases in receipts. For example, an effort by the IRS to clamp down on people avoiding their taxes—that is, their established obligations to pay taxes—to enhance receipts, arguably would fall under this provision, so I think that it should go to revenues rather than to receipts.

Mr. HYDE. I thank you.

Dr. Niskanen, you and I may have an argument some time about declaration of war because that is anachronistic. Nobody does it anymore. We didn't do it in Vietnam because it would have brought China and Russia in and then we would have had to declare war on China and Russia. It is a psychological barrier that just isn't crossed anymore, and therefore we could be in a state of danger, facing a national security threat without wanting to declare war and globalize this but needing the relief that the three-fifths vote might bar. So that is my only problem with your position, and we can talk about that later, and I thank you very much.

Mr. Canady.

Mr. CANADY. Thank you, Mr. Chairman.

Mr. Anderson, I would like to ask you for your analysis of the argument that requiring a balanced budget every year will impose excessive rigidity on the economy and that our goal should really be a balanced budget over the long term, with surpluses in good years and deficits in bad years. Could you comment on that particular line of argument that is used against the balanced budget amendment proposal?

Mr. ANDERSON. Yes. I think the critical thing here is to divide the short term from the long term. I think you can make an argument that, for example, some of the earlier proposals for a balanced budget amendment have talked about a requirement to put forth a proposal for the next year for a balanced budget amendment, for a balanced budget, and it might exceed the deficit maybe by a small amount, and you could fix that over a period of a year or two.

I think that the problem we have here is a systemic one. If you look at the last 20, 25 years, the problem is that the deficit gets larger and larger. In fact, in the paper this morning there is a new CBO analysis which analyzes what is likely to happen to the deficit given current law, and it shows it slowly accelerating to about $300 billion a year to the end of this century on up to $400 billion by the year 2005. Now, given the normal caveat about the uncertainty of all future estimates, this is the situation we are in.

Mr. CANADY. Now, what we are dealing with here in this amendment is a limitation on the annual deficit and also a cap on the national debt. This does not involve a proposal, however, to eliminate

the national debt. Do you think we should extend our consideration beyond what we see before us here? Should we have a national debt of the size that we will have when this amendment goes into effect?

Will that cause us long-term problems? Will this solve the problem by capping it at that level or do we need to go further and actually drawdown the debt or lower the national debt that will exist at that time?

Mr. ANDERSON. Well, my personal predeliction would be some day to have a zero national debt, but in the meantime, which may be a very, very long time, I think the very fact of passing a balanced budget amendment, slowing the growth of the deficit, what would happen is that I think that would translate into greater economic growth. The actual critical problem of the Federal debt or the Federal deficit is its size and relationship to our economy, and if we can ensure steady powerful economic growth, the Federal debt as a problem will get smaller and smaller every year. I think that is the best, most effective way to do it.

Mr. CANADY. Now, you mentioned the critical question is the size of the debt in relationship to our economy. Do you think there is an optimum size for the national debt?

Mr. ANDERSON. Yes, zero.

Mr. CANADY. OK. All right. Mr. Niskanen, would you like to comment on that same question?

Mr. NISKANEN. It is not important to balance the budget every year. In a situation in which expenditures are unusually high, such as during a war or during an unusual capital building program or when receipts are unusually low such as during a recession, a deficit is an appropriate means to finance that difference.

The primary reason we allow a deficit is so that we don't have to have high volatility in either spending programs or in tax rates, and we should be in a position where we allow temporary deficits during these special circumstances as long as the ratio of the debt to our economy does not increase. That means that the primary control should be on the debt and not on the annual deficit.

I am especially concerned about expressing the control in terms, in effect of the congressional budget resolution. In effect you would be delegating the decisions as to whether that vote would be subject to a three-fifths vote or a majority vote to your employees in the CBO and in the Joint Tax Committee, and that is not a viable practice over a period of time.

Mr. CANADY. Well, I understand your concern about that particular section of the proposed amendment, but don't you really get back to the heart of this amendment being section 6, where we would place a permanent limit on the debt, and isn't that an effective answer to that concern?

Mr. NISKANEN. That is the most important section of the amendment as it bears on the debt. It is not sufficient to address the question of whether the powers of the Government can be expanded by increased taxes.

The political philosophy behind this amendment is that an expansion of the fiscal powers of the Government should not be made by the same voting rule as for routine legislation. And the fiscal powers of the Government can be expanded by either a decision to

borrow more or a decision to tax more. And particularly since the effective demise of the enumerated powers in the Constitution, it is especially important to have a symmetric supermajority three-fifths rule on expanding the fiscal powers of the Government by either borrowing or by additional taxes.

Mr. CANADY. Of course, that is accomplished in this amendment in section 2. Do you believe that section 2 would be sufficient to accomplish that objective?

Mr. NISKANEN. Section 2, if it were expressed in terms of a vote on any bill that increased tax rates or base, would be sufficient. I worry about a situation when the vote is on a bill in which estimated receipts are to increase, because I don't like the idea that you would be subject to arguments about whether the estimate of receipts is accurate or not.

I have been in that business long enough to recognize that there is a very substantial unresolvable uncertainty about revenue forecasts or about spending forecasts. And I hate to see a prospect of continuous arguments about the CBO forecast is whether we are going to have a deficit or whether this particular tax bill is going to increase receipts.

In addition, these measures do not prevent Congress from increasing the deficit or taxes in a subsequent fiscal year by actions they take in a particular fiscal year. That is another oversight of the contract version of the amendment.

Mr. CANADY. So, on that particular point, would you suggest that there have to be annual action to raise either the debt limit or——

Mr. NISKANEN. No, after Congress passes the amendment it should set a debt limit with enough leverage to accommodate the schedule by which they expect to move from the current 175 or so billion dollar deficit to a balance by the end of some period. That should be the buffer in the debt limit at any given time.

Mr. CANADY. Thank you very much. Thank you.

Mr. HYDE. The gentleman's time has expired.

The gentlelady from Colorado.

Mrs. SCHROEDER. Mr. Chairman, does this mean we will all get 10 minutes to ask questions? I thought the gentleman had 10 minutes.

Mr. HYDE. No, it was 5 minutes by the light up there.

Mrs. SCHROEDER. Mr. Chairman, I have several questions I want to ask, and I would like to make a parliamentary inquiry before my time starts counting. I do want to thank you very much for having this group of witnesses, but I have been counting. We have been in session a little over 2 hours. And if we count Mr. Barr's proposals too, we would have five different proposals really that we are thinking about, plus if we read Mr. Schultz's, that would be six.

So I think it is showing—and I compliment you that it is showing the diversity in here, but I worry that we are not going to have enough time for our panel to ask questions. So the parliamentary inquiry is how do we intend to proceed with this panel, vis-a-vis many of us being able to ask questions on this side as we have listened to these five different ways of approaching this, plus we read Mr. Schultz's which is the sixth?

Mr. HYDE. I appreciate that the gentlelady appreciates our dedication to diversity. We intend to let people have lunch at 12:30. Dr.

Rivlin is coming in at 2. I would ask any of our panel who wishes to serve their country above and beyond the call of duty, if they would wait and then Dr. Rivlin can go on at 2, and then we could resume. Thereafter, if the gentlelady wants to prolong the hearing, that is fine.

Mrs. SCHROEDER. Would there be any way that we could delay lunch to 1?

Mr. HYDE. I suppose we could do that, if that is the will of the subcommittee.

Mrs. SCHROEDER. I think that might be helpful and not break the momentum.

Mr. HYDE. Sure. Is this doable? Mr. Barr, are you able to stay to 1?

Mr. BARR. Yes, Mr. Chairman.

Mr. HYDE. Thank you. I knew you had a problem. I wasn't sure. Very well, we will stay to 1. The gentlelady is recognized for 5 minutes.

Mrs. SCHROEDER. Thank you, Mr. Chairman, and as I say, as I have been listening, we have now from the variety of witnesses we have had, lots of different proposals here.

Mr. Schultz is ill and could not be here. I think it is very unfortunate because in reading his testimony, he has another whole thing to say, and I think that is important we get it out front here. He says on page 2, that the passage of this amendment would not do one specific thing to bring the budget into balance. That has been our point: that this amendment doesn't cut spending, only Congresspeople can cut spending by voting against spending.

Is there anybody who would disagree with his statement there? Mr. Anderson.

What one specific thing or two or three would this do if we pass it?

I mean, how will the deficit look different if we pass it?

Mr. ANDERSON. I think it would put enormous moral suasion on the Congress to move toward a balanced budget. If it is true what Dr. Schultz says, that it wouldn't make any difference, I would repeat what I said earlier. OK. It won't make any difference, humor me, pass it.

Mrs. SCHROEDER. But you know we have passed many things like this in the past, Gramm-Rudman and all sorts of things to solve it, and the bottom line is that we still have to vote against spending. I think we all want to have a full disclosure act. But whatever we end up passing and I think you would agree with that, Mr. Anderson, we would have to go and still implement it by cutting spending.

Mr. ANDERSON. Absolutely.

Mrs. SCHROEDER. He goes on to say that voting for the amendment without an accompanying piece of legislation containing a strict bill of particulars as to how the budget is going to be balanced, which would give you a whole lot more moral suasion, would be just like the early prayer of Saint Augustine saying, Lord, make me pure, chaste, and content, but not yet. And I think that is his real concern, that we would be engaging in that prayer.

People keep saying, oh, we must pass this because it will force Congress to do it. I think we can stipulate this is not going to enforce it.

Mr. Barr, I would like to go to your legal expertise because I think you pointed out that probably no one is going to have standing to sue on this and force it. Let me move, then, to the next issue that the chairman brought up and that is the issue of declaration of war versus imminent threat. That is a great concern to me.

I think the chairman makes a lot of sense, that declaration of war is a very dangerous thing to throw around in the globe that we live upon. If we then go to imminent threats, how broadly can that get defined? Can that get defined broadly to say that we could deploy antiballistic missile systems, no matter what they cost? How do we define what an imminent threat is legally?

Mr. BARR. I think that is essentially a political question under this amendment that would be within the judgment of Congress to determine what was a serious threat to the national security.

Mrs. SCHROEDER. So nobody could really challenge it. We could say almost anything was an imminent threat and spending could go off the charts in the name of an imminent threat.

Mr. BARR. A military threat, imminent military threat.

Mrs. SCHROEDER. And because so much of that is classified, the taxpayers are not really involved in that, I would think. That would be kind of a Commander-in-Chief issue.

Mr. BARR. Well, it would be a congressional issue. Congress would have to enact it.

Mrs. SCHROEDER. That is right, under article 1, I suppose that is true. I also hear great concern about special interests, that people are saying we have to do this because otherwise special interests keep us from being able to vote against spending.

Why will special interests not be able to do that if we pass this amendment?

Mr. BARR. Because the playing field is being changed. There is greater protection to future generations being placed in the amendment. That is why I really disagree with what Mr. Schultz suggested in the excerpt you read. The issue here is that the public's interest in protecting future generations from paying for our current programs is a diffuse and general one. It doesn't have as strong a voice in the legislature as specific interests pressing for their spending measures. That has been the history over the past 25 years.

And what this amendment does is it places a higher hurdle on taking money from future generations to pay for our current programs and, therefore, forces us to reach a broader level of consensus before we do it, thereby creating a condition where cuts can be made, where hard choices can be made.

So let me just complete my answer. To me, what we are doing here is trying to level the playing field in the stadium before we play the game. We are setting the rules that will apply and trying to level the playing field. And people who come along and say let's play the game first before we level the playing field are missing the point. You can't have a fair game until the rules are set.

Mrs. SCHROEDER. My point is if no one has standing to sue or enforce it, you still never get there, because the political thing

doesn't change. And that is what the polls show. The polls show that once people understand what happens—I hear you saying special interests are people, and the voters are going to be the same.

Mr. BARR. Well—you have to be able to increase the debt limit and you need a three-fifths vote to do that. Otherwise spending runs into a stone wall. Obviously, if you can muster three-fifths support in both Houses and the President agrees, you can continue to borrow.

Mr. HYDE. The gentlelady's time has expired. The gentleman from South Carolina.

Mr. INGLIS. Thank you, Mr. Chairman.

Dr. Anderson, your presence here gives me a wonderful opportunity to do something that I would love to do, and that is to correct some of the revisionist history that seems to be written about the administration you served.

Can you tell me—I think it relates to the balanced budget amendment—the accusations are often made that the Reagan tax cuts created the deficit problem. Do you want to respond to that, and particularly in connection with the balanced budget amendment?

Mr. ANDERSON. Sure, and I will only take 60 seconds. We could go on for a long time on that one. Probably the greatest secret in the United States is that when Ronald Reagan proposed those tax cuts in late 1980 we were looking at large increasing surpluses in the Federal Government. I know it sounds like a fantasy, but they went up to $182 billion a year.

In fact, there have been some studies that looked at this. My favorite is one done by the Urban Institute which went back and pointed out very clearly that the vast bulk of the deficit that burgeoned in the 1980's was due to the fact that the economy went in the tank in the early 1980's. It was the fact of the economic recession, not the cuts in tax rates.

In fact, if you go back and look at the actual numbers, every time Ronald Reagan proposed a reduction in tax rates, he accounted for it fully. There was a lot of nonsense written about if you have a tax cut you would immediately make it back. That was always stated by the opponents. In fact, I think we very conservatively assumed that every dollar of tax cut should make 17 cents back and it actually turned out to be a little more than that.

I think the net result is that if you look at the policies of the 1980's, they would have been a lot better if we had been more successful in controlling spending. We were not. And let me close by saying I remember a number of conversations with David Stockman after he would come back from the Hill and he would throw up his hands and he would say, they just will not accept this kind of spending control. And then he would add, it is not just the Democrats, the Republicans are equally culpable.

Mr. INGLIS. Thank you. Mr. Niskanen, did you want to respond?

Mr. NISKANEN. Let me give you some perspective on this.

The Federal receipt share of GDP was slightly higher in fiscal 1989 than it was in fiscal 1979 so there was no general erosion of the Federal tax base. The Federal noninterest outlay share of GDP was slightly lower in 1989 than it was in 1979, so there was no general expansion of the Federal spending share. What happened

is that the Federal deficit was higher in 1989 than in 1979 because it had been higher in the intermediate years. The only component that drove it higher as a share of GDP was interest payment on the debt that was accumulated in the early years.

So the deficit in 1989 was primarily the fact that we brought inflation down very quickly, much more rapidly than any of us anticipated in the early 1980's, and that we had a weak economy through about 1983. So the conclusion of the Urban Institute was right in direction; we had a big deficit at the end of the period, 3 percent of the GDP, but primarily because we had a weak economy in the early eighties.

Mr. INGLIS. Mr. Barr, you made an interesting observation. I like your term, "the diffuse interest of the American people." One of the most enjoyable things I do as a Member of Congress is what I call a walking town meeting. I pick out a street and walk down it and find out what America thinks.

The thing that I am always impressed by is that on those occasions when I do that, nobody talks to me about spending more money. The only people that talk to me about spending more money are people who come visit me here in Washington or request a visit in my district office. And I am convinced that if I didn't go on those walking town meetings, I would spend 90 percent of my time with 10 percent of the people and they are the 10 percent who ask for more money.

As to your point about the specialized interest as opposed to the diffuse interest of the American people, who after all are paying the bills, they are not interested in the Government spending any more money. They are not heard from because they do not schedule appointments here in Washington, nor in the district offices. They stay in the neighborhoods where they leave in the morning and come home at night. They cut the grass and try to keep the kids together and get them to school.

My question to you—after that long statement which was sort of testimony and I don't have an opportunity to testify the enforcement question is one that intrigues me. What you said about the institutional investors and how they would respond to this, would you elaborate a little bit on that? I thought that the point about the enforcement of the balanced budget amendment was interesting.

Mr. BARR. Well, the United States in order to raise money, and this happens even now under the current debt statute, and anyone who has been in Washington, DC, during one of the fire drills that goes on when we approach the statutory debt limit knows that it is taken very seriously. Treasury starts shutting down programs, monitoring carefully the issuance of debt paper to the public. And bond counsel and others involved in the process of issuing debt and determining whether it is appropriate to invest in debt monitor that situation very carefully. And I think under a constitutional amendment, no one is going to invest in paper if there is any legal question that it is enforceable.

Mr. INGLIS. Do you see that—I was a little bit confused about the standing question that an individual taxpayer may have. Who would have standing? I suppose a Member of Congress might have standing? Would that be the case? Who do you think would have

standing? Or do you see the primary mechanism of enforcement being this impact on the institutional investors and the people who won't buy the paper?

Mr. BARR. In the real world, this is a self-enforcing provision, which as I said, courts could disappear tomorrow and this thing would still bite just as hard as it otherwise would. Now, if we ask the academic question, what would actually happen if Congress ignored the three-fifths requirement and the Treasury went out to raise capital in excess of the debt limit, who would have standing?

I do not think that a private citizen would have standing. There are arguments to be made that certain Members of Congress would have standing because it has been a dilution of their vote. It is questionable whether anyone would have standing. I think the ultimate enforcement mechanism is first the practical reality of raising the money; second, the political—the good faith of Congress and congressional desire to carry out their obligations.

As I said, I don't know of an instance in history where there has been a bare-faced effort to ignore a clear constitutional vote requirement. And then third, the political check that would exist clearly if Congress went out to raise money in violation of the Constitution.

Mr. HYDE. We were a little late in getting the light on so the gentleman's time has expired.

The gentleman from North Carolina.

Mr. WATT. Thank you, Mr. Chairman.

Mr. Barr, I raised on the floor last week when we were debating the three-fifths requirement in the rules an issue regarding the constitutionality of what was being done. And I am resigned to the fact that if a constitutional amendment is passed that requires a three-fifths vote for anything, that would, of course, make it constitutional.

I am still concerned about the constitutionality of a rule which basically, by majority vote, imposes a three-fifths requirement because it seems to me that that rule diminishes in some way the value of a Member's vote.

Do you have an opinion about the constitutionality of the rule itself that was passed last week on this three-fifths majority—aside from the policy justifications, political whatever, just the constitutionality of it?

Mr. BARR. I haven't looked at that issue at all.

Mr. WATT. OK. You raised in your testimony the issue of who would have standing to raise this question before the court if this amendment were passed. And I used to think that standing was pretty sacrosanct, too, until the redistricting litigation came along and it happened to be my district in North Carolina that was the subject of *Shaw* v. *Reno*.

None of the plaintiffs in this case ever alleged any personal harm to themselves, yet the Supreme Court granted them standing to pursue that litigation. Are you concerned that that movement in the direction of relaxing the standards for standing might foretell a similar kind of relaxation in this area?

It seems to me that maybe what the Supreme Court has said now is that any time we want to deal with something as a court, we will find the necessary standing. And my question is, are you

concerned that they are relaxing that standard and if you are not—or even if you are—what kind of adverse impact—can you give me a couple of examples—might trigger a person having standing to raise this issue under this amendment?

Mr. BARR. No, in fact, I think that court decisions, Supreme Court decisions are going in exactly the opposite direction. They are narrowing the standing requirements.

Mr. WATT. I won't get you into a question about redistricting, I will talk to you about that later, but that does concern me.

Mr. BARR. I think there you have impact and discrete impact on a person's right to vote, as opposed to a general public interest that we not do deficit spending. The latter is precisely the kind of general grievance the Court has said that individuals cannot assert, but is best left to the political process.

I think if anything the trend is toward narrowing standing. And I think that these fiscal issues are not the kind of issues that in the past the Court has stretched beyond standing or tried to accommodate suits. Those have been more in the area where personal rights are involved—that ultimately implicate personal rights. So I am not concerned here about judicial overreaching.

And it is hard for me to imagine a circumstance where someone would have standing. Let's look at two cases. You have the situation of exceeding the deficit cap, that is the debt cap, and there that is going to be a violation that either occurs or doesn't occur. It will affect the overall debt of the United States. I just don't see a private citizen having standing there.

Mr. WATT. So is this a right without a remedy? I mean, what is the benefit if nobody has the standing to raise the issue?

Mr. BARR. As I just pointed out on the last response I gave, you have three enforcement mechanisms. You have the practical reality that you are not going to be able to raise money if you violate the three-fifths vote. Second, you have Congress' own fidelity to the Constitution, which I think on most things we trust, and historically Congress has never violated this kind of voting requirement. It doesn't say, well, we are going to veto this by less than two-thirds vote. And third, you have the political check. But frankly, I think the first check, that you are not going to be able to raise money without increasing the debt limit, is the most effective check. And there are other self-enforcing provisions in the Constitution.

Mr. WATT. You also talk some in your testimony about the issue of leveling the playing field, which gets me back to the same issue—concern I have about this three-fifths majority or 60 percent majority. It seems to me that right now each of us as Members of Congress has one vote which is equally weighted. That is a level playing field, it seems to me, when it comes to dealing with any issue that comes before Congress, and this 60-percent rule would alter that level playing field. Could you just address that concern that I have and tell me what your perspective is on it?

Mr. BARR. There are other instances in the Constitution where supermajority is required. Now it is true that obviously as among your peers this changes the balance of power. But that is not inconsistent with the framework of our Constitution.

And, in fact, I think it is particularly appropriate here, because I think if we go back to the origins of the Constitution, the basic concern that the people opposing the Constitution had was it is expansion of Federal power. And indeed, the works of the anti-Federalists are replete with predictions that this Federal Government, which you say is going to be so limited, is going to grow like topsy-turvy, it is going to preempt the tax base of the States and next thing you know they are going to end up being the principal taxing mechanism in this country and performing functions which we really should perform. And they were told, oh, no, don't worry about it.

As Bill Niskanen pointed out, with the erosion of the enumerated powers, the breakdown of any meaningful restraint on Federal power through the expansion of the commerce clause where virtually now the Federal Government can assert power to do anything in this country, no matter how localized and usurp the powers of the State, what is the only mechanism for controlling the exercise of Federal power and its expansion? It is control of fiscal power.

Mr. WATT. So I could get used, on my level playing field, to running up——

Mr. HYDE. The gentleman's time has expired.

Mr. WATT. Thank you, Mr. Chairman.

Mr. HYDE. You bet. The gentleman from Illinois, Mr. Flanagan.

[The prepared statement of Mr. Flanagan follows:]

PREPARED STATEMENT OF HON. MICHAEL PATRICK FLANAGAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. Chairman, I want to commend you on your quick action in calling for this hearing today on what is undoubtedly the single most significant item in the Republican's "Contract with America."

I also want to extend my appreciation to Subcommittee Chairman Charles Canady and to the House Republican Leadership, including Congressmen Joe Barton and Dan Schaefer, for leading up in this important crusade to save America's future.

Mr. Chairman, after a long history of narrow setbacks in this endeavor, I feel the time has come for the proponents of a balanced budget amendment to have their day.

Just last year, the House of Representatives fell 12 votes short of passing a balanced budget amendment. Now, after last November's election, there are at least 40 new members pledged to vote for its passage, with most also supporting an amendment which places additional barriers in the way Congress raises taxes.

Mr. Chairman, the American people's desire to have Congress pass a balanced budget amendment is stronger than ever. Just last Friday, a Washington Post-ABC News poll was published showing that 80 percent of the public support a constitutional amendment to require a balanced federal budget.

Opponents, who are few but vocal, say the Constitution should not be trifled with and, because Congress as a body has failed, we should not pass the buck to the Constitution. We also hear that economic policy should not be incorporated in the Constitution.

Such views overlook the fact that the Constitution is a contract between the Government and the governed and, like any contract, it has and should be amended when it is right and proper to do so.

Mr. Chairman, as you know, the constitution also has economic provisions. For instance, the Constitution provides Congress the right to regulate foreign and interstate commerce. That, Mr. Chairman, is an economic provision.

The Constitution, at one time prohibited Congress from levying direct taxes on the people. Again, an economic provision.

Mr. Chairman, history shows that the Constitution is very much an economic document. History also shows that Congress has done a horrific job of balancing the books.

The hard choices have not been made. This, in part, is why 32 States have called for a constitutional convention. Since Congress has not been able to do its job voluntarily, then it is time to make balancing the budget a constitutional requirement.

Mr. Chairman, we can certainly continue to provide Social Security and Medicare to seniors now and in the future if Congress passes and the States ratify a balanced budget amendment to the Constitution this year. For this reason, I am a co-sponsor of H.J. Res. 1, the Barton-Hyde-Tate Balanced Budget Amendment, and urge its quick passage.

In closing, Mr. Chairman, I would like to say how honored I am to be aboard. I look forward to working with you, Mr. Chairman, the Ranking Minority Member, and all my subcommittee and full committee colleagues now and in the future.

I also look forward to hearing the testimony of our witnesses today, especially of our three distinguished colleagues, Congressmen Barton, Schaefer, and Franks.

Thank you, Mr. Chairman.

Mr. FLANAGAN. Thank you, Mr. Chairman.

Dr. Anderson, I was extremely pleased to hear your exposition, which was both philosophical and broad view, of the perceptions of the amendment and how it will impact the economy generally. The people of the Fifth District of Illinois are deeply interested in how this will come down to them in the very narrow view of jobs, lower inflation and higher growth as you discussed.

And as a broker friend of mine once told me, the markets are governed not by the perception of the traders but by the perception of the people who view the perception of the traders. Consequently, in a market where we worry about nervousness, bullishness, bearishness, confidence, and other less concrete terms, could you expand a little bit on the economic perceptions as they do relate to higher jobs, lower inflation and greater growth?

Mr. ANDERSON. Yes, and once again I don't want to try to expand too much on Keynes, but I think it is incredibly important what people's confidence is. Not only business people, but individual investors.

Let's imagine a fantasy. Let's say everybody woke up tomorrow morning in the United States and they said, gee, you know, we absolutely believe that after a few years the Congress will bring the budget into balance, they will do so primarily by limiting Federal spending, and that they will keep it balanced from then on.

I think you would find in the financial markets that long-term interest rates would start to move downward. I think people's confidence generally in government would improve, and I may be alone on this, but I think that is very good for the business environment.

Right now it is only a fantasy. People simply do not trust the integrity of the Federal Government, especially where fiscal matters are concerned. And that is why it is so important.

I might add one comment. I was reading the paper this morning at breakfast and I read a couple of things which would concern me if I were in the Congress. Rudolph Penner is quoted as saying, my goodness, if you pass the constitutional amendment, it will be an enormous cost to respect for law and order.

And then in another piece, Senate Christopher Dodd is quoted as saying if we pass a constitutional budget amendment, "we will come up with every imaginable trick we can to avoid that responsibility."

Now, maybe it is from living out in California too long but, boy, this is not the attitude of the American people. They hold that Con-

stitution in enormous awe and respect. And if something is put in there, it will not be taken lightly.

I might add, we are not talking about the Congress passing a constitutional amendment. This has to be sent to all the States; 38 States, over 7,000 legislators, approximately half of them Democrats. There are a lot of people out there who are going to take a careful look at that and if they look at it and put it in the Constitution, I would be very careful about it.

Mr. FLANAGAN. Thank you.

Dr. Niskanen, Mr. Barr talked earlier about the self-enforcing mechanism in section 6 and the perceptions that come with that in issuance of paper by financial institutions and the Government. I wonder if you could expand upon that argument as it relates to section 1 of the fiscal responsibility amendment that you have included in your remarks.

Mr. NISKANEN. The most sure way to avoid controversy is to have very bright line standards in the amendment itself. It should be clear whether Congress has voted to increase the limit on the public debt. There isn't any doubt about the facts in that case. It should be clear whether Congress has increased the rate or base of any tax. There isn't any doubt on a particular action as to whether that is the case. So there need be no controversy on that matter.

My concern in those two sections, in sections 1 and 2 of the contract version, is that all of this is in terms of estimates of outlays and receipts in a specific fiscal year, and those estimates are subject to substantial uncertainty under the best of circumstances and some partisan controversy, as you know, about whether the estimates are right.

And I would not want to be the CBO Director who had the responsibility of telling the Speaker of the House that you have to have a three-fifths rule on this issue if there is genuine uncertainty about whether the conditions have been triggered. So that the most important thing to do at this stage is to have very bright line standards in the amendment itself that are not subject to the kind of controversy that will arise.

It is important to have a mandate provision in the amendment if for no other reason than it may be an essential condition for ratification by the primary groups that would have standing, which are the affected State and local governments themselves. They would have automatic standing in that case.

I chaired the committee that drafted the Hadley amendment in the State of Michigan. The municipalities in the State of Michigan can go to court to enforce that mandate protection provision, and that would be the case if that were included in the amendment as it should be.

Mr. FLANAGAN. Thank you. Mr. Chairman.

Mr. HYDE. The gentleman from New York, Mr. Serrano.

Mr. SERRANO. Thank you, Mr. Chairman. Mr. Barr, we are, of course, discussing here a constitutional amendment and in the last 30-odd years, certainly during my adult lifetime, the Justice Department in following up on the interpretation of our Constitution has played a major role in people's lives and in trying to secure and uphold the rights that certain people have.

The trend now seems to be of having government retire from that involvement and to send responsibilities not only fiscal, but I am sure during the next 2 years, otherwise, to the States and to let them do many of the programs that would be affected by a balanced budget amendment, because that is step one. Then step two is how to balance the budget, which would affect a lot of people who are yet not fully participating within all their rights in this society.

While I realize that this is a different kind of a question for someone of your background, am I wrong in being nervous that there might be 50 States in this Union that when it comes to providing benefits and support for the needy, for the poor, for minorities, given an opportunity to make those decisions without Federal involvement, that we may begin to run back to an era where those people will be left out more so than they are now? Based on the kind of casework that came before you, based on the grievances that came before you, based on your knowledge of what happens when the Federal Government steps out, don't we run a risk of having to fight the same wars all over again that we supposedly fought 30 years ago?

Mr. BARR. Well, I am not sure if your question relates to government enforcement or government spending. And I think that the trend in the future will be reducing the size of the Federal Government and shifting spending programs, where appropriate, to the States. And for the Federal Government to engage in spending programs, either two things will have to happen. Either those spending programs are going to have to be funded with revenues, current revenues or three-fifths of Congress and the President are going to have to agree that it is important enough to borrow the money from the future.

And to the extent that it can't fit within that framework, yes, this will mean pushing spending programs back to the State, the Government unit that is closest to the people. And I think if the implication of the question is that charity and beneficence is more acute at the Federal level than at the State level, I disagree with that, because I think people see the conditions in their own community and, in fact, desire to help.

Mr. SERRANO. But the recent history during my lifetime was that if left to the States, some people were not equal. It took the Federal Government—in fact the new Speaker, much to my surprise and amazement stated in his opening statement that had it not been for, quote, unquote, the liberal wing of the Democratic Party, we would not have ended segregation.

Is it your opinion that we have progressed as a nation so much in the last 30-odd years that I should not fear that Federal Government lack of involvement in these programs will then not only pass the responsibility but pass the enforcement to the point where we will have people claiming that they are being left out at the local level?

Mr. BARR. Well, referring back to Speaker Gingrich's speech, from your question it seems that you are talking about civil rights enforcement.

Mr. SERRANO. Civil rights takes different ways. If you don't eat—economic oppression is the same as not being able to vote.

Mr. BARR. This is all nebulous, but I think there are three kinds of programs. There are spending programs and there are enforcement programs and there may be civil rights enforcement programs. And I don't think that this will mean the devolution of the enforcement of civil rights to the States. That is a Federal function. And Congress has the power to provide for civil rights enforcement. There is a division in the Justice Department that does that.

In terms of programs to provide for welfare and other benefits to the needy, I think increasingly States will play a role in that. But as I said, the concept of federalism is that those needs are best met at the State and local level. And I think that is, in part, because that is where the voluntary beneficence of the people exists in its strongest form.

They see the object of the public benefit and they are more willing to make that kind of expenditure. I think part of the reason that we face lack of support for welfare programs today is because it is being administered from the Federal level, frankly.

Mr. SERRANO. Well, I understand what you are saying and certainly I would agree that the question posed to you by myself is not the kind that you, as a lawyer, can answer. My concern—and I will put it in the form of a statement—is that I don't believe that when I first got started being involved in community work and in politics that there was a decision by a group of people that government had nothing to do and that the Federal Government needed to be involved. I mean, as I recall, there were definite needs in certain States in this country where people were not treated equally, and then the Government got involved.

Now, the point is to move us out. Well, there are some of us who believe that that involvement is still very much needed and that does tie in to the first blow, to the first statement which is balance the budget, cut programs, send the dollars to the States and everybody is on their own. So this, in my opinion, is very much related to the well-being of people and to the involvement that the Justice Department and the Congress had over the last 30 years.

Mr. HYDE. The gentleman from Ohio.

Mr. HOKE. Thank you, Mr. Chairman. I wanted to ask the panel, I have thought a lot about this question of capital expenditures, and about the impact that rethinking the Federal budget would have. What impact would there be if we thought in terms of capital expenditures the way that municipalities or States do in terms of the capitalizing a percentage of the budget? How would that actually impact the—whether or not we would be in balance in a particular year? The conclusion that I have come to, particularly if we take the position that you cannot capitalize military purchases, and I think that there is a real good argument to be made for not capitalizing any piece of military hardware, but particularly if you take that approach, my conclusion was that we are talking about a very tiny percentage of the Federal budget.

But that was more of a napkin type of calculation. I wonder if any of the three of you have thought about this in any detail and could comment on it.

Mr. NISKANEN. Mr. Hoke, I agree with you. I think it would be inappropriate for the Federal Government to move to a capital budget. It is much more difficult to define capital at the Federal

level, particularly because so much of it is in the military. And I see nothing gained by expressing a balanced budget rule in terms of the operating budget at the Federal level.

Mr. HOKE. Have you gone through the exercise of trying to determine what actual impact it would have, if you played devil's advocate and decided you were going to——

Mr. NISKANEN. If you had a rule that you could borrow only for nondefense capital, the deficit would be far less than it would be right now. So it would not expand your opportunity. It would not expand your authority to run a deficit.

Mr. HOKE. Dr. Anderson, have you given much attention to this?

Mr. ANDERSON. Only to the extent that I have never been persuaded that our problem is that we don't have sophisticated enough accounting techniques. The problem is simply that we are spending far more than we are taking in each year. And I think if we spent our time trying to figure out more sophisticated—maybe justified—accounting techniques, we would once again pass over the real problem which is that we are spending too much money overall. And CBO and OMB are real good at telling us exactly how much.

Mr. HOKE. Dr. Niskanen, I would like to commend you on the language of your amendment. I think it is crisp. It is elegant, and it clearly gets to the nut of it right at the front, which is prohibiting increasing the limit on the public debt.

My question goes to section 3—I am sorry—to section 2 of your amendment, which is a question I suppose also for Dr. Anderson and Mr. Barr, but it has to do with the—whether you believe that there would be a historical necessity for a three-fifths, a supermajority to raise taxes if we were not in the situation that we are in today with the $4.6 trillion debt.

My personal sense is that this question would be moot and that were we fiscally responsible today, and did we define the size and scope of government based on what the people are willing to pay for it on a pay-as-you-go basis, where we hadn't already gotten into this $5 trillion hole that, we wouldn't really be talking about supermajorities for taxation. And my concern is that perhaps we are overreacting. My greater concern is that the last place that you want to overreact in the United States is in the Constitution. And I wonder if you could perhaps address those thoughts.

Mr. NISKANEN. Mr. Hoke, I respectfully disagree on that matter. The essence of the Constitution is a set of rules that Congress cannot itself change. I think that a democratic government should not be able to define its own powers. And the idea of having a tax provision in the amendment is to say that there are limits on the scope—the fiscal reach of the Federal Government—that cannot be changed by the rule for routine legislation.

In other words, when you expand the powers from one level of GDP to another in terms of the fiscal reach of the Federal Government, that should be treated as an extraordinary decision, not as an ordinary decision. And I think extraordinary decisions should be subject to a broader consensus than ordinary decisions.

The Constitution, of course, itself spells out several types of decisions that require supermajority vote. And Congress itself has specified several other types of decisions that require supermajority vote. So increasing the tax reach, the tax claim on our economy,

is an extraordinary decision, not an ordinary decision, and should be treated as such. And that is the case for a supermajority vote.

Mr. HOKE. Dr. Anderson.

Mr. ANDERSON. Let me just add that sometimes we do learn things from experience. When the Constitution was written, there were certain things like passing a treaty or overriding a President's veto and no one had any concern about the two-thirds vote.

My own personal preference is a two-thirds vote to raise any tax rate or any base. I can't think of anything that a government can do that causes more diminution of freedom or more pain than raising taxes. And if you can't make a sound case to convince two-thirds of the Congress or the Senate that you should raise tax rates then I don't think they should be raised. And it might be a very interesting test.

This may be the kind of thing that should be put to the voters of the United States, which it will be, because if the current version of this amendment passes, it will go to the States for a full discussion in the legislatures. And I think it will be interesting to let 50 legislatures debate the issue of whether government should have at least a 60 percent to increase their tax rates.

Mr. HYDE. The gentleman's time has expired.

The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I am not as confident how democratic discussion will happen merely because it devolves upon the State legislatures. I wish I could feel better about that, but that is the way it is set up.

The practical concern that I have is that we are really making it harder to pass an unbalanced budget. We are not really passing a balanced budget amendment. We are making it more difficult to pass an unbalanced one. And this is one way to do it.

My objection arises because I am more concerned about reducing the deficit than balancing the budget, coming from the school that believes that there are times when you need an unbalanced budget. That you cannot keep ratcheting down. As a matter of fact, rather dire consequences can happen as a result in times of a weak economy; the Government itself, being such a powerful economic force, ends up ratcheting down even further. And so this causes me my second concern.

Now, when Mr. Barr refers to the courts, I am afraid that they are going to have to have a role, because the kinds of good-faith differences that arise in the legislative body that have been pointed out by Dr. Niskanen will happen without mischief necessarily being on anybody's mind. There is going to be the need for the courts.

And the kinds of courts that I have seen leave me concerned as the gentleman from New York, Mr. Serrano, that we are moving into a different time. After all, the courts determine what they feel ought to be the law. They interpret the law. And it is hard for anyone not to have seen a very conservative swing that is now going on in the courts that challenges civil rights, that challenges redistricting and affirmative action, and small business set-asides.

So, we are in exactly the situation that you described, Mr. Barr, but I see it as something that will happen; namely, that there will be a necessity for court intervention, not necessarily

micromanaging, but there will be plenty of decisions that will be left hanging over the edges here. And there will still be so many changes going on inside of Congress, that this will fundamentally become unworkable, even though it is a great intention.

So my emphasis is to reduce the deficit. Let's continue the modest efforts that have been begun and build on them, even with the threat of this hanging over our heads, rather than leaping into it, because I see far more problems involved than you do, Dr. Niskanen. I think it will ultimately be unworkable. And I would invite your comments on this assertion or these assertions.

Mr. NISKANEN. Mr. Conyers, I have been intrigued that the opposition to the amendment has typically taken one of two forms. One is that it won't work and one is that it will work. We have heard both of these today. A charge, in some cases by the same people, that it won't work or will get caught up in the courts. One of the other of these arguments is wrong. My guess is that they are both wrong.

Mr. CONYERS. I stand for both of these principles, that you can have both of them, not the neither of them. In other words, there will be differences in Congress that will lead us into court, and that there will be sacrificed budget items that are not just good for my district, but we are in a conservative era that you gentlemen ought to I guess feel pretty good about, but I think that they spell, in the national interest, big problems, not for the 14th District of Michigan necessarily.

Mr. NISKANEN. Mr. Conyers, I supported an amendment of this type when I had every reasonable expectation to believe that Congress was going to be dominated by the Democrats for the rest of my life. In 1990, for example, an amendment of this nature, the Stenholm amendment, came within seven votes of passing the House of Representatives and at one time was cosponsored by Representative Schroeder.

So this decision should not be based upon an expectation of what specific detailed effects would be. Think of it as the change of the rules in an athletic league. A decision to move the goal posts back from the goal line back 10 yards shouldn't be made in terms of whether it particularly helps or hurts the Detroit Lions, it should be made in terms of whether it is likely to improve the quality of the game. We should be thinking in the same mindset when we are addressing constitutional issues.

Mr. CONYERS. I am glad you said that, because that is probably to me the most unreasonable analogy to make is to compare it to sports. And the reason that I say is that is that we are talking about the most successful democratic system in the world; in history. And I am not talking about moving the goal lines differently and then let's everybody take their best shot.

It just so happens that the people that don't get out of South Carolina neighborhoods and cause one of my colleagues to walk around the streets at night, they are not going to have lobbyists. They are not going to have representatives. The veterans may not be able to withstand a 25-percent cut. Aid to dependent children may not be able to lobby effectively. The Wayne County legal services and pro bono legal service groups all over the country won't

be able to get their share in. That is why one of the things that many of us insist is that we talk about the cuts in advance.

And I appreciated the candor of the gentleman from Texas on television when he said we can't do that. We have got to go ahead with this. Run it down the field, and then everybody will find out what will happen. Well, I think I can guess after my number of years here what will happen to Medicare, to Medicaid, to Federal retirement, to supplemental incomes, and to veterans benefits. It is pretty clear what will happen. We don't need to call anybody in to figure that out. The question is do you want to do it.

Mr. HYDE. The gentleman's time has expired.

Mr. CONYERS. Thank you. The question is whether you want to do it in the name of a balanced budget constitutional amendment, or can we achieve it by some other means?

Mr. HYDE. The gentleman from Texas.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Chairman, I have one question for Dr. Anderson. After that I would like to yield the balance of my time to my new colleague from Texas, Sheila Jackson Lee.

Dr. Anderson, my question is this: I absolutely agree with you that the way to achieve a balanced budget is to slow down the increase in spending. We are not talking about net cuts in spending. And yet there are many others who would try to achieve a balanced budget by increasing taxes and I am wondering if you would offer your perspective on whether that historically has worked or not.

In the Bush and Clinton administrations, we have had an increase in taxes. I do not think that that has resulted in the projected decrease in the deficit. And I think if you look back over the last several decades, you find that for every increase in taxes, there has been an increase of $1.16 or something like that in spending. I wanted to get your opinion on whether you think that increasing taxes would be effective in reducing the deficit.

Mr. ANDERSON. Let me say that I think that question cuts to the essence of everything that we have been talking about this morning and maybe for the last 20 years. There really is a decision that the deficit is ballooning out of control. One way to control the deficit is to pass a balanced budget amendment which emphasizes controlling spending. What we don't talk about is what is implied if we do not pass this amendment. And what we are talking about then—and no one wants to say it out loud—we are talking about major tax increases coming down the road. There is no way to avoid this.

And one of the problems with major tax increases and something that Bill said, I spent a couple of years of my life working on making forecasts and one of the things that economists are really terrible at is making forecasts. I don't know which they are worse at—forecasting spending or forecasting tax revenues, but they have a great deal of difficulty with their models.

I had one little reform that I tried to get through when I was in the Reagan administration—unsuccessfully. I would like the Treasury Department and the Council of Economic Advisers to publish the mathematical models they use for making their projections. I think they would be elucidating to us all. You could see how incredibly sensitive they are to people's own interpretations of

what the interest rate may be in the year 1999 and so on. But that is a minor suggestion.

Mr. HYDE. The gentleman from Texas has kindly yielded to the gentlelady from Texas.

Ms. JACKSON LEE. Mr. Chairman, thank you very much. And to my gentleman colleague from the State of Texas, let me thank him very much, for we might disagree but we certainly do agree on our concern for the citizens of the State of Texas.

Let me then be very brief and say to you that just a couple of months ago I was involved in a budget process for the city of Houston, the fourth largest city in the Nation, and we collectively as council members and staff alike, sat for months at a time eking out the numbers and looking at the receipts and outlays. Of course, and we knew what we were doing.

I am comforted by Dr. Niskanen's comments about unfunded mandates because I come from that history arguing vigorously against unfunded mandates. But I am uncomfortable in believing that we are going in the direction that would give comfort to the cities that I've had the opportunity to represent, more than Houston, sitting on the board of directors of the National League of Cities representing some 17,000 towns and cities. And the reason I say that is a bipartisan approach that my colleague from Texas, Congressperson Stenholm offered to the Budget Committee, was rejected along partisan lines and simply a listing of what was planned to be cut. Without that knowledge of understanding of what the process might entail over the 7-year period, I think that it gives little comfort to cities, one, without the language of the unfunded mandates but more importantly, the question of what are we going to cut.

As my able colleague from New York indicated, what Medicaid and Medicare recipients are we going to leave out in the cold? What AFDC individuals? What senior citizens? What thousands of persons in nursing homes across this country? So my question becomes if we talk about a bipartisan approach to this effort, why are we running away from the concept of a resolution that adds the information most needed for reasonable budget makers, what are we going to cut? Where are we going to be able to save the dollars to make this realistic?

My last inquiry—and I thank the gentleman from Texas—is I raise great question, as a lawyer, as to whether or not you would have standing. My able colleague from Virginia has said to me that Prof. Herb Reed, a constitutional lawyer, has said if you have standing, you know it, or if you don't have standing, you know it as well.

The courts make that determination, Mr. Barr. So my question is for Dr. Niskanen and then Mr. Barr on the standing issue.

Mr. NISKANEN. Representative Lee, we do not know what actions will be taken to meet the terms of the amendment. That was the case in 1789 when they gave the President the veto authority. They could not and did not anticipate which types of bills the President would choose to veto or who would be President and what party would be President, that would command the Presidency over a period of time.

Now, we have some clues about what will happen. Representative Panetta, as chairman of the House Budget Committee, put together alternative budgets, a way to meet the balanced budget by the end of the century. Alice Rivlin has done the same thing. I have done the same thing. You have done various things. We cannot know. That decision will be made in your forums, not in our forums.

We should take the advice of the Harvard philosopher John Rawls. We should make rules behind what he calls the veil of ignorance, about the particular application of those rules and specific circumstances as they affect you and me. At the constitutional stage, we are inherently behind the veil of ignorance. We do not know whether you or I or others will be helped or hurt by the particular application of the rules. That is the proper environment to evaluate constitutional rules. Not the idea somehow that we ought to have full information about its consequences over a period of time.

Ms. JACKSON LEE. Doctor, I am most frightened by that cover of darkness. I appreciate your answer to that.

Mr. BARR. Before turning to——

Mr. HYDE. The gentlelady's time has expired. I regret that. We have two more questioners. I am sure they will be brief.

Ms. JACKSON LEE. Thank you.

Mr. HYDE. The gentleman from Massachusetts.

Mr. FRANK. Let me first just, it is almost a side issue, Dr. Anderson, but you gave some statistics. You said people had unfairly misinterpreted what people had claimed on behalf of the Reagan tax cuts, and I think you said your figures, the estimates were for every dollar of cuts there would be 17 cents back, but in fact it came out a little better than that. Did I hear that accurately?

Mr. ANDERSON. Yes, the numbers put forth during the 1980 campaign and the 1981 budget documents—I am sorry, during the 1980 campaign show that for every dollar of projected cuts in taxes there would be a revenue loss of 100-plus adding back from economic growth $13, so it was about—about $17.

Mr. FRANK. The $17 in loss or $17 in offset to loss?

Mr. ANDERSON. Offset.

Mr. FRANK. So the loss would be about 83 cents?

Mr. ANDERSON. Yes.

Mr. FRANK. I must say I have never heard dynamic scoring so decisively repudiated. I am glad to have that number.

Mr. ANDERSON. No, it was not repudiated. In fact, it worked out—if you go back and read the National Bureau of Economic Reports, you will see that.

Mr. FRANK. Excuse me, you just said that in fact the tax cuts did what you expected. They reduced the revenue, not by dollar for dollar, but they reduced the revenue.

Mr. ANDERSON. Oh, sure.

Mr. FRANK. But that is not what some people have interpreted the dynamic scoring to be.

Mr. ANDERSON. Actually, I have had a $50——

Mr. FRANK. Excuse me. I have been limited in time. I will be glad to stay if you can stay. I just wanted to see if I understood that. The further question I have, though, does go to the argument

we just had about rules and neutrality because I think the witnesses have in the broader sense contradicted themselves, and these are very important issues.

On the one hand you said we want to make things neutral, we want to have rules that are promulgated behind a veil of ignorance but I don't think that is accurate, particularly with the three-fifths vote on taxes. There are in this country a lot of divisions.

One division is between people who think that the public sector has important positive roles to play more than other people do. This is not a neutral thing. There is an ideological divide in this country between people who see a positive affirmative role for the public sector and those who don't, and I think, frankly, to be intellectually honest, this amendment is aimed at giving those who are skeptical of the public sector an advantage over those who are not. Neutrality is everybody gets the same vote.

When you take a three-fifths vote for any increased expenditure, you make it harder and you have all said, part of this purpose is to make it harder to expand the public sector. That is a valid philosophical goal, but it is not a neutral one. It is not done behind the veil of ignorance. This is, and after it has been constitutionalized, one side of a current, very important philosophical debate.

The Constitution now, it seems to me, is neutral as to the size of the Federal Government and what you want to do is to institute obstacles because—and I noticed two of you shake your heads here, not Mr. Barr for the record.

Mr. BARR. No, I was shaking my head, no, I disagree.

Mr. FRANK. The point is what we are getting from all of you is a great distrust of democracy. When you talk about the role, what you say is that under current rules where majority rules, it doesn't work. We have to level the playing field.

How do you level the playing field, by tilting it at one end, by putting in the three-fifths vote. What you are saying is the public cannot be trusted to its own instincts, that in fact we have to put restraints on the majority because a three-fifths vote to require an expansion of the Government is clearly a restriction on a majority at a given time.

You said that there are pressures, there are interest groups, et cetera, but that is how democracy works. Interest groups are organized groups generally that people don't like, so what I have here is a sense that the way the Constitution was formulated isn't working well because people who want to expand the role of government have been too successful, and what you want to do is change the rules to give an advantage so that it will take more than a majority to expand the role of government and less than a majority to pocket, and I will be glad to hear comments.

Mr. BARR. Can I comment first? My observation is the dichotomy here isn't between public sector and not public sector. There are two public sectors in this country, Federal and State, and what this says is that if in fact the American people want intervention by the public sector, that sentiment is best crystallized at the State level, and there are going to be limits on the extent to which we allow the Federal Government to continue to march out and consume resources.

Mr. FRANK. Excuse me, Mr. Barr, your language, "allow the Federal Government," see, the notion that the Federal Government is some alien creature, which is like the Russian Army approaching Chechnya is somehow at stake here. I regard the Federal Government as a result of what the people do in elections, and you obviously don't trust that process.

When you treat the Federal Government as something outside of and external to the voters, that is a fundamental difference. I think that the Federal Government is in fact the consequence of what the voters have done in the most recent Federal elections.

Mr. BARR. And that is why putting this amendment out is exactly what should be done because this enables three-quarters of the States, the people, to place limits on the Federal Government. In fact, the framers thought the Federal Government was to be treated more suspiciously than State, precisely because it is more remote from the people, so this is a structural amendment that doesn't prefer nonpublic.

Mr. FRANK. Of course it does. The three-fifths vote, you have said that earlier——

Mr. BARR. Over public. It will still enable States to act for the public. What it does is it puts some limit on Federal Government and some control. It says the Federal Government——

Mr. FRANK. It says we should make it harder to expand the Federal role than not. That is a legitimate thing. Why don't you admit it?

Mr. BARR. What it says is that once the Federal Government has most people working 4 months a year to pay Federal taxes and once it has already borrowed several trillion dollars from the future and once it has already imposed on States unfunded mandates, there are going to be limits to how much we are going to let you——

Mr. FRANK. Once again your whole philosophy is the Federal Government is some alien creature. The Federal Government imposes. You really don't trust democracy. The notion that the voters have in fact brought this about is somehow foreign to you. The Federal Government is this outside creature that has done all these things to the voters. I don't know where the voters were when all this was happening.

Mr. HYDE. The gentleman's time has expired. The gentleman from Virginia, Mr. Goodlatte. He will be the last questioner before we adjourn for lunch.

Mr. GOODLATTE. Thank you, Mr. Chairman. I do hope that I will have a minute or two to yield to my colleague from Virginia if I am brief here, and so I may not be the last.

I do want to thank the chairman for holding these hearings. I would like to focus for a moment, if I may, we have been talking for a long time here about what will happen if we pass this amendment. I think it is more important that we talk about what will happen if we do not pass this amendment.

Dr. Anderson briefly touched on that by pointing out we are going to face massive tax increases at a time when we are right now at the highest point of taxation in the country's history. But I think even beyond that, in terms of looking at the future of our children and grandchildren, we have got to consider what is going

to happen when the current debt of $4.7 trillion, which comes to $18,000 for every person in the country, continues to balloon and even when we pass this amendment because it has a 7-year glide path to being balanced. We are going to add another trillion dollars to that debt even if we achieve balancing it by the year 2002.

If we fail to do that, and again double or triple this enormous debt, the full faith and credit of the U.S. Treasury, the ability for us to continue to borrow this kind of money is going to be called into question. Mr. Barr alluded to the fact that one of the protections in this amendment is that if we pass it, the ability of the Government to borrow money will be impinged upon by the marketplace not having confidence in the Government's ability to enforce the repayment of those obligations, I think, is a very good point.

If we do not adopt this amendment, however, I think that the marketplace is going to impose some very severe, far more severe sanctions than anything that the minority has addressed here today in what would happen if we do pass it.

Mr. Anderson, do you have any brief comments on that point?

Mr. ANDERSON. There is not much I would add to that. I think you are absolutely right. There has been very little attention paid to what happens if you do not pass it. I think most of the American people are going under the assumption that it is going to happen, and it might be a very interesting path to pursue.

Say, look, what if it doesn't happen and what if these deficits that they describe in this morning's edition of the Wall Street Journal, the new projections by CBO actually come to pass. What is this going to do to our economy and the future of a lot of programs?

I would argue something that I guess hasn't been said, but I think a lot of people would agree with that a strong and vital economy is necessary for a good national defense, and it is good for social programs. You must have it. If you want to see social programs be ravaged, the national defense be really downsized far too much, just let the economy get in real trouble.

Mr. GOODLATTE. Thank you. The next point I would like to address in response to the gentleman from Massachusetts' comments about democracy. Dr. Niskanen, I think that your proposal is an excellent one. I, along with Mr. Hoke, find that to be a good approach to this and we will pursue whether we can add some of those considerations into what we are doing as we proceed in the next few days.

It seems to me, though, that if we limit the ability to raise the debt ceiling by requiring a supermajority, limit the ability to raise taxes by requiring a supermajority, and limit the ability of this Congress to pass its wishes on the States by unfunded mandates that the combination of those three things in a constitutional amendment will have the effect of actually strengthening the Constitution as it exists today. Because we are going to strengthen the 10th amendment to the Constitution, a very badly neglected part of the Constitution that this Congress and the Supreme Court have, in my opinion, ignored for many, many years, and by putting those constraints into the Constitution, we will in effect strengthen the right of the people to be heard through their State representatives. Would you comment on that?

Mr. NISKANEN. I agree with you wholeheartedly. This would strengthen the Constitution in the same way and for the same purpose that the Constitution was originally written, to limit the powers of the Federal Government, to limit the scope of decisions that can be made by a majority of this Congress. That is wholly consistent with the spirit and the letter of the Constitution, and that it will more importantly strengthen the American community by limiting the Federal Government.

Mr. GOODLATTE. Mr. Barr, you made note of the fact that there are going to be restraints on the ability of the courts to interfere in this process. I would just note that it seems to me that the first time that the Supreme Court hands down a ruling or becomes involved in balancing a budget—that is the responsibility of this Congress—will also be the last time that the Court does it because of the wrath of the American people in responding to that kind of abandonment of our responsibility. In my opinion, we do that year, after year, after year, but we will face the embarrassment of seeing that if the Supreme Court actually steps in and takes such action that would be, frankly, a very helpful part of this process to impose upon the Congress responsibilities that the Congress has abandoned for decades. And rather than allow you to respond to that, let me yield the few seconds I have to Mr. Scott to allow him to make a point or two.

I am sure contrary to my point of view, but he is also from Virginia and has been sitting through all this, and I would like him to have a chance to ask questions.

Mr. HYDE. I ask unanimous consent that 3 additional minutes be accorded to the gentleman from Virginia who can yield that to the gentleman from Virginia. Without objection, so ordered.

Mr. SCOTT. Thank you, Mr. Chairman. I would like to thank the chairman and my colleague from Virginia for yielding.

I think we are in general agreement about the desirability of getting toward a balanced budget. The problem is when you do the things that get you there, you are talking about raising taxes and you are talking about cutting spending, both of which do nothing but make enemies. People don't like their taxes raised and they don't like their programs cut.

Even if we passed this amendment, we wouldn't have made any progress towards getting towards a balanced budget until we make those tough choices. The experience in the States has been that they separate the operating budget from the capital budget. You can do that through the front door or the back door. Instead of building roads you can let some private firm build the road and you can lease it over the capital portion of the budget. You can play with pensions, you can play with estimates, and you can do a lot of things to avoid the tough choices that have to be made.

We are talking about unfunded mandates. There is no language we can put in a resolution that will protect the States from the unfunded mandates. If you cut the services and leave the services unfunded, the States will either have to go without the services and housing and health care, welfare, crime control, environmental protection or they are going to have to pick them up. It is not a mandate, but they are going to have to be picking up a lot of the things

that we cut out. It gets us back to trying to reduce the deficit and balance the budget.

If you assume that it is better to have a balanced budget than a nonbalanced budget, which I think there is a clear consensus on, the question is whether or not the language in this resolution helps us get there. There is an assumption that a three-fifths majority to pass an unbalanced budget will help you reduce the deficit. I believe it will go exactly in the opposite direction.

There is no proposal that has any support, any meaningful support in Congress that is going to balance the budget. If we have anything close to the political climate that we have in America today or last year before the Republican takeover, you will find it virtually impossible to raise taxes and cut the spending, which means that you are going to have an unbalanced budget and you are going to require 60 votes to pass the budget.

Why does anybody think, in terms of making enemies, if you can't pass a budget that continues to reduce the deficit with a simple majority, why would you have a higher likelihood of reducing the deficit when you require 60 percent? The experience has been that as you get closer and closer to actually passing the budget, the last few votes, you have to buy up with some kind of—not with additional cuts, but with additional appropriations.

Mr. Barton mentioned aircraft carriers. I can assure you that I will not vote for any budget and most of the Virginia delegation would not vote for any budget without an aircraft carrier in it. I would imagine that those in Texas might withhold their votes for the reinstitution of the supercollider. Those in California might want to withhold their votes for increased spending in the space station.

As you require a higher threshold to pass the budget that everybody agrees is going to be out of balance, why would we think that it would be easier to pass the budget than more difficult? It would seem to me that this would just require more pork and not less, and if we could have a comment in the last few seconds from either of the panelists.

Mr. ANDERSON. I will take a pass at it. Congressman Frank, I see, has left, but I think the purpose of the amendment is to even up the playing field. I think the evidence of the last 25 years has clearly shown that there is an enormous predisposition to running up large deficits, and I think the idea behind this particular amendment is that the Constitution requires the budget be balanced, and a majority vote can slow the growth of spending or even cut spending in some areas, but it takes a 60-percent vote to raise taxes, thus it is more likely that you will balance the budget by controlling spending than raising taxes, which I think is exactly what the American people want.

Mr. SCOTT. I think the experience has been that you will reduce spending less than you will, and you will probably end up with a higher deficit because the costs are going up. You might cut a few programs, but if you have an unbalanced budget and this just says if you get a 60-percent vote to pass the budget it is not going to be balanced.

Mr. HYDE. With regret, I must announce that the gentleman's time has expired. I want to thank this panel. You have been ex-

traordinarily patient and illuminating, and thank you so much for your time. You have made a great contribution.

We are going to recess until 1:55, when Bill Archer has asked to address us for 5 minutes, and then at 2 Alice Rivlin, the Director of the Office of Management and Budget will testify. The time frame is at her request, and we do want to accommodate her.

Mrs. SCHROEDER. Mr. Chairman.

Mr. HYDE. Yes, the gentlelady from Colorado.

Mrs. SCHROEDER. We have a slight problem with that on this side. Most people would rather question Mr. Archer than Ms. Rivlin. I think that there may be a little difficulty in people—maybe he could just submit his testimony in written form, but I think if he comes we will want to ask questions.

Mr. HYDE. I know you will, and let's just see what happens. I don't want to be discourteous to the chairman of the Ways and Means Committee, nor certainly to Dr. Rivlin. We will try to do the courteous thing, whatever that is.

Mrs. SCHROEDER. Maybe they could be a panel. Your side could ask her questions and we could ask Mr. Archer questions, but I know I have many more questions for Mr. Archer, and I really find this kind of a surprise witness who is going to come in and do an oral thing and then leave. I don't think that is quite fair.

Mr. HYDE. Well, maybe we will ask him to testify tomorrow and we will have lots of time, so we will—anyway, I hope you are here at 1:55, whether Mr. Archer is here or not.

Mrs. SCHROEDER. And everyone can submit questions for the record?

Mr. HYDE. Absolutely. Absolutely. The more the merrier. Bilingual, of course.

[Whereupon, at 1:25 p.m., the subcommittee recessed, to reconvene at 1:55 p.m., this same day.]

Mr. HYDE. The subcommittee will come to order. We are very honored to have with us appearing on behalf of the administration Dr. Alice Rivlin, the Director of the Office of Management and Budget, a distinguished economist. Dr. Rivlin is well known to a number of Members from her service as former Director of the Congressional Budget Office and her affiliation over many years with the Brookings Institution.

A prolific writer, she is the author of a number of books. Dr. Rivlin has assisted the Judiciary Committee in its past consideration of a balanced budget constitutional amendment and so she does again today. We welcome her back and look forward to her testimony.

Dr. Rivlin.

STATEMENT OF ALICE M. RIVLIN, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

Ms. RIVLIN. Thank you very much, Mr. Chairman. I am very pleased to be here as you consider this momentous amendment. The Clinton administration shares the concern about huge Federal deficits and the escalating Federal debt that has led to the proposals to amend the Constitution in order to require balance in the Federal budget. We very much share the concern, but we do not share the remedy.

Mr. TSONGAS. Thank you.

Senator BIDEN. Thanks, Paul.

The CHAIRMAN. Now, we are clearly running short of time here, and so I am going to ask our witnesses to limit themselves to 5 minutes and I am going to ask questioners to limit themselves to 5 minutes. We have got to move along here and be fair to everybody.

So we are going to call former Attorney General William Barr and Prof. David Strauss to the witness chairs at this time and move ahead there. We will start with Professor Strauss first and then we will go with Attorney General Barr.

Senator SIMON. And I might add, Mr. Chairman, I am very proud to have him as a constituent of the State of Illinois.

The CHAIRMAN. That is great. We are glad to have you here.

PANEL CONSISTING OF DAVID STRAUSS, PROFESSOR, UNIVERSITY OF CHICAGO; AND HON. WILLIAM BARR, FORMER ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

STATEMENT OF PROF. DAVID STRAUSS

Mr. STRAUSS. Thank you, Senator, and thank you, Mr. Chairman.

Mr. Chairman, thank you for inviting me to speak to the committee today. I will focus on the separation of powers questions that might be raised by the balanced-budget amendment because I think it could produce quite substantial changes in the constitutional order that we have been accustomed to for 200 years.

Whether those changes are worth it in the larger scheme of things is something I have no competence to address and I leave it to others, but that there may be, indeed will be, substantial changes, I think, is clear.

In a sense, no constitutional provision is worth any more than the institutional mechanisms that exist to enforce it, and there are really three options, I think the only options for the enforcement of a balanced-budget amendment.

One would be that the courts could enforce it, could take the lead in enforcing it. The second would be that the President could take the lead in enforcing it, and the third would be that responsibility would be essentially left where it is now with the Congress, and the amendment would function as an admonition to Congress, something Members of Congress would be obligated to observe, but there would be no external enforcement mechanism.

I think it is common ground that large-scale judicial enforcement and interpretation of a balanced-budget amendment would simply be unworkable. This is not something that the courts have ever done. It is not something we can expect the courts to be good at. There are difficult questions of interpretation for which they have no established body of law to resort to, and there are questions of enforcement that have been aired in these hearings already.

Would courts be able to order tax increases as a routine matter? That would be an inversion of our constitutional order. Would they be able to order spending cuts; if so, in what programs, on the basis of what criteria? These are not things that we have ever relied on our courts to do.

Now, Attorney General Barr in his testimony outlines a scenario in which essentially the courts would intervene only occasionally, only in instances of the most severe abuses, and existing doctrines, political question doctrines and standing doctrines, would block most litigation, so the courts would not take the lead in enforcing the balanced-budget amendment.

It is possible that such an optimistic scenario would be true. It is possible, but it is very, very risky to rely on existing doctrine to do the job. There would be substantial arguments at least for taxpayer standing and substantial arguments for legislator standing to enforce the balanced-budget amendment.

But more to the point, these doctrines are very fluid, shifting doctrines. They have undergone dramatic changes in the last 10 or 15 years. They sometimes undergo changes in their contours from case to case, and to make predictions about how the courts will interpret doctrines like this, doctrines of exceptional fluidity, I think, is a very hazardous matter.

The balanced-budget amendment, if it is added to the Constitution, will be there for keeps. There is no telling whether these doctrines will take an expansive turn as they did maybe 15 or 20 years ago, in which case the courts would have a basis for getting involved in the implementation of the amendment in a large way.

Also, to the extent that the President, as Assistant Attorney General Dellinger suggested, believes that he or she is required to impound funds in order to enforce the amendment, there is no question that a Presidential impoundment could be challenged in the sense that someone would have standing to challenge it. The person who would have received the funds had they not been impounded would, under any conventional standing doctrine, be able to challenge that.

It is possible the courts would defer to the President's judgment. It is possible they would not, and then we would be back in the thicket of courts making these decisions, the difficulty of which is, after all, what has given rise to the impetus for a balanced-budget amendment in the first place.

So I think to rely on existing doctrine and simply to enact an amendment that is silent on the question of judicial enforcement—I will deal with the question of implementing legislation in a second—that seems to me to run substantial risks of bringing about an outcome that I think everyone agrees is not a good one of judicial enforcement.

Now, what about, then, implementing legislation that would substantially restrict what the courts could do? It seems to me that such legislation would raise very serious constitutional issues. We are, after all, talking about cutting back on *Marbury* v. *Madison,* about taking away a power that the courts have had since the beginning of the Republic to enforce the Constitution.

Perhaps it could be done and perhaps the law would be upheld. In effect, that might even be the worst outcome, if implementing legislation cutting back on the courts' authority were upheld, because the precedent would then be that Congress, when it decided that it didn't want the courts enforcing a constitutional right, could curtail their power. And if it can be done for the balanced-budget amendment, it will be a little bit easier to do it next time for the

takings clause and a little bit easier to do it next time for the fourth amendment and the sixth amendment and the first amendment. That is not to say that that kind of doomsday scenario will necessarily come true, but this is the way constitutional protections built up over generations erode.

The final possibility is to provide in the amendment itself that there is to be no judicial enforcement, and just one thought about that. Such a provision in our Constitution would stick out like the proverbial sore thumb. If you have had occasion, as I have over the past few months, to look at some of the new constitutions being drafted in Eastern Europe, they are filled with provisions that are not enforceable. They just have a different conception of what a constitution is from us, and the idea that it is an operative legal document that provides judicially enforceable legal rights—that is not their conception, but that has always been our conception and it has always been part of our constitutional culture that we valued. An amendment that provided for no judicial enforcement would, I think, lead to an inroad on that culture; again, perhaps worth it, but that there would an inroad, I think, is something we should be clear on.

Thank you, Mr. Chairman.

The CHAIRMAN. Well, thank you, professor.

Welcome to the committee, General Barr. We appreciate having you here as always, and we appreciate your taking the time. I am sorry it has taken us so long to get to you today.

STATEMENT OF HON. WILLIAM BARR

Mr. BARR. Mr. Chairman, Senator Biden, and distinguished members of the committee, it is a pleasure to be here.

What we really have developed here is a scenario of a Scylla and Charybdis. On the one hand, people are suggesting that we have this big risk on the enforcement side of the courts coming in and taking over the budget process with the President impounding money. And the other part of this is, well, if we cut off enforcement, if we try to limit enforcement, then we have an unenforceable paper tiger.

And I disagree, you know, with both suggestions. One, I do not think there is a significant risk of judicial intrusion here, and second, I think even with the limited role that courts will play, this is a very effective amendment that will work. I think it is actually a very elegantly structured amendment.

Before I summarize a few of the key points in my statement, I just want to try to bring this down to the real language of the amendment and what it really does and what the practical reality is of the budget process because I think a lot of the discussion on these legal threats have been disconnected from the amendment itself. They have been somewhat academic.

The core of the amendment is section 2. That is the enforcement, and that is a very tough enforcement provision because section 2 says you can't increase the debt without a three-fifths vote. Now, that is a stone wall.

Let us take the courts off the face of the Earth. That provision is going to work. I do not know of any instance in our constitutional history where the Congress of the United States or the politi-

cal branches have directly violated a provision such as a three-fifths vote provision. I think everyone here knows Congress will respect that three-fifths vote on increasing the public debt.

There is another practical reality. If Congress tries to borrow money around that provision, who is going to lend Congress the money? There is not one investor in the United States that is going to buy Federal paper if it has been issued in violation of the Constitution of the United States. So the real key provision is section 2, as the section-by-section analysis says. That is the enforcement provision, and it is a self-enforcement provision.

Now, will a court come in someday if someone tries to borrow in excess beyond the debt limit? I doubt it under current standing doctrine, but if they do, it is not the end of the world because the only remedy at that point is declaratory relief or an injunction against further borrowing beyond the debt limit. And that has not happened to us yet, and we have a debt limit today and there is not a lot of litigation about it.

Section 1 is the other provision that is key here, and that interplays with section 2 because what section 1 says is—it does not say that as you are going through the year, your receipts and your expenditures have to be in harmony. In fact, the section-by-section makes it clear they can be out of whack.

What section 1 says is that at the end of the fiscal year, all of your expenditures have to equal all your receipts, and if there is any deficit, it has to have been approved by a three-fifths vote.

Now, that is something that really, except in the most bizarre cases, you are not going to know until the end of the year because the political process is in play all the way through the fiscal year. I don't see that there is a basis for any intervention in the process because at any time Congress can say, we are going over and take that three-fifths vote. If it looks like on the last day of the fiscal year they are going to be $1 million out of whack, then the issue becomes, up until the end of the fiscal year, is Congress going to authorize that by a three-fifths vote? So as long as section 2 is respected, which is you can't go over the debt limit, you can have fluctuations during the fiscal year.

Now, let me just stress a couple of points from my testimony. Very few cases, in my view, would arise under this amendment. First, they have the rightness problem that I mentioned under section 1. Because the political process is still going on and Congress can, up to the last day of the fiscal year, enact a three-fifths resolution, a three-fifths statute on the amount of deficit for that fiscal year—there is no violation until the end of the fiscal year—the court will have nothing to do except wait until the end of the fiscal year. At that point, the only relief essentially is a declaratory judgment, which would not be overly intrusive.

About standing, under current doctrine, it is hard to conceive of a private citizen or a taxpayer having standing, suffering injury, in fact, from the generalized grievance of deficit spending.

Moreover, to the extent that they attack a specific program and say I have standing because this highway is going to come through my property and it is being funded by this appropriations bill, then the other two prongs of standing are not met, because it cannot be traceable to—the violation, the illegal conduct of the unbalanced

spending, can't be traced to that specific bill, nor can it be redressed because there is nothing that the court can do to that specific spending measure.

There are plenty of ways to bring a budget back in balance and they all require policy decisions, and the court has no basis for insisting on one specific measure to take and therefore really has to leave it to the Congress, if we ever got to that stage, to take the appropriate action.

I have discussed in my statement the deference that the courts have historically paid to Congress. I think it would be strong here. We just saw an example of it recently in the reapportionment cases, in the Montana case.

I have also discussed the hesitation to adopt intrusive remedies. I think it is very clear from the cases where Congress adopts a remedial statute, as it is specifically empowered and directed to do under section 6, that the courts will defer to that regime.

We saw that recently in *Bush* v. *Lucas* where an individual came in and said, I am a Federal employee and my first amendment rights have been violated; I want to bring an action under the Constitution. And the court said, well, Congress has already provided a mechanism through the employment statute for you to seek relief. It may not be fully the remedy you want or provide the same as an action under the Constitution, but that is what Congress has provided and we are going to defer to it.

So I think that a lot of the discussions about courts getting into the act really overstate the problem dramatically, and I have to say I came at this with skepticism because I personally am generally concerned about judicial overreaching.

But I frankly think that this is an amendment that is well-crafted and will not result in judicial interference. And to the extent it does, again, I think it will be clear cases and I don't think it will be injurious to the process to get courts involved in those limited instances.

Something has been said about impoundment. I really don't understand it. I don't see any authority for the President to make an impoundment here because, as I say, up until the end of the fiscal year, under section 1, Congress has the power to ratify or to specify the amount of deficit spending that can occur in that fiscal year.

Moreover, it is very clear that under section 6, Congress can adopt whatever regime, enforcement regime, they want to enforce section 1, and they can specify what the President's role is and they can provide for rescissions, and the President would be guided by that, as the President is guided right now under the Budget Control Act, which dealt with the problem of impoundment.

So I think the whip is in Congress' hands, so to speak, under section 6 where Congress can provide the enforcement mechanism that the courts will defer to and that the President will be bound by.

Finally, let me just say that lurking behind this all is a notion that if the courts aren't there to enforce it, then it is an unenforceable provision, and I think that is a distorted view of the Constitution. As I say, I think this is a self-enforcing amendment in the real world because that debt limit is a real debt limit that is not going to be circumvented.

I do think while the courts will be there in perhaps limited areas, although I am even skeptical of that, I think that the real enforcement mechanism here is the fidelity of the branches themselves to the Constitution and the political check that exists.

There are many provisions in the Constitution that have been obeyed for time immemorial. They have not been the subject of judicial enforcement. There are areas of wide prerogative for the Congress. For example, recently on the impeachment case, it was held that this Senate can do anything it wants to in impeachment cases, and I haven't seen over our 200-year history any evidence of converting this institution into a kangaroo court just because the courts are not there hovering at the elbows of the Senators.

I agree with Senator Simon that Members of Congress take their oaths seriously and can be relied on, as can be the President, to see to the faithful execution of this provision. And I think, as the Supreme Court said in the *Richardson* case, that the ultimate check here is the political check. And I would be surprised if, particularly in this year after the changes that have occurred in the election, anyone would suggest that that is not a potent check. Concern about what would happen if we barefacedly violated the Constitution, what would be the reaction of the people is a very real check on congressional action.

Finally, one last word, which is I think it is very clear that if it materialized that the courts were getting overinvolved in enforcement of this statute, Congress does have the power under section 6 to limit the scope of remedies; for example, to prohibit certain kinds of injunctions or prohibit the courts from attempting to raise taxes, and so forth. Again, I don't think there is a significant risk that that would materialize, but clearly Congress is equipped to handle that under section 6 if it did.

Thank you, Mr. Chairman.

[The statement of Mr. Barr follows:]

PREPARED STATEMENT OF HON. WILLIAM P. BARR

Mr. Chairman and distinguished members of the Committee, I am honored to have been invited today to testify on the Balanced Budget Amendment.

You have asked me to discuss whether judicial enforcement of the Amendment would result in undue interference by the federal courts in the budget process.

In my view, though it is always difficult to predict the course of future constitutional law development, the courts' role in enforcing the Balanced Budget Amendment will be quite limited. I see little risk that the Amendment will become the basis for judicial micromanagement or superintendence of the federal budget process. Furthermore, to the extent such judicial intrusion does arise, the Amendment itself equips Congress to correct the problem by statute. On balance, moreover, whatever remote risk there may be that courts will play an overly intrusive role in enforcing the amendment, that risk is, in my opinion, vastly outweighed by the benefits of such an Amendment.

I believe there are three basic constraints that will tend to prevent the courts from becoming unduly involved in the budgetary process:

(1) The limitations on the power of federal courts contained in Article III of the Constitution—primarily the requirement of standing;

(2) the deference courts would owe to Congress, both under existing constitutional doctrines, and particularly under section 6 of the Amendment itself, which expressly confers enforcement responsibility on Congress; and

(3) the limits on judicial remedies running against coordinate branches of government, both that the courts have imposed upon themselves and that, in appropriate circumstances, Congress may impose on the courts.

I will discuss each of these constraints in turn. Before I do, however, let me note that my remarks will focus on sections 1 and 2 of the Amendment. It is these provisions thatwould create new limits on Congress' power to borrow and to expend borrowed funds, and those new limits may potentially give rise to new opportunities for courts to intrude themselves into the budgetary process in ways they currently cannot. Section 4 of the Amendment, in contrast, presents no such new opportunity or risk for judicial interference in the budgetary process. Section 4 merely adds further procedural requirements for the passage of revenue bills, and courts today already may entertain claims that revenue bills (either taxes or user fees) do not comply with clear constitutional procedures.

I. ARTICLE III LIMITATIONS

Article III of the Constitution confines the jurisdiction of the federal courts to "Cases" or "Controversies." As an essential part of this case-or-controversy limitation, any plaintiff who hopes to invoke the judicial power of the federal courts must demonstrate sufficient "standing."

Although the Court has not been completely consistent is defining this doctrine, its fundamental principles remain clear. At an irreducible minimum, a plaintiff must show three things to satisfy the standing requirement:

(1) "Injury in fact"—that he personally has suffered some concrete and particularized injury;

(2) "traceability"—that the particularized injury was caused by, and is fairly traceable to, the allegedly illegal conduct; and

(3) "redressibility"—that the relief sought will likely redress the plaintiffs injury. *E.g., Lujan* v. *Defenders of Wildlife,* 112 S. Ct. 2130, 2136 (1992); *Valley Forge Christian College* v. *Americans United For Separation of Church & State, Inc.,* 454 U.S. 464, 482–83 (1982); *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38, 41 (1976).

Basically, we can anticipate two kinds of court challenges relating to sections 1 and 2 of the Balanced Budget Amendment:

(1) A claim that a particular budgetary action (such as a spending or borrowing measure) violates the Amendment or its implementing statutes by "unbalancing" the budget or by exceeding the applicable debt limit; or

(2) a claim that one of the implementing mechanisms enacted by Congress pursuant to section 6 of the Amendment is itself in violation of section 1 or 2. In either case, I believe, few plaintiffs would be able to establish the requisite standing to invoke federal court review.

The "injury in fact" requirement alone would be an imposing hurdle. It is fundamental that, to establish "injury in fact," a plaintiff cannot rely on generalized grievances and burdens shared by all citizens and taxpayers, but rather must be able to show a particularized injury that he has distinctively sustained. No private citizen or group would have standing to obtain judicial enforcement of the Amendment solely by virtue of their status as a citizen or taxpayer. Their supposed injury—the burden of deficit spending and increased debt—is shared by all taxpayers and is precisely the kind of "generalized grievance" to which the judicial power does not extend. As the Supreme Court recently reiterated: "As an ordinary matter, suits premised on federal taxpayer status are not cognizable in the federal courts because a taxpayer's 'interest in the moneys of the Treasury * * * is shared with millions of others, is comparatively minute and indeterminable; and the effect upon future taxation, or any payments out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for [judicial intervention].'" *Asarco. Inc.* v. *Kadish,* 490 U.S. 605, 613 (1989) (quoting *Frothingham* v. *Mellon,* 262 U.S. 447, 487 (1923)).

Moreover, even in the case where a plaintiff could establish "injury in fact"—by showing, for example, that a specific budgetary action causes particularized and distinct harm to him—it would still be difficult for that plaintiff to satisfy the remaining two elements of Article III standing—the traceability and redressibility requirements. Given the myriad components of any budget, most plaintiffs would be unable to show that the putatively illegal conduct—the unbalancing of the budget or the breaking of the debt ceiling—was "caused" by, and hence is fairly traceable to, the particular spending measure that has allegedly harmed them. Moreover, a plaintiff would be hard put to demonstrate redressibility because the political branches would have numerous ways to achieve compliance with the Amendment—other than by eliminating the specific measure harming the plaintiff. There would thus be no

legitimate basis for a court to single out and strike down the specific spending measure to which the plaintiff objects.

I should for a moment address the case of *Flast* v. *Cohen*, 392 U.S. 83 (1968), where the Supreme Court, 27 years ago, allowed a taxpayer to mount an Establishment Clause challenge against federal aid to parochial schools. *Flast* is the only instance where the Court has departed from its rigorous restriction on taxpayer standing. *Flast* plainly has no application to the present context and would not authorize general taxpayer standing to seek judicial enforcement of the Balanced Budget Amendment. First, the Court has never identified any constitutional restriction on the powers of Congress other than the Establishment Clause that might support an exception to the general prohibition on taxpayer standing. Moreover, by its terms, *Flast* is limited to cases challenging congressional action taken under its tax-and-spending power (Art. I, Sec. 8, Cl. 1 of the Constitution) when the expenditure of tax revenue is made for an illicit purpose. In contrast, sections 1 and 2 of the Balanced Budget Amendment limit Congress' *borrowing* power (a separate power, enumerated in Art. I, Sec. 8, Cl. 2) and contains no restriction on the purposes of congressional expenditures. The Court has expressly declined to extend *Flast* beyond the exercise of Congress' power under Art. I, Sec. 8, Cl. 1 to other fiscal provisions. *See, e.g., Valley Forge Christian College,* 454 U.S. at 480. And finally, in subsequent cases, the Supreme Court has consistently reaffirmed the need for *all* plaintiffs to demonstrate particularized injury, thus casting doubt on the continued vitality of *Flast.* I cannot see the Court resurrecting and extending *Flast* in the context of the Balanced Budget Amendment.

There remains the question whether, by virtue of their office, Members of Congress can establish standing where a private citizen could not. The Supreme Court has never recognized congressional standing, and forceful arguments have been advanced against it. *See Barnes* v. *Kline,* 759 F.2d 21, 41–51 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated as moot sub nom. Burke* v. *Barnes,* 479 U.S. 361 (1987). Those lower courts that have allowed congressional standing have limited it in ways that would greatly restrict its use in efforts to enforce the Balanced Budget Amendment. First, Members must demonstrate that they have suffered injury in fact by dilution or nullification of their congressional voting power. In addition, Members must still satisfy the other requirements of Article III standing, including the traceability and redressibility requirements. And finally, under the doctrine of "equitable discretion," recognized by the D.C. Circuit, Members must show that substantial relief could not otherwise be obtained from fellow legislators through the enactment, repeal or amendment of a statute. *See Melcher* v. *Federal Open Market Comm.,* 836 F.2d 561, 563 (D.C. Cir. 1987).

Even if the legitimacy of congressional standing, in principle, were ultimately accepted by the Supreme Court, I would expect that doctrine would have narrow application in the context of the Balanced Budget Amendment. Even if a circumstance arose where a Member could meet the first two requirements, it seems that, absent a serious and clear abuse, the equitable discretion doctrine would militate strongly against allowing congressional standing. This is not like the Pocket Veto cases where the Executive has allegedly "nullified" a Member's vote; here it is Congress itself that is taking the challenged action. If the doctrine of "equitable discretion" has any force, it should apply to limit judicial actions by individual Members who wish to challenge enforcement of the Congress' own budgetary decisions, since the real grievance of the congressional plaintiffs in such a case would be the failure to persuade their fellow legislators of the correctness of their point of view. *See Moore* v. *United States House of Representatives,* 733 F.2d 946, 956 (D.C. Cir. 1984), *cert. denied,* 469 U.S. 1106 (1985); *Riegle* v. *Federal Open Market Comm.,* 656 F.2d 873, 881 (D.C. Cir.), *cert. denied,* 454 U.S. 1082 (1981).

It is obvious from this discussion that I view Article III's standing requirement as a principal safeguard against undue judicial activism in this area. But I would be the last to say that the standing doctrine is an ironclad shield against judicial activism. The doctrine is malleable and it has been manipulated by the courts in the past. There is a clear trend, however, toward narrowing the parameters of constitutional standing. *See Lujan* v. *Defenders of Wildlife, supra; Valley Forge Christian College, supra.* Furthermore, we can anticipate that the congressional budgetary process is not likely to be a field where the courts would be eager to stretch the doctrine. The federal budget and the public debt limits do not typically implicate sensitive individual rights, and thus there may be less temptation for courts to apply the standing requirements more loosely. In addition, courts are not expert at fathoming the ins and outs of budgetary arcana, and there is no reason to think they would be so inclined to enter that thicket as to manipulate standing principles to do so. Nevertheless, the possibility remains. One way to minimize the risk of such judicial activism is for Congress to take care in the wording of any particular stat-

utes that are enacted in implementing the Amendment so as not to give rise to colorable claims of standing or private rights of action.

Before moving on, I should also point out for the Committee one area that I believe does hold some potential for mischief and that Congress may wish to address. That is the area of state court review. The constraints of Article III do not, of course, apply to state courts, which are courts of general jurisdiction. State courts are not bound by the "case or controversy" requirement or the other justiciability principles, even when deciding issues of federal law, including the interpretation of the Federal Constitution. *Asarco, Inc.*, 490 U.S. at 617. Accordingly, it is possible that a state court could entertain a challenge to a federal statute under the Balanced Budget Amendment despite the fact that the plaintiffs would not satisfy the requirements for standing in federal court. Absent an applicable provision in federal law for exclusive jurisdiction in the federal courts, the state court in such a circumstance would have the authority to render a binding legal judgment. *Ibid.* The only avenue for federal review would be by certiorari to the Supreme Court, which has held that it may exercise its discretionary jurisdiction in such cases "if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for * * * review, where the requisites of a case or controversy are also met." *Id.* at 623–24.

To avoid the possibility that a federal statute or the federal budgetary process itself might be entangled in such a state court challenge, I would suggest that Congress include a provision for exclusive federal jurisdiction in any implementing legislation enacted pursuant to section 6 of the Amendment. Such a provision should be carefully worded so as not to create inadvertently any implied right of judicial review in federal court and so as not to affect any of the otherwise applicable limitations on justiciability discussed in this statement.

II. JUDICIAL DEFERENCE

Let me now turn to the second factor that will constrain judicial overreaching. In those cases where standing is established and the court proceeds to review the merits of a claim under the Balanced Budget Amendment, there is no reason to believe that the court would readily second-guess decisions made by the political branches. On the contrary, following long-established doctrine, as well as the Amendment's own explicit dictates, a reviewing court is likely to accord the utmost deference to the choices made by Congress in carrying out its responsibilities under the Amendment.

This judicial deference would be strongest in cases challenging the implementing mechanisms adopted by Congress. The Balanced Budget Amendment, in essence, mandates certain results (balanced budgets and capped debt) and leaves it to Congress to put in place mechanisms to achieve those results. It is well-established that where the Constitution requires a certain "end," Congress will be given the widest latitude in selecting "means" to achieve that end. Thus, for example, the courts have accorded broad deference to Congress in its selection of appropriate enforcement mechanisms under section 5 of the Fourteenth Amendment. *See Katzenbach* v. *Morgan,* 384 U.S. 641 (1966). And in the context of the apportionment process, where the Constitution mandates in fairly precise terms that Representatives shall be apportioned among the several States "according to their respective Numbers" (Art. I, Sec. 2, Cl. 3), the Supreme Court has deferred to Congress' choice of the method for apportionment, even though a State adversely affected could demonstrate that another method might yield a more accurate result. *See U.S. Dep't of Commerce* v. *Montana,* 112 S. Ct. 1415, 1429 (1992).

The need for deference would be even more compelling in cases under the Balanced Budget Amendment, since the language of the Amendment explicitly confers on Congress, in mandatory terms, the responsibility for implementing the Amendment and specifically allows Congress in so doing to "rely on *estimates* of outlays and receipts" (emphasis added). Unless the implementing and enforcement provisions adopted by Congress are plainly incompatible with the Amendment, it is unlikely a court would substitute its judgment for choices made by Congress.

Even in challenges to specific budgetary actions—for example, a claim that a particular spending measure threatens to unbalance the budget—the courts would tend to defer to the judgments of the political branches, except where a constitutional violation is clear. Not only do courts start with the general presumption that Congress has acted constitutionally, *see Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.,* 467 U.S. 717, 729 (1984), but that general rule of deference is substantially reinforced by the Amendment's explicit assignment of implementation responsibility to Congress in section 6, including the express recognition that Congress may rely on estimates—a process that inherently involves discretionary and expert judgments.

It is precisely when reviewing these kinds of technical fiscal issues—matters uniquely within the province and expertise of the political branches—where the courts are most inclined to defer to the sound judgment of the Congress and the Executive.

In sum, then, even where the courts reach the merits of a claim under the Balanced Budget Amendment, we are far more likely to see deference to Congress than heavy-handed second-guessing by the courts. This is not to say that courts will ignore clear instances of abuse; however, it is precisely in such cases—in which the violations are not arguable but palpable—where judicial intervention is most appropriate.

III. LIMITATIONS ON JUDICIAL REMEDIES

For the reasons outlined above, I am confident the courts will entertain very few suits challenging congressional actions under the Balanced Budget Amendment, and that, when and if they do, the courts will be inclined to defer to the judgments of Congress and the Executive in the budget area. Assuming, however, that a court might entertain such a suit and might declare a particular budgetary action unconstitutional as a violation of the Amendment, there are still further judicial constraints making it unlikely a court will order intrusive remedies in such a case. As I see it, these constraints fall into two categories: prudential considerations that will limit a court's exercise of its remedial powers and limitations created by section 6 of the Amendment itself.

First, courts are appropriately wary of becoming too deeply involved in superintending decisions and processes that are essentially legislative in character, and for that reason, any court—most certainly the Supreme Court—will hesitate to impose remedies that could embroil it in the supervision of the budgetary process. Indeed, in the context of the Balanced Budget Amendment, the choice of any specific remedy—for example, an order specifying a particular adjustment of expenditures to bring the federal budget back into compliance with the Amendment—would invariably require the court to displace Congress by making a policy decision that is inherently legislative and therefore inappropriate for the courts. I believe it far more likely that a court faced with a violation of the Amendment would take the less intrusive route of simply declaring the particular action at issue unconstitutional and leaving it to Congress to choose the appropriate remedy.

There are plenty of cases in which the Supreme Court has followed this route. For example, in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), the Court declared the composition of the Federal Election Commission unconstitutional as a violation of the Appointments Clause, but stayed the Court's judgment to "afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms" that would remedy the violation. *Id.* at 143. And recently, in *Harper* v. *Virginia Dept. of Taxation,* 113 S. Ct. 2510 (1993), where the Court retroactively invalidated a discriminatory tax that had been levied by Virginia, the Court refused to order refund of the amounts improperly collected and held instead that the fashioning of an appropriate remedy was properly left to state authorities. *See id.* at 2519–20.

Even in cases where there has been a proven violation of the Fourteenth Amendment, the Court has required the same respect for a legislature's ability to devise remedies involving the exercise of the legislature's taxing authority. In *Missouri* v. *Jenkins,* 495 U.S. 33 (1990), the Court confirmed that "the imposition of a tax increase by a federal court," even as a remedy for racial segregation by a state school district, must be "an extraordinary event." *Id.* at 51. "In assuming for itself the fundamental and delicate power of taxation," the Court held, "the District Court not only intruded on local authority but circumvented it altogether. Before taking such drastic step the District Court was obliged to assure itself that no permissible alternative would have accomplished the required task." *Ibid.* According to the Court, "the very complexity of the problems of financing and managing a * * * public school system suggests that * * * the legislature's efforts to tackle the problems should be entitled to respect" and that "local officials should at least have the opportunity to devise their own solutions to these problems." *Id.* at 52 (internal quotation marks removed). The Court in *Jenkins* upheld the district court's power to order a local school district to levy its own taxes because such a levy was the only means by which the school district could raise funds adequate to comply with the court's desegregation order. *See id.* at 55–58. That could never be the case with any potential violation of the Balanced Budget Amendment, which imposes a cap on spending and the public debt, rather than an obligation to raise revenues. There will always be a myriad of policy choices available to Congress for avoiding infringement of the budget cap.

Jenkins is also readily distinguishable from the context of the Balanced Budget Amendment on the ground that *Jenkins* did not involve "an instance of one branch of the Federal Government invading the province of another," but instead involved a court order "that brings the weight of federal authority upon a local government and a State." *Id.* at 67 (Kennedy, J., concurring in part and concurring in the judgment). The distinction is critical because under Article I, Section 1, "[a]ll legislative Powers" granted under the Federal Constitution are vested in Congress, and the enumeration of legislative powers begins by providing that "[t]he Congress shall have Power To lay and collect Taxes" (Art. I, Sec. 8, Cl. 1). Based on these provisions, the Court has stated that "[t]axation is a legislative function, and Congress * * * is the sole organ for levying taxes." *National Cable Television Ass'n* v. *United States,* 415 U.S. 336, 340 (1974). *See Missouri* v. *Jenkins,* 495 U.S. at 67 (Kennedy, J.).

A second source of limitations on the courts' exercise of their remedial powers is found in the Amendment itself. Under section 6, which provides that "[t]he Congress shall enforce and implement this article by appropriate legislation," Congress will have the authority to adopt remedies for any purported violation of the Amendment. Congress, for example, could provide for correcting a threatened budget imbalance or overspending through sequestration, rescission or other devices. In addition, section 6 logically gives Congress the power to limit the types of remedies that might be ordered by a court. This power is consistent with Article III's delegation of authority to Congress to define and limit the jurisdiction of the federal courts, and would allow Congress, for example, to deny courts the ability to order injunctive relief for violations of the Amendment. Congress has adopted such limitations in other contexts. *See, e.g.,* Norris-LaGuardia Act, 29 U.S.C. §§ 101–115 (prohibiting courts from entering injunctions in labor disputes); Federal Anti-Injunction Act, 28 U.S.C. § 2283 (prohibiting federal courts from enjoining state court proceedings); Tax Injunction Act, 26 U.S.C. § 7421(a) (prohibiting suits to restrain the assessment or collection of taxes).

These powers given to Congress will compound the courts' self-imposed prudential concerns, with the result that the courts will be even more hesitant to order intrusive remedies for ostensible violations of the Amendment. Courts regularly defer to remedies that have been crafted by Congress. This deference is shown even in cases involving the vindication of individual rights. The Supreme Court, for example, has held that Congress may adopt procedures limiting the remedies available in so-called *Bivens* actions, which are actions brought against federal officials for the violation of an individual's constitutional rights. *See Bush* v. *Lucas,* 462 U.S. 367, 388–90 (1983). Similarly, in devising a judge-made remedy for violations of the Fifth Amendment privilege against self-incrimination in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), the Court recognized that "Congress and the States are free to develop their own safeguards" to redress violations of the privilege and that such alternative remedies would be respected by the courts. *See id.* at 490. Moreover, even if Congress does not exercise the authority granted to it under section 6, the courts will undoubtedly be aware of Congress' ability to limit the relief that courts may grant, and this awareness in and of itself will likely check any tendency on the part of the courts to develop their own creative remedies for violations of the balanced budget requirement.

IV. THE AMENDMENT'S EFFICACY

Some have suggested that the federal courts' limited role in enforcing the Balanced Budget Amendment makes the Amendment a "paper tiger." Their premise is that, unless the courts are there to coerce compliance at every turn, the political branches will flout their constitutional responsibilities. These critics do not argue for a greater role for the courts so much as they dismiss the Amendment as a feckless exercise. In my view, this critique is mistaken: it is based on a distorted view of the Constitution and ignores the practical experience of over two centuries.

First, of course, the point is not that the courts will never be there; it is that we need not fear-an avalanche of litigation, with the courts regularly reviewing fiscal decisions and effectively usurping the proper functions of the political branches. Where the judicial power can properly be invoked, it will most likely be reserved to address serious and clearcut violations.

More importantly, Members of Congress and Presidents seek to conform their actions to constitutional norms, not because of external threats of judicial coercion, but primarily because of their own fidelity to constitutional principles. After all, it is not only judges who must take an oath of allegiance to the Constitution. Just as the vast majority of citizens obey the law because they want to—not because they fear the police—so too those who serve in the political branches feel constrained by constitutional requirements and strive to obey them, whether backed by judicial sanc-

tion or not. Congress, for example, has dutifully provided for a census every ten years since the 1790's, as required by the Constitution, without court order. Even in an area as unreviewable and murky as the War Powers, the political branches strive to comply with constitutional norms. And the Senate has always administered responsibly its sole power to try cases of impeachment, without allowing such trials to degenerate into Kangaroo courts, even though the exercise of that power is not subject to the check of judicial review. *See Nixon* v. *United States,* 113 S. Ct. 732 (1993). As Judge Williams put it in the *Nixon* case:

> If the Senate should ever be ready to abdicate its responsibilities to schoolchildren, or, moved by Caligula's appointment of his horse as senator, to an elephant from the National Zoo, the republic will have sunk to depths from which no court could rescue it. And if the senators try to ignore the clear requirement of a two-thirds vote for conviction, they will have to contend with public outrage that will ultimately impose its sanction at the ballot box. Absent judicial review, the Senate takes sole responsibility for its impeachment procedures as a fill-fledged constitutional actor, just as the framers intended.

Nixon v. *United States,* 938 F.2d 239, 246 (D.C. Cir. 1991) (footnote omitted), *aff'd,* 113 S. Ct. 732 (1993).

For over 200 years, day after day, the business of government has gone forward in prescribed channels, with judicial enforcement the exception, not the rule. The Balanced Budget Amendment will be effective without judges hovering at Congress' elbow; the Congress will carry it out and it will achieve its intended results.

Finally, we can rest assured that the Amendment will be policed through the most effective enforcement mechanism of all—the watchfulness and wrath of the American people. After all, the requirements of the Balanced Budget Amendment are not like those of the Appointments Clause or the Emoluments Clause, which could be violated with virtually no political fallout. Rather, they touch upon one of the core political concerns of the people. Does anyone seriously maintain that Congress could thumb its nose at a constitutional balanced budget requirement with impunity? Or play fast-and-loose with it and escape political retribution? It is precisely in areas like this, where the political check is so potent, that we can safely trust in its efficacy.

Thank you, Mr. Chairman.

The CHAIRMAN. Well, thank you, General. I think you are very cogent on all of these considerations. I just want to thank you first for submitting a well-reasoned and scholarly set of written remarks and testimony. I guess that reflects your days as the head of the Office of Legal Counsel, as well as when you were Attorney General of the United States. And I say it is well-reasoned because I agree with virtually everything you wrote, but a few questions.

You have covered the *Flast* v. *Cohen* matter?

Mr. BARR. Yes.

The CHAIRMAN. And I also think you are right on when you suggest that courts will not enmesh themselves in the intricacies of budgetary issues. Now, do you believe there are any separation of powers problems if courts interfere with the budgetary process?

Mr. BARR. There would be serious suppression of powers problems that the courts will recognize. If the plaintiff coming in, if their claim is that the whole budget is out of whack, then that is the kind of generalized grievance that the courts have traditionally said they do not adjudicate. There is not a specific concrete injury to that individual.

Moreover, what is the remedy, because the balancing of the budget involves a number of options? You could raise taxes, you could authorize debt or you could cut spending. You do not have to cut any specific bill. You could cut any bill. Those are decisions that obviously the court recognizes are legislative decisions.

If the claim is that a specific measure is the measure that hurts me and is part of a budget that is out of whack, then again how does the court determine that that is the measure that caused the budget to go out of whack, but, more importantly, what is the remedy? I have no basis as a judge to say, OK, that transportation bill, I will X that out, because that is the one that is going to put the road through your property, because Congress could say, well, if we have to cut, we will cut this bill, not that bill.

So I think the heart of this courts will recognize, and this is not doctrine that is on unsteady sand. The courts traditionally throughout 200 years have recognized and stayed their hand about becoming involved in these kinds of legislative judgments. And while I am suspicious and concerned and paranoid about the possibilities of judicial activism in many contexts, I think they are overblown in this one.

The CHAIRMAN. I agree with you. Some Senators have mentioned, and some have mentioned here, and some of the witnesses have expressed fear that the Supreme Court's decision in *Missouri* v. *Jenkins* gives the courts a license to order Congress to raise taxes. I do not think that case is even applicable on the Federal level. Could you just expand on your position on that matter?

Mr. BARR. I think actually the case supports what I am saying. There, there was a constitutional requirement for the Government entity to spend money, just like the Constitution says Congress has to support the President of the United States, cannot cut his salary, must provide the salary of the President.

The only way the district court found and the Supreme Court accepted that entity—this was a school board—the only way they could get money was tax. They could not borrow or anything else. So what the court did was first struck down the district court's direct order of the tax, because it said that the courts do not have the power to do that. But it acknowledged that if there is any policy choice that is to be made in terms of how to meet your constitutional obligation, then the political body has to be allowed to make that choice.

In *Missouri,* the court said there was no alternative. The only was that entity had to get the revenue was tax. The second point was, as you pointed out, Mr. Chairman, that was a 14th amendment case where you are dealing with the relationship between the Federal Government and the State, and the court has in other cases made clear that it will not intrude into the taxing authority, which is reserved solely to Congress in the Constitution, the Federal Constitution.

The CHAIRMAN. My time is up.

Senator Biden?

Senator BIDEN. I have two questions. David, welcome back.

Mr. STRAUSS. Thank you, Senator.

Senator BIDEN. You have been here in the past sitting on this side advising us.

Do you disagree with what General Barr said?

Mr. STRAUSS. I think it is a very rosy scenario. As I said, it could be true. It could be true that the judges from now until whenever show the good sense and restraint to interpret the doctrines in a narrow way and stay out of the picture. That could happen. But

the opposite could happen, too, and you could have judges at some point in the future, 20 years, 30 years, 50 years in the future taking advantage of the doctrines that do exist.

Flast v. *Cohen* is on the books. There are expansive standing decisions on the books. There are decisions suggesting that Congress' power to cut back on remedies for constitutional violations is a limited one and Congress cannot cut too far. Judges could take advantage of those doctrines and be quite aggressive in seeking to enforce this amendment.

What would give them the authority, I agree with General Barr, that *Missouri* v. *Jenkins* would give them the authorities of this amendment. They would say, look, this amendment was added to the Constitution to give us the taxpayers and the citizens certain rights against the Government the right to insist on a balanced budget, it was not meant to be a form of words, it was meant to be like the rest of the Constitution, something we could enforce in court. And I can see judges accepting that argument.

If the Congress does not want that argument to be accepted, then the thing to do I think is to make it clear and then face the question of having an amendment that, unlike I think every other amendment that has been added to the Constitution, is not judicially enforceable. There are provisions in the Constitution that the courts will enforce, but I do not know of any occasion in which we have gone through the amendment process deliberately to add a provision to the Constitution that is not enforceable. If that is what is to be done, then I think it should be done explicitly, and not to leave this loaded weapon in the Constitution that some judge might come along some day and pick up.

Senator BIDEN. General, what is the problem with adding language limiting the court's power? You say it is not much of a concern, because of standing the courts moving in to enforce as a practical matter is not much of a concern. You argue that history over the past couple of hundred years tells us they are uninclined to interfere, when it is so clearly a prerogative of the elected body. But is there a down side in putting it in, other than the political down side that may impede its passing? But, as a former Attorney General sitting and looking at this, do you have any problem with an amendment enshrined in the Constitution that prohibits the courts from exercising this feared authority?

Mr. BARR. If I were a Senator, I would put it in the amendment. But if I felt that would mean the amendment would not pass because it would generate these arguments, oh, gee, this is sort of like Eastern Europe, then I would without hesitation support the amendment as written, because I think it is strong, it will be effective, I think there are minimal risks, and I think under section 6 Congress has the power to deal with those down the road.

Finally, one point: What are we really talking about? Are we saying, although we all intend courts not to get into this and we think it will be bad for courts to get into this and this is not what we want, that we are so afraid of lawless courts and judicial activism, that we are not, as a democratic people, going to make a fundamental policy choice that we think is right, because we are intimidated about what lawless courts might do down the road? That is the ultimate surrender.

Senator BIDEN. I think, at least speaking for myself, what is at stake for me here is, with all its imperfections and all of the bumps and potholes that have been in the road for 200-some years, 208 years or whatever it is, my concern relates to upsetting a very, very useful doctrine that is not anywhere specifically enshrined in the Constitution called separation of powers. One of those powers that has been viewed to be the sole prerogative of the elected officials has been this power to tax and spend. So that is a very broad fundamental principle that is equally as important as the policy prescription that is enshrined in this constitutional amendment to deal with a very important and debilitating aspect of our national existence, which is the continuing escalating deficit.

That is the reason why I am inclined to err on the side of caution. By the way, I truly was not trying to put you in a spot, when you say were you a Senator, that you would put it in, by pointing out that that is evidence of the fact that it is flawed if it is not in. I was just genuinely concerned about how you would view it from a constitutional perspective, either having that language, or some language to that effect, or not having the language.

I do not have any more questions.

The CHAIRMAN. Thank you.

Senator Simon?

Senator SIMON. Yes.

Senator BIDEN. Excuse me. Would the Senator yield for a moment?

Senator SIMON. Yes.

Senator BIDEN. Professor Sunstein, a colleague of Professor Strauss at the University of Chicago Law School, could not be here today and asked that the statement that he would have made be placed in the record. I ask unanimous consent that it be placed in the record at this point, so that there is some coherence to the testimony.

The CHAIRMAN. Without objection.

[The prepared statement of Mr. Sunstein follows:]

UNIVERSITY OF CHICAGO LAW SCHOOL,
Chicago, IL, January 4, 1995.

Senator JOSEPH BIDEN,
Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR SENATOR BIDEN: I am sorry that I will be unable to appear at the hearings on the proposed Balanced Budget Amendment, and I offer this brief letter by way of summary of some reactions from the constitutional point of view. I suggest a simple change in the proposed Amendment, designed largely to make clear that courts lack authority to enforce it.

It is unnecessary to say that the various issues raised by the proposed Amendment are quite complex—perhaps more complex, from the legal point of view, than is generally appreciated. My concern here is not economic policy but constitutional law, and especially with the role of the courts under the proposed Amendment. In deciding constitutional issues, courts of course attempt to avoid resolution of complex policy issues, especially when those issues relate to questions of economics and finance. Those questions lie peculiarly within the domain of other branches, especially the legislature. Judges know little about accounting practices or public finance. Of course the resolution of some constitutional issues requires courts to investigate issues beyond their expertise, but this is an unfortunate event, to be avoided where possible.

The proposed Amendment is troublesome from the constitutional point of view insofar as it might give (a) standing to citizens to litigate issues that do not belong in courts and (b) authority to courts to decide whether Congress has complied with

its mandates. The prospect of (a) is troublesome to the extent that well-organized interest groups, with their own selfish agendas, might be able to seek to stop, delay, or change legislative budgeting processes. The prospect of (b) is troublesome insofar as courts—unlikely to know a great deal about the subject at hand, not democratically elected, and perhaps with their own agendas—would be authorized to oversee the budgeting process. Judicial entanglement with fiscal matters would raise unforeseen and novel problems; it is probably best avoided.

Consider, for example, the fact that S.J. Res. 41 (from the 103rd Congress) contains terms "total outlays" and "total receipts" for any fiscal year, people disagree about how these are best calculated. Would courts be permitted to oversee the relevant calculations? And what would be the remedy if courts find that the amendment has been violated? Could courts enjoin expenditures in excess of a balanced budget? If so, courts might be placed in an unacceptable position of deciding which, of many possible programs, must be cut.

There are some additional problems. Would the proposed Amendment alter the traditional allocation of authority between Congress and the President? Perhaps the President would be understood, under the Amendment, to have the power to impound funds if, in his view, impoundment is necessary to produce compliance with the Amendment. Currently the President is understood to lack such authority, largely because of the judgment that the Constitution reserves to Congress the decision whether to spend or not to spend. And if the President could impound funds selectively, he would be authorized to choose those programs that he likes best. This would produce a novel and somewhat troublesome change in existing understandings.

I do not intend with these remarks to express a view on whether a constitutional amendment to require a balanced budget would be desirable. Any judgment on this point would call for expertise in budgetary and legislative matters, not in constitutional law. But I do suggest that the separation of powers issues raised by the proposed amendment raise complex questions and it appears that they have not yet received adequate consideration.

At a minimum, I suggest, as have others, that it would probably make sense to insert a separate section, perhaps a new section 7 in S.J. Res. 41, saying something to this effect: "No court shall have jurisdiction or authority to enforce the provisions of this amendment, or to decide any questions of law or policy that might arise under this amendment." I think that an addition of this sort would be very much in line with what Congress has in mind. The 1993 Committee Report emphasizes that the amendment "leaves political decisions to the political system." Throughout it says that "the political process will provide the ultimate enforcement mechanism."

I think that language of the general sort I am suggesting would probably be preferable to the alternatives proposed last year by Senators Danforth and Reid. The Danforth alternative would allow courts to issue declaratory judgments. This seems unfortunate, for even declaratory judgments would represent a large degree of judicial entanglement in budgetary issues—requiring courts to decide questions for which they lack competence. A declaratory judgment is not an injunction, but it remains an authoritative judicial assessment of legal duties, and probably such assessments should not be permitted in this context in view of the complexity and delicacy of the technical issues, which are best reserved to the democratic branches of government.

Moreover, both the Reid and the Danforth proposals would allow Congress, if it chooses, to grant enforcement authority to courts. I think that this is probably a mistake, since it might lead to partisan debates over whether and how *courts* should be given oversight power, rather than helpful debates about how *Congress* might best to balance the budget. It seems best, from the constitutional point of view, to make a simple statement in the Amendment that courts have no power of enforcement, and hence to settle that issue in the text itself.

The Reid proposal has a further problem: It leaves at least a modest degree of ambiguity insofar as it does not specifically negate judicial authority. The Reid proposal also takes the constitutionally unprecedented and probably unfortunate step of allowing Congress to say that officers within Congress may order uniform cuts. This proposal should probably be rejected simply because it is so novel, and so inconsistent with the traditional allocation of authority, that it should not be placed in the constitution unless there is no doubt that it is a good idea. Usually, of course, any delegates of Congress in the enforcement of federal law is part of the executive branch, and this is part of the whole idea of separation of powers. If Congress can ask one of its own officers to order "uniform cuts," the making of law and the enforcement of the law will be brought together, in a way that is inconsistent with the original constitutional plan.

Of course relevant Committee Reports may sort out the enforcement issues. But such reports are entitled at best to minimal weight in the interpretation of constitutional amendments. What I am suggesting is that Congress' clear desire is to impose duties on the President and the Congress, and not to give new powers to the federal judiciary. It would be unfortunate if an amendment designed to improve democratic policies were to be interpreted to authorize judges to decide questions for which they are singularly ill-suited. With a relatively simple change, this concern could be eliminated.

It might also make sense to include a provision saying something to this effect: "Nothing in this provision shall be interpreted to give the President the authority to impound funds, or otherwise to change the allocation of authority between the President and the Congress." A provision of this kind would make clear that Congress is not intending to settle these issues by inadvertence, and that any judgments about impoundment or related issues (including the line-item veto, an issue that, I know, is receiving separate treatment) are not being made through this Amendment.

The Reid and Simpson proposals do not explicitly speak to issues involving the allocation of authority between the President and Congress, and it would be useful to make clear that no change along this dimension is intended. In light of the goals motivating the Amendment, any alterations in the authority of Congress and the President should probably be made separately.

I hope that these comments are helpful.

Sincerely,

CASS R. SUNSTEIN.

Senator SIMON. Professor Strauss, buttressing somewhat General Barr's statement is the history of State provisions. I do not know if you were here when Senator Brown mentioned that for 56 years they have had a provision stronger than this proposed constitutional amendment and they have had no litigation. There has been very little litigation on these State provisions. Do you have any comment on that?

Mr. STRAUSS. There are a couple, I think maybe three factors operating there. Of course, Senator Simon, to the extent I know you are right in characterizing the State situation, the first is that State courts have different traditions of entertaining lawsuits, of what questions are considered for judicial resolution, different traditions from the Federal tradition.

The second is that the States often have an easier time balancing their budgets than the Federal Government does, so that there is less controversy that might give rise to litigation. And the third point is that there is a range of interpretive questions that might arise in connection with this amendment that has not arisen in the States, either because there has been a tacit agreement to maintain a capital budget and everyone accepted that as the budget that had to be balanced or for some other reason.

I guess my central point, Senator Simon, is that if we want courts not to interfere, we should be clear that that is what we want, and not take the chance that they will and be clear that that is the kind of amendment we have.

On the other hand, if we want a judicially enforceable amendment, we should be clear that that is what we want, and what we should not find ourselves in the position of doing is getting caught in between, where we are not sure what we want and we leave the door open for an outcome that we might all consider undesirable.

Senator SIMON. So you favor something like the Danforth amendment?

Mr. STRAUSS. I think if the amendment is to be adopted, some attention has to be paid to that. I am very uncomfortable with the

idea of having constitutional amendments that are not enforceable. I think that would change the nature of the Constitution and leave us open to argument of why not have an anticrime amendment, why not have an education amendment, similarly unenforceable. So I am very uncomfortable with that.

Senator SIMON. I would say here that, as General Barr has pointed out, that a three-fifths requirement for extending the debt limit makes it very, very enforceable. So it is tough.

I would add, as a former State legislator—and I see Lowell Weicker here—I do not know that you are accurate that it is easier to balance a budget at the State level than it is at the Federal level.

Let me ask you this, because you have hinted opposition, but you have not said you are opposed to the amendment. You are from the University of Chicago, and you are living in a great urban center. We have seen interests grow and squeeze out our ability to respond on social programs. In fiscal year 1949, the Federal Government spent 9 percent of its budget on education. Today, we spend 2 percent. We will spend this year ten times as much on interest as on education. We will spend almost twice as much on interest as on all of our poverty programs.

Knowing your fears, but also knowing that interest is squeezing out what we ought to be doing in our society, and knowing—someone, I think it was Paul Tsongas, mentioned our response to polls—what people want in the polls, and we have been following the polls, are more services and lower taxes, and we have been giving them both at great jeopardy to the future, and we are hurting ourselves right now. If you had to vote on the constitutional amendment, how would you vote?

Mr. STRAUSS. Senator Simon, you are right. No one who lives and works as I do on the outside of Chicago can be insensitive to the extent to which we have social problems that need more attention than they have been getting, in my view.

My concern about this amendment, Senator, is that this might be something that will take the place of the real hard decisions that need to be made, that people will think that by passing a constitutional amendment in a culture like ours, where constitutional amendments mean something, you have a right, you can take it, you can get it enforced, that people will think now they have done something, they voted for the balanced-budget amendment, it is part of the Constitution, our problem is solved and I do not have to face up to the terribly difficult decisions that have to be made.

Obviously, that is not true of everyone, but my concern about endorsing an amendment like this would be that, that we would take a quick symbolic route out that would damage our constitutional fabric, not fatally, but damage somewhat our constitutional fabric and in the end would only deflect attention from the serious problems that need to be addressed.

Senator SIMON. I guess my response is I think this is the only way to force us to face up to the problems, and I have never made any bones about the fact that we are going to have to both cut spending in areas that can be awkward and increase taxes. Milton Friedman's column yesterday in the Wall Street Journal saying that Paul Simon is going to win, we are going to have to increase

taxes if we vote—I have never made any bones about it. We are going to have to do both. We are going to have to face up to some problems that we are ducking, and I do not think we can continue to duck indefinitely without jeopardizing the future of the country.

General Barr, did you want to add something?

Mr. BARR. I would just like to make two points. One, there is nothing symbolic at all about this amendment. This is not a symbolic act. Putting a three-fifths limitation on Congress' power to borrow is a very, very substantial limitation with real teeth. As you know, Senator, anyone who has been in this town running through the drills of shutting down the Government as we approach the debt limit just under a statute knows that these are really effective provisions.

The second point I want to make is, Professor Strauss suggests that the idea of having some provision in the Constitution that deals with taxing and spending of Congress that are not enforceable by the courts would be a great departure, I will just point to two. There is the statement and accounts clause right now which says at the end of each year Congress has to publish its receipts and its expenditures. That goes to the fundamental basis of democracy, informing the people about what you are collecting and what you are spending. The statements and accounts clause, courts have refused to review that, leaving broad discretion to Congress as to how to do that.

The second provision is the requirement that revenue bills originate in the House, again going to a fundamental democratic principle that the more popular branch be the branch that initiate revenue measures. The court has stepped away from enforcing that, as well.

The CHAIRMAN. Senator Kyl?

Senator KYL. Thank you, Mr. Chairman.

I want to commend the witnesses for waiting a long time to testify. This is a very important issue, and your testimony is very helpful to us, and I want to personally express appreciation for your waiting all this time and then having to deal with such an issue in such a short period. We, too, are limited by that, so let me try to ask three very quick questions very briefly.

First of all, General Barr, I found your exposition of the issues very persuasive. I would like to ask you two quick questions, if I could. First of all, do you see any particular problem—you perhaps read Milton Friedman's piece, as well, and you heard my testimony about my proposal for a spending limit method of implementing the balanced-budget amendment. Can you think off the top of your head of any particular legal problem with implementing the balanced-budget amendment by limiting spending to a percent of the gross national product for a specific fiscal year?

Mr. BARR. I think the enforcement mechanism would have to be thought through carefully, but I do not think there is any kind of generic constitutional problem involved there. I think it could be done. As you know, Senator, I do not view that as a substitute for this amendment, but I personally think it is another step that should be taken.

Senator KYL. I appreciate that very much.

Let me ask you a second question. You have made the point that the amendment is essentially self-enforcing with the provision for the debt increase, and that no additional judicial enforcement needs to be explicitly provided. You listed several constitutional provisions that fall under this category.

And I would like to suggest that some very important delegations of power, such as the authority to conduct foreign affairs and the manner in which the President conducts those affairs, are almost always nonjusticiable. In other words, the Framers did leave that to the internal safeguards of the Constitution, such as the separation of powers and checks and balances, to prevent wrong-doing and aggrandizement of power. Does not the balanced-budget amendment fall under the same basic nonjusticiable category of delegations of power?

Mr. BARR. I think that broad portions of it do, particularly, for example, questions of how you bring a budget into balance, if that were ever presented to the court, because there are no standards, the court could apply. Those are purely political decisions that have to be made.

There are other aspects of the amendment that could provide a standard for the court, but, as I say, I think that instances in which they could be raised by a plaintiff are few, and to the extent they are raised by a plaintiff, I see no harm in letting the judiciary determine those few issues that are susceptible to judicial interpretation.

Senator KYL. I appreciate that.

Professor Strauss, you indicated a concern about the risk, and it is well taken, of Congress limiting the jurisdiction of the court. Congress has always been very wary of doing that, notwithstanding its authority to do so. Given that, would you prefer an explicit legislative prohibition on the court's jurisdiction or a very strong record of legislative intent?

Mr. STRAUSS. Legislative intent behind the constitutional amendment itself?

Senator KYL. Yes, a very strong expression of intent, essentially as General Barr has testified, that we do not intend for the courts to get into the enforcement of this, that there may be very limited situations, but otherwise the basic concepts of justiciability apply here. This is a clear matter in which the court would traditionally not second-guess the Congress. If we, in adopting this amendment, express our understanding that that is the way the court has dealt with these issues, and hope that it would continue to deal with them in that fashion, then we would not have to go that extra step in limiting the jurisdiction of the court.

Mr. STRAUSS. Yes, if that were the choice, I think it would be better to have the limitation on judicial authority tied to the amendment itself, rather than enacted independently as legislation, because, as I said and as you alluded to, Senator, that legislation could set a precedent for congressional power to cut back on the authority of courts to enforce constitutional rights where Congress decides it would rather not have the courts enforce those rights, and who knows where that would stop.

I should say, though, that an expression of legislative embodied in the language of the amendment itself is not the sure way to do

this. A lot of justices on the court now are hostile to relying on legislative intent in general, and with a constitutional amendment you have the additional problem of how we might know what the Senate thought or even what the Congress thought. We do not know what the States thought when they ratified it.

Senator KYL. This is one of those unique situations where the two branches are very careful not to intrude into the arena of the other to too great an extent. If the Congress were saying, in effect, that as an alternative to stepping into the court's arena by specifically limiting its jurisdiction, we are expressing to the court in very powerful words our belief that it will not intrude too far, based upon precedent, would that be preferable?

Mr. STRAUSS. I think it would be much preferable to have it be made clear that this limitation on judicial authority is tied to the amendment itself and not to in any way have a congressional assertion of a more sweeping power to limit the power of the courts, which means doing it in the amendment or perhaps by legislative history, with the qualification that that might not be honored.

Senator KYL. General Barr, would you concur with that or have a different view?

Mr. BARR. As I said to Senator Biden, if I were a Senator, I would probably seek to put it in the constitutional amendment itself. But if I felt that that would mean killing the amendment because I lost support, I would seek to put it forward with clear legislative history, and in that regard I would try to make it as clear as possible that, under section 1, a violation, if any, would occur at the end of the fiscal year, and you are not talking about sort of real time monitoring, that anyone can come in during the year and attack it. And if you make that clear, then I think 99 percent of the concern evaporates.

Senator KYL. I appreciate that very much. At least to the extent that this comment expresses any legislative intent whatsoever, I would associate myself with the remarks you just made.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Kyl.

We want to thank both of you for being here. I wish we had more time. I did not even get to ask you any questions, Professor Strauss. But we appreciate both of you, we appreciate the time that you have given and we are sorry it has taken us so long here today. These hearings are important and we are paying strict attention to what you say.

Thank you very much.

Mr. STRAUSS. Thank you.

The CHAIRMAN. We notice that our Governor of Connecticut is here, our former colleague and Senator Lowell Weicker. So we will be happy to take your testimony at this time, Lowell. It is nice to have you here. You are not going to save this amendment, are you?

STATEMENT OF HON. LOWELL WEICKER, FORMER GOVERNOR OF CONNECTICUT

Mr. WEICKER. Mr. Chairman, it is good to see you. Senator Simon, it is good to see you.

Senator SIMON. It is great to have you back here again.

it, are we doing a pretty job of discriminating between those who are threats to us and those who are not? I need that information.

Mr. SCHUMER. Do you want to say anything to that, Mr. Wray?

Mr. WRAY. Well, I am not sure how much of that is readily available. We will certainly try to obtain what we can on it.

Mr. SCHUMER. I would just say we have asked the same questions, the subcommittee staff has. I would just say as follows: No. 1, the question how many people in the Federal prison system are nonviolent first-time drug offenders we can't get answer to because until 2 years ago they were not keeping such records. They knew how long they were sentenced for but not the methodology under which their sentence came. For the last 2 years I think it is available and we are trying to get that.

In reference to the second question, it is pretty clear that in the Federal system your statement is not true that nonviolent criminals are bouncing violent criminals out of prison. Whether that is true for certain State systems is a different question that I can't give you an answer on.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Mr. SCHUMER. OK. Thank you, Mr. Wray.

OK. Now we call our third panel, and I want to thank the third panel for their indulgence, as well as the fourth panel, who are going to have to indulge even more. We would ask them to come forward.

Yes, there is a fourth. We are changing the—I am sorry. We are changing the order. Panel 3 will simply consist of former Attorney General Barr and Judge Wilkins. And then panel 4 will be the remaining four witnesses. We would invite either Mr. Wilkins or the former Attorney General to join in in that panel, if they want to, because we thought the last panel would be a little more of a discussion group. Although, frankly, we have plenty of back and forth discussion even up to this point, which I think is good.

OK. Then let me introduce the Honorable William Wilkins. He is the Chairman of the U.S. Sentencing Commission, and U.S. circuit judge for the Fourth Circuit Court of Appeals. Before taking his current position, Judge Wilkins served as a U.S. district court judge for the District of South Carolina.

The Honorable William Barr served as Attorney General—we all know him well on this committee and subcommittee—of the United States under the Bush administration, and he is now a partner with Shaw, Pittman, Potts & Trowbridge in Washington, DC. And before becoming Attorney General, Mr. Barr served as Deputy Attorney General.

Judge Wilkins, you may begin.

STATEMENT OF JUDGE WILLIAM W. WILKINS, JR., CHAIRMAN, U.S. SENTENCING COMMISSION

Judge WILKINS. Thank you, Mr. Chairman. First of all, I would like to submit, if I may, for the record a factsheet that profiles drug offenders sentenced in the Federal courts in the year 1992. You may find it informative.

Mr. SCHUMER. Please. And, without objection, it will be entered into the record.

Judge WILKINS. Thank you very much. I also have for the record a legislative proposal that I would like to discuss with you. And if I may I would like to submit that for the record.

Mr. SCHUMER. Without objection, that too will be submitted for the record.

Judge WILKINS. Thank you very much. I have just a few brief remarks. My written testimony has been submitted.

First of all, let me say that whatever concerns people may have with mandatory minimum provisions, there is no support from this witness and no support from the U.S. Sentencing Commission that we should retreat from the principle that criminal acts should be met with tough and with certain sentences.

Today, there exists a congressionally chartered sentencing system—that is, the Federal sentencing guidelines—that assure tough and certain punishment. Indeed, this type of system and these punishments would continue even if for some reason the mandatory minimums were to disappear today and be taken from the books or substantially modified.

For example, of all defendants—and I think you have referred to this in earlier testimony—of all defendants subject to the 5-year mandatory minimum penalty—that is, the 60-month mandatory minimum—the average sentence for these defendants is not 60 months but, under the guidelines 88 months. Those defendants who are facing the 10-year mandatory minimum penalties—that is, 120 months—the average sentence is not 120 months but, actually 197 months. Of course, this is because the Congress, by passing mandatory minimum statutes, essentially sets the starting point or base offense level for these type of offenses under the Federal sentencing guidelines. Then, if aggravating factors are present in a given case, the guidelines will enhance the sentence.

A defendant facing a 10-year mandatory minimum penalty who has no aggravating factors will receive 120 months imprisonment. But those who have aggravating factors, such as the use of a weapon or violence, or recidivists with long criminal records and so forth, under the guidelines scheme, those sentences will, of course, be increased.

Importantly, Congress should not be distracted by off-the-mark suggestions that this is an issue of being tough or being soft on crime. I am a former prosecutor and I chair an agency where crime control is the primary goal that we have attempted to achieve. I firmly believe that to effectively control crime we must have a sentencing system that deals from a position of strength. So I put to you what I believe is the real question that we should consider: What is the most efficient, the most effective and the fairest sentencing system that we can devise?

The old system of sentencing that you talked about, Mr. Chairman, the unbridled discretion of Federal judges that we enjoyed at one time in relatively recent history, and then with the sentencing mandatory minimum scheme, if we only had those two choices I would testify keep the mandatory minimum sentencing scheme in place. But fortunately, we do not and are not limited to that choice, for there is a choice that I would like to suggest to you today.

So I believe the solution will lie to this, to the problem, and there are some problems with mandatory minimums I will be glad to dis-

cuss. They have many positive aspects, but they have some negative aspects as well. The solution lies in legislation that will promote greater coordination between the mandatory minimum sentencing scheme and the Federal sentencing guidelines scheme. I propose for Congress' consideration legislation that would, I think, look at both of these two sentencing schemes and then have them both apply in a more systematic, more logical and rational basis.

This is what this legislation would call for, briefly. First of all, the bill would not repeal—with due respect to Mr. Edwards—would not repeal mandatory minimum provisions now on the book. Rather, it would use them as starting points with directions to the U.S. Sentencing Commission to start its sentencing system off. This approach would have the effect of Congress setting the sentence for the typical offender, the average offender, the one who has no aggravating factors present and no mitigating factors present, allowing the guidelines which recognize these other important factors of sentencing to take over.

Congress has a vital, and has played a vital role, in setting national sentencing policy. This legislation, I believe, will fully accommodate the role that Congress shall continue to play in setting national sentencing policy.

Second of all, this bill would say that aggravating factors recognized by the guidelines and recognized by law today; that is, use of a weapon or a leadership role in the offense, obstruction of justice, injury to a victim, and others would continue to apply. This means that when aggravating factors were present, and proven by the Government to the satisfaction of the greater weight of the evidence as found by the district court, the guidelines would require a sentence greater, often substantially greater, than the mandatory minimum sentence.

Third, in the case in which mitigating factors recognized by the guidelines, and recognized by law today; that is, a defendant's minor role in the offense or acceptance of the responsibility of the criminal act, were applicable, then this proposed legislation would allow the guideline provisions to operate for a proportionate reduction in the sentence, to accounting for the presence of the mitigating factor.

Mr. SCHUMER. Judge, I am sorry to interrupt you.

Judge WILKINS. Yes, sir.

Mr. SCHUMER. How much would proportionate be?

Judge WILKINS. Well, I can tell you now, and this works in guidelines every day without the operation of mandatories——

Mr. SCHUMER. I think that is an important question for all of us.

Judge WILKINS. Let me give you an example. Let's take a drug conspiracy. It has the leader, it has three average participants, and it has one errand boy, a real minor participant. They are all convicted of the same statute of conspiracy to possess for distribution purposes 5 or more kilograms of cocaine. They are all looking at the 10-year mandatory.

Under the guidelines, the leader of this conspiracy would receive a sentence of about 16 years, as opposed to the mandatory minimum 10-year sentence. The three average participants who had no aggravating or mitigating role, would receive 10 years, because that is the mandatory provision. The minor participant, assuming

this minor participant accepted responsibility—that is, offered a timely plea of guilty to the Government and cooperated with the Government, not in the prosecution of others but just in his own case, that plus the minor role would reduce that person's sentence down to approximately 5 years. So you would have the kingpin at about 15 to 16 years, the middle level participants, the average participants at the mandatory minimum, and this minor participant at 5 years.

I am glad you asked me that because when I talk about a proportionate reduction no one is suggesting that these minor participants in major drug conspiracies should not go to prison. They should go to prison. The question is how much? Where does crime control reach—when do we achieve crime control? How do we efficiently use our resources? Are we really contributing to crime control or are we fighting the drug war by placing minor participants in prison for extended periods of time when a 5- or 6-year sentence could serve the same purpose?

I might add too that there are only these two mitigating factors—acceptance of responsibility and role in the offense—that are ever recognized by the guidelines in drug offenses. They are structured, they are confined, and judges, when they do apply these mitigation factors, apply them because the facts dictate their application. And, of course, the judge is cabined by the guidelines so the reduction is limited.

I will say this, though. This proposed legislation, as in all other cases, provides that in the unusual case the judge can depart below the guidelines by stating a justifiable reason on the record and then sentencing accordingly. This is the safety valve of the Sentencing Reform Act that applies to all cases, not just drug cases. But, of course, it doesn't apply when a mandatory minimum applies. So, regardless of the mitigating circumstances the judge cannot take those into account.

I would not be alarmed by giving judges that departure authority. They exercise it only in 6 percent of the cases. Moreover, the Government has the right of appellate review in case the judge does something that the Government disagrees with.

In my view, this proposal not only alleviates the structural problems with mandatory minimums, but it also has two important additional benefits. First, it would increase fairness and proportionality in sentencing. One of the major problems with mandatories is that they lack proportionality in sentencing. A mandatory minimum is a flat tariff. Regardless of the facts, regardless of the aggravating factors or mitigating factors, mandatory minimum penalties apply across the board.

My proposal would meet these objectives by providing sentencing adjustments under the mandatory Federal sentencing guideline regime. This means that appropriate adjustments for mitigating factors would occur in a certain and predictable fashion.

Second, by using guideline mitigating factors, which have now been construed by the courts, this approach would not add a further tier of complexity to the current sentencing system. Indeed, my proposal would ease current complexities by making mandatory minimums and the guidelines function in an integrated fashion.

I believe that what is needed is this type of corrective legislation, which would allow us—that is, us, the Congress and the American people—to maintain the core principles of mandatory minimums and provide certain and significant punishment, but not sacrifice proportionality and consistency in punishment at the same time. Integrating mandatory minimums in the guidelines system, I think, would accomplish these twin objectives, and would also do it in a manner that would increase the efficiency of our current, sometimes fragmented, two-tiered sentencing system.

Thank you very much, Mr. Chairman.

[The prepared statement of Judge Wilkins follows:]

PREPARED STATEMENT OF JUDGE WILLIAM W. WILKINS, JR., CHAIRMAN, U.S. SENTENCING COMMISSION

INTRODUCTION

Mr. Chairman, members of the subcommittee, my name is William W. Wilkins, Jr. I am a judge on the United States Court of Appeals for the Fourth Circuit and Chairman of the United States Sentencing Commission. I appreciate the opportunity to appear before the subcommittee today.

Today's hearing offers a rare opportunity. It is the first congressional hearing devoted to the important topic of mandatory minimums in nearly a quarter century. The last time hearings of this kind occurred, they laid the groundwork for Congress' decision to repeal an array of mandatory minimums then on the books. In some ways, it seems we have come full circle. Congress adopted drug mandatory minimums in 1956, repealed them in 1970, enacted more in the 1980's, and is being asked to reconsider their wisdom again today.

There are critical differences between 1970, the year mandatory minimums were last repealed, and today, however. First of all, whatever concerns people may have with respect to mandatory minimums today, there is no support from this witness or from the Sentencing Commission as a whole for retreating from the principle that serious crime should be met with tough and certain punishment.

Unlike the case in 1970, today there exists a congressionally chartered sentencing system—the federal sentencing guidelines—that already assures tough and certain punishment for serious offenses and would continue to do so even if mandatory minimums disappeared tomorrow or were substantially modified. This difference between 1970 and today strikes me as highly relevant to your deliberations.

On the other hand, what is similar about 1970 and the events of today is the growing view among close observers of the federal sentencing system that reform of mandatory minimum laws is needed. The conference of every circuit with criminal jurisdiction[1] in the federal judicial system, the Judicial Conference as a whole, the U.S. Sentencing Commission, prosecutors and defense attorneys, federal corrections experts, as well as such prominent individuals as Attorney General Reno and Chief Justice Rehnquist, have all spoken of their concerns in this area.

It is important to note this developing consensus because we occasionally hear the comment that criticisms of mandatory minimums should be dismissed as coming from judges who are unhappy about limits on their discretion. This viewpoint is, I believe, shortsighted and superficial. True, mandatory minimums limit the discretion of sentencing judges, but among the overwhelming majority of judges who have come to question the wisdom of mandatory minimums are federal appellate judges, whose discretion is not affected, and substantial numbers of district judges who support the federal sentencing guidelines, which are mandatory and limit judicial sentencing discretion more comprehensively than mandatory minimums. Moreover, as I have indicated, the spectrum of viewpoints represented by those who have concerns about mandatory minimums is far broader than the federal judiciary. It includes representatives of virtually all sectors in the criminal justice system. So, Congress should not be led to believe that the concerns being raised derive from some narrow or parochial interest.

Importantly, Congress should not be distracted by off-the-mark suggestions that this is a soft vs. tough on crime issue. I am a former prosecutor and I chair an agency that views *Crime Control* as the most important goal of sentencing. I firmly believe that to effectively control crime our federal criminal justice system must deal

[1] The Federal Circuit does not have criminal jurisdiction.

from strength. So the real issue is how to most effectively, efficiently, and fairly, achieve this important goal.

We should first ask whether mandatory minimums are, on balance, doing what they are intended to do: do they contribute to or detract from the goal of achieving a highly effective federal sentencing system.

For reasons I will detail, I think two conclusions are now clear. First, mandatory minimums are in fact undercutting effective sentencing policy rather than promoting it. Second, the solution to this problem lies not in the abandonment of meaningful and certain punishment, which mandatory minimums are intended to require, but rather in greater coordination between mandatory minimums and the other congressionally chartered approach to mandatory sentencing policy, the federal sentencing guidelines.

In my remaining time, let me briefly outline what I see as the four principal drawbacks of mandatory minimums, explain why I think so-called "safety valve" approaches will not address these problems, and offer a proposal that I think will.

I. The Principal Drawbacks of Mandatory Minimums

In its 1990 omnibus crime bill, Congress directed the Sentencing Commission to submit a comprehensive report on mandatory minimum penalties. That report,[2] which contained exhaustive legal, empirical, and policy-related analyses, identified four principal problems with mandatory minimums.

PROBLEM ONE: MANDATORY MINIMUMS CREATE UNWARRANTED "CLIFFS"

Mandatory minimums often create what can be called "cliffs" in punishment. What this means is that relatively minor and sometimes inconsequential differences in the facts of a case can have a huge impact on the sentence. To cite one example, a defendant who possesses 5 grams of crack *can be sentenced to no more than one year in prison.* But a defendant who possesses even a hundredth of a gram more than that *must be sentenced to 5 years in prison.* So, a minute difference in the amount of crack involved requires at least a four-year difference in the amount of prison time to be served. Can we really defend as rational sentencing policy a law that makes four years of a person's life (and tens of thousands of taxpayer dollars) turn on such an insignificant difference in drug quantity. The sharp "cliffs" associated with many of the mandatory minimums simply do not square with a sentencing policy that is fair, equitable, and avoids unwarranted disparity among otherwise similar defendants.

PROBLEM TWO: MANDATORY MINIMUMS GENERATE SIMILAR SENTENCES FOR OFFENDERS WHO SIGNIFICANTLY DIFFER IN SERIOUSNESS

A second recurring problem with mandatory minimums is that they treat similarly offenders who can be quite different with respect to the seriousness of their conduct or their danger to society. This happens because mandatory minimums generally take account of only one or two out of an array of potentially important offense or offender-related facts. In the drug area, mandatory minimum penalties are generally only concerned with the quantity of drugs involved. Thus, the same 5-, 10- or 20-year mandatory minimum applies whether the defendant was the kingpin who organized and ran the drug conspiracy, whether the defendant was the average or typical offender, or a bit player who, for a few hundred dollars, helped off-load the boat or played some other minor role in the offense. Definitions that trigger the application of mandatory minimums are often so broad that they sweep in very different kinds of offenders. For example, the serious-sounding term "crime of violence," on which some mandatory minimums rely, includes everything from premeditated murder to vandalizing a mailbox. The bottom line is that mandatory minimums tend to impose sentence uniformity when sound policy calls for reasonable differences in punishment.

PROBLEM THREE: MANDATORY MINIMUMS DO NOT PROMOTE CERTAINTY IN SENTENCING

A key objective of mandatory minimums is to foster certainty in punishment. The Sentencing Commission's analysis of over one thousand actual cases found that, in fact, mandatory minimums undercut certainty in sentencing.

> Overall, the study found that of defendants who engaged in behavior for which a mandatory minimum appeared applicable, 40 percent *were sentenced below the applicable penalty.*

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[2] U.S. Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (August 1991).

Of drug defendants who appeared to warrant a mandatory sentence enhancement due to the presence of a weapon, *no weapon charge was filed in 45 percent of the cases.*

Of defendants for whom increased mandatory minimum penalties appeared applicable due to prior felony convictions, *the increased penalty was not sought or obtained 63 percent of the time.*

In short, far from fostering certainty in punishment, mandatory minimums result in unwarranted sentencing disparity. One reason this occurs is that the application of mandatory minimums frequently depends on the subjective charging decisions of individual prosecutors. One prosecutor may think—and perhaps reasonably—that a full mandatory minimum sentence is just too harsh for a minor player in a drug conspiracy and not seek the mandatory sentence, while another, with the identical case, will handle it strictly by the statute. The point is that mandatory minimums often allow the subjective views of individual prosecutors to set the sentence and this both undercuts the certainty of sentencing and leads to measurable, unjustified sentencing disparity.

Much has been said and written in the last several years about how current sentencing policies shift discretion from judges to prosecutors. To the extent these concerns are directed at the sentencing guidelines, they fail to take into account the multiple features built into the guideline system to keep the judge in control of sentencing—albeit with cabined discretion—and to ensure that the sentence will be based on the facts of the case rather than the prosecutor's charge. When it comes to many of the mandatory minimums, however, the prosecutor can often dictate the sentence, and there is little the Commission can do to mitigate this transfer of sentencing authority from judge to prosecutor.

PROBLEM FOUR: MANDATORY MINIMUMS FREQUENTLY INTERFERE WITH THE GUIDELINES ABILITY TO WORK EFFECTIVELY

In 1984 Congress passed the Sentencing Reform Act. This landmark legislation reflected an enormous amount of legislative deliberation and thought. Through detailed enabling legislation (and accompanying legislative history), the Act abolished parole and called for the creation of the Sentencing Commission to write mandatory sentencing guidelines. The guidelines have been in operation since 1987. Evaluations by the Sentencing Commission and the Government Accounting Office found that the guidelines are sound and working. Nevertheless, the Commission constantly monitors and refines them as necessary. The guidelines were written to accommodate mandatory minimum penalty provisions to the extent possible, but many times the guidelines and mandatory minimums simply are at odds with each other.

This is unfortunate because the guidelines have, as Congress specifically provided for, been designed to avoid the other three problems with mandatory minimums that I just identified:

The guidelines do not cause cliffs in sentencing because they *incrementally* increase punishment in light of aggravating facts demonstrating the need for increased punishment, whether those facts be a more serious prior record, an aggravating role in the offense, an obstruction of justice, etc.

The guidelines do not lump together offenders who differ in seriousness because they are *sensitive to facts* that justify differences in sentences. Thus, under the guidelines, the leader of a drug trafficking conspiracy will receive a prison sentence about 50 percent longer than one of his typical subordinates, and about twice as long as an underling with only a minimal role in the offense.

The guidelines foster certainty in punishment because guideline sentences depend far more on *the actual facts of the case,* as found on the record by a judge, than on the subjective charging decision of a particular prosecutor. Thus, the guidelines require a proportionate increase in the sentence of a drug trafficker if that trafficker carried a gun during the offense. This will occur whether or not the prosecutor charges the mandatory minimum statute that requires a flat, five-year increase for weapon involvement.

Yet as the guidelines seek to avoid the very kinds of problems mandatory minimums cause, mandatory minimums often block their ability to do so. The law requires that mandatory minimums control when they differ from the guidelines. So, in precisely the areas where mandatory minimums could benefit from the rational and effective attributes of the guidelines, the law stands sound policy on its head: instead of the guidelines operating to ameliorate the inherent, structurally induced

problems of mandatory minimums, the mandatory minimums render inoperative the ameliorative effects of the guidelines.[3]

II. "Safety Valve" Proposals

Some have suggested that the solution to the concerns mandatory minimums raise is to leave the mandatory minimums in place but carve out, through a so-called "safety valve," a category of offenders who would not be subject to their penalties. There are two troubling flaws with this kind of approach. First, safety valves would add more complexity to an already unnecessarily complex sentencing system. Today we have the mandatory minimum sentencing system built on top of the guidelines system—each system with its own structure and rules of application. Safety valves would add a third layer of complexity. Judges would have to sort out which offenders are subject to which set of penalties, and because the stakes could be a difference of many years in prison, this third tier of sentencing law would likely add resource costs to our criminal justice system in the form of increased litigation, court time, and sentencing disparity as courts grappled with the conflicting sets of rules.

The second problem with safety valves is that they would leave largely intact the four problems I noted that mandatory minimums cause. Indeed, the problem of cliffs could become even more pronounced. Those falling into the safety valve category could expect more lenient sentences—perhaps substantially more lenient—depending on the view of the sentencing judge while those whose offense or offender characteristics *differed only sightly* would receive a far harsher penalty. Again, a small factual difference could cause a substantial difference in punishment.

Moreover, under some safety valve proposals, cliffs could result from highly artificial criteria. For example, under some proposals a prior felony drug conviction would disqualify an offender for consideration for safety valve treatment. Prior record is an important sentencing consideration, but whether an offender had a prior felony drug conviction is not, by itself, a dependable criterion on which to base substantial swings in punishment. To illustrate, prosecutors have historically entered into plea bargains to give breaks, for example, to lower-level players in drug conspiracies. Take the example of two defendants who committed the same drug offense and both were sentenced to six months in prison. In one case the prosecutor agreed to accept a plea to a misdemeanor from offender #1. Another prosecutor, with essentially the same leniency goal in mind, agreed to a sentence bargain calling for the defendant to plead guilty to a felony charge in exchange for a recommendation (or binding agreement) of six months in prison. This is a typical example of two prosecutors faced with similar offenders, both seeking to achieve a desired sentence but using different avenues to do so. Under a safety valve approach, with its simplistic reliance on whether the prior offense to which the defendant pleaded was a felony drug conviction, the nature of the prosecutor's deal—not the actual seriousness of the prior offense—could translate into a difference of five, ten, or even more years in prison for the subsequent offense. And, importantly, in addition to the federal courts, there are 50 state jurisdiction where criminal records are established, jurisdictions that do not follow federal sentencing guidelines and use widely varying plea bargaining and charging practices.

Some safety valve proposals compound these kinds of problems by making the safety valve a discretionary option with the judge. Discretionary safety valves under which the judge would use his or her own subjective judgment about whether and how much to reduce the sentence would undercut sentence certainty and reintroduce unwarranted disparity the Sentencing Reform Act and the sentencing guidelines were designed to reduce.

In sum, safety valves would exacerbate the complexities of an already complex system, would fail to address the structurally inherent problems of mandatory minimums, and could foster unwarranted disparity.

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[3] For example, the Commission designed the drug trafficking guidelines so that a typical, first offender who deals in a quantity of drugs corresponding to a mandatory minimum will receive a guideline sentence at or above the statutory minimum. But, then the guidelines provide an array of aggravating factors to boost sentences higher for more serious drug offenses. They also provide several important factors that most people agree should generally result in lower sentences—principally reductions for a less culpable role and for a defendant's acceptance of responsibility for the offense. In many cases, however, the presence of these mitigating factors has absolutely no effect on the sentence because of the mandatory minimum.

III. A Proposal To Bring About Greater Coordination Between Mandatory Minimums and the Guidelines

I propose for Congress' consideration legislation that would address concerns over mandatory minimums for drug offenses in what I believe is a more systematic and rationally defensible manner. Overall, this proposal would achieve its results by bringing about greater coordination between mandatory minimums and the sentencing guidelines. The proposal I have put forward is supported in principle by the members of the Sentencing Commission, the Criminal Law Committee of the Judicial Conference, and many others.

Briefly, the legislation has these features:

First, recognizing Congress' special concern regarding gun-related offenses, the bill would have no impact on mandatory minimums for firearms. Although sound policy arguments can certainly support expansion of the bill's general approach, it affects only drug-related mandatory minimums.

Second, the bill would not repeal current mandatory minimums. Rather, it would use them as statutorily set starting points for guideline offense levels. This approach would have the effect of Congress setting the sentence in typical cases in which no aggravating or mitigating factors recognized by the guidelines were applicable. Congress has a vital role to play in setting national sentencing policy, and this proposal fully accommodates that role.

Third, all guideline aggravating factors—such as use of a weapon, a leadership role in the offense, obstruction of justice, injury to a victim, etc.—would continue to apply as is the case today. This means that when aggravating factors were present, the resulting guideline sentence would be greater—often substantially greater—than the mandatory minimum. I believe this facet of the proposal meets squarely the American public's rightful concern that serious crime be answered with tough and sure punishment.

Fourth, in cases in which mitigating factors recognized by the guidelines—such as a defendant's minor role in the offense or acceptance of responsibility—were applicable, the guidelines' provisions for a proportionate reduction in the sentence to account for such factors would be permitted in order to draw distinctions between more and less serious offenders. This facet of the proposal ensures that while punishment will always be tough it will also always be fair by recognition of the important principles of proportionality. This does not mean that a minor participant in a drug conspiracy would not go to prison. What it does mean is that because of the existence of a mitigating factor, the sentence would be somewhat less than the sentence for a co-defendant who did not exhibit the mitigating factor.

Fifth, in unusual cases with truly compelling circumstances—which 1992 sentencing data indicate occurs about six percent of the time—courts would be permitted to depart below the guideline range according to well-established statutory and case law criteria. The government would maintain its right to appeal any such departure to ensure it met these criteria.

Finally, to further develop sound sentencing policy with respect to first offenders, the bill directs the Sentencing Commission to work closely with the Department of Justice and others to identify additional sentencing options that would be submitted to Congress for your consideration and approval.

In my view, this proposal would not only alleviate structural problems with mandatory minimums, it would have two important additional benefits. As with all mandatory minimum reform proposals, the bill would seek to increase fairness and proportionality in sentencing. But in contrast to other proposals, the bill would meet these objectives by providing sentencing adjustments under the mandatory federal sentencing guidelines regime. This means that appropriate adjustments for mitigating factors would not be left to unguided discretion, but rather would occur in a certain and predictable fashion. Second, by using guideline mitigation factors, which have been already construed by the courts, the approach would not add further complexity to the current sentencing system, and indeed would ease current complexities by making mandatory minimums and the guidelines function in an integrated manner.

Conclusion

In 1984, before it passed the Sentencing Reform Act establishing a regime of sentencing guidelines, Congress examined the highly discretionary sentencing system then in place and concluded that it was haphazard, unfair, and at times provided results that were disproportionate to the seriousness of the offense. Congress determined that sentencing system that operates in such a fashion "creat[es] disrespect

for the law."[4] Mr. Chairman, I believe it is time to recognize that the outcry we have recently heard over mandatory minimums is also due to the fact that they are, with disturbing frequency, operating in a haphazard, unfair, and disproportionate manner and as a consequence are undercutting respect for the law. The importance of maintaining the credibility of federal criminal enforcement is simply too great to allow this to happen.

I believe that what is needed is corrective legislation that would, on the one hand, maintain the core precepts of mandatory minimums, namely that there be certain and significant punishment, but on the other hand, would assure that proportionality and consistency in punishment are not sacrificed. Integrating mandatory minimums and the guidelines along the lines of this proposal would, I believe, not only accomplish these twin objectives, but would do so in a manner that would significantly increase the efficiency of our current, somewhat fragmented, two-tier sentencing system.

Mr. Chairman, I commend you for convening this hearing on this very important topic. I appreciate the opportunity to appear here today. The Commission looks forward, as always, to working with you on this and other important matters in the months ahead. Thank you.

SECTION-BY-SECTION ANALYSIS

1. Section 1 cites the title of the legislation as the "Controlled Substance Minimum Penalty-Sentencing Guideline Reconciliation Act of 1993."

2. Section 2 instructs the Sentencing Commission to establish minimum offense levels under Chapter Two of the sentencing guidelines for the most frequently prosecuted controlled substance offenses that presently are subject to statutory minimum penalties.

The directive correlates the drug quantities and existing statutory minimum sentence of five years with a Chapter Two guideline offense level of not less than level 24. Similarly, the drug quantities and statutory minimum sentence of ten years are correlated with an offense level of not less than 30. For offenses in which death or serious bodily injury results from use of the controlled substance, the 20-year statutory minimum is correlated with an offense level of 38. Finally, for offenses involving the simple possession of more than five grams of crack, the existing five-year statutory minimum is correlated with an offense level of 24. In each case, the offense levels chosen are those that, in the absence of any mitigating or aggravating factors recognized under the guidelines, would produce a guideline range that contains the existing statutory minimum sentences.

In the case of the five- and ten-year statutory minimum sentences, the minimum offense levels designated in the statutory directive to the commission are each two levels lower than those presently used in the sentencing guidelines. When initially promulgating the guidelines for drug trafficking offenses, the Commission felt compelled to use minimum offense levels equating to sentencing ranges with a lower limit that was above the applicable statutory minimum sentence. The proposed statutory directive would permit the Commission to effect a modest reduction in offense levels, but the resulting guideline ranges applicable to first offenders subject to no aggravating or mitigating factors under the guidelines would still accommodate the statutory minimum sentences.

3. Section 3 of the bill reconciles the operation of the sentencing guidelines with the statutory minimum sentences contained in sections 841(b), 844(a), and 960(b) of title 21, United States Code. These are the minimum sentences presently applicable to drug trafficking offenses and the simple possession of more than five grams of crack. The bill does not repeal these statutory minimum penalties. It retains them for the purpose of establishing, pursuant to specific statutory directives to the Sentencing Commission, base penalties under the sentencing guidelines for typical cases involving drug quantities that correlate with the statutory minimums. The existing statutory ban on probation also would be retained.

Nevertheless, the legislation language would permit the guidelines to operate unimpeded by the Statutory minimums; i.e., any pertinent aggravating or mitigating provision under the guidelines that is applicable to the defendant under the facts of the case would adjust the guideline range above or below the statutory minimum sentence. The court would then impose a sentence within the guideline range. Additionally, if no aggravating or mitigating factors applied, the court could sentence at any point within the guideline range that incorporates the otherwise applicable statutory minimum sentence, even if the chosen sentence was lower than the otherwise applicable statutory minimum. Furthermore, if a basis for sentencing out-

[4] S. Rep. No. 225, 98th Cong., 1st Sess. 46 (1983).

side the guideline range (i.e., departure) existed under the applicable statute (i.e., 18 U.S.C. § 3553(b)), pertinent provisions of the guidelines and policy statements, and relevant case law, the court in its discretion could impose a departure sentence. For example, a mother of a child born with AIDS who, for a fee of $2,000, agrees to act as a heroin courier on one occasion to get money to pay for her child's treatment, could receive a sentence below the guideline minimum.

4. Section 4 of the bill allows the reconciliation of the guidelines and statutory minimum sentences to have a limited retroactive effect, notwithstanding the provisions of 1 U.S.C. § 109.

First it would allow the provisions of section 3 to be applied after they take effect to any case not yet sentenced.

Second, it would permit the provisions of section 3 to apply to any reconsideration of sentence authorized by the Commission under 18 U.S.C. § 3582(c)(2).

Application of the sentencing policy changes to cases previously sentenced presents a number of practical problems that would need to be addressed in order for this procedure to be feasible. The Commission will continue to discuss these issues with representatives of the various components of the criminal justice system in an effort to find a reasonable means to achieve this objective.

5. Section 5 of the bill allows the Commission reasonable flexibility to implement any specific statutory directive in a manner most consistent with the sentencing guidelines as a whole.

It also provides the Commission with a general grant of authority to effect changes in guidelines that initially are constructed in fulfillment of a specific statutory directive. When any such changes are made, the provision requires that the Commission highlight and explain the modifications so that Congress can specifically consider their advisability.

Experience has shown a need for such flexibility in light of changing circumstances. For example, many believe that the guideline applicable to career offenders, which the Commission promulgated pursuant to a specific directive in the Sentencing Reform Act (28 U.S.C. § 994 (h)), should be revisited. with the flexibility afforded by this change, the Commission would have the latitude to modify the guideline without a specific amendment to the statute.

6. Section 6 requires the Commission to conduct a study and report to Congress within 6 months on sentencing practices as they relate to first-offender, non-violent defendants convicted of drug offenses. Congress and the Commission would then be in a more informed position to consider further changes in sentencing policy that may be appropriate for such offenders.

DRAFT
June 11, 1993

103rd Congress
1st Session

AN ACT

SECTION 1. This Act may be cited as the "Controlled Substance Minimum Penalty-Sentencing Guideline Reconciliation Act of 1993."

SEC. 2. Directive to the Sentencing Commission Regarding Amendments to the Sentencing Guidelines for Controlled Substance Offenses.

(a) Within sixty days of the date of enactment of this Act, the United States Sentencing Commission shall amend the sentencing guidelines as necessary to ensure that the Chapter Two offense level applicable to --

(1) a defendant whose offense involved a type and quantity of controlled substance set forth in section 841(b)(1)(A) or 960(b)(1) of title 21, United States Code, is not less than level 30;

(2) a defendant whose offense involved a type and quantity of controlled substance set forth in section 841(b)(1)(B) or 960(b)(2) of title 21, United States Code, is not less than level 24;

(3) a defendant subject to an enhanced penalty under section 841(b)(1)(A), 841(b)(1)(B), 841(b)(1)(C), 960(b)(1), 960(b)(2), or 960(b)(3) of title 21, United States Code, for an offense resulting in death or serious bodily injury from the use of the controlled substance, is not less than level 38.

(4) a defendant subject to a minimum sentence of five years under section 844(a) of title 21, United States Code, for the possession of cocaine base, is not less than level 24.

(b) The Commission may make such additional amendments as it deems necessary and appropriate to harmonize the sentencing guidelines and policy statements to any amendments promulgated pursuant to subsection (a).

(c) The provisions of section 994(x) of title 28, United States Code, shall not apply to the promulgation of amendments under this section.

(d) The amendments to the sentencing guidelines promulgated by the Sentencing Commission pursuant to this section shall take effect sixty days following the date of enactment of this Act.

SEC. 3. Interaction of Minimum Penalties with Sentencing Guidelines.

(a) Section 401 of the Controlled Substances Act (21 U.S.C. § 841) is amended by inserting the following new subsection following subsection (b):

"Interaction of minimum penalties with sentencing guidelines

(c) Notwithstanding the minimum penalties set forth in subsection (b),--

(1) the court shall impose a sentence within the applicable sentencing guideline range, or

(2) if the court determines, in accordance with section 3553(b) of title 18, United States Code, and any pertinent policy statement issued by the Sentencing Commission, that a sentence outside the guideline range is warranted, the court may impose such a sentence.".

(b) Section 1010 of the Controlled Substances Import and Export Act (21 U.S.C. § 960) is amended by inserting the following new subsection following subsection (b):

"Interaction of minimum penalties with sentencing guidelines

(c) Notwithstanding the minimum penalties set forth in subsection (b),--

(1) the court shall impose a sentence within the applicable sentencing guideline range, or

(2) if the court determines, in accordance with section 3553(b) of title 18, United States Code, and any pertinent policy statement issued by the Sentencing Commission, that a sentence outside the guideline range is warranted, the court may impose such a sentence.".

(c) Section 404 of the Controlled Substances Act (21 U.S.C. § 844) is amended by inserting the following new subsection following subsection (a):

"(b) Notwithstanding the five year minimum penalty set forth in subsection (a),--

(1) the court shall impose a sentence within the applicable sentencing guideline range, or

(2) if the court determines, in accordance with section 3553(b) of title 18, United States Code, and any pertinent policy statement issued by the Sentencing Commission, that a sentence outside the guideline range is warranted, the court may impose such a sentence.".

(d) This section shall take effect sixty days following the date of enactment of this Act.

SEC. 4. Effective Date.

Notwithstanding the provisions of section 109 of title 1, United States Code, the provisions of section 3 of this Act shall apply (1) to any defendant sentenced on or after the date section 3 of this Act takes effect; and (2) in any determination under section 3582(c)(2) of title 18, United States Code.

SEC. 5. Commission Authority to Modify Guidelines Promulgated Pursuant to Statutory Directive.

Section 994 of title 28 is amended by inserting the following additional section:

"(y) Variance of Specific Statutory Directive; Amendment of Guideline Subject to Specific Statutory Directive to the Commission.

Notwithstanding any other provision of law, the Commission may--

(1) in promulgating an amendment to a guideline or policy statement pursuant to a specific statutory directive, make such adjustments as the Commission deems reasonable and necessary to effectuate the intent of such directive in a manner consistent with the guidelines and policy statements as a whole; and

(2) subsequently promulgate and submit to Congress an amendment to a guideline or policy statement that has been the subject of a specific statutory directive, provided that any amendment that is at variance with any statutory directive to the Commission shall be specifically designated as such and

accompanied by a report explaining the variance and the reasons therefor.".

SEC. 6. Commission Report Relating to Sentences for First-Time, Non-Violent Offenders.

(a) Report.--Not more than six months after the date of enactment of this Act, the Commission shall transmit to the respective Judiciary Committees of the Senate and House of Representatives a report on sentencing practices as they relate to offenders convicted of controlled substance offenses under title 21, United States Code, who are first offenders and whose offense conduct does not involve violence.

(b) Components of Report.--The report mandated by subsection (a) shall include a consideration of the appropriateness of providing for modifications of current sentencing practices as they relate to such offenders and other related matters as the Commission determines appropriate.

(c) Consultation with Criminal Justice Authorities.--In fulfilling its obligations under this section, the Commission shall consult with

the representatives of the criminal justice system set forth in section 994(o) of title 28, and other persons as the Commission deems appropriate.

Mr. SCHUMER. Thank you, Judge Wilkins, I thank you for your excellent and thoughtful testimony. I have some questions about it.

Before we get to you, Mr. Attorney General, we have a vote, we have 5 minutes. We will try to come back by 1 o'clock and resume.

Oh. Two 5-minute votes? Just two votes. OK. Then we will just have to play it by ear and we will come back as soon as we can.

[Recess]

Mr. SCHUMER. I apologize for the delay. There were indeed two votes.

And now, Attorney General Barr, your statement will be read into the record. We welcome you here. Proceed as you wish.

STATEMENT OF WILLIAM P. BARR, SHAW, PITTMAN, POTTS & TROWBRIDGE, WASHINGTON, DC

Mr. BARR. Thank you, Mr. Chairman. I appreciate the opportunity to be here, and I want to salute you and the committee for taking up this important topic. It has been a hot one, but up until this hearing, frankly, there has been more heat and less light shed on the issue. And, as Congressman Mazzoli said, I really want to commend your opening statement, which was superb, and it was the first time I really heard the facts laid out on the record. And I agree that this is a topic that we really have to deal with on the basis of the facts and not allow myths to drive policy.

I am just going to make three quick points, and I also want to take up the issue you asked me to address, which is this notion of a safety valve and some of the practical concerns I have about it.

I support the current system. I think mandatory minimums are fair in principle, and I think they are being fairly implemented. I think the data shows that the notion that there are—that the system is generating significant numbers of cases where hapless victims are being treated unfairly with draconian sentences is a myth. That as you, I think, are finding, those egregious cases, as you call them, are few and far between.

Second, I think it is important to bear in mind that this is a punishment. These mandatories minimums reflect the judgment of Congress several years ago that the punishment fits the crime. I agree that the punishment fits the crime, and I don't think anything has happened since then to suggest it doesn't. If anything, we know more and more how devastating drug trafficking is, the destruction it causes. I think the drug plague in the United States has cost our society more in lives and treasure and spirit than all the foreign wars that we have ever fought as a nation. The drug trade could not go on unless there were people willing to engage in trafficking. And no one who engages in trafficking these days does so unwitting of the danger of the drug trade, the devastation it causes, and the risks involved.

We have spent 10 years getting the point across that we mean business—that the Federal Government is tough and there are not going to be excuses for participating in this drug trade. And it is starting to sink in and people are scared of the Federal system, and now is not the time, in my view, to be sending a mixed message. People who engage in drug trafficking are engaging in it with a contumacious state of mind, and I think that the 5-year penalty, the 10-year penalty is a just penalty.

The third thing—and I think very important to bear in mind—is how important mandatory minimums are as a practical tool in fighting the drug trade. Picking up again on what Congressman Mazzoli said, Federal prosecutors are not in this to nail mopes who have nothing to offer, hapless people. They are going after the organizations. That is the objective. Federal prosecutors are dedicated people. They are overworked. They want to stop the drug trade and they are going after these organizations.

And I would say the singlemost important tool that the prosecutors have today is mandatory minimums. Why? Because the drug trade is carried on through organizations that are highly secretive, where there are financial incentives to keep that secrecy and to keep your mouth shut even if you are caught, where there is even a risk to your life if you squeal. You can get executed by the drug organization or a related drug organization. And frequently there are ties of culture. For example, some of the drug gangs, the distribution in the United States are tied together with culture and language that make it very difficult for people to squeal.

The only way we have to break into these organizations is to "turn" sometimes the lowest level person so that prosecutors can march their way up the chain, and what makes this process possible is the very stiff penalty of the mandatory minimum. Now, right now the reason the Government can get cooperation is because the defendant knows that there is only one way to break through the floor of that mandatory minimum, one way and one way only, and that is to give substantial cooperation to the prosecutor.

Now, what I am concerned about is the safety valve and what impact that could have. If there is discretion placed in a judge to reach the decision that you can break through that floor, even if you haven't provided substantial cooperation, I think it is going to dilute the strength of this leverage that the prosecutor has. Because then the defendant knows he has another avenue around the mandatory minimum, which is to persuade a judge, not the prosecutor, but to persuade a judge, "Hey, I'm just a de minimis factor and I don't have any information." And, if he can persuade a judge of that, the rug is pulled out from under the prosecutor.

I would be very cautious about a safety valve. But if you determine that this is a sufficient problem that merited a safety valve of some sort, then what I would urge you to consider is one that operates very much like the substantial assistance safety valve. The prosecutor has to be in the loop. That is, the prosecutor files a motion, just as he would file a substantial assistance motion, saying that this person has tried to their maximum ability to cooperate. They have worn the wire that we asked them to wear. They have done everything we have asked and, unfortunately, haven't turned up anything that really amounted to substantial assistance. But they have cooperated. They have testified and so forth, and they were limited players.

And I think there should be a limit on how much it can be reduced, so you still have a fairly significant deterrent even for the de minimis player. Because one thing we have to worry about is the drug traffickers will use the people who have the least to lose. They use kids. And, if we say, "Well, now empathetic girlfriends

are people that are going to get breaks, we are going to see a lot more empathetic girlfriends involved in the drug trafficking."

So I still think there has to be a deterrent. But those are, in a nutshell, my thoughts on this safety valve concept. I think it is important not to just shift it over to the judges, and I think if you look at what the prosecutors' interests are here, prosecutors are getting around the Thornburgh memo in empathetic cases. They are trying to find substantial assistance and they are doing other things to try to give people a break. They have no interest in spending their resources going after a mope that really can't give them anything. So that in a nutshell are my thoughts.

Mr. Chairman, thank you again.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF WILLIAM P. BARR, SHAW, PITTMAN, POTTS & TROWBRIDGE

Thank you, Mr. Chairman, for inviting me to this hearing and allowing me to share my thoughts on the issue of mandatory minimum sentences for federal drug trafficking violations. I particularly appreciate the opportunity to offer my perspective because much of the media attention given to this subject has overlooked the views of law enforcement. Perhaps today's hearing will help to remedy this situation.

My purpose in being here today is to offer my support for the mandatory minimum sentences currently included in federal drug control statutes. I firmly believe that Congress, with the strong support of both Presidents Reagan and Bush, acted appropriately when it established these penalties in the 1980's, and that mandatory sentences have contributed greatly to a major shift in attitude over the past five years concerning drug abuse.

The support I offer for these penalties stands in sharp contrast to the attacks now being waged against them. A clear impression now exists that a substantial portion of the federal prison population consists of non-violent, low-level drug abusers who have never before been convicted of a felony. The picture being painted of this supposed group is one of essentially hapless people who have been caught up in the drug war and are barely culpable of criminal wrongdoing. Moreover, it has been suggested that this large segment of the prison population is displacing the real violent criminals who are presently on the streets because of a shortage of prison beds.

This image of significant numbers of drug war "victims" sitting in federal prisons for long periods of time is simply a myth. Even a quick review of the relevant information, including available statistics, the testimony of federal law enforcement, and federal law, reveals that this image does not square with the facts.

Nearly 80% of the federal drug offenders sentenced in 1992 were either armed, recidivists or found by the court to be leaders or organizers of drug distribution networks. Of the 22 of the federal drug prisoners not fitting this description, nearly half are not incarcerated under a mandatory drug sentence. This means that less than 12% of all drug traffickers in federal prison are serving mandatory sentences and were unarmed non-leaders who had no prior convictions. It should be noted, however, that many in this 12% group could still pose a significant threat to public safety based upon other factors such a juvenile convictions and prior arrests.

These statistics would come as no surprise to federal drug agents and prosecutors. Anyone within those ranks could tell you that nearly all of the drug traffickers they encounter are not merely misguided souls making their first mistake. Rather, they focus their efforts on deadly drug distribution organizations who often view violence as simply a part of business. Indeed, federal law enforcement officials spend thousands of hours training and preparing to dismantle such enterprises.

Finally, there is no legal basis to the claim that drug offenders are displacing violent criminals from federal prisons. Here there are two points to keep in mind. First, since parole was abolished in the federal system in 1987, it is legally impossible to push violent criminals out of prison early. Second, while there has been a large number of drug offenders sent to federal prisons in recent years, there also has been an unprecedented number of violent criminals imprisoned during this same period of time. "Project Triggerlock" alone has netted over 12,000 felons using firearms in only the past two years.

Beyond these important facts about the true composition of the federal prison population, we must not lose sight of the severe threat drug abuse poses to the public's well being. In the 1980's, Congress made the judgment that drug trafficking is a

heinous act and established punishment that fits the crime. I still believe that the punishment fits the crime.

Consider all that our nation has been through over the past decade in the struggle against drugs—the virtual devastation of neighborhoods, the destroyed lives of drug abusers, the murdered law enforcement officers and their suffering wives and children, the newborn children who have entered life as drug addicts. Add to these numbers the hundreds of brave judges, police and soldiers in Colombia, Italy and other foreign countries who have died violent deaths fighting the drug lords. The conclusion is clear. The penalties Congress established for drug distribution unquestionably match the destructive effects of the crime.

It is difficult not to conclude that those who continue to engage in drug trafficking after all that this nation has been through must possess a contumacious state of mind. In weighing the substantial risks involved against the specific business opportunity, they display a cold and calculating nature. It is obvious that such behavior is completely inconsistent with the best interests of the community in which they live.

Not only did Congress act justly in creating mandatory sentences, but it also gave federal law enforcement an extremely valuable tool for dismantling drug distribution organizations. Drug trafficking enterprises are highly integrated structures. Thus, law enforcement officials frequently rely upon those within the conspiracy to acquire evidence of criminal violations. Mandatory minimum sentences have proven to be a very successful tool for law enforcement in working its way up in an organization.

In conclusion, Mr. Chairman, I hope that you and your colleagues will proceed cautiously in reviewing this issue and considering any changes to the law. I have reservations about creating a safety valve which empowers the judiciary to automatically nullify a mandatory sentence. Such an exception could undermine the effectiveness of mandatory sentences as a law enforcement tool because defendants, knowing that the judge will waive the tough sentence, may claim that they cannot provide substantial assistance to the government. I trust you will weigh this concern in your future deliberations.

Mr. SCHUMER. Well, I want to thank you for your very interesting testimony. In this hearing we are really trying to learn and grope with an issue that is a difficult issue. There is no easy answer. And both, I think both you, Judge Wilkins, and you, Attorney General Barr, have helped with that.

Judge Wilkins, let me ask you first a couple of questions about what you mentioned. If, in your proposal of a safety valve going below the guidelines, your general proposal, would there be a limit on how low you could go?

Judge WILKINS. Absolutely.

Mr. SCHUMER. What would that be?

Judge WILKINS. The guidelines now work independent of mandatory minimums.

Mr. SCHUMER. No, I understand.

Judge WILKINS. And the same mitigating factors apply in those cases that I am suggesting should also be allowed to apply in a mandatory minimum drug case.

Mr. SCHUMER. So what you are simply saying is pass a mandatory minimum but don't make that the floor, make that sort of the average, the level for the average person and you can go up a limited amount and down a limited amount?

Judge WILKINS. That is what I am saying. That is right. And it would be a structured up and down. If it weren't structured up now—in fact——

Mr. SCHUMER. Yes, I understand.

Judge WILKINS [continuing]. Seldom is the mandatory minimum penalty the actual sentence imposed on a defendant who has any aggravating role because the sentence is going to be structured up.

Mr. SCHUMER. I understand. The fear that this committee has, most of this committee, certainly most of the public, is that if you allow too much discretion on the down side people who deserve to go to prison won't or that people who deserve to go to prison for a significant sentence will get a slap on the wrist, the 6-month-type situation.

Judge WILKINS. That is correct.

Mr. SCHUMER. If that fear is real I will tell you what will happen if your proposal is passed. They will just up the mandatory minimum. So if they worry that someone might get 2 years when they think they should get 4, instead of passing an 8-year mandatory minimum they will pass a 10- or 12-year mandatory minimum and it would be counterproductive.

So one thing I would urge, and I would look forward to looking at your written submission, is that there be some guaranteed floor as to what the sentence could not go below in terms of a percentage of the guideline. And that might be helpful, it might not. I can't tell. I would have to talk to my colleagues and think it over myself in terms of that. And right now you don't have that——

Judge WILKINS. Yes, we do.

Mr. SCHUMER. You do.

Judge WILKINS. The guidelines provide the floor, Mr. Chairman. The judge cannot, facing a defendant who has a very minor peripheral role in a drug conspiracy and who has accepted responsibility, that judge is not allowed to sentence to whatever sentence the judge thinks is appropriate.

Mr. SCHUMER. Well, I understand that.

Judge WILKINS. The guidelines will say, here is the bottom line.

Mr. SCHUMER. I know what the guidelines do. In your proposal it seemed more tentative. You don't mean that?

Judge WILKINS. No, I did not mean that.

Mr. SCHUMER. So in the example you told, the person who got the 10-year were the average people, the 16-year was the ringleader, and the 5-year was—I can't remember the—was it courier?

Judge WILKINS. A courier.

Mr. SCHUMER. For a minor participant, the court couldn't go below 5 years, the judge could not go below 5 years, for instance?

Judge WILKINS. Through the operation of the guidelines, that is correct. That is the minimum. The fellow might get a 6½-year sentence——

Mr. SCHUMER. I understand.

Judge WILKINS [continuing]. Because the judge has arranged that that would be the bottom. Except, Mr. Chairman, so there be no misunderstanding, under the Sentencing Reform Act judges who can identify an aggravating or mitigating factor not considered by the guidelines can depart above or below the guidelines. The judge couldn't use minor role again, but some other mitigating factor could be a basis for the departure.

Mr. SCHUMER. Right. Yes.

Judge WILKINS. And there are only a few very limited factors recognized by the courts. The judge then could state that reason on the record and sentence below the guidelines.

Mr. SCHUMER. Right.

Judge WILKINS. That occurs in all cases other than when mandatories apply. But it only occurs in 6 percent of all the cases.

Mr. SCHUMER. And that is what you refer to as the safety valve in the guidelines itself?

Judge WILKINS. That is correct.

Mr. SCHUMER. That is correct? OK. And that I think, even though it is only 6 percent I think that would cause a great deal of worry out in the public and with this committee. You know, I have some resentment of people who think this is what the public wants and all of that. Yes, it is what the public wants because they have been through a very bad experience before, and there is nothing wrong with the public wanting to be very safe. I mean to me the greatest failure our Government has, period, is that we are not safe. That is what men and women got together to form government about: external—fight a war, have an army; and internal—be safe as you walk around.

Judge WILKINS. We share your concern.

Mr. SCHUMER. I know you do. And I know everybody here does. And I accept my colleague from Michigan's statement that everyone wants to deal with crime and there are different ways to deal with it, and that is why we are a Congress.

But the idea that people who want to be safe or people who have one position are just doing this out of some malice I reject and find troubling. Worse than troubling, but I can't think of the right word.

OK. Mr. Barr, what do you think of Judge Wilkins' proposal?

Mr. BARR. I would oppose it because I think that the legislature should in certain cases set a floor for certain crimes and basically say we are not going to allow mitigation except under defined circumstances. And I would not like to see judges have any appreciable discretion to go below that floor, and I think the discretion they have now under the guidelines is a little bit too malleable and I am concerned of the erosion of that floor and the impact that would have on using it as a hammer to open up organizations.

So for that reason I would say that if there is going to be a safety valve the prosecutor has to move for it under defined circumstances.

Mr. SCHUMER. All right. And you made a very important point that I appreciated. And not being a prosecutor myself, I think it is an important one that you made.

But what do you say to a person like our witnesses here, particularly the young woman who is incarcerated herself? That to me was the worst case we found. There are others that are less bad, but still probably the sentence is a little bit too long.

What do you say to her? Go ahead. I don't want to put any words in your mouth.

Mr. BARR. I don't know enough about—I don't want to comment on her case because I haven't talked to the prosecutor.

Mr. SCHUMER. Well, let's assume the prosecutor was wrong. Maybe he made a judgment, for instance, that she could lead him to others. In Ms. La Rotonda's care, it perked my ear up that the Colombians who were at the top got 15 years, and maybe the next rung got less because they brought in the Colombians.

Mr. BARR. Right.

Mr. SCHUMER. And that is a justifiable prosecutorial decision. But let's say in this case here she didn't know of anybody and the prosecutor made a judgment—we will squeeze her, she will turn somebody in—but there was nothing to squeeze out of her. What do we say to her?

Mr. BARR. I think more likely in this case, if this is a really empathetic case where she was willing to provide information, willing to testify against her boyfriend or what have you, accepted responsibility, that the prosecutor may have felt he didn't have an alternative under the mandatory minimums and that there was such a substantial amount of drugs involved that she got hit with a very high sentence, which I think was above the mandatory minimum, which suggests that there were aggravating factors involved in the conspiracy.

Wasn't it 12 years?

Ms. STEWART. No. She got 10.

Mr. SCHUMER. It was 12—was it 12 years?

Mr. BARR. No. She got 10.

Mr. SCHUMER. She got the 10.

Mr. BARR. All right.

Mr. SCHUMER. They asked for 12, she got 10.

Mr. BARR. I would say that the safety valve that I am suggesting would deal with that because the prosecutor would be satisfied that this just wasn't someone who was saying that they had nothing to provide, who was in fact really willing to be cooperative.

I would also say, though, that I am not so ready to—I am worried about the implication that somehow involvement in trafficking is not culpable behavior. Nowadays, in my view, people who hang around and associate with individuals who are engaged in large-scale transactions and had sufficient participation in that to assist in those transactions are highly culpable individuals.

Mr. SCHUMER. Mr. Mazzoli and Mr. Schiff, in fact, have made that point throughout the hearing, and I completely agree with it. The question is just how long the amount of jail time should be. It is certainly culpable behavior.

Mr. BARR. Let me just point out there is also right now a safety valve, and I am not suggesting that you just treat this as the only safety valve, but if the current Attorney General and if this administration thought there were cases in the Federal system where there were miscarriages of justice they always have the power of clemency, and they could commute this person's sentence to time served at any time.

Mr. SCHUMER. Right. Judge Wilkins, what do you say about Attorney General Barr's view that if there are other ways to get below a mandatory minimum, particularly in these drug cases because that is where we are focusing, that the defendant will say, well, I don't have to wear the wire, I don't have to do the full cooperation, because I am a low-level person I will get a reduced sentence anyway, because there will be another reason for it?

Judge WILKINS. My experience as a prosecutor and as a trial judge for about 6 years tells me that minimal participants line up at the door and beg to come in to cooperate with the Government. The problem is they seldom have any real meaningful information to give. Consequently, they do not receive the benefit of the sub-

stantial assistance motions that the law allows prosecutors to make. I don't think there is any question about it.

What we are talking about is a recognition that some people who are in a minimal role should get some proportional consideration. Bill and I agree on that. He says it should be structured. I say it should be structured. The guidelines provide a very, very tight structure. If you don't believe me, bring some Federal judges up here and they will tell you how tight it is.

The only difference I think we have between us in recognizing that this is a problem and there should be some reasonable solution to it is his would turn on certification of the prosecuting attorney that this person is a minor participant and then the structured reduction would occur. I am suggesting, as in all other guideline cases that the situation turn on a decision by the district judge based on facts found on the record subject to appellate review.

Mr. SCHUMER. Right. Judge, you have told me personally, and I believe it is in your written testimony, that you might prefer no change. You mentioned before you would prefer to keep the mandatory minimums if there was nothing, if there were no guidelines as a buffer.

And it is true, I don't see that the two are that much at loggerheads. There are different methods and there are questions of leverage and there are questions of egregious cases, but still they came out of the same root problem and they are not as different as some would like them to be. That the guidelines are all good and the mandatory minimums are all bad, or vice versa. That the mandatory minimums are the end-all answer and the guidelines won't protect us from any of that.

If you had the choice of no change versus a safety valve broadly defined, which would you prefer?

Judge WILKINS. Well, it is difficult to answer you, of course, because the broad application——

Mr. SCHUMER. I shouldn't say broadly defined. I should say nondefined. Just the concept.

Judge WILKINS. I would probably, without having the specific safety valve you are talking about, opt for no change because I don't think we are going to generate enough attention to this problem soon again to provide a solution to it. If some solution comes along that is not a good solution—and some safety valve approaches will not be good solutions because if they turn on too much discretion, or if they turn on too much prosecutorial discretion or too much judicial discretion, it is just kind of a band-aid—then we are going to open up the problem, reintroduce unwarranted disparity, which is back to the old problem that we are trying to solve with the mandatories or with the guidelines.

Mr. SCHUMER. Would there be some safety valves that would be better than no change?

Judge WILKINS. I have offered you one.

Mr. SCHUMER. Well, that is not quite a safety valve, but——

Judge WILKINS. Well, you see, I think it is, Mr. Chairman. That is what I am trying to get across. What it says is where you have established facts on the record that this person is not your typical offender, and you must have had that person in mind when you were talking about mandatories, but is a low-level—the example I

gave was an errand boy for the drug conspiracy, that person is facing 10 years. I want this person to go to prison. I think everybody that looks at it objectively thinks this person should go to prison because he is involved in a major drug conspiracy. But the involvement is only on a peripheral level. The safety valve applies to that person and would allow a sentence, as I say, with two mitigating factors the guidelines recognize, and only two apply to receive about a 5-year sentence without parole. That is a stiff sentence for that type of offense, in my judgment.

Mr. SCHUMER. OK. I understand that. It is just that it is a different conceptual framework. I mean the safety valve to me implies the guidelines, or the minimum is applied and then there is some separate procedure that says, wait a minute. This was a miscarriage. You get a second bite at the apple to prove under certain limited circumstances that it was overdone. It is a little different than yours.

And I don't know if it is workable, I really don't. I am just throwing it out here.

Judge WILKINS. Well, you see, we have been into this now for 8 years. I know when we start talking in broad generalities and principles and desirable goals, and then you get down to the actual writing, as you do with legislation, you know how difficult it gets and you start making fine cuts. If you are talking about an individual who is a first offender, how are we going to define that first offender? No contact with the criminal justice system. A person who wrote a bad check at age 17 for $10 at the 7-Eleven. Is that going to disqualify that person from the safety valve.

See, the guidelines use a proportional approach——

Mr. SCHUMER. I understand.

Judge WILKINS [continuing]. Taking in the criminal record and so forth.

Mr. SCHUMER. It is a tradeoff, flexibility versus certainty. But I don't know if it is undoable.

I just had one final question for you, Judge. It is my understanding that the Commission recently rejected an amendment to the guidelines that would have, in effect, given judges the power to move on their own, sua sponte, to reduce sentences for defendants who gave substantial assistance to the Government. Right now that power is held by prosecutors.

Why didn't that happen? Why was it rejected?

Judge WILKINS. First of all, as you know, the statute provides that the motion must be made by the prosecuting attorney——

Mr. SCHUMER. I know. Right.

Judge WILKINS [continue]. To move beyond the mandatory minimum, and another statute directs the Sentencing Commission to have a comparable type approach to it. It has been suggested by many that defendants who would be able to convince a judge that they provided substantial assistance should get the benefit of a downward departure, or really a sentence outside the guidelines.

It was my judgment and the judgment, I think, of at least the majority of the Commissioners that this was really going to open up the sentencing system to a situation where, quite frankly, judges being unsympathetic with mandatory minimums, unsympa-

thetic with the guidelines, would simply use that as a way to get around some of the tough sentences that the guidelines provide.

Another reason, Mr. Chairman, and just as important, it would have no effect on the judge's ability to depart beyond a mandatory minimum.

Mr. SCHUMER. I understand.

Judge WILKINS. Because the statute requires a prosecutor's motion. So there may be some movement there if we were to adopt that within the guideline ranges, but never below the mandatory. So it would have minimal effect anyway.

Mr. SCHUMER. Thank you, Judge. Mr. Barr, did you find any evidence when you were Attorney General that violent criminals either were not being given jail terms or were given reduced jail terms because of the minimum mandatory law and first-time drug offenders taking their places in prison?

Mr. BARR. First, emphatically, in the Federal system there is no displacement going on. Violent criminals are not being released because of drug prosecutions and convictions.

Mr. SCHUMER. What about at the State level that you might have familiarity with?

Mr. BARR. I looked at this somewhat at the State level. There is a problem, of course, with violent criminals, in my view, being cycled through the revolving door too quickly. However, I do not think that there is any appreciable displacement going on in the United States. I think the best case for it was made in Florida. I think a study was done in Florida.

Mr. SCHUMER. I think it has influenced the Attorney General some. I just gather that. Haven't talked to her about it.

Mr. BARR. I think that's a fair——

Mr. SCHUMER. But it's in her statements. Yes.

Mr. BARR. That is probably a fair assumption. The study was done in Florida. I am not a student of that study, but statisticians who have looked at it for me have told me that it is very inconclusive and a lot more investigation would have to be done, just in Florida, to determine whether in fact there is displacement going on.

But I would be very surprised anywhere in the country if there was any significant displacement going on right now.

Mr. SCHUMER. Do you see a distinction between drug and gun offenses when it comes to mandatory minimums?

Mr. BARR. I think they both require stiff mandatory minimums but for different reasons. I think one of the reasons we want drug mandatory minimums is to penetrate the organization, as I discussed. Guns, I think the level of violence has reached such a height that we need the most severe deterrent we can possibly muster to prevent people from carrying guns.

Also, I think it is a good proxy for violent, people with a propensity for violence, who are the people we should be targeting on incapacitating by putting in prisons, and therefore I think that the incapacitation argument is strongest for people who are carrying firearms.

Mr. SCHUMER. Thank you. I want to thank both witnesses myself.

Mr. Schiff.

Mr. SCHIFF. Thank you, Mr. Chairman. Judge Wilkins, there has been a lot of discussion about the so-called first offender, nonviolent offender—first-time offender, nonviolent offender in prison under mandatory minimum sentences. Do you have any figure as to how many individuals that actually is?

Judge WILKINS. I could supply that for you. I would hate to offer——

Mr. MAZZOLI. I have asked for that for weeks and weeks and months. Nobody seems to have that.

Mr. SCHUMER. Is that in the Federal system?

Mr. MAZZOLI. Yes.

Judge WILKINS. Well, I have my staff director—I am sure we can provide that figure. We have all the data.

Mr. SCHIFF. If you could, at your——

Judge WILKINS. What is it?

Mr. SCHUMER. In prison? Yes, it is not available.

Mr. MAZZOLI. We are looking for the choirboys that are in there.

Mr. SCHUMER. It is available—if the gentleman would yield—as I understand it, because we have looked for this for a while, they could do it for the last 2 years, but, obviously, that is not the whole population of the Federal prisons. They have not done it for the 2 years, but it is doable. Before that they didn't keep records as to why the sentence occurred and whether there was a minimum. A mandatory minimum. Sorry.

Judge WILKINS. I can tell you this. Take our definition of what we call zero criminal history points, which means no conviction or convictions that are now stale because of the passage of time, 10 or 15 years, depending. Take those individuals and then look at whether or not they had an aggravating role in the instant offense for which they are serving time, whether or not there was any violence, or whether or not there was any gun used. You put those together and about 34 percent of the prison population of those sentenced in 1992 have none of these aggravating characteristics.

But again, you have to be careful with that because it is our definition of a zero point criminal history. You will find some people in Federal prison who have a criminal history of some time ago that because of the operation of the guidelines it is no longer counted as an aggravating factor.

Mr. SCHIFF. And again, as you said, that gets in the definitions too. I am not sure we would all agree on who is nonviolent, as you have heard in this discussion.

Judge WILKINS. That is a very difficult thing to define, and I know this committee would be very careful in how it defines these things. We need to know the question exactly. Then we would try to provide you the absolute data under very strict research principles, because these things get thrown around too loosely sometimes.

The General Accounting Office's study seems to suggest that those who should get the mandatory minimum sentence, by and large, did get that sentence, or I should say at least that sentence since many times the sentence was actually greater. It is my understanding that the Commission's own report included the opposite, or in the direction of the opposite. How would you explain any difference?

I think the GAO report said that—in what—in 85 percent of the time when the mandatory was applied it was applied correctly. I would hope it would be higher than 85 percent. But what our studies did show is that in many cases, and it is a difficult call, but I would venture that in at least 25 percent of the cases the mandatory minimum applied to this defendant but for one reason or another was not sought.

Indeed, in one area where the statute requires that the mandatory minimum is double because of a prior record—specifically because of a prior felony drug conviction—that double mandatory penalty was sought in only 38 percent of the cases that it could have been sought. It is not difficult to look at that figure because you either had the prior record or not. It is not a judgment call of whether or not I can prove the case and so forth.

So I think there are legitimate reasons, of course, why mandatory minimums are not applied to a given defendant in a given case, and Attorney General Barr has indicated some of those. I do believe, and I know from my own experience, that many times some prosecutors look at the case and they say I need a plea, I won't charge a mandatory. It is just an ease to move the case out of the door, or sometimes they believe the mandatory is simply too harsh. We know of some districts where mandatory minimum penalties are circumvented as a matter of course, whereas, of course, I would suggest if we got the law on the books it ought to be applied uniformly and consistently throughout the country.

Mr. SCHIFF. That brings me to you, Attorney General Barr. You have spoken strongly in favor of structure in the system. And, of course, General, I agreed with you at the very beginning of the hearing. I stated my support for sentencing guidelines as something that community standards of some kind in all of sentences.

But I think it does raise the question what is the structure on the prosecutor in the sense of that same community standard? As a former career prosecutor, I understand that it is not always possible to charge every case in the same way. There could be differences in evidence, strength of evidence, along with everything else we have heard.

But I haven't heard what really promotes the same kind of cohesion among prosecutors in the system so that there is not great disparity created between differences between opinions of the local U.S. attorneys as there used to be great disparity between the opinions and philosophies of different judges.

I wonder if you might address that.

Mr. BARR. The principal effort to enforce some uniformity was the Thornburgh memorandum, and from time to time there were criticisms, mostly from judges saying that they thought the Thornburgh memorandum was not being followed. The Sentencing Commission started looking into that. Some jurisdictions such as the Eastern District of New York were following policies on couriers, for example, that seemed to depart from the Thornburgh memorandum. And the Justice Department is constantly taking action to prod the prosecutors to adhere as best they can to the Thornburgh memorandum.

But I think we have to recognize that because of resource decisions you will always have to have discretion exercised by a pros-

ecutor. A prosecutor cannot prosecute every single potential violation in the district. He has to go after the things he considers the most important.

So you may have a district where marijuana is the number one drug problem. There the threshold for prosecuting marijuana production may be different than the threshold in a jurisdiction like D.C. where crack may be the number one problem.

And the Eastern District of New York would say that "If we prosecuted every single courier then we wouldn't be able to prosecute some of the other important drug cases where the payoff is much bigger." So unless we are willing to give unlimited resources, there have to be those kinds of decisions made. That leads to discretion being exercised and disparities arising throughout the country.

In my view, that kind of discretion is far superior and does less damage to the system than shifting that discretion back to judges.

Mr. SCHIFF. You are not surprised if the judges don't entirely agree with you?

Mr. BARR. That is what the whole debate is about. And the judges, in my view, the judges had their run at discretion and the results were not good for society.

Mr. SCHIFF. Let me ask you two instances and then I will yield back to the chairman. Situation—someone who is participating in trafficking, so we are not dealing with culpability, is so far down the ladder, wants to cooperate with law enforcement when apprehended, has nothing to offer. You know, can't tell them a darn thing. The person above them, a bit more involved, has some information for law enforcement, offers that information and thereby gets a lower sentence than the—under a substantial assistance motion by the prosecutor—than the bottommost individual. For the bottommost individual, could there be some relief? Or is that just a you take your chances kind of thing, and if you can't offer anything of use, we are very sorry but there ought not be any relief?

How would you view that situation?

Mr. BARR. First, as to these much ballyhooed cases of couriers coming in and not having anything to offer, I would like to see some of them. I think the fact that Chairman Schumer had some difficulty scrounging up empathetic cases show that these are sort of hypothetical cases that are talked about as debating points. But couriers usually do, are in a position to provide assistance.

Mr. SCHIFF. Everybody knows something, in other words.

Mr. BARR. Right. Second, in my view, as to a courier, the 5-year or the 10-year penalty, depending on quantity, is a just sentence for that individual. That is justice in that case. The fact that for someone higher up, we are sometimes willing to reduce the sentence, essentially give the guy a break and maybe give an "unjust" sentence—unjust in the sense that it is too lenient—to that individual in order to go after someone that we consider more important, that happens all the time in numerous contexts in law enforcement and I don't think it affects the justice of the sentence given to the lowest level person.

But you raised a point that is sort of a permutation of that that I want to address, and that is do you give the guy up the ladder a break for testifying against people down the ladder.

Mr. SCHIFF. That was my second point. The allegation has been made, I do not know if it is true, or if it is true, in how many cases it is true. The suggestion has been made that the scenario you gave exists not just upwards, which makes some sense, I think, to everybody, but downwards. In other words, if you are at this level and you will testify to bring in the people who are underneath you, you will get the break, they will go to prison longer.

I wonder if you have any feeling whether that is a correct criticism of the system?

Mr. BARR. I don't think it is a correct criticism. I would be very surprised to see any appreciable number of cases where that occurs. I think what you will find is two different kinds of situations, one where there is a dispute as to who is more culpable. As you know, when a drug organization gets busted everyone is pointing fingers at everybody else, and I think there may be a lot of cases where the guy says, "Hey, I was just the little guy and that guy is the big guy." But there is a dispute as to that.

The other kind of case I think you will find—you shouldn't jump to the conclusion, and I am not suggesting you are, but people should not jump to the conclusion that just because in a particular prosecution a top guy got 2 years and a bottom guy got 5 years means that the cooperation by the top guy related to that case. The cooperation by the top guy could be turning in—giving valuable information against another organization, perhaps his supplier, the Cali cartel. That prosecution may not take place for another 3, 4, 5 years.

So the cooperation can be as to a broad range of things, and I certainly as a prosecutor would not take substantial cooperation to be turning in someone who is below you.

Mr. SCHIFF. Let me just say I would agree with that. And I don't know if it occurs. It is merely one of the things that I have been told over and over again at least why we are having these hearings.

I want to thank both witnesses, and yield back to the Chair.

Mr. SCHUMER. Thank you, Mr. Schiff. Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman. And we are all grateful to hear the testimony of these two witnesses. I think it is rather encouraging, at least to someone who worries about this issue that all the witnesses say the system needs fixing. At least—Mr. Barr probably doesn't think very much should be done, but Judge Wilkins sees some flaws in the system, and certainly the previous witnesses, the women, would like to make some major changes.

Something you said, Judge Wilkins, interests me. A prosecutor can look at a case before he has made his decision on what to charge and he can decide not to bring a drug charge. Instead, he can bring a charge based on some other aspect of the crime, such as carrying a gun, to avoid the impact of the mandatory minimum. Isn't that correct? Isn't that what you said, Judge Wilkins?

Judge WILKINS. Yes, sir. I did say that, Mr. Edwards. The charge selection many times can be used, or sometimes at least can be used to avoid——

Mr. EDWARDS. The prosecutorial authority.

Judge WILKINS. Either that or failure to give notice as to the quantity of narcotics being sought in a particular case by the Government. That also triggers mandatories, as you know.

Mr. EDWARDS. We have heard that too, and we have heard that people who have money and the best lawyers in town can do a lot better than the poor person, often a minority, who doesn't know how—he gets a public defender who doesn't know how to plea bargain and who doesn't know how to write all of the important briefs that apparently have some influence. How do you respond to that?

Judge WILKINS. Well, quite frankly, from my experience I think our Federal public defenders do an excellent job throughout the country. Many times they are more experienced than the private attorney.

Mr. Edwards, I will have to say I don't really see that as the major problem that I am trying to address. It was at one time. But with the advent of sentencing guidelines, the guidelines operate not so much on the charge selected by the prosecutor, but act on the real underlying misconduct of the offender who is in the courtroom to be sentenced. This disparity that can result from a lot of charge bargaining and selection and so forth is minimized because of the operation of the sentencing guidelines.

My primary objective here today is to say the mandatories are here and they work today under the guidelines as aggravating—I mean the guidelines aggravate. But the guidelines are not allowed to fully operate because mitigating factors are not allowed to be recognized when a mandatory minimum offense statute is charged.

Mr. EDWARDS. Well, why do we have to have the mandatory minimums as long as we have the guidelines which in themselves have that aspect of mandatory minimums?

Judge WILKINS. You are correct. We lose sight sometimes of the fact that our guidelines are mandatory in nature. As I testified in my opening statement, if somehow the minimum mandatory sentences were abolished today, the guidelines would still operate and the same sentences being imposed today in the Federal courts would be imposed tomorrow under the guidelines. So there would be little change in actual practice in the courts.

What could change, of course, over time is that the guidelines could be modified, reduced or increased as far as the punishment is concerned by the Sentencing Commission. I understand that would be a concern of this Congress. That is why I have suggested in this proposed legislation that you, the Congress, tell us the starting point with the mandatory minimum statute, which would be in concrete and could not be changed by the Commission. Then we would be allowed to aggregate up or mitigate down as the facts would dictate.

Mr. EDWARDS. Well, the guidelines can be changed by Congress anytime Congress wants to change the guidelines.

Judge WILKINS. They certainly can.

Mr. EDWARDS. Right.

Judge WILKINS. Certainly can.

Mr. EDWARDS. So I think you have made a case for what I said. We could eliminate the mandatory minimums that we are talking about that some of us feel have caused a lot of trouble because this issue is being handled very nicely by the Sentencing Commission.

Judge WILKINS. They are handled today.

Mr. EDWARDS. Right.

Judge WILKINS. And the same sentences, I would say, would result tomorrow even if they were abolished today because of the structure of the sentencing guidelines.

Mr. EDWARDS. I think we ought to make it a matter of record that when Congress puts into a criminal law a mandatory amount that a person must serve so many years or something, that amount is usually not the result of the hearing process we have here in Congress. It is sort of an arbitrary thing put into the original bill. Nobody ever questions it. Whoever thought up the bill puts it in. Well, I will put in 5 years. I will put in 10. And that is it. And that is never—I have been here a long time. I have never seen any thought given in a committee such as this or any other committee to whether we ought to look at the sentence and see what effect it is going to have on society. Is that too long or is that not enough? And get some experts in to talk about it. It is pretty important.

The last question I have is, since the celebrated war on drugs and the mandatory, a lot more mandatory minimums and the Sentencing Commission have come into being, starting I believe in about 1980. Then, we had maybe 25,000 Federal prisoners. Now we have about 57,000. We will have to correct this, but I am within——

Mr. SCHUMER. Eighty thousand.

Mr. EDWARDS. All right. Now we have 80,000 and the calculations are we are going to have 117,000 by the turn of the century and so on. The same increase going on indefinitely.

Is that any kind of a serious problem, Mr. Barr?

Mr. BARR. No, I don't think it is a problem.

Mr. EDWARDS. No problem.

Mr. BARR. I think, first, that the mandatory minimums were carefully designed by this committee. A lot of time was taken with DEA as to the threshold amounts and as to the appropriate sentences. They were carefully thought out.

Second, I think that we backed off mandatory minimums in the 1970's. We did away with mandatory minimums, and it was during the 1970's that the drug problem got way out of control and a lot of damage was done to our society. And I think that we are on the right track with a very tough law enforcement system, including mandatory minimums, and the only problem in this country right now is not at the Federal level, it is because the States haven't caught up to the Federal level.

And it does not shock me that in a country of—now approaching 300 million people that the Federal Government has about 80,000 people in prison. That is not any disparity, in my view, considering that we have the highest crime rate of any advanced country in the world.

Mr. EDWARDS. Thank you.

Judge WILKINS. Mr. Edwards, could I comment on something you said, very briefly?

Mr. EDWARDS. Yes. Please.

Judge WILKINS. The Sentencing Commission has the most extensive data set ever assembled by any Federal agency or State agency. We place ourselves at your disposal to respond to questions

seeking information, facts and data, so that when decisions are made on mandatory minimums or any other area of the criminal justice sentencing system you can have as much information as you can gather so that the decision will be informed.

We are here and we have data and we can provide it for you. I might say that in one of the statistics I gave to Mr. Schiff—the zero criminal history category—we have extensive data there. One thing we are missing that is a factor that would change things, I am sure, is that we don't know what is the criminal history of foreign nationals coming into this country. So that figure of 34 percent would be changed somewhat by that. But we could probably, with some extensive research techniques, exclude those people and see what it would be if we didn't include those and so forth.

But at least we could help try to identify the safety valve or my approach or whatever approach we are looking at so we all have all the information we could possibly gather.

Mr. EDWARDS. Wasn't the parole system a safety valve?

Judge WILKINS. Well, if it was designed to reduce prison sentences, it certainly was.

Mr. EDWARDS. Thank you. Thank you, Mr. Chairman.

Mr. SCHUMER. Thank you, Mr. Edwards. And first, Judge Wilkins, I am glad you added in the foreign nationals because that is what I think was the great disparity between the statistics your Sentencing Commission gave us on——

Judge WILKINS. There were other problems too.

Mr. SCHUMER. Right. I understand.

Judge WILKINS. It was the question—you asked the question whether or not a prior arrest with no convictions should be included or not, and it was under some runs, it wasn't under others.

Mr. SCHUMER. Right.

Judge WILKINS. But again, I think it was different people being asked different questions.

Mr. SCHUMER. Yes.

Judge WILKINS. But we can get on the same wavelength and have all the facts given to you.

Mr. SCHUMER. Right. And that is what I want.

I wanted to compliment you and the Sentencing Commission for being always available with the data and everything else. We appreciate that and your interest and concern.

Mr. Mazzoli.

Mr. MAZZOLI. Thank you very much, Mr. Chairman. It is really excellent hearings. I want to thank our two witnesses today for excellent testimony.

Judge Wilkins, I wrote down just a few things as you were speaking which impressed me a great deal. You said what we are looking for is efficiency, effectiveness and fairness in the application, and I think that is what this panel is looking for too, candidly. So I think your idea is something that we could study. The gentleman from New York, our distinguished chairman's idea is something we should study. And I think we could, maybe, come up with something like that.

I probably differ with you a little bit on the fairly frequent use of the term minor or peripheral drug activities and minimal activity with regard to some drug activity, or minimal contact. It just

seems to me that we may be minimizing something which is just tearing America apart. I mean by the very nature of our terminology. Saying he is just a minor actor. He is just a bit player. He is just a walk-on. You know, he is only a peripheral person.

Unless you had the drug courier, you don't have the stuff gotten into the country and therefore don't get it out into circulation. And if you don't have that, then you don't have the guy who shoots himself or ingests it, and we don't have people killing one another in the streets. So I mean I think we have to be just a little bit cautious in how we minimize that person's responsibility for the ultimate of the horrible violence and killing and wasting. And Mr. Barr had said the lives and the treasures and the spirit of our country are at risk as a result of this.

So, anyway, I just was wondering. I just wonder if you, in your mind do you have a picture of one of these minor participants? You know, could you describe that he or she looks like?

Judge WILKINS. This mitigating role is recognized under the guidelines today in many areas.

Mr. MAZZOLI. No. But I mean can you describe to me the person who would fit the role of minimum or peripheral.

Judge WILKINS. Yes, sir. I can. But I wanted to say, first of all, the sentencing guidelines today identify a mitigating role for some defendants, and so it is just not the judge saying, well, you look kind of minor to me. I am going to give you a break. It doesn't work that way.

In fact, of all the drug cases, of all the thousands of defendants, the judges say you are deserving of a mitigating role based on the facts only in 16 percent of the cases,

Mr. MAZZOLI. Good.

Judge WILKINS. And these are the types of individuals who——

Mr. MAZZOLI. What would that person look like?

Judge WILKINS. They are on the edge of the conspiracy. It is the girlfriend of one of the drug dealers who is there, who perhaps answers the telephone, who may run errands. It is the boat offloader who is paid 500 bucks to offload this boat and that is it. He walks away.

It is those people who are lower than the average participant. They have got nothing to do with any policy decisions, nothing to do with the money, nothing to do with any decision. They are there as functionaries.

Mr. MAZZOLI. Could I go back to something, Judge, that is—I think it is very important. And I don't want to be the burr under the saddle here, but I keep saying we need to have information. Can you tell me how many of those kinds of people, the person who offloads—he is like a day laborer, and he said instead of offloading tomatoes we will offload cocaine, and he walks away. I mean how many of those really wind up in the system? How many are we really talking about? How many girlfriends of guys who had nothing, except that they loved this person and they have no other contact—how many of them are we talking about?

Judge WILKINS. Well, I think we are talking about a sizable number.

Mr. MAZZOLI. You think so?

Judge WILKINS. Yes, sir.

Mr. MAZZOLI. Who wind up in the system?

Judge WILKINS. Yes, sir, who wind up in the system, are prosecuted——

Mr. MAZZOLI. And who are therefore busted under various minimum——

Judge WILKINS. That is right. And should be. Should be prosecuted. Should be sentenced. And couriers need to be punished.

You know we have got the foreign nationals coming in every day in our major port cities, bringing in large quantities of narcotics, and they need to be arrested and prosecuted and sent to prison. The question is where do we achieve crime control? By that person staying in prison for 10 years? Or can we achieve it more efficiently through some reduced sentence?

Mr. MAZZOLI. Can I just suggest something? I will be really quite honest with you. I am astonished that you all who are advocating major fundamental change in here come in armed with no statistics whatsoever. Everything is, well, we think there is a lot of people, we think that there is a whole bunch of these folks, and there is quite a lot of them but we will have to get the data for you later.

Nobody—and this is the second time we have been through this routine. Nobody but nobody comes up, and the chairman himself has said he begged for the egregious cases and found only two or three that fit that kind of description.

Judge WILKINS. This is the first time I have been through it. You just asked me how many minimal or minor participants would there be and I told you 16 percent. That is what our figures show. That is who I am talking about, as far as the mitigating role is concerned.

Mr. MAZZOLI. And those 16 percent, you would tell me then, Judge, with respect, would be the kind that offloaded the ship and the girlfriends?

Judge WILKINS. And others who have——

Mr. MAZZOLI. And others like couriers, like mules—right?

Anyway, Mr. Barr——

Mr. BARR. Congressman, could I say something first?

Mr. MAZZOLI. Please. Go ahead.

Mr. BARR. I am not advocating any change to the system. I want it clear I am satisfied with the existing system. I do not think it is a significant problem; that is, the hapless person that we would all feel got unjustly treated by the system. I don't think there are sizable numbers at all.

However, if the committee comes to that conclusion and wants to put in a safety valve, then what I am asking the committee to do is consider the impact that has and to——

Mr. MAZZOLI. Exactly.

Mr. BARR. OK.

Mr. MAZZOLI. And I think that is what—the chairman is just looking for something to put our head on. You know, I remember when I was in law school the professor said "Give the judge or the jury something—a peg to hang their hat on. Give them some reason for doing something." But I will be quite honest with you. At this point I haven't really seen the data, the hard numbers, that would indicate that there are miscarriages of justice beyond the

rare few, and we have had a couple of them, perhaps, in this room today, I don't know.

Mr. Barr, I have one other question. Yes?

Mr. BARR. You know it is interesting. The Bureau of Prisons recently went through an exercise to try to identify people who they would be willing to put back out into the community, that they would feel sufficiently comfortable to put back out into the community, and they came up with 1,600-odd people in the entire system. That suggests to me we are not talking about very many empathetic, egregious cases in the Federal system.

Mr. MAZZOLI. And then to show—and I will wind up on this point, because I remember reading something. I couldn't find it in my notes here. That study where they found just a handful of people that they would feel comfortable enough to really dump on society, which to me demolishes the myth that we have a bunch of choirboys that are in our Federal prisons.

But let me just go on to this. On July 7, 1993, in the Washington Post, what appears to be like a front page story, entitled "The Drug War Locks Up Prisons," and it devoted itself primarily to the situation in Florida. Now these statistics are used by the writer, a writer by the name of William Booth, and they are not used editorially or attributed to something. These are used by him in his writing as if they were standard fact.

Fact: 66 percent of the inmates in Federal prisons broke drug laws. Sixty-six percent of the inmates in Federal prison broke drug laws. Does that sound realistic?

Mr. BARR. I think it is about 62 percent. But that doesn't mean that they are in there just for the drug violation. They could be in there for other activity and there was a drug count as part of their conviction.

Mr. MAZZOLI. Now, let me try this on, and maybe somebody can explain this. It seems like it is very inconsistent.

In Federal prisons 70 percent of the inmates, in Federal prisons 70 percent of the inmates have no history of violence.

Mr. BARR. I don't know. The figure that I used was—it is analogous to the figure you used before, of 93 percent in the State system or either violent criminals or recidivists. The figure that I used at the Department of Justice, and it may be dated by a couple of years, was 88 percent in the Federal system.

Mr. MAZZOLI. If I were to go into a Federal prison, and there is one in Lexington, and walk in and take the first 10 people that walked in, 7 of those 10 would be choirboys?

Mr. BARR. No.

Mr. MAZZOLI. Judge Wilkins.

Judge WILKINS. Well, I don't think they would be choirboys.

Mr. MAZZOLI. What does that mean?

Judge WILKINS. And I don't know this fellow's statistics, but I do know——

Mr. MAZZOLI. Well, then I think we need statistics, my first point.

Judge WILKINS. The question that you put to us is what is the percent of Federal prisoners now in the penitentiaries throughout the country that have a prior history of violence? I assume by that you mean a prior criminal history of violence.

Mr. MAZZOLI. I would ask you.

Judge WILKINS. No. No.

Mr. MAZZOLI. You are the expert. I would like to figure out what is violence. What does that statistic mean, if it is a reputable statistic? What does violence mean in the context in which 70 percent of Federal prisoners have no history of violence?

Judge WILKINS. That is some study you just brought up. I don't know whether it is correct or not.

Mr. SCHUMER. Would the gentleman yield?

Mr. MAZZOLI. I would like to find out. I am not sure where Mr. Booth got his data.

Mr. BARR. That data is available. In fact, I recently saw a Department of Justice study and I looked at it this morning. I just can't remember off the top of my head the figure that is in there for violent offenses.

Mr. SCHUMER A good percentage are people of white-collar crimes, embezzlements and all of that, who would almost exclusively fit into the nonviolent category. I know that. But I don't know the number either.

Mr. BARR. Correct. But that doesn't mean they are choirboys.

Mr. SCHUMER. Right. They are certainly not choirboys. Or choirgirls.

Mr. MAZZOLI. And they are also not the people the Government would feel comfortable in releasing to the streets. If they would release 1,600 to the streets, then where are the other 65,000 or 67,000 people. That means that they are nonviolent and they have done nothing.

I am really curious. These statistics appear totally contradictory, and I think until we can get to the bottom of them, and I am glad our chairman is going to ask for some clarification, we are operating really—and I will complete my statement on this. When Mr. Barr said we cannot allow mythology to draft policy, and I think that is what we could do if we are not really careful.

Thank you, Mr. Chairman.

Mr. SCHUMER. Thank you, Mr. Mazzoli. This has been, so far, a really outstanding hearing in terms of bringing out issues. I want to thank both Judge Wilkins and Attorney General Barr, Mr. Attorney General Barr, for excellent testimony that I think helped us think on this.

So, gentlemen, we appreciate it. You have been here a long time. I was going to suggest you sit in also on the next panel, but you have done your duty.

Will the final panel come forward? And I first want to thank all of them for waiting as long as they have, and we appreciate it. We have been going on about 4 hours.

OK. Let me introduce our panel.

The Honorable Vincent Broderick is the chairman of the Committee on Criminal Law of the Judicial Conference of the United States. He continues to serve as the U.S. district judge in the Southern District of New York, a post which he has held since 1976. And before taking his New York Federal judgeship, Judge Broderick served as commissioner of the New York City Police Department. He is a distinguished person who cares a great deal about the law. We welcome you here, Judge.

Judge BRODERICK. Thank you.

Mr. SCHUMER. Tim Mullaney was supposed to be here, to provide a bit of an opposite point of view, from the National Legislative Committee of the Fraternal Order of Police, and I apologize to members. We won't have that much of a diversity of viewpoint here because he is not here. But the viewpoint has been very well represented. He is opposed to changing the law.

Mr. Neal Sonnett is the chairperson of the Criminal Justice Section of the American Bar Association. He currently works as a partner with Sonnett, Sale & Kuhn——

Mr. SONNETT. Kuhne.

Mr. SCHUMER [continuing]. Kuhne, a Miami-based law firm. Before entering private practice Mr. Sonnett served as an assistant U.S. attorney and chief of the criminal division for the Southern District of Florida.

And finally, the Honorable John Walker is a judge on the Court of Appeals for the Second Circuit, and he is the president of the Federal Judges Association. He also served as Special Counsel to the Administrative Conference of the United States and as Director of the Institute of Judicial Administration.

I want to thank all of you for coming and for waiting patiently. Your efforts are very much appreciated. We have received your prepared remarks, which will be read into the record, and each of you will have 5 minutes for your presentation. Maybe we will do, just in deference to the invisible robes, first Judge Broderick, Judge Walker, and Mr. Sonnett.

Judge Broderick.

STATEMENT OF JUDGE VINCENT L. BRODERICK, CHAIRMAN, COMMITTEE ON CRIMINAL LAW, JUDICIAL CONFERENCE OF THE UNITED STATES, WHITE PLAINS, NY

Judge BRODERICK. Thank you, Mr. Chairman, and thank you for this opportunity to appear before this committee.

I am here to express the complete and unmitigated opposition of the Federal judges of this country to mandatory minimums. We have had in effect since 1984—or at least they have been in effect since 1987; they were passed in 1984—the sentencing guidelines, and you heard earlier from Chairman Wilkins.

The sentencing guidelines were designed to get Congress out of the business of micromanaging sentencing, and I just want you to consider the whole concept of the sentencing guidelines. The concept was to structure sentences and to make that structure a close-to-binding structure. Judges would have to follow it.

The Sentencing Commission was charged with preparing sentences which were proportional one to another, which were honest sentences because parole was abolished and a large part of "good" time was abolished, and they were also to be directives, in effect, to sentencing judges. And then—and this was the most important part of all this—for the first time we had appellate review of sentences and we introduced people like my friend over here on the court of appeals, Judge Walker, who will review what we sentencing judges do.

This is a structure which I certainly concede aroused a furor in the judges' community. But I can assure you right now that so far

Office of the Attorney General
Washington, D. C. 20530

January 15, 1993

MEMORANDUM

LIMITED
OFFICIAL USE

TO: William Sessions
Director, FBI

FROM: William P. Barr
Attorney General

SUBJECT: OPR Report on Alleged Misconduct

As you know, for quite some time now various complaints about misconduct concerning you have been made by individuals within the FBI. As is their duty, the Department's Office of Professional Responsibility (OPR) and the Bureau's Office of Professional Responsibility (FBI/OPR) have been jointly investigating those allegations. You were interviewed concerning the allegations as part of the investigation and provided a full opportunity to explain the actions in question. OPR and FBI/OPR have now completed their investigation, and provided me with a Report dated January 12, 1993, containing findings and recommendations. I have asked OPR to provide you with a copy of the Report by Tuesday, January 19, 1993, with any redactions necessary to preserve commitments of confidentiality.

This memorandum is to advise you that I have accepted the findings and recommendations of that Report and to direct you to take certain remedial actions. The evidence supporting the Report's conclusions is overwhelming and your explanations, where provided, are wholly unpersuasive.

Failure to Meet Tax Obligations

I am most troubled by the Report's conclusion that you engaged in a sham arrangement for the clear purpose of improperly claiming an exemption from the obligation to pay income tax on your government-provided home-to-work transportation. The law is clear that senior government officials who are provided chauffeur-driven limousines for commuting from home to work are required to pay income taxes on the value of that fringe benefit. The value of this benefit can be significant, amounting to several thousand dollars a year. The obligation to pay taxes on this benefit exists even where home-to-work transportation is independently justified for security reasons. Thus, throughout the government, agency heads, including those with security

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details, pay taxes on home-to-work transportation and other authorized personal use of government vehicles. Within the Department of Justice, the Attorney General, Deputy Attorney General and DEA Administrator all pay such taxes, and I think it is clear that the FBI Director has the same obligation.

The Report indicates that in the Spring of 1990, you sought to avoid paying these taxes on the theory that your limousine falls within a narrow exemption for "vehicle[s] which, by reason of its nature (i.e., design) is not likely to be used more than a de minimis amount for personal purposes." Under IRS regulations, this category of exempt vehicle includes such vehicles as ambulances; hearses; cement mixers; and clearly marked police cruisers if they are subject to limits on personal use. This category can also include certain unmarked police vehicles if those vehicles are assigned to "law enforcement officers" who regularly carry firearms, and if any personal use of such vehicle is "incident to law enforcement functions, such as being able to report directly from home to a stake out or surveillance site, or to an emergency situation." This exemption was clearly not meant for chauffeur-driven executive limousines, but rather for police officers and agents who take their cruisers (marked or unmarked) home with them in order to be able to respond to tactical situations.

The Report finds that you sought to take advantage of this exception in an improper manner. You apparently obtained a legal opinion that you could use this exception if you regularly carried a firearm or maintained one in close proximity to your person. (I must say, parenthetically, that this opinion was transparently wrong, and I am surprised that you would have accepted it at face value. Even if regularly carrying a firearm made you a "law enforcement officer" for purposes of the regulation, it is clear that your chauffeur-driven limousine was not the type of vehicle that could qualify -- the personal use that you were authorized to make of the vehicle was not limited; the portal-to-portal service you were given was not "incident to a law enforcement function"; the car did not remain at your residence for purposes of emergency response to a tactical situation; nor would the Director normally be expected to personally respond to the scene of such tactical situations.) But even accepting the reasoning of the legal opinion, you plainly failed to comply with its terms: far from regularly carrying a firearm, you simply had an unloaded gun in a briefcase locked in the trunk; the ammunition was apparently kept in a locked safe at Bureau headquarters. Moreover, despite repeated attempts by FBI staff to schedule it, you refused to take the training required by FBI regulations for those carrying firearms.

Federal law enforcement officials have a special obligation to be scrupulous in meeting their federal tax obligations. The notion that you could convert an executive chauffeur-driven

limousine into a tactical police vehicle simply by keeping an unloaded gun in the trunk does not even pass the "red face test". You must have known that you did not qualify for the law enforcement exception. Given that you are a former US Attorney and Federal judge, and that you are currently Director of the premier federal law enforcement agency, I must conclude that there is no excuse for your conduct.

Improper Use of Government Funds for Personal Travel

OPR and FBI/OPR also found a pattern of abuse of travel by you resulting in the use of government funds for clearly personal travel on a number of occasions. Among other things, it is evident that you and your wife used the FBI plane to make personal trips and then sought to characterize these trips as "official" to avoid reimbursing the government. For example, you have made a number of extended trips on the FBI plane to San Francisco to visit your daughter during holiday seasons. You appear to have charged this all to the government because after you planned the trips you arranged isolated functions of trivial, if any, value to the government, such as a breakfast meeting with a handful of local businessmen. The conclusion is inescapable that these functions were arranged for the sole purpose of allowing you to avoid paying for these personal trips.

In addition, the Report indicates that you abused spousal travel. Your wife appears to have accompanied you on FBI aircraft to 111 locations. Under the regulations then applicable, free spousal travel was arguably authorized where the spouse's presence is in the interests of the government and space is available for the spouse. It is apparent that these requirements were not met on quite a number of these trips; nevertheless you only reimbursed the government for one such trip. Indeed, the Report notes, as one example, that on an extended trip to San Francisco your wife attended an official breakfast that she had not been invited to and was not expected at, and, afterwards, explained to an FBI agent that she had to attend the breakfast to "justify" her travel on the FBI aircraft. (In point of contrast, I note that Attorney General Thornburgh always reimbursed the government for his wife's travel.) Indeed, it is largely because of your excesses that I amended the Department's travel regulations to generally prohibit spousal travel unless specifically authorized by the Attorney General.

The Report also cites a number of other irregularities, including your improperly claiming government per diem while on personal travel; the use of FBI cars to drive your wife to social functions, and on shopping trips and other personal errands; and the failure to account for 120,000 miles of frequent flyer mileage earned on official travel.

Travel regulations can be complex and inevitably involve the exercise of judgment. If all that was involved was one or two lapses of judgment, I would consider harping on this to be petty. But what is troubling here is that there is a clear pattern of your taking advantage of the government. I find that unacceptable, especially given the fact that the Bureau treats even a single instance of travel abuse by agents very seriously -- stiff penalties that I understand you have personally approved.

Failure to cooperate in investigation into alleged "sweetheart" mortgage

I am especially troubled by the fact that you refused to cooperate in -- and indeed affirmatively blocked -- the investigation into allegations that you received a "sweetheart deal" from Riggs Bank on your home mortgage. The inquiry was clearly an appropriate one -- in the face of the allegations that have been made, OPR has a responsibility to ascertain whether you did, in fact, receive financial favors that would not have been available to you as a private citizen. OPR must do this to determine whether you had an obligation to disclose such an arrangement or whether such an arrangement constituted a prohibited supplementation of salary.

All officials and employees of the Department of Justice -- from the Attorney General to the most junior -- have a continuing obligation to respond to the kind of legitimate administrative inquiry made here by providing the information sought. I can conceive of no legitimate justification for your refusal to authorize release to OPR of the relevant documents.

Misuse of Government Funds for Privacy Fence

Finally, I am troubled by the misuse of nearly $10,000 in government funds to install a privacy fence at your residence despite repeated warnings that the fence could not be justified for security reasons and indeed actually derogated from security.

A great deal of effort and expense goes towards protecting your security. This includes government paid for security enhancements at your residence. You were repeatedly advised that only certain types of fences were suitable for security purposes and, therefore, that government funds could only be used for those types of fences. Nevertheless, you used substantial government funds to install a privacy fence that had repeatedly not been approved for installation -- indeed, you had been advised that such a fence actually reduced your security. Thus, taxpayer money intended to enhance your security was actually used by you in a manner that reduced it.

Required Remedial Actions

As noted, I accept the Report's conclusions and recommendations. Accordingly, consistent with the Report's recommendations, I am directing the following remedial steps:

(1) The Department will issue you corrected W-2 forms for the applicable tax years that properly reflect your home to work transportation and other personal vehicle use as income.

(2) I direct that you reimburse the government for the cost of personal travel improperly billed to the government. FBI/OPR is to determine on a case-by-case basis which trips were personal.

(3) I direct that you reimburse the government for the cost of the privacy fence improperly installed at your home at government expense.

(4) I direct that you authorize the release to OPR of all documents relevant to your home mortgage.

(5) I direct that you be counselled concerning the proper use of your security detail and your official vehicle.

(6) I direct that you recuse yourself from participation in any personnel actions involving any of the individuals who conducted or cooperated in this investigation or the preparation of the Report.

I will provide a copy of this memorandum and the Report to the Counsel to the President for his information. I have delegated to Mr. Shaheen authority to decide whether, and, if so, in what manner, to release part or all of this memorandum and the Report. Until any such decision by him, this memorandum and the Report are to be treated as confidential.

cc: Floyd I. Clarke
Deputy Director, FBI

David G. Benney
Assistant Director, Inspection Division

Stephen R. Colgate
Assistant Attorney General, Justice Management Division

Michael E. Shaheen, Jr.
Counsel, Office of Professional Responsibility

Attachment 7

Office of the Attorney General
Washington, D. C. 20530

August 10, 1992

Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515-6216

Dear Committee Member:

On July 9, 1992, a majority of the Democratic members of the House Committee on the Judiciary wrote me, pursuant to section 2(g) of the Independent Counsel Statute (the "Statute"), 28 U.S.C. 592(g), requesting the appointment of an Independent Counsel to investigate allegations of wrongdoing by unnamed "high-ranking officials of the Executive Branch" (the "Letter").

The Statute requires that when I receive a request pursuant to section 2(g), I report to the relevant Committee the reasons for my decision. This letter and the accompanying report (the "Report") constitute my response to the Letter.[1]

The Letter states that the potential criminal conduct relates to:

> activities by both current and former officials to illegally assist the regime of Saddam Hussein prior to the August 1990 invasion of Kuwait, and to attempt to conceal information about potential criminal activity from Congress through the making of false statements, the nonproduction, falsification or alteration of official records and other documents, and through otherwise misleading and obstructing Congress in investigating such matters.

For the reasons stated below, and detailed in the Report, I

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[1]Pursuant to section 2(g)(4) of the Statute, 28 U.S.C. 592(g)(4), I request that the Committee promptly make public this letter and the Report in their entirety.

have concluded that the criteria for invoking the Independent Counsel Statute are not present here.

The Letter, in contrast to previous Congressional requests for the appointment of an Independent Counsel, lacks the specificity required under the Statute. The Letter fails to identify any particular person alleged to have committed a crime, or to describe any particular acts alleged to constitute a crime. Instead, it relies on vague and conclusory assertions of wrongdoing by unnamed persons -- precisely the kind of "generalized allegation[s]" that the Statute and legislative history make clear are wholly inadequate as a basis for invoking the Statute. [See p. 6, infra.]

Although the Letter is inadequate on its face, our analysis of these matters did not begin or end with the Letter. So far as we can determine, all the allegations referred to in the Letter were previously in the public domain. In fact, well before receipt of the Letter, the Department was aware of, and was reviewing and, where appropriate, investigating those allegations as they arose. Substantial review and investigation was accomplished during this process, which remains ongoing for certain discrete matters. But none of the information developed during this investigative process meets the criteria for invoking the Statute.

To respond to the Letter, career professionals in the Department have carefully reviewed not only the Letter, but also the record of the Judiciary Committee hearings on this matter (the "Hearings"), as well as other relevant information gathered by the Department in the course of its ongoing review. Further investigation was conducted by career prosecutors in the Public Integrity Section and agents of the Federal Bureau of Investigation ("FBI"), both as part of the threshold review of the Letter and as part of the Department's ongoing review and investigation of the underlying matters.

My determination that the specialized procedures of the Statute are not applicable here is based on this extensive review and analysis, and is supported by the uniform view of the prosecutors at all levels of the Department who have reviewed this matter.

The Independent Counsel Statute applies where there is specific and credible information that a "covered person" -- one of a small group of senior officials expressly listed in the statute -- has committed a crime. The Letter has not provided, nor have we found, any such information. We are aware of no evidence that would support the criminal investigation of a "covered person" in connection with the matters raised by the Letter.

Nor does the Letter raise any allegations of wrongdoing by lower-level noncovered persons that would provide a basis for applying the Independent Counsel Statute. It appears that one of the central allegations is that loan proceeds guaranteed under the Commodity Credit Corporation ("CCC") program, or commodities sold under that program, were diverted by Iraq for military purchases. This Department, the Department of Agriculture, various Committees of Congress and the General Accounting Office ("GAO") have been investigating the possibility of such diversions. No one has yet established that any such diversion occurred. But even assuming that foreign entities and private intermediaries did engage in such a diversion, we have found no evidence that U.S. government employees knowingly participated in or facilitated any such diversion, or any other criminal conduct with respect to the CCC program with Iraq. [See pp. 8-9, infra.]

Other allegations about noncovered persons relate to conduct that is simply not criminal in any way. It is not a crime for the Executive branch to set up a coordination mechanism to handle Congressional information requests. Nor is it a crime for an Executive branch agency to raise objections to, or to oppose, an informal Committee request for information. [See pp. 9-11, infra.] Still other allegations are based on erroneous factual premises -- such as the suggestion that there were improprieties in the Department's handling of the investigation of Banca Nazionale del Lavoro ("BNL"). The factual record is clear that the Department officials involved in that case acted with dedication and rectitude, and there is not a shred of evidence that any Department employee acted improperly. [See pp. 11-13, infra.]

In sum, then, with the exception of two matters noted below, none of the allegations about noncovered officials warrant further inquiry. We have found them to be without substance and are aware of no evidence that would support a criminal investigation.

Two allegations about noncovered officials referred to in the Letter were already under investigation by the Department. These are what the Letter refers to as the "alteration" of Commerce Department documents and the alleged "contradictory" testimony of certain witnesses at Committee Hearings. The Independent Counsel Statute does not apply to either of these ongoing investigations. They are the kind of matters routinely handled by the Public Integrity Section, and I find no conflict of interest or any other circumstance that would preclude the Department from completing these investigations in the normal course.

As noted, the allegations referred to in the Letter have been the subject of substantial review by the Department starting well before receipt of the Letter. Thus, the decision that the

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Statute is not applicable does not mean that the allegations will not have been properly reviewed. It means only that no basis has been shown for treating this matter under the specialized procedures of the Statute. Those allegations which warrant further inquiry will continue to be investigated by career professionals in the Department in the normal course.

If those ongoing investigations produce any information implicating the Independent Counsel Statute, we will comply with it fully. Moreover, if any Members have any information which they believe we have overlooked or failed to consider in reaching our decision, we request that they provide it to us promptly. In contrast to the Letter, any such submission should identify with particularity: (1) what crimes are alleged to have been committed, (2) who is alleged to have committed them, and (3) what specific factual information supports the allegation.

Discussion

As a general matter, it is the responsibility of the Department of Justice to investigate and prosecute all allegations of criminal conduct by any person subject to the jurisdiction of the United States, including allegations of wrongdoing by government officials. The Department has a long record of vigorously investigating and prosecuting government officials who commit crimes against the United States. Indeed, the Public Integrity Section in the Criminal Division was set up expressly for this purpose, and it has a track record that is above reproach.[2]

The Independent Counsel Statute does not supplant -- nor was it ever intended to supplant -- the Department's general responsibility to investigate allegations of criminal wrongdoing within the government. Rather, the Statute is designed to apply to certain exceptional cases. Accordingly, the Statute's specialized procedures are triggered in two specifically defined circumstances -- one mandatory and one discretionary.

The mandatory provision, 28 U.S.C. 591(a), requires the Attorney General to apply the procedures of the Statute if and when he receives specific information from a credible source sufficient to warrant a criminal investigation of a "covered person." "Covered persons" are a small group of the most senior officials in the Executive Branch who are specifically listed in the Statute, including the President, Vice President, Members of

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[2]The Department prosecuted over 1200 federal officials and employees -- including Department of Justice officials -- for public integrity violations in just the last two years for which final figures are available.

the Cabinet, senior White House staff, senior Department of Justice officials, and certain other senior government and campaign officials.

The discretionary provision of the Statute, 28 U.S.C. 591(c), authorizes, but does not require, the Attorney General to proceed under the Statute if: (i) he receives specific information from a credible source sufficient to warrant a criminal investigation of someone other than a covered person; and (ii) he determines that an investigation or prosecution of that person by the Attorney General or other officer of the Department "may result in a personal, financial or political conflict of interest." Even if the Attorney General finds a conflict of interest under this prong of the Statute, he need not invoke the Statute. Instead, the investigation may be handled by a Department official who has no "personal, financial or political conflict of interest," or a non-statutory special counsel may be appointed who would be part of the Department and who would exercise the powers of the Attorney General for purposes of the investigation.[3]

The threshold requirement for triggering the Statute under either the mandatory or the discretionary provision is the receipt of specific information from a credible source sufficient to constitute grounds to investigate whether some person -- covered or not -- has committed a federal crime. This requirement of specificity is an important safeguard against abuse under the Statute. The legislative materials strongly emphasize the need for "specific factual support," and "facts" indicating a crime, such as particular dates and places -- as opposed to a "generalized allegation of wrongdoing."[4] The Senate

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[3]It has been suggested by some that any allegation of wrongdoing involving Executive branch employees, even those who are not "covered persons", automatically creates a "political conflict" and mandates the appointment of an Independent Counsel. That suggestion is completely without merit. It is contradicted by the Statute itself -- there would be no point in having the Statute designate a category of very senior officials as "covered persons" if an allegation of wrongdoing against any government official required appointment of an Independent Counsel. It is also contradicted by the longstanding and now routine practice of the Justice Department investigating and prosecuting government officials below the "covered person" level.

[4]H.R. Rep. No. 95-1307, 95th Cong., 2d Sess. (1977) at 6 n.14; S. Rep. No. 95-170, 95th Cong., 1st Sess. at 52 (1977), reprinted in [1978] U.S. Code Cong. & Ad. News 4216, 4268; S. Rep. No. 97-496, 97th Cong., 2d Sess. at 12, reprinted in [1982] U.S. Code Cong. & Ad. News 3537, 3548; see also Nathan v. Smith, 737 F.2d 1069, 1074 (D.C. Cir. 1984) (Davis, J., concurring).

Report accompanying the 1983 amendments provides an example of what would constitute specific evidence: "[I]f a credible source informs the Department of Justice that a named, covered official took money on a given date, in a given place, and provides facts which indicate that it may have been a bribe, this information should trigger a preliminary investigation."[5]

Measured against these requirements of the Statute, the Letter is clearly deficient. The Letter contains no specific information (credible or not) concerning crimes by any person, let alone any "covered" person. Indeed, the Letter does not even contain any specific allegation (let alone information) concerning any crime alleged to have been committed by any person, covered or otherwise. In contrast to the example of specificity set forth in the Senate Report, which specified the individual, time and place of the receipt of money and evidence that it was a bribe, the Letter amounts to no more than an unsupported assertion that some unnamed person may have violated one of a number of listed statutes. For that reason, alone, the Letter does not constitute grounds to proceed under the Statute.[6]

Nevertheless, the Department has carefully considered the allegations in the Letter, the record of the Hearings, and other relevant information in our possession. Because these

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[5]S. Rep. No. 97-496, 97th Cong., 2d Sess. at 12, reprinted in [1982] U.S. Code Cong. & Ad. News 3537, 3548.

[6]In this respect, the Letter stands in sharp contrast to several previous Congressional submissions requesting appointment of an Independent Counsel. For example, the request for the appointment of an Independent Counsel to investigate former Housing and Urban Development Secretary Pierce identified specific testimony that was alleged to be perjurious and identified the contradictory evidence, and also set forth detailed allegations of the mismanagement techniques allegedly employed by Secretary Pierce. The letter requesting an Independent Counsel to investigate former Deputy Chief of Staff Deaver specified the individual the Members believed should be investigated, and specified four precise matters of alleged conflict of interest. The letter requesting appointment of an Independent Counsel to investigate assistance to the Contras specifically named individuals the Members believed should be investigated, described a specific incident which might constitute a violation of law, and referenced a staff report which provided additional details on alleged violations. While the letter requesting an Independent Counsel to investigate alleged misconduct by the Department of Justice in withholding EPA documents from Congress did not specifically name any individuals, it enumerated narrow acts of conduct alleged to be illegal, and was accompanied by a 1,284 page Committee report.

allegations had previously been in the public domain, even prior to the Letter, those allegations which warranted further inquiry were already the subject of ongoing review, and, where appropriate, investigation by the Department. In addition, further investigation has been conducted by career prosecutors in the Public Integrity Section and by the FBI.

Our review was conducted by career prosecutors in the Public Integrity Section who had no prior involvement in any aspect of the BNL matter. Their work was reviewed by a number of career prosecutors in the Criminal Division.

In addition, consistent with past practice, a senior prosecutor from outside of Main Justice was asked to review allegations involving the Criminal Division's role in the BNL case. In this case, Michael Chertoff, the U.S. Attorney for New Jersey, a career prosecutor with no prior involvement in the BNL matter, reviewed all allegations relating to the Criminal Division's handling of the BNL case.

Both Public Integrity's review and Mr. Chertoff's review, were further reviewed by George Terwilliger, Deputy Attorney General, a career prosecutor; and Ira Raphaelson, Counselor to the Attorney General, a career prosecutor and former head of the public integrity division in the U.S. Attorney's office in Chicago.

Without exception, every prosecutor reviewing this matter at every level of the Department is of the view that the criteria for invoking the Statute are not present here.

Based on our review, I have concluded that the criteria for invoking the Statute have not been met. Specifically, as to the mandatory provision of the Statute, I have concluded that there is no specific and credible information that a "covered person" committed a crime. As to the discretionary provision of the Statute, I have concluded that, for most of the allegations relating to noncovered government officials, there is no specific and credible information that any crime was committed. In two discrete matters where further inquiry as to noncovered officials is warranted, I find that there is no "personal, financial or political conflict of interest" which would preclude the Department from investigating and, if appropriate, prosecuting the individuals involved. These matters were under investigation by the Department prior to receipt of the Letter, and there is no reason to believe that the Department cannot continue to fully and fairly investigate them. As to those allegations relating to private parties (involving alleged irregularities in the CCC program and alleged export control violations) these also remain under investigation by the Department, and I find that there is no "personal, financial or political conflict of interest" that would preclude continued investigation by the Department.

The Report analyzes in detail all of the allegations we could identify from the Letter, the Hearings and other reported statements of which we are aware.

For purposes of this letter, I will only summarize our reactions to three central categories of allegations, namely: (1) that unnamed officials "illegally assisted the regime of Saddam Hussein"; (2) that unnamed officials attempted "to conceal information about potential criminal activity from Congress"; and (3) that the Department of Justice acted improperly in its BNL investigation.

1. Allegations that Unnamed Officials "Illegally Assisted" Iraq

The Letter refers vaguely to "activities by both current and former officials to illegally assist the regime of Saddam Hussein." Although the Letter does not specify who allegedly illegally assisted Hussein, or what form the illegal assistance allegedly took, based on the Hearings this allegation appears to refer to allegations that loan proceeds guaranteed under the CCC program, or commodities sold under that program, were diverted by Iraq for military purchases.

While the possibility of diversions has been investigated by the Departments of Justice and Agriculture, various Committees of Congress and the GAO, no one has yet established that any such diversion occurred. But even assuming that foreign entities and private intermediaries did engage in such a diversion, we have found no evidence that U.S. government employees knowingly participated in or facilitated any such diversion, or any other criminal conduct with respect to the CCC program with Iraq.

The evidence indicates that, in late 1989, as concerns about possible irregularities in the CCC program grew, Department of Agriculture and other government officials decided to conditionally continue with FY 1990 credits for Iraq while, at the same time, continuing to investigate allegations of irregularities and attempting to ascertain the nature and extent of possible official Iraqi involvement in any such irregularities. Pending the results of that further investigation, the Department of Agriculture divided the CCC credits into tranches for greater control. We have no information that any aspect of that decision was criminal.

Some public statements by certain Members of Congress seem to be based on the premise that it was somehow a crime for the government officials not to immediately and completely terminate the CCC program in the face of allegations and some emerging evidence of irregularities in that program.

It is unclear whether the Letter reflects such a view, but to the extent that it does, it is baseless. When faced with possible evidence of irregularities in a particular program, the decision whether to terminate the program completely or to take lesser steps to police the program pending further investigation, is entirely a policy and management decision. While the wisdom of that decision can be debated, the fact that it was not criminal cannot. It is no more a crime for Executive branch officials to continue to operate a program in the face of some evidence of irregularities than it is for Members of Congress to urge continued operation of the program in the face of such evidence (as happened here). A policy decision not to immediately terminate the CCC program based on the information available to officials at the time simply does not constitute a crime.

The Department is continuing to actively investigate the alleged improprieties in the CCC program. To the extent that, contrary to the evidence to date, that investigation reveals any evidence of participation by U.S. government officials, we will take all appropriate action, including any appropriate action under the Statute. [See Report at 21-24.]

2. Allegations Related to the Alleged Coverup or Obstruction of Congressional Investigations

Again, the Letter sets forth no specific conduct alleged to be criminal, simply asserting that there was an "attempt to conceal information . . . [and] otherwise mislead[] and obstruct[] Congress." Judging from the Hearings, the allegations fall into three basic groups: (i) the alleged use of "'formalized' procedures for screening or rebuffing Congressional requests for information"; (ii) alleged withholding of witnesses and information from Congress; and (iii) alleged false statements by various individuals.

The first category of allegations -- involving formalized procedures allegedly for withholding information from Congress -- simply do not allege crimes. Where, as here, requests for information are made to a number of different agencies it is not improper -- and certainly not illegal -- for those agencies to coordinate their responses. Indeed, the Executive Order on classified information and other publicly available Executive branch policies and procedures require such coordination to ensure that legitimate interests of the various agencies in protecting classified or other confidential information are served, and that consideration can be given to asserting applicable privileges. It is surprising that Members of the Committee would allege that there is something improper about this kind of coordination when, in the course of recent investigations, we have been told that House rules require that all subpoenas -- even those directed to individual members -- be

served on one central person, the House Counsel, to allow for coordination by the House and possible assertions of privilege. [See Report at 94-97.]

Similarly, as to the second group of allegations -- involving the alleged withholding of documents and witnesses from Congress -- there is nothing illegal in the Executive branch objecting to or opposing informal Congressional requests for information. Negotiations between the branches over the scope of such informal and even formal requests are commonplace. There is nothing illegal about the Executive branch objecting to the production of documents or witnesses based on concerns about the scope and reasonableness of the request, potentially applicable privileges, or other interests. Actions such as these have been an established -- and perfectly legal -- aspect of our government from its inception, and they are no more a crime than were the efforts by various Members of the House to limit the scope of the Department's document subpoenas in the House Bank matter. If Congress disagrees with the position taken by the Executive branch with respect to any documents, it has ample tools at its disposal to challenge that action. [See Report at 93-94.]

As to the third category -- the alleged false statements -- only one "covered person" is alleged to have made any false statements. As explained in the Report, his statements simply are not false. [See Report at 14-21.] The other alleged "contradictory" statements do not involve "covered persons". Certain allegations involving noncovered officials are under investigation by the Department. These are the kinds of allegations that are routinely investigated by the Public Integrity Section and there is no conflict of interest that precludes their handling these matters in the normal course. [See Report at 24-25.]

Substantial attention has been focused on the alleged "alteration" by Under Secretary Kloske (a noncovered person) of a Commerce Department document generated in response to a Subcommittee request for information relating to license applications for exports of dual use goods to Iraq from 1985 to 1990. That allegation is under investigation by the Public Integrity Section at the specific request of the Chairman of the Subcommittee involved. While the investigation is ongoing, the investigation to date would not support any suggestion that this incident was part of some larger effort to "coverup". Rather, the evidence, to date, indicates that no official above Mr. Kloske had any involvement in the decision to make the changes in question; that the "alteration" was a change in a shorthand description which he believed created an inaccurate perception in its original form; that he made the change only after consulting with the technical experts involved; that other information remaining in the document conveyed the key information about the items in question; and that the change was to a description in a

draft, rather than an alteration of a pre-existing record. [See Report at 26-31.]

There is no reason to believe that the Public Integrity Section of the Criminal Division cannot fully investigate and, if appropriate, prosecute those allegations warranting further review as it has with many similar allegations in the past.

3. Allegations Concerning the Department's Handling of the BNL Matter

Again, the Letter provides no specifics explaining what crimes may have been committed, or by whom, instead simply asserting that there were "irregularities in the Department's handling of a host of investigations." Indeed, it is not entirely clear if the allegations concerning the Department's handling of the BNL investigation are meant to allege crimes, or to suggest that we should conclude that the assertion of these allegations somehow precludes the Department from investigating the other matters alleged in the Letter. We conclude that they do neither because there was no wrongdoing in the Department's handling of the BNL matter. As detailed in the Report, the handling of the BNL investigation by the Department was entirely proper. [See Report at 32-87.]

The evidence shows that the BNL investigation was initiated by the Atlanta U.S. Attorney's office. As part of standard Department practice given the complex nature of the investigation and Atlanta's desire for assistance in certain international aspects of the investigation, the Criminal Division became involved in reviewing and assisting in that investigation. The record is clear that that review was initiated by career prosecutors pursuant to standard practice, and was in no way politically directed.

The Criminal Division career prosecutors raised issues and concerns that required more work to be done before the indictment was returned. The record is clear that these decisions were made by career prosecutors exercising their best professional judgment. Their sole desire was to strengthen and expand the case, not delay or limit it, and any suggestion to the contrary is unfounded and unfair. It is particularly ironic that two of the major sources of the alleged "delay" were the successful efforts by career prosecutors in Main Justice and Atlanta to ensure the prosecution of wrongdoing by Iraqis and to complete investigation of the possible involvement of BNL Rome in the scheme -- precisely the two points that certain Members have alleged were "covered up".

I am especially troubled by the fact that certain Members would repeat scurrilous charges against career prosecutors which are based on blatantly false "facts", notwithstanding that those

"facts" have been conclusively refuted in the Hearing record itself. For example, much emphasis has been given to statements by Judge Marvin H. Shoob suggesting the need for an Independent Counsel. Almost without exception, however, the "facts" cited by Judge Shoob to explain his conclusion have been shown to be incorrect.

Contrary to allegations repeated in the Hearing record, the plea agreement entered by defendant Paul Drogoul was exactly the one offered by the lead prosecutor (who, far from being excluded from the negotiations was in charge of them) two weeks before the plea (not the weekend before it); the other Assistant United States Attorney involved was not sent down from Main Justice; the prosecutors repeatedly stated on the record that Mr. Drogoul was free to make whatever statement he wanted; the record is clear that Drogoul had never prepared the "lengthy statement" Judge Shoob believed was being withheld; and the sentence calculated under the Sentencing Guidelines, which govern this case, is exactly the same for the 60 counts to which Drogoul pled as it would have been had be been convicted of all 347 counts. [See Report at 53-61.]

The allegation that the Department somehow tried to silence Drogoul is completely unfounded. Rather, the record is clear that the Atlanta prosecutors consistently sought his cooperation, that Drogoul offered a plea including no cooperation which was rejected by the prosecutors, that he finally capitulated and agreed to a plea requiring cooperation, and that the plea agreement includes extraordinary provisions to ensure that any and all information Drogoul provides can be made public by the Government, the Court or Drogoul.

Similarly, the allegations that the indictment ultimately returned was "smaller" than that initially contemplated, and that the "Federal attorney in Atlanta was instructed from on high in D.C. to postpone and delay" are both demonstrably wrong, as the Hearing record shows. The Report shows, in detail, the lack of merit to the myriad other allegations concerning the Department's handling of the BNL matter which have been recklessly repeated without regard for the facts, including, for example, the absurd and slanderous charge, apparently seriously made, that a career prosecutor secretly carried a large magnet into a government office to erase information on a computer tape.

While, as in any complex investigation, there were disagreements among the prosecutors involved, these represent honest differences among career professionals and they raise no question of criminal conduct. It simply is not a crime for the Department's Headquarters components like the Criminal Division to assist in and review investigations and prosecutions being conducted by U.S. Attorneys offices in the field. Indeed, that is one of the primary functions of the Headquarters components

and, far from being a crime, such review is an important check-and-balance for the American people, to ensure that the law is being fairly and uniformly applied. Nor is it an "irregularity" for disagreements to arise among prosecutors working on a case as to the timing of various steps, assessments of the evidence, theories to be pursued, witnesses to be interviewed and the countless other matters that make a successful investigation. Indeed, the existence of at least some disagreements among the professional prosecutors and investigators working on a case is the norm, not the exception, especially in large, complex investigations. It is not a crime.

What is especially disturbing about this attack on the Department is that it strikes at the very core of our daily work. Every day, prosecutors handling thousands of cases make tens of thousands of decisions concerning investigative and other steps which may "delay" the indictment of a particular case. Often these decisions are the subject of debate among fellow prosecutors and between prosecutors and their supervisors. This debate, though professionally motivated, is sometimes heated. The result is increased quality in our work and in the level of protection afforded citizens who may be affected by our work. If a prosecutor is to be subjected to a criminal investigation by an Independent Counsel simply because someone asserts that such debates were evidence of obstruction of justice, our ability to enforce the law would be seriously impaired and important safeguards built into our criminal justice system would be lost. The potential chilling effect on the healthy debate which regularly occurs in our work is unthinkable.

Conclusion

As noted at the outset, nothing in the Letter, the Hearings, or any other source of which we are aware, suggests the need to proceed under the Independent Counsel Statute. While it might be expedient to appoint an Independent Counsel anyway, or to delay the decision by conducting a redundant "preliminary investigation" under the Statute, doing so would be an abdication of my responsibility to enforce the law. The allegations have been and are being properly investigated, and it is clear that the criteria for invoking the Statute are not present. It would be as improper to apply the Independent Counsel Statute where the statutory basis does not exist as it would be to fail to apply the Statute if the statutory conditions were present.

As I also noted at the outset, certain allegations against noncovered persons remain under investigation by the Department. I reiterate my request that if any Members have any specific information of possible criminal conduct by Executive branch officials or anyone else they provide it to the Department promptly. Such information should specify what crimes are

alleged to have been committed and by whom, and what specific information supports the allegation.

Should we receive any information in the course of our ongoing investigations, from Congress, or from any other source, that implicates the Independent Counsel Statute we will continue to comply fully with its terms.

We have treated the Letter very seriously. Dedicated professionals in the Department have spent countless hours trying to make sense of the vague and conclusory allegations it contains. We have found those allegations to be hollow. What is especially troubling here is that the Letter was largely premised on "facts" which are untrue and which were established on the record to be untrue at and before the Hearings. Nevertheless they were repeated in the Letter.

Repeated and unjustified attacks on the integrity of the Department tear down the institution and undermine our ability to advance justice. As Attorney General, I believe strongly that we cannot allow the criminal process to be used as a political weapon or for partisan purposes.

The accompanying Report comprehensively addresses the allegations contained in the Letter and at the Hearings. I hope we can now get on with conducting the Nation's business in a productive and professional manner.

Sincerely,

William P. Barr
Attorney General

Proposed Federal Abortion Legislation

The proposed legislation would enact a federal statutory regime of abortion regulation that leaves the States with substantially less regulatory authority than they have under *Roe v. Wade* or *Planned Parenthood v. Casey*.

The proposed legislation would represent a doubtful exercise of Congress' power to enforce the Fourteenth Amendment and would rest on a questionable link to Congress' power to regulate interstate commerce.

July 1, 1992

LETTER FOR THE CHAIRMAN
COMMITTEE ON LABOR AND HUMAN RESOURCES
U.S. SENATE

This letter presents the views of the Department of Justice concerning the amended versions of the Freedom of Choice Act of 1991, introduced as companion bills H.R. 25 and S. 25 (collectively "the bill"). The Department strongly opposes enactment of this legislation. The recent amendment introduced by Senator Mitchell, making minor changes to the bill, fails to confront the bill's most serious flaws. For the reasons below, if the bill were presented to the President, I and the President's other senior advisors would recommend that he veto this legislation.

The review bill would still prohibit States from enacting reasonable regulatory restrictions on abortions clearly permitted under *Roe v. Wade* and its progeny. It would also represent a doubtful exercise of Congress' power under the Fourteenth Amendment and would rest on a questionable link to Congress' power to regulate interstate commerce.

I. The Revised Bill

The bill is described by its sponsors as a "codification" of much of the complex regime of abortion legislation erected by the Supreme Court since its 1973 decision in *Roe v. Wade*, 410 U.S. 113 (1973). The bill as revised expressly states its purpose to be "to achieve the same limitations as provided, as a constitutional matter, under the strict scrutiny standard of review enunciated in *Roe v. Wade* and applied in subsequent cases from 1973 to 1988." Section 2(b). Because of its sweeping language, however, the bill

would enact a federal statutory regime of abortion regulation that leaves the states with substantially less regulatory authority than under *Roe* or the Supreme Court's decision earlier this week in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

The essence of the bill remains substantially unchanged: "[a] State . . . may not restrict the freedom of a woman to choose whether or not to terminate a pregnancy before fetal viability," and after viability the State may not restrict abortion if the abortion "is necessary to preserve the life or health of the woman." Section 3(a)(1) and (2).

The revised bill would thus still allow abortions for any reason, even sex selection, before the fetus becomes "viable." With no definition or standards for viability, it appears that the bill could leave that determination to the person performing the abortion. Thus a single health care professional's judgment that a particular fetus was not "viable" would be conclusive and binding on the state, whether or not the fetus satisfied other objective criteria of "viability" such as a test for weight. It is not even clear that the professional judgment must be rendered by a medical doctor.

Even after fetal viability, with no standards for determining what constitutes the "health of the woman" justifying an abortion, the revised bill would still go well beyond merely "codifying" *Roe*. As we have explained in earlier statements and testimony, we believe that the term "health" in section 3(a)(2) would likely be construed broadly. *See Doe v. Bolton*, 410 U.S. 179 (1973). The Court there noted that the medical judgment must be made in light of all factors, including "emotional, psychological, [and] familial" factors. *Id.* at 192. It is likely, therefore, that even after viability an abortion performed for any reason that a medical professional (who, again, apparently need not be a licensed physician) deemed "relevant to the well-being" of the woman, *id.*, would probably be protected under the bill as "necessary to preserve the life or health of the woman." Section 3(a)(2).

The revised bill purports to address a few of the concerns the Department has raised previously. These changes, however, do not fully meet the Department's concerns on the issues they address, and leave many more serious flaws unaddressed.

For example, the revised bill allows some degree of parental participation in the decision of a minor to undergo an abortion. However, it provides only that the state could require the minor to "involve" the parent in the decision. Section 3(b)(3). The term "involve" is left undefined. It is troubling that the bill's authors chose an inherently vague term over more definite words such as "notify" and "consent." It is simply unclear whether the bill would exclude parental consent requirements. The bill could thus be read to invalidate laws in the twenty-one states that require some form of parental consent, including the Pennsylvania abortion statute upheld this week by the Supreme Court in *Casey*.

So read, the bill would go well beyond *Roe* and later cases. In *Bellotti v. Baird*, 443 U.S. 622, 647 (1979), for example, a plurality of the Court ruled

that a parental consent requirement for abortions by minors would be constitutional if it contained a judicial bypass provision. And in *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476, 493-94 (1983), the Court upheld another parental consent provision with a judicial bypass. The bill could be read to overrule these cases to the extent they permitted such consent provisions. The bill would not, therefore, codify *Roe* as "applied in subsequent cases from 1973 to 1988," as it claims to do. Section 2(b).

Although the revised bill would permit States to protect the rights of unwilling individuals to refrain from performing abortions, the bill does not permit *institutions* to refuse to perform abortions. Thus, a hospital whose board or sponsoring organization was opposed to abortions could nevertheless be held liable for refusing to perform them. Indeed, the bill could now be read to require institutions to hire willing individuals in order to provide abortion services. Similarly, although the Senate bill has been amended to allow a state to refuse to pay for abortions, section 3(b)(2), nothing in that provision or any other part of the bill appears to permit a state to deny the use of a state facility to a woman who was willing to pay for the abortion. The bill might even be construed to *require* the states to provide state facilities for abortions where private facilities are unavailable.

Further, the revised bill contains no exception for informed consent and waiting periods. State laws requiring that factual information concerning the nature of the abortion procedure and available alternatives be made available to a woman twenty-four or forty-eight hours prior to an abortion would thus be invalidated. Thirty-two states currently have such laws. The purpose of such provisions is typically to ensure that the woman's decision to abort is free, reflective and informed. That state purpose would be illegitimate under the bill.

II. Congressional Authority

The bill has been significantly revised to address the Congress' power to adopt it. The bill asserts that Congress has the authority to enact the bill under both the Commerce Clause (Article I, Section 8) and Section 5 of the Fourteenth Amendment of the Constitution. *See* section 2(a)(4). We continue to doubt whether Congress has authority to enact this legislation on the proffered grounds.

In commenting on earlier versions of this legislation, we criticized the suggested reliance on Congress' power under Section 5 of the Fourteenth Amendment, arguing that the Section 5 authority does not extend to fixing the content of the amendment's substantive provisions. We are therefore pleased that the bill now acknowledges that "Congress may not by legislation create constitutional rights" and purports to create only "statutory rights." Section 2(a)(3).

Having recognized that Congress may not create constitutional rights or

alter their content, the bill's drafters have now sought to assert a connection between recognized constitutional rights and the statutory right to abortion that the bill would adopt. That assertion, however, is unpersuasive.

For example, the bill suggests that the statutory rights it creates would protect "liberty." Section 2(a)(4). The Fourteenth Amendment, however, prohibits only certain deprivations of liberty, for instance those that have no rational relationship with a legitimate state interest; were it to prohibit all deprivations of liberty, it would forbid an enormous range of laws including laws against homicide. Thus, to say that a proposed federal statute prevents the states from restricting liberty in general is to say almost nothing about whether the federal statute in any way implements the commands of the Fourteenth Amendment. The bill also asserts that state restrictions on abortion interfere with women's exercise of constitutional rights unrelated to abortion. Section 2(a)(2)(D). The bill does not say what these other rights are, so it is impossible to tell how it would keep the states from interfering with them.

As we have noted with respect to earlier versions of this legislation, Congress' power under the Commerce Clause has been held to be quite broad. It is likely that Congress could enact some legislation concerning abortion pursuant to that power. The arguments now put forward to support this legislation under the Commerce Clause, however, are still troublesome. For example, the bill finds that restrictions on abortion "burden interstate commerce by forcing women to travel from States in which legal barriers render contraception or abortion unavailable or unsafe to other States or foreign nations." Section 2(a)(2)(A)(ii). We fail to see how any increased interstate travel resulting from diverse state laws regulating abortion would constitute a burden on commerce. Moreover, the argument that travel from one jurisdiction to another justifies a single national abortion law on commerce grounds proves too much, for it could justify uniform federal laws on any subject, which is inconsistent with the notion of the federal government as a government of limited powers.

Finally, in our view Congress' intervention in this area would usurp a field of legislation traditionally reserved to the states. As must be obvious from the public reaction this week to the Supreme Court's *Casey* decision, the policy choices in this area are difficult and national consensus is elusive. The political outcomes of fifty distinct state processes would be far more likely to represent the genuine diversity of views that exists on this subject than would a uniform federal code entrenching a more restrictive regime than that of *Roe* and *Casey*. Observance of federalism is thus particularly desirable with respect to abortion regulation.

In keeping with the President's position that "[a]s a nation, we must protect the unborn," Message to the House of Representatives Returning Without Approval the District of Columbia Appropriations Act, 1990, 2 Pub. Papers of George Bush 1563 (Nov. 20, 1989), and for the reasons explained above, the Department of Justice opposes the enactment of the bill, and if

the bill were presented to the President in its current form, I and the President's other senior advisors would recommend a veto.

Sincerely,

WILLIAM P. BARR
Attorney General

S. HRG. 102–1121

OVERSIGHT OF THE DEPARTMENT OF JUSTICE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SECOND CONGRESS

SECOND SESSION

ON

PROPOSED AUTHORIZATIONS FOR FISCAL YEAR 1993
FOR THE DEPARTMENT OF JUSTICE

JUNE 30, 1992

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Biden, Hon. Joseph R., Jr., a U.S. Senator from the State of Delaware	1
Thurmond, Hon. Strom, a U.S. Senator from the State of South Carolina	2
DeConcini, Hon. Dennis, a U.S. Senator from the State of Arizona	22
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah	26
Metzenbaum, Hon. Howard, a U.S. Senator from the State of Ohio	30
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania	34
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont	37
Grassley, Hon. Charles E., a U.S. Senator from the State of Iowa	41
Brown, Hon. Hank, a U.S. Senator from the State of Colorado	47
Kohl, Hon. Herbert, a U.S. Senator from the State of Wisconsin	52
Heflin, Hon. Howell, a U.S. Senator from the State of Alabama	57

WITNESS

Hon. William P. Barr, Attorney General, U.S. Department of Justice	3

MATERIAL SUBMITTED

Barr, Hon. William P.:	
Testimony	3
Prepared statement	7

APPENDIX

Letter to Hon. Joseph R. Biden, Jr., chairman, Committee on the Judiciary, U.S. Senate, Washington, DC, from W. Lee Rawls, Assistant Attorney General, U.S. Department of Justice, Office of Legislative Affairs, August 30, 1992	67
Enclosures: Responses of Attorney General William P. Barr to questions submitted by:	
Senator Biden	68
Senator Thurmond	92
Senator Metzenbaum	99
Senator DeConcini	101
Senator Leahy	118
Senator Grassley	132
Senator Kohl	137
Senator Simon	143
Attachments:	
1—Edward Byrne Memorial State and Local Law Enforcement Assistance Discretionary Program	146
2—Programs contributing to Weed and Seed	150
3—Statement of George Terwilliger, Deputy Attorney General, before the Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, U.S. Senate, concerning reauthorization of the independent counsel statute, August 11, 1992	151
4—Memorandum from Michael E. Shaheen, Jr., counsel, to all OPR staff, May 12, 1992	168
5—Letter to Harold Andrew Valentine, Associate Director, Administration of Justice Issues, General Government Division, General Accounting Office, Washington, DC, from Ira H. Raphaelson, special counsel, October 1, 1991	171

Page

Letter to Hon. Joseph R. Biden, Jr., chairman, Committee on the Judiciary, U.S. Senate, Washington, DC, from W. Lee Rawls, Assistant Attorney General, U.S. Department of Justice, Office of Legislative Affairs, August 30, 1992 —Continued
Attachments—Continued
6—Miscellaneous charts 176
7—Letter to the Committee on the Judiciary, U.S. House of Representatives, Washington, DC, from William P. Barr, Attorney General, U.S. Department of Justice, Washington, DC, August 10, 1992 187
8—Press release by the Department of Justice, April 3, 1992 201
Department of Justice Policy Regarding Anticompetitive Conduct That Restricts U.S. Exports 204
9—U.S. Department of Justice anitrust cases that have included export restraint allegations 207

OVERSIGHT OF THE DEPARTMENT OF JUSTICE

TUESDAY, JUNE 30, 1992

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:13 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Kohl, Thurmond, Hatch, Grassley, Specter, and Brown.

OPENING STATEMENT OF CHAIRMAN BIDEN

The CHAIRMAN. The committee will come to order.

Welcome, General. The committee is very fortunate to have Attorney General William Barr for the purpose of conducting our regular oversight hearing on the Department of Justice. Because the Attorney General's time is limited, we will not have opening statements, but before we start I have a few words about the purpose of the hearings.

Under Attorney General Barr, I believe the Justice Department and this committee have worked to form a positive working relationship within the limits of a divided Government. While our differences remain and are sometimes substantial, there are differences of principles among women and men of good purpose, and that is how I view the differences with the Attorney General.

Regular and serious oversight of the Department of Justice is an essential part of the working relationship between the committee and the Department, and an important responsibility of this committee. Questions about the policy, administration, and prosecutions undertaken by the Department must be asked, as well as answered.

These questions go to whether our fight against violent crime is being properly directed and whether the battle against white-collar crime is being waged with vigor. They go to the Department's role in protecting our civil liberties and in enforcing our civil rights laws, and they go to whether the Department's budget is adequate in some areas or perhaps excessive in others.

Mr. Attorney General, I know that my colleagues and I have many such questions relating to the areas I have mentioned, and possibly others. It is my hope that these questions and your answers will not be motivated by a spirit of partisanship, but instead

by a dedication to a frank exchange about the direction and future of the Department of Justice.

Some of what is occurring under your tenure is very constructive, and still some of it concerns me. Hopefully, though, working together with open discussions like today and the many you and I have had both in public hearings and private discussions, we can make further improvements at the Department and you can tell us how we can best help you make those improvements. We are here not only to ask questions, but to listen, and stand ready to attempt to help in any way we can.

And I will say it again, at the risk of costing you further damage to your reputation, it has truly been a pleasure to work with you as Attorney General. I am almost afraid to tell the younger people in the audience how many Attorneys General I have been here for. There have been many more Attorneys General than Presidents over the last five Presidents, and I can say without reservation, of all of the Attorneys General with whom I have had the pleasure of working, none have I had more cooperation and greater respect for.

I sincerely appreciate you for a number of reasons, but one most important that I wish to say. Whatever you say, you do; whatever you promise, you deliver on; and whatever you find yourself at odds with me on, you tell me straight up. For that, I am very grateful. To most people, they would think that was the ordinary course in which women and men conduct affairs, but in Washington that has been more the exception than the rule in my limited experience of the last 19 years.

Now, I will turn to a man whose experience far exceeds, whose judgment exceeds all of ours, and whose power, I think, probably has no limits in the Senate. Senator Thurmond.

Senator THURMOND. I am wondering what you are up to today. [Laughter.]

Mr. Chairman, I presume from your complimentary remarks about Attorney General Barr, too, that you are going to go along with his crime bill.

The CHAIRMAN. Well, maybe he will have something to say about that before the day is over.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Mr. Chairman, today we gather to hear testimony from the Attorney General of the United States, William Barr. This oversight hearing will focus on various initiatives being undertaken by the Department of Justice, as well as the progress being made by the Department in a number of areas, including crime, drug trafficking, and financial institution fraud.

At the outset, I want to commend Attorney General Barr for his leadership as our Nation's senior law enforcement official and for his unyielding commitment to justice. General Barr has received much praise during his tenure and has garnered much respect from both sides of the aisle for his competency and tireless efforts.

Mr. Chairman, the Bush administration has recognized that one of the most serious domestic issues is our violent crime problem. In an effort to enhance the Federal Government's law enforcement effort, President Bush's fiscal year 1993 budget requests $11.2 bil-

lion for the Department of Justice. This figure is over $1.7 billion greater than what Congress appropriated for fiscal year 1991.

While some in Congress have been willing to authorize additional Federal resources—initiatives which the Department and I support—it should be noted that the Congress cut the President's law enforcement budget by over $300 million last year. I firmly believe that we should keep this in mind during our discussions here today.

As we all know, the Congress is currently deadlocked over passage of omnibus anticrime legislation. Discussions have been undertaken between Attorney General Barr, Senator Biden, and myself in an effort to get the Congress to pass a tough crime bill. This hearing should shed some light on what Congress must do if it truly wants a tough crime bill which President Bush can sign.

Mr. Chairman, while violent crime has been a major focus of the Department of Justice, it also continues to prosecute white-collar criminals. Convictions for financial institution fraud cases have increased dramatically. In addition, the FBI has enhanced its efforts in the area of health care fraud, a priority if our Nation is to truly reform its health care system.

In closing, through innovative efforts such as Operation Weed and Seed, a multiagency approach to combating violent crime and drug use in high-crime neighborhoods, the Department has made it a priority to assist State and local communities. Enhanced FBI initiatives against street gangs, a strong forfeiture program, and continued grants to State and local law enforcement agencies are growing. These are just a few of the many ways General Barr has implemented this administration's policies.

Despite the importance of this assistance, Congress must continue to bear in mind that the Department has Federal responsibilities which must be addressed. At a time when resources are limited, we must balance the interests of local assistance with Federal priorities. This hearing should prove valuable as Congress and the administration try to strike this important balance to further the Department's commitment to justice.

For these reasons, I welcome Attorney General Barr here today and look forward to his testimony.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

General, welcome.

STATEMENT OF HON. WILLIAM P. BARR, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Attorney General BARR. Thank you very much, Mr. Chairman. It has been 7 months since my last appearance before this committee for my confirmation hearings, and I very much appreciate the courtesy, the support, and the cooperative relationship that we have had with you, Mr. Chairman, Senator Thurmond, and each of the members of this committee. I want to say that the comments that you had about the working relationship that we have and that we share with members of this committee is completely reciprocated both by me and by the Department as a whole.

Now, I would like to have my prepared statement entered in the record, and I won't——

The CHAIRMAN. Without objection, it will be.

Attorney General BARR. I won't read the entire thing, but there are just a few points that I would like to emphasize.

At my confirmation hearing, I think, in response to a question from Senator Thurmond, I identified four main areas of concern for me—the area of violent crime, the prosecution of the drug war, the vigorous enforcement of civil rights, and the effective prosecution of financial fraud and white-collar fraud. Also, I think, largely in response to questions from Senator DeConcini, I stated my commitment to strengthen INS and to maintain the integrity of our immigration laws. And so I would just like to briefly summarize a number of the initiatives that we have been pursuing over the past 7 months in pursuit of these goals.

In the area of violent crime, we recognize that the principal responsibility for combating violent crime really is vested in the States and should remain there. However, we think that aggressive Federal involvement can play a useful role in combating violent crime, and I think that the Federal Government has to lean forward as much as possible to work with State and local law enforcement to try to have as much of an impact as we can, and we must exercise leadership for law enforcement generally in the area of violent crime.

So to this end, we have increasingly targeted gangs and felons who use firearms and violent drug trafficking organizations because these are areas where I think there is a legitimate nexus with Federal enforcement interests—the Federal firearms laws, the Federal drug laws, and the organized crime laws.

Now, we found that tough Federal firearms statutes, drug statutes, and RICO statutes can help local law enforcement in combating these violent street gangs who are responsible for a large part of the level of violence that we see today, and the remarkable success in Philadelphia with our pilot violent traffickers project and the FAST initiative—38 gangs wiped out and 600 Federal convictions—have convinced us to expand this strategy of Federal and local cooperation.

So, shortly after becoming Attorney General, we shifted 300 FBI agents from foreign counterintelligence to violent crime and antigang squads. We have set up joint task forces with ATF, and now we are setting up similar violent crime gang task forces in 39 cities. We are working with ATF to establish a national gang analysis center. We have reassigned DEA agents from Washington—25 DEA agents—to the field to work on drug-related homicide cases. In the wake of the Los Angeles riots, we recently assigned 50 more FBI agents to violent crime antigang squads in California, and we have added 150 new INS criminal investigators to focus on criminal aliens involved in violent street crime.

With these stepped-up resources and the growing cooperation with State and local law enforcement, I believe we will see a steady stream of results in the near future. Just this past Sunday, we saw an example of what can be done. It was an ATF case in Detroit which resulted in dozens of arrests against a street gang in that city.

Another program I would like to mention is our Project Triggerlock, which was started last April 1991. Here we were using

the Federal firearms statutes to target chronic offenders with a history of prior crimes, particularly firearms offenses, and to use these tough Federal firearms statutes to obtain stiff penalties against these individuals and incapacitate them.

I am happy to say that as of May 1, nearly 7,000 defendants have been charged with Federal firearms violations, and our conviction rate is running at 96 percent. This more than doubles the prior rate of prosecutions for firearms offenses by the Federal Government.

Turning to the issue of the drug war and our actions on the drug front, as you know, it is the inner city that is the hardest hit by drug trafficking, and that is one of the reasons, Mr. Chairman, why our Weed and Seed initiative, we believe, is very important.

This year has seen a dramatic expansion of the Weed and Seed concept. As you know, this strategy is designed to revitalize communities by targeting high-crime neighborhoods and housing developments with efforts to weed out violent offenders, drug traffickers, gang members, and then to seed these high-crime areas with comprehensive social and economic revitalization programs.

Over the past 4 months, the pilot phase of Weed and Seed was expanded to 16 additional demonstration sites, and the response from community groups, the private sector, and State and local officials has been overwhelmingly positive. As you know, the administration is seeking $500 million in fiscal year 1993 to provide really mostly the seed component of the Weed and Seed Program, and we would urge the committee to support this important initiative.

As you can see from my prepared statement, we have had successes in our civil rights enforcement. One area, in particular, that I have been pursuing has been the fair housing area, where we have hired testers, and we are now starting to see the fruits of that program in our enforcement actions.

At my direction, John Dunne has been working with other regulatory agencies in the area of mortgage discrimination, and expect in the near future to see some tangible results from that cooperation both in terms of providing some guidelines and suggestions for improving the industry's performance, but also in the enforcement area.

With regard to my fourth priority, in the white-collar crime area I think we have continued to experience unprecedented success both in financial institutions and in other areas. One area of particular concern to me, as you know, has been the health care fraud area, where we have provided some additional resources.

I just came from an FBI press conference where they unveiled a 2-year investigation, the largest investigation of the health care industry ever carried out involving activity in 50 cities. Today, over 100 people will be arrested throughout the Nation, hundreds of seizures being made, as part of our ongoing effort to eradicate fraud from the health care industry.

Finally, I would like to mention what we are doing in the area of immigration. In order to effectively enforce and implement the Nation's immigration laws, we have added to INS this year 300 new Border Patrol officers. As of June 12, 241 trainees have been hired, and 71 officers are already trained and working on the border.

We also are hiring 200 additional criminal investigators to combat illegal immigration and violent crime by criminal aliens; the creation of a national criminal alien tracking center and the hiring of over 700 additional INS workers to improve services to legal immigrants and travelers. In addition, $5 million from the Department's asset forfeiture fund has been used to purchase new lighting, sensors, vehicles, and other interdiction equipment. Last week in Los Angeles, I announced further steps designed to facilitate identification and deportation of criminal aliens.

That will complete my statement, and as I say, I refer the committee to the complete text of it for some of the other details of our activities. Thank you, Mr. Chairman.

[The prepared statement of Mr. Barr follows:]

Department of Justice

STATEMENT

OF

WILLIAM P. BARR
ATTORNEY GENERAL

BEFORE

THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING

DEPARTMENT OF JUSTICE AUTHORIZATION

FOR FISCAL YEAR 1993

ON

JUNE 30, 1992

TESTIMONY FOR THE SENATE JUDICIARY COMMITTEE
ATTORNEY GENERAL WILLIAM P. BARR
JUNE 30, 1992

Thank you, Mr. Chairman.

It has been seven months now since I appeared before this distinguished Committee during my confirmation hearings. I appreciate the courtesy and support I have received from you, Mr. Chairman, and Senator Thurmond, and from the other members of this Committee.

As you will recall, Mr. Chairman, during my confirmation hearings -- in response to a question from Senator Thurmond -- I laid out my top priorities for the Department of Justice during my tenure as Attorney General.

I noted that in one sense it is somewhat misleading to talk about priorities at the Department because there is such a wide range of issues that we must continually address. I also explained that my general priority was to foster and build upon the professionalism and integrity of the Department itself.

In addition to these general comments, I listed four main areas of concern. The first was the fight against violent crime, and closely related to that was the continuation of the vigorous prosecution of the war on drugs. Third was aggressive enforcement of civil-rights laws. And the fourth priority was effective prosecution of financial fraud and white-collar crime. I also stated my commitment to strengthening INS and maintaining the integrity of our immigration laws.

Today, I would like to offer a very brief summary of some of our initiatives over the last seven months in pursuit of these goals, as well as some of our accomplishments so far.

The Department has carried out several major initiatives designed to fight violent crime. Although the problem of violent crime is primarily the responsibility of state and local law enforcement, aggressive federal involvement is a vital part of this struggle. Longstanding priorities in federal law enforcement, such

as organized crime, must be maintained, as our decade-long string of successes against LCN leaders including John Gotti clearly reveals. But I believe very strongly that the federal government must "lean in" as much as possible to make a substantial impact against violent crime and we must exercise leadership for all of law enforcement. To this end we have increasingly targeted gangs, felons who use firearms, and violent drug-trafficking organizations.

We have found that tough federal firearms statutes, drug statutes and RICO statutes can greatly help local law enforcement to combat violent street gangs. The remarkable success in Philadelphia with our pilot Violent Traffickers Project and "F.A.S.T." initiative (Federal Alternative to State Trials) -- 38 gangs wiped out; 600 federal convictions -- convinced me to expand this strategy of federal and local cooperation. The changing world situation allowed me to shift 300 FBI agents from foreign counter-intelligence to work on violent-gang squads and anti-gang task forces with agents from BATF. The FBI agents have been assigned to 39 cities across the country to augment the work of the 1,600 FBI agents already assigned to violent crime. This represents one of the largest re-allocations of resources in FBI history. The Bureau is also working jointly with BATF in setting up a new National Gang Analysis Center. I also shifted 25 DEA agents from Washington headquarters to drug-related homicide task forces in the field. Furthermore, in the wake of the L.A. riots, I recently assigned 50 FBI agents to violent gang squads in California. Finally, I have added 150 new INS criminal investigators to focus on criminal aliens involved in violent street gangs.

With these stepped-up resources and rapidly growing cooperation between federal and state prosecutors (we recently concluded the first national conference for federal and state prosecutors on anti-gang enforcement), we should see a steady stream of results. The dozens of arrests on Sunday of a violent

street gang in Detroit are an excellent example of where our new efforts are heading.

In our crackdown on felons who use firearms, we have continued our "Project Triggerlock," which began in April of 1991. This initiative targets repeat offenders who use or carry guns. We confiscate their weapons, and put the chronic offenders behind bars under stiff federal mandatory sentences. Under "Triggerlock," the average sentence received by an Armed Career Criminal is eighteen years. As of May 1, nearly 7,000 defendants have been charged with federal firearms violations. Our conviction rate is running at 96%.

From February through April, the United States Marshals Service conducted one of the most successful criminal manhunts in the history of federal law enforcement: Operation Gunsmoke. Working closely with federal, state and local law enforcement agencies, the U.S. Marshals focused on violent repeat offenders who used firearms. They tracked down and arrested over 3,300 violent fugitives in 14 cities across the nation. Many were convicted murderers, and many were armed at the time of arrest.

As you know, Mr. Chairman, the presence of these repeat violent criminals on the streets is largely due to the lack of adequate prison space on the state level. The reality of "revolving door" justice undermines any serious fight against violent crime. More violent criminals on the street inevitably means more crime. That is why the President and Congress have made increased federal prison capacity a top priority. In the last three years, as part of its $2.8 billion expansion program, the Bureau of Prisons has activated nearly 17,000 additional beds. In the next five years, this program will create space for 42,000 additional inmates.

Also in April of this year, we sponsored a national summit for federal, state and local corrections officials specifically to examine the problem of prison capacity and the effective handling of violent offenders.

Finally, Mr. Chairman, with regard to federal leadership in the fight against violent crime, we have been closely examining the various criminal justice systems to identify the most effective penalties and procedures. In the very near future, we plan to release a comprehensive Violent Crime Report detailing what needs to be done at all levels of government to combat violent crime.

Because the serious problem of drug abuse in this country is inseparable from violent crime, our attack on violent crime has had a major impact on drug trafficking. Our ongoing offensive against violent street gangs engaged in the drug trade has completely eradicated entire gangs in cities such as Philadelphia, Chicago, Boston, Detroit and Washington, D.C. In prosecuting the war on drugs, we have fought successfully against these violent traffickers. Furthermore, the conviction of General Manuel Noriega demonstrates that no drug kingpin is above the law. Laws passed by Congress in the 1980's have given us a law enforcement infrastructure that continues to yield thousands of arrests and record seizures of drugs, money, assets and processing facilities.

Of course, it is the inner city that is hardest hit by drug trafficking. And that is one reason, Mr. Chairman, why our Weed and Seed initiative is so important. This year has seen a dramatic expansion of Weed and Seed. As you know, the Weed and Seed strategy is designed to revitalize communities by targeting high crime neighborhoods and housing developments with efforts to "weed out" violent criminals, illegal gang activity, drug trafficking and related violence, and then "seed" these formerly crime-saturated neighborhoods with comprehensive social and economic revitalization programs. Over the past four months, the pilot phase of Weed and Seed was expanded to sixteen additional demonstration sites. The response from community groups, the private sector, and state and local officials has been overwhelmingly positive.

As you know, Mr. Chairman, the Administration is seeking $500 million in FY 1993 for Weed and Seed. This request is tied to the

passage of enterprise zone legislation which is vital to the economic growth of urban communities.

In the civil rights area, we have seen a record number of cases brought and defendants charged. From FY 1989 through FY 1991, the Department has prosecuted more racial violence cases than in the previous twelve years put together. Virtually all defendants charged have been convicted or have pled guilty. In response to the problem of police brutality, in the past three years, the Department has brought charges against 123 law enforcement officers alleging official misconduct and abuse.

With the amendment to the Fair Housing Act that became effective in 1989, the Department of Justice has been able to file almost ten times as many fair-housing lawsuits per year as were possible before 1989. While I was serving as Acting Attorney General, I announced plans to aggressively attack housing discrimination by employing the Department's own testers. That testing program is now underway, and has already borne fruit. Furthermore, we will soon announce the filing and simultaneous settling of a major lawsuit involving discrimination in public housing to remedy racial and national-origin discrimination.

I have also directed Assistant Attorney General John Dunne in the Civil Rights Division to study the complex problem of mortgage discrimination. Soon we will suggest specific changes to improve racial and ethnic fairness in the mortgage underwriting process and, with the cooperation of the appropriate regulatory agencies, we will conduct more detailed investigations of specific lending institutions.

We have also sought to counter the disturbing rise in anti-Semitic activity, both in housing practices and in society at large. In the Airmont case, we are attempting to overthrow zoning laws allegedly designed to keep Orthodox Jews out of a community in New York. More recently, we convicted eight members of hate groups who desecrated a synagogue in Nashville, Tennessee. We have also

convicted numerous "skinheads" for a variety of anti-Semitic crimes.

Mr. Chairman, with regard to my fourth priority of white-collar crime and fraud in financial institutions, we have continued to experience unprecedented success. Having over 1,600 FBI Special Agents and prosecuting attorneys dedicated to financial institution fraud, the Department has prosecuted more than 3,100 defendants in major financial institution fraud cases over the past 2 1/2 years. More than 1,000 of these defendants have been prosecuted in connection with major Savings and Loan cases, and more than three-fourths of those convicted have gone to jail.

In the BCCI matter, there have been a number of positive developments since my confirmation testimony. After our special task force returned a comprehensive indictment in December 1991, the Bank of Credit and Commerce International agreed to plead guilty to federal and state charges of conspiracy to commit racketeering and fraud. BCCI agreed not only to forfeit all of its assets in the United States -- worth approximately $550 million, making it the largest forfeiture in history -- but also to cooperate fully with ongoing investigations of individuals. On January 24, 1992, the Court accepted the guilty plea and ordered the $550 million forfeiture. District Courts in both Washington and New York praised the intra-governmental cooperation and round-the-clock international negotiations -- led by Deputy Attorney General George Terwilliger -- that made the settlement possible. The British Courts recently granted U.S. investigators access to millions of pages of BCCI documents. Within the past week, the Department obtained the appointment of a trustee to help sell First American Bank and sever its ties to BCCI, and requested an additional forfeiture of $100 million in frozen U.S. assets claimed by the Ruling Family of Abu Dahbi.

Another major focus in our fight against white collar crime is health care fraud. Evidence suggests that professional criminals in the health-care business are looting as much as 15% of

Americans' $800 billion health-care costs. In February, I announced the reassignment of 50 FBI agents from counter-intelligence work to investigations of health-care fraud. Less than an hour ago, I announced that FBI agents and other law enforcement officers are now making multiple arrests and seizing assets in more than 50 cities, as part of operation Goldpill, the nation's most extensive investigation of health care fraud to date.

Finally, let me mention what we have been doing in the area of immigration. In order to effectively enforce and implement the nation's immigration laws, I have directed the Immigration and Naturalization Service to hire 300 new Border Patrol Officers. As of June 12, 241 trainees have been hired, and 71 officers are already trained and working on the border. I also ordered the hiring of 200 additional criminal investigators to combat illegal immigration and violent crime by criminal aliens, the creation of a National Criminal Alien Tracking Center, and the hiring of over 700 additional INS workers to improve services to legal immigrants and travelers. In addition, $5 million from the Department's Asset Forfeiture Fund has been used to purchase new lighting, sensors, vehicles and other interdiction equipment. Last week in Los Angeles I announced a series of initiatives designed to facilitate the identification and deportation of criminal aliens.

Mr. Chairman, when I was sworn-in as Attorney General, I stated that it was an honor for me to work with the career employees at the Department who have always demonstrated in my experience the highest level of professionalism and devotion. My experience in the last seven months has clearly reaffirmed that view. I am proud of what the Department has accomplished and enthusiastic about the possibilities for the future. It remains my goal to leave the Department of Justice a more effective and more professional institution.

Once again, I would like to express my appreciation to the committee for its support.

Thank you for your courtesy and your time.

The CHAIRMAN. Thank you, General. General, since my friend from South Carolina exhorted me to support "the Attorney General's crime bill," if you would, why don't you tell the committee what you see the status of our discussions on the crime bill to be?

Attorney General BARR. Well, Mr. Chairman, as you know, there are significant differences between the administration's crime bill and the conference report crime bill. In our view, the conference report took the weakest of the various provisions that had been enacted by either House and combined them in a bill that we think is a step backward in many respects for law enforcement.

The principal areas of contentions have been over differences in the Federal death penalty provision; differences over the exclusionary rule, the good-faith exception to the exclusionary rule. There have been serious differences on the issue of habeas corpus reform. I would say that those have been the three principal areas of disagreement.

You and I and Senator Thurmond and our staffs have had discussions to see if we could bridge our differences, and I think those have been very productive exchanges. I think we all recognize, however, that there are a number of other players in this and we also have to bring the House into it and see what would be possible to accomplish by way of compromise legislation in the House.

The CHAIRMAN. Well, General, it is true, you and I have been talking for some time about the possibility of compromise. I, too, am hopeful that it is possible. As you know, I have been meeting with and talking to my colleagues and counterparts in the House, and they, too, have reached the point where they believe that it is worth us exploring the possibility of a compromise.

So, speaking for myself, not for you or for anyone else, I am of the view, as long as there is a realistic and legitimate hope that we can reach a compromise, the biggest sticking point, at least as it is on the Hill, relates to habeas corpus. I expect that may be the biggest sticking point in any potential compromise between me and my counterparts in the House—the "Democrats" who support the conference report—and the administration.

I am hopeful that there is, based on my discussions with you and with our counterparts in the House, some reason for optimism. So I just want you to know, to say publicly what I have told you privately, I have indicated to the majority leader and the leaders in the House that it is my view that we should pursue the possibility of a compromise, and that in the meantime, at least in terms of any initiative from me or the Democratic leadership, that should be temporarily placed on hold until I got back to them to tell them I thought there was no possibility of a compromise.

I am not speaking in terms of binding anyone up here, nor am I by any implication binding you or the administration, but I hope we will pursue the outlines of the compromise—and they are only outlines—that we have over the weeks discussed. It is my hope that we can, up here—it is not on your watch—but up here, we can diminish the political rhetoric and find out whether we can get down to brass tacks and produce for the American people and for the police agencies of this country a solid crime bill that the President could sign and we can support. So I am committed to pursue that.

Again, I want to make it clear, as you said, there are stumbling blocks all along the way. There are some divisions up here within parties, between parties, within institutions, between institutions, and I don't know for a fact, but I wouldn't be surprised if there were similar divisions in the administration. But I am confident we can overcome it, and I just hope the rhetoric up here doesn't get out of hand before we have a chance to finally explore whether that can be done.

On that score, there have been a number of encouraging signs, or at least a few encouraging signs with regard to law enforcement and local law enforcement. One of the few encouraging signs in the last several months of debate over crime legislation in the Senate is a newly found bipartisan support for State and local law enforcement that did not exist over the last year up here, and it seems to now.

About 1 year ago, in May 1992, the then Attorney General, Thornburgh, in a similar hearing wrote the committee to oppose several of the anticrime initiatives that I and other Senators had put together—programs strongly supported by law enforcement throughout the Nation. Among the programs officially opposed by the Justice Department then were an increase for the drug enforcement grants to $1 billion, $100 million for antigang programs, education and scholarships for in-service police officers, and many other specifics.

However, just months ago when Senator Gramm and others of our distinguished colleagues offered a new "Republican crime bill," virtually all of these programs which had been opposed by then Attorney General Thornburgh were included in the so-called Republican crime bill. The total aid for State and local law enforcement in the Gramm, or Gramm-Thurmond, or Republican crime bill tops $3 billion.

So let me ask you if the administration and the Justice Department now support the programs to deliver aid to the front lines of the drug and crime fight in line with the specific recommendations made in the crime bill introduced last year and now virtually the identical provisions on State and local law enforcement in the crime bill introduced by the Republicans this year. Are you at liberty to answer that question?

Attorney General BARR. Well, I would say that if we had a bill that had strong, substantive provisions as far as we were concerned, far be it from the Department of Justice to interpose an objection because of assistance going to State and local law enforcement.

You are right. State and local law enforcement is stretched very thin, as is Federal law enforcement right now, and I think there is a renewed appreciation for the need for more assistance and resources to State and local. I know that you have been making the point for quite some time of the need for more police. The fact is that more police can reduce the incidence of crime, and I think the events in Los Angeles really underscore and have illuminated the debate and shown the need for more police. In my view, that is one of the lessons to be learned from it.

But let me suggest three caveats or three concerns I have. No. 1, I am concerned that we don't divert resources from Federal law

enforcement, and it is hard for me to be enthusiastic about increasing authorizations for State and local assistance when at the same time I am seeing budget committees whack away at Federal law enforcement. So in one week, we see a budget resolution that basically freezes Federal resources or cuts the President's law enforcement budget request drastically for the Federal law enforcement side, and real appropriations dollars, and then have people talk about increasing the authorization for State and local law enforcement. Obviously, I think we need to have balanced law enforcement in this country, and so I don't think that aid to State and locals should come at the expense of a strong Federal law enforcement program.

The second caveat I would have is that I think we have to be careful about not assuming the State and local law enforcement responsibility here at the Federal level. That responsibility should be in State government and we should see to it, and I think the people should see to it, that their Government step up to the plate and provide the resources locally that are needed.

The CHAIRMAN. On that point, do you suggest that any of the programs in this new Republican crime bill or the old Democratic crime bill or conference report do that? Do they supplant the States' requirements, as you view it?

Attorney General BARR. Well, I think there is room for Federal stimulation and assistance and demonstration projects and, in certain circumstances, maybe direct assistance for programs that are better handled by the State. For example, I think the States have to invest more in their corrections systems, and that is a State obligation, but that wouldn't stop me from supporting in proper circumstances some kind of incentive and assistance to certain kinds of facilities.

And then the third caveat I would have, or concern I would have is that, in increasing authorization levels, we also think about getting the real dollars there through the appropriations. So those are the caveats I would raise, but as my predecessor used to say, and you know, law enforcement at all levels can use more resources right now, and I would never say no to more resources.

The CHAIRMAN. Well, my time is up, but let me finish this exchange. It is true that the President's request for the Justice Department is larger than the congressional appropriations for Justice last time, and I do not and did not support those cuts. The majority of the committee did not, and we so wrote to the authorizing committee.

But we are now into a situation where we seem to have consensus on some very big-ticket items relating to local law enforcement that had been opposed up to now, for whatever number of reasons, and it is very important that we know two things as it relates to the Justice Department and the administration's position.

First, do they support, at least as the—I don't know whether it has been stated or implied by the Republican authors of the so-called Republican crime bill, the Gramm bill, the Gramm-Thurmond bill——

Senator THURMOND. It is an amendment, the same as the one I introduced.

The CHAIRMAN. Whatever the appropriate designation is, but I will refer to it for purposes of this brief discussion as the Republican crime bill, it has been suggested on the floor that the administration and the Justice Department now support the specific programs that are included in that bill which they specifically opposed when Thornburgh was Attorney General.

So in the context of the Republican crime bill, at least, it is important to know whether or not the administration supports those specific programs. And, second, notwithstanding the fact that in regard to the last detailed budget summary there is less offered than asked for, will the President, along with me and many other Democrats, as well as Republicans, ask for that additional money, support the request to go after additional money?

I keep hearing from some of my Republican colleagues who strongly support these increases now that this is "funny money." Now, I am assuming they are not being cynical and I assume they mean they support these or they wouldn't offer them, and if they support them and offer them, we have always found up here we have been able to find the money. Each year, we have a drug bill. From the beginning, we have been told we can't find the money, and we put it different places than you may want it, but we essentially find the same amount of money.

So I want to close this loop here and stop, and if you would rather answer for the record, that is all right as well, but the question is does the administration now support the specific spending programs for local law enforcement that have been endorsed by and are being pushed by the Republican leadership in the Senate in the so-called Republican crime bill, and if they do, will they join those Republican sponsors, as well as me and others, in trying to find that money for purposes of appropriation of that money.

Attorney General BARR. Well, specifically, I would want to go back over each of—if you are asking about each program, I would want to look at that bill and refresh my recollection as to exactly where that money is going. But, generally, my impression is that we could support that on two conditions: One, it is part of a crime bill that has strong substantive provisions in it, such as habeas and death penalty, and so forth; and, two, the Federal law enforcement effort is being adequately funded.

So the corollary to that, or the obverse of that is if Federal law enforcement is not getting the resources it needs and if we are not getting a strong crime bill, then I would not favor that.

The CHAIRMAN. Well, then, for the record, would you take a look at that and answer your own threshold question whether the Republican crime bill does do enough for Federal law enforcement in order to allow you to be able to support the additional effort that is being——

Attorney General BARR. Well, I can answer as to the Republican crime bill. Obviously, the substantive provisions are fine as far as we are concerned.

The CHAIRMAN. Right, and the next question was, then, whether or not funding for Federal law enforcement is sufficient.

Attorney General BARR. I am talking about appropriations there.

The CHAIRMAN. Right. Well, appropriations depend a lot, as you well know, on whether or not we all get in the same tank and fight

for it, and I guess what you are saying is if the appropriators were to appropriate the money for local law enforcement and not all the money asked for for Federal law enforcement, then you would not support those programs. Is that right?

Attorney General BARR. Right.

The CHAIRMAN. OK, that is what I was trying to get. All right, thank you very much.

I yield to my colleague from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman. Mr. Chairman, the amendment offered by Senator Gramm, I believe, is the same legislation which I offered as S. 2305, which was endorsed by the Justice Department and the administration. As I understand it, the Justice Department was willing to go along with this money if you could get these tough provisions on habeas corpus and those other matters that we so badly need. Is that correct?

Attorney General BARR. That is correct.

Senator THURMOND. And so it isn't the fact that the Republicans have changed their minds. It is a matter of a compromise that if we can get these tough provisions, we would accept additional money as a compromise with Senator Biden and those who take his position. Is that right?

Attorney General BARR. I believe so, and also, I think, recognition that the violent crime problem is sufficiently serious that if we can find the resources, these would be appropriate places to direct them.

The CHAIRMAN. I say to my friend from South Carolina more cops are more cops, whether or not there is habeas corpus. We either need more cops or we don't.

Senator THURMOND. Well, if you have to choose, as I understand it, you want the tough provisions——

Attorney General BARR. That is right.

Senator THURMOND [continuing]. Death penalty, habeas corpus, and the other positions that we have advocated in this crime bill, and that is what I have put in this bill, which is the same as the amendment Senator Gramm has been offering to various bills and which the administration and Justice had endorsed, and that is very important.

Now, Mr. Attorney General, on June 16 of this year, former Defense Secretary Caspar Weinberger fell victim to the 5½-year fishing expedition of independent counsel Lawrence Walsh. This political effort has yielded precious little at an estimated cost of over $31 million.

The independent counsel statute contains no limit on the length of an investigation or how much can be spent, nor is there any oversight. Now, some in Congress want to extend the independent counsel statute before it expires at the end of this year.

Would you mind discussing your views on the independent counsel statute and whether it should be extended, and if so, what changes should be made?

Attorney General BARR. I will be glad to discuss my views on the independent counsel statute generally, but I don't want to make any comments specifically about Walsh and his investigation.

I think that the independent counsel statute in its present form would have to be substantially changed for me to support it be-

cause I believe that its current framework leads to abuse. I think you have identified some of the problems with the statute. There is no accountability, there is no control over resources. I think that there is a possibility under the statute of people being treated unequally, and so I think that some safeguards and changes have to be made in the statute to address those systemic problems with it.

Senator THURMOND. Mr. Attorney General, President Bush opposed this conference report. I oppose it, and I believe you oppose it. Would you mind stating very briefly why you oppose this conference report?

Attorney General BARR. Well, I think it doesn't have the provisions that we would like to see in the Federal death penalty. It doesn't provide for the good-faith exception to the exclusionary rule, and most importantly, and I think the chairman is right, the principal area of difference has been over habeas corpus.

I think the conference report is a step backward in habeas corpus; in fact, would provide more opportunity for delay. It would, we think, overrule the *Teague* case, which we thought was a reasonable restriction on the abuse of habeas corpus.

So those were the principal concerns we had with the conference report, and one of the major focal points of discussion really has been trying to find a version of habeas corpus that would be acceptable.

Senator THURMOND. As a matter of fact, didn't that report expand the rights of criminals in some cases?

Attorney General BARR. Yes, not only in the area of habeas corpus, but, for example, it overruled the *Fluminante* decision.

Senator THURMOND. Which would expand the rights of criminals?

Attorney General BARR. That is right.

Senator THURMOND. I wanted to be sure we all understood that.

Now, Mr. Attorney General, as you know, recent advances in telecommunications technology threaten to undermine the lawful court-ordered ability of law enforcement to intercept electronic communications. The Department, through the FBI, is presently working on draft legislation which seeks to preserve the current ability of law enforcement, with the assistance of telephone companies, to intercept specific calls, pursuant to court order, that are in furtherance of criminal conduct. Unfortunately, this proposal has met some objection from privacy groups and some telecommunications companies.

Would you discuss briefly the need for this proposed legislation and whether privacy rights would be threatened should this proposal become law?

Attorney General BARR. You are correct that electronic surveillance is a critical part of law enforcement. Without our ability to intercept—pursuant to court order, without our ability to intercept communications, we would have no chance whatsoever of successfully waging the drug war, for example. In many crimes such as kidnaping, the ability to make electronic surveillance or intercepts is absolutely critical to solving the case and saving lives.

I think when all is said and done, the American people will want to preserve for law enforcement the ability to make electronic interceptions of communications. Because of the advances in technology, we will at some point reach the stage where law enforcement's abil-

ity to intercept communications will be negated. So we do seek legislation to ensure that companies will continue to be able to provide information to us pursuant to court order.

Now, I do not see a basis for privacy groups to be concerned about this because it does not expand our current authority to intercept communications. We would still have to go to court and make the same showing that we do now. The interceptions would be pursuant to court order, as authorized by statute. In fact, the kind of technology we are talking about would make it less susceptible to abuse and to—this technology would be less susceptible to use by private parties, for example, seeking to intercept communications. So I don't think that there are legitimate privacy concerns at work here, unless you take issue with the state of affairs right now.

Senator THURMOND. Mr. Attorney General, time is moving on. As briefly as you can, in your prepared statement you noted that enhanced crackdown on felons who use firearms and violent repeat offenders has increased the need for prison space. As you know, the Federal Bureau of Prisons is in the middle of an aggressive prison expansion program which has activated another 17,000 additional beds over the last 3 years. Yet, prison space at the State level continues to be a major problem.

Recently, you hosted a national summit on corrections which brought together corrections officials from across the Nation to discuss this problem. Would you briefly discuss some of the results of this summit and whether the States have demonstrated a commitment to prison capacity expansion?

Attorney General BARR. I think you are right that one of the critical issues in the criminal justice system is to ensure that we have adequate prison space at the State level to incapacitate chronic repeat offenders. In my view, one of the reasons we have the crime rate where it is today is because many States are not providing the prison capacity, and therefore are releasing chronic offenders back out onto the streets much too early.

Nationwide, we spend 2.2 percent of the Government budget on corrections, and in my view there is room for growth there. Some States are providing adequate prison capacity. In my view, for example, California has kept up an adequate prison-building program. Texas, which didn't during the 1980's, has now embarked on a massive prison project; 29 prisons have just been funded and located. So I think the States are starting to respond because of the level of crime.

The prison summit was principally for sharing information and providing a forum for exchange of ideas on a number of topics ranging from reducing construction costs—and there the Federal Government will be playing more of a clearinghouse role. One of the things to come out of the summit was the Federal Government's role as a clearinghouse for prison design and construction to reduce the per-bed costs.

Another area we examined was reducing the operating costs. Right now, the average prisoner costs $20,000 a year to house per year.

Senator THURMOND. $20,000 a year, you say?

Attorney General BARR. $20,000 a year.

Senator THURMOND. Is that Federal or State?

Attorney General BARR. That is the national average, and so one thing we were looking at is controlling those costs and reducing those costs. For example, some States are now spending $7 per day per prisoner for health care, which is a lot more than most families in the United States have spent per member of the family on health care. And so we are looking at different ways of reducing those costs and, again, we have set up a clearinghouse for ideas there.

We have looked at alternative sanctions as a way of taking prisoners who really don't have to be in that kind of high-cost incarcerative surrounding and get them into, hopefully, less costly sanction programs that provide adequate safety to the community without tying up valuable prison space.

Those were some of the issues that we examined at the summit.

Senator THURMOND. Mr. Chairman, I believe my time is up.

[Senator Thurmond's questions and Attorney General Barr's answers appear in the appendix.]

The CHAIRMAN. OK, thank you. I had announced some time ago that when a major witness was here, we would go in order of those who arrived rather than historically, as we had, with regard to seniority. Senator Metzenbaum was for the seniority rule until Senator Kennedy walked in, and now it doesn't matter, so we are going to go in order of those who came first. I thank Senator Kennedy for making my decision easy by agreeing.

Senator DeConcini.

OPENING STATEMENT OF SENATOR DeCONCINI

Senator DECONCINI. Mr. Attorney General, as you know, I have had a keen interest about the Border Patrol, and you have responded to some of the suggestions that we reviewed at your confirmation hearing, having, I think, allocated in the reprogramming some 200 border agents. We need a lot more, but I——

Attorney General BARR. Three.

Senator DECONCINI. 300, was it? Sorry. I want to tell you that I am impressed that you did it and that you are looking at those things. I want to just touch real quickly—we don't have much time, so if you could just give me some brief answers, if possible. If not, you can submit them.

The Border Patrol in my State and along the Southwest border has had recently many incidences of abuse toward the apprehension of illegal aliens, and sometimes legal aliens; targeting high school children, for instance, going out and sitting at high schools and asking questions, and tracking them home and then arresting the parents. Just last week, a border patrolman was charged with first-degree murder, shooting somebody in the back, as I am sure you are aware. The San Diego chief of police has suggested a citizens review panel.

I am a strong supporter of the Border Patrol, but I think this has to stop and the Justice Department has to come forward with something that is going to satisfy the public outcry on this, as well as to ensure that valid complaints can be addressed. Would you consider a citizens review panel, and if not, what can you do to attempt to bring this under some control soon?

Attorney General BARR. Senator, I think to the extent there is a problem there, we are bringing it under control. I think that we have taken steps over the last few years to improve the training and the supervision of the Border Patrol. My impression is the number of incidents is dropping significantly.

Senator DECONCINI. I don't know. If I can interrupt you, Mr. Attorney General, I don't have the statistics here as to how many incidents there were, but certainly the publicity on them is not dropping. It is substantially increased, and maybe it is because we have a murder and school children involved. Before that, it was an undocumented alien coming over and getting beaten up, but it really doesn't make any difference.

Attorney General BARR. I think you are right, and I think it may be some of the publicity, but my impression is the incidents are going down. In fact, I would like to look into that and provide you that for the record.

Senator DECONCINI. Yes. Would you please? I would like to know.

But even if that is true, are you satisfied with the training that is going on with the Border Patrol, that they get enough of this training and there is enough enforcement and there is an ability for people to file complaints?

Attorney General BARR. I think there is. In fact, my understanding is that the rate of complaint is one complaint per 17,000 apprehensions, which is probably far lower than most police departments in the country.

Senator DECONCINI. Well, based on my State, Mr. Attorney General, I don't think that is good, whatever the statistical number is, and I urge you to consider some public input here so there seems to be some feeling that the public can participate.

The next question, Mr. Attorney General. You were very strong in indicating support of a Treasury forfeiture fund, and now the Secretary of the Treasury is on board and indicates that OMB is on board. Have you changed your position at all on that? Do you still support it, as you testified before?

Attorney General BARR. My position on a separate Treasury fund has been consistent from day one.

Senator DECONCINI. And there has been no change?

Attorney General BARR. Well, no change, except there are two important principles, I think. One is the rules for another fund have to be the same so you don't have Federal agencies out there competing for business, essentially.

Senator DECONCINI. Yes, sir.

Attorney General BARR. And, second, setting up a fund shouldn't be used as a means of addressing a change in jurisdiction.

Senator DECONCINI. I agree.

Attorney General BARR. We can deal with jurisdictional claims head-on.

Senator DECONCINI. You said so, Mr. Attorney General. You said, I have told Treasury that I would support a separate fund for Treasury if all the rules were the same, and then you go on about that.

Attorney General BARR. Yes, that is my position.

Senator DECONCINI. I need to turn to Indian gaming, Mr. Attorney General, if I could, and you are aware of this and I have talked to Mr. Terwilliger at some length. Given the public concern and confusion that is going on out there, why was it decided that a forcible seizure of the gaming machines in Arizona was necessary, given the violence that could erupt and given the options of other court procedures and orders, and what have you?

It seems to me very difficult to explain 50 law enforcement officers, the majority of them Federal, swooping down on Indian reservations when, in fact, there is a tremendous history in the U.S. attorney's office in Arizona of the U.S. attorney declining requests from the BIA and Indian reservations to prosecute violent crimes on the reservation. I understand that during a 1-year period, the U.S. attorney's office in Phoenix declined 147 cases referred to it by the BIA and tribal law enforcement.

I know that is a lot of questions, but could you tell us, No. 1, why a restraining order wasn't used? Were you involved in the decisionmaking? Can something be done to correct this? And, fourth—I realize that is a lot of questions, but time is so short—why can't a priority be set?

It seems to me that when 147 violent crimes have been turned down on the Indian reservation, there is a problem in the Justice Department when having some electronic bingo games is more important than violent crimes on the reservation.

Attorney General BARR. Trying to be brief in responding to those various questions, the Department is concerned about the problem of Indian gaming and is under a lot of pressure from across the Nation to do something about it. There is the potential of organized crime moving into it if it is unregulated. So, in part, I think the U.S. attorneys feel that they should take some action, and there is pressure to do so.

Second, I think the action that was taken in Arizona was really a result of the calculations of the local U.S. attorney, and I don't believe Washington was involved in——

Senator DECONCINI. You had not agreed to that?

Attorney General BARR. I don't think I agreed to that, yes.

Senator DECONCINI. Yes, that you had not?

Attorney General BARR. No, I did not.

Senator DECONCINI. You did not agree to that, OK, fine.

Attorney General BARR. No, I did not approve it.

Senator DECONCINI. You did not approve it?

Attorney General BARR. At least I don't recall approving it.

Senator DECONCINI. I think the record is clear that you as Attorney General or your Washington office had not approved that.

Attorney General BARR. And I believe that the local U.S. attorney felt that using seizure was preferable and less confrontational than initiating a prosecution.

Senator DECONCINI. A restraining order?

Attorney General BARR. A prosecution, a criminal prosecution.

Senator DECONCINI. Well, would you agree that that was the best way to handle it, in retrospect, or would you rather not second-guess your U.S. attorney out there? She is a very competent lady, I must say, and has a longstanding history of tough law enforcement which is hard to criticize, but it seems to me there is a

better way to handle it than to swoop down on these reservations, particularly in light of some of the information I gave you on other crimes on the reservation.

Attorney General BARR. I don't know enough about the local circumstances there to second-guess her, and I don't think it would be fair for me to do so because I was pushing the U.S. attorneys to do something.

Senator DECONCINI. To enforce the law?

Attorney General BARR. To enforce the law.

Senator DECONCINI. The gaming laws.

Attorney General BARR. However, at least right now I think the status of it is in a more desirable posture. My understanding is that forfeiture action is being held in abeyance to give the tribe an opportunity to negotiate a compact with the State.

Senator DECONCINI. And that is occurring, and there is a court decision, I think, coming within the next 60 days or something like that that is kind of an outside parameter of when these compacts might be entered into.

Attorney General BARR. In terms of crime on the reservation, that is something that I am particularly concerned about. I have met with a number of Indian leaders precisely—this was one of the issues I wanted to discuss with them. I think there is a gap in Federal enforcement that is largely a resource problem, and that is that a crime may be committed on an Indian reservation that is serious for that reservation and is a serious crime, but given all the prosecutorial priorities of a particular office in that State, it may not get the attention it should. And because the Indian tribes lack jurisdiction over felonies, the crime basically goes unpunished, or it is more often punished as a misdemeanor with a light sentence.

Senator DECONCINI. Don't you think that there is a public image problem where the Justice Department swoops down on reservations for gambling and there is a long history of violent crimes that are turned down?

Attorney General BARR. We are looking at ways now of trying to increase our enforcement against violent crimes on the Indian reservations.

Senator DECONCINI. Would you tell us what you are going to do when you do it?

Attorney General BARR. Yes, I sure will.

Senator DECONCINI. OK. A last question, Mr. Chairman. I happen to support extraterritorial jurisdiction in extreme cases, and this goes to Dr. Machene of the Camarena case. Over the years, I have written Attorneys General Meese and Thornburgh requesting that the United States seek extradition of the murderers of agent Camarena. To this day, I have never had an answer. Can you tell me, was extradition ever sought of this man from the Mexican Government, and if not, why not?

Lastly, it is my understanding that under the terms of the treaty with Mexico, had Mexico refused such a request, if it had been made, it would have been obligated to prosecute the doctor in Mexico. Can you confirm that, and can you tell me whether or not extradition was ever sought, and if not, why not?

Attorney General BARR. Just on Dr. Machene?

Senator DECONCINI. Yes, sir.

Attorney General BARR. I can't recall right now whether we formally sought extradition. The Mexican position is very firm, and that is they will not extradite nationals, their own citizens. So whether or not we formally sought it, I know what the Mexican position is and it has been longstanding and absolutely, and that is they are not going to extradite a Mexican national.

Senator DECONCINI. Did they prosecute him?

Attorney General BARR. Machene?

Senator DECONCINI. Yes, sir.

Attorney General BARR. I don't believe so.

Senator DECONCINI. I don't believe so either. But it is very clear in the treaty that if we do request extradition, they are obligated to prosecute. It doesn't mean convict, but prosecute.

Even if you know that their position is that they don't extradite nationals, wouldn't that have been a valid tool in such a heinous case as Camarena's torture?

Attorney General BARR. I think that if the process worked as it should and the law enforcement system down there responded as it should have, that would have been a useful tool to use at the time.

Senator DECONCINI. Would you mind getting back to the committee or to the record regarding this subject matter and the questions I have asked relating to it?

Attorney General BARR. I would be glad to.

[Senator DeConcini's questions and Attorney General Barr's answers appear in the appendix.]

Senator DECONCINI. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator Hatch.

OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Thank you, Mr. Chairman.

General Barr, I would like to just first express my appreciation for the service you have given thus far as Attorney General. I have watched what you have done and I think you are doing an excellent job, and I share the opinion of the chairman of this committee that he expressed earlier. I thought it was a great compliment to you.

I have a few questions for you regarding the independent counsel statute. As you know, the statute expires this December and we in the Congress have to decide whether or not to reauthorize it. General Barr, is there a danger to assigning prosecutors to just one case with unlimited resources to pursue that case, and how does that compare with the responsibilities of the average U.S. attorney who normally would bring indictments and prosecutions?

Attorney General BARR. I think there is a danger to assigning a prosecutor with an unlimited budget to one case or investigation because I think it results in a loss of perspective by the prosecutor, as well as ultimately the risk of unequal treatment of individuals.

We would not do that in the Justice Department, and under our guidelines resources and prosecutorial priorities are something which a prosecutor should take into account in determining not only whether to proceed with an investigation, but ultimately whether to indict a particular individual.

So if you give a prosecutor an unlimited budget and tell him to go after a particular individual, you could have a situation where that individual, the target, would be indicated and prosecuted for activity that another individual would not be, and I think that that is not something our system should tolerate.

Senator HATCH. Well, I want to get into that. General Barr, Mr. Walsh has been quoted as saying that when confronted with probable cause, his duty as a special counsel has been to seek an indictment. Would that be the same standard used by the Justice Department prosecutors when they determine whether to seek an indictment?

To go further, does the Department have guidelines for determining whether an indictment should be sought against the target of an investigation, and do these guidelines apply to independent counsels?

Attorney General BARR. Well, without discussing Walsh's comment, because, as I say, I don't want to discuss his particular situation-——

Senator HATCH. Sure.

Attorney General BARR [continuing]. My understanding is our decisions to prosecute do not turn solely on whether we believe there is probable cause. I believe that we have to determine, one, that we believe that there is probable cause and we believe the person is guilty. And, second, we have to believe that we have evidence that probably will result in a guilty verdict.

Third, we take into account other factors that would militate against proceeding with an indictment, including the person's past record, the relative seriousness of the offense, whether there is some administrative mechanism that may be sufficiently punitive under the circumstances rather than a criminal case, and a different law enforcement priorities.

So there are a lot of other factors under Department of Justice guidelines that go into a decision whether to prosecute, and I think the most important is the evidence because the worst thing for our system is to have a prosecutor—the prosecution power is probably the most——

Senator HATCH. It is the power to destroy.

Attorney General BARR [continuing]. Devastating that we have in our system.

Senator HATCH. Sure.

Attorney General BARR. It is the power to destroy an individual and, in my view, it should not be exercised solely upon the subjective belief of a prosecutor, an individual person. The reason we have evidence is because that is objective. We don't try and convict people based on subjective belief. We do it based on evidence, and that is why we require our prosecutors to have evidence before they go ahead.

Senator HATCH. So there is a different standard. General Barr, if the Department notifies an individual that he or she is the subject or a target of a grand jury investigation and that person believes that he or she may be indicted, what steps can that person's lawyer take to appeal to prosecutors not to indict?

Specifically, can not that person's lawyer go to the section chief of the U.S. attorney's office, to the first assistant U.S. attorney, to

the U.S. attorney, and then, if it is that important a case, to the head of the Criminal Division in Washington, and really, ultimately, to the Office of the Attorney General itself? In this way, a variety of prosecutors with different backgrounds, different experiences and perspectives, can bring their wisdom and their judgment to the matter.

By contrast, when an independent counsel informs a person that he or she is the subject or a target of an investigation, what recourse does that person have if discussions with the independent counsel are unsuccessful? Have I outlined it fairly?

Attorney General BARR. I think that outlines it fairly accurately. In the Department, whether there is an appeal or not by a potential indictee, there are a number of levels of review, and frequently review back in Washington, for example, by the Criminal Division in certain types of cases.

But, certainly, a target has the ability to go up the chain of command, as you have just outlined, so that different people have a chance to look at the case and ensure that it is not an abuse and that the evidence is there and that justice is ultimately being served. That same recourse does not exist within the independent counsel statute, obviously.

Senator HATCH. Well, General Barr, I bring to your attention an article from the Legal Times dated June 22, 1992. In that article, special counsel, Mr. Walsh, admitted that he had moved back to Oklahoma City and that Craig Gillen is running the office. He said, and I quote, "I rarely make a suggestion."

Now, the independent counsel statute reads in pertinent part that the court

> * * * shall appoint as independent counsel an individual who has appropriate experience and who will conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner. The court shall seek to appoint as independent counsel an individual who will serve to the extent necessary to complete the investigation and any prosecution without undue delay.

Do you believe that Mr. Walsh's apparent delegation of authority to Mr. Gillen is consistent with that statute?

Attorney General BARR. I really want to punt on that one because I don't want to comment specifically on Mr. Walsh.

Senator HATCH. Well, I will be frank to tell you I don't think it is, and I don't believe you really believe it is either.

Let me ask you a specific question. Again, you may not want to answer it, but, General Barr, as you may know, Mr. Walsh has charged in his indictment that former Secretary Weinberger made a false statement when he told a congressional investigator in a deposition that he could "not recall" whether the Saudis had helped finance the contras.

Now, as I understand it—I am not so interested in you commenting about the specifics in the Weinberger case, but as I understand it, is it not the Department's policy to refrain from bringing an indictment for making false statements when the statements at issue are to the effect that, "I cannot recall," or, "I do not remember"? Isn't that generally the rule of the Department?

Attorney General BARR. We don't have an absolute rule against that, but that is a very difficult kind of perjury to prove.

Senator HATCH. Do you know of any case where you have actually brought an indictment when they say they couldn't recall or "I don't remember"?

Attorney General BARR. I can't remember a case, but I am sure there have been cases, but I think we would require substantial evidence of state of mind in that kind of case.

Senator HATCH. Well, similarly, Mr. Walsh has charged in his indictment that Mr. Weinberger perjured himself when he testified to the select committee that he had "no memory" of the Israeli request to be resupplied with Hawk missiles to replace those shipped to Iran.

Now, as I understand it, the Department would not indict someone for perjury for making a statement that he had "no memory" of a given fact. Wouldn't that be generally the rule?

Attorney General BARR. I think what I just said is my understanding of the rule. We don't have an absolute rule against it. I mean, there are cases, I am sure, where someone has gone into the grand jury or what have you and just said, I don't know, I don't know, I don't know, I don't know, I don't remember, and there is strong evidence——-

Senator HATCH. Sure, but that is clearly not this case.

Attorney General BARR [continuing]. There is strong evidence that the person must know to overcome that, including, for example, contemporaneous statements to others that would show state of mind that the person did remember, in fact.

Senator HATCH. But as a general rule, the Department recognizes people might not remember all the facts and all of the matters that come up in a busy person's life, especially somebody like the Secretary of Defense?

Attorney General BARR. That is correct.

Senator HATCH. OK. Now, General Barr, as I understand it, the Department's U.S. Attorney's Manual warns against the prosecution of defendants who have received immunity for their congressional testimony. As we know, this did not deter Mr. Walsh from proceeding with the prosecution of Colonel North and Admiral Poindexter, and the court of appeals subsequently overturned the North conviction.

Now, can you give us the Department's rationale for discouraging its prosecutors from pursuing defendants who have received immunity for their congressional testimony? And in light of the Department's guidelines, are you aware whether Mr. Walsh was advised by the Department that he should not seek any indictments that he subsequently brought?

Attorney General BARR. Well, just stating generally our castigar policy without discussing Walsh specifically, I think under our guidelines specific approval is required to go forward with a case that involves the grant of congressional immunity. I think the Attorney General has to approve that, as a matter of fact. I am not sure on that. I don't believe that Judge Walsh sought our approval on that because I don't think he views himself—and probably under the statute shouldn't be checking with us, but I don't think he did.

I think the rationale for our policy on immunity cases is probably twofold: One, the great difficulty in pursuing those cases and en-

suring that the compelled statement somehow has not tainted the proceeding, and therefore undermined the privilege against self-incrimination; and, two, so that we would not have a chilling effect on the full and robust testimony under a grant of immunity in some other body; in this case, on the Hill. I think those are probably the bases for our policy of carefully considering and reviewing a castigar case.

Senator HATCH. Well, my time is up, but let me just ask this one last question just for the record. General Barr, how much money has been spent on independent counsels since this statute came into existence, and specifically, in particular, how much has Mr. Walsh spent thus far directly, and I am not counting all the indirect costs? If you would care to give those, I would be happy, too.

Attorney General BARR. I think Walsh's investigation is about $30 million, maybe $29 to $30 million, direct costs.

Senator HATCH. That doesn't include the indirect costs, then?

Attorney General BARR. I believe his indirect costs to the department—for example, FBI resources and Treasury resources—may be in the neighborhood of another $9 or $10 million. So, roughly speaking, I think the investigation has probably cost $40 million, in that range.

Senator HATCH. And that is just counting the indirect costs of the Department, not other departments as well?

Attorney General BARR. I think Department of Justice and Treasury, I believe.

Senator HATCH. So you are saying Department of Justice and Treasury and special counsel costs, direct and indirect, have been approaching $39 or $40 million?

Attorney General BARR. I think in that range, yes.

Senator HATCH. Well, I have a number of other questions I will submit in writing. Thank you for your candor.

The CHAIRMAN. Senator Metzenbaum.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. General Barr, I am happy to see you here this afternoon. I am concerned, General, that Vice President Quayle's Competitiveness Council is preventing Federal agencies from properly implementing laws passed by Congress. That concern was reinforced last Thursday when the Environmental Protection Agency issued its final rule on the 1990 Clean Air Act's permit program.

The permit program, as you know, is the heart of the law. It requires factories to obtain a permit which limits the amount of pollution they can release into local communities. Congress intended that the public be actively involved in the permitting process so that local residents would have a say in deciding how much smog and other pollutants could be released into their communities. That is a critical quality of life issue and the public needs to be involved.

Unfortunately, the new regulation issued by EPA contains a massive loophole known as the minor permits amendment that was demanded by Vice President Quayle's Competitiveness Council. Frankly, I am concerned about the role that the Justice Department played in the development of this loophole.

The minor permits amendment allows polluters, without any advanced public notice, to exceed the pollution limits laid out in their permits by up to 245 tons. Under this new rule, polluters can revise their permits simply by sending a letter to the State pollution control agency which says that they are going to exceed their limits. The State then has 90 days to reject the increase, and there is no requirement that the public be involved in the decision. The rule allows the polluter to exceed the permit limits while the application for revision is pending.

Allowing polluters to revise their permits without public notice is contrary to both the purpose and the language of the act. The draft rules initially sent to the White House by EPA in early 1991 required public notification and public hearings before any factory could exceed its pollution levels in its permit.

However, in the spring of 1991, Vice President Quayle's Council on Competitiveness attacked the public notice requirement and sought to have the provision dropped from the regulations. In August, the EPA general counsel properly issued a memo which stated that it would be illegal to eliminate public review. The Comptroller General joined the EPA general counsel. He also wrote a memo which stated that any permit revision process "must provide, at a minimum, opportunities for the public to participate in a public comment period."

Both the New York Times and the Washington Post have reported that your own lawyers in the Justice Department supported EPA's view that the law required public notice of permit revision. However, the Quayle Council continued to pressure EPA to issue a rule that would allow polluters to revise their permits without public notice.

Last month, President Bush resolved the dispute by siding with the Quayle Council, but only after receiving assurances that it would be legal to drop the public notice requirement. Press accounts indicate that EPA Administrator Riley actually refused to issue the new regulation until the Justice Department provided a formal legal opinion supporting its legality. The legal opinion was forwarded to Mr. Riley 10 days after the President made his decision.

Now, General Barr, experts at the EPA, the Comptroller General, and even lawyers within your Department all took the position that the law required public notice of permit revisions. Why didn't you heed their views instead of coming out with a legal opinion to conform to the wishes of the politically motivated Quayle Council?

Attorney General BARR. I think there are two issues. One, it is a very complicated question of law and statutory interpretation, I think, and, as I recall, there were two questions. One is, to amend under the minor permit amendment process, do you have to give notice to EPA and the States? That is one issue, and then the other issue was do you need public hearings. Is that consistent with your understanding?

Senator METZENBAUM. Well, I think it is part of the same issue. It is the public's right to know if there is to be any amendment. Everybody, including people in your own office, the EPA general counsel, and the Comptroller General, all concluded it couldn't be done.

Now, the New York Times does report that Mr. Bush orders Attorney General William Barr to prepare a memorandum to that effect; that is, indicating that it is legal. Did the President order you to do that?

Attorney General BARR. No. No one ordered me to prepare any opinion, and no one directed me or the Department as far as I am aware to come up with a particular result. My understanding of the situation was that the EPA general counsel had looked at this. I think there was some change in the EPA general counsel's position. I think our Lands Division——

Senator METZENBAUM. The EPA general counsel stated—the language that he used says the language of the act shows that "Congress clearly intended that there be a public comment process for permit revisions." And press accounts have indicated that the EPA general counsel's opinion was initially supported by staff lawyers at your Department. As a matter of fact, one Government official involved in the process says that the Justice Department staff lawyers were "overruled by politicians who were willing to torque the rules to come to the desirous results." The Wall Street Journal quoted another observer as saying that the Justice Department's opinion "has some real characteristics of rationalization, not rationality."

So the real question is, is this just one of those political legal opinions when all the lawyers come to one conclusion, but because of the Vice President's Competitiveness Council—which operates, in my opinion, without any legal structure at all—the Justice Department gives the kind of opinion that is wanted by the Vice President and the President as well?

Attorney General BARR. No. In fact, I think that my recollection of it was that the EPA general counsel, before doing their extant opinion, had previously taken the position that was more consistent with the position that the Department of Justice took.

Senator METZENBAUM. What is your authority for that statement?

Attorney General BARR. I think that Don Elliott, who was the general counsel at the time I am thinking of, at one point said publicly, I believe, that a public hearing was not necessary, although notice to EPA was. Now, don't hold me to that because that is a vague recollection I have that EPA wasn't consistent on this issue either.

Senator METZENBAUM. I have no evidence of that, but I do know that he stated that the language of the act shows that Congress clearly intended that there be a public comment process for permit revisions, and that is a quote.

Attorney General BARR. Well, be that as it may, whatever EPA's position was—and I don't think it was as consistent as you are suggesting, but whatever the facts are, in the Department of Justice the Lands Division first took the position that under the statute you could take either position. You could sustain either position under *Chevron*, which is deference to agency interpretation. So, under *Chevron*, you could take the position that a public hearing was not necessary for a minor amendment.

Then I asked OLC to look at that, the Office of Legal Counsel in the Department. Riley asked me to have that position examined,

not just to rely on the Lands Division. So I asked OLC to take a look at it as well, and then I looked at the opinion that was signed off on by both the Lands Division and by OLC and it looked like the right decision to me, and the decision that Justice lawyers reached was that either interpretation could be sustained, that the statute was very ambiguous.

Senator METZENBAUM. Well, Mr. Barr, I want to say to you that we have searched the record. We have read everything that has been written about this subject. We don't find any difference of opinion of legal experts. The Assistant Attorney General for Lands and Natural Resources, Mr. Stewart, was in agreement that this was not the legal thing to do. The Comptroller General took that position. The counsel for the EPA took that position.

As a matter of fact, your Department hadn't taken any position, but some of the lawyers in your Department were saying that it would be illegal to change. Then all of a sudden, the President and the Competitiveness Council come in and there is a flip-flop, and the Attorney General's office comes out and says this is legal.

Now, I guess you didn't do anything criminal, but the fact is that when the Attorney General of the United States comes up with a conclusion contrary to what its own lawyers' decision was, what the EPA lawyer's position was, what the position of the Assistant Attorney General for Lands and Natural Resources was, what the Comptroller General's opinion was, it sure in the devil looks political and it looks like the Competitiveness Council is just playing the political game doing whatever business wants it to do, and the Attorney General of the United States is going along with it.

Frankly, I am disappointed because I have had a good deal of respect for you in your position. I think you are trying to run the Department in a proper manner but in this instance the only conclusion that any objective viewer could arrive at is that you let down the public and you let those manufacturers, those who are the polluters, come in through the back door and get what they couldn't through the front door.

Attorney General BARR. Well, first, I gave advice to the Competitiveness Council, the Department did, before the President's decision. So it wasn't after the President's decision that we gave advice. Now, I don't know about the timing of the formal opinion and when it went to the administrator.

Senator METZENBAUM. Ten days after.

Attorney General BARR. Excuse me?

Senator METZENBAUM. Ten days after.

Attorney General BARR. But the advice was given before the decision, and that was what was relied upon. I am told that the Lands Division—the acting assistant attorney general at the time was Barry Hartman. His advice to me, and the paperwork that they prepared in the Lands Division, was that you did not absolutely have to have public hearings. That was reviewed by OLC. OLC agreed with Lands.

Riley asked me to take a look at it. I looked at the memo and it sounded like it was the correct position; that, under *Chevron*, which gives a lot of deference to agencies like EPA, and given the ambiguities and, really, the opaqueness of the statute, that position

could be sustained. That is what our conclusion was, and if we are wrong, then these regulations are going to be struck down.

Senator METZENBAUM [presiding]. My time is expired, but I have to differ with you as to both the facts and the conclusions.

[Senator Metzenbaum's questions and Attorney General Barr's answers appear in the appendix.]

Senator METZENBAUM. Senator Specter.

OPENING STATEMENT OF SENATOR SPECTER

Senator SPECTER. Thank you very much.

Mr. Attorney General, I compliment you on a job well done in a difficult area. I appreciated your prepared remarks noting the experience of the drug enforcement programs in the Eastern District of Pennsylvania, which have become models for the country with the strike force on Triggerlock, and also with the Federal courts assuming a greater role in the prosecution of serious drug cases. I think that is an example to be duplicated, since the Federal Government has joint jurisdiction on the drug cases, and the inadequacies, candidly, of the Philadelphia State court system has made Federal court intervention really important.

Let me begin the questions by asking what you have in mind with respect to criminal prosecutions on fraud in the health care delivery area. That, as we all know, is a field which is growing by leaps and bounds, with escalating costs of $738 billion a year, 13 or 14 percent of the gross national product. There is considerable evidence of fraud, and if that could be curtailed, reduced, it could produce very substantial savings on health care costs. What do you have in mind on that?

Attorney General BARR. Senator, just before getting to the health care thing, I would just like to make a comment about the programs you mentioned coming out of Philadelphia because——

Senator SPECTER. You might want to comment on the armed career criminal bill as well.

Attorney General BARR. I sure would because to be frank, Senator, it was your leadership that got both of these programs underway in Philadelphia and really prodded the Federal Government to getting into the aggressive use of the armed career criminal statute, which served as the basis, then, for our national Triggerlock program which has been so successful going after chronic offenders.

And it was your efforts on the violent traffickers program in Philadelphia which was really the genesis of using the RICO statutes against gang members, and we have taken that program nationally; also, really, the experience in the Spring Garden neighborhood which you were instrumental in initiating, which has now grown and crystallized into the Weed and Seed Program. So your fingerprints are all over these aggressive steps that we have been taking to deal with violent crime across the Nation.

Senator SPECTER. Fingerprints, but no firing guns.

Attorney General BARR. Now, to go back to the issue of health care fraud, as you say, right now we are spending at least $738 billion, probably this year closer to $800 billion, on health care in this country. Various estimates exist as to the scope of fraud that may be involved there, ranging from $50 billion by GAO, up to $75 bil-

lion and higher. Perhaps as high as 15 percent of that may be related to fraud.

The types of fraud that can be involved in the health industry are almost as limitless as human imagination. They can range from providing billing for tests that are never done, ordering tests that are unnecessary, padding the bills, manipulating cost information in reporting to Medicaid, and so forth.

The other aspect here is that now health care services are the second item in government procurement. The Federal Government procures over $200 billion a year in health care services. So when this fraud occurs, the money is being taken out of the pocket of the taxpayers and it is being taken out of the pocket of people who pay health care premiums and increases the cost of medical care across the board.

The people who are most victimized by this are those who can least afford it; for example, the aged and the infirmed. That is why we have a special commitment to cracking down on health care fraud. We have doubled the resources going into that in February.

Senator SPECTER. Mr. Attorney General, I don't want to curtail your answer here, but I have a number of subjects I want to cover in only 10 minutes.

Attorney General BARR. Go ahead.

Senator SPECTER. I applaud you for your efforts. What I would like to see—if you could submit it in writing for the committee, I think we would all be interested in where you are heading, and perhaps we can be of assistance to you. As we look at the health care field, to curtail fraud would be an enormous help. So I would like to see a more expansive presentation, and I do want to touch a number of other subjects.

Attorney General BARR. I will be glad to do that, Senator. I think we have some ideas that——

Senator SPECTER. That format would be satisfactory with you?

Attorney General BARR. Yes.

Senator SPECTER. Good.

The subject of the independent counsel has been raised earlier, and the authorization is about to expire. It is my hope that we would retain the independent counsel. I believe that it is important to have an independent counsel where you have a category of high governmental officials, and I think it is appropriate to include the Congress in that line. I think that your suggestions, as I have read them publicly, about modifications in the law are important. I think that there ought to be accountability.

It would be my suggestion to you that we look for some judicial review from the appointing authority. You are the Attorney General. You are accountable to the President, your appointer. He is accountable to the people. Independent counsel has no supervisory authority, and my suggestion to you, Mr. Attorney General, would be to take a look at some judicial supervision.

I have studied the statutes on superseding prosecutors, district attorneys, either by State attorneys general or by independent counsel, and there is some latitude there for judicial review. It would be my suggestion that we explore that line. But we ought to try to find some way for accountability and still let us retain the

independent counsel. I would be interested in your thoughts on that subject.

Attorney General BARR. I am not wedded to any particular approach to provide accountability. I just identified that as a major problem and would be willing to explore any mechanism that would provide the needed accountability. So I would be interested in taking a look at that approach.

Senator SPECTER. Mr. Attorney General, I broach now a subject which I raised with you last year with respect to the difference between purchased buildings and leased buildings under the provisions of the Davis-Bacon Act. I had raised this with you when you were testifying last November and we have not received any follow-up, and I would appreciate it if you would take a look at that and try to give us a response.

The focus of attention there was on two points, one on district court opinion which disagreed with one of your predecessor's opinions on the interpretation of law, and, second, the substantive issue itself. So if you could let me have a response on that within a couple of weeks, I would appreciate it.

Attorney General BARR. Certainly, we will do that.

Senator SPECTER. I would like now to discuss with you for a few moments the issue of habeas corpus, which has been the stumbling block of moving ahead on the crime bill. It is my suggestion that we take a look at one full hearing in the Federal system without the constant remanding back to the lower courts and back to the State courts.

As I have reviewed those opinions, the procedural maze is just intolerable. I think there is much to be gained if we simplify the appeals process so that within the State system there is a consideration of adequacy of counsel on a postconviction hearing, and all issues would then have to be raised on one appeal to the State supreme court.

Attorney General BARR. Is that a unitary system?

Senator SPECTER. Yes.

Attorney General BARR. Yes.

Senator SPECTER. I know from my days as district attorney in Philadelphia we would have cases going back up to the State supreme court repetitively and the cases would languish in the State system for several years; then, having finished with the State supreme court, go into the Federal system and not give the kind of deference which some want to the State proceedings.

My reading of the cases has been that it saves no time at all, and ultimately there is a hearing in the Federal system on an evidentiary basis and on a legal basis, but only one hearing. When that matter then goes to the court of appeals and an application for certiorari made, no successive petition would be entertainable by the district court unless leave was granted by the circuit court.

We structured this sort of a statute in the 101st Congress. I would invite you to take a look at that again because I believe that if we were to allow a full Federal hearing, but only one, with appropriate safeguards to avoid successive hearings, that could break the logjam and really stop this process of some capital cases languishing in the courts for as long as 17 years.

Attorney General BARR. Let me look into that, Senator. I would like to study that and look at that proposal. It is basically taking the unitary approach that is used in some States, like California, and moving it into the Federal system?

Senator SPECTER. Yes, that is it exactly.

Attorney General BARR. Yes.

Senator SPECTER. We have come to a point now in the Senate on this issue where there is gridlock. It is unseemly in terms of procedure of the Senate. It certainly is getting us nowhere in terms of the substance, and I believe that with a reasonable effort, we could breach this gap and move ahead and get the crime bill.

Attorney General BARR. Thank you, Senator.

Senator SPECTER. Thank you very much, Mr. Attorney General.

OPENING STATEMENT OF SENATOR LEAHY

Senator LEAHY. General, I have been interested in a number of areas, one of which involves a question that has also concerned me in the Senate Agriculture Committee. That is, here in the United States, we are now spending some very large amount of money in foreign aid to Saddam Hussein. We are going to spend $1.9 billion to pay foreign aid bills for Saddam Hussein this year.

In that regard, Judge Shoob in Atlanta wrote to the chairman of the House Judiciary Committee in the Banco Lavoro matter. He is the presiding judge in the *Iraq-BNL* case. He asked for an independent prosecutor, and the reason he did so was based on the fact that Chris Dragoul, who was a former manager of the bank, BNL, and is a principal defendant in the case, agreed to plead guilty on June 2. I think the Government had 347 counts against him. He said he would plead to all them, that he would do it with no plea agreement. There was no requirement for the Government to recommend any degree of leniency or anything else. Mr. Dragoul was prepared to take whatever came on 347 counts and plead guilty, but he did ask for the right to make a full statement in court, which I would assume a judge would ask for anyway, saying why he was guilty.

Now, slightly prior to that, his lawyer advised the judge that Mr. Dragoul had written out a statement that would take several hours to read. The judge was advised by all counsel that the plea would go forward on June 2. However, that weekend while the lead prosecutor, Gail McKenzie, was out of town, her assistant, Randy Chartash, who had come down to Atlanta from the Justice Department in February, initiated a plea agreement.

Now, keep in mind Mr. Dragoul was going to plead guilty to 347 counts, with no understanding of any special deal on sentencing or anything else—a sweetheart deal for the Government if there ever was one. All of a sudden, the Justice Department says "No." I don't know if they were saying this is too good for us, but now Mr. Dragoul would have to plead guilty to only 60 counts in the indictment; he would make no statement until 2 months of Government debriefing, and the Government would recommend a downward departure in Dragoul's sentence. This is a tremendous change from what Dragoul had been prepared to accept.

Now, that is what Judge Shoob said. Is that basically accurate?

Attorney General BARR. We were asked about this by Chairman Brooks, and on June 26 we provided an extensive answer about Dragoul's plea agreement, and what I would like to do is provide you with a copy of this letter which goes over the chronology of it and explains what happened. Otherwise, I basically will be reading this letter into the record.

Senator LEAHY. Well, let me——

Attorney General BARR. As you know, the House Judiciary Committee is making a lot of noises about writing to me to trigger the independent counsel statute and to see whether one should be appointed. The Attorney General is obliged to consider that when a majority of either party in the Judiciary Committee writes a letter.

Basically, I am waiting to see exactly what they put in this letter and then I will review all the facts and the allegations that have been made, including Judge Shoob's letter. But until then, I haven't been getting into all the nitty-gritty of this thing.

Senator LEAHY. Let me just ask you this as a hypothetical. If you have somebody who is about to plea to almost 350 counts without asking for any statement of leniency or anything else from the prosecution and who is perfectly willing to go forward with that, does it seem strange for the prosecution then to come and talk him into pleading to far fever counts, with a recommendation of leniency? I mean, would that seem unusual at least under those facts?

Attorney General BARR. Well, I am told that we got something, which was his cooperation.

Senator LEAHY. Well, you also had an understanding that he was about to give a long statement in court explaining exactly what was involved in this case, too. I mean, that is the thing that I am worried about. What I am worried about is the fact that we have a person who is willing to talk about something that appears to be a mistake of foreign policy as much as anything else, as well as a whole lot of stolen money. He is going to explain all of that in court, and then all of a sudden he is pleading to far fewer counts and will no longer explain it all in court. I mean, that was my concern.

Let me ask you this. Was Mr. Chartash in touch with Justice Department officials in Washington concerning this plea bargain? Do you know that offhand?

Attorney General BARR. I was just told—you know, maybe if we are going to get into it, I will just sit here and read the letter which provides the full explanation.

Senator LEAHY. I will review the letter from you. I just wonder if you could simply give me an answer to this question. Did Mr. Chartash get in touch with Justice Department officials in Washington concerning this plea bargain?

Attorney General BARR. I am told that there were communications and that Gail McKenzie was involved in those discussions, and that the basic thrust of what we were trying to accomplish was not to prevent Drougal from providing information, but just the contrary, to get his cooperation and get more information from him and his cooperation so that we could get to the bottom of it.

Senator LEAHY. Well, in that case——

Attorney General BARR. But as I say, I am going to wait and see what all the allegations are, as presented to me, and then I am

going to look at them and I am not going to get into the nitty-gritty of it until then.

Senator LEAHY. Well, let me ask you this. Will Mr. Dragoul have the opportunity to make the full public statement he was planning to make on June 2?

Attorney General BARR. I am told that we had no objection to his doing that, and we so said.

Senator LEAHY. Is it your understanding, then, that Mr. Dragoul will, in fact, make this statement that he was putting together, when all of a sudden he was offered a better deal?

Attorney General BARR. I am told that we took the position that he was free to do that.

Senator LEAHY. And it is your understanding from what you have just said that Ms. McKenzie was aware that Mr. Chartash was negotiating with Mr. Dragoul while she was absent?

Attorney General BARR. I was told she was involved in the discussion.

Senator LEAHY. OK. My concern is, you know, here is Mr. Dragoul, who was the manager of the Atlanta branch of Banco Lavoro. It appears he funneled close to $4 billion in illegal loans to Iraq which, by anybody's reckoning, is an awful lot of money. Most of us think that if he is just a manager of a branch he couldn't have funneled that much money without somebody senior knowing about it.

I am just thinking, as one taxpayer who is going to be stuck with paying this foreign aid to Saddam Hussein because of all this money being funneled, I want to know——

Attorney General BARR. From BNL?

Senator LEAHY. Well, no. It becomes part of the whole thing. Here is what we have done: We cosigned many of the loans with—we, the United States—with Saddam Hussein. We were cosigning notes with him, in effect, right up until the tanks were rolling into Kuwait. Saddam Hussein, for reasons I think are obvious, isn't about to pay them back now, and we, the American taxpayers, are stuck with the bill.

What I am concerned about is the $4 billion in illegal loans that went to Iraq. I want to know if somebody else was aware of it or if Mr. Dragoul was acting as a lone agent. Certainly, everything I have seen in the press would suggest that he didn't act alone, and I think that you——

Attorney General BARR. Well, who do you suggest he was acting with?

Senator LEAHY. Well, who knows? That is why I would hope that he would make the full statement. Are you suggesting he acted alone?

Attorney General BARR. No, but I think one of the reasons we have been investigating this is to determine exactly what the scope of this was, including the role of the bank in Italy, the role of Iraqi officials. My belief at this point is that the Department of Justice—you know, we are the only country in the world to have investigated this and actually brought prosecutions, and I think that any suggestion that the Department delayed its case or is trying to withhold information or do anything other than handle this in the most professional way is unfounded as far as I can tell, and if

anyone has any other information, they are free to put it out there and I will look at it.

Senator LEAHY. Well, Mr. Barr, that is not what I am saying. I mean, you say we are the only country in the world that has been willing to prosecute. We also were the only country in the world willing to extend these kinds of credits to Iraq—substantial, long-term credits. Iraq went to a lot of other countries that normally do these things and they wouldn't extend loans because of the question of creditworthiness.

Attorney General BARR. Yes. Well, what we are talking about here is an Italian bank.

Senator LEAHY. I should note on your behalf you did categorically reject the suggestion that the investigation was held up for foreign policy reasons. I believe you were on "Larry King Live" on June 24, and you categorically rejected that.

Attorney General BARR. Rejected what?

Senator LEAHY. That the indictments were held up for foreign policy reasons. I am told that in February 1990 the U.S. attorney in Atlanta was ready to bring indictments in the *BNL* case, but they weren't brought until a year later, well after the policy of trying to improve relations with Iraq was down the tubes.

Was that delay caused in any way by foreign policy considerations, the delay from February 1990 to February 1991?

Attorney General BARR. I am sorry. Someone was whispering in my ear. Could you repeat the whole question?

Senator LEAHY. Yes. I am told that in February 1990 the U.S. attorney in Atlanta was ready to bring indictments in the *BNL* case. These indictments were held up until almost a year later; a lot changed within our foreign policy toward Saddam Hussein in that year. Were the charges delayed in any way for foreign policy considerations?

Attorney General BARR. I have not reviewed this personally and gotten into all the details. My understanding is that basically the reason for the delay was related to professional differences, as well as the need to develop other parts of the case; that there was an aspect of the case, principally, whether to indict the Central Bank of Iraq where foreign policy or international interests were vetted, but that the principal internal discussions in the Department of Justice had to do with seeing what the role of BNL itself was in Italy, whether it was a victim or whether or not it was actually involved in any of the illegal activities, and also to examine the scope of whether Iraqi officials were involved.

It is my understanding that the initial indictment did not cover the senior Iraqi officials, the draft indictment, and that the ultimate indictment did, and that is, I think, part of the puzzle that was put together during that period. But let me turn around and make sure what I said was correct. Yes.

Senator LEAHY. So the delay in bringing indictments in the *BNL* case was not influenced by foreign policy?

Attorney General BARR. I answered the question.

Senator LEAHY. Well, not really, but my time is up and I will submit some more questions for the record. You did not fully answer my question, but I will submit more questions for the record.

[Senator Leahy's questions and Attorney General Barr's answers appear in the appendix.]

The CHAIRMAN. Thank you.

Senator Grassley.

OPENING STATEMENT OF SENATOR GRASSLEY

Senator GRASSLEY. Thank you, Mr. Chairman, and welcome again, Mr. Barr. On this side, there are many of us that feel you are doing a good job. We may not be entirely satisfied with every specific instance, but for the most part you have gotten good reviews and I think they are well deserved.

It wouldn't surprise you if I told you I want to talk about qui tam and false claims. I am sure you realize that I have some disagreements with your Department, but maybe these can be narrowed in our discussion. My differences come from the fact that I think there are some who contend that the Department might be hostile to qui tam relators. So I would try to characterize something, and if I mischaracterize it, I would welcome you to straighten me out.

The Department has taken the position that Government employees should be precluded from being qui tam plaintiffs, contrary to the results in several appeals court decisions. I understand the Department's concern with employees having an incentive to self-deal. I agree with you that we don't want to encourage FBI agents and Department of Justice lawyers, among others, working on fraud cases to use what they learn at work to sue as qui tam plaintiffs.

But what if the employee finds his superiors unwilling to pursue well-founded allegations of fraud, whether because of bureaucratic malaise or corruption or a difference of opinion about merits? I feel that there is a great deal of peer pressure to conform in order to get along within the bureaucracy. I think that sometimes creates problems in getting our intent carried out.

So my question is, Shouldn't we allow Government employees to sue in the name of the Government in cases where the bureaucracy has refused to protect the taxpayers?

Attorney General BARR. I don't think so. I wouldn't like to see a mechanism where the employees get a percentage, and therefore an interest in the claim because I think it inherently creates a conflict in that individual, where he has a potential private interest that is apart from the public interest and the Government interest.

Now, I would think that there are other ways that that employee could ensure that a claim that he thought existed was adequately pursued, even if he thought his supervisors or whatever were not taking it sufficiently seriously. There are, first of all, a lot of avenues within an agency, including the inspector general, and then he is obviously free to bring a potential claim to the attention of, for example, the Government Operations Committee. He can even bring it to the attention of a potential qui tam plaintiff. But once you give a financial interest to the employee, I think you create a conflict of interest, and it ultimately would not be in the public's interest.

Senator GRASSLEY. Well, to some extent, I don't entirely disagree with you, but I ask the question, how do we get from a point where you can assure that there is an incentive there—it seems to me

that a qui tam relator's share is the ultimate incentive. There might be other ways to do it, or at least to make sure that the Government's interest is protected and that there isn't an undue incentive to self-deal.

For instance, the bill before the House Judiciary Committee gives the Government an opportunity to argue for dismissal if the information was learned in Government employment and the employee didn't exhaust available channels for reporting fraud. It requires the employee to report all of his information to his supervisor and to give the Government 12 months to investigate the allegation, with extensions if necessary.

If an employee is still able to sue as a qui tam plaintiff after jumping through all these hoops, why shouldn't we let him do it? I am not asking you specifically to take a position on the bill, although I believe your Department has, but I am offering that as a way of my explaining to you that I don't disagree with the end that you seek. I am willing to modify existing legislation to some extent. It seems to me that we have given a great deal of incentive to make sure that the Government acts on it first.

Attorney General BARR. I think you are right, Senator, that you have made modifications to it and agreed to modifications specifically to deal with our concerns, and I think, as you say, concerns that you share, and those modifications are certainly steps in the right direction. They don't go as far as I would like them to go. I guess that is the bottom line. I don't like the idea of a Government employee getting an interest in it, but certainly the changes you have made are a step in the right direction.

Senator GRASSLEY. If I could just get you to agree that there is some point at which we should allow Government employees an escape valve from bureaucratic inaction to vindicate the public fisc, that would be an important acknowledgment for me if qui tam was still a tool.

Attorney General BARR. Not for the Government employee. In other words, the Government employee can go to a qui tam relator and get the suit brought if he is really acting in the public interest, which he should be because he is an employee, rather than create a separate interest which could be antithetical to the Government's.

Senator GRASSLEY. Well, let me bring up the subject of hostility to relators. I am concerned that the Department takes an overly adversarial stance toward qui tam relators. I understand that the Government frequently argues for the dismissal of qui tam plaintiffs, and often argues that relators in successful cases be given the lowest possible award, without statutory basis.

What is the Department's policy concerning awards to qui tam relators?

Attorney General BARR. I am not sure whether we have a formal policy. I would have to look and see whether we do, but I imagine that there are different types of qui tam relators. I am aware of cases where we think that there have been good ones who are reasonable, who provide the Government sufficient time to pursue any criminal avenues that we would like, and are fairly good and professional people to work with.

And then I think that there have been relators in other cases that have been very difficult and are only interested in No. 1 and are willing to sacrifice the public interest to maximize their own return, and that there are times where there is conflict between the Department of Justice, which is pursuing the public interest, and the relator who is principally interested in having the largest recovery for themselves.

So I assume it varies from relator to relator, and perhaps even from prosecutor to prosecutor. So I would have to look and see what our general policy is and, in fact, I would have to look and see what our experience has been generally with them. I don't keep track of that.

Senator GRASSLEY. I did correspond with Mr. Gerson about a month ago on this and I am still awaiting a response. I don't say that to mean it ought to be answered in a month, I just hope it doesn't take too much longer.

Attorney General BARR. Let me look into that and see if I can expedite it.

Senator GRASSLEY. In regard to it, though, I hope that in the future the Government's stance toward these relators will not be so adversarial that it is going to deter people from bringing meritorious fraud cases.

I want to go back to the point where, in response to my previous question, you said that the Government employee could take the information to another relator, who could then bring a qui tam suit. I need to ask if you are saying it is OK for a Government employee to give information to a neighbor who will then sue. Is that what you are saying?

Attorney General BARR. I guess I was suggesting that if you were looking for a safety valve after all avenues have been exhausted, it is not necessary to create a safety valve whereby the employee personally benefits, but I wouldn't want to suggest that it is OK for Government employees to go out willy-nilly and give out information before every avenue has been exhausted.

What I am saying is if we are trying to construct statutorily a mechanism to deal with the situation you posit, there are ways we should probably investigate before allowing the employee to benefit personally.

Senator GRASSLEY. Well, I think that it is good to have you take the view that somebody else could be given the information. But consider this: If you could have a very well-structured approach that is going to make sure that the employee is doing his job, and the information has been given to people who can sue, and still bureaucracy doesn't allow the suit, causing the suit to never be brought, don't you feel that that sort of controlled environment is better than something that would encourage a frustrated Federal employee after doing their job, to go out and give the information to somebody else?

I would like to discuss your international antitrust policy. I brought this up during your confirmation hearings. I am glad, of course, to see that you have followed through on your commitment to revise the Department's international guidelines. I think that we should go even further than what you have done. I have introduced

legislation to that extent. I think your policy, though, is a step in the right direction.

To clarify the bounds of existing law and DOJ policy, I don't want to go into a long description of what kinds of cases the policy change allows you to bring. If you have to do that, OK, but will the Department bring a case against a foreign firm that does little or no business in the United States if that foreign firm engages in private conduct to exclude American exporters from its home market?

Attorney General BARR. Are you talking about one firm?

Senator GRASSLEY. Yes.

Attorney General BARR. Could you repeat the question?

Senator GRASSLEY. Under your policy changes that you have made, would the Department bring a case against a foreign firm that does little or no business in the United States if that foreign firm engages in a private conduct to exclude American exporters from its home markets?

Attorney General BARR. No, no. Our policy change had to do with agreements, so a single actor like that, I wouldn't think would be covered by the policy.

Senator GRASSLEY. OK. Are you confident that such foreign cartel behavior, which primarily affects consumers in competition in the foreign markets, would be found to have "a direct, substantial and foreseeable effect on the U.S.," and those are quotes from what must be done, to satisfy the jurisdictional requirements of the law?

Attorney General BARR. Yes.

Senator LEAHY [presiding]. Chuck.

Senator GRASSLEY. OK, I will stop.

Attorney General BARR. In fact, I think there is a statute, the Antitrust International Improvements Act, which specifically does that and creates that jurisdiction.

Senator GRASSLEY. I will follow up, then, with some questions in writing because I was going to get into that act.

Attorney General BARR. OK.

Senator GRASSLEY. Yes. Thank you.

[Senator Grassley's questions and Attorney General Barr's answers appear in the appendix.]

Senator LEAHY. Under the other previous arrangement the chairman had set, Senator Simon will be next. I should note just for the record, Attorney General, for those who are passing out compliments, I have been extremely pleased with the type of communication with your office, both with you and with Mr. Terwilliger. It has been a refreshing change from past experience, and I certainly appreciate it.

Attorney General BARR. Thank you, Senator.

Senator SIMON. Thank you, Mr. Chairman, and we are just about to vote. Let me get 5 minutes of questions in before we run over there.

First, I would add, in following what Senator Leahy just said, I think there is a general feeling that you are on top of things over there in the Justice Department, and that is a good feeling.

Attorney General BARR. Thank you.

Senator SIMON. The Hate Crimes Statistics Act was signed into law in April 1990. The FBI informs my office they will not have national statistics until fiscal year 1993, but will have some re-

gional statistics earlier. You don't happen to have knowledge of when that information will be available?

Attorney General BARR. No, I don't, Senator.

Senator SIMON. All right. If you could have someone let us know, I would appreciate it.

Attorney General BARR. OK.

Senator SIMON. Unlike the Hate Crimes Statistics Act, which says any crime against any group because of group membership is to be counted, the Community Relations Service provides help to communities only when there is tension on the base of race and ethnicity. It does not include religion or sexual orientation. There has been at least one attempt by Congress to have them move into these other areas through a conference report.

Are you aware of this, and is there a possibility that that could happen without statutory change?

Attorney General BARR. I wasn't aware of that issue, frankly, Senator. I would have to look at the statute and see if we could do that without a statutory change. Right now, our main constraint, I think, is probably resources. We are stretched pretty thin on the Community Relations Service, I believe, but I would have to look at the statute. I don't know off the top of my head whether that would require——

Senator SIMON. It does not seem to me that that would be a sizable increase in their responsibility, but if you could take a look at it?

Attorney General BARR. Sure.

Senator SIMON. And then I would be interested in if you believe it requires statutory change; and then, second, would you favor such a statutory change.

Attorney General BARR. OK.

Senator SIMON. In your statement you said, "We have increasingly targeted felons who use firearms." One of the responsibilities of the Bureau of Alcohol, Tobacco and Firearms is to spend about $3.5 million a year to review whether to give firearms back to convicted felons. It amounts to about $10,000 per convicted felon who gets this right back again.

Is there any justification for that? Is this not something that we could do away with? For the Federal Government to spend $3.5 million a year to see that convicted felons get firearms back again does not seem like a very judicious use of our taxpayers' funds.

Attorney General BARR. I am happy to say that that is not a Department of Justice program. That is BATF, which is part of the Treasury Department.

Senator SIMON. I understand that.

Attorney General BARR. And I am not really that familiar with that program. I think one area that I am familiar with that bears on that, though, is the rules that are used—some States have provisions which change a felon's status and basically wipe the slate clean, and we have had some difficulty in prosecuting career criminals for subsequent gun violations because their earlier violations have essentially been wiped clean, and so that is one area that we would like to see a change in the law in so that people are held accountable for their prior offenses. But I don't have that much familiarity with the program you are talking about.

Senator SIMON. I recognize this is Treasury rather than Justice, but obviously it is an area of mutual interest there, and I would appreciate your taking a look at it and maybe we can combine your interest, where I agree completely, with this particular area where, frankly, I wasn't aware until very recently, and then Senator Lautenberg and I introduced the legislation.

Attorney General BARR. I would be glad to look at that, Senator.

Senator SIMON. The so-called snatch authority—some of us are very much concerned that we are entering into an area where we may set precedents in terms of what can happen to U.S. citizens here, and let me quote from the Manchester Guardian when Secretary of State Jim Baker heard about the position of the Justice Department. It says,

> A clearly angry Secretary of State, Mr. James Baker, said that the new policy on fugitive arrests would not be invoked without full consideration of the implications for foreign policy. He described the Justice Department ruling as "a very narrow legal opinion," saying that, "it did not take into consideration international law nor the President's constitutional responsibility to conduct the foreign policy of the United States."

Do you think that we are setting up a dangerous precedent here in authorizing people to go into other countries to kidnap people and bring them back into the United States?

Attorney General BARR. The rendition opinion which was issued in June 1989 was not an authorization. It was a legal analysis of whether or not that could be done consistent with U.S. law. Many of the same issues were essentially presented by the case of Machene, who was spirited out of Mexico and turned over to United States authorities, and subsequently we obviously want to go forward with the prosecution.

The Supreme Court decision basically said that we didn't violate the treaty, and therefore we could go ahead and prosecute this person legally under U.S. law. But neither the opinion nor the Supreme Court decision are a statement of our policy and don't reflect a change in our policy. Our basic policy is to rely on law enforcement cooperation, and basically we would like to uphold the rule of international law.

When I was testifying in the House about this back when the original opinion became known, I said that most of the situations where something like this may be contemplated would involve situations where other countries were violating international law and we were essentially acting in self-defense.

I think our policy was well stated by the Secretary of State, which is that any action like this would be fully vetted. The State Department would be involved, and all the agencies that have an interest, and it would go up through the chain and ultimately be decided at the highest level. So we are not about to go out willy-nilly grabbing people from overseas, and I agree with you that that would be very counterproductive from a law enforcement standpoint.

Senator SIMON. I want to continue this, but I had better get over and vote.

Attorney General BARR. OK.

[Recess.]

OPENING STATEMENT OF SENATOR BROWN

Senator BROWN [presiding]. The committee will come to order. Senator Simon may well return, and if he does he has a number of minutes left on his time, but I thought, Mr. Attorney General, if you are ready, that we might proceed with questions in the interim.

Attorney General BARR. Sure.

Senator BROWN. First of all, let me thank you again for your appearance today.

As I read through the comments in the various papers on the Pennsylvania case yesterday, it struck me that most of them must have been written before the case was handed down because some of them didn't seem to have much relevance to the case. I can appreciate your reluctance to capsulize a complicated Supreme Court case within a few sentences, but I would be interested in any observations you might care to make with regard to that Pennsylvania case. As I read it, it seemed to be a clear majority for preserving *Roe* v. *Wade*. Is that a fair evaluation of it?

Attorney General BARR. I think so. I guess my bottom line is that it was a mixed bag. In one sense, there was a step in the right direction because it allows reasonable regulation by States, such as parental consent for minors. So to that extent, it is a step forward. In my view, it didn't go far enough. I believe *Roe* v. *Wade* should be overruled.

Senator BROWN. Well, I think you were very frank and up-front with the committee at your confirmation process, and I know the members, regardless of their feelings on the issue, appreciated that up-front review of it.

I noted in your prepared remarks you had discussed the progress with BCCI. I was concerned about an additional aspect of it; that is, followup indictments or prosecutions involving personal liability in that area. You note that BCCI has agreed to cooperate fully in an ongoing investigation of individuals.

Is there anything you can report to the committee with regard to your progress in those ongoing investigations?

Attorney General BARR. We are pushing very hard now on the investigation as it relates to the individuals. I think we will be indicting individuals in the relatively near term. We have access to information that we didn't previously have access to—documents overseas and individuals—and we are hopeful that that information that we now have access to will help us determine individual culpability. But the focus has now shifted to individuals and we are moving full-bore on the investigation.

Senator BROWN. I think the committee's concern—or perhaps I should speak for myself—is that this aspect of the investigation not be overlooked or shortchanged, and I personally am reassured that you are moving ahead in that area.

Attorney General BARR. Definitely. It is certainly not being overlooked. BCCI remains a priority and I am pushing people to move as quickly as they can in the case in terms of reviewing the evidence and gaining access to all available information.

Senator BROWN. I know when you come to these hearings you have an opportunity to talk about just about every subject in the world, or at least it seems that way, before you leave, and I wanted

to change subjects on you and discuss something you might not have focused on in preparing for these hearings.

Earlier, I had asked your staff to give you a copy of the letter that you had sent to Senator Dole involving the retail price maintenance legislation—specifically, S. 429—in which you shared your views on that measure with Senator Dole. As you will appreciate, that is an important letter, one that I think Senators are interested in, and, inasmuch as it shared some important views about that bill, I think is a significant factor in our debate. I wanted to ask you a few questions about that, if you have had a chance to look at it.

Attorney General BARR. I did; I have the letter here. Go ahead with your questions. Retail price maintenance is not something I have looked at that recently, but go ahead.

Senator BROWN. It is an area that at least I find to be a complicated area of the law. That may only reflect my background, but I did have a small part to play in amending that measure when it came out of committee and we tried very hard to address most of the concerns that I think had been voiced about it.

Your letter in the first opening sentence states, "S. 429 is a bill which would impose treble damages under the antitrust laws for alleged resale price maintenance agreements between manufacturers and distributors." Many of the Senators I have talked to, in reading that sentence, assume that it implies that treble damages have not been available for violations of resale price maintenance agreements, or the establishing of resale price maintenance agreements between manufacturers and distributors that violate the antitrust laws.

The implication of the letter is that treble damages haven't existed before and that they will now with the passage of this measure. Is that what you meant to imply by that sentence?

Attorney General BARR. I think probably that—I don't know, but it is probably taken from the short title of the bill, maybe.

Senator BROWN. It may be.

Attorney General BARR. My understanding of the issue, though, is an effort to essentially circumscribe or overrule the *Sharp* and the *Monsanto* cases. I mean, when we are dealing with resale price maintenance and the relationship between a manufacturer and a distributor, you basically have sort of two issues that come into clash. One is the right of the manufacturer to distribute through whom he wants to distribute, and he has a right to terminate for any reason he wants to, essentially, normally a distributor. He doesn't have to deal through a particular distributor.

And then you have the issue of resale price maintenance. Our concern all along has been that, if you allow a suit for resale price maintenance based primarily and almost solely on the complaint of another distributor that this termination is really to police a resale price maintenance agreement, you have eviscerated the power of a manufacturer to terminate a distributor for a lawful reason because the risk of facing treble damages in a jury trial would basically deter a—it would just create just a great risk to termination of a distributor that it would effectively deprive the manufacturer of that right. That is our principal concern.

I have not looked at your amendments, but I understand that you sought to deal with that by modifying the original proposal by requiring some other evidence. Is that correct?

Senator BROWN. Yes, I think that is a fair description. I guess my concern in looking at the letter is that there seemed to be some implication that treble damages did not exist before this bill would pass, but might exist afterward. At least my understanding of the case, whether you are looking at *Sharp* or *Monsanto* or the other case law, is that treble damages did indeed exist for violations of the antitrust laws in this area before. As I talk to people who looked at the letter, some of them have come to the view that the passage of 429 will institute treble damages as a new concept.

Attorney General BARR. I see where people might think that.

Senator BROWN. Well, I mention it because I know your purpose here is not to mislead, but to enlighten.

Attorney General BARR. Right.

Senator BROWN. I am hoping that while that may be a fine point, it would be one you would consider if you have further discussions with or provide further statements to Members concerning this bill.

Attorney General BARR. Yes.

Senator BROWN. The other one that I wanted to draw your attention to is the start of—really, following the next paragraph where it says "S. 429 would permit allegations of an unlawful price-fixing conspiracy to go to a jury trial based on little more than the fact that one dealer has been terminated in response to a complaint from a competing dealer."

I appreciate that you didn't necessarily come here prepared to debate the bill here and that I may be catching you cold, but at least I wanted to not let the occasion pass without pointing out that, as drafted, there must be proof that the plaintiff had an expressed or reasonably implied request or demand by the competitor and that it was a major cause of the termination.

At least in my view, "major cause," which is the language included in the bill, is significantly different than little more than the fact that one dealer has been terminated in response to a complaint. We are saying the bill requires that it is a major cause, which I think is a bit different than what is implied in that second paragraph.

Again, I don't mean to belabor the point, but it is something I would hope you might want to look at and review.

Attorney General BARR. Well, see, I am not sure—and this really goes to the debate and the merits of the bill—I am not sure that putting in the quantum of cause is really going to deal with our concern, which is once you allow that as the principal circumstantial evidence on which you are going to rely, whether you say substantial cause or cause or major cause, you are still allowing the jury to infer from very little an illegal purpose in the termination.

Senator BROWN. The one last one I wanted to draw your attention to, if I could, is a statement where you indicate that S. 429 stretches and distorts the definition of conspiracy. In that regard, I was hoping you folks might review section 4 of the bill. At least it was our intention in putting section 4 together to be pretty clear on that. Section 4 simply says,

Nothing in this Act shall be construed to change the requirement of the Sherman Antitrust Act that a violation of Section 1 or Section 3 of that Act may only be found upon a determination that the defendant entered into an illegal contract, combination or conspiracy. Nothing in this Act shall affect the application of the rule, * * *

And it goes on at section 5. But at least my belief is that section 4 makes it pretty clear that the law of conspiracy is not modified by the bill.

Attorney General BARR. Well, I think what that refers to is without this legislation, the case law requires a showing of some agreement, and after this legislation you wouldn't have to show that agreement, and I think that is what we are referring to.

Senator BROWN. At least my feeling was that a circumstance where you have one competitor secure the dismissal of another competitor who was a retailer, that is indeed something that might—and it is major cause, his complaint is a major cause of him being dismissed—that that is indeed something that might go to a jury.

I don't mean to burden you with that, but it is an area of a modest level of concern on my part, in that sometimes we are not persuasive, or I am not persuasive even with my friends on issues like this, and it was hoped, at least, that the Department in looking at this in future efforts might be willing to work with us when we are trying to craft this or similar legislation.

I know and understand that sometimes when someone is concerned about the value of a bill or the relative value of a bill that it is easier to kill it than it is to clean it up, and I understand that strategy, but I do think in this one that there is some value in working together.

I would now yield to the distinguished Senator from Illinois who has a significant amount of time left, I think.

Senator SIMON [presiding]. Thank you. We were, General, discussing the Alvarez Machene snatching situation. You mentioned the Supreme Court decision, which I thought was a most unfortunate decision and which made Mexico furious and was denounced, I notice, by press around the world.

In commenting on it you said, "Basically, we would like to uphold international law." I would feel better about that statement if you said we would like to uphold international law, period. I think there is a difference between those two. International law, I think, has clearly been violated; at least that is the opinion of most of the nations around the world. My hope is that either through legislation or through subsequent court decisions that we can change a pattern that ultimately, I think, can put U.S. citizens in jeopardy.

My understanding also is that—and I understand there is a dispute with the House on this—that in the past, opinions of legal counsel have been printed and have been available to Members of Congress. My understanding is that in this case that has not been made available to Members of Congress. Am I correct in stating the facts, and if so, is there some reason for that?

Attorney General BARR. In the past, a portion, a percentage of OLC opinions have been redacted and published publicly in volumes, and I think the last set of those are maybe 7 years behind. In other words, they are published several years after they were is-

sued, and only after the agency that requested it has determined there is no problem with making it public.

Generally speaking, however, other than that publication process, we don't make OLC opinions—the general rule is we don't make OLC opinions available to anybody except the client, and that is basically so we don't deter people from asking for legal advice and getting the most candid legal advice.

In this case, on the snatch opinion, because of the notoriety of it and the international implications, and so forth, I think we have worked out an agreement with Chairman Brooks, and let me just check and see where we stand on it.

I am told that we ultimately agreed to send the opinion up there and have members go and review the opinion, and I think that that has now not been handled through on. The chairman has decided not to go forward with that proposal, so I think that is where things stand now.

Senator SIMON. Well, I would be interested in seeing that opinion, if we can work that out.

Attorney General BARR. OK.

Senator SIMON. In response to a question when you were up here earlier on the Inslaw investigation, you mentioned that Judge Bua was going to be heading an investigation, and let me add I have great respect for him and for what he can do.

Can you comment at all on how that is coming along, and will there be some public disclosure of what that investigation has resulted in?

Attorney General BARR. Yes. I have talked to Judge Bua about the progress of the investigation. From what I can tell and he tells me, he is conducting a very thorough investigation and he expects to have it done some time around October or November and I do intend to make the results public.

Senator SIMON. Good.

Attorney General BARR. He explained to me the timeframe it is taking. Because there are so many diffuse allegations that have been made, he is trying to be as thorough as he can and track them all down and talk to every possible witness, and so forth. So I think from what I can tell he has been working hard at it and diligently at it, and so I expect to have a thorough report from him.

Senator SIMON. If I may shift to one final area and then I will defer to my colleague from Wisconsin, we have had complaints about discrimination within the FBI. It grew out of one agent based in Omaha, and that has resulted in an agreement between the black FBI agents and Judge Sessions.

I guess the first basic question is do you support that agreement.

Attorney General BARR. Yes.

Senator SIMON. I understand that there is another group of FBI agents that has publicly come out in opposition to that. That will not negate the agreement?

Attorney General BARR. You are talking about the agreement that Judge Sessions entered into?

Senator SIMON. Yes.

Attorney General BARR. There was some back pay money given and some agreements as to promotions?

Senator SIMON. That is correct, yes.

Attorney General BARR. I support his decision.

Senator SIMON. But I understand that this FBI agents association is unhappy with that and wants to have that modified. There is no backing off on the part of the FBI or the department on that agreement as far as you know?

Attorney General BARR. Not as far as I know. I don't know what stage their objection is in, whether they have taken it to Sessions or whether it is—have they taken it to me yet? I don't think so.

Senator SIMON. If there is any change in the status of that, I would appreciate being informed.

Attorney General BARR. Sure.

Senator SIMON. My staff tells me that the agreement has not been signed off yet by you.

Attorney General BARR. I see.

Senator SIMON. But if you can check that out, I would appreciate it.

Attorney General BARR. OK.

[Senator Simon's questions and Attorney General Barr's answers appear in the appendix.]

Senator SIMON. I will at this point defer to my colleague from Wisconsin, and that means you are getting close to the end, General, and that has to be a happy hour. Let me again just say I think those of us—even though we disagree with you on this issue or that issue, I think we are impressed by the fact that you are on top of things, and you and your people have been cooperative and we appreciate it.

Attorney General BARR. Thank you, Senator.

OPENING STATEMENT OF SENATOR KOHL

Senator KOHL. Thank you very much, Senator Simon.

General Barr, first of all, I would like to thank you and Tim Shays of your Department for the efforts that you have made in Madison. Since Madison was selected as a Weed and Seed site, Madison has continued to combat illegal drugs and the problems that stem from illegal drug activity. I believe that Madison is a good example of what can be done when all interests in a community coordinate their efforts, and I believe the stats will soon bear this out and I appreciate your interest and your efforts on behalf of that city and my State.

Attorney General BARR. Well, thank you, Senator. I agree with you. As you know, I went up to Madison when we made the grant and I was very impressed with the whole community there, and particularly with your person up there, your staff person, who was instrumental in putting together the whole Weed and Seed Program.

Senator KOHL. Well, thank you. I will tell her what you said.

General Barr, on several occasions in the past you have endorsed the Senate-passed Brady bill as long as it was part of "a broader package." But suppose, General Barr, that no such broader package is sent to the President. Let's take a hypothetical. Suppose it is late September and both the Republican and Democratic crime proposals are bogged down in, as hard as it is to believe, partisan political wrangling.

However, General, suppose Congress can and does send to the President a freestanding Brady bill along the lines of the compromise worked out in the Senate. Under those conditions, would you advise the President to sign such a measure into law or would you advise him to veto it?

Attorney General BARR. I would advise him to veto it.

Senator KOHL. OK. Suppose we sent the President a bill that had only two components, the conference committee's Brady bill and its death penalty provisions. What would you advise the President to do under those circumstances?

Attorney General BARR. Are you going to undercut my entire negotiating position here?

Senator KOHL. I wouldn't mind. [Laughter.]

Attorney General BARR. I would recommend veto.

Senator KOHL. OK. During your confirmation hearing, you told Senator Kennedy that you, and I quote, "would support both the Brady bill waiting period and the DeConcini amendment, provided they were part of a broader and more comprehensive crime bill." So let me ask you this. Would you advise the President to sign into law a bill that had only the conference's Brady bill and death penalty provisions, as well as the Senate-passed assault weapons provisions?

Attorney General BARR. No, I wouldn't, and I would like to see, obviously, the President's bill or the Senate Republicans' bill, the substantive provisions there—the death penalty, exclusionary rule, and habeas corpus—adopted. Right now, as Senator Biden said, we have been talking about modifications of some of those provisions and a look at what the whole package might look like to see whether we can get a compromise.

Senator KOHL. But assuming we can't get that, I had understood that all three of these—the Brady bill, death penalty provisions, and the assault weapons—were three things that you were inclined to be supportive of.

Attorney General BARR. Only if they are part of a broader package, and for me the key provisions are death penalty, habeas corpus, and the exclusionary rule. Those are the things that I think are important to get accomplished, and habeas corpus is particularly important, in my view, and that is what a lot of our discussions have really focused on, whether we can come up with a habeas corpus provision that would be satisfactory to everybody, or to enough people. Habeas corpus is probably the central area of difference.

Senator KOHL. Are you saying that unless you get habeas, you don't feel that you want to be a part of any other kind of a compromise package, or something like that are you saying?

Attorney General BARR. Well, I will say here that unless habeas corpus is part of the package, I wouldn't support it.

Senator KOHL. Any part of the package?

Attorney General BARR. No.

Senator KOHL. Even a Brady bill all by itself?

Attorney General BARR. Right.

Senator KOHL. Death penalty all by itself?

Attorney General BARR. Habeas corpus has to be in the package as far as I am concerned personally, and one of the reasons I would

say that is I don't think we should get into the business of exaggerating the significance or the real impact that Brady would have, particularly the Senate-passed version of Brady.

I think if we strip away the politics of the issue, what we really have to have is an adequate record base. Everyone agrees with the proposition—everybody, I think—that we have to have a way of making sure that felons don't get guns, and therefore we want to check when someone comes in to get a gun whether or not they are a felon.

The thing that drives the whole system is what kind of record base are we checking against. Are we going to have sufficient accuracy in that base to be able to make those decisions? Right now, the state of the records in the country is inadequate because what we have to do is tie together all the State systems, particularly the State systems where—the larger States that compose most of the criminal record material.

What we have to do and what we are trying to do is spend money now through grants to get the States to bring up their record systems so they can be queried. My view is by the time the system is adequate, it won't make much difference, frankly, whether it is a 7-day waiting period or a 7-minute waiting period because once the records are up to snuff and provide a sufficient degree of accuracy, you won't need 7 days. You will be able to do it in 7 minutes.

So I think part of the debate over the length of the waiting period is not a real-world debate. Couple that with the fact that very few weapons that are used in crime come over the counter like that, and that there is no waiting period for criminals. Criminals can get guns, and always will be able to get guns in the environment which we have, and that controlling the over-the-counter sale is not going to have that much effect.

However, that all being said, recognizing the real-world impact that Brady will have, which is, in my view, minor, my position is I would support that, nevertheless, provided we also have these other tough measures. As I just said, habeas corpus reform is an essential part of that, and that has been the focus of much of our discussion, the discussion I have been having with the chairman and others about this.

Senator KOHL. And you think that they are necessarily tied together, that you cannot have a Brady bill or some death penalty provisions, assault weapons provisions, unless you have habeas? Again, in the real world, I am not sure that they are as connected as you are making the case. You feel that habeas is central to the whole thing?

Attorney General BARR. No. I think getting a comprehensive crime bill that deals with criminals is important. It is not enough to deal with over-the-counter sale of firearms. In my view, to suggest that that is going to have any substantial impact is misleading to the public. I think there are other steps that are much more important in dealing with violent crime and I want them all dealt with. To the extent we can get more support for a comprehensive crime bill, then I want to do that. I want to get as much support for a comprehensive crime bill as we can and not address these things piecemeal, which will make it more difficult to accomplish what I think has to be accomplished across the board.

Senator KOHL. A couple questions on juvenile justice. By any objective assessment, OJJDP has been a source of controversy since 1980. In recent years, turf battles between OJJDP and the Office of Justice Programs have been publicly aired in the press, as you know. This past April, Mr. Sweet, then administrator of OJJDP, testified on the House side about reauthorizing the Juvenile Justice Act. Three days later, he was relieved of his duties, and although Mr. Regier has been Acting Administrator of OJJDP since that time, his nomination has yet to be sent to the Senate.

Would you give us some idea of how you personally plan to bring more order to OJJDP? For starters, when will you send up Mr. Regier's nomination, or are you waiting to see what the makeup is of the Perot administration?

Attorney General BARR. No, I am not waiting for that. Let me check and see where Jerry Regier's nomination is because I personally recommended Regier for that position. I have a very high opinion of him. He was working hard on the Weed and Seed Program and did an excellent job.

I think you had some earlier experience with Mr. Sweet, your office did, and I think I can assure you that his departure from that position had nothing to do with his testimony, at least as far as I was concerned.

Now, as I told you, juvenile justice is something that I am very interested in, and what I would like to see in the juvenile justice program is more flexibility given to the Department of Justice in the grant programs. I think most of the money we are spending there now is really focused on the institutionalization problem; that is, separating adults from juveniles in the incarceration setting.

I am not sure that is a good use of Federal money and whether we are advancing the ball much to use our precious resources just to fund that kind of activity. We have basically made that requirement across the board. States know what they have to do, and I am not sure it is a good use of Federal dollars to keep on paying for that. I think the States should pay for that.

I think we should use our Federal dollars in juvenile justice to start trying to deal with, I think, the real problem that we face with juveniles, which is how do we stop the juveniles from getting into that position in the first place; how do we set up an effective juvenile delinquency program, one that does two things—most importantly, salvages the salvageable, takes the kid who might get into trouble and come up with some kind of intervention strategy that prevents that kid from becoming a career criminal.

There, we have a lot of programs. We spend a lot of money on youth programs, but I am not sure any of those programs are really addressing the need that we have nowadays. I think with the decomposition of the family, the problem of the kid who is not brought up in a setting where there is authority and sort of the family structure to fall back on. We have to come up with other kinds of programs, programs that teach kids responsibility, hold kids accountable where appropriate, provide a certain degree of discipline, as well as education and training.

So I would like to see us use our money more in stimulating reform of juvenile justice systems and experimenting with pilot projects, developing ideas, encouraging experimentation on those

kinds of programs. Right now, the amount of money that we really have available to do that is very, very small, and I don't like to see us throw tens of millions of dollars just in separating adults from juveniles when that can be done just as easily by the States.

Senator KOHL. But as you know, many States are not separating them. Seventeen States are not separating them, and it seems to me that is the first thing we need to—and I think you would agree that is one of the very first things we need to do with these juvenile offenders is to separate them from the adults. My State, for example, is not doing it.

Attorney General BARR. Well, why can't States pay for that themselves?

Senator KOHL. What?

Attorney General BARR. Why can't States pay for that themselves? In other words, that is a good idea. That is something we should be doing and encouraging, but why, of all the things in the juvenile justice system, should the Federal Government be using our money to pay for that?

I think where we should be using our money is basically in leadership in developing ideas like that. It is as if we got fixated; at some point in the past, someone said, hey, gee, one of the things we should do here is we should separate them. Well, that is fine, but now we are pouring money into that particular program. What we should be doing is moving on to the next idea, establishing that, getting the States into it, and move on to the next idea. That is my concern.

Senator KOHL. One more question, sir. As you know, our staffs are working to reach a consensus on reauthorizing the Juvenile Justice Act. There are a few sticking points, however, such as getting the approval of the Justice Department on a new title that we have set up to encourage States and communities to invest in delinquency prevention.

We want to add this new title in part because OJJDP has not used its discretionary money to encourage delinquency prevention programs, and also because less than half the States have been able to use juvenile justice formula grant funds for any delinquency prevention programming whatsoever.

Given that we all agree that the entire continuum of juvenile justice programs should be funded, how else do you envision getting communities to act on and coordinate delinquency prevention efforts?

Attorney General BARR. Is this the title that would create line items for education programs and job training programs?

Senator KOHL. It is a separate pot of money to encourage communities to invest in prevention. It is our understanding that OJJDP—you refuse to spend the discretionary money that they have on prevention.

Attorney General BARR. Are you talking about drug prevention or juvenile delinquency prevention?

Senator KOHL. Juvenile delinquency prevention.

Attorney General BARR. Well, let me look into that because I am not sure what that is about or, you know, what that is. Generally speaking, what I would like to see in reauthorization of that statute is the broadest discretion for discretionary grant programs for

juvenile delinquency prevention, reform of juvenile justice systems, and the broadest scope; allow the Department to experiment, to create new programs, new pilot projects, new demonstration programs.

Senator KOHL. Good.

Attorney General BARR. I mean, that is the general principle, and I haven't looked at that particular provision. I would be glad to do it and see what the hangup is.

Senator KOHL. Thank you. Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you.

[Senator Kohl's questions and Attorney General Barr's answers appear in the appendix.]

The CHAIRMAN. The Senator from Alabama.

OPENING STATEMENT OF SENATOR HEFLIN

Senator HEFLIN. Good afternoon. We have a gridlock over the crime bill, and there are basically one or two areas in which there is primary disagreement, one being habeas corpus. Do you see any room for compromise on the various issues that are delaying the passage of the crime bill?

Attorney General BARR. I think there is room for compromise. You know, ultimately what it is going to take is some give-and-take and then each side assessing the whole package and what they can get from the whole package, just like any other compromise.

On the habeas corpus provision, I think that is one of the most important ones we have to deal with, and I have sort of set three criteria for what our position is on that as we try to talk through these differences. Those criteria are that we not take a step backward from what the current law is—so, for example, I would be opposed to overruling *Teague*; that we not block the Supreme Court from any further development of reasonable regulation of the use of habeas corpus; and, third, that we take a step forward, that there is a material and significant improvement in the status quo. Within that framework, I have been encouraged by our discussions so far.

Senator HEFLIN. Well, your second one calls for looking into the crystal ball as to what the Supreme Court might do, which is not to block anything as to their development. I think after some of the decisions that have come down recently, it may well be that what the Supreme Court may do is unpredictable.

Attorney General BARR. That is true.

Senator HEFLIN. So, in other words, if you had a reasonable approach relative to that second phase, which, in effect, would be compromise in regard to allowing what the judgment of the Congress and the White House and the Department of Justice would be in the form of a compromise, some progress could be made relative to that.

The crime bill, of course, is an important piece of legislation today and there are a lot of provisions in it that the administration strongly supports and Senator Biden and others support. I have got mixed feelings about it, but it just seems to me that to have another year of gridlock and the inability to pass a crime bill—we ought to somehow or another resolve the differences and move forward. It may well be that we could reserve to a later day some of

the battles. Anyway, I am interested in what the room for compromise might be on this and see where we are and see if can't move forward on it.

Attorney General BARR. Well, as I said, Senator, I think there is room for it. I just said that habeas is one of the key issues, and I have been encouraged by our discussions so far. As Senator Biden said earlier, there are a lot of different players in this mix and putting together a compromise is a very difficult, painstaking process. But I think everybody involved in the process is working in good faith right now to do it, and understands that it takes give and take.

Senator HEFLIN. I see you announced today your Operation Goldpill, which sounds to be a very excellent operation. Are there a good deal of instances of fraud being perpetrated that come to your attention relative to illegal diverting, repackaging, and distributing of medications, and intentional, excessive, or false bidding by pharmacies for the purpose of defrauding federally funded programs and private insurance companies? Is there pretty strong evidence out there that that is going on?

Attorney General BARR. Yes, Senator. That is one of the areas that people felt was one of the main areas of fraud in the health care industry, and that is why this extensive investigation was done. And I think because of the magnitude of the investigation and the magnitude of the people who have been arrested and the seizures that have been made, hopefully it is not going to be as much of a problem in the future.

As I said earlier in response to one of the Senators here, the whole problem of health care fraud is a significant problem we face. We spend close to $800 billion a year on health care services. The Federal Government spends about $200 billion, and there have been various estimates ranging from $50 billion to $75, $80 billion of fraud in that industry. That is big money, and that is why we have given it such a high priority.

Senator HEFLIN. What would you consider to be the two or three most important provisions of S. 2180, the Equal Access to Justice Act? Please articulate those provisions so that we on the Judiciary Committee will have a sense of the administration's priority in this regard.

Attorney General BARR. Those are our civil justice reform proposals. I would say that I think the requirement to give notice before filing a complaint is important; it is a priority. It could potentially save a lot of money because so much money is used in the initial phases of litigation. The discovery phase is 80 percent of the bill.

I think the ADR provisions, the multidoor courthouse, and finding ways of resolving disputes short of full-scale, set-piece litigation battles; I would say experimentation with the English rule, the modified English rule, in the Federal diversity jurisdiction area is an important one and would, in fact, in our——

Senator HEFLIN. That is lose or pay?

Attorney General BARR. Excuse me?

Senator HEFLIN. That is lose or pay.

Attorney General BARR. Lose or pay.

Senator HEFLIN. Does the Department still remain opposed to the concept of some type of intercircuit panel which has been pro-

posed by the Federal study committee? We recently had it in a bill, but in order to try to get a number of provisions dealing with the Federal courts passed without any serious opposition, we deleted it.

What primarily is the opposition of the administration relative to this?

Attorney General BARR. Well, I think we are tentatively opposed. We have asked Judge Schwartzer of the Federal Judicial Center to do a study for us, a multiyear study, on the impact and significance of unresolved intercircuit disputes and want to get a better fix on it.

I think part of the objection is whether or not it is appropriate to jump in and resolve some of these disputes prematurely; that it may be better to allow some of this to continue and fester for a while, that ultimately it may be better for the system. Part of it may be——

Senator HEFLIN. Wouldn't that be up to the Supreme Court in that decision as to whether to refer it? I mean, the policy of whether it is serious enough—would it be a decision of the Supreme Court?

Attorney General BARR. Yes, but I think right now we have a process of triage where the Supreme Court is forced at some point to confront the issue and has to resolve it. Once the mechanism is there, it may not be—you know, the Supreme Court may use it and it may not be the best judgment to use it at that point. I am not sure the Supreme Court can sit there necessarily and say, from a legal development standpoint, now is the right time to send it over to have that resolved. I think that is part of it. I think part of it is the use of a particular circuit in a geographic area to resolve it rather than a national court.

Senator HEFLIN. We have introduced legislation dealing with the Claims Court, and among the provisions or proposals is to modify and expand the Claims Court's jurisdiction regarding the certification requirement involving the claim disputes between a private contractor and the U.S. Government and to allow the court to hear some tort claims against the Government. It is sort of like a bankruptcy court when they are involved as they seem to be relative to some of the asbestos litigation today.

Has the Department made an effort to seek a middle ground or compromise, or does the Department remained opposed to that portion of the bill relating to this jurisdiction?

Attorney General BARR. You have sort of hit me cold on that one, Senator. Let me go back and see where we stand on that and whether we have tried to work out any differences we have.

Senator HEFLIN. Well, basically, what it would be is that in the Claims Court, if there are tort claims that are involved in it that could come in connection with it, they would be able to be comprehensive in determining that issue along with the other related issues that are involved in the claims court. If you would look at it——

Attorney General BARR. Sure. I would be happy to, Senator.

Senator HEFLIN. I believe that is all the questions I have, since the red light is on.

Attorney General BARR. Thank you.

The CHAIRMAN. Thank you very much.

General you have been here a long time and I appreciate your time. I have just one short round here and then I will submit the rest in writing, if I may.

Attorney General BARR. Thank you, Senator.

The CHAIRMAN. Let me go back to the Brady bill for a moment, if I may. I am getting a little worried; you begin to sound like a Democrat for a minute in this regard. I got in a big, old fight in the Democratic caucus with some of my colleagues who stood up and said, although the Russian aid bill may be a good idea, because the President won't help, from their perspective, on domestic programs, a few said I am not going to be for the Russian aid bill. I found that somewhat crazy reasoning. Either the Russian aid bill is good or it is not good, and we shouldn't penalize the interests of the United States just because the President wasn't good on two things, from their perspective.

Now, you have said and the President has said—let me stick to you; I know what you have said. I am never quite sure otherwise, but I know what you said. You said that the Brady bill is overrated, but it would be positive. That is what you said a moment ago. You used the phrase "it would be positive," but it is—I am paraphrasing. That is a quote, but I am paraphrasing your saying it was overrated in terms of what it would do. You said that——

Attorney General BARR. Did I say "positive"?

The CHAIRMAN. I am quite sure you did. I can ask the stenographer to go back——

Attorney General BARR. I think it would be of very limited use.

The CHAIRMAN. Yes.

Attorney General BARR. Yes.

The CHAIRMAN. But it is of some positive value, limited, and then you went on to point out that it was of very limited value. You said that criminals would still get guns; they are going to get guns.

Attorney General BARR. I think that is one of the downsides of Brady, and I think one of the downsides of Brady was exhibited in the Los Angeles riots. The law-abiding people couldn't get guns for 15 days, and the waiting period for hoodlums was 15 seconds, the time it takes to climb into a storefront window and steal a gun.

The CHAIRMAN. That is true, and there is no law ever going to change that, unless we decided that no gun could be seen in public. I mean, we could still point out, as you and I well know, even if we didn't sell guns, they still could break into arsenals, which they have done. They could still break into military installations, which they have done. They could still do all those things. So on that reasoning, there would be never any circumstance where—a criminal can always get something quicker than a law-abiding citizen, whether it is a drink, whether it is a diamond ring, whether it is a car, whether it is a gun. Whatever it is, they can always get it quicker than a law-abiding citizen.

Attorney General BARR. But we are dealing here with a provision that is designed to prevent the criminal from getting it.

The CHAIRMAN. Right; sure, it does. Well, for example, in Los Angeles 5,859 would-be gun buyers were rejected in California under the new records check. Granted, there are a lot who went ahead and got them, but of those rejected were 609 people who have been

convicted of drug violations, 34 people who have been convicted of homicide, 101 of sex crimes, 338 of burglaries, 7 of kidnaping, 102 of robbery, and 2,667 of assault.

Now, the one thing we both know from our experience is one of the reasons why criminal get convicted is they are stupid; they are not all that smart. The smart ones who get the guns usually aren't the ones that get caught, and so at least we pick up some of the dumber ones.

You know, I don't know how it couldn't be good that 34 people who were convicted of homicide didn't get a gun, at least that way. They may have gone out and smashed the window and gotten a gun, but at least, like every other law, we try to make it a little harder for them. Obviously, if we based our laws on their success rates, we wouldn't have any laws against murder in this country.

We set a record, 24,600-and-some murders. So if we said we are going to base it on our record of those we convict of murder, we would say it makes no sense to have laws against murder; we don't get them anyway, and we don't. There were 24,000 folks murdered last year in America. How many convictions? Does anybody have any rough idea—1 in 10, 1 in 15, 1 in 20? I don't know. What is the number?

Attorney General BARR. I think the clearance rate is actually fairly high for murder, but I couldn't give it to you. I think it is 60 percent.

The CHAIRMAN. Sixty percent, so we end up with at least 10,000——

Attorney General BARR. We solve, I think.

The CHAIRMAN. Yes, solve. So at least 10,000 of them out there murdered with impunity and they are walking around. So I am not trying to be facetious when I say this, but it worries me because if we say something makes sense, even a little bit of sense, and then suggest we shouldn't do it unless all the things that make sense are done from our perspective, then I find that unusual.

For example, there was a newsletter published by the Gun Owners of America quoting a letter from Richard Bond, whom I know you don't work for. He is the chairman of the Republican Party and it is not on your watch, but the newsletter quotes Chairman Bond as saying, "The President has, and will continue to oppose federal gun control in any form."

Now, the President didn't say that, to the best of my knowledge. The President said he would support gun control, Brady. I assume he would view that as gun control. He would support gun control if it was in the context of a larger, tough, from his perspective, anticrime package that included all the things you have suggested—reform of habeas corpus that he likes, death penalty, and all the other things.

But based on what you said today, which didn't contradict that, to the best of my knowledge, and what Bond is quoted as saying to the newsletter—the outfit is called Gun Owners of America—I am beginning to wonder whether or not—I am wondering, if Bond is right, then somebody is not operating in good faith here. I am not suggesting he is right; he is only a party chairman.

So do you believe that the quotes from Mr. Bond and the White House Bulletin, which I should read to you—it says, White House

Bulletin, the Washington-based newsletter, reported on March 31, 1992, that "senior advisers" to President Bush indicated that "there are no circumstances under which the President would be for the Brady bill." Now, that was published, and we will get you a copy of it, in the White House Bulletin, a Washington-based newsletter. Again, I don't know who the heck those senior sources are.

Then the chairman of the Republican Party, whom I hardly ever believe about anything that has to do with politics—he is an honorable man, but I mean, you know, chairmen have certain jobs. Bond saying the President has and will continue to oppose gun control in any form—putting those two together, I am beginning to wonder, and it would be useful if you could tell us as the chief law enforcement officer and spokesperson for the President on this issue whether or not Bond is correct, or the White House Bulletin. Is it accurate? Are there no circumstances under which the President will support gun control?

Attorney General BARR. I think it is a matter of record. I think the White House sent up a floor position statement on the crime bill that stated the position. I don't have it in front of me, but it is in black and white.

The CHAIRMAN. Which said, in effect, that they would support——

Attorney General BARR. I think it said essentially with respect to the Mitchell-Dole compromise that it said if the President gets his comprehensive crime bill, he would give favorable consideration to the Mitchell-Dole bill, something like that. Whatever the floor statement says has been the President's position.

The CHAIRMAN. I am just trying to figure out what the position is.

Attorney General BARR. I think he says he would favorably consider the Mitchell-Dole compromise if part of his comprehensive crime bill——

The CHAIRMAN. That is my rough recollection, but then after that he would favorably consider—now, it sounds to me like that position has changed. Everybody is entitled to change a position. What I am asking is, Is that still the position, to the best of your knowledge?

Attorney General BARR. Our position is the floor position, the SAP, I think it is called, the statement of administration position that was put out last year, and that remains our position.

The CHAIRMAN. OK.

Attorney General BARR. And I have stated my position, which is that if we get our crime bill, I will recommend it be signed even if Brady is in it—I mean, the Mitchell-Dole compromise.

The CHAIRMAN. I know what your position has been, and it has been consistent.

Attorney General BARR. I think the administration's position has been consistent. As to the other point——

The CHAIRMAN. I am not saying it wasn't. It just is confusing. Lots of times, party chairmen don't speak for Presidents or Presidential candidates, and I am hopeful in this case that either Mr. Bond was misquoted or he does not speak for the President because what he is quoted as having said is inconsistent with—heck of an

acronym—with the SAP. It seems like the sap is hardening. At any rate, that is the reason I raise it.

Let me ask you a few more questions. There is a child abuse program. As you know, the Department of Justice budget request seeks to eliminate a $1.5 million initiative, and you may need some staff input on this. I don't know how you could keep all this in your head, all these—$1.5 million is a big item to the vast majority of Americans, but in the context of an entire Federal budget it is not the biggest item.

In the budget request that Congress is debating now, there has been a proposal to eliminate the child abuse investigation and prosecution effort in the Office of Justice programs. This program handles, among several other things, about 2,000 calls each year from prosecutors, law enforcement officials, and parents concerning child abuse.

Now, your budget request justifies the elimination of the program that provides training for prosecutors handling child abuse cases, as well as serving as a clearinghouse for information about child abuse cases and strategies, based upon the reason, and I am now quoting from your budget request, "In light of the scarcity of available Federal resources and the numerous programs in the Department of Justice that are of a higher priority, we move for the elimination of this program."

Now, as I heard your exchange with my friend from Wisconsin, it was my understanding that your position and the administration position has generally been that one of the good things to do is for the Federal Government to act as a clearinghouse, the Federal Government to take those programs where they can help train and/or give positive input for the smooth running of the criminal justice system, and concentrate on those and not on programs that, once up and running, the States are fully capable of handling.

First of all, is the rationale offered the accurate one, that there are higher priorities? And, two, if that is true, how does this square with the overall conceptual notion that you have about what things the Federal Government should be in and not be in, versus what the States should be responsible for and not responsible for?

Attorney General BARR. I am not familiar with the—I have in front of me now an answer that was provided to you on this thing, and frankly I am not familiar with this specific grant. It is a grant to the American Prosecutor Research Institute, but I will just tell you what I think.

Obviously, child abuse is not primarily a Federal responsibility. It is primarily State and local. However, I think given the magnitude of the problem, the Federal Government should be active in this area. I personally support exactly this kind of activity; that is, making written training materials available to prosecutors handling child abuse cases and serving as a clearinghouse. So this is the kind of activity I would like to see and I wouldn't want to see the overall resources of the Department in this area reduced.

Now, it may be that there is other money that isn't earmarked elsewhere that could go into this kind of activity, but I would not want to reduce the Department's resources going into the child abuse area, particularly this kind of activity. I have visited pros-

ecutors' offices that have been the beneficiaries of this material and I think it is an important program to continue.

The CHAIRMAN. Well, maybe we can see if—I mean, it is not a big-ticket item, but it is—$1,500,000 is not a lot of money, as constantly is quoted. I don't know whether he ever really did say it, but the man for whom this building was named allegedly said at one point in a debate years ago, Senator Dirksen, that a million here and a million there, eventually it adds up to real money, or something to that effect.

Attorney General BARR. Well, I think law enforcement is one area the American people don't mind spending money in, and this type of program dealing with battered children is certainly something I don't mind spending money on. And I will tell you that whatever support you can provide to getting the resources to the Department of Justice this time around would be very much appreciated by everybody in Federal law enforcement.

Last year, we were held down; we lost about $500 million. We got the money we needed for prisons, but virtually nothing else, and this year they are talking about no increase. If we have to go through 2 flat years in a row, Federal law enforcement is going to be in deep trouble. So I know there are a lot of different priorities, but the President wanted to increase us this year 10 percent and I hope Congress is able to find the money to do that.

The CHAIRMAN. Well, as you know, I share your view, and this ends up being a moving target. Last year, you are correct; we were about $210, $212, $215 million under what the President wanted, if I am correct. The year before, we were about $300 million over what the President wanted, and hopefully this year we will be at a place where all that you have requested we are willing to give. And if the administration and the Congress can compromise in earnest on this crime bill, maybe we can do a lot more than that as well.

There are those with whom we each have to deal in our own parties in the Congress and in the administration who may have different views than you and I on substantive issues, as we have different views, you and I, on the substantive issues. But there are also those in this body that have a very—and I know for a fact, not speaking for you, but some in the administration, who have different judgments about what is the best politics as well.

There are those here, Republicans as well as Democrats, who say, well, you know, it is better not to have a crime bill, and point the finger and say we would have stopped that crime in your city had only that other party cooperated, had they only done what we wanted. We see that in budget matters all the time, and I suspect there are those in the administration, some, who may share that view.

But I think there are also those who probably share the view, and hopefully they are a majority, that, speaking for me—I can't speak for you, but my instinct tells me you might disagree that the one thing the American people want is some action, and the only thing that is truly damning to both political parties, Congress, and the administration, is to demonstrate once again to the American people, for whatever reason, we cannot make any movement on a

problem as big as the crime issue; that we cannot step up to the ball.

So I hope that both parties, appropriators who are in the Congress controlled by the Democrats, political advisers to the President controlled by Republicans, both listen to the message old Rossie Perot is sending out there. I may be dead wrong. I am no political analyst, but my instinct tells me that the single greatest appeal of Ross Perot is that he says he will get things done. Now, whether he could or would is a totally different question, but that can-do notion that is associated with anybody who is able to amass several billion dollars in personal fortune somehow communicates to folks out there. So I would hope that we can make some effort.

As I indicated to you—and I have spoken to the ranking member, Senator Thurmond, and, as I said, I have spoken to the chairs on the House side. I think we should make a concerted effort to see if we can work out a compromise on a crime bill and then, in unison—President, Attorney General, chairperson, leadership, minority, and majority—come up with the money to back it up.

I am an optimist. I believe we can do that because I believe the alternative is not something that the American people are prepared to live with, and that is for us to continue to squabble over this issue. So this is not at your request, I know, but I will be calling you in about 12 minutes to see whether or not there is a possibility of us beginning to explore the possibility of a compromise, and I hope we can because I know you sincerely want a crime bill and I know the ranking member sincerely wants a crime bill, and maybe we can work it out.

Again, thank you for your time, General.

Attorney General BARR. Thank you, Mr. Chairman.

The CHAIRMAN. It is a pleasure working with you. I am going to send to you, if I may, just because I know your staff only is working 14 hours a day—we might as well make them work 14½ hours a day, like ours, as well—and that is I have about 10, 12 questions that I would like, for the record, answered.

Attorney General BARR. Sure.

The CHAIRMAN. There are some matters that you have already covered, some you haven't covered, from Weed and Seed, to reauthorization of independent counsel, to handling of the BCCI investigation, and a few other matters—nothing that will surprise you, but I think we should have for the record in this oversight effort.

[The chairman's questions and Attorney General Barr's answers appear in the appendix.]

The CHAIRMAN. Anything you would like to say, General, before we part?

Attorney General BARR. No. I appreciate once again your courtesy, Mr. Chairman.

The CHAIRMAN. Thanks.

Attorney General BARR. It is a pleasure to work with you.

The CHAIRMAN. We are adjourned. Thanks again.

[Whereupon, at 5:43 p.m., the committee was adjourned.]

APPENDIX

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

AUG 30 1992

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Biden:

This responds to your recent letter to Attorney General William P. Barr submitting additional questions regarding his testimony before your committee on June 30, 1992. The Department's answers to those questions are attached.

If you require any further assistance, please do not hesitate to contact me.

Sincerely,

W. Lee Rawls
Assistant Attorney General

Enclosures

QUESTIONS FROM SENATOR BIDEN

Questions on Transfer of Bureau of Justice Assistance Funds

Q. How much of fiscal year 1991's discretionary portion of the Drug Control and System Improvement Grants were transferred to or administered by federal agencies other than the Bureau of Justice Assistance? Please provide a complete list of the discretionary grants that will be transferred or administered by other Justice Department agencies along with a specific explanation for these grants being awarded to federal agencies rather than state and local agencies? If figures are available for fiscal year 1992, please provide them to the Committee.

A. Through the discretionary program of the Edward Byrne Memorial State and Local Law Enforcement Assistance Program, the Bureau of Justice Assistance (BJA) provides support for programs to control crime and drugs and to improve the functioning of State and local criminal justice systems, particularly programs that are national or multijurisdictional in scope. BJA also supports educational and training programs for criminal justice personnel and provides technical assistance to States and local units of governments. All of the programs supported by BJA with discretionary funds are for the benefit of State and local criminal justice systems and the funds are spent in accordance with the statutory purposes of the program.

In accordance with the authorizing legislation, the discretionary program "is to provide additional Federal financial assistance to public or private agencies and private nonprofit organizations" to carry out the program. In some instances, other Federal agencies may be the most effective vehicle for providing training and technical assistance to State and local agencies. The utilization of existing Federal expertise in providing training and technical assistance may more directly and cost-effectively serve the interests of States and localities than would awarding funds to a private grantee. For example, BJA has utilized the Drug Enforcement Administration (DEA) to provide State and local officials training on clandestine laboratory investigations and officer safety and, through the Federal Bureau of Investigation (FBI), BJA has provided training to State and local officials in the areas of financial investigation and asset forfeiture. In other instances, expertise may lie with one of BJA's sister agencies within the Office of Justice Programs (OJP). For instance, the mandate to conduct comprehensive evaluations of the Byrne formula and discretionary programs lies with the National Institute of Justice (NIJ). In Fiscal Year 1991, the Conference Report accompanying the appropriation bill specified that not less than $3 million should be provided to NIJ for this effort. The OJP Bureau of Justice Statistics,

which is the principal agency for gathering statistics on crime, criminal offenders, and the criminal justice system at all levels of government, assists BJA with its comprehensive program to improve State criminal history records information systems. In some instances, another OJP bureau may have an existing contract for similar functions, such as clearinghouse operations. For many years, NIJ has contracted for this type of service and activity. It is more economical and efficient for BJA to support its clearinghouse activities by "riding" the existing NIJ contract, as a separate component or task of the contract. These cooperative, collaborative efforts do not "transfer" funds out of the Byrne Program nor does the collaborating agency use these funds to augment its own resources or functions. Furthermore, these efforts are undertaken in the spirit of the Economy Act.

A list of FY 1991 projects undertaken by BJA in collaboration with other OJP bureaus or other Federal agencies is provided. A list of projects initiated to date and those planned in FY 1992 is also provided.[1] In all instances these efforts are targeted at providing assistance to State and local units of government to enhance the operations and effectiveness of their criminal justice systems.

Questions on Federal Aid to State and Local Law Enforcement

Q. It was encouraging to hear you testify about the importance of federal aid to state and local law enforcement. As we discussed at the hearing, including the more than $3 billion in state and local aid programs in the Gramm-Republican crime bill is a valuable change. Administration support for these programs is, of course, vital to finding the funds to meet these authorization targets.

I assume that you, as I, are not playing a cynical game with these authorizations. That is, that we are each proceeding that the money can be found if the President is willing to find it and that the money will not be found unless we authorize these funding levels.

So, the key question is, if these authorizations -- authorizations that are now in a Republican crime bill -- became law as part of comprehensive crime legislation that is acceptable to the President, will this Administration do everything it can to help find the dollars necessary to fund these programs? What, specifically, will the Administration do to fund these programs?

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[1] See attachment 1.

A. As you know, the constraints of the Budget Enforcement Act of 1990 limit the available funding for new programs. As a result, unless an emergency is declared, any funding for this assistance will be largely re-directed from current programs. The President's 1994 budget request is now being developed and no specific funding decisions have been made.

Q. The President has wide-ranging abilities to find dollars for emergency programs, will you convince him to unleash these powers?

A. Provisions of the Budget Enforcement Act allow the President to propose the appropriation of funds above the spending caps if an emergency is declared. The needs of State and local law enforcement are certainly urgent, but they must be weighed against the deficit emergency facing our country.

Q. Will your budget request to OMB for FY 1994 seek full funding to meet all of these authorizations? If not, which of these programs will be fully funded in your request?

A. Currently, the Department is in the process of developing its 1994 request to OMB. The Administration prohibits the disclosure of specific budget decisions until the President's budget is transmitted formally to Congress.

Q. Will the President's budget request for FY 1994 fully fund these programs? If not, which of the several programs will be fully funded in the President's budget request for FY 1994?

A. Presidential decisions have not yet been made. In addition, the nature and amounts of the President's decisions are confidential and may not be released until the budget request is transmitted formally to Congress.

Q. As you know, the President's budget for 1993, <u>actually cut aid to state and local law enforcement</u> by $116 million. Not only was the juvenile justice budget slashed by more than $60 million, but $36 million was cut from the state and local aid portion of the high intensity drug trafficking areas program, and numerous other programs were cut.

While I was encouraged to hear you testify that you will fight to support the "front lines" of the anti-drug, anti-crime effort, I do not understand how this squares with the president's budget.

Moreover, I do not know how this squares with your comments to the law enforcement community. For example, after a speech to the National Sheriff's Association -- on June 21, 1992, in San Diego -- you were quoted in newspaper accounts as saying:

> Now is not the time for cutbacks in law enforcement. Police, prosecutors, and prisons are a good investment. We cannot afford not to invest in more law enforcement.

If this accurately quotes your words, could you explain how do these comments square with the reality of the budget proposed by President Bush that cuts $116 million from federal aid to state and local law enforcement?

A. The reduction of $116 million for State and local law enforcement programs is largely made up of decreases for programs in the Department of Justice appropriation for the Office of Justice Programs, specifically Juvenile Justice Programs ($61 million) and the Regional Information Sharing System Program ($14.5 million). However, the total also includes a cut of $36 million for the High Intensity Drug Trafficking Areas Program (HIDTA), which is administered by the Office of National Drug Control Policy. Although the Department of Justice did propose full funding in 1993 for the Juvenile Justice Program, limited resources available for the Administration's priorities did not permit the funding of these programs.

Questions on Civil Asset Forfeiture

Q. As you know, the equitable sharing provisions of the 1984 Crime Bill have greatly increased cooperation among federal, state and local law enforcement officials. One proposed change in the Justice Department's Asset Forfeiture Fund has been to increase the Department's "off the top" share for administrative expenses -- from the current 10% to 15% or 20%, depending upon the litigation required by each case. Has, in fact, this change gone into effect?

If this change has gone into effect, under what authority does the Department of Justice make such a change, absent Congressional action?

If such a change has gone into effect, could you please share with the Committee the specific justification for increasing the Department's share for administrative expenses?

A. The change has gone into effect. By way of background, section 881(e)(3) of Title 21 states that "The Attorney General shall assure that any property transferred to a State or local law enforcement agency . . . has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture . . ."

In the typical joint case, the Department assess the relative degree of participation in the case. In a simple case, if the Delaware State Police and the Federal Bureau of Investigation (FBI) put an equal amount of time and effort into a case resulting in a federal forfeiture generating $1 million in net proceeds, then one-half of the net proceeds ($500,000) is transferred to the Delaware State Police and the remainder is retained in the Department of Justice Assets Forfeiture Fund. The portion retained represents the efforts of the FBI and the United States Attorney's Office which prosecutes the case. The only subtractions in arriving at the "net proceeds" are actual out-of-pocket payments for property management, satisfaction of liens held by innocent lienholders, advertising costs paid out to newspapers, payments to informants and so forth. No subtraction is made for "overhead" or "administrative expenses."

Confusion often arises over the federal equitable share retained in so-called "adoptive seizure" cases. In these cases, State or local law enforcement agencies have done all the pre-seizure work involved in a case and bring the seized property to a federal agency for "adoption" and federal forfeiture. The Department of Justice commenced "adoptive seizures" in 1985 as a way to encourage forfeitures in States which had weak forfeiture laws. Lacking experience, the Department established a "presumptive" federal equitable share of 10% of the net proceeds for carrying out the legal and additional investigative work involved in transforming a "seizure" into a "forfeiture." As adoptive cases are fairly uniform in the relative degree of effort devoted by federal, State, and local officials and thus lend themselves to use of a "flat-rate" share; the use of this "presumptive" federal share also avoids the necessity of requiring an accounting of hours devoted to the case by federal, State, and local officials. Some State and local officials have mistakenly viewed this federal share as an "administrative fee" which is highly misleading.

In reviewing the adoptive program in 1990, the Department concluded that the 10% federal share was unrealistically low and increased the federal share in adoptive cases to 15% in uncontested cases and 20% in contested cases for all State and local seizures adopted on or after September 1, 1990. As of this date, the policy will have been in place for two years.

The authority for the change is the basic sharing authority set out at 21 U.S.C. 881(e)(3). The Department reads the cited statute as requiring that the United States of America, as well as State and local law enforcement agencies, receive its equitable share of federal forfeiture proceeds.

The Department's Office of Inspector General (OIG) is currently auditing the equitable sharing program and is reviewing the federal share retained in adoptive cases to determine whether it is too low, too high, or appropriate. An OIG report is expected in August or September and the Department will give great weight to the OIG recommendation as to the appropriate federal equitable sharing percentage in adoptive seizure cases.

Questions on the Weed and Seed Program

Q. Please list each of the programs -- including Congressional appropriations for FY 1992, and President's request for FY 1993 -- that are components of the Weed and Seed proposal?

A. In FY 1992, the Department of Justice has allocated about $13.8 million to expand the initial pilot phase of the Weed and Seed program. Of this amount, $9 million was provided from the United States Attorneys Account, in close cooperation with OJP and the BJA to initiate the 16 new Weed and Seed demonstration projects to provide continuation funding for the pilot sites and to coordinate the Special Operation Weed and Seed in Los Angeles. In addition to the funding provided by the U.S. Attorneys, BJA has contributed $3.5 million of Byrne Discretionary funds from base resources to support the Weed and Seed program. Boys and Girls Clubs of America has also agreed to establish clubs in public housing in Weed and Seed sites, consistent with the $2.5 million Congressional earmark and will allocate approximately $1 million toward the establishment of these clubs. BJA will provide $350,000 for training and technical assistance to the Weed and Seed pilot sites, as well as other jurisdictions that are interested in implementing a Weed and Seed project. In addition, a new project will be initiated in 1992 by the National Institute of Justice to perform a process evaluation of up to ten Weed and Seed sites. The Weed and Seed neighborhoods are also eligible to receive targeted monies under a variety of existing Federal programs during Fiscal Year 1992. For example, OJP and the Office for Resident Initiatives in the Department of Housing and Urban Development (HUD) are currently negotiating an interagency agreement to develop and deliver training and technical assistance for residents and public housing police on implementing community policing in public housing developments. Additionally, HUD, under its Drug Elimination Grant Program Notice of Funding Availability for FY 1992, provides that applicants who are coordinating with Operation Weed and Seed will be given preference in funding.

The President's budget request for 1993 includes a total of $500 million to support this comprehensive initiative. A chart identifying each component of the program is provided.

The $500 million includes $30 million for the Department of Justice, made up of $20 million for the U.S. Attorneys and $10 million for the Office of Justice Programs. The $20 million requested for the U.S. Attorneys includes $5.7 million from base resources and $14.3 million in new funding. The $10 million for OJP includes $2 million in the Juvenile Justice High Risk Youth program and $8 million of Edward Byrne Discretionary funds. All of the OJP funds are from base resources.[2]

Q. What authority will the U.S. Attorney's in Weed and Seed demonstration sites have over Weed and Seed funds distributed by federal agencies other than the Justice Department?

A. Weed and Seed is a locally driven strategy that is coordinated in the community by a local steering committee. The U.S. Attorney acts to facilitate and initiate the coordination required among law enforcement and social service agencies.

Funds provided by other Federal agencies will be administered by those agencies -- not by the U.S. Attorneys.

Q. How will grant recipients for Weed and Seed funds distributed by federal agencies other than the Justice Department be selected? According to regulations currently governing the distribution of these funds? What impact will this have on existing selection procedures, such as peer review systems?

A. An interagency working group has been established at the Federal level to determine and establish procedures for the operation and implementation of the Weed and Seed program. At this time, it is envisioned that each Federal agency will be responsible for the administration of its own grant program.

The Attorney General will provide the leadership and coordination efforts necessary to implement the Weed and Seed strategy, including developing a plan for the use of Federal funds appropriated for selected activities in the Departments of Labor, Education, Health and Human Services, Transportation, Agriculture, and Housing and Urban Development. Each participating Federal Department, however, will be responsible for accounting for the expenditure of funds under their administration. The Attorney General will also solicit plans from State and local applicants to revitalize neighborhoods using programs administered by these agencies and will review and approve these plans in consultation with the Federal agency to which the funds are appropriated. Again, at this time it is envisioned that each

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[2] See attachment 2.

Federal agency will be responsible for the administration of its own grant program.

Q. Will Weed and Seed funds distributed by federal agencies other than the Justice Department be disbursed according to regulations currently governing these programs?

A. As stated above, an interagency working group has been established at the Federal level to determine and establish procedures for the operation and implementation of the Weed and Seed program. At this time, it is envisioned that each Federal agency will be responsible for the administration of its own grant program.

Questions on the Assassination of Judge Falcone

Q. Due to the Judge's membership in the Italian-American Working Group (IAWG) on Organized Crime, do you believe there are any other avenues for cooperation?

A. The Department of Justice (DOJ) views Judge Falcone's murder as a cowardly act carried out by desperate people. DOJ does not view this act as part of an international criminal conspiracy against law enforcement. DOJ has pledged to assist Italian authorities in any way possible to help bring to justice those individuals responsible for this heinous act.

Specifically, the FBI has made available the entire scientific expertise of their Laboratory Division and the outstanding expertise of their Criminal Investigative Division to assist the Italian authorities in their search for the perpetrators of this wanton act of violence.

Experts from the FBI Laboratory and the Criminal Investigative Division traveled to Palermo, Sicily on May 29, 1992 and departed June 4, 1992 and worked at the bomb site near Palermo with the Italian authorities in an effort to obtain every possible shred of evidence to indict and convict those responsible for these murders.

The FBI is in the process of conducting an exchange program between FBI officials and the new Direzione Investigativa Antimafia (DIA) to assist the Italians in establishing the organizational and administrative structure of this new agency. The DIA will eventually assume responsibility for all Mafia investigations in Italy. Hopefully this spirit of cooperation will send a signal to the criminals responsible for these murders that they are not operating in a vacuum, and that these murders have international ramifications.

Q. Do you think it is appropriate to grant protection to witnesses -- under the Witness Protection Program -- who help bring these killers to justice?

A. As the Witness Security Reform Act (18 U.S.C. 3521, et seq.) is written, there are no specific provisions which authorize witness protection for persons who testify in foreign proceedings, absent a nexus to a prosecution brought by the United States government. Currently, the statute provides for states to request that the United States relocate a witness in a state case. If the case is unrelated to a federal prosecution, the federal government will provide protection if the state reimburses the federal government for the cost of the relocation.

In the spirit of international cooperation in criminal matters, it may be possible under existing law to afford protection to a witness in a foreign proceeding, provided that 1) the case in the foreign country meets the criteria used to evaluate United States federal cases, 2) the foreign government reimburses the United States government for the cost of relocation, and 3) the witness is allowed entry into the United States. The Department would welcome the opportunity to work with Congress to draft legislation to clarify this question.

Q. Do you believe that there are any statutes under which the United States could assert jurisdiction over the prosecution of these killers? Is the Department pursuing all of these avenues?

A. There are a number of Federal statutes that provide the United States with the jurisdiction to investigate and prosecute the unknown subjects of the Falcone investigation. The statues include Title 18, U.S.C., Section 1959, Violent Crimes in Aid of Racketeering Activity; Title 18, U.S.C., Section 1961, Racketeering Influenced and Corrupt Organizations; Title 18, U.S.C., Section 1952, Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises.

These statutes permit United States prosecutions of a crime partially or even mostly committed on foreign soil if some aspect of the planning of the crime occurred within U.S. jurisdiction. The FBI is pursuing this investigation vigorously. Aside from the scientific and technical assistance being rendered to the Italian Authorities, there are many other investigative areas being pursued at the present time. However, because it is a pending matter I am not at liberty to make any further comments.

Q. Do any of the initiatives against international terrorists -- such as monetary rewards -- hold promise for this investigation?

A. The statute to which you are apparently referring is 22 U.S.C. 2708, which pertains to rewards for acts of terrorism committed primarily outside the United States. (Since Judge Falcone was killed outside the United States, 18 U.S.C. 3071, a statute which provides for rewards for acts of terrorism primarily within the United States, would not apply, even if the crime were considered an act of terrorism.) 22 U.S.C. 2708 provides that for the payment of a reward, the crime involved must be considered an "act of international terrorism" and be "against a United States person or United States property." It appears very doubtful that the Judge Falcone murder meets either criteria.

18 U.S.C. 3076 provides that a person eligible for a reward under 22 U.S.C. 2708 or 18 U.S.C. 3071 may, in the discretion of the Attorney General, participate in the witness protection program. But, this statute would also appear not to apply since the facts as known in the Falcone case indicate he was not a United States person, was not killed in the jurisdiction of the United States, and his killing probably would not be considered an act of terrorism.

Q. Newspapers have reported a potential link with the Colombian cocaine cartels, can you comment?

A. It is impossible to say at this point who was responsible for two reasons: first it is a pending investigation of the Italian authorities on which the FBI is assisting; and, second, the evidence is still being evaluated and it would be premature to comment on that at this time.

Questions on the Bureau of Justice Statistics

Q. What is the current Justice Department policy concerning the inclusion of comments on policy in Bureau of Justice Statistics Reports?

A. In its reports, the Bureau of Justice Statistics (BJS) presents analysis based upon the statistical data contained within the report. While BJS does, to the extent appropriate, indicate how this information may relate to policies or practices of interest to the justice community and others, it scrupulously avoids staking out specific policy positions in its analysis. BJS data is collected independently and, through the University of Michigan, is made available to researchers across the nation for further analysis and replication. While BJS analysis is cited by the

Administration and Congress in support of various policy positions, the central mission of BJS is to provide to all consumers the most accurate data and statistical analyses possible of operationally relevant topics. For these reasons, every attempt is made to avoid the appearance of promoting specific policies within BJS statistical reports.

Questions on Reauthorization of the Independent Counsel

Q. Later this year, the independent counsel statute will expire unless Congress reauthorizes it. Last fall, in connection with your confirmation hearing, in response to my written questions asking whether you supported reauthorization of the independent counsel statute, you stated that:

> [T]he Administration has had certain practical concerns with the statute, such as the independent counsel's budget, the extent to which [the] independent counsel is bound by Department of Justice policies and procedures, and the scope of the statute's coverage. In general, assuming that the Administration's concerns are satisfactorily met, I expect that I would be able to support reauthorization.

You wrote further that:

> I would not raise constitutional objections to the reauthorization in its present form. Rather I would treat this matter as a policy decision. I would recommend changes in the statute to address the practical concerns noted above.

More recently -- last month on "Larry King Live" -- you spoke of being opposed to the statute as currently written.

Please identify each of the specific features of the independent counsel statute as currently written that cause you concern, and describe what change in the statute would adequate resolve your concern.

A. The Administration's position on the reauthorization of the Independent Counsel Act was set forth by Deputy Attorney General Terwilliger on August 11, 1992, in testimony before a Subcommittee of the Senate Governmental Affairs Committee. A copy of that testimony is enclosed for your review.[3]

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[3] See attachment 3.

Q. If these concerns are addressed by Congress, will the President support reauthorization of the independent counsel statute? Will you advise him to do so?

A. See above.

Questions on the Office of Professional Responsibility

Q. In February 1992, the General Accounting Office issued a report on the operations of the Office of Professional Responsibility (OPR). In its report, GAO recommended that OPR make several specific improvements in its procedures. For example, GAO recommended that OPR establish written standards for conducting and documenting its work, in part to ensure that all reasonable follow-up leads are investigated. Has this recommendation been implemented? If not, why not?

A. The recommendation has been implemented effective May 12, 1992.

Q. If so will you provide a copy of the written standards to the Committee?

A. A copy of the standards and the implementing memorandum are attached.[4]

Q. GAO also noted that OPR is authorized by regulation to make recommendations to the Attorney General on broad policy changes and improvements in department-wide operations but does not presently undertake such analyses. GAO recommended that OPR assume responsibility for periodic review of all internal investigative case files to identify and address systemic changes that may be warranted in the Department's procedures an policies. Has this recommendation been implemented? If not, why not?

A. The recommendation has been implemented effective May 12, 1992. However, the question mischaracterizes the issue. As the Department pointed out in its comments to the draft GAO report, there are numerous examples (six were cited in OPR's comments to the GAO report) of OPR identifying instances of systemic problems and the need for policy changes. GAO was apparently concerned with yet another more formal analysis of cases over time to identify problems based upon observable trends to identify any need for policy changes not already addressed as a part of OPR's investigative activities. Accordingly, OPR has agreed to perform an analysis of its closed cases on an annual basis to determine if trends exist

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[4] See attachment 4.

which clearly suggest the need for policy changes. OPR will also continue to identify systemic problems which are noted in the course of its investigations and will notify appropriate Department officials and make necessary recommendations.

Q. If so, will you direct OPR to report on its findings on a regular basis? Will you make such reports available to this committee?

A. OPR has committed to performing a broad review of its cases on an annual basis. I believe that is an appropriate time interval; therefore, there is no need for me to direct OPR to take any action. Consistent with past practice regarding OPR reports, OPR will provide a briefing to appropriate members of the Committee with respect to such matters.

Q. Finally, GAO found that OPR does not determine the results of investigations referred to other units within the Department, nor does OPR monitor the imposition of disciplinary action resulting from investigations conducted either by other units or OPR itself. GAO recommended that OPR track the results -- including whether disciplinary actions were imposed on employees who engage in misconduct -- of investigations it completes as well as those handled by other units. Has this recommendation been implemented? If not, why not?

A. The recommendation has been implemented effective May 12, 1992. For cases closed after May 12, 1992, the OPR file will reflect the disposition of the matter as well as the disciplinary action, if any, imposed.

Q. The GAO report included a statistical analysis of the number of cases OPR investigated, the number of cases in which allegations of misconduct were found to have merit, and the number in which disciplinary action was taken. Will you direct OPR to maintain these type of statistics in connection with tracking the results of investigations of misconduct by Department employees?

A. Under the procedures adopted following the GAO report, OPR will not close a file until the final results of the matter, including disciplinary action, if any, are documented in the file. As a result OPR will, maintain statistics on substantiated cases and disciplinary actions taken.

Q. Will you make such statistics available to this committee on a periodic basis?

A. The statistics will be reported in OPR's Annual Report for FY 1993 and each fiscal year thereafter and will be available to the Committee in that form.

Questions on the Clean Air Act Regulations

Q. Is it the case that the Department was asked to provide an opinion supporting the new regulations after the President decided to issue them, and had not provided an opinion analyzing the regulations prior to the President's decision?

A. No. The Department was asked to provide its opinion concerning the issue of public notice and comment on permit amendments before the Administration's decision on this question, and in fact provided its opinion before the decision. The Department had commenced its review of this question long before the policy decision was taken. Similarly, EPA had been repeatedly informed of our legal conclusions on this question prior to the policy decision. In particular, a written summary of our views was conveyed to that agency through a March 1992 letter from then Acting Assistant Attorney General Barry M. Hartman of the Department's Environment and Natural Resources Division. Administrator Reilly requested and received a detailed written opinion from the Department after the Administration's policy decision had been made, to confirm and elaborate on the advice the Department had earlier provided.

Q. If yes, why did the Department not provide an opinion on the legality of the new regulation prior to the President's decision?

A. As explained above, the Department repeatedly provided its legal opinion on this issue prior to the Administration's policy decision.

Q. Did you or anyone else in the Department ever advise the White House, the Competitiveness Council, or the Environmental Protection Agency that the proposed regulations are inconsistent with Congressional intent as expressed in the 1990 Clean Air Act amendments?

A. No. Our legal advice to client agencies is, of course, privileged from disclosure, including disclosure to Congress. Because our opinion to the Administrator has been disclosed, however, and because it has been suggested that the Department offered our clients inconsistent advice on the question of public notice and comment, I believe it is appropriate to state that neither before nor after the issuance of the Department's opinion on public notice and comment to Administrator Reilly has the Justice Department ever advised the White House, the Competitiveness Council, or EPA that the proposed permit regulation's omission of public notice and comment was unlawful under the Clean Air Act. As the attached June 3, 1992 letter to Representative Waxman explains in greater detail, the two pieces of "evidence" that have been

cited to suggest a contradiction in our position on public notice and comment in no way support that charge. Rather, it has been this Department's consistent view that the 1990 Clean Air Act Amendments give EPA the discretion to allow the States either to require or to omit such procedures.

On May 10, 1991, EPA issued a proposed permit rule that, like the recent final rule, would have allowed States to approve minor permit amendments without public notice and comment. In congressional testimony on May 1, 1991, then-General Counsel E. Donald Elliott of EPA testified that "[i]t certainly is the case that I would not sign off on something that I thought was clearly illegal and [where] no argument could be made that this was in compliance with the law." Subcomm. on Health and Environment, House Comm. on Energy and Commerce (May 1, 1991) (trans. at 110). Mr. Elliott defended the legality of the proposed rule's minor permit procedure throughout the hearing. See, e.g., id. at 162 ("[B]oth I and the Justice Department believe in this instance that this provision meets the minimum requirements of legal defensibility."); id. at 93 ("We don't believe that [section] 502(b)(10) about operational flexibility is the only tool in the Act that Congress provided for us to deal with these problems.")

Q. Did you or others in the Department provide any advice in connection with the proposed regulations to the White House, the Competitiveness Council, or the Environmental Protection Agency during the period between May, 1991 -- when the White House first issued its proposal -- and May, 1992 -- when the President made his final decision? If yes, please describe the contacts that took place.

A. As noted above, our legal advice to our clients is protected by well-recognized privileges against disclosure. Nevertheless, I think it appropriate in the circumstances of this case to state that] Department personnel did provide formal and informal legal advice on the public notice issue to EPA, the White House, and the Competitiveness Council during the period in question, through a number of mostly informal meetings and telephone conversations.

Our legal analysis of this issue was and is that the 1990 Clean Air Act Amendments permit EPA wide latitude either to require the States to provide for notice and comment, or to permit the States to reach their own determinations as to whether notice and comment are necessary or appropriate for their particular circumstances, as both the initial and final EPA permit rules provide. Nothing in our opinion, or in EPA's permit rule, prevents any State from offering full opportunity for notice and comment, should it so desire. The Administration believes that leaving this decision to the States is fully in accord with the Act's mandate for

"[a]dequate, streamlined, and reasonable procedures . . . for expeditious review of permit actions . . . ."

Questions on International Antitrust

Q. Earlier this year, you announced a change in Justice Department policy concerning the extraterritorial application of our antitrust laws. Specifically, this change allows for the prosecution of foreign cartels that injure U.S. exporters trying to compete in a closed foreign market, even when there is no proof of harm to American consumers. Have you initiated prosecutions of this type, since the announced change of policy? If so, please indicate, to the extent possible, the number and nature of these prosecutions. If not, why not.

A. No prosecutions have been brought since the April 3, 1992, policy change. It is important to us that any case brought under this theory be well-considered and well-developed. It ordinarily takes a considerable period of time between the initiation of an antitrust investigation and the point at which sufficient evidence has been obtained to warrant filing a case. Prior to the April 3 announcement, the Department's policy had been not to pursue antitrust investigations based only on harm to exporters. As a result, there were no investigations of this nature in the pipeline at the time the change was made.

Q. How have our largest trading partners responded to this change in antitrust policy?

A. They have welcomed our expressed intention to implement the policy consistently with principles of international comity, and our stated willingness to work with antitrust authorities of the importing country when the conduct violates their laws and they are prepared to take action to remedy the conduct.

Q. What difficulties are presented, in these cases, by barriers to effective discovery in foreign nations? How can these discovery problems be overcome?

A. Obtaining evidence located abroad is often more difficult than obtaining evidence located in the United States. There often are instances in which the Department does not have jurisdiction over foreign individuals or firms that have relevant information abroad. Even when the Department is in a position to assert jurisdiction, however, we find that many foreign governments object to the use of compulsory process by another government to obtain evidence from within their territories as a violation of sovereignty. A number of these governments have enacted blocking laws that prohibit compliance with such discovery demands. Efforts to compel the

production of foreign located information may lead to time-consuming litigation over the legal implications of these blocking laws.

These difficulties are not unique to antitrust investigations, or to antitrust investigations under the changed policy.

Jurisdictional disputes of this nature have diminished in recent years. There is a growing appreciation among our trading partners that it is in our mutual interest to cooperate in the enforcement of our respective antitrust laws. The Department is pursuing efforts at increased cooperation both multi laterally, primarily through the OECD, and bilaterally. The antitrust cooperation agreement we signed with the Commission of the European Communities this past September is a good example of the kind of cooperation the Department is working to achieve and expand upon in the antitrust area. In addition, in our negotiations on mutual legal assistance treaties in the criminal enforcement area, the Department has been seeking to assure that antitrust crimes as well as other types of offenses are covered, whether or not the offense is treated under the criminal laws of both parties to the agreement.

Questions on the Prosecution of Financial Institution Fraud

Q. In 1989, then-Attorney General Richard Thornburgh indicated that the primary mode of investigating financial institution fraud cases would be inter-agency task forces, with personnel from the FBI, U.S. Attorney Offices, the IRS, regulatory and other federal agencies working together. The Justice Department announced plans for task forces in 27 cities. But it appears that only three task forces have been formed to date. Why did the Department establish only 3 of the task forces that were planned? Has the task force model been abandoned, or does the Department intend to follow through with the originally announced plan?

A. The Justice Department has placed 100% dedicated attorney resources not in 3 cities, not in 27 cities but in 75 U.S. Attorneys Offices whose U.S. Attorneys use dedicated Financial Fraud Coordinators to supervise these matters. Their leadership has brought about a string of successful prosecutions in this complex area of white collar crime.

The criticism implied by this series of questions concerns me insofar as it seems to demonstrate a continuing unwillingness on the part of GAO to paint both a complete and fair picture of the Department's efforts in this our number one white collar criminal priority. It is particularly disappointing given the detailed response the Department provided on this

very topic in the Spring of 1991 to Chairman Brooks, your House counterpart, and of which GAO was aware.

GAO auditors told us last fall that they have no criticism of the substantive effectiveness of our financial institution fraud program but field auditors repeatedly visit our prosecutors to look at the "form" of this program. In fact, GAO auditors have praised programs in a number of cities which are different in structure than the Dallas Regional Bank Fraud Task Force. Dallas is not our only successful model as GAO has privately conceded.

Before GAO auditors visited a single "Task Force" they were told by our Special Counsel that they did not all look like Dallas. GAO and Congress have been told what the Department was doing with the resources it was given. There have been no secrets or changes in strategy.[5]

In September 1990, GAO itself noted in a written Report that the 27 Task Forces had been staffed and their creation mooted their earlier concerns. That September 1990 Report by GAO identified two central elements of what they viewed as a successful program -- dedicated resources and dedicated supervision. The Department has worked to ensure that these elements are present in all of our Financial Institution Fraud (FIF) programs. Ironically, in its September 1990 Report, GAO chose to criticize the very Dallas Bank Fraud Task it now wishes us to use as an exclusive model by saying its accomplishments were unclear -- a "fact" which the Department

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[5] On April 12, 1990 then Criminal Division Assistant Attorney General Edward Dennis stated in testimony before Congress that the Department was: "--establishing task forces, consisting mainly of FBI staff and United States Attorney office staff, in FBI divisions and judicial districts having the greatest need" (emphasis added).

This same interpretation can be found in Mr. Dennis' later testimony of May 11, 1990.

On August 2, 1990, then Attorney General Dick Thornburgh told Congress that "[t]he Task Force concept uses the combined resources of the United States Attorneys' office, the Criminal and Tax Divisions of the Department of Justice, the FBI, the Internal Revenue Service (IRS) and various financial institution regulatory agencies, including the FDIC and Office of Thrift Supervision (OTS), in a team effort to pinpoint, investigate and prosecute serious fraud allegations." (Testimony at p. 4)

Through a variety of mechanisms, we have attempted to bring all of these diverse resources to bear.

disputed then and disputes now with more than 100 major S&L criminals jailed through Dallas Task Force efforts.

These are professional prosecutors dealing with an unprecedented problem as best they can with the resources that were and have now been provided to them. The traditional and professional way of dealing with any law enforcement problem is to begin with the United States Attorneys at the local level.

The financial institution fraud program has been coordinated at a national level since the Spring of 1990 through the efforts of a Special Counsel within the Office of the Deputy Attorney General -- one selected by the Attorney General (Jim Richmond), and one selected by the President and confirmed by the Senate (Ira Raphaelson). Both of these men served on my staff when I was the Deputy Attorney General. They were "professional" prosecutors who commanded the respect of those local U.S. Attorneys. Nonetheless, their experience, indeed no experience, is a substitute for the judgement and leadership of the local U.S. Attorneys. The Special Counsel's efforts are those of national leadership and coordination and those efforts have helped to produce a remarkable program.

GAO was told in writing on October 1, 1991 that their misinterpretation of my predecessor's remarks was unfair.[6] Yet their continued misinterpretation of those remarks seems to persist to date.

Q. There have been reports that the Justice Department has encountered difficulty in getting other federal departments to provide personnel for financial institution fraud investigations. Has the Justice Department received sufficient cooperation from the regulatory agencies and other government departments?

A. The Justice Department has received an unprecedented degree of cooperation in this effort. Coordination has never been better as evidenced by the adoption on June 25, 1992 by the Senior Interagency Group of a National on Coordination of the Collection of Restitution.

If the thrust of this question is to ask whether the Department would welcome additional investigative assistance from IRS and certain of the regulators, the answer is of course. For instance, while the Department would welcome additional investigative resources from IRS-CID, and has requested same, appropriations levels have not allowed IRS-CID to increase staffing to meet the needs we all agree are there.

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[6] See attachment 5.

The FBI, in adherence to the DOJ policy of aggressively pursuing all appropriate cases of FIF, has directed its Special Agents-in-Charge to meet with other law enforcement and regulatory representatives through local and regional working groups to prioritize and coordinate investigations. These working groups promote interagency cooperation on all levels.

Q. Does the Special Counsel for Financial Institution Fraud have the statutory authority needed to ensure that the other agencies or departments cooperate and participate in these investigations, or are legislative reforms necessary to ensure that you receive greater cooperation?

A. The effort against financial institution fraud is not a matter of authority for the Special Counsel for he exercises the Attorney General's authority when needed in this area. The question is to what degree other departments or agencies could or should put their resources at our discretion. As the Department responded to Senator Alan Dixon's committee this past spring:

> Along with the Brady Bank Bill, one statutory change that we sought last year that was not adopted by Congress would have required coordination of regulatory litigation with the Attorney General; that proposal had the support of the Treasury Department as well as the regulators. Fortunately, we have been able to achieve an enhanced degree of coordination with the Treasury Department, but that still does not allow them to allocate sufficient IRS Criminal Investigative Division (CID) resources for they are, by law, under the direction and control of IRS Regional Counsel.

Q. Has the Justice Department established a national policy for prosecuting financial institution fraud cases that are below a certain monetary threshold, or is it up to individual U.S. Attorney offices to set such a policy?

A. The Attorney General has committed the resources and efforts of this Department to the prosecution of "major" financial institution fraud cases as we have defined them. Prosecution of non major cases is within the discretion of the U.S. Attorney to prioritize along with the other demand on his/her resources.

Q. If a national policy has been established, what is it?

A. See above.

Q. Have any U.S. Attorney offices adopted a policy of routinely declining smaller cases?

A. While I cannot state with precision which, if any, offices have adopted these policies, I am told by those who have been U.S. Attorneys that it has long been the practice and would not be unusual for a United States Attorney, often in consultation with and/or at the request of the law enforcement agencies and regulators to set a threshold dollar or loss level for prosecution of cases with an appropriate caveat for exceptional circumstances making the exception to that threshold.

Questions on the BCCI Investigation

Q. At your confirmation hearing last November you said that you had asked for a "thorough review" of the Department's investigation of BCCI up until July of last year, when you became personally involved.

Who in the Justice Department is in charge of this review?

Has the review been completed yet?

What did the review conclude about the Justice Department's handling of the BCCI investigation?

Did the review encompass the apparent failure of other agencies, such as the C.I.A., to inform the Justice Department in a timely manner about possible illegal activity?

Have you implemented any change in policies or procedures or new policies or procedures in the wake of the review? If so, what are they?

Will you make a copy of the conclusions resulting from the review available to the Judiciary Committee?

A. The Justice Department's "retrospective review" of the BCCI investigation remains an ongoing matter under the direction of Robert S. Mueller, III, Assistant Attorney General for the Criminal Division. A portion of that review deals with claims that the Department was in some manner improperly influenced by the CIA, other intelligence agencies, the White House, defense attorneys, lobbyists, and others not to prosecute the bank. To date, no credible evidence has been uncovered to support any suggestion that the Department was subjected to improper influence in the course of its investigations of BCCI. At present, therefore, it would be unwarranted to make any referral to the FBI or any other law enforcement agency, or to the Office of Professional Responsibility, for further investigation in that regard.

The Department's overall management of the investigations and claims of failure of coordination within the Justice Department and between law enforcement agencies, regulatory agencies and the intelligence community in this regard are still being examined. The search for ways to maximize coordination and communication within the many decentralized components of the Justice Department and to enhance the sharing of information among federal agencies in major criminal investigations such as BCCI, without violating restrictions imposed by law, remains an ongoing process. I cannot give a definite date when this process will be completed. Our first priority is, and must continue to be, the vigorous pursuit of the BCCI investigations and prosecutions.

When the Department's analysis is completed and I have had a chance to review all of Mr. Mueller's conclusions and recommendations, the Department expects to disclose some or all of its findings to the Judiciary Committee, consistent with our obligations to protect both confidential grand jury information and information, which, if disclosed, could compromise ongoing investigations and prosecutions related to BCCI.

Q. Approximately how many times per year and under what circumstances does the Justice Department consult with the C.I.A., the State Department, or the National Security Council on criminal investigations?

A. The Department does not maintain statistics on the number of times and under what circumstances it consults with other departments and agencies in the course of our criminal investigations. Such consultations occur whenever they are warranted by the facts of a case.

Q. How many U.S. Attorney's offices are currently working on the BCCI case?

A. In addition to attorneys from the BCCI Task Force in Washington, D.C. (which consists of attorneys both from the Department's Fraud Section, Criminal Division and the U.S. Attorney's Office for the District of Columbia) prosecutors from U.S. Attorneys' Offices in the Southern District of Florida, Middle District of Florida, Northern District of Georgia, Central District of California and Southern District of New York are working on various civil and criminal aspects of the BCCI investigations and prosecutions.

Q. How many prosecutors, F.B.I. agents, and other personnel are investigating the BCCI case?

A. Approximately three dozen prosecutors, excluding supervisory personnel, are assigned to various aspects of the BCCI case. This number includes attorneys assigned to pending prosecutions of former BCCI officers, employees and shareholders in the District of Columbia, Tampa and Miami; attorneys conducting ongoing criminal investigations; attorneys focusing primarily on forfeiture and bankruptcy issues; attorneys assigned to Congressional matters; and attorneys responsible for international matters, including the acquisition of evidence in foreign countries. Some of these individuals work on BCCI-related matters on a part-time basis.

In addition, more than 40 agents and analysts from the Federal Bureau of Investigation, Internal Revenue Service, Drug Enforcement Administration and Customs Service are assigned to BCCI-related investigations.

According to a Justice Department court filing last month, Abu Dhabi has refused to cooperate with the criminal investigation by preventing the Justice Department from gaining access to witnesses and documents that are in Abu Dhabi.

Q. According to a Justice Department court filing last month, Abu Dhabi has refused to cooperate with the criminal investigation by preventing the Justice department from gaining access to witnesses and documents that are in Abu Dhabi. What measures is the Department taking to gain access to the witnesses and documents Abu Dhabi is holding?

A. Since last September, the Department has attempted to gain access to both witnesses and documents in Abu Dhabi. Senior prosecutors from the Department visited Abu Dhabi on two occasions last fall to discuss mutual cooperation to resolve the BCCI criminal investigations undertaken by our respective governments.

Although discussions with attorneys for the Abu Dhabi government have continued since that time, cooperation has not been forthcoming to date. The Department expects that the issue will be resolved, however, within the next several weeks. If cooperation from Abu Dhabi is not achieved, the Department will report that fact to the Judiciary Committee.

Q. What roles have the State Department, the White House and any other federal agency played in attempting to obtain the cooperation of Abu Dhabi?

A. The White House has not played any role in attempting to obtain the cooperation of Abu Dhabi. For the past several months, the State Department has assisted the Department of Justice in its efforts to achieve mutual cooperation.

Q. Last fall, Abu Dhabi hired James Lake to handle its public relations in this country, a representation that continues today. Since January, Mr. Lake has also served as deputy chief of President Bush's reelection campaign. Do you perceive any conflict of interest in Mr. Lake's dual role?

A. No evidence has been brought to our attention to suggest that the elements of any criminal statute have been violated. Under these circumstances, it would not be appropriate for me to comment since it is not a matter that falls within the jurisdiction of the Justice Department.

Q. In your view, should the Ethics in Government Act be amended to prevent a senior presidential campaign official from representing an individual or entity involved in a federal criminal investigation?

A. The Department of Justice has not formulated a position on whether the Ethics in Government Act should be amended to cover senior campaign officials. However, the Department would be concerned about the policy of treating private persons involved in campaigns the same as current or former government officials.

Questions on the Investigation of Banco Nazionale del Lavoro

Q. How many prosecutors are currently assigned full-time to the Banco Nazionale del Lavoro (BNL) case?

A. Two career prosecutors from the Northern District of Georgia work full-time on the BNL case. The First Assistant United States Attorney from that district also spends considerable time supervising the matter. In addition, several attorneys from the Fraud Section and the Office of International Affairs of the Department of Justice continue to assist the Atlanta prosecutors in obtaining evidence from various federal agencies and foreign countries.

Q. How many investigators are working on the case fulltime?

A. Twelve agents and one examiner are currently assigned to investigate the BNL case. Some of these individuals are working on the case on a part-time basis. Other agents and supervisory personnel are involved in the investigation in varying degrees on an as needed basis.

QUESTIONS FROM SENATOR THURMOND

Questions on the Prosecution on Financial Institution Fraud

Q. The Department has launched a major effort to uncover and prosecute those responsible for the bank and thrift crisis. Special Counsel for Financial Institution, Ira Raphaelson, has coordinated the over 1,600 FBI agents and prosecuting attorneys dedicated to financial institution fraud. Despite the fact that the Department has prosecuted more that 3,100 defendants in these cases over the past 2 years there is some question whether we are doing all we can to prosecute those responsible. From your experience, what can Congress do, if anything, to assist the Department in its continuing effort to fight financial institution fraud (FIF).

A. The Congress can continue to recommend and appropriate funds to ensure that the manpower required to address and prosecute those responsible for the crisis continues. The FBI caseload as to FIF cases continues to increase. From the end of Fiscal Year (FY) 1986 to April 30, 1992, the number of FIF cases being investigated by the FBI has steadily increased from 7,286 to 9,172. In this same period, investigations as to major cases (losses of $100,000 or more) have increased form 2,948 to 4,798 and failure cases have increased from 202 to 744. There has been an increase in major cases and failures for each year since 1986 to the present, and the FBI has no indication that this upward trend will abate.

Questions on Reauthorization of Office of Justice Programs

Q. General Barr, as you know, Congress is preparing to reauthorize the Office of Justice Programs and its various bureaus. In fact, I plan to introduce the Administration's bill later today. Most would agree that the Office for Victims of Crime, National Institute of Justice, the Office of Juvenile Justice, and other bureaus should be reauthorized. Yet, it has been suggested that the Office of Justice Programs should be eliminated or that its authority over the various bureaus should be substantially curtailed. In your opinion, is there a need for improved cooperation and communication between the various bureaus and is the Office of Justice Programs best suited to further these objectives?

A. The OJP bureaus and offices provide more than $800 million annually for state and local government activities. The role of the Assistant Attorney General, OJP, is an important one -- it is to promote and facilitate coordination and cooperation among the bureaus and offices within OJP and to provide the support services they need to accomplish their important

missions. The programs coordinated through OJP and developed, funded and administered through the various bureaus and offices, work to form partnerships among Federal, state and local government officials to combat violent crime and drug trafficking, improve the administration of justice in America, meet the needs of crime victims, and find innovative ways to address problems such as violent crime, prison crowding, juvenile crime, and drug abuse. OJP's main goal is to provide the coordination necessary to make the Nation's criminal justice system more efficient and effective by identifying emerging criminal justice issues, developing and testing promising approaches to address these issues, evaluating program results, and disseminating these findings and other information to state and local units of government. OJP serves as a crucial link between Federal, State and local law enforcement and justice agencies in serving their communities and carrying out the National Drug Control strategy. OJP also houses important statistical activities for the Department of Justice and the nation.

The Department is confident that OJP has and will continue to meet its responsibilities, and that the needs of state and local units of government are being met.

However, it is unfortunate that as the principal grant-making arm of the Department of Justice, OJP's organizational structure has been the subject of some controversy since its inception. OJP's structure of five Bureaus and an Office of the Assistant Attorney General, all headed by Presidential appointees has been the focus of several Congressional hearings and three studies over the last three years: (1) the Department's Office of the Inspector General (OIG) (January 1991); (2) the Department's Justice Management Division (JMD) (November 1990); and (3) the General Accounting Office (GAO) (September 1991). These studies all acknowledged that the organizational structure, as established by statute, is non-traditional and has inherent conflicts. Indeed, the organizational structure has, at times, fostered territorial battles, fragmentation of programs, duplication of efforts, and made coordination somewhat difficult. JMD made recommendations that the OJP Assistant Attorney General's authority over the bureaus and offices be strengthened and more clearly defined, and on February 19, 1991, the Attorney General issued a new Delegation Order No. 1473-92, which defined, in a manner more consistent with traditional organizational structures, the Assistant Attorney General's authority over the OJP bureaus.

The Administration's OJP reauthorization proposal seeks to clearly acknowledge the need to foster greater coordination and cooperation among OJP and its bureaus, and, in this time of fiscal restraint, to integrate where possible the bureau

and office resources to maximize their effect through such programs as Weed and Seed. This proposal reflects the Department's intent to improve OJP's ability to coordinate and thereby enhance the effectiveness and efficiency of operations within OJP and its bureaus and offices.

Questions on Civil Asset Forfeiture

Q. General Barr, the Department's Asset Forfeiture Program has proven to be a remarkable success. Since FY 1985, more than $2.4 billion in cash and property has been stripped from drug traffickers and other violent criminals. Most of this has been reinvested in law enforcement. Please discuss whether you believe the Federal forfeiture statute should be expanded to fight other types of crime, such as white collar crime. In addition, how do you respond to those who have called for the elimination of civil forfeiture?

A. We believe asset forfeiture should be available as a sanction for white-collar crime and in 1990 formally submitted legislation to Congress proposing that forfeiture be established as a sanction for the fourteen most frequently used federal fraud statutes. Since that time, the Department has endorsed proposals that forfeiture be expanded to encompass profits and proceeds of alien smuggling, counterfeiting, and various violent firearms and explosives offenses. There is much to be said for the proposition that forfeiture should be available for all federal criminal offenses committed for profit.

Regarding criticisms of the asset forfeiture program, and particularly civil forfeiture, the Department is keenly aware of the power of forfeiture and are taking extraordinary steps to ensure the prudent use of this very effective law enforcement weapon. To the extent that the Department has investigated media allegations of abuse, we have found that such media reports were based on inaccurate and/or incomplete accounts of the cases described. While we cannot vouch for all the seizures and forfeitures conducted by State and local agencies, the Department believes that federal law enfo cement authorities are using asset forfeiture prudently and with appropriate caution and restraint. If we discover cases where any abuse has occurred, I can assure you that we will take strong and immediate corrective action as we recognize that to abuse any law enforcement tool will ultimately result in the loss of it. Asset forfeiture is much too important for us to allow it to be jeopardized by misuse.

Questions on Victims Rights

Q. General Barr, all too often, crime victims are victimized a second time by our criminal justice system. The Department's Office for Victims of Crime has made substantial progress in making the needs of crime victims known to the general public. Yet, many in Congress think that the best way to help crime victims is to financially compensate them for their injuries. What do you believe are the most important steps Congress can take to further the interests of victims' rights?

A. Since the passage of Victims of Crime Act (VOCA), which authorized the establishment of a Federal Crime Victims Fund [Fund], the Office for Victims of Crime (OVC), within the Department of Justice, has awarded $631,068,000 to States to support direct services to crime victims and to financially compensate crime victims for cost associated with their victimization from deposits in the Fund. In Fiscal Year (FY) 1986, the first year of this Federal grant program, the cap on the Fund was $100 million dollars; however, today the cap on the Fund is $150 million dollars. Since the inception of the program, we have observed an overall increase of 84% in the amount of funds available to support State crime victims programs. Likewise, we have noted substantial increases in the amounts States have dedicated to crime victim compensation, claims approved by State compensation programs, and amounts awarded to crime victims for medical expenses, mental health counseling, funeral expenses, lost wages, and other expenses.[7]

We have also observed increases in the provision of victim services such as shelter, criminal justice advocacy, crisis intervention and other emergency services. Attached are charts which depict the number of victim services programs funded, dollars set aside for specific categories of crime victims, and requests for various types of services under the VOCA victim assistance grant program.

Concerning steps that may be taken by Congress to further the interest of crime victims, we believe passage of the amendments to VOCA contained in H.R. 3371, the Omnibus Crime Control Act of 1991, introduced by Congressman Schumer, is critical. The proposed amendments to VOCA in H.R. 3371 would: (1) permanently reauthorize VOCA, remove the cap on the Crime Victims Fund, and create a mechanism that permits the Director to retain a portion of the Fund as a reserve for use when deposits decline; (2) simplify the distribution of the Fund; (3) authorize much needed funding for demonstration projects; (4) provide limited administrative costs for State crime

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[7] See attachment 6.

victim compensation and victim assistance grant recipients and contains a nonsupplantation clause with regard to administrative expenditures; (5) increase funding for the Children's Justice Act grant programs; (6) seek to limit the extent to which State crime compensation programs are treated as primary payers of crime victims compensation costs; (7) increase the matching share to State compensation programs; (8) extend the obligation/expenditure period for Fund dollars; (9) identify child victims of violent street crime as underserved; (10) delay the implementation of amendments until sufficient sums are available in the Fund to ensure that States will not receive reduce funding under the two formula grant programs; and (11) establish a new due date for the biennial report to Congress on the impact of VOCA.

We think these are important amendments which can greatly advance our efforts on behalf of crime victims. Furthermore, these amendments are supported by major victims rights groups such as the National Organization for Victim Assistance and the National Victims Center. Further, we anticipate deposits in the Fund to exceed the current legislative cap of $150 million in Fiscal Year 1992, since as of the end of May deposits into the Fund had reached $105 million with four months remaining in the fiscal year. At this rate of collection, the Fund could easily exceed $150 million. If the cap were removed, the additional funds could be used to assist more crime victims than are currently served.

Questions on Habeas Corpus Decisions

Q. The Supreme Court handed down a number of habeas corpus decisions this term. What is your opinion of these decisions and is the Court continuing to restrict the potential for frivolous litigation?

A. The Court's habeas corpus decisions in this term have primarily involved applications or elaborations of standards adopted in earlier decisions. In general, the Court has taken a number of constructive steps in recent years to accord increased finality to criminal judgments and reduce the abuse of habeas corpus. However, these decisions do not obviate the need to enact the legislative reforms proposed in title II of the President's violent crime bill (S. 635 and H.R. 1400), which were passed by the Senate in title XI of S. 1241, and which have been incorporated in title II of the Thurmond-Gramm bill (S. 2305).

For example, title II of S. 2305 proposes a rule of deference to full and fair state court adjudications in habeas corpus proceedings. This would generally require deference to reasonable state court determinations of a prisoner's claims.

This deferential standard of review would apply to questions of law and questions of application of law to fact, as well as to the determination of purely factual matters.

The case of Wright v. West, 112 S.Ct. 2482 (1992), raised the possibility that the Supreme Court might adopt a similar rule. Earlier cases, including Butler v. McKellar, 110 S.Ct. 1212 (1990), have effectively adopted a standard of reasonableness in reviewing state court decisions of questions of law in the context of "retroactivity" determinations. The facts of Wright v. West potentially provided an opportunity to adopt the same sort of deferential review of applications of law to fact by state courts. (Review of purely factual determinations is already deferential under the standards of 28 U.S.C. 2254(d)).

However, the various opinions in the decision of Wright v. West rejected the petitioner's claims on other grounds, and the Court did not need to adopt any new principle regarding the general standard of review. Hence, enactment of the reform proposed in S. 2305 remains essential to eliminate the gratuitous second-guessing of reasonable state court decisions by lower federal courts.

A similar point appears from the Court's decisions regarding successive petitions. The Supreme Court's articulation of the "abuse of the writ" doctrine in McCleskey v. Zant, 111 S.Ct. 1454 (1991), was a significant step forward in curbing the virtually endless litigation involving second and successive habeas petitions that often occurs, particularly in capital cases. Moreover, in Sawyer v. Whitley, 112 S.Ct. 2514 (1992), the Court rejected an interpretation of the McCleskey rule that could have broadly allowed challenges to capital sentences in successive petitions, even where no "cause" could be shown for failing to raise a claim in earlier petitions.

However, even on the most favorable construction, the McCleskey rule falls short of the Powell Committee's proposal, under which successive petitions in capital cases would be limited to cases in which a claim is raised that casts doubt on the defendant's commission of the offense for which the death penalty was imposed, and cause is shown for failing to raise the claim in earlier proceedings. Enactment of the Powell Committee proposal remains essential to obtain an adequate safeguard against delay and obstruction of the execution of death sentences through repetitive habeas filings.

Finally, we would note that the habeas corpus reforms of title II of S. 2305 include important reforms which, by their nature, cannot be adopted through caselaw development. These include the definite time limitation rules for habeas corpus

filings proposed in the bill, and the adoption of definite time limits for lower federal courts to conclude the litigation of habeas petitions in capital cases. The enactment of these legislative proposals is essential to control the unconscionable delays and limitless prolongation of litigation that can occur under the existing rules.

QUESTION FROM SENATOR METZENBAUM

Question on the Regulation of the Life Insurance Industry

Q. As you may be aware, my antitrust subcommittee is holding a series of hearings on the life insurance industry to determine if the billions of dollars that the American people have invested in life insurance is being protected by state regulation or national oversight.

What we found is that state regulation is tantamount to no regulation. State regulations are clearly inadequate to prevent an industry-wide insolvency problem. State guarantee funds cannot protect consumers' investment if their life insurance company becomes insolvent. State laws don't prevent life insurance companies from transferring policyholders, without their consent, to other less financially secure companies. State laws don't protect consumers against life insurance companies, and their agents, who use deceptive tactics to sell their policies.

Worse still, the only national body that is in a position to oversee the industry and push for uniform laws to deal with these problems--the National Association of Insurance Commissioners (NAIC)--has strong ties to the insurance industry and virtually no consumer representation. Even if that were not the case, I do not believe that the NAIC is up to the task of assuring proper oversight of this industry. For instance, the NAIC passed a resolution concluding that Executive Life was in "no imminent financial danger" just four months before that company collapsed.

The point here is that the insurance industry is not subject to uniform, or reliable state regulation or oversight by any effective national watchdog. Likewise, it is exempt from the federal antitrust laws under the McCarran-Ferguson Act. Currently, these are the only national laws that could stop some of the anticompetitive practices that have undoubtedly contributed to the insurance industry's insolvency and other problems. Despite that fact, the DOJ has, for the first time in my memory, opposed legislation to repeal the McCarran-Ferguson antitrust exemption for insurers.

General Barr, can you explain to me how the DOJ can oppose subjecting the insurance industry--where regulatory oversight is either lacking or woefully inadequate--to the same rules of fair competition that apply to virtually every other industry in America? By taking that position, aren't you leaving the American people at the mercy of an insurance industry over which neither the federal government nor the states have any meaningful control?

A. Various specific proposals to repeal or reform the broad antitrust exemption for the business of insurance contained in the McCarran-Ferguson Act have been introduced and debated during the current and recent Congresses. The Department has been closely following the arguments for and against such repeal or reform legislation, and has stated that, in general, it endorses congressional review of the existing exemption. The Department has stated its opposition to one version of such legislation, H.R. 9, the Insurance Competitive Pricing Act of 1991, on a variety of grounds. We are concerned that this bill could have unwarranted deterrent effects on appropriate procompetitive behavior, that the bill fails to include important types of procompetitive behavior among its "safe harbor" provisions, and that the bill is ambiguous with respect to the application of the "state action" doctrine to the business of insurance.

The Department views insurance fraud and the problem of insolvencies as a significant growing crime problem. Insurance fraud threatens the very foundation of our nation's financial services industry. Our commitment to combating insurance fraud is evidenced by the recent FBI publication of an insurance insolvency study, reallocation of resources to insurance fraud matters, and the expansion of specialized training on insurance fraud.

QUESTIONS FROM SENATOR DECONCINI

Questions on the Commerce IG Report on Alteration of Documents

Q. On July 10, 1991 Congressman Barnard requested the Justice Department open an investigation into the Commerce IG report on alteration of documents provided Congress. In House testimony last week, Assistant A.G. Robert Mueller stated that the Barnard request was immediately assigned to the Public Integrity Section at Justice, which in turn, enlisted the aid of the FBI. According to Mr. Mueller, the investigative phase has been delayed because of the unavailability of Dennis Kloske. His testimony goes on to say that recently the FBI finally located Kloske in Europe and interviewed him. It has been 11 months since Mr. Mueller stated that the Barnard request was "immediately assigned to the Public Integrity Section". It is apparent to this Senator that Dennis Kloske is the key to this case. With both the Public Integrity Section and the FBI assigned to this investigation, how could it take 11 months to interview Mr. Kloske?

A. Both the Public Integrity Section and the Federal Bureau of Investigation have been actively investigating the allegations relating to the alteration of documents by officials at the Department of Commerce. The attorneys and agents assigned to this matter have followed the Department's standard investigatory practices. Prior to interviewing Mr. Kloske, they reviewed volumes of documents and interviewed numerous persons with knowledge relating to the Department of Commerce's response to Congressman Barnard's request for information. It was only upon the completion of this phase that an interview was sought with Mr. Kloske. Although there was some difficulty in locating Mr. Kloske, and in arranging an interview, they located and interviewed him within a reasonable period of time.

Q. How long had Mr. Kloske been out of the U.S. and was he traveling under a false passport? How many lawyers and FBI Agents were assigned to locate Kloske?

A. Mr. Kloske resigned from the DOC May 1, 1991, and then began working as a financial consultant dealing in stocks. He traveled to Europe and remained in Europe until June 1992, when he returned to the Washington, D.C. area. Kloske was not traveling under a false passport. The FBI had two Agents involved in this investigation.

Q. I believe the Commerce I.G. investigation has serious flaws. It is also difficult, in the current political climate, to have complete confidence in a Justice Department investigation. You have the Democrats in Congress claiming

cover-up. You have the President claiming the is nothing more than election year politics. Regardless of what the Congress decides Mr. Barr, you have the authority to appoint a special counsel in this case. The American people deserve a full accounting. Are you ready to appoint a special counsel to investigate these alterations? What would it take for you to appoint a special counsel?

A. As you may be aware, a majority of the majority Members of the House Judiciary Committee have requested the appointment of an independent counsel to investigate matters relating to Iraq. The allegations of alteration of documents by officials at the Department of Commerce are included in this request. On August 10, 1992, the Attorney General declined to seek appointment of an independent counsel for the reasons stated in his letter and report to the House Judiciary Committee. A copy of that letter is enclosed for your review.[8]

Q. Both the Commerce Department's General Counsel and its Inspector General are convinced that Dennis Kloske, a lowly Deputy Under Secretary, acted on his own in altering documents that involve the sale of more than $1 billion in U.S. military equipment and technology to a country that we were at war with. It is interesting to note that at an interagency meeting on April 16, 1990 on Iraqi policy, Kloske presented a variety of proposals to restrict licenses of high-tech goods with potential military uses to Iraq. The proposal were rejected. Mr. Attorney General, don't you find it rather odd that an individual who is being accused of altering documents, would six months earlier attempt to change U.S. government policy with regard to Iraq?

A. The allegations against Dennis Kloske are currently under investigation by the Department of Justice. Accordingly, it would be inappropriate to speculate about Mr. Kloske's motivations or intent.

Q. According to an article in U.S. News and World Report last month, Nicholas Rostow, Special Assistant to the President and Legal Advisor to the National Security Council (NSC), established a vetting policy for Iraq-related records, urging that "Alternatives to providing documents to Congress regarding Iraq should be explored." Documents show that Rostow presided over interagency meetings on crafting responses for congressional request on April 8, 9, and 15, 1991. Did you or anyone at Justice attend any of these meetings? At any time in those meeting was there any discussion of altering any government documents or delaying the release of, or withholding documents from Congress?

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[8] See attachment 7..

A. The information we have to date shows that there were interagency meetings attended by Department of Justice and other government attorneys responding to Congressional requests for information. The Attorney General did not attend any of these meetings. The purpose of these meetings was to determine what information Congress was seeking from each Department, which agency had jurisdiction over certain documents, whether any of the information should not be released or should be released only under certain conditions on the grounds of executive privilege or other lawful bases (such as the classification status of the documents) and whether there were national security issues at stake in releasing the information, and if so, how they should be addressed. While these issues were discussed, and properly so, we have no information of any improper discussion of delaying the release of or withholding documents from Congress. We have no information that any documents were in fact withheld, or that alteration of documents was discussed at all at these meetings.

Questions on Border Patrols

Q. Last April, it was reported that Border Patrol officers were targeting young school children in Phoenix, AZ for questioning about their immigration status.

A. The Border Patrol does not target school children for questioning anywhere in the United States. During the normal course of business the Border Patrol may encounter and need to interview unaccompanied minors who are in the United States unlawfully. Public schools are contacted for information to locate parents or guardians of unaccompanied minors in an effort to minimize detention time and to expedite reunification with family members. A meeting was conducted with Dr. Victor Herbert, Superintendent of the Phoenix Union High School District to foster better communication concerning juvenile alien matters. The Border Patrol was represented by an Assistant Chief of the Tucson Sector and the Sector Counsel.

Q. More recently, a Border Patrol officer was arrested and is being charged with first degree murder in the fatal shooting of an individual near Nogales--an incident that was not reported to supervisors for several hours.

A. The case is being investigated by the Santa Cruz Sheriff's Department, the FBI and the Office of the Inspector General. We will provide a full report of the results of the investigation when the pending criminal actions are resolved.

Q. I have the highest regard for the men and women of the Border Patrol. As you know, I have fought for years to improve the resources and funding available to this agency so that they may carry out the difficult and dangerous mission of protecting this country's border. However, the public perception of these officers has been altered negatively over the years by reports of incidents of unnecessary violence and abuse. There exists a sense that the process through which complaints are filed is not effective. I realize that the agency views allegations of harassment and excessive force very seriously. What exactly is the policy with regard to complaints against Border Patrol officers?

A. All allegations of abuse or misconduct by a Border Patrol Agent are referred to the Office of the Inspector General (OIG). The OIG refers any cases which may involve civil rights violations to the Civil Rights Division of the Department of Justice, usually for investigation by the FBI.

All INS employees are required, by regulation, to promptly report any personal knowledge of wrongdoing by an INS employee or any complaint received, to the OIG. Failure to do so may result in disciplinary action being taken against the employee.

INS adheres to the DOJ schedule of disciplinary offenses which are taught to each Border Patrol agent while attending basic training at the Border Patrol Academy. Additionally, these offenses are issued as a handout on a yearly basis by the Office of Management of INS.

Each Border Patrol agent is also required to read INS pamphlet M-68, Standards of Conduct for INS Employees, shortly after they enter on duty and acknowledge in writing that the standards prescribed in the handbook are understood and will be adhered to. Ethics in law enforcement, as well as courses in use and abuse of force and civil rights are taught at the basic training at the Academy and reinforced at supervisory and journeyman schools.

Section 503 of the Immigration Act of 1990 prescribes the establishment of service standards of conduct when engaged in law enforcement activities. These standards will be fully developed as soon as possible.

Q. Does the Agency compile statistics on the number and disposition of complaints filed against Border Patrol officers?

A. Because the processing and case management of complaints filed against INS employees, including Border Patrol agents, has been handled by the Office of the Inspector General, the INS

has not routinely compiled such statistics on a nation-wide basis. However, the newly-established INS Office of Internal Audit will collect and analyze complaint data to identify problems and trends.

Q. What efforts are made to advise the public as to their right to file a complaint following an incident of harassment or excessive force?

A. The OIG has published a toll-free hotline telephone number for referral of such complaints by the public. This number is posted in the public area of Border Patrol stations. In addition, INS employees are familiar with the OIG's role and refer aliens directly to the OIG. The hotline is also advertised in OIG brochures and in a variety of Departmental publications. The OIG advises that, from its experience with hotline callers, it appears that its 800 telephone number is well known and circulated among immigration rights organizations and the Spanish-language media. In addition, the Mexican consulates in El Paso, Texas, and Tucson, Arizona, have been of assistance in OIG investigations of such allegations.

Q. How can these efforts be improved?

A. One recent activity of the OIG to improve this process involved attendance and a presentation by the Assistant Inspector General for Investigations at a U.S. Commission on Civil Rights sponsored hearing on border abuse issues at El Paso, Texas on June 12, 1992.

Q. Recently, a task force appointed by the San Diego Police Chief recommended that a citizens review panel be set up to review allegations of abuse by Border Patrol officers. I feel that it is important to involve the community in the process, and the idea of a citizens panel is a good one. Would you support the creation of some type of citizens panel to accept and review complaints against Border Patrol Officers?

A. The Border Patrol values community interest in and support for its operations and actively pursues opportunities to enhance its community relations. However, the Department of Justice believes citizen review of individual complaints against Border Patrol agents and other Federal law enforcement officers would not be useful.

Although refinements continue to be made, the Department of Justice believes the current system provides for thorough review of and effective action on complaints against Border Patrol agents. The Border Patrol is continuously reviewed by the INS Offices of Enforcement, Operations and Management. Specific complaints are handled by the DOJ Offices of

Professional Responsibility and Inspector General. Complaints are investigated by the Office of the Inspector General, the Civil Rights Division and the Federal Bureau of Investigation, or by INS investigators as warranted by the nature and circumstances of the allegations.

Q. If not, what would you suggest be done to eliminate the perception that the agency is not responsive to complaints?

A. The Immigration and Naturalization Service (INS) has adequate procedures in place to receive and investigate allegations of wrongdoing against INS employees. Although that system has been responsive, the INS is continuing to improve the accuracy, adequacy, and timeliness of its products. Those efforts should, in turn, enhance the system's credibility.

Currently, the Department's Inspector General has a mechanism in place to receive, investigate, and track allegations of INS employee misconduct, principally involving bribery or fraud. Such allegations are either investigated directly by the OIG or referred to INS for investigation, with a report back by the INS to the OIG. These same case tracking procedures are used to handel civil rights violations, with one notable difference: the allegations are transmitted by the OIG to the Department's Civil Rights Division for review and assignment for investigation (usually to the Federal Bureau of Investigation).

In January 1992, the INS Office of Internal Audit was established. When fully staffed, this office will assume many of the internal investigative duties currently accomplished by INS field agents and ensure nationwide consistency of investigative reports and corrective actions. It will also analyze trends to identify systemic problems which can be corrected through training or increased supervisory controls. The Office of Internal Audit currently has a staff of three and will, over the next few months, be building to its Fiscal Year 1993 authorized strength of 16 personnel.

Q. Last month, there was a report that U.S. Justice Department officials and their counterparts in the Mexican government met to discuss the issue of border violence. Can you update the committee as to what issues were discussed at that meeting?

A. The following issues were discussed at the May 27, 1992 meeting between the Government of Mexico and the United States. Also, both parties agreed on the following specific measures to increase individual safety and to prevent incidents of violence in border areas:

1. To review procedures used by both government authorities to respond to border incidents, including as a priority

alternatives to the use of lethal weapons. The Immigration and Naturalization Service reaffirmed its policy of stressing the appropriate use of non-lethal force throughout its basic and advanced training for Border Patrol agents.

2. To continue including courses in the Border Patrol Academy's training program in Glynco, GA, on reasons for emigration, as well as the cultural characteristics of Mexico. The Mexican delegation accepted the United States Government's invitation to contribute to these training courses through the National Commission for Human Rights and other agencies.

3. To establish courses for law enforcement officers engaged in border duties in each country, emphasizing the sensitivity of their activities, as well as their impact on the bilateral relations between both countries.

4. To strengthen the various agencies engaged in combatting border criminality in their respective jurisdictions.

5. To review the conditions for the repatriation of undocumented workers, while protecting their dignity and human rights.

6. To instruct their representatives of the International Boundary and Water Commission to establish more visible boundary delineation at ports of entry.

7. To share information between appropriate Mexican and United States authorities, particularly regarding criminal law and procedures used to investigate and remedy incidents of border violence in each country.

8. To encourage further contacts between the law enforcement authorities of both countries, in order to foster active cooperation in the prevention and investigation of incidents of violence.

9. To discuss information regarding the flow at border crossings and the procedures for issuance of border crossing cards.

Both parties exchanged information on the progress of their respective investigations regarding past incidents of alleged abuses. In preparation for the next meeting of the Binational Commission, both parties agreed to continue their efforts to address the remaining pending cases. There will be a Binational Commission meeting in Washington, DC in September or October 1992.

Finally, both parties agreed to meet at least annually within the framework of the Binational Commission, in order to

evaluate the effectiveness of the measures agreed upon, as well as the possibility of any further measures which might be required.

Q. What is your commitment to improving the training of Border Patrol officers in an effort to ensure that they carry out their duties in a fair and humane manner?

A. The Border Patrol is committed to providing the best possible training for its agents. Their Academy curriculum is reviewed on a regular, recurring basis. The training measures agreed to as a result of the border violence meeting will be incorporated into training programs already developed by the Border Patrol and/or implemented at the field level in the form of in-service training as appropriate.

Q. During your confirmation hearings, you committed your support for additional resources, and I am encouraged by your actions thus far. You have requested additional officers for the Southwest border, and have followed through with a request earlier this year for reprogramming of resources for an additional 300 Border Patrol officers along the Southwest border. Have you requested any additional reprogramming of funds for Border Patrol?

A. The Border Patrol has received the additional funding from the reprogramming action for the hiring of the additional 300 Border Patrol agents in 1992. The additional funds will cover the salaries in 1992 and equipment for the additional agents. The 1993 Budget request includes funding for the full year salary costs for the additional agents hired during 1992. No additional reprogramming of funds is anticipated for 1992 for the Patrol.

Q. What is the status of the hiring of the additional 300 Border Patrol officers which you announced earlier this year?

A. The hiring of an additional 300 Border Patrol agents is proceeding on schedule. As of July 21, there have been 247 agent trainees entered on duty. These new agents are all currently in basic training at the Border Patrol Academy at Glynco, GA. Another 150 agent trainees are scheduled to enter on duty in August and September 1991, bringing the total new hires to 397 since the reprogramming action in 1992.

Q. On another matter, recently, Quartzsite, AZ was selected as the site for an INS/Bureau of Prisons detention facility. While I am pleased that the site selected is in Arizona, however, Quartzsite is located several hundred miles from the nearest major metropolitan area. There is some concern that detainees will not be able to obtain access to legal representation. Do you know whether the request for proposal

issued for detention center projects include the availability of legal representation?

A. A specification relating to legal access was not included in the solicitation. We believe, however, that there will be appropriate legal representation available in the surrounding communities as Quartzsite, AZ is located only 30 miles from Blythe, CA, population 8,500; 86 miles from Yuma, AZ, population 107,000; and approximately 120 miles from Phoenix, AZ, population 900,000.

Q. Last summer, several human rights groups, including one in my home state of Arizona, presented documentation of incidents in which detainees, including minor children, were severely beaten. Many of these detainees are refugees seeking asylum, and I am concerned that these individuals are not being treated humanely and fairly. Although complaints have been filed with the Inspector General's Office, little has been done to investigate these allegations. How do you address this concern about possible human rights violations in INS detention facilities?

A. The INS is committed to insuring there are no violations of human rights of any alien detained in any of our detention centers. Abuse of aliens in any manner is and will not be tolerated by INS.

Allegations by human rights groups that incidents within INS detention centers reflect the inhuman treatment of aliens by INS are simply not true. Any allegation by any alien or other party that abuse or inhumane treatment is or has taken place in any INS facility is referred to the Inspector General's Office of the Department of Justice. As discussed previously, most of these are within the jurisdiction of the Civil Rights Division and are assigned by it to the FBI for investigation. When an impropriety has been found, the INS has taken remedial action.

INS detention centers are consistently visited by alien advocacy groups, the United Nations High Commission on Refugees, civic organizations as well as the print and electronic news media. Telephones are provided to aliens detained in INS facilities and their use is restricted only during normal sleeping hours and during short periods throughout the day for security checks within the facility. Mail, both outgoing and incoming, is checked only for physical contraband, and if an alien is indigent, the INS even pays for the postage.

Q. I am also concerned about the conditions under which unaccompanied minors and young children are being detained.

Many INS facilities fail to meet the same standards as other juvenile detention centers.

A. INS is presently contracting with established voluntary agencies to provide shelter care, foster homes and other related child welfare services to undocumented minors detained. The Catholic Charities Diocese of Galveston-Houston and Catholic Charities Diocese of San Diego are providing these services utilizing two different models.

Catholic Charities in Houston, Texas, houses the juveniles in homes located in residential neighborhoods. They are staffed with mature or older adults referred to as "House Parents," supported by professional staff and Jesuit Volunteers. Catholic Charities in San Diego, California, utilizes a large home in a residential neighborhood staffed by child care workers, supported by professional staff and Sisters who volunteer their time. The support staff for both programs include a full-time licensed teacher, social worker and psychologist. The staff are bilingual and bicultural.

International Educational Services (IES) in Los Fresnos, Texas and Eclectic Communications, Inc. (ECI) in El Centro, California, provide shelter care to unaccompanied juveniles in INS custody. IES is licensed and monitored by the State of Texas Department of Human Services, and ECI is licensed by the State of California Department of Social Services to provide shelter care. Both programs have licensed social workers, licensed full time teachers and provide recreation, counseling, education, family reunification and other child welfare-related services. Day trips for purposes of shopping, going to the beach, and attending recreational activities in the community are a regular part of the programs. Medical care is provided by the U.S. Department of Public Health Service. These are non-secure residential facilities; thus, the clients are free to walk away.

Questions on the Weed and Seed Program

Q. I know that Weed and Seed is one of the major initiatives of this Administration and the Justice Department. As I understand it, the way the program works is by "weeding" out criminals in designated neighborhoods through stepped up arrest and prosecution and then "seeding" these same neighborhoods with a range of social programs, like education, job training, and drug treatment, in order to keep crime from returning. Since most individuals released from jail return to their old communities, are there provisions in the Weed and Seed Program to habilitate the "weeds" while they are in prison? Don't you really need a "Weed, Seed and Mulch"

program to make sure we don't create another revolving door of "weeds" arrested, released, and rearrested again?

A. The "weed" elements of the Weed and Seed strategy are aimed at closing this revolving door by offering a strong law enforcement effort made up of coordinated Federal, State, and local agencies. However, to keep the door shut, we must combine tough law enforcement with social, educational, and economic programs to revitalize high-crime neighborhoods. The "seed" elements are designed to create a strong economical and social environment in which crime cannot thrive. The prevention, intervention, and treatment element will focus on activities such as youth services, school programs, community and social programs, and support groups and will also provide opportunities for neighborhood residents. The economic development and neighborhood restoration element will focus on activities to improve living conditions, enhance home security procedures, allow for low-cost physical improvements within neighborhoods, develop long-term efforts to renovate and maintain housing as well as provide educational, economic, social recreational and other vital opportunities. A key feature of this element will be the fostering of self-worth and other vital opportunities.

Weed and Seed is a community-based program tailored to meet the needs and problems of the targeted neighborhoods. Two of the demonstration sites that have been funded this year have included components in their strategies to address the specific needs of these individuals upon re-entering community life. Atlanta has a program that will make probation officers available in the neighborhoods to serve as case managers for the large numbers of probationers living in the target area. Expanded support and re-integration services for prisoners returning to the community will also be provided. The Madison, Wisconsin project includes an initiative that will use jail inmates released on electronic monitoring to provide free labor to revitalize and restore vulnerable neighborhoods

Q. I understand that one of the reasons the Department of Justice opposes the Senate bill to reauthorize the Juvenile Justice and Delinquency Prevention Act is because justice believes the rehabilitation services which the bill would provide to incarcerated juveniles -- services like education opportunities, employment skills, and drug treatment -- are really "the job of the Departments of Health and Human Services and Education" and are not within the scope of DOJ. Weed and Seed is under the authority of the Justice Department. Do you have this same attitude toward providing rehabilitation services to incarcerated offenders under the Weed and Seed program?

A. First, the Department's opposition to S. 2792, a bill to reauthorize the Juvenile Justice and Delinquency Prevention Act, as introduced, was based on the fact that this bill limited the juvenile justice system's ability to adequately deal with juvenile offenders. To be sure, the Department recognizes and supports the need to expand and provide education opportunities, employment skills and drug treatment programs to rehabilitate juvenile offenders. However in this regard, it is important to note that based on a GAO report issued March 31, 1991, there are 260 federal grant programs funded at a level of $4.2 billion annually, administered by 7 federal departments, through 18 agencies that focus on youth prevention and intervention initiatives, with the vast majority of funding being provided for job training, education and health care. While the Department understands the need for these types of programs, we believe that such programs do not need to be added to, and duplicated within the Office of Juvenile Justice and Delinquency Prevention's programs (OJJDP). Rather, the juvenile justice system should be enhanced so that it intervenes early and sternly with meaningful sanctions that hold juveniles accountable for their actions, while also offering an opportunity for rehabilitation through programs that instill values, discipline and responsibility. We believe that the role of OJJDP is one of federal coordinator of all federal programs relevant to juvenile justice and delinquency prevention, through the Coordinating Council of Juvenile Justice and Delinquency . A major OJJDP role should be to link its juvenile justice programs with those social service programs of other federal agencies.

Operation Weed and Seed is a community-program that links federal state and local law enforcement efforts with federal state and local public and private social service agency programs, and private sector and community resources, thereby putting in place a comprehensive, multi-agency approach to community revitalization and restoration. Each and every federal, state and local agency, private sector and community group participating in Weed and Seed has an extremely important role to play, and each has the expertise to implement its programs and direct its activities. By linking all of these activities together, within targeted sites, the full impact of all these programs can be maximized. All are equally important, and all have important roles to play in restoring America's crime and drug-ridden neighborhoods.

Q. I believe that almost half of the Weed and Seed money in FY 1993 is to come from existing funds. Since DOJ is the lead agency in Weed and Seed, would you be able to redirect a drug treatment grant that the Department of Health and Human Services (HHS) has already awarded to one particular treatment center to another treatment center because you think the

second center would do a better job? Could you do the same thing with Department of Housing and Urban Development (HUD) money? With Department of Labor money? Do you have the authority to take money away from the High Risk Youth Program, for example, which is run by HHS, and put that money into Weed and Seed? Do U.S. Attorneys have the time -- and the expertise -- to make these kinds of decisions?

A. As noted above in our answer to Senator Biden, an interagency working group has been established at the Federal level to determine and establish procedures for the operation and implementation of the Weed and Seed program. At this time, it is envisioned that each Federal agency will be responsible for the administration of its own grant program.

Further, Weed and Seed is a locally driven strategy that is coordinated in the community by a steering committee. The U.S. Attorney acts to facilitate and initiate the coordination required among law enforcement and social service agencies.

The Attorney General will provide the leadership and coordination efforts necessary to implement the Weed and Seed strategy, including developing a plan for the use of Federal funds appropriated for selected activities in the Departments of Labor, Education, HHS, Transportation, Agriculture, and Housing and Urban Development. However, each participating Executive Department will be responsible for accounting for the expenditure of funds under their administration.

Questions on the Gang Analysis Center

Q. You and I have spoken about the need for a Gang Analysis Center and I was under the impression that if you did not receive funding from the Department of Defense (DOD) for initial operations of the Center that you would see to it that $5 million from the Super Surplus proceeds were provided for this purpose. I have heard from the Bureau of Alcohol, Tobacco, and Firearms (ATF) that DOD rejected the request for the Center. Has DOD formally notified the Justice Department that it would not fund the Center?

A. To date, DOD has not indicated that it will be unable to fund the Center. The Justice Department also has not been notified by ATF that DOD rejected the request for funds for the Center.

Q. Can you give us the status of your Super Surplus Fund and if and when you intend to devote the initial $5 million for the Gang Analysis Center?

A. At present there is $21.4 million available in the Super Surplus Fund for 1992 funding requests. Any decision by the

Department to devote Super Surplus Funds to the Center must await DOD's formal notification that it has rejected the funding request.

Q. I know the FBI and ATF were working closely on the investigation of violence in Los Angeles (LA) as a result of the Rodney King verdict. Can you give me an update on the case in L.A. and the working relationship Between the FBI and BATF.

A. Task Force (TF) personnel are continuing to prepare background profiles on ten gangs operating within the L.A., California (CA), area. Members of these gangs have been identified by various Federal, state, and local law enforcement personnel as having been involved in riot-related crimes and as being among those posing the greatest threat to the community. Recently, three additional gangs were identified for profiling. The FBI and BATF have developed a good working relationship in this area.

Questions on Salvadorans

Q. On May 4, 1992, President Bush stated in a letter to President Christiani of El Salvador that:

> Although we will not be able to extend temporary protected status I am happy to tell you that Attorney General William Barr will be taking the necessary steps to grant Deferred Enforced Departure for Salvadoran citizens for one year beyond the expiration of their Temporary Protected Status. This will provide Salvadoran citizens the same rights to remain and work in the United States.

Since Salvadorans will receive the "same rights to remain and work in the United States" under Deferred Enforced Departure (DED), why didn't the Administration just designate them as eligible for Temporary Protected Status (TPS) for another year?

A. Section 302 of the Immigration Act of 1990 provided TPS for foreign nationals who cannot safely return to home countries that are experiencing extraordinary conditions such as armed conflict, natural disasters, or other types of unusual hardship. El Salvador's initial designation as a TPS country was granted by a special provision (section 303) of the Act rather than through the regular TPS procedures established in section 302. Congress, in enacting TPS for El Salvador, clearly established June 30, 1992, as the deadline for that provision of the law.

El Salvador was considered for a possible section 302 TPS designation but it was not clear that it met the criteria established by Section 303 of the Act. The country is not experiencing any kind of natural disaster and a peace process has been established in El Salvador since the enactment of section 303. The peace process has eliminated the alleged danger involved in the return of most Salvadoran nationals to their native land. Although President Christiani did request an extension of the TPS designation for El Salvador in a letter to President Bush, the provision enabling foreign governments to request such protection applies only to natural disasters.

Therofore, in consideration of El Salvador's inability to accommodate the repatriation of the approximately 150,000 persons granted TPS at the present time, we determined to defer enforced departure of TPS Salvadorans to June 30, 1993.

Q. On June 24, 1992, an INS cable states that a Salvadoran who did not re-register for TPS and who is seeking DED after June 30 must "show compelling reasons, such as illness, family emergency or similar circumstance beyond the alien's control" for not having re-registered for TPS. I am concerned that this restrictive re-registration policy may result in approximately 20% of the 187,000 Salvadorans under TPS to be ineligible for DED.

Since INS did not inform many Salvadorans about their re-registration responsibilities and because of the INS delay in processing re-registration requests, would these circumstances be considered "beyond the alien's control" to qualify for DED? I hope all Salvadorans under TPS will be eligible for DED.

A. El Salvador's designation as a TPS country was granted by a special provision (section 303) in the Immigration Act of 1990. Section 303 provides that eligible Salvadorans must register for the first period of TPS in the form or manner specified by the Attorney General and re-register "semiannually at the end of each 6-month period" after the granting of such status. Paragraph (c)(3) of section 303 provides for the withdrawal of TPS by the Attorney General if the alien fails without good cause to register. Section 303 also requires that the Immigration and Naturalization Service (INS) enforce the departure of the Salvadorans granted TPS at a date after the termination of such designation on June 30, 1992.

As of June, 1992, there were approximately 150,000 Salvadorans re-registered for TPS. Because El Salvador cannot currently accommodate the repatriation of the approximately 150,000 persons granted TPS, INS deferred until June 30, 1993, the enforced departure of these Salvadoran nationals.

Thus, the DED provision is only intended for the approximately 150,000 Salvadorans who are TPS re-registrants and whose departure from the United States was to be enforced after June 30, 1992. By this criteria, a Salvadoran national who failed to register for the second period of TPS is ineligible for DED status. However, a Salvadoran national who registered timely for the initial period of TPS and then failed to re-register will be considered for DED if he or she can establish that the failure to re-register was for good cause. Any Salvadoran who failed to register timely for the second period of TPS may submit an application to register for DED to the INS District Director for individual consideration of the circumstances in the case. Salvadorans who have pending applications for second period TPS registration at INS offices are considered to have filed timely and are not excluded from eligibility for DED provisions.

The fact that there were approximately 150,000 Salvadorans re-registered for the second period of TPS is a clear indication that the Salvadorans were well informed of the need to re-register. Salvadorans who registered for the initial period of TPS were issued work authorizations that were only effective for a period of 6-months. INS field offices gave detailed instructions to all of the first period registrants that they must return for re-registration and to renew their work authorizations before they expire. In fact, the expiring work permit itself served as a reminder to the TPS Salvadorans of the need to re-register -- failure to re-register would have interrupted their employment. Accordingly, except in isolated incidences, there is nothing to indicate that the failure to re-register was caused by anything other than a conscious decision of the individual not to continue in the program.

Q. What measures is INS taking to ensure that employers know that the work authorization cards for Salvadorans under TPS are valid until October 31, 1992. For example, is INS publishing this information in major newspapers throughout the country? Many Salvadorans could lose their jobs tomorrow if employers are not adequately informed about the October 31 extension of their work permits.

A. Those who apply for and receive DED will not become deportable until June 30, 1993, and will be granted work authorization to that date. To ensure continuous employment authorization for the affected Salvadorans, the INS has published a notice in the Federal Register on June 26, 1992, to automatically extend their work authorization to October 31, 1992.

Employers of TPS Salvadorans whose employment authorization is automatically extended to October 31, 1992, by the notice must accept, for purposes of verifying employment eligibility, an

EAD on Form I-688B, bearing an expiration date of December 31, 1991, or later and containing a notation "274a.12 (a) (12)" on the face of the document under "Provision of Law." The Office of Special Counsel for Immigration Related Unfair Employment Practices also issued a warning, in the form of a press release and notice in the Federal Register, to employers prohibiting document abuse against aliens with TPS status.

The INS has sent copies of the Federal Register notice (in both English and Spanish), and related press releases to voluntary legal service organizations (e.g. National Immigration, Refugee & Citizenship Forum), which provide counsel and assistance to Salvadorans on immigration matters. We are encouraging Salvadorans to take copies of these publications to their employers. In addition, INS has also written to the Small Business Administration and other business groups to request their assistance in disseminating this information to its member businesses.

QUESTIONS FROM SENATOR LEAHY

Questions on Kaye, Scholer

Q. On March 2, 1992, the Office of Thrift Supervision hit the New York law firm of Kaye, Scholer, Fierman, Hays, and Handler with an unprecedented order, (i) demanding a $275 million penalty for its alleged role in the failure of Charles Keating's Lincoln Savings and Loan and, more importantly, (ii) freezing the firm's assets.

Although these were unproven allegations, against which Kaye, Scholer had no opportunity to defend itself, the asset freeze reportedly forced the firm's hand. The firm's bankers were said to have warned that would have to consider cutting off the firm's credit lines if the case were not settled quickly. Kaye, Scholer succumbed to this pressure, settling within days for $41 million.

The OTS order is reportedly the first time that an asset freeze has been used against a law firm. There was obviously no risk that Kaye, Scholer would squirrel away its assets.

Q. Does the Department of Justice believe the OTS action was proper under the circumstances?

A. Although the decision concerning whether to impose a temporary cease-and-desist order on a law firm was unquestionably a difficult one, OTS, in consultation with the Department of Justice, concluded that a temporary order would be appropriate under the circumstances of this case, and in keeping with the purpose of the legislation under which such restrictions are authorized. Congress, in passing 12 U.S.C. § 1818(c)(1), sought to ensure that the government would be able to prevent the dissipation of assets during the pendency of an administrative hearing and thereby secure the government's ability to collect on any judgment it obtained against individuals or entities accused of violating substantive provisions of the banking laws. It was precisely this purpose that motivated the decision to place Kaye, Scholer under a temporary cease-and-desist order.

In reviewing the history of Kaye, Scholer's representation of Lincoln Savings & Loan Association, OTS became convinced that the firm had made serious misrepresentations to regulators concerning a wide range of issues, including statements about the adequacy of Lincoln's underwriting, the quality of its assets and investments, and ultimately about its overall financial health and well being. In addition, Kaye, Scholer provided regulators with backdated documents in an effort to convince the Federal Home Loan Bank Board that certain direct

investments made by Lincoln would qualify under the grandfather provision of a new regulation. In sum, OTS believed that the firm was involved in extremely serious instances of misconduct and regulatory violations, actions that contributed significantly to Lincoln's ability to evade regulators and stay in operation for several additional years after concerns were first raised about its financial health.[9]

The prima facie evidence compiled by OTS, which showed that respondents had substantially benefitted financially through their breaches of professional responsibility and that the violations were committed knowingly or with reckless disregard for the law and regulations, warranted concerns that OTS' ability to execute a judgment for restitution might be impaired in the absence of a temporary cease and desist order sufficient to preclude the dissipation of respondents' assets during the pendency of the administrative action. Independent of respondents' past conduct, the OTS also was properly concerned with the failure of respondents Fishbein, Katzman and Fisher to comply with a subpoena for information about their finances and Kaye, Scholer's threat to amend its professional liability insurance policy so as to impair collectibility of any judgment requiring restitution.

The bailout of Lincoln, as you know, is now estimated to run in the range of $2.6 billion.

Faced with these facts, OTS elected to exercise its authority under 12 U.S.C. § 1818(b)(1) and file an administrative notice of charges against the law firm. In the nearly 100 page document, OTS specified the types of egregious conduct that served as the foundation for the charges.[10] At that point, discussions began between OTS and the Department concerning the propriety of imposing a temporary cease-and-desist order.

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[9] Kaye Scholer's response in subsequent media statements has generally been that they did not have a duty to disclose the serious wrongdoing that they knew was taking place, not that they were unaware of their clients misdeeds. The suggestion that a regulated institution may ignore its disclosure obligations through the simple expedient of funnelling all contact with its regulators through the thrift's attorneys is not only unprecedented but would pose a serious threat to the ability of all regulatory agencies' ability to perform their duties.

[10] Many of the activities involve the same or similar transactions which prompted the district court in Lincoln Savings and Loan Association v. Wall, 743 F. Supp. 901 (D.D.C. 1990), to reject the bank's efforts to overturn the banking agency's decision to appoint a conservator and subsequently place the institution in receivership.

In light of the factors discussed above demonstrating Kaye, Scholer's past unlawful and misleading conduct, threats to notify insurance coverage, and other factors relating to the effectiveness of recovery against a partnership that might dissolve in the face of a $275 million suit, the decision was made to craft a temporary order that would ensure that the firm would retain its present configuration and guarantee that the taxpayers would be able to recoup amounts owing at the conclusion of the judicial proceedings.[11]

Perhaps the largest misconception about the Kaye, Scholer case, a misconception which has been perpetuated in both the legal and popular press, is the contention that OTS imposed an "asset freeze" on the law firm, prohibiting Kaye, Scholer from conducting its business and forcing the firm to settle. The inquiry from your office also refers to the temporary cease-and-desist order as "freezing the firms assets," a move that "forced the firm's hand" and compelled settlement. This description of the OTS temporary cease-and-desist order and the effect the order had on the firm, however, is inaccurate.

First, the OTS action is not properly termed an asset freeze. OTS imposed a temporary cease-and-desist order under 12 U.S.C. § 1818(c)(1) which placed certain restrictions on Kaye, Scholer. It did not, however, in any sense "freeze" the firm's assets. Upon concluding that Kaye, Scholer, based on its extensive involvement in the examination process, had violated substantive provisions of various regulatory prohibitions, and in light of the other factors discussed above, OTS had the authority to impose a temporary cease-and-desist order to ensure that it could collect on any judgment it might obtain after the requisite administrative and judicial proceedings. The measures it imposed to accomplish this goal were quite reasonable. Although the OTS order has attracted a great deal of attention, very few commentators appear to have familiarized themselves with its actual terms. Rather than freezing the firm's assets, OTS' order permitted Kaye, Scholer to service all loans, draw on any revolving lines of credit, pay all necessary business expenses, and only then, after satisfying all partnership obligations, place 25% of distributed partner profits in an escrow account to be established by the firm.

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[11] The statement that there was no threat that Kaye Scholer would "squirrel away" the assets, therefore, does not address whether other factors, such as the dissolution of the firm, might also adversely affect the government's ability to recover. It should also be noted that, when dealing with professionals who are knowledgeable about financial transactions, there is always the risk that efforts will be made to transfer or otherwise hide assets.

More significantly, the temporary cease-and-desist order also required that any partner desiring to leave the firm post security for obligations that may arise out of the administrative charges and it prohibited alterations in the partnership agreement. This provision served to ensure that the firm would not rapidly unravel in the face of the administrative charges and guaranteed that the agency would not have to bring multiple lawsuits in various jurisdictions in an attempt to recover.

Second, contrary to popular belief, Kaye, Scholer was not forced to settle by the terms of the temporary order. Rather, it elected to settle in light of the strength of the government's case and the size of the potential loss. Kaye, Scholer's banks were concerned about the possibility that the firm might be held liable for amounts in excess of $200 million, not about the temporary order which permitted Kaye, Scholer to service and draw on all revolving lines of credit and pay all necessary business expenses including existing debt. The reason Kaye, Scholer did not challenge the temporary order as authorized under 12 U.S.C. § 1818(d) is that the order was narrowly tailored to accomplish its statutorily authorized purpose and would have been upheld and that, even without the temporary order, the firm would still have been facing a potential award of unprecedented proportions. It was the notice of charges itself, therefore, not the temporary cease-and-desist order, that brought Kaye, Scholer to the negotiating table.

Some commentators have suggested that institutions like law firms and the individuals associated with them do not pose a significant risk of asset dissipation and thus they contend that the imposition of preliminary asset preservation measures cannot be justified in the same way that such tactics can be rationalized in racketeering or tax evasion cases. It must be remembered, however, that the charges raised in these cases are quite serious and involve the loss of millions of dollars. In addition, the fraudulent transactions that generated these enormous losses were conducted and facilitated by professionals. These individuals also have the knowledge and ability to hide assets both within the country and offshore. As a result, the banking agencies have repeatedly used asset preservation measures in cases involving professional defendants.

The suggestion that lawyers and law firms are somehow above allegations of impropriety and thus regulatory agencies should not use all available measures to guarantee their ability to reimburse the insurance fund is simply untenable in light of the role played by professionals, including attorneys, in the savings and loan crisis. In fact, the legislative history from the passage of FIRREA specifically states that

"[a]ppraisers, accountants, and attorneys have participated in some of the serious misconduct in banks and thrift institutions . . . ." H.R. Rep. No. 101-54, Part I, 101st Cong., 1st Sess. 466-67 (May 16, 1989).

The allegations raised against Kaye, Scholer in this action were extremely serious and warranted the use of a temporary cease-and-desist order. The law firm was accused of knowingly submitting backdated documents to regulatory officials, intentionally misrepresenting the financial health of Lincoln Savings and Loan, and willingly misrepresenting the extent to which the thrift had underwritten numerous high risk investments. In light of these charges, and the risk that the firm might crumble in the face of the alleged damages, the Department believes that OTS properly imposed a temporary cease-and-desist order to ensure that the firm continued operation in its present form and that the agency could recover should an adverse judgment ultimately be entered.

Q. Do temporary cease-and-desist orders raise due process issues?

A. Clearly, any time the government moves expeditiously and without prior judicial approval to take actions that have an impact on an individual's or entity's interests in life, liberty or property, due process issues are "raised." To note that due process interests are implicated, however, is not to suggest that the due process clause of the Fifth Amendment has been violated.

In the case of temporary orders under 12 U.S.C. § 818(c)(1), numerous defendants have raised challenges to the imposition of financial restrictions prior to a determination of liability. Almost without exception, these challenges have been rejected. See, e.g., Spiegel v. Ryan, 946 F.2d 1435 (9th Cir. 1991), cert. denied, 60 USLW 3687 (U.S. April 7, 1992); Parker v. Ryan, 960 F.2d 543 (5th Cir. 1992); Paul v. OTS, 763 F. Supp. 568 (S.D. Fla. 1990). In Spiegel, the Ninth Circuit concluded that OTS' use of a temporary cease-and-desist order without prior judicial approval did not violate the Due Process Clause. The Court found that the statute furthered a substantial government interest in protecting the insurance fund from further losses, that prompt preliminary action was necessary to secure the agency's ability to recover and avoid any dissipation of assets, and that the statutory scheme provided sufficiently focused standards to properly channel the agency's discretion. Spiegel, 946 F.2d at 1439-41. Finally, the Court observed that the promptness with which a post-deprivation hearing must be held, and the ability to challenge the temporary order within ten days foreclose any suggestion that the statutory procedures in 12 U.S.C. § 1818(c) transgress traditional concepts of due process.

The due process analysis of this statute can also be approached from another perspective. As an initial matter, there is some question concerning whether a deprivation of property has occurred at all when OTS or other banking agencies impose temporary orders. While the statute itself states that such orders are effective when issued, the fact is that the order must be either challenged by the object of the order or enforced by the agency before any action can be taken with regard to the enforcement of its terms. Thus, even though the agency initially and necessarily acts unilaterally based on extensive investigations and the well-documented need to act expeditiously, it is important to bear in mind that the agency must seek judicial approval to enforce the order and the defendant is given ten days to raise a judicial challenge to its terms. 12 U.S.C. §§ 1818(c)(2) and (d). Only after the courts have examined and upheld the order can it be enforced. Accordingly, the Department believes that in this regard the statute does provide a prior judicial check on the agency's discretion. See Spiegel v. Ryan, 946 F.2d 1435, 1442-43 (9th Cir. 1991) (Rymer, J. and Hall, J. concurring).

Q. Should temporary cease-and-desist orders be permitted in the absence of any threat that the assets will be removed?

A. Temporary cease-and-desist orders may only be imposed under the terms of the statute when there is a possibility of significant dissipation of assets or other threat to the interests of the depositors. 12 U.S.C. § 1818(c)(1). In enacting FIRREA, Congress defined the term "significant" as covering anything more than a minimal or nominal dissipation of assets and made clear that it was attempting to lower the burden of proof necessary to justify the imposition of a temporary order. H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 439 (1989). Absent a potential for significant dissipation of assets or other prejudice to the insurance fund, a temporary cease-and-desist order would not be authorized by section 1818(c)(1).

As indicated previously, the Department concurred with OTS' conclusion that the nature of the activities Kaye, Scholer engaged in, including misrepresentation and knowing submission of backdated materials to regulators, potential insurance problems, and the risk of dissolution of the partnership could jeopardize any effective recovery absent the invocation of this statutory authority.

Q. Does the Department of Justice believe that temporary cease-and-desist orders should be used only in exceptional cases?

A. The Department of Justice believes that regulatory agencies should use the authority granted to them by the Congress and the President in all circumstances in which the statutory

prerequisites have been met. In other words, the banking agencies should use their power to preserve assets for an eventual recovery in any case where there is a threat of significant dissipation of assets or other prejudice to the insurance fund during the pendency of the administrative and judicial proceedings.

Q. Does the Department of Justice believe guidelines should be developed to regulate the use of temporary cease-and-desist orders under 12 U.S.C. § 1818(c)(1)?

A. The Department believes that the statute as written already provides sufficient guidance to agencies concerning the conditions under which a temporary cease-and-desist order is appropriate. First, before issuing a temporary order, the agency must file an administrative notice of charges against the individual or entity. 12 U.S.C. § 1818(b). To file a notice of charges, the agency must conclude that the individual or entity has or is about to engage in an unsafe or unsound practice or has or will violate a law, rule or regulation. Until this initial requirement has been satisfied and a notice of charges detailing the factual basis for any charges has been issued, a temporary cease-and-desist order may not be filed.

Once this has been accomplished, the agency must then examine whether it is likely that the agency's ability to recover will be adversely affected by the administrative defendant's actions during the pendency of the proceedings. If the agency concludes that an order preserving assets is justified under this standard, then all statutory requirements have been met and the agency may permissibly impose a temporary cease-and-desist order. See Spiegel, 946 F.2d at 1441 (finding that statute provides sufficient guidance to agencies).

The Department believes that these standards provide sufficient guidance to the Federal banking agencies without unduly burdening the wide degree of discretion which is unquestionably required in pursuing those responsible for the savings and loan disaster. Placing restrictions on the agencies' ability to ensure that obtaining a judgment will not be an idle exercise will simply provide yet another procedural avenue of attack for those accused of serious wrongdoing and further delay an eventual determination on the merits.

Q. To the extent the Department was consulted by OTS, what guidelines did the Department use in this case?

A. As indicated above, the Department and OTS used the guidelines presently incorporated in 12 U.S.C. § 1818(b)(1) to first issue a notice of charges based on violations of laws and regulations by Kaye, Scholer, then examined the standards

enunciated in 12 U.S.C. § 1818(c)(1) to determine that the agency's ability to recover would in all likelihood be severely adversely affected if measures were not taken to ensure that the law firm would remain intact during the pendency of the administrative hearings. Both the Department and OTS were convinced that, without a temporary cease-and-desist order prohibiting changes in the partnership configuration and requiring any partner attempting to leave the firm to post a bond, the firm would quickly collapse. This result was not in the interest of either the firm or the agency. Because dissolution of the firm would adversely affect the agency's ability to recover and thus its ability to reimburse the insurance fund, OTS concluded that a narrowly tailored temporary cease-and-desist order should be imposed.

Questions on International Antitrust Enforcement

Q. The Justice Department recently adopted your proposal to eliminate the consumer injury requirement in application of U.S. antitrust laws to conduct in foreign countries that unfairly prevent U.S. companies from competing in the foreign country. Before this proposal went into effect, Justice Department Guidelines allowed an antitrust suit in these circumstances only if U.S. consumers, as distinguished from U.S. companies, were injured. What plans does the Justice Department have to implement this change in its guidelines?

A. As in other types of civil antitrust enforcement, the most promising cases are likely to come to us through informants and aggrieved market participants. We also monitor trade developments in the media and maintain close contacts with relevant government agencies, here and abroad. We continue to review closely allegations of anticompetitive conduct abroad that harms U.S. exporters or consumers. We would file such a case once we were satisfied that the evidence warranted it and all the legal thresholds were met.

Questions on Economic Espionage/Encryption

Q. You and I have discussed your concerns about the increased use of encryption. I am concerned about the serious long-term implications of errors to control encryption for network security and American competitiveness. Given your assessment of the threat of economic espionage, can industry afford not to protect itself with secure encryption programs?

A. Law enforcement's needs for gaining access to encrypted communications are not at odds with the business community's need to protect its trade secrets and products. The Department considers it technologically feasible to produce

robust encryption products and systems that provide industry with full protection and provide law enforcement with the capability, under court order, to decrypt communications.

Development of such products and systems could also place American industry in a favorable position in world-wide markets where law enforcement has similar needs. Therefore, maintaining the integrity of the various encryption schemes benefits everyone. Additionally, any compromises law enforcement performs would be selective and would target only those devices used by the subject of an investigation. These compromises would not weaken the overall system. However, if law enforcement is not afforded the ability to decrypt communications obtained by a court order, it would be detrimental to Congress' legislative intent and would restrict severely law enforcement's investigative ability in the future.

Questions on Digital Telephony

Q. In response to a question from Senator Thurmond, you said that the Administration's digital telephony proposal does not expand current authority under the wiretap statute. The current statute requires telephone companies and others to provide law enforcement with the "technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference." Does not the Administration's proposal expand the law by requiring industry to design their systems in a way that makes electronic surveillance possible?

A. The proposed legislation does not alter or expand the legal authority of Federal, state, or local criminal law enforcement authorities to conduct electronic surveillance. That is, the proposed legislation in no way changes the legal requirements which law enforcement must satisfy in order to obtain an electronic surveillance court order or the procedures which must be followed in monitoring the intercepted communications, such as minimization. Indeed, the legislation will ensure that the status quo is preserved with regard to the concept of minimization. Similarly, the proposed legislation in no way expands the types of communications which are the subject of electronic surveillance. All types of communications are currently covered in existing Title III legislation (wire, oral, and electronic communications). Thus, there is no greater intrusion into the realm of communications privacy.

The proposed legislation will ensure that as the sophistication and complexity of telecommunications and electronic communications networks increase that the new networks, systems, and technologies will not impair or

preclude lawfully authorized electronic surveillance. The proposed legislation, rather than expanding legal authority, seeks to preserve law enforcement's technical capability to effect interceptions under existing statutory authority.

The proposed legislation clarifies the nature and extent of cooperation which electronic communication service providers must afford law enforcement under the current assistance provision in Title III in order that electronic surveillance court orders will not be frustrated. The proposed legislation does not require the telecommunications industry or others to design or redesign their systems in any special way. The proposed legislation specifies the generic benchmarks and attributes of effective electronic surveillance which service providers are to satisfy. Since different systems and technologies will require different approaches and modifications, the methods for fulfilling the cooperation and assistance requirement are left to service providers. In many instances no changes in network or system "design" will be required; in many, software feature modifications should suffice to accommodate the electronic surveillance requirements.

Q. The latest version of the proposal also gives you the authority to grant exceptions to the requirements in the proposal. What criteria and procedures would you apply in determining whether a specific company should be exempted?

A. At this time we see three general categories where exceptions to compliance will be strongly considered. Beyond these broad categories, we will consider granting individual waivers to specific service providers based upon the particular circumstances of that service provider. One category for likely exception would involve communications systems, networks, and technologies where we conclude that electronic surveillance interceptions are not, and have not been, required to effectively carry out criminal investigations. Examples of such systems would be Automatic Teller Machine systems (ATMs) and "point of sale" computer networks. A second category would pertain to certain systems or networks where technologically it may be impossible to effect an interception. An example of such a network would be certain computer networks which provide for dynamic random access and would effectively prevent detection and interception of the target. A third category would include certain classes or types of providers where the societal and economic costs required to modify the system to achieve compliance would outweigh law enforcement's infrequent or negligible need to conduct electronic surveillance interceptions. Examples of such systems would be a PBX operated by nursing homes, certain types of hospitals, or a high school, etc.

For service providers who are not generally excepted in some broad category, class, or type of system or network, the service provider could seek relief from compliance through a request for a waiver directed to the Department of Justice. Such a waiver request need not be formalistic or legalistic wherein resort to legal counsel would be required. A service provider could explain the peculiar nature of its problem with regard to compliance. A service provider who indicates, for example, that its particular system is not amenable to modification and that attaining compliance would require replacement of the system in whole or in substantial part would be a probable candidate for a waiver.

With reference to all exceptions and waivers the Attorney General will necessarily carefully balance the need to effectively enforce the law through electronic surveillance with the societal and economic costs associated with compliance. In this regard, the Attorney General will consult with the Department of Commerce, the Small Business Administration, and the Federal Communications Commission, as appropriate, as set forth in the proposed legislation.

Q. I believe you also said that the Administration's proposal would make systems less susceptible to abuse by private parties. What did you mean by that statement?

A. The introduction of digital transmissions in the so-called "local loop" from the subscriber's facility to the telephone company's central office will enhance the security of a subscriber's communications. Unlike analog transmissions, digital transmissions traversing the local loop effectively preclude illegal wiretapping by unauthorized individuals, and, unfortunately, also prevent lawful authorized wire interceptions by law enforcement in the local loop. However, there are networks and systems outside of the public switched telephone network, such as computer networks, which can be, and are, abused by "hackers" who utilize the public switched network to gain unauthorized access into such networks. The proposed legislation will ensure that law enforcement, when authorized by court order, can intercept the communications of "hackers" occurring in the public switched network. Without an effective interception capability when end to end digital transmissions are introduced, law enforcement's investigations of "hackers" who abuse computer systems will be severely impaired.

Questions on Civil Asset Forfeiture

Q. Civil forfeiture statutes are a powerful tool to dismantle drug operations. However, their great power also makes them susceptible to abuse. What guidelines does the Department use

to ensure that local law enforcement or individual U.S. Attorneys do not overreach in forfeiture proceedings?

A home is the sum of the average American's life's work. Given that claimants in forfeiture cases do not have the procedural protections provided by the presumption of innocence in criminal proceedings, should federal prosecutors be more cautious in initiating forfeiture proceedings against someone's home than against a luxury car or a speedboat?

How do the Justice Department's guidelines work to ensure proportionality in prosecutions? What latitude do those guidelines give a prosecutor to bring charges and seek penalties that he or she thinks are in the interests of justice?

A. Civil forfeiture is a powerful weapon but the procedural advantages to the Government are greatly exaggerated by defense attorneys who are accustomed to criminal procedures. In summary, the first civil forfeiture statute was enacted by the First Congress in 1789, the same First Congress which drafted our Bill of Rights. The Supreme Court has reviewed civil forfeiture laws from the time of Chief Justice John Marshall to Chief Justice William Rehnquist and has consistently upheld them as constitutional. In this regard, Anglo-American law has always had two basic legal procedures: a criminal process for determining liberty interests and a civil process for determining property interests.

Before an item of property can be seized for purposes of civil or criminal forfeiture, the Government must be able to establish probable cause to believe the property was used to facilitate or was purchased with the proceeds of a designated criminal offense. This probable cause standard, of course, is the same one that the Constitution requires for the arrest of a person, search and seizure, or an indictment of a person for a felony offense. This probable cause requirement is the first and most important protection against misuse of forfeiture laws.

Once a property has been seized, the owner can attack the Government's probable cause and can also seek to recover seized property through the statutory "innocent owner" defense applicable to all federal forfeiture laws. Once a forfeiture action is complete, the owner can petition the Government for remission or mitigation of forfeiture.

Recognizing the sensitivity of seizures of real property, the Department has established special policies and procedures for such seizures. A copy of the pertinent policy directive is attached.

As in other areas of law enforcement, federal prosecutors must retain some degree of discretion in the application of forfeiture laws so that the wide range of available criminal and civil sanctions can be applied consistent with the unique facts of each case. In the forfeiture area, over $6 million per year has been expended on training of federal prosecutors and agents in an effort to ensure that this discretion is exercised prudently.

Questions on the Rodney King Investigation

Q. The verdict in the Rodney King beating case was handed down on April 2[9], 1992. The Justice Department then announced it was resuming the federal civil rights investigation it had held in abeyance pending the trial in state court. What has happened to the federal investigation?

A. Within hours of the announcement of the verdict, the Department of Justice resumed its investigation of the King incident. After an extensive grand jury investigation conducted jointly by the Civil Rights Division and the U.S. Attorney's Office for the Central District of California, and with the assistance of FBI agents, an indictment was returned on August 4, 1992 charging four persons, who at the time of the incident were on-duty officers with the Los Angeles Police Department, with depriving Rodney Glen King of his federally protected civil rights (United States v. Koon, et al., C.D. Calif.). The first count of the indictment alleges that Officers Laurence Powell, Timothy Wind and Theodore Briseno willfully and intentionally used unreasonable force during their arrest of Rodney King on March 3, 1991. In a second count, Sgt. Stacey Koon is charged with willfully permitting and failing to take action to prevent the unlawful assault by the other defendants, who were under Koon's supervision.

A status hearing on the case has been scheduled for August 27, 1992 and trial has been scheduled for September 29, 1992. The officers face a maximum penalty of ten years imprisonment and a $250,000 fine.

Q. What factual or legal distinctions exist between the Rodney King case and other cases in which the Justice Department has successfully prosecuted police for deprivations of civil liberties under 18 U.S.C. §§ 241 and 242?

A. The indictment returned by the grand jury in the King incident charges violations of 18 U.S.C. § 242 which requires the federal government to prove beyond a reasonable doubt that the defendants willfully intended to deprive Rodney King of his Constitutional and federally protected rights. That standard

applies to all Section 242 prosecutions. Because this is a pending criminal case, we can make no further statement about either the factual or legal aspects of the case.

Question on the BCCI Investigation

Q. At your November 1991 confirmation hearing, you testified that the Justice Department was conducting a retrospective analysis of causes of apparent delays in prosecuting BCCI. In his February 1992 confirmation hearing, Deputy Attorney General Terwilliger also testified that the Department was engaged in a retrospective analysis of the BCCI prosecution.

Is this analysis of the BCCI prosecution ongoing? If so, when do you expect it to be completed? If it is completed, will you please produce a report of it to the Judiciary Committee? If the analysis is still ongoing, please specify what remains to be analyzed.

A. Please see the Department's answers to questions posed by Chairman Biden.

QUESTIONS FROM SENATOR GRASSLEY

Questions on Alternative Dispute Resolution

Q. In enacting the Administrative Dispute Resolution, the intent of Congress was to encourage the use of alternative dispute resolution in controversies relating to the programs of federal agencies. The Department of Justice, however, has taken a restrictive view of the application of Administrative Dispute Resolution (ADR), stating that it can only be used at the agency level.

Why has the Department rejected the use of ADR in litigation handled by the Department of Justice?

A. The Department of Justice has not at all rejected appropriate use of ADR in litigation handled by the Department of Justice. The President's recent Executive Order on Civil Justice Reform, E.O. 12778, dated October 23, 1991 (56 Fed. Reg. 55195), directs appropriate use of ADR in litigation. The Justice Department has issued a "Memorandum of Preliminary Guidance on Implementation of the Litigation Reforms of Executive Order No. 12778" to assist in implementation of the Executive Order's reforms, including enhanced use of ADR. 57 Fed. Reg. 3640 et. cet. (January 30, 1992).

In addition, to implement Section 8 of the Administrative Dispute Resolution Act, Pub.L. 101-552, the Department of Justice has promulgated regulations applicable to agency use of alternative dispute resolution techniques in the course of consideration of resolution of administrative claims under the Federal Tort Claims Act. 57 Fed. Reg. 21738 et cet. (May 22, 1992) (Amending 28 C.F.R., Part 14).

Q. I thought our legislative intent was clear -- that if a controversy over an administrative program arises, the agency may use ADR. Perhaps we need to clarify the legislative intent with an amendment to the ADR Act.

What would be your view, General Barr, of such an amendment to clarify the language of the Act to apply to controversies over administrative programs, but are at a stage where they are under the control of the Department of Justice?

A. An amendment to the recently enacted Administrative Dispute Resolution Act is unnecessary for the reasons set forth in my answer above. ADR is appropriate both in administrative proceedings and in litigation; the means of implementation may differ due to the differing nature of the proceedings.

The Administrative Dispute Resolution Act is described in the legislative history of the Act contained in Senate Report 101-543, at Section III, page 3937, "Summary." It states: "S. 971 amends the Administrative Procedure Act to authorize parties involved in disputes arising under federal administrative programs to agree to use ADR methods." (Emphasis added). The title to the amendment to the Administrative Procedure Act is also evidence of its administrative focus: "Alternative Means of Dispute Resolution in the Administrative Process." (Section 4(b)). (Emphasis added). The Department of Justice is fully committed to use of ADR both in administrative disputes and during litigation.

Questions on Haider Youssef

Q. Mr. Barr, I would like to commend your efforts in response to questions and concerns I have raised regarding Syrian terrorist Haider Youssef, including a review of the activities of the FBI on this matter. I would like to know if you can give me a status report on your department's findings thus far.

A. The FBI has concluded its investigation and consultation with other agencies regarding the allegations made about Youssef. A letter to you is being prepared which will address the issues remaining which were raised with Mr. Terwilliger.

Questions on Office of Special Investigations

Q. General Barr, do you share my view, and I am confident that it is the view of most, if not all of my colleagues, that the work of the Office of Special Investigations is important and worthwhile work? I believe that bringing Nazi war criminals to justice is consistent with the leadership of the United State in the area of human rights.

A. The Attorney General has confidence in the Office of Special Investigations; their's is an important task and must be continued.

Questions on International Antitrust

Q. To clarify the bounds of existing law and DOJ policy, could you please describe the kinds of cases your April 3 change in the Department's Guidelines for international Operations allows you to bring?

Specifically, would the Department bring a case against a foreign cartel whose members do little or no business in the

United States, if the cartel engages in private conduct that excludes American exporters from its home market?

A. A copy of the Department's policy statement, outlining the circumstances in which it would bring such cases, is attached.[12] Subject to the considerations set out in that policy statement -- including the need to establish personal jurisdiction -- the Department would bring such a case.

Q. Are you confident that such foreign cartel behavior, which primarily affects consumers and competition in a foreign market, would be found to have a "direct, substantial, and foreseeable effect: on the U.S., and satisfy the jurisdictional requirements of the law?

A. Whether a foreign cartel that excluded American exporters from its home market had a "direct, substantial, and foreseeable effect" on U.S. commerce would depend on the particular facts involved. However, the 1982 Foreign Trade Antitrust Improvements Act made it clear that such an effect on U.S. export trade can satisfy the Act's subject matter jurisdiction standard.

Q. Could you give a specific example of the kind of fact pattern in which you would bring a case? Could you give an example of a fact pattern which would not, in your opinion, satisfy the aforementioned "effects test" of extraterritorial jurisdiction?

A. The Department indicated in its April 3 policy statement that conduct challenged under the new policy would include anticompetitive activities that violate U.S. antitrust laws -- in most cases, group boycotts, collusive pricing, and other exclusionary activities. We are not in a position to describe detailed factual scenarios in which we would or would not bring a case, however, in view of the complex mixture of legal, economic, and policy considerations that are involved in each such prosecutorial decision.

Q. According to the Department's announcement of the policy change of April 3, "[a]pplying the antitrust laws to anticompetitive conduct that harms U.S. exports is consistent with the enforcement policy the Department had followed for many years prior to 1988."

Could you provide a list of international antitrust cases brought by the Department based on harm to U.S. exporters prior to 1988, and describe the ultimate disposition of those cases?

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[12] See attachment 8.

A. A list and description of cases that appear to have been based in whole or part on such allegations is attached.[13]

Q. Has the Department ever brought a case under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), which is the statutory basis for the policy change?

A. It is important to note that the FTAIA confirmed existing jurisdiction, and was not a new grant of subject matter authority. The last case the Department brought based on the impact of anticompetitive conduct on U.S. export trade was U.S. v. C. Itoh, et al., 1982-83 (CCH) Trade Cases 1165,010 (W.D. Washington 1982). C. Itoh was a civil case, settled by consent decree, that involved a Japanese buyers' cartel that fixed the price its members paid to Alaskan processors for crab for export to Japan. Although the case was brought shortly before the enactment of the Foreign Trade Antitrust Improvements Act of 1982, the Department relied on well-established jurisdictional principles that were confirmed and codified in the FTAIA.

Q. Are you aware of any cases in which a U.S. court has found it had subject matter jurisdiction over an antitrust suit against foreign firms based on the direct effects on U.S. exporters of off-shore antitrust violations?

A. The Supreme Court has confirmed that anticompetitive conduct that restrains American exports is actionable under the antitrust laws. In Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969), the Court sustained Zenith's antitrust challenge to activities of a Canadian patent pool whose members conspired to give licenses only to firms manufacturing in Canada and to refuse licenses Zenith needed to export U.S.-made radios and televisions to Canada.

Q. Do you expect to bring cases under the new policy in the near future? Are you actively looking for meritorious cases under the new policy? If so, what method are you using to look for such cases?

A. The Department is actively looking for meritorious cases under the new policy, and we will continue to review allegations of possible anticompetitive conduct in this regard. At this stage it is impossible to anticipate when the first such case will be brought. In addition to our regular investigation, detection and case development we have made a point to widely publicize the policy change both within the Antitrust Division and in the legal and business communities. Further, we have

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[13] See attachment 9.

invited companies and associations engaged in business activities abroad to bring to our attention evidence indicative of conduct that would potentially fall within the scope of the enforcement policy.

QUESTIONS FROM SENATOR KOHL

Questions on the Weed and Seed Program

Q. The Emergency Supplemental [Appropriation], signed into law by the President on June 22, 1992, authorizes $250 million for the Weed and Seed program. The law also says that the money is available for agreements and contracts which "shall be specified by the Attorney General."

How will the funds be distributed if they become available? Is the Department currently meeting with representatives of other departments and agencies to develop a strategy and coordinate programs?

A. No funds were appropriated for the Weed and Seed program under the Emergency Supplemental. The Department is meeting with other Federal agencies and has established an interagency working group comprised of representatives from all Federal agencies involved in implementing the Weed and Seed program. This working group will determine and establish procedures for the operation and implementation of the Weed and Seed program. It is now envisioned that each Federal agency will be responsible for the administration of its own grant program.

Q. What existing public and private neighborhood revitalization programs are being considered for Weed and Seed funding -- the law states that the AG, with the cooperation of other agencies, shall implement W&S by providing funding to existing neighborhood programs?

A. In FY 1992, the Department of Justice has allocated about $13.6 million to expand the initial pilot phase of the Weed and Seed program. Of this amount, $9 million was provided by the United States Attorneys Office, which has worked closely with the Office of Justice Programs (OJP) and the Bureau of Justice Assistance (BJA) to initiate the 16 new Weed and Seed demonstration projects. In addition to the funding provided by the U.S. Attorneys, BJA has contributed $3.5 million of Byrne Discretionary funds from base resources to support the Weed and Seed program. Boys and Girls Clubs of America has also agreed to establish clubs in public housing in Weed and Seed sites, consistent with the $2.5 million Congressional earmark and will allocate approximately $1 million to establish these clubs. Further, in FY 1992, OJP and the Office for Resident Initiatives in the Department of Housing and Urban Development (HUD) are currently negotiating an interagency agreement to develop and deliver training and technical assistance for residents and housing developments. Additionally, HUD, under its Drug Elimination Grant Program Notice of Funding Availability for FY 1992, provides that

applicants who are coordinating with Operation Weed and Seed will be given preference in funding. To date 11 of the 16 Weed and Seed sites funded in FY 1992 have leveraged over $57 million in State and local funding, over $20 million in private sector funding, and over $104 million in funds from other Federal agencies.

Also, the President's budget request for FY 1993 includes a total of $500 million to support this comprehensive initiative. A chart identifying each component of the program is provided. The $500 million includes $30 million for the Department of Justice, made up of $20 million for the U.S. Attorneys and $10 million for the Office of Justice Programs.

Q. S. 2726 -- the Weed & Seed Implementation Act of 1992 -- provides the broad powers to enact the program. One particular Section -- Section 7 -- allows the Secretaries of Education, Labor, Health and Human Services, Transportation, HUD and Agriculture to waive any regulation or provision of law that restricts distribution of funds or is inconsistent with Weed & Seed implementation. Granted, there are a number of areas where the waiver is not allowed -- health and safety, civil rights, environmental protection. With such broad power, isn't there potential for abuse?

A. Section 7 of S. 2726, the waiver provision, is designed to address potential problems in the delivery of social services to Weed and Seed sites. Individuals involved in the delivery of social services describe the existing system as fragmented and inefficient. Proponents of efforts to streamline the delivery of services to serve targeted groups more effectively and efficiently find themselves thwarted by inconsistent regulations and requirements. Bureaucratic red tape is literally strangling local efforts to respond efficiently and effectively to violent crime and drug abuse problems in America's neighborhoods. Section 7 will permit the appropriate Secretary to attempt to alleviate delivery problems by waiving those provisions of laws and regulations that impede the effective implementation of benefit programs within the Weed and Seed framework. With this waiver authority, the Secretary with jurisdiction over a program will be able to ensure that it is being directed at a given Weed and Seed site in the most efficient and effective manner possible.

The focus of Section 7 is thus on what is commonly referred to as "government red tape" and not on eligibility for particular programs. Indeed, Section 7 explicitly exempts from each Secretary's waiver authority eligibility determinations. Section 7(a)(2) states that "[a] waiver . . . may not alter or otherwise affect the eligibility of a person for the programs or services provided under the Weed and Seed plans approved

under section 2 of this Act." Furthermore, Section 7(a)(3) explicitly protects against possible abuse of this authority by providing that "No waiver may be granted under this section of any law respecting public or individual health or safety, civil rights, environmental protection, labor relations, occupational health or safety, or any other law that the Attorney General shall by regulation determine." As an additional safeguard, all waivers granted pursuant to Section 7's waiver authority must be published in the Federal Register pursuant to Section 7(b).

Q. Does this raise constitutional questions concerning the separation of powers -- department heads waiving laws which have been passed by Congress?

A. The authority to waive certain laws and regulations would also be granted by a law that has been passed by Congress. As such, it has the same effect as the commonly used phrase "notwithstanding any other provision of law" in setting legislative priorities, and raise no constitutional concerns.

Q. What types of laws or regulations do you envision being waived in order to implement Weed & Seed? Can you give the Committee a few examples?

A. As is explained above, the purpose of Section 7 is to provide Federal administrators with a tool to enhance the coordination of Federal social welfare programs in the Weed and Seed program. Although the need for such coordination has been recognized for over twenty years, only limited progress has been made. Using Section 7 waiver authority, Secretaries of the specified agencies will be able to cut through the myriad of inconsistent regulations to ensure that "seed" programs desired by individual Weed and Seed sites are implemented in the most efficient and effective manner possible. The particular laws and regulations that may be subject to waiver will depend on the grant applications of individual Weed and Seed sites.

Q. Concerns have been expressed that many worthwhile programs -- non-law enforcement, yet valuable programs -- will be the target of this waiver provision. What can you tell those with concerns to reduce their fears?

A. As is explained above, Section 7 is directed at enhancing the efficiency and effectiveness of existing Federal programs. Indeed, Section 7 permits a Secretary to waive provisions relating to the delivery of programs; it does not permit alterations in eligibility determinations. In "targeting" particular programs, the Secretaries will be attempting to ensure that such programs are administered more effectively.

Q. There has been speculation that funding for juvenile justice and other programs would be diverted to the Weed & Seed program. This belief may be the result of hearing statements similar to what you said on the Brinkley program. Let me quote:

> We have been trying to address the root causes of violent crime in this country for the past 25 years. ... We've been spending trillions of dollars. ... And what Weed & Seed program is about is a recognition that we need both. You can't follow a social agenda without strong law enforcement."

Many of the juvenile justice advocates fear this approach -- the thinking is that juvenile justice funds will be spent on more law enforcement and incarceration of kids, rather than addressing the causes of the juvenile crime problem. Is the Department planning on taking juvenile justice funds and diverting them to other programs?

A. There are no plans to divert the Department's juvenile justice funds to programs other than those that address the needs of juveniles. Juvenile justice funds will continue to support efforts to enhance services and provide assistance to those within the juvenile justice system. While juvenile justice funding may be provided to support efforts within the Weed and Seed program, they in no way will be diverted away from juvenile justice assistance, but rather, will focus on programs and efforts to help high-risk youth within our some of our country's most troubled communities. As you know, the neighborhoods that are targeted within the Weed and Seed program, are those that are experiencing the highest levels of violent crime, drug use and trafficking and gang activity. The Weed and Seed strategy integrates the resources of federal state and local law enforcement and social services with community and private sector resources. This comprehensive approach to community revitalization and restoration must include a broad array of programs to address the needs of high-risk youth. Juvenile justice funding would be made available for programs that (1) prevent delinquency among at-risk youth; (2) intervene in the lives of juvenile delinquent offenders; (3) rehabilitate juvenile offenders through accountability, intermediate sanction, and appropriate treatment and intervention programs; and (4) remove and incapacitate that small percentage of juveniles who are serious, violent and habitual offenders and who pose a danger to society. The Department's Office for Juvenile Justice and Delinquency Prevention has been working closely with the Coordinating Council on Juvenile Justice and Delinquency Prevention to develop a Weed and Seed Youth Component, because Weed and Seed provides a unique vehicle and opportunity to reach many youth-at-risk. The objectives of this program are

to provide leadership for a comprehensive, multi-agency strategy to prevent juvenile delinquency and effectively intervene in the lives of high risk youth and juvenile offenders; and to provide coordination in integrating existing as well as new Federal, state, local and private sector juvenile delinquency prevention resources. Additionally, efforts to establish a nurturing and caring environment for youth and their families within these neighborhoods is paramount so that these young people may be motivated to take advantage of opportunities and activities that will prepare them for the responsibility of future jobs and families. The final objective is to ensure accountability of juvenile offenders through the creation and expansion of appropriate intervention and intermediate sanction programs and services that recognize the gradations in offenses. We must intervene early and sternly with meaningful sanctions that hold juveniles accountable for their actions, while also offering an opportunity for rehabilitation through programs that instill values, discipline and responsibility.

Questions on Civil Asset Forfeiture

Q. General Barr, my office has been contacted by a number of individuals complaining of overzealousness on the part of U.S. Attorneys in prosecuting civil drug-forfeiture cases. It has been suggested that since there is no requirement for a companion criminal case, civil forfeiture has become the "method of choice" for prosecutors. Are you aware of any concerns being expressed regarding the civil forfeiture laws?

A. Media criticisms of asset forfeiture have relied upon what we see as misleading representations of forfeiture procedure and one-sided presentation of the facts of specific forfeiture cases. Attached are two letters to the editor responding to what we believe to be slanted news articles relating to asset forfeiture. Although we have reviewed all federal forfeiture cases that have been criticized by the news media, we have yet to find one where we felt an abuse had occurred.

Most federal seizures are processed as civil rather than criminal forfeitures. This is true for a number of reasons. First, the owners of properties seized for forfeiture often reside beyond the jurisdiction of the United States or are fugitives from justice. In such cases, civil forfeiture is the only option. Second, seizures are sometimes made during the course of a long-term criminal investigation or undercover operation. In such cases, civil forfeitures can sometimes be accomplished without jeopardizing the investigation or undercover operation whereas to proceed with criminal forfeiture would require closing down the investigation or operation prematurely. Third, criminal prosecutors are

sometimes reluctant to complicate an already complicated criminal trial with a criminal forfeiture count. We are strongly encouraging use of criminal forfeiture wherever possible to reduce court dockets and conserve prosecutorial resources.

Q. Has the Department been evaluating the prosecution of these laws?

A. The Department is closely evaluating its forfeiture program in an effort to strengthen the integrity of and public confidence in the program. A number of policy initiatives have been implemented to temper the application of forfeiture and further initiatives are in various stages of development.

Q. Specifically, has the Department considered requiring a higher standard than probable cause that the property in question was used in connection with criminal acts?

A. With respect to the probable cause standard, it has served the United States of America well for over two centuries. Moreover, as probable cause is sufficient to justify the arrest and jailing of a person pending trial, we believe it is more than sufficient for the seizure or "arrest" of property.

QUESTIONS FROM SENATOR SIMON

Questions on the FBI Discrimination Suit

Q. What is the status of the reported settlement of a suit by minority FBI agents against the FBI? Has the Department signed off on the settlement? What effect will litigation by other FBI agents have on the settlement?

A. The Department has not yet signed off on the agreement in principle reached between a group of Black FBI Special Agents (BADGE) and the FBI on April 21, 1992.

A recent ruling by the U.S District Court for the District of Columbia dismissed the action by employees of the FBI who were challenging the proposed settlement.

Questions on the Expansion of CRS Jurisdiction

Q. Would the Department support the expansion of the Community Relations Service's (CRS) statutory authority to resolve community disputes related to sexual orientation and religion in order to address all of the categories of hate crimes described in the Hate Crimes Statistics Act? In the alternative, would the Department support a more limited expansion of CRS's authority to provide only technical assistance for disputes arising from sexual orientation and religion has also been posed?

A. The Department does not support expansion of CRS's overall jurisdiction for several reasons. CRS does not currently have, nor is the Service scheduled to have, adequate resources to respond appropriately to an expanded jurisdiction.

In order to provide service to address sexual orientation and religion, CRS would need to (1) dramatically increase its resources to serve its existing and new constituencies at least at the current level of service, or (2) with its existing level of resources, significantly reduce the level and scope of service for race and ethnic based disputes in order to service sexual orientation and religion-based disputes. Under alternative (2) CRS could only provide a low level of service to existing and new constituencies than it provides for race and ethnic based disputes now.

Based on the most recent workload statistics for FY 92, each conciliation specialist (a total of 41) carries an average annual workload of 92 alerts, 64 assessments, 23 conciliation cases and an average backlog carried over each year of 7

conciliation cases. Projections for FY 93 and FY 94 indicate that the workload will grow in every area.

Because of its small staff, when an emergency or crisis situation arises in any part of the country, CRS shifts resources to the site of that crisis. This shift inhibits the ability of the regional offices to meet their current regional workload. In May of 1992, CRS resources were stretched thin in all parts of the country as conciliation specialists were shifted to Los Angeles following the verdict in the Rodney King beating trial, and to Guantanomo, for the Haitian refugee influx. In both instances, because the program functions were already in place, and did not demand costly development and start-up of new substantive programs, CRS was able to address the crises quickly, effectively, and economically.

In providing conciliation services to a conflict under the current mandate, CRS will have expended an average of 80 staff hours for each of the 932 cases alerted, assessed and conciliated during FY 92.

Although the level of work and resources varies with the conflict, the Department believes that it would be unable to provide appropriate services to every conflict which arose if its jurisdiction were expanded.

The Department would also oppose expanding its jurisdiction for technical assistance only. Providing technical assistance for disputes arising from sexual orientation and religion would require new programs and trained staff which CRS does not now have. More precisely, adding two new constituencies to the CRS jurisdiction does not mean merely increasing the number of participants to our existing programs and presentations. All of the strategies and resources devoted to race, color and national origin, would have to be developed and implemented for sexual orientation and religion.

It is projected that if sexual orientation and religion were added to the current mandate, that the demand for services and workload of CRS would triple. To adequately address community wide conflicts that disrupt the economic, education, law enforcement, social or other systems of a community based on sexual orientation and religion, CRS would require at least three times the budget and personnel it currently has.

Even if CRS immediately obtained the resources to provide expanded service, there is the problem of preparation in order to provide new services to a new constituency on new subject areas. CRS would require start-up resources in order to create staff development materials, train its entire conflict resolution staff in subject areas with which it has no

familiarity or experience, and develop additional local community networks.

In order to respond to an expanded mandate (race, color, national origin, sexual orientation and religion) with current and planned resources CRS would be forced to respond only to those conflicts that reach the most urgent crisis level. These would be incidents that "reach the highest tension levels on the CRS index--violence or harassment resulting in physical injury, property damage, and/or the threat of economic disruption (e. g., economic boycott).

This would result in CRS services being provided only when the most serious violence and economic disruption has occurred. Our projection is that with the current state of affairs involving conflicts over sexual orientation and religion, approximately 75% of such crisis conflict resolution response by CRS would have to be directed at these conflicts, leaving only 25% of resources to address the other three areas of jurisdiction.

Moreover, CRS would have sparse resources spread widely, and could only respond after the fact to crises. It would be forced to cease its prevention activities. With this change in emphasis, CRS would cease outreach activities which inform communities of the conflict resolution services it provides and educates communities on conflict resolution techniques. CRS would also be forced to stop its immigration and refugee affairs liaison work which resolves difficulties arising in communities receiving refugees through the CRS Cuban and Haitian resettlement and placement programs.

Attachment 1

Edward Byrne Memorial State and Local Law Enforcement Assistance Discretionary Program

Fiscal Year 1992 Interagency and Intra-agency Initiatives

Joint Administering Agency/Office	Amount	Project
Drug Enforcement Administration	$200,000	Clandestine Laboratory Investigation and Safety - This initiative expands the existing agreement with DEA that provides a program of training and certification to State and local law enforcement officers in clandestine laboratory investigation and safety, to provide training to additional law enforcement officers. Program will also assist States in developing their own State and Local Clandestine Laboratory Certification Training programs
State Justice Institute	100,000	To support a program of technical assistance and training to assist State court officials to implement strategies for effectively handling substance abuse cases
National Institute of Justice	1,008,104 -244,748 * 763,356	Bureau of Justice Assistance Clearinghouse - The Clearinghouse serves as an important vehicle for disseminating information to State and local criminal justice practitioners on effective programs and practices described in BJA publications
National Institute of Justice	2,900,000	Evaluation of BJA Discretionary and Formula Grant Programs. This program evaluates BJA's Formula and Discretionary Programs to identify and disseminate information to States and local jurisdictions on "what works" against violent gangs, violent crime, drug use, and trafficking
National Institute of Justice	800,000	Drug Use Forecasting (DUF) Program - The DUF Program provides information on the prevalence and types of drug use among booked arrestees in 24 American cities. Data is analyzed to give State and local policymakers information for carrying out drug prevention, education, control, and treatment programs. DUF is also used by policymakers to gain a more informed picture of the total drug consumption pattern in the U.S.
Bureau of Justice Statistics	9,000,000	State-Level Criminal History Records - This program, initiated in 1990, is a comprehensive program to provide grants to the States to make systematic improvements in the accuracy, completeness and timeliness of State criminal history record information throughout the Nation. The program particularly focuses on enhancing criminal history records of convicted felons and enabling the States to meet new FBI standards for identifying and transmitting the information to the FBI, an essential element of the effort to stop firearms sales to felons
Bureau of Justice Statistics	200,000	Drugs and Crime Data Center & Clearinghouse - The Data Center & Clearinghouse continues and expands user and analytic services to State and local policymakers, criminal justice practitioners, researchers, and the general public with ready access to understandable information on drug law violations and drug-related law enforcement
Office for Victims of Crime	100,000	National Victims Resource Center (NVRC) - Provides partial financial support for NVRC, which is a national clearinghouse for victims information, utilized by State and local criminal justice jurisdictions
Office for Victims of Crime	100,000	Prosecution Based Training and Technical Assistance - This program provides training and technical assistance to improve the response of State and local prosecutors to the rights and needs of crime victims, with emphasis on the development and dissemination of training materials and model victim impact statement guidelines
Office for Victims of Crime	150,000	Improving the Treatment of Victims of Bias Crimes - The purpose of this program is to improve the response of law enforcement and the criminal justice system to victims of bias crimes. The initiative will develop model policies, procedures and practices for responding to victims of bias crimes; develop a training and technical assistance program; and disseminate information to the field about effective strategies for responding to victims of bias crimes

* Allocation from FY 1991 appropriation

Edward Byrne Memorial State and Local Law Enforcement Assistance Discretionary Program

Fiscal Year 1992 Interagency and Intra-agency Initiatives - Continued

Joint Administering Agency/Office	Amount	Project
Planned/Pending:		
National Institute of Corrections	950,000	Corrections Options Training and Technical Assistance - Program will provide training education and technical assistance for State and local criminal justice personnel on issues related to corrections options/intermediate sanctions
Total	15,263,356	

Budget Staff 7/20/92

Edward Byrne Memorial State and Local Law Enforcement Assistance Discretionary Program

Fiscal Year 1991 Interagency and Intra-agency Initiatives

Joint Administering Agency/Office	Amount	Project
National Institute of Corrections	$350,000	Implementation of Boot Camp Programs - Support the design and delivery of training and technical assistance for State and local jurisdictions that wish to implement boot camp programs as intermediate sanctions for non-violent offenders
State Justice Institute	100,000	National Conference Impact of Substance Abuse Cases on the State Courts - To co-fund the preparation for and conduct of a conference to coordinate judicial response with other State and local criminal justice, health care, and education systems
National Institute of Justice	3 186 008	Evaluation of BJA Discretionary and Formula Grant Programs. This program, initiated in 1989, is to evaluate the BJA programs in order to identify and disseminate information to States and local jurisdictions on "what works" against drug use and trafficking (Conference Report accompanying 1991 appropriation bill specified that not less than $3 million be provided to the National Institute of Justice for this program)
National Institute of Justice	1,523,681 -558,701 * 964,980	Drug Use Forecasting (DUF) Program - This program provides information on the prevalence and types of drug use among booked arrestees in 24 American cities. Data is analyzed to give State and local policymakers information for carrying out drug prevention, education, control, and treatment programs. DUF is also used by policymakers to gain a more informed picture of the total drug consumption pattern in the U S
National Institute of Justice	130 000	Office of National Drug Control Policy Second National Conference on State and Local Drug Policy - Provide financial support for conference that will provide a forum for State and local policymakers to discuss anti-drug abuse strategies (Other Federal agencies reimbursed the Bureau of Justice Assistance for their contribution to the conference)
National Institute of Justice	339 921	Bureau of Justice Assistance Clearinghouse - The Clearinghouse serves as an important vehicle for disseminating information to State and local criminal justice practitioners on effective programs and practices described in BJA publications
National Institute of Justice	650 000	Drug Market Analysis - This program is to develop at the State and local level computer technology to integrate various databases in law enforcement agencies and determine the effectiveness of various drug enforcement strategies
National Institute of Justice	499 646	Drug Testing in Community Corrections - Purpose of this program is to document and disseminate information to local and State agencies on the effectiveness of periodic drug testing of convicted offenders during community supervision
National Institute of Justice/ U S Dept of Commerce	100 000	Technology Assessment Program Locks for Corrections Facilities - The Technology Assessment program facilitates the transfer of information about equipment and technology to State and local criminal justice agencies. This assessment will focus on the establishment of tentative tests for performance attributes appropriate to required level of lock security (minimum, medium, maximum) and the type of locks used in detention and correction facilities and ultimately a performance standard for such locks
Office of Juvenile Justice and Delinquency Prevention	1 765 000 1,600,000 * 165 000	Intermediate Sanction Juvenile Bootcamps - This program is to test and demonstrate the effectiveness of "boot camp" programs as an intermediate sanction approach with juvenile offenders, which may prove to be an effective sanction for juveniles and deter them from future crime and substance abuse (Grants were awarded to three State/local sites)
Office of Juvenile Justice and Delinquency Prevention	18 000	National Conference on Youth Gangs and Violent Crime - To provide financial assistance and support for conference to address the problems of gangs and their involvement in drugs and violent crime. Attendees included policy officials from governors offices across the Nation

* Allocation from FY 1990 appropriation

Edward Byrne Memorial State and Local Law Enforcement Assistance Discretionary Program

Fiscal Year 1991 Interagency and Intra-agency Initiatives - Continued

Joint Administering Agency/Office	Amount	Project
Bureau of Justice Statistics	$299,964	Drugs and Crime Data Center & Clearinghouse - The Data Center & Clearinghouse continues and expands user and analytic services to State and local policymakers, criminal justice practitioners, researchers, and the general public with ready access to understandable information on drug law violations and drug-related law enforcement.
Bureau of Justice Statistics	9,353,083 -2,700,715 * 6,652,368	State-Level Criminal History Records - This program, initiated in 1990, is a comprehensive program to provide grants to the States to make systematic improvements in the accuracy, completeness and timeliness of State criminal history record information throughout the Nation. The program particularly focuses on enhancing criminal history records of convicted felons and enabling the States to meet new FBI standards for identifying and transmitting the information to the FBI, an essential element of the effort to stop firearms sales to felons.
Bureau of Justice Statistics/Bureau of Census	600,000	Criminal Justice Expenditure and Employment Survey (CJEE) - The CJEE survey produces the variable pass-through data required for the allocation of State and local anti-drug abuse formula grants to ensure that formula funds are allocated among State and local governments equitably and in accordance with the legislation. The Survey also provides detailed information on the costs of the criminal justice system, including police protection, courts, prosecution, public defense, and corrections
Office for Victims of Crime/ National Institute of Justice	132,379	National Victims Resource Center (NVRC) - Provides partial financial support for NVRC, which is a national clearinghouse for victims information, utilized by State and local criminal justice jurisdictions
Office for Victims of Crime/ National Institute of Justice	33,997 -33,997 *	State Compensation Laws Directory and Bulletins - Partial financial support to improve the quality of instruction available to State and local law enforcement officials so that they may be better skilled at serving and communicating with crime victims
National Institute of Corrections	25,000	Project to provide training and technical assistance to State and local agencies on methods for the acquisition or use of surplus real property and facilities for correctional facility construction and renovation
Total	14,213,286	

* Allocation from FY 1990 appropriation

Budget Staff 7/20/92

Attachment 2

PROGRAMS CONTRIBUTING TO WEED AND SEED*

(Obligations in millions of dollars)

Programs	1993 Obligations
Department of Justice:	
US Attorneys	20
Office of Justice Programs (OJP) Demonstrations	10
Subtotal, Justice	30
Department of Labor:	
Job Training Partnership Act	28
Youth Opportunities Unlimited	5
Senior Community Service Employment	9
Job Corps	50
Subtotal, Labor	92
Department of Health and Human Services:	
Treatment Improvement Grants	36
Capacity Expansion Grants	47
High Risk Youth/Pregnant Women Prevention	7
Community Partnership Grants	4
Aid to Families with Dependent Children (AFDC) JOBS	43
Head Start	54
Community Health Centers	35
Subtotal, HHS	226
Department of Housing and Urban Development:	
Public Housing Modernization	20
Housing Vouchers	20
Community Development Block Grants	44
Public Housing Drug Elimination Grants	6
Subtotal, HUD	90
Department of Education:	
Compensatory Education	16
School Improvement/Pre-College Outreach	30
Family Literacy and Adult Education	10
Subtotal, Education	56
Department of Transportation: Reverse Commute Demonstration Grants	1
Department of Agriculture: Women, Infants, Children (WIC) Nutrition	5
Total for 1993	500

*Source: The Budget for Fiscal Year 1993, Part I, p. 169, Office of Management and Budget, January 1992.

Attachment 3

Department of Justice

STATEMENT

OF

GEORGE TERWILLIGER

DEPUTY ATTORNEY GENERAL

BEFORE

THE

SUBCOMMITTEE ON OVERSIGHT OF
GOVERNMENT MANAGEMENT

COMMITTEE ON GOVERNMENTAL AFFAIRS

UNITED STATES SENATE

CONCERNING

REAUTHORIZATION OF THE
INDEPENDENT COUNSEL STATUTE

ON

AUGUST 11, 1992

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to present the views of the Administration on the reauthorization of the Independent Counsel statute, 28 U.S.C. §§ 591-599 (IC Act or Act). Assistant Attorney General Lee Rawls already has submitted a letter in response to the Subcommittee's March 10, 1992, request for certain technical information relating to the IC Act. This morning, therefore, I will address the central issue now before the Congress, whether the IC Act should be reauthorized for another five years.

The Administration opposes reauthorization of the IC Act, and believes that it should be allowed to expire as scheduled on December 15, 1992. Our opposition is based upon three principal considerations: First, and most importantly, the independent counsels appointed under the IC Act exercise concentrated prosecutorial power without appropriate accountability or effective review. Second, the IC Act is not necessary to ensure that alleged misconduct by high-ranking Executive Branch officials is appropriately investigated and prosecuted. And, third, the costs of independent counsel investigations can be far greater than any benefits obtained, particularly because independent counsels lack the financial controls and accountability that normally attach to governmental entities.

However, if the Act is determined to serve a valid purpose and

is to be reauthorized, then its limited scope, applying principally to a selected group of Executive Branch officials, is inadequate -- its coverage should be extended to the other branches of government -- and a new regime of accountability needs to be added.

I will discuss each of these points in turn.

As you know, the IC Act originally was enacted as Title VI of the Ethics in Government Act of 1978, P.L. 95-521, 92 Stat. 1867. It provides for the appointment of an independent prosecutor by a three judge panel to investigate allegations of criminal wrongdoing by certain senior Executive Branch officials -- including the President, Vice-President, the Cabinet, senior Justice Department officials, and certain political party officials. While an independent counsel is obliged by statute to follow the prosecutorial standards of the Department of Justice, no authority has the power to review, modify, or control the conduct of an independent counsel's investigation and prosecutions. In essence, the statute substitutes the prosecutorial judgment of one individual, the independent counsel, for that of the Department of Justice as an institution. An independent counsel is unsupervised in the exercise of prosecutorial discretion, which is broad in the normal case, but virtually unchecked in the case of an independent counsel. This glaring deficiency is out of step with our general governmental structure that makes those wielding substantial power accountable through supervision and other checks and balances.

An independent counsel can be removed only "for cause." The Ethics in Government Act was upheld in the face of a constitutional challenge in Morrison v. Olson, 487 U.S. 654 (1987), and I want to note at the outset that my comments today are fully consistent with the Morrison Court's decision: that is, the Administration recognizes that the Act is constitutional, but nonetheless opposes its reauthorization.

1. The IC Act is Unnecessary to Ensure that Allegations of Criminal Wrongdoing by Senior Government Officials are Fully and Fairly Investigated.

Some historical perspective on the Act is necessary to its understanding. The IC Act was passed in the wake of Watergate, and in particular of President Nixon's dismissal of Special Watergate Prosecutor Archibald Cox. It was premised upon the assumption that the professional prosecutors of the Department of Justice could not successfully investigate and prosecute high government officials, who might be in a position to exercise improper influence over the Department's decisionmaking process. That assumption is an affront to the integrity of the dedicated men and women of the Department who toil daily in the pursuit of justice. They have proven this assumption wrong again and again.

Overall, since 1970, the Department of Justice has prosecuted more than 6,600 federal officials and employees. In 1989, the

Department indicted 695 federal officials and employees, as well as 71 State officials and employees, 269 local officials, and 313 other individuals for violations of the public corruption laws. In 1990, 615 federal officials and employees, 96 State officials, 257 local officials, and 208 other individuals were indicted for public integrity violations. In 1991, the last year for which complete figures are available, the number of public corruption indictments was 803 federal officials, 115 State officials, 242 local officials, and 292 others. For each of the past six years, we have obtained over 1,000 public corruption convictions. The Department is proud of this record and of its long tradition of prosecutorial independence.

Significantly, those convicted include such high-ranking individuals as an Assistant to the Attorney General, a United States Attorney, assistant United States Attorneys, a United States Marshal, and several FBI and DEA Special Agents. In addition, the Department has brought successful prosecutions against officials of the legislative and judicial branches of government, including members of the House of Representatives, the Senate, and several United States District Judges. The ability of the Department effectively to respond to allegations of wrongdoing by these officials, and by its own employees, proves that it can respond to such allegations brought against other high-level officials. Moreover, this record makes clear that the integrity of the Department's processes is of such a high caliber that it should not

be impugned by a statute that requires its automatic disqualification in certain cases.

Overall, since the IC Act became law, during a time period in which both major parties have held the White House and been responsible for running the Justice Department, there is no evidence that the Department's professional prosecutors could not have successfully performed the tasks of the independent counsels who have been appointed. Indeed, the Watergate episode itself demonstrates that the Department of Justice can and will remain impartial in the prosecution of high-ranking government officials. The dismissal of Archibald Cox did not end the Watergate investigation. Acting Attorney General Robert H. Bork preserved Professor Cox's task force intact within the Department and appointed a new special prosecutor, Leon Jaworski. The investigation continued unimpeded, leading to many convictions and guilty pleas.

Thus, the IC Act, and consequently any reauthorization of the Act, is based on a mistaken premise. The professional prosecutors of the Department of Justice, guided by the standards developed over decades, have proven themselves fully capable of investigating and prosecuting senior government officials, including officials within the Justice Department itself. Indeed, speaking as a career prosecutor, I can state unequivocally that the Department has no greater goal than insuring the integrity of the investigatory and

prosecutorial process.

In those instances where public faith in a prosecutive decision would be best served by the involvement of a special counsel, the Attorney General can appoint such an officer. The Attorney General can tailor the appointment to suit the circumstances. For example, he can ask an outside official to conduct an investigation, or to review a prosecutive decision, or several other variations. Such an appointment can serve the essential purposes of the current statute while at the same time avoiding the undesirable aspects of creating a prosecutive authority unchecked in its discretion by anyone.

2. The Independent Counsels Wield Extensive Power and are Largely Unaccountable for its Exercise.

The power of a criminal prosecutor is immense, as is its potential for misuse. And, as Justice Robert Jackson, who served as President Franklin Roosevelt's Attorney General, explained more than fifty years ago, the most dangerous power of a prosecutor is in selecting his or her defendant. The danger, explained Justice Jackson, is that the prosecutor:

> [W]ill pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking

6

> for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm -- in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

Robert Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940, quoted in Morrison v. Olson, 487 U.S. at 728 (Scalia, J., dissenting).

The independent counsel's mission, from the start, is to find criminal wrongdoing by a particular individual or small group of individuals. As a result, an independent counsel does not have the perspective of a prosecutor who must investigate and review dozens of cases, nor, as will be discussed below, is he or she subject to the resource constraints imposed on ordinary prosecutors. An independent counsel's prosecutorial resources are expended to investigate and prosecute a handful of individuals. Indeed, more than 70 percent of direct IC Act expenditures through June 30, 1992, ($32,067,250) have been spent by a single independent counsel. In addition, the Department of Justice, the Department of the Treasury, and other agencies have expended in excess of $10,000,000 in appropriated funds to provide investigative,

security, and administrative support to that independent counsel.

Independent counsels are not constrained in their decisionmaking by this factor. Combined with a lack of accountability and a mandate to pursue particular individuals, these unlimited resources are an invitation to the abuse of prosecutorial power. This state of affairs renders the independent counsel's mission one dangerously close to the "personal prosecution" Justice Jackson warned of.

This fundamental flaw with the IC Act has been noted by three former Attorneys General, Edward Levi, Griffin Bell and William French Smith -- who served Presidents Ford, Carter, and Reagan, respectively -- in connection with Morrison v. Olson. These gentlemen characterized the problem as follows:

> The problem is less spectacular but much more worrisome. It is that the institutional environment of the Independent Counsel -- specifically, her isolation from the Executive Branch and the internal checks and balances it supplies -- is designed to heighten, not to check, all of the occupational hazards of the dedicated prosecutor; the danger of too narrow a focus, of the loss of perspective, of preoccupation with the pursuit of one alleged suspect to the exclusion of other interests.

Brief for Edward H. Levi, Griffin Bell, and William French Smith as Amici Curiae 11, quoted in Morrison, 487 U.S. at 731-32 (Scalia, J., dissenting).

At the same time, the independent counsel is effectively unaccountable for his or her activities. Selected by a panel of judges who enjoy life tenure and who have no role in reviewing the exercise of prosecutorial discretion, an independent counsel can be removed by the Attorney General "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs" his or her performance. 28 U.S.C. (596(a)(1). Although the precise contours of these removal restrictions have not yet been determined, it is clear that, as a practical matter, the Department of Justice can exercise no ongoing supervision over independent counsels. In addition, as noted below, independent counsels effectively enjoy unlimited funds with which to conduct their investigations, and have not been held to account for either the purposes or amounts of their expenditures.

Of course, no one is more cognizant than the Department of Justice both of the awesome power of a prosecutor, and of its potential for abuse. To harness this power, and to avoid abuses, the Department's professional prosecutors operate under guidelines designed to circumscribe prosecutorial discretion, and to assure that it is exercised both wisely and fairly. While the independent counsels are by law required to follow the "written or other established policies of the Department of Justice respecting enforcement of the criminal laws," there is no effective means to enforce this restriction. 28 U.S.C. (594. Moreover, even this injunction is subject to an exception. An independent counsel must

follow Justice Department policies "except where not possible." Id. As a practical matter, while each independent counsel is provided with the Department's guidelines, including the multi-volume United States Attorneys Manual and Principles of Federal Prosection, they may ignore this guidance, and need not comply with the restrictions imposed on other federal prosecutors. Moreover, as Attorney General Barr has stated, unlike an independent counsel, all of our actions are governed by "an institutional ethos" concerning the proper role of the prosecutor.

The lack of such constraints, and of the experience of the Department's professional prosecutors, has resulted in circumstances where independent prosecutor actions were taken that were outside the scope of fundamental Department policy. One independent counsel, for example, issued a subpoena to the Canadian Ambassador, notwithstanding his diplomatic immunity. This action resulted in a formal protest by the Government of Canada.

Another flaw of the IC Act is the publicity occasioned by the appointment of an independent counsel and the conduct of his or her investigation. Specific guidelines cover the release of information by Department prosecutors from the time an individual becomes the subject of an investigation until all proceedings have been completed. These are designed to minimize the danger of damage to reputation occasioned by the premature identification of a person subject to investigation. Far more investigations are

commenced than ever result in criminal prosecutions. Normally, investigations are kept confidential to protect both the subject's privacy, and the integrity of the investigatory process. Under Department of Justice rules, a prosecutor may only publicly release information that is necessary to protect the public or to seek its assistance in capturing a fugitive, or incontrovertible factual matters such as the text of an indictment. The Department's career prosecutors may not speculate on the evidence or make public statements about a case that does not result in prosecution. The reporting requirements in independent counsel matters often undermine the purposes of these restrictions. Moreover, there are no effective means to police extrajudicial commentary by independent counsels.

The traditional structure of the Department and its organization also functions as a check on prosecutorial power, in contrast to the independent counsel offices, where the investigatory and prosecutorial function is unified. Prosecutorial and investigative authority are, in the ordinary case, diffused within the Justice Department. Investigations are conducted by components separate from those with prosecutorial charging authority. Even cases being investigated under the direction of a particular prosecutor are not entirely under his or her control, since the investigative agents report through a different chain of command, even though all ultimately are answerable to the Attorney General. For example, the Federal Bureau of Investigation is the

Department's core investigative component. The FBI's chain of command is entirely separate from that of the federal prosecutors working in the Department's Criminal Division or in the United States Attorneys offices. Even when a group of FBI special agents are assigned to a particular United States Attorney's office, the chain of command differences act as a check on a prosecutor's choices and limit his or her ability to push a case into a particular mold. This is not true of an independent counsel, who exercises far more immediate and pervasive control over his or her investigators.

We do not mean to criticize the conduct of any particular independent counsel. The flaws identified above are built into the independent counsel system itself. However, as Justice Scalia noted dissenting in Morrison v. Olson, "the fairness of a process must be adjudged on the basis of what it permits to happen, not what it produced in a particular case." 487 U.S. at 731. Independent counsels are widely perceived as appointed with the mandate to pursue a particular individual and are largely removed from the restrictions that have developed over time to avoid the abuse of prosecutorial power. As Attorney General Barr has stated, "[t]he problem with the [IC] statute is that it creates a prosecutor that has no accountability. And I think . . . in its present form, it's a threat to civil liberties."

3. The Costs of Independent Counsel Investigations are

Unjustified.

In conducting its investigations the Department, like other prosecutors, always must take the cost of pursuing an investigation or prosecution, and the likely benefit to be gained, into acccunt. Independent prosecutors under the IC Act do not operate under such constraints. Such investigations are funded out of a "permanent indefinite appropriation within the Department of Justice to pay all necessary expenses of investigations and prosecutions by independent counsels." Title II, Pub. L. 100-202, 101 Stat. 1329-8. Since the IC Act was enacted in 1978, independent counsels have required $45,254,902 in direct expenditures through June 30, 1992, the last date for which complete figures are available. I note that these are only the direct expenditures, and do not take into account other expenses involved, such as the costs imposed on agencies to provide support services to independent counsels or to answer discovery demands, the costs imposed on individuals subjected to independent counsel inquiries, or costs arising from the disruption of normal government operations.

Overall, the costs to the taxpayer of conducting an independent counsel investigation are far greater than those involved in the average Justice Department investigation. The appointment of an independent counsel requires the creation of a new and separate government prosecutorial/investigative office, duplicating many of the costs (without the advantage of economies

of scale) already born by the taxpayer in supporting the Department of Justice. In addition to duplication of costs, an independent counsel can expend amounts on staff and support services far in excess of comparable Department expenditures. For example, an independent counsel can routinely hire lawyers (regardless of years in practice or whether or not they have had prosecutorial experience) at the top of the government pay scale. The Department, on the other hand, has available dozens of seasoned professional prosecutors compensated at much lower rates, who regularly pursue cases of equal or greater significance with great distinction.

These fundamental flaws in the IC Act, we submit, persuasively demonstrate that it should not be reauthorized, but rather allowed to expire on December 15 of this year.

However, if the Act is to be retained, we believe that its coverage should be extended to the other branches of government. As you know, the IC Act currently covers only a few dozen officials in the Executive Branch, and certain political campaign officers. It does not apply to the Congress or to the courts. At the same time, the rationale underlying the Act -- that prosecutors may be subject to improper influence by high-ranking officials -- is (if valid at all) equally applicable to all three branches. While the Executive Branch directs federal prosecutorial efforts, it is the Congress that appropriates the funds for those prosecutors,

exerting very significant influence on the Executive Branch through both the appropriation and oversight process. In a functionally different but similar vein, federal prosecutors must practice before the courts on a daily basis, and the courts exercise substantial influence over the process wherein the success or failure of prosecutorial actions is determined.

Moreover, limitation of the IC Act's coverage to one branch of government creates an imbalance in the constitutional system of checks and balances. The President has made clear in his proposed Accountability in Government Act of 1992, transmitted to the Congress earlier this year, that the IC Act should be made applicable to Members of Congress and their senior campaign advisors, if it is to remain in force at all. Unless such a provision is included in any reauthorization of the IC Act, the President's senior advisors will recommend that the legislation be vetoed.

Specifically, I would like to make one observation with respect to S. 3131, the "Independent Counsel Reauthorization Act of 1992." That bill's attempt to extend the IC Act to Congress is inadequate. Section 591(a) of the IC Act provides that the Attorney General "shall" conduct a preliminary investigation upon receiving certain information about covered Executive Branch officials. Section 4 of S. 3131, on the other hand, provides only that the Attorney General "may" conduct a preliminary investigation

upon receiving certain information about members of Congress.

This is a significant difference. Even if S. 3131 were enacted into law, Congress still would be treated differently than the Executive Branch. In theory, the Attorney General is not given discretion with respect to Executive Branch officials so as to avoid any appearance of impropriety. Such an appearance of impropriety is just as likely in a case where the appointment of an independent counsel to investigate a member of Congress is involved. As I have said, we do not believe that there is any impropriety, or the appearance of impropriety, in the Attorney General exercising prosecutorial discretion with respect to high-level government officials. However, to the extent that the IC Act is based upon such considerations, they are applicable to decisions taken with respect to both the Executive and the Legislative Branches.

Finally, we believe that any bill to reauthorize the statute should take into account the concerns I raised earlier regarding the lack of financial controls and the possibility of unfettered exercise of prosecutorial discretion.

Mr. Chairman, that concludes my prepared testimony, and I would be pleased to answer any questions at this time.

Attachment 4

Memorandum

Subject	Date
New OPR Procedures	May 12, 1992
To	From
All OPR Staff	Michael E. Shaheen Jr. Counsel

Attached is a copy of new OPR procedures which are effective immediately. These procedures were written in response to the GAO Management Review of this Office and are self-explanatory.

I. OPR Standards for Conducting Investigations

All OPR investigations shall be conducted in accordance with the policies and guidelines set forth in the United States Attorneys' Manual and shall:

1. include an interview of the complainant[1],
2. pursue all logical investigative leads,
3. include an interview of the subject,[2]
4. sufficiently address the allegations made by the complainant.

II. OPR Standards for Case Documentation

All files on OPR matters shall include appropriate case documentation. At a minimum, such documentation shall include:

1. a copy of the complaint,
2. all case-related correspondence,
3. documentation of each interview conducted,
4. documentation of all significant investigative activity,
5. all documentary evidence obtained during the inquiry,

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[1] In appropriate circumstances, an interview of the complainant may be omitted. Such an omission must be approved by the Counsel or Deputy Counsel, and the reasons for the omission must be documented in the case file.

[2] In appropriate circumstances, an interview of the subject may be omitted. Such an omission must be approved by the Counsel or Deputy Counsel, and the reasons for the omission must be documented in the case file.

6. documentation explaining a decision not to conduct an interview of the complainant or the subject of the complaint,

7. documentation containing the rationale for the disposition of the matter,

8. a case chronology,

9. OPR case closing form,

10. the disciplinary action taken in substantiated matters.

III. Periodic Case Reviews for Systemic Problems

All OPR case files will be reviewed periodically, but at least annually, to identify any possible systemic problems that might necessitate changes to the Department's procedures and operations. Any such problems will be brought to the attention of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or other appropriate Department official.

Attachment 5

October 1, 1991

Mr. Harold Andrew Valentine
Associate Director
Administration of Justice Issues
General Government Division
General Accounting Office
Washington, D.C. 20548

Re: Our meeting of September 27, 1991

Dear Mr. Valentine,

I am writing because I am concerned that after numerous meetings, after all the information we have provided under the Crime Control Act (CCA), after voluntarily providing information beyond the requirements of the CCA, and after the intense scrutiny applied by GAO to the Justice Department's recent handling of financial institution fraud matters, you have apparently decided to criticize our organizational structure on the basis that it is purportedly different from what you say was promised Congress.

At the outset, I should note that I am grateful for your assurance during our meeting that you were not planning to criticize the effectiveness of our operation. In the absence of substantive criticism of the substantial improvements and results of the Department's Financial Institution Fraud (FIF) program, you previewed a negative report citing a number of "facts" for me. These "facts" are nothing new to us and evince either an inability or unwillingness to comprehend the work of this Department. With all due respect, the criticism you wish to advance is simply unjustified.

The following outlines your major comments and my responses:

1. The Department of Justice has shifted its strategy from the 27 task forces announced in December 1989 to encouraging interagency bank fraud working groups without telling Congress.

This is false in a number of respects. First, there is no "shift" in the Department's strategy. Second, there are no secrets. We have told Congress exactly what we are doing. We have told you too.

The consistency of the Department's approach is seen in testimony by Department officials appearing before Congress. See e.g. testimony of Edward S.G. Dennis Jr. of April 12, 1990, which you cited during our meeting, at pages 3-4, and 10, describing the role of United States Attorneys and the Department's allocation of

FIRREA resources. I particularly wish to stress the portion of the testimony at pages 11-12 concerning the Department's strategy wherein Mr. Dennis stated: "--establishing task forces, consisting mainly of FBI staff and United States Attorney office staff, in FBI divisions and judicial districts having the greatest need" (emphasis added). This same analysis can be found in Mr. Dennis' later testimony of May 11, 1990. I would suggest that we have done precisely what Mr. Dennis said we would do.

On August 2, 1990, then Attorney General Dick Thornburgh told Congress that "[t]he Task Force concept uses the combined resources of the United States Attorneys' office, the Criminal and Tax Divisions of the Department of Justice, the FBI, the Internal Revenue Service (IRS) and various financial institution regulatory agencies, including the FDIC and OTS, in a team effort to pinpoint, investigate and prosecute serious fraud allegations." (Testimony at p. 4) Through a variety of mechanisms, we have attempted to bring all of these diverse resources to bear. That discussion must also be read in the context of Mr. Dennis' description of the Department's strategy. It must also been seen in light of our implementation of the Crime Control Act of 1990 wherein Congress refined many of the concepts advanced by the Attorney General for dealing with financial institution fraud - e.g. inclusion of Secret Service personnel in our prosecutive effort and limited availability of IRS and regulatory personnel.

The FIF problems in the various districts in this country are not all the same. No one solution is appropriate or desirable. This fact was emphasized when then Attorney General Dick Thornburgh testified before Congress on June 24, 1990 and stated "[t]hey are not 'shelf items' or 'one size fits all' investigations and prosecutions." (page 5) By maintaining our ability to effectively adapt to a local problem we can best avoid national crisis.

2. Interagency bank fraud working groups are not task forces.

As I told you at our meeting, this truism reveals nothing about our program. We never suggested that the working groups were substitutes or surrogates for task forces. Your field examiners actually confirmed this at our meeting. Criticizing us for an idea we never advanced is unfair.

We have advanced the working group concept since the formation of the national group in 1984. The national group was not the only model however. For instance, Los Angeles modelled its group on Chicago even though its prosecutive mechanism is designed quite differently. Working groups are a suggested means for exchanging information with regulators, getting and giving feedback, obtaining information and facilitating cooperation. Task forces investigate and prosecute. Working groups may help prioritize investigations but they do not conduct them - that is what the prosecutors and law

enforcement components do - sometimes with a regulatory investigator's assistance but more often without.

Encouraging the formation and use of working groups to enhance communication and cooperation is something Congress seemed to want in mandating the Senior Interagency Group and complimenting the national Interagency Bank Fraud Enforcement Working Group. It is something we did in addition to applying resources to prosecutions (task forces). To criticize us for this effort is to tell us more is less.

3. The 27 Task Forces do not all look like Dallas.

This "fact" was made known to your agency by me before your audit team conducted a single field interview. We are professional prosecutors dealing with an unprecedented problem as best we can with the resources that were and have now been provided to us. The traditional and professional way of dealing with any law enforcement problem is to begin with the United States Attorneys at the local level.

In 1987, in Dallas, the U.S. Attorney decided he wanted and needed help from the Criminal Division in Washington and he got it in the form of the Dallas Bank Fraud Task Force. In New England, the Attorney General and six U.S. Attorneys decided that a task force might be needed to handle any bank problems discovered by the FDIC's greatly expanded Boston liquidation office and the New England Bank Fraud Task Force resulted. In the other districts, where resources were needed and available under FIRREA and the CCA, they were allocated.

In 1989, with the passage of FIRREA and availability of new resources, then Attorney General Dick Thornburgh announced the allocation of additional resources to 27 Task Force cities. The 27 task force cities were the first to receive FIRREA resources both in the FBI division and the U.S. Attorney's office. At that time, the 27 augmented FBI offices actually served 37 U.S. Attorneys offices, which received enhancements of FIRREA personnel. Since that time, the Attorney General created the position of Special Counsel, Congress later mandated it in the CCA and Congress provided funding for even more prosecutors. After the passage of the CCA, the 27 offices got increased resources where appropriate and other districts did too. At no time were those districts told to make themselves look like the Dallas operation or like any other operation. They were all told to apply 100% of the resources 100% of the time to FIF prosecutions and the recovery of assets.

4. Since announcing the 27 task forces modeled on Dallas, we have shifted our model to Chicago according to answers we provided to inquiries from Congressman Brooks this past spring.

This is both false and misleading. There has been no shift in models. Dallas is a model. So are other successful programs. By sharing what works on different cases in different parts of the country, we can adopt what is best from a variety of successful approaches and adapt those solutions to the particular local problem involved.

Moreover, our answers to Congressman Brooks concerning this question plainly indicate that we have used many models including Dallas, Chicago and Los Angeles - not just Chicago as you suggested at our meeting. Models are things to learn from. We have never promised nor intended to simply photocopy anything for the sake of precision in duplicating form. We have focused on substance - results which speak volumes and ensuring that resources earmarked for the program are effectively applied to it.

This Department provides unprecedented amounts of information about its FIF program to Congress under the Crime Control Act of 1990 in our monthly reports and through responses to inquiries from various Congressional committees and members, as well as questions by your own audit teams. You should already know that this information reveals:

- Development of formal and informal lines of communication between the Department through the Special Counsel and the appropriate regulatory and law enforcement components.

- Establishment of the Senior Interagency Group to enhance our efforts.

- Development of a case reporting system for major S&L cases and enhancement of that system to include major bank and credit union prosecutions.

- 820 major S&L crooks charged between October 1, 1988 and August 31, 1991;

- 628 major S&L crooks convicted in the same period (93% conviction rate);

- 953 defendants charged in fiscal year 1991 in major FIF cases, those including bank, credit union and S&L prosecutions.

- 773 defendants convicted in FY 1991 in major FIF cases (94.8% conviction rate)

- 79% of those convicted sent to jail.

- Allocation of additional attorney and support resources provided by FIRREA and the CCA not just to 27 districts but to 75 of the 93 U.S. Attorneys Offices around the country where

caseloads indicated additional support was needed. In allocating the CCA lawyers, our numbers were not significantly different from the recommendations of your office. Where they were, qualitative rather than statistical analysis of the relevant programs dictated the result.

- Creation of the New England Bank Fraud Task Force by the Attorney General and six New England state U.S. Attorneys to deal with existing inventories and to serve at the ready for any cases developed by the expanded FDIC liquidation office in Boston.

- Design and implementation of an ambitious training program for the newly acquired and applied resources.

- Formulation of special civil FIF units in eight pilot districts to do forfeiture and collections work.

The progress of our effort is known and it is spectacular. Moreover, I believe it is exactly what Congress had in mind in passing the CCA. In my position, I have met many times with members of your staff. They have been given unprecedented access to internal memorandum and material both to demonstrate the Department's and my desire to cooperate in every way and because the material shows the program is working and evolving in a positive direction, just as we have told Congress and just as Congress has indicated they wished us to proceed.

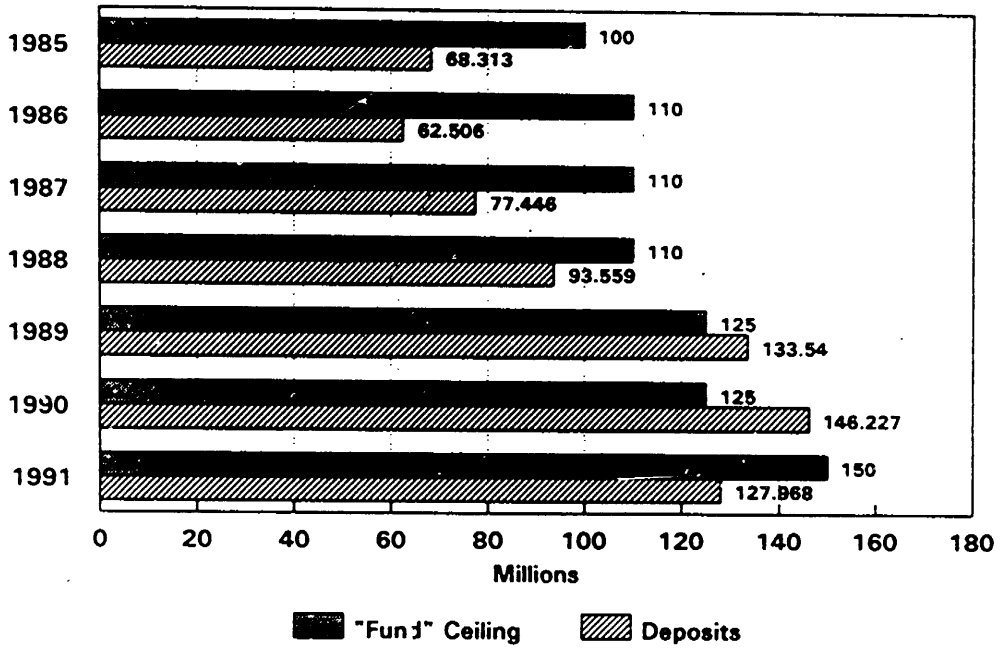
In short, the Department's program to combat financial institution fraud is one that has evolved, with substantial Congressional input and intense, if not unprecedented, scrutiny from many quarters. You told me that your agency does not go into an audit with preconceived notions. Whatever notions had developed as of our meeting, the criticism you announced at our meeting is borne neither of fact nor fairness.

If our program is different from what your auditors understood it to be, the problem may be in the understanding and not in the program. If it is both different and better than what they understood, I would suggest that there should be no criticism at all. I urge you to reexamine the premises and conclusions of your upcoming report in light of our discussions and this letter. As always, I remain available to help you and your team understand the work we are doing.

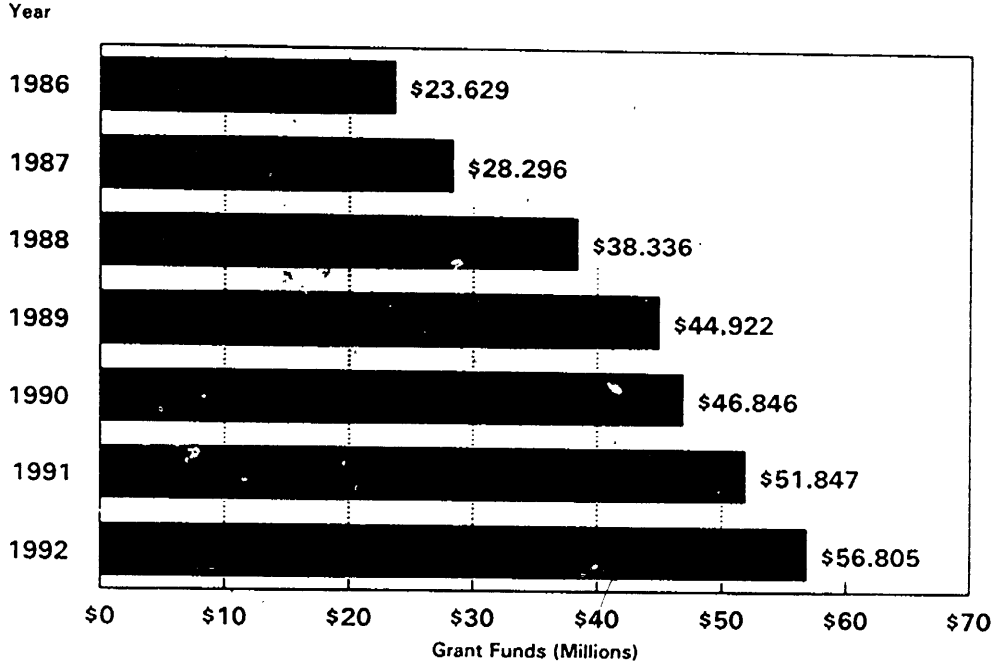
Very truly yours,

Ira H. Raphaelson
Special Counsel

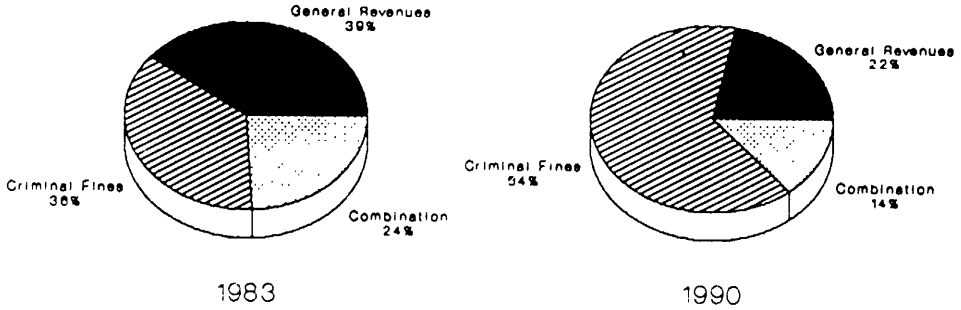
Crime Victims Fund Revenues



VOCA Compensation Grants to States
1986 - 1992

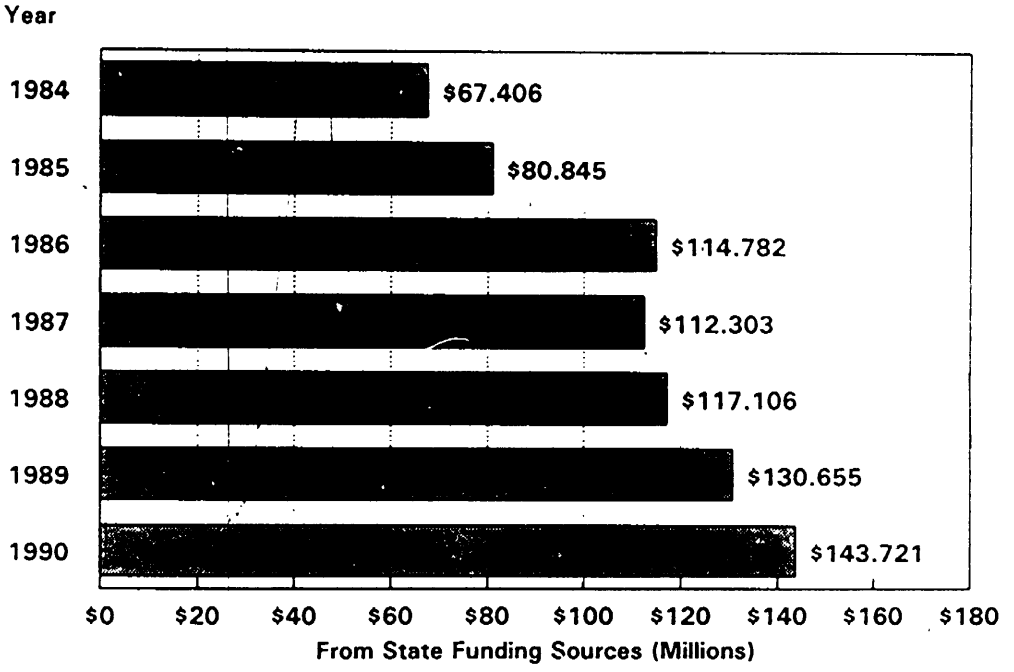


State Funding Sources for Victim Compensation



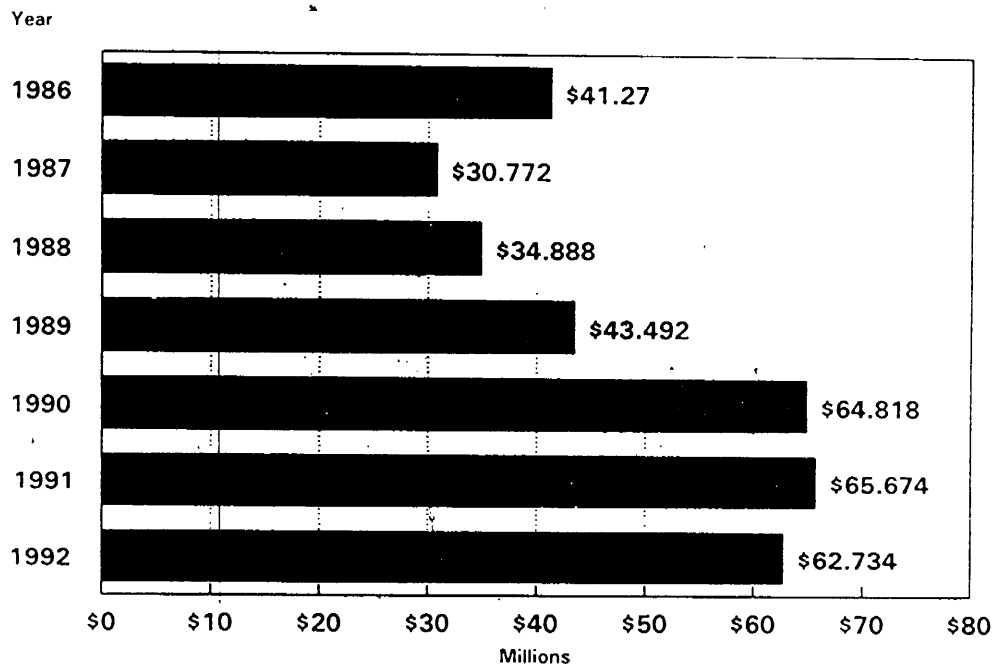
1983 (33 States) - 1990 (50 States)

State Certified Payments to Crime Victims



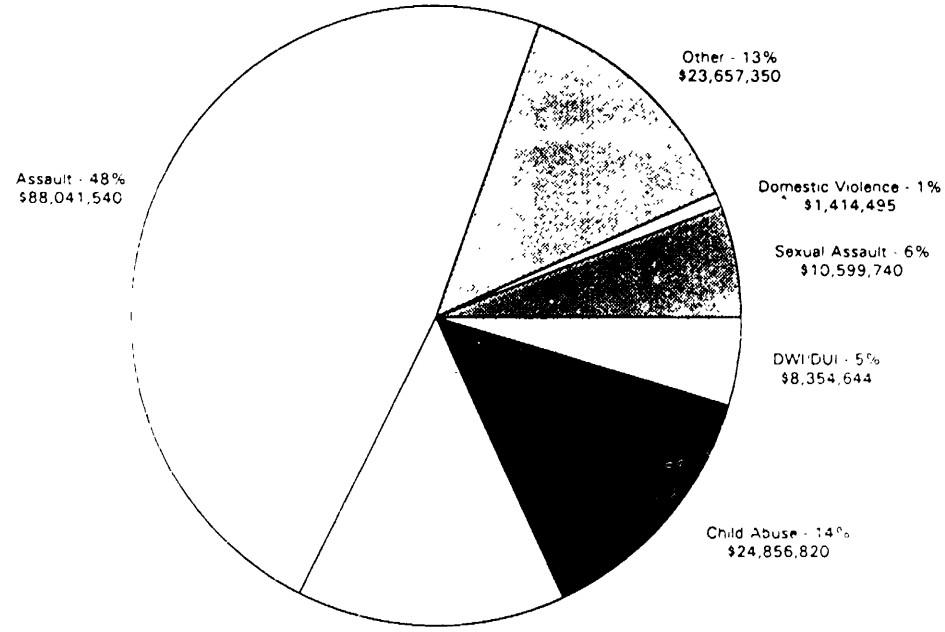
Payments Meeting VOCA Requirements

VOCA Assistance Grants to States
1986 - 1992



State Awards of Compensation

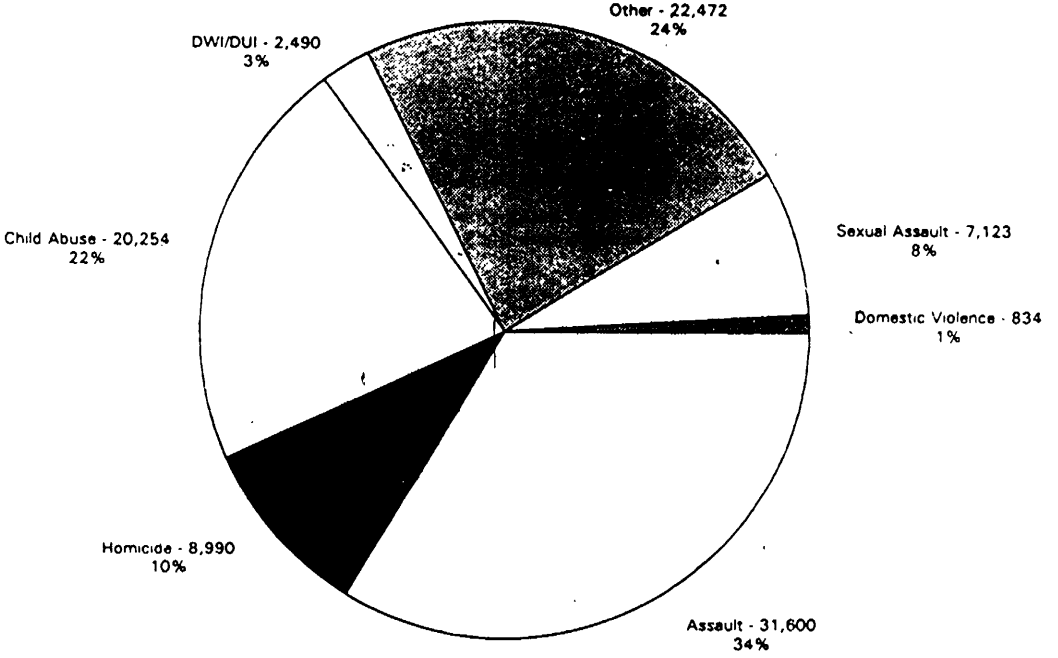
$183,040,912 Paid in Compensation Claims



By Type of Crime - FFY 1990

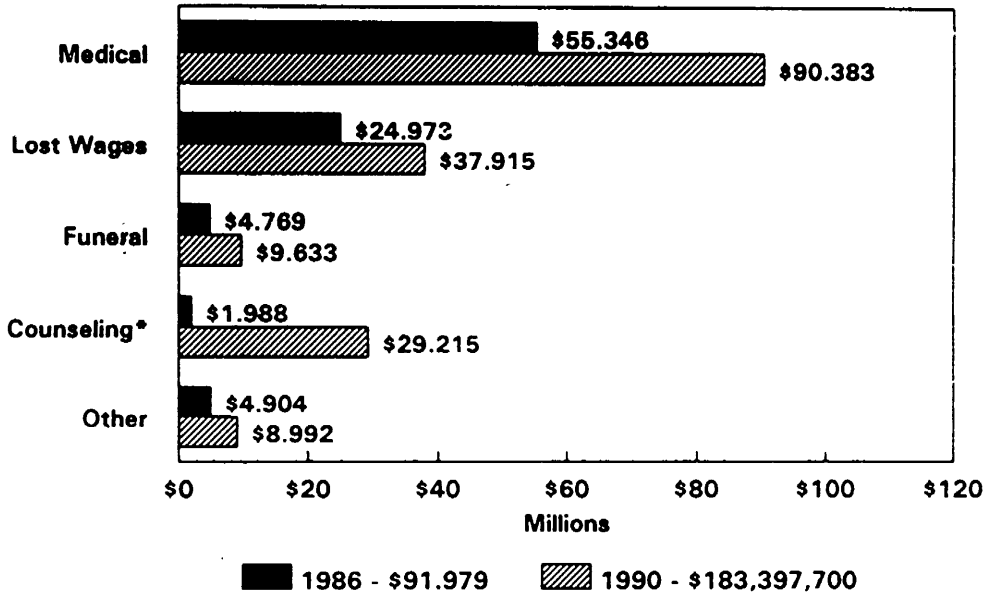
Claims Approved by States

93,763 Claims Amounting to $183,040,912



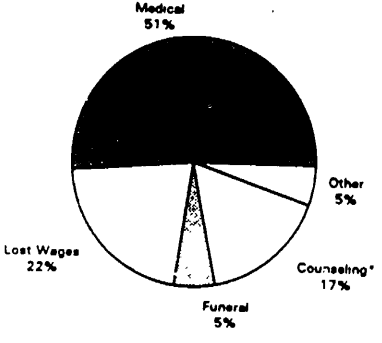
By Type of Crime - FFY 1990

Crime Victim Expenses Paid by States (Includes VOCA Funds)

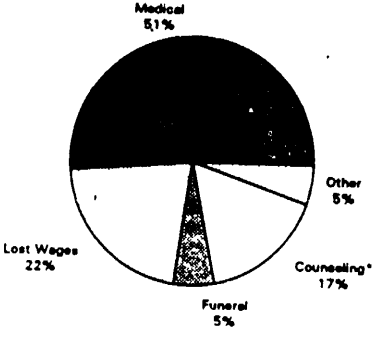


*Mental Health Counseling

Crime Victim Expenses Paid by States



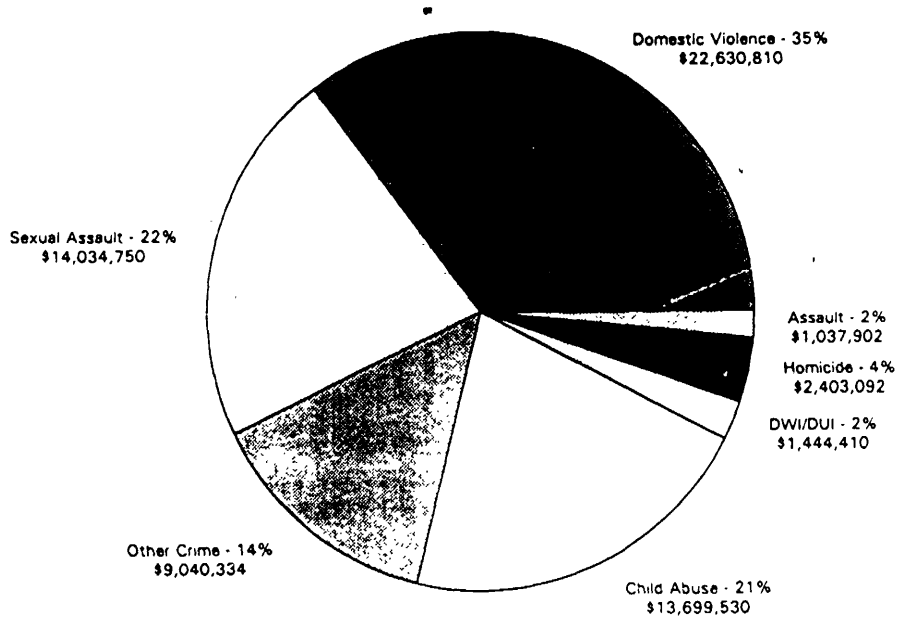
1986



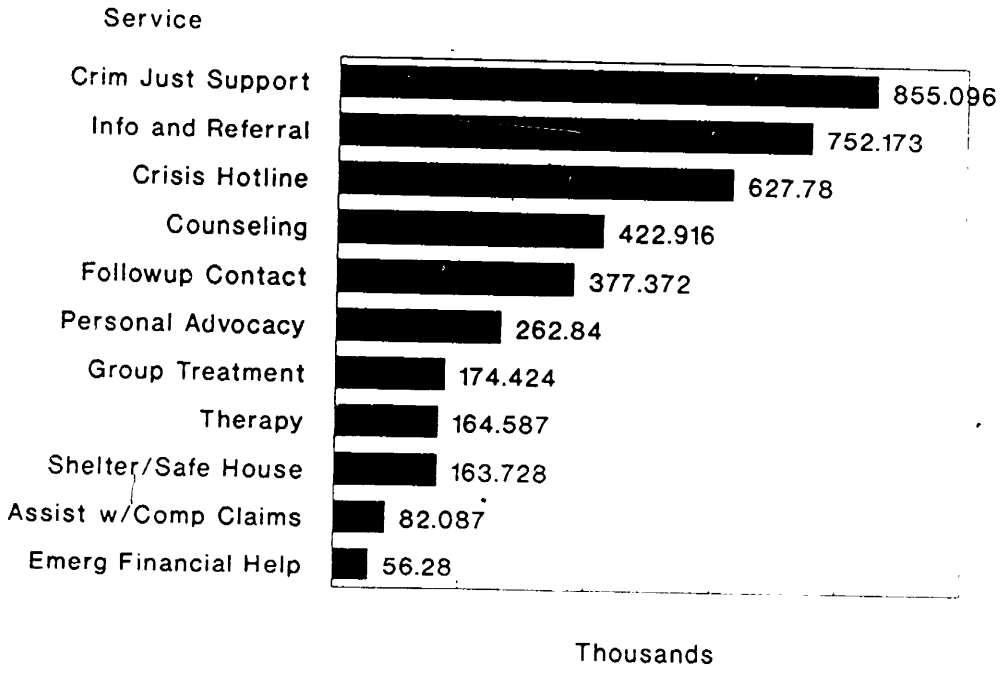
1990

*Mental Health Counseling

Distribution of VOCA Assistance Funds
By Type of Crime - FY 1990



Services to Crime Victims
Fiscal Year 1989



Attachment 7

Office of the Attorney General
Washington, D. C. 20530

August 10, 1992

Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515-6216

Dear Committee Member:

On July 9, 1992, a majority of the Democratic members of the House Committee on the Judiciary wrote me, pursuant to section 2(g) of the Independent Counsel Statute (the "Statute"), 28 U.S.C. 592(g), requesting the appointment of an Independent Counsel to investigate allegations of wrongdoing by unnamed "high-ranking officials of the Executive Branch" (the "Letter").

The Statute requires that when I receive a request pursuant to section 2(g), I report to the relevant Committee the reasons for my decision. This letter and the accompanying report (the "Report") constitute my response to the Letter.[1]

The Letter states that the potential criminal conduct relates to:

> activities by both current and former officials to illegally assist the regime of Saddam Hussein prior to the August 1990 invasion of Kuwait, and to attempt to conceal information about potential criminal activity from Congress through the making of false statements, the nonproduction, falsification or alteration of official records and other documents, and through otherwise misleading and obstructing Congress in investigating such matters.

For the reasons stated below, and detailed in the Report, I

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[1]Pursuant to section 2(g)(4) of the Statute, 28 U.S.C. 592(g)(4), I request that the Committee promptly make public this letter and the Report in their entirety.

have concluded that the criteria for invoking the Independent Counsel Statute are not present here.

The Letter, in contrast to previous Congressional requests for the appointment of an Independent Counsel, lacks the specificity required under the Statute. The Letter fails to identify any particular person alleged to have committed a crime, or to describe any particular acts alleged to constitute a crime. Instead, it relies on vague and conclusory assertions of wrongdoing by unnamed persons -- precisely the kind of "generalized allegation[s]" that the Statute and legislative history make clear are wholly inadequate as a basis for invoking the Statute. [See p. 6, infra.]

Although the Letter is inadequate on its face, our analysis of these matters did not begin or end with the Letter. So far as we can determine, all the allegations referred to in the Letter were previously in the public domain. In fact, well before receipt of the Letter, the Department was aware of, and was reviewing and, where appropriate, investigating those allegations as they arose. Substantial review and investigation was accomplished during this process, which remains ongoing for certain discrete matters. But none of the information developed during this investigative process meets the criteria for invoking the Statute.

To respond to the Letter, career professionals in the Department have carefully reviewed not only the Letter, but also the record of the Judiciary Committee hearings on this matter (the "Hearings"), as well as other relevant information gathered by the Department in the course of its ongoing review. Further investigation was conducted by career prosecutors in the Public Integrity Section and agents of the Federal Bureau of Investigation ("FBI"), both as part of the threshold review of the Letter and as part of the Department's ongoing review and investigation of the underlying matters.

My determination that the specialized procedures of the Statute are not applicable here is based on this extensive review and analysis, and is supported by the uniform view of the prosecutors at all levels of the Department who have reviewed this matter.

The Independent Counsel Statute applies where there is specific and credible information that a "covered person" -- one of a small group of senior officials expressly listed in the statute -- has committed a crime. The Letter has not provided, nor have we found, any such information. We are aware of no evidence that would support the criminal investigation of a "covered person" in connection with the matters raised by the Letter.

Nor does the Letter raise any allegations of wrongdoing by lower-level noncovered persons that would provide a basis for applying the Independent Counsel Statute. It appears that one of the central allegations is that loan proceeds guaranteed under the Commodity Credit Corporation ("CCC") program, or commodities sold under that program, were diverted by Iraq for military purchases. This Department, the Department of Agriculture, various Committees of Congress and the General Accounting Office ("GAO") have been investigating the possibility of such diversions. No one has yet established that any such diversion occurred. But even assuming that foreign entities and private intermediaries did engage in such a diversion, we have found no evidence that U.S. government employees knowingly participated in or facilitated any such diversion, or any other criminal conduct with respect to the CCC program with Iraq. [See pp. 8-9, infra.]

Other allegations about noncovered persons relate to conduct that is simply not criminal in any way. It is not a crime for the Executive branch to set up a coordination mechanism to handle Congressional information requests. Nor is it a crime for an Executive branch agency to raise objections to, or to oppose, an informal Committee request for information. [See pp. 9-11, infra.] Still other allegations are based on erroneous factual premises -- such as the suggestion that there were improprieties in the Department's handling of the investigation of Banca Nazionale del Lavoro ("BNL"). The factual record is clear that the Department officials involved in that case acted with dedication and rectitude, and there is not a shred of evidence that any Department employee acted improperly. [See pp. 11-13, infra.]

In sum, then, with the exception of two matters noted below, none of the allegations about noncovered officials warrant further inquiry. We have found them to be without substance and are aware of no evidence that would support a criminal investigation.

Two allegations about noncovered officials referred to in the Letter were already under investigation by the Department. These are what the Letter refers to as the "alteration" of Commerce Department documents and the alleged "contradictory" testimony of certain witnesses at Committee Hearings. The Independent Counsel Statute does not apply to either of these ongoing investigations. They are the kind of matters routinely handled by the Public Integrity Section, and I find no conflict of interest or any other circumstance that would preclude the Department from completing these investigations in the normal course.

As noted, the allegations referred to in the Letter have been the subject of substantial review by the Department starting well before receipt of the Letter. Thus, the decision that the

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Statute is not applicable does not mean that the allegations will not have been properly reviewed. It means only that no basis has been shown for treating this matter under the specialized procedures of the Statute. Those allegations which warrant further inquiry will continue to be investigated by career professionals in the Department in the normal course.

If those ongoing investigations produce any information implicating the Independent Counsel Statute, we will comply with it fully. Moreover, if any Members have any information which they believe we have overlooked or failed to consider in reaching our decision, we request that they provide it to us promptly. In contrast to the Letter, any such submission should identify with particularity: (1) what crimes are alleged to have been committed, (2) who is alleged to have committed them, and (3) what specific factual information supports the allegation.

Discussion

As a general matter, it is the responsibility of the Department of Justice to investigate and prosecute all allegations of criminal conduct by any person subject to the jurisdiction of the United States, including allegations of wrongdoing by government officials. The Department has a long record of vigorously investigating and prosecuting government officials who commit crimes against the United States. Indeed, the Public Integrity Section in the Criminal Division was set up expressly for this purpose, and it has a track record that is above reproach.[2]

The Independent Counsel Statute does not supplant -- nor was it ever intended to supplant -- the Department's general responsibility to investigate allegations of criminal wrongdoing within the government. Rather, the Statute is designed to apply to certain exceptional cases. Accordingly, the Statute's specialized procedures are triggered in two specifically defined circumstances -- one mandatory and one discretionary.

The mandatory provision, 28 U.S.C. 591(a), requires the Attorney General to apply the procedures of the Statute if and when he receives specific information from a credible source sufficient to warrant a criminal investigation of a "covered person." "Covered persons" are a small group of the most senior officials in the Executive Branch who are specifically listed in the Statute, including the President, Vice President, Members of

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[2]The Department prosecuted over 1200 federal officials and employees -- including Department of Justice officials -- for public integrity violations in just the last two years for which final figures are available.

the Cabinet, senior White House staff, senior Department of Justice officials, and certain other senior government and campaign officials.

The discretionary provision of the Statute, 28 U.S.C. 591(c), authorizes, but does not require, the Attorney General to proceed under the Statute if: (i) he receives specific information from a credible source sufficient to warrant a criminal investigation of someone other than a covered person; and (ii) he determines that an investigation or prosecution of that person by the Attorney General or other officer of the Department "may result in a personal, financial or political conflict of interest." Even if the Attorney General finds a conflict of interest under this prong of the Statute, he need not invoke the Statute. Instead, the investigation may be handled by a Department official who has no "personal, financial or political conflict of interest," or a non-statutory special counsel may be appointed who would be part of the Department and who would exercise the powers of the Attorney General for purposes of the investigation.[3]

The threshold requirement for triggering the Statute under either the mandatory or the discretionary provision is the receipt of specific information from a credible source sufficient to constitute grounds to investigate whether some person -- covered or not -- has committed a federal crime. This requirement of specificity is an important safeguard against abuse under the Statute. The legislative materials strongly emphasize the need for "specific factual support," and "facts" indicating a crime, such as particular dates and places -- as opposed to a "generalized allegation of wrongdoing."[4] The Senate

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[3]It has been suggested by some that any allegation of wrongdoing involving Executive branch employees, even those who are not "covered persons", automatically creates a "political conflict" and mandates the appointment of an Independent Counsel. That suggestion is completely without merit. It is contradicted by the Statute itself -- there would be no point in having the Statute designate a category of very senior officials as "covered persons" if an allegation of wrongdoing against any government official required appointment of an Independent Counsel. It is also contradicted by the longstanding and now routine practice of the Justice Department investigating and prosecuting government officials below the "covered person" level.

[4]H.R. Rep. No. 95-1307, 95th Cong., 2d Sess. (1977) at 6 n.14; S. Rep. No. 95-170, 95th Cong., 1st Sess. at 52 (1977), reprinted in [1978] U.S. Code Cong. & Ad. News 4216, 4268; S. Rep. No. 97-496, 97th Cong., 2d Sess. at 12, reprinted in [1982] U.S. Code Cong. & Ad. News 3537, 3548; see also Nathan v. Smith, 737 F.2d 1069, 1074 (D.C. Cir. 1984) (Davis, J., concurring).

Report accompanying the 1983 amendments provides an example of what would constitute specific evidence: "[I]f a credible source informs the Department of Justice that a named, covered official took money on a given date, in a given place, and provides facts which indicate that it may have been a bribe, this information should trigger a preliminary investigation."[5]

Measured against these requirements of the Statute, the Letter is clearly deficient. The Letter contains no specific information (credible or not) concerning crimes by any person, let alone any "covered" person. Indeed, the Letter does not even contain any specific allegation (let alone information) concerning any crime alleged to have been committed by any person, covered or otherwise. In contrast to the example of specificity set forth in the Senate Report, which specified the individual, time and place of the receipt of money and evidence that it was a bribe, the Letter amounts to no more than an unsupported assertion that some unnamed person may have violated one of a number of listed statutes. For that reason, alone, the Letter does not constitute grounds to proceed under the Statute.[6]

Nevertheless, the Department has carefully considered the allegations in the Letter, the record of the Hearings, and other relevant information in our possession. Because these

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[5]S. Rep. No. 97-496, 97th Cong., 2d Sess. at 12, reprinted in [1982] U.S. Code Cong. & Ad. News 3537, 3548.

[6]In this respect, the Letter stands in sharp contrast to several previous Congressional submissions requesting appointment of an Independent Counsel. For example, the request for the appointment of an Independent Counsel to investigate former Housing and Urban Development Secretary Pierce identified specific testimony that was alleged to be perjurious and identified the contradictory evidence, and also set forth detailed allegations of the mismanagement techniques allegedly employed by Secretary Pierce. The letter requesting an Independent Counsel to investigate former Deputy Chief of Staff Deaver specified the individual the Members believed should be investigated, and specified four precise matters of alleged conflict of interest. The letter requesting appointment of an Independent Counsel to investigate assistance to the Contras specifically named individuals the Members believed should be investigated, described a specific incident which might constitute a violation of law, and referenced a staff report which provided additional details on alleged violations. While the letter requesting an Independent Counsel to investigate alleged misconduct by the Department of Justice in withholding EPA documents from Congress did not specifically name any individuals, it enumerated narrow acts of conduct alleged to be illegal, and was accompanied by a 1,284 page Committee report.

allegations had previously been in the public domain, even prior to the Letter, those allegations which warranted further inquiry were already the subject of ongoing review, and, where appropriate, investigation by the Department. In addition, further investigation has been conducted by career prosecutors in the Public Integrity Section and by the FBI.

Our review was conducted by career prosecutors in the Public Integrity Section who had no prior involvement in any aspect of the BNL matter. Their work was reviewed by a number of career prosecutors in the Criminal Division.

In addition, consistent with past practice, a senior prosecutor from outside of Main Justice was asked to review allegations involving the Criminal Division's role in the BNL case. In this case, Michael Chertoff, the U.S. Attorney for New Jersey, a career prosecutor with no prior involvement in the BNL matter, reviewed all allegations relating to the Criminal Division's handling of the BNL case.

Both Public Integrity's review and Mr. Chertoff's review, were further reviewed by George Terwilliger, Deputy Attorney General, a career prosecutor; and Ira Raphaelson, Counselor to the Attorney General, a career prosecutor and former head of the public integrity division in the U.S. Attorney's office in Chicago.

Without exception, every prosecutor reviewing this matter at every level of the Department is of the view that the criteria for invoking the Statute are not present here.

Based on our review, I have concluded that the criteria for invoking the Statute have not been met. Specifically, as to the mandatory provision of the Statute, I have concluded that there is no specific and credible information that a "covered person" committed a crime. As to the discretionary provision of the Statute, I have concluded that, for most of the allegations relating to noncovered government officials, there is no specific and credible information that any crime was committed. In two discrete matters where further inquiry as to noncovered officials is warranted, I find that there is no "personal, financial or political conflict of interest" which would preclude the Department from investigating and, if appropriate, prosecuting the individuals involved. These matters were under investigation by the Department prior to receipt of the Letter, and there is no reason to believe that the Department cannot continue to fully and fairly investigate them. As to those allegations relating to private parties (involving alleged irregularities in the CCC program and alleged export control violations) these also remain under investigation by the Department, and I find that there is no "personal, financial or political conflict of interest" that would preclude continued investigation by the Department.

The Report analyzes in detail all of the allegations we could identify from the Letter, the Hearings and other reported statements of which we are aware.

For purposes of this letter, I will only summarize our reactions to three central categories of allegations, namely: (1) that unnamed officials "illegally assisted the regime of Saddam Hussein"; (2) that unnamed officials attempted "to conceal information about potential criminal activity from Congress"; and (3) that the Department of Justice acted improperly in its BNL investigation.

1. Allegations that Unnamed Officials "Illegally Assisted" Iraq

The Letter refers vaguely to "activities by both current and former officials to illegally assist the regime of Saddam Hussein." Although the Letter does not specify who allegedly illegally assisted Hussein, or what form the illegal assistance allegedly took, based on the Hearings this allegation appears to refer to allegations that loan proceeds guaranteed under the CCC program, or commodities sold under that program, were diverted by Iraq for military purchases.

While the possibility of diversions has been investigated by the Departments of Justice and Agriculture, various Committees of Congress and the GAO, no one has yet established that any such diversion occurred. But even assuming that foreign entities and private intermediaries did engage in such a diversion, we have found no evidence that U.S. government employees knowingly participated in or facilitated any such diversion, or any other criminal conduct with respect to the CCC program with Iraq.

The evidence indicates that, in late 1989, as concerns about possible irregularities in the CCC program grew, Department of Agriculture and other government officials decided to conditionally continue with FY 1990 credits for Iraq while, at the same time, continuing to investigate allegations of irregularities and attempting to ascertain the nature and extent of possible official Iraqi involvement in any such irregularities. Pending the results of that further investigation, the Department of Agriculture divided the CCC credits into tranches for greater control. We have no information that any aspect of that decision was criminal.

Some public statements by certain Members of Congress seem to be based on the premise that it was somehow a crime for the government officials not to immediately and completely terminate the CCC program in the face of allegations and some emerging evidence of irregularities in that program.

It is unclear whether the Letter reflects such a view, but to the extent that it does, it is baseless. When faced with possible evidence of irregularities in a particular program, the decision whether to terminate the program completely or to take lesser steps to police the program pending further investigation, is entirely a policy and management decision. While the wisdom of that decision can be debated, the fact that it was not criminal cannot. It is no more a crime for Executive branch officials to continue to operate a program in the face of some evidence of irregularities than it is for Members of Congress to urge continued operation of the program in the face of such evidence (as happened here). A policy decision not to immediately terminate the CCC program based on the information available to officials at the time simply does not constitute a crime.

The Department is continuing to actively investigate the alleged improprieties in the CCC program. To the extent that, contrary to the evidence to date, that investigation reveals any evidence of participation by U.S. government officials, we will take all appropriate action, including any appropriate action under the Statute. [See Report at 21-24.]

2. Allegations Related to the Alleged Coverup or Obstruction of Congressional Investigations

Again, the Letter sets forth no specific conduct alleged to be criminal, simply asserting that there was an "attempt to conceal information . . . [and] otherwise mislead[] and obstruct[] Congress." Judging from the Hearings, the allegations fall into three basic groups: (i) the alleged use of "'formalized' procedures for screening or rebuffing Congressional requests for information"; (ii) alleged withholding of witnesses and information from Congress; and (iii) alleged false statements by various individuals.

The first category of allegations -- involving formalized procedures allegedly for withholding information from Congress -- simply do not allege crimes. Where, as here, requests for information are made to a number of different agencies it is not improper -- and certainly not illegal -- for those agencies to coordinate their responses. Indeed, the Executive Order on classified information and other publicly available Executive branch policies and procedures require such coordination to ensure that legitimate interests of the various agencies in protecting classified or other confidential information are served, and that consideration can be given to asserting applicable privileges. It is surprising that Members of the Committee would allege that there is something improper about this kind of coordination when, in the course of recent investigations, we have been told that House rules require that all subpoenas -- even those directed to individual members -- be

served on one central person, the House Counsel, to allow for coordination by the House and possible assertions of privilege. [See Report at 94-97.]

Similarly, as to the second group of allegations -- involving the alleged withholding of documents and witnesses from Congress -- there is nothing illegal in the Executive branch objecting to or opposing informal Congressional requests for information. Negotiations between the branches over the scope of such informal and even formal requests are commonplace. There is nothing illegal about the Executive branch objecting to the production of documents or witnesses based on concerns about the scope and reasonableness of the request, potentially applicable privileges, or other interests. Actions such as these have been an established -- and perfectly legal -- aspect of our government from its inception, and they are no more a crime than were the efforts by various Members of the House to limit the scope of the Department's document subpoenas in the House Bank matter. If Congress disagrees with the position taken by the Executive branch with respect to any documents, it has ample tools at its disposal to challenge that action. [See Report at 93-94.]

As to the third category -- the alleged false statements -- only one "covered person" is alleged to have made any false statements. As explained in the Report, his statements simply are not false. [See Report at 14-21.] The other alleged "contradictory" statements do not involve "covered persons". Certain allegations involving noncovered officials are under investigation by the Department. These are the kinds of allegations that are routinely investigated by the Public Integrity Section and there is no conflict of interest that precludes their handling these matters in the normal course. [See Report at 24-25.]

Substantial attention has been focused on the alleged "alteration" by Under Secretary Kloske (a noncovered person) of a Commerce Department document generated in response to a Subcommittee request for information relating to license applications for exports of dual use goods to Iraq from 1985 to 1990. That allegation is under investigation by the Public Integrity Section at the specific request of the Chairman of the Subcommittee involved. While the investigation is ongoing, the investigation to date would not support any suggestion that this incident was part of some larger effort to "coverup". Rather, the evidence, to date, indicates that no official above Mr. Kloske had any involvement in the decision to make the changes in question; that the "alteration" was a change in a shorthand description which he believed created an inaccurate perception in its original form; that he made the change only after consulting with the technical experts involved; that other information remaining in the document conveyed the key information about the items in question; and that the change was to a description in a

draft, rather than an alteration of a pre-existing record. [See Report at 26-31.]

There is no reason to believe that the Public Integrity Section of the Criminal Division cannot fully investigate and, if appropriate, prosecute those allegations warranting further review as it has with many similar allegations in the past.

3. Allegations Concerning the Department's Handling of the BNL Matter

Again, the Letter provides no specifics explaining what crimes may have been committed, or by whom, instead simply asserting that there were "irregularities in the Department's handling of a host of investigations." Indeed, it is not entirely clear if the allegations concerning the Department's handling of the BNL investigation are meant to allege crimes, or to suggest that we should conclude that the assertion of these allegations somehow precludes the Department from investigating the other matters alleged in the Letter. We conclude that they do neither because there was no wrongdoing in the Department's handling of the BNL matter. As detailed in the Report, the handling of the BNL investigation by the Department was entirely proper. [See Report at 32-87.]

The evidence shows that the BNL investigation was initiated by the Atlanta U.S. Attorney's office. As part of standard Department practice given the complex nature of the investigation and Atlanta's desire for assistance in certain international aspects of the investigation, the Criminal Division became involved in reviewing and assisting in that investigation. The record is clear that that review was initiated by career prosecutors pursuant to standard practice, and was in no way politically directed.

The Criminal Division career prosecutors raised issues and concerns that required more work to be done before the indictment was returned. The record is clear that these decisions were made by career prosecutors exercising their best professional judgment. Their sole desire was to strengthen and expand the case, not delay or limit it, and any suggestion to the contrary is unfounded and unfair. It is particularly ironic that two of the major sources of the alleged "delay" were the successful efforts by career prosecutors in Main Justice and Atlanta to ensure the prosecution of wrongdoing by Iraqis and to complete investigation of the possible involvement of BNL Rome in the scheme -- precisely the two points that certain Members have alleged were "covered up".

I am especially troubled by the fact that certain Members would repeat scurrilous charges against career prosecutors which are based on blatantly false "facts", notwithstanding that those

"facts" have been conclusively refuted in the Hearing record itself. For example, much emphasis has been given to statements by Judge Marvin H. Shoob suggesting the need for an Independent Counsel. Almost without exception, however, the "facts" cited by Judge Shoob to explain his conclusion have been shown to be incorrect.

Contrary to allegations repeated in the Hearing record, the plea agreement entered by defendant Paul Drogoul was exactly the one offered by the lead prosecutor (who, far from being excluded from the negotiations was in charge of them) two weeks before the plea (not the weekend before it); the other Assistant United States Attorney involved was not sent down from Main Justice; the prosecutors repeatedly stated on the record that Mr. Drogoul was free to make whatever statement he wanted; the record is clear that Drogoul had never prepared the "lengthy statement" Judge Shoob believed was being withheld; and the sentence calculated under the Sentencing Guidelines, which govern this case, is exactly the same for the 60 counts to which Drogoul pled as it would have been had be been convicted of all 347 counts. [See Report at 53-61.]

The allegation that the Department somehow tried to silence Drogoul is completely unfounded. Rather, the record is clear that the Atlanta prosecutors consistently sought his cooperation, that Drogoul offered a plea including no cooperation which was rejected by the prosecutors, that he finally capitulated and agreed to a plea requiring cooperation, and that the plea agreement includes extraordinary provisions to ensure that any and all information Drogoul provides can be made public by the Government, the Court or Drogoul.

Similarly, the allegations that the indictment ultimately returned was "smaller" than that initially contemplated, and that the "Federal attorney in Atlanta was instructed from on high in D.C. to postpone and delay" are both demonstrably wrong, as the Hearing record shows. The Report shows, in detail, the lack of merit to the myriad other allegations concerning the Department's handling of the BNL matter which have been recklessly repeated without regard for the facts, including, for example, the absurd and slanderous charge, apparently seriously made, that a career prosecutor secretly carried a large magnet into a government office to erase information on a computer tape.

While, as in any complex investigation, there were disagreements among the prosecutors involved, these represent honest differences among career professionals and they raise no question of criminal conduct. It simply is not a crime for the Department's Headquarters components like the Criminal Division to assist in and review investigations and prosecutions being conducted by U.S. Attorneys offices in the field. Indeed, that is one of the primary functions of the Headquarters components

and, far from being a crime, such review is an important check-and-balance for the American people, to ensure that the law is being fairly and uniformly applied. Nor is it an "irregularity" for disagreements to arise among prosecutors working on a case as to the timing of various steps, assessments of the evidence, theories to be pursued, witnesses to be interviewed and the countless other matters that make a successful investigation. Indeed, the existence of at least some disagreements among the professional prosecutors and investigators working on a case is the norm, not the exception, especially in large, complex investigations. It is not a crime.

What is especially disturbing about this attack on the Department is that it strikes at the very core of our daily work. Every day, prosecutors handling thousands of cases make tens of thousands of decisions concerning investigative and other steps which may "delay" the indictment of a particular case. Often these decisions are the subject of debate among fellow prosecutors and between prosecutors and their supervisors. This debate, though professionally motivated, is sometimes heated. The result is increased quality in our work and in the level of protection afforded citizens who may be effected by our work. If a prosecutor is to be subjected to a criminal investigation by an Independent Counsel simply because someone asserts that such debates were evidence of obstruction of justice, our ability to enforce the law would be seriously impaired and important safeguards built into our criminal justice system would be lost. The potential chilling effect on the healthy debate which regularly occurs in our work is unthinkable.

Conclusion

As noted at the outset, nothing in the Letter, the Hearings, or any other source of which we are aware, suggests the need to proceed under the Independent Counsel Statute. While it might be expedient to appoint an Independent Counsel anyway, or to delay the decision by conducting a redundant "preliminary investigation" under the Statute, doing so would be an abdication of my responsibility to enforce the law. The allegations have been and are being properly investigated, and it is clear that the criteria for invoking the Statute are not present. It would be as improper to apply the Independent Counsel Statute where the statutory basis does not exist as it would be to fail to apply the Statute if the statutory conditions were present.

As I also noted at the outset, certain allegations against noncovered persons remain under investigation by the Department. I reiterate my request that if any Members have any specific information of possible criminal conduct by Executive branch officials or anyone else they provide it to the Department promptly. Such information should specify what crimes are

alleged to have been committed and by whom, and what specific information supports the allegation.

Should we receive any information in the course of our ongoing investigations, from Congress, or from any other source, that implicates the Independent Counsel Statute we will continue to comply fully with its terms.

We have treated the Letter very seriously. Dedicated professionals in the Department have spent countless hours trying to make sense of the vague and conclusory allegations it contains. We have found those allegations to be hollow. What is especially troubling here is that the Letter was largely premised on "facts" which are untrue and which were established on the record to be untrue at and before the Hearings. Nevertheless they were repeated in the Letter.

Repeated and unjustified attacks on the integrity of the Department tear down the institution and undermine our ability to advance justice. As Attorney General, I believe strongly that we cannot allow the criminal process to be used as a political weapon or for partisan purposes.

The accompanying Report comprehensively addresses the allegations contained in the Letter and at the Hearings. I hope we can now get on with conducting the Nation's business in a productive and professional manner.

Sincerely,

William P. Barr
Attorney General

Attachment 8

Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, APRIL 3, 1992

AT
(202) 514-2007
TDD (202) 514-1888

JUSTICE DEPARTMENT WILL CHALLENGE FOREIGN RESTRAINTS ON U.S. EXPORTS UNDER ANTITRUST LAWS

WASHINGTON, D.C. -- The Department of Justice announced today a change in antitrust enforcement policy that would permit the Department to challenge foreign business conduct that harms American exports when the conduct would have violated U.S. antitrust laws if it occurred in the United States.

"Applying the antitrust laws to remove illegal barriers to export competition makes sense as a matter of law and policy," said Attorney General William P. Barr. "Our antitrust laws are designed to preserve and foster competition, and in today's global economy competition is international."

The new policy, effective immediately, does not alter the jurisdiction of U.S. courts over foreign persons or corporations, Barr said. Ordinary jurisdictional principles will continue to apply.

Under the changed policy, the Department will challenge anticompetitive conduct such as boycotts and other exclusionary activities that hinder the export of American goods or services to foreign markets, the Attorney General said. For example, the Department would take action against a foreign cartel aimed at limiting purchases from U.S. exporters or depressing the prices

(MORE)

they receive, or a boycott of American goods or services organized by competitors in foreign markets.

Today's announcement resulted from a Department review of antitrust enforcement policy on export restraints.

It supersedes a footnote in the Department's 1988 Antitrust Enforcement Guidelines for International Operations that had been interpreted as prohibiting challenges to anticompetitive conduct in foreign markets unless there was direct harm to U.S. consumers.

Applying the antitrust laws to anticompetitive conduct that harms U.S. exports is consistent with the enforcement policy the Department had followed for many years prior to 1988, said James F. Rill, Assistant Attorney General in charge of the Antitrust Division.

"Our review of this issue confirms that Congress did not intend the antitrust laws to be limited to cases based on direct harm to consumers," said Rill. "As recently as 1982, Congress clarified the jurisdictional reach of the Sherman Act to cover cases of direct, substantial and reasonably foreseeable harm to U.S. export commerce.

"We have always applied our law to challenge foreign as well as domestic cartels aimed at raising prices to American consumers, and during most of this period we were prepared in appropriate cases to attack cartels aimed at our exporters, as

(MORE)

well. Today, when both imports and exports are of growing importance to our economy, we should not limit our concern to competition in only half of our trade."

Rill said the Department would continue its practice of notifying and consulting with foreign governments in antitrust proceedings that significantly affect their interests.

"Our concern is opening markets to competition," said Rill. "In most cases conduct that harms our exporters also harms foreign consumers, and may be actionable under the other country's antitrust laws. If the importing country is better situated to remedy the conduct, and is prepared to act, we are prepared to work with them."

Rill emphasized that the policy change has general application and is not aimed at particular foreign markets.

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92-117

Department of Justice Policy Regarding Anticompetitive Conduct that Restricts U.S. Exports

Statement of Antitrust Enforcement Policy

The Department of Justice will, in appropriate cases, take antitrust enforcement action against conduct occurring overseas that restrains United States exports, whether or not there is direct harm to U.S. consumers, where it is clear that:

(1) the conduct has a direct, substantial, and reasonably foreseeable effect on exports of goods or services from the United States;

(2) the conduct involves anticompetitive activities which violate the U.S. antitrust laws -- in most cases, group boycotts, collusive pricing, and other exclusionary activities; and

(3) U.S. courts have jurisdiction over foreign persons or corporations engaged in such conduct.

This policy statement in no way affects existing laws or established principles of personal jurisdiction.

This enforcement policy is one of general application and is not aimed at any particular foreign country. The Department of Justice will continue its longstanding policy of considering principles of international comity when making antitrust enforcement decisions that may significantly affect another government's legitimate interests. The Department also will continue its practice of notifying and consulting with foreign governments, where appropriate.

This statement of enforcement policy supersedes a footnote in the Department of Justice's 1988 Antitrust Enforcement Guidelines for International Operations that generally had been interpreted as foreclosing Department of Justice enforcement actions against anticompetitive conduct in foreign markets unless the conduct resulted in direct harm to U.S. consumers. The new policy represents a return to the Department's pre-1988 position on such matters.

If the conduct is also unlawful under the importing country's antitrust laws, the Department of Justice is prepared to work with that country if that country is better situated to remedy the conduct and is prepared to take action against such conduct pursuant to its antitrust laws.

Department of Justice Antitrust Enforcement Policy Regarding Anticompetitive Conduct that Restricts U.S. Exports

Background

The Change Announced Today Would Return the Department to its Longstanding Pre-1988 Enforcement Policy

The Justice Department's longstanding enforcement policy prior to 1988 was most clearly expressed in the Department's 1977 Antitrust Guide for International Operations, which identified two purposes served by the Antitrust laws' application to international trade: to protect U.S. consumers from restraints that raised the price or limited their choice of imported as well as domestic products and, separately,

> to protect American export and investment opportunities against privately imposed restrictions. The concern is that each U.S.-based firm engaged in the export of goods, services or capital should be allowed to compete on the merits and not be shut out by some restriction imposed by a bigger or less principled competitor.

Although the Department had brought few cases based solely on harm to exporters in recent years, it did not hesitate to bring such cases when there was evidence of a violation. For example, in 1982 the Department sued eight Japanese trading companies for fixing the prices they paid Alaskan seafood processors for crab to be exported to Japan. The case was settled by a consent decree. *U.S. v. C. Itoh & Co., et al.*, 1982-83 (CCH) Trade Cases ¶65,010 (W.D. Wash. 1982).

The Department's 1988 Antitrust Enforcement Guidelines for International Operations, however, indicated that harm to exporters would not be a sufficient basis for enforcement action unless there also was direct harm to U.S. consumers. While acknowledging that Congress had provided for actions against export restraints in 1982 when it codified Sherman Act subject matter jurisdiction in foreign commerce cases, the Guidelines stated that as a matter of enforcement policy,

> The Department is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.

The Department has never limited its antitrust enforcement to cases in which there is direct harm to consumers where the conduct in question is wholly domestic. The antitrust laws have always applied to anticompetitive conduct that harms producers as well as to conduct that harms consumers. For example, a buyers' cartel that suppresses the price paid to suppliers is treated in the same way as a sellers' cartel that raises the price charged to customers -- even though the immediate harm is to producers in the first instance and to consumers in the second. The 1988 policy, however, has been interpreted as precluding action against a cartel of offshore buyers who suppress prices paid to U.S. exporters, even though it has always been clear that the Department would act against offshore sellers' cartels that collusively raise prices to U.S. consumers.

The Policy Implements Existing Law

The enforcement policy announced today is fully consistent with existing law. The Supreme Court has confirmed that anticompetitive conduct that restrains American exports is actionable under the antitrust laws, and there is no debate about the law on this issue. Its clearest expression by the Supreme Court was in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969), in which the Court sustained Zenith's antitrust challenge to activities of a Canadian patent pool whose members conspired to give licenses only to firms manufacturing in Canada, and to refuse licenses Zenith needed to export U.S.-made radios and televisions to Canada.

Congress, moreover, endorsed the antitrust laws' application to conduct that restrains exports in the 1982 Foreign Trade Antitrust Improvements Act. 15 U.S.C. §6a. The Act amended the Sherman Act, and added a parallel provision to the Federal Trade Commission Act, codifying their jurisdictional reach over foreign conduct that has a direct, substantial and reasonably foreseeable effect "on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States." The Act was intended as a clarification of existing law, and was not seen as an extension of antitrust jurisdiction.

The Department Will Seek Cooperation With Foreign Antitrust Authorities

In adopting this enforcement policy, the Justice Department recognizes that a number of unique considerations can affect antitrust enforcement that involves parties or conduct outside the United States. The policy will operate within existing law, and will not alter the jurisdictional principles that determine when foreign firms and individuals are within the reach of U.S. courts.

The Department will also continue its longstanding policy of considering international comity principles when making antitrust enforcement decisions that may significantly affect another government's legitimate interests. Under this approach, the Department will continue its present practice with respect to notification and consultation with foreign governments. In most cases, conduct that harms U.S. exporters also harms foreign consumers who benefit from the availability of imported goods and services. Such conduct may be actionable under the importing country' antitrust laws. The Department of Justice is prepared to work with antitrust authorities in the importing country if they are better situated to remedy the conduct and are prepared to act.

Attachment 9

U.S. Department of Justice
Antitrust Cases
That Have Included Export Restraint Allegations

1. United States v. C. Itoh & Co., Ltd., 1982-3 Trade Cas. (CCH) Para. 65,010 (W.D. Wash. 1982). The United States brought a civil case against eight Japanese importers of Alaskan seafood products, alleging that the defendants had fixed the prices they paid U.S. seafood processors for exported crab. The case was settled by a consent decree, which enjoined the defendants from fixing prices and exchange certain price information.

2. United States v. Bechtel Corp., 1979-1 Trade Cas. (CCH) Paras. 62,429, 62,430 (N.D. Cal. 1979), affirmed, 648 F.2d 660 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). This civil case against Bechtel and three of its affiliated construction firms alleged that they had violated the Sherman Act by conspiring to refuse to deal with U.S. subcontractors blacklisted by Arab League Countries pursuant to the Arab Boycott of Israel and by requiring their subcontractors to do the same. This conspiracy restrained U.S. export of construction services and equipment by the boycotted firms to those Arab countries. The case was settled by a consent decree prohibiting the defendants from participating in the Arab Boycott.

3. United States v. Gulf Oil Corp., Crim. No. 78-123, Trade Cas. (CCH) Para. 45,078 (W.D. Pa. 1978). The misdemeanor information alleged that Gulf had participated in an international cartel which fixed prices on foreign-source uranium shipments to the U.S. and refused to deal with U.S. uranium "middlemen," including Westinghouse, which sought to purchase foreign uranium for reexport to its overseas reactor customers. The complaint charged that the effects of Gulf's conduct were to stabilize prices and allocate uranium sales among the cartel members. The case was terminated with a nolo contendere plea and a fine.

4. United States v. Westinghouse Electric Corp., 471 F. Supp. 532 (N.D. Cal. 1978), affirmed in part, reversed in part, 648 F.2d 642 (9th Cir. 1981). This civil case against one U.S. and two Japanese firms alleged that they had engaged in cross-licensing of patents in order to restrict imports of Mitsubishi products into the U.S. and imports of Westinghouse and other products into Japan. The complaint was dismissed because the government failed to show that the cross-licensing in this case violated the antitrust laws.

5. United States v. Diebold, Inc., 1977-2 Trade Cas. (CCH) Paras. 61,735, 61,736) (N.D. Ohio 1977). This civil case against a U.S. and a British producer of bank security equipment alleged allocation of customers, territories and markets between the U.S. and Britain. The consent decrees settling the cases enjoined restraints on imports or exports by the defendants.

6. United States v. Addison-Wesley Publishing Co., 1976-2 Trade Cas. (CCH) Para. 61,225 (S.D.N.Y. 1976). This consent decree settled charges against a group of American publishers that they had used American and British copyrights to allocate geographic markets for English-language books. The decree enjoined, inter alia, the use of import or export restrictions.

7. United States v. Foote Mineral Company, 1976-1 Trade Cas. (CCH) Para. 60,836 (E.D. Pa. 1976). The United States brought a complaint against a major U.S. and a major German producer of the element lithium, alleging that the defendants had allocated territories, thereby restraining U.S. imports and exports. The complaint was settled by a consent decree prohibiting the defendant from allocating markets or customers.

8. United States v. Standard Oil Co. of New Jersey, 1963 Trade Cas. (CCH) Para. 70,819 (D.D.C. 1963)(consent decree), and 1969 Trade Cas. (CCH) Paras. 72,742 and 743 (D.D.C. 1969) (superceding consent decree). This complaint against several major U.S. oil firms alleged a broad international conspiracy which, inter alia, restrained exports from the U.S. and restrained other U.S. petroleum firms from producing and refining petroleum in foreign countries. Among other things, the consent decree settling the case dissolved two overseas joint ventures of certain defendants.

9. United States v. The Learner Company, 215 F. Supp. 603 (D. Hawaii 1963). In this criminal case, the U.S. charged U.S. exporters of steel scrap with conspiring with Japanese scrap buying cartels to monopolize U.S. scrap exports to Japan, to fix prices and to exclude others from the export trade. Both Section One and Section Two of the Sherman Act were alleged to have been violated. The court denied defendants' motion to dismiss the indictment based on defendants' argument that the conspiracy was permissible because the Japanese cartels might be legal in Japan. The Court noted that a conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because some of the conduct complained of occurs in foreign countries. Two defendants pleaded guilty and the others were found not guilty by a jury.

10. United States v. General Electric Co., 1962 Trade Cas. (CCH) Paras. 70,342; 70,428; 70,546 (S.D.N.Y. 1962) These parallel complaints against GE, Westinghouse and Philips (a Dutch firm) alleged that the defendants had conspired with others to use a Canadian patent pool to restrict exports of radios and televisions to Canada. The complaint alleged adverse effects both on would-be U.S. television exporters and on U.S. consumers. The consent decrees settling the cases enjoined the firms from taking action to directly or indirectly restrict exports from the United States into Canada.

11. United States v. Scott Aviation Corp., 1961 Trade Cas. (CCH) Para. 70,148 (W.D.N.Y. 1961) This consent decree settled a civil case brought by the United States to enjoin a U.S. manufacturer of artificial breathing devices from imposing export restraints on its distributors. The decree enjoined the defendant from allocated customers, territories or markets.

12. United States v. B.F. Goodrich Co., 1958 Trade Cas. (CCH) Para. 68,994 (S.D.N.Y. 1958). This case involved an alleged international territorial allocation between two U.S. rubber companies and certain English firms operating an international patent pool. In the consent decree settling the case, the two U.S. companies were enjoined from entering territorial allocation agreements, price fixing, or restricting exports or imports from the U.S. market.

13. United States v. Hughes Tool Co., 1958 Trade Cas. (CCH) Para. 69,001 (S.D.N.Y. 1958) Hughes, a U.S. manufacturer of oil and gas well equipment, was alleged to have conspired with a German competitor to allocate geographic territories. The consent decree settling the case enjoined such restraints, including restraints on exports.

14. United States v. Holophane Co., 119 F. Supp. 114 (S.D. Ohio 1954), affirmed per curiam, 352 U.S. 903 (1956). In this civil case against an American producer of prismatic glassware, the United States alleged that it had conspired with a French and an English firm to allocate geographic markets. The Court held the market allocation to be a violation of Section One of the Sherman Act.

15. United States v. The Watchmakers of Switzerland Information Center, Civ. 96-170 (S.D.N.Y. 1954). This complaint alleged a variety of anticompetitive agreements among Swiss and American watch makers. According to the complaint those agreements were intended, inter alia, to prevent new competition in the U.S., to fix prices of Swiss watches in the U.S. and to prevent exports of U.S. produced watches to Switzerland and elsewhere. Litigated judgments against both U.S. and Swiss defendants were entered in 1962 in which the court found that defendants' conduct violated the Sherman Act. (See 1963 Trade Cas. (CCH) Para. 70,600, and 1965 Trade Cas. (CCH) Para. 71,352).

16. United States v. American Lead Pencil Co., 1954 Trade Cas. (CCH) Para. 67,676 (D.N.J. 1954). This consent decree settled a case against a group of American pencil makers which had agreed among themselves to refrain from exporting to foreign markets except by mutual consent and to avoid selling to markets where any one of them had manufacturing facilities. Among other things, the consent decree enjoined the defendants from restraining exports or allocating markets.

17. United States v. Diamond Dealers Club, Cr. 138285 and Civ. 76-343 (S.D.N.Y. 1952). These companion criminal and civil cases charged that two New York diamond dealers groups had boycotted the German diamond industry and anyone who dealt with it, to the detriment of U.S. exports. The cases were settled with a nolo contendere plea and a consent decree (see 1955 Trade. Cas. (CCH) Para. 67,987). The consent decree directs defendants to revoke any decisions that would restrain or prevent imports or exports of diamonds.

18. United States v. Imperial Chemical Industries, Ltd., 100 F. Supp. 504, (S.D.N.Y. 1951), 105 F. Supp. 215 (S.D.N.Y 1952)(decree). This civil case against various U.S. and foreign firms alleged that they had conspired to allocate exclusive geographic sales territories for certain chemical products, to the detriment of U.S. exports and imports. The court held defendants' conduct to be a violation of Section One of the Sherman Act and enjoined the restraints.

19. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951). The Supreme Court upheld a lower court determination that a U.S. company (the major producer of tapered roller bearings) and its European affiliates had violated Sections One and Two of the Sherman Act by allocating geographic territories, fixing prices and restraining U.S. imports and exports. This civil action was brought only against the U.S. firm.

20. United States v. Morton Gregory Corp., 1950-51 Trade Cas. (CCH) Para. 62,750) (N.D. Ohio 1951). This case involved an allocation of territories between a U.S. producer of welding equipment and certain foreign firms based upon exclusive patent and trademark licenses. The case was brought only against the U.S. firm. The court enjoined the defendant from entering any further agreements on market allocation or similar exclusionary conduct.

21. United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass 1950). In this civil action, the District court held illegal under Section One of the Sherman Act an agreement among American manufacturers controlling 80% of export trade in coated abrasives to establish jointly-owned factories abroad and to refrain from exporting from the U.S. to countries where such plants were located.

22. United States v. SKF Industries, Inc., 1950-51 Trade Cas. (CCH) Para. 62,708 (E.D. Pa. 1950) This case charged a Swedish ball bearing producer, its American affiliate and an Italian firm with an international market allocation cartel which, inter alia, restrained U.S. exports. The U.S. and Swedish firms were named as defendants. The consent decree settling the case enjoined the U.S. firm from further agreements on market allocation or similar exclusionary conduct.

23. United States v. United States Alkali Export Association, 86 F. Supp. 59 (S.D.N.Y. 1949). This suit against a Webb-Pomerene association and several of its members, along with a British firm, alleged that the defendants had entered into a series of agreements with foreign competitors to restrict U.S. exports and impede imports -- i.e., an international market allocation. The court rejected arguments that defendants' conduct was immunized by the Webb-Pomerene Act and subsequently found defendants guilty of violating Section 1 of the Sherman Act.

24. United States v. General Electric Co., 82 F. Supp. 753 (D.N.J. 1949). The court found that GE had monopolized commerce in light bulbs by a variety of means, including international territorial allocations with foreign firms for the purpose of keeping them out of the U.S. market. The complaint had alleged, inter alia, that GE and its co-defendants had monopolized interstate and foreign commerce. While the opinion focuses primarily on GE's conduct, it also notes that GE's co-defendant Philips (a Dutch firm) had engaged in restraints on U.S. exports.

25. United States v. Scophony Corp. of America, 1948-49 Trade Cas. (CCH) Paras. 62,356 and 62,463 (S.D.N.Y. 1949) This case involved alleged global divisions of territories for sales of television equipment between an American and a British firm. Both consent decrees ended the cartel arrangements; the consent decree settling the case against the British firm specifically enjoined, inter alia, restraints on U.S. exports.

26. United States v. General Electric Co., 1948-49 Trade Cas. (CCH) Para. 62,318 (S.D.N.Y. 1948). In this criminal case it was alleged and established at trial that General Electric, two of its subsidiaries and several of its employees had conspired with a German firm to allocate markets and eliminate U.S. exports and imports of hard metal alloys and tools and dies.

27. United States v. Rohm & Haas Company, 1948-49 Trade Cas. (CCH) Para. 62,334 (E.D. Pa. 1948). A U.S. maker of plastics was alleged to have conspired with three foreign firms to set up a global allocation of sale territories based on patent rights, inter alia, restraining exports from the United States. A consent decree was entered settling the case and enjoining the defendant from allocating markets.

28. United States v. The International Nickel Company of Canada, 1948-9 Trade Cas. (CCH) Para. 62,280 (S.D.N.Y. 1948). Inco and its U.S. subsidiary were alleged to have conspired with the German firm I.G. Farben, among others, to allocate world markets in nickel. The case was settled by a consent decree, which prohibited the defendant from allocating markets.

29. United States v. Electical Apparatus Export Association, 1946-7 Trade Case (CCH) Para. 57,546 (S.D.N.Y. 1947). This civil complaint had alleged that a Webb-Pomerene Association fixed foreign market prices and terms of sale between General Electic and Westinghouse and their international subsidiaries and that

export competition was eliminated. The consent decree settling the case dissolved the Association and enjoined further restraints upon exports of members' electrical equipment.

30. United States v. Norma-Hoffman Bearings Corp., Civil No. 24216 (N.D. Ohio 1946). The defendant and its 50% British shareholder were alleged in this civil case to have divided world markets and restricted U.S. imports and exports of roller bearings. A consent decree was entered in 1953 settling the case. (1953 Trade Cas. (CCH) Para. 67,523).

31. United States v. The Diamond Match Co., 1946-7 Trade Cas. (CCH) Para. 57,456 (S.D.N.Y. 1946). Various U.S. and foreign firms were alleged in this civil case to have engaged in an international market allocation for matches. The consent decree settling the case ordered, inter alia, that immunities under Swedish Match's foreign patents be given to U.S. producers desiring to export.

32. United States v. National Lead Co., 63 F. Supp 513 (S.D.N.Y 1945), affirmed per curiam, 332 U.S. 319 (1947). The court in this civil case held that three U.S. firms had violated Section One of the Sherman Act by participating in an international cartel which pooled patents and allocated markets. The Supreme Court opinion largely is confined to issues of appropriate relief.

33. United States v. Merck & Co., 1944-5 Trade Cas. (CCH) Para. 57,416) (D.N.J. 1945) Merck was alleged in this civil case to have conspired with a German affiliate to divide world markets. The case was settled by a consent decree prohibiting market allocations.

34. United States v. Westinghouse Electric Mfg. Co., Civil 5152 (D.N.J. 1945). Westinghouse was alleged to have divided trade territories for electrical equipment with two German firms. The case was settled in 1953 by a consent decree which, inter alia, prohibited restraints of U.S. exports. (1953 Trade Cas. (CCH) Para. 67,501).

35. United States v. General Dyestuff Corporation, 57 F. Supp. 642 (S.D.N.Y. 1944). The court upheld an indictment charging a world-wide division of territories in dyestuffs among U.S. and European firms, including restraints upon U.S. exports. The court dismissed an argument that such export restraints only harmed foreign consumers, finding that they nonetheless violated the Sherman Act. 57 F. Supp. at 647. Two defendants pled guilty and a jury found another defendant not guilty.

36. United States v. Imperial Chemical Industries (New York) Ltd., 1940-3 (CCH) Trade Cas., Para. 56,211 (S.D.N.Y. 1942). In this civil action, Imperial Chemical Industries (New York) and two of its officers entered a consent decree agreeing, inter alia, not to restrain the export of fertilizer nitrogen from the United States.

37. United States v. American Bosch Corp., 1941-3 (CCH) Trade Reg. Rpts, Supp., Para. 52,888 (S.D.N.Y. 1942) Bosch was alleged to have divided international territories with certain foreign parties for sale of various types of automotive and aircraft equipment. The case was settled by a consent decree.

38. United States v. Alba Pharmaceutical Co., 1941-3 (CCH) Trade Reg. Rpts., Supp, Para. 52,650 (S.D.N.Y. 1941) U.S. and German firms were alleged to have allocated international sales territories for various pharmaceuticals. The case was settled by a consent decree.

40. United States v. General Aniline & Film Corp., Cr. 111-136, and United States v. Dietrich Schmitz, Cr. 111-137 (S.D.N.Y. 1941). An American and a German firm and various individuals were indicted for dividing world markets in photographic materials. Nolo contendere pleas eventually were entered by the defendants.

41. United States v. Bausch & Lomb Optical Co., Cr. 107-169 (S.D.N.Y. 1940). In this criminal action, Bausch was alleged to have agreed with the German firm Zeiss that Zeiss would stay out of U.S. markets for military optical instruments and Bausch would stay out of other world markets. Bausch and Zeiss's U.S. subsidiary pleaded nolo contendere; Zeiss, the German parent, was dismissed from the case.

42. United States v. Franz Rintelen (S.D.N.Y. 1915) and United States v. Franz Bopp (N.D. Cal. 1916). These criminal indictments under the Sherman Act alleged conspiracies to prevent shipment of munitions to foreign countries through fomenting labor unrest and through acts of sabotage and violence, respectively. The defendants were convicted.

43. United States v. Pacific and Arctic Ry. & Nav. Co., 4 Alaska 530 (D. Alaska 1912), reversed, 228 U.S. 87 (1913). The Supreme Court upheld a criminal indictment charging the defendant with monopolizing certain transportation routes between Alaska and the Yukon, Canada. The Court rejected an argument that the indictment should be dismissed because parts of the monopolized routes were outside of the U.S. Subsequently, the individual defendants were dismissed and the corporate ones entered guilty pleas.

44. United States v. Aluminum Co. of America, 1 D & J. 341, Eq. 159 (W.D. Pa. 1912). Alcoa was alleged in this civil case to have monopolized and restrained commerce in aluminum, in part by allocating territory and restraining imports and exports. The case was settled by a consent decree.

ROLE OF THE DEPARTMENT OF JUSTICE AND THE DRUG WAR, WEED AND SEED

HEARING

BEFORE THE

SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

SECOND SESSION

MAY 20, 1992

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CONTENTS

	Page
Opening statements of Members:	
Charles B. Rangel, chairman	1
Lawrence Coughlin	2
James A. Traficant, Jr	3
Howard Coble	3
Kweisi Mfume	3
Frank J. Guarini	4
Jim Ramstad	5
Testimony:	
The Honorable William P. Barr, Attorney General, U.S. Department of Justice	6
Appendix:	
William P. Barr	35
Charles B. Rangel	52
Frank J. Guarini	57
Jim Ramstad	59

HEARING ON DEPARTMENT OF JUSTICE AND THE DRUG WAR, WEED AND SEED

WEDNESDAY, MAY 20, 1992

HOUSE OF REPRESENTATIVES,
SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL,
Washington, DC.

The committee met, pursuant to call, at 10 a.m., in room 2322, Rayburn House Office Building, Hon. Charles B. Rangel (chairman of the committee) presiding.

Members present: Charles B. Rangel, chairman, Lawrence Coughlin, Kweisi Mfume, James A. Traficant, Jr., Howard Coble, F. James Sensenbrenner, Jr., James M. Inhofe, Jim Ramstad, Wally Herger, Frank J. Guarini, William F. Clinger, Jr., Michael G. Oxley, James H. Scheuer, Donald M. Payne, Tom Lewis, George J. Hochbrueckner, and Benjamin A. Gilman.

Staff present: Edward H. Jurith, staff director; Peter J. Coniglio, minority staff director; James Alexander, press secretary; George Gilbert and Michael J. Kelley, staff counsel; Rebecca L. Hedlund and Steve Skardon, professional staff; Richard Baum and Melanie T. Young, minority professional staff; and Marianne Koepf, staff assistant.

OPENING STATEMENT OF HON. CHARLES B. RANGEL, CHAIRMAN

Mr. RANGEL. Let me open up the Select Narcotics Committee hearing and welcome our Attorney General here to speak about whatever he would believe is important to the Congress and specifically this committee, but most importantly, the concept and the program of Weed and Seed.

I would want to be the first to go on the record in indicating that in the 22 years that I have been in Congress, I have yet to meet an Attorney General that has been more sensitive to the problems that have caused so much violence and eruptions in our system which leads to incarcerations.

In my private conversations with you, I have been impressed with your sensitivity as to how America has now had incarcerated more people per capita than any country in the world.

But most of all, I appreciate your concern that you see the law enforcement and the Attorney General's Office as one that puts the wrongdoers away with a degree of speed and certainty, and at the same time has some commitment to try to keep people out of the system where society can be better served.

As a former prosecutor and recognizing how sometimes it is difficult for those in law enforcement to even think this way, I think

that your leadership in this area will go a long way, not only on the Federal level, but in letting police know that community police work, community involvement in education and recreation, and giving hope to generations to follow is important.

So even though with the past so-called Weed and Seed Programs, I have a lot of problem in finding the Seed being adequate or the way it is directed, again, I hope that this committee and this member can be a partner in assisting to redirect the formula so that we would feel some balance, that people can go into their communities not only safe from the criminals that should be in jail, but also safely knowing that our country has a concern that their children have opportunities that would allow them to avoid jails.

Mr. Coughlin.

OPENING STATEMENT OF HON. LAWRENCE COUGHLIN

Mr. COUGHLIN. Thank you, Mr. Chairman.

I want to join you in welcoming the distinguished Attorney General to this hearing and would ask that my statement be included in the record in full.

Just let me say that I want to commend the Department and the Attorney General for developing the Weed and Seed Program, which I think is an extraordinarily important program.

I was with the President last week in Pittsburgh when he had meetings on that program, and it is, indeed, significant that of the Administration's request for that program of $500 million, $30 million is for the Weed part of it, and $470 million is for the Seed part of it. So it is a significant effort on the Seed end.

I did want to mention very briefly two programs in Philadelphia which served as catalysts for the Weed and Seed program: the Violent Traffickers Project, a joint Federal-State task force which targets drug gangs and resulted in indictments of 600 members of 30 separate gangs and a conviction rate of 98 percent; and the Federal Alternatives to State Trials (FAST) Program, in which certain criminal cases are transferred from local to Federal courts, achieving the objectives of expedited trials in Federal courts and having sentences imposed under Federal sentencing guidelines. We have seen offenders receive sentences of 15 to 20 years for drug and gun offenses which they would not have received in State courts.

The success of these programs is really directly attributable to your Department and your leadership, which we appreciate. I would also mention your recent targeting of drug gangs by redeploying 300 FBI agents from the Foreign Counterintelligence Program to the Violent Gang Task Forces around the country. I certainly commend you for that and would appreciate your comments on that, as well.

I think it is important to recognize that law enforcement is frequently referred to only as supply reduction, but that is really not the case. It is also a deterrent to demand. After reviewing the Justice Department's accomplishments to date, there is little question that life for those who violate the law has become tougher, but law enforcement also deters crime, and that deterrent aspect of it is very important.

I wish I could say that the President's crime bill had been passed by the Congress as he proposed it. It has been three years since it was sent up here. It is still languishing in the Congress. I look forward to a discussion of these issues and any others that you care to bring forward, Mr. Attorney General.

Thank you for your service to the country and to the cause.

Mr. RANGEL. Is there any other member seeking recognition at this point?

OPENING STATEMENT OF HON. JAMES A. TRAFICANT, JR.

Mr. TRAFICANT. Mr. Chairman, I would like to make a brief statement.

I am a former sheriff and also operating for ten-plus years a multi-modality narcotic treatment program. I want to echo your statements. We have a very progressive Attorney General. He is looking at both sides of it in a holistic, comprehensive approach. I think it will serve the Nation well, and certainly the President and his administration and our whole country.

I want to say good luck to you. I think what you are doing meets with the approval of both law enforcement, the treatment and educational community, and the holistic, comprehensive approach that you have embraced is good for our nation.

I just want to say good luck to you and agree with all the statements that our chairman made.

I yield back my time, Mr. Chairman.

Mr. RANGEL. Mr. Coble.

OPENING STATEMENT OF HON. HOWARD COBLE

Mr. COBLE. Thank you, Mr. Chairman.

I have no prepared statement, but I want to reiterate what has been said about you to you, Mr. Attorney General. I appreciate your interest in this very severe matter that probably is at the root of the problems that plague this country more consistently than any other single source.

I refer to drugs as rat poison. You know what happens to rats when they consume the poison. Well, that is what happens to people when they consume drugs. It is a "no win" game, as we all know. In fact, it is an "all lose" game.

I think most people recognize that, but it appears to be an evasive target that we are having difficulty in embracing and controlling. So I look forward to hearing from you, as well, and, Mr. Chairman, I thank you for having conducted this hearing today.

Mr. RANGEL. Thank you.

Mr. Mfume.

OPENING STATEMENT OF HON. KWEISI MFUME

Mr. MFUME. Mr. Chairman, I do not have prepared remarks. I want to thank you, however, for convening us here. As most of us on this committee will witness, it has been a while getting to this point, and we are certainly happy to have with us the Attorney General who, in my estimation at least, appears to bring a genuine sensitivity to this position and certainly has made a very quick transition into the role of Attorney General.

There are a number of questions that most of us have about Weed and Seed, of course, and I assume that as we progress through the hearing today we will try to get around to all of those. I certainly have some question about the cost aspect of it and the fact that $220 million of it is supposed to be made available through earmarking funds from other programs.

So I hope the Attorney General counsel will shed some light on that and the fear that some people have that we are robbing Peter perhaps to pay Paul.

Also, I look with a great deal of anticipation, Mr. Attorney General, with you also being able to try to allay the fears of some people, fears that are born out of uncertainty because it is new in some respects and fears by some people that Weed and Seed is something that is perhaps targeted against them or will work against them.

So I welcome your comments. I am certainly glad that you are here. Particularly, as the chairman said, we are also happy that we did not get a letter or a subordinate or someone else, that you have come yourself. I think that is a strong statement about your concern about the items that this committee has before it.

We welcome those comments, and I thank you again for appearing.

Mr. Chairman.

Mr. RANGEL. Mr. Guarini.

OPENING STATEMENT OF HON. FRANK J. GUARINI

Mr. GUARINI. Thank you, Mr. Chairman. Thank you for having these hearings. It is very timely and very important in view of the tragedy in Los Angeles and the riots that have galvanized a great deal of support, to address the problems of our inner cities.

I also want to thank you, Mr. Attorney General, for your promptly being here and cooperating with the committee.

Both parties, Democrats and Republicans, are now trying to work and forge legislation to buy new resources for our inner cities, and the $500 million as proposed for Weed and Seed is certainly an important step in the right direction.

However, it must be pointed out that we have also at the same time cut existing programs, including public housing, community development block grant funds, which really go to inner cities, which is really key money that is very necessary and really is money that would be part of the concept of Weed and Seed.

So, therefore, those cuts, I think, are counterproductive. Now, we have in Trenton and we had hearings with Mayor Palmer in Trenton in my state, New Jersey, great success in regard to the Weed and Seed Program, and they have even committed some of their local funds because it is so important.

The Attorney General of New Jersey, Robert Del Tufo has even committed for community police additional monies taken from other law enforcement activities.

So we are trying to help ourselves on the local level, but we need a great deal of help, input and understanding from the national level, and you can provide that.

We do not want to build more prisons. We do not have the money to build more prisons. We want to be able to attack the problem intelligently and go to the core and heart of it, which is in our inner cities.

So I want to thank you very, very much for being here, Mr. Attorney General, and we will weed out, but we must spend more money in seeding.

Thank you.

Mr. RANGEL. I ask that the record remain open for my prepared remarks to be entered and all other members who have prepared opening statements, if there is no objection.

Mr. RAMSTAD. Mr. Chairman.

Mr. RANGEL. Mr. Ramstad.

OPENING STATEMENT OF HON. JIM RAMSTAD

Mr. RAMSTAD. Mr. Chairman, just very briefly, if I may, I do want to commend you, Mr. Chairman, for your leadership in this area, and, General Barr, I thank you for yours, as well.

Mr. Chairman, I just want to make one point. I have a prepared statement, which I intend to submit for the record. I do not want to take inordinate time, but I do want to make one point, Mr. Chairman.

It is time for this committee and this Congress to put aside politics as usual. These problems are too serious for business as usual in Washington, and the people are sick and tired of a Democrat approach or a Republican approach. We have got to be smarter, and we have got to cast politics aside and come up with a bipartisan approach to the problems of the inner cities and the problem of drug addiction and unemployment which go hand in hand.

I commend you, General Barr, and you, Chairman Rangel, because I believe that you are trying to do just that, and Weed and Seed in my judgment embodies the elements of a program that we need for the inner city.

I have more than a political or a passing interest in the problems of people with alcohol and drug addiction. I happen to be a recovering person, and I know what they go through every day of their lives. I understand this problem first hand, and I am very encouraged by the positive signs coming from the Weed and Seed pilot programs.

This week I picked up in my dentist's office a copy of Newsweek, and I read an article that I just want to share with the committee. It talked about the program in Trenton, New Jersey, where a $750,000 grant went to a small, new, community policing unit designed to get cops out of their cars and onto the streets where they could work in closer collaboration with residents.

A young woman, a florist by the name of Ina Ford, said that the sidewalk in front of her shop on Martin Luther King Boulevard used to be swarming with crack cocaine dealers, and thanks to the introduction of this program, with stepped up police attention and a better understanding of the drug problems, it restored a sense of cohesion to the area. She said, "We are coming together as a neighborhood."

Well, Mr. Chairman, I believe that is what we have to do. We have to come together as a neighborhood, and that is what Operation Weed and Seed is all about, getting communities involved in crime prevention and neighborhood revitalization, empowering people to take charge of their lives and their surroundings.

So I truly hope we can do this in a bipartisan way and deal with the Nation's problems because they are too serious for politics as usual.

Thank you, Mr. Chairman.

Mr. RANGEL. Mr. Barr.

STATEMENT OF THE HONORABLE WILLIAM P. BARR, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. BARR. Thank you, Mr. Chairman.

I have a prepared statement and ask that it be entered in the record.

Mr. RANGEL. Without objection.

[The statement of Mr. Barr appears in the Appendix.]

Mr. BARR. I would like to thank you, Mr. Chairman, Mr. Coughlin, and the other members of the committee for your comments.

I think the Department has had a very constructive relationship with this committee, and I am looking forward to carrying that out as we work on Weed and Seed and other issues that confront us.

I very much appreciate the opportunity to come up and discuss the Weed and Seed program with you. I know there are some questions about it, and I am happy to answer them.

We think it is a new idea, common sense idea, that provides a strategy for citizens in our inner cities to reclaim their neighborhoods and also to help them restore those neighborhoods, physically and economically.

I thank you, Mr. Chairman and Mr. Coughlin, for your leadership particularly in helping us develop this project and supporting our early efforts to get this underway.

I think it is time, as Congressman Ramstad said, that we pull together here. These are serious issues facing our cities and our country, and now is the time to move beyond politics and try to work this out in a bipartisan fashion.

In fact, like in so many other things, out in the field where these programs are getting underway in our demonstration cities, the people out in the field have moved beyond politics. They are working together. There is no Republican and Democrat out there. There are Democratic mayors working with Republican prosecutors, working with community groups, and so forth, and I think that is the kind of spirit we need here in Washington to get this kind of program underway.

I will let my prepared statement really speak for itself. I would sort of like to just spend a moment on the overall philosophy here because I think that is important.

This is really not so much a new spending program, although we can talk about level of resources. It is really a strategy and a method of applying our resources in a way that I think is a smarter way of doing it and one that will bear better results.

I think the program recognizes two important facts or realities. One is I think we have to recognize that our efforts at social rehabilitation or revitalization of our cities, which is critical and should continue, has to go hand in hand with strong law enforcement, a holistic approach as Congressman Traficant said.

I think we have to recognize that things have reached a level in our country where serious crime is, in fact, contributing to poverty. It is a serious problem in our inner cities, and the principal victims of violent crime in our society, and I know I do not have to tell the members of the committee this, are the minorities and the inner city residents. The crime rate in the suburbs is lower. The real brunt of the violent crime problem is being borne by minorities and inner city residents.

In many of our communities in the inner cities, there is a pervasive atmosphere of fear. In my first six months as Attorney General, I have traveled around the country, and I have gone into the inner city communities, and I have gone into the housing projects. I have gone to the schools, and community centers. I have been to boot camps where kids who have gotten in trouble have been assigned, and tried to learn as best I can about the dynamics there.

One thing that struck me on my trips is the rows and rows of houses of the law-abiding citizens in many of these communities that are barred up, bars on the windows, bars on the doors, and really in a sense prisoners in their own home.

I remember I was in Trenton and went into a mini-police station. There was an older woman there who said to me, "Mr. Barr, when are you going to make this community safer? I am in my golden years, and my husband and I should be enjoying our lives. Instead we live in perpetual fear of these drug dealers," and so forth.

In another housing project in Fort Worth where a drug trafficking gang had just been taken out, the residents came out of their houses talking to me and the mayor and saying this was the first time in many months that they actually slept in their beds. Normally in that housing project people sleep on the floors because they are afraid of the bullets ricocheting.

I think that poverty does contribute to crime obviously, but we are caught in a vicious cycle where crime is contributing to poverty. It is playing a role in the decline of our neighborhoods, deterring investment, and it is making it difficult for many of our projects to reach their full potential.

One commentator, I think, wrote an interesting description which sums up the impact that crime can have on the neighborhood and the community. He says:

> Neighborhood deterioration usually starts with an increased sense of fear and vulnerability. Commerce slows. People go elsewhere to shop and stay off the streets in the evening. Stores put in alarms and bars on the windows. Going out of business sales increase, and as businesses change hands, the quality of the merchandise declines and prices rise. Buildings get shabbier and some are abandoned. Disorderly street behavior increases. Investments and loans dry up. People who can afford to move out of the area do. Schools deteriorate, and the community slides down the spiral of economic and social decline.

I do not think we can have two standards in this country, two standards of justice or two standards of public safety, one in the suburbs and one in the inner cities. I think all citizens in the

United States have a right to be protected so that they can go about pursuing their dreams and opportunities.

So I view the law enforcement component of this as an essential part of rebuilding our cities because I think it provides the foundation upon which our other programs can be built and can bear fruit and be much more successful than they have been.

I think we have to recognize though, and I think people in law enforcement are the first to recognize it, and that is that law enforcement alone cannot offer the long-term prospect of the safer America. Law enforcement alone cannot do the job.

We need sustained commitment to the development of our neighborhoods and communities, and we do have to address the conditions that contribute to crime. We do need jobs and economic opportunity. We need education. We need youth programs. We need drug education and prevention programs, job training, the whole host of strategies and economic opportunity to deal with these problems.

Because, as you say, the cost of dealing with them in terms of crime is very high, not only the cost of crime itself, which is so high, but the law enforcement cost of dealing with a violent offender.

Weed and Seed, I think, links up our efforts on the social side and the law enforcement side so that each side can support the other, and I think that way law enforcement is more effective and the social programs will be more effective.

Another thing that the Weed and Seed approach does which we think is common sense is to integrate the social side more than it has been and coordinate it more than it has been. I think we have had a tendency here in Washington to have the different grant-making agencies go off and each do their own thing, so to speak, with one department giving a youth grant over here and another department giving a high risk youth grant here and another a drug grant there.

Those three grants may have been great if they worked together and reinforced one another, and yet they may just be given out willy-nilly to different neighborhoods without regard to where we could have the most impact, and I think trying to bring some cohesion to our efforts is one of the benefits of Weed and Seed.

Then another area, of course, is that Weed and Seed is designed to embrace the concept of enterprise zones, which provides a powerful incentive to attracting investment and job opportunities and economic growth, which has to be part of the solution.

The second reality, I think that Weed and Seed addresses is the need if we are going to have a chance of reducing crime and rebuilding our cities and our inner city communities; that we have to do so by building a broad coalition that engages all segments of the community in a working partnership.

Law enforcement has to work together with the community, and I think back in the 1970's we got into the business of applying technology to law enforcement and putting police in cruisers and relying heavily on communications equipment and moving very aggressively to the model of response policing, with the 911 and the dispatchers, and so forth.

What that has done is that has undercut the fundamental bond that has to exist between law enforcement and the community, and what we have going on around the country, and it is a reform that police departments themselves are in the vanguard on, and that is bringing the police back into the community and working as a team, as partners with the community itself, because that leads to better and more effective and safer communities, and as importantly, it breaks down the distrust that exists sometimes on both sides, on the community's side and on the police side.

I think long term this is the wave of the future, and the Weed and Seed Program on the law enforcement side tries to reestablish that bond. It is supporting the community policing concept.

But I think also that we have to be partners on the social side, as well, and I think too often in the past we have sort of parachuted in programs and dictated a lot to the community itself about how we wanted the community to do its business and the people to do their business, and I do not think we have given enough credit to the fact that there are solutions and problem solvers in the community itself.

I think the Mayor of Trenton has a good line I like to use that I stole from him, Mayor Palmer, who says, "We may need help, but we are not helpless." And I think too many programs in the past in the way they have been applied sometimes treat the beneficiaries of the programs as helpless in an overly paternalistic way.

So part of the Weed and Seed concept is to have the community involved in the solutions at the table, to be part of the decision-making process as to how to make the community safer and how to provide these programs. So an essential ingredient of the program then is the community involvement, and we see our role more as helping and supporting those local efforts where we think ultimately the solutions lie.

I think most of you know how the program works, but I will just very briefly summarize it. The first step, and this does not necessarily mean chronologically, but conceptually a first step is a unified law enforcement effort working, again, in partnership with the community to identify the criminal problems in the community, the safety threats, the gangs, the drug dealing, and to attack those criminal problems aggressively and with the support of the community.

Then as those threats are dealt with, install community policing, bringing the police closer to the community and providing the presence and the safety that really the community demands and deserves.

Finally, a broad panoply of programs, Federal, State, local, private, public, are then brought to bear in a coherent way in that community to solve problems and to provide, to seed in, the long-term stability and growth that is needed.

Now, we have 20 demonstration projects underway, and we got them started very quickly this year because we did want to hit the ground running, get out there, start building support for this approach, start learning more about what was necessary and better ways of approaching the job, and we have these demonstration projects out there.

But we would like to substantially expand the program this coming year, and the President is asking for a total of $500 million in the program. As you know, part of that is tied to the passage of the enterprise zone legislation.

Now, I think there have been some questions raised about whether this is all Weed and no Seed, and I think you would recognize, Mr. Chairman, as we discussed earlier, that that is really an unfair criticism at this stage because, admittedly, the Department has mostly Weed money, and we got this underway this year so we could have a running start for fiscal year 1993. Most of our money is by necessity law enforcement money.

But even Justice grant money that we are using this year in our demonstration projects, 38 percent of that goes to law enforcement or suppression activities. Thirty-seven percent goes to community policing, and 25 percent goes to Seed programs like Boys and Girls Clubs, Safe Havens, those kinds of programs.

So some of the Justice Department money even this year is going to Seed, but we need more Seed money, and I think that the basic ratio set forth in the President's proposal demonstrates our concept. It is actually $510 million, I believe, but out of that amount, $480 million would be Seed money and $30 million would be Weed money.

So we understand that we do need the Seed to go with the Weed, and we need a lot more Seed than we currently have right now.

The other aspect of the program, and this will be my final point, is the leveraging effect of it because part of our requirement for Weed and Seed is the State governments and the local governments and the private sector, businesses or development councils or what have you, foundations, come to the table and have a willingness to provide resources to this effort.

So we have substantially leveraged the Federal resources this year in our program, and I think out of 11 sites, we have put in $12 million across the board, but out of 11 sites, we have more than $100 million in State and private resources going into the same projects. So that is mostly Seed money.

So just a little bit of Weed money can generate a lot of Seed money, and I am now going to close these remarks, and I would be glad to answer questions, but just let me go back and again thank you for your interest and this committee for its interest in this program, and I look forward to working with the committee to see if we can get this thing moving.

Mr. RANGEL. Thank you, and I am confident that no matter what the questions are, it is not going to take us off track as to the leadership that you have provided, and we are partners and, indeed, equal partners. So any thrust that we have is only for the purpose of trying to improve when we find the flexibility to do that.

I have found, or the committee has found, that the Justice Department does an extraordinary job when it comes to coordinating local and State law enforcement activities. The single most important exception, of course, is the City of New York, with your high intensity drug area program, where a recent hearing with Governor Martinez appeared to correct some of the inequities there.

Who do you envision as being the coordinator of the so-called Seed program, the social and education programs?

Mr. BARR. The overall coordinator of the program as a Federal program, we see the U.S. Attorney playing a role, which is largely a role of pulling the people together and keeping the people moving to achieve a common objective.

But generally in the cities, what is happening and what we think is a good idea is basically somewhat of a bifurcation, a task force that focuses more on the Weeding and then a task force that focuses more on the Seeding, and most——

Mr. RANGEL. Both are operated by the U.S. Attorney's Office?

Mr. BARR. No. Usually the Seeding part is headed—that task force is usually headed—by, I think, most commonly the mayor.

Mr. RANGEL. Good.

Mr. BARR. Or it could be someone else. In another city, for example, I think the mayor's office has designated a private citizen.

Mr. RANGEL. That is good. At least it is flexible.

Mr. BARR. Yes.

Mr. RANGEL. The second thing is that you and I and others have talked about this new proposal prior to the incidents which tragically occurred in Los Angeles. Since that time the President has met with you and other Cabinet officials in terms of preparing some legislative package to alleviate the conditions in areas that have this same potential as Los Angeles does.

How does this Weed and Seed concept fit into whatever package may be presented to the Congress?

Mr. BARR. Well, I think in his meetings with the leadership, the President has listed his priorities and what he would like to see in a package. The leadership has, I think, expressed a lot of those things they are sympathetic with and agree should be part of the package, and have some additional things that they think should be part of the package.

I think, in fact, today there are some discussions going on to see whether or not there can be some agreement, but the President would like to have Weed and Seed as part of the package.

Now, on the specific other elements, the one that is most closely related to Weed and Seed is the enterprise zones because we see Weed and Seed and enterprise zones reinforcing one another and going together.

Does that answer your question, Mr. Chairman?

Mr. RANGEL. Well, it does, but I assume that the President sees many other things going into the package besides the enterprise tax incentives, besides the Weeding of the criminal element, and that the Seeding has to be those things that Lynn Martin——

Mr. BARR. Right.

Mr. RANGEL [continuing]. And I do not envy the Secretary of Education, but we meet with him this afternoon.

In any event, I assume the entire Cabinet comes forward with those types of programs that are not necessarily Great Society programs, but programs that are designed to give more opportunities to people finding themselves in the situation, and that the enterprise zone could be the vehicle that would include Weed and Seed and other social and education programs.

Mr. BARR. That is correct.

Mr. RANGEL. My last question is then I could assume that the criteria of these areas that would be selected would be different

from the Weed and Seed Programs that you have in the past, since we do not know and it is not important now as to how you selected them, but the new legislation certainly would describe in detail as to what makes a community eligible for this type of treatment.

Mr. BARR. That is right. Although the criteria would in some cases be similar, high crime areas, high unemployment areas, those are some of the criteria we use; some large cities, some smaller cities.

We put a lot of emphasis on this first round of demonstration projects on existing programs, existing relationships, things which we knew we could get underway quickly because of the method of operating, and so forth, and the relationships that existed in those jurisdictions.

I think now there are a lot of cities that are getting Weed and Seed Programs started without new resources, without the Weed and Seed grants, what we call Level 2 Weed and Seed, in the expectation that they are going to be applying for Weed and Seed for fiscal year 1993.

So a lot of the infrastructure is now being put together. The steering committees, the groups are coming together. So I think there will be a lot more opportunity for cities to participate across the country.

Mr. RANGEL. Exactly, and we will know that new criteria. I mean I am not objecting to what Justice has done. It does not make any difference, but we will be able in the Congress at least to see what factors are necessary for a community to be eligible.

Mr. BARR. Yes.

Mr. RANGEL. Mr. Coughlin.

Mr. COUGHLIN. Thank you, Mr. Chairman.

You indicated in your prepared testimony that in implementing a Weed and Seed Program, you organize a steering committee, and you work through target neighborhoods and community-based organizations. I have two questions on that point.

One, it is obviously important that this be a very carefully targeted effort to the very neediest communities, and not be looked upon as some sort of panacea for urban redevelopment or something like that.

How do you assure that it is targeted?

Mr. BARR. Well, in the grant proposals, the steering committee has to pick, and it is part of the grant application, pick a particular community that meets the criteria that the chairman was talking about. So it is a designated neighborhood. You can see it on a map. That is the Weed and Seed area.

Mr. COUGHLIN. Last week we had what I thought were some extraordinary hearings on community-based organizations. It is very difficult to go into a neighborhood which is only part of a city perhaps and deal with that neighborhood unless you have some basis to deal with it. These community-based organizations were the people you could deal with on a local basis.

You mentioned in your prepared testimony community-based policing. Now, do these organizations have a part in that, and how do you encourage the development of these organizations where they do not exist, these community-based organizations?

Mr. BARR. The answer to the second part of the question first. We do not have as part of this program an effort to create community organizations where they do not exist. Frankly, we think the place to start this program anyway is where there is already strong community support and sentiment for this kind of effort, and those are the communities where it is most likely to succeed initially, and I think that is the place we should start our efforts.

The first part of your question is the role of community policing, and they obviously do have a lot to say about it because it is done with the support of the community. Community policing is not imposed. It is something that the community wants and supports.

It involves, as you know, the police staying out with the community, knowing the people in the neighborhood, having a mini-station or offices in the housing projects or on the block, and staying in close contact with the community, and the community leaders regularly meeting with the police to solve problems.

Mr. COUGHLIN. One of the things that this committee is considering as a result of the hearings we had on community-based organizations is developing some kind of handbook on how you go about doing this because some of these organizations have been very successful. In other areas where there is great need, these organizations that are so important to the Weed and Seed Program do not exist.

Would such a handbook be a good idea?

Mr. BARR. It probably would be a good idea. I am not sure we need that for Weed and Seed because right now, in most of the cities, there are active community groups who want to improve their life in their community.

There are organizations nationally that are in the business of going out and helping to develop these community groups. I am thinking of, for example, like the Southern Christian Leadership Conference with their Wings of Hope, which relies heavily on black churches, and other similar groups are heavily involved nationally in going about and developing the community organizations and infrastructure that is necessary.

In fact, we are working very closely with those national organizations. In fact, in seven of our current Weed and Seed cities, we have a working partnership with the Southern Christian Leadership Conference Wings of Hope Program because it is so involved in the community.

Mr. COUGHLIN. And finally, obviously the Weed and Seed Program, under the leadership of the Department of Justice, involves coordination among various different departments, particularly in the Seed part of the effort.

How comfortable are you with the level of cooperation that has been obtained between the various departments that administer all of these programs under the leadership of the Department of Justice?

Mr. BARR. I am very comfortable with it now. People are pitching in, and I hope it is not just the spirit of the post-L.A. period, but right now people are very enthusiastic about it, and I do not think it is going to pose a problem at the Federal level.

It also requires a lot of coordination and team work at the local level. It is a full-time job keeping people moving together, but so

far people in the demonstration projects have been very enthusiastic about it.

Mr. COUGHLIN. Thank you, Mr. Chairman.

Mr. RANGEL. Thank you.

Mr. Mfume.

Mr. MFUME. Mr. Attorney General, Baltimore is not one of the 16 cities that were listed as demonstration cities, and as the chairman said, I am sure there will be some clarity and some crystallizing, at least, of the criteria that will be used for future selections.

But there are a couple of things I do want to say about what we are doing there, some of which you and I spoke privately about earlier, and they go to the core, I think, of the things that you have explained as the process under which Weed and Seed were to occur.

We have a unified law enforcement effort working with community groups to identify gangs or other problem areas or specific individuals, if necessary. We have installed community policing against the doubts of many people and against some resistance, I should say, on both sides, but it is starting to work, and it is working very, very well there, and we have been able to leverage local and State efforts, as well as private sector efforts, to bring about a sense of change.

The Nehemiah Project, which now has 300 units of housing not scattered, but in one community, which has revitalized the entire community, where crime has gone down and a great deal of pride has been on the rise, as well as the efforts of the BUILD organization, Baltimore and United in Leadership Development, the churches and some of the other civic groups.

We would like very much under this next round to be considered because, quite frankly, we think that we have been out in the forefront in this, and it has been difficult. It is difficult to reinstill a sense of pride in communities, but I go back to the statement you made that was borrowed from the Mayor of Trenton. These communities need help, but they are not helpless. They just need an opportunity to do those sorts of things.

If we get to the point of fruition with regard to Weed and Seed, I would certainly ask that you take that into consideration.

I need for you, Mr. Attorney General, if you would, to explain the funding process as you see it because it is my understanding that $220 million of the funding is being earmarked to come from other programs, and I would like to get some sense of what other programs the Administration has in mind in terms of diverting funds, and if that is incorrect, perhaps you can correct it.

Mr. BARR. OK. I think it is probably fair to say that the Weed and Seed Program is a mechanism for applying resources. First we have the law enforcement resources, and as I said, that is $30 million, and I think most of that is so-called new money. That is new appropriations we are seeking.

The Seed money is really earmarking money. It is not taking money out of a program and shifting it to another program. It is earmarking a percentage of other programs, whether it be 1, 2, or 3 percent of grant money, for example, and it requires that that money be applied through the Weed and Seed mechanism.

To give you some examples, for instance, the Job Training Partnership Act money. That would be $28 million of that fund. Another example would be the Job Corps, at $50 million. Head Start would be $54 million.

Those are examples. I could go through the whole list if you would like.

Mr. MFUME. Is that cooperation? I mean I understand this is a presidential policy, and I would assume that there have been Cabinet meetings where representatives of secretaries of other agencies may have expressed some concern or some support, for that matter.

But is it fair to assume that there is a genuine consensus within the entire administration that these transfers will occur and that they can occur without damaging the existing efforts of the agencies?

Mr. BARR. Yes. In fact, we have already set up a deputies' committee meeting with the deputies of all the agencies to meet regularly on Weed and Seed to be sure that it is being implemented; and there is consensus that this is the proper way to go.

Now, one of the things we would like to have legislation for is to permit some kind of waiver mechanism because some of the ground rules for some of these programs are so—over the years they have grown up with so much red tape that sometimes in order to get some money into a particular neighborhood, there just does not seem to be a way to get there from here unless we have some kind of waiver authority.

So we would like a little bit more flexibility, but the statute that we have proposed would make it clear that we cannot use that waiver to defeat the purpose of the program or to do something that would not be safe.

So we do need a little bit more flexibility under the law to make it work as efficiently as we would like to make it work, but right now the agencies are committed to using this money to help on the Weed and Seed approach, and the more that I think the other Cabinet secretaries have been out on the road and have seen some of these sites, they come back very enthusiastic about it.

Mr. MFUME. Has the Administration, at least to the best of your knowledge, made plans for introduction of the legislation?

I do not know how dependent the transfer is on the legislation or whether or not it is a significant enough amount for them to wait any longer. Has a bill been sent up?

Mr. BARR. I think we have sent up a bill, and we are talking with members of Congress about introducing it.

There are two ways that we could go here. This could be done through appropriations, which has some advantage of not requiring sequential referral or referral to a broad number of authorizing committees.

On the other hand, there could be authorization legislation, as well.

Mr. MFUME. Mr. Attorney General, my time is just about up. Let me ask one final thing if I might that is an aside to all of this, and that is that after the tragedy in Los Angeles, many of us wrote you and wrote the President asking at least for some consideration as

to whether or not there was the potential that civil rights violations had occurred.

And we recognize that what you have to do will take some time, but you must recognize also that for some of us there is a great deal of pressure and concern coming from the people we represent as to whether or not their Justice Department is, in fact, moving with dispatch in this area.

Is there anything you could tell myself or members of this committee or the American public, for that matter, to assure them that you are moving towards some sort of conclusion with regard to your own review of the case?

Mr. BARR. Yes. There are two things I would like to say in response to that. First is to take the opportunity to sort of lay out the chronology, and I am glad you have given me the opportunity to do it because I think there may be a perception that the Justice Department was prodded into this or only took this step because of the riots.

This Federal investigation was started at the time of the Rodney King incident. As we do in all of these cases and have done for decades, when we think that the State in good faith, as this prosecutor, the District Attorney, was coming in to handle the case and was going to bring it to trial, we hold our case in abeyance until the completion of the State proceeding. That is our normal policy.

But here, in fact, there was another compelling reason to do that, which is there was a California statute which would have meant that if the Federal Government had gone first, we could have blocked any further State action. So by sequencing it as we have with the State going first, it kept the potential of the Federal Government going second so that there will be two investigations and potential proceedings.

Within an hour of that verdict, we were moving to reactivate our investigation and directed prosecutors to go out to California to press ahead. There were statements issued in L.A. and from Washington that afternoon, after the verdict, that this is not the end of the process. We are moving on our case.

Unfortunately, with all of the news of the riots, that did not get out into the public consciousness. So the first point I want to make is we were not prodded into this. We were on this case from the beginning and intended to pursue it as we have.

We have sent out top prosecutors. I think one of the most seasoned, highly regarded prosecutors in the Civil Rights Division is heading the case, and in fact, I saw that some civil rights groups had put out a press release applauding his role in it because of their experience with this particular individual, and we have all of the investigative resources we need.

The timing of this is dictated by the professional requirements of the team that is doing it. No one would like more than me to explain in detail why time might be necessary, but as I have said over the last few days, whatever time is being taken is essential so that if a case is brought, it is a winnable case because I think people want to make sure that if we go ahead with this, the Federal Government is going to win the case.

So we have to put in the time now because we have the tools, the grand jury, and so forth to fully develop the information. I wish I could be more specific, but——

Mr. MFUME. Oh, no, I know that you cannot. I am glad that you are at least on the record with that. Again, my time has expired. So I want to thank you for your appearance here and go back to something that was said earlier, and that is that I think you will find that you have the full support of this committee, Republican and Democrat, as it relates not only to this Weed and Seed Program, but to your general approach and the enthusiasm and the sincerity that you bring to your job.

Mr. Chairman, I know I have overstepped my time. So I will conclude. Thank you.

Thank you, Mr. Attorney General.

Mr. BARR. Thank you.

Mr. RANGEL. Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman. First of all, I would like to add my words of praise and of welcome to you, Mr. Attorney General. Three previous members of the committee who have asked you questions all represent urban areas, and urban area problems are, indeed, pressing. We saw a demonstration of that tragedy on television when the Los Angeles riots occurred.

However, let me strongly urge you not to forget the suburban and ex-urban areas because the problems of drugs and the problems of gangs are there, as well. It seems to me, if there is a concentration of Federal effort in the urban areas only, we are just going to see the criminals move out into the suburban areas. Then we are going to have a problem that has spread and one that is going to be even more difficult to get under control.

I would just like to say that Mayville, Wisconsin, which is in the district I represent, has had numerous published reports of gang activity. This is a small town of about 6,000 population 50 miles northwest of Milwaukee. Gang activity, drug peddling, and the crime that goes with it simply is not only in the central city areas. It is all over the place, and as a national government, I think we are going to have to address that problem wherever it occurs.

Now, having said that and given my sermon, let me ask you one specific question. Last year I spent quite a bit of time as the ranking Republican member on the Crime Subcommittee of the House Judiciary Committee, putting together what ended up being the Democratic Crime Bill. While I did not support most of those initiatives, there was one initiative I thought was a good one, and that was some seed money relative to putting cops on the beat.

Because it seems to me there has been an alienation between the law abiding public and the police force as a result of changes in actual street crime policing; where the cops have gone from walking the beat to being in the squad car, and the only time citizens really have an opportunity to deal with the police is when they have to make a 911 emergency call.

Police-community relations with the vast majority of the public, whether it is in the city area or suburban area, would be improved with face-to-face dealings with the police as the police are working,

and not in an emergency situation when a crime has occurred or there is a medical emergency or a fire or something like that.

Let me ask you what the Department is doing along that line because I think that is a way of preventing gangs and the drug pushing and the crime that goes with them from expanding out of the areas where it is now into other areas which so far have escaped this scourge.

Mr. BARR. We are approaching it two ways currently. We have given grant money from the Office of Justice Programs specifically to assist community policing programs in various cities or towns to get underway and serve as demonstration sites so that we can promote the idea of community policing nationally. So those have been direct grants, and I cannot give you the exact amount. It is about $20 million in grants over the last two years I am told.

Then the other way is through Weed and Seed, where a high percentage of the Weed money goes to promoting community policing.

I think part of the solution also has to be the city leadership, the local leadership recognizing that we do need investment in public safety and community policing does not come cheap. We need to have these people out in the communities.

Mr. SENSENBRENNER. Community policing is a very nebulous term. My question was about a specific program to get the cops out of the squad car and onto the streets.

Mr. BARR. That is what we do.

Mr. SENSENBRENNER. You know, and I know that there are all kinds of ways to use community policing, such as getting the police involved in things like Boys and Girls Clubs, which I support in concept. But, you know, Mr. Attorney General, the bottom line, in terms of this phase of how to make our neighborhoods safer is to give people an opportunity to interface with the police when they do not need them.

Getting the police out of the squad car and walking up and down the street, I think, will give the police a heck of a lot more information on what is going on in the neighborhood and perhaps be able to get some illegal activity nipped in the bud rather than simply having them sit in the squad car listening to the radio and then turning on the blue lights when there is a 911 call and appearing on the spot.

Thank you very much for being here.

Mr. BARR. Thank you.

Mr. RANGEL. Mr. Inhofe.

Mr. INHOFE. I have no questions.

Mr. RANGEL. Mr. Ramstad.

Mr. RAMSTAD. Mr. Chairman, just one question to which Mr. Sensenbrenner opened the door in terms of talking about the crime bill. I know this hearing is not about the crime bill.

But nonetheless, will there be an effort on the part of the Administration to come up here and talk to the Democratic leadership, Republican leadership and try to get at least the consensus elements, including the Weed and Seed Program, from the crime bill and put together a bipartisan crime bill before the end of the year?

Mr. BARR. The answer is yes, but I do not think Weed and Seed has to be part of the crime bill. It is not now, and I think we can

move on Weed and Seed separately, but we would like to see a crime bill and would like to talk further about whether we can get some kind of agreement on a crime bill that everyone can go forward with, and I am willing to do that.

Mr. RAMSTAD. Certainly, and Mr. Sensenbrenner underscored the community policing element of that crime bill, and there are other good elements. I happen to be one of only six or seven members of this side of the aisle who supported the crime bill because I thought there was more good in it than bad, and I certainly don't want to open the door today to a debate on habeas or the exclusionary rule or the Fourth Amendment.

But nonetheless, I really believe, again, we have to put politics as usual aside and come up with a reasonable, responsible crime bill, and so I encourage your efforts in that regard, Mr. Attorney General.

Mr. BARR. Thank you, but let me just use that comment as an opportunity to point out that the crime bill has a substantial amount of money authorized in it, but of course, the key is getting the money appropriated.

And just as some people are concerned about whether certain social programs are stealing money from other social programs, the way things looked for the law enforcement budget last year and now they way they look this year is very bleak.

Last year we were hurt on appropriations. The President's budget request was substantially reduced. So we basically had very little growth in our law enforcement, and so a lot of programs we wanted, such as in the rural areas, we have not been able to do.

Now, this year the budget situation is such that we are very concerned about our appropriations for law enforcement. I just want to take this opportunity to ask members of the committee to take a look at that and support the President's budget for law enforcement because these are the resources we need to get out there working with State and local law enforcement to do a better job.

If we have two flat years in a row, we are really going to be hurting.

Mr. RAMSTAD. And just as a final comment to that, I think the fact that all 13 major law enforcement associations, cops who work in the real world of crack houses and who deal with these problems every day of their lives, support those elements to which you speak.

So I believe it is essential that we get together and address that crime bill.

Mr. BARR. Thank you.

Mr. RANGEL. Mr. Guarini.

Mr. GUARINI. Thank you, Mr. Chairman.

Mr. Barr, on the law enforcement side, you as the Attorney General's Office alone are getting $93 million more in the President's budget than the previous year.

Mr. BARR. This year?

Mr. GUARINI. That is right, and we are squeezing money to try to find money for our inner cities. The new money is not $500 million. It is only $280 million. $220 million was already money that was going to the cities.

What we have is some programs that have been worked and relied upon by local governments, like CDBG monies. We have a

request for a cut of $500 million; a cut for modernization of public housing of $509 million. They cut $46 million from the Job Corps and $28 million from the Job Training Partnership Act.

Those are all programs that are key for our State and monies that would otherwise be appropriated for inner cities. So sometimes I think we are cutting more money out than what we are granting.

The monies that we talked about for the programs of the 16 cities that were getting monies for 1992 for your pilot projects is only the sum, as I understand, of $9 million.

Mr. BARR. Excuse me? For this year?

Mr. GUARINI. Only in the sum of $9 million.

Mr. BARR. I think it is $12 million.

Mr. GUARINI. All right. Let's say it is $12 million, but we are talking about a nation of 250-some odd million people, and we are talking about a very egregious situation where the national budget is $1.4 trillion. So $12 million to address what has happened in Los Angeles and the other cities around our country is not a very strong response.

Now if we have monies that are not emergency appropriated, but monies that go through our legislative process, for 1993 the President is proposing this $280 million of new monies or a total of $500 million for the inner cities where the problems are arising, but that money does not happen until the budget is brought, which is October 1st, and then there are programs and applications that have to be applied for, which means that it will not be perhaps until some time at the middle or the end of next year that all of that paper work will have taken place, assuming the best of all worlds, that the monies are appropriated.

So here we have a situation which is festering, and it is going to take us from now until then, at least a year, before these inner cities and communities receive the kind of money they need to attend the problem that is very volatile.

I do not know if we can wait for the summers or wait for a year for this to happen. I know the process of government is slow, but by the same token we are in an emergency here, and I imagine the President should ask for emergency monies.

We spend 70 percent of our money on law enforcement and prisons and 30 percent on the demand side, which is hardly, hardly sufficient. We need community policing, and it gets them out of the cars.

I went to Hoboken, New Jersey, and saw that the police get into the stores, into the houses of families, into the back yards. They know everything about their place, about their beat.

They know also everything about the people on their beat. They play basketball in school with the kids where the kids start relating to the police and they are not afraid of them.

Mr. BARR. That program is paid for with our money, Congressman. So I am not sure why you are assuming that tone with me. I support that program.

Mr. GUARINI. No, I am saying community police is excellent, but there is not enough money that is being appropriated for the kinds of programs that are working.

Because when you talk about $9 million to $12 million, you are not talking about much throughout an entire United States.

Mr. BARR. Well, let me respond to that, Congressman. Let's first start with this year, 1992. We took Justice Department money that otherwise would have gone to the U.S. Attorneys because we thought this was a good idea and we wanted to get it up and running to cut down the lead time, precisely for the reasons you say.

So we have used our own resources and diverted them away from prosecutorial slots into these kinds of programs, and we used asset forefeiture money.

I would have liked more money this year, but the appropriations committee took out $751 million from the Department of Justice's budget. Had we gotten what we asked for from Congress, I would have had a lot more money to spend this year.

Mr. GUARINI. But to spend on prisons and law enforcement.

Mr. BARR. Partly to spend on prisons, but also to spend on this kind of thing.

Mr. GUARINI. Because the answer is on the supply side. On a forfeiture——

Mr. BARR. Can I—I mean you had a lot of questions in there. I would like a chance to respond.

Mr. GUARINI. Certainly.

Mr. BARR. So in fiscal year 1992, I think the Department exercised leadership in getting these programs up and running and using the resources that we had, and we scraped around for every dime we could find to help.

Now, the 70-30 figure you used, to be fair, is the allocation of the drug budget money, the $12.7 billion on the drug budget. That is not a fair breakdown, however, of the money that is put in on the social side versus law enforcement.

Mr. GUARINI. That is right.

Mr. BARR. Law enforcement gets less than 1 percent of the budget. So I do not think it is fair to talk about building prisons and police and FBI agents as if this is a big drain on the budget.

Mr. GUARINI. No, but we do need that. I agree with that.

Mr. BARR. OK. Now, on the social side of——

Mr. GUARINI. I am just saying our priorities or our emphasis may be wrong.

Mr. BARR. Well, on the social side of the ledger, right now Federal spending has been going up on all of the means-tested programs, not each single one, but for 78 means-tested programs, and since 1965, it has been going up steadily. It went up steadily in the 1980's, and they have gone up substantially under this administration.

In fact, the Federal share has gone up $134 billion to $197 billion under President Bush, and when you add in the State and local contribution, it is over $280 billion we are spending on means-tested programs.

I am not saying we should not spend it, but I think we are spending a lot on the social side, and compared to what we're spending on the law enforcement side, it dwarfs it. That is $3,100 per average paying taxpayer. That is a lot of money we are putting into these programs.

Now, we can sit here all day and talk about how much of the money is new money, how much is not new money. I have said from the beginning that Weed and Seed is a philosophy and a

strategy about how to apply resources, and we can talk about what the resources should be in Head Start. We can talk about what the resources should be in Job Training, and those decisions are going to be made, and I hope they are going to be negotiated between the leadership and the White House and will come to some resolution.

What I am here to talk about is the need to take percentages of those programs and apply them through this funding mechanism so we get maximum return for them.

Mr. GUARINI. Well, let me just conclude by saying we do not want high promises and false expectations because that will not resolve any problems that we have in our country, and it is a matter of priority.

I do know that there is a difficulty which you have in trying to make the monies spread out because we are in a budget crunch. There is no question about that.

But, by the same token, it just seems to me that we have to get money where it will do the best in time to be able to take care of the emerging problems that exist.

Mr. RANGEL. Mr. Herger.

Mr. GUARINI. Thank you.

Mr. HERGER. Thank you very much. Mr. Chairman.

Mr. Attorney General, I want to thank you for being here and for the emphasis that you are placing on this very serious problem of drugs and the emphasis that President Bush is also placing on it.

We have heard from a number of representatives from urban areas of our country and at least one from a suburban area. I represent a very rural area of Northern California, and I want to make sure that you are aware that, unlike when I was growing up in that area, the drug problem is no longer something that we know about only what we hear and read about in the larger cities.

I can assure you that even our small, rural areas are experiencing this drug problem. Obviously your emphasis, as you mentioned earlier, particularly on the earlier stages of our Weed and Seed, are going to be in the areas where the problems are the most dramatic, primarily in the big cities.

I just want to emphasize and would be interested in your comments that we still need to maintain a program for all of our areas, including our rural areas. I would be interested in your comments.

I also would like to mention a particular problem that we have in about three or four different areas of rural Northern California where we have communities of immigrants from Laos and Vietnam that were placed there after the war. These are areas where really there are very little job opportunities for them, and where this drug problem has been a growing problem.

Again, I would be interested in your comments on what we are doing specifically for the rural areas, as well as our fight in our bigger cities.

Mr. BARR. Well, first, I agree that we have to have a national program, and the point I made at the beginning about the inner cities is we need the same standard of protection for everybody. All American citizens are entitled to be free from fear of crime and drugs.

So our enforcement program does cover rural areas, and we have been seeking both last year and this year in our budget request to

expand our rural resources both through DEA joint task forces, where we work with State and local in a joint task force and through expanding FBI agents who are in either smaller cities or rural areas to serve as the backbone for our counter-narcotics and counter-gang efforts. That is why we need additional FBI and DEA agents, primarily to expand our operations there.

Because you are right. Right now one of the dynamics that is going on is the movement of gangs, drug trafficking organizations, and the associated crime from the larger cities—it is still prevalent in larger cities—but moving out into smaller cities and into rural areas, and we will not have accomplished very much if we move it from one place to another.

But that being said and recognizing the importance of keeping up the pressure in the rural areas, I think it is important for people in the suburbs and the rural areas to recognize that they have a direct stake in what happens in the inner cities because still where the gang problem is most prevalent, where the gangs are moving out from, their home base is basically the larger cities, and those are the hubs of drug trafficking.

So I think by effective law enforcement in the major cities, American major cities, we can also have an impact beyond those cities.

Mr. HERGER. I thank you very much, and again, I think it is important even though so much of our emphasis is on the larger cities, that we not forget that as the pressure increasingly is applied to the big cities, we do have a number of these people moving out.

Particularly in my area, we have a number of methamphetamine labs in the mountain areas. We need to keep the pressure there as well.

Again, I thank you very much for being here today.

Mr. RANGEL. Mr. Payne, Don Payne.

Mr. PAYNE. Thank you very much.

I was looking at some recent polls, and they indicate in the wake of the Rodney King verdict, most Americans believe the criminal justice system treats African-Americans and Hispanics more harshly than whites. Forty-one percent of those arrested on drug charges were black, even though African-Americans comprise only 15 percent of the drug abusing population.

Last year a San Jose Mercury survey of 700,000 found that at every stage of pre-trial negotiations, whites were more successful than non-whites. Of those with first felony offenses, one-third of the whites had their charges reduced.

In New Jersey, we see that the number of juveniles that are handed up to be tried as adults is overwhelmingly higher for black youths who are tried as adults. We find that pre-trial intervention is three to four times more available to white youths and first time offenders than to African-Americans.

So in light of all of the information, do you and the President have any kind of—first of all, do you agree that there may be a color blind justice system, and, secondly, if you do, are there any plans that the Justice Department may have in terms of a national level effort to combat this situation?

Mr. BARR. I think that our criminal justice system is designed to be fair and, in fact, is the fairset known to man; that it has built into it numerous safeguards to protect against racial discrimination.

Now, when we talk about our criminal justice system, we are talking about not only the Federal system and 50 State systems, but we are also talking about how it operates in every county and city in the country.

I think that there may well be people who have racial bias somewhere in the criminal justice system, and I cannot vouch for every act taken in the entire American criminal justice system, but I think as a system overall it is a fair system, and I am concerned about the perception that it is not fair, but to the extent I have reviewed the empirical studies, I think that the empirical studies show that people are not treated differently, and to the extent that there appear to be anomalies, they can be explained.

Now, there are some areas of the law where the law may have a disparate impact in a sense. In other words, it is not that it is intended that there is a discrimination present, but because of the objective factors, it may have a disproportionate impact on minorities.

For example, crack cocaine minimum mandatories. It takes a very little bit of crack cocaine, I think, five grams for a 5-year mandatory minimum, and I think there is no question that that has a much greater impact on minority defendants than otherwise, and therefore, a lot of minority defendants are put away under that statute.

It is not that the statute or the process is discriminatory. It just has that kind of impact.

Mr. RANGEL. Would the gentleman yield just on that because I did not follow your response as well as I wish I had?

How do you explain the foreigners when they just take a look at our system and see the overwhelming number of people in our prison system on the local, State and Federal level who are minority black and Hispanic and out of proportion to their percentage in our society?

And if they were to ask you why is this, do you give the same answer that you gave to Mr. Payne?

Mr. BARR. Yes.

Mr. RANGEL. Mr. Payne.

Mr. PAYNE. So I could conclude that you do not believe the survey, and you say that the system is fair and color blind and it is the best known to man. I know you say that.

Mr. BARR. I think it is a fair system, and I think overall it is operating. The empirical studies to me do not show that people are treated differently because of race.

Mr. RANGEL. You do not mean that judges do not give more time to blacks and that prosecutors do not encourage more plea bargaining and the white population has more access to counsel?

Mr. BARR. The economic point is one that bears some scrutiny, but the three studies——

Mr. RANGEL. I just stress that.

Mr. BARR. The three studies that the Justice Department has done, DJS has done, does not indicate a disparity in sentencing. In

fact, I think the last study we did or one of the recent ones we have done shows that after you account for prior criminal history, white sentences are slightly longer than black sentences for the same offense.

Mr. RANGEL. Well, I ask the gentleman to yield again. There was a study that 40 percent of the kids in the District of Columbia were in the criminal justice system, either arrested or in jail, and then we have some statistic that one out of every four black males was incarcerated youth.

And if you are saying that you do not see racism involved in that, I would like to really take that up at another hearing, but I just beg the forgiveness of the member for getting involved in this, but I am really surprised at your response.

Mr. Payne.

Mr. PAYNE. Yes, I am a little stunned also. The whole question of disparate impact, you know, we spent a year or two dealing with that with the women's equity bill, which the President vetoed initially saying it was a quota bill, but then we were able to get it passed, and the whole issue of disparate impact is a reality.

You say that other than the fact that there may simply be disparate impact, therefore the conditions may have a disproportionate impact on a segment of people in society just happens to be irrelevant. It is just something that we do not have direct control of.

Mr. BARR. I did not say that. I said that I think the empirical studies have shown that some of the numerical disparities are explained by nondiscriminatory factors. For example, another one that has been found to account for some of it is geography. A lot of the laws in many States where there is a high proportion of minority population are stronger and have longer sentences than other States.

So if you are looking at a universe of how many minorities are in the system, they may be affected by the fact that there is a stronger law enforcement system, heavier penalties in areas where they have a higher percentage of the population. That is another factor that has come into play.

Now, I think we have to be constantly vigilant to ensure that the system is operating for everybody as it is designed to, and I think there are improvements that can be made at all levels of government to continue to ensure that it is a fair system.

For example, one area is sentencing guidelines, to limit discretion so that the sentencer, whether it be a jury or a judge or whatever, does not have complete discretion to punish one person who commits a crime significantly more or less than another person who commits the same crime.

That is something that we have done at the Federal level, and I know a recent study in California shows that after sentencing guidelines were adopted in California, the study concluded that there was no disparity in sentencing.

We would like to see sentencing guidelines adopted by the States because I think that is a step that can be taken to assure that discriminatory bias does not enter into the criminal justice process.

Mr. PAYNE. How do you prove discrimination then? You know, I read a similar study that showed that a typical African-American college graduate making about $35,000 a year was turned down

more often than an eighth grade white graduate making $13,000 a year for a credit loan, but they said exactly the same thing you said, that it is just statistics, and you cannot determine a trend from the fact that a $35,000 salaried employee who is black and a college graduate gets turned down for a loan that an eighth grade white male graduate can get.

But that is not conclusive, they said. It is just statistics. How do you go about proving it? What is a system we could use?

Mr. BARR. Well, it seems to me there are two ways. One is either programmatically by showing disparities and then to the extent you can account for nondiscriminatory factors that come into play so that you have a residue that you can arguably assign to discrimination if it is otherwise unexplained. That is one way of doing it, which has been done.

And the other way is to prove it in a particular case. What I am saying is the studies that I have seen and other people who have reviewed all of the studies have concluded that there are nondiscriminatory explanations for the overall numerical disparities yielded by the entire system.

But as I said, we are dealing with a lot of different criminal justice systems, and I am not saying that there is not bias among people involved in the system or in particular cases.

Mr. PAYNE. My time has expired. I did want to ask some questions about the administration, about dysfunctional families, and Vice President Quayle, who was in California last night talking about how the breakdown of the black family is one of the major factors for the criminals in that community.

But I do not have time to.

Mr. RANGEL. Well, the record will remain open, and I am certain that the Attorney General will agree to accept questions to respond to.

Following the hearing, Mr. Payne submitted questions to the Attorney General, Mr. Barr. A reply was never received.

If these materials are received, they will be kept in the files of the select committee.

Mr. PAYNE. Thank you.

Mr. RANGEL. Mr. Oxley.

Mr. OXLEY. Thank you, Mr. Chairman.

Welcome, Mr. Attorney General. Just to follow up on the questions that the gentleman just asked, and if the statistics are correct that the chairman quoted regarding the District of Columbia and a rather high percentage of black males who have been in the criminal justice system and have served time; it is also true, is it not, that the District being majority black, that at least a good portion of the judges and the juries are black? Am I correct on that?

Mr. RANGEL. I would assume the juries. I am not that certain about the judges.

Mr. BARR. I believe the juries are, and I do not know what the breakdown of the judges are.

Mr. OXLEY. Well, my point being—and the Vice President, as a matter of fact, referred to this yesterday—that blacks are more likely to be victims of crime by black perpetrators.

Mr. BARR. Eighty-four percent of the crime perpetrated against blacks is by black perpetrators.

Mr. OXLEY. So we could see why perhaps a black jury or a black majority jury and a black judge may very well feel compelled to mete out a rather strong sentence under those circumstances.

I did not want to dwell on that, but I did want to bring that up.

Let me ask you, Mr. Attorney General, on the question of recidivism, and I know that the Justice Department has done some studies on it.

It seems to me that that program very well could fit into the Weed part of the Weed and Seed Program; that is, that you could make a point that since a relatively small percentage of people are committing the majority of the crimes, that these are the people to go after.

Has the Department looked at melding to some extent the recidivist program with the Weed part of Weed and Seed?

Mr. BARR. Yes. The basic thrust of our program is to use the Federal system against the most chronic, the most violent, the worst actors to incapacitate them because we do believe that a disproportionate amount of crime is committed by those habitual, chronic offenders.

We just had a prison summit here in Washington of the correctional people from around the country, and I was stressing the point that prison space is very expensive. It costs $53,000 to build a prison bed, and it costs an average of $21,000 a year to keep someone in prison So that is a lot of money, and we have to use it as a resource, a valuable resource, and the people who we put in prison should be people who are really feel should be there to protect the community, the worst actors, the chronic violent offenders, and we should not just be using prison space for people who really do not pose an ongoing threat to the community, generally speaking.

Now, I mean we do need space for white collar offenders because it is a good deterrent and things like that, but generally we are interested through using our firearms statutes, like Trigger Lock Program and other programs, to go after the worst chronic offenders.

Mr. OXLEY. All of us were stunned when the 13-year-old boy was killed just recently in the District, an honor student, going from his grandmother's church back home. The automobile he was riding in got caught in a crossfire.

It occurred to me when I first heard it on television that if they apprehended the assailants, that at least one of them would be on parole. At least one of them, in fact, was on parole. One of them, I think, was on some kind of a probation.

The point being obviously that we pay a very, very heavy price for overcrowded prisons. Many times it seems to me the courts almost have to put people on parole or probation because of the failure of the system to accommodate the number of prisoners, and then those people are out committing crimes and killing 13-year-old boys who have been a credit to their community. It really tears your heart out, and it just is a vicious cycle that is difficult to break.

Any emphasis on that recidivist offender certainly would pay dividends for us in the future, coupled with, I think, the ability, sad as it may be, to build more jail facilities.

In Ohio, for example, we are currently under a program under Governor Voinovich to build new facilities, two of which will be in my congressional district, that are very necessary. But it is sad that they are necessary.

Let me just ask Mr. Barr one other question, if I may, Mr. Chairman. That is, there has been some recent publicity about the seizure laws. I think USA Today happened to do a rather extensive story, fairly negative, about the seizure laws, and it has been chronicled, I think, on "60 Minutes" and some other programs.

There have obviously been some abuses in the Federal seizure laws, but at the same time I think it is important to recognize how valuable the seizure laws can be. Would you care to comment—I am sure you have seen the reports.

Mr. BARR. Yes.

Mr. OXLEY. And also from your perspective how effective the program has been.

Mr. BARR. I think the seizure laws are a critical law enforcement tool that are sort of a double-barreled weapon. On the one hand, you take away the profits and the instrumentalities from the criminals. You take the profit out of crime, punish the crime and the criminal by that method, and then you take it and you reinvest it in law enforcement, and you step up our law enforcement program.

A lot of our Federal prison facilities were funded through asset forfeiture money. It is basically the criminal paying for their own prison cell, and so I think that that is a critical program.

It is important that the money be used to supplement and augment law enforcement. There have been some cases that have been pointed to as abuses. I know there have been a couple of articles recently, and I am not yet familiar with the facts that are pointed to in those articles.

But generally, as we follow them up I think we have been able to defend most of those cases, and we are obviously intent on making it a fair system. So we are constantly reviewing it and trying to correct any shortfalls in the program.

But it might be useful for me to point out here because we are focusing mainly on Weed and Seed, we have modified the asset—in the past we would only let these seized assets go to pure law enforcement, to police cruisers or things like that. We have now modified the rules, and as part of the Weed and Seed Program, these seized assets can be used for the programs, including the youth programs and other kinds of programs in the Weed and Seed area.

So we can take, for example, a crack house and seize it and refurbish it and turn it over to the community for productive use.

Mr. OXLEY. You can do that under existing statutes obviously.

Mr. BARR. Yes. We were able to do that administratively. It has to have a sponsoring law enforcement agency. Law enforcement agencies support this move because there is a close nexus with what we are trying to do.

Mr. OXLEY. Thank you. Thank you, Mr. Attorney General.

Mr. RANGEL. Mr. Attorney General, I hope at some later time we might explore Mr. Payne's questions and also the thinking of me and other minorities that black males, adults as well as youth, are targeted; that in black communities you find more round-up of

black youth; that access to adequate legal services are unavailable, and plea bargaining. A lot of people have to decide whether they are going to plead guilty or innocent as opposed to getting the ire of the judge in going through a long, delayed trial.

There are a lot of cases where racism in the United States is not cut off when you enter the criminal justice system, and I know that once you visit my district, as you are scheduled to, that you will be able to talk with law enforcement officers, judges, social workers, and you would find that it is in the justice system, and to a large extent it is reflected in the number of people incarcerated.

But the Seed part that we were lauding you about deals with how you can afford to have people, regardless of their color, avoid coming into contact with the system, and that is the part that I, as well as Mr. Coughlin, want to concentrate on.

Now, you had mentioned the possibility of bringing your bill up, going directly to the appropriations committee, and trying to avoid the problems of getting waivers from the standing legislative committees. I hope you answer that, but before you do, I had thought that your package was going to be a part of a larger urban emergency package that the President was going to present to us.

Mr. BARR. I think they are discussing now how this is going to be done, whether it is going to be one package or an agreement that five or six or seven bills move along together as part of an overall agreement. I am not sure that there has been a decision on that.

Mr. RANGEL. Well, let me just give you my political advice that when the President presents an urban package in view of what has happened in Los Angeles and tells Democrats and Republicans that it is urgent that this package and not some new entitlement package or broader package, but this package be delivered to the cities as soon as possible, I think that many of your concerns would be taken care of as the leadership and the chairman recognize that we do not have time to exercise all of the prerogatives that we normally do with which legislation they can just have the committees work their will.

If, indeed, enterprise zones stands on its own and Weed and Seed stands on its own and goes through the process, God knows I do not know whether this would be an adequate response to what happened on the West Coast, and I hope when you go into these meetings with the President's cabinet, you might share these views, that we hope we get a presidential package which includes certainly as one of the anchors the Weed and Seed Program.

And I hope I could tell Mr. Guarini, too, that I do not see Weed and Seed being a response to urban problems. I see it being a factor, one of the programs that can be put together to try to address the inequities of the past, and that is why I wish this was coming from the Secretary of Education, the Secretary of Labor, the Secretary of Health and Human Services, Mr. Martinez or whomever, but I do not see or hear from them, and that is why you are getting more than your share of the compliments in terms of addressing this problem. [Laughter.]

Mr. Coughlin.

Mr. BARR. Actually, could I just make a comment? The first point you made about the concerns over discrimination in this system, obviously I feel strongly, very strongly, that there has to be

one standard of justice. There are things we can do to improve the system. We have to be vigilant about it, and I recognize the reality that many in the minority communities feel the system does not work for them and is discriminatory.

But I also think we should do everything we can to deal with that. At the same time I think you would agree that the big picture is that the law enforcement system should be the friend of, the ally of, not the enemy of the inner city because the victims of crime are predominantly disproportionately minorities in the inner city.

Mr. RANGEL. There is no question.

Mr. BARR. And they want that protection. They want the police there.

Mr. RANGEL. But putting everyone in jail is not necessarily the best answer to society, to take a young person and give them a mandatory sentence, and to start then the breeding of a career criminal.

Mr. BARR. And that goes to the second point, which is I think, we have to attack it from both directions. We do need strong law enforcement. We have the obligation, as I was saying to Congressman Oxley, that we have to really make careful decisions about who belongs where in the system, but we need a strong law enforcement system.

But also the long-term approach has to be to stop people flowing into the system, turning the spigot off, so to speak, and that is where these programs come into play.

Mr. RANGEL. As well as what you do with them when they do get into the system. There is an alternative to the $60,000 a year system we have in the State of New York. They are keeping them behind bars doing exercises, lifting weights and watching TV.

Mr. Coughlin.

Mr. COUGHLIN. Thank you, Mr. Chairman.

As I understand it, the Administration has not decided whether to submit your Weed and Seed legislation involving the waivers and so forth independently or as part of another package or both?

Mr. BARR. I think it will be submitted independently. It is part of the President's package. The President has identified six things he would like. The leadership has some additional things, and there are discussions about whether we can come to an agreement on the package.

As far as the mechanics are concerned——

Mr. COUGHLIN. We just want to be helpful on the package.

Mr. BARR. Right, and the President wants Weed and Seed as part of that package, and so far I have not heard anybody in the leadership dispute that. My impression is that there is broad support for this kind of approach, and maybe there is fine tuning here and there, but I think the concept is generally supported.

As far as the mechanics of whether it is authorization or appropriation or part of one bill or many bills, all we can say is or at least all I can say is, we just would like to see it get done as quickly as possible, whatever it takes to get it through.

Mr. COUGHLIN. I have one further question that I had wanted to ask earlier but ran out of time. In many parts of the nation, gangs have become the principal organizations that are coordinating and

conducting the drug trade and are responsible for a good deal of the violence.

In fact, there have been reports that a great deal of the violence in Los Angeles was a result of gang activity in that city.

What is the Federal Government's strategy to combat gangs? This is a fairly specialized thing, and I guess there is a lot of State and local responsibility. However, we do have a Federal responsibility, as well, in looking at gangs, particularly because they can move across lines and jurisdictional boundaries.

Mr. BARR. I think our approach on gangs has to reflect the overall two-front strategy that I just suggested to the chairman. On the one hand, we have to have strong enforcement against the violent criminals who are out there on the street victimizing people, and, on the other hand, we have to deal with the problem of why kids are going into gangs in the first place.

On the enforcement side, the Federal Government is working with the Violent Traffickers Program that you mentioned, Congressman, was very successful in Philadelphia. We worked closely with the Chief of Police there, Willie Williams, who is now going to L.A., and the District Attorney there, on going after the hard core gang leaders and the real criminal element.

We have taken that program essentially nationwide. What we do is work with State and local Government and use our Rico statutes and other statutes to go after the core gang members.

On the social side of the ledger, I think there are a lot of factors that contribute to gangs. I am not an expert in this area, but I think the breakdown of the family is not confined to the inner cities. It is a nationwide problem we have. The breakdown of the family is part of it. The lack of opportunity is part of it. The feeling of being out of the mainstream and the emergence of sort of a counter-culture in a sense where the establishment is viewed as the enemy, and one gains self-esteem and approval by participating in these kinds of activities.

Self-protection is part of it. In Los Angeles, there are a lot of gang members, but some of those gang members are there because everyone in the community is a member of the gang, and if you are not a member of the gang, you are not going to get any protection on the street.

So I think what the Federal Government has to do is work with State and local officials and the community itself and institutions that have moral influence, like the churches, to develop programs and to continue the programs that are successful now and develop new programs to deal particularly with the youth in providing opportunity and an environment which does not divert people or channel people into these gangs. So I think that is the second half of the equation.

Mr. COUGHLIN. Thank you, Mr. Attorney General.

I just want to say this testimony has been extraordinarily useful and you have obviously put a great deal of thoughtful attention into this whole problem. The nation is grateful for it.

Thank you, Mr. Chairman.

Mr. RANGEL. We know you have a time problem, but Mr. Hochbrueckner is with us, and he has a question before we adjourn.

Mr. HOCHBRUECKNER. Thank you, Mr. Chairman.

I do apologize for my tardy arrival, but we had an Armed Services Committee meeting with a Governor making a presentation.

You may have asked this question earlier in my absence, but it seems to me in looking, Mr. Barr, through your press release, I see that, for example, New York is not a designated Weed and Seed demonstration program, and I would assume that as indicated later in the press release that to be eligible for the larger programs that come after the pilot programs, you sort of have to be in the pilot program.

I was just wondering why New York City, for example, is not included or Baltimore and some of the other cities.

Mr. BARR. No, you do not have to be in a pilot program to be eligible for the 1993. The pilot programs will continue in 1993, but it is our intention to expand it as much as we can to other cities. So cities like New York, Baltimore, in both cities I am familiar with the law enforcement community there and some of the other things that are going on. Florida cities, certainly Miami are cities that are prime candidates for this.

Mr. HOCHBRUECKNER. Is there any particular reason why New York was not included in the pilot program? It just seems like such an obvious omission.

Mr. BARR. I do not know all of the details, except I think we had $1.1 million in HIDTA money that we broke loose from HIDTA for a Weed and Seed Program there.

Is that right? So I think we are using some of the HIDTA money to get a Weed and Seed Program underway in New York.

Mr. HOCHBRUECKNER. I see. So it is really being done. It is just not officially thought of as a Weed and Seed official program.

Mr. BARR. It is a Weed and Seed type program that we are funding through HIDTA, but New York is a place that can use as much Weed and Seed Programs as we can get going there.

Mr. HOCHBRUECKNER. Thank you very much.

Thank you, Mr. Chairman.

Mr. RANGEL. I know I told you that we were going to adjourn, but we have just seen the arrival of one of our most outstanding members of the committee and, indeed, of the Congress, Mr. Ben Gilman, and I may ask whether at this point he would like to inquire.

Mr. GILMAN. Mr. Chairman, just having arrived, I regretted I had a mark-up in another committee. I will waive my opportunity at this time.

Mr. RANGEL. Well, the Attorney General has graciously agreed to accept questions in writing.

Mr. GILMAN. I am pleased that the Attorney General is before the committee, and I assume, Mr. Chairman, that you have exhaustively reviewed some of the problems confronting our nation.

Mr. MFUME. Mr. Attorney General, the morning is late, I will be brief. I have an observation and a question, and I will put it to you in the form of a fast ball, not a curve.

In the past 10 years our Nation has doubled the number of people in prisons. We are executing more people now than we ever have in recent memory. We have dramatically increased mandatory sentences throughout the country. We have increased spending ten times in drug-related law enforcement, and we have given law

enforcement agencies in some respects extraordinary power to seize assets of drug suspects.

Yet last week we were all troubled that the Administration reported another significant increase in illegal drug use. Last month it also reported a major increase in violent crimes, especially in small towns and small cities.

Aside from the Vice President's characterization of Murphy Brown, which I think may have been over-reaching, it seems to me that in any coordinated criminal acitivity or criminal enforcement approach, we have got to look at values. We have got to look at the level of self-esteem in the communities that we are trying to bring some justice to.

We also have to look at the self-worth or the absence thereof that many people feel in this country that lead them to do all sorts of things. I just wanted to ask in conclusion as the Nation's chief law enforcement officer whether or not you see any messages in these numbers about effectiveness of the current policies that we have, and if so, whether or not you see some indications as to where we ought to change those and how quickly and how boldly, perhaps, we ought to do that.

Mr. BARR. It is a good summing up question. Let me just start though on the Dawn statistics which you referred to and then move to the broader question.

On my reading of the Dawn statistics, in connection with all the other statistics, I think what is happening is we are continuing to see reduced use of drugs. Since 1985, I think, basically we have reduced the number of people using drugs by about half. That is progress.

I think the number of people who are using drugs still are using more drugs. So we are getting a harder core addict population. So there is greater frequency by that group that is using drugs. That is my reading of the Dawn statistics.

I think we have to keep up the work on the demand side. That is ultimately where this war is going to be won. It has taken decades to get into this situation, and it is going to take a long time to get out, and progress will be slower as we are dealing with the harder and harder core of the addict populaiton on the demand side.

The broader question, I think, really deals with what I have been talking about or trying to talk about for the last six months, which is we have had a debate in this country for as long as I can remember, which I think is a false debate. It is the debate between tough law enforcement on crime and let's deal with the root causes.

The tendency for people perhaps—I know so-called conservatives are criticized for putting overemphasis on crime suppression and devaluing programs that deal with root causes, but I think it is also fair to say that many people who push root causes programs maybe devalue tough law enforcement, and I think it is a false debate.

I think we need both hand in hand, and I think now it is important to keep up tough law enforcement because I think crime is undercutting the root causes and solutions that we are trying to put into place.

So I think we should stop the debate and stop, you know, pointing at things on the other side of the equation and saying that is really not that important or your approaches have failed.

I do not think law enforcement has failed. I think we have to continue tough law enforcement. I think the crime rate is going up somewhat. It is still lower than it was in 1980 and 1981. So in a sense, the 1980's compared to the 1960's and 1970's have been a period of relative plateau.

The issue really is where would it be today if we had not taken some of the tough steps we took in the 1980's on the drug war and on violent crime, and I think if we had not done what we did, we would have more victims and more crime than we have today, and that is the issue.

So I think we have to proceed on the law enforcement front. We have to hold people accountable. We have to protect the society by putting violent predators in prison, and we have to pursue the most effective programs in an integrated and coherent way on the social side, working as a partner with law enforcement and stop what I think has been a false debate and move together to solve the problem in the broadest possible coalition for doing that.

That is my reaction.

Mr. MFUME. Thank you very much. Thank you, Mr. Chairman.

Mr. RANGEL. If there are no further questions, the meeting is then adjourned.

Let me once again extend the invitation to you to work with me and other members of this committee outside of our hearing process, and I do hope that Weed and Seed is a part of the package because the package is going to need the engines of Weed and Seed and enterprise zone to move, and I would hate to see these programs standing on their own feet, as strong as they are.

It has to go through the regular legislative process, which is cumbersome, but thank you for your presentation. I look forward to working with you.

Mr. BARR. Thank you. Thank you, Mr. Chairman and Mr. Coughlin and members of the committee.

[Whereupon, at 11:50 a.m., the select committee was adjourned, subject to the call of the chair.]

APPENDIX

Department of Justice

STATEMENT

OF

WILLIAM P. BARR
ATTORNEY GENERAL

BEFORE

THE

SELECT COMMITTEE ON NARCOTICS
ABUSE AND CONTROL
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

OPERATION WEED AND SEED

ON

MAY 20, 1992

1

Mr. Chairman, Members of the Select Committee, I am pleased to have this opportunity to discuss Operation Weed and Seed, the Administration's new initiative to combat violent crime and drug trafficking in targeted neighborhoods and to revitalize these areas with social services and economic opportunities.

Weed and Seed is a community-based, comprehensive, multi-agency approach to combatting violent crime, drug use and gang activity in high-crime neighborhoods. The goal of this strategy is to "weed out" crime from targeted neighborhoods and then to "seed" the targeted sites with a wide range of crime and drug prevention programs and human service agency resources to prevent crime from reoccurring.

The ultimate objective is to maximize coordination and involve the entire community in this effort to revitalize crime-ridden neighborhoods. If we are to reclaim America's communities from the terror of violent crime, we must work together on every level of government and with the private sector. Law enforcement alone cannot solve these problems. The coordination of law enforcement and social programs is essential to the revitalization of these communities, and they must work together, mutually reinforcing one another. Law enforcement is not a substitute for social programs, and social programs cannot be pursued instead of -- or at the expense of -- aggressive law enforcement policies. No social program or community activity can flourish in an atmosphere poisoned by violent crime and drug abuse.

Elements of Weed and Seed Strategy

The Weed and Seed strategy involves four basic elements:

1. Law Enforcement: Eliminating Crime and Violence. Building on a partnership among State, local and Federal law enforcement agencies, this element focuses on enforcement, adjudication, prosecution, and offender management activities designed to target, apprehend and incapacitate violent street criminals and criminal organizations that terrorize neighborhoods and account for a disproportionate percentage of criminal activity.

Criminals will be prosecuted under Federal law when possible. Programs such as the Department of Justice's Project Triggerlock target violent armed offenders for prosecution in Federal court to take advantage of tough Federal firearms laws. Between April 1991 and February 1992, Project Triggerlock resulted in approximately 4,500 cases charged and had a 91 percent conviction rate.

Other activities will focus on special cooperative enforcement operations such as repeat or violent offenders, intensified narcotics investigations, targeted prosecutions, victim/witness protection and services, and the elimination of narcotics trafficking organizations operating in targeted areas. Again, it must be emphasized that central to this element is a cooperative partnership between Federal, State and local law enforcement agencies and prosecutors.

3

Community-Oriented Policing operates in support of the intensive law enforcement suppression activities described above and provides a "bridge" to programs aimed at prevention, intervention and treatment, and neighborhood reclamation and revitalization. Community-oriented policing activities focus increasing police visibility and the development of cooperative relationships between the police and the citizenry in the targeted areas. Techniques such as foot patrols, targeted mobile units, victim referrals to support services and community relations activities will increase positive interaction between the police and the community. The objective is to raise the level of citizen and community involvement in crime prevention activities to solve drug-related problems in neighborhoods and to enhance the level of community security, and to build trust and respect between neighborhood residents and law enforcement.

Community policing is more than simply reacting to crime after it has occurred. As one police chief said recently, "It's getting out front" before a crime is committed. Its citizens and law enforcement working together to solve problems that lead to crime. In areas where community policing has been implemented, residents report increased satisfaction with law enforcement, while law enforcement officials report greater job satisfaction on the part of officers and improved attitudes of the community towards police. New York City has found its community policing demonstration program so successful that it is now working to integrate community policing throughout its police force.

2. Social Services: Providing Hope and Assistance. This element of Weed and Seed is a coordinated set of social programs that will help residents reclaim their lives and their neighborhoods. These programs will include improved access to primary and prenatal health care, drug abuse treatment and prevention, Head Start, job training, after-school and adult education programs, and transportation services to link inner-city workers to suburban jobs.

Central to this strategy is that such services will be visible, on-site, and accessible. This provides our best chance of breaking this cycle of drug use, poverty, and unemployment. By breaking the cycle, we eliminate the demand for drugs, thereby putting drug organizations and dealers out of business.

3. Creating Jobs and Economic Opportunity. This element focuses on creating jobs, wealth, and opportunity in neighborhoods where businesses have been driven out by violent crime and drug trafficking. Up to $400 million of the Weed and Seed money earmarked in the budget will go to neighborhoods designated as Enterprise Zones by the Secretary of Housing and Urban Development. The Administration's Enterprise Zone proposal has been carefully designed to stimulate entrepreneurial activity and job creation. An additional $100 million will go to Weed and Seed neighborhoods that are not designated as Enterprise Zones.

4. Housing and Community Development. Public housing developments in Weed and Seed areas will be eligible for HUD's drug elimination grants and modernization funds. In addition,

housing vouchers, and community development block grant funds for recreational areas, rehabilitation of private housing, and other community infrastructure improvement will be provided.

Implementation of Weed and Seed

Weed and Seed requires six basic steps for implementation:

1. Organize a Weed and Seed Steering Committee, which will be coordinated by the U.S. Attorney and comprised of Federal, State, and local law enforcement including local prosecutors; Federal, State, and local school, housing and other social services officials; private sector foundations and corporations; and most important, representatives from community-based organizations. Depending on the requirements of the local community, a Law Enforcement Task Force could be established to coordinate the "weed" activities and a Neighborhood Revitalization Committee to coordinate the "seed" programs.

2. The Steering Committee selects a target neighborhood. Factors that should be considered in selecting a target neighborhood include: the presence of grass roots community organizations open to the Weed and Seed concept; high incidence of gang-related violence; high rates of homicide, aggravated assault, rape and other violent crime; high number of drug arrests; high dropout rate; high unemployment rate; and the presence of public housing developments, including high-rise apartments.

3. The Steering Committee will conduct a needs assessment of the targeted neighborhood. The type of information developed

in step two will be used to assess the problems and needs of the targeted neighborhood in relationship to the program goals and objectives. The assessment will identify problems in the targeted neighborhood and inventory the available resources to address them.

4. Existing and new resources to meet the objectives selected in step 3 will be identified. These resources include funding, staff for various programs and activities, and materials and equipment.

5. The program activities and human services that will be implemented to achieve each of the objectives will be identified. A plan will be prepared specifying who will be responsible for administering the activity, what it will involve, where the activity will be conducted, when it will be done, how it will be implemented and how much it will cost.

6. An implementation schedule will be developed with target dates for the completion of major activities.

Evaluations

Evaluation is an important component of the Weed and Seed program. Each funded program will be evaluated to determine to what extent the program was implemented as intended and what impact the program had on the stated problem. The evaluation will be organized to allow for a comparison of baseline and post-Weed and Seed quantitative data, such as the number of investigations and arrests, and the rates of high school graduation, infant mortality, poverty, and teen pregnancy. The

evaluation will also measure qualitative data such as offender characteristics, displacement of criminal activity, and level of citizen satisfaction. In addition, the Department of Justice's National Institute of Justice will conduct a national evaluation of Weed and Seed. Results of these evaluations will be crucial as we progress in implementing future sites.

Phase I -- Fiscal Year 1991-- Pilot Sites

Building on programs developed independently in Philadelphia, Pennsylvania, the Department of Justice initiated pilot sites for Weed and Seed in two locations in Fiscal Year 1991. The Weed and Seed strategy is being implemented in Kansas City, Missouri, and Trenton, New Jersey, as described below.

Protype: The Philadelphia Experience.

Several programs in Philadelphia served as catalysts for the Department's Operation Weed and Seed program. The Violent Traffickers Project (VTP) is a joint Federal-State task force organized in August 1988 to address the severe problems of drug trafficking and drug-related violence in neighborhoods in the Philadelphia area. VTP consists of agents and officers of the Drug Enforcement Administration; the Philadelphia Police; the District Attorney's Office; the Bureau of Alcohol, Tobacco and Firearms; the Federal Bureau of Investigation; the Immigration and Naturalization Service; the Pennsylvania Attorney General's Office; the Pennsylvania State Police and the U.S. Attorney's Office. The Violent Traffickers Project is part of the President's Organized Crime Drug Enforcement Task Force Program

(OCDETF). Between November 1988 and July 1991, 551 individuals have been indicted as a result of VTP investigations. The conviction rate is over 99 percent.

As a result of the success of VTP in targeting and removing violent offenders from the community, a number of neighborhood-based revitalization efforts began to flourish. For example, in the Spring Garden neighborhood, following successful law enforcement drug sweeps, residents began and maintained vigils to keep the neighborhood free of drug dealers. These highly successful activities resulted in providing a safe environment in which residents can live and business can develop and flourish. In addition, law enforcement officials, working out of a police mini-station in the neighborhood, and community residents are working together to revitalize the neighborhood, renovating former crack houses, cleaning up playgrounds, and encouraging businesses to open in the area.

Another program that led to the creation of Weed and Seed is Philadelphia's Federal Alternatives to State Trials (F.A.S.T.) Program. In July 1991, the Department's Office of Justice Programs (OJP), through its Bureau of Justice Assistance (BJA), provided funding for this joint effort of the Philadelphia District Attorney's Office and the Office of the United States Attorney for the Eastern District of Pennsylvania.

Under the F.A.S.T. project, selected drug and firearm cases are transferred to Federal jurisdiction through the U.S. Attorney's Office. The transfer from local to Federal

jurisdiction substantially increases the likelihood that accused local drug dealers and other armed career criminals will remain in custody from the moment of arrest forward by holding them in Federal detention facilities pending trial. In addition, defendants receive expedited trials in the Federal district court. If convicted, they are subject to Federal sentencing guidelines and/or Federal mandatory minimums and incarcerated in a Federal facility.

Operation PEARL (Prevention, Education, Action, Rehabilitation and Law Enforcement), a Federal/State/city effort to rehabilitate the Mantua neighborhood was launched in 1990, and resulted in increased law enforcement and social services in the targeted neighborhood. The Bureau of Justice Assistance provided a planning grant to help PEARL get started. President Bush visited Mantua in July 1990, and applauded the joint efforts of government and the neighborhood residents to conquer problems brought on by drug trafficking. A second PEARL program --PEARL II-- began operating in a South Philadelphia neighborhood in October 1991.

<u>Pilot Site: Kansas City, Missouri</u>

In August 1991, the Bureau of Justice Assistance awarded Kansas City, Missouri, $200,000 for a program organized by the U.S. Attorney and the Kansas City Police Department. The Kansas City Weed and Seed program has been expanded, and the working group, comprised of law enforcement, human service agencies and community organizations, has made substantial progress in

developing its implementation plan for both the "weeding" and "seeding" components. A target neighborhood, the Ivanhoe section of the city, has been selected. The "seeding" effort is focusing on demolishing dangerous buildings and creating incentives for development, and it will include forfeiture of houses used for drug trafficking and abandoned property and conversion of those into affordable housing.

In addition, the Kansas City project is rebuilding neighborhood alliances to get residents involved in maintaining the security of their community through neighborhood cleanups, removing abandoned cars, fixing and replacing street lights, and removing or painting over graffiti. The seeding effort also aims to encourage businesses to relocate to the area and has established a "Hub House" in the neighborhood--a one-stop center to provide residents with information on a wide range of programs available to them, including drug treatment and referral, family therapy, education, counseling, child development programs, youth services, housing services, and opportunities available through the Small Business Administration.

Key participants in the Kansas City Weed and Seed program currently involve: Federal, State and local law enforcement agencies and prosecutors; the regional office of the U.S. Department of Housing and Urban Development; the Small Business Administration; the Kansas City Neighborhood Alliance; the Ad Hoc Group Against Crime, a neighborhood-based organization; and other local government and community groups.

11

Pilot Site: Trenton, New Jersey.

In September 1991, BJA awarded Trenton, New Jersey, $284,000 to further demonstrate the Weed and Seed strategy. This Weed and Seed project is targeted at four neighborhoods and is proceeding with very good results. Under the direction of the State Attorney General, and in close coordination with the United States Attorney, and the City of Trenton, the project has developed a four-pronged approach to fighting the war on drugs and crime in these neighborhoods:

(1) The Violent Offender Removal Program (VORP) is designed to target, apprehend, and incapacitate violent street gang members and disrupt drug trafficking networks in and around the designated Safe Haven Zones. VORP has resulted in the arrest of 69 persons since the beginning of this program.

(2) The Trenton Weed and Seed program was recently awarded an additional $743,142 to fund community policing activities. The Community Policing Program is designed to emphasize the need for police officers and residents within the community to work together in creative ways to address the problems of crime at the neighborhood level. Community policing has been implemented in each of the four targeted neighborhoods and has met with high praise from both residents and local police.

(3) The Safe Haven Program is designed to provide an alternative to the dangers of the streets by bringing together education, community, law enforcement, health, recreation and other groups to provide alternative activities for high-risk

youth and other residents of the community. Three public middle schools in three of the targeted neighborhoods are being used after regular school hours from 3 p.m. to 9 p.m. to house these programs. In addition to programs for high-risk youth, the Safe Haven Project also includes a number of programs that are adult-oriented. The number of community participants at one of the Safe Haven sites has averaged between 85 and 125 per evening, with as many as 200 on several occasions.

(4) The Community Revitalization and Empowerment Program is in the planning stages and should be underway soon. A number of human service agencies have been identified to participate in this "seed" effort, including: the Delaware Valley United Way, Urban League of Greater Trenton, Boys and Girls Clubs, DARE (Drug Abuse Resistance Education) program, and the Trenton School District, among others. In addition, the Mayor of Trenton has held a number of town meetings in the targeted areas to assess community needs and the types of social services to be made available in the "Safe Havens." Project participants also have signed a memorandum of agreement specifying their commitment to the program.

Phase II -- fiscal year 1992 -- Demonstration Program

In Fiscal Year 1992, the Department will expanding the pilot phase of Weed and Seed to additional demonstration sites. This initiative shows great promise, but much work remains to be done to refine the design of the program. Resources are limited in Fiscal Year 1992, so the demonstration program can be expanded to

only 16 cities. The cities participating in Phase II are Atlanta, GA; Chelsea, MA; Charleston, SC; Chicago, IL; Denver, CO; Fort Worth, TX; Santa Ana, CA; Madison, WI; Philadelphia, PA; Pittsburgh, PA; Richmond, VA; San Antonio, TX; San Diego, CA; Seattle, WA; Washington, DC; and Wilmington, DE.

On January 7-8, 1992, United States Attorneys from the 16 cities participated in a Planning Conference hosted by the Department of Justice. At the planning conference, the U.S. Attorneys were fully briefed on the requirements for the Weed and Seed program. In addition, on February 11-12, 1992, the Office of Justice Programs hosted a Weed and Seed Technical Assistance Workshop to assist representatives from the 16 sites in developing their Weed and Seed programs and preparing their applications. The agenda included presentations on organizing and planning Weed and Seed programs, the application of community policing, and the role of prevention. The Workshop also provided participants an opportunity to review application requirements and to discuss the mechanics of preparing the application. All applications from the sites were received by the March 20, 1992 deadline and have been analyzed by impartial peer review panels, composed of law enforcement officers, prosecutors, social service providers, and community planners. All 16 sites met the Weed and Seed criteria have been notified of their selection for funding. These sites will receive approximately $1.1 million from the Department of Justice to begin implementation of the Weed and Seed strategy. An award of about half that amount will be made

this year, and the remainder will be available in Fiscal Year 1993, subject to Congressional appropriations.

Training and technical assistance will also be made available in this fiscal year to other jurisdictions wishing to develop Weed and Seed programs.

Los Angeles Weed and Seed

On May 7, 1992, the President announced a $19 million "Weed and Seed" operation designed to help resuscitate blighted and burned Los Angeles communities.

The $19 million "Weed and Seed" program will include funding from the Department of Justice and numerous other Federal agencies. The Department of Justice, in consultation with the other Federal agencies, State and local officials and the private sector, will identify specific hard-hit neighborhoods in Los Angeles for this targeted aid.

A combination of social service and law enforcement, all backed by State, local and strong private sector involvement, is essential for the success of "Weed and Seed" in Los Angeles. A coordinated and extensive social and health investment will follow the law enforcement efforts to address the needs of the blighted areas. Such a coordinated investment of public and private resources will give law abiding citizens the kind of economic and social opportunities that breathe life into neighborhoods.

President's Fiscal Year 1993 Initiative

Phase III of Operation Weed and Seed is planned for implementation in Fiscal Year 1993. As you know, Mr. Chairman, President Bush has requested (in his Fiscal Year 1993 budget proposal) $500 million to substantially expand Weed and Seed activities. This $500 million has been identified in the budgets of the U.S. Department of Housing and Urban Development to fund programs such as public housing drug elimination grants; the Department of Health and Human Services for community partnership grants, drug treatment, and improved access to health care and to provide Head Start for one year for eligible children; the Department of Labor for Job Training Partnership Act programs that provide job training for high-risk youth and adults; and the Department of Education to increase educational opportunities and drug education and prevention programs.

Some $30 million has been requested in the Fiscal Year 1993 budget of the Department of Justice to support Weed and Seed to expand the number of demonstration sites. An additional one million dollars has been requested in the Department of Transportation fiscal year 1993 budget to support reverse commuter demonstration grants to facilitate movement of inner city residents to suburban jobs.

Notwithstanding the President's substantial request for additional Federal resources, I want to stress, Mr. Chairman, that Weed and Seed is not simply another Federal grant program.

While additional funding will be allocated for this initiative, its success is not dependent upon new Federal dollars. Rather, its success will depend, in large part, on coordinating private sector efforts and existing Federal grants and State formula block grants and redirecting these resources in a comprehensive effort to assist these targeted sites. The Justice Department is working with officials from HUD, HHS, Labor, Education, Agriculture, Transportation, Treasury, and the Office of National Drug Control Policy to coordinate the manner in which Federal resources will be directed to this initiative in Fiscal Years 1992 and 1993, and I am pleased to report that they have been very enthusiastic about this critical effort.

In conclusion, Mr. Chairman, by implementing this Weed and Seed strategy, Federal, State, and local governments, law enforcement and human service agencies, the private sector and community residents can form a partnership which will give neighborhoods the best chance to significantly affect the problems of violent crime, drug trafficking, and gang activity that terrorizes law-abiding Americans. I appreciate your support and look forward to working with Congress to further this critical effort.

Thank you, Mr. Chairman. I would now be happy to answer any questions you may have.

THE HONORABLE CHARLES B. RANGEL, *Chairman*
SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL

Role of the Department of Justice in the National Drug Control Strategy
Weed and Seed

May 20, 1992

Ladies and gentlemen. Mr. Attorney General, I am pleased to welcome you here today. While you have had a long-standing relationship with this committee, this is the first time you have appeared here as the top man. With that in mind, I congratulate you on your quick transition into the job and the aggressive leadership you have shown from the very start of your tenure.

Today we are to hear from you on the Justice Department's role in the National Drug Strategy, particularly with respect to Weed and Seed. We have heard from Governor Martinez in a formal hearing, and we have met with other Cabinet officials informally to talk about their respective roles in this so-called War on Drugs.

In a moment I will recognize our distinguished ranking Member, Mr. Coughlin, and then other members of the Committee for opening comments. After that I will recognize you for whatever time you need to make your presentation.

Our principal reason for being here today, of course, is the Weed and Seed initiative. To me the most significant part of this proposal is that it is the first time in twelve years a President has acknowledged a clear relationship between the social and economic infrastructures of a community and the magnitude of its drug problem and related violence. OMB Director Darman reported to the Ways and Means Committee in December that our failure to address these conditions is costing the economy nearly $300 billion a year in lost productivity, increased welfare dependency, prison and court costs, drug treatment, and higher educational and social costs.

The Administration is to be commended for its attempt to respond to that report with this concept. I don't need to remind you that many in Congress want you to succeed, but also need to be assured that the effort is balanced and comprehensive. I must underscore my belief and that removing drug dealers and violent criminals from the streets is only part of the battle. To make these communities safe in the long-term, there needs to be a significant investment in the social and economic frabric as well. Last week week we heard from the mayor of Trenton, who was very supportive of the program, but added that his support was completely dependent on the successful implementation of the "seed" component.

At this point I want to mention to you several concerns that have been shared with me by colleagues in the House about the program.

• First is the question of the $500 million the President has proposed to fund the initiative. As I look at his budget, it is obvious that none of this is really new money -- $220 million is supposed to be made available through earmarking funds from other programs, while $280 million appears to be dependent on Congress actually making cuts in existing urban programs. In short, it looks like we are being asked to fund Weed and Seed through the reshuffling of existing resources from one needy community to another. I can tell you that such a proposition is neither practical nor realistic, particularly in light of the recent violence. I have been before the Budget Committee, the Ways and Means Committee, and three House Appropriations subcommittees asking for support for your program. And the message I get is the same -- "We'll go for your program, just give us a credible plan for paying for it." Frankly, unless the President is willing to commit himself to a realistic funding scheme, I have serious concerns about this critical aspect of an otherwise well-intented program is going to become reality.

• Second, I must emphasize that successful implementation of this program depends heavily on your ability to enlist the enthusiastic support of those actually living in Weed & Seed areas. My office has received numerous phone calls from communty groups and individuals expressing fear that Weed and Seed is little more than a cover for a police action against poor black communities. The fact is the most visible part of the program to date has been law enforcement actions in minority communities. The "seed" side of the equation is simply not evident to people living in these cities -- if it exists at all.

One elderly man from a Weed and Seed site called my office to ask why his neighborhood "had been targeted for martial law." Another person -- a mother with three young children -- called to complain that she had been told that Federal law officers had photographed her sons at school for a file of potential future gang members.

• Thirdly, there is confusion about who is in charge at the local level. I understand that the U.S. Attorneys play a pivotal role, but I also understand that mayors and other local officials believe they have a measure of control over this program that I don't think you intend for them to have. As I understand it, the "weed" side is an operation under the U.S. Attorneys, in which local officials and police agencies participate, but over which they have no direct control. If my understanding is incorrect, I would appreciate your correcting me. There is also confusion on the "seed" side. I saw a report from Seattle recently that the Justice Department had invalidated Mayor Rice's announcement of Weed and Seed money for a youth counseling program, a drug treatment initiative, and several other local "seed" projects. These kinds of misunderstandings, especially where prominent mayors are concerned, are going to give this program a black eye very quickly.

• Fourthly, there are a number of Members of Congress and, I imagine, the public as well, who want to know how a community is selected for participation in Weed and Seed. It is not clear, at least to me, how these 16 cities were selected last spring. It is not clear what standards you applied, or even how you solicited and obtained applications. I am

told that at least in one case local residents were refused a copy of the official "Request For Proposal" by the Department. I hope that is not true, but I think you probably need to address that question.

• Finally, I invite you to offer your assesment of the progress of the NYU-Ford Foundation program, which was one of the original grant recipients under Weed and Seed. As many on this committee may remember, this is an $8 million program for demonstration programs targeted to high-risk populations in the inner cities. Half of the money for the program came from Justice, while $3 million came from the Ford Foundation and $1 million from the Pew Trust. Bill Grinker, the former NYC Commissioner of Human Services, is the director of the program. This effort has a great deal of potential, and represents precisely the kind of private-public partnership that should be encouraged in finding solutions to urban problems.

Thank you for joining us, Mr. Barr. Congressman Coughlin?

MAY 20, 1992

STATEMENT BY REP. FRANK J. GUARINI:

THE TRAGEDY OF THE LOS ANGELES RIOTS HAS GALVANIZED SUPPORT FOR ADDRESSING THE PROBLEMS OF OUR INNER CITIES. BOTH PARTIES ARE NOW WORKING TO FORGE LEGISLATION TO PROVIDE NEW RESOURCES TO OUR CITIES.

THE PRESIDENT'S BUDGET PROPOSES TO EARMARK $500 MILLION FROM EXISTING DOMESTIC PROGRAMS FOR A WEED AND SEED INITIATIVE. THE WEED AND SEED CONCEPT HAS BEEN AROUND IN ONE FORM OR ANOTHER FOR SOME TIME. LIKE MANY OF MY COLLEAGUES, I BELIEVE THAT THE ADMINISTRATION HAS PLACED TOO MUCH EMPHASIS ON THE WEEDING SIDE OF THIS COMPLICATED EQUATION.

THE ADMINISTRATION CLAIMS THAT 95% OF THE $500 MILLION REQUEST IS FOR SEEDING. YET, MUCH OF THIS MONEY WOULD COME FROM EXISTING PROGRAMS INCLUDING PUBLIC HOUSING AND COMMUNITY DEVELOPMENT BLOCK GRANT FUNDS -- WHICH THE PRESIDENT PROPOSES TO CUT.

THE WEED AND SEED PROGRAM IS WORKING IN CITIES LIKE TRENTON, NEW JERSEY AND IT WILL WORK THROUGHOUT THE COUNTRY IF WE ARE WILLING TO PAY FOR IT.

WEED AND SEED IS WORKING IN NEW JERSEY BECAUSE THE STATE AND THE CITY OF TRENTON HAVE COMMITTED THEIR OWN FUNDS TO MAKE THE SEEDING PROGRAMS WORK.

IN FACT, THE PROGRAM HAS BEEN SO SUCCESSFUL IN TRENTON THAT THE ATTORNEY GENERAL HAS PROPOSED TO FUND ADDITIONAL WEED AND SEED SITES WITHIN NEW JERSEY BY USING SOME OF THE STATE'S JUSTICE BLOCK GRANT FUNDING.

GIVEN THE PROGRESS THAT WE ARE MAKING IN NEW JERSEY, I STRONGLY URGE THE JUSTICE DEPARTMENT TO CONTINUE THE FUNDING THIS YEAR.

FINALLY, I WANT TO STRESS THAT ANY WEED AND SEED PROPOSAL MUST INCLUDE FUNDING FOR THE TREATMENT OF DRUG OFFENDERS.
RIGHT NOW, NINE OUT OF TEN DRUG OFFENDERS DO NOT RECEIVE TREATMENT. AFTER BEING RELEASED FROM PRISON THEY RETURN TO THEIR COMMUNITIES -- AND RESUME THEIR OLD LIFESTYLES.

WE SIMPLY CAN NOT AFFORD TO CONTINUE SPENDING HUNDREDS OF MILLIONS OF DOLLARS EACH YEAR TO BUILD MORE PRISONS. WE MUST BREAK THIS VICIOUS CYCLE.

NO AMOUNT OF "WEEDING" BY THE POLICE WILL CHANGE THE INEVITABLE RESULT -- WITHOUT TREATMENT -- DRUG OFFENDERS END UP BACK IN PRISON AGAIN AND AGAIN.

I LOOK FORWARD TO WORKING WITH YOU, GENERAL BARR, IN AN EFFORT TO OBTAIN NEW FUNDING FOR THE WEED AND SEED PROGRAM AND PRISON DRUG TREATMENT THIS YEAR.

**OPENING STATEMENT BY REPRESENTATIVE JIM RAMSTAD
SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL
ON OPERATION WEED AND SEED**

MAY 20, 1992

MR. CHAIRMAN, THANK YOU FOR CALLING THIS IMPORTANT HEARING ON OPERATION WEED AND SEED, AND THANK YOU, ATTORNEY GENERAL BARR, FOR COMING TODAY TO DISCUSS THIS PROGRAM WITH US.

IN THE AFTERMATH OF THE RIOTS IN LOS ANGELES AND ATLANTA, WE OBVIOUSLY MUST ADDRESS THE PROBLEMS OF VIOLENT CRIME AND ECONOMIC DEPRESSION IN OUR URBAN CENTERS. CLEARLY, THE INDIVIDUAL EFFORTS OF FEDERAL, STATE AND LOCAL GOVERNMENTS HAVE NOT BEEN SUCCESSFUL IN KEEPING THE PEACE AND CREATING A COMPETITIVE BUSINESS ENVIRONMENT IN WHICH INNER-CITY NEIGHBORHOODS CAN GROW AND PROSPER. BUSINESS-AS-USUAL WILL NOT SUFFICE

THAT'S WHY I STRONGLY SUPPORT OPERATION WEED AND SEED AS THE BEST WAY TO COORDINATE THE EFFORTS OF FEDERAL, STATE AND LOCAL GOVERNMENTS AND THE PRIVATE SECTOR TO COMBINE LAW ENFORCEMENT AND SOCIAL SERVICE PROGRAMS FOR TARGETED AREAS.

I AM ENCOURAGED BY THE POSITIVE SIGNS COMING OUT OF THE CURRENT WEED AND SEED PILOT PROGRAMS. FOR EXAMPLE, THIS WEEK'S EDITION OF NEWSWEEK FEATURED THE PROGRAM IN TRENTON, NEW JERSEY WHERE

"A $750,000 GRANT WENT TO A SMALL NEW COMMUNITY-POLICING UNIT DESIGNED TO GET COPS OUT OF THEIR CARS AND INTO CLOSER COLLABORATION WITH RESIDENTS. FLORIST INA FORD SAYS THE SIDEWALK IN FRONT OF HER SHOP ON MARTIN LUTHER KING BOULEVARD USED TO BE SWARMING WITH DEALERS. STEPPED UP POLICE ATTENTION HAS DRIVEN OFF SOME DRUG MERCHANTS AND RESTORED A SENSE OF COHESION TO THE AREA. 'WE'RE COMING TOGETHER AS A NEIGHBORHOOD,' SAID FORD."

"WE'RE COMING TOGETHER AS A NEIGHBORHOOD." THAT IS WHAT OPERATION WEED AND SEED IS ALL ABOUT: GETTING COMMUNITIES INVOLVED IN CRIME PREVENTION AND NEIGHBORHOOD REVITALIZATION, EMPOWERING PEOPLE TO TAKE CHARGE OF THEIR LIVES AND THEIR SURROUNDINGS.

ATTORNEY GENERAL BARR, THANK YOU FOR YOUR EFFORTS ON THIS MOST IMPORTANT PROJECT. LATER THIS WEEK, I WILL BE CIRCULATING A LETTER AMONG MY COLLEAGUES PLEDGING OUR SUPPORT FOR OPERATION WEED AND SEED AND URGING THE PRESIDENT TO KEEP UP THE FIGHT FOR OUR CITIES.

THE TIME HAS COME FOR A NEW URBAN POLICY. OPERATION WEED AND SEED IS THE FIRST STEP IN THAT DIRECTION.

○

58-408 (64)

Office of the Attorney General
Washington, D. C. 20530

MAY 15 1992

May 15, 1992

(TYPO Corrected)

Honorable Henry B. Gonzalez
Chairman, Committee on Banking,
Finance, and Urban Affairs
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Administration has been providing you significant quantities of classified information that you have requested. We would like to continue to respond positively to your requests. However, your recent disclosures of classified information on the floor of the House of Representatives and in the Congressional Record have raised serious concerns.

Public disclosure of classified information harms the national security. The departments and agencies are precluded by executive order from disseminating classified information "outside the executive branch except under conditions that ensure that the information will be given protection equivalent to that afforded within the executive branch." (E.O. 12356, Section 4.1(c), 47 Fed. Reg. 14874, 14881 (1982).) Therefore, in light of your recent disclosures, the executive branch will not provide any more classified information to you until specific assurances are received from you that classified information provided to you and the Committee will receive the same security protection provided by the executive branch, that is, protection from unauthorized disclosure, with access provided only to persons with appropriate security clearances.

If you wish to receive further classified information on the basis of such assurances it will be provided expeditiously as in the past. With those assurances, we remain committed to providing your committee with the information it needs to perform its legislative responsibilities. Please let us know your wishes in this regard.

Sincerely,

William P. Barr
Attorney General

cc: Honorable Chalmers P. Wylie

DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATIONS FOR FISCAL YEAR 1993

THURSDAY, MARCH 19, 1992

U.S. SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS,
Washington, DC.

The subcommittee met at 10:15 a.m., in room S–146, the Capitol, Hon. Ernest F. Hollings (chairman) presiding.

Present: Senators Hollings, Lautenberg, Adams, Rudman, and Gramm.

DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL

STATEMENT OF WILLIAM P. BARR, ATTORNEY GENERAL

ACCOMPANIED BY:

GENE McNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE

J. MICHAEL QUINLAN, DIRECTOR, FEDERAL PRISON SYSTEM, BUREAU OF PRISONS

HENRY E. HUDSON, ACTING DIRECTOR, U.S. MARSHALS SERVICE

JIMMY GURULE, ASSISTANT ATTORNEY GENERAL, OFFICE OF JUSTICE PROGRAMS

HARRY H. FLICKINGER, ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION

MICHAEL J. ROPER, DEPUTY ASSISTANT ATTORNEY GENERAL CONTROLLER

ADRIAN A. CURTIS, DIRECTOR, BUDGET STAFF

BUDGET REQUEST

Senator HOLLINGS. The subcommittee will come to order, please.

This morning, the subcommittee will continue its fiscal 1993 hearings for the Department of Justice. The Department is requesting a total of $10,018,488,000 in appropriated funds representing an increase of $695 million, or 7 percent, more than the amount appropriated last year.

There are some amounts to be explained here with regard to the Department's reference to a $1 billion increase which includes various fee receipts, an additional $250 million for expansion of a program that is yet to be authorized, and moneys assumed transferred

into our bill from the Treasury-Postal Service appropriations bill. We will have to get those things straightened away.

Let me welcome Attorney General William P. Barr and his agency heads, Mike Quinlan, Federal Prison System; Gene McNary of the Immigration and Naturalization Service; Henry Hudson of the U.S. Marshal Service; and Jimmy Gurule, Office of Justice Programs.

I yield to you.

Senator RUDMAN. Thank you, Mr. Chairman. I welcome the Attorney General and look forward to his testimony.

PREPARED STATEMENT

Senator HOLLINGS. Very good. Mr. Attorney General, we have your complete statement. It will be included in the record, and you can highlight it as you wish or deliver it in its entirety, whichever way you choose.

Mr. BARR. Thank you, Mr. Chairman. I ask that it be put into the record as if read, and I would just like to give some overview remarks.

[The statement follows:]

STATEMENT OF WILLIAM P. BARR

Mr. Chairman and Members of the Subcommittee: I am pleased to be here today to present to you the President's 1993 budget request for the Department of Justice. I consider it a privilege to have had the opportunity to work with the members and staff at this Subcommittee during my tenure at the Department. In particular, over these past few months I have greatly appreciated the courtesy and support you have extended to me. I look forward to continuing this strong and positive relationship.

The mission of law enforcement is to protect the freedom and liberties of all Americans. Indeed, the first freedom of all who live in this country is the freedom from fear of crime. Adequately protecting this freedom and defending the blessings of liberty is an unending task, requiring both moral and financial commitment.

Like the members of this Subcommittee, we at the Justice Department are firmly committed to vigorous enforcement of the law. As I have mentioned frequently in my short tenure as Attorney General, and as you are certainly aware, enforcement of the law is a costly endeavor. Nevertheless, I believe that it is a cost we as a society must willingly bear. The President's proposed budget will give us the financial resources we need to make good on our commitment to the cause of justice.

Of course, in a time of scarce resources, all of us must be certain that our expenditures are effective and judicious. I believe the resources the President is requesting are absolutely necessary for the Justice Department to perform its mission of law enforcement for this nation. I hope you will agree with me that our budgetary plans for the coming fiscal year merit full funding. With the 1993 budget, the Department intends to build on the progress we have made in federal law enforcement over the past three years. The total request for fiscal year 1993 is $11.3 billion. This is about 10 percent greater than the comparable amount for 1992. Out of the total, the request for discretionary funds is $9.7 billion, an increase of 9.3 percent over 1992.

Before I go into the specifics of the proposal, I would like to discuss some of my priorities for the Department and how the Department has been using its resources in this current fiscal year.

I recognize, as you do, that my responsibility is to administer the law across the board, ensuring that all programs and activities in law enforcement are given their due attention and resources. As you consider the entire funding request for the Department, I trust you will see the Administration's commitment to the full breadth of the Department's responsibilities. Nevertheless, there are several areas which I believe warrant special emphasis, and I have attempted in my first months as Attorney General to bring greater attention to these challenges for law enforcement.

First, as you undoubtedly know by now, the fight against violent crime and drug trafficking is one of my top priorities. While the problem of violent crime is primarily the responsibility of state and local law enforcement, strong federal leadership can have a significant impact. In this regard, we have been increasingly tar-

geting our resources over the past year on gangs, felons who use firearms, and drug trafficking organizations.

With regard to gangs, federal law enforcement has become extremely effective in combating violent street gangs by using tough federal laws to assist local law enforcement in dismantling these criminal organizations. As you know, in the past several weeks, I have attempted to enhance this assistance by shifting 300 FBI agents from the foreign counterintelligence program to violent gang task forces in dozens of cities across the country. This was one of the largest reallocations of resources in FBI history.

Along with this shift, the Administration agreed that the Bureau of Alcohol, Tobacco, and Firearms should join the FBI in joint task forces which would expand the Washington, D.C. effort and launch new programs in Baltimore, Dallas and Atlanta. We are augmenting this effort by supporting a new national gang analysis center. Furthermore, I have added 150 INS criminal investigators who will focus on violent criminal alien gang members and I have reassigned 25 DEA agents from headquarters to drug-related violent crime task forces. I would be remiss if I did not add that I greatly appreciate the Subcommittee's support of these changes.

In connection with our crack down on felons who use firearms, we are now targeting habitual offenders who use or carry guns, seizing their weapons, and putting these repeat criminals in prison under stiff federal mandatory sentences. Under our "Operation Triggerlock," we will have charged nearly 6,000 violent criminals by the time of our one year anniversary in April.

Finally, with regard to drugs, in addition to our ongoing attack on trafficking organizations throughout the nation and around the world, the Department has been focusing resources on violent street gangs engaged in drug distribution. Over the past year, entire gangs, along with the murder and destruction caused by their drug trafficking enterprise, have been completely removed in cities such as Philadelphia, Chicago and Washington, D.C.

In addition to these efforts, the Administration's "Operation Weed and Seed" is an essential element in our attack against street crime and the social and economic devastation it brings. Working with community leaders, we are targeting high-crime neighborhoods and housing developments to "weed out" violent criminals, illegal gang activity, drug trafficking and related violence. Then, these formerly crime-saturated neighborhoods will be "seeded" through comprehensive social and economic revitalization. We hope to expand substantially this initiative next year, and this proposal is outlined more fully in my statement.

Another priority of mine and the Department's is civil rights. The Department is firmly committed to working diligently to ensure that every American's civil rights are protected, whether it be in the home, workplace, marketplace or classroom. While I was serving as Acting Attorney General, I announced plans to aggressively attack housing discrimination this fiscal year by employing the Department's own discrimination "testers." I also directed the Civil Rights Division to study the problem of mortgage discrimination for possible enforcement action.

Finally, we have been making great headway in the fight against white-collar crime and financial institution fraud. In February, I announced my intention to reassign this year another 50 FBI agents from counterintelligence to investigations of health care fraud. Furthermore, since 1988, the Department has prosecuted more than 2,700 defendants in major financial institution fraud cases. More than 1,000 of these defendants have been prosecuted in connection with major S&L cases, and more than three-fourths of those convicted have gone to jail. Our success in the past year is in large part the result of the enhanced resources we received in 1990. The task now is to build on our successes, to keep up our momentum.

All of us here—members of this Subcommittee, Justice Department officials alike—understand the need for strong law enforcement. The President's budget proposal contains some significant increases over last year's budget. This reflects an understanding of the challenges before us, and it shows the resolve necessary to meet them. This budget is right in line with the priorities of the Department. I would now like to discuss in some detail the proposed budget.

VIOLENT CRIME

Although reducing violent crime is our top budget priority, it does not have high visibility in our formal 1993 budget request. In the budget, most of the violent crime effort of the Federal Bureau of Investigation is in a program that is simply titled "Other Field Programs." This program includes investigation of crimes on Federal property and Indian reservations, interstate thefts, bank robbery, airline piracy, a growing list of statutory offenses against violent acts, and the tracking of fugitives. In the U.S. Attorneys, violent crime falls under the title "Criminal litigation." In ad-

dition, the Marshals Service deals with fugitives and the Criminal Division provides litigation guidance.

Starting with the resources we have in 1992, our violent crime initiative moves in two principal directions. One is a direct assault on violent street criminals where agents of the FBI and DEA and personnel from INS and the Marshals Service join with State and local law enforcement agencies. The other effort is the more comprehensive "Operation Weed and Seed" program. By 1993, we hope to apply nearly $486 million to our violent crime initiative, more than a 23 percent increase over the original 1992 enacted level for violent crime programs.

DIRECT ASSAULT ON VIOLENT CRIME

In 1993, the violent crime activities of the FBI will be further strengthened by reallocating another 85 agents from the counterintelligence program to further increase the number of Violent Crime Task Forces and broaden their focus on gangs.

As the law enforcement agencies develop their Violent Crime Task Force cases, the U.S. Attorneys will need to expand their capacity for handling additional cases. In addition, the U.S. Attorneys will take a lead role with State and local law enforcement officials in targeting repeat violent offenders, drug traffickers, and gang members who must be removed from circulation so that neighborhoods can be rejuvenated. Beyond the reprogramming within the FBI, increases totaling $26 million and 360 positions (161 attorneys) are requested for violent crime.

OPERATION WEED AND SEED

On January 27, the President formally endorsed the "Weed and Seed" program which provides intensive crime and drug fighting assistance, social services, and job opportunities to targeted inner city neighborhoods. The goal is to "weed out" crime from targeted neighborhoods by increasing police visibility, developing police relationships with the citizenry, addressing social and economic problems in communities where narcotic trafficking is prevalent, and then "seed" them by developing an active community policing program coordinating the delivery of social services, including prevention, intervention and treatment programs, addressing social and economic problems in communities where narcotic trafficking is prevalent, and building a framework under which public and private agencies can enhance public safety and the overall quality of life. In 1993, the program includes a $30 million commitment by the Department of Justice. The Government's total 1993 commitment may reach $500 million, provided that Congress adopts the appropriations language proposed for the budgets of the various departments affected by the program and permits the establishment of Urban Enterprise Zones.

The concept of "Weed and Seed" originated in Philadelphia. In 1991, the Office of Justice Programs made pilot grants to Trenton, New Jersey; Kansas City, Missouri and Omaha, Nebraska; and in 1992, grants will be made to at least eight to ten cities. With the request for 1993, over 30 neighborhoods may be selected for participation.

DRUG ABUSE AND CONTROL

Unlike our violent crime initiative, drug abuse and control have long been recognized as a Federal responsibility. In January 1992, the President transmitted the Fourth National Drug Control Strategy to Congress. The principal goal remains unchanged: to reduce the level of illegal drug use in America. The President noted that in fighting the drug war, we are winning the war against casual drug use, but progress is slower in the war against hard core drug use.

Debate will continue over the proper balance between "supply" and "demand" efforts to combat drugs. Clearly, the ultimate victory must be won on the battlefield of values. This means that drug abuse must be rejected in the family, classroom, houses of worship, and throughout our social structure. But as the National Drug Control Strategy report says, "Treatment and education stand little chance of succeeding if they must compete in a neighborhood where drug dealers flourish on every corner."

The National Drug Control Strategy for 1993 enumerates the agencies requesting $12.7 billion for the anti-drug abuse effort, a total 6 percent greater than the $12 billion available in 1992. For the Department of Justice only, the 1993 total is $4.7 billion. This is $411 million more than the amount provided in 1992 and represents more than 41 percent of all the financial resources included in our 1993 budget.

The $4.7 billion Department of Justice segment includes the entire appropriations for the Drug Enforcement Administration and Organized Crime Drug Enforcement, as well as all obligations of the Assets Forfeiture Fund. Because of the magnitude

of the Drug Abuse grant program in the Office of Justice Programs, the preponderance of its activities are classified as part of the drug war. Beginning in 1983, the Federal Bureau of Investigation formally joined the list of investigative agencies budgeting directly for the drug war. Perhaps the most indicative measure of the success of the drug war is the inclusion of more than $1.6 billion for the housing and care of prisoners convicted of drug-related offenses. Smaller but significant funding amounts are contributed by the U.S. Attorneys, the Marshals Service, and the Immigration and Naturalization Service. Rounding out the heavy commitment by the Department are direct activities of the Criminal and Tax Divisions, as well as INTERPOL.

Although the Justice Department is primarily associated with the mission of reducing the supply of drugs, it is strongly committed to drug abuse prevention and education. The DEA and the FBI have allocated increasing resources to this effort. The Federal Prison System is actively involved in prisoner education and treatment programs, and the Office of Justice Programs is authorized to provide grants for almost any activity that may successfully fight drug abuse.

Recognizing that the preponderance of our resources are directed at reducing the drug supply, there are three possible approaches. One is to destroy drugs at their source. A second is to sharpen the attack on drug trafficking organizations. Finally, the drug supply can be reduced by attacking drug transactions at the street dealer level. As circumstances change, the response of law enforcement also must change.

WHITE COLLAR CRIME

Three years ago, when former Attorney General Thornburgh was before this Committee, he noted that the battlefield of values was not limited to drugs but extended to the nation's corporate board rooms. We were already involved in addressing financial institution and defense contractor fraud, HUD-related cases, and a variety of other crimes in the suites. The magnitude of fraud in the savings and loan industry and its precarious condition soon became evident. Within months, the Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. Since then, we have relentlessly pursued fraud cases and secured long sentences and orders for high fines and restitution not only from savings and loan industry defendants but also from others who have violated their fiduciary responsibilities.

In 1993, our White Collar Crime request totals $640 million, of which $278 million is requested to respond to financial institutions fraud. To respond to the broadening array of white collar criminal activity, we are requesting 388 positions and $23.3 million in program increases.

More than half of the entire program and the majority of the program increases are slated for investigations conducted by the Federal Bureau of Investigation. As expected, the second largest component, in terms of ongoing and increased resources, is the U.S. Attorneys. Five of our legal divisions comprise the remainder of the program.

A number of new or expanded white-collar crime initiatives need to be undertaken. We must investigate and vigorously prosecute instances of fraud involving health care, insurance and pension plans to guard against another debacle on a scale similar to the savings and loan crisis. The ballooning number of bankruptcies also appear to be laced with fraud.

Within the Federal Bureau of Investigation, the focus will be on augmenting health care and financial institution fraud cases, sharply increasing the resources applied to computer crimes, investigating the siphoning off of funds both before and after bankruptcies are filed, and responding to complaints about fraud associated with telemarketing, insurance, and commodities and securities.

The Tax Division requires additional staff to stem a massive evasion of the motor vehicle fuel excise tax and to collect taxes owed but concealed during bankruptcy proceedings. Within the Criminal Division and the U.S. Attorneys, prosecutions will focus increasingly on pension plan fraud, health care fraud, and computer crimes.

The Civil, Antitrust, and Environment and Natural Resources Divisions will continue to devote considerable resources to ferreting out those who violate criminal laws in their business activities.

IMMIGRATION

Although the President's budget contains several immigration initiatives, the priority for controlling illegal immigration was enhanced greatly by the Department's February 19, 1992 reprogramming notification which proposed to accelerate the application of user fee resources to strengthen inspection and examination activities. This reprogramming also had the beneficial effect of providing resources in 1992 to hire 300 Border Patrol agents and 200 investigators to interdict, identify, and deport

criminal aliens, and over 700 INS employees to serve those who are lawful immigrants and travelers.

OTHER PRIORITIES

Earlier, I mentioned a number of priorities that the Congress must address, but detailed discussion of them can be deferred because they can be fully covered as we later address specific organization requirements.

MATTERS OF SPECIAL INTEREST

The Civil Liberties Act of 1988 established a Fund out of which Japanese-Americans interned during World War II would receive a payment of $20,000 if still living at the time the Act was signed. An authorization was established for $1.25 billion to compensate 62,500 people over a three year period. This Fund will become exhausted in 1993. However, because the number of eligible interned Japanese Americans has been higher than expected, legislation is proposed to provide benefits to those who remain unpaid. In addition, equity requires payment to non-Japanese spouses and parents who were also interned, a provision of the Administration's legislative proposal. To pay these additional costs, the authorization for this permanent-indefinite appropriation will need to be increased by $250 million.

The Radiation Exposure Compensation Act established a Trust Fund to pay claims of individuals exposed to radiation stemming from atmospheric nuclear tests and uranium mining. The first funding for this purpose was a $30 million appropriation to the Department of Defense in 1992. In 1993, the Administration is requesting almost $171 million in the Department of Justice. Because fixed compensation amounts are not provided by law, this program falls within discretionary spending ceilings, but instead of being classified under the domestic discretionary category, the costs are classified as defense discretionary. This is because they stemmed from the activities of the Department of Defense and the Department of Energy and its predecessor agencies. In addition, a small component of the Civil Division charged with administering compensation claims is proposed for similar funding.

Unusual interest has already been shown in another matter which shows up as a general provision of the Department's budget. Section 111, if enacted, would permit the Department to charge prisoners the costs of their first year of incarceration following sentencing. The fee for most prisoners would be waived because of their indigence or other mitigating circumstances, but it seems very reasonable that society should not shoulder the full cost of incarcerating criminals who have the ability to pay.

The appropriation request includes a modification of the U.S. Code that would require U.S. courts to award filing and docketing fees to the United States when the United States is a prevailing party in a lawsuit. The United States would continue to be exempt from paying fees when it files documents. For example, if the United States won a case as the plaintiff, the loser, be it an individual or a corporation, would be required to pay these fees, notwithstanding that the Government had not paid any filing fees.

INDIVIDUAL COMPONENTS

Understanding how certain priorities of the Administration sweep across almost all of the Department's components is necessary to comprehend how we deal with nationwide problems and to understand how critical it is that each has its proper share of resources. The war on drugs is our best example. In other cases, developing programs can be adequately described within organizations that are directed at specific missions. The remainder of my remarks are directed mainly at Department components falling under such broad classifications as law enforcement, litigation, corrections, State and local assistance, and infrastructure.

LAW ENFORCEMENT

The largest law enforcement component in the Department of Justice is the FBI. Its direct appropriation request exceeds $2 billion. The FBI's enhanced role in fighting violent crime has already been discussed along with its continuing and growing responsibilities in the war on drugs and white collar crime. The changing world situation not only allows us to shift major resources out of foreign counterintelligence but also allows us to shift certain counterintelligence costs to the defense discretionary category under the operative budget agreement.

The changes mentioned above focus on the work of the Bureau's 56 field offices and approximately 400 resident agencies. In addition to the reprogrammings for 1992, which will be augmented in 1993, the budget includes a number of program increases to strengthen FBI field activities. For the Drugs Program, the request for 35 positions and $2.2 million focuses on establishing additional Regional Drug Intelligence Squads. Under the White Collar Crime Program, an additional 225 positions and $14.2 million would be applied to financial institution fraud, fraudulent bankruptcy filings, computer and wire fraud, and criminal activities in the telemarketing, insurance, securities, and commodities industries. In addition, the magnitude of health care fraud requires resources beyond those we will obtain through reprogrammings. For the Organized Crime Program, an additional 53 positions and $2.4 million are needed to counter the influx of Asian organized crime groups. The final direct request for field funding relates to increasing the size of the Hostage Rescue Team (HRT). This segment of the request includes 24 agent positions and $2.9 million. This would provide a third HRT unit which would better position us to handle several individual hostage rescue events simultaneously.

Backing up the FBI's field activities are a number of vital support programs. Within the "Salaries and Expenses" appropriation, the Technical Field Support and Equipment program has net increases totaling $11.4 million and, within the $80 million requested for the defense discretionary "Special Program" appropriation there is an increase of $8.9 million for advanced digital telephony.

The greatest single dollar item requested for the FBI continues to be the Fingerprint Identification program. In a 1990 supplemental appropriation, $185 million was provided to prepare for moving the Identification Division to Clarksburg, West Virginia. In 1992, $48 million was provided to initiate development and acquisition of an Integrated Automated Fingerprint Identification System that will be located there. In addition, Congress approved our 1992 request to provide 487 positions and $12.5 million so that we could begin to rapidly update records to aid in the identification of felons who attempt to purchase firearms. The 1993 request includes an additional $103.4 million to acquire computer hardware related to the image transmission network, convert 32 million manual fingerprint images to digitized images, and develop a prototype system to identify felons who attempt firearm purchases.

DRUG ENFORCEMENT ADMINISTRATION

As the lead Federal drug enforcement agency, the Drug Enforcement Administration has the mission of controlling abuse of dangerous drugs and restricting their supply.

Our direct appropriation request of $771.5 million is $54.8 million over the 1992 appropriation. The budget will support 115 positions and $15.5 million to cover program changes. The largest increase is the $8.4 million slated to convert four provisional State and Local Task Forces to permanently funded task forces and to purchase vehicles, radios and other equipment to support existing task forces. The next largest increase is the $5.9 million request to support Operations SNOWCAP and CADENCE, our drug suppression efforts in South America. In addition, program increases are requested to further improve the capabilities of the El Paso Intelligence Center and to provide additional agents trained as pilots to support both foreign and domestic operations.

ORGANIZED CRIME DRUG ENFORCEMENT

The $399 million Organized Crime Drug Enforcement appropriation request for 1993 is $35.8 million more than the direct appropriation for 1992. The budget request provides nearly $20.6 million in program enhancements. Increases would be provided to nearly all the 12 participating organizations based on the mix of resources needed to pursue cases that warrant inclusion in the Task Force effort. The latest agency to join the ranks of participants is the Treasury Department's Financial Crimes Enforcement Network.

Because the Task Forces work in combination with State and local investigators and prosecutors to target and destroy major narcotic trafficking and money laundering operations, they are the frontline of many of our most important domestic antidrug activities.

IMMIGRATION AND NATURALIZATION SERVICE

As discretionary spending has become limited, increasing attention has been given to identifying activities that might be continued and expanded if financing sources other than direct appropriations could be found. Within the Department, a number

of programs are being financed through the collection of fees, especially within the Immigration and Naturalization Service.

The 1993 budget request for the INS Salaries and Expenses appropriation is slightly over $1 billion, an increase of $96.4 million over the amount provided in 1992. In addition, INS's four fee accounts are expected to support spending of nearly $463 million. Spending from the Immigration Examinations Fee account is expected to reach $238.6 million for activities related to adjudication of applicants, naturalization, and the administration of asylum and refugee programs. Spending from the Immigration User Fee account will be $216 million which will provide primarily for inspection of commercial aircraft and vessels. The Land Border Inspection Fee account provides accelerated inspection for frequent border crossers on a pilot basis, and the 1993 budget request reflects a phasedown the Immigration Legalization program.

Within the appropriation request are several programmatic increases of significance. An additional 200 Border Patrol agents designated to enhance a number of southern border sectors are budgeted at $8.6 million in 1993. To address the growing criminal alien problem an increase of 94 positions, including 73 agents, and $3.7 million will enhance INS's ability to identify and initiate deportation proceedings against criminal aliens living in the United States, and provide resources for a National Enforcement Operations Center to coordinate efforts with State and local law enforcement agencies to locate and apprehend criminal aliens. The largest budget increment, 249 positions and $21.8 million, is requested for the Detention and Deportation program to staff a new joint INS-Bureau of Prisons contract facility in the Southwest, and allow safe operation at all INS Service Processing Centers. Other increases are requested to build support facilities necessary to accommodate the criminal alien population at the Krome Service Processing Center, to accelerate legal proceedings, and to enforce civil document fraud legislation. In addition to the increases included in the 1993 budget, full-year support for my recently announced enforcement initiative that provides an additional 300 Border Patrol agents and 200 investigators will be provided in 1993 through the permanent reprogramming of funds. This proposal was transmitted to you earlier this month.

U.S. MARSHALS SERVICE

The Marshals Service, in many ways, is the organization that links law enforcement with prosecution as well as providing specific services to the Judiciary. Therefore, as long as more persons are charged with crime, the Marshals Service responsibility for moving them through the justice system grows.

In 1993, the budget request totals $341.5 million, or $27.6 million over the 1992 appropriation enacted. After adjustments to base are covered, the net program increases total 113 positions and $7.7 million.

As the judicial workload grows and judgeship vacancies are filled, there are increased requirements for court security, prisoner security and the transportation of prisoners. Outside these normal workload increases are significant increases for converting the Marshals Service to the Department's Financial Management System, improving its ADP and telecommunications system, implementing the Chief Financial Officers Act, and other administrative systems improvements.

Two significant offsets are made to the requested increases. One is the closure of the Special Operations Group Training Center at Camp Beauregard, Louisiana which has been underutilized and too costly and the other is to defer a portion of the funding available for the construction of holding cells.

SUPPORT OF U.S. PRISONERS

The Marshals Service has responsibility for administering a separate appropriation titled Support of U.S. Prisoners. For a number of years, there has been an unrelenting increase in the number of unsentenced prisoners who must appear before the courts, and daily housing costs of keeping prisoners in local jails have steadily risen. In 1993, we expect to house an average of 12,987 prisoners daily in 920 State and local jails at an average cost of $49.09 per day. The cost is expected to be about $261 million. In addition, $7.4 million will be applied to the popular Cooperative Agreement Program to provide 250 guaranteed bed spaces on a long-term basis.

ASSETS FORFEITURE FUND

Like the Marshals Service, the Assets Forfeiture Fund is linked to both law enforcement and litigative efforts. The Fund was designed to take the resources of drug dealers and apply them back into law enforcement activities after the expenses of handling forfeitures were subtracted, and a determination was made that sei-

zures were legally transferred to the Government. In the 1993 budget, the discretionary budget authority associated with the Fund continues at the $100 million level.

LEGAL ACTIVITIES

The litigation and other legal work of the Department is conducted by a dedicated staff supported from three appropriations—U.S. Attorneys, General Legal Activities, and the Antitrust Division. Witnesses who appear at trials on behalf of the Government are paid from the Fees and Expenses of Witnesses appropriation. In criminal cases, the vast resources applied to investigations are useless unless the Government is able to prosecute criminal offenses effectively in court.

The U.S. Trustees, who oversee bankruptcy filings, are also included within this section.

UNITED STATES ATTORNEYS

At the core of the Federal legal system are the United States Attorneys. In the 94 judicial districts, the U.S. Attorneys prosecute most criminal cases, represent the Government in civil actions, and initiate the collection of fines, penalties, and forfeitures. As the priorities of the Nation change, U.S. Attorneys are asked to take up new and stimulating challenges.

The Department's four priority initiatives of violent crime, drugs, white collar crime, and civil rights all require considerable resources from the U.S. Attorneys. These initiatives explain the thrusts of the $813.5 million appropriation request, an increase of $92.8 million over the amount appropriated in 1992, as well as the increases slated to be allocated to the U.S. Attorneys from the Organized Crime Drug Enforcement appropriation.

Mandatory increases and a transfer of 30 positions and $3.3 million from the Civil Division to handle financial fraud investigations account for more than half of the increases.

Program enhancements over the base funding level net to $39 million. The preponderance of the new funds, $34.4 million, are for criminal litigation in two areas—violent crime and white collar crime.

Violent crime efforts will require $25.8 million and 360 positions. Of this amount, the "Weed and Seed" initiative will require $14.3 million, thus bringing 1993 resources for "Weed and Seed" to $20 million. The remainder will be about equally divided between enabling the District of Columbia Superior Court to respond to the continuing wave of homicides and other violent crimes committed in the District of Columbia and a nationwide effort to use Federal laws to reduce firearm violence.

White collar crime will require an additional $6.6 million, which will be applied to health care fraud, bankruptcy fraud, computer fraud, pension plan fraud, and telemarketing fraud.,

Rounding out the criminal litigation initiatives is a request for $2 million to use U.S. Attorneys more widely to enforce civil rights laws.

On the civil side, increases totaling more than $5 million will be used for debt collection and to assist other Federal agencies recover claims in bankruptcy proceedings. The U.S. Attorneys will continue work in prosecuting drug offenses both from their direct appropriation and from the allocation they get from the Organized Crime Drug Enforcement appropriation. In 1993, all additional funds for drug prosecution will come from the Organized Crime Drug Enforcement Task Forces.

GENERAL LEGAL ACTIVITIES

The General Legal Activities appropriation funds 10 Washington based activities. Most of the resources vested in this appropriation are concentrated in the five legal divisions supported by this appropriations, but there are also sizeable requirements for the Legal Activities Office Automation activity and smaller amounts for the Solicitor General; the Office of Legal Counsel; the U.S. National Center Bureau, INTERPOL; and the Special Counsel for Immigration Related Unfair Employment Practices.

In 1993, the budget request for the General Legal Activities appropriation is $419.5 million, or $35.3 million over the amount enacted in 1992. The program increases are concentrated in five high priority areas previously addressed.

The largest increase for the Washington-based legal divisions is for the Civil Rights Division. These include program increases totaling $3.7 million, all of which fall within the Administration's priorities to enforce the civil rights laws. In 1993, the Department's request includes approximately $2.7 million that is needed to provide information to entities required to comply with the Americans with Disabilities

Act and to enforce compliance actions where it is clear that voluntary compliance will not be obtained. Additional resources are also needed to investigate police brutality and hate crimes and uncover housing discrimination by continuing a Housing Testers Program.

The Tax Division initiatives totaling over $2 million have a link to white collar crime. More than half of the total relates to criminal prosecution and most of the remainder to civil litigation, where the emphasis will be to collect taxes from bankrupt corporations financed through high yield bonds. Within the white collar crime priority, we will focus on complex schemes devised to defraud the Government of excise taxes on motor fuels, increased fraud associated with electronic filing of income taxes, fraud associated with bankruptcy filings, and a general effort to follow through on the Internal Revenue Service's effort to reduce the tax gap.

The Criminal Division's program increase for $1 million is mainly related to our white collar crime initiative, which specifically includes $350,000 to combat pension plan fraud and another $300,000 for health care fraud. Most of the remainder will be applied to the recently established computer crime unit.

The Environment and Natural Resources Division is central to the implementation of the President's environmental priorities. Increases total $3.2 million, of which $1.8 million will be used to develop standard protocols to help bring Federal facilities into compliance with environmental laws. The Government will also be required to defend cases protesting Clean Air Act regulations and enforce the final provisions of the Resource Conservation and Recovery Act. The remainder of the increase is the $1.4 million requested for automated litigation support.

Aside from the various legal division requirements, the budget includes a $43.4 million request for Legal Activities Office Automation, a $12.7 million increase over the amount provided in 1992. This request, which is one of our infrastructure priorities, is a key factor in the Department's productivity and efficiency. Several legal divisions that entered the office automation era fairly early are now at the point where their systems are outmoded, and the basic equipment is obsolete. The request will allow us to begin to upgrade some of the earlier systems and allow the Department to comply with the mandatory requirements of the Government Open Systems Protocol.

ANTITRUST DIVISION

The appropriation request for the Antitrust Division for 1993 is $54.1 million. Together with a fixed $10 million estimate for premerger notification filing fees under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, the total amount available to the Division in 1993 will be $64.1 million, an increase of almost $5.9 million over the total amount available in 1992.

The Antitrust Division was the earliest legal division in the Department to install office automation equipment and automated litigation support. Consequently, the Division has a strong need to obtain automated systems that meet current security requirements, support management requirements, and meet special litigation requirements. In terms of new program initiatives, the Division is following up on its legislative proposal regarding joint production ventures and proposing to expand its role as an advocate for competition. The 1993 initiatives will require an additional $2.6 million.

If legislation to transfer certain railroad related functions from the Interstate Commerce Commission is enacted, the Committee will need to consider a related budget request for $850,000.

FEES AND EXPENSES OF WITNESSES

The Fees and Expenses of Witnesses appropriation request for 1993 of $81 million is $11.8 million below the $92.8 million enacted in 1992. The no-year mandatory portion of the account can absorb this reduction without difficulty because unexpected unobligated balances from 1992 will remain available to help support the 1993 expected program level.

This appropriation supports litigation efforts by paying witnesses who appear on behalf of the Government, either as fact or expert witnesses, as well as physicians ordered by the court to perform mental competency examinations. Persons admitted to the Government's witness protection program are maintained in safehouses or are permanently relocated at Government expense. Smaller programs have been established to compensate victims harmed by protected witnesses and to pay private counsel for Government employees sued for actions taken while performing their official duties.

Until 1993, this entire appropriation was classified as mandatory, but the pending request now includes a $1.4 million to provide temporary protective services to ap-

proximately 50 witnesses who will appear before the D.C. Superior Court. Because this program has not been statutorily mandated, it has been classified by the Administration as a discretionary program.

UNITED STATES TRUSTEE SYSTEM FUND

Although the fees established for bankruptcy filings exceed the expenses of the United States Trustees, the basic enabling legislation made receipts unavailable for operations and specified that the program should be financed from appropriations. In the 1992 appropriations act, relief was provided to the extent that certain increased fees for Chapter 11 cases were made available for obligation. This allowed the 1992 program to be funded near the level of the request. The total funding expected to be available in 1993 is $100.2 million, $29.3 million of which is derived from Chapter 11 filing fees. This should support 1,308 positions, 198 positions more than in 1992. In 1993, the appropriation request is $70.9 million or $13.7 million more than in 1992. Even with these increases, the situation remains serious. The growing wave of bankruptcies demands a Federal response because bankruptcies are the Constitutional responsibility of the Federal Government. Over the past five years the caseload has increased by 82 percent. The U.S. Trustees Program has made great strides in bringing integrity, professionalism and uniformity to the system. Yet, thousands of old cases remain open, and there is a high risk that many private trustees who have not met fiduciary standards will go undetected. In addition, fraud by debtors appears to be extensive. Accordingly, we are now reviewing the steps that we must take to close cases that should be closed, to find and prosecute any private trustee or debtor fraud (including improved training of Assistant U.S. Trustees, FBI Special Agents and Assistant U.S. Attorneys), and to propose any legislation needed to ensure that we have all the necessary tools to accomplish these tasks.

FEDERAL PRISON SYSTEM

The Federal Prison System, it must be emphasized, is at the end of a long administration of justice pipeline where public attitudes about crime influence the Administration to propose and the Congress to act on the punishment of crime. These actions usually translate into decisions on investigative and prosecutorial resources to be applied. Ultimately, the courts are presented with criminals who require sentencing within guidelines. With a growing body of Federal offenses and the recent wave of violent crime, it is difficult to see an end to the growing population in Federal prisons.

At present there are over 65,000 Federal inmates in direct custody, about 40 percent more than there were in 1989. The average daily population forecast for 1993 is 74,500. Drug offenders make up 58 percent of this population, a proportion that has risen steadily since 1980.

For many years the Federal prison population has been well over the System's rated capacity. Within the last year, we have decided that we could safely accept more double bunking in correctional institutions, and we have urged the American Correctional Association to adopt similar standards. Even using our own upward revision in design capacity, we are still 50 percent overcrowded. From the policy perspective, our only option seems to be to construct more prisons to house the growing population.

In the 1993 budget for the "Buildings and facilities" appropriation, the $339.2 million request includes program increases of $172.1 million for new construction and $67.3 million for modernization and repair of existing facilities.

The $172.1 million construction request includes $79.6 million to construct a 662-bed penitentiary in Yazoo City, Mississippi. Architectural, engineering, and site preparation work totaling $39.5 million is budgeted for the construction of a penitentiary in Forrest City, Arkansas, which will have another 662 beds, a medical center and camp with 750 beds at an undetermined site, and detention centers in the Middle District of Florida and Sacramento, California with 500 beds each. Another $33 million is included to expand projects at five existing facilities, adding another 408 beds. These specific construction projects will provide an additional 3,482 beds. Finally, $20 million is included to acquire and renovate surplus facilities, such as former military bases or closed colleges, that would house an undetermined number of prisoners.

Under modernization and repair, an increase of $67.3 million includes a number of projects that are needed to keep the older facilities fully functional. Substantial increases are needed to achieve utility and energy savings, life safety improvements, and hazardous waste removal.

For the "Salaries and expenses" appropriation, the request is for $1.9 billion, nearly $297 million higher than 1992. This is an 18.6 percent increase. Metropolitan Correctional Centers will be opened in Brooklyn, New York and Miami, Florida. The Federal Correctional Institution in Manchester, Kentucky and portions of the Correctional Complex in Florence, Colorado will be activated. In Allenwood, Pennsylvania we plan to open a medium security facility. Opening and staffing these facilities will require an additional 1,683 positions and over $100 million in 1993, but these activations will make 4,640 bed spaces available.

The request for care and subsistence is $13.5 million. Another $19 million for 1,502 contract bed spaces should allow some relief from current overcrowding. The other major increase is $22 million to provide a joint contract detention facility in the Southwest with 1,000 beds which would be shared with the Immigration and Naturalization Service.

Finally, the operation of a total system requires that we provide AIDS treatment, manage drug care, extend the use of contract medical care, and provide other correctional services.

OFFICE OF JUSTICE PROGRAMS

State and local assistance for law enforcement activities is being provided by a growing number of Justice components, but the major vehicle for providing law enforcement assistance grants is still the Office of Justice Programs.

The 1993 request for the three accounts administered by the Office are very similar to the 1992 proposals.

For the "Justice assistance" appropriation the request is $588.5 million. Its largest component is the $496 million drug control grant program. This includes $22 million to be transferred to the Federal Bureau of Investigation to continue its work to implement the National Crime Information Center 2000 Project. The Administration also urges that the Regional Information Sharing System be incorporated into the drug grants and that the States should share more of the costs. Finally, our pilot "Weed and Seed" effort includes $8 million in drug grants and another $2 million from the Juvenile Justice request.

We continue to support the efforts of the National Institute of Justice, the Bureau of Justice Statistics and the Missing Children's program. The Bureau of Justice Statistics needs resources to survey offenders on probation and parole; to measure family violence, child abuse, and other injuries that warrant emergency room care; and to reinstate the Criminal Justice Employment and Expenditure Survey.

The 1993 budget request would terminate the $5 million program to reimburse States for Mariel Cubans convicted in State courts. The Juvenile Justice program request for $7.5 million will focus on High Risk Youth programs that deal with gangs and drugs.

For the "Public Safety Officers Benefits" appropriation we have been fortunate that death clams have leveled off but new legislation passed in 1990 will add costs for disability payments. The self-financed Crime Victim Fund requires no legislative action.

GENERAL ADMINISTRATION

The direct funding requested for the General Administration is $132.9 million, or $22.8 million more than in 1992. The request includes net mandatory changes of $8.1 million and program increases totaling $14.7 million.

An increase of $6.5 million in no-year funding is requested to continue the implementation of the Department's Facilities Program 2000 initiative. The requested funding will support several planned projects, including the design and above standard construction for the Swing Space project, which is required to house the personnel that will be displaced during the planned renovation of the Main Justice Building.

A $5.3 million increase is requested to begin implementing the Chief Financial Officers Act and to improve the Department's financial reporting system. Additional resources will also enhance the Department's ADP security through increased program coordination and oversight

In addition, the request includes $1.5 million to provide 20 additional immigration judges and 40 support staff needed by the Executive Office of Immigration Review.

The budget request also earmarks $1.1 million to improve debt collection methods and increase information on the program's effectiveness.

QUANTICO TRAINING CENTER

In the 1992 appropriations process, the Congress provided $3.5 million to begin work on an expanded law enforcement training center in Quantico, Virginia. The 1993 request provides $31 million to construct the center. The center will be located on donated Marine Corps land and will serve the growing training needs of both the Federal Bureau of Investigation and the Drug Enforcement Administration. It is necessary that we proceed with additional facilities.

OFFICE OF THE INSPECTOR GENERAL

The Office of the Inspector General conducts audits, investigations, and inspections of Departmental programs and functions. The 1993 request for $31.8 million and 358 positions includes 10 new positions and $3 million to oversee audits of the Department's financial statements.

OTHER PROGRAMS

The Community Relations Service's 1993 request of $36.6 million contains $8.5 million in program increases over the base funding level. All of these initiatives relate to the Cuban Haitian entrant program. A major component is the $4.9 million requested for halfway house outplacements of 360 Mariel Cubans from Bureau of Prison facilities. An additional $3 million is needed to maintain beds at St. Elizabeths Hospital and for drug release cases. Accompanying these overall increases, the program requires more substance abuse and follow-up counselors as well as more mental health evaluations. Our goal is to get Mariel Cubans out of Federal facilities quickly and keep them out.

The U.S. Parole Commission continues to phase out its operations as it moves closer to its termination date of November 7, 1997 as directed by the Judicial Improvements Act of 1990. With sentencing guidelines applying to more prisoners, the number of prisoners eligible for parole declines.

For the National Institute of Corrections (NIC), the $11 million request includes only one 1993 program initiative. As State and local correctional institutions are rapidly expanding, the need for technical assistance requests, training, and grants from the Federal Government grows.

Finally, the Foreign Claims Settlement Commission request provides for core staff and continued adjudicating claims against Iran.

CONCLUSION

Again, I want to express my appreciation to this Subcommittee for your support. I am hopeful that we can receive your backing for fiscal year 1993.

STATEMENT OF THE ATTORNEY GENERAL

Mr. BARR. I am pleased to be here today to present to you the President's 1993 budget request. It has been a privilege for me during my tenure at the Department to work with you, Mr. Chairman, and you, Senator Rudman, and the other members of this committee. In the past few months, as I have moved into the position of Attorney General, I have greatly appreciated the courtesy and the support that you have extended. I look forward to continuing that strong and positive relationship.

I think we all understand that the very first duty of Government is to protect the public safety, and that is the mission of law enforcement. It is the mission of the Department of Justice. In this town, we have this strange lexicon where almost all of this spending is called discretionary, but I can't think of anything that is more mandatory and more of an entitlement than spending on law enforcement, because it is really the foundation of everything else we do as a society.

I think you would agree, and the other members of this subcommittee would agree that now is not the time to be scrimping on law enforcement. It still must come first. As you know, the

President has been seeking substantial investment in law enforcement in the Department of Justice during his administration. He has sought substantial increases each year, and those increases are really necessary to meet the challenges that confront us.

I have to say that we are very grateful for the leadership role that this subcommittee played last year, in the appropriations process, to get us the increased funding that we were able to get. Without the role of this subcommittee we came dangerously close to ending up with no increase, but thanks to the work on the Senate side, we ended up with a significant increase; not as much as we would have liked overall, but still a significant increase. This year is no different. The President is seeking a substantial increase, and I know we can count on you, Mr. Chairman, and you, Senator Rudman, and the other members to support law enforcement as you have in the past.

As you say, we are seeking an increase, depending on how you measure it, between 9.3 and 10 percent. I have often said, that it is misleading to talk about priorities in the Department of Justice because our first priority is to cover the entire front of our law-enforcement responsibilities across the broad spectrum of requirements. I think you'll see from our budget request that we are going to remain committed to the full breadth of our responsibilities. Nevertheless, there are a few areas that warrant special emphasis, and I want to make some brief note of them.

VIOLENT CRIME

One of my top priorities is to do all we can at the Federal level to support our State and local colleagues in fighting violent crime and drug trafficking. In the violent crime area, we are dealing with an area of responsibility that lies primarily with State and local governments. Over 95 percent of violent crime falls within the jurisdiction of State and local governments. Nevertheless, there are some target areas where we can assist State and local governments, and have a significant impact at the Federal level.

Specifically, I think we can use our resources and our tough Federal laws in areas that have traditionally had a Federal nexus, and that is in attacking drug trafficking organizations, felons who use firearms in the commission of their offenses, and organized criminal activity, such as gangs.

It might be useful if I correlated some of what we have done recently by way of reprogramming requests, in which we are grateful for your support, and how those reprogramming requests correlate to what we are asking for in 1993.

Starting with the gang area, we, in our reprogramming, sought to shift 300 FBI agents from FCI work and put them into violent crime work in 39 cities. We established some joint FBI and ATF task forces in four cities; we are supporting a National Gang Analysis Center to support those FBI and ATF operations. In the immigration area, we have reprogrammed 150 INS investigators to target violent criminal alien gang members.

The second area that we are active in, as I said, is targeting violent offenders who violate Federal firearm statutes. That is our Project Triggerlock. That started last April. We have over 4,000 individuals charged under that statute. I think probably by the 1-

year anniversary, we are going to have about 6,000 charged. That represents about 10 percent of our Federal prosecution caseload right now.

Then the third area is the so-called Weed and Seed Program. We are pressing ahead, in 1992, with this innovative program to assist communities to reclaim their neighborhoods from crime. Working with community leaders, we are targeting high-crime neighborhoods and housing developments to weed out violent criminals, gang activity and drug-trafficking activity, and then working with those community leaders and State and local governments to seed those neighborhoods in a focused way to achieve economic redevelopment.

So, those are the three elements of our violent crime program, and we are seeking enhancements in all three of those areas. On the antigang activity, we are proposing to shift 58 more agents from FCI to violent crime in 1993; we are seeking an enhancement for the U.S. attorneys of 161 additional prosecutors in the violent crime area.

In addition, the President seeks a major increase in the Weed and Seed Program. There are really two options that are being proposed: One option would not require enactment of enterprise zones and that would be largely a Department of Justice program with $30 million for weeding, essentially, law enforcement activities, and then $80 million of earmarked money from other appropriations, social programs, and social spending, to be applied in those weed and seed areas.

The other option would require enactment of the enterprise zones and would be part and parcel of the enterprise zones approach. With the enterprise zones what is being proposed as a $110 million program would go up to $500 million, another $390 million in social program targeting for those weed and seed areas.

DRUG ENFORCEMENT

On the drug front, the President's budget seeks $12.7 billion for our total antidrug effort. Now, with this, $4.7 billion would go to the Department of Justice. This is a $411 million increase in our antinarcotics efforts, or an 8.8-percent increase. This represents 41 percent of all the financial resources included in the Department of Justice's budget, and that includes all of DEA and OCDETF, but also portions of other accounts that are attributable to our antinarcotics efforts. For example, for the Bureau of Prisons, we are allocating about $1.6 billion to the antidrug account.

The two highlights in the narcotics area are obviously OCDETF, which is a principal program within the Department of Justice in the counternarcotics area. We are seeking $399 million. This represents an increase of $35.8 million. Of that, $20.6 million would be enhancements, and basically what we are seeking is a total of 205 agents and 47 prosecutors. Sixty-six agents would be in the FBI, and would be part of our heartland strategy of putting agents out into level 3 and level 4 cities, smaller cities to work on drug problems in those communities; 47 would be DEA agents; 22 INS agents; and 44 U.S. attorneys.

In the DEA program we are seeking $771.5 million in direct appropriations. This includes an increase of $54.8 million over appro-

priations for 1992. Basically, what we are seeking is an enhancement of 93 new agents of which 53 would be for our South American operations. They would go into seven teams in South America: two to Bolivia, two to Peru, one to Guatemala, one to Ecuador, and one to Venezuela. In addition, of those 93 agents, 22 would go toward State and local task forces here in the United States, and 18 would be for pilots for both our domestic and our international operations.

WHITE-COLLAR CRIME

White-collar crime remains one of our top priorities, and we always have to bear in mind that with the stroke of a pen, a corrupt bank official can steal more money than 1,000 armed robbers, and that it is important to maintain the integrity of our whole economic system and to maintain confidence in our system. That requires strong white-collar enforcement. Obviously, a key concern over the past few years, and currently, remains financial institution fraud. We received a substantial infusion of resources, and you played a central role in that, Mr. Chairman, as well as the subcommittee, in 1990 under the Financial Institutions Reform, Recovery, and Enforcement Act [FIRREA]. We think those resources have been put to good use. Since October 1988, we have prosecuted more than 2,700 defendants in major financial institution fraud cases, and more than 1,000 of those defendants were in S&L cases. We are achieving over a 97-percent conviction rate, and 75 percent of those convicted are receiving jail sentences.

But, as we keep up the momentum in the financial institution fraud area, I think it is important that we move aggressively to deal with emerging problem areas, and one area of particular concern to us is health care fraud. In 1991, here in the United States we spent $738 billion on health care. The Federal Government purchased over $200 billion for health care services. The GAO estimates that fraud and abuse in the health care area is over $50 billion a year.

Now, as you may be aware, we took some steps this year to step up our effort in the health care fraud area. We reprogrammed 50 foreign counterintelligence agents from the FBI to work on health care fraud. That gives us now a total of 96 agents working full time in 12 cities in health care task forces. We have set up a health care fraud unit in the Criminal Division with six prosecutors in that division. We have allocated approximately 100 assistant U.S. attorneys to deal with health care fraud and added 10 positions to support that effort.

Overall, for 1993 in the white-collar area, we are seeking $640 million for our white-collar program generally. Of this, $278 million is requested for financial institution fraud, so that shows the magnitude of the financial institution fraud effort. The overall program increase in the white-collar area is $23 million and 388 positions. The bulk of these positions would go to the FBI in our request; it is 136 additional agents.

I would like to give you just briefly the breakdown where we would seek to allocate these resources: In the financial institution fraud area, 50 more agents; in health care, 35 new agents plus an additional reprogramming of 15 agents from FCI to health care for

a total of 50 new agents in 1993. That, joined with the 50 we are doing this year, would mean the augmentation of over 100 agents in 1992 and 1993. In wire fraud, 10 more agents; in bankruptcy, 16 more agents; and in computer crime, 25 agents.

In the U.S. attorney's offices, in the white-collar program, we are seeking 60 new prosecutors; 24 of those would be in the health care fraud area, and 36 would be distributed among other areas of white-collar crime. In the Criminal Division we are seeking 12 new prosecutors, and in the Tax Division we are seeking 19 new attorneys that would focus principally on bankruptcy fraud, tax, and excise fuel fraud.

CIVIL RIGHTS

The civil rights area remains a priority as well, and we are seeking a 13.8-percent increase in the Civil Rights Division, which is the highest increase of any of our litigating divisions. That would be from $48 million to $54 million, and would fund 14 new attorney positions in the Civil Rights Division. They would work principally on criminal litigation including hate crimes, employment discrimination, and the implementation of the Americans With Disabilities Act.

We are also seeking $500,000 to continue our testers program in the fair housing area that we started this past year with the reprogramming of $700,000. We are also seeking 20 additional prosecutorial positions for the U.S. attorneys offices to work primarily in the hate crimes area.

IMMIGRATION

I would like to run briefly through the immigration area, and then finally, I will end up with just a review of what we are doing and requesting in the prison area. It is important that we maintain the integrity of our borders in this country, and maintain the integrity of the immigration process. I think that requires strengthening INS. Earlier this month, we took steps to bolster INS in both the enforcement and the service side, using the fees, fines, and various reprogrammings. As you are aware, that involved adding 300 new Border Patrol agents for this fiscal year; 200 criminal investigators, and as I said earlier, 150 of those would be targeted to criminal aliens; over 700 new personnel would be on the service side, including 248 airport inspectors.

In 1993 we are seeking a total appropriation for INS of $1.066 billion. That would be a 12.8-percent increase for that agency, and fund over 549 positions. That would include 200 additional Border Patrol, so our combined 1992/1993 augmentation of the Border Patrol would be 500 new positions. It would also fund, for 1993 with this request, 50 more investigators who would be targeted principally in criminal aliens, and 249 positions in our Detention and Deportation Program.

PRISONS

Finally, in the prisons area, we are pressing ahead with our commitment to substantially expand Federal prison capacity, that we believe is the precondition of all law enforcement. All our other ef-

forts go to naught if we do not have the prison space to incarcerate the people who have been convicted. Our 1993 request includes construction funds for a 662-bed penitentiary in Mississippi, and A&E funds for a penitentiary in Arkansas—that would be another 662-bed facility—a medical center with 750 beds at an undetermined site, and detention centers in the middle district of Florida and Sacramento, 500 beds each, and in addition, expansion funds to add another 408 beds in five existing facilities. Finally, we are requesting $20 million to acquire and renovate surplus property, including military bases for detention space.

Our S&E request for the Bureau of Prisons is $1.9 billion, which is nearly a $297 million increase over last year. A large part of this is necessary to fund the activation for 1993 of 4,640 beds in facilities that have been under construction. Those facilities include metropolitan correctional centers in Brooklyn and Miami; an FCI in Manchester, KY; part of a complex in Florence, CO; and a medium security facility in Allenwood, PA.

So, that is an overview of our budget request. I would be glad to answer any questions that you and the committee members have.

HEALTH CARE FRAUD

Senator HOLLINGS. You said out of the approximately $738 billion in health care costs spent in the United States, about $200 billion is Government supported and about $50 billion of that is in fraud and abuse?

Mr. BARR. The GAO estimates about $50 billion is lost through fraud and abuse, and we have no basis for quarreling with that number. We don't always cite GAO as an authority.

Senator RUDMAN. Only when it is convenient.

Mr. BARR. When it is convenient, right. [Laughter.]

No; in this case, I think the FBI estimates are similar.

ADDITIONAL DRUG ENFORCEMENT ADMINISTRATION AGENTS

Senator HOLLINGS. The FBI's estimate is similar. That is a stunning statistic there of some $50 billion in health care fraud.

On another matter, I question, from our experience here, the foreign assignments of the DEA. Of the 93 additional agents you just mentioned, you are going to send quite a few of them down to Latin America.

Mr. BARR. That is right.

Senator HOLLINGS. The only reason that I comment in that vein is that we started 20 years ago in the poppy fields of Burma, and we burned all of those up; and then we went to the laboratories in Marseille, and we destroyed all of those; and then we went to Bolivia; and then we jumped up to Colombia; then we went down to Peru and in between, Mexico. From personal experience out there in the Golden Triangle, we went up there into upper Thailand, Laos, and the old-time Burma, accompanied by the DEA, the State Department, and all the rest of the authorities. And, then they say, "By the way, Senator, you can't go in there right now; they have got their own armies."

I don't know about sending agents down to Latin America and question whether this thing works. It sure costs us with respect to our relations. It is the old "Gringo from the North," and it is a questionable foreign policy. I mean, you can't enforce the laws in other people's countries. I believe we are wasting money.

Then, of course, Senator Rudman and I go down and hold public hearings in my own backyard in South Carolina and find out the biggest cash crop in the State is marijuana. It isn't tobacco or cotton or poultry; it is marijuana. So we have got to have a better approach. With all the innovation and everything else that you have got in your budget here, which we commend, I just ask you to look closely at that request for increased drug efforts in Latin America. It sounds good and everything else like that, but it doesn't appear to be affecting production and we seem to be going backward.

Cocaine production is up; usage is up; and accompanying crime is also up. So with all the approaches that you are innovating here, I encourage you to think on that one a little bit.

WEED AND SEED PROGRAM

For example, weed and seed, how do you describe your social programs? We have all got ideas of how to get down into the inner city, the ghetto, the crime-infested area. You say weed out the criminals, everybody knows that: Arrest everybody you can get your hands on. But then how do you seed? What is your plan in Justice, as the Attorney General, for seeding?

Mr. BARR. I think the underlying philosophy in the program is that we have a lot of programs now in the Federal Government, so-called social programs, things like drug-prevention programs; job training; Head Start, community development grants; housing grants; spread around the Federal Government, each administered by a different agency. Historically, the coordination among those agencies, just on the social side, has not been that effective.

Senator HOLLINGS. So you are going to take it over?

Mr. BARR. Well, we are not going to take it over.

Senator HOLLINGS. Who is? You have pointed at the problem.

Mr. BARR. The second part of the problem is these programs haven't been coordinated with law enforcement. This is the concept of the program, if we spend some money in the inner cities that have been undermined because of the crime problem, we build housing projects, schools, and so forth that are then subsequently overrun by crime, the idea behind weed and seed is that the social programs have to be targeted and focused to work together in a reinforcing way, and have to work hand-in-hand with law enforcement.

The Attorney General can play a role by working with various Cabinet members, first, by earmarking some of the money in those other programs for these weed and seed communities, and second, by having the Attorney General work with these other Cabinet Secretaries to make sure that these programs are carried out in an effective, integrated way in those communities.

SPECIAL FORFEITURE FUND

Senator HOLLINGS. Let's see if maybe you can get the program coordinated, like you say, focused and operative. It hasn't been supported heretofore, and you seem to have a charm with OMB. Evidently you are getting through.

With respect to the special forfeiture fund, you are the authority in the Government on jurisdiction. How do you justify $14.3 million from the Treasury-Postal Service appropriations in your particular budget? In fact, the numbers don't appear in the Justice portion of the President's budget. The President's budget request for Justice agencies does not include the transfer of this money from Treasury to you, but you have got it in your justification. I am not complaining, but we are going to have to rely on Senator DeConcini for the money when they mark up. Are you aware of that?

Mr. BARR. I am not exactly sure. In putting together our budget, the Office of Management and Budget informed us we could expect $14.3 million coming out of the special forfeiture fund, so that was taken into account.

BUREAU OF PRISON'S UNOBLIGATED BALANCE

Senator HOLLINGS. On the prisons themselves, we find that the Bureau of Prisons has $1.4 billion in unobligated balances. How do you justify asking for $339 million when you have a $1.4 billion backup in the Bureau of Prisons?

Mr. BARR. Are you talking about construction funds?

Senator HOLLINGS. Yes; "Buildings and facilities construction" account. I hope it is not for salaries—that they are holding back on their salaries.

Mr. BARR. As you know, the buildings and facilities appropriation are no-year funds. The bulge in the BOP's unobligated buildings and facilities balances occurred with the unexpected infusion of an extra $1 billion in 1990. All of the funds have been allocated against specific projects.

Senator HOLLINGS. All $1.4 billion?

Mr. BARR. Whatever the construction amount is. I am not sure what it is.

Senator HOLLINGS. Attorney General Barr, you have just found money. They have been building up this balance for 4 years. They are all empire builders. They have got $1.4 billion. The richest thing you have got is Mike Quinlan in the Bureau of Prisons over there. They have got money to spend. I pick up the morning paper and read it, and I find out, "How in the world did that ever happen?" because we have pinched, conferenced, argued, and fussed, all trying to find more to support critical law-enforcement needs. "We need more money. We have got to get build more prisons." The Senator from Pennsylvania, he put in his amendment bigger than life, Senator Specter; he wants more prisons, and I have got prison money going bad, to the tune of $1.4 billion.

ALLOCATION OF RESOURCES

Senator RUDMAN. Mr. Chairman, if I could interject a moment, maybe to get a truly definitive answer to this, because I think we need a very definitive answer in terms of our allocation. I think we

ought to ask the Attorney General, in consultation with his BOP people, to give us a rather specific report on how that money will be spent that is presently unobligated. Then we can make our own judgment about that, rather than try to get an answer today, since I am not sure that we have all the data in front of us. Can you respond to that?

Mr. BARR. I think that is a good idea. I would be glad to provide that report. As I understand, this is like a basketball swallowed by a snake. We got a substantial increase in, I think, 1988?

Mr. ROPER. 1990.

Mr. BARR. My chart shows that our unobligated amounts are dropping, and are now coming into line with our obligations. So, I think we are working this out, but I would be glad to provide a report.

Senator RUDMAN. I think the reason we want to know that, Mr. Chairman, is that I expect we are going to have an allocation problem this year. If it turns up that BOP is going to have a higher rate of unobligated funds toward the end of the fiscal year than we presently anticipate, I think your point is that we ought to know that so we can do some reallocating. Am I correct about that?

Senator HOLLINGS. That is right. But, let me also point out that the activation request you made for 1992 was off by $24.4 million. And, you fell short of the projected inmate population by 1,226 inmates, or $5 million. So you have got us appropriating $30 million more than what you needed and that is a shame. I can tell you now, we are going to get into the conference over on the House side and with our colleagues here on the Senate floor, and it will be hard to justify cuts—they will be voting more money because everybody believes in prisons rather than schools in this day and age. We give goals to schools; we give money to prisons. That is the way it has been working.

[The information follows:]

UNOBLIGATED BUILDING AND FACILITY FUNDS

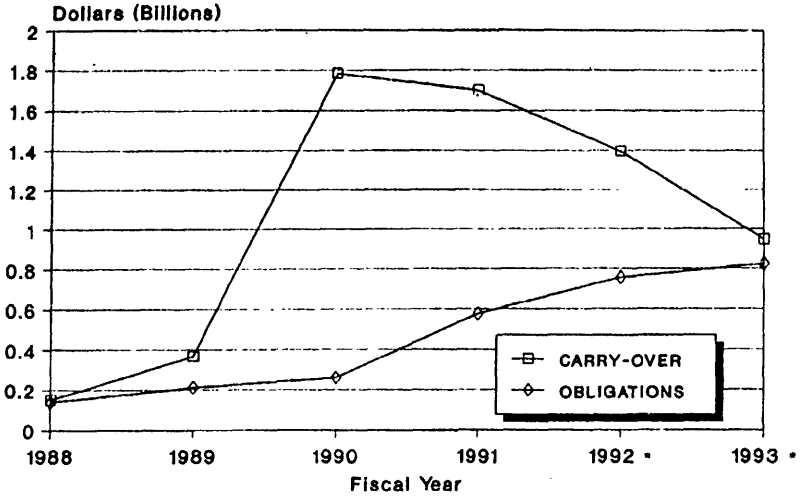
During fiscal year 1989 through 1992, the Bureau of Prisons was appropriated a total of $2.95 billion in Building and Facilities (B&F) funds for capacity expansion, general improvements, major renovations, utility improvements, hazardous waste removal, life safety improvements and energy savings projects. Of this total, $2.59 billion was for capacity expansion. Since B&F projects take several years to complete, B&F appropriations are specifically intended as no-year funds. This provides for funds to be allocated to specific projects but not actually obligated until the various contracts are awarded.

As the attached chart indicates, there was a surge in the Bureau's unobligated balances in 1990. This was caused by the unexpected additional appropriation of $1 billion for new prison construction. The chart also reflects the Bureau's progress in substantially reducing the unobligated balances as the siting, design, and construction activities have increased in response to the additional funding received.

The capacity expansion funds have all been allocated toward projects which will add over 34,000 additional beds to the Bureau's capacity by the end of 1996. These projects are located in 23 States, the District of Columbia, Puerto Rico, and include 6 correctional complexes, 8 correctional institutions, 7 detention facilities and 34 expansion projects at existing institutions.

Since all of the B&F funds appropriated for capacity expansion have been allocated to specific projects, they will be needed for obligation at the appropriate time. Thus, it is imperative that the additional B&F funds requested by the Bureau for 1993 be provided in order for the Bureau to continue expanding its capacity to keep up with the relentless growth in its inmate population.

FEDERAL BUREAU OF PRISONS
OBLIGATION AND CARRY-OVER COMPARISON
Buildings & Facilities Appropriation



• Estimated

INMATE USER FEE

Senator HOLLINGS. Looking at your request to charge inmate fees for first-year costs of incarceration, I'm questioning how this is different from fines assessed by judges at the time of sentencing. I am a judge sitting there, and I have got to take the financial status of the defendant that I am about to sentence into account. So, I fine him heavy because he can afford it. Then I come around here and I find out that you are starting a fee schedule for inmates that can afford it. Is that going to be duplicative? Is that going to be constitutional? Has that been factored through and worked with the sentencing guidelines in the Federal judiciary?

Mr. BARR. Yes, sir; we have looked at the legality of it, and it is our view that this is not a punishment; this is a user fee. It is constitutional. We estimate that of the 30,000 prisoners we are projecting to be admitted in Federal facilities, 9 percent of them will have the resources to pay for their first year of incarceration, and so what we are proposing is a user fee that extracts this and would raise about $48 million.

Senator RUDMAN. What is that fee per year?

Mr. BARR. The cost is approximately $17,000.

Senator HOLLINGS. But if you are not able to charge that $48 million, you see, then we are into another soup, because OMB and CBO on the scoring of the President's request, have automatically reduced our allocation by an estimated $48 million. Well, we will know where to get it. We will go ask Mr. Quinlan for a loan. [Laughter.]

They talk about the House bank.

Senator RUDMAN. Let's not talk about that.

Senator HOLLINGS. Let's talk about the prison bank.

Senator RUDMAN. Let's get back to the subject.

Senator HOLLINGS. The prison bank. We have got a fellow who is really a banker. He is better than any bank I have got in my backyard.

General, I want to yield to the others, but let me commend you. I notice that you made a ruling here that registered lobbyists for foreign companies and governments cannot serve on Federal Government advisory panels. The U.S. Senate, and in this particular subcommittee, put riders on past appropriation bills along those lines. I am glad you picked this up.

SHERMAN ANTITRUST ACT

With the antitrust initiative that you put in, can you elaborate on that for us a little? Are we now going to enforce the antitrust provisions against these foreign entities the same as we do against an American manufacturer or corporation; is that right?

Mr. BARR. That is essentially right, Senator. Our international antitrust guidelines, in 1977, took the position that if foreign companies enter into an agreement, a cartel to restrict U.S. exports, that was covered by the Sherman Act and was actionable as an antitrust violation. That goes to the legal issue of potential read of the Sherman Act, and that was the rule followed by the Department of Justice until 1988.

In 1988, a new set of guidelines was issued and there was a footnote that said the Sherman Act would be applied only where you could demonstrate harm to U.S. consumers as a result of that cartel agreement. Our decision or recommendation is to knock out that footnote, that restriction, as not being required by the Sherman Act. So, the position that we are in now or proposing would go back to the rule that was in effect in 1977 to 1988, and say that where foreign companies enter into an agreement to restrict U.S. exports that there could be a violation of the Sherman Antitrust Act without having to show harm to U.S. consumers.

Now, there are a lot of practical difficulties that arise, as you are aware, in international or extraterritorial enforcement. Those are practical problems, questions of diplomacy, comity, enforcement problems, how to get evidence, how to prove an agreement. Our initiative really is to put the guidelines essentially back in the position they were from 1977 to 1988.

Senator HOLLINGS. As you know, this is a dramatic change, and we welcome it here at this committee for the simple reason that in years back the Justice Department was always appearing in the *Zenith* case, in Smith-Corona, and others, as a force de jour. The companies only did that as a requirement of their government and the government practices, and the Justice Department, in other words, was appearing on the side of the competition against the American entity. It was having to obey the antitrust laws and still being discriminated against, so we welcome it. Let me yield to Senator Rudman.

Senator RUDMAN. Thank you, Mr. Chairman. Senator Gramm has another hearing to go to, and I don't mind yielding to him and Senator Adams before coming back to my questions.

SUPPORT ON PRISON AND IMMIGRATION POLICIES

Senator HOLLINGS. Thank you. Senator Gramm.

Senator GRAMM. Thank you, Mr. Chairman. Mr. Attorney General, let me first say that I strongly support your prison construction program. I intend to support the $339 million. In my State we have a situation where if somebody is sentenced to prison for 1 year in the State system, they serve, on average, 21 days. We have the lowest effective cost of being engaged in criminal activity in the country, and as a result, we have got a lot of crime.

One of the great gains that we have made in the past few years is imposing strict mandatory minimum sentencing in the Federal system. I think it is very important as we look at crowding. So far as I am aware, we have a great deal of crowding in my State in the Federal system. I don't want to ever get to a situation on the Federal level where we have got to start letting criminals out on the street because we don't have prisons, and so I strongly support your proposal.

Let me also say that I strongly support your action in terms of illegal immigration. Several years ago, Congress passed a bill granting amnesty retroactively to people who came to the country illegally. Part of that package was that we were going to begin to enforce employer sanctions and that we were going to gain control of our borders. That is something that we have not done. I think it is outrageous that we have got 7 million people that are waiting to come to this country legally and yet we are letting hundreds of thousands of people come to the country illegally and we are not doing anything to effectively enforce our laws.

Some would say that is an overstatement. As a person who is involved in border activities on a continuing basis I am not in any way being critical of people in the Border Patrol. We have very dedicated people. It is one of the most effective agencies in the Federal Government, and I am totally supportive of it, but we need to commit the resources to enforcing the law, to enforcing employer sanctions, to prosecute people who violate the law, and I think your proposal for 500 new positions is an important step in the right direction. I commend you for it. I intend to strongly support it. I think we need a greater degree of commitment to gaining control of our own borders.

CRIME CONTROL BILL

I wanted, in my only question, Mr. Attorney General, to give you a chance to talk about the crime conference report that will be voted on in the Senate probably today. The question will be whether we will invoke cloture, which would, in effect, send the bill to the President. I would like to just get a short summary from you about the bill and any concerns you might have about it and give you an opportunity to state your position and the administration's position.

Mr. BARR. We are opposed to the conference bill. We think it is a crime bill in name only; it will not be an effective anticrime measure. We think that it takes a number of steps backward for law enforcement, and erodes, and in some ways causes, reverses or jeopardizes some pro-law enforcement court rulings that we have

gotten over the last decade or so. So, we are opposed to the current conference version and would like to see a stronger crime bill, such as that initially introduced; I think you were involved in introducing the crime bill along with Senator Thurmond and others.

In a nutshell, that is our position on that crime bill.

Senator GRAMM. Thank you, Mr. Chairman.

Senator HOLLINGS. On that score, with respect to the financing of the crime bill, the Republican bill has $3.55 billion in new expanded program authorizations. The Democratic one has got $3.6 billion of the same. One way or the other, if it becomes law, and apparently some crime bill will become law, are you going to have to increase your request for 1993?

Mr. BARR. I guess my question all along has been where is this money going to come from?

Senator RUDMAN. The Japanese.

Senator HOLLINGS. No; the prison bank.

Mr. BARR. The first crime bill that was sent up to the Hill by the administration did not have additional authorizations included and it dealt chiefly with substantative changes to the criminal justice system. Senator Biden's bill added over $3 billion in new authorizations. One of our concerns all along has been, we agree that law enforcement should have and can use all the resources that we can get, but the situation currently is we don't see where those appropriations are available for the additional authorizations in Senator Biden's bill.

I think the bill that was introduced to counteract Senator Biden's bill had substantial authorizations in it also. So that wouldn't be the issue, and the issue could focus on the substantive provisions. But, my concern all along has been that people shouldn't be waving phony money at State and local law enforcement. They deserve candor from Washington, DC, and unless we are ready to raise this money and appropriate it by cutting someone else's budget we really shouldn't be waving around authorizations we have no intention of funding. That is my position.

BRADY BILL/ASSAULT WEAPONS PROVISIONS

Senator HOLLINGS. Senator Adams.

Senator ADAMS. Thank you, Mr. Chairman. Mr. Barr, you commented that you were opposed to the bill that is presently being offered for cloture. Do you favor the Brady bill provisions and the assault weapons provisions, prohibiting the use of assault weapons, of that bill?

Mr. BARR. I said at my confirmation hearing, and it is still my position, that if we achieve a comprehensive antiviolent crime bill with the tough measures, such as those proposed by the President, then I would recommend including Brady in that proposal. I would support the President signing such a bill.

Senator ADAMS. You would support the assault weapons provision and the Brady bill provisions?

Mr. BARR. Only if they are part of a comprehensive tough crime bill.

Senator ADAMS. We could argue as to whether or not the present bill is comprehensive and so on. I happen to think that it is. As a former U.S. attorney I feel the provisions on habeas corpus and

so on adequately meet the objections of the President. That is an argument that will come up as Senator Rudman and others have indicated today, but I wanted to know what the administration's position was on that.

Mr. BARR. I think it is the same this year as it was last year.

Senator ADAMS. You support it?

Mr. BARR. No; our position this year is the same as it was last year, which is, we would give favorable consideration to the Brady bill if it were part of the President's comprehensive crime bill.

Senator ADAMS. It is part of one now, but what if it were part of one presently pending on the floor as an amendment?

Mr. BARR. As I said to Senator Gramm, that bill would be vetoed if it were presented to the President. We don't consider it to be a tough crime bill.

Senator ADAMS. Suppose there is another bill that comes up and that is added as an amendment? Would the administration and your position be to support that?

Mr. BARR. I will repeat the position, which is, if we can get a comprehensive tough crime bill that is consistent with the President's crime bill, and has measures in it like the President's proposed measures, then we would give favorable consideration to including Brady as part of that.

Senator ADAMS. And the assault weapons section?

Mr. BARR. I am not sure if the assault weapons section is in the current version.

Senator ADAMS. It is in one version; it is not in another.

Mr. BARR. I concluded that before, the DeConcini proposal.

FUNDING OF TASC OR IMPACT PROGRAMS

Senator ADAMS. I have two specific questions which you can refer to staff if you wish. We have tried various methods of fighting street crime in the State of Washington in addition to those that have been suggested in your written testimony. One is known as the treatment alternative to street crime, TASC, which is a joint effort of the State of Washington and one of its counties and the second is IMPACT, which is a Washington State Youth Substance Prevention Program. In the conference report last year we directed the Bureau of Justice Assistance to review these and other programs and report back to the Appropriations Committee on which of these programs it was intending to fund. If you do not have that before you, I would appreciate your submitting it to the committee so that we will know your decision. If you do know the answer, I would appreciate receiving it.

Mr. BARR. I do not know the answer, so we will submit it.

Senator ADAMS. Fine. Thank you, Mr. Chairman.

[The information follows:]

STATUS OF TASC AND IMPACT PROGRAMS

TASC.—A grant to improve drug testing laboratory services in the State of Washington. In discussions with project representatives, staff of the Bureau of Justice Assistance (BJA) advised them that the laboratory services would have to be a part of an overall criminal justice program to qualify for discretionary grant funding. Both TASC and drug testing services have received and are receiving extensive funding under the BJA Formula grant. Standing alone, such operations are no longer innovative and thus do not warrant support from the limited Discretionary

funds available. Such services, when incidental to the demonstration of an overall model program that could illustrate an innovative way to deal with criminal justice problems facing all States, could receive funding. Given the present circumstances, BJA is not planning to include this item in funding plans.

IMPACT.—A demonstration project in Washington State, which provides training and technical assistance to teachers, counselors, administrators, and community groups in youth substance abuse prevention. BJA included a program solicitation in the 1992 Discretionary Program Guide for the IMPACT program in the amount of $200,000. A copy of the program solicitation is provided.

IMPACT

Purpose.—The purpose of this program is to demonstrate the effectiveness of the Impact program in assisting elementary and secondary schools to implement a drug and alcohol abuse prevention program.

Background.—The Impact Program of Spokane, Washington, is designed to aid schools in the development of a program which will deal effectively with the problem of drug and alcohol abuse by young people. "Impact" provides formal training programs on developing drug and alcohol prevention and intervention programs for school professionals. The objectives of the impact training program are:

—To heighten awareness of chemical dependency, including the impact in the school setting, and the role of school personnel.
—To facilitate personal awareness of attitudes, feelings, and expectations, which impact school programming.
—To offer practical skills for the school professional in identification, intervention, and referral for chemical dependency.
—To propose effective school programming and successful implementation of components.
—To stimulate discussion and action planning for school program implementation.

"Impact" provides assistance to schools in completing a needs assessment as well as in developing and implementing a program.

Goal(s).—To expand the training and technical assistance activities of the Impact Program; and to assess the effectiveness of "Impact" in assisting schools to respond to the problem of drug and alcohol abuse.

Objectives.—To provide training and technical assistance to selected schools; to assess the effectiveness of the training and the technical assistance activities; and to refine the training and technical curriculum and related materials.

Program strategy.—This program will be implemented in two stages.

Stage I—Provision of Training and Technical Assistance

"Impact" training will be provided to a selected set of new schools in Washington State.

The products to be completed include: A plan for providing training and technical assistance; development of an assessment strategy; implementation of the training and technical assistance and the assessment; and a report on the results of the assessment and recommendations for revision of the training and technical assistance materials and/or format.

Stage II—Refinement of Training and Technical Assistance

The results of the assessment will be used to refine the training and technical assistance activities and related materials.

The products to be completed include: A plan for revising the training and technical assistance materials and delivery; and revised training and technical assistance curriculum and format.

Eligibility requirements.—To be determined.

Selection criteria.—The application will be reviewed in accordance with the Application and Administrative Requirements section of this document.

Award period.—The award period will be for 12 months.

Award amount.—Up to $200,000 will be available for this program.

Due date.—The application must be postmarked no later than 60 days from the date of this publication.

Contact.—For further information, contact, Pam Swain, Director, Discretionary Grants Program Division.

PENDING PRESIDENTIAL DECISION ON ANTITRUST POLICY

Senator HOLLINGS. Thank you. Senator Rudman.

Senator RUDMAN. Thank you, Mr. Chairman. I want to come back to something that Senator Hollings spoke about, the antitrust matter. I notice Mr. Rill is here, and it is a very interesting issue, one that I think you are on the right track on.

When Secretary of State Baker was before this committee about 1 week ago we had a hearing, and I discussed this issue with him. It wasn't St. Patrick's Day, but he proceeded to do one of the finest Irish jigs around the question that I have seen in a long time. I don't know really what he said, except I guess what he finally said was that this would have to be elevated to the Cabinet level. The policy disputes between State and Justice, if any, must be resolved and the President would review it himself because of the foreign policy implications to which you, of course, referred.

My question is: At what stage are we in the process in getting this policy implemented and approved by the President or disapproved by the President? The Secretary of State kind of indicated there could be some problems with it, as I am sure you are aware. So, I wonder if you, or Mr. Rill, might respond to that.

Mr. BARR. Sure. I think there are really two separate issues. One issue is: What is the potential reach of the statute—which is largely a legal question.

The second issue is: Once you have defined its potential reach, what are the considerations in applying it in a specific case? On the first issue, that is whether or not we should continue to have this restrictive footnote in our guidelines. Frankly, I think a consensus has emerged on that. I am not aware of any Cabinet Secretary who disagrees with the Justice Department on that issue, and I think that that position will be formally adopted imminently.

DAMAGE TO EXPORTERS AS CAUSE FOR ACTION

Senator RUDMAN. That footnote being that you do not have to show damage to consumers in order to proceed under your statute; you can just show general damage to an industry?

Mr. BARR. Right, to the exporters who were the target of the boycott.

Senator RUDMAN. Right.

Mr. BARR. So, I expect that to be formally adopted imminently; no Cabinet Secretary has raised an objection to that to me, and I think a consensus has emerged that is the proper legal call.

The next issue, which is one that really wasn't an issue before when we made this change in the footnote or proposed change in the footnote, is the considerations that come into play in a particular case. I have said all along—in fact, I said at my confirmation hearing; I think you may have been there at the time—that whenever you deal with extraterritorial enforcement of U.S. law, you have to take into account practical difficulties, questions of potential retaliation against American companies where we could end up in a worse position. So, you have to take a pragmatic assessment of the case and the consequences.

You can also look at other alternatives, other ways of achieving the same objective of prodding a particular country to enforce its own antitrust laws and, therefore, get the same result. You have to take into consideration whatever diplomatic factors may exist in a particular context. I have said all along, that in enforcing the

antitrust laws extraterritorial, I will consult with all the interested executive departments so that all relevant issues can be vented.

Obviously, if someone disagrees with what I want to do, and there is, in fact, butting on a particular application of it, then anyone is free to elevate it however far they want in the executive range.

CONSULTATION ON EXTRATERRITORIAL APPLICATION OF LAW

Senator RUDMAN. So if I understand your answer, there is consensus on the technical reach of the statute in terms of the footnote being removed. Rather than having a general policy approval now from the President on this proposal of the Justice Department's Antitrust Division, the policy would be considered on an ad hoc basis as each case came up that Mr. Rill and his people thought needed action; it would go up through the process and there would be consultation with State et cetera. Is that where we are?

Mr. BARR. That is essentially correct. I would have to approve an extraterritorial application of the law, and in doing that, I would consult with other interested agencies and Cabinet heads to find out what the impact of that may be.

For example, if USTR has an ongoing negotiation over the very same issue, and there is progress being made, I would want to know that. That is, I think, a significant factor. I shouldn't be coming in from left field without anyone else knowing what is going on.

Senator RUDMAN. I am just looking at the practicality of the procedure. So, take the case of a group of German companies or a group of Japanese companies who were doing something which met the test of violating a portion of our statute, your present policy would be that if you found a violation, then you would go forward unless there was objection from another part of the government that you either thought was valid or, if you thought it was invalid, it was then ruled to be valid by the President or people in the White House; is that generally how this works?

Mr. BARR. I wouldn't say up front that in every case where someone suggests there is a violation that I am necessarily going to be willing to go forward automatically.

Senator RUDMAN. No; I understand that.

Mr. BARR. I would consult with interested agencies, and we would also notify the country involved, and all the issues could be vented. I could then make my decision from the Justice Department standpoint, and if someone wanted to object to it, they could always do that.

Senator RUDMAN. I would just say, Mr. Attorney General, I think it is a very creative policy. We talk a lot on this committee about many issues that have to do with trade and competition. There is evidence abounding around the world on this issue, and the question is whether or not you are going to get by the State Department on some of these. That is the issue.

Senator HOLLINGS. If you can yield right now?

Senator RUDMAN. Sure.

Senator HOLLINGS. What happens on this is article 1, section 8 gives the Congress, not the courts and not the executive, but the Congress, the power to regulate foreign commerce. Then, when we put in a bill to regulate foreign commerce we get an opinion from the Attorney General that said we interfered with the foreign policy authority of the President of the United States. That is how far extreme we have gone. Not you, specifically, Mr. Barr. But I can show you those letters. It is absolutely ridiculous, in other words, the textile bill was an unconstitutional assumption by the Congress of the Presidential authority to make foreign policy.

That is why I am so interested to welcome you and help you in any way I can. Don't worry about the prison bank. I will help you in any way I can. [Laughter.]

You are the first breath of fresh air I have seen around this town in several years. Warren, you know that. There is no question about the fundamental fault in our dilemma right now. One-half of it is, of course, our own extravagance in not paying the bill, but the other is the lack of what you call a focus or coherence in our trade policy. While I am on that, if you will yield just one moment, our good friend Harry Truman, that couldn't operate a haberdashery, knew how to run Government. Old Bill Casey came up when Truman got in and said, "Mr. President, intelligence shows this, and you have got to do so and so," and the State Department said, "Oh, no. That is not the policy." The Defense Department Secretary said, "Huh-uh. Wait a minute. That is against our national security interests." So the President said, "I am putting you down underneath me in the White House."

By Executive order he instituted the National Security Council. He said, "You go downstairs and you beat it out and you give me a couple of alternatives, and I will make a decision." Out of that came the Marshall plan, the North Atlantic Treaty Order, the Atlantic Charter, the Truman Doctrine, the farsighted visionary policies that worked and helped to bring about our victory for capitalism—it was done by a fellow who knew how to run the Government.

We now have a similar situation. We have 28 departments and agencies in trade. If it is a farm product, you go to Agriculture. If it is the Export/Import Bank, I go over to the Treasury. If it is the Foreign Trade Administration, I go over to Commerce. They have got me dancing all around, and then the State Department comes in, and the Defense Department comes in on critical materials. So we need a correlation, a coordination and a focus, as you say, and you are now bringing it around, as I see it, to level that playing field. We are going to have to get in the game.

Our Government ought to be on the side of our own industry and our own manufacturers and, heavens above, quit representing the other side. It was good to do the Marshall plan. We were trying to spread capitalism. I have heard it many a time, "Governor, what do you expect them to do, make the computers, the planes? Let them make clothing and let them make shoes." Fine, that was a

good argument, but now they are making the planes and they are making the computers and we are going out of business running around here hollering, "Don't let us start a trade war when it is in the fourth quarter."

So keep going. Excuse me.

FOREIGN COMMERCE

Senator RUDMAN. That is fine. I would just finish up by saying that in economic history of the last 20 years there is evidence that abounds, agregious cases of groups of companies, foreign companies buying market share by price conspiracy, and essentially eliminating the entire American industry. There is plenty of evidence of that. I happen to believe that what you have here is a very sound idea. I think you are going to have lots of problems getting it implemented, but I hope you don't quit trying. I just wanted to commend you for that. In this particular subcommittee if anyone is ever so careless as to give you anything that is trade related, normally the entire pot comes off in the hearing. We have kept it moderately under control this morning.

QUANTICO TRAINING CENTER

Let me turn to the Quantico Training Center. Just a question for you; we have had a lot of discussions with you about this. You requested a little over $31 million for that facility. Last year we put in $3.5 million. Are the plans finalized? Are you going to have joint training and are you going to use the FBI Academy for some of the DEA, or just what are you going to do down there? Just give us something for the record on that.

Mr. BARR. Sure. Right now Quantico really is performing three functions. It has FBI agent training, DEA training, and what we call the National Academy, which is State and local training. The demands of those three operations are up against capacity. In fact, we have had to cut down on State and local training to accommodate our DEA and FBI training, and I think State and local training is very important. You know how much State and local law enforcement supports the National Academy.

So, what we want to do is build a joint-use DOJ facility on the new property that the Marine Corps has made available to Quantico. Its first priority will be for DEA basic training. That would relieve some of the pressure on the existing Quantico facility, but it would also be available for other Department of Justice training.

It is important to ensure that DEA continues to train in Quantico; it is important that FBI and DEA work more closely together. There are a lot of areas where we have to improve that cross fertilization. I think it has to start with training. We have done the A&E study. My decision was to request construction funds for that facility on the new Marine Corps property.

Senator HOLLINGS. Who is going to manage and control the facility itself?

Mr. BARR. Well, the Department of Justice will ultimately be responsible for it, but it is quite possible that would be delegated, perhaps to DEA, since they would probably have most of the training at the facility.

AMERICANS WITH DISABILITIES

Senator RUDMAN. We had a complaint from a very responsible New Hampshire group that works for disabled people that they are having difficulty in getting technical assistance on the Americans With Disability Act. I notice that you are asking for nine positions and $2.6 million for technical assistance in public access litigation cases.

I just believe that fostering voluntary compliance through rendering technical assistance is very cost beneficial. I hope you agree with that. I hope you believe that this request for technical assistance is sufficient, because a lot of these folks out there need a lot of help in compliance. They really need the help, and they want to comply, but they are having a hard time getting answers. It is pretty tough to tell people, "Comply with the law," and then tell them, "We don't know how to tell you to comply with the law," when, in fact, it is so technical; they can't go to their local lawyer to find out. Do you think that is enough in here?

Mr. BARR. Given all our other responsibilities, I think that has to be enough for us. I agree that what we have to be putting emphasis on now is cooperation, technical assistance, working with State and local governments, trade associations, and others to give them the assistance they need to comply, because people want to comply with this.

Senator RUDMAN. That is right.

Mr. BARR. We are not going to be going out with a heavy-handed enforcement strategy.

Senator RUDMAN. Take a look at that, would you, please?

Mr. BARR. I have talked to John Dunne, and he has been very responsive. There have been some other cases up in New England where we have been slow in giving technical assistance, and we are turning that around, but we would be glad to get up and get John Dunne up there.

DEPARTMENT OF JUSTICE LAPSE RATE

Senator RUDMAN. I am going to have a question for the record on your lapse rates. I notice you have got your lapse rates in there at a 75-percent rate, which is kind of getting the camel's nose under the tent. We are going to pay for the nose this year and the rest of the camel is going to come by in 1994.

Mr. BARR. That is exactly what we are proposing. [Laughter.]

Senator RUDMAN. That was a fairly transparent strategy. I commend you for your honesty. But I just think, Mr. Chairman, we ought to have that question for the record with some detailed explanation so we can figure out what the lapse rate really ought to be around here.

Finally, a couple other things, Mr. Chairman. On RISS, let me just make an observation that you folks target it; we do it; you target it; we do it. I mean, why don't you give up after 10 years and agree that it really works? Because you know we are going to do it, and the fact is, the Department does a good job with it, and the local agencies do a good job. By your own statement a few moments ago—I forget the percentage—93, 94, or 95 percent of crime is local and enforced by local people. It is a pretty good system. It works.

I would love to see you come back in your budget next year and say, "We support this program." It is only $14.5 million, but you propose to reduce it.

So I would just make that comment on RISS. I will give you a couple of questions for the record, and a last question, which is kind of back for your Antitrust Division, which, as you know, is a favorite subject of mine. I talked to you about this 1 month or so ago, and I am not sure exactly what the policy ought to be, so do not assume by the question that I am looking for a particular answer. I am not. I am just kind of curious.

FINANCIAL SYNDICATION INTERVENTION

There has been a great dispute between a whole bunch of people in our Government on the whole financial syndication question. The Department had a totally contrary view to what some people in the Commission did. You know, you well may be right. As this market is changing you may have been right. I have a contrary view. But I well could be wrong on this, but I am curious as to where this is going. It is in the seventh circuit. A lot of people are watching it to see what is going to happen out there. Someone told me, who was not unfriendly to your doing it, that the Department was going to intervene in the circuit as a legal curiae or as a party or whatever, since, of course, you have intervened in the Commission itself.

I find it interesting because then you get yourself interposed in a position where you are opposing an agency of the Government, an independent agency of the Government which has taken a point of view that if you do that, you are going to go in there and say, "Well, we think they are wrong." Well, that may be all right. Maybe that is what the Justice Department is supposed to do. I wonder if you or Mr. Rill would like to tell me where it is, if you can, and if you don't want to answer it today, I can understand that.

Mr. RILL. Senator, good morning.

DEVELOPING EXECUTIVE BRANCH LEGAL POLICY

Senator RUDMAN. Good morning, Mr. Rill. You have got the only job in the Justice Department other than his that I think must be very interesting.

Mr. RILL. I find it fascinating, sometimes more than others. The fact is that by statute the United States is a party. We have not taken a position on that issue in the seventh circuit nor are we required to do so.

Senator RUDMAN. I understand. But you are allowed to if you wish to.

Mr. RILL. We are certainly permitted to. I have not made a determination nor have I made a recommendation to the Attorney General at this time, so that is the status of the FCC matter.

Mr. BARR. I did say I didn't want anything filed in the seventh circuit unless I knew about it based on my last experience with this issue.

Senator RUDMAN. If you are going to say the United States is a party under the statute, well, the Justice Department is the United

States, but I imagine to some extent the various independent agencies think they are also the United States, so you get a case of the United States, upper case, against the United States, lower case.

Mr. RILL. We are aware of that situation, and I have not made a recommendation to the Attorney General at this point, and there are a variety of options that are available to us, Senator.

GENERAL COMMENTS

Senator RUDMAN. I appreciate that, and again, the question is just informational. Let me just commend you, Mr. Barr. I have been very interested in the Department for some time. I have sat on this committee now for 12 years. I have never missed a hearing with regard to this agency, and I join with what the chairman said. You are doing a good job getting a lot of things together that need to be put together. Even more important, I have the sense that if there is something you think is going to be a real problem for us, you are going to come and talk to us about it. That is the way it ought to be because we would rather work with you than go into some battle with you.

Mr. BARR. Thank you, sir.

LEGAL EDUCATION PROGRAM

Senator HOLLINGS. General, let me ask about the Department's legal education program. I worked with Attorney General Thornburgh in enhancing and expanding our legal education, and then we instituted the facility down there in Columbia, SC. Can you elaborate on that now: What the status of it is and what the Department intends for the National Advocacy Center?

Mr. BARR. I am committed to carry out Attorney General Thornburgh's decision to move the Department's legal education program down to the University of South Carolina. I think that was a good decision, and we are in the process of implementing it. We have submitted the report that was requested and required under the conference committee report, and we are now working to move some courses down there for this fiscal year, and some additional courses for next fiscal year. We are working with the university officials and the local officials to determine the best way of carrying that out.

CAMP BEAUREGARD

Senator HOLLINGS. Very good. On another matter, and we will yield then to Senator Lautenberg here—there was a reprogramming proposal that Senator Rudman and I approved of a long-term lease of the facility under construction down there at Camp Beauregard, LA, for the Special Operations Group Tactical Center in the camp. The lease was of the facility now under construction including the dormitory, warehouse, office, classroom space, all these other things, and then there is a sudden change in policy where you propose in the budget, as I understand it, and that is what I want to be corrected on if I am incorrect, a reduction of 14 positions and $1.8 million less by closing the camp down there. Are you familiar with that?

Mr. BARR. Generally, yes. I think the function that is being carried out down there, which is a facility for the Marshals Special Operations Group and also training, international training under the State Department's ATAP Program, are important functions. I think that given the current fiscal constraints and the scrubbing of our budget to look for areas which we may be able to accommodate elsewhere at lower cost, that this is one of the casualties of the budget process. We are right now considering alternatives to maintaining Camp Beauregard to see whether or not we can provide those services within existing departmental resources and existing facilities.

Senator HOLLINGS. That translates into: OMB must have cut it.

GENERAL COMMENTS

Senator Lautenberg.

Senator LAUTENBERG. Thank you very much, Mr. Chairman. I don't want to delay the process. I know that you have been here for awhile, Mr. Attorney General. I am glad to see you. I want to have a chance to kind of see you face to face. I keep seeing your picture in the paper and this is a chance.

Senator HOLLINGS. He looks the same way. [Laughter.]

Senator LAUTENBERG. Frankly, I think he looks different.

Senator RUDMAN. He looks older.

Senator LAUTENBERG. When you get white hair like the chairman and I, everybody looks older on the other side of the table.

Senator HOLLINGS. When I get on TV, my wife says I look like a Q-Tip. [Laughter.]

Senator LAUTENBERG. Having too much respect for your rank and seniority, I won't comment. [Laughter.]

Senator RUDMAN. Ask your question, please.

FUNDING FOR STATE AND LOCAL TRAINING

Senator LAUTENBERG. Mr. Attorney General, I know that the administration has said that it wants to focus more on fighting violent crime, and it is a goal that I fully agree with.

I believe that one of the best and most effective ways to fight violent crime is by helping local law enforcement to get the training and the facilities that they need to do their job. I had a little discourse with your predecessor here last year about this issue. He had penned a letter to Chairman Biden explaining his opposition by saying that, and I quote from that letter, "The cost of dependency of State and local law enforcement was continuing infusions of enormous quantities of Federal cash." I don't think that that is necessarily the wrong kind of a facility.

I think that where the Federal Government can help it ought to because without expanding the discussion, there have been so many places where the Federal Government has cut back that this is one place that I had hoped that we could muster more support. I was disappointed that the administration was proposing a cut of $115 million in aid to local and State law enforcement agencies down to $589 million, in particular, the Byrne Memorial State and Local Law Enforcement Assistance Program.

So I just wanted to ask, and perhaps this is hypothetical because I understand that there was a discussion beforehand that said that the authorization level, it was your view that might not be the actual funding level; did I get it correctly?

Mr. BARR. I think we were talking about the crime bill.

Senator HOLLINGS. The crime bill, yes.

Senator RUDMAN. The one that is pending.

Mr. BARR. But even there, I am not sure about this, but I think there probably are. The authorizations for OJP programs probably substantially exceed what has been appropriated over the last several years, probably $1 billion in authorization, probably $500 million in appropriations.

Senator LAUTENBERG. Does the administration still oppose the $1 billion for the Byrne program?

Mr. BARR. I don't think there is $1 billion in that program. Our position on State and local assistance generally, the quantum is: Law enforcement can always use the resources. It is a question of what is available right now, and also where we spend the rest of the money out of the pot that is available. Last year, I mentioned this generally in my opening statement, the President asked for a 15-percent increase in the Department of Justice. We ended up not getting $472 million that was requested, because that money was put into education and other budgets up here on the Hill.

Frankly, if it wasn't for the efforts of this subcommittee we wouldn't have had any increase in our law enforcement budget last year. So, when people start talking about, "Well, let us throw hundreds of millions of dollars more into State and local aid," my question is: Where is the money going to come from?

GRANT PROGRAM EFFECTIVENESS

Senator LAUTENBERG. What about the evaluation of the effectiveness of fighting violent crime in terms of local versus not?

Mr. BARR. That is a good question. Let me also say, that some of the cuts that you are talking about are similar to some of the cuts Senator Rudman was referring to. This yearly pirouette that we do where we zero out grant programs, and we know they are going to be put back in, so some of those cuts are part of the process. I think, probably, some of that money that you are talking about is the Juvenile Justice Program, the grant program. There is probably $70 million in that program. I agree that it is important for State and local governments. I think that Federal and State and local government have to work together in a partnership, task forces, and other things like that, and it is important that we do provide some level of assistance.

I also agree, however, with Attorney General Thornburgh's position that we just can't become a funding mechanism for State and local law enforcement. State and local law enforcement has an obligation to provide resources. It is their first level of Government as well as ours, and we have some programs like the Weed and Seed Program where we are going to be putting more money into those communities.

WEED AND SEED PILOT PROGRAM

Senator LAUTENBERG. The Trenton Program?

Mr. BARR. The Trenton Program is a pilot, and I was just up there last week, and I think they are doing a tremendous job. I am very proud of what is going on there, and the job that the State and local people are doing is tremendous. But, I think you raise an interesting point which is a correlation. The financial assistance of State and local government, I think, has to be matched with the strengthening of criminal justice systems at the State and local level. I am not saying that one should be dependent on the other, but we have to keep a careful eye on that. We have to ensure that our money is not going into State systems that are largely dysfunctional.

For example, Senator Gramm was here this morning, and he pointed out that in Texas they serve only 21 days for each year of sentencing received, and that the system in Texas is largely broken down.

Well, how much sense does it make for us to spend a lot of money in that kind of State system? I think we can continue to do it, and a lot of our efforts now are in Texas, and some of our weed and seed sites are slated for Texas, or at least are under consideration. As we help State and local law enforcement we also have to be encouraging State and local law enforcement to adopt many of the reforms that the Federal Government did in the eighties to strengthen their systems.

WORKING WITH STATE AND LOCAL GOVERNMENTS

Senator RUDMAN. If I may interject. Some of the efforts, which I can understand, would reduce the match requirements. Then you fall exactly into the trap that the Attorney General is talking about. Then you have essentially Federal dollars funding State and local functions, so they don't fund them. We fund them. They don't get any better, and yet when you talk about raising the match, you get screaming of bloody murder. That is the issue.

Senator LAUTENBERG. Senator Rudman, the problem is that the States are being overwhelmed with new and broadened responsibilities. It is very, very tough. State budgets and today, George Will wrote about New Jersey and its tax requirement. We have become a euphemism for what happens when you have to reach in to pay old debts, and it is pejorative. It is not a compliment by a long shot.

The fact is that States are under assault by the expansion of criminality; by their lack of resources; by having to provide funds for programs that were taken away over these last years, this last decade, and the systems do break down because the States are beginning to search for the skills with which to manage these programs. They don't have the funds for them.

So they have fallen on hard times, and they do look to the Federal Government. Listen, no one suggests that you just throw money down the rat hole, but with those funds can come some education, some skills development that will be unique to the law enforcement agency like yours which is so large and has so many well trained managers and is skills-based that we can use that at the local level.

We can't do it; we can't punish these States, honestly, into getting better. That is not it.

Mr. BARR. As I said, I am not suggesting that, but I am all for working with State and local government and doing as much as we can to assist. If anything, some of these programs, such as setting up gang task forces, Triggerlock, and so forth, where we are prosecuting essentially 6,000 armed offenders, are leaning forward on the Federal Government's part to help State and local. But by the same token, I think that has to be matched by real reform of the criminal justice systems in the States and no slackening in the funding commitment of States.

Part of the problem is that we have to go back to the basics throughout the country, State and local government, but also the Federal Government. Law enforcement is one of the basics; it is one of the reasons we have Government, and Senator Rudman's article pointing out how this mandatory spending is squeezing out the discretionary spending, that is happening at the State level, too. What is happening, the foundation of society, law and order, which is necessary for all these other nice programs to succeed, is under a lot of pressure. I think we have to go back to basics and assure that the first dollar spent goes to providing an environment in which the rest of these programs can succeed.

Senator LAUTENBERG. I agree. We could have a good time talking about this for awhile, but Mr. Chairman, I promise the debate is over as far as I am concerned.

WASHINGTON, DC, CRIME PROBLEM

Senator HOLLINGS. One other thing, General, that comes to mind, and I go to our hearing in the subcommittee with the Secretary of State. He got $1 billion more for peacekeeping everywhere; Cambodia, Angola. You pick a country, he is finding it; Yugoslavia. We are running around peacekeeping, peacekeeping. Here we have got the Capital City and we have got all of your programs, Triggerlock, weed and seed.

In the Capital City, every time you turn on the 6 o'clock news program we have bad problems: So many killed here; another stabbing there. And we are getting further and further behind. Literally, here is a good test area right in your own backyard. It is a tremendous Federal responsibility as well as for the city itself, and you know they run everybody out with the high taxes and everything else to afford the schools and all the services and everything else of that kind. It is a good place for the Attorney General to make history and be remembered that he cleaned up this Nation's Capital where you can walk the streets again.

You have got Senators being assaulted and this one getting shot; his wife being assaulted, everything else. I mean, every week it gets worse. So it is a good place to try to get that done, right here, along with outreach into my backyard and in Texas. Let's start those programs and see what we can do right here, too.

DRUG ENFORCEMENT ADMINISTRATION OVERSEAS PROGRAMS

Mr. BARR. Senator, it is hard for me to use that one to say what I wanted to say, but you talked about the DEA overseas programs,

and I didn't want to let these hearings conclude without saying something about that, because I think it is an important program.

We have to take the long view on the drug war in the sense that the real challenging part of the supply side problem is this production and distribution from overseas where it is produced and distributed in the United States like marijuana, methamphetamine. We have been making substantial progress on the supply side. The challenge is where it is coming from overseas, and I think by necessity it is going to take some time to gather the intelligence, and we have been doing that, but also to put in place the building blocks and the relationships overseas to start making an impact on those organizations overseas.

We are at the point where we are having an impact. DEA has good relations by and large with the law enforcement people overseas with whom they work, and I think that we have to.

Senator HOLLINGS. How is it then when you say that, and then turn on the TV and they have got armies organizing in Peru against us and the Government of Peru is now having a problem?

Mr. BARR. Peru is a difficult problem because they have these insurgent groups, these rebel groups.

PROGRESS IN COLOMBIA

Senator HOLLINGS. We had the same thing with the farmers in Turkey. That is why this is related. Wherever we go, we become the object of disaffection; it is sort of a catalyst to get the opposition to the particular government or the authority or whatever, and brother, "It is best then that we get out of Turkey," and, "Then it is best that we get out of here and get out of there."

Do you think we can get control down there in Colombia?

Mr. BARR. I think in Colombia we are making substantial progress, because in working with the Colombians we have decimated the Medillen cartel, and we are starting to hit the Cali cartel. A few months ago, you saw taking down two Cali cells in New York and then two simultaneous raids on the cartel, seizing documents and computer tapes. I think in the future, the Cali cartel will get hit harder and harder. We have spent several years putting in place intelligence; working with countries to put strike forces in place there; building up international agreements, and the building blocks are in place. Now is the time to go for the jugular on these organizations.

Senator HOLLINGS. I am willing to learn. Go right ahead.

Mr. BARR. Thank you, Senator.

ADDITIONAL COMMITTEE QUESTIONS

Senator HOLLINGS. We appreciate what you are doing. There will be some additional questions from various Senators which will be submitted to you for your response.

[The following questions were not asked at the hearing, but were submitted to the Department for response subsequent to the hearing:]

QUESTIONS SUBMITTED BY SENATOR ERNEST F. HOLLINGS

Criminal Enforcement Priorities

QUESTION: In recent years, Congress has appropriated hundreds of millions of dollars for additional Drug Enforcement (DEA) and Federal Bureau of Investigation (FBI) agents, assistant United States Attorneys, United States Marshals and pre-trial detention, and prison construction and operations. These resources have been provided for the Department's priority efforts to combat violent, drug, and white-collar crime. The primary impact of these efforts seems to be a burgeoning Federal prison population.

The Department has said it is giving high priority to major drug trafficking, white collar crime--including financial institution and health care fraud plus environmental crimes--and violent crime (Operation Triggerlock, etc.). But actual priorities may vary considerably across the country, depending upon the local priorities and declination policies of the various United States Attorneys. Moreover, according to the Department's own budget justifications, the supply of drugs seem largely undiminished (though transportation routes and participants have shifted), and the supply of heroin is actually growing.

On what basis does the Department determine its national criminal law enforcement priorities? How does it monitor compliance with these priorities? How does it determine the effectiveness of its investigative and prosecutorial priorities?

What have been the Department's major criminal law enforcement priorities for the past 3 years? What have been the Department's major measurable accomplishments and its major disappointments? Why?

ANSWER: The Committee is correct in noting the priority that the Department has given to major drug trafficking, white collar crime (including financial institution and health care fraud), environmental crimes, and, more recently, violent crime. The 1993 President's budget addresses these priorities in a chapter titled "Ending the Scourge of Drugs and Crime" with environmental priorities being discussed in the next chapter.

As I said in my statement before the Committee "The mission of law enforcement is to protect the freedom and liberties of all Americans. Indeed, the first freedom of all who live in this country is the freedom from fear of crime. Adequately protecting this freedom and defending the blessings of liberty is an unending task, requiring both moral and financial commitment."

The Department has responsibility to administer the law across the board. Each Administration and each Attorney General must utilize available resources to respond to problems that are perceived to be the most serious and

request additional resources when necessary. When problems are anticipated or erupt and a response is made, the prioritization process starts.

Although the Department of Justice has used priority rankings in a variety of contexts as an aid in its internal decision-making process, these priorities are driven strongly by changes in the law, changes in the pattern of criminal behavior, changing values in society, and the need to maintain a balance of resources within the various organizations that participate in the administration of justice. As crime spreads increasingly across State lines and international boundaries, Federal responsibilities change and tougher Federal laws are enacted. Workload also varies as Federal and State prosecutors weigh the merits of prosecution and punishment under Federal or State laws. With so many outside factors bearing on the Department, the Attorney General often has very few options in establishing priorities.

Although the Department regularly prepares "ranking sheets" to reflect its own priorities, it must be remembered that the Administration has its own methods for establishing priorities, and the Congress expresses its own priorities through the authorization and appropriations process.

Once a basic set of priorities has been determined for a given year, the Department and its components have the capability to monitor compliance through the Department's accounting and auditing systems. In some cases workload data must serve as a surrogate measure of compliance. To the extent unexpected events occur, or better approaches are developed during the current year, the Department follows Congressional notification guidelines for reprogrammings and reorganizations.

Determining investigative and prosecutorial effectiveness is an ongoing process. The Department's management team has primary responsibility for assuring that resources are used wisely. At the State and local level, Law Enforcement Coordinating Committees have been very helpful in making law enforcement and prosecution respond effectively to local priorities. A number of task forces at various levels coordinate and prioritize specific law enforcement activities at the regional, State, and local levels. The Office of the Inspector General has authority to review activities and make suggestions to improve performance within the Department. The General Accounting Office may provide recommendations, particularly in areas where Congress has expressed concern.

Regarding the Department's major criminal law enforcement priorities over the last three years, the war against drugs remains high on the priority list. During my tenure as Attorney General, I have added violent crime because many of the gangs that were once associated primarily with drug trafficking are now into violent crimes where drugs may or may not be a major factor. White collar crime continues to be a priority. Within this broad category, financial

institution fraud remains a major concern; but there is now clear evidence that more resources must be applied to suppress health care fraud. We also face a major task in ferreting out computer crimes and fraud associated with bankruptcies, telemarketing, insurance, commodities and securities, and pension plans.

As to our measurable accomplishments and major disappointments, there are several significant observations.

In the war against illegal drugs, we are pleased that the number of people using drugs on a regular basis has dropped significantly, that we have achieved a high degree of international cooperation in controlling drug supply and money-laundering, and that drug barons have not gained political control over any of the drug producing countries. We are troubled that there remains a hard core of drug users who can obtain supplies and we fear the increasing violence of gangs.

In the white collar crime area, we have had marked success in gaining convictions. In the financial institution fraud area, the conviction rate has been remarkably high. We are troubled about the spread of fraud into other areas and worry that our resources will not be adequate to deal with the levels of fraud that may be uncovered.

On the whole, considering the level of resources available, our law enforcement efforts have been successful. This, in large measure, is because we have learned to work more effectively with other Federal law enforcement agencies as well as our State and local counterparts.

Department's Violent Gang Initiative

QUESTION: A lot has been presented in the media lately about the growth in the gang problem across the country. In January, the Attorney General announced that in 1992, the FBI would be committing an additional 300 agents (about a 20-percent increase) to address the problem of gangs and violent crime. In 1993, an additional 85 agents will be reprogrammed to support the Violent Gang Initiative. The Bureau of Alcohol, Tobacco and Firearms (ATF) is also increasing the resources it is committing to fight violent street gangs. Part of those resources were to be assigned to join ATF/FBI task forces. And, as part of its justification for budget increases, the United States Attorneys are requesting additional resources, in part, to prosecute Organized Crime Drug Enforcement Task Force cases involving violent gangs.

How many gangs has the Justice Department identified that fall within its purview, and how many members does Justice estimate these gangs have? What criteria is used to determine whether a gang's activities are of such scope or significance that they qualify for investigation by the Department of Justice? Are there gangs that do not meet the criteria for Federal investigation and, if so, how do they differ from gangs that meet the criteria?

ANSWER: For the investigative purposes of the "Safe Streets" initiative, the Department of Justice defines a gang as "an association of two or more individuals, the purpose of whose association is the generation of income through continuing criminal activity." Due to the generic nature of the definition that is used, it is difficult to determine how many gangs or gang members there are in this country. There are many other factors that affect the demographics of gangs, and these factors vary from community to community.

The criteria used by the Department to determine whether the gang's activities qualify for investigation include a thorough examination of the character, complexity, sophistication and organization of the gang. However, the primary consideration is the thorough identification of the gang's criminal activity. Gang criminal activity does not distinguish between Federal, State and local jurisdiction. In all cases where it is practical, and the gang activity involves a violation of Federal statutes within the Department's jurisdiction, the Department will insure that its investigation is coordinated with other Federal, State and local law enforcement agencies.

With the specific implementation of the "Safe Streets" initiative, many FBI field offices have or are in the process of establishing multi-agency task forces in order to address specific violent gang problems.

In announcing the Violent Gang Initiative, the Attorney General, Director Higgins of the Bureau of Alcohol, Tobacco and Firearms, and FBI Director Sessions estimated that there are between 300,000 and 350,000 gang members in the United States. Some specific examples include the following: 20,000 Jamaican posse members; 50,000 outlaw motorcycle gang members and associates; 26,000 Crips, 10,000 Bloods, and 64,000 other street members in the Los Angeles area alone; 34,000 Latin Kings and Black Gangster Disciples; 13,000 prison gang members; and an undetermined number of Asian gang members.

Due to the generic nature of the gang definition, it is likely that any gang that commits crimes could meet the criteria for Federal investigation. However, the overriding considerations as to whether an investigation will be initiated are discussed above.

QUESTION: Extensive FBI, as well as other Federal, State, and local resources, have been committed to the gang problem which encompasses a number of different Federal enforcement objectives including emerging organized crime syndicates, drug and weapon distribution rings, and violent criminals. How can we be assured that the Federal resources, as well as State and local law enforcement resources being devoted to investigating each of these areas, are being well coordinated and that overlapping investigations are minimized? What mechanisms are there to oversee and coordinate the direction of the Federal efforts among the various agencies involved?

Has a determination been made as to which agencies have the lead in the various criminal violation areas and, if so, which ones are they?

ANSWER: With the implementation of the "Safe Streets" initiative, the FBI is managing, coordinating, and investigating many multi-faceted and multi-jurisdictional investigations which include the coordinated efforts of other Federal, State and local law enforcement agencies. Mechanisms in place to oversee and coordinate the direction of these multi-agency investigations include the establishment joint task forces. These task forces are generally formalized, and include agreed-upon memorandums of understanding which define each agency's jurisdictional and investigative responsibilities. The Special Agent in Charge (SAC) of each FBI field office, heads of other law enforcement agencies, as well as the respective United States Attorneys oversee and coordinate the investigative focus of these many "Safe Streets" initiatives in order to insure that overlapping investigations are minimized.

In many instances, the Department's FBI is best suited to act as lead investigative agency in these multi-faceted and multi-agency task forces for several reasons. The FBI has extensive experience in developing and bringing to fruition many types of complex, long-term investigations. These investigations include organized crime, drug, white collar crime and other program violations, and have been successful to the point of decimating all levels of the organizations' hierarchy. In other instances, another agency, such as ATF is the lead agency, due to the nature of the suspected violations.

QUESTION: In making the decision to reprogram agents from the Foreign Counterintelligence program to the Violent Gang Initiative, what criteria were used to decide that this initiative was a higher priority or was in greater need than other priority areas? In making this decision, to what extent were other Federal, State, and local investigative resources already committed to this area considered? In addressing the gang problem, what unique investigative tools or expertise does the FBI possess that other agencies investigating this problem lack?

ANSWER: On August 11, 1991, the Uniform Crime Report (UCR) released the 1990 statistics for crime in the United States and revealed that violent crimes increased by 11 percent over 1989, 22 percent since 1986, and 34 percent since 1981. In response to the President's initiative to combat the spiraling incidents of violence plaguing communities throughout the nation, and in recognition of recent world developments which indicate a somewhat less hostile environment, FBI Director William S. Sessions established crimes of violence as one of the FBI's national priorities. The decision to reprogram 300 special agents from the Foreign Counterintelligence program to the Violent Crimes and Major Offenders program was made in order to assist Federal, State and local efforts and to facilitate the creation of FBI-directed Federal gang task

forces to combat the increase in violent street crimes. The FBI's "Safe Streets" initiative is designed to complement existing Federal, State, and local investigations that are already in place and additionally provide a vehicle for the initiation of an investigation where there are no current investigations being conducted and a need exists.

The FBI possesses the unique capability of attacking violent street gangs not only at the street level, but from an organizational perspective. The FBI's unique experience in dismantling organized crime and drug organizations, complemented by its extensive resources, working knowledge of complex organized groups and ability to conduct in-depth investigations utilizing sophisticated techniques, such as undercover operations and electronic surveillance, makes the FBI singularly qualified to address this problem.

Immigration and Naturalization Service

QUESTION: Your recent Immigration and Naturalization Service (INS) reprogramming and the 1993 budget focuses heavily on border patrol, investigation of criminal aliens, and detention and deportation. The Administration is pursuing an overall free-trade agreement involving Mexico, Canada, and the United States. There are concerns expressed by border State members that INS is woefully understaffed at its land border inspections posts. To encourage commerce and free trade, we need to move people expeditiously across our local borders.

Where does the local border inspections issue fit into your overall priorities?

Why haven't you made more rapid progress in the local border pilot user fee program?

Why haven't you gone beyond the one site in Blaine, Washington?

Are you dealing at a Cabinet level with Treasury on expanding this initiative?

ANSWER: Several initiatives recently undertaken in the land border inspections area will allow INS to address the dual requirements of law enforcement, and travel facilitation at all ports-of-entry. The addition of the 135 new positions approved by the Congress, as part of this year's appropriation, is now underway. This increase represents a significant improvement in the land border staffing structure, essentially a rise of 13-percent above last year's 1,033 authorized level. The addition of these new officers to the staffs of the larger urban area ports is expected to materially improve our ability to avoid the lengthy traffic delays that currently occur.

Additionally, progress is being made on the expansion of the dedicated commuter lane concept to new locations along the northern border. Plans call for this program, currently in

full operation at the Blaine, Washington facility, to be expanded to several locations during 1992 and 1993. The diverting of the vehicles of frequent travellers into specially-equipped processing lanes results in a net improvement of overall facility efficiency, and allows all applicants for admission to be more quickly processed.

The INS also is developing improved automated inspection tools, such as a fingerprint scanner and document readers, to allow for improvements in officer effectiveness through increased detection of fraud and deterrence of illegal entry.

An additional initiative involves the development of a comprehensive staffing model geared to the unique requirements of the land border facilities. Following completion of the model, the Service will be able to quantify the relationship between officer staff and workload at all border locations, and will be in a position to reallocate existing staff, if warranted, as well as define future resource requirements.

The Land Border User Fee Pilot Program, initiated in Blaine, Washington, presents the INS with an exciting and innovative opportunity not only to increase facilitation efforts, but also to enhance other inspectional services rendered at land border ports-of-entry. The INS was ready to proceed with additional Dedicated Commuter Lanes (DCLs) before the end of 1991.

After implementation of the initial DCL, the Service began work on plans for a southern border test at the Paso del Norte Bridge (PDN) in El Paso, Texas, initially scheduled to open in September 1991. Unfortunately, the United States Customs Service (USCS) has actively opposed this project since inception and continues to prevent its implementation.

In the current appropriations act for Customs, Section 532 states in its entirety: "None of the funds made available to the United States Customs Service may be used to collect or impose any land border processing fees at ports-of-entry along the United States-Mexico border." Based on this section, USCS will withdraw written authority for immigration inspectors to perform primary inspectional duties for USCS and will reissue such authority valid only for non-DCL lanes if plans for a southern border DCL continue, or actually come to fruition. In effect, this would mean that any vehicle using a DCL would be stopped twice, once for immigration inspection, and once for customs inspection, while all other vehicles entering through regular lanes would only be required to stop once, thus nullifying any gain in facilitation.

While USCS continues to cite supporting opposition to DCLs from the Border Trade Alliance (BTA), and other groups, experience has proven otherwise. Meetings with such groups, as well as with members of Congress, have resulted in increased interest in the testing of further DCL locations.

Although staff officers from both the Department of Justice and the Department of the Treasury have met to discuss this issue, no Cabinet level meetings between the Attorney General and the Secretary of the Treasury have, to date, occurred.

Increases in Fees for Nonimmigrant Visas for Artists, Entertainers, and Athletes

QUESTION: On February 21, 1992, the INS adopted new fee schedules for work-related nonimmigrant visas, including the O, P and Q visa categories for artists, athletes, entertainers, and certain cultural exchange workers. The schedule dramatically increases fees for artists, entertainers and athletes, and imposes equally high fees on the Q category. For example, the initial application fee for a 200-member international orchestra was $80 total under the old fees but will be $2,070 under the new schedule, a more than 25-fold increase. If the orchestra were obliged to extend its stay, the fee increase would be from $70 to $10,070, because INS practice has been to charge a single extension fee for an entire group. These fee increases give rise to several questions:

Under 31 U.S.C. §9701(b), agencies are supposed to consider public policy in setting fees. In setting the fee schedule, did INS:

Consider the direct financial impact the fee schedule might have on not-for-profit arts presenters and their ability to continue to present the American public with the broadest possible access to international artists?

Consider the prospect that, if other nations retaliate in kind to the new fee schedule, American jobs and employers in our entertainment industry might be threatened?

Consider whether the fee schedule is consistent with United States obligations under the General Agreement on Tariffs and Trade (GATT)?

ANSWER: The amendments to the fee schedule are largely a result of the consolidation onto a single form of a number of forms and processes which were previously considered separately. In the example of an orchestra of 200-persons, under the old schedule the base petition cost was $80. The new base cost has been lowered to $70, but a $10 charge for each worker has been added to cover the cost of additional biographic data entry and record maintenance. Changes in the level of review and amount of data required of individual foreign workers included in group petitions were mandated by the Immigration Act of 1990. This additional requirement has increased processing costs.

This "front-end" cost may be at least partially offset by a reduction in the cost for an extension of stay. Previously, an extension of stay cost $70 per worker. This cost is reduced to $50 per worker plus the base petition fee of $70.

It should also be pointed out that in the example used, an extension for a 200-person orchestra, is a highly improbable scenario. It would be unusual for such an orchestra to extend for any significant length of time, since a major orchestra would inevitably be booked in advance elsewhere and could not simply pick up additional bookings on a United States tour.

In amending the fees, the INS reviewed the impact of the new regulations resulting from the Immigration Act of 1990 and assessed the processes and costs accordingly. The fee schedule is comparable to other nations' fees for similar petitions and applications, higher than some, lower than others. Therefore, the Service does not anticipate retaliation from other countries. The Service does not anticipate any conflicts with possible GATT agreements.

QUESTION: At the end of September 1991, Congress enacted, and President Bush signed into law a delay in the effective date of the new O and P visa categories from October 1, 1991, until April 1, 1992.

Why did INS publish a new proposed fee schedule on October 4, 1991, that included fees for O and P artists, entertainers and athletes, when the effective date of the new program had been delayed until April 1, 1992?

Considering the substantial changes in the O and P program from the 1990 Act, would it not be advisable and more consistent with the Administrative Procedures Act for INS to provide the affected industry with an opportunity to address itself to and comment on the relevant fee increases, rather than simply adopting them by final rule?

ANSWER: The O and P fee changes were published with all general temporary work category fee schedule revisions as a result of the Immigration Act of 1990.

The INS did not consider the adjustments in these fees as substantial. There have been statements from the entertainment industry that some INS offices in the past accepted a single fee for an entire group extension. If this occurred, it was in clear violation of existing regulations. The cost of data entry and file maintenance for a 200-person orchestra far exceeds $70. A practice of allowing a single fee for a group application would cost the agency a considerable amount of lost revenues, which would have to be made up through other fees.

In meetings with the representatives of the entertainment industry, the INS has agreed to clarify certain procedures to minimize the need for large entertainment groups to have to file for extensions of stay. The proposed changes will eliminate the paperwork burden and fees required by the extension process in many instances, and will also eliminate associated processing costs for the Service.

QUESTION: Has INS prepared any cost studies which justify the dramatic fee increases for O and P visas? If so, have those studies been submitted to this committee and, if not, could you submit them? If no studies are available, how do you justify the fee increases?

ANSWER: The amendments to the fee schedule are largely a result of the consolidation, onto a single form, of a number of forms and processes which were previously considered separately. Changes in the level of review and amount of data required of individual foreign workers included in group petitions were mandated in the Immigration Act of 1990. As a result, charges for each worker in a group were added to the charge for a base petition to cover the cost of additional biographic data entry and records maintenance.

QUESTION: Did INS consult with representatives of non-profit arts groups or the entertainment industry in the process of determining the new fee schedule?

ANSWER: All new and revised immigration forms that resulted from the Immigration Act of 1990 were published in the Federal Register and were open for public comment. As with changes for all INS applications, the I-129 Non-Immigrant Worker form was published in the Federal Register. Consequently, the arts, labor and entertainment industries had a 30 day period on which to comment on the fees and regulations regarding O and P visas. These comments were incorporated in the final regulations for the new fee schedule.

QUESTION: Has INS consulted with the State Department or Office of the United States Trade Representative (USTR) regarding the fees set for O and P visas in the particular, or for nonimmigrant worker visas generally? If not , the Committee would benefit from such consultation and information regarding the position of State and USTR on this matter.

ANSWER: The INS did not consult with the State Department or the Office of the United States Trade Representative.

QUESTION: In the Federal Register notice of the new fee schedule, INS certified under 5 U.S.C. §605(b) that the fee schedule "will not have a significant adverse economic impact on a substantial number of small entities." However, in apparent violation of the requirements of that section, there appears to be no "succinct statement explaining the reasons for such certification." Please explain on what basis and evidence INS reached this conclusion.

ANSWER: Fees certified under 5 U.S.C. §605(b) are collected from individuals applying for immigration benefits. Therefore, it was concluded that the fee schedule had no economic impact on any small entity.

Inspector Staffing at Airports

QUESTION: Last year, this Committee was seriously concerned that delays in immigration processing of arriving airline

passengers often required passengers to wait several hours after arriving at the airport, primarily resulting from the fact that INS had not hired the authorized levels of staff. Unfortunately, it appears that this problem has not yet been solved.

Immigration staffing reports indicate that INS still has 83 vacancies for new inspector positions that were authorized for 1992, even though we are already six months into the fiscal year. Why are last year's authorized positions not yet filled, and when will they be filled?

ANSWER: INS monitors its major ports-of-entry for delays in passenger processing. Reports indicate that the 45-minute standard has been met at least 98 percent of the time. Of the seven major international airports which the INS has been monitoring, seldom is more than one flight a week reported as not having met the processing time standard.

The Service currently has filled 1,773 of its authorized 2,173 inspector positions. One hundred percent on-duty rates are not possible since attrition during the course of a year results in a net on-duty level several percentage points below full staffing. Although our goal is full staffing, the Service actually plans its budget based on an assumption that in practice 95 percent of the total authorized positions will be filled at any given time. It is anticipated that the INS will attain the 95 percent "full employment" level during the third quarter of 1992, in time for the summer high travel period. The filling of airport positions was accelerated last year when over 400 new inspectors were recruited and hired. The Service anticipates further progress this year and expects to end the year with 325 new hires.

QUESTION: Current delays and traffic projections indicate that even if authorized levels are attained, they will be inadequate to meet the passenger traffic expected at airports across the country. What is being done to evaluate whether the current authorized numbers of inspectors will be sufficient to meet the demand, or whether the authorized numbers of positions may in fact be too low?

ANSWER: The INS has undertaken a comprehensive review of staffing at all facilities to insure that proper resource levels are available to facilitate the arrival of all passengers within the 45 minute time frame. To obtain the best staffing analysis and model, the INS awarded a competitive contract during September 1991, to the Rail Company of Towson, Maryland, an operations research firm, to develop a staffing model to replace the models developed in previous years.

The models are tools for the Inspections program staff to use to evaluate every port-of-entry. The model being developed uses sophisticated statistical techniques to simulate mathematically the operation of each air inspection facility. This will enable the Inspections program to conduct simulations for each airport. These simulations will assist the

program's managers in determining an optimal staffing for every location through examination of operational assumptions, including traffic, for each location.

QUESTION: In light of the President's highly-publicized advertisements inviting foreign travellers to visit the United States, what is the Immigration Service doing to insure that lengthy delays travellers encountered last summer will not be faced again this year?

ANSWER: The Service has continued to take measures to do its best to meet the 45-minute standard for the inspection of a flight. Those measures include the expansion of the Advanced Passenger Information System (APIs) and the special "Blue Lane" processing. Most importantly, the Service is actively recruiting to fill all its current Inspector vacancies. Processes which previously had caused excessive delays in hiring are being removed or changed to further facilitate the hiring process. Despite these INS efforts, unless heavy peaking of arrivals within short time periods and facility constraints are addressed by the airlines and airport authorities, the INS cannot ensure that delays will not occur.

QUESTION: Last year, this Committee also expressed concern with the delays as high as six months in processing new personnel for available openings for Inspector positions. What has been done since last year to review the INS's staffing procedures that created the inordinate delays in hiring personnel to fill vacancies?

ANSWER: The Service has been aware of delays in filling Immigration Inspector vacancies and has taken a number of steps to change procedures to streamline and improve the hiring process. The agency has been successful in filling positions through a variety of staffing alternatives: internal merit promotion; the Office of Personnel Management's "Career in America" examination; the "Outstanding Scholar" program; and the appointment of bilingual candidates.

The INS Western Region has been delegated authority from the Office of Personnel Management (OPM) to administer the Administrative Careers with America (ACWA) examination, Test 6, which covers Inspector positions. Other regions are requesting OPM approval to administer the ACWA Test 6 as needed.

The Service is exploring other methods of improving hiring procedures and is working with the OPM to establish a separate inventory of candidates who are specifically interested in the occupation of Immigration Inspector, rather than continuing to use the current general inventory of candidates for law enforcement and law enforcement-type positions.

INS Detention Budget

QUESTION: In 1990, the INS detention budget was only $13 million dollars. For 1993, the Department is requesting a budget of $35 million for detention costs to be paid out of the user fee revenues. That represents a 270-percent growth in the detention budget.

Last year, in the Conference Report accompanying the Department's Appropriations bill for 1992, this Committee expressed serious concern over the fact that INS was increasing the amount of user fees spent on detention costs, but was slow in using the same user fees to hire necessary inspectors.

Now, several months later, the problem is still present. The inspectors have not been hired, but the detention budget continues to grow. What is the Department doing to ensure that sufficient funds are being made available to achieve inspector staffing plans?

ANSWER: The INS budget contains sufficient resources to support the Immigration Inspector staffing levels in the budget. The problem in hiring is not a resource problem. It is related to the recruitment and retention of qualified personnel. Considerable attention has been and continues to be given to filling vacant Inspector positions. The INS has taken steps to expand the number of staffing alternatives used to acquire applicants for vacancies. In addition, the agency is working with OPM to establish a separate inventory of candidates who are specifically interested in the occupation of Immigration Inspector rather than continuing to use the current general inventory of candidates for law enforcement and law enforcement-type positions.

The INS is addressing the Inspector retention problem in several ways. The work underway with OPM to establish a separate inventory of candidates interested in the occupation may assist in insuring that persons applying for Immigration Inspector vacancies are genuinely interested in that type of work. The Service is also taking steps to establish a GS-11 Special Operations Inspector position which will provide promotional opportunities for current Inspectors. Finally, Inspectors who are leaving their positions are being interviewed to determine their reasons for leaving. This information will be used by the Service to determine what can be done to address problems that contribute to attrition.

QUESTION: In light of the massive growth in the detention costs budget, and despite the language in the 1986 user fee statute that requires that the user fees will be used to pay for the detention costs, why does the INS continue to force the airlines to pay for the detention costs?

ANSWER: Pursuant to the provisions of sections 237(b), and 273(d) of the Immigration and Nationality Act (INA), transportation carriers are liable for the detention expenses of aliens whom they transport to the United States, and who,

upon inspection, are deemed to be stowaways as has been the case when persons have arrived at air ports-of-entry who are not in possession of travel documents or evidence of boarding.

In addition, pursuant to sections 238(c) and 238(d) of the INA, carriers have entered into contractual agreements with the Service to provide for the detention expenses of persons transported to the United States as transit without visa and are determined to be inadmissible at the time of inspection.

The statutes that established the Immigration User Fee Account in 1986 did not relieve the carriers from their legal responsibilities for detaining stowaways at their own expense, nor did it relieve them from their contractual obligation to incur the detention costs associated with passengers boarded as transit without visas and found to be inadmissible, as delineated in 8 CFR 238.3(c). That section states that alien custody and maintenance costs for transit without visa passengers are exempted from the provisions stipulated in sections 286(g) and (h)(2)(A) of the Act.

INS is responsible for costs related to detention of passengers using fraudulent documents, or who are determined to be inadmissible for other reasons as defined under the Immigration and Nationality Act. To enhance overseas deterrence activities, INS plans to detail officers to source airports to assist airlines in screening the travel documents of departing passengers. It is anticipated that the training provided by INS officers to airline personnel will eventually reduce detention-related costs of the airlines, as well as INS. In addition, the Department has submitted legislation designed to deal with the fraudulent document problem.

QUESTION: Last year, this Committee expressed its desire that the INS act on the industry petition for a rulemaking on the issue of fines, and to publish a final rule as soon as possible. What is the status of the final rule, and when will it be published?

ANSWER: On April 1, 1992, the Commissioner of the INS signed final regulation 8 CFR 270, which establishes the procedures for Section 274C of the Immigration and Nationality Act. The regulation was forwarded to the Department of Justice on April 2, 1992 for review. The regulation is in the clearance process, and publication is anticipated in the near future.

Immigration Judges

QUESTION: Last year you sought 20 additional Immigration Judges for the Executive Office for Immigration Review (EOIR). Though authorized in the Immigration Act of 1990, Congress did not fund these 20 Immigration Judges (IJ). You are requesting the 20 IJ's again in 1993.

Why do you need more IJ's to address criminal alien problems?

How does the request relate to your overall efforts against criminal aliens?

ANSWER: INS is increasing its focus upon the identification of criminal aliens as a top priority. When inmates incarcerated in Federal and State prisons are identified as criminal aliens, INS issues "Orders to Show Cause", the charging documents that initiate deportation proceedings. The judges must conduct proceedings before INS can deport the aliens.

In order to conduct these proceedings, judges and support staff must travel to Federal and State prisons nationwide. During 1991, for example, there were 78 active criminal alien hearing locations. The processing of this priority caseload, in mainly remote locations, is extremely resource-intensive in terms of judge and staff time, and travel expense.

When EOIR's judges are on detail, they are not available to adjudicate existing caseload in their home offices. The 20 additional judge positions requested for 1993 will allow the increased processing of criminal alien caseload while lowering the adverse impact these details have upon the processing of home office caseload.

Federal Jails

QUESTION: Federal jails typically are built in high-cost, downtown areas near the Federal courthouses. Because of increased criminal trials, often of a high-profile nature, Federal court houses have become high-security facilities with limited access to the general public. Has Justice approached the Judiciary to consider co-locating jails and courtrooms for criminal cases in outlying areas where costs are lower, security can be enhanced, and the Federal courthouse can be left for other activities?

ANSWER: The Department of Justice has not specifically approached the Judiciary regarding this idea. Although the Department is not opposed to exploring the idea, several potential concerns exist. A distant criminal courthouse would hamper interaction between criminal and civil case judges; impair ready access between the defendant and legal counsel; and impede family visiting (presuming the defendant's family would be further from where the courthouse is now located).

QUESTION: What are the advantages and disadvantages of having Federal jails located downtown?

ANSWER: The principal advantage to having Federal jails downtown is proximity to the courthouse. This reduces transportation costs and improves security. The principal disadvantage is that land is scarce and expensive, dictating a high-rise building, which is more costly to construct and operate than a traditional correctional institution.

QUESTION: Can the Bureau of Prison's (BOP) classification of jail inmates be strengthened to facilitate the double-bunking of inmates? How? If not, why?

ANSWER: The foundation of any objective inmate classification system is information. The more that is known about an inmate, the more precise his/her classification can be. The information available on a pre-trial inmate is, necessarily, very limited. Information which would be readily available from a probation officer preparing a pre-sentence investigation following conviction is deliberately withheld during the adjudication of the criminal charges.

Given the limited information available, the BOP feels it is classifying pre-trial inmates as well as possible. As you are aware, BOP currently double bunks pre-trial inmates extensively due to insufficient detention capacity. BOP's success in doing so does not diminish the validity of its goal of reducing detention crowding and its policy of rating the capacity of detention facilities at one inmate per cell.

Staffing Federal Prisons

QUESTION: BOP has hired thousands of new employees over the past few years, and plans to hire thousands more over the next four years in order to staff its new and renovated facilities. The increased number of employees has the potential of placing a burden on BOP and OPM to complete the required background checks for new employees within their first year of employment, as well as every five years for all employees. How many employees, if any, are past the probationary year, and their background checks are not completed? If the background checks are not completed, how does this effect BOP's retention of that employee, i.e., does BOP have to suspend or dismiss the employee's employment until the background checks go beyond the year?

ANSWER: According to the Department of Justice's Security and Emergency Planning Staff, 1,930 non-probationary employees in the BOP lack background clearances. A number of factors account for this:

. Office of Personnel Management's role in the initial limited background investigation takes an average of over 7 months.

. Upon BOP receipt of OPM's background work, any derogatory information must be resolved. This resolution may take in excess of 3 months when such information as financial transactions or military records must be accessed.

. Once BOP's portion of the process is completed, the background must be reviewed and approved by the Department of Justice.

This process does not affect the staff member's employment status. We perform an extensive pre-employment check that includes a panel interview, an "integrity" interview,

urinalysis, credit checks, NCIC, law enforcement and previous employer vouchering, and a fingerprint check. A recent audit conducted by the Department's Inspector General's Office stated that the BOP does more than any other component regarding pre-employment checks.

QUESTION: Is BOP in compliance with the 5-year reinvestigation of employee backgrounds? If not, why? And, what if any affect does this have on BOP operations?

ANSWER: BOP has made great strides in the area of 5-year reinvestigations of employee backgrounds. As of December 1991, 97.4 percent of all BOP staff were either within 5 years of clearance or had a reinvestigation already initiated. As of that date, only 2.6 percent remained to be initiated. Great emphasis has been placed on compliance with this program.

QUESTION: BOP faces critical problems in hiring and training qualified correctional staff for the prisons which will open in the coming years. At the same time, the Department of Defense (DOD) is attempting to cope with the scaling-down of the military and costly reductions-in-force. Have BOP and DOD considered any type of plan or program that would target recruitment of qualified military and civilian DOD staff for hard-to-fill positions, i.e., food service and health positions. For mid-level management positions? What have been the results to date? What more could be done to successfully recruit these people?

ANSWER: Since 1990, BOP has coordinated with the DOD to take advantage of outplacement programs, advertised in military magazines and newspapers, and conducted job fairs at military bases. These efforts have proven successful in helping attract candidates to a variety of positions. This recruitment source has great potential for locating candidates for hard-to-fill and mid-level management positions, and efforts will continue to utilize military and civilian DOD personnel in staffing our prisons.

QUESTION: In 1991, BOP delayed establishing some positions in order to allocate funds to pay for salary increases. What impact, if any, does BOP anticipate that budgeting for pay increases and locality pay will have on BOP's ability to establish new positions and staff facilities in the future?

ANSWER: In 1992, BOP received partial funding for both the law enforcement and general personnel costs of the Federal Employees Pay Comparability Act. During 1992, BOP will be able to cover pay related costs without negatively affecting filling of new positions. With the annualization funding requested in the 1993 budget, BOP anticipates no adverse impact in the future.

QUESTION: Overtime charges and costs have increased over the last few years from about $8 million in 1985 through 1987 to $20 million in 1988 and $15.8 million in 1989. In 1990, $32 million was spent when about $11 million had been budgeted.

The $32 million equates to about 800 positions. What were the overtime charges for 1991? How much is budgeted for overtime in 1992? 1993?

ANSWER: The overtime charges for 1991 were $32 million. BOP, in an effort to better control costs, has revised the 1992 ceiling to $28 million. In the 1993 budget, BOP originally budgeted $38 million (based on 1991 actuals, 1992 estimates and inflationary factors) for overtime. However, if BOP is able to contain it at a lower spending level, the dollars not used for overtime could absorb higher costs of activations than permitted in the 1993 request.

QUESTION: Why have overtime charges increased? Was BOP unable to hire people? Were there delays in establishing positions at new facilities? What is BOP doing to reduce overtime costs?

ANSWER: Approximately one-third of BOP's overtime costs are a result of the need for correctional officers to escort inmates to hospitals outside the institutions for medical treatment. Over the past few years, BOP has had extreme difficulty in hiring medical professionals to perform in-house medical treatment.

In 1991, nearly $4 million in overtime was incurred as a result of incidents, such as the Lompoc escape and the Talladega hostage situation. Incidents such as these are unpredictable but when they occur, BOP makes every effort to absorb these costs within existing resources. The growing population and pay increases have also affected the overtime costs related to inmate bus and airlift transfers.

BOP is making every effort to reduce overtime costs. We have set reduction goals for 1992 and plan to maintain the same level of spending in 1993, even though we are faced with growing staffing level, additional facilities, and pay increases.

BOP Specialty and Management Training

QUESTION: In order to stay current in their medical field, medical staff are expected to receive continuing medical education (CME). On average how many CME hours did BOP doctors, nurses, physician assistants, and dentists get in 1990? In 1991? What training criteria or standards do BOP medical staff follow to ensure that they are up to date within their respective medical fields? What evaluations are done to ensure that medical staff have received appropriate levels of training?

ANSWER: In order for BOP to provide quality medical care and to manage its varied medical facilities, all health services professionals need to stay abreast of current practices and procedures. This is done through an aggressive CME program that is available at all BOP facilities.

For CPE/CME funding, BOP allotted $750,000 in 1990, and $758,000 in 1991. These figures translate into the following average number of CPE/CME training hours for the following positions.

Average 1990 CPE/CME Training Hours Per Position

Physicians Assistants	Dentists	Nurses	Physicians
36	25	19	29

Average 1991 CPE/CME Training Hours Per Position

Physicians Assistants	Dentists	Nurses	Physicians
34	32	16	31

To insure that health services personnel receive the required number of CME/CPE training hours needed for certification/ recertification, the BOP Mandatory Training Standards Program Statement addresses the needs of physicians, nurses, dentists, physicians assistants, medical records, chiefs of health programs, assistant health services administrators, health services administrators, psychiatrists, wellness coordinators, and medical dietians. In addition, BOP adheres to the training guidelines established in the Standards for Adult Correctional Institutions (3rd Edition) published by the American Correctional Association.

To accurately assess the needs of all health services employees, an ongoing evaluation program is in place. The program starts at the grassroots level and generates into formal reviews that assess program effectiveness and the establishment of funding limits. Areas of evaluation include:

- Individual Employee Training Needs Assessments
- Institution/Regional/Central Office Medical Training Plans
- Institutional Operational Reviews (audits)
- Central Office conducted Medical Program Reviews (audits)
- Central Office CPE Coordinator Random Surveys (to confirm staff involvement, training completion, and program effectiveness).

QUESTION: In 1991, BOP spent about $4.5 million for meetings and conferences, i.e., warden, associate warden, specific department head positions. BOP considers these as a way for employees to learn from each other and share experiences, i.e., a form of on-the-job training. What evaluations have been done to determine what kinds of information employees obtain at these meetings that can be applied to their jobs?

ANSWER: Each program area accomplishes a needs assessment prior to the conference that identifies the program goals for the upcoming national conference. In addition, the executive staff has identified Core issues that are instrumental in the development of managerial staff and are required to be presented during each National Conference. Core elements such as "wellness," "writing skills," "caring," "use of information," "leadership skills," "stress management," and "how to take initiative (without fear of mistakes)" are on the agenda of many conferences. At the conclusion of these conferences, evaluations are completed to assess the effectiveness of the conference.

QUESTION: As BOP increases its management ranks, does BOP anticipate using this type of forum more as a way to enhance management skills? If yes, has BOP estimated the costs associated with it?

ANSWER: BOP intends to use the current forum as a way to enhance management skills during future national conferences. The conference provides opportunities for information sharing, goal realignment and affirmation, and fellowship, all of which are essential for an efficient and effective organization. To address the concern of cost containment, BOP has rescheduled future national conferences on 2-year and 3-year cycles rather than annually.

QUESTION: BOP officials have informally been discussing a proposal to have a management training center located in the Washington, D.C. area. Is BOP's intent to expand its management training or relocate it? Would the BOP anticipate closing its management training center in Aurora, Colorado or would the facility in D.C. be an additional training center? Why is the BOP considering a training center in D.C.? Has BOP estimated the cost associated with this proposal?

ANSWER: BOP has explored moving the Management and Specialty Training Center from Aurora, Colorado to the Washington, D.C. area. No definitive cost projections or active site research have been conducted, and this proposal is not under active consideration.

Prison Alternatives

QUESTION: Since the mid-1980's, 26 States and BOP have begun prison "boot camps" as an alternative to prison. The goals of these camps are to reduce costs, recidivism, and crowding by offering short-term, military-style programs for young, nonviolent, first-time offenders. What has been BOP's experience, to date, with its Intensive Confinement Center (boot camp) at Lewisburg, PA, in terms of reducing costs and recidivism?

ANSWER: The Intensive Confinement Center (ICC) at Lewisburg, Pennsylvania, has been in operation for only 15 months. As such, it is much too early to assess its impact on reducing costs and recidivism. Our research department has in place

a comprehensive tracking procedure for each ICC graduate that will provide information on the offender while he is in the Community Corrections Center, home confinement, and ultimately when released from Federal custody.

QUESTION: When will BOP open its boot camp program for female offenders that had been promised for summer 1991?

ANSWER: The female ICC located on the grounds of the Federal Prison Camp, Bryan, Texas is currently scheduled for activation in July 1992.

QUESTION: Has BOP considered expansion of its boot camp program to include inmates beyond the minimum-custody level? What are the advantages and disadvantages of such expansion? What changes would be required in existing law?

ANSWER: At present, we have not considered expansion of the ICC program to include inmates beyond the minimum security level. We originally are targeting younger, more impressionable offenders; and, if research shows this to be a viable alternative to traditional confinement methods, we may explore the possibility of expanding the concept to older, more criminally sophisticated inmates. The advantages to expansion of this program would be minimal at this time. We would see a slight reduction in population at our existing facilities, and some participants may actually benefit from the program. However, the disadvantages of such expansion far over-shadow the positive effects. First, we would be expanding a program that has yet to show whether there will be results in terms of reducing costs and recidivism. Secondly, we would need to increase security to house older, more criminally sophisticated inmates. This would require additional funds for secure construction as opposed to minimum security which has no physical barriers, non-secure housing, etc. Additionally, older offenders who have exhibited a pattern of deviant behavior over the years would most likely be harder to work with and would require more time before achieving the desired result.

The existing statute that speaks to shock incarceration does not specify any age requirements. However, it does limit participation to those offenders serving sentences of less than 30 months. This provision would require modification if we were to include more sophisticated inmates with longer sentences.

QUESTION: In its report, <u>Prison Alternatives: Crowded Federal Prisons Could Transfer More Inmates to Halfway Houses</u> (GAO/GGD-92-5, Nov. 14, 1991), GAO pointed out that BOP is not taking full advantage of the halfway house program as a less costly alternative to prison. What actions have you taken to increase the number of inmates being placed in halfway houses? What is the impact of this on your construction costs? On your operation costs?

ANSWER: To be responsive to the recommendations of the General Accounting Office (GAO) report, BOP initiated a

review of national guidelines for Community Corrections Center (CCC) placement. Also, efforts continue to ensure greater consistency among like institutions in CCC utilization rates. An agency task force has been established to review pre-release programming, including CCC placement issues. The task force is reviewing CCC referral procedures to ensure that existing policy allows for expeditious referral of appropriate cases for CCC placement. BOP has increased the number of inmates in CCC's to over 4,300, an increase of about 18 percent since the time of the GAO review.

In discussing operational and construction costs, the GAO report draws an inaccurate conclusion that there would be a cost savings to BOP if empty CCC beds were utilized. If additional inmates were placed in CCCs to fill empty beds, the majority would come from minimum security facilities throughout the country. The average institution would lose 20 to 25 inmates and would realize almost no financial savings, given BOP's current level of crowding nationwide. While the average level of overcrowding would diminish slightly, there would be no concomitant financial savings since the level of staffing, utilities, and other fixed operational costs would effectively remain the same. Marginal savings on food and other inmate care items would approximate only $3.00 to $5.00 a day per inmate.

Additionally, GAO erroneously reports that if BOP would have used the empty CCC beds, a total savings of $43 to $59 million in prison construction costs would have been realized. Again, if BOP filled all CCCs to capacity, the average institution would lose 20 to 25 inmates, really a very negligible impact on our overall institutional capacity expansion plan. The impact would clearly not be to lessen BOP's need for planned construction, but only to slightly decrease the margins of our 150-percent overcrowding. However, CCC capacity has been formulated into BOP's capacity expansion plan.

QUESTION: Is there an opportunity to make greater use of halfway houses as a "front end" alternative to prison? If not, should there be?

ANSWER: Halfway houses continue to be available to the courts as a "front end" sentencing alternative. Since the GAO report was published in mid-November, the number of offenders admitted to halfway houses directly from the courts has increased by 100, and they continue to account for about one-third of the CCC population.

Confinement in a CCC is limited by BOP policy to those with sentences of one year or less. However, not all of those with sentences of one year or less serve them in CCC's, for a variety of reasons. First, the sentencing court may feel that the sanctioning of the criminality is most appropriately accomplished by removal from the community, even for a short period. Additionally, public safety may be better protected by placement in an institution. BOP reviews all cases at the

time of initial designation to determine if community placement would be appropriate. Prior to any such assignment the United States Probation Officer is contacted to determine how the court and the United States Attorney would react to such a placement.

QUESTION: Currently, the Federal Government contracts with over 270 halfway houses to provide transitional services to Federal inmates. Halfway house operators include such groups as the Salvation Army and the Volunteers of America. Until 1982, BOP directly operated halfway houses but withdrew from direct operation in favor of contracting with private groups. What are BOP's plans or proposals for direct operation of halfway houses?

ANSWER: BOP does not foresee any changes in the concept of contracting for the vast majority of our halfway house needs. We currently contract for halfway houses in approximately 260 locations, 198 with private vendors and the remainder with intergovernmental agreements with State and local entities.

BOP does intend to pursue the concept of a Federal correctional facility that meets three distinct population demands: housing for United States Marshals Service inmates in pretrial and pre-designation status; inmates with sentences less than three years who have substantial security needs; and inmates needing traditional halfway house programs.

Seattle, Washington is the only identified site for a BOP operated halfway house. We are in the site selection phase and do not expect this 500-bed facility to be operational until 1995. The halfway house component of this facility is not expected to exceed 100 beds. As individual population demands for these combined populations are identified in other metropolitan areas we will consider the expansion of this concept. These are the only plans we have for direct BOP operation of halfway houses.

QUESTION: What are the advantages and disadvantages of direct BOP operation of halfway houses instead of private operation?

ANSWER: The only situations where it appears advantageous for direct operation are locations like Seattle where there is a combined population need of approximately 500 beds. Of the 260 contract facilities, only 4 are for over 100 beds. We stopped operation of our own community facilities because it was not a prudent use of resources. The situation has not changed.

We have found that through contracting for this service, with stringent monitoring techniques, we are receiving quality community programs at a reasonable cost.

QUESTION: What are the costs of operating halfway houses through BOP--both in terms of initial construction costs and recurring operating expenses--instead of contracting for these services?

ANSWER: There are no current figures available to answer this question accurately. Most of our contractors have been long established in their communities, and it is improbable that BOP could construct and operate a community facility significantly cheaper than we are now contracting for that service. The average expenditure for a halfway house bed is approximately $32.00 per day. The average cost in one of our minimum security camps is $40.15 per day. With camp populations averaging over 400, the economy of scale keeps the costs down. We would not have these advantages in operating halfway houses in urban areas with average populations of under 20.

QUESTION: How would construction of halfway house beds affect BOP's current prison construction plans in terms of budget? Would these proposals be reduced or increased?

ANSWER: Any construction costs of halfway house beds would have to be added to current construction plans. Our construction needs are for secure beds. Building halfway house beds would in no way affect our current overcrowded conditions.

QUESTION: Would BOP build and operate halfway houses in locations where existing private operators have facilities? Is there a need for additional halfway house beds that the private contractors could not satisfy at a lower cost?

ANSWER: We have no plans to operate halfway houses anywhere other than in Seattle, where we intend to combine United States Marshals Service detainees, sentenced short-term inmates with high security requirements and traditional halfway house prisoners. This is a rare example of a situation in which a contract halfway house would be inappropriate.

Overall, there is not a need for additional halfway house beds that cannot be met by private contractors.

QUESTION: Prior to 1984, BOP had the flexibility to use home confinement as a means of serving a Federal sentence because the law allowed for BOP to find a "suitable facility" for service of Federal sentence which could be an inmate's home. However, a 1984 law changed the wording to "any penal or correctional facility" which eliminated home confinement. To what extent would BOP be able to reduce overcrowding and the cost associated with keeping someone in prison if it had the flexibility to place inmates under "house arrest"? Approximately what percent of inmates might qualify for this type of program?

ANSWER: Present law permits the use of home confinement for "the last 10 percent of the sentence not to exceed 6 months." The limitation of 6 months corresponds with professional correctional judgment that the demands of the program are such that longer periods increase the probability of failure.

Under the sentencing guidelines, the courts have the flexibility to sentence offenders to "house arrest" or home confinement as a condition of the sentence.

There are approximately 300 inmates on some form of home confinement as a transition from traditional confinement. We hope to double that figure during the next year, but beyond that, we see only slight increases in the use of home confinement for inmates.

Considering these factors, it is not currently realistic to conclude that the use of home confinement will ever have a significant impact on BOP's overcrowding rate.

QUESTION: Besides boot camps, halfway houses, and home confinement, what alternatives to traditional prisons are you currently involved in? What is their potential for safely reducing the Federal prison population and Federal prison construction and operation costs?

ANSWER: In addition to the above listed programs, BOP has established a "Halfway Back" program, which places parole, mandatory release, or supervised release violators in a halfway house rather than returning them to an institution. BOP has also instituted specialized female program components that are composed of programs for the placement of pregnant offenders in CCCs, keeping them together with their infant for a specified period of time.

The Urban Work Camp is a new program in which low-risk offenders spend the last 18 months of their sentences at a CCC. During the first 12 months of that period, offenders work for another Federal agency such as the National Park Service, the Veterans Administration, or the Department of Defense. During the last 6 months of the sentence, offenders move into the pre-release component of the CCC for transitional pre-release programming.

The impact of these programs on reducing the Federal prison population and prison construction and operation costs will be insignificant. Given BOP's level of overcrowding nationwide, the reduction would be minimal, and there would be no concomitant financial savings since the level of staffing, utilities, and other fixed operational costs would effectively remain the same.

Inmate Education and Training

QUESTION: An inmate confined in a Federal institution who does not have a verified General Educational Development (GED) or high school diploma is required to attend an adult literacy program for a minimum of 120 calendar days or until a GED is achieved, whichever occurs first. According to BOP, their literacy standards reflect those in the communities to which Federal inmates will be released and are intended to help inmates to compete for available jobs and to cope with post-release community, family and related responsibilities. On the surface, this initiative appears to be a significant

step towards increasing inmate literacy levels. A closer look at the requirement raises a number of questions. Will the literacy requirement increase the number of offenders that receive a GED, or will it just increase attendance of GED classes and offenders will ultimately drop out after the required 120 days? Since this requirement is intended to better prepare inmates for employment upon release, should BOP provide post-release employment assistance?

ANSWER: The number of Federal prisoners who have taken the GED since 1981, the first year of mandatory literacy in the Federal Prisons System, has increased over 229 percent compared with a corresponding increase in the average daily prisoner population of 146.3 percent. In the most recent year, 1991, the number of Federal prisoners who took the GED test was 7,886, an increase of 22.7 percent over the preceding year's total of 6,426. The corresponding increase in the average daily population was 10.6 percent (61,404 in 1991 compared with 55,542 in 1990). We estimate that the current drop out rate is approximately 25 percent after the required 120 days.

Statutorily, BOP has no authority to provide direct post-release employment assistance. This is the job of the Probation and Pretrial Services Division of the Judiciary.

With respect to whether BOP should provide post-release employment assistance, modest efforts are currently in place. Institution based pre-release programs include guidance and counseling focused on individual aptitudes and interests, extensive vocational training options providing assistance to prisoners in the preparation of employment resumes, and identification of potential employers in the labor market to which they are returning. In addition, employment in UNICOR (Federal Prison Industries) and institution work assignments provide many prisoners with on-the-job training, live work opportunities, and the chance to develop positive attitudes toward work and good work habits. These latter qualities are those sought by outside employers.

In addition, job placement assistance is provided to prisoners released through community corrections centers. On balance, BOP sees a need for more intensive job placement efforts. Not all Federal prisons have employment counselors, and current resources for counseling and pre-release programs are spread thin. Intensifying post-release employment assistance above current levels would require additional positions and resources.

QUESTION: Considering the unprecedented growth expected in Federal prisons over the next five years, how will the increased population affect BOP's ability to implement the mandatory literacy requirement? What plans have BOP developed to address this issue?

ANSWER: It is unlikely that with current resource levels, the Federal Prison System will be able to absorb completely the increased mandatory literacy requirements stimulated by

continued population growth over the next five years. We are currently running into classroom space shortages, student waiting lists and related scarce resource issues. BOP is expanding the use of computer assisted instruction, mobile classroom space, inmate tutors, community volunteers, free services and additional contract teachers to meet these increasing needs. In addition, we anticipate that some of the growth can be accommodated by restructuring and redesigning current facilities. However, absent additional space, education positions and related resources, waiting lists may increase and meeting mandatory literacy requirements may be deferred over time.

BOP is also examining the benefits of restructuring the delivery of education services so that not all programs will be provided at all institutions. This stratified approach to the delivery of education services may make better use of resources to meet increasing population needs.

QUESTION: Hard data is only available for the GED program. Are trends in other BOP educational, as well as vocational programs sufficient for planning and assessing program success? What is the best way to measure the success of educational and vocational training programs? Are enrollment and completion rates the best performance indicators?

ANSWER: Post-release employment is considered by some a measure of program success. However, there are many impediments to post-release employment even for those prisoners who successfully complete an academic or vocational program. This is particularly true during periods of high unemployment and few job opportunities. Widespread discrimination still exists with respect to released offenders; they are often the last to be considered by employers. However, from a post-release success point of view, BOP's recent Post-Release Employment Project study indicated that inmates who participated in work and vocational programming during their imprisonment showed better adjustment and were less likely to recidivate by the end of their first year back in the community. Similarly, research studies are beginning to show that prisoners involved in education and related programs have a lower than average rate of recidivism.

Absent hard post-release data, the best way to measure the success of educational and vocational training programs continues to be the enrollment and completion rates, including completion of certificate and credential programs.

Special Needs Populations

QUESTION: The sentencing guidelines and mandatory minimum sentences virtually guarantee a large number of elderly inmates in Federal prisons in the coming years. In this regard does the Department maintain statistics on and prepare population projections for elderly inmates? What are the growth rates projected?

ANSWER: Statistics and projections for elderly inmates are not currently maintained. A method for forecasting this population is under consideration.

QUESTION: What are the special needs of elderly inmates? To what extent are they more costly to house because of special facilities, more health care, etc.? Are they isolated from other inmates? How?

ANSWER: Elderly inmates are not isolated from the general population, unless they require hospitalization. Within BOP's elderly population, we see a much higher incidence of cardiac disease and hypertension. In January of 1989, BOP's Office of Research and Evaluation published a bulletin on "Looking Ahead -- the Future BOP Population and Their Costly Health Care Needs." At that time, it was estimated that treatment of elderly inmates' health care problems consumed about 33 percent of BOP's budget for outside medical treatment, even though they account for only 12 percent of the inmate population. BOP defines an elderly inmate as being 50 years or older due to the fact that health problems occur much earlier in the inmate population.

QUESTION: What is the Department doing to provide for the special needs of elderly inmates? How is this expected to change?

ANSWER: Where possible, elderly inmates are handled at their home institution. When this is not feasible, they may be transferred to our Medical Referral Center in Fort Worth, Texas. Fort Worth has a long-term care unit that was originally planned to provide care for 207 inmates. Currently, that facility is providing care for 393 long-term care inmates, of whom approximately 50 percent are elderly inmates. In December 1990, BOP held an issues forum on "Long-Term Confinement and the Aging Inmate Population." A component of this forum was dedicated to the issue of aging inmates and their health care needs. As part of its strategic planning process, BOP is considering a variety of options for providing health care to elderly inmates.

QUESTION: How have medical costs increased for Federal prisons over the past 5 years, and what are the projections for the future? What are the reasons for the increase? General inmate population growth? Substance abuse? AIDS? An aging population? Other?

ANSWER: Health care costs have increased substantially from approximately $1,600/inmate/year in 1985 to $2,800 in 1992. Based on a linear regression analysis beginning in 1983 (Index=100) and using the CPI-U (Hospital and related services) the index in 1995 is projected to be 233.0, which equates to $3,303/inmate/year. This increase is based on the rapid rise in the inmate population; costs associated with HIV positive/AIDS inmates; escalation in cost of outside medical care; new technology; costs associated with an increasingly aging population and an increase in the number of substance abuse inmates.

QUESTION: Given the high costs of prisons, and the trend toward longer prison sentences, would it be feasible and advantageous to build and/or operate some prisons jointly with one or more States, particularly for inmates in high-security facilities or for inmates with AIDS? Asking this from another perspective, is there a way to better use the resources of the 50-plus prison systems in this country to cut the nation's prison costs in general and Federal prison costs in particular with respect to the housing of particular types of offenders? Are there legal or administrative barriers to join Federal/State facilities? If so, what are they and can they be removed?

ANSWER: The option of joint construction and/or operation of a correctional institution has been considered. Conceptually it is appealing, but it presents many practical difficulties. Issues which would need resolution include, but are not limited to, differences in legal authority, staff training, use of force, inmate discipline, command authority, application of policy, and budgeting procedures.

The most practical way to house prisoners from more than one jurisdiction in the same facility is for one entity to run the facility and contract with other jurisdictions, who for varying reasons, would prefer not to house a particular inmate themselves. These reasons could include budget restrictions, inability to manage difficult inmates, and the expense of providing specialized care to certain inmates.

QUESTION: BOP's growing inmate population is composed of a significant number of substance abusers. Substance abusers will have their own special needs as evidenced by the new drug treatment program established in Federal prisons. Has BOP identified and estimated the costs for other special needs of substance abusers, such as an increased demand for kidney dialysis resulting from kidney failure related to drug use?

ANSWER: The number of inmates requiring kidney dialysis has increased from 9 in 1979, to 27 in 1989, and is presently at maximum capacity at 36 patients. Since there is a strong relationship between kidney disease and the use of drugs, with the increased emphasis on drug enforcement, it is expected the number of inmates requiring kidney dialysis will increase substantially. At the present incidence rate, the projected demand for dialysis service is 65 to 70 by the year 1995. BOP is considering the establishment of a 12-patient dialysis unit at USP Terre Haute.

QUESTION: What action has BOP taken to address the shortcomings noted in the recent GAO report (GAO/HRD-91-116, September 16, 1991) on the drug treatment program for Federal inmates?

ANSWER: The GAO report noted a number of shortcomings that they believed BOP had not adequately addressed in its drug abuse treatment programming. While the GAO did not take into account the program development stage of the BOP's implemen-

tation of drug abuse treatment programs, they noted several items that, in the course of normal program development, have been addressed.

1) GAO's greatest concern was its perception that there is an inadequate "outreach" effort to encourage inmates to participate in drug treatment programs. BOP has been working on this issue. The elimination of parole and the potential loss of pay during enrollment may reduce the incentive for participating in treatment programs. To encourage greater inmate participation, BOP recently approved several incentive programs. These include:

a) Extended CCC placement. Inmates who complete a residential treatment program and are otherwise eligible for a Community Corrections Center (CCC) placement, will receive extended placements (120 - 180 days) in a CCC.

b) Small monetary awards. A small monetary achievement award will be paid to inmates for each quarter completed in a residential drug program.

c) Special clothing. Special clothing will be provided to inmates who participate in a residential drug treatment program. Items will include sweatshirts and sweatpants printed with the local drug program logo.

d) Motivational programs. A Motivational Program has been developed for those inmates who have a moderate to severe substance abuse problem, are between 24 and 30 months from release, and have not volunteered for a residential drug treatment program. This 4-hour program includes video presentations and interactive instruction.

2) GAO noted that BOP's drug treatment strategy did not include a post-release component. In April 1991, BOP created a Transitional Services Program to fill this gap. There is now a structure in place to ensure that the inmate who completes a residential treatment program will be provided with substantial treatment upon his/her release. The Transitional Services Program provides the inmate in a CCC or under the supervision of a United States Parole Officer access to community-based treatment providers, frequent drug testing, contract monitoring, and individualized treatment planning.

3) Another shortcoming noted by the GAO report was inadequate communication between BOP and United States Probation staff. In response, the Administrative Office of the United States Courts and BOP developed a Memorandum of Understanding that details the communication required between BOP staff and United States Probation staff across the country.

QUESTION: The demand for medical care will increase with the growing inmate population and the special populations needs. Has BOP done or considered doing a cost benefit analysis of various alternatives for providing medical care? For example, using mobile units, contracting with doctors or

private sector hospitals, consolidation of medical facilities either within BOP or with States?

ANSWER: BOP is in the process of soliciting bids for a Fiscal Intermediary (FI). Ultimately, as part of this process, the contract FI would work with the BOP and community health care providers to monitor and pay claims for outside medical care at the Medicare rates for reimbursement. Several BOP Health Services Units have taken the initiative and have already negotiated to reimburse the local community hospital for services provided based on prevailing Medicare rates. We have increased the capabilities of our BOP laboratories at our Medical Referral Centers in Springfield and Rochester, so that a greater portion of laboratory tests are being processed at the Referral Centers instead of being sent to an outside lab. Abt Associates, under the auspices of National Institute of Justice, prepared a study entitled "Privatize Federal Prison Hospitals?" Basically this study found that it would not be feasible to contract for medical care.

Criminal Aliens

QUESTION: What efforts are being made to get the countries of origin to agree to incarcerate convicted criminal aliens to reduce the Federal prison population? What legal or other barriers exist to such an agreement? Realistically, about what percentage of the Federal criminal alien inmate population could BOP expect to return to their home countries to serve out their sentences?

ANSWER: The United States currently has treaty transfer agreements for the voluntary repatriation of imprisoned nationals with a substantial number of countries, either through multilateral conventions or bilateral agreements. The statutory authority for voluntary transfers is contained in 18 U.S.C. §§ 4100-4115.

The Office of Enforcement Operations in the Criminal Division reports that efforts are being undertaken to increase the number of nations that will accept prisoners who wish to return to their home countries. In this regard, an ongoing initiative at the Organization of American States (OAS) is aimed at producing a multilateral convention for prisoner transfers among member nations. This project is currently before an OAS committee and would require United States Senate approval if ultimately adopted by the OAS.

Current statutory authority only provides for the voluntary transfer of alien offenders to a foreign country. Therefore, the consent of the inmate is required before any transfer can occur. In addition, the United States is constrained by the fact that it does not maintain treaty transfer agreements with all foreign countries.

QUESTION: Each year, how many criminal aliens are returned to their countries of origin through the prisoner exchange

program? What could be done to make this program more useful in reducing our own prison crowding?

ANSWER: Listed below are the number of returns over the last four years. An average of 58 criminal aliens were returned annually over this period of time.

1988 - 51
1989 - 40
1990 - 61
1991 - 81

We believe 1992 will most likely exceed all previous figures since 58 have already been returned this year.

The program could be improved further if treaties were signed with additional foreign countries. This action would be initiated by the State Department. New treaties have been signed with Germany and the Bahamas. It would be extremely beneficial to have treaties with additional South American countries, i.e., Colombia, whose inmates account for nearly 5 percent of the BOP population. BOP institution staff are doing their part in advising foreign nationals (aliens) of the Prisoner Exchange Program during local programming. This is evidenced by the increased number of transfer referrals to the Central Office.

QUESTION: How does the Department learn of and maintain oversight of criminal aliens being housed in State prisons and jails? How many such criminal aliens are currently in prison or jail in the State systems? How does the Department coordinate the release of such inmates?

ANSWER: Local Immigration and Naturalization Service (INS) offices have developed, through liaison with State Departments of Corrections (DOC), various methods of notification when suspected aliens enter the State correctional systems. INS focuses limited resources on identifying criminal aliens at DOC intake centers, locations through which inmates pass for initial processing. For those facilities where INS is unable to have personnel on-site to identify aliens as they enter the corrections systems, INS is notified of suspected aliens in the form of hardcopy printouts, received weekly or monthly, or through access to the DOCs' inmate tracking networks.

Maintaining oversight of the numerous local jails is more difficult due to limited INS enforcement resources, the number of jail locations, and the short time inmates are detained. As with the State institutions, INS identifies aliens at many large county jails by either frequent visits to interview new inmates suspected of being criminal aliens shortly after they enter the facility, or by on-site personnel working in the facility to screen aliens as they enter the correctional system. Through liaison between local jails and nearby INS offices, the Service has established similar mechanisms of notification with the local jails. In many

instances, INS is unable to oversee the local jails due to their number and locations throughout the country.

There are currently approximately 41,184 foreign-born inmates housed in State correctional systems. Each of these cases requires investigation in order to determine which inmates are naturalized citizens, lawfully-admitted permanent residents, or criminal aliens subject to deportation on the basis of their criminal convictions. It is not known exactly how many foreign-born inmates are incarcerated in the country's local jails. The results of a 1991 INS jail survey are still being collated and analyzed.

INS uses detainers to coordinate the release of inmates from correctional facilities. Detainers placed on suspected aliens request the correctional facility to notify INS 30 days prior to the release of the inmates. The 30-day notice is necessary to allow time for INS to make available alternate detention space to hold the aliens in INS custody. Advance notice also permits INS to coordinate the location of the inmates' release with the location of INS records (A-files) and prevents the release of criminal aliens into the community due to lack of detention space or detention funds.

INS has also implemented an Institutional Hearing Program (IHP) under which deportation hearings are held and proceedings completed in State correctional facilities prior to the completion of aliens' sentences. The program is a cooperative effort undertaken by the INS, the Executive Office for Immigration Review, and States with large enough incarcerated criminal alien populations to justify the costs associated with the implementation and maintenance of the program. By using the IHP, the Federal Government avoids costs associated with the detention of criminal aliens after their release.

In addition to these efforts, the recently-approved reprogramming adds 150 Immigration agent positions to address criminal alien problems. In 1992, INS will also begin establishment of a National Enforcement Operations Center, which will assist Federal, State and local criminal justice agencies in the identification of criminal aliens. When fully implemented in 1993, this Center will be available to respond to inquiries regarding apprehended criminal aliens on a 24-hour-a-day basis.

Fraud

QUESTION: We had almost 1 million bankruptcies in 1991, and are likely to have more than a million in 1992. The bankruptcy program area is called a High Risk area by the Administration. Can you describe your overall bankruptcy fraud program effort?

ANSWER: The Internal Revenue Service is one of the nation's largest creditors in bankruptcy. Taxes were owed in approximately 262,000 of the 783,000 bankruptcy cases filed in 1990. The influx of bankruptcy cases into the Department's Tax Division's civil litigation program is itself proof of the

increasing importance of tax claims in the bankruptcy courts: civil bankruptcy receipts grew from 6,954 cases in 1987 to 26,869 cases in 1991 and may reach the 40,000 case level this year.

While we have no reliable statistics on the losses suffered by the Internal Revenue Service due to bankruptcy fraud, the available evidence indicates that its losses are substantial. If, as they claim, VISA and Mastercard lose over $1 billion annually to bankruptcy fraud, we believe that the IRS losses could be at least as much.

The Department's Tax Division is currently investigating or prosecuting 20 bankruptcy fraud cases where taxpayers have attempted to use the bankruptcy laws to evade the collection of taxes.

The Tax Division is working with the United States Trustees, the United States Attorneys and the Internal Revenue Service to develop a coordinated effort to identify and prosecute these violators. Our initial focus is on abuses that have occurred in Chapter 13 debt reorganizations.

Criminal cases stemming from tax fraud in bankruptcy will add to our criminal docket, rather than replace other criminal tax referrals. Therefore, it is critical that we have the additional resources needed to prosecute these cases, because it is only through successful prosecutions that we can deter those who might consider committing bankruptcy fraud in the future.

QUESTION: You are also seeking resources for health care and insurance fraud. What is the level of criminal activity in these areas that warrant such increase initiatives?

ANSWER: The Justice Department is not a newcomer to the battle against health care fraud. In 1986, the Department's Economic Crime Council designated health care as one of the Department's three top white collar crime priorities. The FBI reports that fraud affecting the costs of health care are prevalent in every geographic area of the United States, and health care crimes have expanded beyond single health provider frauds to organized criminal activity affecting public and private health care programs. The General Accounting Office has recently reported that health industry officials estimate that health care fraud and abuse costs approximately $70 billion each year.

A study conducted by the FBI in the area of insurance company insolvencies concluded that the business of insurance is uniquely suited to abuse by mismanagement and fraud. Moreover, the National Crime Information Bureau has reported that losses due to fraud in the property/casualty segment of insurance are estimated at $17 billion annually. The National Council on Compensation Insurance (NCCI), which represents workers' compensation insurance carriers, has indicated that for the two months ending March 1, 1992, they have identified over $40 million in fraudulent activity. The

NCCI has reported that the involuntary workmans' compensation market lost in excess of $2.4 billion in 1991. The NCCI estimates that as much as $1.3 billion of the loss is related to fraud on the part of employers. The General Accounting Office has indicated that it has received reports that within the reinsurance industry losses due to fraud are estimated between $10 and $20 billion.

In the area of health care, single defendant prosecutions have given way to multi-defendant conspiracy indictments; and, rather than "reacting" to isolated complaints, the current initiatives include the deployment of unique and sophisticated proactive investigative techniques. The FBI's efforts now focus on the larger crime problems and are evidenced by recent successes in: pharmaceutical frauds and diversions; medicare frauds; and, medicaid clinic fraud. The FBI has also taken a broader approach to health care provider fraud cases. While it has been recognized that Government funded health care frauds are significant criminal problems, it has been repeatedly shown that providers who defraud the Government also defraud commercial insurance carriers.

Field offices will be able to address Government frauds more effectively by investigating the same provider for commercial insurance fraud. This approach not only addresses significant financial ramifications of health care fraud on the commercial insurance industry, but also the inherent difficulties in investigating many medicare cases.

QUESTION: You're seeking more agents for financial institution fraud -- what is your assessment of progress to date with the over $200 million a year in base resources?

ANSWER: The following information describes prosecutions of "major" frauds against financial institutions covered by FIRREA and the Crime Control Act of 1990[1], for the period October 1, 1988, to February 29, 1992.

(Dollars in millions)

Description	S&Ls	Banks	Credit Unions	Total
Information/Indictments:	644	1,217	71	1,932
Estimated loss:	$10,662.0[2]	$2,818.0	$83.2	$13,563.2

[1] This information was supplied by the 93 offices of the United States Attorneys and from the Dallas Bank Fraud Task Force. Numbers may be adjusted due to monthly activity, improved reporting and the refinement of the data base.

[2] This figure contains a double-count of the loss in the Lincoln S&L case. That change, as well as a considerable store of new information, will be set forth in our soon-to-be-published second quarterly Report to Congress entitled "Attacking Financial Institution Fraud."

(Dollars in millions)

Description	S&Ls	Banks	Credit Unions	Total
Defendants charged:	1,093	1,694	90	2,877
Defendants convicted:	797	1,368	79	2,244
Defendants acquitted:	58[3]	26	1	85
Conviction rate:	93.2%	98.0%	98.8%	96.3%
CEOs/COBs/Pres.				
charged:	124	123	8	255
convicted:	87	110	8	205
acquitted:	8	1	0	9
Conviction rate:	91.6%	99.1%	100%	95.8%
Directors/other officers				
charged:	180	392	46	618
convicted:	151	343	44	538
acquitted:	5	3	0	8
Conviction rate:	96.8%	99.1%	100%	98.5%
Sentenced to jail:	490	849	60	1,399
Sentenced w/o jail:	138	276	9	423
% sentenced to jail:	78%	75.5%	87%	76.8%
Fines Imposed:	$14.867	$5.084	$12.250	$19.96
Restitution Ordered:	$394.413	$322.472	$11.883	$728.768

Note: "Major" is defined as (a) the amount of fraud or loss was $100,000 or more, (b) the defendant was an officer, director, or owner (including shareholder), (c) the schemes involved multiple borrowers in the same institution, or (d) case involved other major factors.

The above-cited accomplishments would not have been possible if resource enhancements had not been received as requested. Rather, the workload would have been impeded, with the result being an unacceptable level of underaddressed or unaddressed work, or at a minimum, a lengthening of time in bringing these cases to a conclusion. This would be further complicated by a greater dissipation of any remaining assets that could be seized and forfeited as part of the investigative process and by endangering successful prosecutive results because of dated evidence and deteriorating recollections of witnesses. The past and current enhancement requests are necessary for the proper investigation of financial institution fraud cases.

QUESTION: How long will we have to continue this significant level of investment in financial institution fraud?

ANSWER: The Attorney General has designated financial institution fraud as a top priority for the Department of Justice in the white collar crime area. We will devote all available resources to this most important investigative and prosecutive effort as long as the need exists and referrals of these types of matters continue. There is no way to

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[3] Includes 21 borrowers dismissed in a single case in a District Court.

predict how long the need for resources at present levels will exist, although in 1990 then-Attorney General Thornburgh predicted a 5 year period would be needed to resolve the then-existing caseload -- a caseload that continues to grow.

United States Trustee Program (Bankruptcy)

QUESTION: The Department has identified and ranked white-collar crime as a priority. Where does bankruptcy fraud rank within white-collar crime?

ANSWER: The Department has clearly emphasized the importance of detecting and prosecuting those individuals or entities that attempt to defraud the bankruptcy system. The significant increase in the number of bankruptcy cases filed nationwide over the past decade has had a correlative effect on the opportunity for bankruptcy fraud by private trustees who do not meet their responsibilities as fiduciaries as well as fraud committed by, or on behalf of debtors.

Bankruptcy fraud not only severely impairs the integrity of the system, but also impacts the return of estate monies to creditors, of which the Federal Government is the largest. The FBI is placing additional emphasis on bankruptcy fraud based on the increasing number of filings, and fraud associated with those filings. The Department has established the aggressive prosecution of bankruptcy fraud as a special emphasis area. The Attorney General has given a high priority to those efforts that the Department can make against white-collar crime operations that significantly affect the economy, as well as those efforts that may result in substantial gain to the Federal Government. The program's efforts to address the serious problem of bankruptcy fraud meets both of these important precepts.

QUESTION: Describe the Department's response to the growing wave of bankruptcies in terms of (1) steps to improve and (2) efforts to find and prosecute the private trustees or debtors?

ANSWER: The Department has implemented a myriad of initiatives to confront the significant challenges imposed by the escalation in the number of bankruptcy cases and instances of bankruptcy fraud. These initiatives include the development and implementation of uniform reporting requirements on private trustees in their administration of cases as well as legislative proposals to strengthen the enforcement of the Nation's bankruptcy laws.

The Department has steadfastly taken the position that under the Bankruptcy Code, the private trustee is a fiduciary, with wide-ranging responsibilities to effectuate the goals of the particular chapter under which the case is filed. Consequently, there is a concomitant need to be able to require the private trustee to adhere to basic standards. It is from this premise that the United States Trustee program has implemented policies in supervising private trustees.

The program has sought to impose accountability on the bankruptcy system. The bankruptcy oversight methodology includes conducting audits on private trustee operations, establishing uniform reporting requirements relating to the private trustee's administration of cases, and examining the manner by which a trustee has administered each case. One of the results of the new standards of accountability is that 28 private trustees, or their employees, have been prosecuted for embezzling estate funds.

Establishing standards of accountability and confronting those who embezzle estate monies only touches the surface of what must be undertaken to uphold the integrity of the bankruptcy system. The law requires that the administration of an estate be performed expeditiously and in a manner that maximizes the return to creditors. Bankruptcy estates must not be administered so that the private trustee and the professionals that perform services for the estate are the sole recipients of funds.

Regrettably, despite the establishment of standards and the substantial efforts undertaken to require those who administer estates to meet these standards, the bankruptcy system continues to suffer from individuals who evade the law's mandates. Therefore, to realize the desired effect of the broad reforms in the system mandated by the Congress in the 1978 and 1986 bankruptcy acts, the Department has proposed a draft bill to strengthen the program's supervisory and enforcement efforts. The draft bill, the Fiduciary Standards in the Administration of Bankruptcy Estates Act of 1992, would enhance significantly the ability to supervise properly the increasing number of bankruptcy estates filed nationwide.

The proposed legislation will amend the existing legislative structure to provide the program with the tools necessary to impose reform on the bankruptcy system in the near term. Currently, the program has no unilateral authority to enforce compliance with its policies or procedures, nor can it rectify departures from the law, unless it goes to court. All the program can currently do is confront these trustees. Deterrence is undermined not only by time consuming litigation, but by the vast range of decisions emanating from the courts. The ability of private trustees to ignore, and ultimately escape from departures from their responsibilities as fiduciaries, undermines the bankruptcy system.

The draft bill proposed by the Department will enhance the supervision of private trustees and their administration of cases as well as strengthen the ability of the Government to prosecute bankruptcy fraud. The draft bill includes three direct enhancements to the supervision of private trustees. First, present law will be clarified to require a private trustee to maintain records and to make them available to the United States Trustee. Second, the draft bill will authorize the Attorney General to establish the standards for the proper administration of bankruptcy cases and to remove trustees who depart from those standards. Third, civil penalties would be imposed upon those trustees who depart

from the established standards. The proposals to enhance the prosecution of bankruptcy fraud include the creation of a new bankruptcy fraud offense, modeled after the mail and wire fraud statutes, which will eliminate serious gaps in the coverage of existing statutes. In addition, the draft bill contains amendments to clarify the definitions of the individuals and entities covered by existing statutes to better ensure the honest administration of bankruptcy estates.

The amendments proposed in the draft bill will allow the program to ensure that those who administer bankruptcy cases adhere to fiduciary standards. Moreover, in the event that circumstances arise that demonstrate a failure to adhere to the law, those responsible for the deficiency can be held accountable. In addition, these legislative proposals will enhance dramatically the ability to maximize the money returned to creditors, the largest of whom is the Federal Government.

QUESTION: What additional FBI and United States Attorneys resources are planned for the bankruptcy area?

ANSWER: The Department's 1993 budget request includes 16 FBI agents to address bankruptcy fraud matters. These agents would be assigned to field offices that have identified a bankruptcy fraud crime problem. These additional agents would permit increased contact with the United States Trustees to better coordinate and expand bankruptcy fraud investigations.

The United States Attorneys are planning an additional four bankruptcy fraud conferences this year to train civil and criminal Assistants United States Attorneys, Assistant United States Trustees, FBI agents, and some investigators from other interested agencies, such as the Postal Service, IRS, and the Department of Agriculture. The United States Attorneys are also seeking additional resources to address bankruptcy fraud in the 1993 Budget request for the White Collar Crime program.

QUESTION: We understand that you have bankruptcy task forces set up in Chicago and Los Angeles. How effective have these task forces been? What agencies participate in them? Do you think the task forces could be effective in other parts of the country?

ANSWER: The Bankruptcy Task Forces that are established in Los Angeles and Chicago are a cooperative effort by the United States Trustee's Office, United States Attorney's Office, the Federal Bureau of Investigation (FBI), and other law enforcement agencies. The role of the United States Trustee is to detect the fraudulent activity, reconstruct all of the cases of the private trustees suspected of embezzling estate monies, and building the case to the point of referral to the FBI and the United States Attorney. The task forces have been effective in the detection, investigation, and

prosecution of fraud committed by private trustees and debtors in bankruptcy in their respective cities.

The efforts of the Bankruptcy Task Force in Los Angeles have resulted in the detection and prosecution of a significant number of instances of bankruptcy fraud. As the Central District of California is the largest single district in the number of bankruptcy case filings, and one where sizable assets are involved, the dollar amount of fraud is substantial. The problem is that few, if any, of these cases are prosecuted.

The dramatic increase in the number of bankruptcy filings over the past decade has been accompanied by an increase in the number of fraudulent bankruptcy schemes by, or on behalf of, debtors. The types of schemes uncovered by the program include: 1) the concealment of assets; 2) repeated bankruptcy filings in which debtors make false declarations on their petition such as denying previous filings; 3) planned bankruptcies which occur in the traditional "bustout" scenario in which a company obtains merchandise on credit with the intent to sell it and keep the proceeds without paying suppliers; and 4) "petition mills" which lure customers with promises to solve their credit problems, charge them hundreds of dollars while inducing them to sign documents they often don't understand, and then improperly file for bankruptcy on behalf of the unsuspecting debtors.

In addition to detecting and rectifying instances of debtor fraud, it is a major responsibility of the program to confront those individuals who do not meet their responsibilities under the Bankruptcy Code. The process of detecting instances of fraud and building the case to the point of referral to the FBI and ultimately the United States Attorney for prosecution is time intensive. The 1993 budget attempts to establish the foundation for enhancing the United States Trustee's efforts in confronting bankruptcy fraud throughout the system. A commitment of resources in the near future is vital to the ultimate success of this effort to sustain the integrity of the bankruptcy system. The significant number of bankruptcy cases currently active in the system and the continual escalation in bankruptcy filings, enhances the opportunity for fraud to occur. The United States Trustees must be able to send the clear message to private trustees who do not carry out their duties as fiduciaries and to debtors who attempt to defraud the system, that fraudulent activity will not be tolerated.

QUESTION: What kind of system did you inherit from the courts when you took over the program nationwide in 1986? What effect has it had on your progress in instituting your program?

ANSWER: The Bankruptcy Judges, Family Farmer, and United States Trustee Act of 1986 (Pub. L. 99-554) expanded the United States Trustee program on a nationwide basis effective July 25, 1987. The program completed the expansion in 1989 under the transitional provisions in the Act. The legacy

inherited by the United States Trustees may be characterized as a nationwide patchwork of practices lacking any semblance of uniformity and steeped in local customs and procedures.

At its best, the previous system basically focused on two phases of the bankruptcy, the time following the filing of a bankruptcy petition and the time at the close of the case when it reviewed the manner in which the private trustee proposed to distribute the estate funds. Little guidance or oversight was provided during the intervening and most important periods of the case administration.

Under the previous system, deficiencies were either not discovered, or were revealed only when a case was about to close and there was inadequate money to distribute. In general, the system lacked institutional standards of accountability for its own oversight responsibilities, and in turn failed to hold those involved in the process accountable for theirs.

When the nationwide expansion began in 1987, the United States Trustee program encountered circumstances in the supervision of private trustees far beyond departing from fiduciary standards. Vast numbers of dormant bankruptcy cases were allowed to languish on the court's dockets for years. In fact, some trustees were unaware of cases being assigned to them and, in at least one judicial district, trustees had never been appointed to administer the cases. Reporting requirements regarding the administration of estates were virtually non-existent, as were the maintenance of record-keeping procedures. Trustees were underbonded and, in some cases, not bonded at all. Bankruptcy estate funds were often commingled and were not required to be placed in an interest bearing account, as cash or checks were usually maintained in the trustees file cabinets. Little or no guidance was provided to private trustees and chapter 11 debtors-in-possession regarding what was expected of them. Appointments of private trustees were made without any review of their backgrounds. Moreover, audits of the private trustees were not performed in order to obtain an independent assessment of whether adequate internal and financial controls were instituted and maintained. Far from having any ability to approach a structure of accountability for those purporting to be fiduciaries, the previous system symbolized clearly the immense discrepancy from what the law demanded and reality. Most dramatically, since the program expanded, 28 private trustees or employees of trustees have been prosecuted for embezzling estate monies.

Beyond the lack of any supervisory process was the fact that the system had been committed to those who strayed far from their fiduciary responsibilities. Thus, when the program began its expansion effort in 1987, there was not a clear understanding of the degree of effort necessary to implement those mandates. Consequently, the personnel resources required by the program were severely under-estimated when the initial staffing allocation was developed for the implementation of the nationwide program. Moreover, the

immense deficiencies of the previous system delayed the progress of the program in its oversight responsibilities. The United States Trustees had to perform background reviews of the private trustees, train the trustees on how to maintain records so that they were auditable by the Department's Inspector General and by private accounting firms. The program has made significant strides in the past several years to enhance its oversight responsibilities of private trustees and their administration of cases. However, there are serious challenges that still face the bankruptcy system. The 1993 President's budget reflects the Department's commitment to continuing to enhance the oversight of bankruptcy administration that the Congress has mandated to the United States Trustee Program.

Funding from National Drug Control Policy Office

QUESTION: Justice has been receiving about $28 million, for its own use, from the Drug Czar for the High Intensity Drug Trafficking Areas initiative. Your 1993 budget doesn't reflect a continuing receipt of these funds.

Assuming the Drug Czar receives High Intensity Drug Trafficking Area funds in 1993 and the Department receives its share, please explain what the Department does with $28 million each year and how the High Intensity Drug Trafficking Areas initiative relates to and supplements the Organized Crime Drug Enforcement Task Force program.

ANSWER: The funding level provided to the Department for the metropolitan HIDTA areas is dependent upon the total HIDTA funding Congress provides. Initial planning guidance for the program with respect to 1993 is based on the assumption that funding levels will at least remain the same as 1992, if not increase slightly. The metropolitan HIDTA Coordinators are currently basing their initial 1993 requests on a $28 million total for the four metropolitan HIDTAs. Generally, these resources would be used to expand existing HIDTA initiatives.

Funds made available to both Federal and State and local law enforcement agencies in the metropolitan HIDTAs are used to supplement a variety of multi-agency task force type operations. Emphasis has been placed on efforts that focus on money laundering, intelligence, and drug-related violent gang crimes. HIDTA funds have permitted the expansion of investigative efforts resulting in more OCDETF quality cases being prosecuted in the four metropolitan areas.

The Department proposes initiatives in each of the four metropolitan HIDTAs that respond to the Administration's policy guidance and at the same time address the strategy developed for each HIDTA. These individual initiatives consist of multi-agency proposals that focus on dismantling major drug organizations. A review of the funding requested for each initiative is conducted by ONDCP. Once ONDCP reviews the initiatives as being consistent with the National Drug Strategy, funding is transferred to the Department of Justice.

The $28 million in Federal funding is specifically used for various operational support needs and equipment. HIDTA funding is not used for salaries of Federal agents or attorneys, but permanent change of station and transfer costs have been funded, as have administratively uncontrollable overtime (AUO) costs.

Within the Department, the HIDTA program is actually a funding mechanism that augments the OCDETF program. HIDTA funding can make a difference by providing operational support to task force operations that focus on major drug-related organizations and offenses. Virtually all cases developed as a result of the infusion of HIDTA resources will be prosecuted as OCDETF cases. HIDTA funding has given the Department's successful OCDETF program an added boost, allowing proven techniques to be applied to major drug organizations in the key HIDTA areas.

050 Funding for Justice Accounts

QUESTION: I see that you are requesting about $250 million in 1993 under the defense discretionary area. Over $170 million is related to the Radiation Compensation Trust Fund and its administration and $80 million is labeled the Special Program of the FBI.

How were you able to convince the Administration these initiatives fall under the defense versus domestic discretionary category of spending?

ANSWER: A decision was made, during the 1993 budget process, to realign resources among budget functions, where appropriate and when in compliance with the Budget Enforcement Act.

Funds were appropriated through the Department of Defense (DOD) in 1992 for the Radiation Exposure Compensation Trust Fund because the actions of DOD created the need for the program. Therefore, although Justice administers the Fund, it remains appropriate for it to be funded from defense discretionary resources in 1993.

Historically, all of the FBI's resources have been included under the Domestic Discretionary Category, or the 750 (Administration of Justice) budget function. A portion of the FBI's Foreign Counterintelligence Program can, categorically, be defined as supporting national security. In addition, with the changes taking place in the geo-political world, the FBI is in the midst of a realignment of Foreign Counterintelligence program resources focusing on new and revised strategies that support national defense goals and objectives.

A new initiative, called the "Special Program", is being established under the Defense Discretionary Category, or the 050 budget function to capture the national defense-related resources within the FBI. It consists of a base adjustment of $71,100,000, 578 positions (including 354 agents) and 565 workyears from the 751 budget function to the 050 budget

function. In addition, a program enhancement of $8,900,000, 5 positions (including 4 agents) and 1 workyear is requested for the Advanced Telephony Program, now located in the 050 budget function. In total, the 1993 request for the "Special Program" in the 050 budget function is $80,000,000, 583 positions (including 358 agents) and 566 workyears.

QUESTIONS SUBMITTED BY SENATOR DANIEL K. INOUYE

Redress Questions

QUESTION: In its 1993 budget, the Department proposes to eliminate the education component of the Civil Liberties Act of 1988 (Public Law 100-383).

What is the Department's justification for the elimination of the education component, especially in light of anti-Asian American sentiments?

ANSWER: There are three reasons underlying our recommendation for the elimination of the educational component of the Act. First, the size of the Federal deficit constrains our ability to provide funding for this program. Second, we believe that the Federal Government has supported, and will continue to support, activities that serve to educate Americans about the internment. For example, the Smithsonian Institution has established a permanent exhibit at the National Museum of American History on the internment of Japanese Americans. In addition, on March 3, 1992, President Bush signed legislation to designate the Manzanar Relocation Center as a National Historic Landmark and to establish a series of other landmarks of historic interest to Japanese Americans. Finally, there have been a number of private efforts, largely within the Japanese American community, to present information about the internment through forums, films, publications, and the like.

QUESTION: The Department's budget proposal requests an additional $250 million to address the estimated 12,500 increase in eligible recipients. In addition, the Department proposes to terminate the Civil Liberties Public Education Fund to the date by which all funds have been expended or by September 30, 1994.

How confident is the Department that the projected number for the increase will not extend beyond the 12,500 eligible recipients?

ANSWER: The Office of Redress Administration has not completed the verification process for all potentially eligible individuals. Thus it is important to remember that our estimate of 75,000 is just that -- an estimate. We expect to have a more accurate estimate within the next few months, as our verification process nears completion.

QUESTION: If an accurate figure is difficult to obtain at this point in time, would the Department want Congress to au-

thorize additional funds (above the $250 million) to ensure that all eligible recipients are covered under the program.

ANSWER: We do not recommend amending our request at this time. However, if we determine that additional funds are needed, we will notify Congress after clearing the request through the Office of Management and Budget.

QUESTION: What is the Department's justification for terminating the Civil Liberties Public Education Fund by September 30, 1994?

ANSWER: The Department believes that its outreach programs have been quite effective and that all eligible individuals have been located and paid more quickly than was anticipated at the time the Act was passed. A related proposal in our draft legislation will allow the Department an additional 180 days after the final payment from the Fund to complete phase-down activities of the Office of Redress Administration (ORA), which was established to implement the 1988 Act. These activities would include archiving case files, as required by the Act, inventorying equipment, and securing the computer system operated by ORA.

Current law requires that the fund terminate the earlier of August 10, 1998 or when all funds have been disbursed.

QUESTIONS SUBMITTED BY SENATOR DALE BUMPERS

Immigration and Naturalization Service

QUESTION: Mr. Attorney General, the current controversy over the stream of Haitians attempting to make their way to the United States has generated much debate over the proper definition of a refugee. How much is the processing of all these people costing? How much will it cost to admit and process those who are deemed to be true refugees under your current reading of the standard? If they are true refugees, what role should cost play in determining whether to admit them?

ANSWER: The Haitians who are being intercepted at sea and brought to the Naval Base at Guantanamo Bay, Cuba, are being processed as applicants for political asylum. Both refugees and asylees are defined as persons who are unable or unwilling to return to their country of nationality, or to seek the protection of that country because of persecution or a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion. The distinction between a refugee and an asylee is that an asylee is one who is physically present in the United States or at a port-of-entry. A refugee is any person who is outside his or her country of nationality, but not in the United States when they make their request for refugee status. As of June 30, 1992, political asylum pre-screening interviews were completed for some 38,007 Haitians at a cost of approximately $3.10 million. This is the INS's cost

including personnel and support costs at Guantanamo Bay, Cuba.

As of June 30, 1992, some 11,119 Haitians had been able to demonstrate a credible fear of persecution if they were to be returned to Haiti. The approximate cost of processing these individuals' political asylum cases once they arrive in the United States is an additional $1.90 million.

Cost is not a consideration when determining whether an individual with a valid asylum claim should be admitted to the United States.

Violent Crime Initiative

QUESTION: Many of the agents involved in counterespionage activities are to be moved to anti-gang activities in cities around the country, including Little Rock. I welcome the added attention to the pressing problem of gang activity, but I am concerned that there isn't some element of trying to find something, anything for these people to do to avoid budget cuts in these tight budgetary times. Would you comment on that?

ANSWER: In response to the initiative of President Bush and Attorney General Barr to combat the spiraling incidences of violence plaguing communities throughout this Nation, Director William S. Sessions established crimes of violence as one of the FBI's national priorities and made the assessment that a reprogramming of 300 special agents from the Foreign Counterintelligence (FCI) program was appropriate.

On August 11, 1991, the Uniform Crime Report (UCR) released the 1990 statistics for crime in the United States, which revealed that violent crimes increased by 11 percent over 1989, 22 percent since 1986, and 34 percent since 1981.

According to the FBI Training Division's National Center for the Analysis of Violent Crime, in 1960 there were over 8,000 homicides in the United States. In 1991, we experienced over 23,000 homicides. While the drastic increase in homicides is nearly three-fold, what is alarming is the overall declining solution rate. That is, the percentage of cases that are cleared by law enforcement. In 1961, the solution rate was 93 percent. In contrast, the solution rate in 1991 declined to 67 percent, and is expected to be even lower in 1992. Nearly 7,000 homicide cases from calendar year 1991, remain unsolved.

The decision to reprogram 300 special agents from the FCI Program to the Violent Crimes and Major Offenders Program in 1992 was based on a current assessment reflecting these increases in crimes of violence and changes in the national security threat resulting from recent world events. This reprogramming decision will enhance the FBI's Violent Crime and Major Offenders Program efforts to assist Federal, State and local efforts and will facilitate the creation of FBI-directed Federal gang task forces to combat the increase in violent street crimes. The FBI's "Safe Streets" initiative

is designed to complement existing Federal, State and local investigative resources that are already in place and, additionally, provide a vehicle for the initiation of an investigation where there are no current investigations being conducted and a need exists. In summary, the need for an enhanced effort against violent crime existed far before the reprogramming was contemplated.

War on Drugs

QUESTION: Where do we stand on the "War on Drugs"? What are we getting for all the billions we are throwing at this problem? Don't we need to direct more of our resources toward curbing demand in the United States?

ANSWER: The scope of this Nation's "War on Drugs" is one that cannot be won overnight but through a sustained and comprehensive attack on many fronts. The President's 1992 National Drug Control Strategy emphasizes a balanced, integrated strategy focusing on both supply reduction through law enforcement, and demand reduction through prevention, education, and treatment. The Strategy states that "treatment and education stand little chance of succeeding if they must compete in a neighborhood where drug dealers flourish on every corner."

The overall objective of the President's strategy is to reduce drug use. This can be accomplished by reducing both the supply of and demand for drugs. Reducing the demand for drugs can be accomplished by preventing and deterring new and casual users as a primary objective, and by treating existing users. Reducing the supply of drugs can be accomplished by sharpening the focus of the attack on drug trafficking organizations, first by identifying the principal organizations and then by developing and implementing specific plans to dismantle those organizations.

Progress continues in this "war." For example, between 1988 and 1991, the following accomplishments have been achieved:

- Current overall drug use dropped 13 percent; current adolescent drug use dropped 27 percent.
- Occasional use of cocaine dropped 22 percent; adolescent cocaine use dropped an astounding 63 percent.
- Current users of marijuana dropped by about 2 million since 1988, a drop of over 16 percent.
- Among persons 12 to 17 years of age, current use of any illicit drug is down more than 25 percent since 1988, and, according to the High School Senior Survey, drug use by high school seniors has dropped to its lowest level since the survey began in 1975.
- Student approval of occasional marijuana and cocaine use dropped by 29 percent and 47 percent respectively.

- Federal drug seizures in 1991 continued to be substantial, with figures totaling several hundred thousands of pounds of cocaine, heroin, and marijuana seizures.

Simply put, our efforts have been reaching the casual user and overall drug use is down. However, because the hard-core addict is harder to reach, this is not the time to reduce our efforts. As was mentioned earlier, only through collective efforts by the Government, private sector, families, churches, and communities can we continue to reduce drug use in this country in the future.

In summary, supply reduction through law enforcement is obviously not the only answer to this Nation's drug problem. Drug demand reduction through treatment, education and moral suasion is an essential part of the solution as well. Enhanced resources are justified on both fronts for 1993.

Mississippi River Delta

QUESTION: Mr. Attorney General, two years ago this Subcommittee asked the Bureau of Prisons to consider the benefits and impact of locating Federal prisons in the lower Mississippi River delta area. As a result of the BOP's study, a decision was made to locate two prisons in the delta. Since the real economic benefit to the delta won't be felt until construction begins on the facilities, would you estimate when construction will begin? Will the Department of Justice and the Bureau of Prisons make every effort to get these facilities completed as quickly as possible? Are there plans to locate more facilities in the delta, or to increase the size of the facilities that are now under consideration?

ANSWER: Actually, the Bureau of Prisons, pursuant to the Delta study, made a commitment to move forward on the environmental impact statement (EIS) for correctional facilities in three sites: Yazoo City, MS; Forrest City, AR; and Pollock, LA. The EIS process has already begun at the first two sites, and we have conducted the initial site investigation on the third.

The Bureau of Prisons anticipates that site preparation at Yazoo City and Forrest City can begin in mid-1993 with major construction commencing in the Fall of 1993. The Department of Justice and the Bureau of Prisons will make every effort to complete these facilities as timely and cost-effectively as possible. We are currently reviewing our capacity needs by security level and geographic distribution.

QUESTION: The two facilities in the lower Mississippi delta areas are the same size, 662 beds, but the construction request for one is double the amount of the other. Would you please describe what is planned for the two facilities and briefly explain why one is so much more expensive than the other?

ANSWER: Our 1993 request includes full funding for the Mississippi facility and funding to initiate design and site work for the Arkansas facility. The balance of the Arkansas

funding will be included in future budget requests. The full funding cost for Yazoo City, Mississippi, is $79,603,000 and the full funding cost for Forrest City, Arkansas, is $76,603,000.

QUESTION: The Bureau of Prisons is planning a medical center and camp with 750 beds at an undetermined site. When selecting the site for that facility, will BOP take into consideration the cost benefits that would be derived from obtaining an existing medical facility?

ANSWER: When planning the development and activation of new facilities, the BOP always weighs the options of acquisition, conversion or new construction. Where a viable, cost-effective acquisition or conversion exists, it has been the BOP's historic practice to utilize these alternatives instead of new construction. Due to the unique combination of security and medical requirements of a correctional medical institution, the acquisition or conversion options are necessarily limited, especially in the geographic portions of the country where our greatest need exists, the northeast and west. Several of the military properties on the base closure list have hospitals that may provide conversion alternatives, and the BOP is actively exploring these with the Department of Defense.

QUESTION: I am pleased to see that the Bureau of Prisons is planning to acquire and renovate surplus facilities such as former military bases. What criteria will the BOP take into consideration in selecting which bases to acquire?

ANSWER: We have applied our standard site selection criteria to bases on both base closure lists 1 and 2, and selected approximately 39 bases for further consideration. At this time, we have targeted bases in those areas of the country where projections indicate the greatest number of inmates will come into our system in the future, and in those areas where our existing facilities are experiencing overcrowding.

Additionally, our selection criteria identified bases with existing correctional facilities and hospitals which are of the size that could be considered for cost-effective conversion to Federal correctional use.

QUESTIONS SUBMITTED BY SENATOR FRANK R. LAUTENBERG

Weed and Seed Program

QUESTION: How will localities be selected to participate in the Administration's proposed Weed and Seed Program? Who will make the selection decisions? What criteria will be used?

ANSWER: In 1992, the Department will fund Weed and Seed demonstration projects in 16 cities. Factors that were considered in selecting the 16 cities invited to participate under the limited competition included: the existence of a

severe crime problem within the city; a demonstrated presence of successful Department of Justice and/or other anti-drug programs; the potential for strong and active community group participation; a geographic diversity of sites; and a balance of large and mid-size cities. For 1993, the Department is considering holding a National Competition.

For 1993, the President's budget proposes a substantially-expanded program. Under the Attorney General's leadership, the Office of National Drug Control Policy and the Departments of Labor, Education, Health and Human Services, Transportation, Agriculture, and Housing and Urban Development will coordinate social services and community assistance programs. The Attorney General will solicit plans from State and local governments to revitalize neighborhoods using programs administered by these agencies and will review and approve these plans in consultation with the Federal agency to which the funds are appropriated.

Pursuant to program guidelines promulgated by the Attorney General, local applicants will submit proposals to the Department of Justice. The precise criteria that will be used in the 1993 selection process is currently undergoing refinement by representatives of the involved Federal agencies but the final criteria can be expected to include the following factors:

- Identify existing Federal, State and local resources for the targeted community that will be dedicated to the Weed and Seed effort.

- Demonstrate a working partnership among law enforcement agencies, including local prosecutors, and between law enforcement and community service providers.

- Identify private sector resources, including corporate contributions and individual commitments, to be included in the Weed and Seed effort.

- Demonstrate a balanced, comprehensive plan that addresses getting violent offenders off the streets, supports drug and crime prevention, and includes other efforts at neighborhood revitalization through strategies to create jobs and opportunities.

- Target previously-designated Enterprise Zones with documented drug, gang and violent crime problems.

QUESTION: I understand that this program has already been implemented in Trenton, New Jersey. Do you anticipate that any other New Jersey localities would benefit by the funds requested for 1993?

ANSWER: The Weed and Seed project in Trenton, New Jersey, is targeted at four neighborhoods. This project is proceeding with very good results. If competition for 1993 funding is open nationwide, other cities in New Jersey would be eligible to compete.

QUESTIONS SUBMITTED BY SENATOR WARREN RUDMAN

Weed and Seed Initiative

QUESTION: In 1991, the Department began a Weed and Seed Initiative at three sites (weeding out crime and seeding the community to revitalize the economic structure of the neighborhood). Last year, the Subcommittee approved $9 million to expand this initiative. The 1993 budget requests a total of $30 million for Weed and Seed -- $20 million for United States Attorneys' law enforcement efforts and $10 million in the Office of Justice Programs for community policing efforts. However, this is small potatoes compared to the $470 million in "seed money" requested through other Departments and agencies.

Are Secretaries Alexander, Sullivan, Martin, and Kemp fully committed to this initiative?

ANSWER: All Federal agencies participating in the Weed and Seed program are committed to making this effort a success. The Secretaries of the Departments of Education (DEd), Health and Human Services, Labor (DOL), Housing and Urban Development (HUD), Agriculture and Transportation are fully committed and enthusiastically supportive of the Weed and Seed program. A Weed and Seed interagency working group composed of representatives from each of these agencies meets on a weekly basis with representatives of the Department of Justice to discuss and develop the Weed and Seed implementation strategy and procedures for 1993. Further, many of these agencies are working aggressively with their grant recipients in an effort to encourage them to target resources to the pilot sites funded by the Department of Justice in 1991 and 1992. These resources include Public Housing Drug Elimination Grants at HUD; Job Training Partnership Act resources and Youth Opportunities Unlimited demonstration grants at DOL; and Chapter 1, School Improvement, Vocational Education, Impact Aid, and Even Start resources at DEd. Additionally, both of the pilot sites funded by the Department of Justice in 1991, Trenton, New Jersey and Kansas City, Missouri, are working with regional offices of Federal agencies to secure resources for their Weed and Seed projects.

QUESTION: Are you aware of any opposition to the "Seed Component" of the initiative?

ANSWER: The Office of Justice Programs (OJP) has been working with national organizations to address issues they initially raised regarding implementation of the program and the selection of cities for Weed and Seed funding. Those issues were fully addressed by OJP and the organizations are now supportive of the program. At all levels of government -- Federal, State and local -- there is full recognition that success of the Weed and Seed program can only be achieved by linking social service programs with law enforcement efforts.

QUESTION: Can the initiative succeed if the "seed" monies are not provided?

ANSWER: Seed programs are essential to the success of the program. The Weed and Seed program includes four elements: (1) Suppression -- which builds on a partnership among law enforcement agencies and consists primarily of enforcement, adjudication, prosecution and supervision activities designed to target, apprehend and incapacitate violent street criminals who terrorize neighborhoods; (2) Community-Oriented Policing -- which operates in support of intensive law enforcement suppression and provides a "bridge" to the prevention, intervention and treatment as well as neighborhood reclamation and revitalization components; (3) Prevention, Intervention and Treatment -- which focuses on providing activities such as youth services, school programs, community programs, and support groups designed to develop positive community attitudes toward combatting narcotics use and trafficking; and (4) Neighborhood Restoration -- which consists of programs that bring about economic development and provide economic, educational, recreational and other vital opportunities along with enhanced living conditions and long-term neighborhood revitalization. The effectiveness of Weed and Seed is dependent on a coordinated effort by law enforcement, community groups and social service agencies, government and private, to work together to revitalize distressed neighborhoods in a fully comprehensive manner. Resources provided by the Federal Government are important in the early stages of Weed and Seed implementation; however, the ultimate responsibility for long-term economic and social improvements rests with State and local governments and the communities, churches, schools, and families.

QUESTION: The bill language giving the Attorney General authority over Weed and Seed monies appropriated to other departments is liable to be controversial. Is the bill language necessary or can you work at a cabinet level to carry out the initiative while leaving administration of specific programs to the Departments which would otherwise run those programs?

ANSWER: An interagency working group has been established at the Federal level to determine and establish procedures for the operation and implementation of the Weed and Seed program. At this time, it is envisioned that each Federal agency will be responsible for the administration of its own grant programs.

Gasoline Excise Tax Avoidance Schemes

Question: Your 1993 request for the Tax Division includes an increase of 10 positions and $431,000 to support a criminal enforcement initiative directed at investigating and prosecuting individuals and corporations engaged in motor fuel excise tax evasion. You cite the involvement of the four New York organized crime families in evasion schemes such as a "daisy chain" where a bootlegger purchases gasoline and moves it on paper down a chain of dummy corporations.

The examples cited in your justification took place in the early to mid-1980's. The 1986 Tax Reform Act changed the collection point for gasoline taxes. That Act required gasoline excise taxes to be collected upon removal from the refinery. In your view, has the change in the collection point made by the Tax Reform Act put an end of the schemes described in your justification which occurred in the early to mid 80's, or are there recent examples of evasion schemes as well?

ANSWER: The 1986 Act had little or no impact in stemming gasoline tax evasion. Although that statute generally imposed the tax on the removal or sale of gasoline by refiners, importers or terminal operators, it exempted from taxation all bulk transfers of gasoline within the terminal to holders of registration certificates. Thus, the 1986 statute permitted the tax-free transfer of gasoline not only between terminals, but also among registered sellers prior to the gasoline's leaving the terminal at the rack.

The exception applicable to transfers between holders of registration certificates was exploited by criminals, who used forged, stolen, or fraudulently-obtained registrations to facilitate the tax-free transfer of gasoline. These tax-free transfers allowed for the continued use of "burn" companies and daisy chain schemes.

Nor have the 1988 statutory changes prevented evasion schemes. They continued the system of exemptions from taxation that had been exploited by criminals under prior law.

The 1988 rules added an exception that permits the tax-free transfer of diesel fuel among registered sellers, and many of the schemes employed to evade taxes on gasoline are now being used to evade taxes on diesel fuel. In addition, a substantial portion of diesel fuel tax evasion is attributable to the fraudulent mislabelling of certain kinds of petroleum products -- for example, we have uncovered schemes in which sellers have labeled diesel fuel as home heating oil (which is tax-exempt) -- or outright smuggling. Still other schemes involve "splash blenders," who dilute No. 2 diesel fuel with substances like mineral oil or flammable toxic waste and then sell the increased volume of diluted fuel without paying the applicable taxes.

We do not have sufficient data to determine whether the 1990 statutory amendments changing some collection procedures are likely to have any effect on reducing evasion. These amendments did not, however, change any of the rules regarding diesel fuel. With 54 criminal investigations pending concerning post-1986 Act violations of the gasoline excise tax provisions and more investigations being initiated each month by the IRS and the FBI, we believe that the modest increases we have requested are required to deal with the expected inventory involving both pre- and post-1990 Act cases.

Facilities 2000

QUESTION: You are requesting an increase of $6,357,000 to continue implementation of the Facilities 2000 program which will consolidate the Department's components, acquire new space, and renovate the Main Justice Building over a 10-year period. Your budget submission indicates that the total estimated cost of this program, subject to GSA's prospectus process, is $850 million to $1 billion over the ten-year period. It further notes that Justice's share of those costs is estimated to be $125 million, subject to further negotiation.

What kinds of things are included in your share of these costs, and is it reasonable to expect Justice, rather than GSA, to pay for them?

ANSWER: The Department's estimated costs are for those items which GSA, according to the Federal Property Management Regulations, requires the component occupying the space to pay. The majority, though not all, of these costs are related to replacement of technology-driven systems such as telecommunications, security, automated data networks and emergency power systems. In replacing these systems, there is frequently an upgrade to the current technology. Requiring agencies to fund these items places their approval with the agency's authorizing and appropriation committees which have specific oversight as opposed to the GSA committees. This reinforces the oversight of the appropriate committees, and, therefore, the Department considers this a reasonable method of funding.

Parole Commission -- Alternative Sanctions Demonstration

QUESTION: The Parole Commission's request includes $72,000 for a pilot project in the Washington, D.C. - Baltimore area to be developed in conjunction with the United States Probation Office and the Bureau of Prisons to identify technical parole violations (defined as mostly illegal drug use violations) and develop sanctions, other than parole revocation.

Specifically, what kind of technical violations will the project address?

ANSWER: The technical violations addressed by the project include the following: substance abuse problems, marginal offenses such as traffic violations or petty theft, failure to report as directed by the United States Probation Office, failure to obtain or maintain employment, leaving the district without permission, non-payment of fines, restitution or child support.

QUESTION: What kinds of alternative sanctions are envisioned?

ANSWER: Technical Parole Violator Sanctions Centers are live-in centers that function much the same as "halfway

houses" do for prisoners being released from incarceration. The sanctions center provides a final opportunity for the parolee to remain out of prison and maintains a high level of control.

QUESTION: With drug abuse being the driving force of the violent crime in this city, are there implications for the community of alternative sanctions for these violators?

ANSWER: Substance abuse problems yield the largest number of technical violations among the potential subjects. It is believed that the intensive supervision and control exercised by this program would lead to long-term reductions in drug abuse violations among those on parole with a corresponding reduction in the level of violence. However, since violent parole violations do not qualify as technical violations, the impact of this program on the level of violence is not great. The real benefits of this program are families preserved, recidivism rates lowered, cost reductions from a lowered rate of re-incarceration, and a focus on treatment and rehabilitation for non-violent offenders.

QUESTION: From a policy standpoint, are we establishing a different standard for parolees who abuse drugs than for those who are subject to the sentencing guidelines and new mandatory minimums?

ANSWER: The technical violations criteria are not designed to establish a different standard between parolees and those subject to the sentencing guidelines. The types of violations that will be referred to the Sanctions Centers will be technical and/or minor law violations which would not be comparable to the types of offenses punishable under the sentencing guidelines or subject to a mandatory minimum prosecution. The philosophy of this program is quick treatment of problem parolees in the community rather than returning these non-violent persons to prison.

Lapse Rates -- AKA Camel's Nose Under the Tent

QUESTION: The new positions requested in your budget, with few exceptions, are lapsed at a 75-percent rate. It's a classic case of getting the camel's nose under the tent. The Subcommittee pays for the nose this year and the rest of the camel in 1994. For the record, please provide the following on an agency by agency basis:

The costs associated with the same number of new positions at a 50-percent lapse.

The 1994 costs which will be incurred as an "adjustment to base" if the Subcommittee were to approve all of the new positions included in the 1993 request.

ANSWER: Attached is a chart (Column A) depicting the costs associated with the same number of new positions in 1993 at a 50-percent lapse. As you indicated, most of the Department's positions were lapsed at a 75-percent rate; however,

for those organizations that did not use a 75-percent lapse rate the adjustment has been made from the lapse rate shown in the budget request. Using a 50-percent lapse results in an increased 1993 funding need of $38,679,000. Please note that this chart does not include the anticipated 1994 pay raise.

Column B depicts an estimated 1994 cost that may be incurred as an "adjustment-to-base" if the Subcommittee were to approve all of the new positions included in the 1993 request at the 75-percent lapse rate. This results in a 1994 cost of $714,681,000. The largest part of this increase, $605,612,000, is associated with the remaining construction and activation costs for the Federal Prison System. These amounts also exclude the anticipated 1994 pay raise.

DEPARTMENT OF JUSTICE
(DOLLARS IN THOUSANDS)

	Column A			Column B
APPROPRIATION	TOTAL REQUEST	REVISED REQUEST (50% LAPSE)	INCREASE OVER 1993	ESTIMATED 1994 ADJUSTMENT TO BASE
	AMOUNT	AMOUNT	AMOUNT	AMOUNT
DISCRETIONARY				
FUNCTIONAL CODE 750				
GENERAL ADMINISTRATION	14,675	16,252	1,577	4,218
OFFICE OF THE INSPECTOR GENERAL	477	659	182	454
QUANTICO TRAINING CENTER	0	0	0	0
WORKING CAPITAL FUND	0	0	0	0
U.S. PAROLE COMMISSION	(406)	(406)	0	0
GENERAL LEGAL ACTIVITIES	22,759	25,303	2,544	7,668
ANTITRUST DIVISION	2,601	2,757	156	511
ICC TRANSFER	0	0	0	0
U.S. ATTORNEYS	39,006	49,085	10,079	26,300
U.S. MARSHALS	7,652	10,127	2,475	8,840
SUPPORT OF U.S. PRISONERS	49,356	49,356	0	0
FEES AND EXPENSES OF WITNESSES	0	0	0	0
COMMUNITY RELATIONS SERVICE	0	0	0	0
U.S. TRUSTEES	0	0	0	5,613
ASSETS FORF FUND CURRENT BUDGET AUTHORITY	0	0	0	0
ORGANIZED CRIME DRUG ENFORCEMENT	20,563	26,389	5,826	8,840
FEDERAL BUREAU OF INVESTIGATION	130,099	135,825	5,726	11,217
DRUG ENFORCEMENT ADMINISTRATION	15,456	18,605	3,149	4,843
IMMIGRATION AND NATURALIZATION SERVICE	35,514	42,479	6,965	19,757
FEDERAL PRISON SYSTEM				
SALARIES AND EXPENSES	179,041	179,041	0	330,000
NAT'L INSTITUTE OF CORRECTIONS	500	500	0	0
BUILDINGS AND FACILITIES	239,432	239,432	0	275,612
TOTAL, FEDERAL PRISON SYSTEM	418,973	418,973	0	605,612
OFFICE OF JUSTICE PROGRAMS				
OFFICE OF JUSTICE ASSISTANCE	(81,008)	(81,008)	0	0
PSOB	2,000	2,000	0	0
SUBTOTAL, DOMESTIC DISCRETIONARY	677,717	716,396	38,679	703,873
FEDERAL BUREAU OF INVESTIGATION	8,900	8,900	0	198
SUBTOTAL, DISCRETIONARY AUTHORITY	686,617	725,296	38,679	704,071
MANDATORY				
FUNCTIONAL CODE 750				
IMMIGRATION USER FEE	15,179	15,179	0	5,122
IMMIGRATION EXAMINATIONS FEE	35,726	35,726	0	5,488
FUNCTIONAL CODE 800				
CIVIL LIB PUB EDUCATION FUND	250,000	250,000	0	0
SUBTOTAL, MANDATORY AUTHORITY	300,905	300,905	0	10,610
TOTAL, DEPARTMENT OF JUSTICE	987,522	1,026,201	38,679	714,681

Assets Forfeiture Fund Capital Surplus

QUESTION: You are projecting a capital surplus in the Assets Forfeiture Fund of $49.9 million for 1992.

How confident are you that the projection is accurate?

Are any of the requests funded with the surplus of sufficient priority to require appropriated funding if a capital surplus is not available for them?

ANSWER: Through February 1992, income to the Fund this year is down from original projections. Fortunately, expenses are also lower than projected. As a result of this slowed cash flow, the Department has delayed its first quarter transfer to the Office of National Drug Control Policy's Special Forfeiture Fund until such time as estimates indicate that a surplus will be available for transfer. As you know, the Department had estimated that it would transfer $28 million to the Special Forfeiture Fund before any funds were set aside as the 1992 capital surplus. We are confident that a capital surplus will be available. However, we are not assured that the surplus will reach the $49.9 million in funding needs identified as advance appropriations.

The purposes identified for use of this capital surplus are high priority items. The Administration made the decision to meet these budget needs with the potential $49.9 million in Fund surpluses in lieu of new appropriation requests to improve the chances that these items would be funded in 1993. Therefore, if capital surplus funds do not materialize, the organizations' budgets would be reviewed in 1993 for possible reprogramming action. If the Administration concludes that these items are of higher priority than items for which appropriated funding has been provided, the requisite reprogramming notification will be prepared and forwarded to Congress.

Civil Liberties Public Education Fund

QUESTION: The 1993 request of $500 million to continue reparation payments to Japanese-Americans interned during World War II exceeds the amount authorized for the permanent-indefinite appropriation by $250 million. Your estimate is based on a revised eligibility level of 75,000 eligible individuals, 12,500 more than estimated by the original Act.

A change in the authorizing statute would be required to extend this program. Have you discussed this issue with the Chairman and Ranking members of the appropriate authorizing committees?

ANSWER: Draft legislation, which included an increase in the authorization and several other amendments to the Civil Liberties Act, was submitted by the Department of Justice to the House and Senate on February 25, 1992. Hearings on the proposed legislation were held on March 26, 1992, before the Administrative Law and Governmental Relations Subcommittee of the House Judiciary Committee; hearings in the Senate have not been scheduled.

QUESTION: Because this program is an entitlement, changes in it would be subject to the PAYGO provisions of the Budget

Enforcement Act. Have you identified offsets for the proposed increase?

ANSWER: The President's 1993 budget includes several proposals that are subject to pay-as-you-go requirements. Considered individually, the proposals that increase direct spending or decrease receipts would fail to meet the Omnibus Budget Reconciliation Act of 1990 (OBRA) requirement. However, the sum of all of the spending and revenue proposals in the President's budget would reduce the deficit. Therefore, this proposal should be considered in conjunction with the other proposals in the 1993 budget that together meet the OBRA pay-as-you-go requirement.

Automated Litigation Support

QUESTION: Your 1993 request includes $10,653,000 to begin an upgrade of the AMICUS office automation system. The current contract expires in January 1994. What is the basis for the $10.6 million estimate? What do you anticipate the total cost of this upgrade to be?

ANSWER: The 1994 estimate for conversion of AMICUS assumes that the AMICUS organizations (Civil, Civil Rights, and Environment Divisions, and the Department's senior management offices) will begin to replace "dumb terminals" with personal computers during 1993, in anticipation of a new uniform office automation contract in 1994, which will be based on personal computer local area networks. The total cost of replacing the AMICUS II system in the 1993 to 1995 timeframe, at the end of its eight-year system life, is expected to be approximately $30 million.

Antitrust Merger Fees

QUESTION: The Department is requesting reduced reliance on the Hart-Scott-Rodino premerger notification filing fees from $13.5 million to $10 million.

Last year, the Subcommittee reduced the fee component of the Division's funding to $13.5 million. Your budget request indicates that $13.25 million is projected to be collected in 1992. What is the basis for your 1993 estimate? Is there a further decrease in fees projected?

ANSWER: Hart-Scott-Rodino (HSR) fee collections continue to be of great concern and remain below authorized funding levels. At the time our 1993 budget request was submitted for consideration by the Congress, fee collections of $13.25 million were anticipated. Taking collections received to date into account, however, we now estimate that only $12.8 million may be collected this year, or $450,000 less than our currently-authorized level of $13.25 million. This estimate may again change significantly, as the fee collection process does not permit accurate, long-range projection. In 1992, Congress exempted the Division from the provisions of the Antideficiency Act so that the Division's total revenue authority was available for obligation despite any shortfall in fee collections. In 1993, no such authority has been

provided, and we must therefore limit spending to stay within actual collections.

It is impossible to predict with any certainty what the Division will receive from HSR fee revenues until the last day of the year. Without increased certainty in our funding levels, it is difficult to manage division operations prudently within available funding. History with collections indicates that at least $10 million in fees will be collected each year. Therefore, we have requested that our reliance on fees be reduced to $10 million in 1993, with any surplus to be deposited in the Treasury.

INS Inspections

QUESTION: Last year's Senate report directed INS to hire and maintain sufficient Inspectors to comply with a 45-minute inspection standard for passengers arriving at airports. Where are you in terms of meeting that 45-minute standard?

ANSWER: The INS has been successful in meeting the 45-minute standard, except in a few instances when heavy peaking or facility constraints resulted in reported delays. For example, at the John F. Kennedy International Airport's Trans World Airlines' terminal on February 29, 1992, 1,284 passengers arrived during a one-hour period. A subsequent arrival of a Boeing 747 flight resulted in delays despite the Service's staffing of all available booths.

Federal Prison System - Salaries and Expenses

QUESTION: The cost of operating the Federal Prison System in 1983 was just under $400 million. For 1993, you are requesting nearly $1.9 billion. This is a 375-percent increase over the last ten years, most of which is directly related to the drug problem. Do you have a five-year projection beyond 1993 for operating costs for the Federal Prison System?

ANSWER: Yes, preliminary Salaries and Expenses projections for 1993 through 1997 are estimated below, but are subject to revision:

	In Billions
1993	$1.9
1994	2.5
1995	3.0
1996	3.4
1997	3.9

Prison Construction

QUESTION: Your budget includes $172 million for new construction. Yet, this year's request represents a shift in the way you budget for the costs of Federal prisons. In the past, we have provided the full construction cost of the prison up front. This year, you are requesting only the architectural, engineering and site work for four of the

planned facilities. What can we expect in terms of out-year costs for these four facilities?

ANSWER: The cost of completing these facilities are:

Forrest City	$68,000,000
Northeast Medical Center	108,000,000
Middle District/Florida Detention Ctr.	50,000,000
Sacramento Detention Center	60,000,000
TOTAL	286,000,000

QUESTION: Are we buying into new facilities that we may not be able to afford a year from now?

ANSWER: The continued funding of additional capacity is imperative if the Bureau of Prisons is to be able to manage the projected inmate population increases. The "split funding" approach is intended to reflect the pattern in which construction funds are actually obligated. The future years costs, while occurring later in this method of appropriation, will, nonetheless be needed to complete the projects.

QUESTIONS SUBMITTED BY SENATOR MARK O. HATFIELD

National Alzheimer's Patient Alert Program

QUESTION: It is estimated that there are over four million persons in the United States currently suffering from Alzheimer's Disease and related dementia. One of the most alarming and potentially life-threatening behaviors which accompanies memory impairment is wandering. With memory impairment, wandering puts the patient at risk of becoming lost, unable to request or seek assistance and unable to fund his/her way home. Equally important, the potential of wandering is very frightening to family members and other caregivers. Research studies have estimated that 59 percent of Alzheimer's sufferers wander and that wandering is seven times greater in disabled older individuals than in the general population.

Several States across the country have developed localized identification and safety networks for Alzheimer's patients. Each one of these is heavily dependent upon local law enforcement authorities to find lost patients. Existing local wanderer's programs do not duplicate the efforts or interfere with the work of local officials. Instead they attempt to facilitate the work of local law enforcement agencies by providing information, training and additional human resources.

In recognition of the strong role the law enforcement community can play in this problem, this Committee provided $500,000 in 1992 to the Department of Justice for the development of a National Alzheimer's Patient Alert Program. It is my understanding that the Department has been working with the National Alzheimer's Association to establish a central registry of information to assist in the identifica-

tion and location of missing memory-impaired persons, a national toll-free hotline to access the registry and a Fax Alert system to set the search process in motion.

Please update the Committee on the Department's work in this area. Please also comment on the role of local law enforcement personnel in this endeavor.

ANSWER: The Office of Juvenile Justice and Delinquency Prevention (OJJDP) awarded the $500,000 grant to the Alzheimer's Disease and Related Disorders Association for the National Wanderers Program on March 23, 1992.

The Association is focusing on the following design and developmental elements of the program:

- Development of a national registry toll-free hotline, Fax Alert System, and label and bracelet identification program;
- Determination of data elements for the registry and ID items for registrants, as well as beginning the registration system;
- Development of curriculum guides and educational materials for law enforcement and emergency health care personnel, utilizing a Train-the-Trainer model;
- Development of a national awareness program on wandering;
- Development of a resource kit for caregivers; and
- Creation and initial implementation of Area Resource Centers as a prototype for future national expansion. The Centers will provide training for trainers, assist in the development of new local outreach programs, and increase the effectiveness of existing programs.

Local law enforcement agencies will play an important role in the program since in most cases it is local law enforcement officers who make the initial contact with missing Alzheimer patients. The program will provide Alzheimer patients with several means of identification, such as bracelets and labels bearing an 800 number, and will train police to look for these items when they observe a disoriented person. A central registry, which will be reached through an 800 number, is part of the planned program and will enable the police to learn the identity of an Alzheimer patient very quickly. The project also includes the production and dissemination of brochures and training videos for police in handling Alzheimer patients. OJJDP will assist the grantee in developing and implementing the training program for police and security personnel and will serve as a source of information and liaison for cooperation with law enforcement agencies, emergency personnel, and private security firms.

The Department has no problems with the merits of the proposal, but the Administration believes that it may be more

appropriately administered by another Federal agency, such as the Department of Health and Human Services.

Immigration and Naturalization Service

QUESTION: I understand that there has been a considerable increase in passengers destroying passports and other travel documents in order to resist exclusion from the United States and to conceal travel identity. Aside from seriously burdening airlines with the assessment of additional fines, what has the INS done to alleviate this problem?

ANSWER: The INS has actively sought to provide training to airlines in the detection of fraudulent documents at various sites overseas. For example, the Service completed a joint training project with other members of the International Air Transport Association-Control Working Group (IATA-CWG) at Singapore and Malaysia. The INS's National Fines Office has conducted a number of seminars on fines for carriers to help the airlines avoid situations that result in fines. The agency also plans to provide "carrier consultants" at overseas sites in the near future, in addition to the ongoing training that is provided by the INS's overseas officers. In addition, the Department has proposed legislation to address this issue.

QUESTION: At least one airline has felt forced by the INS fine policy to photocopy, and to even hold, some travel documentation. In fact, I am told that this airline's efforts to detect fraudulent documents have, in some cases, resulted in physical threats against its employees. I am advised that the airlines have repeatedly requested help in the form of INS "advisors" at key airports in the Pacific. What has INS done to provide such assistance and to take some of the burden off the carriers?

ANSWER: Funding has been provided in order to conduct a 60-day test period of assignment of Immigration Officers at selected overseas locations. The officers' primary duties will be to act as consultants, advisors, and training resources to members of the passenger carrier industry. Specifically, duties would entail:

(1) providing training on fraudulent and counterfeit documentation, liquidated damages and fines issues;

(2) examining travel and related documents in order to detect fraudulent and counterfeit documentation presented to airlines agents prior to boarding a flight destined to the United States;

(3) advising carriers, upon request, of the possible risks involved in boarding certain profiled passengers; and,

(4) providing the foundation for a direct, responsive link between the industry and the various enforcement activities of the INS.

Results of the test will determine whether the assignment of personnel could be made on a permanent basis if funds and positions become available.

QUESTION: With regard to the issue of fines, I understand that the airline industry filed a petition for rule-making with the INS last April seeking a cooperative program which would waive or mitigate fines for carriers that take certain precautions to prevent the boarding of undocumented or inadequately documented passengers. What action has the INS taken with respect to this petition?

ANSWER: On April 1, 1992, the Commissioner of INS signed final regulation 8 CRF 270, that establishes the procedures for Section 274C of the Immigration and Nationality Act. The regulation was forwarded to the Department of Justice on April 2, 1992 for review.

QUESTION: It is my understanding that in 1986, the airlines agreed to support INS efforts for a $5 inspection fee with the understanding that the proceeds of the fee would be used in part to support all alien detention. With this in mind, why has the INS reversed itself by causing the airlines to bear the burden of detaining certain classes of aliens -- specifically, those who have destroyed their documents and those who are in transit without visa (TWOV)?

ANSWER: The INS has been using the Immigration User Fee Account for detention. However, under the agreement between the Service and the carriers for transit without visa passengers, carriers remain responsible for the custody of the passenger in immediate and continuous transit (without visa) through the United States. Therefore, if a passenger who was boarded by a carrier as a transit without visa passenger destroys his documents enroute to the United States, the carrier remains responsible for the custody of that passenger until departure.

QUESTION: Last year, a 45-minute clearance standard was set for the INS. What efforts have been made by the INS to meet that standard and to work with both the airport authorities and the airlines to ensure agreement on that measurement?

ANSWER: The Service continues to work closely with the airport authorities and the airlines to measure the Service's achievement of the 45-minute standard. Major airports report daily to INS Headquarters so that compliance with the 45-minute standard can be closely monitored. The few reported recent delays have been due to heavy peaking of arriving flights and severe facility constraints. Several measures have been undertaken to further our progress in consistently meeting the 45-minute goal. Those measures include the expansion of the Advanced Passenger Information System (APIS) and the special "Blue Lane" processing. Most importantly, the INS is actively recruiting to fill all its current inspector vacancies. Processes that previously had caused excessive delays in hiring are being removed or changed to further facilitate the hiring process.

QUESTION: Several carriers are involved in a test to provide both Customs and INS with advanced passenger information (API). What incentives is INS offering to encourage greater API participation?

ANSWER: The INS encourages carrier participation in API by continuing to offer expedited inspection processing through special dedicated booths referred to as "Blue Lanes" for those who are API passengers. INS inspections processing of air passengers arriving in the United States is expedited by eliminating the need to perform a computer query at the United States port-of-entry, given that such query had been performed prior to the passenger's arrival.

QUESTIONS SUBMITTED BY SENATOR WYCHE FOWLER, JR.

Justice Training Center

QUESTION: What is the Justice Department's position on consolidated law enforcement training at the Federal Law Enforcement Training Center (FLETC) at Glynco, Georgia?

I understand the Attorney General signed the Memorandum of Understanding which established the FLETC in 1970. Doesn't that action commit the Justice Department to have all of its agencies, except the FBI which already had its own facility in 1970, carry out their training at FLETC?

ANSWER: The Department of Justice supports consolidated law enforcement training at FLETC, and is, in fact, the second largest user of this training facility. However, it is problematic that FLETC has not and can not accommodate all the DEA agent training requirements, especially follow-on and in-service training requirements for DEA agents and support personnel. This, among other factors, drove the Department to collocate DEA training with FBI training at the Quantico facility.

QUESTION: The President's budget proposed for 1993 contains a request for $31.075 million to construct a new law enforcement training center at Quantico, VA, to meet the training needs of the Drug Enforcement Administration (DEA) and the FBI. This in addition to the $3.5 million that was appropriated in 1992. Are you aware of the Congressional language which restricts the acquisition of land and construction of redundant law enforcement training facilities without prior approval? What is the rationale for creation of new or expanded training facilities for DEA's purposes?

ANSWER: The referenced Congressional language only restricts the acquisition of land and construction of redundant law enforcement training facilities if such facilities are built on land which is <u>not contiguous</u> to a current law enforcement training center. As concerns the Justice Training Center, land for the training academy expansion is, in fact, contiguous to the FBI Academy and is not, therefore, in violation of any Congressional legislation. In addition, to avoid

duplication, DEA will continue to use common facilities with the FBI including Hogan's Alley, firing ranges, and physical fitness facilities.

QUESTION: For the record, would you please submit a complete construction prospectus which provides a detailed explanation and justification for this expenditure. Also, I am interested in information you might provide identifying the portion of the workload, funding, and facility construction that relates to each agency -- FBI and DEA.

ANSWER: A contract for the architectural and engineering (A&E) study was signed during the second quarter of 1992. DEA estimates that work on the A & E study will commence the latter part of 1992. A construction prospectus for the training facility will be available upon completion of the A & E study. At such time, DOJ will be prepared to provide the prospectus and any other information requested concerning facility construction and costs.

QUESTION: Do you expect additional requests for construction and expansion at Quantico in future years? Does the Justice Department have a long-term utilization plan for the Quantico facility? If so, please supply it for the record.

ANSWER: At this time, the Department anticipates that the $3.5 million appropriated in 1992 combined with the $31.1 million requested in 1993 will be sufficient for training construction at the Quantico facility. The Department's intention is that DEA will share costs with the FBI for the upgrade of shared Quantico facilities including firing ranges and Hogan's ally. Upon completion of the study referenced to above, the Department will be in a position to present a master utilization plan for the entire Quantico facility.

QUESTION: The FLETC submitted to the Congress in 1989 an extensive facilities expansion plan. Assuming the funding request for 1993 is approved, Congress will have appropriated over $48 million in new construction at FLETC, which is about half the total amount estimated to pay for the expansion. Assuming that FLETC is willing to make reasonable modifications to its facilities plan to accommodate DEA, why wouldn't DEA take advantage of this opportunity? Would you agree that there are some significant benefits to DEA to training along side other law enforcement agencies at the FLETC, many of which have drug enforcement responsibilities?

ANSWER: In order for FLETC to accommodate the needs of DEA, substantial costs would have to be incurred over and above the planned enhancement of the Glynco facility. To quote FLETC Director Charles F. Rinkevich in his testimony before the House Appropriations Subcommittee, "If DEA were to come to us, we would need to revisit the (FLETC) master plan. And I know that we would probably add some to it to account for their needs." Studies have indicated that due to the expected increase in costs associated with further expansion of the FLETC, it would be just as cost-effective for DOJ to continue current plans for expansion of its Quantico training facilities. More importantly, FLETC's entry level training

is too general to meet the needs of DEA's new agents. Altering FLETC's basic training program runs counter to FLETC's training philosophy, which is to provide a common core curriculum for all participating agencies. Finally, the staffing upheaval caused by a DEA move from Quantico to FLETC the third relocation within a decade would cripple DEA's training program.

QUESTION: In your opinion, wouldn't the dollars requested for construction of what might well be considered redundant facilities at Quantico be better invested for the completion of the expansion plan at Glynco where all of the participating agencies could utilize the facility?

ANSWER: The requested Justice Training Center is not redundant since it will be contiguous to the existing FBI facilities and both agencies will continue joint use of certain common areas. The requested construction dollars would not, in the Department's opinion, be better spent at FLETC because of FLETC's limited capacity and difference in training philosophy. FLETC's planned expansion as currently conceived will not be able to provide all of DEA's entry level and advanced training needs. The expanded training facilities at Quantico will be fully utilized to meet DEA and FBI's training needs, and the Department anticipates no excess capacity. Furthermore, FLETC training does not meet the specialized needs of DEA's agents. Rejecting the current DEA/FBI training plans and agreements would, in fact, send the wrong message to these two law enforcement agencies.

SUBCOMMITTEE RECESS

Senator HOLLINGS. The subcommittee will be in recess until next Wednesday, March 25, when we will hear from the Federal Communications Commission and the Securities and Exchange Commission.

[Whereupon, at 11:39 a.m., Thursday, March 19, the subcommittee was recessed, to reconvene at 10 a.m., Wednesday, March 25.]

possible. Isn't it ironic that at the same time the Congress is considering campaign finance reform, including the possibility of eliminating PACs altogether, this legislation would expand PACs to make it possible for federal employees to solicit other federal employees for contributions to a PAC.

Not only would this legislation expand PACs, when one examines where Federal and Postal PAC contributions go, one begins to understand the very impetus behind this legislation. Of the total political contributions given by these PACs in 1987 and 1988, 88 percent went to Democratic candidates and 12 percent went to Republicans. In 1985–86, 92.2 percent went to Democrats and 7.8 percent went to Republicans. This legislation will expand by almost one million individuals the number of people who could solicit contributions for these PACs.

Congress will have created a much greater political force in federal and postal employees organizations. On the basis of our previous political experience, it would be our judgment that this new political force would devote its efforts to electing Democratic Party candidates.

At a time when the public's confidence in government is very low, if not at an all-time nadir, this legislation would politicize our federal government. The public is tired of politics as usual. Unfortunately, this legislation simply adds fuel to the fire. This legislation should be rejected.

BILL ROTH.
BILL COHEN.
WARREN B. RUDMAN.
JOHN SEYMOUR.

OFFICE OF THE ATTORNEY GENERAL,
Washington, DC, March 4, 1992.

Hon. JOHN GLENN,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This is to advise you of our continuing and fundamental objections to legislation that would substantially repeal the Hatch Act, S. 914. This bill is identical to H.R. 20, which was vetoed by the President in the 101st Congress. If S. 914 were presented to the President, his senior advisers would recommend that it be vetoed.

The Hatch Act of 1939 prohibits certain partisan political activities by federal government employees. It was enacted to remedy a century of patronage abuses resulting from the "spoils system." Federal programs to help the poor and the dispossessed were often perverted for political purposes. The Hatch Act seeks to guarantee the integrity of the federal civil service by assuring that federal employees are hired and promoted based upon their qualifications and not their political loyalties. It also assures that federal programs are administered on the basis of need, not politics. The Act's ban on active partisan campaigning by federal employees protects them from coercion and patronage abuse. Those protections remain essential to assure the integrity of the federal workforce and the

administration of federal programs. They also are critical to the public perception and confidence in the impartial, even-handed conduct of government business.

S. 914 would fundamentally undermine the Merit System by changing a presumption that partisan politicking by federal servants is prohibited into a presumption that such partisan campaigning is to be encouraged. Specifically, the bill would allow federal employees to hold office in political parties, work in partisan political campaigns, and solicit political contributions from other federal employees who are members of the same federal employee organization. Such a reversal in the role of partisan politics in the ethic of public service would permit virtually unbridled partisan activities by federal employees, which, history shows, would inevitably lead to the politicization of public administration. For example, S. 914 would permit Internal Revenue Service District Managers to serve as political party officers, loan officers with the Department of Housing and Urban Development could organize partisan campaigns after work, and federal law enforcement officers could make television commercials paid for by political committees on behalf of partisan candidates.

We note that the bill provides that these newly authorized partisan activities are not to be conducted while employees are on duty, wearing the insignia of their offices, or otherwise about the government's business. Unfortunately, these prohibitions would be meaningless. They add nothing to existing criminal prohibitions in this area (*see, e.g.,* Chapter 29 of Title 18 of the U.S. Code, and 18 U.S.C. §§ 641 and 872). Moreover, the vestige of the Hatch Act left by S. 914 could easily be circumvented. For example, government officials, who belong to employee organizations, could induce subordinates to join their organizations, where employee peers could extract involuntary political contributions of money or services, as long as this activity occurred during off-duty hours and while the participants were not in government uniforms or on government property.

The inevitable result of S. 914 would be a politicization of the federal work force to the great detriment of federal employees, the programs that these employees administer, and ulitimately the public which these programs were enacted to serve. Without the Hatch Act, employees would be inevitably subject to subtle, and not so subtle, pressures to support the partisan agenda in their government offices. It is unreasonable to expect that the few prohibitions listed in S. 914 would have any practical impact on the subtle politicization that would occur in the federal workforce. Rank and file civil servants would not make federal criminal cases out of requests for political contributions or off-duty time in support of a candidate. They would find it less costly to be victimized rather than incur the job-related risks that would surely result from a complaint to law enforcement authorities. Moreover, the difficulties inherent in proving even the most patent abuses would render the protections of the criminal justice system illusory. Thinly veiled exploitation and extortion would flourish because the politicized atmosphere of the workplace would make criminal conviction virtually impossible. The resulting impact on federal programs

would undermine the public's confidence in the impartial administration of public business.

The Hatch Act ensures an environment wherein federal employees are encouraged to impartially carry out the public's business rather than being distracted by the demands of political patronage. Under the Hatch Act, promotion is based upon merit, not political loyalty. The Act is understood by the vast majority of federal employees as a bulwark against the political pressure that would inevitably accompany a partisan public workforce. Its prohibition are clearly set forth in the statute and regulations at 5 C.F.R. § 733. The Office of Special Counsel (OSC) is empowered to provide authoritative advice to employees with questions about the application of the statute and regulations to particular circumstances. Last year, OSC processed about 1,400 inquiries from the approximately 3 million federal employees covered by the Act. We believe, on the basis of experience, that most federal employees either understand how the Hatch Act applies or they simply have no desire to politicize their lives and their jobs by engaging in the sort of partisan activity it covers. It is, we think, significant that there has been no groundswell of popular support for this bill from the raks of federal civil servants.

In sum, the Hatch Act has served to shield federal employees and the programs that they administer from political exploitation and abuse for over fifty years. S. 914 which is being promoted as a liberator of federal workers' civil rights, is perceived by many federal workers as stripping them of that shield, and presages that those workers may have to demonstrate a fealty to a political party that they might not otherwise endorse. We are committed to continuing the protections of the Hatch Act and urge you to join us by opposing S. 914.

The Office of Management and Budget has advised that there is no objection to the submission of this report to the Congress and that enactment of S. 914 would not be in accord with the program of the President.

Sincerely,

WILLIAM P. BARR,
Attorney General.
CONSTANCE BERRY NEWMAN,
Director, Office of Personnel Management.
KATHLEEN DAY KOCH,
Special Counsel, Office of Special Counsel.

Office of the Attorney General
Washington, D. C. 20530

March 2, 1992

Honorable Henry J. Hyde
United States House of Representatives
2262 Rayburn House Office Building
Washington, D.C. 20515-1306

Dear Congressman Hyde:

This responds to your request for the views of the Department of Justice concerning the "Freedom of Choice Act of 1991," introduced as companion bills H.R. 25 and S. 25 (collectively "H.R. 25" or "the bill"). This legislation would impose on all 50 States an unprecedented regime of abortion on demand going well beyond the requirements of Roe v. Wade, 410 U.S. 113 (1973), and its successor cases. It would also rest on a doubtful construction of Congress' power under the Fourteenth Amendment. Finally, it would, by congressional action, usurp a field of legislation traditionally reserved to the States.

Accordingly, for the reasons summarized below and explained more fully in the enclosed memorandum, the Department strongly opposes H.R. 25 and, if this bill were presented to the President, I and other senior advisors would recommend that he veto the legislation.

H.R. 25 is described by its sponsors as a mere "codification" of much of the complex regime of abortion regulation erected by the Supreme Court. Because of its sweeping language, however, the bill would enact a federal statutory regime of abortion regulation that would severely limit the regulatory authority left to the States under Roe.

The bill provides that "a State may not restrict the right of a woman to choose to terminate a pregnancy . . . before fetal viability; or . . . at any time, if such termination is necessary to protect the life or health of the woman." Section 2(a). A single exception is authorized: a State "may impose requirements medically necessary to protect the life or health of [pregnant] women." Section 2(b). The bill specifies no other State purposes as valid reasons to restrict abortion. Thus, while Roe expressly recognizes the State's "important and legitimate" interest in protecting fetal life after the second trimester, 410 U.S. at 163, the language of H.R. 25 would appear to prevent a State from regulating even post-viability abortions in order to

protect that interest. Similarly, the broad language of H.R. 25 would probably prohibit States from limiting abortions undertaken for reasons of sex-selection or birth control, or enacting laws that attempt to make live births a more likely outcome of the abortion procedure, because such laws would be designed to preserve fetal life rather than to protect the woman's life or health. H.R. 25 might even be construed to affirmatively require States to provide State facilities for abortions where private facilities were unavailable.

The bill also fails to recognize such important State interests as maintaining the family unit, upholding parental authority, and ensuring that the decision to abort is free, reflective, and informed. H.R. 25 would appear to prohibit any form of parental consent or notification requirement, overruling, at least in part, five Supreme Court cases upholding such provisions. Similarly, twenty-four or forty-eight hour waiting restrictions would probably not survive the bill.

In addition, there is significant doubt whether the constitutional basis asserted for the power of Congress to enact H.R. 25 -- the power granted to Congress under section 5 of the Fourteenth Amendment to "enforce" the provisions of that Amendment -- is sufficient. The history of the framing of section 5 indicates that this provision was not viewed as a vehicle for Congress to alter the substantive scope of the Fourteenth Amendment. In our view, reliance on the section 5 power as authority for enactment of this legislation is problematic because the bill -- by attempting to broaden the substantive content of the guarantees of section 1 of the Fourteenth Amendment -- would do far more than simply enforce through remedial legislation the regime of abortion rights that has been identified in the Supreme Court's decisions.

Finally, in our view congressional legislation in this area would usurp a field of legislation traditionally reserved to the States. Observance of federalism is, we think, particularly desirable in this area, given the divisiveness of the current abortion debate. The political outcomes of 50 distinct State processes would be far more likely to represent the genuine diversity of views that exists on this subject than would a Federal statutory scheme that is even more restrictive than that of Roe v. Wade. These concerns, of course, would be dramatically reduced in circumstances where national consensus was reached through the process of constitutional amendment, in which, under Article V of the Constitution, a full three-fourths of the States would be required to give their consent through State legislatures or conventions.

In keeping with the President's position that "[a]s a nation, we must protect the unborn," Message to the House of Representatives Returning Without Approval the District of

Columbia Appropriations Act, 1990, 25 Weekly Comp. Pres. Doc. 1801 (Nov. 20, 1989), and for the reasons explained above, the Department of Justice strongly opposes the enactment of H.R. 25, and if the bill were presented to the President in its current form, I and other senior advisors would recommend that he veto the legislation.

Sincerely,

William P. Barr
Attorney General

datory minimum penalties for firearm offenses, other violent crimes, and drug offenses.

Why? Why would we be removing minimum penalties for firearm offenses? Whose idea was it to drop that? Nobody that I can think of would want to drop that. The conference report requires that Federal prisoners be given drug treatment on demand and reduces the sentences of violent criminals upon completion. That is incomprehensible.

Let me just read now what Attorney General William P. Barr wrote with regard to the conference report on November 25, 1991. That is the Monday after the night passage of the bill on Sunday:

DEAR MR. MINORITY LEADER: I join men and women of law enforcement around the country and victims of crime in voicing my strenuous objections to the so-called "crime bill" reported by the House and Senate conferees this weekend. While law enforcement groups and victims of violent crime cry out for the Congress to move forward aggressively on criminal justice reform, the conferees now propose that we take a significant step backwards. The proposed legislation actually overrules several recent Supreme Court decisions favorable to law enforcement. This conference report does more for those convicted of crimes than it does for those victimized by them.

The American people know that our criminal justice system is failing because convicted criminals are able to escape just punishment through endless delays and repetitive technical legal maneuvering. This abuse has deprived our criminal justice system of any finality: convicted criminals can perpetually reopen and relitigate their cases even when their appeals have been completed and when there is no question as to their guilt. The guilty thus avoid punishment by filing frivolous habeas corpus petitions that drag on for years, consume valuable law enforcement resources, and reopen the wounds of victims and survivors. State law enforcement agencies demand relief. And yet, the conferees now propose that we actually create broad new avenues and new loopholes by which convicted criminals can exploit the system and evade punishment. The conferees propose to make the current situation worse by: 1) overruling certain reasonable limitations recently established by the Supreme Court on successive habeas corpus petitions; 2) imposing substantial costs on the states to fund these frivolous challenges while offering no prospect of finality and no relief to their already overburdened systems; and 3) offering criminals wider opportunities for continued frivolous delays than are allowed even under existing law.

The conferees also propose to step backwards on reasonable reform of the exclusionary rule. By rolling back court decisions which allow for the admissibility of evidence when police have acted in good faith, the conference report will handcuff police and increase the number of criminals who escape justice on legal technicalities.

Finally, in authorizing $3 billion for law enforcement programs, the bill offers only a mirage. Authorization of this funding when there is no appropriation is essentially meaningless. The irony here is that the Congress failed this year to fully fund the President's budget request for law enforcement, slashing it by $472 million—a 64% cut in the increases sought by the President. Dangling the empty promise of more grant programs before the eyes of state law enforcement cannot camouflage a weak crime bill.

In sum, the conferees have let down law enforcement, let down victims, and let down those in Congress who voted for tough anticrime measures. This "whirlwind weekend conference" cannot obscure the fact that the Congress has again failed to deliver on serious criminal law reform. If this bill comes to the President's desk, I will urge him to veto it.

This is a very strong letter. I do not even agree with the part about the funds. Maybe it is a mirage. Maybe there will never be appropriations. It is a fact that Congress many times does not fund the President's request for law enforcement, but I think we are going to have to put our money where our mouths are in this particular case.

Finally, time and again yesterday I heard Presidential politics or partisanship being mentioned. Tell that to Jack Russ, the Sergeant at Arms of the House, a Democrat. Tell that to the family of Tom Barnes, an aide to Senator SHELBY who was murdered inexplicably—by being shot in the head from behind. Tell it to his family. A Democrat. Tell it to so many of the people in this city being killed, so many people in my State being killed. They are not Democrat or Republican, really. They are victims. They are people whose lives are at risk, who are scared to go out of their homes.

What is happening in the streets of this city is indefensible. Maybe we are guilty. Maybe some of our own had to be affected before we would take action, but I have been worrying about it and complaining about it for months and for years.

This is not Presidential politics. This is an urgent matter, a crisis in our Nation's Capital and in our Nation as a whole and we need to address it now. The bill that was introduced by the distinguished Senator from South Carolina was done at his initiative after trying to work across the aisle, working with other Senators, working with the Attorney General. This bill was introduced to try to break this deadlock. We need to do something.

As far as partisan politics, it should not be. There should not have been a party-line vote on that conference report. We should stop this now. If you want to vote on the conference report, fine. I am not voting for this. I am not voting for a show and tell. I am going to vote for something that is real and is tough on criminals in this country. We need to say to Senator BIDEN and Senator THURMOND, go back and try again. Do something more on these repeated appeals and on trying to help the law enforcement people do their jobs; on the death penalty; on firearms, some of these things that were dropped from conference on firearms. I have never been able to imagine whose idea that was.

So it is not Presidential politics from the Senator's standpoint, and it is not partisan politics. I know there are tons of Democrats and Republicans in the Congress and all across America who say enough already. Let us do this job. Let us worry about the law-abiding citizens who are being raped, maimed, and murdered in America and quit shuffling around trying to find some additional way to comfort criminals who are convicted and encouraging them to avoid the swift punishment they deserve and that the American people demand.

Mr. President, I yield the floor.

Mr. CRANSTON addressed the Chair.

The PRESIDING OFFICER. The Chair recognizes the Senator from California.

U.S. SECURITY

Mr. CRANSTON. Mr. President, the collapse of the Soviet empire has fundamentally changed the nature of the security threat to the United States.

In the place of an ideologically hostile superpower bristling with weapons of mass destruction, the new threat to American interests comes from a range of international criminal activities.

Terrorism, narcotics, and money-laundering, Mafia-like international cartels, and the proliferation of weapons of mass destruction and weapons technologies have replaced communism as the principal foreign threat to our way of life.

At the same time, the global march to democracy is still impeded or blocked in many countries by oversized military establishments whose main role is one of internal security—the persecution of internal enemies—rather than national defense.

The subordination of local police forces to the military in many of these countries virtually ensures two unhappy results.

The police become demoralized and professionally frustrated because their institutions are run by men who may also be in uniform, but who cannot really speak their language.

And the military inevitably become politicized given their hegemonic participation in internal security—a role we have wisely prohibited our own military here in the United States.

United States efforts to strengthen the administration of justice can help to promote the demilitarization of societies whose armed forces often constitute—even in countries such as Venezuela, with more than three decades of democratic experience—the greatest threat to democracy.

The failure of host country law enforcement discourages needed international investment, as foreign corporations face concerns of physical security and the ability to enforce contracts.

Mr. President, despite this important challenge, U.S. efforts to strengthen international law enforcement efforts

S. HRG. 102-505, Pt. 2

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS—WILLIAM P. BARR

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

ON

CONFIRMATION HEARINGS ON APPOINTMENTS TO THE FEDERAL JUDICIARY

NOVEMBER 12 AND 13, 1991

Part 2

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to the basic values we have embraced as a nation, and that you will serve as a lawyer for the people as well as for the President.

Consequently, there are some areas in which I have questions. I want to know about your general philosophy and approach as the Nation's chief law enforcement officer; and I want to know your views in such areas as juvenile justice, State and local cooperation, and the competing loyalties of the Attorney General.

I enjoyed meeting with you last month, and I was encouraged by what you said. The root of the crime problem, the cause and not merely a symptom, is found throughout our society. It is in the workplace, in our schools and in our homes, not just in the criminal element. To overcome this violence we must take a more comprehensive approach—an approach that empowers our communities, educates our youth, reestablishes a strong family structure, and keeps guns out of the hands of criminals and drug traffickers, as well as one that emphasizes crime control.

Without doubt, the Nation will be looking to you, as Attorney General, to provide leadership in this area.

Mr. Barr, inside the beltway people frequently are more interested in what constitutes a good sound bite, than what is constitutionally sound. I believe that if you are confirmed you will find that approach unacceptable, that you will work towards real achievements, and not just political wins.

Our earlier talks have led me to believe that you will seek goals and solutions and not merely the political advantage of the moment.

To this end, I look forward to learning more of your thoughts and your views, and I wish you and your family well.

Thank you, and thank you, Mr. Chairman.

The CHAIRMAN. Thank you, very much.

General, will you stand to be sworn?

Do you swear the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. BARR. I do.

TESTIMONY OF WILLIAM P. BARR, TO BE ATTORNEY GENERAL OF THE UNITED STATES

Mr. BARR. Thank you, Mr. Chairman.

The CHAIRMAN. Please introduce that fine family to us, those young women who are wondering why they have to sit there all this time?

Mr. BARR. Thank you, Mr. Chairman.

I would like to introduce my wife, Christine.

The CHAIRMAN. Welcome, Christine.

Mr. BARR. And my daughter Margaret, who we call, Meg; and Patricia, and Mary.

The CHAIRMAN. One thing is certain, you will never be able to deny any of them.

Welcome, ladies. As I tell most of the children of people who have to come here to go through this process, No. 1 it will be painless, although it will be boring; and No. 2 you are entitled to ask

your dad and your mom for something special for having to sit through this hearing and put on your best dresses.

So if you need any legal representation in that matter, I promise I would be willing to help and will not confirm your father until you get a commitment from him for something special.

Anyway, thank you, very much for coming, ladies.

First of all, it is a pleasure to have a nominee before us in this administration that did not graduate from Yale Law School. [Laughter.]

The CHAIRMAN. It is the first one in 100, I think, not that there is anything wrong with Yale Law School but we like to try other law schools occasionally, particularly George Washington University.

But I would like to invite you if you have a statement, General, to make the statement and then we will go to questions.

Mr. BARR. Thank you, Mr. Chairman.

It is a distinct privilege to appear before this committee this afternoon and I would like to thank you for moving so quickly on this nomination. I am honored that the President has selected me for the position of Attorney General. It is not a position that I pursued. I never thought I would be nominated to be Attorney General. In fact, I never thought I would serve as Deputy Attorney General. But the way circumstances have unfolded, I believe I am in a good position to provide leadership to the Department of Justice.

As you know, from my background, I am committed to public service, and I also revere the law. It is my life and my profession. And as Attorney General, I believe I can serve my fellow citizens by upholding the rule of law. The Attorney General has very special obligations, unique obligations. He holds in trust the fair and impartial administration of justice. It is the Attorney General's responsibility to enforce the law evenhandedly and with integrity.

The Attorney General must ensure that the administration of justice, the enforcement of the law is above and away from politics. Nothing could be more destructive of our system of government, of the rule of law, or the Department of Justice as an institution than any toleration of political interference with the enforcement of the law.

When I met with the President about this nomination, I observed that there were others who had greater stature, and he said that the most important thing, as far as he was concerned, was to have a Department of Justice that was run with professionalism and integrity. That has been his only charge to me, and I am accountable to him, I am accountable to you, and I am ultimately accountable to the American people for carrying out that charge.

I believe that the essence of leadership is ultimately service. I have been at the Department of Justice for almost 3 years. I have grown to love the institution and the dedicated men and women who serve in it. I am proud to be associated with them.

I want to serve the Department. I believe I can serve the rule of law and the Department of Justice by protecting and fostering the professionalism and the integrity of the Department of Justice as an institution. AG's come and go and so the character of the Department of Justice, as an ongoing institution, has much to do with the course and the fair administration of justice in this country,

and if you confirm me, I would like at the conclusion of my tenure to have it said that I upheld the law and that I left the Department of Justice a more effective, stronger, and a better institution.

Thank you.

The CHAIRMAN. Thank you, very much.

As you know, this BCCI matter is engulfing and touching, it seems everything in sight, from the United States to God knows how many other countries. But, although I have other questions later on, I want to begin with one to clear the air, if it is possible to clear it, and I hope it is.

That on November 11, last night, on NBC, the following news report was broadcast and I am quoting.

It says, "The BCCI banker, Nazir Chinoy"—I hope I am pronouncing that correctly—"now in Federal custody in Florida, facing drug money laundering charges. And Chinoy's lawyers say Federal prosecutors seem to want Chinoy's cooperation until Chinoy made a startling disclosure that BCCI had financed—was right in the middle of covert American arms shipments to Iran. If true, what this member of the BCCI's inner circle says, means that BCCI was deeply involved in the CIA's most secret operations, playing a much greater role than the CIA has yet admitted."

Then skipping four or five paragraphs, it concludes, the second to the last paragraph, it says, "But two top Justice Department sources say, under Thornburgh, and his designated successor, William Barr, agents, and prosecutors have been blocked and delayed again and again in going after BCCI."

Would you comment on that?

Mr. BARR. The Chinoy report, from last night, was the first I heard about this episode.

The CHAIRMAN. What do you mean by, this episode?

Mr. BARR. This discussion with Chinoy. He was an original indictee—this is what my understanding of the situation is, as far as I have been able to tell—Chinoy is a BCCI official. He was one of the original indictees in the first Tampa money laundering case.

We were not able to get custody of him, because he was fighting extradition. We worked for 2 years to get custody of Chinoy. Meanwhile, the first Tampa case was prosecuted for the defendants that we were able to get into custody.

When we finally got Chinoy in custody, we successfully extradited him. He is scheduled for trial on those original money laundering charges for January 1992. There were plea negotiations with his lawyer. I am told that in these plea negotiations he made a proffer to agents that the agents considered to be incomplete. I do not know the full content of this proffer but Chinoy and counsel were seeking a plea agreement.

And one of the elements they were asking for is something called a 5(k) motion, for a departure from the sentencing guidelines based solely on the proffer without any evaluation of subsequent performance and ultimate truthful cooperation in the future.

This is something that I am told we never do. It is akin to buying a pig in a poke to let someone off on a plea bargain, cut a sweetheart deal for someone based solely on a proffer, one that the professionals involved believed was incomplete.

At any one time, there are literally thousands of criminal defendants scheduled for trial on serious crimes. And, if every time one of them wafts the word "Iran" under our nose, and insists upon a sweetheart deal without any commitment of followthrough, we would not be in the criminal justice business. That is my understanding of the Chinoy episode.

The CHAIRMAN. Did you learn this from the news broadcast last night?

Mr. BARR. The first that the Chinoy thing ever came onto my radar scope was last night on the NBC report. Now, you have to understand there are about 5 to 6 linear feet of documents that come into my office every day.

The CHAIRMAN. I am not being critical, I just want to know when.

Mr. BARR. No, I am just saying, you know, it could be in some report somewhere. It could have been on a summary of events or developments that I never focused on. But the first it penetrated my consciousness was last night.

The CHAIRMAN. The reason I ask, and I do not doubt you for a moment, you have never been anything but truthful with me, it does, at least in my mind, raise a question of how top a priority the BCCI investigation is receiving under the Justice Department if this—unless it is not that significant an event in the minds of the Justice Department—that you, as Acting Attorney General, would not be aware of Chinoy's proffer.

Mr. BARR. It would be quite unusual for either the Deputy Attorney General or the Attorney General to be monitoring plea negotiations closely, even in a case of this magnitude. In fact, I think that if I responded to media pressure or political pressure to get the job done in BCCI, and reached down and interfered with the professional judgments early on in this kind of case, I think I would be legitimately criticized. The process in the Justice Department is for these things to move up step-by-step and if it requires a review or if it is escalated to my level then I can deal with it.

But I am not going to monitor plea negotiations that are going on across the country in any case. But this maybe gives me an opportunity to talk more broadly about BCCI which I would be glad to do if you would like to pursue it.

The CHAIRMAN. Sure, if you feel comfortable with it.

Mr. BARR. BCCI—I think I can look at it from a prospective and a retrospective standpoint, really using the summertime as the pivot point. I personally did not get involved in any appreciable way in BCCI until the summer when all the articles started appearing about alleged foot dragging by the Department. And at that point——

The CHAIRMAN. The summer of 1991?

Mr. BARR. Yes, just this past summer. And Dick Thornburgh at that point designated Bob Mueller, who is a career prosecutor, who is the head of the Criminal Division, to take charge and to coordinate this effort, and make sure that the job gets done in the future, and also to find out what has happened in the past.

The CHAIRMAN. Who was in charge up to that point?

Mr. BARR. There were separate investigations going with very little coordination in various districts.

Since that time, as Bob Mueller has written to——

The CHAIRMAN. Of course, you know that has been one of the criticisms.

Mr. BARR. Sure. I will get to the retrospective in a moment. But first looking from the time that I have been involved forward, as Bob Mueller said in his letter to Congressman Schumer, since that time he has received very clear, straightforward instructions: First, spare no resources, use whatever resources are necessary; two, pursue the investigation as aggressively as possible and follow the evidence anywhere and everywhere it leads; third, that there is going to be coordination and a consolidated effort; and, finally, that jurisdictional turf fights that impede this investigation are not going to be tolerated. And that has been the consistent direction he has received.

The investigation now is going forward in five different districts, U.S. Attorneys districts.

The CHAIRMAN. Are you now directing Mueller?

Mr. BARR. Yes. And in the District of Columbia, in addition to those five districts, we have a consolidated task force between the U.S. Attorney's Office here and the Criminal Division. That task force has three different teams. Two are conducting investigations; one is providing coordinating and other kinds of support to the overall investigation. In addition, we have the Office of International Affairs in the Criminal Division assisting all the offices with the international dimensions of this. We have right now 37 prosecutors nationwide and dozens of agents, obviously, supporting those prosecutors on this case.

As far as I am aware, all allegations that have surfaced are now being pursued aggressively. And starting from the time that I have been involved, I will accept personal responsibility for performance in this case, and I will be held accountable for it. And, Mr. Chairman, if you want to hold hearings in several months, or whatever timeframe, to determine what progress has been made, I would welcome that. But I will take personal responsibility for the performance of the Justice Department on this investigation.

But I want to make something clear, and that is that this is a complex case. We have a standard at the Department of Justice, an indictment standard. We believe we need to have evidence sufficient to support an indictment, in hand, so that we can prove our case in court. A lot has been said about not wanting to have a political Justice Department. And I agree with that. There are a lot of different ways politics can come into play in a case. On the one hand—and I think many of you are thinking of this—you shouldn't sweep anything under the rug. Don't cut anyone a special break. Don't show favoritism. Don't withhold an indictment that should be laid down because of political influence.

But there is another side to the coin, and that is don't hand down an indictment because of political pressure. Don't lower the standard of indictment just because it is politically convenient. That standard, if I become Attorney General, is going to be one standard, and it is not going to be changed for anybody in this country. And I don't care how much political pressure is brought to bear. I don't care what the op eds say. I don't care what the journalists say, or if it is not fast enough for them. And I don't care

what the political pressures are. That standard is staying where it is.

Right now the career prosecutors in the Department—and, believe me, I have been pressing them—have explained to me very coherently what evidence is lacking that prevents us from laying down an indictment today. I have insisted on explanations, and I have gotten them, and they are coherent, and I think they are right. And they are coming from the career professional prosecutors.

And nothing—you know, from a personal standpoint, it would be great if I could just throw an indictment on the table and say, "See, guys." But I am not going to do that. Until that standard is met, there is not going to be an indictment in the BCCI case. As it is met, there will be indictments. So that is talking prospectively.

Let me just say, we have to support the indictments with evidence. That means people and documents, and most of this activity occurred overseas. And it was carefully carried out to avoid regulatory scrutiny.

Much of this activity was conducted in countries where there are bank secrecy laws. It is very difficult for us to get access to the records and people we need, but we are working to do that.

I am not going to take the Price Waterhouse Report, staple an indictment to it, and throw it into the bin. We are going to get the evidence before any indictment comes down.

Now, looking retrospectively, I have asked that a thorough review of pre-July activity be conducted.

The CHAIRMAN. Before you do that—I apologize for interrupting—there will be two other things that will be raised, and I just want to raise them now so you can throw them in the bin.

It is my understanding—and I do not know this for a fact—that your former law firm, Shaw and Pittman, now represents the president of BCCI. Is that true, to the best of your knowledge?

Mr. BARR. I learned yesterday that they are representing Naqvi.

The CHAIRMAN. Naqvi. And what is his position?

Mr. BARR. I think he is one of the very senior people.

The CHAIRMAN. Now, was there any work done by that law firm when you were with the law firm as a partner or as an associate with regard to BCCI?

Mr. BARR. Let me make it clear. This is my understanding. The law firm, I am told, represented people, one of whom was Frank Saul, who owned Financial General back in 1978 when it was being purchased by others and apparently it says in the paper that Frank Saul suggested that this was a move by BCCI to take control. That was the first year I was at the firm. I was an associate. I don't believe I had any contact with that matter. As I say, the firm was representing a person who was a shareholder and whose interest was ultimately bought out.

My understanding is that Naqvi became a client of the firm well after I left, and I have been gone for almost 3 years.

The CHAIRMAN. Well after you left as a partner?

Mr. BARR. Yes.

The CHAIRMAN. Let me make——

Mr. BARR. I left the——

The CHAIRMAN. You were there as an associate in the early 1970's?

Mr. BARR. I will give you the chronology. I was at the law firm from 1978 to 1982 as an associate. I then returned to the firm from the White House and was there from 1983 to 1984 as an associate, made partner, and was at the firm as a partner from 1985 to 1989 when I came into the administration as the head of OLC. So I have been away from the firm for almost 3 years.

The CHAIRMAN. So when you say you left the firm, in your last statement you said when you left the firm, you are referring to 1989.

Mr. BARR. 1989, yes.

The CHAIRMAN. When you left as a partner.

Mr. BARR. Yes. My understanding is Naqvi has become a recent client of one of the partners there.

The CHAIRMAN. To the best of your——

Mr. BARR. Let me just say, I have no financial interest in the firm. I liquidated that completely when I left in 1989. I have no arrangements with the firm.

The CHAIRMAN. When you were at the firm as a partner, not as an associate—the period when you were a partner, 1985 to 1989—you, I assume, would have more access to information relative to what the firm was doing than when you were an associate. Can you tell us whether or not the firm at the time you were there as a partner, from 1985 to 1989, in that timeframe, whether or not they were representing BCCI or any of the principals in BCCI?

Mr. BARR. Not to my knowledge.

The CHAIRMAN. Not to your knowledge. That is good enough for me.

Now, I will come back with some other questions. My time is up, but you can——

Mr. BARR. Let me just say that the firm has some international bank clients. I was never involved in that practice, and I never became aware of the firm representing BCCI.

The CHAIRMAN. For the record, how big is the firm?

Mr. BARR. Right now it is 240 or 250 lawyers.

The CHAIRMAN. And how many partners, roughly?

Mr. BARR. Probably around 70 or 80.

The CHAIRMAN. If you would like to—I am not asking you to. If you want to finish your answer with regard to BCCI, not prospectively, but as you started, or if you want to wait until later, it is up to you. Otherwise, I will yield to my colleague, Senator Thurmond. I don't want to cut you off. I just wanted to get that in so it didn't linger.

Mr. BARR. Maybe we can—I was going to give an overview of what has happened in the past and largely defend the Department's record. But I will hold off on that until someone else raises the BCCI issue.

Senator SIMON. I think it would be helpful, as long as you are having this, to get that retrospective look right now.

Mr. BARR. OK. I have asked for a retrospective look. I think it is important that if there were mistakes made, that we can learn from our mistakes and make sure these kinds of slip-ups don't happen again. So that is one reason. And the other reason is be-

cause there is, lurking in the background, some suggestion that somehow there is some wrongdoing or mischief involved. And, to the extent there are any allegations like that, I want those all pursued and run to ground.

Let me also say that I am frankly not immersing myself in all the details of what happened prior to July. I have people working on that. I learn a little as it goes on. But my priority is what happens from now on and making sure the job is done.

But from what I do know, I think the record is fairly good, and I think much of the criticism is unfair. The major criticism is that the Department didn't act quickly enough.

There are basically four categories of offenses that BCCI is alleged to have committed that touch upon the United States. First is money laundering. Second is regulatory offenses, the secret acquisition of financial institutions in the United States. The third is a widescale fraud, a ponzi scheme where depositors' money was taken worldwide. And the fourth is general allegations about public corruption, that there is somehow a list somewhere of bribes being paid to public officials.

Starting with money laundering, most of the money laundering allegations centered on Florida which was the major area of drug activity and money laundering. And the Department of Justice has prosecuted a major money-laundering case against BCCI, the only one so far brought to fruition. It was a Customs Department undercover investigation. It was a complex investigation. Ultimately we were able to prosecute five, I think, of the BCCI officials, and we also had a plea agreement with the bank where we got the largest payout forfeiture in history of financial institutions.

Then there has been a second phase of this, a follow-up in Tampa, where, in September 1991, we brought a follow-on indictment against other individuals.

The money laundering, by and large, the big picture is that the money-laundering allegations were detected and have been prosecuted. Now, there is an allegation in the Washington Post—I believe it is on the Washington Post editorial page today—that there were 125 DEA cases relating to BCCI in DEA's files and that somehow we didn't get the picture and didn't focus on these 125 cases. I am informed that the 125 figure is the number of current reports in the DEA files, most of which relate to the investigation and the activity that was carried on from 1986 through 1990 in that money-laundering case.

The second area of allegations are the regulatory offenses. As I said, that is the notion that there were secret acquisitions of financial institutions. The basic allegation is that while the law enforcement people, both Justice and Treasury—because there were two Treasury agencies involved, Customs and IRS—while they were covering the money-laundering part of the case, they acquired some evidence about the alleged secret acquisition of First American and that they never passed that on and that somehow that slowed down the investigation.

I think—again, I am talking here about the big picture and my preliminary assessment, because I haven't immersed myself in all of the facts. But the general pattern, it seems to me, was that this evidence was passed along to the Fed. Maybe not as promptly and

tidily as it should have been, but basically the information was transmitted to the Fed after the takedown of the undercover operation. And the evidence that was transmitted to the Fed, which had primary jurisdiction here—these were regulatory violations, and the Fed in the first instance is the regulatory agency that should be investigating—was of limited utility to the Fed because it was sort of general in nature, hearsay, gossip, and the Fed was really focusing on trying to get more tangible evidence.

And my understanding of the Fed's position is that it was the Price Waterhouse study that came out in December 1990, that was the big breakthrough for the Fed. Now, remember, the Fed has a lower standard of proof. They are operating in a civil environment, not a criminal environment. So it was in December 1990, that the big piece of evidence as far as the Fed was concerned on the regulatory offenses, came out of the United Kingdom.

My general sense is that the hearsay and the gossip and the rumor and the general corporate knowledge kind of evidence that was transmitted to the Fed from the money-laundering investigations, I think it was sheer speculation and quite unlikely that that would have materially advanced the Fed's ultimate investigation.

In any event, the Fed did refer the regulatory case to us in January of this year. So the process has worked. The Fed as the regulatory agency has made a criminal referral that came to the Department in January 1991, and the Department is pursuing those regulatory offenses, potential offenses. But as I say, the issue for us is getting the evidence from overseas.

I think that the allegations of the ponzi scheme, the worldwide fraud, likewise arose after the Price Waterhouse report, and the allegations of corruption are of relatively recent vintage and of quite a general nature. And those are now being pursued, and those issues arose in 1991.

I have already discussed the fact that it is very hard for us, a tedious process, to gain the evidence that we need as a predicate for an indictment. And I think it is unfair generally to be conducting an autopsy on a live body. This is an investigation in midstream. And ordinarily the Department of Justice is not, and should not, be driven by a political timetable. I don't know why the people feel we should be handing down indictments immediately here. We will hand down indictments when the evidence is there to support it.

There is a saying—I think all of us know it—that the wheels of justice grind slowly, but exceedingly fine, and most people appreciate that because we have to go through a process. And the reason we are ultimately able to do justice and get that fine grinding at the end, where all the allegations are handled in a coherent way, is because we go through a process.

No one at the CIA, the State Department, or the White House or anybody outside the Department of Justice, as far as I am aware, has ever attempted to influence the course of this case, and no political influence whatsoever has been brought to bear on this investigation.

The CHAIRMAN. Have you been asked to update the White House on the state of the investigation of BCCI?

Mr. BARR. When?

The CHAIRMAN. Since you have taken over primary responsibility for it?

Mr. BARR. There were two instances where—there are only two communications that I am aware of with the White House on the BCCI case, on the investigation. One was a lunch I was having with Boyden Gray, we were going over a number of issues that were going to be coming up in the fall and discussing that the department would be having a transition at that point, and I said that the BCCI matter was, you know, an important priority area, and he asked me to explain all the adverse press that the department had been getting over the summer.

The only other instance I am aware of is where we, basically following up on that, went to brief the counsel's office—I did not do it, someone else did—on the allegations that had been made in the progress of the investigation. But no one in the White House has ever attempted to influence this in any way.

The CHAIRMAN. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Barr, when a person is elevated into a new position, they generally set up goals. What are your goals during your tenure as Attorney General?

Mr. BARR. I think talking about specific goals and priorities, and I think I have said this to a number of you on courtesy calls, is a little bit misleading in the Department of Justice, because we are called upon to administer the law across the board and make sure that all programs and all areas of enforcement are covered. And, as Senator Kennedy said, it is a very difficult job to do in a period of scarce resources.

In a way, I hate to suggest that by giving emphasis to one program we may be giving short shrift to another. I do not mean to suggest that, and so one of my priorities is to try the best I can to cover the whole waterfront, so that at the end of my tenure it cannot be said of me that I let the ball drop in a particular area. That is an important priority, I think, for any Attorney General to have. It does not necessarily get headlines, but that is the business of the Department of Justice.

The second priority, before getting into specific areas of emphasis, is also sort of cross-cutting nature, and that is something I said in my opening statement, which is to try to foster and build upon the professionalism and the integrity of the institution itself, so that when I leave, people will say that it is a better institution, it is a more professional institution. And, I think that the way I can do that as Attorney General, is both by personal example, by being professional in my decisions and my dealings, and also by insisting on professionalism from top to bottom in the work that is done in the department.

Beyond that, there are several areas of emphasis. Obviously, drugs has to continue as a top priority. In my view, it is a long-term struggle. We are talking here about the cold war. We are not talking about Desert Storm. This problem took decades to come about, and it is going to take decades to cure. But part of my responsibility and my priority will be to keep the pressure on, so we continue to make progress.

Beyond that, I want to give increasing emphasis to the problem of violent crime. Violent crime is intolerable in the United States, and while it is largely a local concern, 95 percent of it or more is really under State and local jurisdiction, and should be, I do think there are some areas where the Federal Government can provide greater support and make a real difference in fighting violent crime. Later on, I will be glad to discuss the details of what I am talking about.

Next, I would say that civil rights would be one of my areas of emphasis. I think there is a broad area of agreement; sometimes we focus on areas of policy disagreement, but there is even a broader area of agreement in the civil rights area, and that is that discrimination is abhorrent and strikes at the very nature and fiber of what this country stands for.

I believe that, although progress has been made in this country, that there is still discrimination in this country, and enforcing the civil rights laws would be a high priority of mine. I intend to be vigilant in watching for discrimination, and I intend to be aggressive in rooting it out and enforcing the laws against it wherever it is detected.

The first experience I had with this, as Acting Attorney General, was in the area of fair housing, that Senator Hatch alluded to. Shortly after I took the position of Acting Attorney General, I saw that a report came out of HUD about discrimination in housing, followed by a report from the Fed concerning discrimination in mortgages. I recognize there has been a lot of talk about how that data has to be massaged and sifted and studied and analyzed, but, in the meantime, I told John Dunne that that did not mean we should sit on our haunches, and I asked him to put together a stepped-up enforcement program.

He talked about Senator Hatch's bill, to start using testers, and I thought that was a good idea, but I concluded that we did not really need new legislation to do it. I asked that we reprogram $1.4 million into the program over 2 years, and that we embark on a testers program. This would be the first time the Department of Justice has used testers directly. We have relied on evidence from testers before, but now they will be working for us directly.

Also, I asked John to set up a group of regulatory agencies that are involved in the mortgage area, so that we can have a coordinated enforcement program, and I believe that group is meeting and setting out an enforcement program in the mortgage area. So, I intend to be proactive and, as I said, civil rights will be a priority.

Finally, I would say white collar crime, and there the challenge is to keep up the momentum in the areas where we have been making progress. I think we have been making a lot of progress on financial institution fraud, in large part because of the infusion of resources we got in the Crime Control Act of 1990, and we have been making progress in government contracting and in HUD fraud and in affirmative civil litigation.

But the other part of the white collar challenge is to anticipate the slumbering giants before they become problems like the S&L problem, and try to get ahead of the power curve, get the resources in place and get the program in place.

I have been chairing the Economic Crime Council, where we have designated areas of insurance fraud, pension fraud, computer crime and health care fraud as new areas of emphasis and we are starting to put in place a program to deal with them. But as Senator Kennedy said, while these are priorities, and while I will be trying to give them emphasis, we are in an area of very scarce resources.

The President has asked for a 60 percent increase in the Department, budgeted over 3 years. This past increase for the 1992 fiscal year was almost 15 percent. I have to say that the Senate, in their appropriations, basically gave the President what he wanted for the Justice Department, but, unfortunately, in conference committee we lost $472 million. That is a tremendous blow to the department. It means a lot of the initiatives we were hoping to carry out cannot be carried out.

So, another cross-cutting priority of the department, of any Attorney General, is increasingly the role that the Attorney General has to play as a manager, to make sure that we are effectively investing the money and the resources.

So, Senator, those are my goals as Attorney General.

Senator THURMOND. What steps are being taken to fill the existing judicial vacancies? About 2 weeks ago, I checked and we had approximately 125 vacancies. It seems to me that some part of the process is taking too long. Is the slowdown at the White House or at the Justice Department?

Mr. BARR. Well, it is a long process, Senator. I think we had a total of 150 vacancies, and my figures show that we have 41 nominations pending, we have tentatively selected 66 candidates who are now undergoing either FBI background checks or ABA reviews, and we are in the process of interviewing for 18 additional judgeships, and we have not received recommendations on 25.

Now, I agree that it is a slow process, but it is an important one. We did have a big backlog, because of this creation of the new judgeships, and it is a long process, because we have to make sure that we are putting people who have the proper character and integrity and competence on the bench, and that requires the FBI background check, it requires the ABA screening process, and that takes a lot of time.

But I think the big picture is that we have 41 nominations pending and 66 already in the pipeline, with only 18 interviewing and 25 with no action on them yet, and that is not too bad a position to be in. But I agree with you, we have to do better, and it may require putting more FBI resources into it.

Senator THURMOND. Would it be possible to employ more FBI agents to get the background checks completed? I get complaints all the time about filling these vacancies. The judges are complaining, they say they are overworked, and that they cannot get the job done under the current circumstances. We created the vacancies and now they are not being filled in a timely manner. Can you not employ about 50 extra FBI agents to get the necessary work done quickly?

Mr. BARR. I do not know if I can employ them, but, obviously, we can shift FBI agents from other areas to do the backgrounds. But this is a pipeline we are talking about. It has a number of different

points along the line, and even if we were to push through these 66 we have going through the process now, either background or ABA, this committee also has limitations on its capacity to process these people quickly.

I am not suggesting there has been delay at all. I am just saying that right now there are 41 pending. We are just about——

Senator THURMOND. Where is Senator Biden? I wanted him to hear that. [Laughter.]

Mr. BARR. We have 66 more coming down the pike. I think this background——

Senator THURMOND. In some cases it has taken 2 or 3 months for the FBI to complete its investigation. It has taken several months for the ABA to complete its investigation and evaluation. I think that is ridiculous, to be frank with you.

Mr. BARR. Well, I think we have to expedite those investigations and get more nominations up to the committee, but the committee also has to investigate these individuals.

Senator THURMOND. These positions ought to be filled expeditiously. Now, if it is the Justice Department's fault or the White House, they ought to correct it. If it is the fault of this committee, it ought to be corrected. These positions should be filled.

Now, I am sure you realize the importance of a good working relationship with the Congress. How would you hope to accomplish that?

Mr. BARR. I think that I have been able to establish a good working relationship with the Congress, both on the Senate side and the House side. I have been willing to work closely with committees and with individual members to accomplish legislative objectives.

I played a role in getting the Debt Collection Act through and, as Senator Simon mentioned, came up and spent an all-nighter here on the Crime Control Act. I worked closely with Senator Biden on this year's crime bill, which passed the Senate. I think the key to it is mutual respect and open communication.

Senator THURMOND. Do you feel there are sufficient resources at both the State and Federal levels to effectively fight organized and white collar crime, and would you hesitate to ask for more funds, if you need them?

Mr. BARR. Well, as Dick Thornburgh said, we could always use more resources in law enforcement. We only spend a little over 1 percent of our budget on law enforcement in this country at the Federal level and I think 3 percent on the State level. My impression is that any law enforcement officer in the country, State or Federal, can always use more, so it is a question of prioritizing and doing the best you can with limited resources.

On the organized crime front, I think we have a good program in place. We have recently changed our strategy, as you know. Whereas, before we were focusing exclusively on the La Cosa Nostra and certain other organized crime entities, we have now expanded the definition of organized crime so that we could go after other groups, emerging groups, and not just traditional organized crime groups, and we are deploying those resources now.

On the State level, that is really a matter for the State and local authorities to determine how much is enough resources. I myself

would not like to see a scaling back of what is being invested in law enforcement on the local and State level.

Senator THURMOND. The Office of Professional Responsibility has made fine contributions. I presume you expect to continue to provide support for that office?

Mr. BARR. Yes, I do support the Office of Professional Responsibility. As you know, we have a new IG that was created, and there has been some issue as to the respective jurisdiction of the IG and the Office of Professional Responsibility.

On the one hand, I think part of the statute suggests, or maybe it is the legislative history, that the Attorney General may consider subsuming OPR in the IG's office, merging the two. On the other hand, I believe there is also language, either in the statute or legislative history, suggesting that consideration might be given to shifting investigative slots from the IG to OPR, basically creating a larger, far bigger organization of OPR, while at the same time having the IG.

Those offices have given me their views on the allocation of responsibility, and I decided when I became Deputy to basically get a year more of experience under our belt with these two offices in operation, before making any decisions, because I wanted to see where the pressure points were and how the relationships were and what roles they were playing.

While I have not come to a final conclusion about all the details, I think that we should continue to have OPR as a separate entity, enforcing particularly the professional responsibility of the lawyers in the Department and assisting the Attorney General in insuring the highest standards in the department.

Senator THURMOND. I believe my time is up. Thank you very much.

Senator KENNEDY [presiding]. Thank you very much, Mr. Chairman.

I want to say that it is difficult to differ with your orders of priority. I think the order that you represent certainly expresses my own kind of priorities in the Justice Department and I think you pointed out whether you are going to be able to—and the new initiatives I think you ought to be commended for.

The fact of the matter is there has been more action over in HUD than there has in the Justice Department in recent times in the areas of enforcement of civil rights, and as I understand, even though it is in a preliminary stage, what you are attempting to do there I think is noteworthy and commendable.

Let me go into some other areas that have not been touched. One of them has been mentioned, but I would like to, if I could, direct your attention to the Brady waiting period for handguns. The Brady handgun waiting period is an important proposal. Your predecessors supported it, on the condition that it be included as part of a comprehensive crime package, including habeas corpus, death penalty and other reforms.

The proliferation of assault weapons, though, continues to be a problem for law enforcement and every law-abiding citizen. The success of waiting periods and background checks at the State level is compelling; they provide a cooling off period, and the only opportunity to determine whether a prospective firearm purchaser is not

entitled to make that purchase is because of a criminal record or history of mental illness or other disqualifying factor.

Now, the Brady waiting period the adminstration is willing to accept as part of the crime package applies only to handguns. Assault weapons, obviously, are at least as lethal, and why shouldn't we expand the scope of the Brady bill to encompass assault weapons, as well?

Mr. BARR. On the assault weapon front, the proposal before us is the DeConcini amendment. I think—I don't know if this is a new statement or not, but I would support both the Brady bill waiting period and the DeConcini amendment, provided they were parts of a broader and more comprehensive crime bill that included tough enforcement provisions, including very tough provisions on the use of firearms in crimes and illegal purchase and trading in firearms, which are part of the package that passed the Senate.

Now, to be candid, on the waiting period, I would prefer an approach that was directed toward point of sale, and I know that we are not at that point yet technologically. It is going to require more investment, and I have been involved in infusing those resources to upgrade the records. But the important thing, I think, ultimately, will be a system that is based on State records, a State system. And so I think the House approach is preferable, frankly, to the Senate approach.

On the DeConcini amendment, I would prefer a limitation on the clip size, but ultimately I would recommend the President sign a bill that had the Brady waiting period and a DeConcini assault weapons provision in it, as long as we had other tough crime measures in it that dealt with the other problems.

I have not considered before whether the waiting period should apply to assault weapons and would want to think about that, but off the top of my head, I don't think there should be an objection to that.

Senator KENNEDY. Well, as you know, DeConcini on the assault weapons does not provide for the waiting period for the assault weapons. And although it includes a number—I believe it is 11 sets of assault weapons, there are clearly others that result in the same kind of destruction and havoc and threat to law enforcement personnel.

I think the fact that you are forthcoming in terms of the waiting period for assault weapons is very constructive. We have—

The CHAIRMAN. And unusual for an Attorney General nominee.

Senator KENNEDY. We have here just the application for the purchase of weapons, and as you are familiar, prior to 1968, they didn't even ask the six or seven questions, which are probably the most rudimentary questions that there are. Of course, without having the opportunity to give local law enforcement the opportunity to check those, the significance and importance of them are significantly compromised. And it has been to try and give that period of time to local law enforcement that the waiting period has been supported, and there have been some important successes. In New Jersey over a period of time some ten thousand convicted felons trying to buy guns have been identified. I am not going to take the time of the committee to go through those.

53-053 O - 92 - 2

But the fact that you would be willing to consider seems to me to be logical. If it is important in terms of dealing with violence on the hand guns and on the kinds of weapons that have been used that have brought such destruction and violence to our fellow citizens, would certainly be justified as well, and that are threatening many of those in the law enforcement community.

Just let me ask you on one other related area, and that is on reviewing the licensing requirements for the sale of assault weapons, as you probably know, and I won't go through in great detail. But it is virtually four or five of the same kinds of questions, and you can get a license to sell these assault weapons and sell them to virtually anyone. And it seems to me that if it is good enough in terms of the purchase of the hand guns, in terms of checking out the background, and good enough in terms of trying to deal with the assault weapons, having some kind of idea about who is going to be selling these, who is going to be the licensee, given some of the recent information about who is selling assault weapons is worthwhile, as well.

Would you be at least willing to visit and talk about that particular issue and see what suggestions you might have on that?

Mr. BARR. Sure, Senator. I am always willing to consider that. In considering restrictions on the lawful sale of guns, I do start out with the threshold considerations that the most effective way ultimately of dealing with violent crime is to deal with violent criminals, and that anything that focuses exclusively on lawful sale is somewhat of a feckless exercise. But as part of a comprehensive approach, I think it is legitimate to take a look at reasonable steps, recognizing that there is a tradition of private gun ownership in this country and a legitimate interest in that, but nevertheless looking at reasonable steps as part of a broader approach to controlling the deadly use of firearms that is becoming an increasing part of the plague of violence, the crime that we have in our streets.

Senator KENNEDY. I liked your earlier answer better, but I am glad to hear this one, too. [Laughter.]

I would say to my good friend from South Carolina, if you need any recommendations on those vacancies up in Massachusetts, to fill those, I would be glad to help.

Let me go to another area, and that is the area that we talked about at the time that we had our visit, which I very much appreciated. That is with regard to the Wichita Operation Rescue case and the decision to file a brief in the Wichita Operation Rescue case, the *Women's Health Care Services* v. *Operation Rescue.* As we understand, historically the Federal Government has protected the individual rights, and when protesters attempted to prevent the black Americans from attending newly integrated schools by blocking the students' access, the Federal Government stepped in to ensure the students' safe entry. That was done at a time when there were many that really, out of a sincere belief, believed that the law was wrong during that time. It wasn't really a question whether they believed it was right or wrong. Still, the Justice Department acted.

But in this case, the U.S. Justice Department reached out to the district court in Kansas and entered the dispute on the side of the

lawbreakers. It weighed in with those who would forcibly deny a woman a Federal constitutional right to abortion. And it, as far as I am concerned, poured gasoline on an already volatile situation by making it appear that the Government supported the clearly unlawful acts of Operation Rescue.

The Government had already stated its position in a brief before the Supreme Court, defended in both cases the same entity, Operation Rescue, was even represented by the same attorney so there is no reason to believe the judge in Kansas would not be appraised of the pending Supreme Court case.

Why did the Government feel it necessary to sort of fan the flames in Wichita and to argue that Operation Rescue should be free from the Court's order prohibiting its illegal activities?

Mr. BARR. Well, thank you, Senator. This gives me the opportunity to describe what happened because I think it has been mischaracterized, largely, and people drew the wrong conclusions from the way it was publicly presented.

In describing it, I would like to emphasize three points. First, this was not viewed as an abortion issue in the Department. It was viewed as an issue of jurisdiction and the reach of the so-called Ku Klux Klan Act of 1871.

Second is that the Department did not side with the demonstrators. On the contrary, we condemn those who break the law and who violate other people's legal rights.

Third, this was not a gratuitous action by the Department where we reached out and tried to stir up an issue. On the contrary, we felt that circumstances came about that really drew us into it, and we tried in good faith to deal with it in a lawful way as we understood it.

The first point that I think bears emphasis is that Operation Rescue demonstrators who block abortion clinics are lawbreakers. They are treading on other people's legal rights. I do not support or endorse or sympathize with those tactics. As the President said, everybody has an obligation to obey the law, and as a Government official, my responsibility is to enforce the law and to protect people's rights.

The issue in Wichita was not whether those demonstrators should be dealt with. The issue in Wichita was which statute should be used to deal with them, which law enforcement agency should be used, and what court system should be used to deal with the demonstrators. And we believe that the applicable statutes were local and that the local police should be the law enforcement agency and that the local courts could deal with it. And this has been—in fact, in city after city around the country, that is how it has been handled—locally.

In Wichita, there was an attempt to federalize the issue. The clinics went to Federal court claiming that there was a violation of the Ku Klux Klan Act and seeking the intervention of Federal marshals to enforce their rights of access. Now, before Wichita, I learned at the time—I hadn't really focused on it before until the Wichita matter came up to me—but before Wichita, as you mentioned, this same effort had been made to federalize this issue, and that was in the Washington, DC, area. And that had been litigated up to the Supreme Court, and 3 to 4 months before Wichita, the

Department had filed a brief in the *Bray* case in the Supreme Court, saying that the Ku Klux Klan Act did not give Federal jurisdiction in these kinds of matters, that it required a class-based animus, certainly racial and possibly sexual class-based animus. But that was the limit of the jurisdiction under the Ku Klux Klan Act. So that was a position we had already taken by the time Wichita arose.

We had the additional situation where the district court judge in Wichita bought into the Ku Klux Klan Act theory. He issued a very broad injunction, sweeping injunction that had very stiff—as a condition of demonstrating, imposed a—I have forgotten what the term is now. But, anyway, the demonstrators had to pay in substantial moneys as a condition of demonstrating.

That concerned us, and then the order itself, the injunction itself, had very detailed instructions to the marshals about how to enforce the order.

The judge started holding press conferences and made statements—at least they were reported to me—about filling the jails, statements hostile to the elected officials, and also indicating that the Department of Justice fully supported his position. A number of components expressed concern about this state of affairs, and we had wide consultations within the Department, and it was decided that the best way to proceed, since we had already taken the position that the marshals did not have the jurisdiction to go in and do the things that they were now being told to do by the district court judge, was have the marshals obey the judge, have them obey the law, and call on everyone to obey the law, and then file an amicus with the court where we submitted the *Bray* brief—not rearguing the matter, just giving the judge a copy of the *Bray* brief to make it clear what our legal position was, but at the same time telling everyone to follow the judge's order.

I think for a period of time it helped defuse the situation out there and focus the attention on the courts and the legal process where it should be, rather than on the streets. But several days after that action, it appeared to me that other elements in Operation Rescue rekindled it and violated the law. They were arrested by—most of the arrests were by local police, but the marshals also made arrests. And I believe a number of them are being prosecuted for interfering with U.S. marshals.

But it was a legal question about the jurisdiction of the Ku Klux Klan Act, as I said, and we felt it was the proper thing to do, given the earlier position we had taken.

Senator KENNEDY. I am wondering if I could just finish. This is a very helpful statement and a good one.

The CHAIRMAN. Sure.

Senator KENNEDY. Just a final couple of points on this, if I could inquire, Mr. Chairman.

Do I understand you are saying that you think the Federal courts should not have jurisdiction to prevent interference with a woman exercising her constitutional right to choose abortion?

Mr. BARR. I was saying that the Ku Klux Klan Act doesn't provide that jurisdiction. I wasn't taking a policy position.

Senator KENNEDY. Well, you are aware that three Federal Courts of Appeals have decided this issue—the Second, Third, and Fourth

Circuits—as well as at least 12 Federal District Courts have held that section 1985-3 can be used to prevent groups like Operation Rescue from blockading clinics. The rulings have been based on interference with the right to travel. Only three District Courts, no Courts of Appeals, have taken views espoused by the Justice Department, which would deny women seeking abortions protection from these law-breakers.

I mean, effectively you are saying on the one hand they have a constitutional right, but you are leaving it up to the local law enforcement. And even in this case, you advocated that they lift the injunction against those that had been interfering with the clinic, and even in the face of the attorney that said, even if they don't lift it, I am not going to urge that they not continue their interference and their activities. And we are trying to find out what really the distinction is between the Justice Department that was prepared to go the extra mile on the basis of race over a period of 30 years to guarantee a constitutional right, and not prepared, evidently, to give the assurance of the protection and the safety to an individual here that is trying to pursue a constitutional right.

Mr. BARR. I think the issue for us as a matter of law was whether the Ku Klux Klan Act of 1871 was intended to provide that basis. I was not taking a position on whether the Government should or should not do that. Let me give you an example, and I do not mean to equate the two or analogize here, but I went to Columbia University during the riots in the late 1960's. People interfered, private citizens interfered with my constitutional rights, and I am not saying this is an analogous situation completely, but people blocked me from getting into the library, I know how it feels to be blocked when you are going about your lawful rights and it is quite offensive.

But even though I was being blocked in the exercise of my constitutional rights, I was being blocked not by the State, but by private people. And my remedy there was to go to State courts and get the city police to get them out of my way, which is what ultimately happened.

Now, with the Ku Klux Klan Act, the Federal Government has been given a role to play in certain circumstances where private parties combine to interfere with constitutional rights, but that is an exception to the rule. And the issue was whether that statute, passed in 1871, was designed to give the Federal Government that kind of a role in the matter of abortion and when this issue came to me the Department had already taken an issue on the position.

Senator KENNEDY. Well, I would just cease and hope you give responses.

I understand the 1985 Act prohibits a conspiracy to deprive a person, a class of persons from equal protection or equal privileges. Operation Rescue blockades are aimed at preventing pregnant women from obtaining abortions. Now, Congress said in the Pregnancy Discrimination Act, and that passed 75-to-11, that discrimination based on pregnancy is a sex discrimination under title VII.

So the Justice Department action in Wichita abandoned its traditional role of advocating the protection of civil rights under title VII. If we said that it is under title VII, with the Pregnancy Discrimination Act, falls within that, it would appear to me that there

are those kinds of requirements for the protection of individuals. I do not know whether you have any kind of comment, my time is gone.

Mr. BARR. I would want to have, you know, I would want to see that issue briefed before reaching a conclusion, but off the top of my head, my feeling there is if the class that is being invidiously discriminated against are pregnant women then title VII might apply, but that is not what was happening here. These people were not invidiously discriminating or demonstrating against all pregnant women. They were against abortion, both the patients and the people performing the abortion, that was the activity they were demonstrating against.

But I would want to have that issue fully briefed before I reached any conclusions on it.

Senator KENNEDY. Thank you, Mr. Chairman.

The CHAIRMAN. Let me ask the nominee as well as the committee a scheduling issue here. This was noticed for continuing tomorrow as well. I have no intention of ending now. We are going to go for a while longer, but it is my inclination, but I would be interested in my colleagues input that we finish today about 5:30. And that would get us so that we have at least two more of our colleagues, excuse me, three to four more of our colleagues be able to ask questions and then begin tomorrow at 10 o'clock.

Things are going fairly smoothly, I think we can just keep going along at that pace, if that is all right with the committee. Is that appropriate?

Well, then why do we not give you a chance to stretch your legs, a five-minute break right now, and then we will continue.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Senator GRASSLEY. And before you begin, Senator, I am told that there is going to be a vote around 5:15 and so hopefully we can get three or four more of our colleagues in before we break for that vote, if that is possible.

I have not been following, but what has been our time allotment? I forget.

The CHAIRMAN. Technically it has been 15 minutes, and in almost every case it has gone longer.

Senator GRASSLEY. OK, well, I probably will not use more than 15 minutes.

Mr. Barr, as you probably remember and I am sure that we have talked privately at other times when you have been around my office, of my interest in the False Claims Act of 1986. I was involved with the writing of that act, and as everybody knows that act was passed to give incentives for individuals who know about fraudulent use of taxpayer's money, the ability to take cases to the court and get a judgment or get a portion of what the Treasury would find in a favorable judgment.

For the False Claims Act to work it is very important that the Justice Department not fight efforts by private qui tam relators to pursue claims on behalf of the Treasury. Sometimes I have had cause for concern whether or not there has been a real commitment on the part of DOJ to prosecute in qui tam suits.

My question to you is not accusatory or anything, but could I count on you to ensure Justice Department's cooperation with qui tam relators and to continue what I thought was Dick Thornburgh's commitment to the Department prosecuting Government fraud?

Mr. BARR. Well, absolutely, we are strongly committed to prosecuting fraud against the Government. On the qui tam provisions we are, as you know, your statute has spawned substantial qui tam practice. I think there have been 370 cases filed since that act. We have entered 59 of them. And qui tam has—you cannot quarrel with success—it has been successful in leading to substantial recoveries for the United States. I believe we have recovered so far about $134 million.

We are monitoring the qui tam regime carefully. And as far as I am aware, there are basically two areas of concern. I know you are familiar with our concern over Government employees using information that they have gotten while employed and then going out and bringing a qui tam action so that they get part of the take. And I think we are working with you on seeing how we can fine tune the statute to address that issue, and I would like to continue to work on that effort.

The second area of concern is the extent to which a qui tam case, over which we do not have any control or limited control, might work at cross purposes with a criminal investigation and those are some of the areas where there is sometimes some tension. Where we are pursuing a criminal investigation, if this was completely a Justice Department show we would go criminal first, and civil second. And sometimes if there is a qui tam suit out there it is a little hard to coordinate with our criminal investigation which we always give first priority.

So we are sort of amassing experience as this statute works its way out and as case law develops. And to the extent that we see problem areas, we will be back asking for some changes and we know of your interest in it, and would obviously come to talk to you first about any problem areas we saw.

But we are committed to prosecuting Government fraud, fraud against the Government and maintaining the integrity of our procurement programs.

Senator GRASSLEY. Well, I believe that there are some areas that it is worth our visiting and talking in detail at your staff and my staff's level. I will have some things that I can suggest. I am not so sure that we will be able to work out some compromise but I am surely very happy to sit down and talk about that, and to suggest what some of those are.

I previously mentioned Vice President Quayle's civil justice reform proposal. I would like to discuss some of these proposals and get your views. One of the reforms that I am most sympathetic with concerns alternative dispute resolution. Again, I got some legislation passed in this area last fall signed by the President and now law. When you were before the committee to be confirmed for Deputy Attorney General, I solicited your opinion on ADR and arbitration. In written responses you expressed your strong sympathy with efforts to encourage arbitration, but declined to give an opin-

ion on the constitutionality of delegating judicial making authority to private parties.

So now that you are back here again, I am curious to know if your opinions in this area have grown in the past two years? Do you remain sympathetic to arbitration and ADR efforts? Do you see any constitutional problems with the use of arbitration as a substitute for judicial decision making?

Mr. BARR. First, as to the ADR as it was embodied in your act in 1990, we ultimately were able to work out our concerns there, and we supported that statute, and we have been working hard to implement it.

We have——

Senator GRASSLEY. And I think there has been a good-faith effort to implement it. I thank you for that and other departments that are cooperating.

Mr. BARR. Right.

In the civil justice reform package, we contemplate use of ADR more in litigation. As you know, your statute dealt with more of the administrative process. Now, we are looking at trying to give ADR a shot in the arm in litigation. And as you know the President just put out an Executive order where he is really trying to take the lead in this area and require the Federal Government, as a litigator, to adopt a lot of these civil justice reforms including ADR. So now we have the mandate under this Executive order to use ADR as much as we can, in the civil litigation area and we intend to do that.

It is coming, with the increased demand that we are placing on our court system on the criminal side as well as the civil, it is becoming more and more important that we try to discipline the civil side of the docket, and ADR is one of those ways we can relieve the burden on the court and help the court manage its workload better and handle priority cases, including serious criminal prosecutions.

Senator GRASSLEY. Do you still have any qualms about constitutionality?

Mr. BARR. I do have qualms about the constitutionality of binding—of delegating to a private party outside the Government the power to bind the Government in arbitration, but that was not implicated in the ADR statute.

Senator GRASSLEY. I guess I would ask within your concerns about constitutionality then, to what extent then would you find yourself supporting and encouraging arbitration efforts if confirmed?

Mr. BARR. I support arbitration efforts. The problem comes when it is binding on the Government with no chance for a senior Government official to review it. And that is the way we dealt with it in your statute, there is a 30-day period where a senior Government official can review the decision and then I think that there are incentives against upsetting an arbitration decision. But I looked at this issue in the administrative context. I have not looked at it yet in the litigation context. I do not know whether the Office of Legal Counsel has, so in a way, I am talking off the top of my head here about constitutional issues, and I really have not looked at it that carefully.

Senator GRASSLEY. Well, beyond the Executive order what do you think we can do to encourage greater use of currently available arbitration procedures?

Mr. BARR. In litigation?

Senator GRASSLEY. Yes.

Mr. BARR. Well, first, I think the Federal Government litigates 25 percent of the civil case load. And so the President has taken a major step by requiring the Federal Government litigators to make full use of ADR.

And, as you know, we are trying to push the broader package, including ADR on the legal profession so that the lawyers generally make greater use of it. I think the administration is showing a lot of leadership in that area.

Senator GRASSLEY. Requiring the loser to pay winner's attorney's fees—and this is also part of Vice President Quayle's recommendations, you know, following the so-called English rule where that is done—actually I guess it is done in almost every place but in America.

Well, what contribution to our civil justice system would the adoption of that English rule make? More specifically, obviously it must be viewed by the administration as positive, what do you intend to do to pursue that?

That goal, I mean.

Mr. BARR. We are proposing a modified English rule in a very limited area to basically use—there have been a number of proposals to do away with diversity jurisdiction. And what we are saying is, let us use diversity jurisdiction as a sort of test bed for a modified version of the English rule. And let us see, based on real experience in the Federal courts, how it works.

The modified version of the English rule has built-in protection for the little guy, to make sure the little guy is not driven out of litigation. It also has built-in protection for the contingency fee plaintiff.

So I think that the ultimate impact of this projecting ahead, if we adopted a modified English rule, would be to help the middle-class litigant, the plaintiff get legal services on meritorious cases where they feel they have a good chance of winning, they would be able to recover their legal fees and be made whole.

As you say, we are the only jurisdiction in the world, the common-law world that does not have the so-called English rule. So we would like to see some experimentation in that area.

Senator GRASSLEY. And you are in a sense saying, implicitly, that this is a goal you pursue and you are going to pursue for the administration?

Mr. BARR. It is a part of our package. Now, we cannot unilaterally impose the modified English rule. That will require either legislation or rule changes in the Federal rules and we are going through the process of deeding what is needed and we intend to pursue it.

We intend to pursue all the recommendations in the civil justice reform package, and would like, frankly, to work with this committee on those ideas and any other ideas to promote civil justice reform. I think steps were taken, I believe in 1990 in a civil justice reform package, and I think we can still do more and I think that

everyone is interested in doing more. And we have told the ABA and the other elements of the organized bar that we would like to work with them and talk with them about our proposals and any other proposals.

Senator GRASSLEY. I know that you have more than a passing concern in the application of American legal authority to events occurring abroad, extraterritorial jurisdiction. I am concerned that American companies are competing on American soil with foreign enterprises that are not subject to strict limitations on monopolies, cartels, and collusion that our antitrust laws impose.

I think it is important that the Antitrust Division actively investigate and prosecute anticompetitive activities by businesses which sell their goods in the United States. American businesses should not have to compete with companies that benefit from an artificially induced absence of competition in their home countries.

Do you have any misgivings about strict application of American antitrust principles to foreign countries trading in the United States?

Mr. BARR. I think we have to move very carefully in applying our antitrust laws extraterritorially because they can have adverse consequences for competition, for American consumers, for our economy, where a foreign government, for example, retaliates or takes action against the United States, if we unilaterally apply our antitrust laws to foreign activity.

However, I think in the foreign area we are moving on two fronts. First, we are trying through international cooperation to increase antitrust enforcement abroad and to reach a better understanding and a common understanding of competition strategies with European and other countries and reaching antitrust agreements, cooperative agreements with trading partners to enhance antitrust enforcement overseas.

So part of it is cooperation and I think Jim Rill has been exercising a lot of leadership in that area, and recently in Japan in the structural impediments initiative we were able, I think, to increase Japanese antitrust enforcement.

But we also are taking a look at enforcement of American antitrust law overseas and we are reexamining that whole issue. The Export Control Act of 1982 provided, I believe, that antitrust laws should apply to foreign practices that substantially and foreseeably affect foreign commerce of the United States. I think the Antitrust Division in 1988 in its international antitrust guidelines tried to back away from that statutory requirement by imposing a limitation on enforcement which says that we would only enforce where there is direct and substantial harm to U.S. consumers.

We are reexamining that 1988 limitation. And are looking at potentially applying antitrust laws solely where there is impact on U.S. companies, U.S. exporters, without having to show an impact on U.S. consumers. So that would be an attempt to return to the 1982 standard in the statute and change the 1988 antitrust guidelines.

That is still under review, but the policy that is being contemplated would include unilateral enforcement in proper cases, subject to considerations of jurisdiction, whether it is an appropriate case under principles of comity. But if the proper case were to

arise, if we do go down this road, then we would be bringing unilateral antitrust actions against foreigners who are violating U.S. antitrust laws.

Senator GRASSLEY. So in summation, do you see it as a useful tool then to see that American businesses have a level playing field in international competition as, you know, it seems to me to accomplish the same goal of some of the suggestions of Vice President Quayle's Commission on Competitiveness is trying to accomplish in other areas?

Mr. BARR. Antitrust is a very valuable tool both domestically—it is an essential tool domestically and internationally. And we have to move cautiously internationally because there can be adverse consequences to unilateral action but we are exploring ratcheting up the use of antitrust laws internationally.

Senator GRASSLEY. I guess my only admonition is, do not fall into the State Department mentality about being so cautious that we continue to lose the battles that we have over a long period of time. I would expect that in the area of the enforcement of the American law that you would have more leeway than a lot of other Cabinet positions have, when dealing in foreign matters. And so that the State Department is not, in the end, making decisions for the Justice Department like we see them making in the Commerce Department with the Special Trade Representative, with the Agriculture Department, to a great extent, on foreign tax policy, with the Treasury Department.

And I just ask you to use every tool you can and be as aggressive as you can in that area.

Let me move on, please.

I would like to bring up an issue that would be no surprise—my 15 minutes is up.

The CHAIRMAN. Go ahead and ask it, if you have another question.

Is it a whole line of questioning, Senator?

Senator GRASSLEY. It would be. But let me ask one question just to get something out now and then it will not be a line of questioning, it will just be one question, but it is another area.

And that is, you know I have had an interest in the American Bar Association's role in judicial nominations.

They have been involved, as I understand, since 1950, to assist the investigation, assessment, qualification of Presidential nominees for the judicial branch. No other private group is allowed to play this quasi-governmental role in the constitutional process as far as I know. And, of course, the Senate has the duty to investigate and assess nominees and does the job quite adequately without the help of the ABA as far as I am concerned.

I would like to have you state for the record how you see the ABA's role in the President's nomination of and the Senate's advice and consent of candidates for the judiciary.

Mr. BARR. Well, the ABA plays a unique role, as you pointed out. It is actually brought into the nomination process itself; that is, before the President exercises his responsibility of making the nomination. He is bringing in a private group to help him assess a candidate prenomination, and that is a unique role. It is to be distinguished from making recommendations about potential nomi-

nees, and it is to be distinguished from rating—that is r-a-t-i-n-g—candidates after they are nominated.

I think that if the ABA is using agreed-to standards and is not imposing its own tests or criteria that haven't been agreed to ahead of time and understood by all concerned, including this committee, that that can be a constructive and a useful role. Somebody has to do that job.

As you know, we have had concerns about it in the past, and we have been watching it very carefully. I would say over the past year we have pretty much ironed out our differences with the ABA, although it is a role that is subject to abuse. And we will be continuing to watch it very carefully, but at this point I am not inclined to make a change.

Senator GRASSLEY. I understand you are reconsidering your decision to not allow State and municipal bar associations to be involved in the nomination process. If the ABA process has some problems—and I think they do—why would you consider compounding the problem by the involvement of other bar associations in the confirmation process?

Mr. BARR. Well, as I say, I have no problem with other bar associations making recommendations. I have no problem with other bar associations evaluating people who are nominated. I would have concerns about bringing other bar associations into the prenomination process that is now being served by the ABA, playing the role that is now being served by the ABA, because——

Senator GRASSLEY. Well, then, my information was probably wrong. You aren't reconsidering it.

Mr. BARR. Well, one of the main objections of other bar associations, at least the objection that they have been most vocal about to me, is the affirmative steps that the Department has taken to discourage people from talking to them. They feel that we have blocked their access to people by telling candidates not to talk to other bar associations, and I am taking a look at that issue.

But I would be concerned about letting other bar associations into the process as a sanctioned group like the ABA, because I don't know what the standards are that they are applying and I am not sure where you would draw the line. The ABA is an umbrella group, and I am not sure where you would draw the line. The process could become extremely burdensome on candidates, and there are enough disincentives right now on public service and serving in the judiciary to open people up to that kind of process. So I am concerned about letting them into it the same way the ABA is, but I am looking at the issue of whether or not the Justice Department should be in the business of telling candidates not to talk to those kinds of associations.

Senator GRASSLEY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Thank you, Senator DeConcini, for your patience?

Senator DECONCINI. Thank you, Mr. Chairman.

Mr. Barr, you and I have talked about the need for cooperation among law enforcement agencies. As a matter of fact, I just read a speech you made in October, October 2, where one of the things you said, "If there is one thing we have learned about fighting crime, it is that success depends on the essential ingredient—coop-

eration." And, of course, cooperation among law enforcement agencies is what you were referring to. I couldn't agree more.

We spoke about this when we visited, and I gave you some examples such as the problem between the FBI and the BATF over gang investigations; Secret Service and FBI over financial institutional fraud investigations, which last year you weighed in or were involved in finding some compromise—I will talk about that in a minute—the Customs Service and DEA over title XXI, 881 authority; between Treasury and the Justice Department on sharing proceeds.

What specific plans do you have, Mr. Barr, to eliminate or reduce this, and are you willing to weigh in yourself to see that these are minimized and some changes made within all law enforcement so there is more cooperation involving each other?

Mr. BARR. I couldn't agree more that it is critical that we strengthen cooperation. It is an essential element of any kind of success on the crime front. Strengthen it first among Federal agencies. That is our own family. And that not only means interagency—that is, Justice and Treasury—but it also means within the Justice Department. We have agencies in the Justice Department who sometimes are getting into turf fights. And I have weighed in to the specific issues that you have just raised, which are mainly Treasury agencies interfacing with Justice agencies.

My general approach is we can't let turf fights distract us. We have to get on and get the job done in the most effective and efficient way. As I mentioned to you when we were talking about this earlier, my principal concerns are let us do it in a coordinated way. Let us not just go off on our own and, you know——

Senator DECONCINI. Well, Mr. Barr, are you prepared to continue that policy, to weigh in and, you know, if it so happens that Border Patrol has more merit, are you willing to tell the FBI or Treasury or Customs or whoever is working there that, hey, this isn't the way to operate? That is what I am really looking for.

Mr. BARR. Absolutely. As you know, I weighed in on the BATF issue, and we worked out a compromise there.

Senator DECONCINI. Yes, you did.

Mr. BARR. I think there was some misunderstanding on the FBI/Secret Service issue, but I think that when the smoke cleared, I think you appreciated——

Senator DECONCINI. I will ask you a question on that, but on the BATF on the gang issue, Thornburgh wrote a letter opposing that legislation. That doesn't help much when we are trying to get some compromise, and as a result, we really dropped the whole thing although the FBI and your designee came up there and did try to work something out.

But let me give you an example. The Secret Service has specific authority under section 528 to undertake financial institutional fraud investigations through coordination with the Attorney General. And since November 1990, the Service has investigated 245 cases of financial institutional fraud through 57 offices throughout the country, and thus far the Service has arrested 98 individuals, 48 of which have resulted in felony convictions. And recent Department of Justice reports on financial institutional fraud indicates that the FBI is receiving about 3,000 of these criminal referrals a

month. But for the month of July 1991, the latest month for which we have statistics, the FBI only opened 608 cases. This leads me to believe that cases are not being worked due to lack of resources, and here you have the Secret Service willing to provide some of the resources.

That being the case, can you tell me why since August 1991 the Secret Service has not received any FIF referrals from the FBI?

Mr. BARR. No, I can't. I would have to look at those figures and find out more about the situation.

Senator DECONCINI. Would you, please?

Mr. BARR. However, I will say that when I have traveled around, I have talked directly to the Secret Service people out in the field, and I think I mentioned this to you before. I have asked, "Any problems here?" And the word I am getting from the field is that there are no problems. Maybe I am hitting the wrong jurisdictions.

The other thing is I have made it clear to the Secret Service head, John Simpson—who I guess is now leaving so I will make it clear to his successor. I made it clear to Pete Nunez, the Assistant Secretary of the Treasury for Enforcement, that if there is any foot dragging or turf fighting in this program, that they are to take it directly to me so I can deal with it. And as far as I am aware, no one has come and complained.

Senator DECONCINI. I don't think they have, and I get my information from some of the ones who are here at headquarters and some of the ones out in the field. And maybe there is a reluctance to bring it there, maybe partly because you weren't confirmed or they didn't know how to do it.

Do you know, does the Department of Justice have a policy instructing its agents not to conduct any FIF cases of under $100,000?

Mr. BARR. I don't know the answer to that. I do know what I said at a meeting, sort of the Magna Carta meeting of this concordat between the FBI and the Secret Service, which was that it should be a regional decision as to how best to use the resources. If in a particular jurisdiction the best way of using the resources is smaller cases, fine, if that is what the people in the field think is the best way to use it. In other cases, it could be joint investigations or big cases.

I have heard conflicting things from some people in the Secret Service. Some have told me they want a lot of smaller cases to build up the expertise. Some have complained that they are getting the little cases and they are not getting into the big cases. So——

Senator DECONCINI. I would just hope that you would look at that after your confirmation.

Mr. BARR. Sure.

Senator DECONCINI. Let me go to the forfeiture fund. Do you support the equitable sharing of proceeds from seized criminal assets with State and local law enforcement? I suspect you do.

Mr. BARR. Absolutely.

Senator DECONCINI. And how about equitable sharing among Federal law enforcement bureaus?

Mr. BARR. Yes. In fact, we have expanded sharing to other agencies.

Senator DECONCINI. Including outside the Justice Department?

Mr. BARR. Yes. We have brought the Postal Service in and believe in it strongly.

Senator DECONCINI. Do you have any estimates from the DOJ forfeiture fund how much they received annually based on law enforcement investigations outside the Department of Justice?

Mr. BARR. How much agencies outside——

Senator DECONCINI. Yes. How much outside have they contributed to the DOJ forfeiture fund?

Mr. BARR. We have those statistics, but I wouldn't know them off the top of my head.

Senator DECONCINI. Well, I am not sure either, but it seems to be safe to say that the IRS alone contributed $100 million plus to it last year. And just for the record, they only received $3 million in sharing of these funds. Our understanding is that roughly there is $500 million in that fund, after the so-called expenses of administering that fund is taken out. And the Justice Department had instituted a policy of 15 percent for your handling it and 20 percent of it if the seizure is challenged in court.

My concern and question is do you think a better job can be done to get more of this money back to some of these agencies that are outside Justice as well as those that are inside Justice, perhaps Border Patrol and others, of this fund?

Mr. BARR. Yes. The theory originally—and there is some merit to it—is that we shouldn't have a speed trap mentality in the Federal Government, so that agencies should not feel that just because they seized the money they are going to get the money. And the theory was that you should have a central allocator and a set of priorities that dole out the money without regard to who brought it in.

I don't think it has been—if, in fact, there has been inequity, it is not Justice Department parochialism. It is the setting of the priorities and just the way the money was spent to meet those priorities.

However, I have made it clear to Treasury—and I will say it here now—that I would fully support a regime whereby Treasury agencies get a pro rata share of what they bring into the fund, provided that the Secretary of Treasury dole out that money among Treasury agencies so that they don't have a speed trap mentality over there, so that if IRS gets the money they feel that, you know, they get——

Senator DECONCINI. I think that is a good solution, and I hope that you would encourage that, because I think somebody has to make that decision, and I don't trouble too much—maybe I do—with the Secretary of Treasury because of his noninvolvement in law enforcement, but somebody has got to make the judgment, and I see your point. And I am encouraged that you say that there ought to be more sharing outside the Department, as well as within. I don't know how much of a portion the Border Patrol gets, but I suspect it is very little. And I would like to see that changed.

Am I correct in stating that you would have no objections to the establishment of a separate fund for the Treasury Department, that in your understanding the objections probably will come from OMB?

Mr. BARR. I am not sure about what OMB's position is. I have told Treasury that I would support a separate fund for Treasury if all the rules were the same, so we don't have the unseemly specta-

cle of Government agents running around bidding for local business.

Senator DECONCINI. Fair enough.

Mr. BARR. But in the course of those discussions, it was my impression—and, believe me, these discussions have taken circuitous turns and twists over the months. But it is my impression that Treasury now may feel that they are a lot better off leaving the management to the Department of Justice and just getting the pro rata payout. I don't know if that is still their position, but for a period of time it was their position.

Senator DECONCINI. Yes, I have talked to them a number of times, and their position seems to go back and forth on that. I think what they would really like is a greater sharing of those assets. I think if that seemed to be clearly your policy, if confirmed, maybe you will have some time to designate somebody and tell them what you want to see happen there, and I think that would be a great improvement.

Let me ask you a couple of questions, Mr. Barr, about the Border Patrol. I have discussed this with you and expressed my frustration about the lack of attention given this critical law enforcement agency. The Justice Department has maintained that Congress has failed to provide the funding necessary to meet authorized staffing levels, and that is just not true. The fact is that funding for Border Patrol has increased 63 percent since fiscal year 1986 due in large part to the efforts of Senator Hollings and Senator Rudman, and the Congress who has backed this. And the administration has not been there making these requests.

However, despite these increases, GAO found that staffing for the Border Patrol along the southwest border had declined by 9 percent since 1986, and the attrition rate is 34 percent, the worst, I think, in all law enforcement, even below the Bureau of Prisons.

Now, as Attorney General, do you intend to make the Border Patrol a greater priority within the Department, and can you give me your commitment now to see that this important law enforcement agency is given the funds and attention required to carry out its mission?

Mr. BARR. Absolutely. The Border Patrol is a superb professional organization, and I intend to support it fully. I more generally have tried to support the INS, which I think has suffered from underinvestment for a long period of time, and the Border Patrol is paying the price for that.

Senator DECONCINI. Indeed, they are. Indeed, they are, and GAO certainly substantiates just what you said.

Mr. BARR. I have increased the budget priority of the INS as a whole and the Border Patrol specifically, and I will be seeking more resources for Border Patrol personnel and for investment in their equipment, which, as you know, is old and——

Senator DECONCINI. If you succeed in getting that, through OMB or not through OMB, but out of Congress, will you do what you can—and you can have a lot to do with it—to see that the INS doesn't sop up for their legitimate needs some of the appropriations that are set aside for the Border Patrol?

Mr. BARR. Absolutely. I would have to approve any reprogramming of the funds.

Senator DECONCINI. Have you ever given some thought that Border Patrol maybe should not be in Treasury? I realize that is turf and sensitive——

Mr. BARR. Is that a Freudian slip when you say "Treasury"? [Laughter.]

Senator DECONCINI. I mean in Justice, about it being in Treasury or a separate agency, or at least a separate agency within Treasury where it would not be the problem that you and I have discussed and that you now indicate that you are willing to get into? I don't care where Border Patrol is. What I do care about is that they get the short shake of the budget and have for literally 15 years, since I have been here, except 1 year when President Reagan's budget did ask for a substantial increase in the Border Patrol. To me that is a disgrace.

My question is not a Freudian slip; it is a direct one. Do you think that Border Patrol—have you ever given it thought that it might be either an independent agency within the Justice Department rather than under INS or some place else?

Mr. BARR. I have given passing thought to a proposal that I have seen floated occasionally, but I believe that we can improve INS and the Border Patrol within the Department of Justice.

INS is a very difficult agency to manage. It has difficult assignments, sometimes conflicting responsibilities, and, in an era of tight resources, it is sometimes not getting the resources it should have.

I have spent a lot of time, as Deputy Attorney General, on INS, to help the head of INS upgrade the agency, improve the management, and start rebuilding the infrastructure, and I would intend to continue to do that, if I am confirmed to be Attorney General.

There is an adage that INS has broken more careers at the Department of Justice than any other agency, but I am willing to take the risk and, if at the end of my time, it is a better agency, which I think it will be——

Senator DECONCINI. I can tell you, Mr. Barr, you would be the first Attorney General in the almost 15 years I have been here that would really pay attention to INS. I have asked these questions of every Attorney General, and every Attorney General has more or less said yes, more should be done, and I must say every Attorney General has not done it, and your immediate predecessor made strong commitments here. That is water under the bridge and there is no use going back over it. I could read you statements that Mr. Thornburgh said, and there was little or no improvement. As a matter of fact, there has been a denigration towards the Border Patrol.

I am pleased with your attitude, I must say, and it helps me feel very comfortable in my support for your nomination, that you have a grasp of the INS-Border Patrol problem within your own Department of Justice, and it is just as big or bigger than GAO or Senator DeConcini or somebody else may have told you, and you have that understanding and I appreciate it.

Detention centers that are under INS need some attention. Basically, the potential human rights violation within those centers and how you are going to deal with the expanded number of immigrants that are going in there.

Mr. BARR. Can I say something, Senator?

Senator DECONCINI. Yes, please.

Mr. BARR. The GAO report we did get. That came down and that made a lot of recommendations and pointed out a lot of problems in the INS, and we didn't even wait for it to be finalized before trying to attack those problems. You may know that I asked Norm Carlson, the former head of the Bureau of Prisons, to come and do his own survey of INS, to help identify areas where we can improve it. I know you are talking partly about resources, but there are also management issues there.

Senator DECONCINI. I suspect there are great management needs changes there.

Mr. BARR. You know, Norman Carlson, I think, deserves the respect he has in the community.

Senator DECONCINI. He does from this Senator.

Mr. BARR. The bottom line of his report was that the INS people out in the field are doing a terrific job, they are dedicated, they work hard and, by and large, they are getting their job done, and I think they deserve the support of the leadership of the Department of Justice and they deserve the support of Congress. I know if it weren't for your appropriations, through your fund, then the Border Patrol would be in worse shape than it is now.

Senator DECONCINI. Has Mr. Carlson finished that report and recommendations? Is that what it is to you?

Mr. BARR. Yes.

Senator DECONCINI. Is that available for us to review?

Mr. BARR. It wasn't public, but I would be glad to——

Senator DECONCINI. I would just like to see it. I have the greatest respect for that man and what he did at the Bureau of Prisons and other things, and maybe there is something that we can learn from that report, as well.

Mr. BARR. Yes.

Senator DECONCINI. Thank you, Mr. Barr.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

Mr. Barr, if there is another vacancy on the U.S. Supreme Court while you are Attorney General——

The CHAIRMAN. Don't say that, please. [Laughter.]

Senator LEAHY. I just want to make sure the chairman is listening.

If there is another one and you are Attorney General, the President will look to you to make recommendations to him of whoever the best men and women available for that position. Have you thought in your own mind what kind of criteria you would use, if you were asked to make that sort of recommendation to the President?

Mr. BARR. Not in great depth, but generally the traditional criteria of competence and integrity and judicial philosophy that is compatible with the President's.

Senator LEAHY. You would want to be able to give the President somebody who is the best person possible, I would assume, though, and carry out your obligations?

Mr. BARR. Generally, yes, but——

Senator LEAHY. Generally, yes. You wouldn't give the worst person to the President, obviously. I am not trying to play games. I am just trying to think what goes through your mind in making recommendations. Perhaps we can step back a little bit and take it step by step. You would want to give the best names possible, is that correct, within the criteria you have just mentioned?

Mr. BARR. Certainly.

Senator LEAHY. And how do you determine in your own mind—I am not asking for names, but how do you determine in your own mind, looking at a person you are going to walk over to the Oval Office with and say to the President of the United States, in my estimation, this is the best man or woman for the job, or here are the best three people for the job, or whatever? What are you looking at?

Mr. BARR. As I said, I would look first for integrity, I would look for professional competence, I think being a very strong substantive lawyer, with strong analytical ability would be paramount for me, and a judicial philosophy that is compatible with the President's philosophy.

Senator LEAHY. The President said that Justice Thomas was the best person for that job. Was he?

Mr. BARR. I believe he was.

Senator LEAHY. The New York Times reported that White House Counsel Boyden Gray and then Assistant Attorney General Michael Luttig and others had watched Prof. Anita Hill testify, realized her testimony was pretty powerful and compelling, and decided that, after watching it—and I quote now the Times—"their only course was to pick apart Professor Hill's case, even if this involved a direct attack on her character."

The Times further reported that the President approved of the effort, the White House assembled a team of lawyers from the White House, from the Justice Department and the EEOC to amass evidence against her, along with help from Republican Judiciary Committee staffers. Is the New York Times' account accurate?

Mr. BARR. I did not have personal involvement in support for the logistical——

Senator LEAHY. That wasn't my question.

Mr. BARR. I am going to answer your question—in the logistical support for the Thomas confirmation, but I am confident that the Office of Legal Counsel behaved professionally and properly throughout.

I am told, and it is my understanding, that OLC lawyers did not go out proactively to investigate Anita Hill. They didn't conduct their own investigation. My understanding is that OLC lawyers performed the traditional role of lawyers, which was to take the information that was coming in, transcripts, statements, and so forth, and to analyze them. But I am not aware of an instance where an OLC lawyer affirmatively went out to collect information.

I am told that there was one instance where a lawyer from the Office of Legislative Affairs one night was asked by a Senator to make a call to try to track down someone who was purported to have some pertinent information and, at the request of the Senator, placed a call, but never got through to that individual. But

that is the only instance I am aware of where a Department of Justice lawyer can be characterized as going out and affirmatively seeking information against Anita Hill.

Senator LEAHY. To reiterate my question, is the New York Times article accurate?

Mr. BARR. I thought I answered the question, which——

Senator LEAHY. When they said that, "Their only course"—speaking now of Assistant Attorney General and White House counsel—"Their only course was to pick apart Professor Hill's case, even if this involved a direct attack on her character." Was that decision made?

Senator THURMOND. Senator, could I interrupt you for just a minute? Did you say they said the Republican staff, do they mean the committee staff? Is that what you said?

Senator LEAHY. I am not referring to the committee staff now. I would just like to get this question answered.

Senator THURMOND. Well, I want to know if you said the committee staff. If so, I want to tell you it is untrue.

Senator LEAHY. You know, we have a——

Senator THURMOND. This committee staff did no such thing.

Senator LEAHY. We sometimes have a problem up here, that when I ask questions of administration appointees, that the answers come from the other side.

Senator THURMOND. I understood you to say the Judiciary Committee staff, and I am only interested in that part.

Senator LEAHY. The record will speak for itself. I think Mr. Barr, though, is a nominee who is capable of answering for himself and doesn't need somebody else to answer for him. So, if I could go back to the basic question, the New York Times said, reports that White House Counsel Boyden Gray and Assistant Attorney General and others decided during the day that Prof. Anita Hill's testimony, "Their only course was to pick apart Professor Hill's case, even if this involved a direct attack on her character." Is that inaccurate?

Mr. BARR. I don't know.

Senator LEAHY. OK. Do you know whether, as the Times further reported, that President Bush approved of the effort and that the White House assembled a team of lawyers from the White House, the Justice Department, and the EEOC to amass evidence against Professor Hill?

Mr. BARR. And that I think I answered. My understanding of OLC's role was to provide support through the process. That support has been given past candidates, it was going on for months before Anita Hill made her allegations, and it continued through those last few days where the committee's deliberations were focusing on Anita Hill's allegations, but the support was the support that OLC traditionally gives, as lawyers. It was not to go out and amass evidence against Anita Hill. As I say, I am not aware of OLC going out and conducting an investigation to attack the character of Anita Hill.

Senator LEAHY. And during that evidence——

Mr. BARR. But I don't think there was anything wrong with putting her allegations to the test in the advice-and-consent process.

Senator LEAHY. And was that done also with the help of Republican Judiciary Committee staffers?

Mr. BARR. With the who?

Senator LEAHY. With the help of Republican Judiciary Committee staffers, staffers from the minority side of the Judiciary Committee.

Mr. BARR. Was what done?

Senator LEAHY. Putting together the same evidence you just talked about, the same facts you just referred to against Professor Hill or regarding Professor Hill.

Mr. BARR. I don't know what Republican committee staff did. I am told that OLC lawyers did not conduct their own investigation into Anita Hill.

Senator LEAHY. Did the White House and the Justice Department orchestrate tactics with members of this committee to go after Professor Hill? Did they coordinate, did the White House and Justice Department coordinate tactics with members of this committee regarding Professor Hill, if you know?

Mr. BARR. Well, I assume that departmental lawyers were coordinating with the committee and the committee staff, as they do through every nomination. I don't know what you are referring to by "tactics."

Senator LEAHY. Well, it was obvious during the hearings that every effort was made to go against Professor Hill's character, and we had, according to testimony that came out, that the FBI was following whatever she said and then reporting whether there were any differences in what they had heard from earlier interviews, something they did not do with others they had interviewed——

Mr. BARR. Excuse me, Senator. I am told that they did monitor Clarence Thomas' testimony, and I am also told that they made both sets of agents available to the committee.

Senator LEAHY. Well, without going into FBI reports, my recollection is somewhat divergent from yours, and I would be glad to discuss it further with you out of the committee room.

In a case like that, what is the Justice Department's role? Is it simply let's find out what is the truth, or is it a case of saying the nominee is the President's nominee, the President is our client and we will act, in effect, as an adversary, in an adversary role to protect our client?

Mr. BARR. Well, I think if allegations are made against an administration nominee, the first issue is to try to get to the bottom of the allegations. I think the administration has the obligation to make a judgment for itself about the veracity of allegations about a nominee, and if the administration concludes that those allegations are unjustified, I think it is perfectly appropriate for the administration to defend its nominee through the advice-and-consent process.

Senator LEAHY. How involved is the Justice Department in getting into that? Do they start involving themselves with tactics, with so-called spin control, PR?

Mr. BARR. As a prudential matter, I would not have liked to see the Department go out and conduct an investigation to impeach a person making allegations, and, as I said, I don't think that happened.

Senator LEAHY. Do you think that following the investigation, once the hearing began, did the Justice Department involve itself in efforts to impeach that witness?

Mr. BARR. Well, as I said, the Office of Legal Counsel performed the normal work of lawyers. That is what the Office of Legal Counsel are. They are lawyers in the administration, they provide support for administration nominees, and I think it was appropriate for them to review the record, to review the transcripts, to review the allegations that were being made and the evidence that was coming in and point out areas that required exploration or potential discrepancies. It is part of the truth-finding process, and I assume that is what this committee was trying to do.

Senator LEAHY. And did they spend a great deal of time on that in this case?

Mr. BARR. Of course. There was a very—well, they spent a great deal of time, because my recollection is it was a fairly concentrated effort, it was over a matter of a few days, and there were a lot of groups that were performing that function against Clarence Thomas. I don't think it is realistic for the committee to feel that an individual can come up here and not have the support of the administration that is nominating him.

Senator LEAHY. I will go back into that. Rather than use up all my time here, we had news reports which recently revealed that Ed Rogers, who had been a political aide to John Sununu, entered into a $600,000 contract with Sheik Kamo Adams only weeks after Mr. Rogers left the White House. The sheik, as I understand, is a former head of Saudi Arabian intelligence, but the more important thing is he was supposed to have had a major role in the financial corruption that seems to be coming out of BCCI.

Now, as I understand it, the Justice Department—as I go down through these facts, if I am misstating it, from your view, please interrupt me, because I want to make sure we both look at the same set of facts—the Justice Department claims that Mr. Rogers played no role in arranging a meeting between the Department of Justice and Sheik Kamo in Cairo, Egypt, where Federal prosecutors and Kamo discussed Kamo's role in the BCCI affair. But the meeting did occur soon after Kamo retained Rogers, and Rogers was in Cairo when the meeting occurred. Does that so far purport what you understand are the facts?

Mr. BARR. That is my understanding. That is what I have been told.

Senator LEAHY. Now, let me just act within that context, what issues are raised, if you have a high-level White House aide who goes to representing a target of a major Justice Department investigation just week after leaving the administration? Are there any special concerns?

Mr. BARR. There are two principal legal issues. One is under the law, under the Ethics in Government Act, did Ed Rogers participate in BCCI matters while he was in the Government. If he did participate in BCCI matters and then left the Government and took on representation in that area, that would implicate the Ethics in Government Act.

The second issue would be whether he had any contacts relating to BCCI with his employing agency, the White House, and if he did

before the expiration of the cooling off period, and this second concern would arise, regardless of what his exposure to BCCI was previously. It is a separate issue.

If, before the cooling-off period, he had contacts with the White House regarding a particular matter like that, then that would also implicate the Ethics in Government Act.

Senator LEAHY. By cooling off, you mean the revolving door——

Mr. BARR. The 1-year absolute bar on contacts.

Senator LEAHY. My time is up. I will come back to this. I know on the other side they go over time fairly often, but I don't want to go over that. Senator Thurmond may be concerned about this line of questioning, and I will hold it for another time.

The CHAIRMAN. Well, we have all gone over the time and you are entitled to go over the time because we all have, Democrats, as well as Republicans. But Senator Thurmond would like to ask a few questions.

Senator THURMOND. Since your time was up, I wanted to ask some questions.

Senator LEAHY. Thank you, and I am perfectly willing to wait until my next two or three rounds.

Senator THURMOND. Mr. Barr, I think one of the most serious domestic problems today is violent crime. There is a murder committed every 22 minutes, a rape every 5 minutes, a robbery every 49 seconds; what do you believe can be done to address the crime problem today in this country?

Mr. BARR. Well, as I said when I was stating my priorities, I think the violent crime problem, while primarily a State and local matter, there are areas where the Federal Government can make a difference. One, obviously is in prosecuting the drug war because there is a relationship between drugs and violence.

A second would be in attacking criminal organizations, that is gangs, street gangs, many of which are involved in drug trafficking themselves, and I think there are some initiatives we can take in that area. We are focusing OCDTF, the Organized Crime Drug Enforcement Task Forces more on those kinds of organizations like the Cripps and the Bloods. You may have read about the FBI antigang squad that was established in Washington, and I think you will be seeing more of that nationwide.

A third area would be attacking, trying to contribute federally to the problem of career criminals, armed career criminals. We have strong firearm statutes under Federal law and we are seeking some additional statutes and we realize that a very high proportion of violent crime is committed by a very small group, a cohort of hardened criminals, career criminals and we can use the firearm laws to apprehend these individuals and put them away in Federal prison for long periods of time. And I think we have launched some, we have had some success with the program we have launched recently, the trigger-lock program where we have now charged, since April, over 2,200 armed career felons under that statute.

I think also we have to focus on strengthening the criminal justice system itself. We have done a lot in the Federal System during the 1980's, and the Federal System is shaping up as a fairly good system, although we think we have some unfinished business, that

is what the President's crime bill is all about, so that there are some things that we can still do at the Federal level. But I think States should start following suit. Some are and have adopted a lot of the reforms but a lot of have lagged behind and I think the Federal Government can play a leadership role in encouraging States to adopt the kinds of strong laws, like pretrial detention laws and other laws that help reduce violent crime.

And then I think the Federal Government can also promote innovation by investment through the Bureau of Justice Assistance and NIJ in pilot programs and in research.

Senator THURMOND. Thank you, very much.

I authored some legislation on child pornography and obscenity. And I just wondered what, in your opinion, steps could be taken to eliminate this insidious material?

Mr. BARR. Well, as you know, the Department has created a section in the Criminal Division that is dedicated to this mission. We have added some personnel to that section and they are involved nationwide in prosecuting child pornography and other forms of obscenity. And I think that program should continue to be supported.

Senator THURMOND. I want to commend you again for your great work on the Federal prison facility riot that occurred, and to what extent was this uprising attributable to overcrowding in the Federal prison system, and what would you suggest, as Attorney General, to address the problem?

Mr. BARR. I do not think it was attributable to generic overcrowding in the prison system. It may have been contributed to, to some extent, by a backup that occurred on the deportation of the Mariel Cubans. That is the group that we are talking about. And there were delays caused by Cuba's decision not to accept a particular flight of Mariel Cubans which backed up the system and meant that there were more Cubans in that particular facility than there should have been at that time.

And that may have contributed, to some extent, to it, maybe to the magnitude of the crisis, but I am not sure that the crisis would not have occurred anyway.

Senator THURMOND. I have been a long-time proponent to join multistate and local organized crime and narcotics projects, known as Regional Information Sharing Systems, better known as RISS. I believe they perform a valuable service to both State and local law enforcement agencies.

There is a Regional Organized Crime Information Center, or ROCIC. I think it is doing a fine job. Do you have any plans to expand that or to improve it in any way?

Mr. BARR. I believe RISS is essential, those are the Regional Information Sharing Systems; there are six regional systems that have been set up in the United States to help local law enforcement to coordinate their activity interstate.

As you know, the administration, having set up this system, would now like to see the States pay for them, their continued operation, and has sought to basically zero out the Federal contribution to the program, but that has not found favor on Capitol Hill. So last year the Federal Government continued investing in it. I think it was about close to $15 million.

But regardless of who should pay for it, it is an important system, and it must continue. Clearly it is in no danger of being zeroed out right now.

Senator THURMOND. I am glad to hear you say that. There is a vote on now, Mr. Chairman, I guess we will have to go vote.

Now, Mr. Barr, I want to congratulate you on your record so far. You have done a fine job; we are proud of you and I hope we can confirm you forthwith and I think you will make one of the finest Attorney Generals this country has had.

Mr. BARR. Thank you, Senator.

The CHAIRMAN. Thank you.

Mr. Barr, as you can see, we are about roughly half-way through the process in the first round. As I indicated to you, it is likely that there will be a number of questions on BCCI, many of them, most of them, if not all of them generic. There is, if not a dissatisfaction, a disquiet in some quarters of the Senate with the depth and speed and thoroughness of the Justice Department's activities thus far.

So I expect you will be asked more questions on that tomorrow. I would also like to, tomorrow, as I indicated to you, talk to you about the separation of powers issues. But I appreciate your taking the time today.

We will reconvene tomorrow at 10 o'clock and hopefully move along swiftly.

All right?

Mr. BARR. Thank you, Senator.

The CHAIRMAN. Recessed until tomorrow at 10.

[Whereupon, at 5:33 p.m., the committee recessed, to reconvene at 10 a.m., on Wednesday, November 13, 1991.]

TO TAKE THIS OPPORTUNITY TO COMMEND YOU FOR YOUR LEADERSHIP AND THANK YOU ON BEHALF OF THE PEOPLE OF MY HOME STATE.

MR. BARR, I LOOK FORWARD TO YOUR TESTIMONY BEFORE THIS COMMITTEE. THROUGH THIS QUESTION AND ANSWER PROCESS YOU WILL BE ABLE TO HELP THE SENATE DETERMINE IF YOU ARE THE RIGHT PERSON TO BE OUR NEXT ATTORNEY GENERAL. I AM PARTICULARLY INTERESTED IN HEARING YOUR VIEWS ON THE CONTINUING BATTLE AGAINST THE USE AND IMPORTATION OF ILLEGAL DRUGS. SPECIFICALLY, THE ROLE YOU FEEL THE ATTORNEY GENERAL SHOULD PLAY IN IMPLEMENTING A WORKABLE STRATEGY THAT WILL FURTHER ADDRESS THIS LONGSTANDING PROBLEM.

I CONGRATULATE YOU ON YOUR NOMINATION AND WISH YOU WELL THROUGHOUT THE CONFIRMATION PROCEEDINGS.

THANK YOU MR. CHAIRMAN.

Senator HEFLIN. Senator Brown, I believe it is your turn.

Senator BROWN. Thank you, Mr. Chairman.

One of the many responsibilities that you will have as Attorney General will be assisting the President in reviewing potential candidates for the Federal courts. The administration, through a variety of spokesmen, have had a number of initiatives and suggestions on ways to deal with the burgeoning litigation explosion in the United States.

One area that occurs to me that perhaps will be directly under your purview is reviewing the attitudes potential members of the judiciary would have with regard to frivolous litigation. Obviously, current rules provide redress in this area, including the awarding of attorney fees for frivolous cases.

My question is, Do you think potential judges' attitudes about awarding attorney fees is an area that is worthy of inquiry in examining or evaluating candidates for the bench?

Mr. BARR. I would not focus solely on the awarding of attorney fees, but I myself, when I have been involved in evaluating candidates, have looked at their record and talked to them about their views on a whole range of topics relating to case management, the handling of frivolous lawsuits, the extent to which they are following the guidance of the Supreme Court in the *Cellotex* case; that is, the willingness of the judge to grant summary judgment where there really are no genuine material issues in dispute. So, I think that whole area of managing the civil docket and being willing to follow the leadership of the Supreme Court in dealing with frivolous lawsuits is a legitimate area of inquiry and should become more so.

Senator BROWN. One of the things that you commented on yesterday in response to Senator Metzenbaum's question was the whole area surrounding BCCI. The transcript indicates you said, I think, it is unfair generally to be conducting an autopsy on a live body; this is an investigation in midstream. That is a fair comment, in my view. Obviously, to try and evaluate the performance on the BCCI area, when you are in the process of conducting an investigation and moving forward on it, is somewhat premature in some aspects.

But I want to draw your attention to at least an aspect of it that concerned me, with the hope of obtaining your reaction to it.

One of the things that we were advised or have been advised is that the CIA gained knowledge of BCCI's efforts to take over First American in the early 1980's. My recollection is that somewhere in 1985 that they passed that information on to Treasury. It is also my impression that Treasury did not share that—or if they did we do not have knowledge of that—until 1988.

In effect, Treasury, specifically the head of intelligence at Treasury, was advised of BCCI's illegal attempt or illegal efforts to take over First American, and simply did not pass that information on to the Fed.

I appreciate you have not had a chance to investigate this yet; that you do not know that them gaining the knowledge in 1985 is a fact; or that they failed to pass it on until 1988 is a fact. But I am hoping that you would advise us whether or not that apparent fail-

ure to pass on vital information concerns you and whether or not you think it is worthy of investigation?

Mr. BARR. As I said yesterday, I do want a postmortem done on how these investigations were handled by the Government in the past, because I do not want these mistakes repeated if we can avoid them. So I do want them reviewed.

The word "investigate" sounds a little as if we are suspicious of some kind of wrongdoing and while we will track down all allegations of wrongdoing, I am not prepared at this time to ascribe wrongdoing on the part of anybody in the CIA or the Treasury Department in that episode. But I do want the whole matter looked at.

Now, another issue to be assessed involves the CIA information: When it got to the Fed, and the extent to which the Fed would have been further along than it ultimately was if it had received it sooner.

Senator BROWN. Well, I can appreciate the reluctance to reach a conclusion before you have had either an inquiry, a review, or an investigation. But what bothered me in hearing Mr. Kerr, of the CIA, talk about this, was that the initial response we got from them was that they did not really recognize that they had done anything wrong by not telling the Fed. And were not really sure that they would pinpoint who made the mistake and that there was even a mistake made.

I guess my question is, If indeed it turns out that someone at the Treasury was advised in 1985 that BCCI was illegally taking over First American, or illegally had taken over First American, that official did, in fact, fail to advise the Fed of that, is that something you think, given those facts, you think deserves a followup, or further action by Justice?

Mr. BARR. Well, first, Treasury also, I am sure, is looking into the who-struck-John of the last several years on this case. But generally, I think we have to remember that we have fostered in the CIA an Agency that is supposed to stay out of domestic law enforcement issues. And it normally does not think of itself as part of the law enforcement community and the process of using intelligence information, foreign intelligence information for law enforcement purposes, and the interface of intelligence activities and law enforcement activities is a very complicated matter, as I am sure you know.

And it has only been in the last few years that we have been working out procedures and thinking our way through how to use intelligence better for law enforcement. A lot of this has come about in the drug war, for example.

I think—and I am just speaking now of——

The CHAIRMAN. Excuse me, when you say the last few years, you mean the last decade, do you not?

Mr. BARR. The last decade, but I think we have made a lot more progress just in the last few years.

The CHAIRMAN. What do you mean by few years?

Before this, because it is relevant to this BCCI investigation.

Mr. BARR. Well, you know, there has been progress, but I think the most significant progress has been in the last 3 or 4 years.

The CHAIRMAN. Good, that is all I wanted to know, just what you meant by few.

Mr. BARR. The—I sort of lost my train of thought there. What I think is remarkable or maybe should not be remarkable is the CIA did get this information and did make an effort to pass it on to the people they thought were the responsible officials.

And it did not get to the Fed and my understanding is that it did not get to the Department of Justice, and we have been setting up structures and interagency groups to try to encourage more exchange of intelligence information among agencies.

So I think we can learn from this but the fact of the matter is that the CIA got some information and passed it along to the people they thought should get it.

Senator BROWN. The concern I had was the CIA's not recognizing that maybe the Fed had an interest in this and I think they thought that through again and the reflection indicated they would agree the Fed is the agency that should be on the list to get this kind of information.

The other concern I have, and it is one that I hope you will look at, is whether or not someone at Treasury was given this information and sat on it for 3 years which appears to be the case, and at least it is my hope that that is an area that you will be reviewing, whatever the appropriate term is, to see if, indeed, someone covered up or someone simply failed to act.

In that regard though, I would be interested in your thoughts regarding what kind of standard is appropriate in determining what evidence should be passed on. When Justice does an investigation or Treasury, what kind of guideline should be appropriate? In the current case, Justice has been working on the BCCI affair for some time. At what point does Justice share their information with the Fed?

Mr. BARR. At the point where we believe we can share without jeopardizing some other investigation, criminal investigation, that we are carrying out and where we have reason to believe that the information may assist the Fed in their regulatory responsibilities.

Senator BROWN. So, for example, the effort that you mentioned yesterday, the undercover operation, where you have an undercover operation in that evidence disseminating information about that could jeopardize a criminal prosecution, it would——

Mr. BARR. And the safety of the undercover agent.

Senator BROWN. I would assume that simply ownership of BCCI might fall into a different category, would it not, where that is primarily regulatory in nature?

Mr. BARR. I am not sure what you are saying, what you are asking.

Senator BROWN. Well, in thinking about the problem I could well appreciate why it would be inappropriate to pass on information about the money laundering and so on because you are in the process of conducting an investigation, or agencies of the Federal Government were in the process of conducting an undercover investigation, and sharing that information could well jeopardize the lives and the safety of people involved.

On the other hand it struck me that information that had come to the Treasury—not Justice, or at least not Justice in 1985, as

near as I can tell—that indicated BCCI was, indeed, buying First American, it struck me that that kind of information probably should fall under a different standard. That holding that information back would not necessarily relate to any investigation, but would relate to strictly the regulatory function performed by the Fed.

Mr. BARR. So you are talking about whether Customs and IRS agents working on the money laundering should have passed along information sooner to the Fed?

Senator BROWN. Well, frankly I—others may come to different conclusions—but my own impression is that that is a good example of an area where it is appropriate not to blow the cover of those agents, where it is clearly a case you need to protect the individuals involved and the investigation involved.

Now, that is simply my impression and you have others that deal much more closely with it than I. On the other hand, the information that BCCI was buying out or had bought out First American, at least strikes me as an area where the information, indeed, ought to be passed on, that it is primarily regulatory in its impact.

Mr. BARR. Well, I think that the—and again, I can only give you my preliminary impression because I have not, as I said, immersed myself in all the details of this yet—but my general impression is that the Fed, at this time, was aware of corporate rumor, gossip, suggestions, you name it, that BCCI was involved in the takeover of First American.

I do not want to put myself in the heads of the Customs and the IRS agents who were involved in the money-laundering case and the ones who were responsible for maintaining the integrity of the undercover investigation that was going on, but I really wonder whether they could have passed along any meaningful information to the Fed, prior to the takedown of the undercover investigation.

Because part of the use of information would involve who the source is and what they said and, you know, where they fit into the landscape, and why is this somehow evidentiary, why does this carry any evidentiary weight? And I do not think those attendant facts could have been transmitted to the Fed, or, you know, I question whether they could have been transmitted to the Fed without compromising the integrity of the undercover investigation.

And I think soon after the undercover investigation was taken down, the information was transmitted, not in as formal a way as it probably should have been, but it was transmitted.

Senator BROWN. My own view, what is important here is not did someone act properly or improperly at the time? Clearly these sort of things took place on someone else's watch. But I do think that what is relevant, perhaps to this committee's inquiry, is the fact that you will be conducting at least a review of what went on here. I think that is important because it indicates a willingness on your part to look at problems and try and correct them

And as I understand your testimony, you are willing to take an independent look at what has happened here.

Mr. BARR. That is correct.

Senator BROWN. Thank you.

The CHAIRMAN. Before I yield to my friend from Illinois. The line of questioning that Senator Brown just pursued with regard to the

CIA passing on information to Treasury, do you know, and can you state with certainty that the Justice Department was unaware of the very information that the CIA passed on to Treasury? Can you affirm for us that the Justice Department knew nothing about that information in a contemporaneous timeframe?

Mr. BARR. I am told that at this stage we have no information that these CIA reports got to the Department of Justice. Right now, I do not think that we got the reports, the CIA reports. But I do not think that we have completed our review.

The CHAIRMAN. To the best of your information, the CIA reports did not find their way to the Justice Department?

Mr. BARR. That is the best information I have. Until recently.

The CHAIRMAN. Yes, I meant contemporaneously, back then.

Mr. BARR. Yes, right.

The CHAIRMAN. All right, thank you very much.

Senator SIMON. Thank you, Mr. Chairman.

You are getting down toward the end here, Mr. Barr.

First, perhaps a softball——

The CHAIRMAN. If I could interrupt, what we will do is we will break after the questioning of the Senator from Illinois and we will break for an hour for lunch.

Senator SIMON. First a softball question, but I think an important one. I was pleased with your response yesterday that politics has no place in law enforcement. The Legal Times has this paragraph in an article, "Sources familiar with Barr suggest that he shares Thornburgh's belief that the Attorney General owes allegiance to the President, and to the people, second."

They leave out the Constitution and the law in that equation. Just your reaction to that statement here.

Mr. BARR. I think the Attorney General owes allegiance to the Constitution and the law above all else.

Senator SIMON. And in the process he or she will serve the people and the President well?

Mr. BARR. That is correct.

Senator SIMON. All right.

Shifting to another area, you answered Senator Metzenbaum on *Roe* v. *Wade* that you differ with that decision and while I disagree with your viewpoint, I respect the candor of that viewpoint. The *Rust* v. *Sullivan* decision involves much more than the abortion question. It involves the freedom of speech question.

I held a hearing on the *Rust* v. *Sullivan* question and Leslie Southwick of the Justice Department testified. In his prepared statement he said this: "In a sense when the government funds a certain view, the government, itself, is speaking. It, therefore, may constitutionally determine what may be said."

Now, that is a fairly sweeping statement. And I do not know whether that was cleared with anyone or not. But let me take that statement, do you believe that, for example, when the Federal Government funds libraries through the Libraries Services and Construction Act, that we have any right to say to a library, since we fund the library in part, what books a library may have?

Mr. BARR. I do not think so. I think that would be an unconstitutional condition where restrictions were being placed on the recipi-

ent of funds limiting their constitutional rights solely as a condition of receiving the funds.

Senator SIMON. And how do you distinguish between that and the *Rust* v. *Sullivan* decision?

Mr. BARR. I think in some cases the distinction may be clear. In others I think these issues can get fairly knotty and the lines can be difficult, as in many areas of the law.

I think it is important to recognize that the Department in the *Rust* case was serving as the Nation's litigator. We were defending regulations promulgated by another agency. We defend statutes, we defend regulations put out by others.

Now, the justification for the regulations was that these were not restrictions on the recipient, they were restrictions on the use of funds. And a lot of clear cases, hypothetical cases that would fall on one side of the line, where you would say, look, if the Government is going to spend money on a particular activity, you can ensure that the money that goes into that activity is restricted to that activity.

If people engaged in it want to do something else, they can do something else on their own time, but as long as they are spending the taxpayers' money they are going to do what the Government is spending the money to accomplish.

And you can go through a series of hypotheticals and some would fall more clearly on one side of the line. Others, then, start looking more like restrictions on the recipient rather than restrictions on the funds.

And that is where a question arises as to unconstitutional conditions. The Department of Justice argued that this was a restriction on funds, and that the recipients could engage in abortion-related activity provided it was not part of the same family planning program that the Government was funding.

That was a regulation which interpreted a statute passed by Congress and that statute used language that was frankly ambiguous, I think. I think any fair-minded person would have to say that the language was ambiguous in the statute.

The statute said none of the funds shall be used in a program that supports abortion as a method of family planning. That is a restriction. Congress can always change the law if it disagrees with the way an agency has interpreted or wants to clarify exactly how they would want the program run.

But, anyway, the Department of Justice's role in *Rust* was to defend this regulation. I think it made a sound argument that this was not a restriction on the recipient, but a restriction on the use of funds. And that position ultimately prevailed, and Congress, I believe, is in the process of readdressing the issue and working its will on it.

Senator SIMON. Do you automatically defend any regulation—if you think HHS or Department of Education has adopted a regulation that you believe is unconstitutional, would you automatically defend that even if you believe it is unconstitutional?

Mr. BARR. No. In fact, I have told agencies I wouldn't defend regulations, not only if they raise constitutional questions, but if I don't think the regulation is consistent with Congress' intent. If the statute requires a certain action and if a regulation in my view

is not consistent with the statute, then there is a legal problem with it.

Here I think that the arguments supporting the regulations were very strong because they ultimately prevailed in the Supreme Court. So I don't think it was a frivolous argument.

Senator SIMON. When you talk about restrictions of engaging in activities, it seems to me that engaging in activities and expressing opinions are—you know, there is a clear division there, and while you say the Court decided, and it did in a 5-to-4 decision, my own feeling is that we have stepped over the bounds in terms of restriction of speech. And I would hope the Justice Department under your leadership would be sensitive in that area.

Mr. BARR. I believe strongly—I am very concerned about the Government using the power of the purse and money as leverage to get people to surrender their constitutional rights. So I am always concerned about unconstitutional conditions being imposed. And I will be sensitive to that issue.

Senator SIMON. I thank you.

Let me shift over to the Inslaw matter that I am sure you are familia: with. Inslaw is a small, Washington-based software company. In a Federal bankruptcy court suit, Judge George Bason found the Justice Department used—and I am quoting him—"trickery, fraud, and deceit" to take Inslaw's property and awarded $7 million in damages to Inslaw. The court of appeals set aside that ruling on the technical basis that bankruptcy courts have no power, without making any comment on the specifics of the case.

One of your predecessors, Elliot Richardson, wrote in the New York Times. Let me just read here a couple of paragraphs.

> The new claims alleged that Earl Brian, California health secretary under Governor Ronald Reagan and a friend of Attorney General Edwin Meese 3d, was linked to a scheme to take Inslaw's stolen software and use it to gain the inside track on a $250 million contract to automate Justice Department litigation divisions.
>
> (In Mr. Meese's confirmation fight, it was revealed that Ursula Meese, his wife, had borrowed money to buy stock in Biotech Capital Corporation, of which Dr. Brian was the controlling shareholder. Biotech controlled Hadron, Inc., a computer company that aggressively tried to buy Inslaw.)
>
> Evidence to support the more serious accusations came from 30 people, including Justice Department sources. I long ago gave the names of most of the 30 to Mr. Meese's successor as Attorney General, Dick Thornburgh. But the Department contacted only one of them, a New York judge.
>
> Meanwhile, the Department has resisted congressional investigations. The Senate Permanent Subcommittee on Investigations staff reported that its inquiry into Inslaw's charges had been "hampered by the Department's lack of cooperation" and that it had found employees "who desired to speak to the subcommittee, but who chose not to out of fear for their jobs."
>
> The Department also hindered the interrogation of employees and resisted requests for documents by the House Judiciary Committee and its chairman, Representative Jack Brooks. Under subpoena, Mr. Thornburgh produced many files but the Department said that a volume containing key documents was missing.
>
> In letters to Mr. Thornburgh in 1988 and 1989, I argued for the appointment of an independent counsel. * * * it became obvious that Mr. Thornburgh did not intend to reply or act * * *

The first question in this connection is: Do you feel that an appointment of a special prosecutor is necessary or is desirable?

Mr. BARR. I don't think appointment of an independent prosecutor at this point is either necessary or desirable. I think that the heart of this, it appears to me, is a contract claim against the United States, against the Department of Justice as an agency.

And my general view is that claims should be litigated in court, and if people have evidence, they should go to court and prove their case.

But this case has gone on for many years with layer after layer of allegations, some of them strange, and there have been a series of investigations, not only internal in the Department of Justice but, as you mentioned, Hill oversight investigations. And I am not aware of any impropriety ever having been established.

However, I am interested, as this case goes on and on, to get to the bottom of it and bring it to some kind of resolution. And so I have asked a distinguished retired Federal judge, Nicholas Bua, who I think you probably know——

Senator SIMON. I know him. He is a distinguished judge.

Mr. BARR. An exceptional reputation. He was appointed by President Carter to the district court. He served on the district court for 14 years, and he was a State court judge for 12 years before that, a tremendous reputation in the Northern District of Illinois. I have asked him to serve as a special counsel to me and do a complete top-to-bottom review of the case and let me know what he thinks, if anything, should be done further by the Attorney General.

Senator SIMON. I applaud that appointment and I assume he will have your full cooperation in terms of missing documents or anything else.

Mr. BARR. He has carte blanche, full cooperation, full support. He can select any support he wants.

Senator SIMON. I appreciate that. I would like to put the Elliot Richardson column in the record, if I could, Mr. Chairman.

The CHAIRMAN. Without objection.

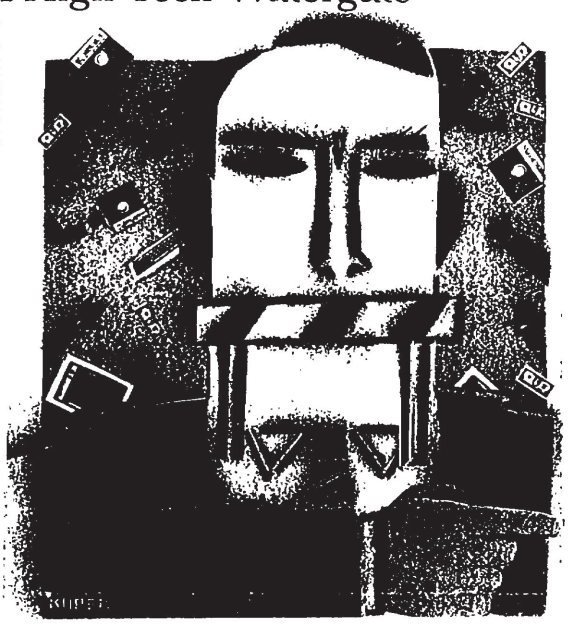
[The article follows:]

The New York Times

THE NEW YORK TIMES **OP-ED** MONDAY, OCTOBER 21, 1991 A17

A High-Tech Watergate

By Elliot L. Richardson



WASHINGTON

As a former Federal prosecutor, Massachusetts attorney general and U.S. Attorney General, I don't have to be told that the appointment of a special prosecutor is justified only in exceptional circumstances. Why, then, do I believe it should be done in the case of Inslaw Inc., a small Washington based software company? Let me explain.

Inslaw's principal asset is a highly efficient computer program that keeps track of large numbers of legal cases. In 1982, the company contracted with the Justice Department to install this system, called Promis, in U.S. Attorneys' offices. A year later, however, the department began to raise sham disputes about Inslaw's costs and performance and then started to withhold payments. The company was forced into bankruptcy after it had installed the system in 19 U.S. Attorneys' offices. Meanwhile, the Justice Department copied the software and put it in other offices.

As one of Inslaw's lawyers, I advised its owners, William and Nancy Hamilton, to sue the department in Federal bankruptcy court. In September 1987, the judge, George Bason, found that the Justice Department used "trickery, fraud and deceit" to take Inslaw's property. He awarded Inslaw more than $7 million in damages for the stolen copies of Promis. Soon thereafter, a panel headed by a former department official recommended that Judge Bason not be reappointed. He was replaced by a Justice Department lawyer in a ruling in the Inslaw case.

An intermediate court later affirmed Judge Bason's opinion. Though the U.S. Court of Appeals set that ruling aside in May of this year on the ground that bankruptcy courts have no power to try a case like Inslaw's, it did not disturb the conclusion that "the Government acted willfully and fraudulently to obtain property that it was not entitled to under the contract." Inslaw, which reorganized under Chapter 11, has asked the Supreme Court to review the Court of Appeals decision.

After the first court's judgment, a number of present and former Justice Department employees gave the Hamiltons new information. Until then, the Hamiltons thought their problems were the result of a vendetta by a department official, C. Madison Brewer, whom Mr. Hamilton had dismissed from Inslaw several years before. How else to explain why a simple contract dispute turned into a vicious campaign to ruin a small company and take its prize possession?

The new claims alleged that Earl Brian, California health secretary under Gov. Ronald Reagan and a friend of Attorney General Edwin Meese 3d, was linked to a scheme to take Inslaw's stolen software and use it to gain the inside track on a $250 million contract to automate Justice Department litigation divisions.

(In Mr. Meese's confirmation fight, it was revealed that Ursula Meese, his wife, had borrowed money to buy stock in Biotech Capital Corporation, of which Dr. Brian was the controlling shareholder. Biotech controlled Hadron Inc., a computer company that aggressively tried to buy Inslaw.)

Evidence to support the more serious accusations came from 30 people, including Justice Department sources I long ago gave the names of most of the 30 to Mr. Meese's successor as Attorney General, Dick Thornburgh. But the department contacted only one of them, a New York judge.

Meanwhile, the department has resisted Congressional investigations. The Senate Permanent Subcommittee on Investigations staff reported that its inquiry into Inslaw's charges had been "hampered by the department's lack of cooperation" and that it had found employees "who desired to speak to the subcommittee, but who chose not to out of fear for their jobs."

The department also hindered the interrogation of employees and resisted requests for documents by the House Judiciary Committee and its chairman, Representative Jack Brooks. Under subpoena, Mr. Thornburgh produced many "[illegible]" but the department said that a volume containing key documents was missing.

In letters to Mr. Thornburgh in 1988 and 1989, I argued for the appointment of an independent counsel. When it became obvious that Mr. Thornburgh did not intend to reply or act, Inslaw went to court to order him to act. A year ago, the U.S. District Court ruled, incorrectly I think, that a prosecutor's decision not to investigate, no matter how indefensible, cannot be corrected by any court.

In May 1988, Ronald LeGrand, chief investigator for the Senate Judiciary Committee, told the Hamiltons, and confirmed to their lawyers, that he had a trusted Justice Department source who, as Mr. LeGrand quoted him, said that the Inslaw case was "a lot dirtier for the Department of Justice than Watergate had been, both in its breadth and its depth." Mr. LeGrand now says he and his friend were only discussing rumors.

Then, in 1990, the Hamiltons received a phone call from Michael Riconosciuto, an out-of-fiction character believed by many knowledgeable sources to have C.I.A. connections. Mr. Riconosciuto claimed that the Justice Department stole the Promis software as part of a payoff to Dr. Brian for helping to get some Iranian leaders to collude in the so-called October surprise, the alleged plot by the Reagan campaign in 1980 to conspire with Iranian agents to hold up release of the American Embassy hostages until after the election. Mr. Riconosciuto is now in jail in Tacoma, Wash., awaiting trial on drug charges, which he claims are trumped up.

> The Attorney General should name a special prosecutor in the Inslaw case.

Since that first Riconosciuto phone call, he and other informants from the world of covert operations have talked to the Hamiltons, the Judiciary Committee staff, several reporters and Inslaw's lawyers, including me. These informants, in addition to confirming and supplementing Mr. Riconosciuto's statements, claim that scores of foreign governments now have Promis. Dr. Brian, these informants say, was given the chance to sell the software as a reward for his services in the October surprise. Dr. Brian denies all of this.

The reported sales allegedly had two aims. One was to generate revenue for covert operations not authorized by Congress. The second was to supply foreign intelligence agencies with a software system that would make it easier for U.S. eavesdroppers to read intercepted signals.

These informants are not what a lawyer might consider ideal witnesses, but the picture that emerges from the individual statements is remarkably detailed and consistent, all the more so because these people are not close associates of one another. It seems unlikely that so complex a story could have been made up, memorized all at once and closely coordinated.

It is plausible, moreover, that preventing revelations about the theft and secret sale of Inslaw's property to foreign intelligence agencies was the reason for Mr. Thornburgh's otherwise inexplicable reluctance to order a thorough investigation.

Although prepared not to believe a lot they told him, Danny Casolaro, a freelance journalist, got many leads from the same informants. The circumstances of his death in August in a Martinsburg, W.Va., hotel room increase the importance of finding out how much of what they have said to him and others is true. Mr. Casolaro told friends that he had evidence linking Inslaw, the Iran-contra affair and the October surprise, and was going to West Virginia to meet a source to receive the final piece of proof.

He was found dead with his wrists and arms slashed 12 times. The Martinsburg police ruled it a suicide, and allowed his body to be embalmed before his family was notified of his death. His briefcase was missing. I believe he was murdered, but even if that is not true it is a possibility, it is a possibility with such sinister implications as to demand a serious effort to discover the truth.

This is not the first occasion I have had to think about the need for an independent investigator. I had been a member of the Nixon Administration from the beginning, when I was nominated as Attorney General in 1973. Public confidence in the integrity of the Watergate investigation could best be insured, I thought, by entrusting it to someone who had no such prior connection to the White House. In the Inslaw case, the charges against the Justice Department make the same course even more imperative.

When the Watergate special prosecutor began his inquiry, indictments of the President's involvement were not as strong as those that now point to a widespread conspiracy implicating lesser Government officials in the theft of Inslaw's technology.

The newly designated Attorney General, William P. Barr, has assured me that he will address my concerns regarding the Inslaw case. That is a welcome departure. But the question of whether the department should appoint a special prosecutor is not one it alone should decide. Views from others in the executive branch, as well as from Congress and the public, should also be heard.

Elliot L. Richardson, a Washington lawyer, was Attorney General in the Nixon Administration.

Senator SIMON. I see I am just about out of time here. Let me ask just one final question before that light turns red.

In the process of advice and consent, we have followed the consent side of it. We have not followed the advice side of it very much. You will be working with the President if there is another Supreme Court vacancy. My strong feeling is—and it is one that is shared by Senator Simpson, for example—that the President would be wise to get together with a few key members of the Senate and say these are among the people I am considering, to get some input so that we can avoid the kind of acrimony that we have seen in the latest nomination.

Do you have any reactions?

Mr. BARR. That is something I would want to discuss with the President. I really don't have any reaction to it.

Senator SIMON. But when the Constitution says advice and consent with the Senate, what do you think the Constitution means when it says advice?

Mr. BARR. That is interesting. I think the words of the Constitution actually say the President "shall nominate, and * * * with the advice and consent of the Senate, shall appoint * * *" So I think the phrase "advice and consent" relates to the ultimate appointment. So I don't think there is a constitutional obligation on the part of the President to consult before nomination. I don't say there is an obligation to. I think historically Presidents have from time to time consulted on various appointments. In fact, on district court and circuit court appointments, there is a very formalized practice of consultation. But that is really a matter of comity and prudential judgment, not a matter of constitutional requirement. That is my view on the law.

Senator SIMON. Let me just say I differ slightly with that view, but whether the Constitution mandates it or not, it seems to me it would be prudent and wise to follow a course that is less confrontational, so that everyone wins in the process.

Thank you very much.

Mr. BARR. Thank you, Senator.

The CHAIRMAN. Thank you.

As I indicated earlier, we will now break until 1:30.

[Whereupon, at 12:20 p.m., the committee recessed, to reconvene at 1:30 p.m., the same day.]

AFTERNOON SESSION

Senator LEAHY [presiding]. Mr. Barr, you can see the situation you have gotten yourself into when this has degenerated to the point where I am now the acting chairman. But welcome back to you and to your family. Again, as each one of us has done, we compliment your family for both their interest and their patience. They should understand that this is, after all, of historic importance, not just for the Barr family but obviously for the country.

Senator Kohl, I understand that you are next, and I yield to you.

Senator KOHL. Thank you very much, Senator Leahy.

Mr. Barr, first of all, I would like to commend you for your statement yesterday to Senator Kennedy, on the record, that you support the Brady bill and Senator DeConcini's assault weapons legis-

lation. We have all worked hard and long on that crime bill with these particular provisions, and we appreciate the fact that you support it. And for those like myself and Senator Metzenbaum and others, we are very much indebted to you for your support, which we know has some conditions attached to it but, nevertheless, is very sincere and perhaps even unequivocal.

I also appreciate the fact that you are as frank as you are and have been on your opinions with respect to *Roe* v. *Wade*. Even though some of us disagree, the fact that you are forthcoming and honest and state your position right up front is very impressive.

I would like to ask you about your role as the Attorney General in relationship to the President and the people of this country. On the one hand, the President is in some respects your client; on the other hand, the people of this country believe, Mr. Barr, that you are first and foremost their advocate. I think if we made a poll, conducted a poll in this country and asked the people of this country what they think about the Attorney General in a generic way, I think they think about him as, No. 1, first and foremost, their advocate when it comes to justice in this country.

But, of course, we know that you also have another responsibility and another loyalty, and that is to the President. How do you balance these two roles?

Mr. BARR. I think the starting point for understanding the Attorney General's role is the fact that the law stands above everything. Everybody is subordinate to the law, and we are a government of laws. Then the Attorney General plays several roles with respect to the law.

First, I think the Attorney General serves as a legal counselor to the President and the Cabinet in explaining the law. In fact, the first Judiciary Act of 1789 specifically assigned to the Attorney General responsibility for providing legal advice to the President and the Cabinet. So I think one role the Attorney General plays is providing legal advice, explaining what the law is. In that role, I think the Attorney General has an obligation, like any lawyer has an obligation, to tell it like it is, to provide accurate legal advice, good-faith effort to describe what the law is.

The second role is different. That is administering the law, enforcing the law, and that is what I think is the most fragile, sensitive, and important role of the Attorney General, because that is the area where the Attorney General's allegiance has to be to the law above all. And that is not to say that the first role doesn't require allegiance to the law, but it is in the second role where the tension is sometimes said to exist between politics and doing justice.

As I said in my opening statement, that is the area where the Attorney General must keep the administration of justice away from and above politics.

The third role is a policy role. There are many questions that arise, the results of which are not dictated by the law. For example, how much resources should we seek or put into this program or that program, or do we need new laws, or should we amend laws? These are policy issues. And that is where the Attorney General serves as a policy adviser within the executive branch and, like any other Cabinet Secretary, offers his advice. It may be ac-

cepted; it may be rejected. But in that capacity as a policy adviser, ultimately he takes the direction of the President and carries out the program. So those are different roles the Attorney General plays.

Senator KOHL. What do you do in cases where the interests of the President and the people are divergent, as, for example, in Watergate? What is the role of the Attorney General in a situation of that sort?

Mr. BARR. I think the role of the Attorney General is to adhere to the law. That is where the allegiance of all Government officials should lie, and the Attorney General should not do anything or countenance anything that is a violation of law.

Senator KOHL. Who was the Attorney General during Watergate?

Mr. BARR. I think there were a series during the whole incident.

Senator LEAHY. It depended on what time of day it was at one point.

Senator KOHL. Wasn't Mitchell there at one time, or was he gone already?

Mr. BARR. He was there.

Senator KOHL. How would you assess the conduct of the Attorneys General during Watergate?

Mr. BARR. I would just rather stand on the general statement that an Attorney General's obligation is to uphold the law.

Senator KOHL. Yes, but if you can give us some indication as to how, in a practical way as opposed to a theoretical way, you assess the Attorneys General during Watergate. Did the Attorneys General conduct themselves in ways that you would say fit your general concept of how it works, or would you say that they did not?

Mr. BARR. Well, if an Attorney General, any Attorney General in Watergate countenanced violations of the law or was involved in violations of the law himself, then that was a betrayal of his public trust.

Senator KOHL. Are you qualified to make a judgment with respect to whether or not you think they were in violation of the laws?

Mr. BARR. Whatever the record shows. If people have been found to have violated the law, then that means they betrayed their public trust.

Senator KOHL. OK. Griffin Bell once said as Attorney General, and I quote, "If you bow to Congress, you can do just as much damage as if you are not independent of the White House." Do you have a comment on that?

Mr. BARR. I am sorry. Could you repeat that?

Senator KOHL. "If you bow too much to Congress, you can do just as much damage as if you are not independent of the White House."

Mr. BARR. I believe that is true. I think any political interference defeats the process and taints the administration of justice.

Senator KOHL. OK. I would like to talk about juvenile justice for just a minute. As you know, I am chairman of the Juvenile Justice Subcommittee. For a decade, the Attorney General's office has not been supportive of the juvenile justice effort made by Congress. I say that by way of the funding. The funding recommendation from

the administration, which I presume comes as a result of a recommendation from the Attorney General's office, has been zero, except for this past year. In this past year, the funding recommendation from the administration was $7.5 million. Congress has not accepted that. As you know, our current funding level is about $75 million, still quite inadequate.

What we try, and do, in juvenile justice is to get at what you have been talking about as so important in our society, the root causes of the problems we have in our society, and in this case with respect to our young people. Certainly we are not perfect, but what we are trying to do is find out how we can, at the governmental level, do something to improve the conditions, the quality of life, the conduct, and hopefully the future of young kids who get into trouble; we strive to find out why and what can we do to improve it.

Now, I presume that that effort has your—I won't even say qualified support; I will say your total support.

Mr. BARR. Let me give you a pragmatic answer. I support the program. The administration policy, however, is that it should not be funded by the Federal Government, but that the State should now pick up these kinds of expenses. That is obviously not a policy that has made much headway on Capitol Hill. As you say, I think we have been seeking to zero it out for over a decade.

That creates a big problem for me in the real world because, if we send up a budget that has zero after juvenile justice, that forces Congress to take the money from my account elsewhere and fund that program. Therefore, I don't like sending budgets up to the Hill that zero out programs in the Department of Justice's budget with no hope of persuading Congress that it is better not to fund the program. That takes money right out of the pocket of other Department of Justice components. So that is my answer.

Senator KOHL. Well, now, just hold on. What you are saying is that the only reason, or the major reason that you might support a funding level of whatever for juvenile justice is because if you don't it is going to be taken out of your hide in another part of your budget?

Mr. BARR. No. What I am saying is I believe in these programs. These are programs, just like the RISS Program that Senator Thurmond mentioned. These are important things.

Senator KOHL. Yes.

Mr. BARR. And I think we have to be doing more in the area of education and working with youth as a nation. The question is: Which particular program is going to be paid for by which particular government agency, or what part of government? Is it a State program or a Federal program at this point?

It has been the administration's policy for over a decade that these costs should now be borne by the States. Now, States are in a budgetary difficulty right now, as we all know. It is unlikely that they will pick up the expenses, and it is very unlikely that Congress is going to zero out that program. I want the program to continue. In my view, the best way to fund the program right now is in the Federal budget, because otherwise—that is the only way the program is going to continue, and it will be funded in the Federal budget.

Senator KOHL. Could I presume from what you have said, and from what I heard you say when we had our discussion prior to today in my office, that you would support some modest increase in funding for juvenile justice, in lieu of your convictions with respect to the needs in this country and what it is we can do. Right now the funding level is $75 million, which you know is not a number of any significance or consequence for 50 States.

Would you support some modest level of increase in funding for juvenile justice in addition to working with me next year on reauthorization of juvenile justice?

Mr. BARR. I would support—it is hard to project what the budget circumstances will be, but I would support modest increases in programs in this area. Whether they would be under juvenile justice or part of the weed-and-seed program or juvenile justice money that is dedicated to the weed-and-seed program, we could work out. But the underlying concept is one that I would support.

Senator KOHL. That is good. Just let me say I look forward to our working together. And I mean this sincerely, first, because I think you do feel this way and, second, because you are a very good person to work with. I have made that judgment, and I believe it is true. I look forward to having a constructive relationship with you, and I believe we will in this area in which I have responsibility—juvenile justice. I am very pleased about that.

Mr. BARR. Thank you, Senator.

Senator KOHL. I thank you.

I would just like to make a request from you regarding weed-and-seed. Earlier in response to Senator Specter, you spoke about the need to combat criminal behavior at its roots as opposed to only treating its symptoms. During our meeting a few weeks ago, you spoke of a comprehensive approach, which I appreciate, involving law enforcement, government, social services, and community activities.

Since our conversation, my staff has been in contact with your staff at the Justice Department and with respect to the weed-and-seed program. There is a strong desire and a need for a weed-and-seed effort in Madison, WI, which is a very fine city, a city in which the drug problem and the crimes associated with drugs have not yet gotten a firm foothold. Not at all is there a firm foothold with respect to these problems.

But the community leaders and the citizens are concerned about rising crime, and they are excited about weed-and-seed. They feel it can have a very constructive impact on the community. Might I hope that the people in the Justice Department would be willing at least to discuss the possibility of a weed-and-seed effort in Madison, WI?

Mr. BARR. Absolutely.

Senator KOHL. Thank you.

Mr. BARR. We would be pleased to do that.

Senator KOHL. Thank you very much.

Senator Leahy, thank you.

Senator LEAHY. When you started talking about weed-and-seed, I thought maybe we were back at the Agriculture Committee.

Senator KOHL. No, that is rag-and-tag. [Laughter.]

Senator LEAHY. The Senator from Wisconsin has been a forceful advocate on the program and has a great deal of support on this committee.

I understand Senator Grassley is next.

Senator GRASSLEY. Thank you.

Senator LEAHY. I yield to the Senator from Iowa.

Senator GRASSLEY. Thank you very much.

The Justice Department has been very active in the fight against terrorism. I think it plays a very important role, so I have some questions along that line. There have been press reports that the administration may grant visas to PLO officials in the coming months. As I understand the Immigration Act of 1990, PLO officials are specifically defined to be excludable from the United States.

Will you ensure that the Immigration Act is followed and that those who engage in terrorist activities will not be admitted to the United States?

Mr. BARR. I will commit to enforcing the law. I am not familiar with the terms of that law. I will enforce it.

Senator GRASSLEY. OK. That is a satisfactory answer.

We are coming up to the third anniversary of the Pan Am 103 tragedy, and yet we have had no indictments to this date. Could you tell us something about the progress of the investigation and what the prospects for an indictment are?

Mr. BARR. I am very satisfied with the progress of the investigation, but other than that, I am afraid I can't say anything at this time.

Senator GRASSLEY. And that is because of the sensitivity of the issue and your desire not to go public with information? Is that what you are saying?

Mr. BARR. Right. It is an open criminal investigation, and I cannot discuss the timing of any possible indictment.

Senator GRASSLEY. OK. Well, since I don't want to——

Mr. BARR. But I think that——

Senator GRASSLEY. I don't want to jeopardize it. If you have a feeling that you are making progress in that area, I will be——

Mr. BARR. We are making great progress, and I think the American people will ultimately be very proud of the job done by the Federal agencies involved.

Senator GRASSLEY. On another point, this is something that I picked up in our newspapers that I want to discuss with you. It is a visit to the United States of two Syrian generals. They were hosted by the United States Information Agency and taken on tours of facilities of the Drug Enforcement Agency at a time when I sense that Syria is known as one of the biggest traffickers of heroin in the country.

Could you tell me why these individuals were given such red-carpet treatment, and why are we showing off our antidrug efforts to people who are known to be pushing heroin and other drug trafficking?

Mr. BARR. I would have to look into that, Senator. I don't know the answer.

Senator GRASSLEY. You would submit an answer in writing?

Mr. BARR. Certainly.

[Responses to all the written questions of committee members can be found in the appendix.]

Senator GRASSLEY. One other point, and here, admittedly, I have even less information but I hope that you can shed some light on it. I have learned that a well-known Syrian terrorist, who goes by the name of Yosef Heider, visited the United States. He had been implicated as a payoff person in a number of terrorist activities. I can't get confirmation on whether or not he was in the United States in late September. The FBI seems to deny that Heider was in the United States.

Do you know if Heider was allowed entry into the United States?

Mr. BARR. I don't know the answer to that.

Senator GRASSLEY. Well, OK. Let me ask you this, then: Let's suppose Heider was in the United States. Could you comment on what policy could possibly be served by letting an individual like Heider into the United States, following my description of him—I think it is an accurate description—unless, of course, if when he were in the country, while he was here he was arrested and prosecuted for crimes that he has committed?

Mr. BARR. Senator, I don't want to speculate about a circumstance I don't know about. I would want to know the facts. I would want to know more about the person and more about the circumstances of his being here, if he was here.

Senator GRASSLEY. Well, I would appreciate responses in writing.

Mr. BARR. OK.

Senator GRASSLEY. Let me return to a subject we discussed yesterday, and that is the role of bar associations in the nomination and confirmation of Federal judges. You made clear to my satisfaction your intentions to monitor the objectivity of the ABA in rating judicial nominees, and I thank you for that. But my questioning today is because I am unclear of what you consider appropriate for State and municipal bar associations.

You indicated, if I understood you correctly, that you are considering allowing judicial nominees to cooperate with local bar associations that wish to comment on the nominee's qualifications. Now, I am concerned that such action would give local bar associations too formal a role in the judicial selection process. Private groups may have a right to give their opinion on a nominee, but the role as active participants in the governmental decisionmaking should be limited. We have expressed the limited but acceptable role of the ABA. Now we are talking about whether that acceptable role ought to be extended to other organizations.

Multiple investigations of nominees would be duplicative and I think very time consuming. Such formal involvement by local bar associations would create an undue burden on nominees, by requiring them to cooperate with an unlimited number of interviews and document requests. And as you indicated yesterday, there are already enough deterrents to an attorney submitting herself to judicial confirmation process. I think we ought to be removing those impediments.

It is for that reason that we have had several members of this committee, including Senator Thurmond, Senator Hatch, Senator Simpson, Senator Brown, and myself, write to Attorney General Thornburgh in June commending his policy and expressing our

opinion that State and municipal bar associations not be granted a formal role in the selection and confirmation of Federal judges.

So, could you please clarify your position on the role of local bar associations in the confirmation process? Do you disagree with our position that such groups should not have a formal role in the process, that nominees should not be required to cooperate with redundant investigations by local bar groups?

Senator SIMON. Would my colleague yield to put an addendum onto your question? This question is about formal requirement and formal process. I think part of the question is also whether nominees should be permitted to go to local bar associations or a group like that.

Mr. BARR. As I said yesterday, Senator, I would be very concerned about bringing other bar associations into the prenomination process the way the ABA is involved in that process now, so I share your concerns as you have just laid out. Several of them are ones that I alluded to yesterday.

I, however, am willing to talk to some of the bar associations and find out more about what their position is. Several have suggested to me that their chief complaint is that we are affirmatively barring people from talking to them, and I want to discuss that issue with them.

I would, however, not require, I can certainly say I am not going to require our candidates at this point to talk to other bar associations, but I think that the issue may be whether or not we affirmatively preclude that, and I want to talk to those bar associations and get exactly what their views are and also have a chance to express some of my concerns about what the practical impact of this is and find out more about what their process is. That is where I stand on the issue right now.

Senator GRASSLEY. I guess the only comment or question I would have in regard to what you said—and I do not think you are announcing a change of position, rather that you were just going to look into it—relates to some concerns that members of this committee have.

Let's suppose that you just simply said you were not going to require anybody to meet with local bars, but you had a change of policy that left it more neutral than it currently is. It seems to me that there would be a great deal of pressure, and that that is just the same as saying nominees should meet with local bars, and that the practical end will be that if the nominee does not meet with them, he will have one more nail in his coffin.

Mr. BARR. That is certainly a consideration, but at this point I want to find out more about what they have in mind and also have a chance to talk about some of my concerns. For example, the fact of the matter is that, prior to nomination, we try to keep these things confidential, so I see some logistical problems as well.

But when bar associations such as the City of New York Bar Association and so forth, say they want to meet and talk, I see no problem with talking about it.

Senator GRASSLEY. One last matter, which is not in the way of a question, but just to reaffirm a point. You and I visited yesterday about the extraterritoriality of our antitrust laws, and I think you indicated that you thought that Assistant Attorney General Rill

was looking into that and considering certain possibilities. I have looked into it since you and I talked yesterday, and I can confirm what you said—that more aggressive international enforcement is a direction that the Antitrust Division plans to take if an appropriate case presents itself.

I guess the only admonition I would have for you, as Attorney General and the overseer of what the Antitrust Division does, is that for us to make certain the goals that Vice President Quayle seeks in the work of his Competitiveness Commission, we must ensure that our business has a level playing field with its international competition, and that if our Government doesn't use our antitrust laws as a major tool in this effort, we are losing a wonderful opportunity.

I hope, as Attorney General, without your making any promises to me, because I don't want you to do that, you will give that a careful consideration as a very effective way of accomplishing what this administration hopes to accomplish, and maybe can be accomplished through a Justice Department that cannot be accomplished through commerce, through the Special Trade Representative, and maybe even through the State Department sometimes, because these are laws on the books that we can enforce and they do nothing more than see that the American consumer gets a fair shake. We are entitled to that fair shake, whether it is unfair competition from overseas violation of antitrust law or whether it is an American company doing it.

Thank you.

Mr. BARR. Thank you.

Senator GRASSLEY. Senator Leahy, I am done.

Senator LEAHY. Thank you, Senator Grassley.

Mr. Barr, yesterday, when I was reminded that my time had run out, we were discussing Mr. Rogers. You and I had a private conversation regarding him in the situation.

I will not go into any of the things we discussed privately, for the reasons I told you yesterday, but I had asked you more in the broad sense about the kind of issues that are raised when a high-level White House employee goes straight to representing a target of a major Justice Department investigation only a few weeks after leaving office, and your answer went to the question of whether Mr. Rogers could not have been shown to have violated the law.

President Bush has said a number of times about the avoidance of and even appearance of impropriety, and I commend the President for that, and I have been there, as you have, at different times when he has stated that, both in small gatherings and large gatherings, and I don't think either you or I question the President's concern about that.

But I think the issue raised some other policy questions. The city of Washington has many distinguished attorneys. You were in a law firm with a number of them, and you and I could sit here and list off the top of our heads a couple hundred very distinguished attorneys in this town.

So, I wonder why a wealthy man such as Sheik Kamal would choose a legal unknown like Mr. Rogers, unless it was to obtain political influence. Do you happen to know how he picked Mr Rogers?

Mr. BARR. No, I don't, Senator.

Senator LEAHY. Has the Justice Department undertaken any independent factual investigation of how or why Mr. Rogers and Sheik Kamal got into the legal arrangement that they got into?

Mr. BARR. No, Senator.

Senator LEAHY. Have you undertaken any independent investigation into possible improper conduct or contact between Rogers and Sheik Kamal or between Rogers and present administration officials?

Mr. BARR. Yes.

Senator LEAHY. You have?

Mr. BARR. Yes.

Senator LEAHY. Is that ongoing?

Mr. BARR. The Department of Justice's review of that matter or investigation of the facts has been completed.

Senator LEAHY. Do you do that independent of the White House counsel, or do you base it on the findings of the White House counsel?

Mr. BARR. We conducted part of the investigation that we felt it was appropriate to conduct ourselves.

Senator LEAHY. Is your final conclusion based on that of the White House counsel, is it to confirm the White House counsel, or is it a conclusion independent of?

Mr. BARR. Could you repeat that? I am not sure what you——

Senator LEAHY. When you say this has been concluded, the Department of Justice investigation, does it reach its own independent determination of whether there was impropriety? Do you reach one that is for the use of the Justice Department?

Mr. BARR. We have not conducted an investigation, our own investigation of contacts with the White House.

Senator LEAHY. Do you then ask questions of the White House, or do you have the White House conduct that kind of investigation?

Mr. BARR. The White House conducted that investigation.

Senator LEAHY. What office in the Department of Justice conducts the investigation, the Justice Department's investigation?

Mr. BARR. OPR conducted part of the inquiry, and the Criminal Division conducted part.

Senator LEAHY. Now, on the question of——

Mr. BARR. You said with respect to the Department.

Senator LEAHY. Pardon?

Mr. BARR. With respect to the Department.

Senator LEAHY. What part of the Department of Justice conducted any of the investigations involving Mr. Rogers?

Mr. BARR. Well, there were certain inquiries and reviews that were undertaken. The word "investigation" sometimes suggests——

Senator LEAHY. Whatever review was done regarding Mr. Rogers, who was——

Mr. BARR. My answer stands.

Senator LEAHY. It is the same?

Mr. BARR. Yes.

Senator LEAHY. Thank you. Now, as far as the contact with White House officials, that the Department of Justice left to the White House counsel to do, is that correct in my understanding?

Mr. BARR. That is correct. That would be normal, and not only normal with the White House, but normal with any agency on an Ethics in Government Act question. There are hundreds of lawyers that leave government at any given period of time, and if they are retained by somebody, the Justice Department doesn't run out and say, gee, so-and-so was retained, maybe there was a violation of the Ethics in Government Act; let's determine whether he worked on the subject at his agency.

Senator LEAHY. Even if something like this was a front-page story involving a major issue like BCCI?

Mr. BARR. Well, as I said the first day, to be fair, Justice has to run according to process and standards, and because there is a story on the front page doesn't mean someone is going to get treated differently. Unless there is some reason to believe that the—normally, what will happen is an agency will contact us and say we have been contacted by an employee about a particular matter and the person left less than a year ago, or they will say so-and-so is representing so-and-so, and we think he may have worked on it. We rely on those kinds of referrals from the agencies. We don't, without any factual predicate, launch investigations ourselves.

Senator LEAHY. In this case, did the White House then come back and tell you the result of their investigation?

Mr. BARR. Yes.

Senator LEAHY. Did they ask for any help by the FBI in doing it, or did they do it all in-house?

Mr. BARR. I think it was done in-house.

Senator LEAHY. They did not ask for anybody, either the FBI or the Department of Justice to aid them?

Mr. BARR. I don't think so.

Senator LEAHY. In their response to you, did they determine whether there had been any improper contact with the White House?

Mr. BARR. Their conclusion, I think it was public knowledge, was that he did not work on BCCI whatsoever at the White House, and that he had no communications with the White House concerning BCCI.

Senator LEAHY. Yesterday, you were asked a number of questions about Judge Kelly and Wichita, and you had said, if I am correct—I have gone back over the notes, I was out at another hearing during part of that, but I understand you said that Judge Kelly should have left the issue of protecting Wichita health clinics to State officials. Is that a fair summary of what you said?

Mr. BARR. That was the position we had taken in the Bray brief, which was filed in April.

Senator LEAHY. And you said further, and this is a quote, "This was not viewed as an abortion issue in the department," is that correct?

Mr. BARR. That is correct.

Senator LEAHY. Now, apart from the legal position, do you accept that interceding on behalf of the protestors was at least widely viewed as a political endorsement of their actions?

Mr. BARR. I cannot speak as to how it was widely viewed. That is the way a lot of newspapers reported it.

Senator LEAHY. There is a troubling in the broader sense that a Federal judge who was able to really enforce the law based on respect for his rulings and the position of the Federal judge. They don't have troops to back it up, they don't have an army or anything else. Considering the fact that a Federal judge must have the force of his moral suasion and legal status, does it trouble you that the Department of Justice would appear to be undercutting that same type of moral authority and legal authority that a Federal judge should have?

Mr. BARR. We wanted to stand by the judge and obey the judge's order, and that is exactly why we instructed the marshals to obey the order, carry out the judge's directions, and make the arrests.

Senator LEAHY. Well, you couldn't tell the marshals to do otherwise, could you? At that point, it was a valid order, it had not been reversed by anybody else. I mean, the Department of Justice couldn't call up a marshal and say the judge has just given you an order which is at least valid on its face, don't follow it. Is that correct?

Mr. BARR. That's true.

Senator LEAHY. Are you sending contradictory signals to the populace at large?

Mr. BARR. What are the contradictory signals?

Senator LEAHY. The impression was that the Department of Justice was stepping in and saying we are going to get rid of that pesky Federal judge's order just as quickly as we can.

Mr. BARR. I don't think that is what the Department of Justice said. We did not become a party. We filed an amicus and we filed a copy of the brief that we had filed 3 to 4 months earlier. We made it public that our marshals were going to carry out the court's orders, and we called on everyone to obey. My impression was, and I can't remember that clearly the sequence of events, but I think for a period of days after that there was no blocking of any of the clinics.

Senator LEAHY. Earlier this year, the FBI came to the Congress and they had a proposal involving telecommunications and computer services. They wanted to give the Government trap doors into private encryption devices. In other words, you could have in your computer system encryption to protect against industrial espionage or even to keep your own files in such a way that is compartmented even within a company, but certainly we have companies, as you know, fax material back and forth or send material from computer to computer that may be of design of their new car, their new whatever, and so they encrypt that, because we found industrial espionage and it is often stolen.

But what the FBI wanted to do was to say if the computer is going to be made, if telecommunications is going to be made, that even though industry would buy them to keep things safe, there should be a trap door in there that would allow the FBI to go into it.

Now, we have heard from the phone companies and from the computer industry and computer scientists and academics and

many others, and they are in an uproar about the proposal's potential impact.

The reason I ask you this question is I understand it ended up on your desk, and a number of agencies, including the FBI and NSA, Commerce, OMB, are involved in discussions over what should be the administration's policy.

How do you proceed with that? Can you give us some idea of how you sift out the obvious law enforcement request the FBI is making, balanced by those who say this is my business, my commercial interest, and I don't want to give a trap door to anybody else, and then others—civil libertarians—who are just concerned about the obvious Big Brother aspects? How do you sift that out?

Mr. BARR. Senator, first let me say this matter is still under review within the executive branch.

Senator LEAHY. I understand.

Mr. BARR. Second, I recall several months ago—or I forgot when you said this proposal surfaced, but at some point I conveyed or I instructed people to convey to you or your staff that nothing was going to happen on this until we came up and had a chance to sit down and talk to you and consult with you before anything went. I don't know if you recall——

Senator LEAHY. Oh, I do indeed. That is why I asked the question. I knew it would be an area that you are familiar with so that I wasn't trying to toss you any kind of trick question. I know that you are one person now who is aware of this.

Mr. BARR. So nothing is going to be coming down the pike by surprise. I will be able to talk to you well before anything is proposed. But as to those details, I would be glad to discuss them either in executive session or privately with you, but I don't want to discuss them in public.

Senator LEAHY. I don't want to go into the obvious law enforcement aspects, and we will have to have and I suspect the Technology and the Law Subcommittee may have a closed-door hearing on that. Certainly some of the Senators who are involved in it, maybe sometime if you are coming up here to talk about it, I can notify some of the other Senators who are interested, and we could do that.

My question was not to ask you to tell us today how you are going to finally work that out but rather more of a process one. Are you making an effort to go to all the different parties involved, not just the obvious, the NSA and the FBI, but the computer manufacturers and those who have civil libertarian concerns about it, the telephone companies and so on?

Mr. BARR. I have been contacted by some private sector interests that have obviously a deep interest in this issue. I am planning to sit down and talk with them and be accessible to them on the issue. But right now it would be premature because I am not sure what direction we are going in, and in a way it would be a real waste of their time to come in when we really haven't formulated our thoughts completely. But once we do get an idea, my plan is to consult with the Hill and to consult with the private sector and see if we can come up with a consensus view. If not, and if there are differences, then we will see where we go from there.

Senator LEAHY. Thank you. I have been intruding. I know Senator Simpson is waiting. But I think that this is also an area that he is interested in, too, and we all want to hear about it. Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman, and I thank you for your courtesy.

It is good to have you here, and your very patient family I see is still at your side. It is hard to believe, isn't it?

Mr. BARR. Well, they get out of school by doing this, Senator.

Senator LEAHY. It is the best thing he has going for him, Al.

Mr. BARR. I think at 3:30 they disappear. [Laughter.]

Senator SIMPSON. I see, just like a puff of smoke. Well, anyway, they are very attentive, and it is good to have them here.

We have been talking, and this is my first round of opportunity. Obviously there has been a lot of discussion of BCCI. I think we all anticipated that would come. There have been questions in other streams and branches on other things, but let me just, if we could, establish one fact at the outset concerning the BCCI investigation, which happens to be obviously the most topical.

Is it not correct that the Justice Department is the lead agency for prosecuting BCCI's money-laundering activities and the Federal Reserve is the lead agency responsible for investigating BCCI's illegal ownership of the First American Bank? Is that not correct?

Mr. BARR. That is correct; however, then the Fed, if they come across evidence that may be potentially criminal, then they would refer it to the Department of Justice. The first referral came on January 22, 1991.

Senator SIMPSON. But we have a separation here that takes place, and then if they do find things, then it is referred on to Justice?

Mr. BARR. Correct.

Senator SIMPSON. I think that is something that is not quite clear sometimes.

Now, with regard to the Justice Department's investigation of BCCI's money-laundering activities, may I just review and summarize what you have already told us and ask you if this is correct? In the first indictment in Tampa, FL, two BCCI corporate entities pleaded guilty to money laundering in January 1990, and paid a forfeiture of $15 million. Then in July 1990, all five BCCI officials who stood trial were convicted, and they received prison terms ranging from 3 years to 12 years. Is that correct?

Mr. BARR. That is correct, after a 7-month trial.

Senator SIMPSON. Then a second indictment was filed in Tampa on September 5, 1991, and in that indictment six BCCI officers, five other individuals, and one corporation were charged with money-laundering crimes, and a trial of those persons and entities is now pending. Is that correct?

Mr. BARR. I believe that is correct, although I can't remember if it was the 5th of September—yes, it was. That is correct.

Senator SIMPSON. Yet we were left with the impression in some of the pages of our newspapers that somehow one should come away with the impression of the Justice Department's investigation of BCCI that the first Tampa investigation only resulted in indictments, and, two, that high-level officials at BCCI were not indicted.

Could you again respond to those two points just so the record is clear and complete?

Mr. BARR. A lot of the press commentary on BCCI has failed to distinguish among the different kinds of criminal offenses that are alleged and when those allegations surfaced. Prior to January 22, 1991, the allegations that were properly within the jurisdiction of the Department of Justice and being followed were money-laundering allegations, and they were followed. They centered on Florida, and the Department of Justice prosecuted a case developed by the Treasury agencies and achieved very substantial success—one of the greatest successes we have had in the money-laundering area.

Senator SIMPSON. It seems to me that in listening to the questions and your responses, it would seem to me that some of the critics of the Department are overlooking the extremely complicated and difficult nature of this type of investigation. Obviously this money-laundering charge and this case involved complex, highly complex financial transactions occurring around the world. And that is correct, is it not?

Mr. BARR. That is correct. The bank operated, I think, in 72 countries, or in that range. The operations seem to have been structured in a way that avoids regulatory review. One of the interesting statements made in the Washington Post editorial a couple of days ago was that all this was going on right under the regulator's nose, and I can't think of a less apt description of what was happening.

Price Waterhouse was the internal auditor for this bank and had access to witnesses and people and documents within the institution, and it wasn't until November 1990 that the internal auditors, who had all those advantages, were able to piece together what was going on. And even then, it is only part of the picture.

Senator SIMPSON. And so actually we have this huge network of an institution, a foreign institution, if you will, with only a very small presence in the United States. Isn't that correct?

Mr. BARR. That is correct. It was a very small presence. The vast bulk of injury done was overseas to foreign depositors.

Senator SIMPSON. And is it also correct that much of the records, many of the records, most of the records and other material that would be evidence is located overseas? Isn't that correct?

Mr. BARR. That is correct. The key personnel and the key documents are overseas.

Senator SIMPSON. And it takes obviously a huge investment in time and energy to put together a prosecution of a case like this, does it not?

Mr. BARR. Absolutely. A lot of preparation goes into preparing a case. Look at the money-laundering case itself. It was a 7-month trial.

Senator SIMPSON. And I think you said eloquently yesterday, and you said it crisply, too, that the Justice Department should not indict someone based on mere rumor, speculation, hearsay, or political pressure or uncorroborated testimony of a single witness. That was and is your feeling, is it not?

Mr. BARR. I think the basic safeguard we have in our entire system is requiring evidence before we hold someone to account under our criminal laws. We have to act on the basis of evidence.

Senator SIMPSON. Well, there wouldn't be a member of this Judiciary Committee who has practiced that wouldn't believe that. That is one thing we can agree on from either side of the aisle. But it seems to me that——

Mr. BARR. And I will expand on that and say it is more than just evidence. It has to be evidence that is admissible in court. We have to be able to prove whatever counts we are going to indict someone on.

Senator SIMPSON. It would seem to me that if the Justice Department were to indict the average violent criminal defendant based on mere rumor, speculation, or hearsay, or political pressure, I think there would be intense criticism of the Department for overstepping the proper bounds of prosecutorial discretion. So it seems to me there is almost a double standard working here. If a criminal defendant deserves protection against unsubstantiated indictments, then so does BCCI or any other large corporation. I think the Justice Department would and should indict BCCI once it would obtain sufficient evidence available in a court of law to justify indictment. And if takes some time to obtain the proper evidence, then so be it.

I think that that is what our Constitution requires. Do you concur?

Mr. BARR. Yes.

Senator SIMPSON. I think it is just good to touch upon that as we get swept away in the sinister network of BCCI, which it certainly obviously has proven to be.

Let me ask you a couple of other questions. I know you have been asked questions about the civil litigation, the Federal civil justice reform issue. I have been either the chairman or the ranking member of the Immigration Subcommittee since 1981, and I have been closely involved in monitoring the activities of some of the Justice Department's largest agencies, or at least one of them, and that is the Immigration and Naturalization Service. I know Senator DeConcini asked you about that. I have been involved with them for 10 years.

Historically there has been a tendency, I think, to treat the Immigration Service as the long lost relative or something lesser of the Justice Department. Indeed, that agency has a very tough mission, one of the most difficult missions of any agency. So I might ask you, what do you think are the most important challenges now facing the INS, and how would you intend to ensure that the Immigration Service is a vital part of the Justice Department's priority activities and that their voice is heard within the Department?

Mr. BARR. INS' voice is heard within the Department. I, since becoming Deputy Attorney General, have had two of my Associate Deputies working a substantial portion of their time—one 100 percent and one probably 33 percent of her time—on INS issues.

I think basically INS, as you point out, has a difficult mission, and because of budgetary constraints, there has been a period of underinvestment in the agency. And based on the information I have, I think on the management side there is a need to—and I think this is both what GAO and Norm Carlson concluded—a need to put in place financial systems and a better budgetary process and accountability, computer systems and record systems, better integrated throughout the INS—the whole management side. And I

got six more SES positions for INS, and those people are in the process of being recruited for INS for these senior management positions. So upgrading the management side of INS is a key area.

Beyond that, I think, as Senator DeConcini said, we have to bolster the Border Patrol, both in terms of manpower but also equipment. Much of their equipment has to be replaced. I think we have to deal better with the backlog of asylum petitions. We created a corps, a special trained asylum officers corps, to deal with it. This year we didn't get as much in the budget as we wanted to get in order to bring those people on, but we still have made a lot of progress in the asylum area. Inspectors, as you know, there have been a lot of complaints about inspections at airports. We have upgraded that, added inspectors.

So I think both on the management side and on the operational side, there is a lot that has to be done. But I think we are moving in the right direction, and I have made INS a higher budget priority in this budget cycle than it has ever been before.

Senator SIMPSON. So it is something that stimulates your personal interest to nurture and sustain and supervise this part of your operation in a new way?

Mr. BARR. Yes.

Senator SIMPSON. I think that is important. Then, of course, we passed a Legal Immigration Act of 1990. That took effect October 1, 1991, and unfortunately many of the regulations under that act that the INS is responsible for under that law have not been issued in final form. There are only three members of the Subcommittee on Immigration and Refugee Policy; that is Senator Kennedy as chairman and Senator Simon and myself. It is the smallest subcommittee because no one wants to get on it. We know how that works.

So we do our labors, but I would just say in conclusion you certainly are not personally responsible for that delay in formulating those regulations. But it may be OMB that is causing the delay, but all I ask you is to make some inquiries into the tardiness of the 1990 act regulations to see if you can break that bottleneck. And if you could give me your views on that at some later time, I would greatly appreciate it. I think we need to do that.

Mr. BARR. Certainly, Senator. We would be glad to do that.

Senator SIMPSON. Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you. Each of you have had a second round—I mean a first round?

Senator SIMON. We have each had a first round. I need a second round.

The CHAIRMAN. And so do I. So good luck. It is my turn. [Laughter.]

No, you go ahead. I can wait. I will just wait until the end. I have at least an hour's worth of questions. You go ahead.

Senator SIMON. I will be very brief in my questions.

The CHAIRMAN. That is OK. Take your time.

Senator SIMON. One is to follow through. First of all, I agree with what Senator Simpson has just said on the regulations on immigration. One area that you have had something to do with where I don't know what the right answers are, other than that I feel we don't have the right answers, is the Cuban detainees. We have, for example, some young immigrants who committed crimes and are

now serving long beyond the point of the crime they were convicted for. There are a lot of other different circumstances.

I don't know what the right answer is. I am not being critical of the Justice Department because I haven't offered anything that is more constructive than what you are doing. I do have the feeling that our answers now are not the right answers or are not adequate. Any reflections on your part on this?

Mr. BARR. As I understand what we are trying to do is to take a look at the hardened criminal element among the Marielitos that came to the United States and we have tried to separate those that we felt were incorrigible and posed a risk to our citizenry if they were permitted to get out on the streets. And that group numbers in the hundreds and we are trying to deport them to Cuba as quickly as we can.

And there was an appeals process set up in the wake of the Atlanta prison riots which was put in the Deputy Attorney General's office to run. It was the Mariel Cubans review process, and when I got down to the Deputy's office, I asked that we expand the panels that were doing that and move along much more quickly on it, because these people were being detained and I thought that we had to go through the process and do it in an efficient way.

And we are now nearing the end of that process for those that the Cubans have agreed to take back, and there are now several hundred more who are not on the list, they are not listed Cubans, and we are trying to persuade the Cubans to substitute—there are some people who are listed who are now being permitted to stay and now we are trying to get the Cubans to accept these nonlisted Cubans in lieu of some of the listed ones who we have decided can stay in the United States.

It is a difficult problem. It is a costly problem, and we are trying to work through it as quickly and efficiently as we can, but I do agree with the general policy that hardened criminals, people who have had problems with the law before they left Cuba and have had problems with the law sometimes here when they have been given a chance and let out, that these are people that we should deport back to Cuba.

Senator SIMON. There is no disagreement on that. I have just got a few wrap-up questions. Hate crimes. The FBI has been keeping track of statistics since the first of the year, when are we likely to get the first report on hate crimes statistics?

Mr. BARR. I think the first report will be December of this year. It will be a partial report. The FBI, as you say, does have responsibility for collecting this data and they will be collecting it as part, as you know, of the uniform crime reporting system. That is a system that requires State cooperation. The Bureau has carried out training programs now involving all 50 States. Reports are being complied. There are still some States that are doing a better job than others and still glitches that have to be worked out.

The first report though is scheduled for December, and I think it will be prepared. And then the whole system is scheduled to be implemented at the end of 1992.

Senator SIMON. If I may follow through on Senator Grassley's question on the local or other bar associations, an example that we had a bit of a problem with the Department of Justice on. There

are nominees for the Court of International Trade. Well, the bar association—and I do not differ with your prenomination process of using the regular bar association—but the Court of International Trade Bar Association says we would like to interview these nominees. I am not suggesting that you require that they be interviewed but it does seem to me not unreasonable that the bar association should have the ability to request an interview and that the Justice Department should permit them to be interviewed.

The same if a nominee in the Northern District of Illinois, while the American Bar Association is a fine organization, the Chicago Bar Association or the Chicago Council of Lawyers, each of whom have several thousand members, they are the people who are going to be dealing directly, and at least to permit an interview does not seem to be an unreasonable policy for the Department of Justice.

I just pass that along.

Mr. BARR. OK.

Senator SIMON. And the silence, I assume means that you agree with my process.

Mr. BARR. I, as I think you have gathered, understand the distinction between involving them in the prenomination process, versus obstructing access and interfering with candidates talking to them, and that is what I am willing to explore with these groups.

Senator SIMON. No, I understand and there is no criticism on the prenomination process at all, and it just does seem to me that permitting them, if they want to, to meet with the other groups.

And then one final very important question. You are going to be the chief law enforcement official for the Nation; you are the acting chief right now. What about an acting chief who permits three girls to skip school? What do you think of that?

And may I ask the three daughters who are over here, and this is very important now, do you think we should approve your father for Attorney General of the United States?

[The three Barr daughters responded affirmatively.]

[Laughter.]

Senator SIMON. I hope you got that in the record, all three said, yes.

Mr. BARR. It better be.

Senator SIMON. It was a 2-to-1 vote, no, it was all three and that is powerful testimony. We thank you, very, very much, and we wish you the best.

Mr. BARR. Thank you, Senator.

Senator LEAHY [presiding]. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Attorney General, the Senate has passed a crime bill this year, the President recommended a strong crime bill, and the House has passed a bill. We will probably go to conference soon. I want to ask you about the importance you place on a tough crime bill that provides death penalty provisions, habeas corpus provisions, exclusionary rule provisions?

Mr. BARR. It is an important part of the President's program, Senator, and it is, I think, a very important part of our efforts to combat crime in this country. There are a lot of good provisions in the crime bill. I think we need a Federal death penalty. I think we do have to reform the habeas corpus process. We have lost the idea

of finality, in my view, through the abuse of the writ of habeas corpus, we have lost the whole concept of finality in criminal adjudication in this country. We never come to rest.

Obviously we wanted a reform of the exclusionary rule; we did not get that in the Senate. From my standpoint, the strict penalties on firearms offenses that are in the bill are very important, especially at this time as we face the violence in the cities. And there are a number of other excellent proposals in the crime bill.

So we would like to see Congress move quickly to conference and would like to see a crime bill come out of conference that meets the President's objectives.

Senator THURMOND. One thing that has clogged the Federal courts, has been the appeals in the habeas corpus proceedings. This needs reform exceedingly bad. In my State, for instance, a man came there and asked for coin collectors, found one, killed him, killed three other people in the process, injured a woman for life. The chairman remembers she came up here and testified.

And he was convicted and sentenced to death. It was 10 years before that man finally went to the electric chair. Senator Hatch had a case in his State where one went 16 years. People lose respect for the law when something such as that takes place.

That is extremely important, I think, to get this habeas corpus straightened out. Do you feel that way about it?

Mr. BARR. Yes, I feel very strongly that way about it. Not only in death penalty cases, although those are usually the most celebrated examples, but even in other cases. And I know that most people who raise habeas corpus claims for noncapital cases are nevertheless in prison, but I think a dimension that people do not pay much attention to and should pay more attention to is the impact of endless habeas corpus petitions on the victims of crime.

We are not talking about an appeals process. Habeas corpus is a writ that is used after the appeals process is completed. And under our current system there seems to be no end to it. Criminals can continue after their appeals are done to bring an endless series of repetitious and duplicative petitions, reopening their cases, going back into the courtroom, and that lack of finally has a lot of wear and tear on people who have been victimized by crime. They never are able to look and say, justice has been done and concluded. Each year their wounds are reopened as they see the perpetrator, again, attempting to escape just punishment.

Senator THURMOND. In the case I referred to, I believe appeals went to the Supreme Court of the United States four different times in one case. Finally, the time has come when we have to have finality, would you agree?

Mr. BARR. Absolutely.

Senator THURMOND. I want to ask about another matter. In the Supreme Court decision, the *United States* v. *Batson,* which relaxed the racial bias in jury selection, the House would apply *Batson* retroactively in its crime bill. What effect would the retroactive application of *Batson* have if the House version is enacted into law, especially for those individuals convicted years ago?

Mr. BARR. My understanding is that was defeated in the House and, therefore, it is not in the Senate bill, and it is not in the House bill, and hopefully it will not be in any bill coming out of

the conference committee. But the practical impact, because of records not being kept and the expense is that it would have upset virtually all prior convictions or many prior convictions because the prosecutors would not have been able to meet the burden. But I am hopeful we will not have to deal with that issue, since it did not garner majority support in the House.

Senator THURMOND. Wouldn't it be ridiculous where they have been convicted years ago to go back now and review those matters?

Mr. BARR. I think it would place an impossible burden on the Government.

Senator THURMOND. I want to ask you about another topic. In the next 2 years, we are going to close a lot of military bases. Have you given any consideration as to whether some of these bases could be used for Federal prisons and save the taxpayer's a lot of money?

Mr. BARR. Yes, and——

Senator THURMOND. Some of them could be used maybe for drug addicts, for treatment of drug people?

Mr. BARR. Mike Quinlan, of the Bureau of Prisons, has, I think, been very aggressive in looking for any opportunity to use military bases, either for a prison facility or a camp, boot camp, whatever use it can be put to.

Senator THURMOND. That is all the questions I have right now. Thank you, very much.

Mr. BARR. Thank you, Senator.

Senator THURMOND. Mr. Chairman, thank you.

The CHAIRMAN. Thank you.

I have two sets—did you want to question?

Senator LEAHY. I had some more questions, but, Mr. Chairman, it is your turn.

The CHAIRMAN. I will pursue one area that I hope I can finish with and that is some additional questions with regard to BCCI, if I may.

Mr. Barr, as I indicated in my opening statement, or opening set of questions to you, yesterday, that I asked you about the NBC News report on the Department's investigation of BCCI. And I want to make it clear that I am not suggesting that the Department should be bringing indictments without the necessary evidence to support them. But the allegation has been made that the Justice Department has not put the full weight of its resources, including the personal attention of the Attorney General, behind this investigation into the largest bank fraud in history.

And the NBC report, in addition, suggested that high-level Department officials, naming Thornburgh and you, personally, have purposefully acted to delay or impede action.

NBC reported that key BCCI indictments developed by the IRS in Miami have been stalled by the Justice Department since August 23, almost 3 months ago, approximately the time that you assumed the role of Acting Attorney General.

Do you know, Mr. Barr, whether the Justice Department has been sitting on these or any other indictments?

Mr. BARR. Yes, I do know the answer to that. And if I could use this question maybe to lay out what I think has been the course of

activity and where these indictments or potential indictments and others fit into the picture.

The CHAIRMAN. Sure.

Mr. BARR. May I have that opportunity?

The CHAIRMAN. Yes.

Mr. BARR. And I think the best way to start is to understand how the Department is normally structured, and then see how this case went up against that structure and what changes were then made to respond.

The Department of Justice tries to walk a delicate line between decentralization and centralization. There are a lot of advantages to decentralization. By that, I mean we have 93 U.S. attorneys out in the field with their own staffs and offices. And normally the U.S. attorney who is the chief law enforcement officer in a district, has a lot of independence, and works directly with the investigative agency, so that Customs or IRS, or DEA brings the case to the U.S. attorney. The U.S. attorney just handles the case. That is a decentralized operation. You get much—usually you get expedited handling of cases; they are closer to the action; there is not a lot of bureaucracy and you can make a lot of progress.

Now, that is the normal system in the Department. Then the U.S. attorney's manual and other guidelines in the Department require U.S. attorneys, on specific matters, to come back to headquarters for various kinds of approval. Some examples of that would be, there is a standard requirement if a U.S. attorney is going to bring a RICO count he has to go back and let the Criminal Division look at it in Washington. Certain kinds of tax cases have to be reviewed by the Tax Division before a U.S. attorney brings it, so you have a national policy.

If another district gets a case that is related, so you have two districts working on a similar or related matter, then those U.S. attorneys are supposed to coordinate with each other.

And if there are disagreements between them or decisions that have to be made that they cannot agree to then they bring it to Washington for arbitration. That is the decentralized system we operate un ler and I think generally it serves us well.

I think the key date to look at from our standpoint is January 22, 1991. And then ultimately the period from May through June 1991. Prior to January, we basically had an investigation going on in Miami, and investigative activity in Tampa that were BCCI-related. They were not jostling up against each other. Whatever may be said of how those investigations were being handled within each district, there was not much need for coordination between Miami and Tampa.

The old decentralized model prevailed during that time. The U.S. attorneys were in charge. On January 22, we received the first criminal referral from the Fed. That related to one financial institution.

The CHAIRMAN. And how did that come from the Fed? From the Fed to whom?

Mr. BARR. I believe it was from the Fed to, probably the U.S. attorney's office in the District of Columbia. Yes, that is correct.

Now, see, normally agencies take the referral to the U.S. attorney, not to main Justice. So that started up the D.C. activity on

that particular referral which related to the alleged secret acquisition of one financial institution.

So from January forward then we had three offices operating—D.C. on a regulatory violation, alleged regulatory violation; and Miami and Tampa going along.

The CHAIRMAN. This was in what month now, roughly?

Mr. BARR. This is the period from January to May. So we had three different districts. There was no apparent reason for any change in the system, any more active coordinating role or centralization by main Justice. We did not see any coordination problems at that time.

May is where things started to change. In May into early July, the first week of July, we quickly had——

The CHAIRMAN. This was in 1991?

Mr. BARR. Yes, 1991; this is just several months ago, we got two more institutional referrals relating to separate financial institutions. So we then found ourselves with five districts going. Also at that time there was a minor turf fight between two of the districts, the U.S. attorneys, and they were not shoving the case away, two U.S. attorneys were fighting to take the case.

So it was at that point at the very beginning of July when we had five districts going, and there were some immediate coordination problems as these new offices came out of the chute and wanted to start interviewing the same people. And during this period it became evident to Bob Mueller, the head of the Criminal Division—started to become evident that we were going to have coordination problems.

The CHAIRMAN. Let me ask you, this is about coordination now. I want to make sure I get it. Where did Sapphos fit into this picture? He was from the Justice Department's Narcotics and Dangerous Drugs Division, right?

Mr. BARR. That is right.

The CHAIRMAN. And as early as back in February 1990, he picked up the phone, allegedly, and called folks in Florida.

Mr. BARR. Right. As I said, you will have—the U.S. attorney's office will be running a case, and there are times when they go back to headquarters to get approvals, to have reviews done, or to get the support of expertise back at headquarters. But the person running the case is the U.S. attorney. Sapphos' involvement, as I understand it—and there are people here to correct me if I am wrong—he got involved because we wanted to maintain some undercover—we wanted to let some accounts continue as sort of an undercover operation in BCCI as part of a money-laundering investigation. And I think he got involved to see if we could keep those accounts going, even though they technically were in violation of law, as part of that undercover operation. But that doesn't mean that the drug section in the Criminal Division was running the case in Florida.

The CHAIRMAN. Did the U.S. attorneys know that Sapphos had called and requested the Florida regulators not to shut them down?

Mr. BARR. That is not what he requested and——

The CHAIRMAN. What had he requested?

Mr. BARR. He wrote two letters. The first letter was inartfully written, and what he was trying to do is say, look, we went to—I

think we went to BCCI and said, as part of the cooperation, we want you to keep these accounts going. OK? It was sort of a sting-type operation. They said these accounts are in violation of law, we will get killed by the Florida regulators and get shut down by the regulators if we allow these accounts to go.

Sapphos was saying to the regulators, We want to tell you that these accounts are OK, they are part of our undercover operation, so you should allow them to—the tacit message in the letter and what was left out of the letter was, to the extent they are going to be permitted to operate, we want them to operate with these accounts going.

When the regulator called up and said, "Are you saying that you want us to keep them open, or are you saying if we keep them open let them have these accounts?" Sapphos immediately followed up with a second letter saying: I am saying the latter, I am not taking a position on whether they should continue to operate. I am saying if they are operating we would like them to have these accounts in there.

So that was that episode. But to get back to sort of the overview, it was in July, around the first——

The CHAIRMAN. Now, something like this, though, Sapphos' action, would that have to have been signed off by the head of his Department, the Narcotics and Dangerous Drugs? Did he have to sign off with anybody else, or is that an independent action he could take? Again, the mechanics of how it works.

Mr. BARR. My understanding is that a district doesn't have to go to headquarters to have this done.

The CHAIRMAN. I am not sure I am asking the right question then. Where is Sapphos?

Mr. BARR. Sapphos does not have to go up to Bob Mueller or anybody higher to do that.

The CHAIRMAN. Where is Sapphos residing?

Mr. BARR. Washington, DC was where he resided. He was head of the drug section of the Criminal Division in main Justice.

The CHAIRMAN. Main Justice. So he is at main Justice.

Mr. BARR. Yes.

The CHAIRMAN. OK. Go ahead.

Mr. BARR. In the first week of July, in that timeframe—I am not going to say during the first week, but basically between late May and early July, it became evident with the new referrals now dealing with three financial institutions, similar claims, similar players, that we were going to have coordination problems and this thing was getting bigger. Also the international dimension rapidly became evident on July 5 with the worldwide shutdown, and the need to get the Criminal Division's Office of International Affairs involved in helping us get what we needed overseas.

Mueller recommended to Attorney General Thornburgh in July that we had to do more consolidation and more coordination, and we had to start pulling some of this more into Washington. And that is when Attorney General Thornburgh said to Mueller, Go ahead, spare no effort, follow the——

The CHAIRMAN. Now, in this timeframe, were you aware of all this? Would you have been called in on this? Would you be part of this? Technically everything goes through you to the Attorney Gen-

eral, but, in fact, is that how it works? What did you know about all of this at the time?

Mr. BARR. This was basically on my far periphery in the sense that Mueller was basically handling this and dealing directly with Thornburgh on it. In the July timeframe, I started taking over the budget hearings because we expected, depending on Governor Thornburgh's future, that he might be leaving the Department, and he told me, "You handle the budget hearings," which takes up most of July. I started getting into some other things, and basically there was a division of labor. If Bob Mueller was working on BCCI and running that operation and reporting to Thornburgh on it, I had other things to do. I had my hands full on a number of other crises.

So then Thornburgh gave Bob the marching orders to consolidate at that point, much more consolidation and coordination. Between that time and August 15, when I became Acting Attorney General, my role in the matter was to say to Bob Mueller a few times, "If you need any support from me, any additional resources, if a U.S. attorney gives you a hard time, if someone is blocking this, you know, and being obstreperous, come to me and I will give you full backing on this thing, make it clear that you have full backing on it."

Then on August 15, or a week or so before that, at the time it was clear that Thornburgh was leaving the Department, I told Bob that I had better start getting some briefing books and get up to speed on BCCI, because with the Attorney General leaving obviously I was going to have to get on top of it.

The CHAIRMAN. Did you have any sense prior to June that this was a big, big deal? I mean personally. Did you——

Mr. BARR. No.

The CHAIRMAN. This thing is—did you have a sense it was as significant as it may be, that it has touched so many people, places, and things?

Mr. BARR. No, I did not until in July.

The CHAIRMAN. Well, my time is up. Let me just conclude with one very quick question, and I will come back to this. Then I want to get on to separation of powers, which I want to talk a lot about.

Mr. BARR. Could I say something?

The CHAIRMAN. Oh, yes, anything you want to say.

Mr. BARR. Because you asked about the IRS once, and I want to get to that because it shows you the delicate line we have to walk.

Basically, as I said, between May and through June is when we had to ratchet up the effort because of these new referrals coming in. We understood the thing was getting significantly bigger. We then started greater coordination and consolidation. After I got into it more formally and got up to speed on it, I suggested to Bob in the August and September timeframe that we even have to do more, more consolidation. I did intervene on occasion with U.S. attorneys to take parts of cases and shift them around to where it made more sense to investigate them.

Now, when you consolidate and you coordinate, you start running into some other problems that you didn't have before, and that is that some of the hard chargers out in the field now have to go back to Washington before doing a certain thing. We had situa-

tions where we had, I am told, 15 different agents and prosecutors wanting to talk to the same witness. So then you have to start setting some priorities and queuing things up, and that adds a little bit more time, on occasion. Overall the case as a whole moves forward better, but little parts of it here and there, it may appear to the person on the ground, "well, wait a minute, why do I have to go and get approval to do this?"

So I think we are starting to pick up a little background noise because we have consolidated. It shows you sort of the catch-22 you are in when you are trying to walk a fine line between decentralization and consolidation. Earlier we caught flak because it was alleged we weren't coordinating enough. Now we are coordinated, and now we are picking up a little flak that, well, now you have to go through some bureaucracy.

On the IRS issue, there are potential tax indictments in the Southern District of Florida. Under uniform rules in the U.S. attorneys manual, these cases have to be referred to the Tax Division for approval. This is not a special case. As a matter of course, the Tax Division reviewed these cases. There was a dispute between the Tax Division and the Southern District as to whether the cases should go forward in the form in which they were presented.

The person who was acting for me essentially as Acting Deputy reviewed the matter, made a decision, and I am told that both the Tax Division and the Southern District, the U.S. attorney in the Southern District, are happy with the decision.

The CHAIRMAN. So you are suggesting that that may be the genesis of the assertion made by somebody and reported by NBC that something is being sat upon?

Mr. BARR. Yes. I think there was a legitimate professional difference, and I think it has been resolved.

The CHAIRMAN. Well, I will yield with this last question, and I am going to divert for a minute. I am trying to get enough loose ends here before I open up other things.

I asked you yesterday about your old law firm, its representation of Mr. Naqvi—I think I am pronouncing it correctly—present representation, and I am told—I am under the impression that Mr. Webster, a former partner of yours, is the one representing Mr. Naqvi.

My question is this: Has Mr. Webster of your old law firm, or anyone else from your old law firm, at any time contacted you about their representation of Mr. Naqvi?

Mr. BARR. No.

The CHAIRMAN. Have they contacted you at all about their representation of any ancillary issue related to BCCI, direct or indirect?

Mr. BARR. No. Let me just—you are not saying confirming that there was a representation? You are talking about contacting me to discuss a case or——

The CHAIRMAN. Correct.

Mr. BARR. No.

The CHAIRMAN. Did they contact you to confirm that they were representing?

Mr. BARR. Well, you know, last night I asked whether or not there was any representation of BCCI, and I asked about the representation of Naqvi.

The CHAIRMAN. Right.

Mr. BARR. I was told that there was no representation of BCCI at any point.

The CHAIRMAN. But there is representation of Naqvi? Or can you tell us that, if you know, based on your conversations?

Mr. BARR. At least there was representation of Naqvi. I don't know what the present status is.

The CHAIRMAN. I got you. But no one initiated a telephone call to you at any time from the time you got back to the Justice Department from your old law firm about Naqvi or anything else having to do with BCCI?

Mr. BARR. No one has contacted me in any way from the law firm relating to the BCCI case, discussing the case with me or asking me to do anything about it.

The CHAIRMAN. Thank you.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

I know a number of my colleagues raised the INS issues, and I don't want to duplicate those. You have made some progress with INS in bringing a greater accountability and policy coordination, for which you are to be commended. Clearly more has to be done. We have the two major pieces of legislation with regard to illegal immigration and with regard to the legal immigration, which Senator Simpson and I and Senator Simon have been very much involved in. We look forward to working with you.

I had just a couple of related questions dealing with those. This is with regards to HIV and immigration. The new immigration, last year we gave HHS the authority to decide which diseases should be on or off the list of diseases which exclude people from entry, and we made clear that this was purely a public health determination based on the threat to the public. In January, Secretary Sullivan proposed taking HIV off the list, and he was fully backed by public health experts, including the President's adviser on science and technology. But in May he issued interim rules keeping HIV on the list, while interdepartmental discussions continue.

I am sure you are aware of the press accounts that reported that you had a major hand in overriding HHS, primarily because you were concerned about the cost and the impact on the public health system. Can you tell us what role you played in that issue?

Mr. BARR. Sure. As I recall, the proposed regulations in January embodied an income or financial assets type of test. It said that people could come into the United States as permanent immigrants if they could show the financial wherewithal to cover long-term health care if they had HIV. And INS objected to these regs, felt that it would put a tremendous administrative burden on INS to determine who passed this wealth test and who didn't and whether or not a particular individual is likely to incur substantial costs and so forth.

So through the Department came INS' concerns about it and requests that we support them in slowing this down so that we could consult with HHS about it. In addition, others in the Department had concerns about squaring the conclusion that HIV was not, in the words of the statute "a communicable disease of public health

significance." And the legal rationale that was being used by HHS on this—and at the time we didn't have any opinion from the HHS general counsel supporting this position, at least not in writing that we were aware of—was that they were interpreting the term "communicable disease of public health significance" as saying that no matter how communicable it was, the significance of the disease can be discounted if there is a substantial foothold of the disease in the United States; that is, you only look at the incremental significance of the disease. And we were not sure that was a proper construction of the statute, so we wanted a chance to discuss this with HHS.

At some point, some people, some subordinates in the Department were communicating with HHS trying to get them to delay this and trying to persuade them that this was not the way to go. And they asked me to weigh in as well. And so I called OMB and said I wanted a review of the regulations, and I wanted a chance to weigh in on them.

Since then we have been talking to HHS, and I think we have generally come to a—or a consensus seems to be taking shape.

I would add that the AMA—after I did this, the AMA issued a letter which essentially supports the position that I took, which was expressing concern about having long-term HIV immigrants who would then sap the health care services in the United States, which in my understanding are already not necessarily providing adequate health care to people that have HIV here.

I thought that was not adequately treated, and I believe that the latest position of the AMA, at least the latest I have seen, supports that.

Senator KENNEDY. Well, of course, you have provisions under the INS to deal with what is considered public charge for people that have various medical problems, so that they are not going to be an undue burden, and I think that is certainly understandable, and certainly there was no attempt to alter or change on that particular issue or question.

The real issue on this was who is going to determine the basic question of meeting the legislation, which is very specific. It said, on health related grounds, in general, any alien who is determined, in accordance with regulations prescribed by the Secretary of Health and Human Services, to have a communicable disease of public health significance, and then it would appear that Secretary Sullivan made a judgment, after examining the various recommendations of the President's panel, President Bush's panel and CDC, and made the recommendations, and then it was effectively backed off by the INS.

Mr. BARR. Actually, Senator, my concern on the public charge was exactly as you say. The HHS was proposing to have the Justice Department use the public charge exception, which says that we start making judgments about people with diseases and whether they are going to be able to support themselves. My position was, it was going to be hard to sustain. If we start doing that for HIV—first, it is hard to do, just on the basis of HIV, it is hard for INS people to make those kinds of judgments.

Second, what justification would we have at that point for just doing it to HIV. If we start using the public charge against people

with serious medical conditions, then we are going to have to start doing it for renal disease, for heart disease——

Senator KENNEDY. For cancer.

Mr. BARR [continuing]. For cancer, and since most of these people who apply are applying from within the United States—as you know, most of the people who are applying for permanent status are already here—we would be in the position of applying this kind of financial test to people who are here in the United States and then excluding them, and when people got wind of this—I had people come to my office, for example, the Catholic Bishops sent a delegation over from their group here who were concerned about refugee and immigration issues, saying don't go down this route of public charge.

So, I thought that the HHS regulations that were trying to shift this issue over to public charge were a mistaken way to go. I thought it raised a lot of policy issues, and I just wanted a chance to have the Department, which had a legitimate interest in this area, to have them fully aired.

Senator KENNEDY. Well, as I understand, the AMA concurs with the Public Health Service determination to remove HIV and other diseases from the list, leaving only infectious tuberculosis—I am just reading from Dr. James Todd, President—"we do not believe there is a sound public health justification for continuing to exclude aliens who are infected with these diseases, none of which are spread through casual contact."

Mr. BARR. Actually, the last letter I saw, my recollection—and, again, my recall may not be perfect here, but AMA wrote three letters initially, with ever more refined positions, and then more recently, since the letter you read from, I believe—I don't know what the date of that letter is, Senator—they wrote a letter saying that, in the long term, there should be no permanent admission, because of the impact on the public health system, but that there should be admission for travel, and that Congress should address this issue. That is the last letter I have seen from AMA, I believe. Maybe I am mistaken on this point.

Senator KENNEDY. Well, as I understand, the AMA has been concerned about cost for immigrants only, not concerned about communicability. That is my understanding. Maybe you have another reading on that.

Of course, the consular offices at the present time in INS have the authority now to reject persons with disease disabilities at the present time.

Mr. BARR. It is almost never used.

Senator KENNEDY. Well, they can do it, if there is going to be a public——

Mr. BARR. I think that would be a very significant policy change, to start not only excluding people——

Senator KENNEDY. Do I understand, then, what you are really talking about is not cost, you are talking then about the disease. Because if you are talking just about cost and we are having people come in here with cancer and the other, renal dialysis and other kinds of health challenges, you are not prepared to exclude them, but you are prepared to take a general class in terms of HIV, as I understand it, so it really isn't the cost?

Mr. BARR. Remember, the HHS regs that I raised concerns about would have excluded permanent aliens or permanent immigrants who did not meet a financial test, and do it under the theory of the public charge provision, and my point was—that was their proposal and they wanted INS to administer it, and my concern was how do you do that and then not do it in other areas. That was one of my concerns.

Senator KENNEDY. Well, they are not prepared to do it with the other diseases, though. You are making the case very well that they are doing one thing with regard to HIV and something else with regard to other diseases.

Mr. BARR. Senator, all I am saying is, you know, this was a complex policy——

Senator KENNEDY. Well, do you have a position just with regard to the health questions?

Mr. BARR. I am not responsible for health. That is not my area.

Senator KENNEDY. But if the Secretary of HHS indicates that they don't believe that the HIV falls within the statute of having a communicable disease or public health significance that is defined in the report of disease of public significance means ones in which admission of aliens with such disease would constitute a public health threat to the United States, such determination shall be based on current epidemiological principles and medical standards. So, if it meets those requirements, you are prepared to——

Mr. BARR. If an expert agency makes a rule that is not "arbitrary, capricious, * * * or not * * * in accordance with law," I think that is the legal standard and then my role ends.

Senator KENNEDY. Well, after you are confirmed, can we talk about it?

Mr. BARR. Sure.

Senator KENNEDY. Good. Let me go into just a couple of other areas quickly, if I might. One is on the asylum provisions, which you are familiar with, the area where I certainly support what the former Attorney General did on asylum. You know the backlog that we have had, over 100,000 cases, limited resources, leaving people in limbo, and I would hope—you talked about limited resources earlier, but that is a place where we have to really give some attention and I just want to flag that for you now, and anything we can do in terms of priorities, because we did get good regulations established under that, a lot of people hanging out there, case by case, and it is very, very slow moving. They have made some recommendations of what is necessary to try and clear that up, and I hope you would get a look at that.

Mr. BARR. Yes, Senator.

Senator KENNEDY. Can I ask you, did you meet with Mr. Martinez at all, as you have been Acting Attorney General and Deputy Attorney General, in terms of the war on drugs?

Mr. BARR. Yes, several times.

Senator KENNEDY. Can you tell us basically, just generally, what the issues were that you were talking with him about?

Mr. BARR. Well, the drug strategy and what shape the drug strategy should take, but, more particularly, usually issues of coordination, how we can improve coordination within the Federal Government.

Senator KENNEDY. I just have a couple of other areas. One of the things that we explored with Mr. Martinez is on the mandatory minimums. We talked about it in our office. I really hope you get a chance to look at both the Sentencing Commission's recommendation in this area and some of the administrative conference's.

I am not going to take a lot of time here, but with the enactment, particularly on—they enacted in Florida, when he was Governor there, the various mandatory minimums, primarily in the areas of drug-related crimes, and what happened was the prerelease of rapists and criminals that were in the violent end of the criminal sector were squeezed out, all shorter in time, with the resulting reaction, at least of statistics reflective of continuing escalation of the crime curve on us.

I would like at some time, not today, go through this with you, but I would really invite your attention in just taking a look through that of what happened down there on this. We are going to have the study from the Sentencing Commission, and I would welcome both your own review of that particular evolution there in Florida, and I hope that we are able to work.

Could I have just one final question: If confirmed, can you give us assurance that the Justice Department will do nothing to delay the civil actions now pending against Mr. Keating presently set for trial, I guess, in March 1992?

Mr. BARR. Unless the civil actions somehow impair criminal investigation or some other potentially more significant civil action. We are coordinating a number of different things, and there certainly would be no delay for delay's sake, but if the sequence of civil action impaired a criminal case, we might seek some kind of delay.

Senator KENNEDY. The point that I am getting at is, obviously, the delay of any possibility of recovery with the extent of criminal action, just to try and give some protection to thousands of people who have been adversely impacted, and whether that, obviously, would be adverse in terms of their ability to pursue their interests, and this obviously affects the consumers on this. Obviously, whatever is necessary in terms of the criminal justice system ought to go forward, but the spinoff on that would obviously delay in a very important way, I guess, the ability of a lot of the consumers to recover, and they have great concern.

As I understand from what you are saying, you are sensitive to that and would try and at least, to the extent that——

Mr. BARR. I would not want to be in the position of preventing or being responsible for the loss of a potential recovery that could make victims whole.

Senator KENNEDY. I gather you are time sensitive to that particular issue, as well.

Mr. BARR. Yes.

Senator KENNEDY. Senator Specter.

Senator SPECTER. Thank you very much, Mr. Chairman.

Mr. Barr, in 1986, the Congress passed a resolution generally in support of an international criminal court, on the ground that terrorists were avoiding prosecution. The thought was that there might be greater likelihood of extraditing or turning over a terrorist with an international criminal court, as opposed to sending

somebody back to the United States, and the Abu Abbas case was very current at that time.

In 1988, there was a similar resolution passed by the Congress supporting the creation of an international criminal court on the drug bill, because of concern at that time that the Matta case might have been one where the fugitive would have been turned over to an international court, as opposed to the great disruption which occurred in Honduras.

Last year, there was another resolution calling for a study—there are many of us who think that it is an idea worth pursuing—recognizing the difficulties of structuring all the legal procedural requirements, but that something might be structured after a Nuremberg model. If extradition could be obtained, for example, in Colombia, where we are having such difficulties getting extradition, than that would be one alternative, or if the country would try the terrorist or the drug dealer there, that would be a desired result. But there ought to be another alternative, and that is to have an international criminal court for situations where the country was unwilling to try a terrorist or a drug dealer and was unwilling to extradite. I would be interested in your general views on this subject.

Mr. BARR. I have heard of the proposal, but I have never had the opportunity to look at it and think it through and hear from the components in the Department what the pros and cons or legal concerns or advantages might be, but I would certainly be interested in talking to you about it and finding out more about it.

It is important to me that you use the term "alternative," because my view is that the United States always has to maintain the option of unilateral action in dealing with terrorists.

Senator SPECTER. Well, I think that is true, if we have control of the situation, and I am aware of the work which your Department has done on the issue of trying terrorists under *Kerr* v. *Illinois*. If you have custody and can bring the individual to trial in the United States, that involves control over the issue. But where you have an Abu Abbas, where Italy won't turn him over, nor will Yugoslavia, where you have the drug dealers in Colombia, what I am looking for is an option.

Secretary of State Baker testified in response to a question about a year ago of interest in it, and I will pursue it with you later. One of the difficulties we have is that, when the issue is referred back to the bureaucracy, there is a grave reluctance to take up some of the innovative approaches which some of the policymakers see, so let's put that on the agenda for a later discussion.

Mr. Barr, it was reported that you concluded that the President could use force in the gulf pursuant to U.N. Resolution 678, without an authorization by Congress. I would be interested in your view on that subject.

Mr. BARR. This may be impertinent, but I think Senator Biden indicated to me he wanted a full explanation of this, and I am wondering just to allow me to go through it once, if we could choreograph this so that he would be here when I talk about that.

Senator SPECTER. Well, if there is any impertinence, Mr. Barr, it is probably mine, not yours. I did not know that he had raised that subject with you.

Mr. BARR. No, privately he said he wanted to get into that this afternoon, so I am——

Senator SPECTER. I will defer to Senator Biden, because I have quite a few more questions during my 10-minute period, and I will await your answer to that.

Mr BARR. If at the conclusion he has not broached the topic, I will be glad to talk to you about it.

Senator THURMOND. Why don't you go on with your other questions?

Senator SPECTER. I am about to do that, but let me just give you my view, that the gulf was a war very much like Korea and Vietnam, and I was distressed that the Congress did not convene to take up the issue until January 10 of this year, but I find it difficult to see how the President can use force, which really is an act of war, without having congressional authorization. This is an issue which I will await your answers with Senator Biden.

The crime bill is currently pending, Mr. Barr, and I would be interested to know your views on the efforts to put a time limit on habeas corpus proceedings. Today, some cases with the death penalty go as long as 17 years. The average time is about 8½ years. A number of us have been trying to craft a compromise which would allow one full review by the Federal courts, without going through some of the maze of technicalities which the Supreme Court has currently established, but in the context where there would be a time limit, 120 days in the district court, a similar time limit in the circuit court, and a similar time limit in the Supreme Court, absent very complicated circumstances, complicating factors which would preclude that on a showing or a statement by the court that they couldn't meet the time limit.

These cases arise only about once every 18 months for district court judges, on the average, in States like Pennsylvania, Texas, Florida, and California, where there are many death penalties. I would be interested in your view about the practicality and realism of establishing some time limits on Federal review on these cases.

Mr. BARR. I would like to see time limits on the handling of habeas petitions. They have to be reasonable time limits that give the process enough time to work and be properly sequenced, but I think that might be fruitful.

Senator SPECTER. The other side of that equation is the very restrictive rules which the Supreme Court has imposed on reviewability, and there is a lot of controversy as to that.

One of the cases that came out of Pennsylvania, called *Peoples* v. *Pennsylvania,* involved the situation where an appeal was taken to the Supreme Court of Pennsylvania which denied review, and they can do so either on the merits or as a discretionary matter, without specifying. The case then went through the Federal court system, ended up in the Supreme Court of the United States, and they remanded all the way back, on the ground that it was not conclusive on the record that the Supreme Court of Pennsylvania had considered the merits.

So it had to go all the way back. This is a very involved subject, but I would like to discuss it with you further after you have had a chance to review it. It seems to me that if the Federal courts had a little more realistic view—what they are really doing is just wear-

ing out the system and wearing out the petitioners, because there is no reason why once it is in Federal court there shouldn't be a full and fair hearing. That is my view. But only one. Perhaps a gatekeeper approach which has been introduced where the court of appeals would decide whether a successive petition for a writ of habeas corpus should be utilized. But it is a very emotional issue, and it gets involved with a lot of technicalities. It is one which I think your Department and this committee ought to address in advance of the conference, because I think we have come up with a good crime bill which accorded due rights to the defendant and due concerns for society's issues.

So I would ask you to take a look at the *People's* case and also *Teague* v. *Lane,* which I am sure you are familiar with, to see if we can't craft something that would make some sense.

One of the amendments to the crime bill which I added, Mr. Barr, calls for an annual audit on forfeiture accounts which came to my attention when my wife, who is a city councilwoman in Philadelphia, sought to have some of these forfeiture moneys used in a drug-related field and found that they had been utilized instead for general purposes of the police department. On a review of the situation, I found that there was no audit, no accounting made as to precisely what the funds were used for. Those are now very, very substantial pools of money, and I would be interested in your opinion, and would like to really solicit your support for the Senate position which enacted an amendment calling for an audit on the forfeiture funds.

Mr. BARR. I think we are generally moving in that direction. I think we recognize that to maintain the integrity of the program—it is such an important program, but also recognizing it is a high-risk program—we have to take steps to make sure that the resources are being properly used. And just how far we go in auditing State and local operations ourselves versus requiring an independent audit and getting certifications as a condition, I am not sure what your proposal entails. Does it entail a Government audit or a private audit and then a certification?

Senator SPECTER. It entails a private audit and a certification. It is fairly fundamental and rudimentary—it is not very elaborate.

Mr. BARR. Yes, I think that is the direction we are going in, and I generally would support that.

Senator SPECTER. We have had considerable problems in Pennsylvania—and I think this is a national problem—in getting help from the Drug Enforcement Agency, the DEA. I would appreciate it if you would take a look at that aspect of the budgeting because in some areas like Erie, PA, for example, there has been a real need to have DEA support on a triangle among Buffalo, Cleveland, and Erie, and it has been just impossible to get the attention of the Drug Enforcement Agency. With the very substantial funding which is available there, I would appreciate your attention to see if we can't get some more assistance on that issue.

Mr. BARR. I would look into it. Is this a task force or stationing of an agent that we are talking about?

Senator SPECTER. It requires the stationing of an agent there so that there is a permanent presence and a real coordination and liaison with DEA.

Let me very briefly support what Senator Thurmond has said about the need for faster processing of the Federal judges. We have many vacancies which are present in my State and many vacancies which are present nationally. I know that there are problems on manpower. But you litigate in the Federal courts all the time. It would be very much to your interest as well as to all the litigants' interest, and would end up saving time in the long run for your FBI agents who wait around for their cases a long time because of overcrowded dockets, if we could expedite the process.

We worked through a very comprehensive judicial bill last year with many new judges, and they are still waiting. Let me strike a partially partisan note. This is November 1991. I am very much concerned that by midyear next year we are going to start to have caps placed on the number of judges who will be confirmed, as there were in 1988. So it very much behooves us to move with speed to try to get that moved forward.

Mr. Barr, I have a number of other questions on some of the specifics of the international court which I will submit in writing, and a question in writing on the pending authorization for U.S. attorney's offices in Philadelphia and perhaps some others. But the yellow light is on, and my colleagues are waiting, so I will conclude now with my thanks to you for your testimony.

Mr. BARR. Thank you, Senator.

Senator DECONCINI [presiding]. Thank you, Senator Specter.

Mr. Barr, do you feel like continuing or do you want a little time here?

Mr. BARR. I wouldn't mind a break at some point.

The CHAIRMAN. If the Senator from Arizona does not mind, I think it is appropriate that we give our witness, if we have the time, a little break here. So why don't we recess until 10 minutes of.

[Recess.]

The CHAIRMAN. The hearing will come to order.

The Chair recognizes the Senator from Arizona, Senator DeConcini.

Senator DECONCINI. Mr. Barr, I want to thank you—I have been observing these hearings in my office—for your candid answers to the questions that different members have been proposing here to you, and I appreciate that very much. I realize these things have got to be a trying experience. Somebody might ask why in the world would you even want the job and have to go through this. But that is a decision you have made, and I am glad that you have made it.

I want to follow up, Mr. Barr, on a question I talked to you about yesterday in response to a question regarding the turf wars or battles between Treasury and Justice. You have stated with respect to the Secret Service financial institution fraud investigations that there did not appear to you to be any problem, or at least that no one had come to you with any problem on the coordination of investigations between Justice Department and Treasury. This is really more of a request for you to review these documents that I will give you, and that is the only purpose of it, to demonstrate that I think there is a problem and I think it is worthwhile for the Attorney General to look at it.

I have copies here, which I will give to you, exchanged between the FBI field office and the Secret Service field office concerning the authority of the Secret Service to investigate financial institution fraud violations. I also have a copy of an internal memo sent to all FBI field officers from Director Sessions on this same matter. And I want to make these available to you for your review, because I believe there is a problem with respect to the FBI's interpretation of the types of criminal referrals which can be made to the Secret Service. And I would ask that you look at these and see whether or not you feel as I do that there is a flap here that ought to be smoothed out and we ought to get the maximum out of Secret Service as well as the FBI. We will deliver those to you.

Mr. BARR. Thank you, Senator.

Senator DECONCINI. Mr. Barr, the Immigration Act of 1990 authorizes and directs the Attorney General to designate temporary protected status, known as TPS, to nationals of a country currently in the United States under certain conditions. These conditions include ongoing armed conflict or extraordinary and temporary conditions in a foreign state preventing the safe return of a country's nationals. In this case, the designated country is El Salvador.

Given that approximately 200,000 Salvadorans have registered for TPS, you will be faced with a decision next year whether to continue TPS for Salvadoran nationals, and thereby extend their protection against deportation. That authority rested with the Attorney General before the Immigration Act of 1990. This just mandated that they respond to it, and the administration signed off, finally, on that legislation.

My question to you is: Do you intend to continue the administration's policy regarding TPS for Salvadorans if circumstances in El Salvador do not change when you must make the decision on this issue?

Mr. BARR. As long as the statutory standards are met and if the situation hasn't changed, then it would seem the statutory standards are met. I haven't hesitated, nor has my predecessor, to grant TPS. I think we granted it not only for the countries listed in the legislative history of the statute, but then more recently with the Somalis.

Senator DECONCINI. That is correct. You have. In this case, it has taken us some 6 years to pass this legislation because the Attorney General did not feel Salvadorans qualified—El Salvador did—for protected status. I respected that, though I didn't appreciate it. I disagreed with it.

Finally, the administration went along, as did Senator Simpson, and I am not interested in extending that legislation. What I am interested in is just bringing it to the attention of the next Attorney General that when this runs out, assuming the conditions are the same—and I hope that they are not—assuming that they are the same, that policy would not change.

Mr. BARR. That is right.

Senator DECONCINI. Now, let me ask you this question. It has recently been brought to my attention that a proposed National Drug Intelligence Center is moving forward and will be located in Pennsylvania. I have also been told that the FBI would be the Director

of this new center and that the DEA and the Department of Defense would serve as Deputy Directors.

In 1989, I called for the creation of a National Intelligence Center. However, since that time, it appears that the need for this center certainly has become questionable. And with tactical drug intelligence or the day-to-day type operations being handled by the DEA's El Paso Intelligence Center, known as EPIC, and CIA's Counter Narcotics Center responsible for strategic or long-term intelligence, what will be the mission of this National Drug Intelligence Center? Do you know anything about it?

Mr. BARR. What was the second center you mentioned after EPIC?

Senator DECONCINI. It is the CIA's Counter Narcotics Center, CNC.

Mr. BARR. Right, right.

Senator DECONCINI. Responsible for strategic and long-term intelligence on drugs.

Mr. BARR. I believe this was a DOD appropriation to establish a center in Pennsylvania.

Senator DECONCINI. That is correct.

Mr. BARR. EPIC is tactical interdiction intelligence. That is its principal function. What NDIC is supposed to provide is strategic law enforcement intelligence, and the CIA obviously has restrictions on its law enforcement role, and also there are a lot of sensitivities about using intelligence information in law enforcement files. And there are considerations that have to be given to the crosswalk between intelligence collection for foreign intelligence purposes and for law enforcement purposes. But the concept behind NDIC is strategic law enforcement intelligence.

Senator DECONCINI. Do you have any fears of duplication here between EPIC, CNC, and this new center?

Mr. BARR. I think you always have to worry about duplication or unnecessary overlap when you have a number of centers like this, but they do have discrete functions. Pursuant to the last drug strategy, we are establishing a law enforcement drug intelligence council, and that will have the Justice Department and also as the vice chair the Assistant Secretary for Enforcement from the Treasury Department and other law enforcement agencies. It is my hope that that council, among the law enforcement agencies, can help sort out and monitor the intelligence activities in the drug war.

Senator DECONCINI. Do you intend to look at this after it is established and operating? Would you consider it appropriate for you to review whether or not there is duplication here? I am deeply concerned about it, obviously, or I wouldn't be asking you the question. I have no trouble with all the intelligence we want to get together, but now to have three or maybe four different places really bothers me.

Mr. BARR. Absolutely. I will be glad to——

Senator DECONCINI. Do you know if the FBI has been designated the Director of this new center?

Mr. BARR. I think an FBI person.

Senator DECONCINI. Did you select the Director as the Acting Attorney General, do you know?

Mr. BARR. I believe I did.

Senator DECONCINI. I believe you did, too, but I don't know. I am just asking.

Mr. BARR. It was my intention——

Senator DECONCINI. Why would you select the FBI in which drug investigations is only a secondary responsibility over the DEA?

Mr. BARR. I believe that it wasn't a question of over the DEA. I am trying to improve coordination between the FBI and the DEA. I think that there are a number of functions that both agencies perform, and we should have those functions performed jointly rather than duplicative systems in the DEA and the FBI. One of those areas that I think we can achieve efficiency and also merge the activity is in the intelligence area. And DEA, as you say, has the lead in the tactical intelligence.

From my experience, FBI does an excellent job on strategic intelligence, and as part of this process of trying to draw FBI and DEA into a closer working relationship, I felt it was appropriate to have FBI take the lead on strategic.

Senator DECONCINI. Where does the Treasury Department and its drug-fighting agencies fall within this center, in your judgment?

Mr. BARR. I think they should be integrated into it. Obviously the Treasury agencies play an important part in the drug war, and in particular——

Senator DECONCINI. Is Treasury or Customs or BATF designated as a Deputy Director? I can't find out.

Mr. BARR. I will check on that. I don't think so.

Senator DECONCINI. And do you know if they have been fully involved in the design of the center and input from other law enforcement besides just FBI?

Mr. BARR. I don't know the answer to that.

Senator DECONCINI. Would you please let us know?

Mr. BARR. Yes.

Senator DECONCINI. Thank you.

Dealing with Los Angeles and its problems with police there in the wake of the Los Angeles police brutality incident involving Rodney King, your predecessor directed the Civil Rights Division head, Mr. John Dunne, to undertake a comprehensive study of similar incidents and claims. Do you know what the status of that study is?

Mr. BARR. Yes. The Civil Rights Division has reviewed the cases—I think it is 15,000. That number sticks in my head, so I will use it here—and has passed those cases and their preliminary review to the National Institute of Justice, which is preparing two reports and has increased the data base by collecting additional cases that were not available to the Civil Rights Division. So now the second phase of the study is being completed by NIJ through a competitive process where——

Senator DECONCINI. When is that likely to be finished? Do you have any idea?

Mr. BARR. I am not sure. I don't want to——

Senator DECONCINI. Would you let us know?

Mr. BARR. Sure.

Senator DECONCINI. Do you anticipate that this study would be available to Congress?

Mr. BARR. Yes.

Senator DECONCINI. And you will share it with us whenever it is finished?

Mr. BARR. Yes.

Senator DECONCINI. Because I think some of us here are interested in perhaps legislation, or at least reviewing how these occur and what could be done to be constructive at the local level.

Mr. Barr, it has been nearly 7 years since the DEA agent Kika Camarena was tortured and murdered in Mexico. I am sure you are familiar with the case. DEA's investigations into Agent Camarena's murder has led to more than 20 indictments, including several former Mexican Government and law enforcement officials.

When Judge Robert Bonner took over as DEA Director last year, he said that the investigation would continue as long as it takes to achieve justice. Drug kingpin Rafael Carlos Quintero and Felix Gallardo have been arrested, and in the case of Quintero, he has been prosecuted.

Does the Justice Department plan to seek the extradition of Felix Gallardo or any other Mexican citizen indicted in the Camarena case?

Mr. BARR. We will continue this investigation and follow the evidence and continue until we are satisfied that everyone has been brought to justice, and we will seek to obtain custody of people who were responsible for this. In the present state of affairs, it is doubtful that we would obtain extradition from Mexico.

Senator DECONCINI. You would not anticipate——

Mr. BARR. I don't anticipate that they would——

Senator DECONCINI [continuing]. Gallardo.

Mr. BARR. I think their position is that they will not extradite nationals, Mexican nationals.

Senator DECONCINI. And that would prohibit us or keep you from making such a request?

Mr. BARR. No, it wouldn't necessarily prohibit us from making such a request. We are going to try all avenues to bring these people to justice. As you may know, we have three cases pending now, including two going up to the Supreme Court, of people who were involved in the murder——

Senator DECONCINI. I don't mean to pick at this, but does that mean that extradition is under consideration by the Justice Department and that if you, and the Justice Department in particular, decide that there is merit, that you will ask for it?

Mr. BARR. Yes.

Senator DECONCINI. Is that a safe summary of what your position is?

Mr. BARR. Yes, we have——

Senator DECONCINI. And that has not been determined as of now?

Mr. BARR. That is correct. It has been determined that we want these people and we want to try these people, and the best way of getting custody of them has not been determined.

Senator DECONCINI. As I said, Quintero has been prosecuted, but Gallardo has not, and I call that to your attention for the possibility of extradition by the United States. I realize that is a judgment for the Justice Department to make.

Does it occur to you that our policy may have been to let Mexican justice do justice, instead of our extraditing, because of the difficult or embarrassing or awkward international position that might put us into?

Mr. BARR. There are Mexican citizens who were taken out of Mexico for trial in the United States.

Senator DECONCINI. Right.

Mr. BARR. The Mexican Government has objected to that.

Senator DECONCINI. Some of those were not extradited.

Mr. BARR. Correct. The Mexicans have objected to that process. They filed formal diplomatic protests. The legality of that informal rendition is now before the Supreme Court. It has been a sore point in our relations with Mexico.

Senator DECONCINI. Wouldn't it be better, if you have a sore point, to have one where you proceeded through the proper extradition requests, and then if you couldn't agree to that, at least doesn't that make more sense?

Mr. BARR. If we could get custody through extradition, it would make a lot of sense.

Senator DECONCINI. Do we know if everyone indicted in the Camarena case is in custody in Mexico?

Mr. BARR. I don't know the answer to that.

Senator DECONCINI. Could you supply us with that? I am interested in that case. Do you believe the Justice Department has done everything in its power to successfully bring every individual involved in the Camarena case to justice, or have you looked at this case at all?

Mr. BARR. I have looked at the case. I am quite interested in the case. This was a DEA agent that was tortured and killed.

Senator DECONCINI. Indeed he was, and his family happens to live in my State. You are personally involved in the case, then?

Mr. BARR. Yes.

Senator DECONCINI. And intend to continue to do so, including the question of extradition?

Mr. BARR. Yes.

Senator DECONCINI. Thank you. My time is up. Mr. Barr, I know you are going to be so glad to get out of here, so I am not going to hang around and ask you some more questions. I will submit some questions, if you would not mind having you and your people put together some answers for us.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator Metzenbaum.

Senator METZENBAUM. Mr. Barr, it is——

The CHAIRMAN. Before you begin, Senator, I know I told you that I am going to wait until the end to ask the rest of my questions, and I have, I suspect, somewhere between half an hour and 45 minutes of questions, if that long, and I want to make sure that the Senators that remain that have questions, there is no time limitation, but do you have any rough idea how much, so we could——

Senator METZENBAUM. Just 15 or 20 minutes.

The CHAIRMAN. So, my guess is that by 6 o'clock, God willing and the creek not rising, we will be able to end this hearing.

Senator METZENBAUM. Mr. Barr, it is good to see you again. I wasn't sure I was coming back with additional questions, but the staff informed me that you would be unhappy if the hearing concluded too early, so I thought I would come over and accommodate you. [Laughter.]

The Justice Department has consistently supported ending the McCarran-Ferguson antitrust exemption for the insurance industry. Most recently, during the Reagan administration, the Justice Department testified before my Antitrust Subcommittee in favor of eliminating special antitrust protections for the insurance companies.

Charles Rule, the Assistant Attorney General of the Antitrust Division, was frank to state that there was "no justification today" for the antitrust exemption for the business of insurance. He also testified that "the insurance industry has no inherent characteristic that requires its protection from competition," and that "repeal of the antitrust exemption for the business of insurance should generate benefits for consumers."

In light of this strong statement of support from the Justice Department for repealing the McCarran-Ferguson antitrust exemption and the reasoning on which it was based, can I assume that the Justice Department will continue to support efforts to modify McCarran-Ferguson and, thereby, end special antitrust treatment for the insurance industry?

Mr. BARR. Senator, I haven't discussed this issue yet with Jim Rill, but I will tell you that my general disposition is to be very skeptical of exemptions from antitrust for sectors of industry. I think that we should rely on healthy competition, and so I am very skeptical. Someone would have to make a very compelling case for continuing an exemption from antitrust law, but I haven't explored this yet with Mr. Rill.

Senator METZENBAUM. If it is possible for you to respond to that question before the matter comes to the floor, I would be grateful to you.

Mr. BARR. Certainly, Senator.

Senator METZENBAUM. Along that line, some years ago, the distinguished ranking member of this committee and I authored legislation to provide an antitrust exemption for joint research efforts in the industry.

Mr. BARR. Yes.

Senator METZENBAUM. I thought that was far enough, not to go beyond that. There is now pending before the Congress a proposal to provide an exemption for joint production efforts. There is some division in Congress on that subject. Would you support or oppose legislation to provide an antitrust exemption for joint production efforts of industry in this country?

Mr. BARR. My understanding, Senator, is that it is not an exemption, but that it is the rule of reason test, taking it out of per se violation and treating it under rule of reason.

Senator METZENBAUM. I don't really believe that is correct. It would apply single damages, but I don't believe that—my recollection is, I don't think it refers to the rule of reason becoming applicable. I think it is an exemption along the lines of the exemption we provided for research maybe 5 or 7 years ago, and I am ques-

tioning you as to whether or not you, as the chief law enforcement officer, the chief attorney for the country, would think that serves this Nation's interests.

Some of us think that provides an almost open loophole to violate antitrust laws, although it wouldn't be a violation if you changed the law, of course, so I think your position on that is very significant, and I would appreciate your telling me what your thinking is, assuming that it is not the rule of reason about which we are speaking.

Mr. BARR. I would have to study that, Senator, but I would be certainly willing to give you my reaction after I have had a chance to look at it.

Senator METZENBAUM. Would you be good enough to do that as promptly as possible?

Mr. BARR. Certainly.

Senator METZENBAUM. Let me ask you, even though you haven't studied it, do you have an initial reaction to the idea of providing an additional exemption from the antitrust laws?

Mr. BARR. I would like to study the matter first and really see what the issues are.

Senator METZENBAUM. Do you believe consumers should have a right to buy at discount, assuming the seller is willing to sell at discount?

Mr. BARR. I am not sure what you mean by "right to buy at discount."

Senator METZENBAUM. Well, if I own a store and I want to sell to Senator Biden my product at $65 and maybe the list price of that item is $80, should the consumer have the right to buy it from me at $65?

Mr. BARR. I think that discounters should be able to discount their products, but if we are getting into the resale price maintenance issue, I also think that distributors, I would be concerned about a rule that eviscerated the long-standing right of manufacturers to terminate their distributors, as long as it is not part of an agreement to enforce resale price maintenance. I believe that resale price maintenance is a violation, but I am concerned about abridging the rights of distributors. I know you have legislation in this area, and I think the Department has taken a position against it.

Senator METZENBAUM. It has passed the Senate, it has passed the House, and are you saying that if the Congress sent it to the President, that you would think that legislation ought to be vetoed?

Mr. BARR. I think there is a veto statement out on that bill, and I wouldn't anticipate changing it.

Senator METZENBAUM. Well, there is a veto statement out on just about every bill, so we can't go on that basis. [Laughter.]

Do you believe the antitrust laws—well, I will skip that. I ask you, then, do you believe that vertical price-fixing should be per se illegal under the antitrust laws?

Mr. BARR. I don't know enough about that issue to give you a response right now off the top of my head. Generally, I believe in enforcement of the antitrust laws. My view is that they are an essential tool to maintaining competition, and I am not one of those

that believes that the market itself always is self-adjusting, and certainly not self-adjusting in time to prevent harm to consumers.

If I felt that there was anticompetitive conduct going on that substantially injured competition, I wouldn't hesitate to intervene. I don't hold myself out as an expert in antitrust law, and I rely heavily and will rely heavily on Jim Rill in this area, and I am generally satisfied with the direction that he has taken things. I think he has carried out a strong enforcement policy.

Senator METZENBAUM. Mr. Barr, I think I left the resale price maintenance issue too rapidly. Under the Supreme Court decisions, as you know, resale price maintenance is per se illegal. Now, the problem has then developed as to what are the evidentiary standards that have to be used, and you indicated that there is as veto message out on it, but that was under Mr. Thornburgh, which I assume had interceded with the President.

My real question to you has to do with what does Mr. Barr think, because what we are talking about here isn't very complicated. It really has to do with whether or not I, as a local merchant, can sell my product to a consumer at whatever price I want to sell it, assuming all other things are equal, or whether a manufacturer can tell me I have to sell it or can tell me that I must sell it at a higher price.

The issue that has complicated the subject isn't whether our resale price maintenance is or is not illegal, the issue has been what is the evidentiary standard that must be used, and it is in this area that I think the position of the administration—we are in an economically distressed America, we are in an America where people are having trouble finding the money to buy the shoes for their children and clothes and a TV, if they want it, or whatever the case may be, or a new refrigerator.

The question is, Will you, as the Attorney General, support the right of individuals to buy at the lowest possible price from the distributor or the dealer, and support the concept of that individual being able to go to court to protect his or her right?

I think it is a basic question. It isn't a question of what the message is that is out there, it isn't a question of whether you believe or don't believe in RPM. The question really is will you support our clarifying the law sufficiently to make it possible for dealers to sell at the lowest price that they want to sell it to the consumer.

Mr. BARR. Senator, as I said, I am not an expert in this area, but my understanding of the issue is whether or not we are going to overrule Supreme Court cases. My understanding is that, under current law, if a manufacturer terminates a distributor on the complaint of another distributor, then that is not considered enough to establish a per se violation of resale price maintenance, that current law requires that the complaint from the complaining distributor involve some kind of agreement with the manufacturer to terminate the discounting distributor, in order to enforce resale price maintenance, and that is the standard now under Supreme Court interpretation of present antitrust law, and that what you want to do is reduce the evidentiary standard so that the complaint alone from another distributor could be taken into account, could go to the jury and there would be no requirement of having to show some kind of agreement to enforce a resale price maintenance.

So, the way I understand the issue is whether we are going to change existing law, not whether I am committed to enforcing existing law. I am committed to enforcing existing antitrust law. I believe in competition and I believe that consumers are ultimately served by maximum competition, but we do also believe, and have for a long time, that manufacturers should have a right, within certain limits, to determine who is going to be their distributor.

The way this has been explained to me by the antitrust experts in the Department of Justice is that the evidentiary standard in your bill would go so far as to really substantially impair and abridge the right of a manufacturer to terminate a distributor, and I am relying on that advice and that expertise.

Senator METZENBAUM. What we are really talking about isn't complicated. That is not the issue. The issue is really whether or not you believe in free enterprise. I happen to believe in free enterprise, and I am sure you do, and I am sure the President does. But free enterprise is meaningless, if you provide evidentiary standards that are either impossible or almost impossible for a plaintiff to maintain.

What we are talking about here is not the question of what the law is, because there is no question that resale price maintenance is illegal under Supreme Court decisions, and there is no question that, under my proposal, there must be a causal connection between the complainant and the terminator.

Now, the question really is can we get the administration to join with us in support of that free enterprise concept that makes it possible for people who are very much in economic distress or may not be in economic distress, but many are at this time, to be able to buy at a discount, without the seller being fearful of being terminated, and somehow I think there has been misinterpretation at the White House, somehow it has been made into a bugaboo that doesn't exist, but it is as pro-free enterprise as anything the U.S. Chamber of Commerce could maintain.

What I am asking you is—and I appreciate the fact that you are not an authority on this subject—but what I am asking you to do is to reevaluate this issue, so that there will not be a Presidential threat. It came about, I am sure, by reason of Dick Thornburgh's recommending that to the President. I am asking you to reexamine it personally, because I think you are an intelligent man and I think you will come to the conclusion that the right thing to do is to make it possible for the dealers to sell at a discount.

Mr BARR. I am always prepared to take another look at a legal issue and a policy issue, as well, so I will be glad to reexamine it.

Senator METZENBAUM. You are described as a conservative, I think this is a conservative point of view, but I think it has been misinterpreted by some at the White House, and I would appreciate your looking at it.

Am I all right on time?

The CHAIRMAN. Senator Leahy is here, but——

Senator METZENBAUM. I won't be too much longer.

During the last decade, an avalanche of bank mergers went virtually unchallenged by the Department's Antitrust Division. Although the Department reviewed over 9,000 bank merger applica-

tions from 1986 to 1990, it didn't bring a single court case to stop a merger.

Then, in 1990, in the face of two undeniably anticompetitive bank mergers in New England and Hawaii, the Department finally took action to block those mergers in court. Now, as you know, in the last 6 months there has been a veritable wave of consolidation and it has swept through the banking industry. The bank mergers that have been proposed include the three largest in U.S. history, Chemical Bank with Manufacturers Hanover, NCNB with C&S Sovran, and BankAmerica with Security Pacific.

According to industry analysts, over 35,000 jobs may be lost as a result of these bank mergers. In addition, bank concentration levels will literally go through the roof in many Western and Southern States, as well as the State of New York.

For consumers and for small- and medium-size businesses, consolidation of this magnitude means paying higher interest rates and finding it even more difficult to obtain bank loans. I don't have to tell you how bad the economy is, and I don't have to tell you that banks have already tightened up on their lending, without this added pressure.

The Department of Justice and the banking regulatory agencies will be reviewing every one of the proposed mergers, to determine its effect on competition generally. It is my view that the Department of Justice should take the lead role in reviewing these proposed bank mergers, to determine, among other things, how they would affect consumers and small or medium-size businesses, who are the most vulnerable customers in any banking market.

As I understand it, the President himself would reportedly agree with my view of the Department's role for bank mergers. You may recall that, in 1984, George Bush chaired a task force on regulation of financial services which recommended that "all anti-competitive analysis for bank mergers be performed by the Department of Justice, utilizing normal antitrust standards."

My question to you, Mr. Barr, is: Will the Department take an active role in bank mergers and challenge those with anticompetitive effects, whether or not it has the support of the Fed or the other banking agencies?

Mr. BARR. I think we have just demonstrated that. I believe that both the Hawaii case and the New England Bank case were cases in which the regulators approved the merger. And as you know, they were challenged by the Department of Justice. So I think under Jim Rill's leadership, the division is going to be looking at bank mergers and wouldn't hesitate to challenge them regardless of what position the Federal regulators ultimately took on it.

Senator METZENBAUM. As you know, the Antitrust Division will shortly be coming out with its analysis of the NCNB/CNS Sovran merger. Assuming that they take the position that the merger should not go through, will the Department of Justice go to court to block the merger or seek significant divestiture?

Mr. BARR. I can't answer that. I will have to wait and see what position they take and, you know, whether it is significant divestiture or some divestiture or whatever the proper resolution of their concerns might be.

Senator METZENBAUM. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Metzenbaum.

Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

Mr. Barr, in your earlier discussion with Senator Thurmond on habeas corpus, it left a couple questions in my mind. I share with you and others the concern about getting finality. I am not convinced that there are many criminals, especially—well, certain types of crimes, whether there is any rehabilitation that is ever going to occur within the prisons. But I do think that there is a deterrent effect, especially with some of the crimes and sentences. But that deterrent effect is diminished, and if there is any chance at rehabilitation, it is out the window if the whole time the person is there is spent in just one appeal after another. It has been my experience that they tend to forget why they are there, but their whole feeling wraps around did my lawyer wear the wrong tie this day, speak this wrong way to a juror.

I know, being here in the U.S. Senate for a dozen years or more, I pick up my hometown paper and find cases where people I had prosecuted before I came to the Senate were still going through a series of habeas corpus.

So having said that, I agree, as everybody else does, there should be finality. I am concerned, however, that with the expression of justifiable frustration on the part of prosecutors, judges, everybody else, we not throw the constitutional baby out with the bath water.

The Justice Department supported—and the reason I raise this in response to one of your answers in responding to Senator Thurmond, speaking of the crime bill that is now before us, the Department of Justice supported the provision of the Senate crime bill that bars Federal court review of any claim that has been fully and fairly adjudicated by a State court.

Now, I am told by constitutional experts in reading that, that even if a Federal court believed that a prisoner's fundamental constitutional rights have been violated—for example, by depriving him of competent counsel or by coercing his confession or by admitting a tainted identification into evidence, all things that have happened and shown up on appeals—the court would be powerless to do anything to act.

Does that come into a bit of statutory overkill?

Mr. BARR. If that is what it meant, but that is not my understanding of full and fair. Full and fair was a standard that was adopted by the Senate in 1983 and then again last year. In 1983, the Senate report actually laid out what I thought were the appropriate parameters of the full and fair standard of review. And ineffective assistance of counsel would not be precluded, would have to be considered, obviously, there would not only be procedural review, but substantive review as well.

Now, the Senate version did not have any definition of full and fair in the bill itself, and I recognize that after it passed the Senate, some groups raised concerns about the fact that there was no definition of full and fair, and it was susceptible to interpretation that would preclude appropriate levels of review in the Federal system. So I am hopeful that if we can get a crime bill out of the Conference Committee, we can work on some kind of version of habeas that would clarify that.

Senator LEAHY. Well, let us assume arguendo that the Senate bill meant the way I described it or meant what I said, that it would preclude these, would preclude reviews under these circumstances, the incompetent counsel and so on. Is my understanding correct that that is not something you would favor?

Mr. BARR. That is right.

Senator LEAHY. Would a more balanced approach to habeas reform be to enact reasonable time limits, restrict successive petitions, but protect that historic right to review of petitioners' Federal constitutional claims?

Mr. BARR. Yes. Essentially I want a rule of deference in the review. And——

Senator LEAHY. How would you describe your concept of rule of deference, Mr. Barr?

Mr. BARR. Procedural safeguard, and that there was a reasonable finding of fact and application of the law to those facts. Not complete de novo where, you know, it is a close question, reasonable men or women may differ, and even though 17 State court judges have reached this conclusion, I would have gone the other way, and so I am going to sweep aside the entire State process.

But that is essentially the standard of review that I would seek.

Senator LEAHY. Have you looked at what the Federal Judicial Conference, which is comprised of some of the most respected members of the Federal bench, have you looked at what they have said about the administration's recommendations on habeas reform?

Mr. BARR. I am not sure if we are talking about the same thing, but I did look at the fact that a number complained that the Senate version did not have a definition in it and that therefore the standard was uncertain and they were opposed to full and fair as the sole standard. And that is why we would like to work out some kind of definition in the conference.

Senator LEAHY. Do you agree with their conclusion, the one you have described?

Mr. BARR. Well, we have testified as to what we mean by full and fair, and if it is a question of pinning it down in statutory language, we are willing to do that.

Senator LEAHY. If the final version of the crime bill came out with the Senate version of habeas reform, would you favor that?

Mr. BARR. The way it has passed?

Senator LEAHY. Yes. The way it passed the Senate. If the final bill—actually I will make the question easier for you. If the Congress passed a bill just on habeas reform, separate from all the other issues that may be in the crime bill, but just on habeas reform, and it was in the form the U.S. Senate passed it in the crime bill, would you be in favor of the President signing such legislation?

Mr. BARR. Provided people understood what we meant by full and fair.

Senator LEAHY. But somebody reading it could take the same view that the Federal Judicial Conference did that the definition is not—that it is not your definition, for example.

Mr. BARR. That is an argument for putting in the definition, but as I said, we——

Senator LEAHY. That is my point. I mean, what I am saying—and this matter still has to go to conference. I am seeking perhaps some guidance before we go to conference. I have not made up my own mind whether I want to be a conferee on it or not, because I don't know whether it is going to be—what kind of an exercise it might be. But assuming I am a conferee, is it fair to say the nominee for Attorney General of the United States does not feel that the wording of the habeas provision, the wording is adequate in the Senate version and needs some work? And the conference, of course, has the ability to do that work prior to the final bill being enacted.

Mr. BARR. The wording is adequate if people mean what we think it means. This is language that has passed the Senate twice.

Senator LEAHY. Would you add to the language?

Mr. BARR. I would be willing to clarify the language if that is what it takes to get the full and fair standard, as we understand it, through.

Senator LEAHY. Do you take as a serious concern the Federal Judicial Conference's alarms that they have raised?

Mr. BARR. I took very seriously their comment that they were concerned that there was no definition of full and fair. That is how I understood the thrust of their position.

Senator LEAHY. That is not just a case of them being soft on crime or anything like that?

Mr. BARR. I don't think I have accused them of being soft on crime.

Senator LEAHY. I am not suggesting you have. I am trying to anticipate arguments others may raise. These are judges who end up having to deal with this issue day in and day out. They go across, I suppose, the ideological spectrum. But is it fair to say we should take seriously their concerns? You do; is that correct? I don't want to put words in your mouth, but do you?

Mr. BARR. I pay careful consideration to their concerns.

Senator LEAHY. Do they have merit?

Mr. BARR. You can take any statute that has been passed by Congress and say let's put in a definition of a particular term. If that is what it takes, if it is an accurate definition, then I would support that. If people are satisfied that the meaning is as we say the meaning is, then there may not be a need to define it. I am not opposed——

Senator LEAHY. We could do that with any statute, I understand. But on this particular one, do you take seriously their warning?

Mr. BARR. I think that they say that they are not satisfied that the standard is clear enough. I think it is clear, and I think the legislative history can make it clear. But I don't think the point they have raised is frivolous.

Senator LEAHY. *McCleskey* v. *Zant* on habeas corpus basically states a prisoner should be limited to one bite of the apple in Federal court. As I read *McCleskey,* it fairly well followed the Powell Committee's recommendation. Do you read it that way?

Mr. BARR. In what respect?

Senator LEAHY. On habeas corpus.

Mr. BARR. But I mean in what respect did they follow the Powell Committee?

Senator LEAHY. Well, that there should be this limitation on habeas, basically the one bite at the apple.

Mr. BARR. I——

Senator LEAHY. Do you recall the Powell Committee recommended that State prisoners be limited to one habeas corpus review of their constitutional claims in Federal court? Justice Rehnquist then forwarded that on to the—I believe that came down in the fall of 1989, the Powell Committee. Justice Rehnquist forwarded it to the Congress for speedy action on it. The 101st Congress declined to pass the Powell Committee's proposals. Then when the Rehnquist—the Court in *McCleskey* in effect wrote them in in the decision. Do you agree with that?

Mr. BARR. I don't know if they—I don't know——

Senator LEAHY. They took the same—they——

Mr. BARR. The general approach may be the same. I am not sure exactly what the standard—I would have to go back and look at what Powell said. There is a trap door in the one bite of the apple. It is one bite of the apple, except—and I would have to go back and look at *McCleskey* and look at Powell to see exactly what the loophole is.

Senator LEAHY. The Powell Committee, their recommendations were forwarded to the Congress by the Chief Justice but not adopted by the Congress. My reading, at least, of *McCleskey* is that the Supreme Court then adopted it themselves in there. If that is so, is that judicial activism on the part of this very conservative Court?

Mr. BARR. In what respect would it be activism?

Senator LEAHY. Well, it had been recommended to the Congress to do it by congressional action. We did not, so they wrote it in by judicial decision.

That is the way I have always heard judicial activism described by those who debate it.

Mr. BARR. Well, I would have to go back, as I said, and look at *McCleskey* and then look at the Powell Commission.

My vague recollection is that the standard imposed in *McCleskey* is not as strict as in the Powell Commission report. Obviously the Supreme Court can't adopt the Powell Commission report because I think the tradeoff in Powell for the limitation was States opting into the system by providing——paying for counsel. I am not sure the Supreme Court can insist that States do that or even hold that option——

Senator LEAHY. I am talking about the part of Powell which speaks to the limitations.

Mr. BARR. Again, I would have to study those limitations.

Senator LEAHY. I would be interested in your views. It appeared to me to be the same judicial activism that we are warned could happen only in a liberally oriented Court. I just wondered whether there were two types of judicial activism, good judicial activism and bad judicial activism, or whether we went to a more pure no judicial activism standard.

Mr. BARR. Well, after——

Senator LEAHY. I would be interested. Obviously your confirmation does not hang on that issue, but it would be an interesting thing if we—maybe for the sake of some in the Senate who would

give long and lengthy speeches about judicial activism, whether indeed they may have overlooked a double standard.

Mr. BARR. I will give you my reaction, Senator.

Senator LEAHY. Thank you.

Earlier this year, the Senate voted in favor of an amendment by Senator Symms that codified an Executive order and gave your office the authority to review agency regulations. The idea was to determine whether it constituted a taking under the fifth amendment. It gives the AG extraordinary authority. You can hold up legislation. In fact, you could hold up any legislation the administration didn't like. For example, the Clean Air Act or health and safety legislation requiring certain actions to be taken by people, could be held up as being a taking under the fifth amendment.

Is that just throwing in another bureaucratic layer?

Mr. BARR. I hope not.

Senator LEAHY. But what do you think about it?

Mr. BARR. Well, I think, obviously, if I remember the Symms amendment correctly, is that the amendment that says that if agency action is found to result in a taking, then the payment has to come out of the agency's appropriation?

Senator LEAHY. Basically.

Mr. BARR. Well, under the Constitution, if the government action is later found to be a taking of private property, I think, obviously, it has to be compensated. I think one way to avoid unintended takings, takings that Congress itself probably hasn't intended, otherwise the money would have been appropriated for it, that one way of handling that is to have the department responsible pay for it.

Senator LEAHY. For example, it was first proposed on wetlands legislation and then did not go on that. It was then put on the highway bill, as I understand it. It was a fairly sweeping thing and it made me go back and read, and I found where former Solicitor General Charles Fried was talking about people working with then Attorney General Meese, and he said—he was speaking specifically of young conservatives working with him, and I quote Charles Fried now—he said, "They had a specific aggressive and, it seemed to me, quite radical project in mind, to use the takings clause of the fifth amendment as a severe break upon Federal and State regulation of business and property. The grand plan was to make government pay compensation for a taking of property every time its regulations impinge too severely on a property right."

My only concern—and, obviously, anybody who has been in private practice has dealt in cases of condemnation and takings and seeking just compensation, and in my days in private practice, certainly I had cases like that for everything from building new highways to adding on to shoreline.

But the fact that the Justice Department has embraced this amendment, is this in any way a backdoor attempt to frustrate congressional intent regarding environmental and health and safety laws? For the record, what is your response?

Mr. BARR. This amendment has passed, hasn't it?

Senator LEAHY. That's right, but it was embraced at the time.

Mr. BARR. Excuse me?

Senator LEAHY. I am talking about the support that was given it at the time it was before the Congress, the strong support that was

given by the Justice Department. My concern was, because the courts—as I was just referring to earlier in the cases I have handled, as I suppose most lawyers have—the courts have always handled this question of condemnation, government taking, and there is a very solid body of law in this country. What concerned me is why the Justice Department was so eager to back this amendment to get the executive branch involved. Was that to frustrate congressional intent regarding environmental or health and safety laws?

Mr. BARR. Well, I don't think it could be to frustrate congressional intent, if Congress passes this second statute. I assume Congress' intent is that they want to avoid takings or, if takings are done by regulation, then they want it paid for.

Senator LEAHY. Why is it needed beyond what we already have? I mean it is on the highway bill now, which, of course, is tied up in conference, but when it passed the Senate, it had strong support from the Department of Justice.

Mr. BARR. My view is——

Senator LEAHY. Why do we need this extra? That is all I am trying to figure out.

Mr. BARR. My view is that it will police against unintentional takings that result in substantial cost to the government down the road.

Senator LEAHY. I'm sorry, do you want to run through that one again?

Mr. BARR. I assume that agencies have to be careful, so that they do not engage in unintended takings that lead to substantial costs down the road. If the government puts out a rule that is adjudicated to be a taking down the road, then the government is going to have to pay for it. What this statute does is say to the agencies, you had better be careful when you are framing your rules, because if, down the road, this is going to result in substantial payout by the government, it is coming out of your hide, so I assume it is there to promote more rational decisionmaking. I assume that is the reason for it, and I assume that is why Congress passed it.

Senator LEAHY. Well, Congress passed it with a very, very strong urging by the Department of Justice. I was thinking, for example, how the executive branch can get involved in rulemaking or even sometimes frustrating congressional intent. I look at what happens at EPA. The Administrator takes one position, and OMB comes in and says, whoops, a different position. Does this give those who may be opposed, in this case EPA taking environmental steps, doe sit give them a second ability to stop them?

Mr. BARR. I don't know the answer to that. I assume what it will mean is that people will have to focus on the potential costs or the risk of costs down the road, and since we are trying to avoid unexpected liabilities on the part of the government, it probably is a good idea.

Senator LEAHY. When the U.S. Sentencing Commission recently released a report indicating a vast majority of Federal judges opposed mandatory minimum penalties, we passed those here in Congress with a fair amount of enthusiasm, but I was kind of struck by that.

I have always taken the position that there are certain crimes I feel a mandatory minimum sentence makes sense. I argued that

early as a prosecutor and voted for some here. But I was struck by the Sentencing Commission, because half of the Federal prosecutors interviewed in the study also thought that mandatory minimums were bad policy, they thought that some were too harsh, and many resulted in too many trials.

The chief Federal judge in my State, Judge Billings, whom I have known most of my life, wrote to me and said this type of statute denies the judges the right to bring their conscience, experience, discretion, and sense of what is just into the sentencing procedure.

You must have looked at this, and I would assume the Department of Justice has an ongoing review of the question of mandatory minimum. Can you tell me your philosophy?

Mr. BARR. I have asked the Criminal Division to review the Sentencing Commission report and give me their reaction, and it is a matter I will be taking up with the U.S. attorneys, the Attorney General's Advisory Committee, which represents the U.S. attorneys, so you are correct in saying that we always have it under review.

I can tell you my general disposition, and that is that mandatory minimums are an important tool in certain limited areas, and the two areas that I think are important are drugs and guns. In the drug area, I think they are a valuable tool, because they are necessary to help dismantle drug organizations. The principal Federal role is the dismantling of drug organizations and, as you know, the way that has to be done or is usually done is from the bottom up, and mandatory minimums give the prosecutor the leverage that I think the prosecutor needs to work our way up the chain and into an organization.

I also think, given the gravity of the drug problem, that it is a strong deterrent and we need that kind of strong deterrent, and the same goes in the gun area. Those are the two areas where I am disposed to support mandatory minimums.

We also get complaints about them and we are reviewing the Sentencing Commission report. We are looking at some areas where potentially mandatory minimums may be unjustified, and I am also concerned, obviously, about prison space.

Senator LEAHY. We will agree that there is a serious question. This should not be considered as something just locked in stone and not looked at.

Mr. BARR. Oh, absolutely not. I think we have to continue to look at it.

Senator LEAHY. Let me talk about both the drugs and the guns, because these are both areas where I have supported mandatory minimums. I feel anybody using any kind of weapon in a crime, for example, should have an additional penalty separate from the crime itself for that. If they use a knife, a gun, a baseball bat in a robbery, for example, whatever the penalty is for the robbery, apply that, but then apply a separate distinct penalty for the use of the weapon. I have no problem with that.

I have no problem in taking as strong stand as we can against major drugs. But what concerns me, Mr. Barr, as we federalize more and more things that are basically State crimes—I will use drugs first—that there are some of the cases, possession cases, rela-

tively minor possession cases which would ordinarily be handled at the State level within some concept of how the State feels about them or how the prosecutors, the judges, and so on in the State feel, and I worry that there may be a temptation for an overly ambitious U.S. attorney to simply say here is a great way to make statistics, I sent 29 people to jail last month or last week or whatever the reporting period might be, and they all turn out to be relatively minor cases that normally would have been handled by the sheriffs department or the police department or the local prosecutor, and we have been handling it considerably different, the difference, however, being that, if it is handled in the Federal court, it has got a mandatory minimum, and something that might have been a fine or a very short incarceration in a State court, for precisely the same offense, becomes a serious Federal prison term.

We also have passed, and the law came out of here, we have made gas station holdup murder a Federal crime. Normally, the police departments will go after, if the gun could have conceivably have gone in interstate commerce, which virtually every gun would have, so instead of the sheriffs department or the police department or the State police or whatever going down to handle it, it can be the FBI.

There are a lot of things I would like to see the FBI go after. I think most States, most local jurisdictions, their police and their prosecutors are perfectly competent to handle gas station stickups, whether there is a murder or not, but they are not equipped to handle BCCI or handle a major drug cartel or organized crime or anything else.

Does that worry you, that perhaps we are taking valuable resources of the Department of Justice away from them, simply because it looks good in passing crime legislation here?

Mr. BARR. I think we have to be very cautious at the Federal level about federalizing activity that should be controlled by the State local enforcement authority. I think that in Federal law enforcement, we have to be constantly on our guard to make sure that our policies make some sense and that we are not out there dealing with low-level, serious, but, nevertheless, low-level criminal activity from the Federal Government standpoint, activity that could be just as effectively handled by the State.

I think we can go about that in two ways: First, I think we have to make sure that if we are employing the Federal tools on someone who may appear to be a small-time offender, it is for a specific policy objective. For example, most of the drugs distributed in Charleston, WV, I think come from Columbus, OH, and it may be that a mule coming down from Columbus, OH, to make a drug sale gets off the bus in Charleston, not carrying much, that might be a good case for the Feds to handle, because it may help us go back up the chain and find and get to the organization in Columbus.

So, we have to make sure that those kinds of cases are related to our objective of taking down drug organizations, that we are not just doing street crime to run up statistics, and I think that is a legitimate point.

Senator LEAHY. That is the concern I have.

Mr. BARR. That is why the OCDETF Program, the OCDETF Program, which, as you know, is the flagship of our antidrug effort,

now over more than the past year has made it very clear that we emphasize quality over quantity. We are not interested in running up the statistics, and performance in OCDETF is not numbers. It is the quality of the case.

So, that is a constant concern, we have to monitor it and make sure that is not going on.

The second way we attack the problem, I think ultimately, is to encourage States to get some of the same tools that we have at the Federal level. A survey of 35 States found that the average sentence for drug trafficking, not drug use, not mere drug possession, but drug trafficking, was 1.9 years. It found, for example, rape on the average of 3 or 4 years. Homicide, less than 5 years. And there is prison overcrowding in many States that contributes to that, but I think what we have to do is start encouraging States to have the same kind of tools, pretrial detention, mandatory minimums, where appropriate, sentencing guidelines and other things that make going into the Federal system less attractive, or at least not the only option you have for dealing appropriately with some of these offenders.

But I think the point you raise about not moving ahead pell-mell into federalizing State and local criminal activity is a proper point.

Senator LEAHY. I don't want to delay any further on this particular issue, but I would be interested at some time if you could have somebody from the Department of Justice come and give me a briefing on what kind of controls they have to make sure that you don't have U.S. attorneys in any part of the country or special agents in charge of the FBI in any part of the country who feel they are on a quota system, because that destroys the whole purpose of what we are trying to do in criminal legislation. Also, it destroys the whole purpose of everything we are trying to do in giving you the budget and the people you need to enforce the criminal laws, which I think you would agree with.

Mr. BARR. That's right, Senator, we are not interested in the quota system in law enforcement.

Senator LEAHY. We will arrange that at a later time.

My last question, and I will submit everything else for the record, so you can go home and see your family. Actually, none of us care to have you here any more, it is just your family that would want to see you.

Mr. BARR. I figured that out, so I sent them home. [Laughter.]

Senator LEAHY. You will hopefully follow.

Mr. Barr, a recent GAO investigation of computer security lapse revealed that the Department of Justice may have compromised highly sensitive information, when the U.S. attorneys office in Lexington, KY, sold surplus computers without first erasing that information from their memory.

In testimony before Congress, the GAO officials said, and let me quote him, "Our investigation leads to the unmistakable conclusion that, at present, one simply cannot trust that sensitive data will be safely secure at the Department of Justice." The reason I worry about that, you have—and this is something I spent a lot of time on over the past few years—the Department's responsibility in preventing terrorist attacks on our country's critical computer systems, something that could cripple us. A serious terrorist attack

could really cripple us. We have had people from the Department, experts like Robert Kupperman and others who have testified here about that. Are you confident you are good enough, not you personally, but the Department?

Mr. BARR. On security, I think there is room for improvement and I think we are moving aggressively to improve security. We did take the GAO report seriously. I think it went a little overboard in magnifying the dimensions of the problem, but, nevertheless, we do have an obligation, because of the sensitivity of our files and records, to ensure that they are secure, and we have a training program and a security program in place to upgrade it, so we are trying to respond in that area.

Senator LEAHY. Well, you have a two-edge sword here, and I don't envy the job you've got. If you are going to go after organized crime or significant crime, or sometimes even one kidnaping where a person travels across the country, being able to go to the computer and pull out everything from memos to leads has to be a tremendous tool for you.

On the other hand, if I have sensitive information that I am willing to give to you in the course of investigation on the idea that you, the Department of Justice, is going to hold it confidential, especially if I happen to be somebody in an area like organized crime, where you might be killed for giving the information, you have obviously also got to have a real concern that that is not going to go floating out there somewhere.

Mr. BARR. Absolutely, Senator. We can't operate, unless people have confidence that we can keep information secure, so that is a high priority for us.

Senator LEAHY. Mr. Chairman, you have given me a great deal of time and I do appreciate it, but these are matters, as the Chairman knows, a number of these areas I have covered in hearings earlier in years past. They are things that require an ongoing, continuous monitoring by the Attorney General, and many of them are areas that the Attorney General personally would have to make the final decision, so I did not want to simply submit them for the record, although I will have other questions for the record. I appreciate the Chairman's courtesy, as always, in giving me the time to do that, and the ranking member's courtesy, as always. I know how much he appreciates having me take time asking questions.

The CHAIRMAN. Thank you, Senator.

Senator THURMOND. We are always glad to extend any courtesy we can.

Senator LEAHY. I appreciate that.

The CHAIRMAN. Do you have any questions?

Senator THURMOND. Not right now.

The CHAIRMAN. Well, hopefully we can finish up now. As I indicated to you, Mr. Barr, I have several areas that I want to touch on. And I will try to do them as quickly as possible. I am going to take anywhere from a half hour to 45 minutes. I told you I think we will get you out by six, I think we will meet that. Would you like to take a break now, or just headon?

Mr. BARR. Let's plow ahead.

The CHAIRMAN. All right, let's do that then.

One of the things that came up during the Thomas hearing, the real hearing, the first hearing, I mean the hearing on the substance matter of his views, and I do not want to rehash that. But one of the subjects related to the takings clause and the interpretation of the takings clause. And when I raised it, I think that all but maybe you, and a half a dozen other people in America knew what I was talking about and everybody kind of wondered. But now, I am reading in the New York Times and the Washington Post and other places, this takings clause thing is an important issue, and it is a big deal.

And I want to pick up where the Senator left off when he asked you about the highway bill. The real concern is not whether or not we will have open liability. The real concern is the Government will have to pay. The intention of maybe not you, but the intention of Senator Symms is very explicit. He is not looking to save the government from potential exposure to liability. This is to make it more difficult for the government to exercise powers as traditionally exercised over the past 100 years, particularly under the exercise of authority granted by what has been known generally as police power.

When you take somebody's property under the fifth amendment, as long as you are taking it for the general welfare—I can't take it from me and give it to Senator Thurmond—but if you take it from the general welfare you got to generally pay for it.

The Government has to pay. Come back and take my backyard and put a highway through it, well, I can do that, but they got to pay me for the value of the property they took from the backyard. But if they take my property in the sense that they tell me I cannot build a five-story building on my property, it costs me money. I want to build a five-story building and my property is going to be worth a lot more money with a five-story—maybe not this economy—but generally speaking with a five-story building on it than with a two-story dwelling.

But the county or the city comes along and says, you can't do that, the zoning violation. Now, they took my property. It is exempted out, if you will, of a takings clause because it is an exercise of the police power. Now, what Senator Symms explicitly wants to do is change that; just as Mr. Macito does, and just as Mr. Epstein does, and just as the people referred to by the former Solicitor General, not by name, want to do.

And the question is, Are you one of those guys? And it is real simple. And just so you and I don't play games with one another—we never have and you never have with me—but it has nothing to do with saving the government money. It has everything to do with costing the government money and elevating private property to a status it does not now have.

Case in point: Under the takings clause you can prevent me from building a five-story building, under the Symms amendment as long as you paid me for the three stories you did not build, you, the government, paid me.

Now, we have an old expression around where I come from, "never kid a kidder." You know what it is about, and I know what it is about. It doesn't have a darn thing to do with saving the government from liability, zero. Don't you agree?

Mr. BARR. Senator, you want, if you want to know whether I am one of them——

The CHAIRMAN. No, not whether you are one of them, let's agree on the premise here. The premise has nothing to do with saving the government money. It is a very artful, lawyerly answer that you gave and I—that is why you are going to be a good Attorney General, you are sharp, you are smart. But it has nothing to do with saving the government money, does it?

Mr. BARR. I think it does but this is not an area that—when you started asking the question, I said, oh, oh, I have not looked in this area in 2 or 3 years, this is not an area that I am——

The CHAIRMAN. Well, that is reassuring to me. Because if you have not looked at it in 2 or 3 years you are "not one of them."

But seriously, I just want you to know ahead of time, I have a great concern that what is happening is there is an attempt—I think there has been a basic judgment made, and this is the only editorial comment I will make and then I will ask a question—there has been a basic judgment made and that is the Democrats have basically sat back until very recently and said, we are probably not going to have the Presidency for another decade, and the Republicans have sat back and said, we are not going to get the House and the Congress for another decade.

So how do we make sure that we get what we want done, done? Well, the Republicans have figured out a way and the Democrats have not figured it out yet. And the way is real simple, and you know it and I know it. And that is the more power that can be accrued to the executive branch the safer the issues, concerns, legitimate issues, and concerns of the conservative Republicans and the conservatives of America are. And that is what this battle going on is all about.

So, that is what the takings clause is about. The takings clause says, you do not want these Congressmen in there meddling around, passing these rules on the environment and on people passing these rules on zoning, and you know, and those kinds of things, because that takes people's property and does not pay them for it.

That allows us to regulate companies and not pay them for the cost of that regulation. And as you know, taking just doesn't mean physically taking your property. I take your property if I cause you to have to spend $1 million to put a scrubber on top of a smokestack, I am taking your money.

So it leads me to this. You said in a much earlier response to one of my colleagues when they asked you about administrative agencies making judgments that arguably are at odds with congressional intent. You said, well, you implied it is not that big a problem—at least as I understand it, and I will ask you to comment—that is not that big a problem because—I believe this is a quote—because the Congress can always pass a law to change that ruling. We pass a law saying to a regulatory agency, you can't do X. We don't want the public to be able to do X, and the regulatory agency looks at it and says, well, that looks to me like they really meant they can't do X minus 7. But they can do X. So they go ahead and they do not regulate it as intended and they do not prohibit X.

We can come along and say, wait, wait, we want to clarify this. We mean X and here is the definition of X, we can pass that law. But what has essentially happened is significant power has accrued to the executive because you have to do that by a two-thirds vote.

Mr. BARR. Senator, I did not mean to suggest that administrative agencies should promulgate regulations that are not consistent with the intent of Congress.

The CHAIRMAN. No, but the question is——

Mr. BARR. I think they should and be consistent with Congress' intent that should be the guidepost for what regulations say. If there is ambiguity in the statute and an agency, using good faith in trying to handle the issue that has been given to it by Congress to handle in regulations, makes the wrong judgment there is power to correct it. But I do not think that that means that the agency should ignore in any way——

The CHAIRMAN. Well, let's make it clear though, the power to correct it is a limited power. It moves from having 50 votes to having to have 67 votes, if the judgment made—administrative agencies don't often make judgments Presidents don't want made, not often, not on the issues that are the controversial issues. Therefore, what is increasingly being done, in the last two administrations, in my humble opinion, with the acquiesence of the Justice Department has been deliberate attempts where there is any color of right at all to interpret a statute the way the administration wishes it to be interpreted, as opposed to the way the Congress intended it. If there is any little opening, that has been, that power has been exercised.

Now, we can argue whether the gag rule is one of those examples or not, but there is a number of examples well beyond the gag rule. The gag rule is a perfect case in point. Congress passed a law, Congress intended the law by obviously the overwhelming votes in the Congress in both houses on this. Clear that they intended it just like you made the comment, you said, you know, your judgment was correct on such and such a case because the Supreme Court obviously upheld that judgment.

Mr. BARR. I didn't say——

The CHAIRMAN. It's not correct.

Mr. BARR. It was a reasonable position.

The CHAIRMAN. It was reasonable. Well, obviously it is reasonable to assume that the Congress meant what it said the first time, different than what the President interpreted, by the mere fact that the Congress overwhelmingly voted, both House and the Senate, for the position they had only voted for not too many months ago.

But the big difference is we have to, in the Senate fight off a filibuster when we do it this time and we have to, in the House and Senate, get two-thirds of the vote.

Mr. BARR. There is another side to this coin.

The CHAIRMAN. I would like to hear it, that is what I want to talk to you about.

Mr. BARR. Well, part of it—Congress frequently creates this problem, itself, when passing statutes, by failing to come to a real policy decision and then throwing it in the lap of the regulators without appropriate guidance, leaving a broad area. And in my view the welfare of the country is best served by trying to hash out

these policy differences in the branch that is closest to the people, that is responsive through the political process. So it is not, in my view, simply a problem on the administrative agency side of the ledger.

The CHAIRMAN. No, I think you hit it right on the head, and that is where you and I have real disagreement. It is Congress' responsibility in areas that are of intrinsic complexity—the environment, matters relating to the Food and Drug Administration, matters relating to the FDA, I mean the FAA, matters that are extremely complex for us to make policy judgments but not to make specific case-by-case and/or specific analyses of how every case under such a policy would be handled, because if that is done, Congress is essentially paralyzed.

Let me give you a case in point. There was a big fight about odometers, about 6 years ago. Whether or not the Federal agency could make a rule saying that odometers could not be turned back by used car dealers when they sold their automobiles. They made such a judgment. What happened is that all the used car dealers, and I love used car dealers—my father was an automobile salesman his whole life, I don't mean that as any knock on them—but the used car dealers all got together and came in here and lobbied. And they got people to say obviously that agency out there is just run-amok, and so we spent 3 days, 5 days debating whether or not to roll back odometers while the country went to hell in a handbasket on the economy.

We are not capable of determining whether or not there should be 0.005 parts per billion of a carcinogenic substance in the effluent of a factory, coming out of a wall of a factory. Because if we are held to that, which is a part of the scheme that you may not be part of, a part of the intellectual construct that is underway, then that obviously is going to tie us up so long in such mire in detail that we are not going to be able to make policy judgments.

So what worries me about what you are broadly suggesting that those decisions should be made at that body closest to the people, then I think we have really tied the hands of the legislative body to be able to function.

Mr. BARR. Well, I think it is a matter of degree. Obviously Congress cannot get into the business of legislating in detail where there is an ongoing regulatory program that has to be adaptable, that has to make case-by-case decisions. It is a question of degree. And I think frankly that people would have to acknowledge that there are cases where not enough guidance is given and terms are deliberately used that are vague in order to reach a deal here and sort of leave the battle to another day.

And that happens, as you know, in the legislative process. So I am just saying that——

The CHAIRMAN. It is called the functioning of a complex society. And that is—let me move on.

Mr. BARR. Well, let me just——

The CHAIRMAN. Yes.

Mr. BARR. There was a premise originally in what you were saying which is that the fact that the Republicans control the executive or have for some time and that the Democratic Party has controlled the legislative branch is leading to—I mean the premise

seems to be sort of ingenuous lawyer's arguments made to expand the power of the executive.

The CHAIRMAN. There is no question about that.

Mr. BARR. I will tell you——

The CHAIRMAN. Maybe not by you but in the literature, I mean just pick up the literature of the Heritage Foundation, it is explicit. It is not implicit. It is explicit.

Mr. BARR. Well, I want to make clear what my position is and that is that my loyalty is to the separation of powers and the system. And when an issue is brought to me, an argument that the power is here, the power is not there, the first thing I do analytically is say, let's take the politics out of it. Let's say the shoe is on the other foot, is this a good rule?

I mean is this a rule that was intended by the Framers, is this a rule that over the long term is going to result in a system that they intended to go forward?

Let's take the line-item veto, for example. You know that there was a lot of writing in the literature among some scholars that there is an inherent line-item veto. That would have shifted a tremendous amount of power just by interpretation to the Executive. It is one, as a matter of policy, I think the Executive should have, personally. I think the President should have a line-item veto. But I looked at that issue and I looked at it hard and spent a lot of time having people research it. In fact, we went back to ancient English and Scottish constitutions and precedents and so forth. I found no basis for an inherent line-item veto in the Constitution.

So I think that what we have to look for here in separation of powers arguments is let's not have bad precedents come out of the fact that we do have a divided government and have for a period of time where one branch, where partisan politics may infect the tensions that naturally exist in our separation of powers government between two branches and let's not have bad rules over the long haul come from that. That is my major concern.

The CHAIRMAN. Well, let's talk about separation of powers. As you know, from your research, there is no reference to separation of powers in the Constitution. The phrase is never used. The only person who probably read Montesquieu was in France at the time, Thomas Jefferson, when they wrote it. And up to now it has functioned based on a relatively loose examination of what constitutes a separation of powers. There are only three parts to the Constitution, articles I, II, and III which are the basis of any argument for the separation of powers. And there is not a great deal of precision in each of those. There is no definition of what is a purely legislative, what is a purely executive, what is a purely judicial function. Except that there is a school of thought and I questioned you on this before in your last incarnation before the committee in *Morrison* v. *Olson* and Scalia's dissent. And Scalia is a purist when it comes to the separation of powers.

And as he applied his rationale to the independent prosecutor case he concluded that because the prosecutorial capability is a uniquely executive function, any, any impingement upon the independence of termination when to do that, is a violation of the doctrine of the separation of powers, therefore the independent counsel falls.

I am not doing full justice to the argument but in the interest of time, I hope you would agree that is the essence of his argument. Now, you said when you were before us last time and I asked you about, what page am I, page 8? I better put my glasses on. I asked you about upholding the statute of the independent counsel and you said, "* * * had entertained doubts about the constitutionality of the independent counsel statute." This is still a quote from you, "I had thought that the statute might violate the doctrine of separation of powers by impinging upon the President's control over prosecutorial functions. I also had thought that the statute might violate the requirements of the appointment clause. These issues were addressed in *Morrison*, and, of course, I fully accept the Supreme Court's ruling. Constitutional issues will undoubtedly continue to arise in other applications of the statute, in particular cases. Should such issues arise, I would attempt to resolve them in a manner consistent with the *Morrison* decision."

Now, do you still subscribe to that position?

Mr. BARR. Yes.

The CHAIRMAN. Good. Now, with regard to the phrase you use, which, as I said, I realize this is fairly esoteric for anyone who may be even hanging around this long listening, but it is fairly important, I think it is very important. You used the phrase that the statute might violate the doctrine of the separation of powers by impinging upon the President's control.

Now, do you think if any function of one of the branches is impinged upon at all by any other branch that it violates the doctrine of separation of powers?

Mr. BARR. Part of the doctrine of separation of powers is that in some areas, power is allocated in the Constitution precisely to impinge on the freedom of action of a particular branch.

The CHAIRMAN. I can hardly think of anything, I can't think of a single phrase in the Constitution where it is explicitly defined, any power is explicitly defined as a power of one branch or another.

Mr. BARR. Are you going to argue later that the war power is?

The CHAIRMAN. Even the war power. I want to get to that. The reason I raise is that there is, again, a whole well-informed, extremely articulate school of thought that argues that the present regulatory agencies, most of which I believe, if they got before the Court, adopting Scalia's rationale, would all be declared unconstitutional.

I cannot think of a single administrative agency that isn't quasi-judicial, quasi-legislative, and quasi-administrative. I cannot think of a single one. There may be one out there, but I do not know of one. And there are those who believe the government interferes in the lives of Americans too much already, are not real crazy about any of those agencies, whether it is the FDA or the FCC, or just go down all the alphabet.

Now, do you have any doubt about the constitutionality of any of the major existing administrative agencies, such as the FDA, the FCC, do you have any doubt about the constitutionality of their existence, when, in fact, they perform all three functions, most of them?

Mr. BARR. I have no interest in confronting or trying to brush aside the established case law, including *Humphrey's Executor*——

The CHAIRMAN. I am not asking, I am not concerned about your interest. I am concerned about what you think. I am concerned whether or not you have an interest in it. Do you believe, do you doubt the constitutionality, under the separation of powers doctrine, for example, of the FDA? Do you have any doubt about it?

Mr. BARR. I haven't looked at their statute recently.

The CHAIRMAN. Do you have any doubt about the constitutionality of the FCC?

Mr. BARR. No.

The CHAIRMAN. I will get my alphabet lined up. How about the Federal Reserve?

Mr. BARR. I haven't looked at their statute recently, either. There is a distinction, it seems to me, between a question like what would you have done in some of the earlier case law regarding administrative law, what do you think was the proper interpretation of the separation of powers, versus, you know, what do you think are the rules of the game now, like on *Morrison.*

On *Morrison,* without *Morrison* being decided, I would have gone with Scalia. I thought Scalia's dissent was a good opinion. Too bad it was the dissent, as far as I am concerned, but I accept it as the law.

The CHAIRMAN. If the President asked you to pursue a litigation strategy that would challenge the constitutionality of independent agencies, how would you respond?

Mr. BARR. I would have to see if we could make reasonable good-faith arguments.

The CHAIRMAN. Well, if you accept the dissent in *Morrison* as a good-faith argument, not necessarily the law, but a good-faith argument, then I can assure you that you could make a good-faith argument, as your lawyer, I could tell you that you would be able to do that.

I knew few people up here believe it, but I will promise you that, before the next several years are out, there is going to be direct constitutional attack on the constitutionality of a number of the administrative agencies, independent, I should say, regulatory agencies, and if they fail, obviously, a great deal of power is moved to the executive branch, as a practical matter.

Let me ask you about the War Powers Act—not War Powers Act, strike that—about war power. Do you believe that the President—I am not asking what you advised or did not advise—do you believe that the Constitution required that the President seek the constitutional equivalent of a declaration of war, which he did, in order to be able to use the 500,000 troops or any portion of them in the Persian Gulf, as he used them? Is it required under the Constitution to do what he, in fact, did do, not politically, but constitutionally, was he required?

Mr. BARR. The issue of whether or not congressional action was required to proceed with the offensive against the Iraqis and the Kuwaitis looked as if it was going to arise for a period of time, because Congress initially indicated, or at least all the indications were that Congress was not going to take action before the expiration of the deadline, and that, in my view, would have put the President in a very difficult position.

But prior to the expiration of the deadline, I think it was early on in January, the leadership—during that period, it was my view that it was very important for Congress to act, so that we had both the executive and the legislative branch working together and whose views were consistent, and I was very concerned about the situation and potential constitutional crisis that could result, if we reached January 15 and Congress hadn't acted.

As I say, the leadership in Congress determined to take up the issue, and it was my view that the best thing to do would be to seek the most explicit authorization. There were some people on all different sides of the issue suggesting to leave it ambiguous, have different resolutions suggesting different things, dancing around the issue, and so forth, and my view was that we needed to seek from the Congress the most explicit authorization. Fortunately, we never got to the point——

The CHAIRMAN. But you are there now.

Mr. BARR. In a hypothetical?

Senator THURMOND. Speak a little bit louder.

The CHAIRMAN. That is a fine political judgment, and you are correct, in my view. There is no question that the country should go to war united, rather than divided, and that the President took the risk of going to war with the potential of a divided Congress, it would have been very serious, I agree with you.

With all due respect, that is not my question. Do you believe that the President was constitutionally required, under the war-making clause, the war clause of the Constitution, to get the approval of the U.S. Congress, before he would be constitutionally authorized to commit a 500,000-member force in the Persian Gulf to a war?

Mr. BARR. My view was—let me describe my thinking.

The CHAIRMAN. Sure.

Mr. BARR. I did think about this during the period where it appeared that Congress was not going to take any action whatsoever. Looking ahead, I saw that the President might be standing there with all the world supporting what we were doing collectively, and the only body that hadn't been heard from was Congress, so I tried to put myself in that position and I did do some thinking about it.

My conclusion was that this is the ultimate law school exam question on separation of powers. It has been debated for 200 years, and it will probably be debated for another 200 years, as to exact parameters of the power of Congress versus the power of the President in the war area.

I thought it was a gray zone, that the Framers had allocated substantial powers to both branches, the President as the Chief Executive and as the Commander in Chief, and Congress having the power to raise armies and navies, to make rules and fund, and that, ultimately, Congress in my view had most of the cards in the area, because of those specific powers in article I.

I think in my mind there were two fairly clear points of reference. One was that the war power, the declaration clause—I left that out, but obviously the declaration clause was assigned to the legislative branch—I thought it was clear that the President did have the power, without any preliminary congressional authorization, to respond to a sudden attack, clearly if that attack was on

the United States, he could repel such an attack, if anything, it was clear.

On the other pole, I felt it was clear that the President could not launch a purely offensive war from a cold start. He couldn't say today I feel like taking over Canada and make America the belligerent that started the hostilities.

But in between there, I felt there was a gray zone. I think the question of to what extent can the President use force to repel an attack, where armed aggression does not start with the United States, but there is armed aggression by another country that either affects the lives of Americans, the property of Americans, or the vital interests of the United States, and I think that was a gray area and an area that has been debated endlessly.

I looked then to history to give me some idea of how the system has worked over time, and, in my review of it, I felt that sort of a modus operandi had been worked out over 200 years of practice, where there is latitude for the President, if he believes that the vital interests of the United States are threatened by foreign military attack, there is room for him to respond, but his action is largely provisional, because it is always subject to Congress' exercise of powers.

In the years of our existence of our Republic, there have been 216 deployments of military troops by the President and 5 declared wars.

The CHAIRMAN. Those are mostly ridiculous examples that have been used, but I——

Mr. BARR. But the principle remains the same. You know, President Wilson took Vera Cruz while he was—he asked Congress, I think this was the history, he asked Congress for some authority and Congress was slow on moving on it and he decided to take it anyway, because he heard that the ship was coming into the harbor. In any event, there have been a number of—

The CHAIRMAN. Roosevelt didn't need a declaration of war, then, did he?

Mr. BARR. Excuse me?

The CHAIRMAN. Roosevelt did not need a declaration of war, did he?

Mr. BARR. No, he didn't, to repel that attack. We were attacked.

The CHAIRMAN. Well, would he have needed a declaration of war prior to the attack? He didn't need a declaration of war then to send troops to Europe, to enter the war.

Mr. BARR. Well, he took Iceland, he occupied Iceland without any authority from Congress.

The CHAIRMAN. But that is a question. Do you agree he did not need a declaration of war to enter World War II prior to Pearl Harbor?

Mr. BARR. I am focusing more on the situation where we had hostile military action by another country that affected the vital interests of the United States.

The CHAIRMAN. I can't think of anything more than Europe having affected the vital interests of the United States.

Mr. BARR. Well, there is debate as to what is the vital interest of the United States and how much exigency is needed to warrant Presidential action. But the lesson from history—and I think histo-

ry does play a role in telling us the true nature of the constitutional structure—is to take the country to war, particularly substantial engagements, requires joint action ultimately by both branches of Government and requires cooperation, and no substantial commitment overseas can be sustained for long, unless both branches of Government are working cooperatively.

The CHAIRMAN. I agree with you, that's the lesson of history and a policy lesson.

Mr. BARR. I was persuaded, when I went back and looked at the Korean war, by an article in the New York Times, when the Republicans were criticizing President Truman, and Henry Steele Cominger wrote I thought a very good article in the New York Times, making exactly this point and defending President Truman's intervention in Korea.

The CHAIRMAN. I read the same article. I have done a great deal of research on this, as well, and I think Cominger was probably wrong, and I think Truman set a precedent that was probably wrong for where we are, so we end up on different sides of that.

Let me skip, in light of time and there is a vote on here, to ask you about two other areas, very quickly. One is the area of executive privilege. Before I do that, do you think there was any merit to the argument that the President's counsel initially made when this debate started, when he came before our committee, saying that—we held extensive hearings on this issue of the constitutionality of what was required of the President to use force in the Gulf, and the argument made by the White House before the committee was that the power to declare war should be read as meaning that if the Congress wants to have a war, it can declare one, but it doesn't mean anything else, it is not a prohibition or a limitation upon the President, it is only the Founding Fathers' recognition of a grant of the power to Congress to declare a war, if the President doesn't want one, we can declare one and make the President fight it.

That was the argument used. It is the most unusual argument I ever heard, having read a lot of the literature, but was that——

Mr. BARR. I don't agree with that argument.

The CHAIRMAN. Executive privilege, in your capacity at the Justice Department, have you ever refused access to information sought by a congressional committee, on the grounds of executive privilege, or recommended that?

Mr. BARR. While I was at OLC, I did resist initial requests for information, documents that I felt were very sensitive, and was able while I was at OLC to work out compromises or accommodations in every case. While I was at OLC, executive privilege was never asserted.

I think there has been a little bit of hype about my position on executive privilege. Executive privilege is nothing new. The Office of Legal Counsel at the Department of Justice, Attorneys General and Presidents going back have invoked executive privilege.

The CHAIRMAN. I wasn't suggesting that it was new. I just wondered where you were.

Mr. BARR. I have not advanced novel arguments of executive privilege, nor is my disposition to withhold information for information's sake. My view is Congress has a legitimate interest in seeking information, that normally that proves to be no problem,

that our policy should be one of maximum accommodation, and that where we do have particularly sensitive issues—I think, for example, you would probably agree, an open criminal file and certain kinds of documents, we have a legitimate need for confidentiality, and I have always attempted to work out a compromise. While I was at OLC, and part of the business of OLC, on a daily basis, day in and day out, as you know, is to get into the middle of these fights that agencies are having——

The CHAIRMAN. That is why I asked the question.

Mr. BARR [continuing]. And I have been able to work it out.

The CHAIRMAN. On that score, let me ask two questions very quickly. I have additional questions on BCCI, but let me ask you this: You indicated, I thought early on, in response yesterday to a question by me, that you are in the process of doing a—I forget how you phrased it, but you are in the process of going back and looking over how things were handled up to the point you took over and what the course should be from here on, and that you would be willing to come back to this committee in the next couple months and discuss in detail your findings, judgments, and the state of play with regard to BCCI. I don't have any objection as—is that correct?

Mr. BARR. That is not how I remember what I said.

The CHAIRMAN. Why don't you tell me? That is what I wanted to clarify.

Mr. BARR. I said I was taking responsibility, since I became involved and I will be held personally accountable for performance, and if you want to hold hearings down the road, I hope I didn't say a couple of months, several months from now to assess the progress we are making, consistent with grand jury rules and so forth, that would be fine, I would be pleased to——

The CHAIRMAN. I can tell you, we are going to kind of have to do that at some point, because, as you know, obviously, by the questions, there is a lot of concern. I don't know of anybody who said Bill Barr has withheld, Bill Barr has not done, Bill Barr—I don't know anybody who has said that, nor has it been asserted. But there is an assertion of at least—as one of my colleagues in the House has spent a lot of time looking at the Department, the way it was characterized, I cannot attest to its veracity, but they found little malfeasance, if no malfeasance—not you, the Department—but a good deal of nonfeasance. So, I am going to want to be able to do that with you after you are there.

The other thing I want to ask you about, in terms of the Congress, the refusal of the White House counsel to share FBI reports with the committee and allow designated investigators to have access to them on judicial nominees, U.S. attorneys and marshals is something that we haven't had to come head-to-head with yet, because all the ones in the pipeline are under the old regime.

I can assure you that the new proposal will not work, will not function. There has been a change in the White House, we don't even get anything other than a summary of the FBI reports, No. 1; and No. 2, the ability of me and the ranking member to sit here over the next 120 judges or so and direct FBI followups and investigations is simply not practical. It is just not possible.

And I do not say this as a threat, I don't say it as anything, I say it as an alarm bell. We have moved, it has taken the White House, on average, 10 months to come up and fill a vacancy. We fill them all on average within 10 weeks. I would hope that we could fill 100 new judges vacancies next year. I can assure you if we don't have the FBI reports, we are talking about 10 instead of 100.

This is not going to be done. I will not sit here, I just want to let you know, and I hope with your reputation for being able to work out difficult things, you will be prepared to work with the ranking member and myself on how we come up with a rational basis on——

Senator THURMOND. Can I have a word on that?

The CHAIRMAN. Sure, please.

Senator THURMOND. Mr. Barr, I agree with him on that and I wrote the White House counsel to that effect. It is impractical. It is going to delay the judges. There has been no evidence that a leak occurred from this staff, the investigatory staff on this committee, and I suggest you see if you can't get that reversed.

The CHAIRMAN. And if you do that we will see to it that you are confirmed in the next 24 hours. [Laughter.]

Senator THURMOND. I vote to confirm anyway.

The CHAIRMAN. And if you don't, we will look at your FBI report. All right, I also want to raise with you—I don't want to hold you but I have got other things—I am going to submit to you, in writing, several more questions about executive power.

It is a presumptuous thing for me to say, but I personally like you. I think you are a heck of an honorable guy. I think that you are someone we can work with and you have demonstrated that. When I say, can work with, I don't mean you do it our way, I mean when you sit down and negotiate, you genuinely negotiate.

I do, I am concerned, as I told you from the outset about one thing. And that is your view about separation of powers. I think if the Scalia view of separation of powers were the law this country would be in chaos. I feel very strongly about that, as you know, and so I am going to submit to you some additional questions on separation.

That will not hold up the consideration of your nomination, that is not what I am doing, but it will make a difference to me what I do on your nomination. That is the only thing. I found no evidence, and I have done a good deal of looking to determine whether or not you had direct responsibility on what I considered to be incompetence in the way some of the BCCI matters were handled thus far. I don't see any place, to use the expression, where your fingerprints are on any of that. I see neither malfeasance nor nonfeasance to the best that I can determine with regard to you, personally or any reason why that should be sufficient reason to hold you up, as some have suggested, until BCCI is settled.

But I do have real concern about the separations arguments but I will submit those to you in writing. And let me just double-check before I let you go. Because I hope if you are confirmed, and I expect that you will be, that we are going to see you more than once every 10 months, like the last Attorney General. At any rate just in case we won't see you in the next 10 months just let me see if I have got everything covered.

OK, and I will also have a few followup questions on BCCI but the things I wanted to satisfy myself with regarding BCCI were matters about your personal involvement, knowledge of, etc. But if you are confirmed I sincerely hope that you do take hold of this thing because you must know by now that this is an octopus that has attracted the attention, with good reason, of everyone, everyone. And it needs more than the usual business as usual way to handle it. And I don't mean to imply business as usual does not mean that things are taken care seriously. It is a different breed of cat. And I know you know that and I look forward to working with that.

Again, I have other questions, but I will refrain.

Thank you, very much for your cooperation for being here.

Mr. BARR. Thank you, Senator.

The CHAIRMAN. If confirmed, I look forward to working with you and I would hope that—I still have not given up hope on a crime bill before we leave here. I know that sounds strange. My friend, Mr. Symms, and others who have a gunner's view of the world do not want to see a crime bill but maybe we can end up overcoming that even between now and the time that we go out. And if we do it will only be with your help if we are able to. I am not making you responsible for any Senator. I don't mean that. I mean in terms of us reaching a compromises on what is out there.

Again, thank you for your cooperation.

Mr. BARR. Thank you, very much, Senator.

The CHAIRMAN. The hearing is adjourned.

[Whereupon, at 5:55 p.m., the committee was adjourned.]

APPENDIX

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full Name (including any former names used.)**

   William Pelham Barr

2. **Address: List current place of residence and office address(es).**

   Office: Department of Justice
   10th & Constitution Avenue, NW
   Washington, D.C. 20530

3. **Date and place of birth.**

   May 23, 1950
   New York, New York

4. **Marital Status (including maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

   spouse: Christine Moynihan Barr
   spouse's occupation: Librarian (Elementary School)

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

   Columbia College — 1967 - 1971
   New York, New York — A.B. 1971

   Columbia University — 1971 - 1973
   New York, New York — M.A. 1973
   (Political Science/Chinese Studies)

   National Law Center — 1973 - 1977
   George Washington University — J.D. 1977
   Washington, D.C.

6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or**

employee since graduation from college.

1971 - 1972	Central Intelligence Agency Summer Intern Program
1973 - 1977	Central Intelligence Agency (1973 - 75 Intelligence Directorate) (1975 - 77 Office of Legislative Counsel)
1977 - 1978	Law Clerk to the Honorable Malcolm R. Wilkey U.S. Circuit Judge U.S. Court of Appeals for the D.C. Circuit
1978 - 1982	Shaw, Pittman, Potts & Trowbridge Washington, D.C. (Law Firm - Associate)
1982 - 1983	Deputy Assistant Director Office of Policy Development White House
1983 - 1989	Shaw, Pittman, Potts & Trowbridge* 1983 - 1984 Associate 1985 - 1989 Partner
1984 - 1989	2300 N Street Associates Real Estate Investment Partnership with a number of other Shaw, Pittman partners
1989 - 1990	Assistant Attorney General Office of Legal Counsel Department of Justice
1990 - Pres.	Deputy Attorney General Department of Justice

* In connection with law practice, at Shaw, Pittman, when the firm was asked to set up a new corporation for a client, I would occasionally be listed as an incorporating director/officer for purposes of filing incorporation papers but would be replaced by the permanent director/officer at the first corporate meeting. In one case, however, I actually did serve on a client's board. In April 1986, Scottish Widows Fund Assurance Society, a U.K. insurance company, asked me to serve on the board of its two wholly-owned U.S. subsidiaries, "Dalkeith Corporation" and "1146 19th Street Corporation". These corporations own a commercial office building in Washington, D.C. I served as a director, vice president, and treasurer of each subsidiary from April 1986 to January 1989.

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

None

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe should be of interest to the Committee.**

NDFL Fellowship (Mandarin Chinese)

Order of the Coif

J.D. With Highest Honors

9. **Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.**

Virginia State Bar

District of Columbia Bar

American Bar Association

10. **Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.**

American Bar Association

Knights of Columbus

11. **Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapse if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.**

Virginia Supreme Court 1977 to present

District of Columbia Court of Appeals
1978 to present

U.S. District Court for the District of Columbia
1978 to present

U.S. Court of Appeals for the District of Columbia Circuit
1978 to present

U.S. Court of Appeals for the Federal Circuit
1988 to present

12. **Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

1. Federalist Society Symposium

   Panel: Appropriations Power and the Necessary and Proper Clause
   (Reprinted Washington University Law Quarterly, Volume 68, Number 3, 1990)

2. Los Angeles Times, September 13, 1990

   Wolves Fighting Crime Go 'B-a-a-a'

3. Federalist Society Symposium
   Yale Law School, February 1991

   (To be published in the Harvard Journal Law & Public Policy, January 1992)

4. Judicial Conference of the District of Columbia
   Williamsburg, Virginia, Friday, June 7, 1991

   Topic: Crime in the Streets: Must It Produce Congestion in the District Courts?

5. The New York Times, September 24, 1991

   Bush's Crime Bill: This Time, Pass It

6. Remarks, Multinational Conference on Asian Organized Crime, San Francisco, CA, September 26, 1991

7. Remarks, Conference of Crime Stoppers International Louisville, Kentucky, October 2, 1991

8. Remarks, 98th Conference of the International Association of Chiefs of Police, Minneapolis, MN, October 7, 1991

Note: Copies of the above items are being submitted with

this Questionnaire.

13. **Health: What is the present state of your health? List the date of your last physical examination.**

Excellent. April 5, 1991 (complete physical)

14. **Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any successful candidacies for elected public office.**

See answer to Question 6.

15. **Legal Career:**

a. Describe chronologically your law practice and experience after graduation from law school including:

1. Whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were clerk;

2. Whether you practiced alone, and if so, the address and dates;

3. The dates, names and addresses of law firms or offices, companies or government agencies with which you have been connected, and the nature of your connection with each;

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

2. What percentage of these appearance was in:
(a) federal court
(b) states courts of record;
(c) other courts.

3. What percentage of your litigation was;

(a) civil;
(b) criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

5. What percentage of these trials was;
(a) jury;
(b) non-jury

I attended law school at night from September 1973 to June 1977, while I was working for the Central Intelligence Agency. From February 1975 forward, I served in the Agency's Office of Legislative Counsel. My principal duties were analyzing the impact of proposed legislation on Agency operations, drafting Agency bill comments, drafting Hill testimony, carrying on liaison with Congressional committee staffs, drafting Agency-proposed legislation, and coordinating legislative activities with other agencies and OMB.

In July 1977, I left the Agency to serve as law clerk to the Honorable Malcolm R. Wilkey, U.S. Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit. I completed my clerkship in September 1978.

In October 1978, I started as an associate with the Washington, D.C. law firm of Shaw, Pittman, Potts & Trowbridge. I was the 55th lawyer at the firm. I remained at the firm as an associate until May 1982.

During this period as a Shaw, Pittman associate, I functioned largely as a generalist, with about 70% of my time devoted to litigation and about 30% to other areas of the firm's practice. The firm's clients were mainly national or large local corporations. My responses to questions no. 16 and 17 below describe some of the matters upon which I worked.

The litigation -- all civil -- was varied, although a significant part of it involved environmental cases. Virtually every case I worked on was staffed by a total of two lawyers -- one supervising partner and me. Although, in number, I handled more state court cases than federal, I devoted substantially more time to the federal cases because they tended to be more complex. Appearances in federal cases were infrequent and were generally handled by the supervising partner. I occasionally appeared in state court cases, usually to argue motions. Most of the cases upon which I worked either were settled or disposed of on motion.

One complex environmental case went to non-jury trial in federal district court. Atchison, T. & S.F.Ry.Co. v. Alexander, 480 F.Supp. 980 (D.D.C. 1979). We represented defendant-intervenor and played a substantial role in the case. I assisted the

partner who tried the case for our client. Judgment was for defendant and was upheld in all material respects on appeal. Izaak Walton League of America v. Marsh, 665 F.2d 346 (D.C. Cir. 1981). See my response to question no. 16 for further details.

An arbitration I handled went to a final award. Berlin v. Chevy Chase Lake Corp., 16 10 0071 81 (American Arbitration Association). The case involved valuation of a closely-held corporation. We represented the defendant. I assisted the supervising partner who tried the case. The final award was substantially below the amount sought by plaintiff.

Examples of some of the non-litigation matters I worked on during this period are provided in response to question no. 17 below.

In May 1982, I left Shaw, Pittman, Potts & Trowbridge to accept a position as Deputy Assistant Director for Legal Policy in the Office of Policy Development at the White House. My responsibilities included: (1) preparing briefing papers for senior White House staff; (2) coordinating preparation of briefing papers and decision documents for the Cabinet Council on Legal Policy; (3) representing the White House on inter-agency working groups and (4) reviewing agency bill comments and testimony in conjunction with the OMB process.

In September 1983, I left the White House and returned to Shaw, Pittman, Potts & Trowbridge. In October 1984, I was elected as a partner, effective January 1985. The firm currently has over 240 lawyers.

Upon returning to Shaw, Pittman in 1983, the nature of my practice was different than it was during my earlier period with the firm. I spent less time on litigation and more on administrative/regulatory matters before federal agencies. For examples of these non-litigation projects see response to question no. 17 below.

In the litigation area, while I took on fewer cases, I assumed lead responsibility on these matters. My court appearances were more frequent, either in federal court or in federal administrative tribunals. I tried one case to verdict as co-counsel in a non-jury administrative trial. (See Murray v. Henry J. Kaiser Co. in response to question no. 16 below.)

In April 1989, I left Shaw, Pittman to serve as the Assistant Attorney General for the Office of Legal Counsel. My principal responsibility in that position was the preparation of legal opinions for Executive branch departments.

In May 1990, I became Acting Deputy Attorney General. In July 1990 I was confirmed as Deputy Attorney General.

As Deputy Attorney General my responsibilities became more managerial in nature, overseeing the day-to-day operations of the Department. I served as chairman of the Economic Crime Council; the Organized Crime Council; and the Executive Review Board of the OCDETF. I also participated on the NSC Deputies Committee.

On August 15, 1991 I became Acting Attorney General.

16. Litigation: Describe the ten most significant litigated matters which you personally handled. Given the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

The following include cases that were decided on motion and some that were settled. On all the listed cases, except for no. 10, I was the sole associate, supervised by one partner. On no. 10, I was the supervising partner assisted by one associate.

1. Atchison, T. & S.F.Ry. Co. v. Alexander, 480 F.Supp. 980 (D.D.C. 1979), aff'd in part, rev'd in part sub nom., Izaak Walton League of America v. Marsh, 655 F.2d 346 (D.C. Cir.), cert. denied, 454 U.S. 1092 (1981). (District Judge: Richey) (Circuit Judges: Wright, Fobb, Penn).

Almost one-quarter of my time from October 1978 through July 1981 was devoted to defending against an action brought by 18 midwestern railroads and three environmental groups challenging, under NEPA and the APA, a Corps of Engineers' decision to construct an expanded replacement facility for Lock & Dam 26 on the Mississippi River. We represented the defendant-intervenor, Association for the Improvement of the Mississippi River ("AIMR"), an association of over 350 municipalities, businesses, farm and labor organizations, waterway carriers, and shippers that depend on waterway transportation. The case involved extremely complex technical and legal issues. Although the Corps was represented by DOJ, AIMR played a leading role in all aspects of the case. I was responsible for legal research; developing factual and expert evidence; discovery; trial preparation; drafting numerous motions, pre-trial brief, post-trial brief,

appellate brief, reply brief, and opposition to cert. petition. The trial court found for the Corps and AIMR; the Court of Appeals upheld the trial court on all material points. Government Counsel was Fred Disheroon, Lands Division, U.S. Department of Justice, Washington, D.C. Opposing counsel was Joe Karaganis, Karaganis & Gail Ltd., 150 N. Wacker Drive, Chicago, Illinois 60606 (312) 782-1905.

2. Potomac Electric Power Co. v. EPA, 650 F.2d 509 (4th Cir.), cert. denied, 455 U.S. 1016 (1981). (Circuit Judges: Widener, Phillips, Ervin).

From May 1980 through November 1980, I represented PEPCO in its petition for review of an EPA decision that the Chalk Point 4 Unit was subject to the new source performance standards for fossil-fuel steam generating units under the Clean Air Act. I was responsible for legal research and drafting a substantial portion of the brief. The Court of Appeals upheld the EPA decision. Opposing counsel was Bingham Kennedy, Lands Division, Department of Justice, Washington, D.C.

3. Group Health Ass'n, Inc. v. Blumenthal, 453 A.2d 1198 (Md.Ct.App. 1983).

From February 1981 through January 1983, I defended Group Health Association (GHA) in a negligence and wrongful death diversity action in U.S. District Court for the District of Maryland. GHA moved to dismiss on the grounds (1) that the claims were subject to mandatory arbitration under Maryland's Health Care Malpractice Claims Act, and (2) that Maryland did not recognize a wrongful death action for a non-viable child born alive. The district judge certified questions to the Maryland Court of Appeals. The Court of Appeals held for GHA that the action was subject to arbitration, but held also that an action did lie for wrongful death of a non-viable child. I was responsible for factual investigation; legal research; discovery; drafting pleadings, motion to dismiss, brief and reply brief in Court of Appeals. Opposing Counsel were Jonathan Azrael, Azrael & Gann, Baltimore, Maryland and John Jude O'Donnell, Rockville, Maryland. (301) 424-6060

4. Berlin v. Chevy Chase Lake Corp., 16 10 0071 (American Arbitration Association).

From March 1981 through March 1982, I represented B.F. Saul and Chevy Chase Lake Corporation in an arbitration over the valuation of a minority interest in a closely-held corporation. We were urging a low value. I was responsible for development of facts, legal research, all aspects of trial preparation, development of expert testimony, pre-trial brief, post-trial brief. The final award was higher than our position, but substantially lower than that urged by our opponent. The arbitrators were Daniel Coon,

David Gruber, Michael Jackley, c/o American Arbitration Association, 1730 Rhode Island Avenue., N.W., Washington, D.C. Opposing counsel was Charles Lee Eisen, Kirkpatrick, Lockhart, 1800 M Street, N.W., Washington, D.C. 20036. (202) 778-9000

5. Murray v. Henry J. Kaiser Co., 84-ERA-4 (DOL ALJ Rokentenetz, 1984).

From September 1983 through May 1984, I defended Henry J. Kaiser Co. (HJK), constructors of the Zimmer nuclear power plant, against a "whistleblower" suit brought by a discharged employee (Murray) under the Energy Reorganization Act. The case was highly sensitive because it was litigated during a pending grand jury investigation into alleged illegal conduct by HJK in the construction of Zimmer, including some of the allegations raised by Murray. (See response to question no. 17 below.) I was responsible for factual development, discovery, drafting pre-trial statement, trial preparation, and post-trial brief. The case was tried before a Department of Labor ALJ in Cincinnati, Ohio. I personally tried half the case, with a Shaw, Pittman partner trying the other half. The ALJ decided for defendant HJK. Opposing counsel was Andrew B. Dennison, 200 Main Street, Batavia, Ohio 45103. (513) 732-6800

6. Arlex, Inc. v. B. Francis Saul, et al., Law No. 19962, Circuit Court of Arlington County (1978) (Winston, J.).

From November 1978 through September 1979, I represented the B.F. Saul Real Estate Investment Trust, defendant ground lessor in a suit by lessee who operated a Howard Johnson's hotel on the leased site. The dispute was over the proper method for calculating lease payments. On March 5, 1979, the trial court granted judgment to defendant on cross-motions for summary judgment. The plaintiff petitioned for appeal to the Virginia Supreme Court, which denied the petition on March 15, 1979. I was responsible for factual investigation, legal research, preparing motion for summary judgment, preparing brief in opposition to petition for appeal in the Virginia Supreme Court. Opposing counsel was LeRoy E. Batchelor, 2060 N. 14th Street, Arlington, Virginia 22201 (703) 525-0102.

7. Rapps v. United States, et al., Civil No. 78-0612 (D.D.C.) (Parker, J.).

From October 1978 to March 1980, I defended a formal high-level CPSC official (Dimcoff) in an action brought by another former CPSC official (Rapps) against the CPSC and several current and former CPSC officials for violation of constitutional, statutory, and common law rights. The other federal defendants were represented by the Department of Justice. The case, which involved numerous complex legal issues, was settled on the eve of trial. I was responsible for factual investigation; extensive

legal research; conducting most discovery; drafting numerous motions, including motions to dismiss, motions for summary judgment, pre-trial statement, etc. During discovery, I successfully overcame a claim of newsman's privilege by a journalist witness. Plaintiff Rapps was represented by Raymond Battocchi, Cole & Groner, 1730 K Street, N.W., Washington, D.C. (202) 331-8888. The other federal defendants were represented by Lawrence Moloney, U.S. Department of Justice, Civil Division, Washington, D.C.

8. Provident Life Ins. Co. v. Life Investors, Inc., v. Equitable of Iowa Companies, Civil Action No. A 78-1061 (D.N.D.).

From October 1978 through October 1979, I represented Equitable of Iowa, third-party defendant in a 16(b) short-swing profits suit. Provident Life Insurance Co. sued Life Investors, Inc. to recover short-swing profits realized by Life Investors on the sale of Provident stock to Equitable. Life Investors impleaded Equitable as a third-party defendant. The case was settled prior to trial. I was responsible for factual investigation, discovery, legal research, legal advice on settlement. Opposing counsel for Provident Life: James Collins, Boodell, Sears, Sugrue, Giambalvo & Crowley, One IBM Plaza, Suite 2650, Chicago, Illinois (312) 782-0600.

9. Marshall v. Schlumberger Well Services, OSHRC Docket No. 79-3912, Region III (ALJ Cutler).

From October 1979 to May 1980, I represented a Schlumberger subsidiary in defending against an OSHA complaint arising from a fatal explosion at a West Virginia job site. The case was settled by joint stipulation in May 1980. I was responsible for factual investigation, legal research, pleadings, settlement discussions. Opposing counsel were Marshall Harris and Joseph Crawford, Office of Solicitor, U.S. Department of Labor, 3535 Market Street, Philadelphia, Pennsylvania 19104 (215) 596-5165.

10. Gutherz, et al. v. U.S. News & World Report, 86 Civ. 2517 (GLG) (S.D.N.Y.) (Judge G. Goettel).

From January 1986 to March 1989, I was lead counsel defending U.S. News & World Report in a large, multi-plaintiff age discrimination suit under the ADEA. The suit arose from the termination of half of U.S. News' advertising sales force after the magazine was taken over by a new owner. I conducted and defended extensive discovery, represented U.S. News in all court appearances, drafted and argued motion for summary judgment. The motion was denied. Opposing counsel were Judith Vladeck and Anne Vladeck of Vladeck, Waldman, Elias & Engelhard, 1501 Broadway, New York, New York (202) 354-8330.

17. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

1. I worked on the following matters as an associate at Shaw, Pittman, Potts & Trowbridge. (Except where otherwise noted, I was the sole associate, supervised by one partner.)

First Pennsylvania Bank (6/80 - 9/80) Prepared legal opinion for Board of Directors of First Pennsylvania Corporation (FPC) re propriety of advancing indemnification to Board Chairman who had retained separate counsel to defend lawsuit against FPC, the Chairman, and other individuals, alleging violations of antitrust laws and the Bank Holding Company Act. I did the factual investigation, legal research and analysis, drafted legal opinion, and made part of oral presentation to the Board.

Zimmer Grand Jury Investigation (9/83 - 9/84) Spent the substantial part of a year successfully defending Henry J. Kaiser Co. in connection with a grand jury investigation into possible violations of federal law in the construction of the "Zimmer" nuclear plant in Cincinnati, Ohio. Also handled a parallel NRC investigation and three related whistleblower cases. Extensive factual investigation, witness interviews, etc.

United States v. A.B. Chance Co., Civil Action No. 80-0034-P(H) (N.D.W.Va.) (1/79 - 5/80) Represented Parkersburg, West Virginia plant charged with violating Clean Water Act. The case was settled by consent decree entered May 1[illegible] 1980. I was responsible for factual investigation, [illegible]l research and drafting pleadings. Opposing counsel was Assistant U.S. Attorney William A. Kolibash, Department of Justice, Wheeling, West Virginia.

King v. GPU Nuclear, 83-ERA-10 (Department of Labor) (8/84 - 11/84) Defended GPU in whistleblower case arising out of Three Mile Island. Extensive discovery, trial preparation. Settled on eve of trial.

American Management Systems, Inc. v. Delphi Associates, Civil Action No. 79-2467-T (D. Mass.) (1/79 - 3/82) Worked with a partner and another associate representing AMS in a suit seeking damages for breach of contract and in quantum meruit. Defendant Delphi had been prime contractor on a project to design MMIS computer system for State of Illinois. AMS sued under its subcontract with Delphi to recoup substantial losses. Participated in extensive discovery and motions. Case was settled.

Miscellaneous Litigation: (10/78 - 3/82) Handled numerous smaller cases, including defense of Group Health Association in a series of medical malpractice suits, all of which settled: Robinson v. WMATA, Civil Action No. 6610-80 (D.C.Sup.Ct.); Davis v. Patow, M.D., Civil Action No. 12220-79 (D.C.Sup.Ct.); Stribling v. Mel-Art, Inc., Civil Action No. 650-80 (D.C.Sup.Ct.). Also handled numerous smaller commercial cases which were either decided on motion or settled, including Westminster Investing Corp. v. Nordheimer, Civil Action No. 2924-80 (D.C.Sup.Ct.); Malawer & Associates v. Centennial Contractors, Inc., Chancery No. 62053 (Cir.Ct. Fairfax Cty.)

GHA Labor Matters (1979-82, 84) Represented Group Health Association in a half dozen labor disputes with its physicians' union. All involved arbitration of grievances under the collective bargaining agreement -- one major grievance related to working conditions, the others related to individual disciplinary actions. All disputes were settled prior to, or during, arbitration. Extensive factual investigation, legal research, arbitration preparation, negotiation.

Virginia Condominiums (1979) Prepared all legal documents, prospectuses, etc., in connection with three of the earliest condominium conversions under the Virginia Condominium Act. The three projects were: Horizon House, Huntington Club, and Telegraph Hill. The Horizon House documents were distributed by the state as "models".

B.F. Saul REIT (1981) Worked on various securities matters for REIT, including advice and submissions to SEC pursuant to Rule 14a-8 re omission of shareholders' proposals from proxy material.

2. I handled the following matters as a partner at Shaw, Pittman:

National Air Transportation Association (3/85 - 5/85) Represented NATA in connection with proposed IRS regulations on the use of employer-provided aircraft. Prepared and submitted formal comments.

National Automobile Dealers Association (2/85 - 4/89) Represented NADA on a variety of tax issues. In 1985 and 1986 prepared and submitted a series of formal comments on proposed IRS regulations re taxation of auto salesmen's demonstrators.

Knights of Columbus (12/84 - 4/89) Represented Knights of Columbus in connection with preserving the tax exemption for "fraternal benefit societies" under Section 501(c)(8). Prepared and submitted numerous comments during 1985 and 1986. Assisted Knights of Columbus in prevailing on Administration and House

Ways & Means Committee to preserve exemption in "Treasury II" and subsequent Tax Reform legislation.

Mutual of Omaha (7/85 - 12/85) Represented Mutual of Omaha in connection with OPM proposed regulations relating to the Federal Employees Health Benefit Program, a substantial part of the company's business. Prepared and submitted formal comments.

Carolina Power & Light (4/85 - 7/85) Researched and prepared comprehensive legal memorandum assessing CPL's potential claims against Westinghouse for installing allegedly defective generators in CPL's nuclear power plant.

Sallie Mae (1/88 - 3/88) Represented SLMA in connection with Department of Education regulations relating to due diligence requirements under the Guaranteed Student Loan Program. Analyzed potential legal challenges to regulations.

Taiwan Power (9/86 - 10/88) Represented the government-owned utility of Taiwan in connection with its pre-sanction, long-term supply contracts for Namibian uranium. Unsuccessfully sought from Treasury Department an interpretation of sanctions legislation that would allow for "in transit" processing of Taiwan Power's uranium. Also sought legislative relief.

Pico Ski Resort (6/87 - 3/89) Represented Vermont ski resort in resisting initial efforts by the Department of Interior to locate Appalachian Trail through the resort in a way that would cripple future operations. Prepared extensive submissions and presentations to DOI relating to its legal obligations under the National Trial Systems Act.

Equitable of Iowa (11/87 - 9/88) Represented Des Moines-based company in opposing a UDAG grant for the development of a major shopping mall on the outskirts of Des Moines. Prepared extensive submissions to HUD. Prepared complaint. The grant was not awarded.

U.S. News & World Report (8/87 - 9/87) Successfully assisted U.S. News in obtaining FCC recognition of exception to Equal Time rule for television series featuring David Frost interviews on Presidential candidates. Made written and oral presentations to FCC staff and commissioners.

Miscellaneous Litigation Represented Emerson Electric in prosecuting claims against the United States for "over and above" work on two defense-related contracts.

Other Legal-Related Activities In 1986 I served on two peer review panels for the National Institute of Justice. In the fall semester of 1987, I assisted a Shaw, Pittman colleague by teaching one of his Legal Research & Writing sections at GMU Law

School on a voluntary, unpaid basis. In 1985 and 1986, I spoke regularly on "The Presidency" to high school students as part of the Close-up Foundation's program.

The following are some of the significant matters I handled while serving as Assistant Attorney General for OLC:

Flag Desecration: I opined that various statutory proposals to protect the United States' flag from physical desecration would not be constitutional under Texas v. Johnson. My analysis is reflected in my testimony before the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary (July 19, 1989); and my testimony before the Senate Judiciary Committee (August 1, 1989).

Extraterritorial Arrests: I provided legal advice concerning the authority of the FBI, as a matter of domestic U.S. law, to make arrests overseas which do not comply with customary international law. This advice is reflected in my testimony before the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary (November 8, 1989).

Posse Comitatus: I advised that the restrictions of the Posse Comitatus Act do not apply extra-territorially. This advice is reflected in legal briefs, drafted in OLC and filed in the Noriega case in Miami.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

None.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

Due to the nature of my assets, I am not likely to have a financial conflict. If I do, I will follow the requirements of 18 U.S.C. §208 by either disqualifying myself or, if appropriate, obtaining a waiver.

If potential non-financial conflicts arise, I will consult with appropriate ethics counsellors at the Department. I understand the Department follows the guidelines of the Administrative Conference of the United States to resolve potential non-financial conflicts.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

Please see my SF278.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Please see attached financial statement.

6. **Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

Vice Chairman, D.C. Lawyers for Reagan-Bush, 1984
Bush for President 1988 (Vice Presidential Candidate Screening Team)

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

(Rounded to nearest thousand)

ASSETS				LIABILITIES			
Cash on hand and in banks	35	000	*	Notes payable to banks—secured			
U.S. Government securities—add schedule				Notes payable to banks—unsecured	17	000	
Listed securities—add schedule				Notes payable to relatives			
Unlisted securities—add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due	1	000	
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid tax and interest			
Doubtful				Real estate mortgages payable—add schedule	265	000	
Real estate owned—add schedule	450	000		Chattel mortgages and other liens payable	10	000	
Real estate mortgages receivable				Other debts—itemize:			
Autos and other personal property	80	000					
Cash value—life insurance							
Other assets—itemize:							
Retirement Accounts	45	000					
TIAA-CREI, IRA, Keogh							
				Total liabilities	293	000	
				Net worth	317	000	
Total assets	610	000		Total liabilities and net worth	610	000	
CONTINGENT LIABILITIES	None			GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule.)	No		
On leases or contracts				Are you defendant in any suits or legal actions?	No		
Legal Claims				Have you ever taken bankruptcy?	No		
Provision for Federal Income Tax							
Other special debt							

* See SF 278 for names of money market accounts

Real Estate Schedule	Value	Mortgage
Residence in Falls Church	$450,000	$255,000 (includes first mortgage and home equity line of credit)

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

My former law partnership has, for the past several years, made substantial cash contributions to groups providing legal services to the indigent and needy. The firm also supports an active in-house pro bono program which has been widely commended in the Washington legal community.

In 1980 I reviewed and critiqued a brief prepared by another associate in a pro bono Bivens action against a government official, and I served on a mock appellate panel to prepare the associate for oral argument. (4.5 hours)

In 1981 I represented pro bono a young retarded woman who was discharged from her job at a large department store. After my calls and correspondence to the parent company, the store rehired the woman and apologized. The matter involved legal research into possible state and federal claims, drafting demand letters, etc. (9.0 hours)

In early 1982 I brought into the firm, as a pro bono matter, two Ethiopian nationals seeking asylum. The work on these cases was done by a more junior associate with expertise in immigration. One of the clients obtained asylum, the other ultimately decided not to seek it. (2.0 hours)

In 1985 I agreed to assist, on a pro bono basis, the Catholic League for Religious & Civil Rights in bringing an action challenging an A.I.D. policy which barred natural family planning groups from receiving grants unless those groups also promoted artificial methods of birth control. The matter was settled in its early stages when A.I.D. agreed to change its policy. (12 hours)

In early 1986 I assisted on a pro bono basis the Jamestown Foundation with respect to legislation to assist defectors. I also supervised an associate providing pro bono assistance to a defector. (30.50 hours)

In 1987 I assisted, on a pro bono basis, the parents' association of a parochial school in their legal efforts to keep the school from being closed. (53 hours)

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

I am currently a member of the Knights of Columbus, which is an all-male Catholic fraternal order. I have been a member since 1984.

While an undergraduate at Columbia University (1968-71), I was a member of Sigma Nu Fraternity, a national social fraternity. It was, at least, de facto all-male, and probably was so de jure.

Responses to Additional Questions Submitted
by the Senate Judiciary Committee
to Acting Attorney General William P. Barr

(By arrangement with Committee staff, responses to additional written questions will be provided as soon as possible.)

Questions from Chairman Biden

Q: Do you support reauthorization of the Independent Counsel statute?

A: The Administration has had certain practical concerns with the statute, such as the independent counsel's budget, the extent to which independent counsel is bound by Department of Justice policies and procedures, and the scope of the statute's coverage. In general, assuming that the Administration's concerns are satisfactorily met, I expect that I would be able to support reauthorization.

Q: If the President wanted to oppose reauthorization of the statute, would you support that decision or would you advise him the statute should be reauthorized?

A: I would not raise constitutional objections to the reauthorization in its present form. Rather I would treat this matter as a policy decision. I would recommend changes in the statute to address the practical concerns noted above.

Q: Do you believe the Supreme Court's decision in Morrison v. Olson is correct as a matter of constitutional interpretation?

A: As I indicated in my testimony before the Committee, although I might have decided Morrison differently had I been a judge, I fully accept the Court's decision on the constitutionality of the independent counsel statute. Any advice I would give regarding the statute or related matters would be consistent with the Court's reasoning.

Q: If the President asked you to seek a reversal of the majority opinion in Morrison v. Olson, how would you respond to this request?

A: As I indicated in my testimony, if the President ordered the Department of Justice to ask the Supreme Court to overturn Morrison, it would do so, provided a reasoned, professionally defensible legal argument could be made.

Q: Do you doubt the constitutionality of any of the independent federal agencies?

A: Morrison and other decisions of the Court clearly support the constitutionality of independent agencies. I fully accept those decisions. As I indicated in my testimony, I have no desire to upset the administrative structure that has developed over the past century.

Q: If the President asked to pursue a litigation strategy designed to challenge the constitutionality of the independent agencies, how would you respond? Do you believe such a strategy is appropriate as a matter of constitutional interpretation?

A: I accept current law on the constitutionality of independent agencies, and, as I indicated above, I have no desire to upset the prevailing administrative structure. My advice would depend on the circumstances, and would be based largely on the trends in the Supreme Court's constitutional jurisprudence and on the Justice Department's own legal research and analysis.

Q: Assume, for the moment, that Congress enacted a law prohibiting the President from pursuing a particular course of action in the area of foreign policy.

Assume further that the President believes Congress exceeded its constitutional authority in attempting to restrict the President's conduct of foreign policy, and that he asked you to advice him on a course of action.

Would you advice the President that he should veto the legislation if he believes it is unconstitutional?

A: If the constitutional infirmities in the bill were sufficiently serious, I would urge the President to consider a veto.

Q: Are there any circumstances under which you would advise him that he could sign the law but disregard the particular provision of the law he believed was unconstitutional? If so, what are the circumstances that would justify such action?

A: That is a very difficult question, and I hesitate to opine in the abstract. Normally, the President should veto a bill containing a provision that he believes is unconstitutional in any significant respect rather than disregard that provision. There may, however, be compelling reasons for a President to sign a bill that he believes contains unconstitutional provisions. For example, President Roosevelt signed lend-lease legislation even though he beleived certain provisions of the bill were unconstitutional. The President has an obligation to enforce the laws, and the supreme law is the Constitution. If Congress were

to pass a law that violated the Constitution, the President may well have an overriding obligation not to enforce the unconstitutional provision. James Wilson, one of the Founders, recognized that such a situation could arise, and more recently Attorney General Civiletti in the Carter Administration took a similar position. For example, Attorney General Civiletti concluded in Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President, 4A Op. OLC 21 (1980), that a statutory "legislative veto" was unconstitutional. He stated that "the Executive's duty faithfully to execute the law embraces a duty to enforce the fundamental law set forth in the Constitution as well as a duty to enforce the law founded in Acts of Congress, and cases arise in which the duty to one precludes the duty to the other." The authority of Congress, and the judgment of Congress that a particular statute was constitutional, have to be given great respect, but it has long been the position of the Department of Justice that the President may decline to enforce unconstitutional statutes. The fact that the President has signed a bill would not preclude such action in apprpriate circumstances. Cf. INS v. Chadha, 462 U.S. 919, 942, n.13 (1983). Obviously, that is not a step that any President will take lightly, and it is not a step that can be justified on the basis of a policy disagreement, as opposed to a good faith judgment that the statute is indeed unconstitutional.

Q: Are there any circumstances under which you would advise him that he could go to court and seek declaratory or injunctive relief to avoid the effect of the particular clause to which he objected? If so, what are the circumstances that would justify such action?

A: This is a difficult question, and different circumstances might require different approaches depending on the facts. If a case could be brought that did not run afoul of the "political question" doctrine and for which standing requirements were met, I would certainly consider recommending such a course of action. Recently the Administration did file such a case. (United States v. Instruments S.A., Inc. and Fisons Instrumente/VG Instruments)

Q: Under what circumstances would you advise the President to assert executive privilege in response to a request from Congress to review executive branch documents or information?

A: The most direct way for me to answer your question is to quote from the current Executive Branch statement of policy on assertions of executive privilege:

> The policy of this Administration is to comply with Congressional requests for information to the fullest

> extent consistent with the constitutional and statutory obligations of the Executive Branch. While this Administration, like its predecessors, has an obligation to protect the confidentiality of some communications, executive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches. To ensure that every reasonable accommodation is made to the needs of Congress, executive privilege shall not be invoked without specific Presidential authorization.

This statement is from a November 4, 1982 memorandum from President Reagan to he heads of the Executive departments and agencies. The memorandum is being following by the Bush Administration.

I want to stress one point from the memorandum. The Executive Branch is committed to engaging in an accommodation process when Congressional committees seek confidential information. As I stated in my testimony, I fully share this commitment. The agencies work with committees to develop means of providing information the committees need while protecting Executive Branch confidentiality interests. Experience has shown that good faith communications between agency and Congressional staff resolve almost all difficulties as they arise. Only in exceptional circumstances has it ever been necessary to request that the President assert the executive privilege with respect to a Congressional request. As I testified, during my tenure as Assistant Attorney General for the Office of Legal Counsel, there were no assertions of executive privilege.

> Q: If you were asked to provide the administration with a legal opinion setting forth the scope of the executive privilege and guidelines for when it should be asserted, what would that opinion say?

A: Obviously, any such legal opinion would need to discuss the constitutional principles and precedents in detail. I can say here, however, that in order to discharge faithfully its constitutional and statutory responsibilities, the Executive Branch must seek to protect certain confidential information. Examples of confidential information include national security information; materials that are protected by statute, such as the grand jury secrecy rule of the Federal Rules of Criminal Procedure; information the disclosure of which might compromise open investigations or prosecutions or civil cases; and pre-

decisional deliberative communications, such as internal advice and preliminary positions and recommendations.

I should reiterate the point I made in answering the previous question on executive privilege. The Executive Branch is committed to seeking to accommodate the information needs of Congress. We are almost always able to accommodate those needs, even when the Congressional requests seek confidential information. Accommodations can be structured in ways that provide Congress the information it needs for its legislative purposes while preserving essential confidentiality. As for when executive privilege should be asserted, the Reagan Memorandum states the longstanding policy that "executive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary." These principles are also spelled out in a memorandum that I prepared for the General Counsels Consultative Group dated June 19, 1989.

Q: Will you ensure that the Department of Justice cooperates fully with the Congressional committees now or in the future investigating the BCCI matter, by making all documents and other relevant information available as requested by those committees?

A: The Department has spent hundreds of hours over the last several months responding to document requests by congressional committees and making witnesses available for staff interviews. All requested witnesses from the Department have been interviewed, sometimes at great length, by congressional staff. The Department has fully complied with all document requests from the Senate subcommittee; one recent request from the House Judiciary Committee, Subcommittee on Crime and Criminal Justice is still outstanding.

As Congress has long recognized, the Department must take special care in responding to requests for information concerning open investigations. Under the circumstances, I believe that we have been as forthcoming as possible. Indeed, Representative Schumer's staff has commended the Department for its cooperation in arranging interviews in connection with their investigation, and we intend to continue that attitude toward other investigations. There has been no effort to suppress information for any inappropriate reason. The sole interest of the Department has been to protect ongoing investigations and other confidential law enforcement information. I will ensure cooperation consistent with my obligation to ensure the integrity of the law enforcement process.

Q: Do you intend to continue the apparent policy of your predecessor that if a prospective judicial nominee consents

to an interview with a local bar association, that person's judicial nomination will necessarily be imperiled?

Do you have any meetings currently scheduled with representatives of local bar associations to discuss and address the subject of local bar associations involvement in the judicial nominations process?

A: As I testified, I am currently reviewing this matter and will be meeting with representatives of bar associations to discuss the issue.

Questions from Senator Kennedy

Q: Late last year, the State Department and our military evacuated to the United States around 700 families from Kuwait, mostly Palestinians. Most of these families had U.S. citizen children, so were of great concern to the United States. And many at great risk to themselves had also hidden Americans from Iraqi forces.

While many do have Jordanian passports, they really have nowhere to go. And so many of them have performed a great service in protecting American lives in a time of acute conflict with Iraq.

I believe the Administration should comprehensively address the immigration status of these families to whom the American people owe so much. Immediate steps should be taken to assure them that they will not be removed from the United States and those who qualify for permanent residence will be assisted in the processing of their applications.

But furthermore, I believe that legislation should be enacted to provide permanent status to those who may not qualify for adjustment of status under existing criteria.

Would you support such actions?

A: It is my understanding that the President will make an announcement in the near future concerning the deferral of departure of Persian Gulf evacuees. I would be happy to comment on this matter after that announcement.

Questions from Senator Metzenbaum

Q: Do you believe OSHA's criminal penalty provisions presently serve as an effective deterrent?

. . .

Overall, do you believe these stronger penalties would improve the deterrent effect of the OSH Act's criminal provisions?

A: The Department has determined that OSHA criminal penalties are insufficient for wilful conduct that leads to loss of human life, and has supported proposed legislation that would have increased the penalty for such behavior from a misdemeanor to a felony. In a letter to Congressman Tom Lantos dated January 16, 1990 from Carol T. Crawford, then Assistant Attorney General for Legislative Affairs, the Department's position was set forth. That position is unchanged and the Department is aggressively addressing regulatory enforcement at this time.

Enforcement relating to life or health endangering violations in the workplace is one of the initiatives of the Department's Criminal Division. The Criminal Division is wholly committed to enforcement in this area because of the serious, and sometimes potentially catastrophic, consequences that can result from such violations. This initiative focuses on violations of regulations promulgated by the Nuclear Regulatory Commission (NRC), OSHA, and Mine Safety and Health Administration (MSHA).

The objectives of the initiative may be summarized as follows: The General Litigation Section processes promptly all investigative referrals from the regulatory agencies and refers to the appropriate U.S. Attorneys' offices those referrals which can be adequately addressed by those offices. The General Litigation Section analyzes the prosecutive merit of all other referrals, declining those for which no action is required due to a lack of evidence of wilfulness or intent, and pursuing (either directly or by monitoring the efforts of U.S. Attorneys) the more complex referrals. The Criminal Division currently has numerous cases in this area under investigation. Examples of the demonstrated commitment by the Department are the following:

- October 21, 1991 thirty-three coal companies and forty-two individuals were charged and pled guilty in the Western District of Virginia to violations charging a conspiracy to defraud MSHA in the operation of the respirable dust testing program required by Title 30. Two individuals pled to RICO violations in connection with the scheme.

- On May 2, 1991, ABC Utilities and Bruce Shear were convicted in the Southern District of Texas of Occupational Safety and Health Administration Act violations resulting from a fatal trench collapse in Texas. The conviction is significant because Shear is the first nonowner/employer defendant convicted under the Act.

- The Mine Safety and Health Administration, the Criminal Division, and the U.S. Attorney's Office for the Western District of Kentucky are conducting a thorough investigation into the explosion at the William Station Mine, Pyro 9 Slope, that killed 10 miners in 1989.

- On August 21, 1989, Harrell Murray pled guilty in the Western District of Virginia to a violation of the Atomic Energy Act, 42 U.S.C. 2273, a felony. The charge resulted from Murray's injection of overdoses of radioactive drugs into hospital patients.

- On June 26, 1989, Howard Elliott pled guilty in the District of South Dakota to a one count information charging him with a criminal violation of the Occupational Safety and Health Administration Act in that he failed to follow trenching safety standards resulting in the death of two workers and serious injury to another worker. Mr. Elliott was sentenced to six months imprisonment. The prosecution was the first under the Occupational Safety and Health Administration Act in which the defendant was sentenced to incarceration.

The information requested by Senator Metzenbaum in his further questions on this subject will be provided as expeditiously as possible.

Q: Will the Justice Department appeal the district court's decision [in United States v. Burlington Northern Railroad Co., regarding the enforcement of a subpoena issued by the Inspector General of the Railroad Retirement Board]? If not, why not?

A: Yes.

Q: As Attorney General, will you vigorously protect the "audit" authority of the Inspectors General?

A: Yes.

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Questions from Senator Leahy

Q: What is the current status and scope of the FBI's Library Awareness Program? When was the effectiveness of the program reviewed by your office? What was the result of that review?

A: The FBI's New York Office discontinued making contacts pursuant to the Library Awareness Program over three years ago. Total contacts under the Program numbered approximately 20 and were limited to scientific and technical libraries in the New York area. There are no plans to resume contacts of libraries for this purpose.

Because the FBI is no longer contacting libraries pursuant to the Library Awareness Program, the Department of Justice did not conduct a review of the effectiveness of the Program.

Q: In September 1988, the Director of the FBI criticized the investigation of the Committee in Solidarity with the People of El Salvador. What steps has the Department taken to ensure that this type of violation of citizens' constitutional rights does not happen again?

A: In November 1987, Director Sessions ordered the FBI's Inspection Division to conduct an in-depth inquiry into the CISPES investigation conducted by the FBI. That inquiry revealed that although there had been no violations of individual rights, there were areas of policy and procedures that could be strengthened to preclude future problems such as occurred in the CISPES investigation. As a result, the Director made 33 separate policy changes primarily designed to strengthen oversight and approval of international terrorism investigations and the use of informants or assets.

In addition, the Attorney General, at the Director's request, formed a working group to examine the Attorney General's Foreign Counterintelligence Guidelines as they apply to international terrorism cases. The working group, chaired by Mary Lawton, Counsel for Intelligence Policy, recommended a number of modifications to the Guidelines, all of which the Attorney General adopted. These changes tightened definitions and clarified the applicability of portions of the Guidelines to international terrorism investigations involving groups.

As a result of these changes, international terrorism cases receive greater Headquarters oversight and must be more tightly focused. The Foreign Counterintelligence Guidelines are more specific, especially as to "groups" and any aspect of an

investigation involving First Amendment activities must be specifically reviewed.

The inquiry conducted by the FBI's Inspection Division, the policy changes by the FBI Director and the Guideline changes by the Attorney General received intense scrutiny by both the House and Senate Intelligence Committees and the House Judiciary Subcommittee on Civil and Constitutional Rights.

Q: In a speech you gave last month, you stated that the high prison population in the United States is "a sign of success." Today there are more people incarcerated per capita in the United States than in any country in the world.

Isn't that statistic a measure of our society's failure to provide realistic, desirable opportunities for people to participate and contribute to society? Isn't it a measure of our society's failure to provide basic education and economic opportunity to our young people, to counsel our children against substance abuse and to establish adequate drug treatment programs?

A: In my speech I did not say, and I do not believe, that any single approach can stop crime. I noted, for example, that "[i]n the long-term, only by strengthening our values can we triumph over violence" and that "family, church, and civic institutions are the building blocks of a solid community" because they transmit the values on which a just and safe society ultimately rests.

I agree that we should seek to expand economic and educational opportunities and to provide counseling about substance abuse and treatment for drug addiction. The Administration has programs that address all of these areas.

Nevertheless, although law enforcement alone cannot solve the problem of violent crime, the struggle against crime cannot succeed without vigorous law enforcement. Social programs cannot succeed in an atmosphere of violence. As I said in my speech, the best way to protect the public against habitual criminals is to keep those criminals off the streets by locking them up. The increase in the prison population shows that violent criminals are being caught, convicted, and removed from society. While the prison population grew in the 1980's, the staggering increases in crime that afflicted the 1960's and 1970's were brought to a halt. In this sense, a high prison population is indeed a sign of success in our law enforcement efforts.

Responses to Additional Questions Submitted
by the Senate Judiciary Committee
to Acting Attorney General William P. Barr

(The responses provided below are in addition to the responses provided to the Committee on November 14, 1991.)

Questions from Chairman Biden

Q: [The Bureau of Justice Statistics 1990 National Crime Survey] is supposed to tell the nation just how many crimes were committed. Is that your understanding?

A: The annual National Crime Victimization Survey (NCVS) attempts to measure personal and household offenses, including crimes not reported to the police, by interviewing all the occupants of housing units age 12 or older, who have been selected to comprise a representative sample. Each person interviewed is asked about the crimes he or she may have experienced over the previous 6 months. The survey is an essential tool in understanding the impact of crime on our society. Obviously, any crimes that victims are unwilling to describe to the survey interviewer are not reflected in the survey results.

Q: If confirmed, will you base the Justice Department's attack on rape on the national total indicated by the victimization survey? Or, on the survey's indication of a decline from 1989 to 1990?

A: Any occurrence of rape is unacceptable. Correspondingly, the Department of Justice is committed to aggressively attacking the complex problems of rapes and sexual assaults in all instances. I strongly support the activities of the Office of Victims of Crime, various national organizations and others engaged in promoting wide-ranging programs and reforms for this purpose.

Q: [A]re you telling us that you believe 8 of every 10 rapes are reported to the police? If not, what is your estimate of the number of rapes that are not reported to the police?

A: According the NCVS data, violent crime victims generally report only about half of their victimizations to the police. In some cases, rape victims do not reveal the crime to anyone. In yet other cases, some victims may have reported the crime to the police but are unwilling to discuss the crime with anyone else, including a survey interviewer.

Much of the apparent discrepancy between NCVS rape victimizations and Uniform Crime Reports (UCR) counts of rape reported to the police are within the wide confidence intervals statistically applied to NCVS rape estimates. Furthermore, data from several states indicate a significant number of rape victims are under 12 years of age, thus representing a category of victims not included within the NCVS. Again, while surveys and law enforcement reports provide extremely important data on rape trends and incidence rates, neither source can provide exact measures of the annual occurrence of these terrible crimes.

Q: If confirmed, what priority will you place on this re-design of the survey?

A: The Bureau of Justice Statistics has vigorously pursued the re-design of the rape question on the NCVS to attain a better measurement of this crime. If confirmed, I will place a high priority on obtaining accurate data on the occurrence of rape and all other crimes.

Q: The Drug Use Forecasting system undertaken by the National Institute of Justice is, I believe, one of the most valuable tools the federal government has for detecting and assessing trends in drug use.

If confirmed, will you support continued expansion of the Drug Use Forecasting program?

A: The Drug Use Forecasting (DUF) system of the National Institute of Justice provides this country's first objective measure of recent drug use by people arrested for serious crimes, and I support it fully.

Q: The Senate-passed crime bill included the "Police Officers' Bill of Rights" (S. 1241, Title IX). This bill would provide certain procedural protections for police officers in disciplinary proceedings. This bill does not, however, address the issue of actions against police officers for criminal misconduct.

What is your view of the need for federal legislation to guarantee procedural protections -- such as those included in the "Police Officers' Bill of Rights" -- to police officers subject to disciplinary proceedings?

A: Although specific procedures for the investigation and adjudication of such cases are the responsibility of state and local governments, and I would resist federal involvement in labor/management issues in local law enforcement, I strongly support general principles of fairness in disciplinary procedures pertaining to law enforcement misconduct.

Q: The Administration's fiscal 1992 budget proposed to slash the funding for the Office of Juvenile Justice and Delinquency Prevention from $70 million to $7.5 million. Do you support this reduction?

A: The Office for Juvenile Justice and Delinquency Prevention (OJJDP) should continue to fund numerous demonstration, research and evaluation efforts through its discretionary grant program. OJJDP, through this program, provides services to juveniles that are very important and funds projects that have a significant impact on high risk youth.

Since the inception of OJJDP's grant program in 1975, more than $1.2 billion has been appropriated for the program, of which more than 60% (almost $781 million) went to formula grants. The states have made progress in meeting the legislative goals (deinstitutionalization of status offenders, separation of juveniles from adults in secure institutions, and removal of juveniles from adult jails and lock-ups) under the formula grant program. Fifty-one states and territories (of 56 participating in the formula grant program) are in full compliance with the deinstitutionalization of status offenders mandate. Therefore, I think we are at a point where it is important to reexamine the level of funding provided to OJJDP and the methods by which OJJDP funds programs that address the needs of juveniles. Given the fact that Congress has repeatedly rejected efforts to shift funding to the states I would support continued federal funding.

Q: According to the Justice Department, not one single program that directly or indirectly provides drug treatment or prevention services for juvenile offenders would be targeted for elimination or reduction in funding.

Please provide a specific listing of the juvenile justice programs that <u>are</u> targeted for elimination or reduction under the Administration's fiscal 1992 budget.

A: The Office of Juvenile Justice and Delinquency Prevention's FY 1992 appropriation is $76 million. The Administration's proposed 1992 budget request for OJJDP was $7.5 million. The $7.5 million requested, together with a 50% match from grant recipients, would have provided $15 million for the juvenile justice high risk youth program. At either level, it was and is not anticipated that any programs, directly or indirectly, providing drug prevention or treatment services for juvenile offenders would be targeted for elimination or reduction in funding in 1992.

Q: Funds are badly needed for counseling and treatment for drug involved youth. The Boys and Girls Club of America is an example of a highly successful organization that has

helped provide alternative, constructive activities that prevent youth from joining gangs.

According to the Justice Department, the Boys and Girls Club "Targeted Outreach" program enjoys a 93% success rate in the number of youth who have avoided reinvolvement with the juvenile justice system. Another survey reported that three out of four Club alumni believe their Boys and Girls Club experience helped them to avoid difficulty with the law.

Does the Justice Department intend to continue its support of organizations like the Boys and Girls Club of America?

A: Yes. On December 11, we will be presenting $2.5 million to the Boys and Girls Club to expand the number of Clubs in public housing projects throughout the country. We are also interested in working with organizations such as the Boys and Girls Club in our Weed and Seed initiative.

Q: What effect will the proposed budget cut have on the Boys and Girls Club of America's 5-year plan to expand services to include an additional 700,000 youth?

A: None. Funding for the Boys and Girls Clubs program is available in 1992.

Q: I have expressed my concern about the problems of drug trafficking and violent crime in rural America. Accordingly, I have proposed a significant expansion in federal efforts to fight these problems, including boosting the number of DEA agents in rural areas; creating rural drug task forces composed of federal, state and local officials; and boosting direct federal aid to law enforcement agencies.

What is the Justice Department doing at this time to address this serious problem?

A: I strongly support ensuring adequate resources for rural drug enforcement. We sought expansion through OCDETF's heartlands program and DEA was planning on allocating 50% of new agents in FY 92 to rural areas. Unfortunately, budget cuts have seriously impacted both initiatives.

Q: Do you support my efforts to increase the number of DEA agents assigned to rural areas?

A: Yes.

Q: Do you believe that small, rural law enforcement agencies are capable of attacking the increasing number of large, regional and interstate drug trafficking rings that operate in rural areas?

A: No. I am committed to the expansion of the DEA State and Local Task Force program which provides much needed federal resources and expertise to assist local communities in meeting these challenges.

Q: What is your position with respect to my proposal to create federal-state-local drug enforcement task forces in rural areas? Do you believe that agencies other than DEA, e.g. the Bureau of Land Management and the U.S. Park Police, can play a role?

A: As stated above, I favor expansion in rural areas both through DEA and through OCDETF task forces. As in all aspects of our law enforcement effort we support incorporating efforts of other agencies in a coordinated manner.

Q: As you know, the Bureau of Alcohol, Tobacco and Firearms is playing an increasing role in combatting violent crime, primarily through the agency's firearms jurisdiction. FBI Director William Sessions has written to me to express his concern about the fragmenting of law enforcement responsibility among federal agencies.

Do you think it is appropriate for the federal government to play a role in attacking violent street crime? Which agency is best positioned to accomplish this task?

A: It is indeed appropriate for the federal government to play a role in attacking violent street crime. As I indicated in my testimony before the Committee, if confirmed, attacking violent crime will be one of my priorities. While the vast majority of violent crime is properly subject to state and local jurisdiction, the federal government can play an important leadership role. For example, Congress has given the federal government enforcement and regulatory responsibilities in the areas of drug trafficking and firearms violations, because much of violent street crime has a nexus with drugs and firearms. Moreover, the federal government is often best situated to attack criminal organizations, including street gangs. The federal government can also contribute in the area of armed career criminals. The federal court system can also provide a model to the states as they grapple with problems of criminal justice administration, and the Justice Department's Bureau of Justice Assistance and National Institute of Justice can promote innovative pilot programs and research in the area of law enforcement.

No one agency is appropriately assigned sole responsibility for the entirety of this problem. The Department's task force

approach enables the Department to draw upon the expertise of various individual agencies, so that the best mix of resources and experience can be brought to bear.

Q: Do you agree that expanding BATF's activities in these areas poses a problem in terms of coordination?

A: BATF plays an important role and it is important that their activities in this area be coordinated. They are the backbone of our Triggerlock effort and we believe coordination has been improving because of the Justice Department's strong working relationship with the Treasury Department.

Q: What is the appropriate role for the FBI? Is it the lead federal law enforcement agency? If so, what does that mean? How should the numerous federal law enforcement agencies be coordinated?

A: Experience has shown that the FBI is one of the best law enforcement agencies in the world. It is also the federal agency with the most comprehensive statutory responsibilities and jurisdiction. Therefore, the FBI should continue to play a leading role in law enforcement and in coordinating the law enforcement efforts of other agencies, in conjunction with the Attorney General's overall responsibility for the federal law enforcement effort. As I testified, I am very concerned about the need to coordinate the various agencies involved in our law enforcement effort. We are continuously examining ways to improve that cooperation and I look forward to working with the Committee on this issue.

Q: What role should the Office of National Drug Control Policy play in coordinating such efforts?

A: Because so much of the violent crime problem currently confronting the Nation is related to drugs, it is important that law enforcement efforts be consistent with the government's larger efforts to combat the drug problem, and that law enforcement efforts and education and rehabilitative efforts reinforce each other for maximum effect. Accordingly, the Office's policy role is a critical one in this area.

Q: Mr. Barr, in last year's crime bill, Congress amended the Perkins Student Loan program to permit the Secretary of Education to repay the student loans of persons who commit to serve a number of years with a law enforcement agency. Unfortunately, this program is open to only the most needy students, and many currently serving police officers are not eligible.

Do you think the federal government should play a role in

providing financial assistance to prospective law enforcement officers?

Would you support an expansion of federal educational aid to law enforcement officers, particularly currently serving officers who want to complete an undergraduate degree?

A: Obviously, the best educated police force possible, in every locality, is in the best interests of the public. We look forward to working with the Committee, other federal agencies, and the state and local law enforcement communities to define the appropriate federal role in this important area. The Department of Justice does, however, have deep concerns about the proposed expansion of federal educational aid based on its prospective cost.

Q: Heroin trafficking and use appears to be on an upswing. Record opium production abroad has resulted in increased supplies to the U.S. making heroin more available and less expensive than ever before.

How seriously do you take the new heroin threat?

A: We take the heroin threat very seriously. In the past five years, production of opium has tripled in the Golden Triangle, and has quadrupled in Burma. Within the United States, heroin seizures have doubled in the past five years. Southeast Asian heroin alone accounts for 56% of the U.S. heroin market, up from just 22% in 1986. Sources of supply are not limited to Southeast and Southwest Asia; Mexico and Guatemala are significant sources of opium and heroin. There is also evidence that Colombian traffickers are expanding into the heroin trade.

The heroin situation is more complicated in some ways than the cocaine problem. The United States Government has little or no access to major source countries, including Burma, Laos and Iran. Myriad ethnic Chinese organizations are the world's primary trafficking mechanism. The Nigerian traffickers have also emerged as a significant source of U.S.-bound heroin.

Q: What, specifically, has the Justice Department done to combat this problem before heroin becomes the next "crack" cocaine?

A: The Department has been, and remains, committed to monitoring all heroin-related trends -- including production, trafficking and abuse -- to anticipate heroin developments. We have also provided advice and counsel to policymakers in other federal agencies, as well as international officials, encouraging them to take the world's opium and heroin situation seriously. DEA is actively developing cases against the world's heroin kingpins and is aggressively seeking to separate these kingpins

from their assets. Our Asian Organized Crime initiative should also have a positive impact on fighting heroin trafficking and abuse. We held the first Asian Organized Crime Summit recently and at the Summit I spoke to my counterparts of the need for a coordinated effort in this area.

I will approach the heroin problem on the international level, drawing on our experience in combatting cocaine traffic. The Department, primarily through the Drug Enforcement Administration, is working with host country counterparts in most of the major opium producing and heroin trafficking countries to eliminate trafficking and strengthen host country laws to thwart the heroin trade. In the last year, new and important anti-narcotics legislation has been passed and/or implemented in Thailand, Hong Kong, the Peoples Republic of China and Japan. These laws make a number of critical drug enforcement tools available for the first time, including conspiracy prosecutions, money laundering prosecutions, controlled delivery, asset forfeiture and chemical controls. DEA provides training to host country counterparts and works side-by-side with them in investigations.

Domestically, DEA has a number of special enforcement programs (SEPs) designed to reduce the availability of heroin and to counter the trafficking activities of the major trafficking groups and their kingpins. SEP King Cobra is designed to focus on Southeast Asian heroin trafficking groups. DEA offices in New York, Los Angeles, Hong Kong and Bangkok have been particularly effective in dismantling some major Chinese organizations. The indictment of Chang Chi Fu (a/k/a Khun Sa) is but one accomplishment of this program.

SEP Balkan is directed at the highest levels of major criminal organizations trafficking in Southwest heroin to the United States. Southwest Asian trafficking groups are primarily based in New York, Newark, Los Angeles, Detroit, Chicago, Seattle, San Francisco and Houston.

SEP Aztec is directed at all facets of the Mexican heroin trade, and targets all aspects of the opium-to-heroin industry.

Q: What do you plan to do to increase the department's efforts to fight heroin trafficking and abuse?

A: We will continue to pursue vigorously the domestic and international efforts described above.

Questions from Senator Kennedy

Q: You played an important role in connection with the Justice Department and FBI policy of questioning Arab-American business and community leaders during Operation Desert Shield and Operation Desert Storm. The interview process evolved during the course of Iraq's occupation of Kuwait. Guidelines for questioning, particularly with regard to political beliefs or opinions, were clarified during the process of the interview program. It appeared that the FBI was singling out individuals for questions on the basis of ethnic background, and that questions were indeed asked about political beliefs and support or opposition to U.S. involvement in the Gulf.

How did the Justice Department develop guidelines or criteria for interviewing Arab-Americans and do you believe it would be worthwhile to consider whether revisions to your policy could be developed to limit the intrusiveness of such interview programs in the future?

A: The FBI interview program involving Arab-American leaders in the United States had two chief purposes: to solicit cooperation from these prominent leaders in assessing the potential for terrorist activity within the United States in response to the crisis in Kuwait, and to advise these leaders of the FBI's recognition of the potential for a possible backlash against the Arab-American population and the FBI's civil rights responsibilities.

With respect to the first purpose, we were approaching armed conflict where explicit threats of world-wide terrorism had been made by Saddam Hussein and others. The FBI took very seriously this potential threat of terrorism inside the United States. As one of many steps in response to that real and serious threat, the FBI undertook to solicit cooperation from the Arab-American community in fulfilling the FBI's counter-terrorism mission in the United States. This involved a number of voluntary interviews with Arab-American leaders. The FBI has had an outstanding record in preventing terrorism in the United States. They concluded that this was an appropriate step to take under the circumstances. The FBI was sensitive to the possible appearance of singling out Arab-Americans and was careful to emphasize in public statements that none of those interviewed was in any way suspected of any wrongdoing. Very few of those interviewed voiced any complaint to the Department or the agents involved concerning the interview.

The second purpose evolved from prior discussions with representatives of the Arab-American Anti-Discrimination Committee. In these discussions, the representatives repeatedly raised concerns that Arab-Americans would be subject to

discrimination and/or harassment based on incidents in the Middle Est. These concerns weighed heavily in the FBI's decision to reach out to the Arab-American community, to alert them to the possibility of a backlash against the community and to assure them of the FBI's role in upholding the civil rights statutes.

It is clear that the Government needs to proceed cautiously whenever it conducts an interview program that could be subject to the type of criticisms identified in your question. I am confident that future interview programs conducted by the FBI will be further refined so as to limit the intrusiveness of the programs.

Q: Is it the goal of this Administration to make treatment available to every drug addict in the federal prison system? If so, how soon will that be a reality?

A: This Administration has taken the position that providing drug treatment programs to inmates at federal institutions is important given the high percentage of federal offenders who are drug-dependent. The Bureau of Prisons currently offers an extensive drug treatment service in each of its institutions. Every inmate entering a BOP institution is screened and assessed by a psychologist for drug treatment needs. Following that evaluation, every inmate with an identified need for drug treatment is required to participate in a mandatory 40-hour drug education program.

Providing adequate drug treatment to inmates has been and will continue to be a priority for the Department. For the period October 1, 1990, through March 30, 1991, more than 8,900 inmates participated in substance abuse programs. The number of program completions for FY 91 is projected to be approximately 17,800, as compared to 1,800 completions in 1987. In FY 91, the Bureau spent more than $9.5 million on those programs. For FY 92, the Department has requested more than $22 million for inmate programs of which $5 million are for transitional services. The Department will continue to work with the Congress to provide funding for these programs and to increase their effectiveness.

Q: For several years, the Department's Bureau of Justice Assistance supported treatment programs in state and local criminal justice systems, but that support has decreased in recent years, especially in the Bureau of Justice Assistance's discretionary grant program. How would you describe the federal role in promoting state and local criminal justice treatment programs and the degree to which the Justice Department is committed to such programs?

A: BJA's discretionary grant program is capped by statute at $50 million and, increasingly, even that amount is heavily earmarked. The focus of this program is to foster innovative

demonstration projects that hold promise for replication, to promote multi-jurisdictional and national scope projects and to provide training and technical assistance. Because of the limited amount of funding, it would be impossible for BJA to fund programs within all 21 Congressionally authorized purpose areas.

BJA does fund treatment-related programs. Through BJA's formula and discretionary grant program, direct services and treatment-related spending will amount to about $100 million in FY 1991. States may use any portion of their BJA formula grant awards ($423 million in FY 1991 and FY 1992) to initiate programs related to drug treatment.

Direct treatment services are funded through larger grant programs administered by the Department of Health and Human Services (HHS). HHS administers a $512 million formula grant drug treatment program and a $153 million discretionary grant program for drug treatment. Within this discretionary grant program $15.9 million is designated for treatment in state correctional settings.

As mandated by the President's National Drug Control Strategy, and consistent with BJA's statutory authority, grants are intended to create a link between the criminal justice and drug treatment systems. Through drug testing, intermediate sanctions, and a host of other programs, the criminal justice system helps to identify offenders for treatment and to ensure that they remain in treatment. The Justice Department remains committed to ensuring the crucial linkage of identifying and referring those criminals to treatment who need treatment.

Q: What is the status of the study [of police abuse complaints received by the Civil Rights Division that former Attorney General Thornburgh announced the Department of Justice was conducting]?

A: The study of abuse complaints was part of an initiative announced by Attorney General Thornburgh to provide insight into the causes of police abuse in this country. As I testified in response to Senator DeConcini's questions, the Civil Rights Division has now completed its phase of the study and NIJ is in the process of expanding the data base. I anticipate completion of the study during this fiscal year.

Q: Upward mobility regulations affecting the litigation divisions and the Solicitor General's Office at the Justice Department have been in place for over ten years. An employee union representing the 1,100 clerical and technical employees in those divisions has complained to the Department that the Upward Mobility program has not been implemented. The Justice Management Division reportedly deferred negotiation of the issue when requested to take

action by the employee union. What is the status of that program, its funding and training, any delay in implementation, and the degree to which the program focuses on lower-graded support staff as opposed to Justice Department attorneys?

A: I am personally committed to continuing upward mobility and plan to pursue this program aggressively. The Upward Mobility Program was formally established in 1978 for the Offices, Boards and Divisions of the Department. The program provides for creating bridge and target positions and career development plans for employees in grade levels GS 1-8 who might otherwise be trapped in "dead-end" positions. Various divisions and offices have conducted formalized programs from time to time since the program was created.

However, many employees have also had the opportunity to move up from clerical ranks to technical and paraprofessional positions (e.g., legal technicians and paralegals) through other means, primarily the Merit Promotion Program. Since the Upward Mobility regulations were written and implemented, the Office of Personnel Management has significantly modified its qualifications standards, allowing employees to qualify for positions much more readily under the competitive merit promotion program than had previously been the case. This change has reduced the need for the formal Upward Mobility program by offering an alternative means for lower graded employees' advancement.

The Department has not yet negotiated a basic labor agreement with Local 3719 of the American Federation of State, Local and Municipal Employees, which was certified by the Federal Labor Relations Authority less than one year ago. Upward Mobility will certainly be one of many subjects negotiated in that master agreement. Groundrules have recently been completed, and we are about to begin the full-scale negotiations.

The formal Upward Mobility program is one means available for employee advancement. When personnel are selected under a formal Upward Mobility program, an individual development plan is initiated which identifies formal classroom and on the job training necessary for the incumbent to qualify for the target position. The cost for this training is assumed by the sponsoring organization. In addition, the Department Training Center regularly conducts Upward Mobility training classes for Department personnel. For FY 1992, ten such courses are scheduled. These courses cover such topics as reading improvement, writing skills, memory and concentration skills, speaking and listening skills, editing and proofreading, organization skills, time management and career development.

In addition, the Department has sponsored a Workforce 2000 training program for newly hired lower level clerical and secretarial personnel. Costs for this program average $2,500 per participant for 8 weeks on intensive classroom and on the job training. All of these programs are directed to personnel in grade levels GS 2-6.

Q: In the case of United States v. Lopez, a federal district judge dismissed an indictment because of concerns over a prosecutorial guideline memorandum authored by your predecessor. The memorandum indicated that federal prosecutors could communicate directly with criminal defendants, notwithstanding local bar ethics rules precluding such contact without the consent of defense counsel. What is your view of the policy embodied in that memorandum and the extent to which it undermines the attorney-client relationship and other precepts of our adversarial system of justice?

A: This issue is under discussion with various outside groups, including the ABA Criminal Justice Committee. In general, we believe the Lopez case was wrongly decided, and have appealed. In that case, the defendant repeatedly insisted on meeting with the prosecutor outside the presence of his counsel. Instead of simply agreeing to meet with the defendant, the prosecutor and the defendant went before a federal magistrate, who made great efforts to be sure that the defendant understood his right to counsel before accepting an oral and written waiver from the defendant and approving the meetings. Counsel for a codefendant was present during the prosecutor's two subsequent meetings with the defendant, the defendant was read his Miranda rights before both meetings, and the prosecutor provided use immunity to the defendant for any statements made during the meeting.

The California ethical rule governing communications with represented parties did not prohibit the prosecutor's judicially-approved meetings with Lopez for a variety of reasons. First, the rule simply does not apply to such meetings, under well-established case law. Second, even if the rule did apply, the contact was obviously "authorized by law," and thus fell within a specific exception to the rule. Third, the rule cannot be interpreted to interfere with the defendant's constitutional right to self-representation, as provided in Faretta v. California, 422 U.S. 806 (1975). Finally, Lopez waived whatever rights he may have had under the ethical rule. Indeed, the ABA Standards for Criminal Justice presently provide that "Where the defendant has properly waived counsel, the prosecuting attorney may engage in plea discussions with the defendant. . . ."

It has long been established that legitimate, constitutional investigatory and prosecutorial contacts with targets of criminal investigations or indicted defendants do not run afoul of

disciplinary rules generally prohibiting communications with represented parties. The memorandum issued by Attorney General Thornburgh in June 1989 essentially reaffirmed the Department's commitment to traditional, common-sense interpretations of state bar ethical rules. The Department's position has not changed on this issue for many years, and I expect to continue to support traditional and long-standing interpretations of those rules.

Q: In a 1990 report, the House of Government Operations Committee compiled ten cases where federal judges found misconduct by Justice Department prosecutors. After extensive inquiry, the Committee found that no disciplinary action was taken by the Justice Department in any of the ten cases. The Committee also found that the Department's "Ethics Handbook" says nothing about such matters, and addresses only minor matters such as financial disclosure and outside activities. Can you assure the Committee that the Ethics Handbook will be reexamined and that you are committed to swift and strict discipline for prosecutors committing knowing violations of constitutional, statutory and bar ethical rules?

A: Yes.

Q: The Justice Department is reportedly beginning an effort to enforce Section 60501 of the Internal Revenue Code against lawyers who refuse to inform the government of the identities of clients who pay their fees in cash. Tens of thousands of IRS Form 8300's have been filed by lawyers seeking to balance their statutory reporting obligation with ethical duties owed to their clients. The choice that ethical lawyers face is between bar disciplinary action for violating client confidentiality rules or a five year jail term for failure to file a complete form. Will you agree to work with bar association representatives to devise prosecutorial guidelines to ensure that these enforcement actions are pursued only against lawyers who are genuinely engaged in criminal misconduct? If the underlying statute does not give you that flexibility, do you believe it should be amended?

A: The Department has welcomed and held an ongoing dialogue with Bar Association groups relating to Section 60501 and is sensitive to the need for balancing proper enforcement of the statute with the special concerns the statute may pose for lawyers. Although the statute is clear and provides no exception for cash payments of legal fees, the law established in the Goldberger & Dubin case provides ample flexibility for exercising restraint where "special circumstances" are shown to exist. Section 60501 of the Internal Revenue Code requires reporting of cash in excess of $10,000 received in connection with a "trade or business." Under the statute, providing legal services is a

trade or business, and cash legal fees are, therefore, reportable on an IRS Form 8300. The Internal Revenue Code authorizes the IRS to obtain this information with summonses, enforceable only in court, and provides for civil and criminal penalties in the event of noncompliance.

In late 1989, the IRS referred to the Department the first IRS summons enforcement case against two law firms who had filed incomplete Forms 8300 on which they had refused on attorney-client privilege grounds to supply client identifying infor The Department of Justice filed summons enforcement actions in the United States District Court for the Southern District of New York, and in March of 1990, the District court found no privilege and ordered the summonses enforced. A three judge panel of the United States Court of Appeals for the Second Circuit unanimously affirmed. It found application of the cash reporting requirements to lawyer's fees constitutional and held that "absent special circumstances, concerning which there is no evidence whatever herein, the identification in Form 8300 of respondents' clients who make substantial cash fee payments is not a disclosure of privileged information." United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 505 (2d Cir. 1991).

Since the Goldberger & Dubin case was filed, the Department of Justice has filed four other enforcement actions, the government prevailed in one of the cases -- the lawyer lost in the district court and did not appeal -- and three other cases are pending in litigation. The Department defended two other cases in which lawyers prematurely challenged the issuance of IRS summonses and prevailed in both cases. Although the Department has not adopted formal guidelines pertaining to summons enforcement actions against lawyers who file incomplete Forms 8300, all enforcement actions are carefully reviewed and are approved before filing by the Assistant Attorney General for the Tax Division. Consistent with the Goldberger & Dubin case, the Department has informed bar association groups that it will consider "special circumstances" presented to the IRS by lawyers in determining whether to seek judicial enforcement of a summons, but, as yet, the Department has seen no case in which a lawyer has attempted to make such a factual showing either to the IRS or in court.

So far, the Department of Justice has only filed summons enforcement actions seeking to obtain payor identifying information withheld by lawyers from Forms 8300. No civil penalty or criminal action has been brought against a lawyer for filing an incomplete Form 8300 with the IRS reporting the amount and date of receipt of cash legal fees but excluding -- on privilege or related grounds -- client identifying information. [In fact, the Department sees no basis for bringing a criminal action against a lawyer who because of bona fide concerns about bar association rules or privilege questions files an otherwise

accurate form but withholds client identifying information.] At this stage in the enforcement of Section 6051, the IRS has not requested and, as a result, the Department has not determined the appropriate circumstances, if any, for the imposition of civil [or criminal] penalties in response to a lawyer's incomplete Form 8300. On the other hand, lawyers who receive large amounts of cash and engage in money laundering or criminal structuring to evade reporting or deliberately fail to file even a partial Form 8300 claiming privilege would be subject to civil and/or criminal penalties.

The Department is proceeding cautiously and believes that this approach is faithful to the statute as currently drafted and adequately addresses the concerns expressed by the bar. Accordingly, we do not believe that any legislative action is required to address the issue at this time.

Questions from Senator Metzenbaum

Q: The Department of Justice has responsibility for enforcing a host of federal criminal statutes that permit prosecution for causing "serious bodily injury." These include the Resource Recovery and Conservation Act, the Clean Water Act, the Federal Food, Drug and Cosmetic Act, and other statutes which address tampering with consumer products, engaging in sexual abuse within the jurisdiction of the federal government, and using a hazardous device on a federal enclave.

Have those provisions been used often in the past five years? Will you provide me with information as soon as possible as to the number of cases filed, the statute under which each case was filed, and the result obtained?

A: A number of federal criminal statutes permit prosecution for causing serious bodily injury.

We have been able to obtain the following information from the Department's Environment and Natural Resources division, with respect to prosecutions under the environmental laws. As of July 31, 1991, at least seven indictments had been filed containing charges under the "knowing endangerment" provisions of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(e), and three indictments had been filed containing charges under the analogous provision of the Clean Water Act (CWA), 33 U.S.C. § 1319(c)(3). Those statutes provide enhanced penalties for knowingly placing another human being in imminent danger of death or "serious bodily injury."

As of July 31, 1991, four corporations and eleven individuals have been indicted in those ten cases on knowing endangerment charges.

Of the seven RCRA cases, four were successfully prosecuted. Three cases resulted in jury convictions on "knowing endangerment" changes, and an individual in a multi-defendant case entered the first guilty plea to "knowing endangerment." United States v. Metro Container Corp., et al., E.D.Pa.; United States v. Albert S. Tumin, a/k/a Mark Hunter, E.D.N.Y.; United States v. Carlos Gomez, N.D.N.Y.; United States v. Protex Industries, Inc., et al., D.Col.

Convictions were received on numerous charges other than the "knowing endangerment" charge in one case containing "knowing endangerment" charges (United States v. Arthur Greer, M.D.Fla.). A guilty plea to another charge was accepted in a fifth case (United States v. Chemical Commodities, D. Kans.) In the sixth case, United States v. Commercial Metals, et al., S.D.Mo., the

corporation was acquitted and mistrials were declared regarding two individuals. The seventh case, United States v. Metro Container, et al., E.D. Pa., one of the individuals in the case recently entered a guilty plea to knowing endangerment.

Of the 3 CWA cases, two went to trial and the government obtained knowing endangerment convictions (corporation and two individuals) (United States v. Borjohn Optical Technology, Inc., and John Borowski, D. Mass. and United States v. Plaza Health Lab and Geronimo Villegas, M.D., E.D.N.Y.); pleas were entered to other charges in the third case by a corporation and three individuals.

A knowing endangerment provision was recently added to the Clean Air Act, 42 U.S.C. § 7413(c)(5), in which the phrase "serious bodily injury" is defined in substantially identical terms. That provision was added in the 1990 Clean Air Act Amendments, and no indictments have yet been brought.

Additional responsive information concerning prosecutions under other statutes will be provided as expeditiously as possible.

Q: Has the Department used its prosecutorial discretion in deciding which cases to prosecute? Please be specific as to the factors that informed any exercise of prosecutorial discretion.

A: As with every potential federal offense, the Department of Justice exercises prosecutorial discretion in deciding whether to bring cases brought under statutes involving serious bodily injury. Among the factors considered in evaluating a case for potential prosecution are the threshold issues of whether there is probable cause to believe the potential defendant's conduct constitutes a federal offense and whether the admissible evidence is likely to be sufficient to obtain and sustain a conviction. Other potentially pertinent factors include the nature and seriousness of the offense, the deterrent effect of prosecution, the potential defendant's culpability in connection with the offense, the potential defendant's history of criminal activity, the person's willingness to cooperate in the investigation or prosecution of others, the probable sentence or other consequences if the person is convicted, and federal law enforcement priorities. Also potentially pertinent are whether the person is subject to effective prosection in another jurisdiction and whether there is an adequate non-criminal alternative to prosecution. The United States Attorneys must also consider the immediate practical problems of allocating prosecutorial resources within their districts, as well as local federal law enforcement priorities.

Q: Have the various definitions of "serious bodily injury" in those statutes proved workable? Again, will you provide me with information as soon as possible as to the statute in which each definition appears, and any particular problems experienced with each such definition?

A: A number of federal criminal statutes contain a definition of serious bodily injury. Among these are 18 U.S.C. §§ 247, 802, 831, 1365, 1864, 2245. Other statues use the phrase "serious bodily injury" without a definitional section, such as 18 U.S.C. §§ 113 and 1153.

The statutes that contain clear definitions appear to be workable in that they provide a standard under which a jury can be instructed and decide the matter at issue.

Q: Are you aware of any problems the courts have had in interpreting these "serious bodily injury" provisions? Specifically, has the concept of 'serious bodily injury' been challenged as unconstitutionally vague? With what result?

A: We are aware of no successful constitutional challenge to any of the statutes on the grounds of vagueness. One unsuccessful challenge of which we are aware occurred in United States v. Protex Industries, 874 F.2d 740 (10th Cir. 1989). The defendant corporation contended that the statute at issue was unconstitutionally vague as applied on two grounds. First, it argued that the injury involved -- Type 2-A psychoorganic syndrome -- did not fall within the definition of "serious bodily injury." Second, it argued that in its jury instructions, the district court impermissibly broadened the scope of the statute by defining "imminent danger of serious bodily injury" as "a condition or combination of conditions that could reasonably be expected to cause death or serious bodily injury." The Court of Appeals for the Tenth Circuit rejected both arguments. 874 F.2d at 743-44.

Q: Some have suggested that increasing the maximum criminal penalties under the Occupational Safety and Health Act, and extending them to cover serious bodily injury, would make the enforcement process more adversarial and employers less likely to cooperate with OSHA. But attorneys in the environmental crimes unit at the Department of Justice -- as well as those in criminal enforcement at EPA -- have informed my staff that criminal and civil enforcement have been highly complementary. Indeed, they told us that the meaningful possibility of criminal prosecution actually enhanced EPA 's civil enforcement efforts. Overall, do you believe these stronger penalties would improve the deterrent effect of the OSH Act's criminal provisions? Please explain your answer.

A: In appropriate circumstances, criminal enforcement of environmental laws has a role, along with civil and administrative enforcement, in helping contribute to our overall goals of deterrence, punishment and restitution. Environmental matters sometimes differ from other regulatory cases, because immediate responses to environmental problems are often necessary if they are to be effective. The Department of Labor, rather than the Department of Justice, handles most OSHA enforcement litigation. Accordingly, it would be in the best position to consider whether regulating the workplace involves particular considerations justifying sanctions and penalties different from other regulatory programs. I would certainly be willing to work with the Committee and the Department of Labor to explore the need for additional legislation in this area.

Q: What is the Department's position on modification of the McCarran-Ferguson antitrust exemption for the insurance industry?

A: As I testified, I am skeptical of broad antitrust exemptions. Although we have not reached a final position on this matter, we are analyzing proposals for modification of the exemption within the Administration, and look forward to working with the Committee to resolve the important issues involved.

Q: What is the Department's position on providing antitrust exemption for joint production ventures?

A: The Department opposes antitrust exemptions for joint production ventures. We do, however, support extending the provisions of the National Cooperative Research Act to such ventures, which guarantee the application of the antitrust rule of reason in the event such a venture is challenged and given parties the opportunity to limit potential liability to actual damages through notification to the antitrust enforcement agencies. We do not, however, support doing so in a manner that effectively discriminates against joint production ventures with foreign participants.

Questions from Senator DeConcini

Q: How much money do you estimate the Department of Justice Forfeiture Fund receives on an annual basis from law enforcement investigations outside the Department of Justice?

What percentage of those funds has gone back to those agencies?

A: I assume these questions are directed to efforts of other federal agencies. Neither we nor other federal agencies know how much in DOJ Forfeiture Fund Deposits are attributable to efforts of non-DOJ agencies. The best seizure statistics we have available by agency are appended in a separate table. Administrative forfeiture proceeds of Treasury agencies go to the Treasury's Miscellaneous Receipts account. Consequently, tens of millions of dollars in IRS seizures, for example, result in deposits to Miscellaneous Receipts rather than to the DOJ Fund.

During FY 1990 and 1991 we transferred $12.6 million in DOJ Forfeiture Fund proceeds to the Customs Forfeiture Fund to reflect the assistance of Customs in cases where Justice agencies had the lead. We also allocated $7.1 million from the DOJ Fund to IRS and BATF over the two-year period. All IRS and BATF funding requests authorized by law were fully funded.

Moreover, we have just secured the enactment of provisions in our Appropriations Act for FY 1992 enhancing our authority to allocate DOJ Fund monies to non-DOJ agencies, e.g., authorizing allocations for equipping of conveyances and payment of awards for non-DOJ agencies on the same basis as DOJ agencies. We have also secured authority to share DOJ Fund surpluses generated in FY 1992 and later years with all agencies in the DOJ Forfeiture Program, Justice and non-Justice agencies alike.

Finally, I should note that the percentage of forfeiture proceeds that investigative agencies receive necessarily depends not only upon statutory authority but upon how much is available after out-of-pocket costs and equitable sharing transfers to participating State and local agencies are satisfied. Within the DOJ program, federal litigators (U.S. Attorneys' Offices and the Criminal Division) and property managers (the U.S. Marshals Service) receive allocations from the DOJ Fund to reflect their essential roles in the total asset forfeiture process. We do not believe that investigative agencies alone should benefit from asset forfeiture proceeds.

Q: It is my understanding that the bulk of investigations on gangs conducted by the Federal Bureau of Investigations

(FBI) are on Asian gangs and those which resemble Cosa Nostra style organizations. Is that a correct assessment?

A: It is not entirely correct. Gang criminality has traditionally been addressed by the FBI within the Drug Program, the Organized Crime Program and the Violent Crimes and Major Offenders Program. These programs are working hand in hand to provide resources and investigative strategies with the underlying goal of reducing gang and street related violence in the United States. The focus of FBI gang investigations has been the criminal enterprise and its leadership. These investigations are long-term, resource intensive and are directed at dismantling the entire criminal organization. Generally, the rank and file members are not priority objectives of the investigations.

The FBI has continued to respond to gang problems, with the majority of the gang investigations being developed as task force cases. These cases target Blood/Crips Street Gangs, Jamaican Posses, national Outlaw Motorcycle Gangs, and other gangs, including Asian gangs, involved in violent crimes and drug crimes. In some instances, individual gangs may not be a national threat, but are nonetheless a real threat in numerous communities. In such cases, the FBI field offices have the latitude to select and prioritize targets in addressing the problems of gang related violence.

Q: Can you tell me how many agents the FBI has assigned nationwide to gang task forces?

A: The FBI has three priority programs addressing the multitude of gang related activity in the United States. The Organized Crime, Drug and Violent Crime/Major Offenders programs address the multitude of crimes indicative of gang-related activity. Also, many groups that the FBI investigates could be classified as gangs, but are not. As an example, a significant number of drug investigations could be deemed gang-related, but they are not so classified and, consequently, the number of Agents assigned to these investigations is not retrievable. The information below is therefore limited to instances where it is specifically retrievable as "gangs" and is not by any means a full accounting of the resources the FBI devotes to gang investigations.

The Organized Crime Program addresses gang-related activity within the Asian Organized Crime sub-program. Asian gangs that criminally support Asian Organized Crime groups are investigated by the FBI. Currently, the Organized Crime Program has Asian Organized Crime task forces operating in various divisions with approximately 35 Agents assigned.

The Drug Program has approximately 40 agents involved in drug-related gang task force investigations that are not

Organized Crime Drug Enforcement Task Force (OCDETF) Agents. These cases are addressed utilizing the task force concept with state and/or local police agencies. In addition, the FBI has another 594 Agents assigned to OCDETF, which by definition are task forces. A significant number of OCDETF investigations target gang activity. The number of gang investigations within the FBI's Drug Program is steadily increasing and virtually every FBI field Division has been involved in some type of gang-related drug investigation.

The Violent Crime/Major Offenders Program is violation-specific. However, the FBI has recently initiated an innovative approach to address violent street gangs through investigations of drug-related homicides. For example, the Washington Metropolitan Field Office currently has a Safe Streets Task Force which has successfully caused the indictment of 20 members of the "R Street Crew" which operates in Northwest Washington, D.C. Other field offices are in the process of forming similar task forces. In another task force with the Metropolitan Police Department focusing on the apprehension of violent fugitives, from August 1989 to June 1991, 1,365 arrests -- 303 for homicide -- have been made. This task force is till operational.

Q: Do you know how this compares to other Federal law enforcement agencies like the Bureau of Alcohol, Tobacco, and Firearms (ATF)?

A: No. Because the FBI classifies its investigations differently than ATF there is no way to make a meaningful comparison.

Q: How many gang cases have been brought to prosecution by the FBI?

A: An attempt to quantify prosecutions is not an effective measure of the success of investigations. Past practice has demonstrated that when numbers alone become the measure of success the quality of investigations decreases. This is why the FBI uses the enterprise theory of investigation, concentrating on the leadership and structure of organizations. Consequently, numbers in themselves are not meaningful. However, recognizing that the focus of investigations has been the leadership and organizational structure, involving long-term complex investigations of conspiratorial conduct, and use of sensitive investigative techniques, I submit the following data concerning cases classified strictly as involving "gangs." Not included are the thousands of other drug and violence related investigative results that were included in other programs but which could have fit within some definitions of "gangs"; e.g., 5 or more persons.

As a result of the FBI's Organized Crime Program investigations involving non-traditional organized crime, the

following accomplishments were recorded from 1986 through the first nine months of 1991: 415 convictions and 441 indictments. These numbers include Asian Gang investigations.

The Drug Program investigations, which primarily addressed the Los Angeles-based Blood/Crips, Jamaican Posses and Outlaw Motorcycle Gangs, has resulted in the following accomplishments from 1986 through the first nine months of 1991: 847 convictions and 851 indictments.

Q: To your knowledge, has the FBI ever denied a request from a U.S. Attorney to investigate outlaw street gangs?

A: Yes, but because of resource limitations and not because the FBI did not want to be involved in investigating gangs. During 1988, the U.S. Attorney for the Central District of California requested the FBI to join in a gang task force that was to be composed of various federal and local agencies. At that time, the FBI declined based largely on manpower limitations (among other things, the FBI at the time was conducting the "Polarcap" investigation, the largest money laundering case ever addressed by the Justice Department). Moreover, the planned task force was to implement its investigations in four phases, and the FBI asked to be recontacted about participating in the last two phases. Due to the limited manpower available, and the desire to have the greatest impact possible with its limited resources, the FBI did not believe that participating in the first two phases of the investigation -- involving searches of known or suspected gang members who were convicted felons on parole, and street buys of narcotics -- would be the most economical, effective or efficient use of its manpower.

Q: Do you believe there is any need to coordinate investigations on gangs through the Attorney General? If so, for what reason?

A: The House version of the Crime Bill (H.R. 3371) calls for the Attorney General, in consultation with the Secretary of the Treasury, to develop a national gang strategy. I strongly support this approach. As the nation's chief law enforcement officer, the Attorney General is in the best position to ensure that there are not redundant or ineffective uses of precious law enforcement resources by competing agencies. By developing a strategy that relies upon the expertise and available resources of the various federal law enforcement agencies, the Attorney General can ensure that all contribute significantly without needless waste of resources.

Q: In one of your answers to my questions on the Border Patrol during the hearing, you mention a survey that Norm Carlson had conducted, by your request, on the Immigration

and Naturalization Service (INS). Would you please supply me with a copy of that survey?

A: Yes. A copy of the survey was provided on November 14.

Q: I would also like to touch on an issue which has been brought to my attention regarding conditions at INS detention facilities across the country. As a member of the Helsinki commission, I am concerned that the human rights of individuals who are being detained in these facilities are being neglected.

Last summer, several human rights groups, including one in my home state of Arizona, presented documentation of incidents in which detainees, including minor children, were severely beaten. Many of these detainees are refugees seeking asylum, and I am concerned that these individuals are not being treated humanely and fairly. Although complaints have been filed with the Inspector General's office, little has been done to investigate these allegations.

As Attorney General, will you advocate the thorough investigation of complaints of human rights violations in INS detention centers?

A: Yes. It goes without saying that abuses of the sort you describe cannot be tolerated and that governmental entities that detain people must commit whatever resources are necessary to prevent them. Although I am informed that the number of allegations of such incidents in INS detention facilities is not high in comparison to the numbers for other such facilities, the only acceptable number is zero. Without pre-judging the merits of any particular case or the adequacy of the present investigatory process, I can promise that all complaints will be promptly and thoroughly investigated and that appropriate disciplinary and preventive measures will be taken in response to any abuses revealed by such investigations. We would appreciate receiving any information you have on this matter so we can be sure to investigate all allegations.

Q: I am also concerned about the conditions under which unaccompanied minors and young children are being detained. Many INS facilities fail to meet the same standards as other juvenile detention centers. INS Commissioner McNary has engaged in an ongoing dialogue with the human rights organizations in an effort to address this problem. If confirmed, will your office partake in ensuring that these children are not being exposed to unnecessarily harsh conditions while awaiting process of their claims for asylum?

A: Yes. Current INS policy is that juveniles in immigration proceedings should be released wherever possible into the custody of their parents or of other responsible adults. When it is absolutely necessary for a juvenile to remain in INS custody, such custody should be in appropriate child care facilities rather than in adult or juvenile detention facilities. As you point out, INS is currently engaged in discussions with a number of child welfare organizations in an effort to ensure that these policies are uniformly implemented, and my office will continue to monitor these efforts.

Q: Has the FBI been designated to direct the National Drug Center (NDIC) in Pennsylvania?

A: The FBI and the DEA have been tasked by me, as Acting Attorney General, to conduct jointly the operations of the NDIC, under the overall management of the FBI. An FBI official has been designated as the director of the new center.

Q: If so, why would the FBI be selected to direct this center over the Drug Enforcement Agency, which is the federal government's lead anti-drug agency?

A: As I indicated in my testimony before the Committee, I thought it was important, as part of forging a closer working relationship between the FBI and the DEA, to give the FBI the lead in the start-up phase of NDIC. NDIC will focus on strategic intelligence, an area in which, in my experience, the FBI has done an excellent job. The DEA has the lead in tactical intelligence.

Q: Please explain why you would not implement a rotating directorship for the NDIC as has worked extremely well on the Southwest Border with Operation Alliance?

A: We will consider a range of options, including those that draw upon the lessons of operations such as Operation Alliance, in determining how to manage the NDIC over the long term. As we move forward on those issues, we will welcome the Committee's views as to how the NDIC can be managed most effectively.

Q: Where does the Treasury Department and its drug fighting agencies fall within the NDIC?

A: The Treasury Department has made important and significant contributions to the Nation's drug fighting effort, and we are currently working toward phase two of the NDIC's operations, with substantial involvement from the Treasury Department. In addition, pursuant to the National Drug Control Policy, we are establishing a Law Enforcement Drug Intelligence Council that will help to sort out drug intelligence activities.

The Council's executive committee will be chaired by the Attorney General, and its membership will include high-level Treasury Department representatives.

Q: Is Treasury or the Customs Service, or BATF, designated as a deputy director of NDIC?

If not, why?

A: Not currently. For the implementation phase of the NDIC, we considered it important to keep the management structure lean, in order to promote the maximum degree of efficiency and coordination. Should it be appropriate to expand the management team at the NDIC in the future, we can consider which agencies should have representation on that management team. As we progress with the NDIC, we welcome the Committee's views as to its proper organization and management.

Q: Has Treasury been fully involved in the design and implementation of the NDIC?

If not, why?

A: The Treasury Department has been fully involved in the design and implementation of the NDIC. In the summer of 1990, the Department of Justice undertook a wide ranging and comprehensive effort to design an implementation plan for the operation of the NDIC. The Treasury Department, along with many other federal agencies, played a vital role in that effort. That plan is the underlying working document for the current effort to get the NDIC up and running.

Q: Why have there been no Financial Institution Fraud referrals from the FBI to the Secret Service since August 1991?

A: The premise of the question is incorrect. According to our figures, between July and October, 41 referrals were made. While the numbers are not yet in for all areas of the country, 15 additional referrals were made in October in Los Angeles alone. In August, the Secret Service reporting working on 136 cases, 79 of which were major. Through the end of September, they report working on 245 cases, 155 of which are major. Their figures for October are not yet in, but we understand they show an increase.

Q: Does the Department have a policy of instructing its agents not to conduct any FIF cases of under $100,000?

A: We do not have a policy against handling any case under $100,000. However, as explained in our consultations with Congress, we have been concentrating on cases involving more than $100,000.

NUMBER AND VALUE OF SEIZED ASSETS
BY FISCAL YEAR
(Source: AFTRAK 4/30/91)

AGENCY	FY88		FY89		FY90	
DEA	10,855	$416,888,655	19,536	$1,028,191,855	18,944	$ 1,105,036,561
FBI	3,559	198,103,938	5,050	537,993,686	3,929	241,081,693
INS	9,677	30,864,285	14,512	58,542,943	23,137	64,997,441
IRS	92	4,383,683	508	42,854,092	1,190	113,782,698
USPS	742	403,876	756	222,986,913	1,179	9,147,684
TOTAL	24,925	$650,644,437	40,362	$1,890,569,489	48,379	$ 1,534,046,077

AGENCY	FY91	
DEA	7,963	$318,369,971
FBI	1,539	97,219,554
INS	9,445	23,725,517
IRS	326	24,399,562
USPS	1,969	210,713,503
TOTAL	21,242	$674,428,107

Note: FY91 figures reflect seizures through the first half of the fiscal year.

Questions from Senator Leahy

Q: Last year, I asked Attorney General Thornburgh about a provision that would effect the Freedom of Information Act. It was suggested by the Justice Department that the Department should have the authority to establish and collect fees to cover the cost of identifying, copying and distributing federal tax decisions. That provision would have distorted the Supreme Court's decision in Department of Justice v. Tax Analysts and would have permitted you to override the fee provisions of the Freedom of Information Act that we carefully negotiated with the Justice Department. He responded that while the Department had no intention of asking for a similar amendment, you would continue to monitor the issue. What is the current status of your review?

A: The Department has no intention of proposing the provision described in the question and now considers this issue closed. The Department looks forward to working closely with the Committee regarding any proposed amendment to the Freedom of Information Act.

Q: New technologies raise important civil liberties questions. One scholar recently suggested a 27th Amendment explicitly to extend civil liberties -- including freedom of speech, privacy, and protection against unreasonable search and seizure -- to new technologies. I am not endorsing that proposal, but it raises some interesting questions in light of changing technologies. Would you comment on the adequacy of constitutional protections for computer and new telecommunications technologies?

A: This is a very important area. Without having reviewed the matter in detail, I am not aware that anyone has identified the kind of serious deficiencies in our constitutional protections that would require a constitutional amendment. This reflects in part the fact that many of the relevant constitutional provisions were drafted in language general enough to encompass developments that were unheard of at the time the original Constitution and Bill of Rights were written. It also reflects the fact that Congress has often reacted to new technologies with statutes that protect liberty and privacy. That said, I agree that technical change is very important and that freedom and privacy are central to our political values.

Q: Innovations in computer technology create new opportunities for improving the flow of information and advancing our economic future, but they also create new

opportunities for abuse by those who seek to undermine our computer systems. I understand that the Department of Justice recently launched a new unit to fight computer crime.

What prompted the formation of the new computer crime unit? Has there been a major rise in computer crime ir the past few years?

How do you balance the need to punish destructive conduct with the need to encourage legitimate experimentation and the free flow of information?

A: The incidence of computer crime has risen over the past several years. Computer crime is now estimated to cost U.S. companies billions of dollars. Computer crime has also become an international problem. Offenders are undeterred by national boundaries and can freely conduct their activities across international jurisdictions. In the past, there has been a perception that law enforcement agencies are unable to respond effectively to incidents of computer crime.

To address this problem, the Department has designated computer crime as a priority area and has established a specialized Computer Crime Unit in the Criminal Division. The mission of the Computer Crime Unit includes devising a nationwide strategy for fighting the increasing incidence of computer crime, supplying technical and legal expertise to U.S. Attorney's offices, litigating select types of cases, proposing any necessary legislative changes to remedy defects in current law, and coordinating an international response to the problem.

Clearly, law enforcement in the area of computer technology must be sensitive to the needs for legitimate experimentation in new technologies and for the free flow of information. The Department is aware of such concerns and will consider them as specific issues arise. The Department will, of course, be responsive to the concerns of the Congress in developing policy in this area.

Q: World technological leadership depends on our ability to convert research and development advances into commercial production at a rapid pace. This is often a costly and risky endeavor. Do joint production ventures have a positive role to play in today's high-technology business environment?

A: Yes. Innovations in many fields, such as superconductivity, high definition television, robotics, computer-aided design and manufacturing, and most recently, controlled nuclear fusion emerge daily in laboratories and experimental facilities in the United States and throughout the

world. If American companies are to compete successfully in innovative, high-technology industries, they must be in a position to respond quickly and on an equal footing with international competitors with respect to developing and commercializing the products of that research. The costs of developing and commercializing new technologies and of efficiently providing the products and services they promise may be massive and far exceed the resources of a single firm. Cooperative production ventures can provide a vehicle for separate firms to share such costs as well as the substantial financial risks that developing and producing sophisticated new products can entail.

Q: During the hearing, you spoke to Senator Grassley about the importance of a level playing field. As American firms come under increased pressure from fast-paced technological innovation and development abroad, it is more important than ever to make sure that our companies do not function at a disadvantage. Many of our foreign competitors do not labor under the same antitrust restrictions that confront American businesses. Are federal antitrust laws discouraging legitimate and desirable cooperative activity that would enable domestic companies to compete more effectively in the global economy?

A: U.S. antitrust laws, properly enforced and interpreted, support the ability of U.S. firms to compete in domestic and international marketplaces. Promoting competition promotes innovation and efficiency, and thus international competitiveness. Because cooperative production ventures can frequently increase rather than diminish competition, the antitrust laws should not be an unwarranted deterrent to their formation. However, notwithstanding the current balanced and reasonable approach in government antitrust analysis, there remains concern that uncertainty as to the standard for review of such ventures under the antitrust laws coupled with the threat of treble-damage liability in private suits may be providing a significant disincentive to potentially procompetitive cooperative production. Legislation has been proposed by the Administration to reduce this uncertainty by fine-tuning the antitrust laws with respect to cooperative production as they were fine-tuned in 1984 with respect to cooperative research and development.

Q: One area where U.S. industry lags behind our foreign competitors is in its ability to form cooperative ventures. On February 22, 1991, Senators Thurmond, Biden, and I introduced S.479, the National Cooperative Research Act Extension of 1991. That bill would bring joint production and manufacturing ventures under the scope of the National Cooperative Research Act of 1984. S.479 is designed to

encourage companies to pool financial, human and scientific resources to compete in what is increasingly a worldwide marketplace. When it comes to improving America's competitiveness, nothing is more important than American workers. The National Cooperative Research Act Extension of 1991 contains a provision that provides the benefits of antitrust damage limitations to joint production ventures that provide American workers with jobs and advanced skills in new technologies. Why does the Department of Justice oppose this provision?

A: As originally introduced S.479 would have accomplished these excellent goals. As amended, however, the bill extends only to joint ventures whose principal facilities are in the United States and whose parties all have demonstrated a substantial commitment to the United States economy. The effect of the amendment would be to afford less favorable treatment under the antitrust laws to ventures with significant foreign ownership than to comparable ventures involving only domestic companies. Differing potential antitrust liability would be imposed on companies on the basis of factors that are irrelevant to antitrust analysis. This approach is unfair and invites retaliation, thereby denying American companies the very benefits they are seeking in areas where cooperation could be most helpful -- for example, areas in which foreign firms currently may have access to technology unavailable to U.S. firms. Prejudice to American companies in this regard translates directly into prejudice to their workers. And U.S. consumers will bear the ultimate costs of foregone opportunities for innovation and improvements in efficiency. I am committed to work with the Committee to devise an approach that would address these issues.

Q: Qualification of a company for reduced damage liability under the National Cooperative Research Act Extension does not turn on the nationality of individuals owning or controlling the company. The "principal facilities" and "substantial commitment" requirements apply equally to American-owned and foreign-owned companies. These provisions provide the benefits of antitrust damage limitations to companies--domestic or foreign--that provide benefits to American workers and to the American economy. What is wrong with helping American workers and the American economy?

A: There are other serious concerns with the limitations that have been added to S.479. They would conflict with efforts to open up markets to trade and investment without conditions or performance requirements, and could lead to retaliation and similar differential treatment of U.S. firms abroad. Lost opportunities to expand trade in world markets would further harm U.S. firms and their workers. Secretary Brady, Secretary Mosbacher and U.S. Trade Representative Hills joined former

Attorney General Thornburgh in more fully describing the Administration's concerns with legislation that would result in either explicit or implicit discriminatory antitrust treatment of joint ventures with foreign ownership or foreign facilities in their letter to Senator Biden of July 17, 1991.

Q: Some critics of joint production ventures claim that cooperation means mergers and acquisitions--that it means a boost for the big guy at the expense of our smaller entrepreneurs. If we give industry the option of cooperating, will we be encouraging mergers and acquisitions, or will we be providing alternatives to mergers and acquisitions?

A: I agree with your observation that joint ventures provide a highly significant alternative to mergers and acquisitions. As noted above, cooperative production ventures can allow separate firms to share the costs and risks of developing and producing innovative new products. Cooperation can also significantly increase efficiency by allowing firms to benefit from economies of scale or scope, or synergies resulting from the combining of complementary assets or skills. Moreover, while cooperative ventures may reduce competition between the venturers themselves in developing or commercializing new technology involved in the venture itself, such ventures do not eliminate competition between firms in other aspects of their businesses. In sum, cooperative production joint ventures may be an effective means for U.S. firms to improve their competitiveness without merger.

Questions from Senator Grassley

Q: You indicated that you would enforce the Immigration and Nationality Act of 1990's provisions requiring the exclusion of PLO officials, although you were not familiar with the exact provisions of the law. Section 601(3)(B) of the Act provides:

> **Any alien who has engaged in a terrorist activity, or a consular officer of (sic) the Attorney General knows or has reason to believe, is likely to engage after entry in any terrorist activity, is excludable. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this Act, to be engaged in terrorist activity.**

PLO officials are required by law to be excluded. Will you be an advocate for enforcement of this law in the event the State Department seeks a waiver of this provision in order to admit PLO officials?

A: I am committed to vigorous enforcement of the law as it relates to the admission of aliens involved in terrorist activity. As you have indicated, the Immigration Act presumes that an officer, official, representative, or spokesman of the PLO is engaged in terrorist activity. However, unlike several other grounds of inadmissability for which no waiver exists, Congress has specifically authorized the Attorney General to approve a recommendation of the Secretary of State or the consular officer that this ground of inadmissability be waived for a terrorist or suspected terrorist who seeks admission as a nonimmigrant. 8 U.S.C. 1182(c)(3). I can assure you that any such recommendation received from the State Department would be carefully reviewed, on a case-by-case basis, to determine whether the exercise of favorable discretion would be in the best interests of the United States, in the light of national security concerns and other factors.

Q: Could you please provide information concerning the visit of two Syrian generals earlier this year to the United States? I understand they were sponsored by the U.S. Information Agency and they toured several facilities maintained by the Drug Enforcement Agency. Please explain why officials of the most notorious drug trafficking regime would be afforded access to our anti-drug efforts and resources.

A: The specific visit to which you refer was not brought to my attention. The United States Information Agency (USIA) --

which is not part of the Department of Justice -- in its role of promoting a greater understanding of United States principles and policies, often invites foreign government leaders and representatives to the United States (more than 5,000 per year) to consult with their counterparts and to observe American society and institutions.

The International Visitor's Program visit sponsored by USIA involving Syrian Generals Ali Darboli and Hassan Al-Huri took place in May of this year. The U.S. Government regularly sponsors foreign officials' visits to the United States to learn more about what the U.S. is doing to eliminate narcotics trafficking and abuse. These visits also provide us with an opportunity to make known to foreign governments our position on the need for greater international cooperation in fighting narcotics.

The visit of the Syrian Government officials was arranged for these reasons. No classified information, equipment, techniques or operations were given or shown to the Syrian visitors. DEA facilities were visited where nonclassified briefings/tours were presented, similar to those given to the many foreign visitors who visit the DEA each year.

Our DEA office in Nicosia, along with embassy officials, has been meeting with Syrian anti-narcotics officials in Damascus for several years to encourage increased counter-narcotics activity by the Syrian authorities and bilateral cooperation on this issue. The trip to the United States furthered this dialogue. Although Syria has much more to do to prove to the United States that they are serious about eliminating narcotics, we have been encouraged by certain recent signs of Syrian-Lebanese cooperation on narcotics issues and have urged the implementation of a sustained and coordinated opium eradication program in the Bekaa Valley.

Q: Was Yosef Heider permitted into the United States and, if so, why?

A: The FBI will arrange to brief you on this and the related classified questions you asked at your convenience.

Questions from Senator Specter

Q: During testimony to the House Foreign Affairs Committee on September 4, 1990, Secretary of State Baker stated that the idea of creating an international criminal court is a good one and wondered why it had not been looked at before. A State and Justice Department study (dated 2 October 1991) did look at such a proposal and concluded that it continues to have serious concerns about establishing such a court.

How extensive a role did the Department of Justice play in preparing the report?

A: The Department of Justice, through the Criminal Division's Office of International Affairs, has worked closely with the Department of State's Legal Adviser in analyzing the proposal for an international criminal court. By agreement between the two departments, State drafted the October 1991 report; Justice reviewed the draft, suggested revisions and concurred in the final report.

Q: What is your personal view on the desirability of an international criminal court?

A: In general, I support having the most options possible to law enforcement to deal with terrorists. I have not had a chance to review the practical problems raised concerning the proposed International Court of Justice and I would want to do so before reaching a conclusion on the Court's desirability.

Q: In your view, would not such a court help us the U.S. in its fight against international drug traffickers? For example, while Colombia has stopped extraditions to the U.S. and has reduced the intensity of prosecution of drug traffickers, President Gaviria has publicly stated his endorsement of an international criminal court.

A: In many instances of drug trafficking or terrorism, prosecution of criminal cases may require great political will. There is no substitute for that kind of determination when confronting a lawless group -- such as international drug traffickers -- that is willing to destroy society. Without the required political will in the relevant countries, I don't think the proposed international criminal court will help us to fight drug traffickers.

Q: Too many countries who apprehend terrorists or drug traffickers such as Abu Abbas or Matta fail to take action to prosecute or extradite them for fear of retribution. Would you not agree that an international criminal court

would offer such countries a third alternative to state prosecution or extradition?

A: Yes.

Q: The State-Justice report notes that the creation of such a court would be enormously complex and would require consensus on numerous important issues. What role if any has the Department of Justice been playing with the Sixth Committee of the United Nations on the propqsal to establish an international criminal court?

A: A former Deputy Assistant Attorney General, Ron Gainer, who is a member of the UN Committee on Crime Prevention and Control, is working very closely with the Department of Justice in monitoring the development of the international criminal court and focussing the attention of the international legal community on some of the problems that we perceive.

Q: What role has the Department of Justice been playing in the UN and other fora to develop the consensus for such a court?

A: We have actively participated in meetings held under the auspices of the United Nations to consider the problems of establishing the court and we will continue to do so. Let me stress that we do not go to those meetings as nay-sayers: we have tried to suggest solutions as well as problems, and there has been progress in resolving some of the outstanding questions.

Q: What role will DOJ play on the International Law Commission to study and report on underlying and fundamental questions related to an international criminal court?

A: The International Law Commission is an independent international organization composed of experts from the member countries. The United States has nominated the Legal Adviser to the United States Mission at the United Nations to be a member of the Commission. The Department of Justice does not have any direct role to play in the operations of the Commission, although we will make our expertise and support available to it through the Department of State.

Questions from Senator Heflin

Q: What is the Department's position on proposals to permit Federal Judges to carry firearms?

A: The Federal Judicial Conference has indicated its intention to seek legislation authorizing judges to carry firearms. Although officials of the Marshals service have expressed concern, they have not indicated opposition to the proposal. The Marshals Service, which has responsibility for the security of federal judicial facilities and for the protection of members of the judiciary, is concerned by the prospect of the unanticipated introduction of a weapon in a confrontation situation. Marshals Service security personnel are trained to work as a team in a high-threat environment. An untrained individual, no matter how well-intentioned, who unexpectedly produces a handgun in a threat situation could unnecessarily jeopardize his/her own safety as well as the safety of the Marshals Service personnel.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 25, 1991

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Enclosed are additional responses to Senator Metzenbaum as a result of the hearing on the nomination of William P. Barr to be Attorney General.

Sincerely,

W. Lee Rawls

W. Lee Rawls
Assistant Attorney General

Enclosure

SUBJECT: Senator Metzenbaum's supplemental request for information on cases under federal statutes involving the phrase "serious bodily injury."

This memorandum is in response to Senator Metzenbaum's supplemental request for information concerning federal criminal statutes which use the term "serious bodily injury," the number of cases prosecuted under each statute, and the results obtained.

The following information is based on a Lexis search to identify criminal statutes using the phrase "serious bodily injury" and reports regularly provided by the United States Attorneys' offices to the Executive Office for the United States Attorneys. We have not included criminal environmental statutes, on which the Environment and Natural Resources Division has already reported. The time period covered is Fiscal Year 1987 through Fiscal Year 1991 to date, a period of five years. Fiscal year 1987 began on October 1, 1987, and Fiscal Year 1991 ended on September 30, 1991. Conceivably, there may be other statutes which did not surface during our Lexis search which contain the element of "serious bodily injury".

I. ASSAULT AND AGGRAVATED SEXUAL ABUSE

The overwhelming majority of the criminal division cases involving the phrase "serious bodily injury" are based on the assault and aggravated sexual abuse statutes. These statutes are discussed below.

A. 18 U.S.C. § 113
(assault in special maritime and territorial jurisdiction)

Title 18 U.S.C. § 113 governs assaults within the special maritime and territorial jurisdiction of the United States. Subsection (f) of Section 113 pertains to assaults resulting in serious bodily injury.

The number of cases reported as having been brought under 18 U.S.C. § 113(f)(assault resulting in serious bodily injury) in the past five years is 107. The results obtained are given below.

18 U.S.C. § 113 (f)
(assault resulting in serious bodily injury)

FY87-FY91(to date)

Result	Number of cases
Guilty Plea	65
Guilty Verdict after trial	18

Acquittal	3
Other termination	21
Total	107

In addition, during the same five year period, an additional 425 cases were reported as having been brought under 18 U.S.C. § 113, without any specification of the subsection. These cases undoubtedly include some cases brought under subsection (f). However, in order to determine whether or not the case was brought under subsection (f), it would be necessary to have someone in each United States Attorney's office retrieve each case file, including many which have been retired to the Federal Records Center.

The results obtained for the 425 cases reported only under 18 U.S.C. § 113 are given below. It should be noted that this is not the total number of cases brought under Section 113, as many cases are reported under the particular subsection.

18 U.S.C. § 113
(cases reported without indication of subsection)

Result	Number of Cases
Guilty plea	274
Guilty verdict after trial	79
Acquittal	22
Other termination	50
Total	425

B. 18 U.S.C. § 2241
(Aggravated sexual abuse -
special maritime and territorial jurisdiction)

Title 18 U.S.C. § 2241 governs aggravated sexual abuse in the special maritime and territorial jurisdiction of the United States. Subsection (a) governs knowingly causing another person to engage in a sexual act by force or threat of force. More specifically, subsection (a)(2) covers those who knowingly cause another person to engage in a sexual act by "threatening or placing that other person in fear that any person will subjected to death, serious bodily injury, or kidnaping; . . . ." 18 U.S.C. § 2241(a)(2). Only two cases, both guilty pleas, have been reported as having been brought under 18 U.S.C. § 2241(a)(2). Such cases, however, may be included in those

reported under 18 U.S.C. § 2241 and those brought under 18 U.S.C. § 2241(a). The results obtained in those cases is set forth below:

Cases reported under 18 U.S.C. § 2241 and 2241(a)

Result	Number of Cases
Guilty plea	82
Guilty verdict after trial	43
Acquittal	12
Other termination	29
Total	166

C. 18 U.S.C. § 1153
(Offenses committed within Indian country)

Title 18 U.S.C. § 1153 incorporates by reference for Indian country many of the offenses for the special maritime and territorial jurisdiction of the United States. Included among these are assaults resulting in serious bodily injury and sexual abuse committed by threat of serious bodily injury, where these are committed by an Indian against an Indian in Indian country. The results reported for cases brought under 18 U.S.C. § 1153 are set forth below and are not broken down by the specific nature of the offense.

18 U.S.C. § 1153
(offenses committed within Indian country)

Result	Number of Cases
Guilty plea	437
Guilty verdict after trial	76
Acquittal	31
Other termination	54
Total	598

II. OTHER CRIMINAL STATUTES

Other criminal statutes under which prosecutions were reported which may involve "serious bodily injury" are 18 U.S.C. § 1365 (tampering with consumer products) and 18 U.S.C. § 1959

(violent crime in aid of racketeering). These statutes are discussed below.

A. 18 U.S.C. § 1365
(consumer product tampering)

Title 18 U.S.C. § 1365 governs consumer product tampering, false reports of consumer product tampering, and threats to tamper with consumer products. Subsection (a) governs actual tampering and subsection (a)(3) governs those cases where the tampering resulted in serious bodily injury to any individual. No cases have been reported as having been brought under 18 U.S.C. § 1365 (a)(3). Such cases may, however, be among those reported as having been brought under 18 U.S.C. § 1365 or 18 U.S.C. § 1365(a). The result obtained in those cases is reported below:

Cases reported under 18 U.S.C. § 1365 and 1365 (a)

Result	Number of Cases
Guilty plea	11
Guilty verdict after trial	3
Acquittal	0
Other termination	0
Total	14

B. 18 U.S.C. § 1959
(Violent crime in aid of racketeering activity)

Title 18 U.S.C. § 1959 governs violent crime committed in aid of racketeering activity. Subsection (a)(3) is applicable when the violent crime involved is assault with a dangerous weapon or assault resulting in serious bodily injury. The U.S. Attorney's offices have reported one case prosecuted under Section 1959, which resulted in a guilty plea. Until recently, such cases were handled by the Organized Crime Strike Forces.

49 U.S.C. App. § 1472(k)
(Crimes Aboard Aircraft in Flight)

Title 49 U.S.C. App. § 1472 contains the criminal penalties for a wide variety of aviation offenses. Subsection (k) governs many crimes committed aboard an aircraft in flight, including assault resulting in serious bodily injury. The following cases have been reported as having been prosecuted under 49 U.S.C. § 1472(k) during the past five years. There may also be additional cases involving assault resulting in serious bodily

injury included within those reported under Section 1472 without specification of subsection.

Cases reported under 49 U.S.C. App. § 1472(k)

Result	Number of Cases
Guilty plea	11
Guilty verdict after trial	4
Acquittal	2
Other termination	7
Total	24

C. Miscellaneous Statutes

No prosecutions have been reported by the United States Attorneys during the past five years for the following offenses which make reference to serious bodily injury: 18 U.S.C. § 247 (obstruction of persons in the free exercise of religious beliefs); 18 U.S.C. § 831 (prohibited transactions involving nuclear materials): 18 U.S.C. § 1091 (genocide); 18 U.S.C. § 1864 (hazardous or injurious devices on federal land); and 18 U.S.C. § 2332 (terrorism).

the demeanor of the defendant, realize that that is an appropriate alternative.

I put my faith in juries and courts. We're going to hear an awful lot of that in the context of the civil rights bill in the next week or so. I would hope that those who say they put their faith in juries and courts in the civil rights bill will be consistent and put their faith in juries and courts and the death penalty as well.

Thank you.

Mr. SCHUMER. Any other opening statements?

[No response.]

Mr. SCHUMER. Let us begin with the first witness.

Our first panel this afternoon will consist of the representative from the administration, Deputy Attorney General William Barr. Before his appointment as Deputy Attorney General, William Barr served in the Department of Justice as Assistant Attorney General for Legal Counsel.

He has also served in the Central Intelligence Agency on the Domestic Policy Staff of the White House and in private practice.

Mr. Barr is no stranger to this topic, having testified before the Subcommittee on Crime on death penalty legislation last year, which was reported out of this committee.

Without objection, Mr. Barr's written statement will be submitted for the record.

Mr. Barr, you may proceed.

STATEMENT OF WILLIAM BARR, DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. BARR. Thank you, Mr. Chairman and members of this distinguished subcommittee. I appreciate the opportunity to testify today in support of the death penalty provisions of the President's Comprehensive Violent Crime Control Act of 1991.

I would like to join with the members of the subcommittee who have commended you, Mr. Chairman, for your leadership. During the hearings on the Brady bill recently, you stated that you intended immediate consideration of the President's crime bill after completing your work on the Brady bill. And as expected, you have fulfilled your word.

On behalf of the Attorney General and the Department of Justice, I would like to extend our sincere appreciation for your action.

We recognize that this subcommittee has jurisdiction, or will likely have jurisdiction, over only some of the provisions in the President's crime bill. One of those areas is the scope of the Federal death penalty, and that is the subject of my testimony today.

Before turning to the death penalty, however, Mr. Chairman, I would like to address a point that you made in your opening statement, observing that this particular crime bill is heavy on punishment—and you have the feeling that perhaps not sufficient emphasis is given to prevention of crime.

I don't think we should overlook the fact that one of the purposes of punishment is precisely prevention. As you know, our whole criminal justice system is based on punishing criminals, and punishment is intended to vindicate retributive justice interests,

but it is also intended to deter crime and incapacitate criminals so that they don't commit other crimes.

And those latter two features—deterrence and incapacitation—are both designed to prevent crime.

The latter category of incapacitation, I think, is one we should focus on. I think you're familiar with the recent BATF's statistics on career criminals where they reviewed 471 cases of career criminals who were incarcerated in Federal prison, who reported that they average committing—when they were out—three crimes a week. They each had the average of six convictions for serious felonies apiece prior to the conviction which put them in prison for long periods of time.

The Bureau of Justice Statistics reports that 6 percent of criminals commit 70 percent of the crimes. There was a Miami study which showed that 573 drug users were responsible in one 12-month period for 6,000 robberies and assaults, and 6,700 burglaries.

Tough punishment of the hardcore criminal element is one of the most effective ways of dealing with crime, preventing it by incapacitating these criminals. So we don't make any apologies for the tough sentences we seek and the punitive measures we seek in the crime bill.

I think we should also recognize that many of the measures that are preventive in nature are really operational or require operational changes, perhaps, or operational innovations; operational initiatives rather than changes in the law. I know you are aware of a number of the efforts that we have underway precisely to work with State and local law enforcement to prevent crime—the Triggerlock Program, our joint task forces, and so forth.

This requires resources, and we've been fortunate to have a President who has sought—in the first 3 years of his administration—a 60-percent increase in the Department of Justice's budget. This past budget request, he requested a 15-percent increase in the Department of Justice budget. It would help in some of the preventive operations. And we were very disappointed to see the Budget Committees cut the law enforcement request.

And if the current benchmarks are retained, we may end up in a situation where we do not have resources to increase our activities in the Department of Justice. I know that it was not this committee that took that action but I hope that those of you who are concerned about an aggressive and expanding Federal law enforcement effort do support the President in his seeking of further resources.

To turn back, then, to the issue of the death penalty, Federal law prescribes the death penalty for a number of heinous crimes, among them espionage and treason, bombing of aircraft, assassinating the President—just to name a few.

In 1972, the Supreme Court held in *Furman* v. *Georgia,* that the death penalty could not be imposed without procedures designed to channel the jury's sentencing discretion.

In the wake of *Furman,* States started adopting procedures to channel the jury's discretion by focusing on aggravating and mitigating factors connected with the crime, and factors relating to the defendant's background.

These kinds of procedures were upheld by the Supreme Court in 1976 in the *Gregg* v. *Georgia* case. More than two-thirds of the States have now enacted procedures in response to *Furman* and *Gregg* which allow for the application of the death penalty for the most serious State crimes.

It is really quite astounding that for 15 years—that is, 15 years since the *Gregg* decision—Congress has failed to reestablish the Federal death penalty; 15 years of inaction despite the fact that the overwhelming majority of American people supports the death penalty. And, indeed, I think it has been clear for some time that a majority in both Houses supports the Federal death penalty. Last year, in fact, both Houses actually passed separate death penalty legislation only to see it stripped from the final crime bill in the conference committee.

I think it's time that we stop the delay and the maneuvers over the death penalty and move promptly to action to consider the President's death penalty proposals and to act upon them.

Now the opponents of the Federal death penalty say that, well, a Federal death penalty is not very important because most capital offenses are State offenses, and Federal capital offenses would be relatively few. I think this misses the point.

While it is true that most capital crimes are local in nature, this does not diminish the need for an effective Federal death penalty. It is incumbent on the Federal Government to provide adequate penalties where heinous violent crimes are committed within its area of responsibility.

I think it is inexcusable that as we sit here today we cannot impose the death penalty, a jury cannot consider the death penalty for the most heinous crimes—for assassinating public officials, including the President; for murdering judges, for murdering witnesses, for bombing airplanes and terrorist actions.

I think, Mr. Chairman, you said in your opening statement, and I would agree, that the death penalty is not a panacea—standing alone the death penalty is not the answer to the crime problem in the United States. But as with other measures, we believe it has to be part of the solution, part of a broad-gauged solution—it includes statutory changes at the Federal level, perhaps statutory changes on a State-by-State level, resources properly targeted at the most violent criminals.

With that said, let me briefly review the substantive provisions of the administration's death penalty proposals. With some limited exceptions, these proposals are virtually identical to the death penalty provisions passed by the House last year by wide margins.

In this regard, we would like to commend the efforts of Representatives Gekas and McCollum, who successfully offered the President's death penalty proposals as amendments in last year's crime bill.

Title I of the President's bill would provide procedures that would allow use of the death penalty for 18 existing offenses which currently authorize the death penalty. These provisions were all adopted last year by the House. They include two nonhomicidal offenses: Treason and espionage. They also include 16 homicidal offenses, including murders in connection with the use of explosives, assassination of the President, destruction of the aircraft, train

wrecking, and a number of other death penalty authorizations that are currently on the books, but for which we do not have procedures to implement.

Eleven existing noncapital offenses would be changed by the President's bill to allow for the death penalty, which were included in last year's bill; that is, 11 of these changes were included in last year's bill. Ten of them are homicidal. Title I of the bill sets out 7 of these—they are murder of certain foreign officials, murder in connection with a kidnaping, murder for hire, murder in aid of racketeering, murder in hostage-taking, murder by terrorists abroad, and murder in furtherance of genocide.

Title V sets out three additional homicidal offenses—killing of court officers, jurors, or witnesses; retaliatory killing of witnesses and informants, and killing of State and local law enforcement officers assisting Federal officers.

There's one nonhomicidal offense which would authorize the death penalty for an attempt on the President.

All of the above, as I said, were included in last year's bill.

There are a number of new death penalty offenses in the President's bill that were not included last year, and I'd like to call those to your attention. Several relate to terrorism and were part of the President's terrorism proposal, which have largely been folded into this legislation. These relate to terrorism, as I said, and implement various international conventions for the suppression of terrorism.

In title VII the following death penalty offenses are proposed: Murder in connection with attacks on airports, murder in connection with attacks on ships or maritime facilities, murder in connection with torture, murder from use of weapons of mass destruction, either in the United States or directed against U.S. persons outside the United States. Weapons of mass destruction are defined to include explosive devices, rockets, mines, biological weapons, gas, and radioactive weapons; and killing in connection with armed attack on a Federal facility.

There are also several new offenses that were not included in last year's proposal in title X of the President's bill, authorizing the death penalty in various cases involving violations of civil rights laws.

Finally, the administration's proposal contains death penalty for drug kingpins. The version in the President's bill is substantially the same as the version that passed the Senate last year and is similar to the version that passed the House and I'll identify the differences where they exist.

Let me just outline briefly our proposal on drug kingpins. There are three death-eligible offenses that are proposed. The first would impose the death penalty for the heads of massive drug trafficking enterprises even though there is no requirement of showing a specific killing.

These defendants are currently subject to mandatory life in prison. The President's proposal would convert these offenses to death-penalty-eligible offenses. Essentially two elements—first, that the individual be the principal leader of the continuing criminal enterprise, and that's five or more persons acting in concert,

committing a continuing series of violations and deriving substantial income from their enterprise.

The second element is either that the enterprise generates $10 million annually of income or engages in very substantial drug transactions. Our threshold is proposed at 30 kilograms of heroin—that's 66 pounds—or 150 kilograms of coke—that's 330 pounds.

The House version was similar to this last year but the threshold numbers were double what we are proposing.

Now I'd like to note that meeting this criteria does not in and of itself permit imposition of the death penalty. There still must be aggravating factors found by the jury during the sentencing phase—for example, serious prior offenses, firearms violence and other kinds of aggravating factors, which are identified in the proposed legislation.

The second drug kingpin proposal would apply to a leader of a continuing criminal enterprise who attempts to kill, or directs the killing, of officials, jurors, witnesses, family members of jurors, witnesses, and officials, in order to obstruct an investigation or a prosecution of the criminal enterprise.

This element was not in the House version last year.

Again, there's no threshold in terms of the level of transaction. There's a requirement that the individual be the leader of a CCE, and there's no requirement of an actual killing, an attempt, or a direction to kill, would be sufficient.

We believe this is justified to protect the administration of justice and integrity of the justice system.

The CCE violator faces 20 years to life imprisonment if found guilty, and we believe that these penalties—that violent-prone CCE leaders may be tempted to kill in order to save themselves. Once again, still before the death penalty could be imposed, the jury would have to find additional aggravating factors.

The third drug kingpin provision would apply to a drug felon taking action manifesting extreme reckless indifference to human life—kills a person in the course of the felony.

Our typical case here would be the killing of a bystander in a drug-related shootout. Right now, as you know, the Anti-Drug Abuse Act of 1988 provides for the death penalty for intentional killings in furtherance of the CCE, or for the intentional killing of the police; so we have a situation where the individual spraying the crowd with the semiautomatic weapon that the chairman referred to, may be prosecuted if he succeeds in killing a rival gang member but would not be subject to the death penalty if he kills innocent bystanders.

This last drug kingpin provision was included in the House version last year.

In closing, Mr. Chairman, I would like to urge this subcommittee to give favorable consideration to the death penalty proposals in the President's bill and to encourage the full House to consider the President's entire crime package.

I appreciate your indulgence and would like to respond to any questions you or members of the subcommittee may have.

Mr. SCHUMER. Thank you very much, Mr. Barr.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF WILLIAM BARR, DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear today to present the views of the Department of Justice and the Administration concerning the death penalty provisions in H.R. 1400, the President's proposed "Comprehensive Violent Crime Control Act of 1991."

This bill embodies the President's legislative program for the 102d Congress to even the scales of justice and give police and prosecutors the tools they need to successfully apprehend, convict, and punish violent criminals. It contains a wide range of provisions addressing such topics as the federal death penalty, habeas corpus reform, reform of the exclusionary rule, criminal violence involving firearms, gangs and juvenile offenders, terrorism, sexual violence, and child abuse.

With some limited exceptions, the death penalty provisions in the President's bill are virtually identical to the death penalty provisions passed by the House of Representatives last year as title II of H.R. 5269. Hence, most of the Administration's proposals in this area have already been approved by the full House by wide margins. In this regard, I must recognize the efforts of Representative Gekas and Representative McCollum who successfully offered the President's death penalty proposals as amendments to last year's crime bill.

Before discussing the scope of the death penalty provisions

in the President's bill, I would like to make two general observations concerning the authorization of capital punishment under federal law. First, the death penalty debate is over. An overwhelming majority of the American public supports the death penalty for the most atrocious crimes, and at least 36 states authorize capital punishment under their laws. Both Houses of Congress passed general death penalty legislation in the 101st Congress.

Second, while it is true that the majority of capital crimes in the United States are committed within the jurisdiction of the individual states, this does not diminish the need for an effective federal death penalty. It is incumbent on the federal government to provide adequate penalties when lethal acts of criminal violence are committed within its areas of responsibility. For example, there is currently no workable federal death penalty for assassinating the President of the United States. There is no general, enforceable federal death penalty for murdering federal law enforcement officers. There is no effective federal death penalty for a terrorist who takes and kills American hostages, or who murders hundreds of people by planting a bomb on a passenger airplane.

Those who argue that the federal death penalty would apply to only a limited number of crimes each year are missing the point. The senseless murder of a federal judge, or the killing

of innocent civilians to enforce a political demand, or the cold-blooded execution of a federal witness or law enforcement officer, are crimes so depraved that the jury should be allowed to consider the death penalty. From the standpoint of deterrence, the death penalty sends the strongest possible message to those who would commit such crimes about our society's resolve to protect itself from violent predators. From the point of view of retribution, the death penalty tells the families of victims and others close to them that society is shocked and outraged by their cruel and irrevocable loss. I commend this Committee and Chairman Schumer for holding these hearings, and I urge this body and the full House to heed the will of the American people by passing the President's crime bill and sending it to his desk for signature this summer.

Let me turn more specifically to the types of offenses that would be capital crimes under the President's bill.

I. Offenses for Which the Death Penalty Would be Authorized

Existing federal law authorizes the death penalty as a sanction for eighteen offenses. However, since the Supreme Court in 1976 upheld the constitutionality of the death penalty under appropriate procedures, Congress has failed to provide generally applicable procedures under which the death penalty can be

considered and imposed for federal crimes.

The procedural provisions and conforming amendments in title I of the President's bill would enable federal law enforcement authorities to use the death penalty authorizations that Congress has already provided in existing statutes. These are the same existing death penalty provisions to which the procedures passed by the House of Representatives last year would have applied. These provisions include two non-homicidal capital offenses, espionage under 18 U.S.C. 794 and treason under 18 U.S.C. 2381. They also include various existing statutes that authorize capital punishment in cases where death results, including 18 U.S.C. 32, 34 (destruction of aircraft and aircraft facilities), 33, 34 (destruction of motor vehicles and motor vehicle facilities), 115 (retaliation against families of federal officials), 351 (violence against Members of Congress and Cabinet officers), 844(d), (f), (i) (explosives offenses), 1111 (murder in special maritime and territorial jurisdiction), 1114 (murder of federal judges and officers), 1512 (witness tampering), 1716 (mailing dangerous articles), 1751 (violence against the President and Presidential staff), 1992 (wrecking trains), 2113 (bank robbery), 21 U.S.C. 848(e) (certain drug-related killings), and 49 U.S.C. App. 1473 (aircraft piracy).

In addition, eight (non-drug) offenses in current law, which are not now subject to the death penalty, would be changed to

capital offenses by title I of the President's bill. These new death penalty authorizations were also all included in title II of H.R. 5269 as passed by the House of Representatives last year. They are: murders of certain foreign officials under 18 U.S.C. 1116, kidnaping where death results under 18 U.S.C. 1201, murder for hire under 18 U.S.C. 1958 or in aid of racketeering under 18 U.S.C. 1959, murder during a hostage taking in violation of 18 U.S.C. 1203, terrorist murders abroad of American nationals in violation of 18 U.S.C. 2332, attempted assassination of the President in violation of 18 U.S.C. 1751, and murder in furtherance of genocide in violation of 18 U.S.C. 1091(a)(1). Moreover, title I of the President's bill, like H.R. 5269, would create a new capital crime of murder by a federal prisoner serving a life term (proposed 18 U.S.C. 1118).

Finally, title I of the President's bill (in proposed 18 U.S.C. 3591(c)-(e)) would authorize the death penalty for the most serious drug offenders. The specific death-eligible categories would be (1) the leaders of the largest drug enterprises, who are currently subject to mandatory life imprisonment under 21 U.S.C. 848(b); (2) other leaders of continuing criminal enterprises in the sense of 21 U.S.C. 848 who engage in attempted murders to obstruct the investigation or prosecution of their activities; and (3) offenders who commit murders in the course of felony violations of the federal drug laws.

This "drug kingpin" death penalty proposal was passed by the Senate last year in title XIV of S. 1970 and, with some modification, by the House of Representatives in title II of H.R. 5269. We believe that the formulation in the President's bill provides the most appropriate scope of death penalty coverage for the most serious drug offenses and offenders.

As noted above, the first death-eligible category under the President's proposal would be offenders subject to mandatory life imprisonment under 21 U.S.C. 848(b). In essence, these are leaders of drug enterprises involving at least five subordinates, where the enterprise has revenues of at least $10,000,000 in a year, or transactions occur involving enormous quantities of drugs, such as 30 kilograms (about 66 pounds) of heroin or 150 kilograms (about 330 pounds) of cocaine. In contrast, the corresponding provision in section 224 of H.R. 5269 was limited to cases where at least <u>twice</u> the threshold amounts of revenues or drugs specified in 21 U.S.C. 848(b) are involved.

However, under the President's proposal, meeting the general criteria of 21 U.S.C. 848(b) would not be sufficient to permit the actual imposition of the death penalty. Rather, the jury would also have to find one or more of the statutory aggravating factors specified for the drug offender death penalty, such as a serious prior record of violent crimes or drug crimes by the

defendant, firearms violence in the course of trafficking activities, exploitation or endangerment of minors in trafficking activities, or knowing distribution of drugs containing potentially lethal adulterants. In light of the requirement of finding such factors as a prerequisite to imposing the death penalty, increasing the threshold amounts specified in 21 U.S.C. 848(b) is not necessary to establish an appropriate distinction between offenders who are subject to life imprisonment and those for whom the death penalty may also be considered.

A more specific problem with the formulation of this category in H.R. 5269 is that it could fail to provide appropriate penalties for offenders in the range intermediate between 21 U.S.C. 848(b) and the doubled threshold. Such an offender would be subject to life imprisonment under 21 U.S.C. 848(b), and could not realistically receive further punishment for any additional crimes (short of murder) that he might commit in running his drug enterprise. This is much less of a concern under the President's bill, since additional criminal conduct could result in findings of the requisite aggravating factors and expose the offender to capital punishment.

The second death-eligible category under the President's proposal would be leaders of continuing criminal enterprises who engage in attempted murders to obstruct the investigation or prosecution of their operations. This category was not included

in section 224 of H.R. 5269. We would urge the House to give further consideration to its inclusion.

Including a more broadly defined class of major traffickers -- but limited to those who engage in actual attempted murders to obstruct justice -- is justified by the flagrant problem of extreme violence against witnesses in drug cases, as well as the increased threat and reality of violence against criminal justice professionals in such cases. A continuing criminal enterprise violator under 21 U.S.C. 848 will face, in any event, a very long term of imprisonment (20 years to life) if he is convicted, and he may feel that there is relatively little to lose by attempting to silence a witness. The extension of the death penalty to attempted murders, in this limited context, even where death does not actually result, would send a strong message concerning the system's resolve to deal forcefully and effectively with this problem. Of course the House of Representatives did endorse the death penalty for an attempted murder offense in another context in H.R. 5269. See proposed 18 U.S.C. 3591(2) in title II of that bill (death penalty for attempted murder of the President).

The third and final "drug offender" death penalty category under the President's bill is the same as the second category in section 224 of H.R. 5269 -- murders in the course of felony violations of the federal drug laws. This is the most important provision of the bill for reaching lethal "street crime" violence

under a federal death penalty.

Beyond the provisions of title I, The President's bill proposes new death penalty authorizations in a number of other titles. Title V of the President's bill, in sections 501-02, increases penalties for violence against jurors and court officers, and for retaliatory killings and attempted killings of witnesses. This includes authorization of the death penalty for murders of such persons. The same death penalty authorizations were passed by the House of Representatives in title XII of H.R. 5269.

Title V of the President's bill, in section 503, would extend the federal death penalty to murders of state and local law enforcement officers who are killed while assisting federal officers. This is similar to section 223 of H.R. 5269, which also would have authorized the death penalty for murders of state and local officers assisting federal officers. However, the formulation of this proposal in section 223 of H.R. 5269 was technically deficient, since it authorized the death penalty for such murders, but failed to authorize the imposition of any lesser (non-capital) penalty if the jury declined to impose the death penalty in a particular case.

Section 503 of the President's bill avoids this problem by adding state and local officers assisting federal officers to the

list of protected persons under 18 U.S.C. 1114, a statute which generally prohibits killings and attempted killings of federal officers and provides an appropriate range of penalties. The formulation in the President's bill also ensures that state and local officers assisting federal officers will have the protection of statutes punishing non-homicidal violent crimes against federal officers -- see, e.g., 18 U.S.C. 111, 1201(a)(5) -- that cross-reference the list of protected persons in 18 U.S.C. 1114.

Section VII of the President's bill, relating to terrorism, contains a number of additional death penalty authorizations. Subtitles A and B of title VII include criminal provisions that implement international agreements for the suppression of terrorist acts at airports and maritime terrorism. Section 731 includes criminal provisions to implement the convention against torture. Section 732 proposes a new offense covering the use of weapons of mass destruction within the United States, or against American nationals or United States property anywhere in the world. Section 733 adds a provision to 18 U.S.C. 930 to proscribe and punish killings and attempted killings in the course of attacks within or against federal facilities that involve firearms or other dangerous weapons. Under all of these provisions, the death penalty would be authorized in cases where death results.

These particular death penalty authorizations were not, of course, included in H.R. 5269 last year, because they are part of offenses in the President's new antiterrorism proposal, which was initially introduced this year. However, H.R. 5269 did consistently provide the death penalty for offenses available at the time which are likely to be committed by terrorists or threaten massive loss of life. This included the death penalty for murders in violation of such provisions as 18 U.S.C. 32-34, 1992 (destruction of common carriers or transportation facilities), 844(d), (f), (i) (explosives offenses), 1091(a)(1) (genocide), 1203 (hostage taking), 2332 (terrorist murders abroad of American nationals), and 49 U.S.C. App. 1473 (aircraft piracy). The new offenses proposed in title VII of the President's bill are comparable to these offenses, and the death penalty should similarly be authorized in fatal cases.

While these new offenses are particularly designed to reach terrorist acts, they would also have some significant applications to other forms of criminal violence. For example, there have been recent media reports that gangs in Chicago have taken to using hand grenades against their rivals. The offense of using weapons of mass destruction proposed in section 732 of the President's bill would reach such cases. More generally, it would ensure federal jurisdiction to prosecute crimes involving the use of bombs, grenades, rockets and missiles, mines, artillery, poison gas, biological weapons, and weapons involving

radiation or radioactivity. In cases where death resulted, the death penalty would be authorized.

Title X of the President's bill, relating to equal justice, also contains new death penalty authorizations. Section 1004(c) authorizes the death penalty for violations of the principal criminal provisions of the federal civil rights laws, 18 U.S.C. 241-42, 245, that result in death. Each of these provisions authorizes imprisonment for any term of years or life in cases in which death results. However, they do not currently authorize capital punishment in any case, though racially motivated killings that plainly may warrant consideration of the death penalty are often covered by these provisions. See, e.g., United States v. Price, 383 U.S. 787 (1966) (murders of civil rights workers); United States v. Guest, 383 U.S. 745 (1966) (terror campaign against blacks by racists).

In sum, I would urge the Committee to endorse the full range of death penalty authorizations proposed in the President's bill. Most of these are the same as death penalty authorizations that the House of Representatives has already endorsed in H.R. 5269. The additional authorizations in the President's bill are some elements of the drug offender death penalty, murders in violation of the new antiterrorism provisions, and civil rights murders. As indicated above, these authorizations are similar to authorizations that were included in H.R. 5269, or stand on

strong independent grounds of justification.

II. State of Mind for Capital Murder

The death of a person in the course of a violation of a criminal statute that contains a general death penalty authorization is not, of course, a complete and sufficient basis for actually permitting consideration of the death penalty. Sometimes deaths occur in a more or less fortuitous manner in the course of these crimes, and imposition of the death penalty is not allowed in such instances. It is necessary to provide a general definition of capital murder which specifies the highly culpable mental state with respect to the death of the victim that is required to permit consideration of the death penalty.

In Tison v. Arizona, 481 U.S. 137 (1987), the Supreme Court held that the death penalty for homicidal offenses need not be limited to intentional killings, but may also extend to cases where death results from highly reckless conduct by the defendant. The underlying principle of Tison was nothing new. Rather, the decision simply affirmed the constitutional validity of the traditional principle of the common law that the callous indifference to human life that is manifested in such cases is a sufficient moral predicate for imposing liability for murder and exposure to the death penalty.

The terrorist who kills hundreds of people by planting a bomb on a passenger airplane cannot shield himself from liability for capital murder by claiming that he was only interested in making a political statement, and was indifferent to whether anyone died as a result of his actions. A bank robber who sprays police officers with machinegun fire with fatal consequences cannot avoid such liability by claiming that he only wished to disable the officers so that he could escape, and had no specific intent to cause death. There is no basis in law or sound policy for limiting the definition of capital murder to cases where a strict intent standard is satisfied, and imposing such a restriction would foreclose just punishment for many of the most depraved killers.

Both the House of Representatives and the Senate endorsed this point in the crime bills passed in the last Congress. While there were some differences in wording, the House and Senate bills contained substantively similar definitions of capital murder that explicitly encompassed killings committed through aggravated recklessness, as well as intentional killings (proposed 18 U.S.C. 3591(3) in title II of H.R. 5269 and proposed 18 U.S.C. 3591(c) in title I of S. 1970).

The corresponding provision in title I of the President's bill, proposed 18 U.S.C. 3591(f), is designed to provide a

formulation that is somewhat simpler and clearer in terms of wording, but that has about the same substantive scope as the provisions of the House and Senate crime bills of the 101st Congress. It generally provides that capital murder includes homicidal offenses for which the death penalty is authorized if the defendant "caused the death of a person intentionally, knowingly, or through recklessness manifesting extreme indifference to human life, or caused the death of a person through the intentional infliction of serious bodily injury."

The first part of this definition -- causing death intentionally, knowingly, or through recklessness manifesting extreme indifference to human life -- is, as indicated above, similar in scope to both the House and Senate versions from last year. The specific wording used is similar to that found in the murder provisions of the Model Penal Code (MPC § 210.2) and various state codes. See, e.g., Ala. Code § 13A-6-2(a)(1)-(2); N.D. Cent. Code § 12.1-16-01(1)(a)-(b).

The second part -- causing death through the intentional infliction of serious injury -- is essentially an articulation of one aspect of the aggravated recklessness standard, which would be easier to apply in some cases than the general standard because of its greater definiteness. A virtually identical clause -- "intentionally inflicted serious bodily injury that resulted in the death of the victim" -- appeared in the

definition of capital murder in S. 1970 as passed by the Senate. H.R. 5269 as well included an explicit provision that was apparently addressed to situations in which there was not necessarily an intent to cause death, but there was an intent to engage in extreme violence against the victim (offender "intending that lethal force would be used in connection with a person"). There is also support in some state statutes for explicitly including homicides in which there was an intent to cause serious injury within the definition of capital murder. See Ill. Ann. Stat., ch. 38, § 9-1; N.J. Stat. Ann. § 2C:11-3.

III. Death Penalty Procedures

There cannot be good death penalty legislation with bad procedures. Regardless of the range of offenses for which the death penalty is authorized, these authorizations may be seriously undermined or nullified if sound standards and procedures are not provided for putting them into effect.

For the most part, the death penalty procedures in title I of the President's bill are identical to those passed by the House of Representatives last year in title II of H.R. 5269. The President's bill and H.R. 5269 contain essentially the same provisions for conducting a capital sentencing hearing at which

the jury is to weigh aggravating and mitigating factors in deciding whether to make a binding recommendation to impose the death penalty.

Both the President's bill and H.R. 5269 follow the approach approved by the Supreme Court in Blystone v. Pennsylvania, 110 S. Ct. 1078 (1990), and Boyde v. California, 110 S. Ct. 1190 (1990), under which the jury is instructed to recommend the death penalty if it finds that the aggravating factors outweigh the mitigating factors. Both bills reject the notion that the jury should have a standardless and potentially capricious discretion to refrain from imposing the death penalty regardless of the balance of aggravating and mitigating factors. In the President's bill, two of the statutory aggravating factors for homicidal offenses (proposed 18 U.S.C. 3592(c)(1) and (11)(D)) have been strengthened to ensure more consistent coverage of terrorist murders, but the statutory aggravating and mitigating factors in the two bills are otherwise the same. Both the President's bill and H.R. 5269 contain provisions modeled on the "Powell Committee" recommendations for state capital cases (proposed 18 U.S.C. 3598-99) which guard against the obstruction of the federal death penalty through dilatory and repetitive litigation.

I would note, however, two differences between the death penalty procedures in the President's bill and those in H.R. 5269:

First, the President's bill (in proposed 18 U.S.C. 3593(a)) provides that the aggravating factors to be considered at the sentencing hearing may include factors concerning the effect of the offense on the victim and the victim's family. The Senate-passed bill last year (S. 1970) also included a provision to admit victim-impact and victim-family-impact information in capital sentencing.

This is an important provision which is necessary to ensure that the jury has a fair and balanced picture of the relevant facts. In a capital sentencing hearing, the defendant is free to present information concerning any sympathetic feature of his character, background, or behavior in opposing the imposition of the death penalty. If such information is presented under one-sided standards, it is too easy to lose sight of the fact that there was a human life on the other side of the equation that was extinguished by the defendant's savage acts, and that there were others close to the victim whose lives have been irreparably damaged by those acts. The provisions of the President's bill guard against such a one-sided presentation.

Second, title II of H.R. 5269 (in proposed 18 U.S.C. 3596(b)) contained provisions that would create a bar to execution based on a novel set of standards relating to the defendant's mental capacity. The bars to execution in the

corresponding provision in the President's bill are clearer and better defined.

Under existing law, a person suffering from a mental disease or defect cannot be tried for an offense if he is unable to understand the nature and consequences of the proceedings or assist properly in his defense (18 U.S.C. 4241), and cannot be convicted for an offense if he was unable to understand the nature or wrongfulness of his actions (18 U.S.C. 17). Moreover, lesser degrees of mental impairment would be considered as a mitigating factor in capital sentencing, see proposed 18 U.S.C. 3592(a)(1) in title I of the President's bill and title II of H.R. 5269, and a sentence of death cannot be carried out on a mentally disordered or defective convict who cannot understand the nature of the death penalty or why it was imposed, see Ford v. Wainwright, 477 U.S. 399 (1986).

In light of these numerous protections for mentally impaired defendants under existing law, we do not believe that there is a need for the additional mental-capacity restrictions on capital punishment that were included in H.R. 5269. These restrictions could, however, potentially be used by defendants to obstruct the execution of death sentences through last-minute petitions raising claims of mental incapacity.

IV. Use of Racial Quotas for the Death Penalty

There is one provision of H.R. 5269 which dramatically illustrates how bad procedural provisions may nullify the substantive law. This is the so-called "Racial Justice Act" proposal which appeared in title XVIII of H.R. 5269. This proposal would effectively establish a racial quota system for the imposition of the death penalty, not only at the federal level but also for all states. I can state categorically that any death penalty enactment would be illusory if it contained this proposal.

The Senate has rejected this proposal for a death penalty quota system in both the 100th and the 101st Congresses. However, a version of the "Racial Justice Act" was passed by the House of Representatives last year on a closely divided vote.

To begin with, I would note that the factual premises of using a racial quota system for the death penalty are not well-founded. Quota proponents have primarily argued that such measures are necessary because statistical studies indicate that the death penalty is less likely to be imposed in cases involving black victims than in cases involving white victims. In reality, however, the weight of reliable empirical study indicates that racially neutral factors overwhelmingly account for apparent disparities relating to the race of the victim or defendant.

Likewise, courts that have analyzed statistical studies purporting to show racial discrimination in capital punishment have invariably concluded that these studies did not actually support an inference of discrimination because they failed to take account of pertinent non-racial factors or involved other fundamental flaws. A number of studies and analyses have also indicated that white defendants are more likely to be sentenced to death than black defendants. See McCleskey v. Kemp, 481 U.S. 279, 286 (1987) (Baldus study of capital punishment in Georgia indicated that white murder defendants were almost twice as likely to be sentenced to death than black murder defendants); U.S. Dep't of Justice, Bureau of Justice Statistics, Capital Punishment 1984, at 9 (analysis of nationwide figures indicating that white defendants arrested for serious homicidal offenses had a probability of being sentenced to death that was more than 35% higher than the probability for black arrestees).

Moreover, even if it were believed that the death penalty is imposed with insufficient frequency in cases involving black victims, the remedy proposed by the so-called "Racial Justice Act" -- the invalidation of capital sentences -- would be perverse. A far more appropriate response would be to seek capital punishment more frequently across the board, rather than lessening the security of all racial groups against crime through the invalidation of capital punishment. In effect, the proposed

quota system for the death penalty would redress alleged statistical discrimination against a class of murder victims through increased leniency towards their killers -- as well as towards all other capital murderers.

While the "Racial Justice Act" has been offered in various formulations, they all share the same essential features. All versions would authorize findings of "discrimination" and the invalidation of capital sentences based on "racial disproportions" in the imposition or execution of death sentences generally, even where there was no evidence that participants in the process in any particular case had any intention of favoring or disadvantaging anyone on the basis of race, or were influenced by racial considerations in capital charging or sentencing decisions.

All versions of the "Racial Justice Act" also provide that the Act is to be fully retroactive to existing capital sentences, and that claims can be raised under the Act notwithstanding any prior rejection of a discrimination claim in a case by the courts. Hence, the over 2,400 existing capital sentences would all have to be relitigated under the Act's novel standards.

In recent testimony before the Senate Judiciary Committee, Attorney General Lungren of California provided a striking illustration of the prohibitive costs of the type of statistics

game that the Racial Justice Act would require. In one case in California, state attorneys spent 3 years and over $1 million preparing for a hearing on a statistical "discrimination" claim, before the Supreme Court's decision in McCleskey v. Kemp, 481 U.S. 279 (1987), intervened and resolved the matter. See Statement of Attorney General Daniel E. Lungren of California Before the Senate Committee on the Judiciary Concerning Habeas Corpus Reform, at 36-37 (May 7, 1991).

Another case cited by Attorney General Lungren (the Harris case in California) illustrates that these burdens would not be confined to any subclass of capital cases involving discernible racial elements. Both Harris and the two people he murdered were white, and the crime was committed in a white neighborhood. Nevertheless, Harris claimed that he had been "discriminated" against, and that his sentence should be overturned, on the purported ground that killers who murdered black victims were less likely to be sentenced to death. See id. at 33-34.

Beyond their intrinsic effect of making capital punishment impossible as a practical matter, the underlying principles of the quota system proposed in the Racial Justice Act are open-ended. If racial proportionality is presumptively required in imposing capital sentences, then why not impose the same requirements in relation to sentences of imprisonment and other non-capital sentences? If statistical disparities relating to

race are sufficient to invalidate sentences, then why not also disparities relating to other classifications, such as gender and ethnicity?

Indeed, in the Harris case in California, Harris also asserted sex and age discrimination claims, arguing that he was a white male in his mid-twenties at the time of the crime. Moreover, the version of the "Racial Justice Act" proposal originally voted out by the House Judiciary Committee in the 101st Congress would have authorized the invalidation of capital sentences based on ethnicity as well as race. Under this version, death sentences could have been overturned on the ground that defendants of French descent were more or less likely to be sentenced to death than defendants of English or Irish descent, or on the basis of statistical disparities among any of hundreds of other groups defined by national origin.

Hence, the "Racial Justice Act" proposal represents more broadly an attack on the fundamental principle of individualised justice, and movement towards a system of race-based "justice" in which penalties are presumptively to be meted out so as to achieve preconceived numerical proportions among various population groups. Compliance with the "Racial Justice Act" would effectively require a death-by-the-numbers system of quota justice that introduces race into capital charging and sentencing decisions in a constitutionally impermissible manner.

There is, however, a reasonable and legitimate alternative to the "Racial Justice Act," which we have proposed to Congress in title X of the President's violent crime bill, the "Equal Justice Act." The Equal Justice Act includes explicit provisions that the death penalty and all other penalties must be administered evenhandedly without regard to the race of the defendant or the victim; a prohibition of racial quotas and statistical tests in the administration of the death penalty and other penalties; protection for both crime victims and defendants against racial bias in the tribunal through enquiry on voir dire concerning such bias, change of venue, and prohibition of appeals to racial bias by defense lawyers and prosecutors; and specific jury instruction and certification requirements guarding against racial bias in federal capital cases. It would also add new death penalty authorizations for killings in violation of the principal criminal provisions of the federal civil rights laws, and would make the capital sentencing option consistently available for racially motivated murders within federal jurisdiction. Overall, the provisions of the Equal Justice Act would provide effective protection against racial discrimination without quota justice or the imposition of unjustified standards that cannot realistically be met.

In sum, the Department of Justice strongly urges prompt enactment of the President's violent crime bill, H.R. 1400,

including the President's federal death penalty proposal, which is largely the same as the death penalty proposal passed by the House of Representatives last year in H.R. 5269. Meaningful death penalty legislation, however, must include sound standards and procedures as well as adequate coverage of offenses, and any enactment that included the quota system embodied in the "Racial Justice Act" proposal would be illusory.

I would be pleased to answer any questions that the Members may have.

Mr. SCHUMER. My first question relates to the last subject you touched on, which is the drug kingpin death penalty.

As you mentioned, last year the distinguished gentleman from Florida, Mr. McCollum, offered an amendment that passed the House, and it required twice the amount of drugs that you mentioned and the revenues that under current law would warrant a mandatory life sentence. I think it was 132 pounds of heroin, 660 pounds of cocaine, or $20 million in revenues—large, large, large amounts of drugs, which is what it should be.

In addition, Mr. McCollum's amendment didn't include the death penalty for lesser kingpins who merely attempt to kill.

Could you tell us why you didn't simply go with the McCollum approach, in both the change in amount of drugs and the attempted murder by lesser kingpins.

Mr. BARR. It was our judgment that the amounts that we're proposing—the 66 pounds and the 330 pounds, for example—are more realistic when we're dealing with the size of enterprise that's currently trafficking in narcotics, that it would cover the kinds of organizations that we are currently trying to dismantle, and which pose the greatest threat. The higher the threshold, obviously, the fewer the organizations we would be able to target with this penalty.

Mr. SCHUMER. It's not been any change in objective circumstances, has it?

Mr. BARR. Since last year?

Mr. SCHUMER. Yes. Because last year, I think you were supportive of the McCollum amendment.

Mr. BARR. This was our proposal last year, too.

Mr. SCHUMER. I see.

Mr. BARR. I think Congressman McCollum's amendment came before our proposal and, therefore, was the vehicle because it was acted upon in the committee, I believe it was the vehicle that was voted on on the floor, but this was also our proposal last year—it doesn't represent a change.

It was also our proposal last year to have the attempt, the second prong of the kingpin death penalty, if you will. But, again, we were slower on the draw than Congressman McCollum. That was not the proposal in the committee and, therefore, that was not adopted on the floor. But we did propose it last year and I testified on that provision.

We believe that the history of these organizations, particularly in Latin America where they have been under pressure, and increasingly here where we are having witnesses executed, the history of these organizations has been that they turn against the criminal justice system through force and intimidation and we believe we should try to be ahead of the game here, so to speak, and put into place punitive, strict measures to prevent any effort to compromise the criminal justice system that we have to rely upon to deal with this problem.

These people generate tremendous amounts of money; they are very violent; they have access to weapons; and we believe this is merited by the need to protect the integrity of our institutions, but they were represented in the President's proposal last year.

Mr. SCHUMER. Let me go over to the recklessness provisions, which, as I mentioned in my opening statement, we need some pause to think.

The death penalty would apply, according to your bill, to any capital homicide case whenever the defendant acted "with recklessness manifesting extreme indifference to human life."

Let me ask all the questions I have, and then you can respond. How would you define that standard? How many States have adopted that standard for death penalty cases?

Would something more than the commission of a crime itself be required?

Would the mere selling of, say, crack cocaine—something that everyone knows can potentially kill someone from just one use—meet that standard?

How about selling heroin or any other controlled substance in such a quantity that it might be used for an overdose?

How about the sale or transfer of a firearm that is then used in a murder, or the intentional sale of blood known to be contaminated?

How about a prostitute who knows that he or she is HIV-positive but continues to have sexual intercourse without telling his/her partner?

I am trying to get a feel for where the recklessness standard would be.

And the only other comment that I would ask about is, given the *Tison* case and the *Enmund* case, doesn't introducing this recklessness standard make things constitutionally murkier, rather than clearer?

I would think, given what the gentleman from Wisconsin has said, and maybe one of my other colleagues, that we ought to adopt procedures that are constitutionally quite clear.

Isn't bringing this recklessness standard in making it more difficult to adopt a constitutional standard? Because it seems to me from reading the cases, that the law there is still within the constitutional bounds of the 8th amendment and 13th amendment, and is still in formation by the courts.

That's a lot of questions. My time has just expired but now you can answer them all.

Mr. BARR. I hope you will let me give a discursive answer for the record.

Mr. SCHUMER. Sure.

Mr. BARR. Starting with the last part of it, I think the constitutionality of this proposal is clear—clearly supported by the *Tison* case.

Let me back up and sort of review the bidding, I think, on the history of state of mind and death penalty.

Prior to the *Enmund* case, which you mentioned, there was the concept of of the felony murder rule. It was sufficient under that old rule that an individual be involved in a felony where a killing resulted. So it was enough in the old days, before *Enmund,* that someone be the wheel man or somehow had participated in a felony, to warrant imposition of the death penalty on that individual.

So a lot of the older State laws do not require, or don't make it clear, what state of mind this required. In fact, in our existing Fed-

eral laws, a lot of our Federal statutes right now don't say anything about the state of the mind. For example, they say, train wrecking where death results, or destruction of an aircraft where a death results, or destruction of a Federal facility where death results—nothing about state of mind. I think that reflects the old felony murder rule concept.

The *Enmund* case came along and said, that's not a sufficiently culpable state of mind to warrant the death penalty. In *Enmund,* I believe it was the person driving a getaway car who did not know that his accomplices had guns, and I think even before the crime had suggested they not take guns or that no one get shot. And yet, he was held accountable under the felony murder rules. The Supreme Court struck down that sentence.

Subsequently in *Tison,* however, it did say that the death penalty did have to be necessarily limited to intentional killing, that the issue was the culpability and the blameworthiness of the individual state of mind, and that there was a certain state of mind short of specific intent, but involving aggravated recklessness and total disregard for human life that was the moral equivalent of intent. That's what the *Tison* case is all about.

It basically says that there are certain kinds of states of mind, which it defines as reckless indifference, that are the moral equivalence of knowingly and intentionally killing someone. So someone who does something inherently dangerous and reckless like blow up a vehicle or a building and then says, I didn't really mean to kill the people in it, I was just trying to make a statement, I had no specific intent to kill an individual—that is still a sufficiently culpable state of mind where death results to warrant the imposition of the death penalty.

In our view, that's correct. And that there are many circumstances under Federal law and under existing State law where the death penalty is appropriate, short of specific intent, but involving that kind of aggravated recklessness.

Mr. SCHUMER. Let me just ask you to address a couple of the specifics.

Mr. BARR. Sure.

Mr. SCHUMER. Would you believe the HIV-positive prostitute who continues to have sexual intercourse without telling the partners would be under your proposed statute?

Mr. BARR. I am going to answer that question but let me just preface it by saying that the way this works is that it is a jury question, whether or not the actions, the foreseeability, the state of mind of the actor was that kind of reckless indifference that is the moral equivalent of intentional action.

And once that threshold is met, and there has been a killing, then in addition, the jury would have to find aggravating circumstances. So I just want to make clear we're still talking about sort of the predicate offense—in addition to the predicate offense there would still have to be a finding of aggravated factors to warrant the death penalty.

In that kind of case, and again, here we're talking a State offense, presumably, it would seem to me that a prostitute who knew she had HIV, who knew the means of transmission and the risks

associated with it, would be found by a jury to have that kind of reckless disregard.

Mr. SCHUMER. And selling of heroin or a controlled substance in a quantity that would allow for an overdose?

I just find these difficult questions.

Mr. BARR. They are difficult questions, but these are the kinds of questions that really are based on the circumstances on an individual case in which, in our view, a jury should be able to consider the evidence.

I think that a sale of unadulterated drugs, sort of normal dosage sale as opposed to large quantities of drugs to particularly vulnerable individuals, sale of adulterated drugs, I contrast those latter circumstances. In the sale of drugs, you wouldn't have the foreseeability and the recklessness that I think a jury would require to find the extreme reckless indifference that would be required to equate this to an intentional action.

But a kidnaper who kidnaps an individual, takes reasonable good care of the individual, the individual dies unexpectedly, I wouldn't think that that would be a case of—the commission of the felony itself, kidnaping itself does not per se mean that the action manifested reckless indifference.

On the other hand, if the kidnaper takes the little kid, puts him in a coffin, buries him 6 feet under with a straw to breathe through, that jury might very well find that that——

Mr. SCHUMER. But what about the kidnaper who puts somebody in the car, speeds away, goes through a red light and kills a pedestrian who's crossing the street with the light?

Mr. BARR. People kill pedestrians all the time, and it is not treated as first degree murder because the recklessness associated with that is not the kind of——

Mr. SCHUMER. So that would not qualify?

Mr. BARR. Right.

Mr. SCHUMER. Even though a killing had occurred?

Mr. BARR. I think that would be under the old felony murder rule.

Mr. SCHUMER. Thank you.

Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

Given the predilection, not of the chairman, but of many of the members of the committee, subject to capital punishment, I'm surprised that there has not been a serious move in the Congress relating to HIV-positive prostitutes to bring them under the consumer product safety laws here rather than the Criminal Code. That's not what I'm going to ask about.

As you know, one of the things that I participated in when the crime bill was up in the last Congress was the Racial Justice Act. And, unfortunately, the amendment that I offered to strike the Racial Justice Act from the crime bill did not succeed on the House floor.

There have been allegations in support of the Racial Justice Act that the death penalty has been, or will be, applied in a discriminatory manner toward various ethnic groups—blacks, Native Americans, Hispanics, other minority groups.

What evidence does the Justice Department have that that is not the case?

Mr. BARR. Our assessment of the studies that have been done to date—the GAO reviewed, I think, 28 studies that have been done to date—identified a number of them as high quality studies; at least 10 of them were considered high quality studies.

Our assessment of those studies is that the majority of them tend to show the absence of discrimination as a factor in death sentences.

The flagship study that purported to demonstrate racial discrimination as a factor in the death penalty is the so-called Baldus study—and that was subjected to the rigors of an adversary proceeding. And I'd invite members of this subcommittee to review the district court opinion in the *McCleskey* case where the district court tore the Baldus study to shreds and concluded it was unreliable and seriously flawed.

The Supreme Court did not adopt the Baldus study or agree with the accuracy of the Baldus study in issuing its opinion, but assumed, for purposes of argument, the Baldus study was reliable. But in a footnote—I believe it's footnote 6—it took note of the district court's analysis of that study.

I think that the idea of attempting through computer models to isolate racial discrimination as a factor is one that is not only fraught with difficulty, it's virtually impossible.

Mr. SENSENBRENNER. Doesn't the Supreme Court require that the determination on whether the death penalty be imposed be done by the jury that convicted the defendant to begin with?

Mr. BARR. Yes.

Mr. SENSENBRENNER. Don't you think it would be malpractice on the part of defense counsel when he was representing a member of a minority group who was charged with a potentially capital offense not to try to include at least one member, if not more members, of that minority group on the jury, if they were in the jury pool?

Mr. BARR. Congressman, you're referring to a number of the safeguards that exist now to ensure that race is not a factor in the prosecution, or conviction, or the sentencing of a capital offense, including voir dire and the use of preemptory challenges, issues about jury composition, arguments made by counsel. They are all protections that exist now to ensure that race does not enter into it.

Mr. SENSENBRENNER. My point is that in most of these instances where the death penalty was imposed upon a defendant who was a member of a minority group the jury was comprised at least in part of members of that minority group who agreed that the death penalty was the appropriate sentence following a conviction. Would you agree with that?

Mr. BARR. I don't have the statistics to be able to agree with that. Anecdotally, I would think that's probably true.

Mr. SENSENBRENNER. Now there have been allegations that the death penalty would place Native Americans more at risk because more prosecutions for murder with Native American defendants take place in Federal court because of the exclusive jurisdiction of

the Federal courts over Indian reservations in the country and the fact that in most instances there is no State court jurisdiction.

How do you respond to that argument?

Mr. BARR. I don't understand that argument. Is the argument that convictions are more likely in Federal court than in State courts on the same charge?

Mr. SENSENBRENNER. Many States, including my own, do not have the death penalty. And as a result, a Native American who is charged with murder on an Indian reservation, if he or she were prosecuted in a State court, would not be subjected to the potential of the death penalty because Wisconsin doesn't have it. However, the prosecutions take place in the Federal court because that's where the jurisdiction lies.

And if murder is made a capital offense, which it is in H.R. 1400, the argument is made that there is the greater potential that the death penalty will be imposed following a conviction.

Mr. BARR. I think that if the Federal Government adopts the death penalty for cases that arise under its jurisdiction and its responsibilities, and people who commit crimes with that zone are going to be subject to that, if they are not also subject to State law and there is no State law death penalty, then the chances of being exposed to the death penalty do exist.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman, my time is up.

Mr. SCHUMER. Mr. Hughes.

Mr. HUGHES. Thank you, Mr. Chairman, and welcome, Mr. Barr.

If all these offenses were in place last year, how many prosecutions do we have where the death penalty would be appropriate?

Mr. BARR. I don't think we have a way of measuring that or we have not kept sufficient data to be able to estimate precisely how many crimes would fall under these provisions.

Mr. HUGHES. I support the death penalty, I always have. The last case I tried was a case where capital punishment was imposed. So those are my credentials.

It seems to me that we should be developing cases based upon data. We legislate based upon criteria.

I hear a lot of argument about not having the death penalty is why we have so much crime in this country—and if we had the death penalty in place, we'd have a serious deterrent.

Are you suggesting to me that we don't know how many cases were prosecuted last year where the death penalty would apply to give us some reading on perhaps what kind of deterrent it would be at the Federal level—or is it just that we just think we ought to supply that leadership for the States? Is that the reason for it?

Mr. BARR. Let's review some of the proposals that we have now.

Mr. HUGHES. No, no, let's stick with the death penalty.

Mr. BARR. That's what I'm talking about—death penalty proposals.

Mr. HUGHES. My question is, do you have any data? Do we have any data on how many cases, this last year, where the death penalty would have been appropriate?

Mr. BARR. No, I don't have that data because some of the categories, we don't keep sufficient data to be able to tell—I don't have the data to tell you, for example, the third prong of the drug king-

pin proposed death penalty would have covered a number of people.

On the other hand, the first prong, that is, the people who engage in large-scale transactions, we estimate would have covered six to eight people. So on some of these crimes, like espionage or treason, we could tell you how many people would be subject.

Mr. HUGHES. How many last year?

Mr. BARR. I haven't totaled them up by category.

Mr. HUGHES. Do you have any train wrecks where the death penalty would have been imposed? Mailing dangerous material? Destruction of interstate property? Destruction of Federal property?

Mr. BARR. How about the murder of Judge Vance?

Mr. HUGHES. That would have been one.

Mr. BARR. As I think I said in my opening statement, the number of death penalty cases in the Federal regime would be small. But that doesn't mean we shouldn't have the deterrence and the retribute of justice involved in the death penalty for serious offenses. Espionage is a rare crime, very rare crime. Treason is a rare crime.

Does that mean we shouldn't have penalties for them, or they shouldn't be the ultimate penalty given how serious they are?

Assassinations of the President are very rare.

Mr. HUGHES. But the argument I've heard is that it would act as a significant deterrent.

And my question is, how many case were there last year in which capital punishment was imposed?

Are you suggesting that if we had it on the books that that would have been a deterrent?

Mr. BARR. For which crime?

My comments about deterrence, as I said, were apart from the issue of the death penalty, all punishments. Our whole criminal justice system is based on the idea that penalties deter and the more serious the penalty, the greater the deterrence.

Mr. HUGHES. I don't want to take up all my time with this.

Can you furnish for the record from whatever data you have for last year the instances in the various categories the death penalty would have been relevant if we had the statute on the books that incorporated all these particular offenses into a death penalty statute.

Mr. BARR. I'd be glad to do that.

Mr. HUGHES. All right.

Getting to intent, apparently you in your colloquy with the chairman——

Mr. BARR. Can I make a comment about that, though, Congressman?

We've just gone through a serious crisis in this country in the Persian Gulf where we were at war with another country. During that crisis, our enemy put out into the field people who were trained and directed to murder Americans.

Now if you were responsible for protecting American lives, and ultimately doing justice if they had been successful in mass murder of Americans, would you have wanted the death penalty on the books?

We went through that crisis without one. I think that was intolerable.

Mr. SCHUMER. The gentleman can have a little extra time.

Mr. HUGHES. Let me just take you back to intent.

In your colloquy with the chairman, you indicated that clearly it would be constitutional to impose the death penalty in nonhomicide types of offenses where there's a reckless indifference to life.

I presume that the case law you rely upon is the *Tison* case?

Mr. BARR. I didn't say that. We were talking about homicide cases in that discussion.

Mr. HUGHES. How about nonhomicidal? Any case law that supports imposing the death penalty on drug kingpins in nonhomicidal cases?

Mr. BARR. Execution for treason has been upheld by the Supreme Court.

Mr. HUGHES. Let's deal with kingpins. Any case law?

Mr. BARR. No.

Mr. HUGHES. What are you relying upon to extend it to kingpins?

Mr. BARR. I testified before your subcommittee last Congress concerning the constitutionality of imposing the death penalty on drug kingpins in a nonhomicidal circumstance. And there I said—and it's still the position of the Department—that the eighth amendment proportionality rule requires that the severity of the punishment be proportioned to first the gravity of the harm and; second, the moral culpability of the defendant's state of mind.

Mr. HUGHES. But I asked you the case law. What's the case law? What do you rely upon in case law to support the premise that we can develop a capital offense in the case where there's no killing?

Mr. BARR. Case law, I think is the discussion of the Court in *Coker* and in *Tison*. In *Coker*, the Court made clear that there are two ways of showing harm—the penalty has to be proportionate to the harm cause. And in *Coker*, Justice White said there were two kinds of harm—there's the private harm to the individual victim; and that's what that case was about, that's what he focused on, admittedly in his opinion.

But he also referred to cases of grave public harm, and said, we do not decide whether a homicide is required in cases of grave public harm.

Since the very beginning of the Republic, the death penalty has been authorized for crimes that would cause grave harm to the welfare of the Nation, or pose a clear and present danger to the lives of many individuals in the Nation.

Mr. HUGHES. Is there a killing in *Coker*?

Mr. BARR. There's no killing in *Coker*.

Mr. HUGHES. But there was in *Tison*?

Mr. BARR. There was in *Tison*.

Mr. HUGHES. I guess we just read *Tison* a little differently. My recollection, however, of *Tison* was that two of Tison's sons, along with another accomplice, broke into prison and took their father out. Their father had escaped once before and killed somebody. In the *Tison* case itself there was a cold-blooded killing of a family including two youngsters. The majority opinion actually read an intent into that from the circumstances, that while they didn't pull the trigger, they were present and were culpable, and intent was

read into that from their reckless indifference, their knowledge that the defendants could have expected that Tison would have killed once released from prison.

And on that basis, there was an equivalent intent to kill. That's how I read *Tison*.

Mr. BARR. They didn't find there was intent.

Mr. HUGHES. No, they found it was an equivalent, however, from the acts and circumstances of the case. Am I wrong in my interpretation of *Tison*?

There was a killing.

Mr. BARR. To be precise, they said, we hold that the reckless disregard for human life implicit and knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state.

Mr. HUGHES. I understand.

Mr. Chairman, I'm not going to prolong it. I just think that the Department of Justice is reading *Tison* and *Coker* a little more liberally than I would be inclined to believe most individuals would.

Mr. BARR. As I said, since the beginning of the Nation, we have had the death penalty for nonhomicidal cases—treason and espionage. Those are given the death penalty because of the grave social harm that they cause.

Now, in our view, the harm of large-scale drug trafficking, international drug trafficking, the massive amounts involved, are causing grave public harm to the Nation. I don't think that this Nation has faced a threat like this since the nuclear age.

I think you would agree that——

Mr. HUGHES. I would agree with that, but the problem is——

Mr. BARR. And, second, if I can complete my thought—so I think we have the public harm element that Justice White in *Coker* referred to and which has been reflected in the espionage and treason context.

Moreover, I think that given the inherent dangerousness of—this is criminal activity, which involves knowingly, consciously, trafficking in substances that are so destructive. And in our view, that reflects the kind of depraved state of mind that is required under their eighth amendment proportionality rule.

Finally, we're not dealing with something that just hurts people; we are dealing with a substance that causes death. There is a clear nexus between large-scale drug trafficking and death, not only in overdoses, but in the violence associated with the drug trade; the AIDS epidemic spread through the use of drugs; the AIDS babies.

So I would say those three factors—the large social injury to the United States, unparalleled in our history; the highly depraved state of mind involved and these people who for money are engaged in this traffic and; finally, the clear nexus with the death and the destruction it causes. And foreseeability of that warrant the death penalty and it would be upheld by the Supreme Court.

Mr. HUGHES. That's your opinion, and I'm not so sure I agree with it. I think it's a tremendous leap to go from a social harm, which unquestionably is there, and the high risk to our society, and the widespread pain and suffering that spewed out throughout the world—it's beyond question.

But that's a long way from developing a nexus to somebody who overdoses in a clinic where there are a lot of intervening factors. And I know of no case law—unless you can bring it to my attention—that suggests that that's a sufficient nexus to impose capital punishment. I mean, there are so many intervening factors.

I thank the chairman.

Mr. SCHUMER. Mr. Schiff.

Mr. SCHIFF. Thank you, Mr. Chairman.

Mr. Barr, I'm coming from a basically supportive point of view on this package. But having said that, I'd like to examine, for a few minutes, some of the concerns that have been raised—one of which is the number of cases that this might affect versus all the homicides we have in this country.

I believe you testified that you don't have a number from let's say, last calendar year, as to how many cases this would have applied to; is that right?

Mr. BARR. That's right.

Mr. SCHIFF. But you would acknowledge you're not expecting it to be a high percentage of all the homicides that we have in this country?

Mr. BARR. I would say it would be a very, very low percentage.

Mr. SCHIFF. Meaning that there's a lot more we have to do other than consider this particular legislation?

Mr. BARR. As a Nation, yes, because most capital offenses are committed within State jurisdiction, not Federal jurisdiction, and that's a matter for the States to address.

Thirty-six States have adopted the death penalty to deal with that, though.

Mr. SCHIFF. For example, you pointed out that we already have certain drug kingpins—to use the term—serving mandatory life in prison sentences, potential sentences.

How many mandatory life in prison convictions did we get last year, if you know?

Mr. BARR. I can't give you the convictions but I believe that we would have had six to eight people—if we had the death penalty provision there, we would be seeking it from between six to eight people.

Mr. SCHIFF. For an entire year?

Mr. BARR. Yes.

Mr. SCHIFF. Wouldn't that suggest in that area we need more convictions, as much as we might need more in the way of a penalty?

Mr. BARR. Yes, but the investigations necessary to unravel—these are large-scale organizations, these continuing criminal enterprises—and the investigations necessary to unravel them, and then to prosecute them in a rational sequence so that you are marching toward the top of the chain and you can use people to flip and provide evidence against the next up. These are long-term investigations. They do require a lot of resources.

Some of these laws are relatively recent and I think you will see an escalating number of these cases brought. Just to give you an idea of that, as you know, the flagship of the Department's antinarcotics effort that focus on these criminal enterprises is the OCEDTF program. And in the past 2 years, we have been as suc-

cessful in arrests and convictions as we had been in the preceding 5-year period.

So we are seeing an accelerating pace of drug indictments and drug prosecutions, and I think you will continue to see that pattern.

We are reserving the death penalty here, however. This is not a willy-nilly application of the death penalty. The standards here are fairly strict. You're talking about the principal organizer, the leader of the group, and you're also requiring either substantial transactions or attempted murders to block the investigation, and you're also requiring in a finding of one of several aggravating circumstances such as prior offenses, prior serious offenses, or use of firearms, before the death penalty could be imposed.

Mr. SCHIFF. So of the six to eight convictions that you referred to where we got a mandatory life prison sentence—which I congratulate the agency for—how many of those would this death penalty proposal have applied to?

Mr. BARR. What I said was, we would have sought the death penalty in between six and eight cases last year. I didn't say they we had succeeded in convicting all those people last year.

Mr. SCHIFF. All right, I'll ask again.

How many convictions did you get where you got a mandatory life prison sentence?

Mr. BARR. I don't have that figure off the top of my head.

Mr. SCHIFF. My point, and it's really not adverse, is the fact that penalty alone goes so far if there aren't enough prosecutions and convictions; there's a lack of deterrent there also; which I don't think you're disagreeing with. I'm just trying to pull the two together.

Mr. BARR. Congressman, I think that's absolutely right. The whole deterrent theory operates not only on the magnitude of the penalty, but the certainty of being, or the chances of being caught and convicted; which is one of the reasons that we had sought additional resources.

And as I said, the President sought a 15-percent increase for our budget. A lot of that was going to our counternarcotics effort and to the antiviolent crime effort, directed at career criminals who are responsible for most of the violent crime in our country.

That's why we're very disappointed to see, in both the House and Senate, the President's law enforcement budget slashed so drastically. This is not the time to be doing that.

Mr. SCHIFF. Let me just follow up in two other areas of concern that have been expressed already, which I'd be grateful if you would follow up on.

One deals with our Native American population—and the concern there, of course, is the exclusive Federal jurisdiction which exists in most, if not all, Indian reservations or pueblos.

Let me just ask, in all the specific examples you gave in this proposal, is there a proposal here that murder in the first degree, period, without any other circumstances, would, in fact, be subject to the death penalty under this proposal?

Mr. BARR. I am told that section 1111 would authorize the death penalty for murder, for example, on an Indian reservation, provided aggravating circumstances were found.

Mr. SCHIFF. Thank you very much.

Mr. SCHUMER. Thank you.

Mr. Hoagland, you've been here from the beginning of the hearing. Do you have any questions?

Mr. HOAGLAND. I have none, Mr. Chairman, thank you.

Mr. SCHUMER. Thank you.

I have a couple more and then maybe if Mr. Schiff has a couple more he can go and then we will move on to the next panel.

One of our colleagues, Mr. Gekas, had a provision that would allow Indians to opt out to deal with the anomalous situation—I believe that Jim Sensenbrenner talked about it before—that the State wouldn't have any death penalty at all, and Indians would, because of the Federal legislation.

Would the administration be opposed to such an opted-out provision?

Mr. BARR. I'd like to review that provision and supply our response in writing on that.

Mr. SCHUMER. OK.

[The information follows:]

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 9, 1991

Honorable Charles E. Schumer
Chairman
Subcommittee on Crime and
Criminal Justice
Committee on the Judiciary
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in response to additional questions posed by members of the Subcommittee, in connection with the May 29 testimony of Deputy Attorney General Barr concerning the death penalty provisions of the President's violent crime bill (H.R. 1400). The questions concerned (1) the number of cases in which the death penalty could be sought or imposed following the enactment of the President's proposal, and (2) whether murders in Indian country should be specially exempted from the operation of a federal death penalty.

I. Number of Death Penalty Cases

The President's violent crime bill would provide an enforceable death penalty for 42 federal offenses. These offenses were identified and described in Deputy Attorney General Barr's submitted statement to the Subcommittee.

One death penalty authorization under the President's bill is proposed 18 U.S.C. 3591(e), which covers all murders in the course of felony violations of the federal drug laws. This includes almost all murders in the course of drug trafficking offenses or conspiracies. Recent Uniform Crime Reports figures indicate that over 1,500 murders a year are identified by the police as being the result of drug felonies. See Federal Bureau of Investigation, Crime in the United States 1989, at 7, 12-13 (estimated murder total of 21,500 for year; 7.4% of reported murders result from drug felonies). Hence, there are over a thousand and a half murders annually for which the death penalty could potentially be considered under this one provision of the President's proposal.

Additional information bearing on the number of potential death penalty cases under the President's proposal appears in recent correspondence with Senator Joe Biden, Chairman of the Senate Judiciary Committee. On June 7, Senator Biden sent a

letter to the Department of Justice requesting information on the number of cases in which sentences of life imprisonment had been imposed for offenses in a specified list in the period 1987-90. The list generally included offenses for which the death penalty is currently authorized under federal law, and existing provisions for which new death penalty authorizations have been proposed. The purpose of the request was presumably to provide a basis for estimating the number of cases in which the death penalty might be imposed if it was available.

The Department of Justice sent a response to Senator Biden on June 12 which provided the specific information requested (formal "life imprisonment" sentences). It also provided information on cases under these statutes in which sentences of 40 years or more were imposed, since judges frequently impose very long terms of years (e.g., 999 years) which are practically equivalent to life imprisonment in lieu of a formal life imprisonment sentence.

The information sent to Senator Biden showed 181 sentences of life imprisonment or its equivalent under these statutes in the specified period. When 21 U.S.C. 848 -- the Continuing Criminal Enterprise drug offense statute -- was added in, 63 additional cases were found with such sentences. See Letter of Assistant Attorney General W. Lee Rawls to Honorable Joseph R. Biden, Jr. (June 12, 1991) (with enclosed tables).

Current prosecution figures, though substantial, are an inadequate indication of the number of death sentences that would likely be sought and imposed if the death penalty were generally available to federal prosecutors. As indicated above, the largest death penalty category under the President's bill is drug-related killings, and there is no provision of comparable scope under current law.

Moreover, even where comparable offenses do now exist, the addition of a useable death penalty would increase the incidence of federal prosecution. Federal prosecutors will initiate prosecution and seek the death penalty in many cases in which they currently would defer to state prosecution. For example, federal prosecution will often be an attractive option to complement state and local enforcement efforts and to spare overburdened local district attorney's offices the increased burden of carrying out a capital prosecution.

While the precise number of death penalty cases would depend on a variety of factors, it is clear that the number would be substantial. By way of comparison, the states collectively impose roughly 250 to 300 death sentences a year. See Bureau of Justice Statistics, Capital Punishment 1989, at 10. This level would be equaled in federal prosecution if each United States Attorney sought and obtained an average of three death sentences

a year. The large volume of capital cases that would be within federal jurisdiction under the President's proposal, and the greater flexibility that is generally available to federal prosecutors in assigning resources to priority areas, suggest that federal capital sentencing at this level would be possible.

II. Indian Country Cases

At the hearing before the Subcommittee, the question was raised of whether Indian country murders should be specially exempted from the operation of a federal death penalty. The death penalty legislation passed by the House of Representatives last year contained a provision of this type, which limited the application of the death penalty under 18 U.S.C. 1111 to reservations in which the tribal government affirmatively elected to have it apply. The justification offered for such an exemption is that it would avoid discrepancies between Indian country cases and cases in the general population in states that do not have a death penalty under their own laws.

However, most Indian country states -- like most states generally -- do have the death penalty under state law. Hence, a special exemption for Indian country cases is more likely to result in discrepancies. Its normal effect would be to create death-penalty-free zones on Indian reservations, where the death penalty would be available for comparable offenses committed elsewhere in the state.

Discrepancies could result from the availability of the federal death penalty only in the small minority of states that do not authorize the death penalty under state law. In such states, Indians on reservations would generally enjoy the protection against violent crime afforded by the deterrent effect of the death penalty, while persons elsewhere in the state generally would not. However, we believe that potential Indian victims should have the highest degree of protection against lethal criminal violence, and that the death penalty should be available to punish such crimes against Indian victims. To the extent that a discrepancy results in relation to the general population of the state, the state could eliminate the discrepancy by enacting the death penalty for murders committed in its general population, as most states have already done.

We would note further that "discrepancies" of this type are a normal consequence of Congress's decision to give the federal government jurisdiction to prosecute serious crimes in Indian country. See 18 U.S.C. 1152-53. The definitions and authorized penalties for federal offenses generally apply in such cases, though they may be higher or lower than the penalties authorized for comparable offenses under state law. Unless Congress wishes to reconsider the continuation of federal jurisdiction over Indian country cases, we see no basis for treating the death penalty differently from other penalties in this regard.

I trust that the thoughts contained in this letter adequately respond to the members' questions.

Sincerely,

W. Lee Rawls
Assistant Attorney General

Mr. SCHUMER. As you know, racial justice goes before Mr. Edwards' subcommittee, and that's why we didn't put it in. But I have a comment on racial justice and would welcome your response. Last year, consensus of the House was both for a death penalty and for racial justice. I wouldn't be surprised if the same consensus occurred again this year and given the long history of racism in the country if some form of a racial justice act was enacted to just make certain that race doesn't enter into capital cases.

It is my view that last year, racial justice killed the whole crime bill, not anything else. I disagree with Senator Thurmond who said if you had racial justice in any form he would not be for a crime bill. The House insisted that it had to be in some form.

Would you be willing to work with members who wanted to work out some compromises on racial justice so that we might not see a rerun of last year, and to make sure that we truly have a crime bill which has many provisions in that both you and we want signed into law?

Mr. BARR. Certainly I'd be willing and anxious to work with the committee.

Mr. SCHUMER. I do want a crime bill. All I'm saying is the position of a no Racial Justice Act after it's passed in the House is going to allow some of those who don't want a crime bill to box up the whole works. My plea would be that we not fall in to that same trap again.

Go ahead, I'm sorry.

Mr. BARR. I think the Racial Justice Act is a misnomer because I don't think it has anything to do with racial justice and certainly nothing to do with justice. But I know that this committee doesn't have jurisdiction over it and I don't want to take up your time this afternoon by getting into all the nitty-gritty of it.

We think that there are a lot of protections in existence already to ensure that race is kept out of the criminal process and specifically the capital sentencing process.

We've also proposed some additional steps; indeed, the Supreme Court notes in *McCleskey* that any defendant who wants the opportunity to show that race was a factor is free to introduce any evidence he wants, including statistical evidence.

Mr. SCHUMER. That's not the thrust of my remarks.

Mr. BARR. We would obviously be willing to work with the committee to consider and to explore ways of ensuring that there is no discrimination in the application of the death penalty.

But, obviously, we would be opposed to a quota system or some system that we believed——

Mr. SCHUMER. That's the wrong subcommittee also.

Mr. BARR. We think the Racial Justice Act is a quota system, that death by the numbers that will insinuate race, and not keep race out of the process but insinuate race and shift the focus of attention from the justice in an individual case to statistical combat over how to explain patterns in 1,000 cases, and so forth.

I don't want to get into all the details; I just want to say that we'd like to work with you on measures, provided they don't nullify the death penalty and provided they are in keeping with our basic

system of justice, which is individual justice based on the circumstances of the individual case.

Mr. SCHUMER. Given how important the President, the Attorney General and yourself seem to feel a crime bill is, given all of its other provisions, and given the fact the President does feel the death penalty is, as the Attorney General said, one of the three pillars of the crime bill, allowing the bill to stumble over this particular issue sort of misplaces the values that the President seeks.

And all I would urge is that the position on last year's Racial Justice Act, had to come out altogether or there was going to be no crime bill. It would be a mistake for all of us who agree on most of the things——

Mr. BARR. That's still our position, Mr. Chairman. The Racial Justice Act as proposed is incompatible with the death penalty, it would nullify the death penalty. I think the prosecutors in this country—Federal, State, and local—are agreed on that. There's no doubt about it. We'd like the opportunity to show you that that is true, that that's just not rhetoric. And I know that you will keep an open mind on it and let us make our arguments to you at the appropriate time about that.

So the versions that we have seen to date are unacceptable and they would make the death penalty unworkable. And we think that they are indeed perverse Orwellian and the kind of regime that they would establish; and we'd like the chance to demonstrate that to you.

At the same time, we have the Equal Justice Act, title 10 of our proposal, where we propose measures that we think would assist in ensuring that race is not a factor. We're willing, obviously, to work with people of good will to see if there's something that will not frustrate the death penalty and achieve all of our objectives.

But the Racial Justice Act as currently proposed is unacceptable.

Mr. SCHUMER. I've made my point and you've made yours.

The one final thing I'd say is, when I talk about prevention in addition to punishment, it is not as a replacement for punishment, nor is it gainsaying the importance of punishment. There's a preventive measure as well as a retribution measure, and just a statement of society, which I think is important as well.

My constituents and I feel anguish when somebody commits crimes, and for whatever reason, is out on the streets, not punished, or not punished sufficiently.

I think that for too long government has scoffed at that anguish—and it's real—and it lessens people's faith in government. One of my goals is to make sure that happens less—I'm not going to eliminate it altogether—but lessen it. But having said all that, it seems to me that much of the work on punishment has been done by previous Congresses, by this administration and by the previous administration. We've increased sentences, we've built more jail cells, and there's more to do.

But when the Attorney General says one of the three pillars of the President's crime bill is the death penalty—and I think Mr. Hughes brought out as you did—it's going to affect a small number of cases. I think society's opprobium is appropriate for those who commit treason, as well as for drug dealers. A man like "Mr. Gascha" who is killing people should suffer the full wrath of soci-

ety's opprobium. I feel far more anger at him, in fact, than I do at a mule who, you know, is some guy on the street who commits their murder.

But still it's a relatively small number. I think in my opening statement I mentioned close to 2,500 cases out of the million people in prison are affected by the death penalty provision, habeas corpus, which affects even a smaller number of them; and the exclusionary rule, which, again, affects a small number of cases—an important number, but a small number.

We may have some disagreements within the confines of those cases, but I don't think the vast majority of Congress objects to those three concepts.

Where the objection is, or where the rub, the scraping, the chafing is, is when those become the pillars of a complete crime bill, and so many other things. To me, eliminating assault weapons would do more to make the streets safer than those three things—if it had to be relative, and it's not, you can do both—but it chafes.

That is why I have taken to emphasizing prevention. And again, not sociological prevention—as much as you know my record, I'm for all that, but I don't wait a generation to see if sociological prevention works; I mean immediate prevention, I mean things that get at it right away.

That is where I think the administration is somewhat off base. No motivational attribution—in terms of my way of looking at the problem, that's where we differ. I am not gainsaying punishment, but I am saying that there is so much work to be done in the preventive aspects; whereas the focus for the decade-and-a-half has been on the punishment aspects. Maybe we ought to be changing, not our beliefs, but our energies and emphasis a little bit.

That's my response to your initial comments.

Mr. Schiff, do you have any further questions?

Mr. SCHIFF. With your permission, I'd ask one.

Mr. SCHUMER. Please.

Mr. SCHIFF. Although after that colloquy I feel this is pretty mundane—I want to go back to the particular proposals.

One area of concern in this particular proposal we're considering today deals with expanding the potential Federal death penalty into reckless behavior—and, of course, there's already been much said.

I wonder if you could give one example of what would be the kind of reckless conduct which ought to be subject to the death penalty which is not now subject to the death penalty, so we have some feel, on the subcommittee, for what the administration is trying to get at.

Mr. BARR. A lot of terrorist actions, for example, would not, strictly speaking, be intentional killings—blowing up facilities; the defendant would say, I had no intent to kill that individual, specific individual. That's a classic example of the kind of reckless state of mind that we would want to cover in this.

Mr. SCHIFF. Would it go all the way to a high speed chase? In other words, the defendant is being pursued, the police try to pull the suspect over, the suspect won't pull over, the suspect drives at a high rate of speed and someone is killed in an auto accident.

Would that be the kind of reckless behavior that would potentially bring the death penalty under this bill?

Mr. BARR. I wouldn't think so.

Mr. SCHIFF. Thank you, Mr. Chairman, I appreciate the extra time.

Mr. SCHUMER. Thank you, Mr. Schiff.

Mr. Hoagland.

Mr. HOAGLAND. I have nothing.

Mr. SCHUMER. Thank you.

Thank you, Mr. Barr. As always, your testimony was informative. I'd like to say I think the committee appreciates—certainly I do, and I think I could speak for the whole committee, even where we have disagreements—your attempt to deal with the issues head-on and forthrightly.

What I'd like to do in the whole crime area is deal with the substantive issues and move toward them. We'll have our days of rhetoric but it doesn't have to be all rhetoric, and you've helped that a great deal. So, thank you.

Mr. BARR. Thank you, Mr. Chairman.

Mr. SCHUMER. Let us please call our second panel to the witness table. Our second panel will consist of two witnesses. The first is Ms. Diann Rust-Tierney, director of the Capital Punishment Project of the ACLU, the American Civil Liberties Union. Ms. Rust-Tierney has been a legislative counsel with the ACLU since 1985 and has served on a variety of legal service positions.

Next to her is Mr. David Bruck, representing the Legal Defense of the NAACP. Mr. Bruck is the chief attorney with the South Carolina Office of Appellate Defense. He has broad practical experience in death penalty litigation and has written and spoken extensively on the subject.

I want to welcome both of you. Your written statements shall be submitted for the record, without objection.

Ms. Rust-Tierney, if you would begin in whichever way you see fit.

STATEMENT OF DIANN RUST-TIERNEY, DIRECTOR, CAPITAL PUNISHMENT PROJECT, AMERICAN CIVIL LIBERTIES UNION

Ms. RUST-TIERNEY. Thank you, Mr. Chairman.

First of all, I'd like to extend the appreciation of the American Civil Liberties Union for being asked to testify on this subject of major importance to us.

Let me say at the outset, that the American Civil Liberties Union opposes the death penalty under all circumstances as cruel and unusual punishment.

Let me also reiterate our steadfast opposition to the expansion of the Federal death penalty in the course of this Congress or any Congress. We agree with Justice Marshall and former Justice Brennan that the death penalty is inherently a denial of the basic humanity of individuals, which is the fundamental principle underlying our Constitution.

We believe, furthermore, that the death penalty should be rejected because it serves no penal purpose better than any other punishments.

enough money and the movie moguls have enough money to hire pretty good lawyers. All of a sudden, we get this bomb dropped on here, and anybody who has any understanding of administrative law and practice knows that this was designed to postpone and stall an FCC decision. I am concerned about it, very concerned about it. I would be concerned if it were a Democratic administration; I am concerned since it is a Republican administration, and I think we are entitled to answers.

Mr. THORNBURGH. I will convey that.

Senator HOLLINGS. It is an offense to the administrative process. The gentleman who is in charge of the administrative process commits the gravest offense to it. I don't get it.

Senator RUDMAN. I have some questions which you can answer. [Laughter.]

Senator HOLLINGS. All right.

Senator RUDMAN. But I must say, I was just taken aback yesterday when a copy of this letter was delivered to me. We have been through so much. There is so much history that I won't bore you with. However, we finally were at a point where we thought, "Let the log roll; let it happen," and all of a sudden, bang.

Mr. THORNBURGH. I will put a big star beside that.

Senator RUDMAN. Good. [Laughter.]

[CLERK'S NOTE.—The following was submitted to the subcommittee subsequent to the hearing.]

LETTER FROM WILLIAM P. BARR, DEPUTY ATTORNEY GENERAL, OFFICE OF THE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

MARCH 15, 1991.

Honorable WARREN RUDMAN,
United States Senate,
Washington, DC.

DEAR SENATOR RUDMAN: I am writing in response to your questions forwarded yesterday concerning a March 13 letter from Assistant Attorney General Jim Rill to Federal Communications Commission (FCC) Chairman Sikes regarding the financial interest and syndication rules.

Neither Assistant Attorney General Rill nor anyone else in the Antitrust Division informed me about the March 13 letter prior to its submission to the FCC. I received no communications from anyone in the Executive Branch or outside the Executive Branch asking that such a communication be made to the FCC. With respect to whether Mr. Rill had such communications, I have asked him to respond to your questions personally.

As for the propriety of the letter, Assistant Attorney General Rill has explained to me, as he will explain to you directly in his letter, that the Department of Justice's jurisdiction over the consent decrees that settled the network antitrust cases exempted the March 13 letter from the Commission's rule concerning ex parte contacts. See 47 C.F.R. § 1.1204(b)(5) (exempting presentation from "a branch of the Federal Government or its staff and [which] involves a matter over which that * * * branch and the Commission share jurisdiction."). Mr. Rill observes that where, as here, the United States has an interest in the proceeding and has participated throughout the proceeding, a letter seeking public comment on what might be a new proposal was not unreasonable. He notes that four of the five commissioners agreed that some comment period would be helpful to the Commission's deliberations. Based on his explanation, I am satisfied that his letter was not improper.

Very truly yours,

WILLIAM P. BARR,
Deputy Attorney General.

LETTER FROM JAMES F. RILL, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

MARCH 15, 1991.

Honorable WARREN RUDMAN,
United States Senate,
Washington, DC.

DEAR SENATOR RUDMAN: At the request of Deputy Attorney General William P. Barr, I am writing in further response to the questions you forwarded yesterday concerning my March 13 letter to Federal Communications Commission Chairman Sikes regarding the financial interest and syndication rules.

As set forth in more detail in the attached response, I did not inform Mr. Barr about the March 13 letter prior to its submission to the Commission, and I received no communications from anyone in the Executive Branch or outside the Executive Branch asking that such a communication be made to the Commission. Moreover, in my opinion, the letter was appropriate given the Department's coordinate jurisdiction in this matter, the Commission's rules of practice, and principles of sound administrative procedure and public policy.

Very truly yours,

JAMES F. RILL,
Assistant Attorney General.

FURTHER RESPONSE OF ASSISTANT ATTORNEY GENERAL JAMES F. RILL, TO THE QUESTIONS SUBMITTED BY SENATOR WARREN RUDMAN TO DEPUTY ATTORNEY GENERAL WILLIAM BARR

Question. Did Assistant Attorney General Rill inform you prior to submission of this letter to the FCC? If so, did you approve sending this letter?

Answer. I did not inform Deputy Attorney General Barr prior to submission of my March 13 letter to Chairman Sikes.

Question. Did either you or Mr. Rill receive a written or oral communication from anyone else in the Executive Branch asking that such a communication be made? If so, please provide the names and nature of the request. If you believe disclosure of this information is precluded by lawyer/client privilege, please provide the name of the individual client.

Answer. I did not receive any written or oral communication from anyone else in the Executive Branch asking that such a communication be made.

Question. Did either you or Mr. Rill receive a written or oral communication from anyone outside the Executive Branch asking that such a communication be made? If so, please provide the names and the nature of the request. If you believe disclosure of this information is precluded by lawyer/client privilege, please provide the name of the individual client.

Answer. I did not receive any written or oral communication from anyone outside the Executive Branch asking that such a communication be made.

Question. Do you believe it was appropriate for such a letter to have been sent by an employee of the Justice Department, given the ex parte nature of the proceedings before the FCC? As a matter of policy, is it appropriate for the Justice Department to comment or make recommendations on procedural issues, as opposed to policy issues, pending before independent regulatory agencies?

Answer. I believe that it was appropriate and productive to have sent the March 13 letter to Chairman Sikes. Network ownership of financial interests and syndication rights in television programming currently is restricted by both the Federal Communication Commission's financial interest and syndication rules and separate Department of Justice consent decrees settling antitrust litigation against the major networks. The Department thus has coordinate jurisdiction in this subject matter. Moreover, public statements by four of the five FCC commissioners agreed with my suggestion for public comment on the new proposal that we understood was to be put before the Commission.

As a preliminary matter, I should point out that my letter to Chairman Sikes is a contact that, in light of the Department's jurisdiction over the consent decrees in the network antitrust cases, is exempt from the Commission's prohibition on ex parte contacts during the Sunshine Agenda period concerning matters listed on the Sunshine Agenda. See 47 C.F.R. § 1.1204(b)(5) (exempting presentation from "a branch of the Federal Government or its staff and [which] involves a matter over which that * * * branch and the Commission share jurisdiction."). Chairman Sikes took precisely this view in his March 13 statement announcing that no action would

TUESDAY, MARCH 12, 1991.

GENERAL LEGAL ACTIVITIES

WITNESSES

WILLIAM P. BARR, DEPUTY ATTORNEY GENERAL

HARRY H. FLICKINGER, ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION

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GENERAL LEGAL ACTIVITIES APPROPRIATION

Mr. EARLY [presiding]. The Committee will come to order. Continuing with our review of the Department of Justice, we will now hear testimony concerning the General Legal Activities appropriation. General Legal Activities requests $407,742,000 in fiscal year 1992, a net increase of $62,862,000 over fiscal year 1991 enacted amounts. We will insert in the record at this point the fiscal year 1992 budget justifications for this amount.

[The information follows:]

Office of the Solicitor General
Salaries and expenses
Summary of Requirements
(Dollars in thousands)

Adjustments to base:	Perm. Pos.	Work-years	Amount
1991 as requested	49	54	$4,889
Reduction of workyears due to absorption of 1991 pay raise	...	-2	...
1991 appropriation anticipated	49	52	4,889
Mandatory increases:			
One Additional Compensable Day	...	...	13
1991 Pay Annualization	...	...	19
1992 Pay Raise	...	...	81
Within-grade Increases	...	...	11
Executive Level/SES Pay Increase	...	...	43
Health Benefits	...	...	10
Federal Employees Retirement System	...	...	6
Postage	...	...	2
GPO and Department Printing	...	...	34
Security Investigations	...	...	1
Security Reinvestigations	...	...	21
General Services Administration Rent	...	...	32
General Pricing Level Adjustments	...	...	14
Decreases:			
Financial Operations Services	...	...	-1
1992 Base	49	52	$5,175

	1990 As Enacted			1990 Actual			1991 Appropriation Anticipated			1992 Base			1992 Estimate			Increase/Decrease		
Estimates by program	Perm. Pos.	WY	Amount	Perm. Pos.	WY	Amount	Perm. Pos.	WY	Amount	Perm. Pos.	WY	Amount	Perm. Pos.	WY	Amount	Perm. Pos.	WY	Amount
Conduct of Supreme Court proceedings and review of appellate matters	49	54	$4,650	49	50	$4,550	49	52	$4,889	49	52	$5,175	49	54	$5,313	...	2	138
Other Workyears																		
Overtime		2			2			2			2			2			...	
Total compensable workyears		56			52			54			54			56			2	

Long Range Goal: To be as effective as possible in the conduct of all aspects of Government litigation in the appellate courts and the U.S. Supreme Court.

Major Objectives:

To adequately represent the interests of the U.S. Government in cases before the Supreme Court.

To review appellate cases to determine their suitability for appeal to the U.S. Supreme Court or to a lower Federal appellate court.

To meet all filing dates of cases before the U.S. Supreme Court.

Base Program Description: The major function of the Solicitor General's Office is to supervise the handling of Government litigation in the Supreme Court of the United States.

The Office of the Solicitor General is the Government's foremost legal office. The original Statutory Authorization Act of June 22, 1870, states: "There shall be in the Department of Justice an officer learned in the law, to assist the Attorney General in the performance of his duties to be called the Solicitor General." As stated in 28 CFR 0.20, the general functions of the Office are as follows: (1) conducting or assigning and supervising all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, briefs and arguments; (2) determining whether, and to what extent, appeals will be taken by the Government to all appellate courts (including petitions for rehearing en banc and petitions to such courts for the issuance of extraordinary writs); (3) determining whether a brief amicus curiae will be filed by the Government, or whether the Government will intervene, in any appellate court; (4) assisting the Attorney General, the Deputy Attorney General and the Associate Attorney General in the development of broad Department program policy.

Accomplishments and Workload: Recent accomplishments and workload of the Office of the Solicitor General are presented as follows:

Supreme Court Matters:	1989	1990	1991	1992 Base	Change	1992 Estimate
Pending, beginning of term	425	438	457	462	...	462
Received	2,142	2,158	2,163	2,165	...	2,165
Terminated	2,129	2,139	2,158	2,161	...	2,161
Pending, end of term	438	457	462	466	...	466
Other Activities:						
Appellate determination	1,537	1,539	1,543	1,545	...	1,545
Certiorari determinations1/	740	748	750	750	...	750
Miscellaneous recommendations2/	379	381	382	383	...	383
Oral Arguments	83	75	76	76	...	76

1/ Includes certiorari authorizations, no certiorari decisions, direct appeal authorizations and no direct appeal decisions.

2/ Miscellaneous decisions include the following: amicus participation, mandamus, rehearing, settlement, bails, stays, etc. This figure does not include oral arguments in the Supreme Court, conferences, correspondence, etc.

Explanation: Cases decided during the 1989 Term of the Supreme Court in which the Solicitor General filed a brief include those in which the Court held that: (1) neither the First Amendment nor a common-law evidentiary privilege bars the enforcement of a subpoena issued to a university by the Equal Employment Opportunity Commission in an investigation of alleged employment discrimination (University of Pennsylvania v. EEOC); (2) a federal district court abused its discretion in imposing contempt fines on individual members of the Yonkers City Council for refusing to vote for a remedial measure contemplated by a consent decree without first imposing fines on the City alone (Spallone v. United States); (3) the statute assessing a percentage fee from the Iran - United States Claims Tribunal does not violate the Just Compensation Clause of Due Process Clause of the Fifth Amendment (United States v. Sperry Corp.); (4) an agreement by a group of lawyers to cease accepting appointments to represent indigent criminal defendants until the local government increases their compensation is a per se violation of the Federal Trade Commission Act and is not protected by the First Amendment (FTC v. Superior Court Trial Lawyers Ass'n); and (5) the Fourth Amendment does not apply to the search and seizure of property located in a foreign country and owned by a non-resident alien (United States v. Verdugo-Urquidez); (6) the question whether the law directing Federal district courts to impose monetary assessments against convicted defendants was passed in violation of the Origination Clause of the Constitution does not present a nonjusticiable political question, but, on the merits, that law does not violate the Origination Clause (United States v. Munoz-Flores); (7) the Equal Access Act prohibits content-based discrimination against student speech in a high school's student club program, and that Act is consistent with the Establishment Clause of the First Amendment (Board of Education of Westside Community Schools v. Mergens); (8) a state may, consistently with the Due Process Clause of the Fourteenth Amendment, require clear and convincing evidence that an incompetent person would want life-sustaining procedures withdrawn before it approves the termination of such procedures (Cruzan v. Director of Missouri Department of Health); (9) a state statute requiring notification of the parents of a minor who seeks an abortion (subject to medical bypass in appropriate circumstances) and a 48-hour delay, does not violate the Due Process Clause of the Fourteenth Amendment (Hodgson v. Minnesota); and (9) the Office of Personnel Management may not be equitably estopped from terminating a civil service disability retirement annuity as required by law (OPM v. Richmond).

Cases to be decided during the 1990 Term of the Supreme Court include those in which the Solicitor General has filed a brief arguing that: (1) in a prosecution for violation of the criminal tax laws, the element of willfulness may be negated by a good faith misunderstanding of the law only if that misunderstanding is objectively reasonable (Cheek v. United States); (2) a school district that has achieved unitary status is entitled to be released from a desegregation decree (Board of Education of Oklahoma City Public Schools v. Dowell); (3) the validity of an employer's fetal protection policy that excludes fertile women from certain jobs must be analyzed under the bona fide occupational qualification exception in Title VII of the Civil Rights Act of 1964, and an employer bears a rigorous burden in defending such a policy (United Automobile Workers v. Johnson Controls, Inc.; (4) the defendant in a Federal criminal prosecution forfeits his right to have a judge preside over jury selection if he does not object to assignment of that role to the magistrate (United States v. France); and (5) regulations issued by the Secretary of Health and Human Services under Title X of the Public Health Service Act that prohibit grant recipients from furnishing abortion-counseling or abortion-referral services within their Title X programs are consistent with the Act and do not violate the First Amendment rights of grantees or pregnant women or the right, recognized by the Court under the Fifth Amendment, of a pregnant woman to terminate her pregnancy (Rust v. Sullivan; State of New York v. Sullivan).

878

Decision Unit Funding Level Requirements
(Dollars in Thousands)

Organization Office of the Solicitor General

Decision Unit 20SG01 Federal Appellate Activity

Resource Requirements	1989	1990	1991	1992 Base Level		1992 Request Level	
				Change	Cum.	Change	Cum.
BUDGET AUTHORITY	$4,181	$4,550	$4,889	$286	$5,175	$138	$5,313
OUTLAYS	4,117	4,232	4,340	711	5,051	120	5,171
Appropriated Positions	49	49	49	...	49	...	49
Workyears:							
Full-Time Permanent	41	44	46	...	46	2	48
Other	8	6	6	...	6	...	6
Subtotal	49	50	52	...	52	2	54
Overtime/Holiday	2	2	2	...	2	...	2
Total	51	52	54	...	54	2	56

Program Changes: The request of $96,000.00 is for the fifty percent portion of the pay raise absorbed in 1991 and will enable this office to fund 2 full-time equivalent workyears. This will allow the office to effectively carry out its appellate program. The Office of the Solicitor General budget consists almost entirely of uncontrollable items, printing costs, and personnel costs. Absorption of this pay raise again in 1992 would require the office to decrease its program by 2 full-time equivalent workyears, which will undermine the effectiveness of the office's mission.

In 1991, we will have to reduce our full-time equivalent workyears by 2 in order to fund the 1991 pay raise absorption. This will be accomplished by increasing our lapses between departures and arrivals. Since the Court does not readily grant extensions of time to file cases, our attorneys will be required to increase their work schedules to meet the stringent Court deadlines. If it is restored in 1992, we would be able to fill our positions more quickly and our attorneys will not be required to increase their work schedules to meet the Court's deadlines. We have already reduced our staff to the "bare bones" level.

The request of $39,000.00 provides funding for 16 attorneys currently on-board to convert to the AD pay system. This increase is based on the median difference ($2,420) in salary between the GS and AD pay system for attorneys of comparable length of service. This is the first year requirement for a proposed 2-year conversion to the AD pay system. Because this is a relatively minor request, we did not include costs for related benefits. The request for 1993 will include the remaining differences between the pay systems, related benefits, and the increase needed for the lifting of the pay cap in January 1991.

The requested program increase of $3,000.00 is necessary to support the Department's implementation of the Administration's "Management Priorities for the 1992 Budget" as outlined in OMB memorandum (M-90-05) dated July 16, 1990 to all Executive Departments and Agencies. The funding will be used to specifically address upgrades in financial management systems consistent with the Administrative long-standing goals for consolidating, upgrading and modernizing a single integrated financial management system within each agency, with full implementation of the Core Financial Requirements, the Standard Ledger and capable of producing auditable financial statements.

Schedule of Cost Inputs
(Dollars in thousands)

Organization Office of the Solicitor General

Decision Unit 20SG01 Federal Appellate Activity

	Request Level		
	Pos	WY	Amount
Positions by Type			
Attorney	...	...	$ 39
Pay raise absorption	...	2	96
Subtotal	...	2	135
Other Services	...	...	3
Subtotal	...	...	3
Total	...	2	$138

Description of Cost Inputs

The 1992 submission includes program increases of $96,000 for the fifty percent portion of the pay raise absorbed in 1991--these resources will fund 2 full-time equivalent workyears; and $39,000 for converting 16 attorneys currently on board to the AD pay system, which will fund salaries of attorneys. The request of $3,000 for upgrades to the Financial Management Systems will increase other services areas.

880

Office of the Solicitor General
Salaries and expenses
Summary of Decision Unit Resources by Object Class
(Dollars in thousands)

Object Class		1990 Actual		1991 Estimate		1992 Estimate		Increase/Decrease	
		Workyears	Amount	Workyears	Amount	Workyears	Amount	Workyears	Amount
11	Personnel Compensation	50	$2,556	52	$2,716	54	$3,018	2	$302
12	Personnel benefits		465		543		559	...	16
13	Benefits to former personnel		2		2		2	...	...
21	Travel and transportation of persons		10		10		10	...	...
22	Transportation of things		28		33		34	...	1
23.1	GSA Rent		444		452		484	...	32
23.3	Communications, utilities and miscellaneous charges		265		292		300	...	8
24	Printing and reproduction		541		574		608	...	34
25	Other services		174		204		232	...	28
26	Supplies and materials		37		38		40	...	2
31	Equipment		28		25		26	...	1
	Total obligations	50	4,550	52	4,889	54	5,313	2	424

Office of the Solicitor General

Salaries and expenses

Financial Analysis - Program Changes

(Dollars in thousands)

Item	Federal Appellate Activity	
	Pos.	Amount
AD pay increase	...	$ 39
Absorption of prior year pay raise	...	73
Total workyears and personnel compensation	2	112
Personnel benefits	...	23
Other services	...	3
Total program workyears and obligations changes requested, 1992	2	$138

Office of the Solicitor General

Salaries and expenses

Detail of Permanent Positions by Category

Fiscal Years 1990 - 1992

Category	1990 Authorized	1991 Total	1992 Total
Attorneys. (905)	23	23	23
Paralegal Specialists (950)	6	6	6
Other Legal and Kindred (900-998)	4	4	4
Gen. Admin., Clerical and Office Svc. (300-399)	16	16	16
Total	49	49	49
Washington	49	49	49

Tax Division
Salaries and expenses, General Legal Activities
Crosswalk of 1991 Changes
(Dollars in thousands)

Activity/Program	1991 President's Budget Request			Approved Reprogrammings			1991 Program Supplementals Requested			1991 Appropriation Anticipated		
	Pos.	WY	Amount	Pos.	WY	Amount	Pos.	WY	Amount	Pos.	WY	Amount
Federal appellate activity	98	93	$6,522	...	...	...	...	...	$62	98	93	$6,584
Criminal tax prosecution	120	117	8,422	...	...	...	12	6	746	132	123	9,168
Civil tax litigation	339	330	29,300	...	...	...	...	...	246	339	330	29,546
Management and administration	95	103	6,243	...	...	...	...	...	32	95	103	6,275
Total	652	643	50,487	...	...	...	12	6	1,086	664	649	51,573

Supplementals Requested: A 1991 supplemental request for 12 positions, 6 full-time equivalent workyears and $676,000 in budget authority is necessary to address financial institutions fraud litigation.

In addition, $410,000 in supplemental funding is required to cover the costs associated with a decision by the Judicial Conference to raise by over 50 percent the fees paid by the Federal Government for transcription services in 1991.

Tax Division
Salaries and expenses, General Legal Activities
Summary of Requirements
(Dollars in thousands)

Adjustments to base:	Perm Pos.	Work-years	Amount
1991 as requested	652	643	$50,487
1991 Program supplemental requested	12	6	1,086
1991 appropriation anticipated	664	649	51,573
Mandatory increases:			
One additional compensable day	...	...	150
Annualization of 1991 pay raise	...	...	232
1992 pay raise	...	...	1,003
Within-grade increases	...	...	300
Annualization of 1991 program supplemental	...	6	500
Executive level/SES pay increase	...	...	149
Health benefits	...	...	142
Federal Employees Retirement System (FERS)	...	...	76
Federal Insurance Corporation Act (FICA)	...	...	30
Travel: Mileage	...	...	9
Postage	...	...	31
Government Printing Office and Department printing	...	...	4
Employee data and payroll service	...	...	7
Security investigations	...	...	6
Security reinvestigations	...	...	156
GSA rent	...	...	334
GSA recurring reimbursable services	...	...	348
General pricing level adjustment	...	...	217
Total, mandatory increases	...	6	3,694
Decreases:			
Unemployment compensation	...	...	-1
Financial operations service	...	...	-24
Non-recurring decreases - 1991 supplemental	...	...	-144
Total, decreases	...	...	-169
1992 base	664	655	55,078

Estimates by Program	1990 as Enacted Perm. Pos.	WY	Amount	1990 Actual Perm. Pos.	WY	Amount	1991 Appropriation Anticipated Perm. Pos.	WY	Amount	1992 Base Perm. Pos.	WY	Amount	1992 Estimate Perm. Pos.	WY	Amount	Increase/Decrease Perm. Pos.	WY	Amount
General Tax Matters:																		
Federal appellate activity	98	92	$6,193	98	92	$6,193	98	93	$6,584	98	93	$7,000	103	96	$7,384	5	3	$384
Criminal tax prosecution	120	117	7,792	120	117	7,792	132	123	9,168	132	129	10,044	150	138	11,218	18	9	1,174
Civil tax litigation	339	317	22,733	339	317	22,733	339	330	29,546	339	330	31,344	355	338	32,577	16	8	1,233
Management and administration	99	103	5,526	99	103	5,526	95	103	6,275	95	103	6,690	95	103	8,104	...	...	1,414
Total	656	629	42,244	656	629	42,244	664	649	51,573	664	655	55,078	703	675	59,283	39	20	4,205
Reimbursable workyears		12			12			12			12			12			...	
Total		641			641			661			667			687			20	
Other workyears:																		
Overtime		5			5			5			5			5			...	
Total compensable workyears		646			646			666			672			692			20	

Tax Division
Justification of Program and Performance
Salaries and Expenses, General Legal Activities: 15-0128-0-1-752
Federal Appellate Activity - 2 Tax 01

Long Range Goal: To enforce uniformly and equitably the tax laws in appeals taken to the Federal and State appellate courts.

Major Objectives:

To maintain the high caliber of the Government's written and oral advocacy in tax cases on appeal and to prepare briefs and petitions required by the Solicitor General for submission to the Supreme Court.

To recommend appeal, in appropriate circumstances, of adverse Tax Court, Claims Court, District Court, and State court decisions.

To persuade the courts to adopt fair and consistent interpretations of complex new tax statutes, including provisions of the Tax Reform Act of 1986 and the 1988 Taxpayer Bill of Rights, in all cases litigated in the appellate courts.

To furnish legal advice and other litigation support to the IRS, the U.S. Attorneys' Offices, and other sections of the Tax Division.

Base Program Description: Federal Appellate attorneys litigate all Federal civil tax cases appealed to the United States courts of appeals and State appellate courts. Tax Division appellate attorneys also prepare drafts of all tax pleadings and briefs filed by the Solicitor General in the Supreme Court and make recommendations to the Solicitor General regarding the advisability of filing (1) appeals in tax cases lost by the Government in the District Courts, the Claims Court, the Tax Court, and State courts; and (2) petitions for certiorari in tax cases lost by the Government in the appellate courts. In addition, the Division's Federal Appellate attorneys handle the appeal of Freedom of Information Act and Privacy Act cases, civil tort suits which involve IRS officials, and cases involving inter-governmental immunity. They are also called upon to prepare briefs for the United States as amicus curiae in private lawsuits, in which issues affecting the interests of the IRS are presented, or in which the courts otherwise invite the Government's views on tax-related questions, including private ERISA litigation and State and local tax litigation in which Federal Constitutional issues are presented.

Accomplishments and Workload: The accomplishments of the Federal Appellate Activity program are summarized in the following table:

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
1. Appellate Caseload:							
a. Pending, Start of Year	963	924	944	22	966	...	966
b. Received	701	693	742	52	794	...	794
c. Closed	740	673	720	50	770	39	809
d. Percent Government Wins	90%	90%	90%	...	90%	...	90%
2. Work Products:							
a. Main Briefs	595	620	635	40	675	...	675
b. Reply Briefs	115	130	140	10	150	...	150
c. Briefs in Opposition	15	10	10	...	10	...	10
d. Oral Arguments	320	345	395	5	400	...	400
e. Memoranda	540	580	600	...	600	...	600
f. Dispositive/Motions	150	160	165	...	165	...	165

Explanation

This data is derived from the Tax Division's automated monthly report of case receipts, closings, and related statistics. 1989 statistics reflect actual end of year caseload. 1990 caseload estimates are projections based upon eleven months of data on actual case receipts and closings. 1991 and 1992 projections are based upon data received from the IRS' automated case tracking system, as well as internal statistics regarding the Division's civil trial docket.

Significant Cases

While caseload statistics are helpful in appraising the productivity of our Federal Appellate attorneys, and of Tax Division attorneys in general, case examples provide a better understanding of the nature and revenue impact of the litigation conducted by the Tax Division. The following examples demonstrate the critical role played by Federal Appellate attorneys in protecting the public fisc.

The cases handled by the Division's Federal Appellate Section are marked by their extraordinary complexity and administrative importance. For example, in **United States** v. **Goodyear Tire & Rubber Co.**, the Supreme Court granted certiorari to review a decision in favor of the taxpayer, and, in an unanimous opinion, ruled in favor of the Government. The Court held that the term "accumulated profits," as used in the Internal Revenue Code's definition of the foreign tax credit, should be defined by reference to the tax laws of the United States rather than by reference to the tax laws of a foreign country, as the Court of Appeals for the Federal Circuit had held. The Appellate Section's victory in **Goodyear** saved the Treasury approximately $1 billion.

Similarly, in **Colonial American Life Insurance** v. **Commissioner**, Appellate Section attorneys convinced the Supreme Court that "ceding commissions" payable on reinsurance transactions are not deductible in full at the outset of the transaction, but must be amortized over the life of the reinsurance agreement. This decision rendered non-deductible the ceding commissions payable on some $400 billion in life insurance that is reinsured annually in this country, thereby providing the Federal Treasury tens, and possibly hundreds of millions of dollars of additional revenue.

Tax litigation touches virtually every facet of our nation's economy -- from cases involving the tax treatment of bonds used in a leveraged buyout to cases involving the priority of the Government's tax claim in bankruptcy when the same corporation fails under the weight of excessive debt. The Appellate Section has begun to experience the fall-out from the sudden collapse of the corporate takeover frenzy that dazzled Wall Street in the 1980s. For example, in **Securities and Exchange Commission (SEC)** v. **Levine**, the Second Circuit ruled that the IRS had a valid lien against the assets in a receivership established by insider-trader Dennis Levine after his illegal activities were discovered. Levine, as part of the arrangement reached with the SEC, agreed to repatriate approximately $11.5 million then held in Bermuda to a receivership to pay "any and all claims" against him. Rejecting competing claims by the SEC to these funds, the Second Circuit held that the lien perfected by the Internal Revenue Service attached to the repatriated funds prior to the time that the receivership was established and that the Service's lien took priority over the claims of the SEC. The **Levine** case followed the Appellate Section's victories in over a dozen cases involving the deductibility of losses relating to commodity futures straddles placed on various Chicago and London exchanges. The Appellate Section's efforts in these straddle cases saved the Federal Treasury approximately $8 billion.

Like the other components of the Tax Division, the Appellate Section has witnessed a marked increase in bankruptcy cases. For example, in **Ron Pair Enterprises, Inc.** v. **United States**, the Supreme Court reversed the Sixth Circuit and allowed the Government to recover post-petition interest on a pre-petition claim that was secured by a tax lien on property, the value of which exceeded the amount of the claim. The decision in **Ron Pair** will mean increased recoveries in many of the more than 19,000 bankruptcies now handled annually by the Tax Division. In its 1989-1990 term, the Supreme Court decided in the Government's favor one other important bankruptcy case handled by the Appellate Section, **Begier** v. **United States**, which involved attempts by bankrupt employers to recover from the Federal Treasury amounts that had been paid to meet withholding tax liabilities. This case is exceptionally important because it will staunch the loss of hundreds of millions in withheld taxes incurred when the employer withholding agent goes into bankruptcy.

Sometimes the revenue impact of a case handled by our Federal Appellate attorneys is not immediately apparent. Such a case was **True** v. **United States**, in which the issue was whether the taxpayer was entitled to deduct, as ordinary and necessary business expenses, civil penalties imposed for the unlawful discharge of oil in violation of the Federal Pollution Control Act Amendments of 1972. Reversing the District Court's decision, the Tenth Circuit ruled that deduction of the environmental penalties was barred by a provision of the Internal Revenue Code that precludes a deduction "for fines or similar penalties paid to a government for the violation of any law." Although the case directly involved only a $1,200 penalty, the Appellate Section's victory in **True** and in a similar case, **Colt Industries, Inc.** v. **United States**, will allow the Internal Revenue Service to fend off hundreds of millions of dollars in taxpayer claims. (For example, the Government is currently seeking over $700 million in fines from Exxon for the environmental damage caused by the Exxon-Valdez oil spill). These cases illustrate that the litigation conducted by the Tax Division represents the tip of an enormous iceberg -- a single case or series of cases may establish judicial precedents that affect thousands of taxpayers.

888

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization Tax Division — Decision Unit 2TaxO1 Federal Appellate Activity

Resource Requirements	1989	1990	1991	1992			
				Base Level		Request Level	
				Change	Cum.	Change	Cum.
BUDGET AUTHORITY	$5,499	$6,193	$6,584	$416	$7,000	$384	$7,384
OUTLAYS	5,417	6,131	6,518	412	6,930	306	7,235
Appropriated Positions	95	98	98	...	98	5	103
Workyears:							
Full-time Permanent	84	91	92	...	92	3	95
Other	1	1	1	...	1	...	1
Subtotal	85	92	93	...	93	3	96
Overtime/Holiday	...	...	...	...	...	...	...
Total	85	92	93	...	93	3	96

Program Changes: For 1992, the Tax Division requests 5 positions, 3 full-time equivalent workyears, and $301,000 in new budget authority for its Appellate litigation program. The enhancements will enable the Division to hire 4 attorneys and 1 support staffer to deal with a growing number of appeals involving over $1,000,000 each.

In addition, a total amount of $83,000 is required to enable the Division to allocate more travel funds for major cases where litigation teams are assigned to handle the multiple issues involved in the appeal that were deferred due to the absorption of the 1991 pay raise.

MAJOR CASE INITIATIVE

A. The Present and the Future: Current Statistics Regarding Large-Dollar Cases

The Tax Division's Appellate Section defends the United States in all Federal tax cases appealed to Federal and State appellate courts. Under the supervision of the Solicitor General, the Appellate Section also prepares drafts of Supreme Court petitions for certiorari, briefs in opposition to the grant of certiorari, and briefs on the merits.

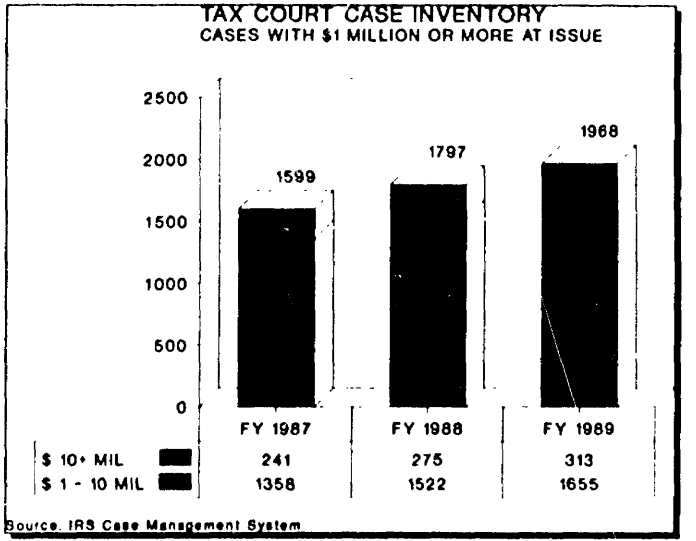
The workload of the Appellate Section is dependent not only on the number of appeals taken but also on the complexity of cases. With complexity often comes enormous revenue implications. For example, in FY 1989, the Appellate Section handled about a dozen cases presenting six issues that the Internal Revenue Service has estimated will determine the outcome in cases involving over $15.6 billion in revenues for the tax system as a whole. These cases present such questions as whether banks may be entitled to a foreign tax credit for fees paid on Brazilian loans; whether oil companies are required to pay taxes on benefits received when their operations in Iran and Kuwait were nationalized; and whether banks can amortize the value of their customer relationships. Other appeals are important because they may control thousands of cases pending administratively. For example, in the Eleventh Circuit appeal in Barton Homes, Inc. v. United States, the Tax Division has argued that the courts do not have jurisdiction to review an IRS refusal to abate $31,245.49 in interest under Section 6404(e) of the Code, a new statutory provision. The importance of this case lies not in the amount at stake, but in the fact that about 12,000 claims for abatement have been filed by taxpayers within the last three years.

In 1985, the Office of Chief Counsel, IRS, established an Industry Specialization Program (ISP) to support an existing IRS initiative designed to identify, develop, and resolve significant industry-wide issues. In 1988, the ISP function was merged into a newly-instituted Large Case Program, which also supports the IRS' Coordinated Exam Program (an audit program that targets large corporations). All these initiatives were instituted because the Service determined that less than 2% of the cases being investigated by the IRS involved more than 80% of the revenue at issue. For example, according to internal IRS statistics, the FY 1987 docket of the Tax Court included 88,873 cases. Within that docket, however, were 1,599 cases (1.8% of the total docket) that involved approximately $16 billion in tax deficiencies or nearly 80 percent of the total deficiencies at issue in the entire Tax Court docket. In FY 1988, similar large-dollar cases represented 81.6% of the Tax Court's total docket value of $22.1 billion, and in FY 1989, such cases represented 83.2% of the $23.2 billion at issue. The IRS has indicated that this trend will continue as cases under the Large Case Program move to litigation.

The cases arising from the Service's Large Case Program are now moving into the appellate courts. This is reflected not only in the multi-billion dollar cases discussed above, but also in statistics kept by the Appellate Section on the overall complexity of its docket. Each case received by the Appellate Section is rated on a 1-5 scale, with "5 weight" representing the most complex cases. In FY 1984, the Appellate Section had 93 "5 weight" cases, representing 6.8 percent of its docket; by the end of FY 1989, however, the Appellate Section had 126 such cases, representing over 14.9 percent of its docket. During this period, the Appellate Section has experienced a marked decrease in "tax protester" appeals, cases that typically are disposed of with minimal investment in briefing. Thus, while the overall number of cases in the Appellate Section has declined in the past several years, the number of cases requiring extensive briefing has increased dramatically. Appellate staffing, however, has not been expanded commensurately.

Tax Division and IRS statistics indicate that the trend towards larger cases will continue. Most tax appeals are taken from the decisions of three courts: the U.S. Tax Court, which produces approximately half of the Appellate Section's docket; and the U.S. District Courts and the U.S. Claims Court, which provide the other half. As a result of the IRS' Large Case Program, the number of cases in those courts involving more than $500,000 has increased rapidly. **As reflected in the accompanying chart, cases in the U.S. Tax Court involving over $10 million have swelled from 241 in FY 1987 to 313 in FY 1989, a 30 percent increase over two years. The Tax Court's current docket includes 15 cases which involve over $100 million; collectively these cases are worth $5.6 billion. During the FY 1987 - 1989 time period, the number of cases in the District Courts involving more than $500,000, has also increased from 148 to 175, an 18% increase. Thirty-one of these cases involve more than $10 million each. The Claims Court now has 166 large cases on its docket with $1.428 billion directly at issue.**

It takes these trial courts, on average, between 1 and 2 years to move these large cases to decision. Thus, it is almost certain that this additional wave of large-dollar cases will reach the Appellate Section in late FY 1991. Added to this mix will be at least 20-30 appeals involving so-called "mega bankruptcies", cases that are expected to arise out of the collapse of corporations whose purchases were financed with junk bonds. (These cases are discussed in detail under the segment entitled "Bankruptcy Enforcement Initiative", a program change for our Civil Trial components). These bankruptcy cases move quickly through the courts -- often it is a matter of months (and sometimes weeks) between the time such a bankruptcy is initiated and the time that a matter is appealed. **The demands of handling these large cases will far exceed the current capabilities of the Appellate Section.**



B. The Response: Targeting Major Cases with Team Litigation

To handle these large cases effectively, the Appellate Section will have to abandon its time-honored practice of assigning only one line attorney to a case. Where millions of tax dollars, and particularly where hundreds of millions or billions are at stake, the Appellate Section cannot effectively function as it has in the past. Many of the large cases now being received by the Appellate Section, and the hundreds on the dockets of the trial courts, present multiple issues and would best be approached by assigning a team of attorneys to a case, each of whom would have the responsibility for handling one or two issues. Even where it is not feasible to split issues between attorneys in this manner, the handling of many major cases could profit simply from assigning a junior attorney to assist the lead attorney in the case. This approach would put Appellate attorneys on a par with opposing law firms, which often pool the talents of five or more attorneys to represent a client in a large appeal. It would also allow the Appellate Section to make optimal use of its most senior and experienced litigators, whose time otherwise could be monopolized for several months by a single case. This team concept has been employed by the Appellate Section with favorable results in a few selected cases.

Without additional resources, the Appellate Section cannot deal with the major cases now regularly being produced by the IRS' Large Case Program. Whether the team approach is used or not, the Appellate Section must have additional resources to handle these cases, lest millions of dollars already expended by the IRS in developing these cases be wasted for the want of adequate resources to defend those administrative determinations on appeal. A single loss in one of these cases could destroy the fruit of an entire IRS enforcement initiative and cost the Federal Treasury billions of dollars. Again, the numbers speak for themselves: $14.7 billion directly at issue in 313 large cases pending in the Tax Court; $6.3 billion in 31 cases in the District Courts; and $1.1 billion in 37 cases in the Claims Court.

It is a certainty that many of these cases will migrate to the courts of appeals within the next year and a half. Unless the Appellate Section is staffed to handle these appeals when they arrive, cases that should have been won will be lost and the Federal Treasury will suffer the needless loss of hundreds of millions, if not billions, of dollars. The requested enhancements will enable the Appellate Section to deal effectively with these major cases, thereby ensuring that taxes properly owed the Government are indeed collected.

892

Schedule of Cost Inputs
(Dollars in thousands)

Organization Tax Division

Decision Unit 2Tax01 Federal Appellate Activity

	Request Level		
	Pos	Wy	Amount
Positions by Type			
Attorney	4	2	$92
Nonlegal	1	1	11
Administratively Determined Salaries	...	...	...
Subtotal	5	3	103
Personnel Benefits			40
Travel and Transportation			106
GSA Rent			22
Rent, Communications and Utilities			4
Printing			2
Other Services			47
Supplies and Materials			5
Equipment			55
Subtotal	...	...	281
Total	5	3	384

Description of Cost Inputs

Major Case Initiative - Four additional attorneys, one clerical support, and $301,000 in additional budget authority are needed to address the influx of complex, large-dollar cases produced by the IRS' Large Case Program. There are currently 371 large tax cases pending in trial courts with $22.1 billion at issue. Most of these cases will find their way to the Division's Appellate Section by FY 1992.

1991 Pay Raise Absorption - A total of $83,000 is required to cover travel expenditures for major cases where litigation teams are assigned to handle multiple issues involved in appeals that were deferred due to the absorption of the 1991 pay raise.

Tax Division

Salaries and expenses, General Legal Activities

Summary of Decision Unit Resources by Object Class
(Dollars in thousands)

Object Class	1990 Actual Workyears	1990 Actual Amount	1991 Estimate Workyears	1991 Estimate Amount	1992 Estimate Workyears	1992 Estimate Amount	Increase/Decrease Workyears	Increase/Decrease Amount
11 Personnel compensation	92	$3,976	93	$4,227	96	$4,573	3	$346
12 Personnel benefits		712		757		829		72
21 Travel and transportation of persons		136		145		252		107
22 Transportation of things		2		2		2		0
23.1 GSA rent		725		770		835		65
23.3 Communications, utilities and miscellaneous charges		310		329		337		8
24 Printing and reproduction		12		13		16		3
25 Other services		208		222		361		139
26 Supplies and materials		93		99		104		5
31 Equipment		19		20		75		55
Total obligations	92	6,193	93	6,584	96	7,384	3	800

Tax Division
Justification of Program and Performance
Salaries and Expenses, General Legal Activities: 15-0128-0-1-752
Criminal Tax Prosecution - 2 Tax 02

Long-Range Goal: To promote voluntary compliance with the tax laws through the investigation and prosecution of individuals and corporations which have violated the criminal tax laws.

Major Objectives:

To promote compliance with the tax laws by investigating and prosecuting criminal violators of those laws in cases referred by the IRS and the U.S. Attorneys' Offices, and to handle appeals resulting from these prosecutions;

To monitor and participate in grand jury investigations and to review grand jury evidence to determine whether prosecution for tax crimes should be authorized.

To serve as liaison in criminal tax investigations and prosecutions between the U.S. Attorneys' Offices and the Criminal Investigation Division of the IRS.

To investigate and prosecute cases arising from the savings and loan crisis and to support the U.S. Attorneys and Criminal Division attorneys involved in the Financial Institution Fraud Initiative (FIFI).

To supervise and prosecute criminal tax cases involving tax protesters' schemes, money laundering, off-shore banking operations, and other criminal tax evasion activities, including those involving organized and white collar crime.

To protect the Federal Treasury by ensuring that illicit tax shelter and tax evasion schemes are detected, investigated, and successfully prosecuted.

Base Program Description: By ensuring that the criminal tax laws and related criminal statutes are actively and fairly enforced, the Tax Division's Criminal Tax Prosecution program deters taxpayer fraud and promotes voluntary compliance with the tax laws. Attorneys in the Criminal Enforcement Sections investigate and prosecute individuals and corporations who willfully fail to file returns, file false returns or otherwise intentionally evade their obligations under the Federal tax laws. They also investigate and prosecute tax violations arising out of financial institution fraud, narcotics-related crimes, organized crime, public corruption, and domestic and international tax conspiracies. A balanced compliance program is maintained through criminal investigation and prosecution of individuals and corporations in a wide variety of industries and occupations.

The Criminal Enforcement Sections receive prosecution and grand jury referrals in tax cases from the IRS and screen them to ensure that uniform standards of prosecution are employed and that all criminal tax violations warranting prosecution are, in fact, prosecuted. The review of criminal tax cases by Criminal Enforcement Sections' attorneys contributes to the high overall quality of criminal tax prosecutions and results in better than a 95% conviction rate, essential to deter taxpayer fraud. Authorized prosecutions are handled either by the U.S. Attorneys, or, in complex or significant cases, by the Tax Division's own Criminal Enforcement attorneys. Even when not prosecuting a case, Criminal Enforcement attorneys provide legal advice to the U.S. Attorneys' Offices on a wide range of issues and monitor the status of criminal tax cases that have been referred to those offices.

Accomplishments and Workload: Workload accomplishments of the Criminal Tax Prosecution program are summarized in the following table:

	1989		1990		1991		Change		1991 Base Level		Change		1991 Request Level	
	Cases	Subj.	Cases	Subj.	Cases	Subj.	Cases	Subj.	Cases	Subj.	Cases	Subj.	Cases	Subj.
1. Cases Received														
a. Complex	778	1,051	793	1,114	833	1,170	58	82	891	1,252	...	...	891	1,252
b. Non-complex	137	140	132	124	139	141	10	[illegible]	149	151	...	...	149	151
c. Outgrowths	551	950	490	784	515	823	36	551	573	881	...	...	551	881
d. Returned for Supp	221	329	236	355	248	373	17	26	265	399	...	...	265	399
Total Cases Received	1,689	2,470	1,651	2,377	1,735	2,507	121	669	1,878	2,683	...	...	1,856	2,683
2. Total Grand Jury Investigations Received	584	1,649	548	1,886	564	2,018	39	141	603	2,159	...	...	603	2,159
3. Closings														
a. Cases	1,114	1,734	1,297	1,999	1,362	2,099	41	63	1,403	2,162	70	108	1,473	2,270
b. Grand Jury Investigations	400	1,371	361	1,152	379	1,210	11	6	390	1,246	20	62	10	1,308

Explanation

Workload statistics were obtained from the Criminal Appeals and Tax Enforcement Policy (CATEP) Section, which maintains the Division's automated case reporting and tracking system for criminal tax matters. FY 1989 data reflect actual end-of-year caseload. FY 1990 estimates are based on a projection of eleven months of actual case receipts and closings. Estimates for FY 1991 and FY 1992 are based upon internal data, statistics received from the Criminal Investigation Division of the IRS, and information received from the Office of National Drug Control Policy.

Significant Cases

The Tax Division's Criminal Enforcement Sections are responsible for authorizing grand jury investigations and prosecutions of tax crimes and for investigating and prosecuting criminal tax cases. The Tax Division has long recognized that the deterrent effect of successfully discovering and prosecuting criminal tax violators is critical to maintaining the public's compliance with those laws. Accordingly, the Tax Division has traditionally sought significant and visible prosecutions to serve as warnings to those who might be tempted to evade their fair share of tax. Our Criminal Enforcement attorneys have also participated extensively in enforcement programs involving criminal tax violations stemming from public corruption, organized crime activities, narcotics trafficking, and, most recently, financial institution fraud.

The Criminal Enforcement Sections have been heavily involved in "Operation Illwind", the investigation into alleged bribery of Defense Department officials by private consultants and contractors, seeking information on Government contracts. In 1989, Tax Division Criminal Enforcement attorneys obtained highly publicized guilty pleas from **Charles F. Gardner, James G. Neal, Kenneth F. Brooke, and Garland L. Tomlin, Jr.**, all officials of corporations that were involved in attempts to influence the award of Navy defense contracts. More recently, Criminal Enforcement attorneys participated in the investigation that resulted in the conviction of **William M. Galvin** on a series of tax and bribery charges stemming from his role in bribing Navy and Air Force officials in an effort to obtain Government contracts. Galvin acted as a conduit passing bribes and contract information between military contractors and high-ranking Defense Department officials. He failed to report the illegal income that he received from the contractors. **Galvin's was the 36th conviction obtained through the "Operation Illwind" investigation.**

Other Criminal Enforcement attorneys chalked up major successes working with the Dallas Bank Fraud Task Force. In fact, **17 of the 59 convictions obtained by that Task Force have been based, at least in part, on tax charges.** Among the high-profile convictions obtained by our attorneys were those of **Wellington O. Rothwell** and **Rossell H. Westmoreland**, figures prominently involved in the demise of the ill-fated **Vernon Savings and Loan Association**, and **James McLain**, a major Texas developer and financier. More recently, our Criminal Enforcement attorneys obtained the conviction of **Richard E. Dover** on charges of tax-evasion and filing false tax returns. Dover participated in a scheme with officials of **Western Savings Association**, in which he kicked back $15 million of a $60 million loan to one of Western's major customers. Dover failed to report "commissions" he received for assisting in this fraud.

During the past year, Criminal Enforcement attorneys also aggressively pursued criminal tax violations deriving from the operations of organized crime syndicates. For example, they successfully obtained a guilty plea from **Francis "The Bug" Sciortino**, who had extorted money from participants in a gasoline excise tax evasion scheme orchestrated by four of the New York organized crime families (the Columbo, Luchese, Genovese, and Gambino families). This prosecution was one of 19 successful prosecutions undertaken in the last two years in an effort to smash a gasoline excise tax evasion scheme that has been estimated to cost the Government **$250 million** per year in lost revenue in the New York City area alone. Nationwide, similar schemes may be depriving the Government of as much as **$1 billion** annually.

In the past year, the Tax Division's Criminal Enforcement Sections obtained significant convictions in tax cases involving public fraud. In **United States** v. **David Taggart** and **United States** v. **James Taggart**, Criminal Enforcement attorneys obtained the convictions of the two brothers who were the principal aides of James O. Bakker, the founder and president of the Praise The Lord (PTL) television ministry. Following a three-week jury trial, the Taggarts were convicted of failing to pay tax on **$1.1 million** diverted from the PTL and were each sentenced to 19-year prison terms. Tax Division Criminal Enforcement attorneys also elicited a guilty plea to tax charges from **Ralph Pari**. Pari had evaded income tax on approximately **$128,000** he stole from the Rhode Island Housing and Mortgage Finance Corporation, a quasi-public corporation established by the State of Rhode Island to assist in the construction and financing of low-income housing. Pari was sentenced to a 3-year prison term, the lengthiest sentence ever imposed in Rhode Island for a Federal tax conviction. And, Criminal Enforcement attorneys assisted the Public Corruption Section of the Department's Criminal Division in obtaining the conviction of **Arch A. Moore, Jr.**, a former West Virginia Governor, on charges including filing false tax returns.

Criminal Enforcement attorneys have also played a critical role in the Administration's war on drugs. For example, they obtained the conviction on tax charges of **Ovideo Camejo** and **Luis Rivera-Torres**, Miami-based baggage handlers for Eastern Airlines. Both individuals, together with fifteen other Eastern Airlines baggage handlers who were convicted on tax and narcotics charges, used their positions to smuggle approximately **70,000 kilos of cocaine** into the Untied States over a three-year period. Tax Division

Criminal Enforcement attorneys also obtained the conviction on income tax evasion charges of **Dennis Harker**, a former **DEA group supervisor** who extorted funds from narcotics traffickers. Using Harker's testimony, Criminal Enforcement attorneys successfully

prosecuted **Susan Terry, a nationally prominent businesswoman**, for using her construction firm to launder substantial sums of money for Harker. These drug-related prosecutions were in addition to those undertaken by Criminal Enforcement attorneys in conjunction with the Organized Crime Drug Enforcement Task Forces.

Although the Criminal Enforcement Sections devote substantial resources to enforcement programs concerning illegal sources of income, such as narcotics, organized crime, and financial institution fraud, they have continued to focus on investigating and prosecuting tax evasion schemes involving unreported income legally obtained by individuals and entities. Such general enforcement is crucial to preserving the integrity of the Federal revenue system. (See the segment entitled "General Enforcement Initiative" under program changes). In **United States** v. **Alfred Masters**, for example, Criminal Enforcement attorneys, after an eight-day trial, obtained the conviction of the promoters of an abusive tax shelter, **Music Masters, Ltd.** Music Masters had purchased sound recordings and leased them to 2,000 investors, who paid grossly inflated prices for the recordings using bogus promissory notes. The successful efforts of our Criminal Enforcement attorneys prevented a potential revenue loss to the Treasury of **$12 million.**

Our attorneys also participated in the successful prosecution of **Pete Rose.** Following a lengthy grand jury investigation, Rose, the former Cincinnati Red and baseball's all-time leading hitter, pled guilty to two counts of filing false tax returns. Although Rose evaded only $162,703.15 in taxes, the front-page publicity stemming from his conviction will undoubtedly enhance the general public's compliance with the revenue laws. (See "Rose Set to Admit in Court Today That He Filed False Tax Returns". The New York Times, page A1 (April 20, 1990)).

898

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization Tax Division

Decision Unit 2Tax02 Criminal Tax Prosecution

Resource Requirements	1989	1990	1991	1992			
				Base Level		Request Level	
				Change	Cum.	Change	Cum.
BUDGET AUTHORITY	$6,475	$7,792	$9,168	$876	$10,044	$1,174	$11,218
OUTLAYS	6,410	7,714	9,076	868	9,944	1,070	11,014
Appropriated Positions	110	120	132	...	132	18	150
Workyears:							
Full-time Permanent	100	116	122	6	128	9	137
Other	1	1	1	...	1	...	1
Subtotal	101	117	123	6	129	9	138
Overtime/Holiday	1	1	1	...	1	...	1
Total	102	118	124	6	130	9	139
REIMBURSABLE:							
Positions	...	14	14	...	14	...	14
Workyears:							
Full-time Permanent	...	12	12	...	12	...	12
Other than permanent	...	...	...	...	...	...	...
Overtime/Holiday	...	...	...	...	...	...	...

Program Changes: For 1992, the Tax Division requests 10 positions, 5 full-time equivalent workyears, and $602,000 in budget authority to support a criminal enforcement initiative directed toward investigating and prosecuting those responsible for hundreds of fuel excise tax evasion schemes. This evasion is costing the Federal Treasury billions of dollars of lost revenue. The enhancements requested include 8 attorney positions and 2 clerical support positions. In addition, 8 positions (6 attorneys and 2 clerical support personnel), 4 workyears, and $474,000 in new budget authority are being requested to intensify our general criminal enforcement efforts.

In addition, a total amount of $98,000 is required to cover travel and automated litigation support expenditures that were deferred due to the pay raise absorbed in 1991. This funding will enable the Division to allocate more travel funds for crucial financial institution fraud litigation, organized crime litigation, and drug-related litigation. In addition, the funds will permit the Division to utilize additional automated litigation support in certain large-document and complex criminal tax cases.

MOTOR FUEL EXCISE TAX INITIATIVE

For FY 1992, the Tax Division requests 10 positions, 5 full-time equivalent workyears, and $602,000 in budget authority to support a criminal enforcement initiative directed to the investigation and prosecution of those responsible for hundreds of motor fuel excise tax evasion schemes. This evasion is costing the Federal Treasury billions of dollars in lost revenue. The enhancements requested include 8 attorney positions and 2 clerical support positions.

Currently, the Federal excise tax for motor fuels is 9.1 cents per gallon (and may rise under measures being discussed in the budget summit). According to the IRS, motor fuel taxes generated about $16 billion in revenue in 1988, money which is redistributed to the States for construction and maintenance of interstate highways. However, broad-based investigations conducted jointly by our Criminal Enforcement Sections and the Criminal Investigation Division (CID) of the IRS, have uncovered wide-spread evasion of this tax nationwide and particularly in the New York City and Houston metropolitan areas, Southern Florida, and Southern California.

The Federal tax on gasoline, coupled with applicable State taxes, often adds up to more than 25 cents on each gallon of gasoline. At that level, there is tremendous incentive for a marketer to cheat. Profit margins on gasoline frequently are less than 10 cents per gallon. By obtaining a 25 cents-per-gallon advantage through evasion of fuel taxes, a marketer can gain an almost insurmountable edge over legitimate dealers. "What this means for honest marketers", states a recent article in the Independent Gasoline Marketing Magazine ("The Problem of Tax Cheating", (Dec.-Jan. 1990)), is the "inability to compete, and in some cases, being forced out of business altogether." According to former New York Attorney General Robert Abrams ("Making Crime Pay", Forbes (July, 1987)), "[t]hat's where the problem started;" "[w]hen a gas station on one corner decides to cheat, the gas stations on the other three corners have to cheat or lose money and in some cases go out of business."

When organized crime discovered that there were millions in illegal profits to be made, they simply muscled in on the gasoline bootleggers. To prevent bloody competition for the lucrative profits from the excise tax scheme, the heads of four of the New York organized crime families (the Columbo, Luchese, Genovese and Gambino families) agreed to divide a 1.5 cent "mob tax" (later raised to 2 cents) on each gallon of illegal gasoline sold. Their success in this criminal enterprise led Forbes to declare gasoline bootlegging "as one of organized crime's great growth businesses in the Eighties" and the "biggest single money maker for [New York] City's crime families." By 1987, a New York Governor's Task Force charged with studying this problem concluded that evasion of motor fuel taxes had reached epidemic proportions, with one out of every ten gallons of gasoline sold in the New York City metropolitan area escaping taxation.

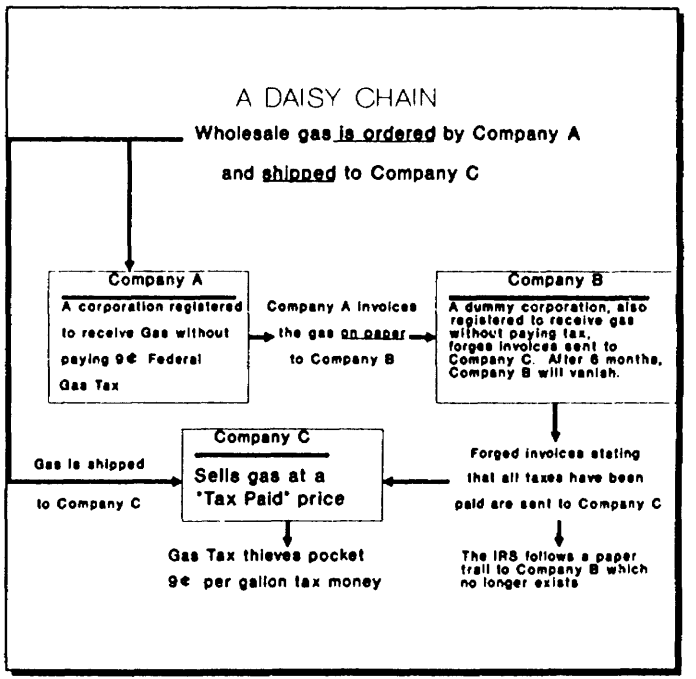
The typical scheme, known as a "daisy chain", works like this: A wholesaler of gasoline obtains the appropriate Federal license to trade gasoline from wholesaler-to-wholesaler without paying the tax. Bootleggers take advantage of that by purchasing gasoline and then moving it -- on paper only -- down a chain of dummy corporations (hence, the term "daisy chain"). In the meantime, the gasoline is secretly shipped to another wholesaler who is provided with forged invoices showing that all taxes have been paid. The gasoline is then sold to retailers at a price that reflects the payment of the excise tax. The tax money itself, however, is divided among the conspirators and not turned over to the Government. Because of the false invoices, retailers can be unwitting accomplices in the tax evasion scheme. In the end, transfer records show falsely that the tax is owed by a bankrupt, dummy corporation. For enforcement agents seeking to collect the tax, that is where the trail ends.

900

The "daisy chain" method has been copied in hundreds of conspiracies which, by IRS estimates, have defrauded the Government out of billions of dollars of motor fuel taxes. (See "A.K.A. Trial is a Study in Evasion of Gas Tax", The New York Times (Feb. 20, 1989)).

The Federal investigation into the nationwide gasoline-tax scheme began on Long Island in 1983 with the examination of the activities of **Larry Iorisso, then head of Vantage Petroleum, and Michael Franzese, a reputed capo in the Columbo organized-crime family.** In 1984, Iorizzo was convicted on mail fraud charges, and in return for a reduced sentence, became a cooperative witness under the Federal witness protection program. In 1985, Iorizzo's testimony led to the conviction of Franzese and 8 others who were involved in an extensive gasoline bootlegging operation that employed 18 companies which served as fronts for the collection and embezzlement of money.

One year later, attorneys from our Northern Criminal Enforcement Section joined CID in an effort nicknamed **"Operation Sludge."** Using information derived from Iorizzo, approximately 100 other witnesses, and over 10,000 bank records, they began unraveling the carefully-constructed bootlegging schemes sponsored by organized crime. In conjunction with the United States Attorney for the Eastern District of New York, our attorneys spearheaded a four-year grand jury investigation that led to the 1989 convictions on tax evasion charges of **Sheldon Levine, John Musacchia, Joseph Gambino** and a number of their associates, all affiliated with one or more organized crime families. Each of these defendants received lengthy prison sentences and was required to pay restitution totalling millions of dollars. In furthering these prosecutions, **Iorisso testified that from 1980 through 1984 he funnelled $360 million in stolen taxes to the Columbo crime family.** These investigations are continuing and resulted in the January, 1990 conviction of **Francis "the Bug" Sciortino** on a charge of extorting money from participants in the gasoline excise tax evasion scheme orchestrated by the Columbo, Luchese, Genovese, and Gambino families.



Organized crime activity in the motor fuel excise tax area is now spreading nationwide, with an annual price tag to the Federal Treasury of over $1 billion. Even before these recent developments, excise tax evasion was hardly a local phenomenon: in Utah, Charles Akerlow, former chairman of the Utah Republican Party, was recently convicted on excise tax evasion charges. In 1984, Akerlow ran Pacific Western Resources, a company through which he evaded over $600,000 in motor fuel taxes. Excise tax evasion is also infecting legitimate business as witnessed by the recent indictment of Getty Oil Terminals on charges of evading millions of dollars of excise taxes. In addition the Tax Division is pursuing cases in Indiana, Texas, and California.

These prosecutions, however, have made little more than a dent in these criminal enterprises. According to information supplied by the Assistant Commissioner of CID in the Spring of 1990, there are 94 Federal investigations involving motor fuel excise taxes pending in 18 different cities (47 of these investigations are in the New York City metro area). The Tax Division has assigned five Criminal Enforcement attorneys to deal with the New York City investigations on a full-time basis. These attorneys are pursuing existing targets and will be examining the records of each of the twelve major petroleum terminals in the New York City area. Other Criminal Enforcement attorneys are attempting to handle the remaining investigations. All these investigations, however, are extraordinarily time-consuming and complex because they require our attorneys to develop an in-depth knowledge of gasoline marketing and to track transactions involving tens of thousands of documents. With current staffing, the Tax Division does not have the resources to develop and prosecute the cases arising out of the current investigations, nor can it even begin to pursue new targets. But, unless these and other new cases are exhaustively investigated and successfully prosecuted, the Government will continue to lose billions of dollars in motor fuel excise taxes, much of which will be used by organized crime to finance other criminal enterprises. The 8 attorneys requested for FY 1992 will be used to prosecute the cases arising out of the 94 current investigations and to pursue new investigations and, we hope, will staunch the significant current drain on the Federal Treasury.

902

GENERAL ENFORCEMENT INITIATIVE

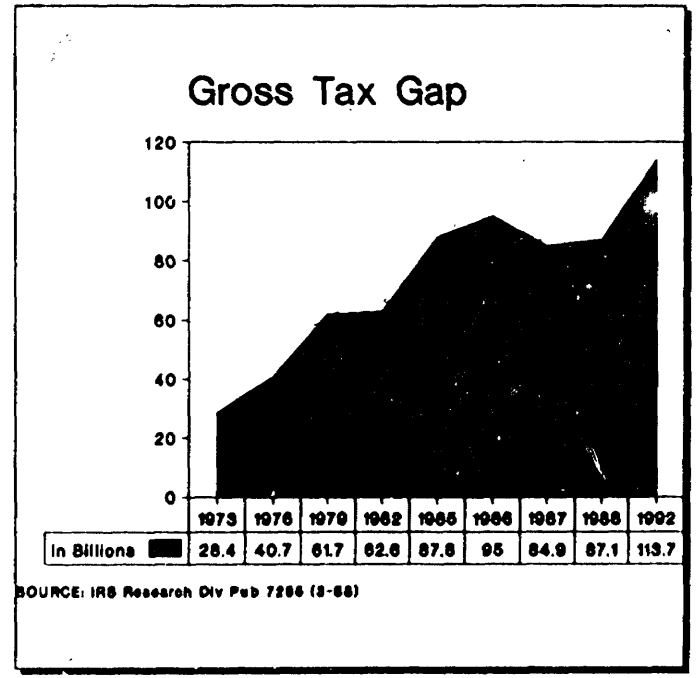
For FY 1992, the Tax Division is requesting 8 positions, 4 full-time equivalent workyears and $572,000 in budget authority to reinvigorate its general criminal enforcement program. The requested enhancements include 6 attorneys and 2 clerical support staff and $98,000 to cover travel and automated litigation support expenditures deferred due to the absorption of the 1991 pay raise.

According to its 1988 Annual Report, the Internal Revenue Service collected income taxes totalling nearly $633 billion in 1988. Virtually all of this amount was collected through self-assessment by taxpayers. However, the IRS' Research Division, in a 1988 publication entitled "Gross Tax Gap Estimates and Projections for 1973-1992", estimated that at least $85 billion in additional taxes should have been collected on income earned from legal sources. According to the Research Division of the IRS, the estimate of the so-called "tax gap" in current dollars has grown from $28 billion for 1973 to $62 billion for 1979 and to $85 billion for 1987. The gap is projected to increase to staggering levels -- $113.7 billion by 1992. (See also GAO Report, "Tax Administration: Profiles of Major Components of the Tax Gap" (April 1990)).

In April 19, 1990 testimony before Congress, Commissioner Goldberg of the IRS stated what the accompanying chart reveals -- "that a one percent swing in voluntary compliance will increase -- or decrease -- revenues each year by more than $5 billion." Not surprisingly, one of the Tax Division's primary missions is to increase the voluntary compliance rate and minimize the "tax gap."

All agree that deterrence plays a pivotal role in inducing compliance from the rank and file taxpayer. In a recent report to Congress, the IRS said it believes that "a significant portion" of the tax gap could be collected through a "balanced strategy" that includes stepped up enforcement. (See "IRS Chief Pegs Unpaid Taxes at $100 Billion", Wall Street Journal, April 20, 1990). The Tax Division and the IRS have traditionally sought visible prosecutions to serve as warnings to those who might be tempted to avoid their taxes. Prosecution, conviction, and imprisonment of tax evaders -- from "Hotel Queen" Leona Helmsley and former baseball star Pete Rose, to construction workers getting paid off the books -- represent the main weapon in the battle against the tax gap.

Historically, the Tax Division and the IRS have devoted the majority of their criminal resources to such general enforcement cases. In recent years, however, the Tax Division and the IRS have been called upon to devote an increased share of their resources to investigations and prosecutions involving illegal sources of income -- narcotics trafficking, public corruption, money laundering, and financial institution fraud. To pursue these special programs, both agencies have diverted staff from cases involving ordinary tax crimes and legal sources of income. Statistics tell the story. During FY 1989, the Tax Division received 3,242 recommendations for prosecution, but only 1,348 of these (or 41%) involved ordinary tax crimes. According to statistics supplied by the Criminal Investigation Division (CID) of the IRS, in FY 1989, narcotics prosecution recommendations increased 34.2% over the previous fiscal year; by contrast, tax shelter and illegal tax protester prosecution recommendations declined by 22.6% and 14.6%, respectively, during the same period. Ultimately, 26 percent of the prosecutions authorized by the Tax Division in FY 1989 related to drug dealing, and an additional 10-15 percent of the prosecutions authorized grew out of the other special programs.



SOURCE: IRS Research Div Pub 7286 (3-88)

Thus, only approximately 60 percent of authorized prosecutions involved general enforcement matters; five years ago that figure stood at 86 percent. And this trend will likely continue in FY 1990, as the CID Annual Business Plan for FY 1990 establishes objectives calling for over 46 percent of direct investigative time to be spent on narcotics crimes, public corruption, and organized crime.

The Tax Division takes great pride in the major role played by its Criminal Enforcement attorneys in fighting the war on drugs, public corruption, and organized crime. But, there must be a balanced approach to enforcing the Federal tax laws without sacrificing or compromising the Tax Division's role in fighting drugs, public corruption, and organized crime. General enforcement cases are essential to the public's perception that the tax laws are enforced fairly. This view, indeed, was expressed by the author of a recent article whose byline stated that "[g]arden variety tax cheats now have little to fear from the IRS." (See Guttman, "Criminal Enforcement Conference Looks at Services Role in War on Drugs", Tax Notes (June 13, 1988).) If "bread-and-butter" tax evasion cases continue to be bypassed for "dirty money" cases, the American taxpayer will eventually come to believe that only drug dealers and organized crime figures are convicted on tax charges. Such a belief on the part of a significant segment of the population would certainly reduce voluntary compliance and result in a major drain of revenue. Conversely, bolstering the general enforcement program should cause the voluntary compliance rate to rise above its current level of 83.6% and should generate the collection of billions of dollars of additional tax revenue. The IRS has taken affirmative steps in this direction. In its support role, the Tax Division must similarly restore its general enforcement program to appropriate levels, thereby making a worthwhile investment in the long-term health of our revenue system.

Criminal enforcement of the tax laws safeguards the tax system in two ways: it obtains retribution for past tax offenses by bringing to justice those who have transgressed the law and it protects future revenue by deterring those who are considering whether to commit crimes. The requested enhancements for the Motor Fuel Excise Tax Initiative relate to the first category and will permit our Criminal Enforcement attorneys to quell evasion schemes that are currently costing the Federal Treasury billions of dollars. At the same time, our General Enforcement Program must be restored to past levels to ensure that ordinary taxpayers are not tempted to abuse the tax system. The latter abuse cumulatively costs the Federal Treasury tens of billions of dollars each year.

904

Schedule of Cost Inputs
(Dollars in thousands)

Organization Tax Division

Decision Unit 2Tax02 Criminal Tax Prosecution

	Request Level		
	Pos	WY	Amount
Positions by Type			
Attorney	14	7	$323
Nonlegal	4	2	44
Administratively Determined Salaries	...	...	...
Subtotal	18	9	367
Personnel Benefits			136
Travel and Transportation			148
GSA Rent			78
Rent, Communications and Utilities			13
Printing			7
Other Services			206
Supplies and Materials			19
Equipment	---	---	200
Subtotal	...	...	807
Total	18	9	1,174

Description of Cost Inputs

Motor Fuel Excise Tax Initiative - An additional 8 attorneys and 2 support staff are needed to prosecute motor fuel excise tax cases arising out of 94 current investigations being conducted by the Tax Division and the IRS. Most of these investigations target organized crime activities. The requested staff will attempt to quell evasion schemes that are costing the Federal Treasury billions of dollars.

General Enforcement Initiative - Six attorneys and 2 support staff are needed to restore the Division's general criminal enforcement program to its prior strength. This initiative will target tax crimes involving legal sources of income, which are estimated to be costing the Treasury as much as $85 billion each year.

1991 Pay Raise Absorption - A total of $98,000 is required to cover travel and automated litigation support expenditures deferred due to the absorption of the 1991 pay raise.

Tax Division

Salaries and expenses, General Legal Activities

Summary of Decision Unit Resources by Object Class
(Dollars in thousands)

Object Class	1990 Actual Workyears	1990 Actual Amount	1991 Estimate Workyears	1991 Estimate Amount	1992 Estimate Workyears	1992 Estimate Amount	Increase/Decrease Workyears	Increase/Decrease Amount
11 Personnel compensation	117	$4,667	123	$5,492	138	$6,415	15	$ 923
12 Personnel benefits		888		1,045		1,299		254
21 Travel and transportation of persons		674		795		991		196
22 Transportation of things		8		8		13		5
23.1 GSA rent		857		1,008		1,185		177
23.3 Communications, utilities and miscellaneous charges		366		431		457		26
24 Printing and reproduction		12		14		27		13
25 Other services		242		284		618		334
26 Supplies and materials		62		73		102		29
31 Equipment		16		18		111		93
Total obligations	117	7,792	123	9,168	138	11,218	15	2,050

Tax Division
Justification of Program and Performance
Salaries and Expenses, General Legal Activities: 15-0128-0-1-752
Civil Tax Litigation - 2 Tax 07

Long Range Goal: To litigate all civil tax matters pending in Federal and State trial courts in a manner that will enhance voluntary compliance with the nation's internal revenue laws.

Major Objectives:

To defend, and resolve fairly, all suits against the Government seeking a refund of taxes paid.

To defend the Government's interests in the tens of thousands of bankruptcy proceedings filed each year in which the Government has a tax claim.

To maximize the collection of unpaid taxes through the successful litigation of civil tax recovery suits and through prompt collection of all tax judgments issued in the Government's favor.

To facilitate on-going IRS investigations by seeking court orders enforcing administrative summonses issued by that agency.

To represent the Government in all injunctive, declaratory judgment, mandamus, jeopardy assessment, and other civil tax suits.

To defend all civil tort actions brought against revenue officials and thereby to discourage nuisance suits against such officials.

To administer Freedom of Information Act and Privacy Act programs by appropriately balancing a taxpayer's right to information concerning the policies and practices of the IRS with the IRS' ability to conduct effective tax investigations and to safeguard statutorily-defined confidential material.

To furnish expert legal advice and other litigation support to the IRS and the U.S. Attorneys' Offices.

Base Program Description: Civil Tax Litigation attorneys handle all trial matters relating to the administration and enforcement of the tax laws and seek to resolve tax controversies on a basis that is fair and consistent with those laws. These attorneys litigate suits filed by or against taxpayers in the U.S. District Courts, the U.S. Bankruptcy Courts, and the U.S. Claims Court, including: tax refund suits brought by taxpayers challenging the IRS' determinations of their Federal tax liabilities; bankruptcy litigation involving the priority of Federal tax claims and the feasibility of plans of reorganization; actions to enforce summonses seeking information needed by the IRS; suits to collect taxes and other moneys owed by taxpayers; suits brought against IRS and other Government officials for tort violations allegedly committed in tax collection activities; and State and local inter-governmental tax immunity suits. Civil Tax Litigation attorneys also represent the Government's interests in a myriad of litigation conducted in State courts.

Accomplishments and Workload: The accomplishments of the Civil Tax Litigation program are summarized in the following table:

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
1. Defense of Monetary Claims							
a. Tax Refund Cases							
Pending	2,563	2,520	2,616	53	2,669	...	2,669
Received	1,107	1,041	1,093	55	1,148	...	1,148
Closed	1,150	945	1,040	52	1,092	52	1,144
b. Other Defense							
Pending	1,401	1,431	1,500	70	1,570	...	1,570
Received	948	844	861	17	878	...	878
Closed	918	775	791	16	807	24	831
2. Recovery of Money							
a. Bankruptcy Cases							
Pending	4,509	4,402	4,494	197	4,691	...	4,691
Received	12,286	17,253	19,683	4,134	23,817	...	23,817
Closed	12,393	17,161	19,486	4,456	23,942	75	24,017
b. Other Recovery							
Pending	2,057	1,999	2,095	101	2,196	...	2,196
Received	892	956	1,004	50	1,054	...	1,054
Closed	950	860	903	45	948	47	995
3. Federal Civil Programs							
a. FOIA/Privacy Act							
Pending	30	26	65	41	106	...	106
Received	26	64	70	7	77	...	77
Closed	30	25	29	3	32	3	35
b. Summons Enforcement							
Pending	278	178	142	46	188	...	188
Received	2,545	2,797	3,077	308	3,385	...	3,385
Closed	2,645	2,833	3,031	312	3,343	167	3,510
c. Other Enforcement							
Pending	723	710	744	41	785	...	785
Received	310	229	275	28	303	...	303
Closed	323	195	234	23	257	13	270

Explanation

This workload data is derived from the Tax Division's automated monthly report of case receipts, closings, and related statistics. The 1989 workload data reflects actual end-of-year statistics. The 1990 figures are projections based on eleven months of actual caseload data. Predictions of 1991 and 1992 workload are based on information from the IRS' automated case tracking system, analyses performed by both the IRS and the Division of the impact of recently enacted tax legislation, and projections based on past caseload trends.

Significant Cases

The Division's Civil Tax Litigation program represents its most comprehensive litigating activity, involving approximately 35,000 cases annually. Our Civil Trial attorneys enforce the IRS' general tax compliance activities and special audit programs by defending the administrative determinations of that agency in the courts. The work of the Division's Civil Trial Sections covers a broad spectrum of tax proceedings in the U.S. District Courts and the U.S. Claims Court, including tax refund suits and other suits brought by taxpayers, as well as actions brought by our attorneys at the request of the IRS to support its enforcement, audit, and collection programs. It also includes a burgeoning number of tax matters arising in the U.S. Bankruptcy Courts. The following cases that were handled by the Division's Civil Trial Sections' attorneys are representative of the diversity and importance of their work.

Cases handled by Civil Trial attorneys often establish the "rules of road" that govern thousands of cases pending administratively. A classic illustration of this is **Norton Homes, Inc.** v. **United States**, in which the taxpayer alleged that it was entitled to recover $31,245.49 in interest under Section 6404(e)(1) of the Internal Revenue Code of 1986. That section provides that the Secretary of the Treasury may abate interest on a tax deficiency if the accrual of such interest resulted from an IRS error or delay in performing a ministerial act. In **Norton Homes**, the District Court held that Section 6404(e)(1) is permissive and not mandatory in scope, and therefore, that it lacked jurisdiction to review the IRS' decision not to abate interest. This decision, which is currently on appeal, will affect the justiciability of approximately 16,000 claims for interest abatement currently in the administrative pipeline.

Many of the corporate cases litigated by our Civil Trial attorneys involve staggering amounts of revenue. Following a four-day trial in Aberdeen, Mississippi, a jury returned a verdict in favor of the Government in **First M & F Corporation** v. **United States**. This case presented the question whether a bank could amortize a portion of the value associated with a customer deposit base (e.g., savings and checking accounts) acquired in the purchase of a bank chain. The jury found that the value of the customer deposit base, also known as a "core deposit intangible," was not separate and distinct from the value of the bank's goodwill and, hence, that the customer deposit base was not amortizable. The IRS has estimated that the core deposit issue and related questions involving the amortization of intangible assets involve, on an industry-wide basis, over $6 billion in collectible tax revenues for the Federal Treasury.

In FY 1989, the attorneys in our Claims Court Section distinguished themselves in a series of precedent-setting cases. The average refund suit in the Claims Court involves $1.9 million. Included among the Claims Court Section's important victories in 1989 was **Transamerica, Inc.** v. **United States** in which our attorneys convinced the Claims Court that United Artists was not entitled to its claimed $27.7 million deduction with respect to film negatives donated to the Library of Congress. More recently, Claims Court attorneys prevailed in **Shimota** v. **United States**, a lawsuit in which Federal retirees were challenging the IRS' treatment of lump-sum payments received under a new retirement election. A recent **Washington Post** article reported that approximately $1 billion in taxes hinges on the ultimate outcome of this suit. And, in **Stokely-Van Camp** v. **United States**, the Claims Court granted the Government's motion for partial summary judgment, holding that the taxpayer could not deduct, as a trade

or business expense, $21.5 million it paid to redeem its stock from shareholders that the corporation believed were planning a hostile takeover. Given the explosion of takeover activity in the mid-1980s, cases involving the deductibility of such "greenmail" payments, as well as cases involving the tax treatment of junk bonds and other exotic financial instruments, are likely to increase, and all of these cases will likely involve significant revenues.

Frequently, our Civil Trial attorneys are required to take dramatic action to protect Federal revenues. For example, our Civil Trial attorneys successfully represented the Government's interests in the recent bankruptcies of William Herbert Hunt and Nelson Bunker Hunt, the largest individual bankruptcies in United States history. A team of Civil Trial attorneys spent thousands of hours drafting, negotiating, and obtaining Bankruptcy Court confirmation of plans of reorganization that assured the Government $170 million from the Hunt brothers. These plans also provide for the Government to receive an additional $165 million out of the Hunt's future income.

Another case in which Civil Trial attorneys obtained a substantial recovery is Roberto Duran v. United States. Civil Trial attorneys filed suit to recover approximately $1.8 million in taxes erroneously refunded to Mr. Duran, a world-class boxer, and took steps to prevent Mr. Duran from leaving the country until he had repaid the amounts owing to the Treasury. Our attorneys eventually obtained Mr. Duran's agreement to surrender his passport, to pay over certain assets to a trust account on behalf of the United States, and to an order prohibiting him from transferring any assets without the prior written approval of the United States. As a result of these efforts, the Treasury collected the refunds erroneously paid to Mr. Duran out of the proceeds of his recent fight with "Sugar Ray" Leonard.

Decision Unit Funding Level Requirements

(Dollars in thousands)

Organization Tax Division

Decision Unit 2Tax07 Civil Tax Litigation

Resource Requirements	1989	1990	1991	1992 Base Level		1992 Request Level	
				Change	Cum.	Change	Cum.
BUDGET AUTHORITY	$19,690	$22,733	$29,546	$1,798	$31,344	$1,233	$32,577
OUTLAYS	19,493	22,506	29,250	1,781	31,031	1,057	32,088
Appropriated Positions	311	339	339	...	339	16	355
Workyears:							
Full-time Permanent	280	313	326	...	326	8	334
Other	4	4	4	...	4	...	4
Subtotal	284	317	330	...	330	8	338
Overtime/Holiday	1	1	1	...	1	...	1
Total	285	318	331	...	331	8	339

Program Changes: For 1992, the Tax Division requests 16 positions, 8 full-time equivalent workyears, and $948,000 in budget authority to address the burgeoning number of bankruptcy cases our Civil Trial attorneys are required to litigate. The enhancements include 12 attorney positions and 4 clerical support positions. The request will provide the Civil Trial program with the resources to deal with a major expansion in its bankruptcy workload.

A program enhancement of $285,000 will enable the Division to better serve our attorneys by making available additional automated litigation support to address complex and large, document-intensive cases and greater access to automated legal research databases used in discovery for virtually every civil tax case handled by our Civil Trial attorneys which were deferred due to the absorption of the 1991 pay raise.

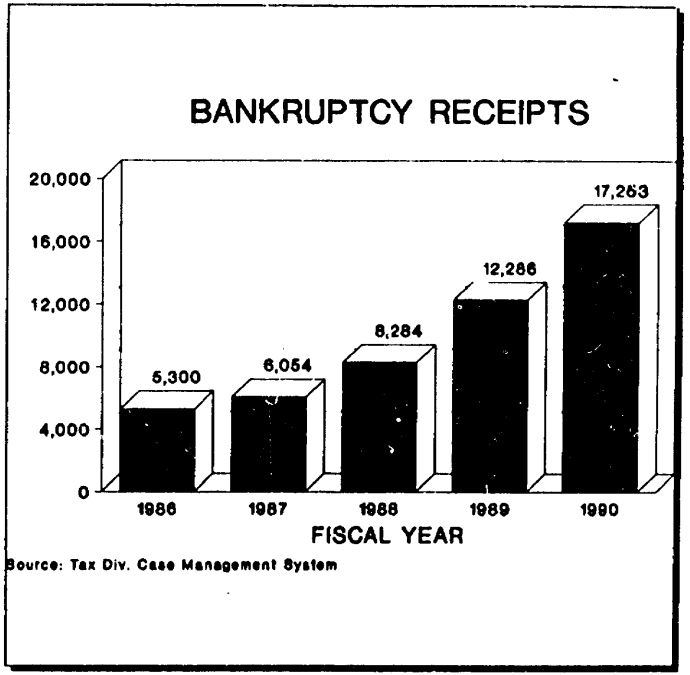
BANKRUPTCY ENFORCEMENT INITIATIVE

A. **The Present: The Tax Division's Surging Bankruptcy Workload**

The Tax Division protects the Government's revenue interests in bankruptcy proceedings initiated by individuals and corporations by defending the validity and priority of tax claims, by posing timely objections to plans of reorganization that do not provide for the appropriate payment of taxes, and by initiating suits to collect unpaid taxes from debtors. Since the amount owed the Government is the primary issue in these proceedings, Tax Division victories translate directly into additional collections for the Federal Treasury.

The Tax Division's bankruptcy docket began to explode in FY 1986, when the combined effect of a spotty economy and record debt levels precipitated an unprecedented upsurge in private and corporate failures. **Between FY 1986 and FY 1989, the bankruptcy caseload being handled by the Tax Division grew by 132 percent. As the accompanying chart illustrates, the Division's bankruptcy receipts swelled from 5,300 cases in FY 1986 to 12,286 cases in FY 1989 and will likely eclipse 17,000 cases by the end of FY 1990 -- a 226 percent increase over FY 1986 levels.**

Although these statistics are sobering, they tell only a partial story. While many of these bankruptcy cases require only a minor investment of resources, a substantial and increasing number of them involve multi-million dollar tax claims and present complicated legal issues. **Indeed, our current docket contains 13 cases that have required 6 months or more of attorney time. This is an entirely new phenomenon -- we had no such half-year bankruptcy cases in 1986 -- and** is illustrative of a trend in our bankruptcy docket in general. Indeed, the number of cases requiring three weeks to one-half year of attorney time has also risen nearly six-fold in the last four years (from 48 to 277). **Bankruptcy cases now occupy approximately 23 percent of our attorneys' time.**



Source: Tax Div. Case Management System

912

The Tax Division has struggled to keep pace with the increase in bankruptcy cases, which, in combination with other new sources of workload, has caused the dockets of our Civil Trial attorneys to skyrocket to between 75 and 90 cases each. Our attorneys have managed these caseloads through increased productivity and the use of automation -- bankruptcy case closings, for example, have kept stride with receipts, increasing by 63 percent just last year. Moreover, the average time lag between the receipt and closing of a bankruptcy case remains around five months. Even with increased numbers, most bankruptcies remain on a fast track. Our internal statistics demonstrate that our attorneys are closing more bankruptcy cases in the same number of days, while spending more time on those cases. Obviously, this trend cannot continue indefinitely.

While the Division has thus somehow been able to cope with the inordinate surge in bankruptcy cases, almost every economic forecast indicates that the worst is yet to come. Economists project that in the next several years there will be a surge of "mega-bankruptcies" -- large conglomerates seeking to restructure mountains of debt, often the product of leveraged buyouts that were financed with "junk bonds." Personal bankruptcies are also predicted to reach all time highs, by some estimates exceeding 600,000 per year. FY 1992 thus almost certainly will be a new high-water mark for the Tax Division's bankruptcy practice -- a flood tide which the Division is simply not equipped to handle. The additional resources requested for our Civil Trial Sections will ensure that millions of dollars of taxes owed the Government by these corporations and individuals are not lost.

B. <u>The Future: Business Failures and the Junk Bond Phenomenon</u>

Corporate bankruptcies have averaged between 19,000 and 25,000 a year since 1982 -- more than in any period since the Depression. Yet, even these figures will likely be surpassed as the result of the collapse of the $300 billion junk bond market.

Junk bonds, or high-yield securities, offer equity-like risks and rewards to investors seeking attractive yields. These bonds became a source of capital and were used aggressively, most notably by the investment firm of Drexel, Burnham, and Lambert, to bankroll the corporate takeover boom of the 1980s. In 1986, according to the Mergers & Acquisitions Magazine, there were 335 leveraged buyouts involving $45.1 billion in total purchase price. In 1987, there were 267 leveraged buyouts, involving $35.8 billion in assets. And in 1988, there were 255 leveraged buyouts, worth $59.5 billion (including the $29.6 billion acquisition of RJR Nabisco). As recounted in the book Barbarians at the Gate, "[j]unk bonds became a high-octane fuel that transformed the [leveraged buyout industry] from a Volkswagen Beetle into a monstrous drag racer belching smoke and fire."

Weighed down by excessive debt, untenable capital structures, and poor cash flow, these highly-leveraged corporations have begun to fail. The leveraged buyout of drugstore chain operator Revco, D.S. Inc. was the first to fail, when, in 1988, Revco defaulted on $700 million in junk bonds and sought protection from its creditors under Chapter 11 of the Bankruptcy Code. Since then, the rush to bankruptcy court protection has continued: Campeau Corporation's Allied Stores Corp. and its Federated Department Stores Inc., with $1.7 billion in junk bonds; Southmark Corporation, a Dallas-based real estate investment company, with $744 million in junk bonds; Eastern Airlines, part of the largest airline company in the free world, with $743 million in junk bonds; and the king of junk-bond deals itself, Drexel, Burnham, Lambert Group, Inc. (See "'80s Leveraged Buyouts May Bring '90s Bankruptcies", The Washington Post (Jan. 10, 1990).) Economists and bond rating services (including Standard & Poor's) have predicted that between five and nine percent of highly leveraged corporations will default on their junk bonds in each of the next two to three years. Indeed, in 1989, defaults rose to 4 percent of the junk bond market, as compared with 2.5 percent in 1988. (See "The Dilemma of Junk Bond Funds", The Washington Post (March 4, 1990).) This course of events has made a prophet out of John S.R. Shad, former Chairman of the SEC, who in 1984 forecast that "[t]he more leveraged takeovers and buyouts now, the more bankruptcies tomorrow."

These and other corporate failures have major fiscal ramifications for the Federal Treasury. In virtually every corporate bankruptcy, taxes are owed the United States: income taxes, FICA taxes, unemployment taxes, and a variety of excise taxes. In most circumstances, the Bankruptcy Code requires the IRS to move quickly to determine the debtor's tax liabilities for all open years. Audits that normally would take years, instead occur in a matter of months, and produce enormous tax claims relating to a series of years that ordinarily would be the subject of several different audits. The result is tax claims that frequently range in the hundreds of millions of dollars. Recently, for example, the Tax Division has defended millions of dollars of tax claims in bankruptcy proceedings involving Storage Technology Inc. ($623 million tax claim); Campeau Corporation ($563 million tax claim); Placid Oil Corp. ($543 million tax claim); and Baldwin-United Corp. ($450 million tax claim). This list does not include the multi-million dollar tax claims that will be filed in many of the above-mentioned "junk bond" bankruptcies, most of which remain to be determined by the IRS. The Tax Division's mission is to ensure that these cases do not cause a major drain on the Federal Treasury.

C. The Response: Early Involvement in the Bankruptcy Process

What is the best way to maximize revenue collection in these upcoming bankruptcies? The answer may lie in our handling of the recent bankruptcies of William Herbert Hunt and Nelson Bunker Hunt, the largest individual bankruptcies in United States history.

Following their disastrous attempt to corner the world's silver market, an attempt that cost them well over $1 billion, the Hunt Brothers in September, 1988, sought bankruptcy protection under Chapter 11 of the Bankruptcy Code. The Hunts' creditors included Minepeco, a Peruvian minerals company which had obtained a $134 million judgment against the Hunts, Manufacturers Hanover Trust Company, approximately 2,000 unsecured creditors, and their largest creditor of all, the Internal Revenue Service, with a $1 billion tax claim.

The Tax Division began monitoring these cases the day they were filed. In October of 1988, our Civil Trial attorneys secured the IRS a place on the Unofficial Ad Hoc Committee of Creditors (which included only two other creditors, Minepeco and Manufacturers Hanover). With the approval of the Bankruptcy Court, our attorneys shared information on the Hunt's assets with Minepeco and Manufacturers Hanover and repeatedly thwarted the Hunts' attempts to deplete their estates. By the Fall of 1989, the Hunts had failed to produce acceptable plans of reorganization. The Bankruptcy Court threatened to convert the bankruptcy proceedings into Chapter 7 liquidations, which, as will be explained below, would have been disastrous for the IRS. To prevent this, our Civil Trial attorneys began working around the clock to draft plans of reorganization that would be jointly proposed by the IRS, Minepeco, and Manufacturers Hanover. In December of 1989, following hundreds of hours of negotiations, plans were proposed by these parties and confirmed by the Bankruptcy Court.

Under the plans, the assets of the Hunts are now being liquidated by an independent trustee, under the supervision of our attorneys and attorneys for the other major creditors. The IRS will receive 80 percent of the proceeds from the sale of the Nelson Bunker Hunt estate, or approximately $110 million, and will receive 70 percent of the proceeds from the sale of the William Herbert Hunt estate, or approximately $60 million. In addition, the IRS retains a nondischargeable $90 million claim against Nelson Hunt and $75 million claim against Herbert, to be paid out of their future income. Our Civil Trial attorneys thus instantly recovered $170 million in cash for the Government, with the prospect of an added $165 million in the future.

914

The Hunt cases illustrate the importance of early Tax Division involvement in bankruptcy proceedings. Because of our early involvement, our Civil Trial attorneys in the Hunt cases accomplished a number of firsts: we participated as a major player on a creditor's committee; we joined with other creditors in proposing a plan of reorganization; and we were appointed by a bankruptcy court to help supervise the implementation of such plans. A huge dividend was paid as the result of these efforts: according to studies prepared by Ernst & Whinney (now Ernst & Young), had the Hunt cases been converted to Chapter 7 liquidations, which almost certainly would have occurred but for our attorneys' efforts, the Government would have recovered only $57.9 million; instead, the Government will receive, at a minimum, $170 million. The additional $112.1 million recouped is more than enough to fund the entire operations of the Tax Division for 2 years.

It required, however, an investment of over 4,000 attorney hours over an eighteen-month period to produce this landmark recovery. Thus, the Tax Division was required to invest the equivalent of 2 full years of attorney time in a single case. Although application of the techniques perfected in the Hunt cases would certainly result in additional recoveries in large bankruptcies, the fact remains that the Tax Division does not have the resources to apply those techniques to the other large bankruptcy cases on its docket, 13 of which, as previously noted, already have absorbed over 1,000 hours of attorney time. Moreover, if even five percent of the 877 leveraged buyouts that occurred between 1986 and 1988 default in the next two years (a default rate well below the estimates discussed above), the Tax Division will be faced with at least 40 more mega-bankruptcies. Although some of these cases will be less time-consuming than the Hunt cases, many will be much worse. Even if these cases, on average, occupy a third of the time spent on the Hunts, they will monopolize the time of at least a dozen attorneys. And this does not take into account the staffing needed to deal with the thousands of individual bankruptcies now being received by the Tax Division. Those cases must also be aggressively pursued, lest the American public be given the impression that they can avoid their tax obligations through the expediency of bankruptcy. Indeed, in many bankruptcies the debtor's only creditor is the IRS.

Unless the Tax Division commits resources to the early development of its bankruptcy cases and pursues every option for maximizing the recovery on Government tax claims, the Federal Treasury will lose hundreds of millions of dollars -- not because the taxes are not owed and not because there are no funds to pay those tax debts, but because the debtors will not be forced to pay them. Conversely, for every additional dollar dedicated to bankruptcy work, the Tax Division stands to return hundreds, if not thousands, of dollars to the Federal Treasury. The enhancements requested for FY 1992 will enable our Civil Trial Sections to successfully to address the surge in both large and small bankruptcy cases, the favorable resolution of which is critical maintaining the integrity of the tax system.

Schedule of Cost Inputs
(Dollars in thousands)

Organization Tax Division

Decision Unit 2Tax07 Civil Tax Litigation

	Request Level		
	Pos	WY	Amount
Positions by Type			
Attorney	12	6	$276
Nonlegal	4	2	45
Administratively Determined			
Salaries	...	...	...
Subtotal	16	8	321
Personnel Benefits			121
Travel and Transportation			75
GSA Rent			69
Rent, Communications and Utilities			11
Printing			7
Other Services			432
Supplies and Materials			18
Equipment	---	---	179
Subtotal	...	...	912
Total	16	8	1,233

Description of Cost Inputs

Bankruptcy Initiative - 12 attorneys and four support staff are needed to address unprecedented increases in the Tax Division's bankruptcy workload. Bankruptcy receipts have increased from 5,300 cases in FY 1986 to more than 17,000 cases in FY 1990. Many of these cases are complex and time-consuming, as illustrated by the recent Hunt brother bankruptcies, which required nearly 3,700 hours of attorney time. More of these "mega-bankruptcies" are expected in FY 1992, making the requested staff increases absolutely essential.

1991 Pay Raise Absorption - A total of $285,000 is required to cover automated litigation support and automated legal research expenditures deferred due to the absorption of the 1991 pay raise.

Tax Division

Salaries and expenses, General Legal Activities

Summary of Decision Unit Resources by Object Class
(Dollars in thousands)

Object Class	1990 Actual Workyears	1990 Actual Amount	1991 Estimate Workyears	1991 Estimate Amount	1992 Estimate Workyears	1992 Estimate Amount	Increase/Decrease Workyears	Increase/Decrease Amount
11 Personnel compensation	317	$12,844	330	$16,693	338	$18,039	8	$1,346
12 Personnel benefits		2,614		3,398		3,662		264
21 Travel and transportation of persons		1,728		2,245		2,325		80
22 Transportation of things		23		30		30		0
23.1 GSA rent		2,319		3,014		3,277		263
23.3 Communications, utilities and miscellaneous charges		1,000		1,300		1,329		29
24 Printing and reproduction		16		21		30		9
25 Other services		1,841		2,393		3,236		843
26 Supplies and materials		296		384		402		18
31 Equipment		52		68		247		179
Total obligations	317	22,733	330	29,546	338	32,577	8	3,031

Tax Division
Justification of Program and Performance
Salaries and Expenses, General Legal Activities: 15-0128-0-1-752
Management and Administration - 6 Tax 30

Long-Range Goal: To provide Division-wide management and policy direction including: maintaining effective liaison with the Internal Revenue Service, U.S. Attorneys' Offices, and other client agencies; providing essential administrative, financial, personnel, and information systems support to Tax Division employees; promptly reviewing and analyzing proposed legislation affecting the nation's internal revenue system; and fulfilling the Division's administrative responsibilities under the Freedom of Information and Privacy Acts, as well as under Section 6103 of the Internal Revenue Code.

Major Objectives:

To furnish policy guidance and direction for all litigating operations of the Tax Division.

To supply all required financial, technical, personnel, and other support services to components throughout the Tax Division.

To obtain funding and programmatic resources needed to sustain the Division's litigation program.

To represent the Tax Division effectively in its dealings with the IRS, the offices of U.S. Attorneys, and the other components within the Department of Justice.

To supervise the comprehensive implementation of the EAGLE office automation network.

Base Program Description: The Executive Direction, Legislative Affairs, and Administrative Services components of the Tax Division provide leadership, policy guidance and direction, and administrative support. The Division's executive leadership establishes appropriate and uniform policies involving civil and criminal tax law enforcement, and promotes and maintains communications and liaison with the offices of U.S. Attorneys, and other components of the Department of Justice. The legislative affairs program reviews and analyzes legislative proposals that directly affect the litigating mission of the Tax Division, and prepares all legislative reports required by the Congress, the Office of Management and Budget, and the Department of Justice. Timely responses are also prepared to satisfy the requirements of the Freedom of Information and Privacy Acts.

The Administrative Section provides services relating to general administration, fiscal/budgetary controls, automated information systems technology, personnel administration, and other administrative support services as required. It consists of five separate components: (i) the Executive Office, which provides overall control and policy guidance; (ii) the Comptroller's Staff, which is responsible for all financial, budgetary, and program evaluation requirements, post litigation operations, and travel voucher processing; (iii) the Information Resources Staff, which is responsible for the implementation and maintenance of the new EAGLE office automation network, and for providing all other information systems technology support required by Tax Division employees; (iv) the Personnel Staff, which monitors the recruitment and hiring of Division personnel, and supplies all other required personnel services; and (v) the Services Staff, which manages security, case and file control, procurement, facilities management, and all other service support functions.

Accomplishments:

The Division's senior executive management remains committed to maintaining and enhancing the standards of excellence that have been the hallmark of the Tax Division for over fifty years. This commitment is reflected in demonstrated improvements in internal management controls, statistical record keeping, and office automation systems, as well as in a renewed emphasis on employee training, recruitment, and retention, the results of which have been extraordinarily successful.

The Tax Division's mission is to promote the uniform and equitable enforcement of the Nation's tax laws. Recognizing that the accomplishment of this mission requires a team effort, the Division's executive managers have fostered heightened cooperation with the offices of U.S. Attorneys, and the Treasury Department, meeting regularly with representatives of those offices to discuss matters of mutual concern. In this regard, and of significance, a Deputy Assistant Attorney General for the Tax Division is currently representing the Division on an Internal Revenue task force responsible for recommending improvements in the Service's criminal enforcement program. Similarly, the Tax Division has increased its participation in the Organized Crime Drug Enforcement Task Forces (OCDETF) and in the Dallas Bank Fraud Task Force established to address the country's savings and loan crisis. The Division also is assisting in the negotiation of international treaties, such as the Mutual Legal Assistance Treaties (MLAT), which may permit tax authorities to obtain access to individual and corporate financial information in both civil and criminal tax cases. These treaties are critical to the Government's continuing efforts to interdict international money-laundering and tax shelter schemes.

The Division has also succeeded in dealing with its previous employee recruitment and retention problems. The Division's management team firmly established employee recruitment and retention as the Division's number one priority. As a result, a number of new programs were established to address these areas. In the past year, the Division greatly expanded its Summer Honor Program and embarked on a new Fall recruitment program under which high-ranking Tax Division officials visited thirty law schools. These programs had an immediate, positive effect: applications for permanent employment rose by 50 percent, the quality of those applications increased dramatically, and the Division experienced its highest offer acceptance rate -- 53 percent -- in recent history. The Division's management also instituted procedures to improve lateral hiring. Media advertisements have produced several hundred quality applicants. To deal with employee turnover, the Division's management augmented existing award programs, created a new spot-award program for non-legal employees whose work performance demonstrated genuine initiative, greatly enhanced the training opportunities available to Division employees, and organized committees of line attorneys and secretaries to improve communications between those groups and the Assistant Attorney General.

The Comptroller's Staff continues to monitor the funding posture of the Tax Division, providing the Division's management with up-to-date reports of the Division's expenditures, as well as proposals for reprogramming resources, when necessary. For 1990, separate reports have been established to track the Division's Organized Crime Drug Enforcement Task Force (OCDETF) program. In meeting the reporting requirements established by the Department's OCDETF Administrative Unit, the Comptroller's Staff has established separate operating plan budgets and has implemented effective procedures for reimbursable billing from the OCDETF appropriation. The Staff is currently in the process of developing similar tracking systems to monitor the Division's activities with respect to financial institution fraud investigations and the new criminal tax enforcement initiative focusing on petroleum excise tax evasion.

A new unit has been established in the Comptroller's Staff, the Management Information Services (MIS) Unit, which has greatly improved office efficiency and productivity. MIS has established management information systems databases that allow the Staff to respond quickly and accurately to a myriad of resources-related inquiries made by management and administrative officials. Newly established internal databases also provide the Comptroller's Staff with a firmer grasp on the Division's caseload as a whole. These databases presage an entirely revised case management system and computer workload projection model that should be in place within the next several years. The Comptroller's Staff has also completed a comprehensive procedures manual for each component of the Staff, which addresses the following areas: (i) travel authorization and voucher processing; (ii) post litigation operations; (iii) financial and accounting procedures; (iv) budget and program evaluation activities; and (v) management information services operations.

The Information Resources Staff is supervising the Division-wide installation of the long-awaited EAGLE office automation network. The EAGLE office automation contract was awarded in July, 1989, and since then extraordinary efforts have been undertaken to meet an aggressive implementation schedule. The Information Resources Staff has supervised cable installations throughout Tax Division offices, and has monitored the construction of a computer room to support the EAGLE office automation network. The staff has also obtained contract support for facilities operations and maintenance and "hotline" services to address any problems that might arise from the network's operations. Additionally, the Staff will soon be working in close cooperation with representatives of the Department's other litigating components to develop a uniform, Department-wide case management database system.

The Personnel Staff has assisted the Office of the Assistant Attorney General in implementing its aggressive employee recruitment and retention program. The Personnel Staff has endeavored to bring new recruits on-board as quickly as possible (consistent with security requirements). In addition, it has overseen the development of a "spot award" program for non-legal employees, which, in cooperation with the Justice Management Division, will provide awards of between $75 to $150 to employees who develop innovative techniques for improving office efficiency and productivity. The Personnel Staff likewise works closely with the Division's Office of Training to track and monitor all training courses attended by Tax Division personnel, a responsibility that has escalated with the substantial expansion of the Division's own internal training program. In order to more fully address employee retention problems, the Division is this year requesting funds to permit it to compensate its attorneys on the Administratively Determined Pay System. This is part of the Department's overall effort to bring all Departmental attorneys under a single pay schedule.

The Services Staff has responded effectively to new workload requirements stemming from the implementation of the EAGLE office automation network. This involved, in no small measure, addressing burdensome procurement requirements associated with EAGLE equipment leases, and purchases, and in coordinating and monitoring the renovation of a computer room in the basement of the Judiciary Center Building. In addition, the Staff worked extensively with Department officials to ensure the smooth transition to the new FTS-2000 communications and WASP telephone systems.

The Administrative Section's Services Staff has embarked on the first full A-76 privatization of commercial activities review in the Department of Justice. An A-76 review of the Division's mail, messenger, and files services is currently under way. A request for proposal from commercial vendors will be issued and the cost comparison completed this Fall and the determination whether to contract out or to retain the function in-house will be made by the beginning of 1991. The A-76 review covers 11 FTE and more than $257,000 in personnel and benefits costs alone. In addition, the Information Resources Staff has contracted out for facilities maintenance and EAGLE hotline support under the auspices of the A-76 program. In total, 17 FTE workyears are being, or have been, reviewed under the Division's A-76 privatization program.

920

The Tax Division has also implemented a number of steps to address the weakness in our debt collection program. We have hired and trained 6 additional collection paralegals for our Civil Tax Litigation program to enable the Civil Trial Sections to consistently implement the debt collection procedures set forth in Tax Division's Memorandum 84-25 on Collection Procedures. A review of all outstanding judgments has identified those judgments not currently in active collection within the Division . These judgments will be transferred to the United States Attorneys' Offices or the Internal Revenue Service. The Division has implemented an annual review of all outstanding judgments. We have made a commitment to automate collection procedures as much as possible and design a computer database that will provide management information that accurately reflects the case inventory, outstanding balance, and collection potential of Division collection cases. Tax Division's emphasis on collection efforts have resulted in the collection of $47 million as of the end of June, 1990, as compared to $14.9 million at the same time last year.

42-569 O—91——30

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization Tax Division

Decision Unit 6Tax10 Management and Administration

Resource Requirements	1989	1990	1991	1992			
				Base Level		Request Level	
				Change	Cum.	Change	Cum.
BUDGET AUTHORITY	$4,817	$5,526	$6,275	$415	$6,690	$1,414	$8,104
OUTLAYS	4,769	5,471	6,212	411	6,623	1,319	7,942
Appropriated Positions	91	99	95	...	95	...	95
Workyears:							
Full-time Permanent	82	91	91	...	91	...	91
Other	12	12	12	...	12	...	12
Subtotal	94	103	103	...	103	...	103
Overtime/Holiday	3	3	3	...	3	...	3
Total	97	106	106	...	106	...	106

Program Changes: A total increase of $1,414,000 is requested for the Division's management and administration program for FY 1992. Of this amount, $500,000 is required to cover operations and maintenance costs for the Division's EAGLE office automation network. Following the award of the EAGLE automation network contract to TiSoft, Inc. in July, 1989, the Division embarked on an aggressive installation schedule designed to put the network in place by the end of calendar year 1990. Under the terms of the contract, the Tax Division is obtaining EAGLE office automation equipment under a lease-to-purchase agreement. By FY 1992, most of the EAGLE equipment will have been purchased by the Tax Division, at which time the funding provided by the Legal Activity Office Automation (LAOA) fund will cease and appropriated funds will be needed to pay for all maintenance costs and upgrades to Division-owned equipment. The President's 1991 budget request includes a mandatory cost increase of $255,000 for EAGLE equipment maintenance. However, this initial level of funding is insufficient to cover all of the operations and maintenance costs that will be incurred during FY 1992. The additional funds requested for FY 1992, in conjunction with existing base level funding for EAGLE operations and maintenance built into the FY 1991 request, will enable the Tax Division to utilize the sophisticated EAGLE office automation network in the manner in which it was originally envisioned.

In addition, a program enhancement of $122,000 is required to cover training that would be deferred due to the absorption of the 1991 pay raise. These funds will enable the Division to broaden the outside professional training opportunities made available to Division personnel. While the Division currently maintains a training program in-house, training in certain complex areas of tax law can best be provided by outside sources with specific expertise in the area of tax law in question -- e.g. financial institution fraud and motor fuel excise tax fraud involving complex "paper trails" which must be carefully and thoroughly analyzed if the prosecution of offenders is to be successful.

The requested program increase of $35,000 is necessary to support the Department's implementation of the Administration's "Management Priorities for the 1992 Budget" as outlined in OMB memorandum (M-90-05) dated July 16, 1990 to all Executive Departments and Agencies. The funding will be used to specifically address upgrades in financial management systems consistent with long-standing Administration goals for consolidating, upgrading and modernizing a single integrated financial management system within each agency, with full implementation of the Core Financial Requirements, the Standard Ledger and capable of producing auditable financial statements.

For FY 1992, the Tax Division requests $757,000 in budget authority to cover the cost of extending the Administratively Determined Pay System to all attorneys within the Division, a change which will ensure parity within the Department and enhance our ability to retain experienced attorneys.

922

Decision Unit Funding Level Requirements

(Dollars in thousands)

Organization Tax Division

Decision Unit 6Tax30 Management and Administration

Resource Requirements	1989	1990	1991	1992			
				Base Level		Request Level	
				Change	Cum.	Change	Cum.
BUDGET AUTHORITY	$4,817	$5,526	$6,275	$415	$6,690	$1,414	$8,104
OUTLAYS	4,769	5,471	6,212	411	6,623	1,319	7,942
Appropriated Positions	91	99	95	...	95	...	95
Workyears:							
Full-time Permanent	82	91	91	...	91	...	91
Other	12	12	12	...	12	...	12
Subtotal	94	103	103	...	103	...	103
Overtime/Holiday	3	3	3	...	3	...	3
Total	97	106	106	...	106	...	106

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For FY 1992, the Tax Division requests $757,000 in budget authority to cover the cost of extending the Administratively Determined Pay System to all attorneys within the Division, a change which will ensure parity within the Department and enhance our ability to retain experienced attorneys.

Schedule of Cost Inputs
(Dollars in thousands)

Organization Tax Division

Decision Unit 6Tax10 Management and Administration

	Request Level		
	Pos	WY	Amount
Positions by Type			
Attorney	...	...	...
Nonlegal	...	...	...
Administratively Determined Salaries	...	...	$757
Subtotal	...	...	757
Personnel Benefits			...
Travel and Transportation			...
GSA Rent			...
Rent, Communications and Utilities			...
Printing			...
Other Services			657
Supplies and Materials			...
Equipment			...
Subtotal	...	...	657
Total	...	...	1,414

Description of Cost Inputs

EAGLE Office Automation Maintenance - An additional $500,000 is required to cover maintenance costs for the new EAGLE office automation network. Sufficient funding to cover such additional maintenance costs is simply unavailable in the Division's current appropriated account. Hence, the requested funding is absolutely critical if the Division is effectively to maintain its new, sophisticated office automation environment in working condition.

1991 Pay Raise Absorption - A total of $122,000 is required to cover training expenditures deferred due to the absorption of the 1991 pay raise.

FMIS Enhancements - A funding increase of $35,000 is required to support the technological enhancement of the Department's Financial Management Information Systems (FMIS).

Administratively Determined Salaries - A total of $757,000 is requested to eliminate the salary differentials currently existing among the Department's attorney personnel.

924

Tax Division

Salaries and expenses, General Legal Activities

Summary of Decision Unit Resources by Object Class
(Dollars in thousands)

Object Class	1990 Actual Workyears	1990 Actual Amount	1991 Estimate Workyears	1991 Estimate Amount	1992 Estimate Workyears	1992 Estimate Amount	Increase/Decrease Workyears	Increase/Decrease Amount
11 Personnel compensation	103	$3,150	103	$3,577	103	$4,588	0	$1,011
12 Personnel benefits		442		502		532		30
21 Travel and transportation of persons		48		52		53		1
22 Transportation of things		48		50		50		0
23.1 GSA rent		481		546		586		40
23.3 Communications, utilities and miscellaneous charges		210		238		242		4
24 Printing and reproduction		17		19		19		0
25 Other services		931		1,065		1,808		743
26 Supplies and materials		88		100		100		0
31 Equipment		111		126		126		0
Total obligations	103	5,526	103	6,275	103	8,104	0	1,829

Tax Division
Salaries and expenses, General Legal Activities

Financial Analysis - Program Changes
(Dollars in thousands)

Item	Federal Appellate Activity		Criminal Tax Prosecution				Civil Tax Litigation		Management and Administration			Total	
	Major Case Initiative		Motor Fuel Excise Tax Initiative		General Enforcement Initiative		Bankruptcy Initiative		Compensation Issues	FMIS Enhancement	EAGLE Maintenance		
	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos	Amount	Amount	Amount	Amount	Pos.	Amount
Grades													
GS-13	4	$183	8	$367	6	$275	12	$550	...	...	...	30	$1,375
GS-7	1	23	2	44	2	44	4	87	...	...	...	9	197
Total positions and annual rate	5	205	10	411	8	319	16	637	...	...	...	39	1,572
Lapse (-)	-2	-103	-5	-205	-4	-160	-8	-318	...	...	...	-19	-786
Other personnel compensation	...	1	...	1	...	1	...	2	...	...	...	...	5
Administratively determined salaries	...	...	...	...	...	...	...	...	$757	...	...	...	757
Total workyears and personnel compensation	3	103	5	207	4	160	8	321	757	...	...	20	1,548
Personnel benefits		60		76		60		121	...	...	...		297
Travel and transportation		106		50		98		75	...	...	...		329
GSA rent		22		43		35		69	...	...	...		169
Other rent		4		7		6		11	...	...	...		28
Printing		2		4		3		7	...	...	...		16
Other services		67		94		112		432	122	$35	$500		1,362
Supplies and materials		5		10		9		18	...	...	...		62
Equipment		55		111		89		179	...	...	...		434
Total program workyears and obligations changes requested, 1992	3	386	5	602	4	572	8	1,233	879	35	500	20	4,205

926

Tax Division
Salaries and expenses, General Legal Activities
Detail of Permanent Positions by Category
Fiscal Years 1990 - 1992

Category	1990 Authorized	1991 Request	1991 Program Supplemental	1991 Total	1992 Program Increases	1992 Total
Attorneys (905)	360	360	8	368	30	398
Paralegal Specialists (950)	26	26	...	26	...	26
Other Legal and Kindred (900-998)	29	29	...	29	...	29
Gen. Admin. Clerical and Office Services (300-399)	236	232	4	236	9	245
Accounting and Budget (500-599)	5	5	...	5	...	5
Total	656	652	12	664	39	703
Washington	632	628	12	640	39	679
U.S. Field	24	24	...	24	...	24
Total	656	652	664	664	39	703

Criminal Division
Salaries and Expenses, General Legal Activities
Crosswalk of 1991 Changes
(Dollars in thousands)

Activity/Program	1991 President's Budget Request			Transfers Between Accounts			Reprogrammings			1991 Program Supplementals Requested			1991 Appropriation Anticipated		
	Pos	WY	Amt	Pos	WY	Amt	Pos	WY	Amt	Pos	WY	Amt	Pos	WY	Amt
3. Criminal Matters:															
Federal appellate activity	29	27	$ 2,307	...	...	...	...	...	...	...	...	11	29	27	$ 2,318
Organized crime prosecution	96	83	7,850	-25	-25	-$1,903	...	...	-36	...	...	27	71	58	5,938
Public integrity	38	34	3,000	...	...	...	...	...	...	...	...	15	38	34	3,015
Fraud	117	104	8,951	...	...	...	...	...	...	30	15	1,940	147	119	10,891
Narcotic & dangerous drug prosecution	73	66	5,743	...	...	...	...	...	...	...	...	28	73	66	5,771
Internal security	43	40	3,515	...	...	...	...	...	...	...	...	17	43	40	3,532
General litigation & legal advice	78	71	6,143	...	...	...	...	...	...	...	...	30	78	71	6,173
Office of special investigations	43	42	3,882	...	...	...	...	...	...	...	...	17	43	42	3,899
Prosecution support	169	160	12,234	...	...	...	...	...	...	6	3	382	175	163	12,616
Child exploitation and obscenity section	20	20	1,712	...	...	...	...	...	...	...	...	8	20	20	1,720
Management & administration	86	86	6,483	...	...	...	...	...	...	...	...	33	86	86	6,516
Total	792	733	61,820	-25	-25	-1,903	...	...	-36	36	18	2,508	803	726	62,389

Transfers: In 1991, 25 positions, 25 workyears, and $1,903,000 will be transferred to the U.S. Attorneys appropriation to implement the directive of the 1990 Violent Crime Initiative which provided resources for combatting emerging organized crime groups in major U.S. cities.

Reprogrammings: Reflects the permanent effect of the 1990 reprogramming of funds from the Criminal Division to the Office of Legal Counsel.

Supplementals Requested: Includes resources for three separate initiatives: Financial Institutions Fraud (30 positions, 15 workyears, and $1,884,000); short term witness protection (6 positions, 3 workyears and $314,000); and increased transcription costs ($314,000).

Criminal Division
Salaries and Expenses, General Legal Activities
Summary of Requirements
(Dollars in thousands)

Adjustments to base:	Perm. Pos.	Work Years	Amount
1991 President's Budget Request	792	733	$61,820
Proposed Supplemental, Financial Institution Fraud	30	15	1884
Transfer of Organized Crime and Racketeering Section resources to U.S. Attorneys	-29	-25	-1,903
Proposed Supplemental, Prosecution Support - Witness Security	6	3	314
Proposed Supplemental, Increased Transcription Services	...	...	310
Reprogramming to Office of Legal Counsel	...	...	-36
1991 Appropriation anticipated	803	726	62,389
Mandatory Increases:			
Annualization of 1991 positions	...	2	117
Annualization of 1991 supplementals	...	18	1,995
1991 pay annualization	...	...	374
1992 pay raise	...	...	1,030
Additional compensable day	...	...	175
Within-grade increases	...	...	147
SES pay increase	...	...	101
Health benefits	...	...	137
Federal Employees Retirement System (FERS)	...	...	93
Federal Insurance Corporation Act (FICA)	...	...	33
Distributed Administrative Support (DAS)	...	...	9
Travel mileage	...	...	9
Postal rate increase	...	...	18
GPO and Department printing costs	...	...	16
Employee data and payroll services	...	...	6
Project Eagle service & maintenance	...	...	33
Security investigations	...	...	5
Security reinvestigations	...	...	531
General Services Administration (GSA) rent	...	...	1,009
Forced relocation expenses	...	...	133
GSA recurring reimbursable services	...	...	403
General pricing level adjustments	...	...	449
Total, mandatory increases	...	20	6,931
Decreases:			
Nonrecurring costs for unemployment compensation	...	...	- 4
Nonrecurring costs for reduction in Financial Operations Services expenditures	...	...	- 26
Nonrecurring costs for equipment/supplies for 152 new positions authorized in 1990	...	...	- 947
Nonrecurring costs for equipment/supplies for 36 positions authorized in 1991 supplementals	...	...	- 508
Nonrecurring costs for equipment/supplies for 4 new positions authorized in 1991	...	...	- 31
Total, decreases	...	...	-1,516
1992 Base	803	746	$67,804

Estimates by budget activity	1991 Appropriation Anticipated Perm. Pos.	WY	Amount	1992 Base Perm. Pos.	WY	Amount	1992 Estimate Perm. Pos.	WY	Amount	Increase/Decrease Perm. Pos.	WY	Amount
3. Criminal Matters	803	726	$62,389	803	746	$67,804	876	782	$ 79,417	73	36	$11,613
ADP Employment:												
Full-time permanent	528			700			812			73		
Reimbursable	6			6			12			...		
Other	76			35			29			-46		
	610		•	741			853			73		

Criminal Division
Salary and expenses, General Legal Activities
Summary of Resources by Program
(Dollars in thousands)

Estimates by Program	1990 as enacted After Sequestration Perm. Pos.	WY	Amt.	1990 Planned Perm. Pos.	WY	Amt.	1991 Appropriation Anticipated Perm. Pos.	WY	Amt.	1992 Base Perm. Pos.	WY	Amt.	1992 Estimate Perm. Pos.	WY	Amt.	Increase/Decrease Perm. Pos.	WY	Amt.
Criminal Matters:																		
Federal appellate activity	29	27	$ 2,152	29	27	$ 2,152	29	27	$ 2,318	29	27	$ 2,483	29	27	$ 2,529	...	...	$ 46
Organized crime prosecution	282	238	19,099	282	238	18,863	71	58	5,938	71	58	6,379	71	58	6,600	...	...	221
Public integrity	34	32	2,611	34	32	2,611	38	34	3,015	38	36	3,331	38	36	3,450	...	...	119
Fraud	117	104	8,555	117	104	8,555	147	119	10,891	147	134	13,071	182	152	17,757	35	18	4,686
Narcotic & dangerous drug prosecution	74	47	3,662	74	47	3,662	73	66	5,771	73	66	5,930	88	73	7,355	15	7	1,425
Internal security	44	34	2,691	44	34	2,341	43	40	3,532	43	40	3,688	43	40	3,822	...	...	134
General litigation & legal advice	78	55	4,383	78	55	3,833	78	71	6,173	78	71	6,408	78	71	6,652	...	...	244
Office of special investigations	45	44	3,731	45	44	3,581	43	42	3,899	43	42	4,157	43	42	4,291	...	...	134
Prosecution support	169	137	9,464	169	137	9,464	175	163	12,616	175	166	13,510	198	177	15,945	23	11	2,435
Child exploitation and obscenity	20	19	1,573	20	19	1,423	20	20	1,720	20	20	1,841	20	20	1,873	...	...	32
Management & administration	87	83	5,738	87	83	6,638	86	86	6,516	86	86	7,006	86	86	9,143	...	...	2,137
Total	979	820	63,659	979	820	63,123	803	726	62,389	803	746	67,804	876	782	79,417	73	36	11,613
Reimbursable Workyears		6			6			6			6			6				
Total Workyears		826			826			732			752			788			36	
Other Workyears																		
Overtime		2			2			2			2			2			...	
Total compensable workyears		828			828			734			754			790			36	

Justification of Program and Performance
Criminal Division
Salaries and Expenses, General Legal Activities: 15-0128-0-752
Federal Appellate Activity - 2CRM01

Long-Range Goal: To secure appellate judicial decisions in criminal cases favorable to the United States in accordance with the fair administration of criminal justice.

Major Objectives:

In Supreme Court cases, the Section prepares draft briefs (briefs in opposition and merit briefs) and petitions for certiorari; and screens defendants' certiorari petitions.

In courts of appeals cases referred to the Section by the United States Attorneys and other components of the Division, the Section writes briefs, rehearing petitions, and mandamus petitions. It also presents oral arguments.

In judicial decisions adverse to the Government, the Section prepares memoranda on behalf of the Criminal Division to the Solicitor General recommending whether further review should be sought.

The Section furnishes solutions to legal problems arising in the prosecution of criminal cases to other components of the Division and to the United States Attorneys.

Base Program Description: The Appellate Section consists of a group of attorneys who are experts in federal criminal law. (1) The Section, in conjunction with the Office of the Solicitor General, reviews certiorari petitions in federal criminal cases filed in the Supreme Court to determine whether to respond by filing a brief in opposition or to waive a response because the petition does not merit any answer. If the case merits a response, a draft brief in opposition is prepared by a Section attorney opposing Supreme Court review. The Section also prepares draft certiorari petitions and merit briefs for the Solicitor General. (2) In cases before the courts of appeals, at the request of United States Attorneys, Section attorneys write briefs and participate in oral arguments. The Section also provides advice to Assistant U.S. Attorneys who seek assistance in the preparation of their appellate briefs. (3) The Section examines reviewable decisions of district courts and courts of appeals adverse to the United States Department of Justice to determine whether review or further review is justified. In this process, the Section Attorneys in their memoranda present the strongest possible arguments in favor of the government's position, and, where possible, attempt to develop arguments that will result in decisions favorable to the United States.

Accomplishments and Workload: The quantitative experience and expectations of the Appellate Section are presented in the following table:

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
Supreme Court:							
Briefs in opposition	308	375	375	...	375	...	375
Waiver of responses	875	875	875	...	875	...	875
Merit (including amicus) briefs	11	6	6	4	10	...	10
Government petitions for certiorari	5	5	5	2	7	...	7
Court of Appeals:							
Main and reply briefs, oral arguments and Rehearing and mandamus petitions	255	240	275	...	275	...	275
Adverse Decision Memoranda	844	1000	1000	...	1000	...	1000

The Appellate Section plays a major role in obtaining favorable appellate decisions in federal criminal cases. For example, the Sentencing Reform Act of 1984 requires that criminal sentences be imposed under guidelines promulgated by the Sentencing Commission. The interpretation of the guidelines is now a common issue in appellate litigation, and the Section is involved in ensuring that the guidelines are properly construed. The Section provides relevant arguments to United States Attorneys pertaining to favorable judicial interpretations. The Section handles appeals for United States Attorneys and other Sections of the Division, including the appeals in complex cases. The Section has continued to shepherd successfully the Speedy Trial Act, providing advice to the United States Attorneys on issues arising under the Act.

It is anticipated that the addition of new positions to the U.S. Attorneys' Offices will result in an increase in adverse decisions, resulting in an increase in adverse decision memoranda. Other workload factors will also be affected. A few representative cases in which the Section has participated are discussed below.

During the past year, the Section has prepared briefs for the Supreme Court and the courts of appeals on a number of important and recurring issues. For instance, the circuits have divided on the question whether certain types of burglary are violent felonies for purposes of enhancing a sentence under 18 U.S.C. 924(e). The Section has filed briefs and rehearing petitions on this issue in several Ninth Circuit cases, including Argo, No. 89-30043; Harkey, No. 89-30057; Chatman, 869 F.2d 525 (1989) and Cunningham, No. 88-5037. The Section also prepared a draft Supreme Court merits brief on the issue in Taylor v. United States, No. 88-7194. The Court will resolve the issue this term.

Last term, in Gomez v. United States, 109 S.Ct. 2237 (1989), the Supreme Court ruled that a magistrate is not authorized by statute to preside over jury selection, and that reversible error occurs where the district court delegates jury selection to the magistrate over the defendant's timely objection. Certain district courts, including courts in Hawaii, Puerto Rico, and the Eastern District of New York, have routinely delegated jury selection to a magistrate. Therefore, in the aftermath of Gomez, virtually every conviction obtained in those districts by jury trial was at risk. In an attempt to contain the damage caused by Gomez, the Section has filed briefs and rehearing petitions in the First and Ninth Circuits arguing that in the absence of a timely objection, a defendant has forfeited his right to reversal under Gomez. These cases include, inter alia, United States v. France, 886 F.2d 223 (9th Cir. 1989), petition for rehearing en banc denied, January 16, 1990, and United States v. Lopez-Pena, 890 F.2d 490 (1st Cir. 1989), rehearing granted, February 9, 1990. The Section has also prepared in conjunction with the Solicitor General a certiorari petition in United States v. France, No. 89-1363.

The Section has successfully filed a rehearing petition in United States v. Restrepo, 883 F.2d 781 (1981), in which the Ninth Circuit held that the Sentencing Guidelines prohibit district courts, in determining the appropriate guideline sentence, from considering conduct that was not the subject of the counts of conviction. In Restrepo, the defendant was convicted on two counts charging distribution of cocaine. The Government showed that the defendant also distributed drugs on other occasions for which he was not charged. To determine the defendant's base offense level, the district court aggregated the quantities of drugs named in the indictment with the uncharged quantities, and the Ninth Circuit reversed. In granting the rehearing petition, the court of appeals withdrew its decision.

The Section filed another successful rehearing petition in United States v. Lauback, 869 F.2d 965 (6th Cir. 1989). In that case, the Sixth Circuit held that the reversal of the conviction of one conspirator on a ground other than insufficient evidence also required the reversal of the conviction of the sole alleged co-conspirator. On rehearing, the court reinstated the conviction of the co-conspirators, agreeing with the Section's argument that consistency was not required. 884 F.2d 924 (1989).

The Section's draft merits briefs for the Solicitor General this term include the following cases: United States v. Ojeda Rios, No. 89-61 (whether suppression is required for nonprejudicial delays in judicial sealing of electronic surveillance tapes); Hughey v. United States, No. 89-5691 (whether an order of restitution may be based on conduct beyond that charged in the count of conviction).

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Criminal Division

Program: 2CRM01 Federal Appellate Activity

	1989	1990	1991	1992			
				Base Level		Request Level	
				Change	Cum	Change	Cum
Resource Requirements							
BUDGET AUTHORITY	$2,039	$2,152	$2,318	$165	$ 2,483	$ 46	$ 2,529
OUTLAYS	2,022	2,135	2,294	164	2,458	4\	2,498
Appropriated Positions	28	29	29		29	...	29
Workyears:							
Full-time Permanent	23	27	27		27	...	27
Other	...	...	...		...	...	
Subtotal	23	27	27		27	...	27
Overtime/Holiday	...	...	...		...	...	...
Total	23	27	27		27	...	27

Program Changes: Increases totalling $46,000 are requested. The requested pay raise absorption ($32,000) will enable the Appellate Section to retain adequate funding for legal research required for appellate cases and service and maintenance of existing automated systems in its base. The remaining $14,000 is for increased costs expected to result from increased use of legal research systems (JURIS/LEXIS/Westlaw) due to greater accessibility through the Division's office automation system, Project EAGLE.

Schedule of Cost Inputs
(Dollars in thousands)

Organization: Criminal Division

Decision Unit: Federal Appellate - 2CRM01

	Request Level		
	Pos	WY	Amount
Other Services	...	...	46
Total	...	...	46

Description of Cost Inputs

Resources for the required absorption of one-half of the 1991 pay increase will allow adequate base funding for legal research and service and maintenance of automated equipment. Other costs are for increased use of available legal research data base systems.

Justification of Program and Performance
Criminal Division
Salaries and Expenses, General Legal Activities: 15-0128-0-752
Organized Crime Prosecution - 2CRM02

Long-Range Goal: To nullify the influence of major organized criminal activities on the economic, political, and social institutions of the United States.

Major Objectives:

To ensure the investigation and prosecution of all major organized groups and activities.

To use innovative investigative and litigative approaches utilizing all appropriate criminal and civil remedies against organized crime.

To set and maintain national goals, priorities and standards in joint program planning and execution by Federal, State and local agencies active in organized crime law enforcement.

Base Program Description: Program resources are directed at those organized crime groups, whether La Cosa Nostra (LCN), Sicilian Mafia, Asian Organized Crime or other emerging groups, which pose the greatest threat to the economic and social well-being of the nation. With the transfer of Strike Force Offices to the United States Attorneys, which was implemented by Attorney General Order No. 1386-89, dated December 26, 1989, the new Litigation Unit of the Organized Crime and Racketeering Section will act as a strategic reserve of experienced prosecutors to try labor racketeering, RICO and other organized crime cases wherever needed. These lawyers will serve to complement the Strike Force Units established in the United States Attorneys' Offices and provide expertise to those units and other United States Attorneys' Offices that are prosecuting organized crime cases. The attorneys will be used principally to litigate organized crime cases in the seventy districts that do not have Strike Force Units, and in those districts where these units are very small (e.g., in cities where field offices were formerly located). They will also help the larger Strike Force Units when special subject expertise or emergency assistance is required. In addition, these lawyers will be available to identify and to target emerging criminal organizations, and to develop new methods of prosecution. The Attorney General's Organized Crime Council (AGOCC) is also likely to assign the new unit special litigation projects.

The Litigation Unit will also provide staff, as necessary, to the AGOCC, which has been established to oversee the national effort against organized crime. That Council is chaired by the Deputy Attorney General, and consists of the Assistant Attorney General, Criminal Division, the Chair of the Attorney General's Advisory Committee (AGAC), and the head of each concerned Federal investigative agency. The AGOCC will review policies and priorities, promote interagency coordination, and evaluate the threat presented by emerging organized crime elements to establish national priorities, and to memorialize a national strategy to combat organized crime.

Because the existing organized crime case management system will remain intact, the Strike Force Unit in each United States Attorney's Office will report proposed case initiations and prosecution recommendations to the Organized Crime and Racketeering Section (OCRS) for approval. Through the Case Initiation Report approval mechanism, management regulates the application of national priorities. The chief priority is LCN activity and affiliated labor racketeering, followed by emerging organized crime groups. Quality control and compliance with Department prosecutorial policies and procedures are guaranteed by the Prosecution Memorandum approval process and continuous supervisory contacts. Program priorities are set through the Attorney General's Organized Crime Council, staffed by the OCRS which complements the extensive interagency communication in the field on case-related matters with regular assessments of local program effectiveness in each Strike Force city and in Washington.

Toward the end of FY 1990, the OCRS will have substantially completed the process of reorganizing and re-staffing in accordance with the Attorney General's plan to merge the Strike Forces, and in accordance with the provisions of the violent-crimes appropriations bill enacted in November 1989 (Pub. L. No. 101-64, tit. IV, Nov. 21, 1989). This legislation provided 20 new attorney positions to be used against Asian, Sicilian, and emerging organized crime groups and to improve coordination at the international level. In response to this direction, the Criminal Division has approved the allocation of these new resources in three groups. First, fifteen of the new attorneys positions will be permanently transferred to Strike Force Units in the field, in those cities currently experiencing the greatest concentration of the targeted criminal groups: initially, Los Angeles, San Francisco, Houston, Boston, Chicago, Philadelphia, and Brooklyn.

Second, another group of three new attorneys will be used to create within the OCRS in Washington, D.C., a new unit whose efforts will be dedicated to coordination with the international law enforcement community with respect to several matters of paramount importance. This new international unit will coordinate with the Russian Interior Ministry concerning Russian organized crime. It will provide increased support to the Italian-American Working Group, and will coordinate with the United Nations and with numerous foreign governments with respect to the preparation of training manuals and courses, asset searches, and other matters. We expect that the existence of this new unit within our Headquarters operation will greatly enhance our ability to track the activities of organized crime groups with international connections, and to develop appropriate investigative strategies quickly and efficiently as new groups emerge or existing groups undergo realignments or other changes. The third leg of the allocation of the 20 violent-crimes attorney positions is the addition of two attorney slots to the OCRS Headquarters support organization. These attorneys will be assigned to the existing RICO Review Unit.

The remaining members of the OCRS will provide Washington based management and support to the Strike Force Units and other activities of United States Attorneys across the country. As part of the Washington Staff, the RICO Review Unit reviews all criminal and civil RICO cases brought by Federal prosecutors, reviews proposed prosecutions involving Violent Crimes in Aid of Racketeering under 18 U.S.C. 1959, and provides extensive support and advice to United States Attorneys and Department prosecutor with respect to those statutes and a wide range of others designed for use against organized crime and other major offenders, e.g., 18 U.S.C. 891-96 (loansharking); 18 U.S.C. 1952 (Interstate Travel in Aid of Racketeering); 18 U.S.C. 1955 (Illegal Gambling Business); 18 U.S.C. 1958 (Murder for Hire). In addition to its responsibilities with respect to the prosecution of organized crime and labor racketeering, the Section's mission includes support of United States Attorneys concerning non-organized crime cases involving labor-management relations, the internal affairs of labor unions, and the operation of employee pension and welfare benefit plans in the private sector. As part of that objective, the Labor-Management Unit acts as the Criminal Division's liaison with the various components of the Department of Labor and other Federal agencies which have regulatory responsibilities in these subject areas.

Accomplishments and Workload: The recent experience and future projections of the organized crime and racketeering program are summarized quantitatively in the following table. It is important to note that, under the terms of the Attorney General's order merging the Strike Forces, there has been virtually no change in the supervisory duties or workload of the Chief, Deputy Chiefs, and Special Counsel to the Chief. Thus, these officials will continue to review and approve all Strike Force Unit Case Initiation Reports, prosecution memoranda, and indictments; requests for electronic surveillance orders; witness immunity orders; and all other substantive and procedural matters with the single exception of travel authorizations for Strike Force Unit attorneys. In addition, the Chief, Deputy Chiefs, and other Headquarters personnel will still carry out extensive oversight of Strike Force Unit activities through field visits to each field office, and the Special Counsel will continue to prepare and argue appellate briefs in major Strike Force prosecutions. In 1989, the Strike Forces closed 100 investigations and 175 prosecutions in the field; at the close of that period, 660 investigations and 360 prosecutions were pending. The levels of Strike Force investigations and prosecutions requiring these supervisory activities are expected to increase substantially with the addition of new prosecutors in the field and in the Headquarters strategic reserve. Although the Section has not historically tracked the workload of its supervisory personnel numerically, available figures for FY 1989 show that the Chief, Deputy Chiefs, and Senior Litigation Counsel handled at least 206 written matters and reviewed 57 separate applications for non-consensual electronic surveillance that were not handled by staff attorneys and that, consequently, do not show up in the table below. The following

table reflects projects handled by staff attorneys and paralegals, as well as appeals completed by the Special Counsel. It should be noted that the number of appellate briefs completed in FY 1989 reflects complex appeals from convictions in Strike Force prosecutions involving 27 defendants, which in some cases involved trial records in excess of 20,000 pages. Matters handled personally by the Chief and Deputy Chiefs are reported informally in the text above:

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
NON-LITIGATIVE MATTERS:							
Approvals of RICO Prosecutions and Civil Suits:	116	128	140	...	140	...	140
Other Consultations/Approvals/Legal Advice for U.S. Attorney:[1]	373	410	451	...	451	...	451
Advice to Others (Agencies, Citizens, etc.):	566	623	685	...	685	...	685
Congressional Matters:							
Bill Analyses/Reports:	14	14	14	...	14	...	14
Preparation of Testimony:	13	13	13	...	13	...	13
Drafting of Legislation:	9	9	9	...	9	...	9
Responses to Inquiries:	56	56	56	...	56	...	56
Document/Data Compilation (FOIA) and Labor Conviction Tracking):	205	226	248	...	248	...	248
Preparation of Training Materials:	32	35	39	...	39	...	39
Appellate Briefs:	20	20	22	...	22	...	22
Case Initiation Reports (Support Functions):[2]	156	234	257	...	257	...	257

[1] This figure includes matters such as consultations and legal advice to prosecutors with respect to various statutes supervised by OCRS, including the Hobbs Act, 18 U.S.C. 1951; various labor-racketeering statutes under Title 29; the Travel Act, 18 U.S.C. 1952; the murder-for-hire and violent-crimes provisions of 18 U.S.C. 1958-59; the impanelling of special grand juries under 18 U.S.C. 3331-32; and numerous other matters.

[2] This category reflects all new organized crime investigations opened, whether by Strike Forces as part of OCRS (through FY 1989) or by Strike Force Units within United States Attorneys' offices (beginning in FY 1990). The support functions for each new investigation include review of Case Initiation Reports and coordination of investigations. These functions are performed by the Chief, the Deputy Chiefs, and on occasion, other staff personnel within OCRS. The projected increase in new investigations reflects an expected increase of about 50% in the attorney positions in Strike Force Units.

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
Matters:							
Pending, beginning of year	604	...	9	15	24	...	24
Opened	156	9	20	2	22	...	22
Closed	100	...	5	1	6	...	6
Pending, end of year	660	9	24	16	40	...	40
Cases (lead prosecution):							
Pending, beginning of year	343	...	2	3	5	...	5
Opened	192	2	21	2	23	...	23
Closed	175	...	18	2	20	...	20
Pending, end of year	360	2	5	3	8	...	8
Disposition of defendants in cases litigated:							
Convictions	365	...	37	4	41	...	41
Acquittals/dismissals	64	...	6	1	7	...	7
Other dispositions (transfers to U.S. Attorneys, deaths)	6	...	1	...	1	...	1

Because of the Government's expanded initiative against drug trafficking, violent crime, and organized crime, which will be accompanied by the hiring of hundreds of new Federal prosecutors nationwide, we anticipate that there will be a significant increase in the volume of RICO prosecutions and civil complaints submitted to our staff for review, and a corresponding increase in requests for support and advice from the field with respect to RICO, labor racketeering, and other statutes supervised by OCRS. For example, the expansion of legalized gambling throughout the United States has led to a significant increase in requests from Federal and State law enforcement authorities for opinions with respect to the application of Federal criminal statutes involving gambling. Moreover, as staffing permits, we expect to assist United States Attorneys who are faced with racketeering prosecutions by detailing Headquarters attorneys to assist in major trials and forfeiture proceedings. In addition, there will be considerable need for training of newly hired Assistant United States Attorneys in complex matters within the expertise of OCRS, such as RICO and labor racketeering. We have already prepared a comprehensive video-based training program on criminal and civil RICO, to be presented in cooperation with the Attorney General's Advocacy Institute. We expect that this program will need to be updated and expanded with some regularity, and that similar programs will be needed in other areas.

It should be noted that, even apart from the increased work load that will come from the Administration's new anti-crime initiative, the RICO Review Unit recently has been faced with added burdens in its normal day-to-day operations. For example, the current movement for RICO "reform" legislation requires considerable expenditure of effort by OCRS attorneys who analyze legislative proposals. We also have been confronted recently with a major controversy surrounding the proper application and scope of the RICO forfeiture provisions; that issue will need to be resolved very carefully and monitored closely in years to come. There has been a steady increase in the number of civil RICO actions filed by the Government, primarily in cases involving infiltration of labor unions by organized crime. These suits are highly complex, and call for Section attorneys stationed in Washington to expend considerable resources, not just in reviewing the cases before filing, but in monitoring their progress, and dealing with highly complex and novel issues that arise when district courts appoint trustees or other officers to oversee some or all of the affairs of labor organizations.

As liaison to other Federal agencies with enforcement and regulatory responsibility in regard to labor and pension-welfare matters, the Labor-Management Unit coordinated the Department's effort to implement recommendations made by the President's Commission on Organized Crime and drafted comprehensive legislation which would enact into law seven of the Commission's proposals and three new statutory initiatives with respect to labor-

management racketeering. The Unit also coordinates and monitors on behalf of the Criminal Division the agency-wide appointment of the Labor Department's labor racketeering investigators as Special Deputy United States Marshals. Because of the Unit's experience in this latter area, the Section's supervising Deputy Assistant Attorney General frequently requests the Unit's assistance with respect to the review of deputation requests and analysis of legislation pertaining to the criminal law enforcement authority of other Inspectors General. Recent issues raised by the Acting Inspector General, U.S. Department of Labor, concerning employee pension and welfare benefit plans, especially with respect to abuses involving organizations which purport to provide insurance-type benefits to small employers seeking to lower their employee health care costs, are expected to confront prosecutors with novel issues concerning the scope of the Federal laws governing employee benefit plans. It is anticipated that attorneys assigned to the Labor-Management Unit will closely monitor and participate directly in such prosecutions as these issues are resolved by the courts. The heightened awareness of abuses in the benefit plan industry has resulted in requests to Unit attorneys for increased participation in investigative training programs conducted by the Department of Labor for its labor racketeering and pension-welfare investigators. These operational demands will require additional attorney resources if the Labor-Management Unit is to maintain its current level of advisory support to field prosecutors and investigators.

Under the provisions of the Attorney General's December 26, 1989, order regarding reorganization of the Strike Forces, OCRS will be required to issue a biennial report to the Organized Crime Council on the status of the Strike Force program. The challenge facing law enforcement today is to sustain our pressure on the LCN and, at the same time, prevent emerging organized criminal groups from acquiring a power base. The President's Commission on Organized Crime noted three major characteristics of organized crime in the United States today. In the first place, there has been a rapid growth in recent years of newly organized crime groups. Most are ethnic-based, although some originated in U.S. prisons or as motorcycle gangs. They share with traditional organized crime, i.e., La Cosa Nostra, a drive to establish a criminal territory, a disrespect for law and a willingness to rely on violence, criminality and corruption to achieve their ends. Organized crime in the United States today is a complex tapestry of multiple groups supported, wittingly or unwittingly, by numerous protectors, specialists and associates. In the second place, the Commission found that the forces of law enforcement indeed have "the mob on the run." Recent successes by law enforcement against the leadership, membership, and associates of La Cosa Nostra have seriously threatened its operations. The emerging groups cited in the report, however, are attempting to fill the vacuum, and the report recommends that law enforcement broaden its perspective to address the full panoply of organized criminal groups and their methods of operation. The final finding of the Commission has been widely reported previously and has been the subject of an Administration program for several years: namely, the increased concentration of organized crime on drug trafficking. This problem has been the focus of the Organized Crime Drug Enforcement Task Forces. In offenses where traditional organized crime families are involved and in cases where emerging groups participate in multiple crimes besides narcotics, the Criminal Division's Organized Crime and Racketeering Section will provide guidance, support and a strategic reserve of experienced prosecutors to complement the United States Attorneys and the Strike Force Units in those offices. Demonstration projects regarding Asian organized crime, for example, will continue.

Since the President's Commission on Organized Crime issued its report on labor-management racketeering in March 1986 and recommended greater use of civil RICO, seven such lawsuits brought by the Department of Justice have resulted in the removal of LCN-corrupted parties to labor-management relations. Four other civil RICO actions seeking to enjoin LCN involvement in labor-management matters are pending. In five of those lawsuits, trustees or monitors have been installed to supervise elections of new labor union officers and to oversee the affairs of labor organizations, including the International Brotherhood of Teamsters, the largest labor union in North America. Headquarters and Washington Staff personnel are regularly apprised by the court-appointed Investigations Officer of continuing efforts to remove the influence of organized crime elements from the Teamsters Union. A civil RICO action was filed on March 20, 1990, in the Eastern District of New York against members and associates of the Lucchese and Gambino organized crime families and two Teamster local unions following RICO criminal convictions obtained by the Brooklyn Strike Force involving freight forwarding activities at Kennedy Airport. The Government seeks the court's appointment of a trustee while the litigation is pending to oversee the operation of the local unions and their affiliated employee benefit plans by conducting shop steward elections and by appointing an advisory executive board consisting of union members to act as business agents and manage other collective bargaining responsibilities. In the first civil RICO action filed in connection with the activities of organizations affiliated with the International Longshoremen's Association (ILA), the Government seeks to relieve six local ILA unions from domination by members and associates of the Gambino and Genovese organized crime families. In this action, filed on February 13, 1990, in the Southern District of New York, the Government requests the court's appointment of a court liaison officer while the action is pending to discipline corrupt officials in these unions and to review the actions of their executive boards with respect to union

expenditures, appointments to union office, and contractors other than collective bargaining agreements. The action also requests the appointment of a trustee after trial on the merits to oversee the election of new officers in these local unions.

Demonstrating the Department's implementation of the Presidential Commission's recommendation that initiatives be undertaken with respect to LCN infiltration of business and distortion of the market place, a court-appointed administrator was appointed in one civil RICO action brought by the Government to oversee the activities of the Fulton Fish Market in New York City. A pending action seeks to enjoin organized crime families from dominating trash-hauling businesses on Long Island, New York, and seeks the appointment of a trustee to oversee the operation of a private sanitation industry association. As part of efforts to police industries impacted by organized crime, a nationwide investigation by the FBI and the Department of Labor led to the criminal prosecution in 1988 of individuals and businesses in the health care industry.

The Organized Crime Strike Forces' regular criminal investigation and prosecution efforts in 1989 and 1990 resulted in some dramatic successes. For example: (1) In November 1989, the Cleveland Strike Force obtained jury convictions of Reuben Sturman, one of the largest distributors of pornography in the United States and two other individuals. All three were convicted of conspiracy to prevent collection of income taxes totaling more that $1.4 million on $2.7 million skimmed from Sturman's pornography businesses in the United States and Great Britain. Sturman was also convicted of 15 other substantive charges. (2) In another Cleveland Strike Force case, a jury in January 1989 convicted two union officials, including a Teamsters International vice-president, of RICO in connection with their embezzling over $700,000 from two local unions through payments to "ghost" employees. The men were indicted with Teamsters International President Jackie Presser, who died prior to trial. (3) In June 1989, the Newark Strike Force, in conjunction with the United States Attorney's Office, obtained guilty jury verdicts against Genovese Family consigliere Louis A. Manna and five LCN associates on multiple counts of RICO and related charges involving murder, gambling, labor racketeering, and extortion. The conduct in the RICO charges included conspiracy to murder John Gotti, the reported boss of the Gambino Family, and other individuals. (4) In November 1988, following a seven-week trial, LCN boss Nicodemo "Nicky" Scarfo and 16 LCN co-defendants were convicted on all counts in a RICO prosecution brought by the Philadelphia Strike Force. The conduct charged in the two RICO counts included nine murders and four attempted murders, as well as multiple acts involving distribution of drugs, gambling, and extortion. Scarfo was sentenced to 55 years in prison; other defendants, including several mob bosses or underbosses and numerous "soldiers," received prison sentences ranging from 30 to 45 years. (5) Following the successful prosecution of United States v. Gennaro Angiulo, et al. by the Boston Strike Force, the Court of Appeals for the First Circuit affirmed the RICO convictions on March 5, 1990, and decided the first appeal since the Supreme Court's decision in H.J. Inc. v. Northwestern Bell Tel. Co. (1989) to reject the claim that RICO's definition of a pattern of racketeering activity is unconstitutionally vague as applied to persons involved in unlawful organized crime activities. The Supreme Court had suggested the possibility of unconstitutional vagueness in dicta. The appeal, handled by the Section's Special Counsel, also upheld the use of expert testimony on the existence and structure of the LCN and the identification of defendants as LCN members and associates of the Patriarca organized crime family.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Criminal Division

Program: 2CRM02 Organized Crime Prosecution

	1989	1990	1991	1992			
				Base Level		Request Level	
				Change	Cum	Change	Cum
Resource Requirements							
BUDGET AUTHORITY	$16,578	$18,863	$ 5,938	$441	$ 6,379	221	$ 6,600
OUTLAYS	16,503	18,560	7,573	-993	6,580	192	6,772
Appropriated Positions	236	282	71	...	71	...	71
Workyears:							
Full-time Permanent	201	238	58	...	58	...	58
Other	4	...	...	...	...	...	...
Subtotal	205	238	58	...	58	...	58
Overtime/Holiday	...	...	...	...	...	...	...
Total	205	238	58	...	58	...	58

Program Changes: The Criminal Division is requesting program increases totalling $221,000 to cover: purchases of Project EAGLE system upgrades deferred in 1991 due to the required absorption of one-half of the 1991 pay increase ($78,000); increased costs ($35,000) for use of legal research data base systems, JURIS/LEXIS/Westlaw; and increased costs ($108,000) associated with enhanced building security. Security concerns have escalated as the Division's role in drug enforcement and other violent crime initiatives have increased. The Division requires funds to enhance guard service at the Bond Building and its new satellite facility (currently being procured) as well as to secure the Bond Building garage and ground floor.

Schedule of Cost Inputs
(Dollars in thousands)

Organization: Criminal Division

Decision Unit: Organized Crime Prosecution - 2CRM02

	Request Level		
	Pos	WY	Amount
Other Services	...	...	169
Equipment	...	...	52
Total	...	...	221

Description of Cost Inputs

Costs are for purchases deferred in 1991 due to the required absorption of one-half of the 1991 pay increase, increased use of available legal research data base systems, and enhanced security.

Justification of Program and Performance
Criminal Division
Salaries and Expenses, General Legal Activities: 15-0128-0-752
Public Integrity - 2CRM03

Long-Range Goal: To improve integrity in Government, and, therefore, the public's confidence in its elected and appointed officials, by detecting, investigating and prosecuting corruption, leading to a public understanding that dishonest government is neither condoned nor tolerated.

Major Objectives:

To supervise the investigation and conduct the prosecution of selected corruption cases at all levels of government.

To supervise the investigation and conduct the prosecution of all matters involving alleged criminal misconduct by Federal judges.

To respond, within the statutory time limits, to matters arising under the Independent Counsel Reauthorization Act of 1987, to conduct any necessary preliminary investigations, and to make timely recommendations to the Attorney General concerning the need for the appointment of independent counsel in such matters.

To ensure an effective law enforcement effort against criminal conflicts of interest among Federal employees and election fraud.

To assist U.S. Attorney personnel in developing their own capabilities to recognize, investigate and prosecute public corruption and election fraud offenses.

To assist in the development of effective investigative and prosecutorial approaches to the problem of public corruption by U.S. Attorney, FBI, Inspector General and other Federal law enforcement personnel through training, advice and consultation.

To establish and maintain liaison and effective exchange of information with the Federal law enforcement community, the Office of Government Ethics, the Federal Election Commission, and others.

Base Program Description: The Public Integrity Section has the general responsibility for overseeing the Federal effort to combat corruption through the prosecution of elected and appointed public officials at all levels of government. The Section is also responsible for supervising the handling of investigations and prosecutions of conflicts of interest and election crimes. The Section's litigators prosecute selected cases against Federal, State and local officials, and are available as a source of advice and expertise to prosecutors and investigators nationwide. The Section supervises the administration of the Independent Counsel Reauthorization Act of 1987, reviewing each matter arising under the Act, conducting any necessary preliminary investigation, and providing a recommendation to the Attorney General as to whether an independent counsel is necessary. In addition, as a national headquarters office, the Section provides extensive training to Federal prosecutors and investigators, and serves as a source of advice and expertise with respect to issues that may arise regarding public corruption investigations and prosecutions.

Accomplishments and Workload: The recent experience and projections for the future with regard to litigation for which the Public Integrity Section is directly responsible are summarized quantitatively in the following table:

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
Matters:							
Pending, beginning of year	186	223	333	121	454	...	454
Opened	185	250	275	...	275	...	275
Closed	148	140	154	121	275	...	275
Pending, end of year	223	333	454	...	454	...	454
Cases (lead prosecution):							
Pending, beginning of year	31	40	40	...	40	...	40
Opened	40	35	35	5	40	...	40
Closed	31	35	35	5	40	...	40
Pending, end of year	40	40	40	...	40	...	40
Disposition of defendants in cases litigated:							
Convictions	55	55	55	...	55	...	55
Acquittals/dismissals	4	4	...	...	...	...	...
Other dispositions (transfers to U.S. Attorneys, deaths)	6	6	...	...	...	...	...

Although the workload for the Public Integrity Section has increased steadily over the last several years, the major factors which caused the enormous increase between 1989 and 1991 — changes in the Independent Counsel statute requiring far more matters to be processed under the statute, changes in the conflicts of interest statutes expanding the Section's responsibilities, and the natural elections resulting in a change of Administration — will have stabilized by the 1992 budget year. Furthermore, due to an increased attorney and paralegal staff and streamlined procedures, it is anticipated that the Section will be able to process more matters, slowing the steadily increasing backlog which has been swamping Section resources. It is anticipated that enhanced attorney staffing in 1990 should, by 1991, result in additional cases tried and convictions obtained.

Responsibility for Litigation: Most of the Public Integrity Section's resources are devoted to the prosecution of public corruption cases. While the vast majority of corruption cases prosecuted federally are handled by the United States Attorneys and their assistants, the Public Integrity Section is available to handle specific cases posing particular problems. In some cases, the Section's presence helps to ensure the appearance as well as the reality of fairness and impartiality in the handling of a criminal case. For example, it handles all investigations involving Federal judges, because of the obvious conflict of interest problems that would be created by a United States Attorney's Office investigating and perhaps prosecuting a judge before whom prosecutors from that Office must appear. The Public Integrity Section prosecuted each of the Federal judges who were subsequently impeached by Congress in recent years, and recently obtained the conviction of U.S. District Judge Robert Aguilar on charges of obstruction of justice and leaking of confidential investigative information.

For similar reasons, allegations involving Federal prosecutors and law enforcement officers are often referred to the Section for handling. The Public Integrity Section also handles corruption investigations where the United States Attorney finds it necessary to step aside because he or she has had a significant business, social, or political relationship with the subject of the investigation. Beyond refusals of this sort, Public Integrity's decision to devote resources to any particular corruption prosecution is based upon the Section's dual role as a source of support to the United States Attorneys, and as a national office providing leadership in the prosecution of corruption matters. For example, a United States Attorney may be

confronted with a particularly serious or wide-ranging corruption problem and need additional experienced prosecutors to devote to the matter. Or, there may be an investigation which crosses jurisdictional lines, raising venue problems which a national office can help to resolve. The Section's involvement in the prosecution of cases arising out of Operation Ill Wind, the Defense procurement scandal, illustrates both of the above situations. At the request of the United States Attorney for the Eastern District of Virginia, the senior Public Integrity Section Deputy Chief assumed a supervisory role in the prosecution of a portion of the case. He was instrumental in obtaining six convictions during the past year. Additionally, aspects of the investigation which occurred outside of Virginia were handled by Public Integrity Section lawyers.

Independent Counsel Matters: Ever since the Independent Counsel provisions were first passed as part of the Ethics in Government Act of 1978, the Public Integrity Section has been responsible for supervising matters arising under the Act. The Independent Counsel Act is designed to remove the investigation and prosecution of matters involving very high-level executive branch officials from the Department of Justice, and place that responsibility with an independent counsel appointed by a Special Division of the United States Court of Appeals. The role of the Public Integrity Section in such matters is therefore limited but critical; the Section reviews all allegations against covered officials, a process limited to 15 days by statute, conducts any necessary preliminary investigation, limited to 90 days, and prepares a recommendation to the Attorney General detailing the results of the preliminary investigation and recommending whether appointment of an independent counsel is necessary. In 1990, the Public Integrity Section handled many independent counsel matters, most of which are confidential under the terms of the statute; however, one, the investigation of former HUD Secretary Samuel Pierce, resulted in the appointment of an independent counsel and was made public by the court order.

Finally, the Section serves as a liaison between the ongoing independent counsels and the Department of Justice, some of which — particularly the Iran/Contra investigation, because of extensive document requests — have absorbed substantial Section resources. The Section is available to assist with independent counsel inquiries concerning legal issues, Departmental policies, requests for documents, and interviews of Departmental personnel.

Conflicts of Interest: Yet another area of significant responsibility within the Public Integrity Section is addressed by the Conflicts of Interest Crimes Branch. The Public Integrity Section's role with respect to conflicts of interest by Federal employees only comes into play with respect to an extremely narrow group of conflicts matters, those allegations which involve criminal misconduct. With respect to the handling of individual cases, the Public Integrity Section reviews matters that have been referred by the Inspectors General, the FBI, private individuals, Congress or through press reports involving apparent violations of the criminal conflict of interest statutes (specifically Title 18, United States Code, Sections 203 through 209) for their potential for criminal prosecution. Investigation of these allegations is coordinated with the FBI and/or the Inspector General for the agency concerned.

The Branch also has a number of legislative responsibilities, a role that has been particularly significant in recent years with the surge of interest in more effective legislation governing government ethics. The Branch played a significant role in the development of the recently enacted "Ethics in Government Act of 1989." Of course, the Branch develops and reviews legislative proposals relating to criminal conflicts of interest, but also devotes considerable resources to the review of non-criminal legislative proposals that overlap, sometimes in a subtle manner not envisioned by a bill's drafters or sponsors, with the criminal statutes. The principal objective is to assure that the impact of proposed legislation on criminal law enforcement is recognized and is consistent with policy reflected in the criminal statutes. Responsibilities of the Branch include formulating policy, drafting legislation and correspondence, reviewing legislative activity of other executive branch agencies, preparing congressional testimony, and providing technical advice to Department officials.

Election Crimes: The Public Integrity Section's Election Crimes Branch is responsible for the nationwide oversight of all federal investigations and prosecutions involving corruptions of electoral processes. The litigation of election crime cases is generally carried out by Assistant United States Attorneys, although Public Integrity Section attorneys are available to assist in especially complex cases, or in instances of United States Attorney refusal.

The Public Integrity Section is responsible for developing and executing a national enforcement strategy for the prosecution of election crimes in Federal courts. This objective is accomplished through Justice Department and FBI regulations that require the Election Crimes Branch to authorize all major Federal investigations, and all Federal indictments, involving ballot fraud, criminal violations of the Federal Election Campaign Act, and

criminal violations of statutes involving illegal patronage practices. In discharging this duty, the Election Crimes Branch seeks to ensure that State prerogatives in the administration of elections are respected, and that Federal law enforcement resources are used wisely and fairly, intervening in election crime matters only where the need for Federal intervention is plainly manifest.

Finally the Election Crimes Branch is the Justice Department's liaison with the Federal Election Commission in matters involving campaign financing violations, and with the Office of Special Counsel and the Merit Systems Protection Board in matters involving the illegal politicization of civil service principles.

Training, Publications, Advice and Consultation: The activities described above are only the most visible of the responsibilities in the Public Integrity Section. One of its most important functions, though seldom noticed outside the world of prosecutors and investigators, is training. The process of investigating and prosecuting corruption offenses requires unique skills and familiarity with statutes and procedures that a typical prosecutor or investigator is unlikely to have encountered before. As a result, opportunities may be missed or cases mishandled, both of which are particularly serious problems in the area of corruption. Therefore, substantial resources are devoted to training efforts, both formal and informal.

The Public Integrity Section, together with the Attorney General's Advocacy Institute, sponsors an annual five day seminar, for Federal prosecutors and FBI agents, offering intensive instruction in the unique statutes, investigative techniques, and trial strategies that are most effective in corruption cases. Over the years, the Section has trained hundreds of prosecutors and agents through these seminars. The Section also provides instructors to a variety of training programs throughout the year. In the last year, the Section has provided lectures to the FBI, to inspector general staff, to election officials, to new investigative agents, and to agency ethics personnel. Finally, informal training is recognized as a central part of the Section's responsibility; a substantial amount of time, through advice, consultation, and review of investigations and indictments, is spent training prosecutors and investigators in the subtleties of corruption prosecutions.

An important correlate to lectures and presentations are Section publications. The Section has assembled a substantial manual, The Prosecution of Public Corruption Cases, which has been widely distributed in the Federal law enforcement community, and The Election Offenses, which is extensively revised and updated on a regular basis. The Section also produces chapters for the United States Attorneys Manual describing areas within its expertise. Production of these manuals is not an easy process for the Section, because it is not set up with the staff or resources to produce such substantial publications, but it has come to recognize their importance to the Section's overall mission of improving the Federal effort against corruption.

946

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Criminal Division

Program: 2CRM03 Public Integrity

	1989	1990	1991	1992			
				Base Level		Request Level	
				Change	Cum	Change	Cum
Resource Requirements							
BUDGET AUTHORITY	$2,314	$2,611	$3,015	$316	$3,331	$119	$3,450
OUTLAYS	2,336	2,576	2,957	325	3,282	104	3,385
Appropriated Positions	34	34	38	...	38	...	38
Workyears:							
Full-time Permanent	24	32	34	2	36	...	36
Other	2	...	...	...	...	...	...
Subtotal	26	32	34	2	36	...	36
Overtime/Holiday	...	...	...	...	...	...	...
Total	26	32	34	2	36	...	36

Program Changes: The Criminal Division is requesting program increases totalling $119,000 to cover: purchases of Project EAGLE system upgrades deferred in 1991 due to the required absorption of one-half of the 1991 pay increase ($42,000); increased costs ($19,000) for use of legal research data base systems, JURIS/LEXIS/Westlaw; and increased costs ($58,000) associated with enhanced building security. Security concerns have escalated as the Division's role in drug enforcement and other violent crime initiatives have increased. The Division requires funds to enhance guard service at the Bond Building and its new satellite facility (currently being procured) as well as to secure the Bond Building garage and ground floor.

Schedule of Cost Inputs
(Dollars in thousands)

Organization: Criminal Division

Decision Unit: Public Integrity - 2CRM01

	Request Level		
	Pos	WY	Amount
Other Services	...	...	91
Supplies	...	...	3
Equipment	...	...	25
Total	...	...	119

Description of Cost Inputs

Costs are for purchases deferred in 1991 due to the required absorption of one-half of the 1991 pay increase, increased use of available legal research data base systems, and enhanced security.

Justification of Program and Performance
Criminal Division
Salaries and Expenses, General Legal Activities: 15-0128-0-752
Fraud - 2CRM04

Long-Range Goal: To reduce the incidence of white collar crime through a comprehensive program of prevention, detection, investigation, prosecution, and punishment for white collar crime offenses.

Major Objectives:

To conduct fraud investigations and prosecutions that require resources exceeding the capacity of individual United States Attorneys.

To assist in the formulation of prosecutorial policies and the development of model prosecutions, especially through the conduct of selected litigation, which will serve to demonstrate the viability of particular statutes, theories or techniques.

To develop and enhance local, state, federal and international law enforcement cooperation in combatting white collar crime.

To identify recurring illegal schemes and devise new practices and procedures for minimizing opportunities for criminal conduct.

To provide specialized training to prosecutors and investigators on effective techniques and procedures for investigating and prosecuting white collar crime cases.

Base Program Description: The Fraud Section's overall objectives are focused on the priorities of the Economic Crime Council as announced by the Attorney General: Defense procurement fraud and financial institution fraud. Other areas of special emphasis are fraud in the securities and commodities markets; fraud involving government benefits, contracts and loans such as HUD and health care providers; pension fund frauds; international white collar criminal activity; and career white collar criminals. The primary function of the Fraud Section is the conduct of major criminal investigations and prosecutions. The selection of specific investigations is based on a variety of criteria, including: magnitude of the alleged fraud scheme; ability of United States Attorneys' Offices to handle the case; complexity; unique fact pattern or theory of prosecution/investigation; and, contribution to long range prosecutorial goals. Many of the investigations are complex and lengthy, requiring over two years to develop. They are developed by a team of investigators and auditors directed by Section prosecutors.

The Section, through the Defense Procurement Fraud Unit, prosecutes nationally significant Defense procurement fraud cases drawn from the over $600 million per day spent by the Department of Defense (DOD). The Unit consists of ten Fraud Section attorneys, four attorneys provided by DOD, four DOD criminal investigators, an agent of the Federal Bureau of Investigation (FBI) and a Defense Contract Audit Agency auditor. The staff focuses on investigating and prosecuting allegations of product substitution, defective products, cost mischarging, defective pricing, corruption and kickbacks that endanger the lives or safety of the troops or seriously impact on the ability of the Armed Services to carry out its mission. (An additional three attorneys from the Fraud Section are assigned to the Ill Wind Defense procurement fraud investigation in the Eastern District of Virginia).

The Unit staff also provides frequent assistance to United States Attorneys' offices, acting as an informational source on legal issues, as well as providing prosecutive guidance and information on the use of complex criminal statutes that are unique to procurement prosecutions. Furthermore, they evaluate investigative work and the adequacy of proposed indictments for United States Attorneys' offices.

In the area of financial institution fraud, the Section has established its Dallas Regional Office (DRO) as required by Section 965 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). This section mandates that the DRO be maintained at least through fiscal year 1992. As of April 1, 1990, twelve Fraud Section attorneys were assigned to handle criminal investigations and prosecutions under the DRO's jurisdiction; ten more Section attorneys will be assigned such work upon their recruitment into the Section. The entire staff of the DRO serves on the Dallas Bank Fraud Task Force (Task Force), which was established in August 1987 to address fraud associated with the serious financial institution crises largely centered in the Northern District of Texas. Because of the volume and complexity of the Task Force's investigations and cases, we expect its efforts to continue beyond the expiration date of the FIRREA legislation. The Task Force's effort has been noted by the Attorney General and the Congress as a top priority economic crime enforcement effort that must be fully staffed and supported. Twelve of the DRO's attorney positions are funded via 1989 appropriations resulting from an authorization under FIRREA. The other ten attorney positions were earlier assigned to the DRO and represent the base staffing level to which the appropriations authorized under FIRREA were added. The twelve other positions funded by FIRREA are added to a base of two to provide ad hoc support to U.S. Attorney Offices around the country. In addition, one Section attorney has been assigned to the trial team handling a major case with losses over $100 million brought by the United States Attorney for the Northern District of Texas and involving five failed savings and loan institutions and a group of land developers in Dallas. The Section is also leading a major investigation concerning abuse of banks by land developers in Oklahoma and expects to support other United States Attorneys' offices with individual cases and investigations when requested. Nine new attorneys, who will be funded via appropriations resulting from FIRREA will be assigned to such work. In all, 15 Fraud Section attorneys are currently assigned directly to financial institution cases, with additional attorneys providing management and other support.

The Section also provides both leadership and support in other types of consumer government and institutional frauds. Section attorneys are working in two districts on HUD Fraud task forces with very heavy caseloads and on a series of gasoline excise tax cases in the Eastern District of New York. The Section also maintains an active role in the computer crimes area. In addition, the section responds to a variety of requests from U.S. Attorneys' Offices for assistance and advice.

Section attorneys also provide staff support to projects of the Economic Crime Council with the Section Chief serving as Executive Director of the Council. The Section also staffs the Interagency Bank Fraud Enforcement Working Group and the Securities and Commodities Fraud Working Group. Through this work in particular, Section attorneys maintain ongoing liaison with several Inspectors General and regulating agencies. The Section devotes considerable time to training attorneys and investigators. Two Economic Crime Enforcement Conferences are given each year, and there are also Defense Procurement Fraud, Fraud and Financial Crimes and Securities Fraud courses scheduled for 1990 and 1991. Section attorneys also teach monthly at the Federal Law Enforcement Training Center and support many other ad hoc courses

Accomplishments and Workload: The recent experience and projections for the future with regard to litigation for which the Fraud Section is directly responsible are summarized quantitatively in the following table:

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
Matters:							
Pending, beginning of year	208	145	82	10	92	...	92
Opened	49	3	30	20	50	25	75
Closed	112	66	20	10	30	15	45
Pending, end of year	145	82	92	20	112	10	122

Several hundred matters in the Dallas Bank Fraud Task Force and in the Oklahoma City HUD investigations are listed as one overall matter for each city, thereby accounting for the apparent decrease in intake in 1989 and 1990.

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
Cases (lead prosecution):							
Pending, beginning of year	43	66	72	35	107	...	107
Opened	81	57	100	20	120	30	150
Closed	58	51	65	30	95	25	120
Pending, end of year	66	72	107	25	132	...	137
Disposition of defendants in cases litigated:							
Convictions	103	70	100	...	100	15	115
Acquittals/dismissals	20	9	15	...	15	...	15
Other dispositions (transfers to U.S. Attorneys, deaths)	1	...	...	...	...	...	...
Monetary Recovery ($000)	$30,120	$42,000	$50,000	$32,000	$82,000	$ 5,000	$87,000

Six convictions were obtained by the Defense Procurement Fraud Unit in Defense procurement fraud cases during 1989 and 1990. One of the Unit's major investigations involved defective pricing by Boeing Military Airplanes of Wichita, Kansas, a division of The Boeing Company. The investigation ended with a $13 million civil settlement, not a criminal prosecution. It was established that Boeing had proposed aluminum prices during price negotiations of several KC-135 Reskin Kit contracts, which were higher than Boeing expected to pay. This represents one of the ten largest civil settlements ever reached with a Defense contractor. The Ill Wind investigation of Defense procurement fraud, in which the Section participates with the U.S. Attorney for the Eastern District of Virginia, has yielded 41 defendants charged, 38 convictions, 2 acquittals and recoveries of twenty-four million as of July 1, 1990. It is not, however, an infrequent matter for a lengthy investigation to yield no results.

In the first ever case involving perjury and obstruction of Armed Services Board of Contract Appeals (ASBCA) proceedings, the Unit returned an indictment in the Middle District of Florida against a production supervisor at E-Systems, Inc. The employee falsely denied that she and others falsified documents pertaining to production and supply contracts for the VCR-12 radio, the Army's principal vehicular-borne tactical communications system. E-Systems pleaded guilty on October 2, 1990. Four other officers are also charged. In addition, in connection with a voluntary disclosure handled by the Unit, a plea of guilty was obtained from a former division manager of Watkins-Johnson Company charging him with conspiracy to commit fraudulent labor mischarging on DOD contracts. The manager had directed his employees in a systematic labor mischarging scheme, by which the company fraudulently inflated historical labor costs and used the costs in support of proposals for follow-on contracts. Approximately $1.8 million was recovered in a civil settlement from Watkins-Johnson Company. Further, the Harris Company pleaded guilty in September 1990 to bribing Colombian officials to do business with them. The Unit also has a primary role in the Defense Department's Voluntary Disclosure Program. Under this program, which was implemented in 1986, the Unit reviews, coordinates and prosecutes criminal matters which are voluntarily disclosed by Defense contractors. In 1989, over $29 million was collected by DOD: a total of $82.9 million since its inception.

During 1989 and 1990, the Fraud Section assumed additional responsibilities in the Government, consumer and institutional fraud arena. The Section's financial crimes task force in the Western District of Oklahoma was expanded, adding two additional attorneys to a HUD fraud enforcement effort. As of July 1990, the HUD task force has obtained 25 felony convictions, $11,000 in fines, and $2,309,489 in restitution orders. The Section has also committed two attorneys to a HUD fraud task force in the District of Colorado beginning in early 1990 and obtained its first guilty plea in August 1990. The Section also successfully concluded the prosecution of televangelist James Bakker, resulting in a sentence of 45 years imprisonment and a $500,000 fine, and obtained the conviction of Robert Morris on computer fraud charges (involving the computer virus launched from Cornell University). The Section continues to have a role in the securities fraud area, especially outside of the major markets and lately in dealing with penny stock fraud, which is the plague of the middle-class investor. Six such convictions were obtained and other indictments brought.

Fraud in savings and loans and in banks continues to be a serious national law enforcement problem. A number of convictions for fraud, associated with bank failures, were obtained by Section attorneys in 1987, 1988 and 1989 in Oklahoma, Oregon, Wyoming, Texas and Kansas. In Dallas, the Task Force, now consisting of twelve Section attorneys (with ten new attorneys to join the Task Force when they are recruited), three Assistant United States Attorneys, one Special Assistant United States Attorney from the Office of Thrift Supervision, more than twenty FBI agents, and a contingent from the Internal Revenue Service, has been conducting investigations and prosecutions stemming from referrals involving over six hundred subjects and over thirty financial institutions. The Task Force will be expanded to twenty-two Section attorneys through FIRREA. The Task Force has brought felony charges against 80 individuals and obtained 58 convictions as of September 1990. Fines and restitution orders total $12.1 million. There are over 400 failed institutions in the Dallas region, and the Unit has addressed about 100. With the increased staffing anticipated in 1991, we will be able to take on more cases more quickly, plus expand the Unit to Houston, which has dozens of significant unaddressed cases.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Criminal Division

Program: 2CRM04 Fraud

	1989	1990	1991	1992			
				Base Level		Request Level	
				Change	Cum	Change	Cum
Resource Requirements							
BUDGET AUTHORITY	$5,643	$8,555	$10,891	$2,180	$13,071	$4,686	$17,757
OUTLAYS	5,575	8,166	10,529	2,212	12,741	4,077	16,818
Appropriated Positions	80	117	147	...	147	35	182
Workyears:							
Full-time Permanent	61	104	119	15	134	18	152
Other	...	...	...	...	...	...	...
Subtotal	61	104	119	15	134	18	152
Overtime/Holiday	...	...	...	...	...	...	...
Total	61	104	119	15	134	18	152

Program Changes: Increases of 35 positions, 18 workyears, and $4,686,000 are requested for the Fraud Section for: financial institution investigations and prosecutions, including funds for the Dallas Bank Fraud Task Force office space; automated litigation support; Defense procurement fraud; support for health care, HUD, insurance and pension plan fraud cases; prior year pay absorption; increased security and increased use of legal research data bases. For financial institution frauds, 2 attorneys, 6 non-attorneys, and funds to support contract personnel are required. These resources are required to meet increased demands of the Significant Referral Tracking System, assisting in data entry, preparation of statistical reports on bank-related fraud cases, image processing, design and implementation of database programs for document control, evidence inventory, and trial preparation.

The Criminal Division is expected to absorb the bulk of the space assignment charges for all Dallas Bank Fraud Task Force participants. Adequate funding was not provided for in the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). The estimated cost is $319,000.

For automated litigation support, the Division requires $1,747,000. Due to the new Federal Sentencing Guidelines that mandate real jail time for most people convicted of major white collar crimes, the Section expects to be faced with more trials. The cost of exhibits, experts, accountants, computer analysts, etc. will increase the cost of litigation support needed by the Section dramatically. Engaging Price Waterhouse for one reinsurance fraud case alone cost nearly one-half million.

For the investigation and prosecution of Defense procurement frauds, 10 attorneys, 2 paralegals, and 3 secretaries are required. The Defense Procurement Fraud Unit (DPFU) was created by the Attorney General and the Secretary of Defense in August 1982 to help concentrate and coordinate the resources of the Departments of Justice and Defense on investigating and prosecuting Defense procurement fraud. Principal responsibilities envisioned at inception were the screening on a nationwide basis of all fraud referrals and the prosecution of nationally significant cases. While the screening function predominated the work of the DPFU attorneys in the early years, DPFU now has assumed tremendous additional responsibilities and continues to lead the nationwide attack on Government procurement fraud. In addition to bringing major prosecutions, the DPFU staff devotes substantial time to providing prosecutive guidance and support to United States Attorneys' Offices in cases where expertise is needed (as is evidence of our ongoing support for Ill Wind prosecutions), or the existing commitments of those offices limit their ability to handle complex and lengthy cases. The staff's commitment to the Voluntary Disclosure Program, which is operated jointly with the Civil Division and the DOD, has also expanded significantly in the past few years. Additionally, staff have become increasingly involved with directing and coordinating DOD components and agency groups, proposing and commenting on legislation, interacting with national and local bar associations, and addressing representative groups. As a result of all these activities, DPFU's resources have been severely stretched and its ability to handle cases has been substantially impacted. A significant increase in Defense fraud referrals is anticipated in the early 1990s as the DOD budget shrinks and the amount of kickbacks, bribery and other forms of illegal gratuities increase. The additional resources are thus required to enable DPFU staff to respond to anticipated workload increases in all areas.

For the investigation and prosecution of health care, HUD, insurance, and pension plan frauds, the Division requires program increases of 12 positions, 6 workyears, and $743,000. These areas are each capable of being the crisis that is as bad or worse than the savings and loan crimes that is now the focus of so much attention. Health care spending is 11 percent (15 percent by the year 2,000) of the gross national product and fraud has been a persistent problem since the Medicare and Medicaid programs began in 1965. In 1987, 28.9 percent of the $500.3 billion spent on health care was paid for with federal funds. The FBI and the Inspector General of the Department of Health and Human Services also report that health care fraud schemes are becoming much more sophisticated and include cartel-type operations. As a result, law enforcement efforts must be more intensive and proactive, and will require significantly greater prosecutorial resources. With additional resources, the Fraud Section can supplement U.S. Attorney, health care fraud task forces in locations which currently lack a fully active enforcement effort. The Fraud Section needs additional resources to help fulfill the Attorney General's commitment to the HUD enforcement effort. HUD fraud is the number two priority within the FBI's government fraud subprogram. The 700 HUD fraud cases around the country pose a formidable burden. The Fraud Section's successful HUD task force in Oklahoma City has yielded 25 felony convictions in the last two and a half years, and the Section has now started a second task force in Denver. The Congress has already begun to inquire into the insurance and private pension programs citing both as the next national domestic crisis. The parallels between the insurance and pension situations and the early states of the savings and loan situation are gravely similar. There is an alarming growth in the number of failures of pension plans in the $1.3 trillion industry that revert back to the Federal Government for partial payout. The rapidly growing number of insurance company failures, particularly in the property-casualty area, that revert back to the state governments for partial payout, have also caused a move toward "federalization" of the industry. These cases will require a substantial investment of prosecutorial resources. In view of this alarming trend, pension fraud is a particularly appropriate area for Fraud Section involvement.

Additionally, the Division is requesting resources totalling $426,000 to cover: purchases of management information systems equipment purchases deferred in 1991 due to the required absorption of one-half of the 1991 pay increase ($129,000); increased costs ($73,000) for use of legal research data base systems, JURIS/LEXIS/Westlaw; and increased costs ($224,000) associated with enhanced building security. Security concerns have escalated as the Division's role in drug enforcement and other violent crime initiatives have increased. The Division requires funds to enhance guard service at the Bond Building and its new satellite facility (currently being procured) as well as to secure the Bond Building garage and ground floor.

42-569 O—91——31

Schedule of Cost Inputs
(Dollars in thousands)

Organization: Criminal Division

Decision Unit: Fraud - 2CRM04

	Request Level		
	Pos	WY	Amount
Positions by Type			
Attorney	20	10	$ 770
Paralegal	5	3	109
Management Assistant	1	1	18
Clerical	9	4	129
Subtotal	35	18	1,026
Travel/Transportation	...	...	189
Litigation Expenses	...	...	10
Equipment Rentals	...	...	88
GSA Rent	...	...	454
Other Services	...	...	2,311
Supplies	...	...	50
Equipment	...	...	558
Subtotal	...	...	3,660
Total	35	18	4,686

Description of Cost Inputs

Travel is for the purpose of investigation and prosecution of cases as well as to attend meetings. Significant expenditures anticipated for automated litigation support and for contract personnel to support data systems required in conjunction with the investigation and prosecution of financial institution fraud are also included. One-time costs for equipping positions are also identified.

Justification of Program and Performance
Criminal Division
Salaries and Expenses, General Legal Activities: 15-0128-0-752
Narcotic and Dangerous Drug Prosecution - 2CRM05

Long-Range Goal: To combat the growth of major national and international criminal enterprises involved in drug trafficking and money laundering.

Major Objectives:

To assist in the formulation of Federal drug prosecution policies, including the development of innovative investigative and prosecutorial methods and the enhancement or modification of existing statutory authorities that foster more effective drug enforcement.

To prosecute directly and/or to assist U.S. Attorneys in major international and multi-district cases involving the most significant violators and to implement innovative prosecutorial methods, especially in the area of narcotics-related financial investigations.

To furnish instruction that will improve the effectiveness of federal enforcement agents and prosecutors who are responsible for investigating and litigating drug cases.

To furnish instructional materials in the areas of money laundering, Continuing Criminal Enterprise (CCE) prosecution, electronic surveillance and grand jury practice.

To supervise and participate in litigation concerning: the Money Laundering Control Act, 18 U.S.C. Section 1956, 1957; the Bank Secrecy Act, 31 U.S.C. Section 5311 et seq.; and the Controlled Substance Act 21 U.S.C. Section 801 et seq.

To promote interagency and inter-jurisdictional cooperation in the conduct of drug investigations and drug prosecutions and to participate in the coordination of multi-district and multi-national cases.

To provide legal advice to Department of Justice officials in support of the Organized Crime Drug Enforcement Program and to otherwise assist the Director in matters pertaining to policy, implementation and evaluation of the program.

To assist the Department in its role of promoting better narcotics law enforcement by assisting State and local authorities to improve statutory tools and training.

To assist the Department in its role of improving international programs for narcotics law enforcement in particular by assisting multinational organizations and states in implementing the statutory requirements imposed by the U.N. Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

Base Program Description: This program works to support the national drug enforcement effort. It supports both the program and policy efforts developed in Washington and the prosecutive efforts being undertaken by the Organized Crime Drug Enforcement Task Forces and the U.S. Attorneys' Offices. In addition, it develops unique and ground breaking methods of investigating narcotics enterprises which, when successful, are taught to field offices. In the area of national program and policy efforts, the Section is responsible for the purely narcotics law enforcement areas of bilateral and unilateral international efforts undertaken by the Department including support for the seven projects of CICAD, the Narcotics Commission of the Organization of American States. It also staffs the efforts of the U.N. Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, including negotiating and implementing the 1988 multilateral convention. It works on legislative and regulatory changes in the areas of narcotics and money laundering.

The Section leads in the development and implementation of the prosecution portion of the national narcotics strategy. It leads in domestic and international narcotics and money laundering training. Working on a cooperative basis with the Advocacy Institute and other components, the newly established Money Laundering Unit is instrumental in insuring that all United States Attorneys receive training in money laundering prosecutions. This office also assists in the formulation of the training programs for investigative agencies and participates in the coordination of international conferences. In 1989, Section attorneys participated in international and domestic money-laundering conferences. The Section advises the field and supervises the utilization of some narcotics statutes. It reviews sensitive initiatives such as wire taps, witness protection, immunities, release of FOIA information, undercover operations (through the undercover review committee), and the use of classified methods to enhance investigation. It is the primary contact of the Department in implementing Presidential Directive 27 for interagency coordination. The Section prepares and reviews other agencies' congressional testimony, statutory initiatives and congressional correspondence. It responds to governmental and private citizen correspondence. It prepares teaching materials, including the quarterly Narcotics, Forfeiture, and Money Laundering Update.

In the area of litigative support, the Section's policy and program goals are promoted by having a staff of trial attorneys whose policy and legal advice to the field is current and authoritative. Each of the attorneys tries current cases in support of the needs of the U.S. Attorneys' Offices. These cases arise when the U.S. Attorney is required to recuse himself, or the U.S. Attorney's Office temporarily lacks the experienced personnel to investigate and prosecute a particularly sophisticated case or when the Section attorneys are developing an innovative program to address the drug crisis. This latter instance is best exemplified by the narcotics money laundering task forces and should be followed by ground breaking efforts in the areas of drug diversion control, crack house programs, drug paraphernalia programs and diversion of essential and precursor chemicals. The Section litigates in the U.S. Courts of Appeals the appeals from the decisions of the Administrator of the Drug Enforcement Administration (DEA) to schedule drugs and license drug dispensers, a case load significantly increased by the increased statutory authority given the Administrator.

Accomplishments and Workload: The recent experience and projections for the future with regard to litigation for which the Narcotic and Dangerous Drug Section, exclusive of the Money Laundering Office, is directly responsible are represented quantitatively in the following table:

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
Matters:							
Pending, beginning of year	63	92	74	19	93	...	93
Opened	47	6	71	- 1	70	...	70
Closed	18	24	52	10	62	...	62
Pending, end of year	92	74	93	8	101	...	101
Cases (lead prosecution):							
Pending, beginning of year	43	54	46	- 3	43	...	43
Opened	12	6	46	19	65	...	65
Closed	1	14	49	16	65	...	65
Pending, end of year	54	46	43	...	43	...	43
Disposition of defendants in cases litigated:							
Convictions	87	18	148	...	148	...	148
Acquittals/dismissals	6	...	...	...	...	...	...
Other dispositions (transfers to U.S. Attorneys, deaths)	1	...	...	...	...	...	...

Prior to 1990, the number of available attorney workyears had declined in the last two years while the number of long term complex cases and investigations the Section was called upon to handle increased. Concurrently, the number of legal support matters increased. As a consequence, the

956

ability of the Section to support U.S. Attorneys' Offices was reduced. With the addition of new resources in 1990, increased numbers of investigations and cases will be opened and closed. Additionally, pilot programs involving drug paraphernalia and money laundering prosecutions, drug gangs and urban crime centers are being initiated and monographs on drug diversion from the legitimate to illegitimate markets and money laundering are being published. Since the latter part of calendar year 1989, the Section has been extensively involved in the prosecutions of Manuel Antonio Noriega, et al., in Tampa (Middle District) and Miami, Florida (Southern District)—assigned full-time are one NDDS attorney, one paralegal, and one secretary in D.C. The Chief and Deputy Chief and two NDDS attorneys from the San Juan, Puerto Rico, Office have also travelled extensively to Panama during this fiscal year. This litigation will continue, at least, into 1991.

Because of the Government's expanded initiatives against drug trafficking, accompanied by the hiring of hundreds of new Federal prosecutors and investigators nationwide, it is anticipated that there will be a significant increase in the volume of support work the Section handles. The following table represents quantitatively two major areas in which support is provided:

					1992		
Item	1989	1990	1991	Change	Base Level	Change	Request Level
Appellate Matters	25	30	35	...	35	...	35
Requests/Referrals from Citizens & Congress	994	1193	1432	...	1432	...	1432

Another area in which the Section expects significant increases is in the approval of investigative and prosecutorial strategies proposing the use of Title IIIs, indictments using CCE, and requests for Federal prosecution and protection of witnesses. Workload is expected to increase 44 percent from 1989 to 1992.

Money Laundering Office

The Money Laundering Office was created in March 1990. Workload projections are quantitatively shown in the following table:

					1992		
Item	1989	1990	1991	Change	Base Level	Change	Request Level
Cases (lead prosecution):							
Pending, beginning of year	...	...	25	...	25	...	25
Opened	...	23	25	...	25	18	43
Closed	...	2	25	...	25	9	34
Pending, end of year	...	25	25	...	25	9	34

The Office leads in the development and implementation of money laundering policy and litigation support in a wide variety of criminal contexts. Though historically tied to the National Narcotics Strategy, the Office's work now reaches into such disparate areas as fraud and public corruption. Its mission is multi-faceted, consisting of the following elements: rendering of legal advice and guidance of the technical legal questions which arise routinely within the U.S. Attorneys' Offices, other Division offices and sections, and the law enforcement agencies; oversight and coordination in the areas of legislation development and review, policy implementation and indictment reviews; coordination of Departmentwide money laundering conferences and training including the formulation of the training programs provided by the investigative agencies. The Office also coordinates international money laundering training and conferences to reflect Department priorities; planning and coordination of multi-district and international money laundering operations; maintenance of a strategic reserve of litigators in order to handle specific litigation assignments; and generation of training materials, sample pleadings, newsletters and other materials as needed.

In the area of litigation support, the Office also provided assistance to the field in the newly emerging areas of money laundering and forfeitures. To this end, the Office is currently handling twenty-two money laundering forfeiture cases in the District of Hawaii at the request of the U.S. Attorney there. These cases involve potential forfeitures to the U.S. of $11 million dollars.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Criminal Division

Program: 2CRM05 Narcotic and Dangerous Drug Prosecution

	1989	1990	1991	1992			
				Base Level		Request Level	
				Change	Cum	Change	Cum
Resource Requirements							
BUDGET AUTHORITY	$2,295	$3,662	$5,771	$159	$5,930	$1,425	$7,355
OUTLAYS	2,298	3,482	5,469	398	5,867	1,240	7,107
Appropriated Positions	35	74	73	...	73	15	88
Workyears:							
Full-time Permanent	25	47	66	...	66	7	73
Other	1	...	...	...	...	...	...
Subtotal	26	47	66	...	66	7	73
Overtime/Holiday	...	...	...	...	...	...	...
Total	26	47	66	...	66	7	73

Program Changes: Program increases of 15 positions (including 9 attorneys), 7 workyears and $1,425,000 are requested for the Money Laundering Office of the Narcotic and Dangerous Drug Section. Money laundering is an integral part of the operation of virtually all crime syndicates and a critical aspect of tax evasion schemes and schemes to defraud the public. Since 1986, with the enactment of the Money Laundering Control Act, U.S. Attorneys have made great use of the criminal sanctions provided under 18 U.S.C. 1956 and 1957, the principal anti-money laundering statutes, and 31 U.S.C. 5324, the provision of the Bank Secrecy Act that makes it a crime to structure a transaction in order to evade the reporting requirements. In the next several years, it is anticipated that there will be a significant increase in the number of money laundering prosecutions that make use of these provisions. In 1989, there were approximately 200 prosecutions under Sections 1956 and 1957 versus 150 in 1988. Additional workload increases are expected to result from the 1990 money laundering legislative package and implementation of the United Nations Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and liberalization of international money laundering asset sharing. Further, there will be increased demands for training and technical conferences from the international community in addition to increased requests from domestic enforcement agencies. Division staff will also be required to provide ad hoc support to the Department of Treasury Financial Crimes Enforcement Network (FINCEN) and to participate in joint ventures. Without the additional resources, the Money Laundering Office will be unable to meet the increased requests for

prosecutorial assistance, provide training as mandated, or to fully support the efforts of the FINCEN and the Drug Czar.

Increases totaling $228,000 are included to cover: costs for instructional manuals and training conferences deferred in 1991 due to the required absorption of one-half of the 1991 pay increase ($81,000); increased costs ($36,000) for use of legal research data base systems, JURIS/LEXIS/Westlaw; and increased costs ($111,000) associated with enhanced building security. Security concerns have escalated as the Division's role in drug enforcement and other violent crime initiatives have increased. The Division requires funds to enhance guard service at the Bond Building and its new satellite facility (currently being procured) as well as to secure the Bond Building garage and ground floor.

Schedule of Cost Inputs
(Dollars in thousands)

Organization: Criminal Division

Decision Unit: Narcotic and Dangerous Drug Prosecution - 2CRM05

	Request Level		
	Pos	WY	Amount
Positions by Type			
Attorney	9	4	$ 338
Paralegal	1	1	21
Clerical	5	2	71
Subtotal	15	7	430
Travel/Transportation	...	...	401
Litigation Expenses	...	...	67
Equipment Rentals	...	...	34
GSA Rent	...	...	52
Other Services	...	...	254
Supplies	...	...	19
Equipment	...	...	168
Subtotal	...	...	995
Total	15	7	1,425

Description of Cost Inputs

The additional resources include significant funds for travel and reproduction costs associated with sponsoring at least 3 national, money laundering conferences annually. One-time costs for equipment are also included. Additionally, funds are included to cover purchases deferred in 1991 due to the required absorption of one-half of the 1991 pay increase, increased security, and increased use of legal research data base systems.

959

Justification of Program and Performance
Criminal Division
Salaries and Expenses, General Legal Activities: 15-0128-0-752
Internal Security - 2CRM07

Long-Range Goal: To enforce, in an effective and uniform manner, approximately 100 criminal statutes and regulations affecting the national security and foreign relations of the United States through coordination and cooperation with the United States Attorneys, the intelligence and investigative communities, and the general public.

Major Objectives:

To develop and implement coordinated investigative and litigative strategies in the area of national security.

To supervise all prosecutions involving the Neutrality statutes, the Espionage statutes, the Arms Export Control Act, the Export Administration Act and the Classified Information Procedures Act (CIPA).

To provide legal support and investigate guidance to all Federal investigative agencies engaged in national security matters.

To administer and enforce the Foreign Agents Registration Act (FARA).

To administer the requirements of 18 U.S.C. 951, concerning notification to the Attorney General by agents of a foreign government.

To provide assistance to Members of Congress and all other appropriate officials involved in the regulation of lobbying.

Base Program Description: The four major substantive areas within the responsibility of the Internal Security Section are: (1) Espionage and Neutrality violations; (2) Arms Export Control Act and Export Administration Act violations; (3) Graymail matters; and (4) FARA administration and enforcement. In the first three areas, the Section supervises investigations and prosecutions by providing legal and policy guidance to the United States Attorneys, law enforcement agencies, the United States intelligence community, and the intelligence agencies of allied nations. Section FARA responsibilities include: the registration of representatives of foreign governments and entities, supervising investigations, conducting inquiries, inspections, and all FARA-related criminal and civil litigation. This Section also provides specialized legal support to the United States Attorneys in the areas of policy interpretation, legal research, and the drafting of indictments, pleadings, and other legal papers. It directly participates in criminal litigation, including grand jury proceedings, trials, appeals, and related legal actions. The Section supports litigation, in a more general way, by developing, analyzing, and evaluating proposed legislation related to the national security and foreign relations fields; serving as the focal point for interagency coordination, participating in international conferences involving the enforcement of NATO export control mechanisms through the Coordinating Committee for Multi-National Export Controls; participating in extremely sensitive matters such as prisoner exchanges with Soviet bloc countries; and delivering speeches before educational institutions and professional groups on the investigation and prosecution of national security cases.

960

Accomplishments and Workload: The recent experience and projections for the future with regard to litigation for which the Internal Security Section is directly responsible are summarized quantitatively in the following table:

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
Matters:							
Pending, beginning of year	164	216	152	43	195	..	195
Opened	278	180	290	20	310	...	310
Closed	226	244	247	3	250	...	250
Pending, end of year	216	152	195	60	255	...	255
Cases (lead prosecution):							
Pending, beginning of year	26	36	45	8	53	...	53
Opened	26	28	42	2	44	...	44
Closed	16	19	34	1	35	...	35
Pending, end of year	36	45	53	9	62	...	62
Disposition of defendants in cases litigated:							
Convictions	16	52	90	5	95	...	95

Increases in investigations and cases are expected as a result of the increasing expertise and sophistication of the Exodus program in detecting the illegal export of weapons and strategic technology. The additional positions provided to United States Attorneys' Offices will result in a significant increase in the prosecution of these cases. President Bush's drug initiative will also result in increased investigation and prosecution of drug-related offenses thereby causing a corresponding increase in issues involving CIPA.

Espionage Unit: In furtherance of the Attorney General's priorities concerning National Security/Espionage, this Unit combats the compromise of the national security of the United States by providing timely advice and guidance to the investigative and intelligence communities and the United States Attorneys' Offices. For example, Staff provided legal advice to the Army and Federal Bureau of Investigation (FBI) in their joint investigation of the espionage activities of Warrant Officer James Hall and his co-conspirator, Huseyin Yildirim. These individuals had passed to East German and Soviet contacts hundreds of Top Secret Codeword signals intelligence documents over a six-year period. The Unit also assisted the Army in the court-martial of Hall, and prepared the Yildirim case for trial in the Southern District of Georgia, trying it jointly with the United States Attorney's Office. They are responsible for responding to Yildirim's appeal from his conviction and life sentence.

The Unit supervised the investigation of former Marine Frank Arnold Nesbitt, working closely with the United States Attorney's Office for the Eastern District of Virginia in obtaining Nesbitt's plea of guilty to espionage charges for his communication of signals intelligence information to Soviet agents. Staff performed a similar role in the successful prosecution of Ronald C. Wolf in the Northern District of Texas for the attempted communication of such information to Soviet agents.

Currently, staff are working with the United States Attorney's Office for the Southern District of Texas in preparing for trial the case against former FBI translator Douglas Tsou, who is charged with transmitting classified information to members of an organization that represents Taiwanese governmental interests in the United States.

Export Unit: This Unit works closely with the investigative agencies and the United States Attorneys' Offices to develop and prosecute cases under the Arms Export Control and the Export Administration Acts. Under these statutes, the Executive Branch controls the export of military and strategic items and technology by requiring a validated license for their exportation. A recent case which illustrates the manner in which the Section exercises its supervisory function in these matters involves an attempt to export 40 missile warhead detonation capacitors, which can be used as an energy source for the triggers in nuclear warheads, from the United States to Iraq. As a result of a lengthy United States Customs and British Customs Services joint undercover investigation, four Iraqis and the export manager of a London-based company were indicted on March 29, 1990, in San Diego, California, for conspiracy, money laundering offenses, and a violation of the Arms Export Control Act. The unsealing of the indictment followed the arrest of five persons, including two of those indicted in San Diego, by British Customs officers at Heathrow Airport, as they attempted to export the capacitors on an Iraqi Airlines flight to Baghdad.

Graymail Unit: This Unit is consulted in any criminal case involving the possible disclosure of classified information in litigation and furnishes legal advice concerning use of the CIPA to United States Attorneys, the Department, and other components of the Executive Branch. The Unit has coordinated the use of the CIPA in 39 cases during 1989, including the Fawaz Yunis case, involving a terrorist who was found guilty on March 14, 1989, of air piracy and hostage taking. The case is now pending appeal. Thus far in 1990, the Unit has coordinated 32 cases, including the case involving Manuel Antonio Noriega, currently in pretrial proceedings.

Registration Unit: This Unit continues to experience an increase in the number of registrants and foreign principals. The General Accounting Office is currently conducting a follow-up audit of the response to its 1980 recommendations concerning FARA. Further, legislation to strengthen FARA has been introduced by Senator Heinz and is currently the subject of hearings before the Senate Foreign Relations Committee. Unit staff provided assistance to the United States Attorney's Office in Connecticut in a Foreign Corrupt Practices Act conspiracy and RICO case. Evidence developed in that case is being reviewed with a view toward a civil injunctive action concerning the filing of several false statements under FARA.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Criminal Division

Program: 2CRM07 Internal Security

	1989	1990	1991	1992			
				Base Level		Request Level	
				Change	Cum	Change	Cum
Resource Requirements							
BUDGET AUTHORITY	$2,144	$2,341	$3,532	$156	$3,688	$134	$3,822
OUTLAYS	2,129	2,313	3,373	271	3,644	117	3,760
Appropriated Positions	30	44	43	...	43	...	43
Workyears:							
Full-time Permanent	27	34	40	...	40	...	40
Other	2	...	...	...	...	...	...
Subtotal	29	34	40	...	40	...	40
Overtime/Holiday	...	...	...	...	...	...	...
Total	29	34	40	...	40	...	40

Program Changes: The Criminal Division is requesting program increases totalling $134,000. The requested pay raise absorption ($47,000) of one-half of the 1991 pay increase will enable the Section to retain adequate funding for travel required in conjunction with espionage and export investigations and cases in its base. Resources requested will also cover: increased costs ($21,000) for use of legal research data base systems, JURIS/LEXIS/Westlaw; and increased costs ($66,000) associated with enhanced building security. Security concerns have escalated as the Division's role in drug enforcement and other violent crime initiatives have increased. The Division requires funds to enhance guard service at the Bond Building and its new satellite facility (currently being procured) as well as to secure the Bond Building garage and ground floor.

Schedule of Cost Inputs
(Dollars in thousands)

Organization: Criminal Division

Decision Unit: Internal Security - 20RM07

	Request Level		
	Pos	WY	Amount
Travel/Transportation	...	...	47
Other Services	...	...	87
Total	...	...	134

Description of Cost Inputs

Costs are for purchases deferred in 1991 due to the required absorption of one-half of the 1991 pay increase, increased use of available legal research data base systems, and enhanced security.

Justification of Program and Performance
Criminal Division
Salaries and Expenses, General Legal Activities: 15-0128-0-752
General Litigation & Legal Advice - 2CRM15

Long-Range Goal: To achieve directly, or through assistance to the U.S. Attorneys, the prompt disposition of all matters within the six major law enforcement responsibilities of the program, and to improve the efficiency and effectiveness of Federal, State and local criminal law enforcement efforts through the encouragement of improved intergovernmental coordination and cooperation.

Major Objectives:

To develop and implement enforcement programs in certain key statutory areas where special requirements indicate the need for centralization.

To develop and prosecute major cases under a vast range of statutes due to recusal, lack of resources or lack of pertinent expertise in U.S. Attorney Offices.

To defend civil suits seeking to obtain information on or to interfere with criminal justice activities and national security operations.

To provide support to the U.S. Attorneys in the conduct of all litigation within the program's subject areas.

To coordinate and participate in crime resistance programs related to the program's statutory responsibilities, including the encouragement of voluntary involvement by corporations and individuals in the private sector in crime resistance efforts.

To provide legal and policy advice to the Assistant Attorney General, Deputy Attorney General, and Attorney General, as well as other components of the Department, on issues of major importance to the Department.

Base Program Description: The six major substantive areas addressed by the General Litigation and Legal Advice Section are: (1) Crimes Against the Public - This includes kidnapping, extortion, bank robbery, riot, firearms and explosives violations, arson, fugitive felons, motor vehicle theft, false identification crimes, interstate transportation of stolen property, and offenses on Federal or Indian reservations or on the high seas. (2) Crimes Against Government Operations - This includes attacks on Federal officials (including the President, Vice President, Congressmen, and designated Federal agency personnel), attacks on candidates for Federal office, unlawful electronic surveillance, theft or destruction of Government property, counterfeiting, postal depredations, obstruction, perjury, false personation, and immigration offenses. (3) Regulatory Enforcement - This relates to violations of criminally enforceable regulations which have been promulgated by such agencies as the Departments of Agriculture, Commerce, Interior, Labor, State, Transportation, and Health and Human Services as well as the Nuclear Regulatory Commission. These violations most frequently pertain to the protection of health, safety, and welfare. Included among these areas of regulation are offenses related to the knowing mishandling of nuclear materials, and flagrant breaches of mine or occupational safety standards. This area also includes trademark, copyright, customs, and industrial espionage violations. (4) Terrorism - This includes the supervision of all terrorism matters, even though certain statutes applicable to particular incidents are normally the responsibility of other Sections. In addition, certain statutory areas are specifically assigned including hostage-taking, air piracy, attacks on foreign officials and official guests of the United States, destruction of aircraft and aircraft facilities and rewards. This area also includes the Section's Counter-Terrorism Management Group. (5) Post-Conviction and Special Matters - This relates to the defense of suits challenging actions by, or procedures of, the Bureau of Prisons or Parole Commission (habeas corpus, coram nobis, etc.). It also encompasses the administering of Federal statutes pertaining to juveniles, mental competence, sentencing, prisoner transfer treaties, detainees, and prison offenses. (6) Special Civil Matters - This includes the defense of civil injunctive actions instituted against the Government or its agents as a result of steps taken, or allegedly taken, in the course of criminal or national security investigations.

Approximately 75 percent of all Federal criminal statutes are assigned to the program, including many violent crimes and most Federal "street" crimes. In priority or sensitive criminal areas, the program serves as an enforcement entity, prosecuting and assisting in the prosecution of cases, and coordinating the various U.S. Attorney Offices and investigative agencies. When a matter is likely to merit prosecution by Section attorneys, the agencies immediately advise the Section of the initiation of an investigation, thus affording the opportunity for Section attorneys to provide guidance on crucial aspects of the investigation. In a more general way, the Section supports litigation by drafting or commenting on proposed legislation. Legislation can overcome the long-run effects of an adverse decision and usually has an effect on both the scope and nature of future litigation. To conserve Federal litigation resources, Section attorneys also interact with the private sector, e.g., industry and labor, and Federal and non-Federal enforcement agencies, regarding adoption of crime resistance measures.

Accomplishments and Workload: The recent experience and projections for the future with regard to criminal litigation for which the General Litigation and Legal Advice Section is directly responsible are summarized quantitatively in the following table:

					1992		
Item	1989	1990	1991	Change	Base Level	Change	Request Level
Matters:							
Pending, beginning of year	46	33	46	10	56	...	56
Opened	41	49	60	12	72	...	72
Closed	54	36	50	18	68	...	68
Pending, end of year	33	46	56	4	60	...	60
Cases (lead prosecution):							
Pending, beginning of year	14	14	13	...	13	...	13
Opened	7	5	8	...	9	...	9
Closed	7	6	8	...	8	...	8
Pending, end of year	14	13	13	...	14	...	14
Disposition of defendants in cases litigated:							
Convictions	10	12	15	3	18	...	18
Acquittals/dismissals	1	1	2	...	2	...	2
Other dispositions (deferred prosecution, deaths)	1	1	1	...	1	...	1

In addition, during the first eleven months of 1990, Section attorneys handled 21 criminal cases in the courts of appeal and 8 civil cases in the District courts and/or courts of appeal. Further, Section Attorneys handled 1,192 legal advice assignments (such as commenting on legislation, responding to congressional inquiries, and reviewing requests to prosecute juveniles as adults).

Currently, the primary enforcement initiatives of the General Litigation and Legal Advice Section involve combatting terrorism, career criminals/weapons violations, immigration offenses, and nuclear safety. Increases in investigations and cases are due to increased terrorist activities, increases in workload anticipated from President Bush's 1990 violent crime initiative, and expanded activity in career criminals/weapons violations and nuclear safety initiatives.

--Terrorism. The Section is combatting terrorism through exhaustive investigation and vigorous prosecution of persons responsible for terrorist acts. To upgrade its response to terrorism, the Department created within the Section a Counter-Terrorism Management Group, headed by a senior attorney experienced in terrorism prosecutions. The signal accomplishment was the conviction and sentencing to 30 years of Fawaz Yunis, a Shiite Moslem, for aircraft hijacking, hostage-taking, and conspiracy as a result of the hijacking of a Royal Jordanian aircraft at Beirut, Lebanon, with Americans on

board. This was the first conviction under U.S. law of an international terrorist for a terrorist act committed outside the U.S. His arrest represented the first overseas arrest by U.S. law enforcement officials of a suspected terrorist being sought under U.S. laws. Section attorneys are defending Yunis' appeal of his conviction.

Other investigations currently pending in the Section include, among others: (1) the hijacking of TWA Flight 847 by Shiite terrorists; (2) the attempted bombing of the U.S. Embassy at Jakarta, Indonesia; (3) the bombing of a Pan Am Airlines jet en route to Honolulu, Hawaii; (4) the bombings of USO Clubs in Barcelona, Spain, and Naples, Italy; (5) the murder of a U.S. military attache in Athens, Greece; (6) the bombing of the American Embassy in Rome; (7) the murder of four U.S. Marines in El Salvador; and (8) the bombing of Pan Am Flight 103 in route to New York from Great Britain; (9) the murder of an U.S. Army officer in Manila; (10) the abduction of a Marine Lieutenant Colonel, assigned to the U.N. Truce Supervision Organization in northern Israel; (11) the bombings of U.S. troop trains in West Germany; and (12) murders, assaults and hostage-takings involving servicemen and civilians in Panama. A Section attorney is participating in the prosecution of 16 defendants, many of whom are leaders of violent Puerto Rican independence groups, for the robbery of $6,956,520 from a Wells Fargo facility. So far, six defendants have pled guilty or been convicted.

--Weapons/Career Criminal Initiative. During 1991, enforcement relating to career criminals is one of the Section's initiatives. The Section will assist United States Attorneys' Offices in assembling career criminal task forces to target career offenders and reduce the crime rate by a vigorous attack on recidivists. The task forces will emphasize triggering available mandatory minimum penalties under the Armed Career Criminal Act, the Anti-Drug Abuse Act of 1988, and the Sentencing Reform Act. Where appropriate, Section attorneys will participate on such task forces and directly participate in prosecutions. The Section will monitor the guidelines restricting Federal plea bargaining in weapons and/or career criminal cases to ensure that dangerous felons receive the maximum penalties Congress has mandated and encourage the use of pre-trial detention under the "danger to the community" provision of the Bail Reform Act of 1984. The Section will continue working with other elements of the Division and Department to amend the firearms laws to provide greater penalties for those violating them, to keep more dangerous weapons under regulation, and to keep firearms from a broader spectrum of undesirables. Efforts will be made to induce the States, through the Executive Working Group, to strengthen their firearms statutes in similar fashion and, in particular, to prevent the automatic restoration of the right of dangerous convicted felons to possess firearms.

Formal Armed Career Criminal Task Forces have been established by the Bureau of Alcohol, Tobacco and Firearms (the primary Federal firearms enforcement agency) in several Federal judicial districts. Seven additional task forces are being established. Federal legislation that will prevent persons convicted of violent crimes and serious drug offenses from lawfully obtaining firearms has been proposed. Assistance from the National Association of Attorneys General and the National District Attorneys Association has been sought to have the states review their laws to prevent the legal acquisition of firearms by dangerous felons.

-- Immigration Offenses. The decision to commit the Section to an enforcement initiative in this area reflects a commitment to assist the Immigration and Naturalization Service (INS) in its enforcement of the Immigration Reform and Control Act of 1986. By enacting this legislation, Congress recognized that "employment is the magnet that attracts aliens here illegally." This enforcement initiative is designed to complement INS' own efforts and to promote the declared policy of the Congress to remove these economic incentives to illegal immigration by penalizing employment of illegal aliens. To that end, the Section litigates selected cases, develops policy, reviews proposed INS undercover operations, participates in training exercises and assists in implementing an enforcement program.

--Nuclear Safety. This initiative is based on the potentially catastrophic consequences which can emanate from nuclear disasters and the difficulties inherent in prosecuting nuclear regulatory cases. The Section reviews all Nuclear Regulatory Commission referrals of criminal investigations; referring to the appropriate U.S. Attorneys' Offices, those referrals which are not sufficiently complex to merit Section resources; and promptly analyzing the prosecutive merit of all other referrals, declining those which merit no action and pursuing (either directly when warranted or by monitoring the efforts of U.S. Attorneys) the timely investigation and possible eventual prosecution of the meritorious complex referrals. Section attorneys and personnel of the Nuclear Regulatory Commission have developed a memorandum of understanding relating to criminal referrals and the problems of parallel administrative and criminal proceedings, which are particularly difficult in the field of nuclear power because of significant public health and safety consequences. A Section attorney obtained the conviction of a hospital technician for knowingly injecting overdoses of

radioactive drugs into patients. In a related health and safety area, Process Technology, Inc., pled guilty to a violation of the Federal Meat Inspection Act resulting from the illegal irradiation of 38,880 pounds of pork tenderloin for export. This was the first case referred by the Department of Agriculture concerning illegal irradiation of food.

In addition, the Section defends civil suits seeking to obtain information or to interfere with criminal justice activities and national security operations. For example, Section attorneys successfully contended on appeal that there is no constitutional requirement for a post seizure probable cause hearing for vehicles seized by the Immigration and Naturalization Service for transporting illegal aliens. The Section sustained Drug Enforcement Agency regulations governing the use of peyote by religious groups. The Section was also successful in having the District Court reinstate the validity of Bureau of Prisons regulations concerning entitlement to reductions in minimum parole eligibility. In another case, the Court of Appeals upheld the Bureau of Prisons regulations permitting involuntary medication of mentally ill inmates with antipsychotic drugs.

The Section also supports United States Attorneys and other Department components in the conduct of other litigation. For example, Section attorneys are handling the trial of a case involving the use of Christian Broadcasting Network facilities to hinder the authorized satellite transmissions of other countries, including the Playboy channel. The Federal Communications Commission considers the prosecution to be a matter of high priority, since the spread of this type of conduct would threaten the viability of the satellite communication industry. Another attorney successfully prosecuted the first case under the Occupational Safety and Health Administration Act of 1970 in which the defendant was sentenced to incarceration.

Crime resistance is often the most cost effective way to reduce crime. In this regard, the Section has worked with the National Committee on Uniform Traffic Laws and Ordinances to improve the provisions of the Uniform Vehicle Code (which serves as the model state code for vehicular matters) relating to the titling and registration of motor vehicles, controls over vehicle salvage, and criminal laws relating to the theft and disposition of stolen vehicles. The Section has also urged the National Highway Traffic and Safety Administration to promulgate voluntary Federal component identification standards, thereby encouraging more vehicle manufacturers and owners to apply the vehicle identification number (VIN) to additional components of the vehicle in order to deter theft. The Section has also lectured and participated in seminars to spread awareness in the law enforcement community about the new mandate on Federal component identification standards that requires the VIN to be placed on up to 14 components of high theft passenger cars.

The Section regularly provides legal advice to the various components of the Department on complex issues. For example, in terrorism cases, Section attorneys advise on the extent and nature of our extraterritorial law enforcement jurisdiction. The Section has also prepared Attorney General guidelines under the Anti-Drug Abuse Act of 1988 on FBI investigations of felonious killings of State and local law enforcement officers. Section attorneys have developed a new memorandum of understanding with the FCC concerning theft of cable programming and have prepared a copyright monograph that describes the copyright statutes and details methods of proving copyright cases. The Section has also participated in the development of new international conventions relating to terrorist acts committed at international airports and against maritime shipping. Implementing legislation is now being prepared. Other legislation has been drafted to allow the Attorney General to grant permanent resident status to certain aliens who cooperate in the prosecution of international terrorists and drug traffickers. Further, the Section has prepared an Indictment Form Book which serves as a resource for all Federal prosecutors.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Criminal Division

Program: 2CRM15 General Litigation and Legal Advice

	1989	1990	1991	1992			
				Base Level		Request Level	
				Change	Cum	Change	Cum
Resource Requirements							
BUDGET AUTHORITY	$3,212	$3,833	$6,173	$235	$6,408	$244	$6,652
OUTLAYS	3,264	3,761	5,856	475	6,331	212	6,543
Appropriated Positions	46	78	78	...	78	...	78
Workyears:							
Full-time Permanent	37	55	71	...	71	...	71
Other	1	...	...	...	...	...	...
Subtotal	38	55	71	...	71	...	71
Overtime/Holiday	...	...	...	...	...	...	...
Total	38	55	71	...	71	...	71

Program Changes: The Criminal Division is requesting program increases totalling $244,000. The requested pay raise absorption ($86,000) of one-half of the 1991 pay increase will enable the Section to retain adequate funding for service and maintenance of existing automated systems and travel in support of Section investigations and cases. Other resources requested will cover: increased costs ($39,000) for use of legal research data base systems, JURIS/LEXIS/Westlaw; and increased costs ($119,000) associated with enhanced building security. Security concerns have escalated as the Division's role in drug enforcement and other violent crime initiatives have increased. The Division requires funds to enhance guard service at the Bond Building and its new satellite facility (currently being procured) as well as to secure the Bond Building garage and ground floor.

969

Schedule of Cost Inputs
(Dollars in thousands)

Organization: Criminal Division

Decision Unit: General Litigation & Legal Advice - 2GRM15

	Request Level		
	Pos	WY	Amount
Travel/Transportation	...	...	43
Other Services	...	...	158
Equipment	...	...	43
Total	...	...	244

Description of Cost Inputs

Resources for the required absorption of one-half of the 1991 pay increase will allow adequate base funding for travel and service and maintenance of existing automated systems. Other costs are for increased use of available legal research data base systems and enhanced security.

970

Long-Range Goal: To locate, investigate, denaturalize and deport individuals who concealed activity committed during World War II involving the persecution of others because of race, religion, national origin, or political opinion, in order to gain entrance to the United States.

Major Objectives:

To identify all alleged Nazi war criminals living in the United States.

To review and investigate systematically all relevant allegations received by the program and to prosecute appropriate cases.

To develop and maintain working relationships with foreign governments having information relating to the activities of suspected Nazi war criminals.

To prevent entry of Nazi persecutors into the United States.

Base Program Description: This program detects, identifies, investigates, and, where appropriate, takes legal action to denaturalize and/or deport any individual who assisted the Nazis by persecuting any person because of race, religion, national origin or political opinion, who later was admitted as an alien into, or became a naturalized citizen of, the United States. The activities of this program include historical research, file review, investigations, witness interviews in the U.S. and abroad, litigation support, and denaturalization/deportation litigation before administrative bodies and U.S. courts. There are four major phases of work: (1) identification, consisting of matching a name of a United States resident to an allegation or suspicion of war crimes, and opening an Office of Special Investigations (OSI) file on that person; (2) investigation of suspects; (3) filing litigation; and, (4) appeals of judgment or other final orders. Four types of litigation action may be conducted: (1) if the subject is a naturalized citizen, a civil complaint may be filed in the U.S. District Court seeking a judgment of denaturalization; (2) for resident aliens (including denaturalized citizens), administrative proceedings are brought to seek their deportation; (3) criminal indictments may be pursued in cases which involve perjury (18 U.S.C. 1001) or other crimes within the statute of limitations; and (4) extradition. The litigation phase begins when the Complaint/Order to Show Cause/Indictment is filed; it ends with the judgment or the final order, and that is the basis for appeal.

Accomplishments and Workload: The recent experience and projections for the future of the Office of Special Investigations is summarized quantitatively in the following table:

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
Investigative Matters:							
Pending, beginning of year	581	512	538	25	563	...	563
Opened	38	45	50	...	50	...	50
Closed	107	19	25	35	60	...	60
Pending, end of year	512	538	563	-10	553	...	553

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
Cases:							
Pending, beginning of year	23	22	17	1	18	...	18
Opened	6	1	4	1	5	...	5
Closed	7	6	3	1	4	...	4
Pending, end of year	22	17	18	1	19	...	19

Some of the most recent accomplishments of the Office of Special Investigations include the following:

-- Denaturalization of three additional war criminals in 1990, bringing the total denaturalized to date to 34.

-- Extradition of one war criminal in 1990, bringing the total of permanent departures to 33.

-- Continuing rendering of assistance to Australia, Canada, Great Britain, West Germany and Austria in their efforts to locate, investigate and litigate their own Nazi war criminals.

-- Continuing negotiations with the Governments of Hungary, Czechoslovakia, East Germany and the U.S.S.R. in an attempt to expand our access to their relevant documentation on the Holocaust.

-- Continuing work with the Immigration and Naturalization Service and the Department of State to exclude known Nazi War criminals from entering the United States.

OSI continues to be "proactive" in its investigations, not merely waiting for allegations from outside sources. A computer database and data retrieval system to assist in the identification of potential subjects for prosecution has been designed in house. The database is the most complete collection in the world of potential Nazi criminals and persecutors. This system has resulted in hundreds of investigative files and the institution of approximately 20 cases. Tens of thousands of Nazi war criminals have been barred from entry into the United States as a result of this system. OSI is committed to pursuing pending investigations and future cases with even greater speed as its pool of witnesses and subjects begins to shrink even more rapidly. OSI is also experiencing a greater workload for the assistance it renders to the Governments of Canada, Australia and Great Britain, where similar units have or are being formed. In addition, cases which OSI regards as final dispositions because the individuals have departed the U.S. pursuant to consent agreements, extradition, or otherwise continue to require an inordinate expenditure of resources because of the subject's efforts to revoke their consent agreements (e.g., Rudolph) or because of protracted Freedom of Information Act litigation (Artukovic, Demjanjuk).

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Criminal Division

Program: 2CRM19 Office of Special Investigations

	1989	1990	1991	1992			
				Base Level		Request Level	
				Change	Cum	Change	Cum
Resource Requirements							
BUDGET AUTHORITY	$2,637	$3,581	$3,899	$258	$4,157	$134	$4,291
OUTLAYS	2,642	3,459	3,839	278	4,117	117	4,234
Appropriated Positions	47	45	43	...	43	...	43
Workyears:							
Full-time Permanent	30	44	42	...	42	...	42
Other	3	...	...	...	...	...	...
Subtotal	33	44	42	...	42	...	42
Overtime/Holiday	...	...	...	...	...	...	...
Total	33	44	42	...	42	...	42

Program Changes: The Criminal Division is requesting program increases totalling $134,000 to cover: purchase of contract historical research deferred in 1991 due to the required absorption of one-half of the 1991 pay increase ($47,000); increased costs ($21,000) for use of legal research data base systems, JURIS/LEXIS/Westlaw; and increased costs ($66,000) associated with enhanced building security. Security concerns have escalated as the Division's role in drug enforcement and other violent crime initiatives have increased. The Division requires funds to enhance guard service at the Bond Building and its new satellite facility (currently being procured) as well as to secure the Bond Building garage and ground floor.

Schedule of Cost Inputs
(Dollars in thousands)

Organization: Criminal Division

Decision Unit: Office of Special Investigations - 2CRM19

	Request Level		
	Pos	WY	Amount
Other Services	...	...	134
Total	...	...	134

Description of Cost Inputs

Costs are for purchases deferred in 1991 due to the required absorption of one-half of the 1991 pay increase, increased use of available legal research data base systems, and enhanced security.

Justification of Program and Performance
Criminal Division
Salaries and Expenses, General Legal Activities: 15-0128-0-752
Prosecution Support - 2CRM10

Long-Range Goal: To provide the legal assistance and central coordination necessary to maximize the effectiveness of Federal criminal law enforcement.

Major Objectives:

International Affairs

To promote the negotiation of treaties with foreign governments that will improve the ability of the United States to extradite fugitives, to acquire evidence, to transfer prisoners, and to accomplish other purposes which will aid the criminal justice system in the United States.

To assist Federal and state authorities in obtaining fugitives, evidence and legal assistance from foreign governments.

To represent, or supervise the legal representation of, foreign governments' extradition and evidence requests in U.S. courts.

To monitor the execution of Prisoner Transfer treaties so as to minimize any delay in transporting prisoners eligible for transfer to their countries of nationality.

Enforcement Operations

To provide effective and reliable service to Federal prosecuting attorneys in the implementation of the statutes and regulations that affect them.

To maintain a legal brief and policy memoranda bank and to integrate into the legal brief bank the briefs in opposition to petitions for writs of certiorari and the Solicitor General appeal memoranda that are generated by the Division.

To maintain an up-to-date U.S. Attorneys' Manual and prepare Criminal Division updates on a regular basis so that all portions of the Division's contribution to the Manual will remain current and informative.

To coordinate responses to Freedom of Information Act and Privacy Act requests pertaining to the Criminal Division.

To review requests for authorization of electronic surveillance and recommend authorization or disapproval of requests pursuant to 18 U.S.C. 2518 in an expeditious manner.

To perform the appropriate review of witness relocation requests and deal with the myriad matters associated with the Witness Security Program.

To renew requests from U.S. Attorneys to immunize witnesses in Federal cases pursuant to 18 U.S.C. 600 et. seq.

Asset Forfeiture

To litigate and assist U.S. Attorney Offices in litigating forfeiture cases where:
(a) major cases arise in districts in which the U.S. Attorney Offices lack the expertise or personnel to conduct the case effectively.
(b) backlogs of forfeiture cases arise because of other demands on U.S. Attorney Offices.

To advise and train investigative agents and Assistant U.S. Attorneys to make greater use of forfeiture provisions and better manage seized and forfeited assets.

To process and resolve petitions for remission and mitigation in judicial forfeiture cases.

To support directly the U.S. Marshals Service and investigative agencies in improving the management of seized and forfeited property.

To review all settlements in forfeiture cases in which the difference between the gross amount of the original forfeiture claim exceeds $60,000 but is less than $750,000.

To encourage coordination with state and local authorities on forfeiture matters.

To provide legal advice and assistance to United States Attorney Offices regarding the collection of criminal fines and appearance bond forfeiture judgments.

Base Program Description: This program seeks, through the Division's Office of International Affairs (OIA), to centralize, coordinate and execute the Department's responsibilities concerning international legal matters related to criminal law enforcement in the areas of extradition and international legal assistance. The handling of treaty negotiations, treaty implementation and international legal assistance requires effective liaison between OIA and numerous foreign and domestic entities, including Department of State, foreign governments and INTERPOL. To assure that extradition requests submitted by the United States meet the requirements of the relevant extradition treaties, OIA advises Federal and State prosecutors on the preparation of all United States extradition requests, OIA either directly represents, or supervises the representation of, foreign extradition requests before United States courts. Included among cases handled by OIA are some of the most important narcotics trafficking, fraud, and violent crime cases prosecuted in this country and abroad. Similarly, to assure that requests submitted by the United States seeking evidence from foreign countries under mutual assistance treaties in criminal matters meet the requirements of the applicable treaty, OIA, acting as the United States Central Authority under the treaties, advises Federal and State prosecutors on the preparation of all such requests, and screens or redrafts them prior to transmittal. Mutual assistance treaties with Canada, the Bahamas, and the Cayman Islands are expected to enter into force in 1990, greatly increasing the demands placed on the Office. When, because of the lack of a mutual assistance treaty, such requests must be made by letters rogatory, OIA performs essentially the same processing role. To promote the reciprocal representation by foreign governments of United States evidence assistance requests, OIA either directly represents, or supervises the representation of, foreign evidence assistance requests before United States courts. As with extradition, such evidence requests are generally related to some of the most important investigations and prosecutions in this country, e.g., investigations of the international laundering of vast profits of major narcotics trafficking organizations. OIA has also been instrumental in obtaining the execution of search warrants in foreign countries in connection with the unlawful export of advanced technology goods, such as computers which could be used in weapons guidance systems.

Through the Office of Enforcement Operations (OEO), the Criminal Division regulates the effective and appropriate use of sensitive investigative techniques such as wiretaps, consensual monitoring and witness relocations through the application of uniform procedural guidelines by specially trained attorneys and paralegals. These individuals maintain effective liaison with the U.S. Attorney Offices, Organized Crime Strike Forces, U.S. Marshals Service, the Federal Prison System, the Federal Bureau of Investigation, and all other applicable Federal, State and local investigative agencies. The Office of Enforcement Operations possesses full responsibility to review and approve or disapprove requests from U.S. Attorneys, investigative agencies, and Congressional committees to place individuals believed to be endangered by organized crime figures in the Witness Security Program. It is responsible for coordination among Government prosecutors, investigative agencies, and U.S. Marshals Service personnel, the conduct of cases requiring witness protection, and participation in litigation arising out of the program, in cases where the United States is named as a party by virtue of any action taken or not taken with respect to the program. (Title 18, United States Code, Section 3121).

The Office of Enforcement Operations is responsible for the review, adjudication, and coordination of all applications for electronic surveillance under Title III of P.L. 90-351, codified in Title 18, United States Code, Section 2510-2520, and is solely responsible for the final recommendation to the Assistant Attorney General. It participates in and, as required, conducts litigation arising from the grant of an application for electronic surveillance, and is responsible for performing ongoing analysis, review, and in-depth evaluations of the implementation of 18 U.S.C. 2510-20. The Office also receives and processes all requests received from U.S. Attorney Offices and Organized Crime Strike Forces for witness immunity pursuant to 18 U.S.C. 600 et seq.; OEO makes the final recommendation to the Assistant Attorney General for approval or rejection of such requests. In addition, OEO provides the various components of the Division and the U.S. Attorney Offices with a wide range of litigative assistance and prosecutorial support, including the following: processing requests for witness hypnosis in the Federal judicial system; processing requests for consensual surveillance in selected cases in sensitive areas; processing requests for disclosure of tax returns, taxpayer information and return information pursuant to the Tax Disclosure Act of 1976, as amended; processing Freedom of Information Act and Privacy Act requests; responding to allegations of illegal electronic surveillance; processing requests for permission to seek issuance of a search warrant for documentary material in the possession of a disinterested third party; updating the Criminal Division's portion of the United States Attorneys' Manual; maintaining the legislative files and records of the Division; maintaining the Legal Reference Unit, a legal brief and policy memorandum bank for use by Division attorneys and paralegals; responding to citizen mail on criminal matters by the Correspondence Unit; and processing requests to subpoena attorneys on criminal cases and to reveal grand jury information to state and local prosecutors. The provision of these services is accomplished through close liaison between OEO and litigating components of the Criminal Division and the United States Attorney Offices. The Office of Enforcement Operations has recently taken responsibility for prisoner transfers. During 1987 and 1988, new prisoner transfer relations are expected to be implemented with at least three more countries, thereby increasing the number of cases handled each year.

Prosecution support also includes the Asset Forfeiture Office which was created in June 1983 through a reorganization of the Criminal Division. The responsibilities of this Office include the conduct of civil and criminal asset forfeiture litigation, the development of policies which incorporate asset forfeiture into an overall law enforcement program and the improvement of existing practices regarding the management of seized and forfeited assets. Forfeitures are an important part of law enforcement because forfeitures allow the Government to confiscate property that lawbreakers use to commit crimes, e.g., the airplanes and boats they use to smuggle narcotics into the country and the cash they use to buy drugs for resale. By removing this working capital from criminals, forfeitures make it more difficult for lawbreakers to operate. By seizing the fruits of crime, e.g, the stocks and bonds purchased with money traceable to drug sales, or a business acquired by a pattern of racketeering activity, forfeitures further deter lawbreaking by taking the profit out of crime. Forfeiting criminal profits also promotes justice, because criminals should not grow rich from their violations.

977

Accomplishments and Workload: A quantitative summary of the Prosecution Support workload is presented in the following tables:

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
Foreign Extradition:							
Requests Pending, Beginning of Year	341	298	308	35	343	...	343
Requests Received	147	200	225	15	240	...	240
Requests Closed	190	190	190	5	195	15	210
Requests Pending, End of Year	298	308	343	45	388	- 15	373
U.S. Extradition (Exclusive of OCDETF Related Requests):							
Requests Pending, Beginning of Year	330	212	275	114	389	...	389
Requests Received	235	351	395	65	460	...	460
Requests Closed	353	288	281	14	295	50	345
Requests Pending, End of Year	212	275	389	165	554	- 50	504

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
Foreign Legal Assistance:							
Requests Pending, Beginning of Year	430	465	530	95	625	...	625
Requests Received	237	265	295	40	335	...	335
Requests Closed	202	200	200	15	215	25	240
Requests Pending, End of Year	465	530	625	120	745	- 25	720
U.S. Legal Assistance (Exclusive of OCDETF Related Requests):							
Requests Pending, Beginning of Year	397	454	602	238	840	...	840
Requests Received	195	317	427	13	440	...	440
Requests Closed	138	169	189	16	205	25	230
Requests Pending, End of Year	454	602	840	235	1,075	- 25	1,050

Matters can be considered pending because: the fugitive(s) has not been located; we are waiting for the requested information; or interim legal proceedings have not been concluded. The information on pending matters is now available as a result of the implementation of a database system to capture this information.

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
Witness Immunities issued	4,496	5,000	5,100	350	5,450	...	5,450
FOI/PA Requests Processed	1,212	1,312	1,450	...	1,450	...	1,450
Title III Applications Reviewed	766	850	1,000	70	1,070	...	1,070
Consensual Wiretap Applications Reviewed	1,016	1,100	1,200	84	1,284	...	1,284
Video Monitoring Requests Reviewed	931	950	1,100	77	1,177	...	1,177
Other Witness Matters Reviewed	2,655	2,750	3,118	-147	2,971	...	2,946
Witness Security Matters Reviewed	2,856	2,930	3,190	220	3,410	...	3,410
Witness Security Applications Received	297	270	427	26	453	...	393
Witnesses Accepted in Protection Program	192	250	400	24	424	...	364
Prisoner Transfer Requests Reviewed	250	300	350	20	370	...	370
Prisoners Transferred	146	200	250	18	268	...	268
Prisoner Covert Activities Reviewed	141	190	210	20	230	...	230
Gambling Registrations Reviewed	754	1,000	1,200*	...	1,200*	200	1,400*
Victim Compensation Matters Received	143	150	204	14	218	...	218

* These are minimum figures, and assume that no additional States will pass legislation mandating Federal registration in 1990. In the past, each time a new State promulgates such legislation, registration figures have increased 20 percent.

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
Forfeiture Cases (lead prosecutions):							
Pending, beginning of year	23	6	15	10	25	...	25
Opened	55	11	60	...	60	...	60
Closed	38	2	55	...	55	...	55
Pending, end of year	40	15	25	5	30	...	30
Equitable Sharing Cases:							
Pending, beginning of year	561*	1,387	2,859	1,524	4,383	...	4,383
Opened	1,843	2,178	2,540	550	3,090	...	3,090
Closed	1,017	706	1,016	220	1,236	...	1,236
Pending, end of year	1,387	2,859	4,383	1,854	6,237	...	6,237

* AFO currently has available workload figures that tie to a calendar year; thus, figures for fiscal year 1989 were extrapolated on a constructed basis. A more accurate fiscal year accounting should be available by the time of the Congressional submission.

An equitable sharing case consists of one or more assets involved in a judicial forfeiture. The cases are submitted to AFO by U.S. Attorneys' Offices. Each asset in an equitable sharing case is the subject of a request made by at least one state or local law enforcement agency to receive an equitable share of the proceeds of that asset when forfeiture is final. Many assets are the subject of requests for equitable sharing by more than one state or local agency. Thus, cases may involve several "requests." Cases currently average 5 requests per case. For the four months up to the end of August 1990, AFO opened an average of 960 requests per month and closed an average of 628 requests per month. A request cannot be closed until the law enforcement agency's request, the recommendation of the federal law enforcement agency and U.S. Attorney's Office regarding sharing, and the final order of forfeiture by the court are submitted to AFO. Requests remain pending while any one of these items has not yet been submitted.

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
Petitions for Remission or Mitigation of Forfeiture							
Pending, beginning of year	...	270	245	- 30	215	...	215
Opened	...	340	200	30	230	...	230
Closed	340	200	230	...	230	...	230
Pending, end of year	270	245	215	...	215	...	215
Offers in Compromise Reviewed	25	25	30	...	30	...	30
Review of Attorneys' Fees Matters	...	45	55	5	60	...	60
Training Seminars	3	8	10	...	10	...	10

AFO serves as the general counsel for all forfeiture matters concerning the Department. In the areas of domestic and international forfeiture, AFO not only provides legal opinions and advice on strategy, it provides litigation support, conducts training, publishes and updates the forfeiture manual and other reference materials, publishes a monthly caselaw update and bi-monthly newsletter, develops and recommends policy and procedure, develops and

disseminates generic pleadings, operates a brief bank, and processes equitable sharing requests, petitions for remission/mitigation, settlements, and RICO and attorney fee forfeiture approvals. AFO also acts as liaison for the Department with other entities in the forfeiture effort in the United Stats and abroad.

In 1989, the Department forfeited about $600 million in property used in or derived from criminal activity. This represents a twenty-fold increase over the $27.2 million forfeited during 1985. Of that $600 million, about $174, million was shared with State and local law enforcement agencies. The projection of $470 million in forfeited property for 1990 is close to being realized. The 180 forfeiture attorneys and 146 support personnel hired as a result of the Anti-Drug Abuse Act of 1988 have materially bolstered the Department's forfeiture effort. In 1990, eight forfeiture training seminars were conducted by AFO for approximately 580 Department attorneys and support personnel. This accomplishment and a comparable training program in 1991 will enhance the prospect of even greater success in the forfeiture effort in 1992.

Savings and Loan Fraud - Forfeiture will be a companion financial sanction to restitution and fines as many investigations now underway in the savings and loan fraud cases come to fruition in 1991 and 1992. AFO will continue its role as trainer of attorneys working these cases, and will carry on its litigation support role in the forfeiture aspects of these cases, a service which AFO is uniquely qualified to provide. This is a growth area for 1992 in AFO.

International Forfeiture - AFO has hired two Special Counsels to the Director for International Forfeiture Matters because of the rapidly increasing activity in the seizure and forfeiture of assets located outside the United States. In 1992, AFO's workload in international forfeiture is projected to increase dramatically as more field personnel become adept at locating assets abroad and seeking the support of AFO in accomplishing forfeiture and sharing with foreign law enforcement agencies.

Equitable Sharing Requests - AFO anticipates increased activity in its workload of sharing requests in judicial forfeitures. As the bar is becoming more active in contesting forfeitures judicially, AFO's workload in this area will likely continue to increase. This is so despite the August 20, 1990, statutory change raising the limit on administrative forfeiture from $100,000 to $500,000 for most property and making all monetary instruments subject to administrative forfeiture.

Forfeiture of Attorney Fees - Recent Supreme Court decisions upheld the right of the United States to forfeit attorney fees if it can be shown that the transaction generating the fees was fraudulent or a sham or that the attorney had reason to know the assets used to pay the fees were subject to forfeiture. While the Department is proceeding conservatively in this area, increased awareness of the availability of this sanction on the part of Government attorneys will undoubtedly cause AFO's work to grow in 1992 regarding the attorney fee issue.

AFO's staff has recently been reconstituted with attention to appointments consistent with the emerging mission of AFO as general counsel in the contemporary sense of the term. More than a provider of legal advice, AFO has become and will continue to develop into 1992 as the one-stop source of information, including policy, practice, and strategic thinking, as well as a reliable provider of hands-on and other support to the rest of the Department and to the asset forfeiture community at large.

During the past year, the Office of International Affairs continued with its program of negotiating new treaties, primarily extradition and mutual legal assistance treaties. The Office completed a six-year effort to replace the extradition treaty with Switzerland, and signed a Memorandum of Understanding with the Swiss clarifying the existing Mutual Assistance Treaty. The process of replacing outmoded extradition treaties and negotiating new mutual assistance agreements continues as resources permit. Supplemental extradition treaties were negotiated with Canada, the Federal Republic of Germany and Spain. OIA attorneys participated in the Council of Europe's multilateral negotiation of a judicial assistance treaty and the new Multilateral Convention of Narcotics (signed by the Attorney General during December, in Vienna, Austria). Six previously negotiated mutual legal assistance treaties (Canada, Mexico, Bahamas, Cayman Islands, Belgium, and Thailand) were reported out of the Senate Foreign Relations Committee and ratified by the full Senate. These treaties, especially those with Canada and Mexico, are expected to produce an enormous increase in workload.

Further, the MLAT with the Cayman Islands will be extended to other United Kingdom Caribbean dependencies. The Attorney General and other Department principals will continue to draw heavily on OIA's expertise in international affairs when preparing to participate in international law enforcement conferences.

Section 4702 of the Anti-Drug Abuse Act of 1988, the "Kerry Amendment," directs the Secretary of the Treasury to "seek to enter into and further cooperative efforts, voluntary information exchanges, the use of letters rogatory, and mutual legal assistance treaties "in order to curtail international currency transactions involving the proceeds of narcotics trafficking. OIA has been asked by Treasury to participate in these negotiations. Section 4605 of the International Narcotics Control Act of 1988 directs the Secretary of State "to place greater emphasis on updating extradition treaties, and on negotiating mutual legal assistance treaties, with major illicit drug producing countries and major drug transit countries." Two MLATs (with Nigeria and Jamaica) have been negotiated and signed, but not yet entered into force and will further increase workload.

The Office was able to provide prosecutors with expert advice and assistance on numerous occasions. Several of the most noteworthy instances included the assistance provided to U.S. Attorneys Offices during pretrial motions in the cases involving General Noriega, assistance provided to the U.S. Attorneys' Offices in the investigation of the death of DEA Agent Enrique Camerena, and the assistance provided to the Federal Republic of Germany in the acquisition and preservation of evidence for the Hamadei trial. OIA also devoted substantial resources to requests for international assistance related to the Iran/Contra and Marcos investigations.

The Office also handled a number of significant cases involving the return of fugitives to the United States by way of extradition, including: Raul Vivas, a major money launderer identified in the PolarCap investigation, from Uruguay; ten Colombians involved with Colombian drug organizations (54 provisional arrest requests have been made to Colombia since August 1989); and defendants from Asian countries, especially Hong Kong, in complex investigations (e.g. Operation Bamboo Dragon, D.D.C., Operation Seahorse, N.D.C.A.); Linda Leary and her two sons, Paul and Richard Heilbrunn, who operated one of the largest drug trafficking operations in Indiana, from Austria; Adnan Mohammed Khashoggi, returned from Switzerland to stand trial in the Southern District of New York for mail fraud, obstruction of justice, perjury, and racketeering; Skander Krasniqi, returned to Cook County, Illinois, from Sweden for the murder of a Deputy Sheriff; and Gabriel Antonio Taboada, returned to South Carolina from Switzerland for the importation of over 1000 pounds of cocaine.

The Office further handled the extradition from the United States to other countries of several internationally significant fugitives, including Oen Yin Choy. Hong Kong requested the extradition of this former bank director who fled to the United States shortly before Hong Kong authorities discovered financial irregularities that cost shareholders of his bank millions of dollars. OIA litigated the second phase of the case after Oen's first unsuccessful trip to the Supreme Court. He is now in Hong Kong, awaiting trial. OIA also continues to provide support to the Southern District of New York in pursuing the extradition of two alleged Sikh terrorists sought by the Indian government on multiple charges of murder and armed robbery.

The importance of OIA's Rome office cannot be overlooked. This office serves as an international gateway in achieving successes which otherwise would not occur. For example, in the past eighteen months, three major fugitives, DeMuth, Chadwick and Butcher, charged in separate multi-count export control indictments in the United States, have been extradited from Italy to the United States. Two more such fugitives, Grandia and Van Amraat (the latter wanted for unlawful export of mustard gas precursors) have been arrested and are now the subject of extradition proceedings in Italy. The DeMuth, Chadwick and Butcher cases are the only successful extraditions from European civil law countries for export control violations and represent a significant breakthrough in the Department's export control prosecution program. Beyond representing an extraordinary precedent in Italy, they also serve as examples of the appropriateness of extradition for export control violations which can be cited in dealing with other European countries which have traditionally been less willing to entertain U.S. extradition requests in such matters.

In 1990, OIA will open two new foreign offices in Hong Kong and Mexico City. Hong Kong was selected because it serves as a "hub" city for major narcotics money laundering, servicing Japan, Singapore, Australia, Thailand and the Philippines. Selection of Mexico City reflects the growing number of cases involving Latin America. The benefits of establishing such offices will result in more expeditious handling of extraditions and judicial assistance matters. They will also be providing effective leadership direction to the various law enforcement components such as the DEA and FBI in these locations in developing stronger cases for prosecution.

The Director, Office of International Affairs, was named as the Department's coordinator for the European Communities' TREVI Group, which the United States has found to be the most significant international organization devoted to fighting terrorism. OIA currently devotes substantial resources to obtaining evidence and the return of terrorists for prosecution in the U.S. (as in the cases, U.S. v. Fawaz Yunis and U.S. v. Raghed) and to support foreign prosecution of terrorists (as in the Hawadei prosecution in West Germany and the prosecution in Italy of the Achille Lauro hijackers). OIA will direct resources received in 1990 to support this effort.

OIA will further increase resources used to obtain international assistance in the investigation and prosecution of organized crime cases and the extradition of organized crime fugitives. OIA is the coordinator of the Italian-American Working Group and expends considerable resources supporting that body's effort to increase bilateral cooperation in the fight against traditional organized crime. It has taken leading roles in efforts being made with regard to the Jamaican posses and Asian Organized Crime, chairing the U.S.-Jamaican Working Group. Additionally, OIA coordinates with, and provides assistance to, the Drug Enforcement Administration (DEA), Federal Bureau of Investigation (FBI), U.S. Customs Service, and Federal prosecutors with regard to major drug money laundering cases which are international in scope. OIA's involvement generally begins in the early stages of investigation and continues until all fugitives are extradited, all necessary evidence from overseas is obtained, and all forfeitures are completed. OIA is also actively involved in providing assistance with regard to the many money laundering cases being investigated and prosecuted federally and by State and local law enforcement officials. Finally, resources will be used to fully implement the U.N. Drug Convention signed by the Attorney General in December 1988 and ratified by the U.S. Senate in November 1989.

While the daily work which the Office of Enforcement Operations (OEO) performs is not, in most instances, glamorous, its investigative and prosecutive assistance is, in many cases, the sine qua non of a successful prosecution. Without the review and approval of OEO: no Federal wiretaps may occur; no nonpublic video surveillance may occur; no trial witnesses may be immunized; no arrests of, nor subpoenas to, the news media may be undertaken; no individual may be admitted into the Witness Protection Program; no covert activity involving Federal prisoners may be undertaken; no Federal grand jury information may be shared with state or local law enforcement agencies; no search warrants may be issued against disinterested third party physicians, lawyers or clergyman; no subpoenas may be issued to nontarget attorneys; no tax returns or return information would be available in nontax cases; and no denial of a subpoena to a Department employee for testimony or records may be issued.

During 1989, over 750 Title III and over 1000 consensual wiretap applications were reviewed. By 1991, additional increases of 32 and 18 percent, respectively, are anticipated in these categories. A survey indicates that over 95 percent of targeted intercepts indicted were convicted. In 1989, the Office completed action on over 1,200 Freedom of Information Act (FOIA) and Privacy Act (PA) requests; an increase in workload of 19 percent is expected by 1991. In 1989, the Office of Enforcement Operations (OEO) received and processed in excess of 6000 matters relating to the Witness Security Program. These matters ranged from applications (297), to witness security matters (2856), to witnesses accepted in the program (192). The Office is also available to assist the more than 18,000 program participants at any time, as is consistent with the Department's continuing obligation to protected witnesses. In 1989, 146 prisoners were transferred, up 39 percent from the precious year and 250 applications were received and processed. OEO received and reviewed in excess of 143 Victims Compensation matters in 1989, a 50 percent increase from 1988. In 1990 and 1991, OEO expects significant workload increases to result from the addition of 800 prosecutors to the United States Attorneys' Offices. Almost all of these resources will be directed to the investigation and prosecution of criminal matters and will result in significant workload increases in the witness protection program, Title III applications reviewed, prisoner transfer requests received and granted and in the number of victims compensation matters.

In 1991, the United States Attorney's Office, District of Columbia, in conjunction with the United States Marshals Service, Bureau of Prisons, and OEO, expects to implement a pilot program for short-term security services for witnesses. As a direct result of this effort, OEO anticipates that 60 new witnesses will be accepted in the program. The new resources received in 1991 will be used to process these individuals and their families.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Criminal Division

Program: 2CRM30 Prosecution Support

	1989	1990	1991	1992			
				Base Level		Request Level	
				Change	Cum	Change	Cum
Resource Requirements							
BUDGET AUTHORITY	$7,858	$9,464	$12,616	$ 894	$13,510	$2,435	$15,945
OUTLAYS	7,783	9,247	12,174	1,157	13,331	2,118	15,449
Appropriated Positions	125	169	175	...	175	23	198
Workyears:							
Full-time Permanent	112	137	161	3	166	11	177
Other	5	...	...	...	...	...	...
Subtotal	117	137	161	3	166	11	177
Overtime/Holiday	...	...	...	...	...	...	...
Total	117	137	161	3	166	11	177

Program Changes: Program increases totaling 23 positions, 11 workyears, and $2,435,000 are requested for the Prosecution Support program area, including: 10 positions, 5 workyears, and $965,000 for the Office of International Affairs, $375,000 for the Asset Forfeiture Office, and 13 positions, 6 workyears, and $609,000 for the Office of Enforcement Operations. Additional resources are also included to cover purchases deferred in 1991 due to the required absorption of one-half of the 1991 pay increase, increased facilities security, and increased usage of legal research data base systems.

The Office of International Affairs is proposing to establish a field office in Brussels. Brussels appears to be the city most likely to serve as the "capital" of the European community. It is also likely to be the permanent site of the Trevi Secretariat, established for the purpose of planning and implementing anti-terrorism strategies. Establishing such offices would: expedite extradition and judicial assistance matters; reinforce close, cooperative relationships with foreign law enforcement personnel; provide for better international cooperation in joint investigations; and represent a strong symbolic manifestation of United States concern and interest, particularly in drug enforcement matters.

Additionally, OIA requires enhanced resources to respond to increased workload stemming from Defense procurement fraud investigations and prosecutions. OIA continues to invest substantial resources in obtaining assistance from other countries, (for example, Switzerland and United Kingdom) on behalf of the investigators and prosecutors working on Defense procurement fraud cases. While the resources devoted to these prosecutions by United States Attorneys' Offices have increased, resulting in expanded demands, OIA's resources have remained constant. Additional resources are

needed to continue the current level of support. OIA also requires additional resources to meet increasing demands in obtaining international assistance in the investigation and prosecution of organized crime cases and the extradition of organized crime fugitives and to continue to be responsive to increasing demands placed on it by its participation in various working groups, such as the Italian-American Working Group and the U.S.-Jamaican Working Group.

The Asset Forfeiture Office requires $375,000 to support the expenses associated with the EBON contract. EBON is the contractor providing data entry support and analyses to the Equitable Sharing/Petitions for Remission/Mitigation Program. This amount reflects 1990 base funding.

Increases for the Office of Enforcement Operations are required to meet workload demands in several areas: electronic surveillance, witness protection, prisoner transfer, and management support. Electronic surveillance requests continue to increase. By 1991, increases of 32 and 18 percent are anticipated in the numbers of Title IIIs and consensual wiretaps, respectively. This trend is expected to continue into 1992. To respond to this, 2 attorneys and 1 support staff are required. To address the growth in workload anticipated in the Witness Protection and Prisoner Transfer Programs, 3 security specialists, 1 paralegal, and 3 support personnel are required. Increases are expected to result from the addition of hundreds of new prosecutors and investigators in 1990 which will result in corresponding requests for use of Federal prisoners in covert activities. Also, the number of witnesses requesting protection and requests for prisoner transfers are expected to grow.

Also included are program enhancements totaling $486,000 to cover: purchases of Project EAGLE system upgrades deferred in 1991 due to the required absorption of one-half of the 1991 pay increase ($187,000); increased costs ($87,000) for use of legal research data base systems, JURIS/LEXIS/Westlaw; and increased costs ($212,000) associated with enhanced building security. Security concerns have escalated with the Division's role in drug enforcement and other violent crime initiatives. The Division requires funds to enhance guard service at the Bond Building and its new satellite facility (currently being procured) as well as to secure the Bond Building garage and ground floor.

Schedule of Cost Inputs
(Dollars in thousands)

Organization: Criminal Division

Decision Unit: Prosecution Support - 2 CRMIO

	Request Level		
	Pos	WY	Amount
Positions by Type			
Attorney	6	3	$ 328
Paralegal	4	2	140
Security Specialists	3	1	51
Systems Programmer	1	1	25
Systems Technician	1	1	14
Clerical	8	3	115
Subtotal	23	11	676
Travel/Transportation	...	...	162
Litigation Expenses	...	...	38
Equipment Rentals	...	...	62
GSA Rent	...	...	98
Other Services	...	...	965
Supplies	...	...	57
Equipment	...	...	377
Subtotal	...	...	1,759
Total	23	11	2,435

Description of Cost Inputs

Significant costs for these activities are associated with the establishment of a foreign office in Brussels, Belgium, and to support the EBON data entry contract utilized by the Asset Forfeiture Office. Additionally, there are significant one-time costs to equip the positions requested.

Justification of Program and Performance
Criminal Division
Salaries and Expenses, General Legal Activities: 15-0128-0-752
Child Exploitation and Obscenity Section - 2CRM50

Long-Range Goal: To eliminate the production and distribution of child pornography and hard-core obscene material through the prosecution of major purveyors.

Major Objectives:

To prosecute major producers and distributors of obscene materials nationwide.

To coordinate investigations and prosecutions of child sexual exploitation networks and to supervise the investigation of multi-district child pornography cases for the purpose of achieving consistent and effective results.

To implement the priority of obscenity prosecutions set by the Attorney General by working closely with the U.S. Attorneys' Offices.

To continue to provide necessary assistance as required to federal and local prosecutors by maintaining a staff of attorneys with unique talents and expertise in the area of obscenity and child pornography prosecution.

To analyze and respond effectively to Congressional proposals for legislation in this area which affect the substance or procedure of the enforcement of obscenity or child sexual exploitation laws.

To supervise and implement the policies of law enforcement in this area.

Base Program Description: The Child Exploitation and Obscenity Section prosecutes major producers and distributors of obscenity and child pornography, coordinates multi-district, multi-defendant investigations into obscenity and child pornography, and provides advice to U.S. Attorneys' Offices, Federal law enforcement agencies, and upon request, state law enforcement agencies.

Accomplishments and Workload: The recent experience and projections for the future with regard to litigation for which the Child Exploitation and Obscenity Section is directly responsible are summarized quantitatively in the following table:

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
Matters:							
Pending, beginning of year	23	73	57	...	57	...	57
Opened	55	59	50	10	60	...	60
Closed	5	75	50	- 10	40	...	40
Pending, end of year	73	57	57	20	77	...	77

Cases (lead prosecution):							
Pending, beginning of year	11	5	47	7	54	...	54
Opened	5	60	25	5	30	...	30
Closed	11	18	18	7	25	...	25
Pending, end of year	5	47	54	5	59	...	59
Disposition of defendants in cases litigated:							
Convictions	16	18	23	7	30	...	30
Acquittals/dismissals	1	...	...	...	...	...	...
Other dispositions (transfers to U.S. Attorneys, deaths)	...	...	...	...	...	...	...

In addition to cases in which Section staff were directly involved, indirect staff involvement with cases handled by U.S. Attorneys' Offices increased dramatically. Total federal child sexual exploitation cases filed nationwide in 1989 were 255 (170% of 1988 figures) and total federal adult obscenity cases filed in 1989 were 120 (324% of the 1988) figures.

The Section was formed in 1987, and in its initial two years devoted a great many resources to training Federal, State and local prosecutors in the enforcement of obscenity laws and to passage of legislation. It also participated heavily in the first obscenity-based RICO prosecution of pornographers which resulted in convictions, and coordinated major nationwide Postal Service and Customs child pornography investigations. However, since the beginning of 1989, the Section has turned its attention almost exclusively to prosecution. The Section is targeting the major mail order distributors of obscenity and the major producers and distributors of obscenity who supply the retail outlets nationwide.

The Section continues to give advice, to Federal and State prosecutors pursuing obscenity and child sexual exploitation investigations and prosecutions. A reservoir of expertise in these areas resides within the Section and is commonly dispatched to assist prosecutors around the country. The Section attorneys, however, also spend a majority of their time preparing complex obscenity cases for trial. The emphasis on prosecution is in accordance with Attorney General Thornburgh's statements both to citizen leaders and to all U.S. Attorneys that the prosecution of obscenity and child sexual exploitation is a priority of his administration.

The following are some accomplishments of the Section:

-- A RICO/obscenity indictment against Reuben Sturman and four of his associates. Sturman was identified by the Attorney General's Commission on Pornography as perhaps the world's largest distributor of obscene materials. The trial is set for July 1990 in the District of Nevada (Las Vegas).

-- Project Post Porn, a project designed to prosecute major mail-order distributors of obscene videotapes and magazines, has yielded great success. To date, Post Porn has produced 38 convictions in 18 districts with no cases lost or dismissed. Several indicted cases are pending trial, and investigations of major mail-order companies still operating are being pursued.

-- New legislation passed by Congress to amend the dial-a-porn statute has created two new areas of work: investigation for purposes of prosecution of dial-a-porn purveyors, and assistance in the defense of challenges to the constitutionality of the new dial-a-porn statute around the country (six lawsuits to date).

-- Initiation of investigation into the production and distribution of obscene materials by those major companies based in Los Angeles that account for the majority of obscenity in every city in the country. To date, 23 search warrants for the seizure of obscene materials and books and records have been executed in Los Angeles.

-- The conviction, by guilty plea, of reputedly the largest mail-order pornographer in the country: Karl Brussel and his company Pak Ventures, Inc. In addition to pleading guilty in five federal districts, Brussel agreed to go out of business, pay a $900,000 fine, and serve a jail term of one year. The prosecution was part of Project Post Porn.

-- The conviction of Rubin Gottesman (X-Citement Video), a major distributor of obscene materials, for the distribution of films with Traci Lords, an underage porn star who was 15 and 16 years old at the time of the production of over 100 movies.

Some current and ongoing priorities of the Section include:

-- The direct involvement of the Section in responding to FBI and U.S. Attorneys' Offices requests to manage and coordinate child pornography and child sexual exploitation cases that involve multiple districts, multiple defendants/targets, and novel issues;

-- Pursuant to new legislation put into effect in November 1988, the initiation of investigations of the transmission of obscenity via satellite or cable;

-- Daily assistance to federal and state prosecutors on issues of obscenity and child pornography prosecutions, including supplying pleadings, reviewing pleadings and search warrants, and working on trial preparations; and

-- RICO prosecution of LCN-controlled obscenity distributors.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Criminal Division

Program: 2CRM50 Child Exploitation and Obscenity Section

	1989	1990	1991	1992			
				Base Level		Request Level	
				Change	Cum	Change	Cum
Resource Requirements							
BUDGET AUTHORITY	$ 992	$1,423	$1,720	$121	$1,841	$ 32	$1,873
OUTLAYS	863	1,333	1,673	146	1,819	28	1,847
Appropriated Positions	19	20	20	...	20	...	20
Workyears:							
Full-time Permanent	12	19	20	...	20	...	20
Other	...	...	...	...	...	...	...
Subtotal	12	19	20	...	20	...	20
Overtime/Holiday	...	...	...	...	...	...	...
Total	12	19	20	...	20	...	20

Program Changes: The Criminal Division is requesting program increases totalling $32,000. The requested pay raise absorption ($22,000) for one-half of the 1991 pay increase will enable the Section to retain adequate travel for investigation and prosecution of obscenity cases in its base. These resources will also cover increased costs ($10,000) for use of legal research data base systems, JURIS/LEXIS/Westlaw.

Schedule of Cost Inputs
(Dollars in thousands)

Organization: Criminal Division

Decision Unit: Child Exploitation & Obscenity - 20PM50

	Request Level		
	Pos	WY	Amount
Travel/Transportation	...	...	22
Other Services	...	...	10
Total	...	...	32

Description of Cost Inputs

Resources for the required absorption of one-half of the 1991 pay increase will allow adequate base funding for travel. Other costs are for increased use of available legal research data base systems.

990

Justification of Program and Performance
Criminal Division
Salaries and Expenses, General Legal Activities: 15-0128-0-752
Management and Administration - 6CRM10

Long-Range Goal: To guide the administration of federal criminal justice in an effective, fair and consistent manner.

Major Objectives:

To supervise the development and implementation of Department policy so as to assure an effective, fair and consistent administration of Federal criminal laws.

To establish priorities and to provide general supervision of national enforcement of Federal laws.

To develop and implement policies relating to the efficient administration of the Division.

To provide administrative services necessary to the operations of the Division.

To analyze all legislative proposals developed within the Congress and the Administration which affect either the substance or procedure of the Federal criminal justice system, and to furnish advice, as appropriate, on the probable effect of such proposals on Federal law enforcement.

To analyze policy and management issues relating to criminal enforcement programs in order to identify and resolve problems.

To assist in developing Division policies and enforcement programs, and help coordinate the exchange of information with other components of the law enforcement system, including operating agencies and research institutions.

Base Program Description: The Office of the Assistant Attorney General carries out its policy-making, supervisory and liaison functions through the Assistant Attorney General, four Deputy Assistant Attorneys General, two Special Counsels, a Senior Counsel and support staff. Included in the Office of the Assistant Attorney General is the Office of Law Enforcement Coordination which is assigned responsibility for staffing the Executive Working Group for Federal-State-Local Prosecutorial Relations, for reviewing Federal district law enforcement plans, for managing the Division's program to abolish concurrent jurisdiction enforcement lapses, for supporting the Division's Crime Prevention Committee, for overseeing the Division's involvement in regional Law Enforcement Coordinating Committees, and for staffing other intergovernmental law enforcement management initiatives which were previously fragmented among several Division offices.

Administrative services are provided by the Office of Administration. Six operational units work closely with other organizational entities of the Criminal Division, the Department and other Federal agencies, to ensure that the Division's administrative services are provided in an efficient, timely, and cost-effective manner: the Office of the Director; the Personnel Unit; the Fiscal Unit; the Mail, File and Records Unit; the Procurement, Space and Security Unit; and the Management Information Systems staff. This last unit was established in 1984 to develop and install top priority automated data processing systems for caseload management information and correspondence tracking, and to provide selected ADP applications in support of investigations and litigation.

The Office of Legislation draws upon expertise that spans the entire breadth of criminal law, as well as familarity with congressional organization, rules, and procedures to conduct the Division's relations with the legislative branch, as well as its relations with the United States Sentencing Commission and the Judicial Conference's Advisory Committee on Criminal Rules. Close liaison is maintained with Members of Congress and their personal and committee staffs, many of whom look to this Office directly for advice and assistance concerning the criminal code and rules of procedure, assistance, and oral and written briefings on the practical effect of legislation. The Office works closely with the Department's Office of Legislative Affairs, ranking officials of the Department and the Division, and the Federal investigative agencies. The Office of Legislation is also heavily involved in implementing the Sentencing Guidelines. The Director has been designated as the Division's Sentencing Coordinator and in that capacity chairs a multi-Division sentencing working group that meets periodically to discuss sentencing issues and resolve policy questions. The Office maintains frequent contact with the staff and members of the Sentencing Commission and attends its meetings. The Office furnishes comments on the Guidelines and develops recommendations for amendments.

Similarly, the Office prepares comments on and develops proposals for amendments to the Federal Rules of Criminal Procedure. The Office Director often substitutes for the Assistant Attorney General at meetings of the Judicial Conference's Advisory Committee on Criminal Rules, and serves as the Departmental contact source and spokesperson on most matters pertaining to the Rules. In addition, specific Office of Legislation personnel have been tasked with several ongoing special responsibilities such as providing advice on ethics matters to employees of the Division.

The Office of Policy and Management Analysis (OPMA) provides the Division with the analytical capabilities needed to perform program development, policy analysis, and management improvement functions. The Office conducts studies and recommends positions on policy and management issues of concern to the Assistant Attorney General and other decision makers in the Division and the Department. Many of the Office's projects are joint efforts with personnel from other units. OPMA's professional staff includes analysts with expertise in public policy, business administration, criminology, economics, organizational behavior, program evaluation, information systems, research methods and related areas.

Accomplishments and Workload:

Office of the Assistant Attorney General

The Office of the Assistant Attorney General continues to provide the Federal criminal justice system with national leadership, centralized coordination and effective direction. The role of the Assistant Attorney General manifests itself mainly in communications imparted to other governmental entities and, by extension, to the public. The legislative proposals transmitted to the Congress represent the Division's position regarding the changes which are needed to improve the criminal justice system. The arguments formulated for presentation to the Supreme Court and courts of appeal reflect the considered experience of the Division as to the constitutional and statutory interpretations which will best support the enforcement of Federal laws in the long run. And finally, communications delivered to other law enforcement executives, Federal and non-Federal, in speeches, meetings, and correspondence serve to focus attention on the most pressing problems facing the criminal justice system and the means available to law enforcement executives to address those problems.

Office of Administration

In September 1990, the Office of Administration completed a major long-term goal, i.e., the installation and operation of an office automation system serving all of our employees worldwide. With Project EAGLE, a terminal on each employee's desk gives them access to word processing, electronic mail and document transfer, legal and general data base access, spreadsheets, and a data base management system. Simultaneously, the Office expanded and improved the internal data processing system by investing in emerging digital image processing technology and expanding the memory, processing capability, and storage capacity of its modern, mid-range business computer. The Division's data communications network was expanded concurrently with the installation, expansion, and improvement of the automated information systems.

The Office of Administration established a centralized litigation support program for the Division in 1990. Internal software development assistance and contractual management were provided to the Asset Forfeiture Office, while contractual services were obtained and managed in support of a major

Fraud Section case. Further, three of the 20 application programs operating on the Division's computer were analyzed, modified or rewritten by Office staff in 1990. The programs included the Correspondence Tracking System (CTS), the Computerized Asset Remission and Transfer System (CARTS) and the Fraud and Corruption Tracking System (FACTS).

The Office of Administration was instrumental in the successful move of the Dallas Bank Fraud Task Force into its new quarters. This space is complete with computer room and full library services, serving not only the needs of the Division but of all Task Force participants.

Office of Legislation

As far back as the passage of the Comprehensive Crime Control Act of 1984, most of which was written by the Office of Legislation, this Office has played a vital role in drafting and working for the enactment of major Departmental and Administration initiatives. The omnibus criminal justice bills that have been enacted at the end of the last two Congresses in 1986 and 1988 have contained many provisions drafted by the Office and other provisions which, while originating in Congress, have been perfected by comments and suggested revisions by the Office. In the present Congress, in the white collar crime area, the Office played a major role in developing the enforcement provisions of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, P.L. 101-73 (the "Savings and Loan" bill) which greatly enhanced civil and criminal penalties for fraud directed against federally insured financial institutions; prepared a major bill to provide for civil and criminal forfeiture of assets obtained in various fraud schemes, presently at OMB; and contributed to the Governmentwide Ethics Act of 1989, P.L. 101-194, a major Presidential initiative.

The Office also prepared many of the provisions in the President's Comprehensive Violent Crime Control Act, introduced as S. 1225 and H.R. 2709. Included in these provisions were the titles on capital punishment, limitation of the exclusionary rule, a series of firearms amendments, and a title to prohibit large-capacity ammunition clips which allow criminal misuse of assault rifles. The Office also prepared several of the provisions in the bill submitted by the Office of National Drug Control Policy (the "Drug Czar") including a provision for drug testing of defendants on post-conviction release and amendments to the drug paraphernalia statute. Provisions in these bills and several others prepared by the Office were also provided to appropriate Members of Congress as representing the Administration's position on a number of criminal justice issues to be offered as amendments to less favorable provisions in bills originating in the House Judiciary Committee. Multiple introduction of major pieces of legislation can enhance chances of enactment, and the procedure illustrates the necessity of having persons intimately familiar with their substance involved in their preparation and review. For example, while the Office of Policy Development was responsible for developing the Department's position on the Drug Czar's bill, OPD relied on this Office for drafting and review of many of the provisions in it.

In the area of sentencing, the Office prepared reports complying with the Criminal Division's express statutory duty to report at least annually to the Commission on the operation of the Sentencing Guidelines and to suggest changes that appear to be warranted. The reports prepared for the Commission described thirteen major areas in which amendments to the Guidelines were needed. The amendment areas came to the attention of this Office generally by way of the Sentencing Working Group, mentioned above, and through contact with United States Attorneys' Offices, particularly the Sentencing Guidelines Subcommittee of the Attorney General's Advisory Committee of United States Attorneys. Frequently, staff attend meetings of this Subcommittee in order to learn of problems in the field and to develop a coordinated position on Guideline amendments and sentencing issues generally. The Commission adopted a number of amendments in the areas proposed and submitted them to Congress in April 1990. If Congress takes no action, the amendments will take effect November 1, 1990. The Office is currently reviewing the proposed amendments for submission of a report to the Sentencing Commission in the Fall of 1990 regarding a new round of possible guideline changes.

The Office of Legislation also coordinated the views of the Department, including those of the United States Attorney's Sentencing Guidelines Subcommittee, on 70 guideline amendments issued by the Commission for comment in the current amendment cycle. The review effort was a two-step process. It initially involved this Office's advising the Department's ex officio representative to the Commission regarding the Department's desired input at Commission meetings aimed at developing the amendments proposed to the public earlier this year. The second step in the amendment process involved this Office in coordinating a Departmental response to the Commission's published proposals. This Office circulated the proposals for comment to all affected sections and offices within the Division, all the other litigating divisions within the Department, and to the chairman of the United States Attorneys' Sentencing Guidelines Subcommittee. After reviewing the 70 amendments and the comments provided, this Office prepared formal

statements presented at a hearing before the Sentencing Commission in March of this year. In addition, this Office provided advice to the ex officio member for presentation of the Department's views at meetings to finalized guideline amendments for submission to Congress.

One other major initiative for this Office is the area of sentencing of organizations. The current Sentencing Guidelines do not apply to convicted organizations, except with respect to antitrust offenses. The Office has prepared several sets of draft guidelines in the area and, in conjunction with other Department components, has reviewed proposed guidelines circulated by the Sentencing Commission. Most recently, the Office of Legislation participated in a review group (consisting of the Deputy Assistant Attorney General of the Criminal Division who serves as the Department's representative to the Sentencing Commission, an Associate Deputy Attorney General, the Office of Policy Development, and the Office of Policy and Management Analysis) to consider issues and review comments in connection with the sentencing of organizations. The review group is formulating a proposed Department position on organizational sentencing.

In the area of amendments to the Federal Rules of Criminal Procedure, the Office prepared successful arguments against various proposals to increase defense discovery in criminal cases at the expense of witness safety. It also developed amendments, adopted by the Rules committee, to facilitate obtaining a search warrant for moving property (e.g. on a train), to provide greater protection to government witnesses who are sought to be examined on the basis of prior convictions, and to give additional flexibility to motions to reduce a sentence based on a defendant's cooperation with the government.

In 1989, the Office received 235 introduced bills -- 119 from the House and 116 from the Senate -- on which the views of the Criminal Division were sought. In the first six months of 1990, Legislation has received 130 introduced bills, 80 from the House and 50 from the Senate. These figures reflect the number of bills, not the number of times a bill was referred. For example, the Office is often asked to comment on a draft of a bill as introduced, to comment on another agency's proposed report on it, and to comment on a version of the same bill as reported out by one of the Judiciary committees, yet the above figures reflect these tasks as merely reporting on one bill. On the other hand, the figures do not differentiate between the bills with regard to their complexity. A few bills can be examined and reported on in less than an hour as having only very marginal importance to the Criminal Division, for example, a bill making a small change in the penalty for a violation of a seldom used regulatory statute. At the opposite extreme, are omnibus bills making scores of changes throughout the substantive and procedural provisions in Title 18 and in other Titles. The above figures count the two types of bills, and all those in between, equally as one bill.

The above figures also do not reflect other important work of the Office such as comments on draft bills (those not yet introduced but written, for example, by another agency), bills, or portions thereof, drafted by this Office, and much of the testimony prepared. While drafting of some bills, like death penalty provisions receive a fair amount of attention, other issues on which the Office drafts provisions are less visible or newsworthy but are nonetheless important to the Division and to United States Attorneys. In the latter category are provisions to resolve a conflict in circuits over the interpretation of a criminal provision to forestall the need for future litigation, and a provision which was developed -- an which it is hoped will be added to a major bill moving toward enactment or considered separately -- to provide for State concurrent jurisdiction in certain places where only federal jurisdiction now exists. Such a provision is strongly favored by several United States Attorneys, because it would relieve them of the responsibility of handling minor offenses like spousal assaults and drunken driving on military bases, matters which are usually better handled by State authorities but which cannot be due to historical jurisdictional quirks. During 1989, there were approximately 330 such "other" matters, while in the first six months of 1990, there have been 164.

Office of Policy and Management Analysis

During 1989 and 1990, OPMA staff members provided key analytic support to Criminal Division and Departmental managers in priority enforcement areas such as organized crime, drugs, asset forfeiture, money laundering, and white collar crime. Increasingly, the Office is handling projects that have an international dimension. In addition, OPMA conducted numerous special projects, including many related to sentencing guidelines and those that address management concerns of the Division.

Organized Crime Enforcement. OPMA continues to play an important role in efforts against non-traditional organized crime, especially Asian Organized Crime (AOC), Italian Organized Crime (IOC), and other emerging organized crime groups. Since the first meeting of the Attorney General's Organized Crime Council in January 1990, OPMA has provided staff support to the Council, its Working Group on Policy and Operations, and the Subcommittee on Emerging Organized Crime. OPMA is conducting field interviews and other research on the organization and activities of the Sicilian Mafia and other IOC groups in North America in a major cooperative effort with the FBI and the Royal Canadian Mounted Police. Study objectives include assessing the relationship between the La Cosa Nostra in the United States and the IOC groups and defining the scope of Italian organized criminal activities in the United States. Recently, OPMA staff presented preliminary findings to the Working Group of the Organized Crime Council. At the request of the Deputy Attorney General, the Office also assessed the severity of the problem created by the rival Los Angeles street gangs known as the Crips and the Bloods, summarized the Department's response to the problem, and made recommendations.

In addition to the special projects on non-traditional organized crime groups, OPMA assisted in the preparation of a survey of United States Attorneys regarding the nature and magnitude of the organized crime problems in their districts. OPMA will assist Departmental officials in using this information to develop the National Organized Crime Strategy. As an indicator of their developing expertise, OPMA staff members have been asked to make presentations on organized crime issues at meetings and conferences sponsored by various organizations including the International Association of [illegible] and the Executive Committee of the Criminal Intelligence Service of Canada.

Drug Enforcement. In March 1989, the Office of National Drug Control Policy (ONDCP) replaced the National Drug Policy Board; all staff work on drug policy issues for the ONDCP is coordinated by the Offices of the Attorney General and Deputy Attorney General. OPMA has provided staff work to both offices on a variety of drug policy matters being handled by the ONDCP. In particular, OPMA staff participated in a comprehensive inter-departmental review of international drug law enforcement issues, as directed by the National Security Council; prepared a position paper on proposed money laundering legislation; and analyzed other areas such as investor cannabis suppression, interdiction efforts, and civil commitment issues.

Asset Forfeiture. Prior to the creation of the Executive Office of Asset Forfeiture, OPMA staff provided ongoing support to the Asset Forfeiture Policy Advisory Committee (AFPAC) on a variety of policy and management issues including equitable sharing procedures, adoptive forfeiture policies, revision of the Attorney General's Guidelines on Seized and Forfeited Property, and management of the Assets Forfeiture Fund. OPMA is also working with the Division's Asset Forfeiture Office to develop instructional material for field personnel on international sharing.

Money Laundering Enforcement. OPMA provided staff support and analysis to the Legal Questions Subgroup of the Financial Action Task Force (FATF). Mandated by the Economic Summit, the FATF provided the Group of Seven Countries (United States, Canada, United Kingdom, France, Italy, West Germany, and Japan) plus eight other countries and the European Community with recommendations to improve international cooperation in combatting money laundering.

International Issues. With increasing frequency, the Office is being asked to address international criminal justice policy matters. In addition to many of the projects already described, staff members analyzed the law enforcement implications of several proposals to change visa requirements, and prepared the Criminal Division's position on a variety of questions related to the Visa Waiver Pilot Program. At the request of the Deputy Attorney General's Office, OPMA is assessing the Department's level of involvement in the Agency for International Development's Administration of Justice program to determine how the Department can increase its support for the program. The staff has initiated a project to assess the international criminal justice implications of recent global economic and political transformations, including the potential law enforcement ramifications of the economic unification of Europe planned for 1992. OPMA is also providing extensive staff support and analytic services to the Chemical Action Task Force, mandated by the 1990 Economic Summit. The U.S. will be hosting this international task force, which will address controls on commerce in precursor and essential chemicals used in manufacturing illicit drugs. Among other things, OPMA is responsible, as the Secretariat, for all meeting planning and the logistics.

White Collar Crime Enforcement. The Office also undertook a variety of projects in support of Criminal Division initiatives against white collar crime. At the request of the Operations Committee of the Economic Crime Council, OPMA prepared a report on scientific jury selection practices and presented the results to experienced prosecutors at a recent Economic Crime Conference.

Sentencing Guidelines. OPPA is responsible for monitoring a variety of issues relating to the new Sentencing Guidelines and represents the Department on the Research Advisory Committee of the U.S. Sentencing Commission. The Office has been participating in the ongoing process of formulating sentencing guidelines for organizations.

Management Improvement Projects. In the area of Criminal Division management, OPPA prepares the Division's Weekly Reports to the Attorney General, as well as other routine reports for the Assistant General. Staff also coordinated and participated in an internal study of the Criminal Division's organization and functions that examined the operations of each section and office. OPPA analysts have conducted and reviewed a variety of studies of attorney recruitment and retention for the Division and the Department. OPPA continues to work on projects that generally support the Division's other missions. For example, the Office monitored the use of pretrial detention by analyzing data on such diverse aspects as court motions, length of detention, and case outcomes. Following the analysis, OPPA prepared congressional testimony on pretrial detention. In addition, the Office conducted a follow-up survey to determine the outcomes of a sample of subpoenas authorized for issuance to attorneys in 1989. The Office regularly reviews and comments on research studies and advises researchers on the concerns and interests of the Criminal Division and the Department.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Criminal Division

Program: 6CRM10 Management and Administration

	1989	1990	1991	1992			
				Base Level		Request Level	
				Change	Cum	Change	Cum
Resource Requirements							
BUDGET AUTHORITY	$5,971	$6,638	$6,516	$490	$7,006	$2,137	$9,143
OUTLAYS	5,903	6,543	6,519	426	6,945	1,859	8,804
Appropriated Positions	83	87	86	...	86	...	86
Workyears:							
Full-time Permanent	71	82	85	...	85	...	85
Other	7	1	1	...	1	...	1
Subtotal	78	83	86	...	86	...	86
Overtime/Holiday	...	...	..	...	...	...	...
Total	78	83	86	...	86	...	86

Program Changes: Program increases totalling $2,137,000 are requested to cover: costs associated with implementing an administratively determined pay scale for attorneys similar to the pay scale for United States Attorneys; improvements to the Financial Management Information System; facilities management for our computer facilities and operating programs; requirements analysis, and increased computer room space costs. The $610,000 in funding

for attorneys currently on-board to convert to the AD pay system is based on the median difference ($2,420) in salary between the GS and AD pay system for attorneys of comparable length of service. This is the first year requirement for a proposed 2-year conversion to the AD pay system. Because this is a relatively minor request, costs for related benefits are not included. The request for 1993 will include the remaining differences between the pay systems, related benefits, and the increased needed for the lifting of the pay cap in January 1991.

A program increase of $56,000 is necessary to support the Department's implementation of the Administration's "Management Priorities for the 1992 Budget" as outlined in OMB Departments and Agencies. The funding will be used to specifically address upgrades in financial management systems consistent with long-standing Administration goals for consolidating, upgrading and modernizing a single integrated financial management system within each agency, with full implementation of the Core Financial Requirements, the Standards Ledger and capable of producing auditable financial statements.

For facilities management, $900,000 is requested. In 1990, the Criminal Division released a "Request for Proposal" for a facilities management contract. A major project for the Division, the contract will provide for the maintenance and order of the Division's four computer rooms in Washington, D.C., and Dallas, Texas, the equipment and software in those facilities, and the equipment and software at user office locations; maintenance and performance monitoring of the Divisions's data communications networks and cabling systems; direct supervision of the facility operators and other employees of the contractor; reporting of system, communications, or facility-related problems and their resolution; operation of computers, file servers, telecommunications equipment and lines, special data bases and operating software on a twenty-four hour, seven days per week basis; provide technical assistance to users; and insure the safety and maintenance of our automated information systems. Without the additional resources, the Division will not be able to support the level of use anticipated by 1992.

Resources of $13,000 are requested to support increased space rate charges associated with our new computer room in our new satellite facility. Additionally, funds to cover the cost purchases of Project EAGLE system upgrades and training support services deferred in 1991 due to the required absorption of one-half of the 1991 pay increase ($96,000), increased facilities security ($117,000), a requirements analysis to establish the need for development of automated litigation support tailored to the unique needs of Federal criminal prosecutors ($300,000) and increased costs ($45,000) for increased usage of legal research data base systems are required.

997

Schedule of Cost Inputs
(Dollars in thousands)

Organization: Criminal Division

Decision Unit: Management and Administration - 6CRM00

	Request Level		
	Pos	WY	Amount
AD Pay	...	...	610
Subtotal	...	...	610
Other Services	...	...	1,473
Supplies	...	...	6
Equipment	...	...	48
Subtotal	...	...	1,527
Total	...	...	2,137

Description of Cost Inputs

Costs are for: conversion to the AD pay system; facilities management; increased space costs for computer facilities; purchases deferred in 1991 due to the required absorption of one-half of the 1991 pay increase; increased building security; and increased use of available legal research data base systems.

998

Criminal Division

Salaries and expenses, General Legal Activities

Summary of Decision Unit Resources by Object Class
(Dollars in thousands)

Criminal Division	1990 Actual Workyears	1990 Actual Amount	1991 Estimate Workyears	1991 Estimate Amount	1992 Estimate Workyears	1992 Estimate Amount	Increase/Decrease Workyears	Increase/Decrease Amount
11 Personnel compensation		$35,695		$33,357		$37,897		$ 4,544
12 Personnel benefits		6,200		6,329		7,944		1,615
13 Benefits to former personnel		6		5		1		-4
21 Travel & transportation of persons		2,814		3,087		4,220		1,133
22 Transportation of things		290		326		413		87
23.1 GSA rent		8,694		7,936		9,792		1,656
23.3 Communications, utilities, and miscellaneous charges		3,895		3,604		3,945		341
24 Printing and reproduction		230		272		412		140
25 Other services		3,613		4,592		11,667		7,075
26 Supplies and materials		664		871		943		72
31 Equipment		1,002		1,998		2,167		169
42 Insurance claims and indemnities		...		...		...		...
91 Unvouchered		20		16		16		...
Total obligations	820	$63,123	726	$62,389	782	$79,417	56	$17,028

General Legal Activities
Salaries & Expenses
Criminal Division
Financial Analysis - Program Changes
(Dollars in Thousands)

	FEDERAL APPELLATE		ORGANIZED CRIME PROSECUTION		PUBLIC INTEGRITY		FRAUD		NARCOTIC & DANGEROUS DRUG PROSECUTION		INTERNAL SECURITY	
	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount
ES-4	...	...	...	...	...	...	...	...	...	...	...	...
GS/GM-15	...	...	...	...	...	...	12	765	5	319	...	...
GS/GM-14	...	...	...	...	...	...	6	326	2	108	...	...
GS/GM-13	...	...	...	..	...	...	2	92	2	92	...	...
GS/GM-12	...	...	...	...	...	...	...	...	...	...	...	...
GS-11	...	...	...	...	...	...	5	161	1	32	...	...
GS-9	...	...	...	...	...	...	1	27	...	...	...	...
GS-8	...	...	...	...	...	...	...	...	...	...	...	...
GS-7	...	...	...	...	...	...	6	135	3	67	...	...
GS-6	...	...	...	...	...	...	3	63	2	42	...	...
AD pay	...	...	...	...	...	...	...	...	...	...	...	...
Total positions and annual rate	...	...	...	...	...	...	35	1,569	15	660	...	...
Lapse (-)	...	...	...	...	...	...	-17	- 785	- 8	-330	...	...
Permanent workyears and Comp	...	...	...	...	...	...	18	784	7	330	...	...
Other personnel Compensation	...	...	...	...	...	...	...	...	...	...	...	...
Total workyears and personal comp	...	...	...	...	...	...	18	784	7	330	...	...
Personnel benefits		...		...		...		242		100		...
Travel		...		...		...		179		397		47
Transportation of things		...		...		...		10		4		...
GSA rent		...		...		...		454		52		...
Communications, utilities, and miscellaneous		...		...		...		88		14		...
Printing and reproduction		...		...		...		10		67		...
Other services		46		169		91		2,311		254		87
Supplies		...		...		3		50		19		...
Equipment		...		52		25		558		168		...
Total, workyears and obligations, 1990	...	46	...	221	...	119	18	4,686	7	1,425	...	134

1000

General Legal Activities
Salaries & Expenses
Criminal Division
Financial Analysis - Program Changes
(Dollars in Thousands)

Item	GENERAL LITIGATION & LEGAL ADVICE		OFFICE OF SPECIAL INVESTIGATIONS		PROSECUTION SUPPORT		CHILD EXPLOITATION & OBSCENITY		MANAGEMENT & ADMINISTRATION		TOTAL	
	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount
ES-4	...	...	...	...	1	105	...	...	...	...	1	105
GS/GM-15	...	...	...	...	3	191	...	...	...	...	20	1,275
GS/GM-14	...	...	...	...	2	108	...	...	...	...	10	542
GS/GM-13	...	...	...	...	...	...	...	...	...	...	4	184
GS/GM-12	...	...	...	...	1	39	...	...	...	...	1	39
GS-11	...	...	...	...	3	97	...	...	...	...	9	290
GS-9	...	...	...	...	4	106	...	...	...	...	5	133
GS-8	...	...	...	...	1	24	...	...	...	...	1	24
GS-7	...	...	...	...	5	112	...	...	...	...	14	314
GS-6	...	...	...	...	3	63	...	...	...	...	8	168
AD Pay	...	...	...	...	...	...	...	...	...	610	...	610
Total positions and annual rate	...	...	...	...	23	845	...	...	...	610	73	3,684
Lapse (-)	...	...	...	...	-12	-423	...	...	...	...	-37	-1,538
Permanent workyears and comp	...	...	...	...	11	422	...	...	...	610	36	2,146
Other personnel compensation	...	...	...	...	...	...	...	...	...	...	...	...
Total workyears and personal comp	...	...	...	...	11	422	...	...	...	610	36	2,146
Personnel benefits		...		...		254		...		...		596
Travel		43		...		129		22		...		817
Transportation of things		...		...		33		...		...		47
GSA rent		...		...		98		...		...		604
Communications, utilities, and miscellaneous		...		...		82		...		...		184
Printing and reproduction		...		...		38		...		...		115
Other services		158		134		965		10		1,473		5,698
Supplies		...		...		57		...		6		135
Equipment		43		...		377		...		48		1,271
Total, workyears and obligations, 1990	...	244	...	134	11	2,435	...	32	...	2,137	36	11,613

Criminal Division
General Legal Activities, Salaries and Expenses
Detail of Permanent Positions by Category
Fiscal Years 1990 - 1992

Item	1990 Authorized	1991				1992	
		1991 Pres. Authorized	Transfers	Program Supplemental	Total	Program Increases	Total
Attorneys (905)	555	436	-15	20	441	35	476
Paralegal (950)	81	74	- 2	6	78	10	88
Other legal and kindred (900-998)	10	10	...	...	10	...	10
Other miscellaneous (001-099)	4	4	...	4	8	3	11
Social sciences, economics (100-199)	4	2	...	...	2	...	2
General administrative, clerical (300-399)	319	261	- 8	6	259	25	284
Accounting and budget (500-599)	6	5	...	...	5	...	5
Total	979	792	-25	36	803	73	876
Washington	743	772	-25	36	783	73	856
Field	236	20	...	...	20	...	20
Total	979	792	-25	36	803	73	876

2001

Civil Division
Salaries and Expenses, General Legal Activities
Crosswalk of 1991 Changes
(Dollars in thousands)

Activity/Program	1991 President's Budget Request			Adjustments in Permanent Pos. to Workyears			Approved Reprogrammings			1991 Program Supplementals Requested			1991 Appropriation Anticipated		
	Pos.	WY	Amount	Pos.	WY	Amount	Pos.	WY	Amount	Pos.	WY	Amount	Pos.	WY	Amount
Federal Appellate Activity	74	84	$6,797	...	-1	...	...	...	...	...	...	$79	74	83	$6,876
Torts Litigation	216	214	32,291	...	-3	...	...	...	...	...	...	209	216	211	32,500
Commercial Litigation	330	295	33,800	...	-4	...	...	...	...	...	...	289	330	291	34,089
Federal Programs	181	154	14,524	...	-3	...	...	...	...	38	18	3,606	219	169	18,130
Consumer Litigation	35	39	3,227	...	-1	...	...	...	...	...	...	40	35	38	3,267
Immigration Litigation	40	48	4,670	...	-1	...	...	...	...	...	...	48	40	47	4,718
Management and Administration	104	114	7,312	...	-2	...	...	...	...	3	2	5,906	107	114	13,218
Total	980	948	102,621	...	-15	...	...	...	...	41	20	10,177	21	953	112,798

Supplementals Requested. The supplemental request for $10,177,000 and 41 positions provides $3,458,000 and 38 positions for additional litigation under the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), $5,906,000 and 3 positions for a Department-wide automated Savings and Loan case management system and $813,000 to cover increased court reporting and transcription costs.

1991 Adjustments in Permanent Positions and Workyears. This adjustment in 1991 equates to the loss of 15 workyears in order to absorb 50 percent of the 1991 pay raise. Program increases in 1992 are requested to restore the workyear costs of the pay adjustments absorbed in 1991.

Civil Division
Salaries and Expenses, General Legal Activities
Summary of Requirements
(Dollars in thousands)

Adjustments to base:	Perm Pos.	WY	Amount
1991 as requested	980	948	102,621
1991 adjustment in permanent positions and workyears	...	-15	...
1991 program supplemental requested	41	20	10,177
1991 appropriation anticipated	1,021	953	$112,798
Mandatory increases	...	70	10,234
Decreases	...	...	-83
1992 base	1,021	1,023	122,949

Estimates by program	1990 Enacted Perm. Pos.	1990 Enacted WY	1990 Enacted Amount	1990 Actual Perm. Pos.	1990 Actual WY	1990 Actual Amount	1991 Appropriation Anticipated Perm. Pos.	1991 Appropriation Anticipated WY	1991 Appropriation Anticipated Amount	1992 Base Perm. Pos.	1992 Base WY	1992 Base Amount	1992 Estimate Perm. Pos.	1992 Estimate WY	1992 Estimate Amount	Increase/Decrease Perm. Pos.	Increase/Decrease WY	Increase/Decrease Amount
Federal Appellate Activity	67	73	$6,034	67	70	$6,034	74	83	$6,876	74	87	$7,526	74	88	$7,711	...	1	$185
Torts Litigation	210	209	31,091	210	185	31,091	216	211	32,500	216	214	34,218	233	226	38,221	17	12	4,003
Commercial Litigation	277	266	29,660	277	236	29,660	330	291	34,089	330	317	37,193	330	321	38,422	...	4	1,229
Federal Programs	151	140	12,462	151	117	12,462	219	169	18,130	219	205	21,496	219	208	21,922	...	3	426
Consumer Litigation	35	34	2,928	35	31	2,928	35	38	3,267	35	38	3,482	35	39	3,572	...	1	90
Immigration Litigation	40	40	4,233	40	41	4,233	40	47	4,718	40	47	4,995	40	48	5,106	...	1	111
Management and Administration	104	104	6,592	104	93	6,592	107	114	13,218	107	115	14,039	107	117	14,187	...	2	148
Total	884	866	93,000	884	773	93,000	1,021	953	112,798	1,021	1,023	122,949	1,038	1,047	129,141	17	24	6,192
Reimbursable Workyears		12			12			18			18			18			...	
Total Ceiling Workyears		878			785			971			1,041			1,065			24	
Other Workyears:																		
Holiday/Overtime		8			8			8			8			8			...	
Total Compensable Workyears		886			793			979			1,049			1,073			24	

1004

Civil Division
Salaries and Expenses, General Legal Activities
Summary of Change
(Dollars in thousands)

	Perm. Pos.	Work-Years	Amount
1991 as requested	980	948	$102,621
1991 adjustment in permanent positions and workyears	...	-15	...
Program supplemental requested	41	20	10,177
1991 appropriation anticipated	1,021	953	112,798
Mandatory increases:			
One additional compensable day	...	...	223
1991 pay raise annualization	...	...	340
1992 pay raise	...	...	1,595
Within-grade increases	...	...	236
Annualization of 1991 positions	...	49	2,369
Annualization of supplementals	...	21	1,620
Executive salary increases	...	...	219
Special salary rates	...	...	2
Health benefits	...	...	199
Federal Employee Retirement System (FERS)	...	...	105
Federal Insurance Corporation Act (FICA)	...	...	95
Distributed administrative support	...	...	7
Postage	...	...	32
GPO and Department printing costs	...	...	45
Employee data and payroll services	...	...	9
Security investigations	...	...	12
Security reinvestigations	...	...	465
GSA rent	...	...	778
GSA recurring reimbursable services	...	...	551
General pricing level adjustment	...	...	1,332
Total, mandatory increases	...	70	10,234
Decreases:			
Unemployment compensation	...	...	-4
Financial operations services	...	...	-79
Total decreases	...	...	-83
1992 base	1,021	1,023	122,949
Program increases	17	24	6,192
1992 request	1,038	1,047	129,141

CIVIL DIVISION
JUSTIFICATION FOR PROGRAM AND PERFORMANCE
Federal Appellate Activity - 2 CIV 01

Long-range Goal: To protect the interests of the United States at the highest levels of judicial review.

Major Objectives:

To prevail in appellate litigation challenging trial court or administrative decisions in favor of the United States.

To initiate and prevail in appeals in which the Government's opponents were successful at the trial court or administrative levels.

To protect the Government's interest at the highest level of appeal by preparing documents to be filed by the Solicitor General in the Supreme Court.

Base Program Description: Appellate litigation involves the spectrum of Government programs and policies. If the outcome of a trial involves huge financial losses, critical Government policies or Federal programs affecting the American public, the decision almost certainly will be appealed.

The financial stakes in appellate litigation are enormous. In 1989, $19 billion was at issue. By 1992, these stakes are expected to increase 32 percent to $25 billion. This caseload includes numerous tort claims, major bankruptcies and contract claims involving huge stakes. Entitlement programs involving billions of dollars in social and welfare benefits are also a frequent subject of hard-fought appellate litigation as plaintiffs go to court to have the qualifying rules rewritten.

Not infrequently, major Administration policy initiatives are the subject of appellate review. Drug testing cases are on appeal in circuits nationwide. The outcome of continuing litigation over the Decennial Census will affect apportionment, financing of public programs and business decisions. Challenges to Health and Human Services' abortion regulations prohibiting abortion advocacy in family planning projects funded under Title X of the Public Health Service Act are the subject of litigation. Immigration reform, national security, Freedom of Information Act and separation of powers cases are other critical areas handled by the Appellate Staff.

Adding to an already overwhelming caseload, new policies are certain to be challenged in court through the appellate level. Litigation targeting the proposed regulatory reforms for Savings and Loan institutions has already entered the appellate stage. The Ethics in Government Act is certain to be challenged. Housing and Urban Development's attempt to remove suspected drug dealers from public housing will result in court action. By 1992 the Staff will be handling 2,397 new cases involving huge financial and policy stakes.

1006

Workload and Accomplishments: The workload of the Appellate Staff is presented in the following table:

Activity/Statistic				1992			
Appellate Cases and Memoranda	1989 Actual	1990 Estimate	1991 Estimate	Change	Base	Request Level Change	Request Level Cum.
1. Handled by Appellate Staff							
a. Pending Beginning of Year	1,028	1,122	1,146	129	1,275	...	1,275
b. Received or Initiated	1,817	2,030	2,226	31	2,257	140	2,397
c. Terminated During Year	1,723	2,006	2,097	49	2,146	105	2,251
d. Pending End of Year	1,122	1,146	1,275	111	1,386	35	1,421
2. Handled in Branches							
a. Pending Beginning of Year	1,522	1,107	1,310	148	1,458	...	1,458
b. Received or Initiated	1,234	1,341	1,605	172	1,777	...	1,777
c. Terminated During Year	1,649	1,138	1,457	147	1,604	...	1,604
d. Pending End of Year	1,107	1,310	1,458	173	1,631	...	1,631
3. Handled by U.S. Attorneys or Client Agencies	1,206	1,240	1,363	137	1,500	...	1,500
Results in Personally Handled Cases Terminated							
a. Percent Favorable Outcomes	81	81	81	...	81	...	81
b. Number Favorable Outcomes	1,395	1,625	1,699	39	1,738	85	1,823
Direct Dollars at Issue (Millions)	$18,584	$21,819	$22,935	$1,532	$24,467	$143	$24,610

Skinner v. Railway Labor Executives' Association; National Treasury Employees Union v. Von Raab. Both cases, decided together by the Supreme Court, deal with the constitutionality of drug testing. In Skinner, by a 7-2 vote, the Supreme Court reversed a Ninth Circuit decision and held constitutional a Federal Railroad Administration regulation that requires railroads to perform drug tests on railway crew members after certain accidents or safety violations. In the latter case, the Supreme Court, by a 5-4 vote, affirmed the Fifth Circuit decision which upheld the drug testing program of the Customs Service against a Fourth Amendment challenge. The Court upheld the program insofar as it tested employees who apply for promotion to positions directly involving the interdiction of illegal drugs or to positions which require the carrying of firearms. It also approved the program's provisions for testing employees who seek promotion to positions where they would handle classified information. The case was remanded because of the Court's opinion that Customs may have included too many employees in the latter category. Numerous other cases pending in the courts of appeals involving drug testing -- particularly random drug testing programs are now being brought to largely favorable dispositions in light of these Supreme Court decisions.

Independent U.S. Tanker Owners Committee v. Skinner. The Merchant Marine Act authorizes the Secretary of Transportation to provide construction differential subsidies to vessels, but the vessels that receive subsidies may not, except in certain narrow circumstances, operate domestically. The current dispute concerns the Independent U.S. Tanker Owners' challenge to the promulgation of a 1987 rule reaffirming the propriety of accepting subsidy repayments of more than $100 million from certain vessels in return for allowing domestic operations. The district court struck down the rule; the Staff appealed to the D.C. Circuit. The court of appeals reversed, thereby saving the taxpayers approximately $150 million.

Dukakis v. U.S. Dept. of Defense; Perpich v. U.S. Dept. of Defense. The Montgomery Amendment provides that State Governors cannot withhold their consent to a two-week overseas training assignment of National Guard units based upon objections to the location or purpose of the training. Two separate actions challenged the constitutionality of the Amendment. In the former case, the district court upheld the Amendment as consistent with the Army and Necessary and Proper Clauses of the Constitution, accepting our argument that members of a State National Guard unit were ordered to duty in their Federal, not State, capacity. The First Circuit affirmed the district court's decision. In the latter case, a panel of the Eighth Circuit held the Amendment unconstitutional. Granting a petition for rehearing en banc, the full court of appeals ruled 7-2 that the Montgomery Amendment is valid, accepting the Government's position that "Congress' army power is plenary and exclusive." The Supreme Court has now unanimously affirmed that favorable decision.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Civil Division

Decision Unit: 2 CIV 01 Federal Appellate Activity

Resource Requirements	1989 Actual	1990 Actual	1991 Estimate	1992 Base Level Change	1992 Base Level Cum.	1992 Request Level Change	1992 Request Level Cum.
BUDGET AUTHORITY	$5,749	$6,034	$6,876	$650	$7,526	$185	$7,711
OUTLAYS	5,763	5,732	6,526	899	7,425	160	7,585
Appropriated Positions	67	67	74	...	74	...	74
FTE Workyears:							
Full-Time Permanent	69	66	79	4	83	1	84
Other	4	4	4	...	4	...	4
Subtotal	73	70	83	4	87	1	88
Overtime/Holiday	1	1	1	...	1	...	1
Subtotal	74	71	84	4	88	1	89
Reimbursable Workyears							
Other	...	...	...	...	...	...	...
Total	74	71	84	4	88	1	89

Program Changes: The Branch requires an additional $185,000 for human capital resources. (See Management and Administration section for justification.)

1009

Schedule of Cost Inputs
(Dollars in thousands)

Organization: Civil Division

Decision Unit: 2 CIV 01 Federal Appellate Activity

	Increase Level		
	Pos.	FTE	Amount
Positions by Type			
Attorney	...	...	...
Paralegal	...	...	...
Secretary	...	...	...
Subtotal	...	...	...
1991 Pay Raise	...	1	$60
Administratively Determined Pay System	...	...	107
Training	...	...	3
Travel	...	...	1
Awards	...	...	14
Litigative Expenses	...	...	...
Equipment/Supplies	...	...	...
Subtotal	...	1	185
Total	...	1	185

Description of Cost Inputs

Human Capital Initiative - This increase provides $60,000 to cover "absorbed" pay increases, $107,000 to achieve more competitive salaries for attorneys, $3,000 for expanded training opportunities, $1,000 to allow for increased "mentoring" through pairing junior and senior attorneys on cases requiring travel and $14,000 for increased employee incentive awards.

1010

CIVIL DIVISION
JUSTIFICATION FOR PROGRAM AND PERFORMANCE
Torts Litigation - 2 CIV 15

Long-range Goal: To protect the U.S. Treasury by successfully defending against unwarranted claims, preventing excessive losses from meritorious claims and maximizing the monetary recovery for injury and damages to Government property.

Major Objectives:

To prevail in the defense of tort actions brought against the Government, its agencies and individual Federal employees.

To initiate and prevail in affirmative actions when the Government has sustained injury or expended resources on behalf of another party.

Base Program Description: The Torts Branch serves as guardian of the public fisc, defending the Government where plaintiffs seek monetary damages for alleged neglect or wrongful conduct and initiating actions to recover injury and damages to Government property. The monetary implications of this caseload are staggering with claims in 1989 exceeding $75 billion. The lion's share of these suits is defensive and, therefore, non-discretionary. Despite the fact that the Branch has little control over the number and size of incoming suits, our attorneys perform remarkably well, holding adverse judgments to a paltry .06 percent of claims.

In many of the suits, the Government's involvement in the event precipitating the tort action is elusive, at best. The most common of these types of claims involve aviation disasters such as the Long Island Avianca plane crash or environmental accidents such as the EXXON VALDEZ oil spill. These suits are unpredictable and, without warning, the Government can be pulled into resource-devouring litigation involving hundreds of plaintiffs and massive discovery requirements.

Other litigation involves the actions of Federal agencies directly. In these cases, individuals seek to recover damages for alleged injuries caused by agency actions. These cases include an escalating number of complex toxic substance and asbestos claims involving Government or Government contractor activities. They also include growing numbers of claims involving financial institutions suing regulatory agencies for actions taken to restructure and shore up the nation's Savings and Loan industry.

Compensation programs represent an expanding area of the Torts Branch's workload. In 1986 Congress passed the National Childhood Vaccine Injury Act to provide compensation to individuals harmed by immunizations. Trust funds supported by a manufacturer's excise tax on certain vaccines and annual appropriations have been set aside for claims payment, but it is important to protect the Treasury from false claims. Adjudication and litigation are complex and require thorough medical evaluation. In addition, a new compensation program is on the horizon. The Radiation Exposure Compensation Act has been passed by the House and Senate and awaits presidential approval. Establishment of this program will entail publicity, claims review and adjudication and check issuance and will engender complex litigation.

Workload and Accomplishments: The workload of the Torts Staff is presented in the following tables:

Activity/Statistic	1989 Actual	1990 Estimate	1991 Estimate	1992 Change	1992 Base	1992 Request Level Change	1992 Request Level Cum.
Defend Monetary Claims							
1. Personally Handled Cases							
a. Pending Beginning of Year	4,802	4,911	5,403	725	6,128	...	6,128
b. Received During Year	966	1,231	2,052	1,038	3,090	...	3,090
c. Terminated During Year	857	739	1,327	-38	1,289	945	2,234
d. Pending End of Year	4,911	5,403	6,128	1,801	7,929	-945	6,984
e. Dollars at Issue (Millions)	$75,085	$82,926	$93,641	$10,376	$104,017	...	$104,017
2. Received and Referred to U.S. Attorneys	3,245	3,386	3,263	52	3,315	...	3,315
Enforce Monetary Claims							
1. Personally Handled Cases							
a. Pending Beginning of Year	198	185	219	8	227	...	227
b. Initiated During Year	43	66	40	-40	...	43	43
c. Terminated During Year	56	32	32	...	32	5	37
d. Pending End of Year	185	219	227	-32	195	38	233
e. Dollars at Issue (Millions)	$1,059	$1,026	$1,027	-$46	$981	$66	$1,047
2. Authorized for Litigation by U.S. Attorneys	18	20	13	2	15	...	15
Appellate Cases and Memoranda							
a. Pending Beginning of Year	106	93	84	-1	83	...	83
b. Received or Initiated	59	59	52	-2	50	...	50
c. Terminated During Year	72	68	53	...	53	...	53
d. Pending End of Year	93	84	83	-3	80	...	80

Decision Unit Workload

Organization: Civil Division

Decision Unit 2 CIV 15 Torts Litigation

Activity/Statistic	1989	1990	1991	1992			
Results in Personally Handled Cases Terminated (Millions)	Actual	Estimate	Estimate	Change	Base	Request Level Change	Request Level Cum.
a. Dollars Defended	$9,786	$7,364	$7,567	$1,409	$8,976	...	$8,976
b. (-) Awards to Opponents	64	65	73	-1	72	...	72
c. (+) Awards to Government	12	19	13	1	14	...	14
d. Net to U.S. Treasury	9,734	7,318	7,507	1,411	8,918	...	8,918

Aviation and Admiralty Litigation. After the successful resolution of the Delta 191/DFW and World Airways/Boston trials in 1990, aviation attorneys have continued their defensive efforts on appeal. The Pan Am/ Lockerbie disaster has induced numerous damage suits. In admiralty, the Coast Guard and the Army Corps of Engineers were completely vindicated in the trial involving the 1984 M/V AIVENUS oil spill in the Gulf of Mexico. The Branch has been involved in all aspects of the EXXON VALDEZ oil spill, including preparation for the National Transportation Safety Board public hearing and the Hazelwood criminal trial.

General Federal Tort Claims Act (FTCA) Litigation. FTCA cases may arise in almost limitless contexts. In Chernock v. U.S., three contractor employees unsuccessfully claimed personal injury from exposure to microwave radiation from FAA and Air Force radar systems. The Branch is defending against the claims of persons who contracted AIDS allegedly due to Government negligence in the course of blood transfusions or other medical procedures. The Branch continues to handle significant litigation related to bank or thrift institution failure. In FSLIC v. Smith, the third-party plaintiff claimed that he was fraudulently induced to purchase stock in an institution which was on the verge of collapse and in whose operations the FSLIC was routinely involved. The court dismissed the suit because the plaintiff had failed to meet the FTCA's mandatory administrative claim requirements. Similarly, the Branch has prevailed in Anderson v. FDIC which raised the issue of whether the FTCA's requirements are applicable in bankruptcy proceedings.

Asbestos Litigation. The Branch defeated several major attempts by asbestos product manufacturers to force the U.S. to reimburse them for their own tort liability. In Eagle-Picher/UNR/GAF v. U.S., the court dismissed more than $13 million in tort claims arising out of injuries to public shipyard employees. In Keene et al. v. U.S., the Branch secured dismissal of all Claims Court complaints brought by six asbestos product manufacturers, seeking over $9.3 billion. However, on July 30, 1990, the manufacturers' appeal of that dismissal resulted in a split decision reversing the Claims Court. A decision is pending whether to seek rehearing. In GAF Corp. v. U.S., the branch secured dismissal on the merits of the remaining asbestos litigant's complaint in the Claims Court; the plaintiff sought $4.5 million.

Toxic Tort Litigation. The Branch is defending an increasing number of toxic tort cases stemming from activities of military installations and defense contractors. It successfully defended Myracle v. U.S., in which the plaintiff alleged personal injuries resulting from inhalation of numerous chemicals.

Constitutional Tort Litigation/Government Employee Representation. Suits seeking damages from individual employees span the full range of Federal employees' activities. The Branch has had extensive litigation against individuals arising from the regulatory activities of the former Federal Home Loan Bank Board. The Branch successfully defended claims against President Reagan, the Secretary of Defense and the Joint Chiefs of Staff and all of the military officers involved in the 1986 retaliatory bombing of terrorist sites in Tripoli and Benghazi.

Automation Litigation Support (ALS). The Division's ALS program plays an instrumental part in the successes of the largest and most complex Torts Branch cases. For the Government's successful defense in the $200 million Delta disaster case, ALS provided a variety of pre-trial and trial databases, as well as a large and ever-ready trial support team. ALS was also integral to the defeat of several asbestos industry leaders.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Civil Division

Decision Unit: 2 CIV 15 Torts Litigation

Resource Requirements	1989 Actual	1990 Actual	1991 Estimate	1992 Base Level Change	1992 Base Level Cum.	1992 Request Level Change	1992 Request Level Cum.
BUDGET AUTHORITY	$27,468	$31,091	$32,500	$1,718	$34,218	$4,003	$38,221
OUTLAYS	27,307	29,537	30,858	3,109	33,967	3,482	37,449
Appropriated Positions	210	210	216	...	216	17	233
FTE Workyears:							
Full-Time Permanent	169	177	203	3	206	12	218
Other	8	8	8	...	8	...	8
Subtotal	177	185	211	3	214	12	226
Overtime/Holiday	2	2	2	...	2	...	2
Subtotal	179	187	213	3	216	12	228
Reimbursable Workyears							
Other	...	12	18	...	18	...	18
Total	179	199	231	3	234	12	246

Program Changes: The Torts Branch requires 17 positions, 9 workyears and $4,003,000 in program increases.

Radiation Exposure Compensation Program. The Radiation Exposure Compensation Act offers an apology and monetary compensation to individuals exposed to radiation released during above-ground nuclear weapons tests and uranium mining. Different versions of the bill have been passed by the House and the Senate. Approximately 13,000 claims are expected to be received over the life of the program. In order to cope with the flood of claims and litigation which the bill is certain to engender, the Branch requires an additional 17 positions, 9 FTE and $3,447,000. This amount includes $2,370,000 for ALS.

The Act will establish a program to compensate individuals or their survivors who lived downwind of the Government's above-ground nuclear tests or who were uranium miners, and who contracted specified diseases. The bill does not require claimants to prove that their illnesses were induced by radiation. In order to receive compensation, a claimant need only prove that he or she resided in one of the specified areas during the specified time period and developed one of the designated ailments within a certain number of years. Payments to affected individuals will come from a trust fund administered by the Treasury Department. The program will expire when all monies from the trust fund have been expended, or at the termination of the program, whichever date is earlier.

The responsibility for the implementation of the program lies squarely with the Attorney General. Despite the fact that the law is expected to generate thousands of claims, the bill explicitly denies the Attorney General any funding for the program's administrative costs and states that all expenses must be absorbed by the Attorney General using available resources.

The position that this work can be absorbed and that the intent of Congress can be fulfilled -- without additional resources -- is untenable. Congress' blunder in enacting the Vaccine Injury Compensation Act without resources to implement the program provides ample testimony to the sheer impossibility of the expectation. Lack of funding for that program forced our attorneys initially to default on all of the vaccine cases, seriously jeopardizing the Government's position and the viability of the program, placing themselves at professional risk and subjecting the Attorney General to Congressional, judicial and public criticism. Without adequate resources, backlogs, delays and controversy are guaranteed, and a program designed to be an apology will degenerate into an embarrassment for the Government and an insult to deserving claimants.

Given the estimated downwinder population of 172,000 stated in the Report of the Interagency Task Force on Compensation for Radiation Related Illnesses and an additional 500 miners, we project the total number of claimants to be approximately 13,000, based on cancer incidence rates published by the American Cancer Society. Assuming that 1991 is the first year of the program, we estimate that 800 claims will be received in 1991, and that the number will more than double to 1,800 claims in 1992. Since the bill requires the processing of all claims within one year of receipt, the procedures for handling the claims must be as streamlined as possible while enabling proper factual determination of the claims.

Effective administration of this program will encompass several areas:

- Publicity. An 800 line, explanatory brochures and the employment of a media consultant to provide low-cost nationwide television, radio and newspaper coverage will all be utilized. Inadequate publicity will undermine the program's success and spawn lawsuits against the Government.

- Claims review and adjudication. Claims processing will be handled by paralegals and a support staff of clerks and data processing personnel provided through our Automated Litigation Support contract. Medical records technicians detailed from the Surgeon General's Office will review each completed claim and an attorney will assess its validity. Although we anticipate that the majority of the claims will be uncomplicated, there undoubtedly will be factual disputes over the issues of place of residency and time, significant medical challenges and the inevitable number of bogus and fraudulent claims.

- Check issuance. An operational process, internal controls and auditing procedures will be established to direct the Treasury to disburse the appropriate funds to the appropriate recipient swiftly and accurately.

- Litigation. If a claim is denied, the claimant will be notified immediately of the decision and of his or her right to a hearing. The hearing would be followed by an appeal procedure. This part of the process may take place entirely within the Department or within another entity. For costing purposes, we assumed that appeals would be handled by the Claims Court Office of Special Masters; our resource needs may be greater if appeals are handled entirely within the Department.

1016

The Division seeks to conform with the intent of the Congress to extend an apology to the unwitting participants of our Nation's nuclear weapons program. Failure to provide the necessary funds to efficiently implement the program would stymie the Act's intent to provide swift and equitable compensation.

Human Capital Initiative. The Branch requires an additional $556,000 for human capital resources. (See Management and Administration section for justification.)

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1017

Schedule of Cost Inputs
(Dollars in thousands)

Organization: Civil Division

Decision Unit: 2 CIV 15 Torts Litigation

	Increase Level		
	Pos.	FTE	Amount
Positions by Type			
Attorney	11	6	$357
Paralegal	2	1	51
Secretary	4	2	49
Subtotal	17	9	457
1991 Pay Raise	...	3	180
Administratively Determined Pay System	...	...	279
Training	...	...	36
Travel	...	...	48
Awards	...	...	49
Automated Litigation Support	...	...	2,370
Equipment/Supplies	...	...	32
Other Services	...	...	552
Subtotal	...	...	3,546
Total	17	12	4,003

Description of Cost Inputs

Radiation Exposure Compensation Program - This increase provides $666,000 for 11 attorneys, 2 paralegals, 4 secretaries and details from the Office of the Surgeon General to process and litigate claims arising from the Radiation Exposure Compensation Act, $2,370,000 for requisite Automated Litigation Support and $411,000 to cover auditing, travel, rent, transportation and printing expenses.

Human Capital Initiative - This increase provides $180,000 to cover "absorbed" pay increases, $279,000 to achieve more competitive salaries for attorneys, $36,000 for expanded training opportunities, $12,000 to allow for increased "mentoring" through pairing junior and senior attorneys on cases requiring travel and $49,000 for increased employee incentive awards.

CIVIL DIVISION
JUSTIFICATION FOR PROGRAM AND PERFORMANCE
Commercial Litigation - 2 CIV 16

Long-range Goal: To protect the financial interests of the United States through the recovery and collection of monies owed the Government and through the assertion of the Government's commercial interests in defensive litigation.

Major Objectives:

To save the Government money by winning lawsuits and obtaining favorable settlements of contract, intellectual property, international trade and Government employment litigation brought against the United States.

To collect money owed the United States as a result of defaulted contracts, unpaid loans, unsatisfied judgments, breach of grant agreements and misuse of benefit programs.

To recover funds lost through fraud and corruption in Government programs and to deter future losses by collecting the statutory penalties allowed for such violations.

To defend Government policies and programs challenged in litigation involving money damages.

Base Program Description: Charged with protecting the nation's financial interests, the Commercial Litigation Branch defends actions seeking money judgments against the United States and initiates civil action to collect money owed the United States as a result of various commercial and statutory activities. The Branch also conducts litigation arising from fraud, bribery and official misconduct such as that uncovered in the Savings and Loan industry; the collection of civil fines and loan defaults; and challenges to Government personnel actions.

The Branch's caseload is largely defensive. Contracts cases in Claims Court and the District Courts are increasing as are the Branch's responsibilities in the Federal Circuit Court of Appeals (CAFC). CAFC cases, in particular, are expected to rise sharply due to recent enactment of the Veterans' Judicial Review Act. Savings and Loan cases are beginning to materialize in the Claims Court as former directors such as Charles Keating allege illegal seizure of property by the Office of Thrift Supervision. Dollars defended are projected to exceed $14 billion by 1992.

Despite its growing defensive responsibilities, the Branch has devoted increasing resources to affirmative litigation. This high-stakes, complex litigation occupies an increasingly prominent role in the Branch's work. Bankruptcy and loan default cases involve numerous Government entities that have significant monetary exposure. The Branch is experiencing the fall-out of leveraged buy-outs that were financed with junk bonds, representing defense agencies with hundreds of millions of dollars in contracts and claims at risk due to bankruptcy. Efforts to recover money lost through fraud, waste and abuse in Government programs have intensified substantially with the enactment of major anti-fraud statutes and stepped-up efforts to target and punish procurement fraud. Heightened emphasis has been placed on recouping millions of dollars defrauded the Government through contract bid-rigging at overseas military bases. The Branch will seek recovery of more than $24 billion in 1992.

1019

Workload and Accomplishments: Workload of the Commercial Litigation Branch is presented in the following tables:

Activity/Statistic	1989 Actual	1990 Estimate	1991 Estimate	1992 Change	1992 Base	1992 Request Level Change	1992 Request Level Cum.
Defend Monetary Claims							
1. Personally Handled Cases							
a. Pending Beginning of Year	8,990	6,961	6,433	-249	6,184	...	6,184
b. Received During Year	1,550	1,431	1,567	81	1,648	...	1,648
c. Terminated During Year	3,579	1,959	1,816	-60	1,756	...	1,756
d. Pending End of Year	6,961	6,433	6,184	-108	6,076	...	6,076
e. Dollars at Issue (Millions)	$10,578	$11,394	$12,888	$1,567	$14,455	...	$14,455
2. Received and Referred to U.S. Attorneys	4,787	4,176	3,428	-770	2,658	...	2,658
Enforce Monetary Claims							
1. Personally Handled Cases							
a. Pending Beginning of Year	1,291	1,360	1,441	129	1,570	...	1,570
b. Initiated During Year	743	768	810	-98	712	122	834
c. Terminated During Year	674	687	681	-13	668	34	702
d. Pending End of Year	1,360	1,441	1,570	44	1,614	88	1,702
e. Dollars at Issue (Millions)	$15,514	$17,373	$21,032	$3,233	$24,265	$390	$24,655
2. Authorized for Litigation by U.S. Attorneys	1,660	1,540	1,192	-345	847	...	847
Appellate Cases and Memoranda							
1. Personally Handled Cases							
a. Pending Beginning of Year	1,135	688	753	45	798	...	798
b. Received or Initiated	725	810	1,034	130	1,164	...	1,164
c. Terminated During Year	1,172	745	989	59	1,078	...	1,078
d. Pending End of Year	688	753	798	86	884	...	884
2. Received and Referred to U.S. Attorneys	50	55	46	1	47	...	47

Decision Unit Workload

Organization: Civil Division

Decision Unit 2 CIV 16 Commercial Litigation

Activity/Statistic	1989 Actual	1990 Actual	1991 Estimate	1992 Change	1992 Base	1992 Request Level Change	1992 Request Level Cum.
Results in Personally Handled Cases Terminated (Millions)							
a. Dollars Defended	$1,559	$974	$983	$15	$998	...	$998
b. (-) Awards to Opponents	111	93	97	6	103	...	103
c. (+) Awards to Government	569	480	533	-126	407	$64	471
d. Net to U.S. Treasury	2,017	1,361	1,419	-117	1,302	64	1,366

General Commercial Litigation. The Branch continues to handle significant litigation arising out of the Government's financial interests. In the utilities field, Branch representation of the Rural Electrification Administration (REA) resulted in the successful restructuring of over $5 billion in defaulted loans to cooperatives. In representing the Bonneville Power Administration, Branch attorneys successfully negotiated a favorable settlement in the $7 billion Washington Public Power Supply System bond default litigation and are now defending that settlement in the court of appeals. The Branch also achieved a settlement with five investor-owned utilities challenging the price of electricity, thereby avoiding a $330 million exposure.

Fraud Litigation. In 1990, approximately $170 million was obtained in fraud judgments and settlements. Department of Defense (DOD) procurement fraud continues to constitute the largest portion of this caseload, particularly cases involving defective pricing and cost mischarging. $60 million was recovered in 1990 for DOD fraud. Significant recoveries in other areas included matters arising from programs of the Department of Education, the Veterans' Administration, the Environmental Protection Agency, the Department of Housing and Urban Development and the General Services Administration. During 1990, 174 suits were filed under the qui tam provisions of the False Claims Act. Overseas, in In re Japanese Construction Contract Fraud, the Branch investigated possible remedies under Japanese law arising out of an order of the Japan Fair Trade Commission concerning bid-rigging on construction projects funded for the U.S. Naval base in Yokosuka. After conducting extensive negotiations, the Branch recovered $34.2 million following a settlement with 131 Japanese companies.

Claims Court/Federal Circuit Litigation. In Carter, et al. v. Gibbs, the Branch successfully defended an appeal dismissing the claims of several hundred Federal employees seeking overtime pay. This decision establishes an important precedent requiring all similarly situated employees to pursue their remedies through the procedures established by collective bargaining agreements. In Acton v. United States, Branch attorneys successfully argued that a two-year, rather than a six-year, statute of limitations applied to the Federal employee overtime pay claims at issue. The Immigration and Naturalization Service estimates this ruling could result in savings in excess of $50 million.

Intellectual Property Litigation. The Branch continues to defend the Government in complex patent suits brought to recover compensation for the use of patented inventions. In Pratt & Whitney Canada v. United States, Branch attorneys obtained a favorable judgment after a lengthy Claims Court trial and then successfully defended the case before the Court of Appeals for the Federal Circuit. Pratt & Whitney Canada sought over $40 million in compensation for the Government's use of certain patented jet engines in helicopters.

Automated Litigation Support Accomplishments. ALS has been critical to the management of major frauds and contracts cases. In Doyle v. U.S., an overtime pay dispute with potentially $500 million at stake, a data base has been established to manage information on up to 25,000 claimants.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Civil Division

Decision Unit: 2 CIV 16 Commercial Litigation

Resource Requirements	1989 Actual	1990 Actual	1991 Estimate	1992 Base Level Change	1992 Base Level Cum.	1992 Request Level Change	1992 Request Level Cum.
BUDGET AUTHORITY	$26,538	$29,660	$34,089	$ 3,104	$37,193	$1,229	$38,422
OUTLAYS	26,233	28,177	32,361	4,340	36,701	1,069	37,770
Appropriated Positions	277	277	330	...	330	...	330
FTE Workyears:							
Full-Time Permanent	235	231	286	26	312	4	316
Other	5	5	5	...	5	...	5
Subtotal	240	236	291	26	317	4	321
Overtime/Holiday	1	1	1	...	1	...	1
Subtotal	241	237	292	26	318	4	322
Reimbursable Workyears							
Other	...	...	...	...	...	...	...
Total	241	237	292	26	318	4	322

Program Changes: The Commercial Litigation Branch requires $1,229,000 in program increases.

Fraud Overseas. As the United States gains momentum in its fight against fraud, the battle has extended internationally, particularly to countries with U.S. military installations. Until recently, overseas cases did not involve substantial dollars. The Defense Department's resolve in ferreting out fraud has resulted in numerous referrals involving substantial sums. In order to wage a successful retaliation against overseas contract fraud, the Commercial Branch requires an increase of $490,000.

The Branch's Office of Foreign Litigation, comprised of a small Washington, D.C. staff and one attorney stationed in Munich, West Germany, engages foreign counsel services to represent the Government's interests overseas. Foreign counsel is comprised of foreign national attorneys who are licensed in their respective countries and experienced with the local court systems and statutes. They are responsible for evaluating the viability of litigation and determining suitable strategy; litigating cases where warranted; participating in settlement negotiations; and enforcing collection efforts. Due to their exclusive expertise, foreign counsel services are indispensable to a growing number of highly complex, priority actions. Foreign counsel activities traditionally include bringing suits in foreign courts to recover monies defrauded the military overseas; litigating asset forfeitures in connection with seizures of foreign assets of convicted criminals; and instituting litigation in ship foreclosures on behalf of the Maritime Administration (MARAD).

As a result of the newly heightened emphasis on foreign fraud recovery, several huge cases of contract bid-rigging have emerged overseas. The Branch recently received Congressional attention for its successful retaliation against a multi-million dollar construction contract bid-rigging scheme at the U.S. Naval base in Yokosuka, Japan. Following a lengthy investigation, the Branch settled with 131 Japanese companies for a record $34.2 million. In the four months following the settlement in Yokosuka, three new bid-rigging investigations were initiated in Asia. Each case involves numerous companies and $20 to $30 million in damages sought. The Department of Defense (DOD) has indicated there are many other high-stakes cases yet to be investigated. The Branch expects five such referrals in 1992.

Each overseas fraud case requires significant resources to cover foreign counsel fees: they totaled over $220,000 for the Yokosuka case alone. Despite the potential for an enormous recovery, the expense of this litigation forced the Division to seriously consider not filing this unprecedented case. Our attorneys went hat in hand to our client agency hoping to secure the funds needed to file the case -- without success. Had it not been successful in securing a favorable settlement, the Branch would not have had the funds for a trial, leaving no choice but to drop the case. This unlucky turn of events would have cost the Treasury literally millions of dollars.

The foreign litigation caseload is expected to rise 33 percent from 1989 to 1992. Recent DOD initiatives have obligated the Branch to investigate every fraud referral for potential settlement. The total costs associated are predicted to soar much higher in the next few years, as bid-rigging investigations multiply in number and complexity. Foreign counsel fees are just part of the picture; there are also considerable travel costs incurred from managing cases overseas and the potential for filing fees upwards of $100,000 per case.

The Branch has endeavored to reduce the amount of foreign counsel fees incurred by limiting the number of attorneys on each case, by taking advantage of the investigative work of other bodies, such as Japan's Fair Trade Commission, and by coordinating efforts with other agencies. It has emphasized avoiding trial proceedings that would last at least three to five years and raise foreign counsel fees to unprecedented heights. On the brink of losing huge recoveries, the Branch sought reimbursement from client agencies, at the risk of jeopardizing our litigating authority. The Division's stopgap measures for holding down foreign litigation costs can only serve as short term palliatives. At current funding levels, the Branch can not possibly make a concerted effort to uncover contract bid-rigging schemes at U.S. military bases abroad. Without additional resources to cover the cost of foreign counsel, a fertile area for fraud recovery will lay fallow and the Branch will be unable to recoup an estimated $150 million defrauded the Government overseas.

Human Capital Initiative. The Branch requires an additional $749,000 for human capital resources. (See Management and Administration section for justification.)

Schedule of Cost Inputs
(Dollars in thousands)

Organization: Civil Division

Decision Unit: 2 CIV 16 Commercial Litigation

	Increase Level		
	Pos.	FTE	Amount
Positions by Type			
Attorney	...	...	...
Paralegal	...	...	...
Secretary	...	...	...
Subtotal	...	...	...
1991 Pay Raise	...	4	$275
Administratively Determined Pay System	...	...	376
Training	...	...	28
Travel	...	...	9
Awards	...	...	61
Foreign Counsel	...	...	480
Equipment/Supplies	...	...	...
Subtotal	...	4	1,229
Total	...	4	1,229

Description of Cost Inputs

Human Capital Initiative - This increase provides $275,000 to cover "absorbed" pay increases, $376,000 to achieve more competitive salaries for attorneys, $28,000 for expanded training opportunities, $9,000 to allow for increased "mentoring" through pairing junior and senior attorneys on cases requiring travel and $61,000 for increased employee incentive awards.

Litigative Expenses - This increase provides $480,000 to handle increased Foreign Counsel costs in five cases arising from a surge of overseas Defense fraud-related referrals.

CIVIL DIVISION
JUSTIFICATION FOR PROGRAM AND PERFORMANCE
Federal Programs - 2 CIV 17

Long-range Goal: To successfully defend against challenges to Federal civil programs, policies and initiatives and to enforce remedies for statutory violations of Federal programs.

Major Objectives:

To prevail on behalf of the United States in civil litigation in defense of the programs, policies, initiatives and decisions of the President, Executive Branch agencies and officials of the Legislative and Judicial Branches.

To initiate and prevail in affirmative litigation aimed at remedying statutory and regulatory violations.

To increase the accountability of financial institutions by aggressively pursuing regulatory enforcement actions.

To pursue recovery of civil penalties from financial institutions suspected of criminal violations.

Base Program Description: The programs and policies of the Federal government have a pervasive effect on the public. It is not surprising that as society has become increasingly litigious, the public is turning to the courts to influence Federal programs and policies. The Branch must vigorously defend against legal challenges to a growing number of vital Government policies and programs to ensure they are not stymied through the judicial process.

Given the vast array of Government activities spanning some 185 agencies, Members of Congress, the Federal judiciary, Cabinet members and other Federal executives, officers and employees, this litigation is broad and diverse. Much of our litigation involves entitlements programs. This litigation has potentially massive impacts on the Federal Treasury. Judicial decisions, such as the recent Social Security Act decisions, can entitle plaintiffs to Federal benefits costing millions — if not billions — of dollars over the life of the program.

Other litigation is crucial to the support of major Government policies and initiatives. The Branch, steeped in litigation challenging agency drug testing programs, has a central role in promoting a drug-free Federal workplace; and it defends challenges to policies surrounding the Decennial Census. On the affirmative side, Federal Programs attorneys enforce regulations promulgated by a range of Government agencies involving important matters such as medicare payments, national security and educational loans.

The Branch also plays a critical two-fold role in the Government's efforts to solve the Savings and Loan crisis and restore confidence in the nation's financial institutions. Under the provisions of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), the Branch defends challenges to increased capital standard requirements and other provisions aimed at tightening control of Federally insured institutions. This litigation is vital to the Administration's goal of protecting the public against additional losses due to unsound banking and lending practices. In addition, in cases where the evidence renders criminal prosecution unsuitable, the Branch seeks recovery of civil penalties for violations of the criminal acts set forth in FIRREA.

Workload and Accomplishments: Workload of the Federal Programs Branch is presented in the following tables:

Activity/Statistic	1989 Actual	1990 Estimate	1991 Estimate	1992 Change	1992 Base	1992 Request Level Change	1992 Request Level Cum.
Defend Federal Civil Programs							
1. Personally Handled Cases							
a. Pending Beginning of Year	841	847	583	116	699	...	699
b. Received During Year	256	276	384	14	398	...	398
c. Terminated During Year	250	540	268	30	298	...	298
d. Pending End of Year	847	583	699	100	799	...	799
2. Received and Referred to U.S. Attorneys	2,361	2,246	2,217	-30	2,187	...	2,187
Enforce Federal Civil Programs							
1. Personally Handled Cases							
a. Pending Beginning of Year	90	114	140	47	187	...	187
b. Initiated During Year	64	76	114	-22	92	7	99
c. Terminated During Year	40	50	67	6	73	2	75
d. Pending End of Year	114	140	187	19	206	5	211
2. Authorized for Litigation by U.S. Attorneys	185	227	238	12	250	...	250
Appellate Cases and Memoranda							
a. Pending Beginning of Year	25	24	31	8	39	...	39
b. Received or Initiated	19	39	39	...	39	...	39
c. Terminated During Year	20	32	31	3	34	...	34
d. Pending End of Year	24	31	39	5	44	...	44

Decision Unit Workload

Organization: Civil Division

Decision Unit 2 CIV 17 Federal Programs

Activity/Statistic	1989 Actual	1990 Actual	1991 Estimate	1992 Change	1992 Base	1992 Request Level Change	1992 Request Level Cum.
Results in Personally Handled Cases Terminated							
a. Percent Favorable Outcomes	92	92	92	...	92	...	92
b. Number Favorable Outcomes	285	572	336	37	373	1	374
Direct Dollars at Issue (Millions)	$666	$830	$904	$78	$982	$7	$989

Savings and Loan Litigation. A key component of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) newly authorizes the Attorney General to bring civil actions for penalties of up to $1 million or the amount of pecuniary gain for conduct also subject to criminal liability. The Federal Programs Branch is responsible for these new civil enforcement actions and for defending banking legislation and regulations against constitutional or legal challenges. In a series of now over 25 cases, the Branch has defended the FIRREA-mandated enhanced capital requirements for thrifts, and joined the Office of Thrift Supervision in several cases defending the implementation of FIRREA by its former Director, M. Danny Wall, and former Acting Director, Salvatore Martoche. The Branch can expect an increasing number of challenges to the implementation of FIRREA.

Drug Testing Litigation. The Federal Programs Branch represents the Federal government and its officers in cases of national importance involving significant constitutional and statutory challenges. For example, in support of the Nation's efforts to combat illegal drug use, the Branch is defending over 50 cases challenging, on Fourth Amendment and other constitutional and statutory grounds, civilian drug testing programs for Federal employees holding sensitive positions and private employees holding sensitive positions in the transportation industry. Among the agencies whose drug testing programs have been challenged in court are the Department of Defense, the Department of Justice, the Executive Office of the President, the Department of Transportation, the Customs Service and the Secret Service. In addition, the Transportation Department's program requiring private employers in the transportation industry to screen their safety-sensitive employees for drug use has been subjected to challenges from all sectors of the transportation industry. The Branch has recently achieved substantial victories in upholding drug testing regulations governing employees of urban mass transit systems and merchant mariners.

Separation of Powers. The Branch has been active in a number of suits involving separation of powers principles. In People of the State of Illinois v. Cheney and National Federation of Federal Employees v. Department of Defense it successfully defended in district court challenges to the constitutionality of the Base Closure and Realignment Act on separation of powers and unlawful delegation grounds. In Burton v. Baker it successfully defended in district court a suit brought by four congressmen seeking to enjoin President Bush's arrangement not to obligate Contra aid funds without the agreement of four committee chairmen, claiming it amounts to an unconstitutional legislative veto.

1990 Census. As with the 1980 Census, numerous suits are expected challenging various aspects of the 1990 population count by the Census Bureau. Among the areas of dispute are questions of statistical adjustments for undercounts in certain areas, of military personnel and others stationed overseas and of inclusion of undocumented aliens in the United States. These issues are very significant because of their potential effect on the apportionment of Congressional seats. The Branch has already successfully defended Ridge v. Verity involving the "illegal alien" issue. As a result of an interim settlement reached in City of New York v. Department of Commerce, the issue of whether to adjust statistically will be reexamined after the Census is taken. However, a second adjustment lawsuit is already being litigated in Illinois and other suits are likely. Challenges to other aspects of the Census are also expected as the Census continues through 1990.

ALS Accomplishments. In the precedent-setting Census challenge by the City of New York, City of New York v. Department of Commerce, ALS was employed to rapidly gain control over a large and complex document collection headed for trial in less than three months. Information from over 45,000 pages of discovery from the Census Bureau and 10,000 pages of testimony were computerized in a highly compressed 10 week timeframe, allowing the attorneys to fully review and utilize the documents in preparation for trial and selection of exhibits. Settlement favorable to the Government was reached on the first day of trial.

1028

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Civil Division

Decision Unit: 2 CIV 17 Federal Programs

Resource Requirements	1989 Actual	1990 Actual	1991 Estimate	1992 Base Level Change	1992 Base Level Cum.	1992 Request Level Change	1992 Request Level Cum.
BUDGET AUTHORITY	$11,873	$12,462	$18,130	$ 3,366	$21,496	$426	$21,922
OUTLAYS	11,716	11,839	16,935	4,010	20,945	370	21,315
Appropriated Positions	151	151	219	...	219	...	219
FTE Workyears:							
Full-Time Permanent	117	111	163	36	199	3	202
Other	6	6	6	...	6	...	6
Subtotal	123	117	169	36	205	3	208
Overtime/Holiday	2	2	2	...	2	...	2
Subtotal	125	119	171	36	207	3	210
Reimbursable Workyears							
Other	...	...	...	...	...	...	...
Total	125	119	171	36	207	3	210

Program Changes: The Branch requires an additional $426,000 for human capital resources. (See Management and Administration section for justification.)

Schedule of Cost Inputs
(Dollars in thousands)

Organization: Civil Division

Decision Unit: 2 CIV 17 Federal Programs

	Increase Level		
	Pos.	FTE	Amount
Positions by Type			
Attorney	...	...	...
Paralegal	...	...	...
Secretary	...	...	...
Subtotal	...	...	...
1991 Pay Raise	...	3	$189
Administratively Determined Pay System	...	...	194
Training	...	...	12
Travel	...	...	4
Awards	...	...	27
Litigative Expenses	...	...	...
Equipment/Supplies	...	...	...
Subtotal	...	3	426
Total	...	3	426

Description of Cost Inputs

Human Capital Initiative - This increase provides $189,000 to cover "absorbed" pay increases, $194,000 to achieve more competitive salaries for attorneys, $12,000 for expanded training opportunities, $4,000 to allow for increased "mentoring" through pairing junior and senior attorneys on cases requiring travel and $27,000 for increased employee incentive awards.

1030

CIVIL DIVISION
JUSTIFICATION FOR PROGRAM AND PERFORMANCE
Consumer Litigation - 2 CIV 18

Long-range Goal: To protect the interests of consumers from defective or harmful products and from unfair and deceptive trade practices.

Major Objectives:

To provide effective enforcement of Federal consumer protection statutes through institution of affirmative civil litigation.

To consider the prosecutorial merit of criminal matters under consumer protection statutes and initiate or assist in the conduct of appropriate criminal proceedings.

To represent the United States in defensive litigation when initiatives and programs of the principal consumer protection agencies are challenged.

To counter drug trafficking by investigating black-market operations and securing steroids prosecutions.

Base Program Description: The Office of Consumer Litigation is responsible for litigation under Federal statutes that protect public health and safety and regulate unfair and deceptive trade practices in interstate commerce. The Office defends the programs, policies and decisions of the Government in consumer-related areas and enforces those policies by both civil and criminal sanctions in order to avert health risks to the public and deter economic fraud.

The Office initiates affirmative litigation to ensure that unsafe and adulterated foods and drugs do not reach the marketplace, protects the integrity of the drug approval process and enforces Federal policies in the regulation of foods. Referrals from the Food and Drug Administration (FDA), which necessitate the initiation of criminal prosecutions, constitute a major and growing focus of the Office's work. Once mostly relatively simple misdemeanor cases, FDA referrals now are largely felony prosecutions for diverse illegal activity.

Other litigation the Branch initiates covers hazardous and unsafe consumer products, unfair debt collection and consumer credit practices, franchising and door-to-door and mail order sales. The Office also seeks the enforcement of administrative orders relating to price fixing and divestiture, unfair and deceptive advertising practices, and cigarette and automobile labeling. The Branch defends the Government in challenges to Federal policies and initiatives aimed at protecting the public in its purchases of foods, drugs, devices and consumer products.

1031

Workload and Accomplishments: Workload of the Office of Consumer Litigation is presented in the following table:

Activity/Statistic	1989	1990	1991	1992			
						Request Level	
Enforce Federal Civil Programs	Actual	Estimate	Estimate	Change	Base	Change	Cum.
1. Personally Handled Cases							
a. Pending Beginning of Year	299	367	511	93	604	...	604
b. Initiated During Year	228	268	279	-141	138	148	286
c. Terminated During Year	160	124	186	-10	176	24	200
d. Pending End of Year	367	511	604	-38	566	124	690
2. Authorized for Litigation by U.S. Attorneys	198	198	238	18	256	...	256
Appellate Cases and Memoranda							
a. Pending Beginning of Year	14	5	18	...	18	...	18
b. Initiated During Year	15	23	15	...	15	...	15
c. Terminated During Year	24	10	15	...	15	...	15
d. Pending End of Year	5	18	18	...	18	...	18
Results in Personally Handled Cases Terminated							
1. Dollars (Millions)							
a. Fines and Penalties Imposed	$5.0	$4.7	$5.0	-$0.4	$4.6	$0.4	$5.0
b. Amount Collected	4.9	2.2	2.4	-0.2	2.2	0.2	2.4
2. Outcomes							
a. Percent Favorable Outcomes	92	92	92	...	92	...	92
b. Number Favorable Outcomes	169	123	185	-9	176	22	198

Food and Drug Administration (FDA) Litigation. The Office of Consumer Litigation continued to lead a nationwide crackdown on the black-market in illegal steroid drugs. In 1990, 38 individuals have been sentenced for steroid trafficking. The Office has also undertaken major investigations relating to the smuggling and illegal distribution of unapproved bulk animal drugs for use in food-producing animals, which have resulted in the convictions of 5 companies and 31 individuals. Significant sentences were imposed on two Baltimore generic drug manufacturing firms and their owners. Each pleaded guilty to two felonies in connection with the marketing of unapproved and unlabeled ingredients in oral penicillin and the falsification of critical manufacturing and testing records on injectable antibiotics.

Federal Trade Commission (FTC) Litigation. The Office pursued litigation against a major telemarketing firm charged with a nationwide pattern and practice of deceptive magazine subscription sales via telephone, involving hundreds of thousands of consumers. In one Pennsylvania case, civil penalties of $90,000 and injunctive relief were obtained for violations of the Equal Credit Opportunity Act by a department store which unfairly evaluated the creditworthiness of married women. In a series of cases, 17 finance companies were enjoined from discriminating against elderly and divorced persons applying for short-term high-interest loans and paid $95,000 in civil penalties. Also on behalf of the FTC, the Office obtained civil penalties and injunctive relief in cases enforcing the agency's Used Car, Funeral Practices, Home Insulation and Mail Order Rules.

Consumer Product Safety Commission (CPSC) Litigation. The Office conducted litigation against two manufacturers of playground equipment for failure to report defects causing serious injuries to a large number of children. Both firms entered into consent decrees and paid civil penalties totalling $140,000. The Office also successfully completed a number of injunctive actions against importers of hazardous fireworks, seeking testing of the fireworks to assure compliance with the Federal Hazardous Substances Act.

Appellate Cases. The Office continued to conduct an active appellate practice in 1990. The Eighth Circuit Court of Appeals, in U.S. v. Larry Hiland, et al., affirmed the convictions of two chief executives and a corporation for the manufacture and distribution of E-Perol, a drug linked to 38 premature infant deaths. The 13-count felony convictions upheld on appeal were the first in the 51-year history of the Food, Drug and Cosmetic Act for the marketing of an illegal "new drug." The Third Circuit Court of Appeals reversed a district court's denial of an injunction which had been sought by FDA to prevent the illegal distribution of bulk animal drugs to veterinarians without approved new animal drug applications. The Third Circuit also affirmed a district court holding that the new animal drug provisions of the Food, Drug and Cosmetic Act are applicable to veterinarians and that the defendant veterinarian misbranded animal drugs when he sold them through the mail without labeling as to "adequate directions for use."

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Civil Division

Decision Unit: 2 CIV 18 Consumer Litigation

Resource Requirements	1989 Actual	1990 Actual	1991 Estimate	1992 Base Level Change	1992 Base Level Cum.	1992 Request Level Change	1992 Request Level Cum.
BUDGET AUTHORITY	$2,383	$2,928	$3,267	$215	$3,482	$90	$3,572
OUTLAYS	2,358	2,782	3,101	345	3,446	80	3,526
Appropriated Positions	35	35	35	...	35	...	35
FTE Workyears:							
Full-Time Permanent	26	29	36	...	36	1	37
Other	2	2	2	...	2	...	2
Subtotal	28	31	38	...	38	1	39
Overtime/Holiday	...	...	...	...	...	...	...
Subtotal	28	31	38	...	38	1	39
Reimbursable Workyears							
Other	...	...	...	...	...	...	...
Total	28	31	38	...	38	1	39

Program Changes: The Branch requires an additional $90,000 for human capital resources. (See Management and Administration section for justification.)

Schedule of Cost Inputs
(Dollars in thousands)

Organization: Civil Division

Decision Unit: 2 CIV 18 Consumer Litigation

	Increase Level		
	Pos.	FTE	Amount
Positions by Type			
Attorney	...	...	...
Paralegal	...	...	...
Secretary	...	...	...
Subtotal	...	...	...
1991 Pay Raise	...	1	$26
Administratively Determined Pay System	...	...	54
Training	...	...	4
Travel	...	...	2
Awards	...	...	4
Litigative Expenses	...	...	...
Equipment/Supplies	...	...	...
Subtotal	...	1	90
Total	...	1	90

Description of Cost Inputs

Human Capital Initiative - This increase provides $26,000 to cover "absorbed" pay increases, $54,000 to achieve more competitive salaries for attorneys, $4,000 for expanded training opportunities, $2,000 to allow for increased "mentoring" through pairing junior and senior attorneys on cases requiring travel and $4,000 for increased employee incentive awards.

CIVIL DIVISION
JUSTIFICATION FOR PROGRAM AND PERFORMANCE
Immigration Litigation - 2 CIV 19

Long-range Goal: To successfully defend challenges to Federal civil immigration programs, policies and initiatives and to conduct civil litigation under the immigration and naturalization laws.

Major Objectives:

To prevail in all civil immigration litigation arising under the Immigration and Nationality Act and related laws, including appellate litigation challenging trial court or administrative decisions in favor of the United States.

To promote and uphold enforcement activities involving the apprehension, detention and expulsion of aliens who lack lawful authority to remain in the United States.

To represent the United States in civil litigation brought against officers of the Immigration and Naturalization Service and other immigration-interested agencies in their official capacities.

To enforce employer sanctions provisions of the Immigration Reform and Control Act of 1986 (IRCA).

Base Program Description: By determining who will be authorized to work in the United States, who will be reunited with their families, who will be granted political asylum and who will be deported, the Immigration and Naturalization Service (INS) affects millions of lives. INS determinations affect the Nation's labor pool, its conduct of foreign policy and its ability to secure its borders. The work of the Office of Immigration Litigation (OIL) is critical to ensuring INS rulings are upheld.

"Traditional" areas of litigation include individual challenges to enforcement actions, class action attacks on statutes and programs and suits directed against Government officials responsible for regulating our Nation's borders. OIL is responsible for district and circuit court challenges to the apprehension, detention and deportation of aliens, the issuance of visas and passports and the Government's response to applications for naturalization, political asylum and other immigration benefits.

Enactment of IRCA, heightened efforts to combat terrorism, increased pressure by Central American migrants and the resumption of the repatriation agreement between the United States and Cuba have expanded the Office's responsibilities dramatically. As a result, between 1989 and 1992, our attorneys will face a 48 percent increase in their litigation caseload. The Office is defending major class actions challenging the legalization provisions of IRCA and the procedures adopted by the INS to implement it. As aliens are denied legalization, the Office is now receiving a growing number of individual challenges to legalization determinations.

Workload and Accomplishments: Workload of the Office of Immigration Litigation is presented in the following table:

Activity/Statistic	1989 Actual	1990 Estimate	1991 Estimate	1992 Change	1992 Base	1992 Request Level Change	1992 Request Level Cum.
Trial Cases							
1. Personally Handled Cases							
a. Pending Beginning of Year	373	382	506	35	541	...	541
b. Received During Year	177	369	245	9	254	...	254
c. Terminated During Year	168	245	210	18	228	...	228
d. Pending End of Year	382	506	541	26	567	...	567
2. Received and Referred to U.S. Attorneys	370	370	357	29	386	...	386
Appellate Cases and Memoranda							
1. Personally Handled							
a. Pending Beginning of Year	242	297	424	96	520	...	520
b. Received During Year	416	410	465	44	509	...	509
c. Terminated During Year	361	283	369	55	424	...	424
d. Pending End of Year	297	424	520	85	605	...	605
2. Received and Referred to U.S. Attorneys	78	60	42	3	45	...	45

Activity/Statistic	1989 Actual	1990 Estimate	1991 Estimate	1992 Change	1992 Base	1992 Request Level Change	1992 Request Level Cum.
Results in Personally Handled Cases Terminated							
a. Percent Favorable Outcomes	93	93	93	...	93	...	93
b. Number Favorable Outcomes	492	491	538	68	606	...	606

Ayuda v. Thornburgh and Haitian Refugee Center v. McNary. These and other class actions broadly challenge the procedures adopted by the Attorney General to implement the general legalization and special agricultural worker provisions of IRCA. Plaintiffs seek to expand the classes of potential amnesty and agricultural worker beneficiaries, to extend the statutory application deadlines and to limit the ability of the INS to regulate the entry and employment of aliens who might apply for IRCA benefits. To date, the Office has been largely successful in limiting judicial intervention in the amnesty and agricultural programs.

Perlera-Escobar v. INS, Umanzor-Alvarado v. INS and Matter of M.A. As political turmoil and socioeconomic misfortune in Central America and elsewhere bring to the United States many thousands of aliens who cannot otherwise qualify as lawful immigrants, asylum and withholding of deportation cases continue to be a substantial and expanding area of litigation. At issue are the alien applicant's obligation to establish a well-founded fear of persecution and the preservation of the primary authority of the Attorney General, in consultation with the Secretary of State, to adjudicate individual asylum claims.

Adams v. Baker, American-Arab Anti-Discrimination Committee v. Thornburgh and Boech v. Thornburgh. The Office is involved in a variety of court actions contesting efforts by the Attorney General and Secretary of State to remove alien terrorists from the United States and to prevent such aliens from crossing our borders in pursuit of their violent objectives. The plaintiffs in these cases typically raise constitutional challenge to both the statutory provisions prohibiting the admission of aliens inimical to national security and to the judgment that particular aliens pose such a threat. The Office has secured rulings sustaining the underlying statute and preserving Executive authority to exclude or expel alien terrorists.

Mester Manufacturing Co. v. INS, Haka's Akamai Service Inc. v. INS and In re INS Subpoena. Employer sanctions are central to immigration reform. Although most enforcement efforts are resolved at the administrative level, a growing number of employer sanction cases are being brought to court. The first such cases have now been decided by the courts of appeals. The Ninth Circuit has upheld both the validity of IRCA's regulation of employment actions and the INS' enforcement efforts against several individual employers; the Fifth Circuit has rejected a challenge to the subpoenas necessary to agency enforcement.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Civil Division

Decision Unit: 2 CIV 19 Immigration Litigation

Resource Requirements	1989 Actual	1990 Actual	1991 Estimate	1992 Base Level Change	1992 Base Level Cum.	1992 Request Level Change	1992 Request Level Cum.
BUDGET AUTHORITY	$4,031	$4,233	$4,718	$277	$4,995	$111	$5,106
OUTLAYS	4,045	4,021	4,479	471	4,950	96	5,046
Appropriated Positions	40	40	40	...	40	...	40
FTE Workyears:							
Full-Time Permanent	41	41	47	...	47	1	48
Other	...	...	...	...	...	...	...
Subtotal	41	41	47	...	47	1	48
Overtime/Holiday	1	1	1	...	1	...	1
Subtotal	42	42	48	...	48	1	49
Reimbursable Workyears							
Other	...	...	...	...	...	...	...
Total	42	42	48	...	48	1	49

Program Changes: The Branch requires an additional $111,000 for human capital resources. (See Management and Administration section for justification.)

Schedule of Cost Inputs
(Dollars in thousands)

Organization: Civil Division

Decision Unit: 2 CIV 19 Immigration Litigation

	Increase Level		
	Pos.	FTE	Amount
Positions by Type			
Attorney	...	...	...
Paralegal	...	...	...
Secretary	...	...	...
Subtotal	...	...	...
1991 Pay Raise	...	1	$34
Administratively Determined Pay System	...	...	64
Training	...	...	4
Travel	...	...	1
Awards	...	...	8
Litigative Expenses	...	...	...
Equipment/Supplies	...	...	...
Subtotal	...	1	111
Total	...	1	111

Description of Cost Inputs

Human Capital Initiative - This increase provides $34,000 to cover "absorbed" pay increases, $64,000 to achieve more competitive salaries for attorneys, $4,000 for expanded training opportunities, $1,000 to allow for increased "mentoring" through pairing junior and senior attorneys on cases requiring travel and $8,000 for increased employee incentive awards.

1040

CIVIL DIVISION
JUSTIFICATION FOR PROGRAM AND PERFORMANCE
Management and Administration - 6 CIV 30

Long-range Goal: Direct the conduct and supervision of all litigation and other matters delegated by the Attorney General to the Civil Division in a fair, consistent, economical and successful manner.

Major Objectives:

- To provide executive leadership while promoting employee participation in salient management concerns.
- To invest in human capital to attract and retain the caliber of staff needed to sustain the outstanding record of success in our litigation.
- To acquire technology which improves attorney productivity and promotes communication throughout the Department.

Base Program Description:

Civil litigation is a dynamic endeavor beset with constant change. As the Government's essentially commercial activities — buying, selling, constructing, shipping, employing and so forth — have mushroomed, the incidence of civil litigation has escalated accordingly. In addition to witnessing a steady rise in the number of cases, the Division has experienced growth in the variety of its suits as a result of multitudinous factors such as new laws and policies, changing economic conditions and unforseen international events. The advent of new technologies coupled with gargantuan document collections has expanded exponentially the complexity of cases the Division handles.

The sheer growth in and complexity of the Division's cases — combined with an enormous jump in dollar stakes — has challenged the Division's management to anticipate and adjust to the topsy-turvy legal environment in order to provide top-notch legal services to the Division's client agencies. The following innovations have amplified the ability of Division attorneys to prevail in the courtroom:

- Privatization. The Division has aggressively contracted out all commercial functions. Through privatization, the Division has reduced the number of positions allocated to functions such as mail distribution, messenger services and supply room operations and reallocated them to attorney, paralegal and management professional positions.
- Office automation. AMICUS is an integrated, automated, legal and management system serving over 2,400 Department employees. By providing instant access to word processing, electronic mail, automated legal data bases and brief banks, electronic spreadsheets, database management and other internal and external databases, AMICUS enables employees to better organize and manage their work efforts resulting in greater efficiency and effectiveness.
- Automated case management. The Civil Division is able to track cases from receipt to judgment enforcement through CASES, its automated case management system. CASES is the primary means for tracing case histories and evaluating trends and resource use.

- Automated Litigation Support (ALS). ALS employs current micrographics and computer technology, coupled with competitively procured contracts, to aid effective litigation management. Cheaper, faster and more reliable than manual systems, ALS is often the only viable alternative for a case involving massive volumes of information. One of the largest ALS projects involves managing a Department-wide automated Savings and Loan case tracking and clearinghouse system. It provides the key element of coordination to this important area of litigation. Responsible for classifying voluminous amounts of widely dispersed information, generating management reports for Congressional presentation and organizing complex case files, ALS plays an indispensable role in the Government's effort to resolve the Savings and Loan crisis.

The institutionalization of these innovations has not halted the Division's active pursuit of new technologies to augment managerial and litigative excellence. Through its participation in the Department's new telephone system, its plans to join the EAGLE family and its upcoming recompetitions of major automation contracts such as ALS, records management and data entry, the Division continues to demonstrate its commitment to an efficient and effective organization.

Eager to join the growing number of organizations who are putting Total Quality Management precepts into practice, the Division has already begun to move in the direction of participatory management. A Division task force ascertained the status of training opportunities in the Division, identified shortcomings and recommended increases in attorney and secretary training, incentive awards and mentoring. Brown bag lunches in which employees from all levels of the Division have an opportunity to express their concerns to senior managers are held regularly. Pilot projects in preventive lawyering have been launched. The Division is also exploring options for more creative use of existing manpower by expanding the use of work details between litigative branches. In addition to improving employee morale by broadening the professional experiences of individual attorneys, intra-Divisional details provide managers with a low-cost option for responding to temporary workload surges.

Sustained commitment to excellence in management and vigilant attention to holding down costs is crucial to the Division's ability to cope with the projected 15 percent rise in pending cases in a time of fiscal austerity. The following chart details the Division's growing workload:

1042

Workload and Accomplishments: The workload and accomplishments of the Management and Administration program are the sum of the workload and accomplishments of its branches and offices:

Activity/Statistic	1989 Actual	1990 Estimate	1991 Estimate	1992 Change	1992 Base	1992 Request Level Change	1992 Request Level Cum.
Defensive Cases							
1. Personally Handled Cases							
a. Pending Beginning of Year	15,006	13,101	12,925	627	13,552	...	13,552
b. Received During Year	2,949	3,307	4,248	1,142	5,390	...	5,390
c. Terminated During Year	4,854	3,483	3,621	-50	3,571	945	4,516
d. Pending End of Year	13,101	12,925	13,552	1,819	15,371	-945	14,426
e. Dollars at Issue (Millions)	$86,247	$95,042	$107,283	$11,977	$119,260	...	$119,260
2. Received and Referred to U.S. Attorneys	10,763	10,178	9,265	-719	8,546	...	8,546
Affirmative Cases							
1. Personally Handled Cases							
a. Pending Beginning of Year	1,878	2,026	2,311	277	2,588	...	2,588
b. Initiated During Year	1,078	1,178	1,243	-301	942	320	1,262
c. Terminated During Year	930	893	966	-17	949	65	1,014
d. Pending End of Year	2,026	2,311	2,588	-7	2,581	255	2,836
e. Dollars at Issue (Millions)	$16,659	$18,512	$22,215	$3,436	$25,651	$257	$25,908
2. Authorized for Litigation by U.S. Attorneys	2,061	1,985	1,681	-313	1,368	...	1,368

Activity/Statistic	1989 Actual	1990 Estimate	1991 Estimate	1992 Change	1992 Base	1992 Request Level Change	1992 Request Level Cum.
Appellate Cases and Memoranda							
1. Handled by Appellate Staff							
a. Pending Beginning of Year	1,028	1,122	1,146	129	1,275	...	1,275
b. Received or Initiated	1,817	2,030	2,226	31	2,257	140	2,397
c. Terminated During Year	1,723	2,006	2,097	49	2,146	105	2,251
d. Pending End of Year	1,122	1,146	1,275	111	1,386	35	1,421
2. Handled in Branches							
a. Pending Beginning of Year	1,522	1,107	1,310	148	1,458	...	1,458
b. Received or Initiated	1,234	1,341	1,605	172	1,777	...	1,777
c. Terminated During Year	1,649	1,138	1,457	147	1,604	...	1,604
d. Pending End of Year	1,107	1,310	1,458	173	1,631	...	1,631
3. Dollars at Issue (Millions)	$18,584	$21,819	$22,935	$1,532	$24,467	$143	$24,610
4. Handled by U.S. Attorneys or Client Agencies	1,334	1,355	1,451	141	1,592	...	1,592
All Cases and Memoranda							
1. Personally Handled							
a. Pending Beginning of Year	19,434	17,356	17,692	1,181	18,873	...	18,873
b. Received or Initiated	7,078	7,856	9,322	1,044	10,366	460	10,826
c. Terminated During Year	9,156	7,520	8,141	129	8,270	1,115	9,385
d. Pending End of Year	17,356	17,692	18,873	2,096	20,969	-655	20,314
e. Dollars at Issue (Millions)	$121,490	$135,373	$152,433	$16,945	$169,378	$400	$169,778
2. Handled by U.S. Attorneys or Client Agencies	14,158	13,518	12,397	-891	11,506	...	11,506

These charts provide summary data on cases personally handled by the Civil Division. The data is derived from CASES, the Division's automated case tracking and timekeeping system. Projections are based on historical data.

Accomplishments: Remarkable success was achieved in 1990 -- particularly with respect to efforts to protect the public fisc. The Division prevailed in the vast majority of defensive cases, saving the Treasury literally billions of dollars. In addition, awards and settlements were secured in a wide range of affirmative litigations including bankruptcy, loan defaults, bribery and kickbacks, pollution cleanup and procurement, customs and loan fraud. Highlights of the 1990 litigative record reveal that total collections far exceeded adverse claims awarded, generating a substantial net yield to the U.S. Treasury.

- Affirmative Awards. The Division secured an astounding $281 million for the Government in court-imposed awards and negotiated settlements. This is more than a six-fold increase over the comparable figure for 1986.

- Collections. Although many awards and settlements require long-term servicing, the Division collected in cash for the Treasury or its client agencies a record total of $223 million.

- Defense Against Monetary Claims. In cases defended by the Division, claimants sought a payout by the Government of more than $5 billion. Over 98 percent of these claims were defeated, and Government losses were held to $90 million.

- Return on Taxpayer Investment. Given a 1990 operating budget of $93 million, the Division's accomplishments translated into a significant return over investment to the Nation's taxpayers. For every dollar appropriated to the Division in 1990, more than twice that was collected in cash, three dollars were secured in judgments and settlements and 57 dollars in claims against the Government were defeated.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Civil Division

Decision Unit: 6 CIV 30 Management and Administration

Resource Requirements	1989 Actual	1990 Actual	1991 Estimate	1992 Base Level Change	1992 Base Level Cum.	1992 Request Level Change	1992 Request Level Cum.
BUDGET AUTHORITY	$6,284	$6,592	$13,218	$821	$14,039	$148	$14,187
OUTLAYS	6,296	6,262	12,084	$1,716	13,800	129	13,929
Appropriated Positions	101	104	107	...	107	...	107
FTE Workyears:							
Full-Time Permanent	97	90	111	1	112	2	114
Other	3	3	3	...	3	...	3
Subtotal	100	93	114	1	115	2	117
Overtime/Holiday	1	1	1	...	1	...	1
Subtotal	101	94	115	1	116	2	118
Reimbursable Workyears							
Other	...	...	...	...	...	...	...
Total	101	94	115	1	116	2	118

Program Changes:

Human Capital: Human capital is far and away the most critical asset of the Civil Division. Sustained success in the courtroom would be a futile aim without a pool of experienced, high caliber staff. Yet the Division has been required repeatedly to absorb salary increases and sustain the resultant decline in on-board strength. Funding for awards and training is inadequate — a mere .4 percent of the 1990 appropriation. It is no wonder that the strength of the Civil Division has been eroded by the exodus of capable litigators and by the chronic difficulty in attracting experienced, competent attorneys. The drain in human capital costs the Division an estimated $5.3 million each year. We must begin to reverse this trend or be prepared to face the consequences of a measurable deterioration in the quality of our legal representation. Implementation of a three-pronged approach to tackling this problem will require an increase of $2,228,000.

1991 Pay Raise Absorption ($858,000). A fundamental component of the retention of human capital is the ability to cover salary costs. Adequate funding is essential to the Division's ability to utilize its authorized workyears. Lacking this funding, the Division will sustain a considerable erosion of on-board staff, costing the Division about 15 workyears in 1992. We will have no choice but to direct fewer resources to affirmative litigation. As the workload tables reveal, the impact on the Treasury of this drop in caseload will be dramatic. Approximately 450 fewer affirmative cases will be brought during 1992 with a potential loss to the Treasury of over $456 million in recoveries. The cases foregone will span the spectrum of significant litigation, including high-stakes frauds actions, financial institutions recoveries, prominent environmental protection suits and appeals of lower-court defeats of key Administration policies such as drug-testing. Inadequate funding will have a disproportionate effect on the workload of the Office of Consumer Litigation, crippling efforts to prosecute steroids traffickers.

Administratively Determined Pay System ($1,074,000). Attorneys in the General Legal Activities components are compensated under the General Schedule (GS system), while Assistant U.S. Attorneys (AUSAs) are compensated under the Administratively Determined Pay System (AD system). By relating pay to performance, the AD system provides much greater flexibility over attorney compensation than the GS system, but more importantly, in recent years, the AD system has raised attorney salaries to levels more competitive with the private sector while GS salaries have been held nearly flat. As a result, there has been an ever-widening gulf between compensation for AUSAs and other Department lawyers. The disparity in pay within the Department of Justice is a contributing factor to the unprecedented attrition facing the legal components that was underscored in the May 1990 Report of the Attorney General's Compensation Task Force:

> "The exodus of experienced trial attorneys poses a severe threat to the litigating divisions which, if allowed to continue, will ultimately undermine the Department's ability to function effectively."

In 1989 the Civil Division sustained a 16 percent attrition rate--the worst among all legal divisions. The most direct way to mitigate this "brain drain" is to allow salaries to more closely approximate competitive levels. Funding for the AD System will enable gradual phasing in of sorely-needed competitive salaries.

Non-Wage Incentives ($296,000). Although the related issues of salary and promotion opportunities are the most critical factors influencing attorney attrition, non-wage factors influence significantly an attorney's decision to remain with -- or leave -- the Division. As non-wage incentives such as office size continue to shrink, it is essential that we make the most effective use of Federally-sanctioned avenues to create incentives which reward and promote excellence and which assist in attracting and retaining a qualified workforce.

Attorney training is an important incentive for improving job satisfaction and improving retention rates. Better-trained secretaries would provide an important retention incentive as well. A 1990 survey conducted by the Civil Division Training Task Force confirmed the inadequacy of the current training program. Half of the respondents felt that the current training opportunities in the Division were insufficient. Only 30 percent of the recent Honors Graduates surveyed by the Task Force considered their introduction to Department procedures and litigation skills sufficient. This fact is especially significant since the highest rates of attrition are found among those attorneys with less than three years of Division service.

To the extent that training directly increases the value of human capital, a training increase of $121,000 can begin to make a dent in the annual human capital loss the Division sustains as its experienced attorneys leave for the more lucrative private sector. The funding will be used to target training opportunities deemed to have the most widespread effect on the performance of our managers and litigators: supervisory training; Total Quality Management training; mentoring; and special Advocacy Institute classes for newly hired attorneys.

The current budget permits the Division to spend annually only $135 per employee for training. This minuscule amount belies the value of the Division's human resources. Moreover, it defies the very priorities President Bush proclaimed so poignantly in his State of the Union Address:

> "This Administration is determined to encourage the creation of capital - capital of all kinds . . . If we ignore human capital we lose the spirit of American ingenuity - the spirit that is the hallmark of the American worker."

Our program increase includes $175,000 for incentive awards. The Civil Division's award program is intended to recognize those employees whose surpassing excellence has contributed to the achievement of the Division's success. Funding exigencies have relegated this program to a scant .3 percent of the Division's budget, accentuating the Division's noncompetitive posture vis-a-vis the private sector. In the study "A Management Review of Attorney Recruitment and Retention in the Department's Legal Divisions," the survey data indicated that,

> " . . . the mixed feelings which attorneys have regarding how their performance is, [or] is not, personally recognized and rewarded, has the most direct connection with why they may seek employment elsewhere."

Thus, incentive awards are an integral part of the Division's approach to retaining our most qualified staff and avoiding the debilitating effect of excessive attrition.

Financial Management Information System (FMIS) Enhancements: A program increase of $37,000 is necessary to support the Department's implementation of the Administration's "Management Priorities for the 1992 Budget" as outlined in OMB memorandum M-90-05 dated July 16, 1990. The funding is essential to the upgrading of financial management systems consistent with the Administration's long-standing goals for consolidating, upgrading and modernizing a single integrated financial management system within each agency.

Schedule of Cost Inputs
Dollars in thousands)

Organization: Civil Division

Decision Unit: 6 CIV 30 Management and Administration

	Increase Level		
	Pos.	FTE	Amount
Positions by Type			
Attorney	...	...	...
Paralegal	...	...	...
Secretary	...	...	...
Subtotal	...	...	...
1991 Pay Raise	...	2	$94
Training	...	...	4
Travel	...	...	1
Awards	...	...	12
Litigative Expenses	...	...	...
Equipment/Supplies	...	...	...
Other Services	...	...	37
Subtotal	...	2	148
Total	...	2	148

Description of Cost Inputs

Human Capital Initiative - This increase provides $94,000 to cover "absorbed" pay increases, $4,000 for expanded training opportunities, $1,000 to allow for increased "mentoring" through pairing junior and senior analysts on projects requiring travel and $12,000 for increased employee incentive awards.

FMIS Improvement - This increase provides $37,000 for upgrading and modernizing the financial management system as part of a Department-wide effort.

Civil Division
Salaries and expenses
Financial Analysis - Program Changes
(Dollars in thousands)

Item	Appellate		Torts		Commercial		Fed. Programs		Consumer		Immigration		Management and Admin.		Total	
	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount
Grades																
GS/GM-15	...	...	1	64	...	...	...	...	...	...	...	...	...	...	1	$64
GS/GM-14	...	...	3	162	...	...	...	...	...	...	...	...	...	...	3	162
GS/GM-13	...	...	7	322	...	...	...	...	...	...	...	...	...	...	7	322
GS-12	...	...	2	77	...	...	...	...	...	...	...	...	...	...	2	77
GS-5	...	...	4	70	...	...	...	...	...	...	...	...	...	...	4	70
Total positions and annual rate	...	...	17	695	...	...	...	...	...	...	...	...	...	...	17	695
Lapse (-)	...	...	-8	-347	...	...	...	...	...	...	...	...	...	...	-8	-347
Prior year pay absorption	...	47	...	137	...	210	...	144	...	20	...	27	...	72	...	657
Administratively determined pay	...	84	...	213	...	287	...	148	...	40	...	50	...	...	...	822
Total workyears and personnel compensation	...	131	9	$698	...	$497	...	292	...	60	...	77	...	72	9	1,827
Personnel benefits	...	50	...	267	...	215	...	118	...	24	...	29	...	34	...	737
Travel and transportation of persons	...	1	...	48	...	9	...	4	...	2	...	1	...	1	...	66
Transportation of things	...	...	...	7	...	...	...	...	...	...	...	...	...	...	...	7
Rent, communications and utilities	...	...	...	187	...	...	...	...	...	...	...	...	...	...	...	187
Printing and reproduction	...	...	...	8	...	...	...	...	...	...	...	...	...	...	...	8
Other services	...	3	...	2,756	...	508	...	12	...	4	...	4	...	41	...	3,328
Supplies and materials	...	...	...	11	...	...	...	...	...	...	...	...	...	...	...	11
Equipment	...	...	...	21	...	...	...	...	...	...	...	...	...	...	...	21
Total workyears and obligations 1991	...	185	9	4,003	...	1,229	...	426	...	90	...	111	...	148	9	6,192

Civil Division
Salaries and Expenses
Detail of Permanent Positions by Category
Fiscal Years 1990 - 1992

Category	1990 Authorized	1991 Anticipated Appropriation	1992		
			1992 Base	Increase	Total
Attorneys (905)	480	562	562	11	573
Paralegal Specialists (950)	49	62	62	2	64
Gen. Admin. Clerical and Office Services (300-399)	355	397	397	4	401
Total	884	1,021	1,021	17	1,038
Washington	844	981	981	17	998
U.S. Field	39	39	39	...	39
Foreign Field	1	1	1	...	1
Total	884	1,021	1,021	17	1,038

Environment and Natural Resources Division

Salaries and Expenses, General Legal Activities

Crosswalk of 1991 Changes
(Dollars in thousands)

Estimates by Program	1991 President's Budget			Approved Reprogrammings			1991 Program Supplementals Requested			1991 Estimate		
	Perm. Pos.	WY	Amount	Perm. Pos.	WY	Amount	Perm. Pos.	WY	Amount	Perm. Pos.	WY	Amount
Land, Natural Resources and Indian Matters:												
Federal Appellate Activity	25	26	$2,219	...	...	...	...	...	...	25	26	$2,219
Land Acquisition	32	28	3,025	...	...	...	...	...	...	32	28	3,025
Environmental Protection	224	202	24,313	...	...	...	...	...	$203	224	202	24,516
General Litigation	110	113	10,517	...	...	...	...	...	113	110	113	10,630
Management & Administration	39	34	3,650	...	...	...	...	...	...	39	34	3,650
Total	430	403	43,724	...	...	...	...	...	316	430	403	44,040

A Department-wide supplemental increase is sought for increased court reporting and transcription rates -- the Environment Division share is $316,000.

1052

Environment and Natural Resources Division
Salaries and Expenses, General Legal Activities
Summary of Requirements
(Dollars in thousands)

Estimates by Program	1990 as Enacted			1990 Planned			1991 Appropriation Anticipated			1992 Base			1992 Estimate			Increase/Decrease		
	Perm. Pos.	WY	Amount	Perm. Pos.	WY	Amount	Perm. Pos.	WY	Amount	Perm. Pos.	WY	Amount	Perm. Pos.	WY	Amount	Perm. Pos.	WY	Amount
Land, Natural Resources and Indian Matters:																		
Federal Appellate Activity...	25	26	$2,120	25	24	$2,133	25	26	$2,219	25	26	$2,458	27	27	$2,536	2	1	$78
Land Acquisition.....	32	28	2,898	32	28	2,694	32	28	3,025	32	28	3,351	32	28	3,351	...	...	...
Environmental Protection.....	178	161	16,348	178	154	16,163	224	202	24,516	224	225	28,022	289	258	39,221	65	33	11,199
General Litigation.....	110	111	10,002	110	103	10,006	110	113	10,630	110	113	11,774	130	124	14,863	20	11	3,089
Management & Administration..	38	30	3,145	38	31	3,217	39	34	3,650	39	34	4,041	44	37	4,242	5	3	201
Subtotal.....	383	356	34,713	383	340	34,213	430	403	44,040	430	426	49,646	522	474	64,213	92	48	14,567
Reimbursable workyears		212			189			212			212			231			19	
Total workyears		568			529			615			638			705			67	

Environment and Natural Resources Division
Salaries and Expenses, General Legal Activities
Summary of Change
(Dollars in thousands)

Adjustments to base:	Perm Pos.	Work-years	Amount
1991 as requested	430	403	$43,724
Supplemental	...	...	316
1991 Appropriation Anticipated	430	403	44,040
Mandatory increases:			
One additional compensable day	...	...	88
1991 Pay annualization	...	...	205
1992 Pay increase	...	...	723
Within-grade increases	...	...	128
Annualization of 1991 program increases	...	23	867
Executive level and SES pay increase	...	...	87
Health benefits	...	...	128
Federal Employees Retirement System (FERS)	...	...	45
Federal Insurance Corporation Act (FICA)	...	...	52
Travel: Mileage	...	...	7
Postage	...	...	13
GPO and Department printing	...	...	28
Employee data and payroll services	...	...	7
Financial Operations Service	...	...	9
Security Investigations	...	...	3
Security Reinvestigations	...	...	171
GSA Rent	...	...	1,781
Forced relocation expenses	...	...	394
GSA recurring reimbursable services	...	...	277
General pricing level adjustment	...	...	650
Total, mandatory increases	...	23	5,663
Decreases:			
Associated with 1991 increases	...	...	(55)
Unemployment compensation	...	...	(2)
Total, decreases	...	...	(57)
1992 Base	430	426	49,6[illegible]

Justification of Program and Performance
Environment and Natural Resources Division
Salaries and Expenses, General Legal Activities: 15 0128
Federal Appellate Activity 2LDN01

Long-Range Goal: To defend or assert the government's position in Environment and Natural Resources Division cases in the appellate courts.

Major Objectives:
To defend successful trial court decisions and to file appeals from adverse decisions in all cases where appellate review is warranted.

To fully satisfy client agencies by formulating legal positions in appellate cases that best represent their interests.

To monitor private party cases and participate as amicus curiae in selected cases.

Base Program Description: The Appellate unit of the Environment and Natural Resources Division handles 95 percent of its cases as staff-lead, and works closely with the U.S. Attorneys and Division attorneys handling the remainder. Most work involves preparing briefs and oral arguments. This requires independent research as well as coordinating the positions of client agency staff and trial section attorneys, analyzing the bases for appeal, and seeking permission from the Solicitor General's Office to appeal adverse decisions. The unit also prepares draft briefs for the Solicitor General.

Accomplishments and Workload: Accomplishments of the Appellate program are presented in the following table:

Ite.	1989	1990	1991	1992 Base	1992 Change	1992 Request
Cases/Matters pending, beginning of year	1,286	1,304	1,239	1,289	...	1,369
Cases/Matters received	286	292	325	330	...	330
Workload production Estimates:						
a. Cases/Matters closed	268	357	275	250	25	275
b. Briefs Filed	239	245	260	275	5	280
c. Oral Arguments	120	120	140	150	...	150
d. Briefs for the Solicitor General	107	115	130	140	...	140
e. Dispositive Motions	86	90	100	100	...	100
Cases/Matters pending, end of year	1,304	1,239	1,289	1,369	25	1,344

One of the factors which affects the work of the Appellate Section is the type of case on appeal, and we are predicting a shift in the makeup of our workload. At present, almost 60 percent of the cases on appeal derive from the Land Acquisition and General Litigation decision units. By contrast, in 1992 we expect that 57 percent of our work will arise in the Environmental Protection area. The highly complex nature of these cases in the district courts, and the voluminous trial transcripts and exhibits attendant to environmental cases, will have some impact on the appellate litigation of the cases.

The Appellate Section enjoyed several notable successes this past year. Among these are victories in an increasingly large docket of criminal cases. These cases make it clear that environmental crimes will be enforced with the same vigor as other crimes. Thus, Protex Industries v. United States affirmed convictions for 16 violations of environmental and other laws, including the first violations of the prohibition on "knowingly subjecting workers to eminent danger of death or serious bodily injury" in RCRA; United States v. Hoflin affirmed criminal convictions for disposing of hazardous waste in violation of RCRA and for violating the conditions of a National Pollutant Discharge Elimination System permit under the Clean Water Act; United States v. Carr affirmed a conviction under Section 103 of CERCLA for failing to report a hazardous waste release from a facility for which the defendant was responsible; United States v. Neville Chemical Co. affirmed a conviction for unlawful disposal of hazardous wastes in violation of RCRA.

The Section has also had success in a variety of civil cases. One such case was Leslie Salt Co. v. United States (petition for rehearing pending). In this Clean Water Act and Rivers and Harbors Act case, the Ninth Circuit held that the Corps of Engineers has regulatory jurisdiction over portions of a 153-acre tract near San Francisco Bay that had become "waters of the United States" even though their status as wetlands was a result of man-made changes to the property. This difficult case is a significant benefit to the government's efforts to maintain wetlands throughout the Nation. Another successful civil ruling was had in City of Las Vegas, et al. v. Lujan. The Secretary of the Interior, acting pursuant to the Endangered Species Act, issued an emergency rule listing the Mojave population of the Desert Tortoise as an endangered species. The City of Las Vegas and others filed suit to enjoin the emergency regulation. The district court refused a preliminary injunction and the court of appeals affirmed. The court of appeals found that the emergency provisions of the Act allow the Secretary to "shoot first and ask [all of the] questions later," and do not require as high a level of proof as final regulations. The court found that the Secretary could rely upon inconclusive scientific evidence where no superior evidence was available, and that the Secretary did not have to show that the regulations would necessarily be successful in saving the species. This case is important in assuring that the Secretary can take prompt action in emergencies to protect endangered species.

Finally, Northwest Food Processors Association v. Reilly illustrates how complicated some of our environmental suits have become. EPA cancelled the Federal Insecticide, Fungicide and Rodenticide registration for a popular herbicide called dinoseb. Certain registrants challenged the cancellation, but settled with the EPA prior to an evidentiary hearing. The last two registrants who manufactured and distributed the pesticide entered into an agreement with the agency that the remaining registrations would be cancelled but that some of the remaining stocks could continue to be used. This agreement was attacked by users, who wanted continued registration of the pesticide, and by environmentalists, who opposed any further use of existing stocks. The Ninth Circuit upheld the agency completely, ruling that the users could not force the EPA to adjudicate the registration of the product in light of its agreement with the manufacturers, and that the EPA quite properly considered potential economic disruption when it allowed continued use of the herbicide.

1056

Program Funding Level Requirements
(Dollars in thousands)

Organization: Environment and Natural Resources Division Decision Unit: 2INDO1 Federal Appellate Activity

	1989	1990	1991	1992		
				Base Level	Change	Request Level
Resource Requirements						
BUDGET AUTHORITY	$1,842	$2,133	$2,219	$2,458	$78	$2,536
OUTLAYS	1,835	2,088	2,194	2,419	66	2,485
Appropriated Positions	27	25	25	25	2	27
FTE Workyears:						
Full-Time Permanent	26	23	25	25	1	26
Other	1	1	1	1	...	1
Subtotal	27	24	26	26	1	27
Overtime/Holiday	...	...	...	...	...	...
Total	27	24	26	26	1	27
Reimbursable Workyears:						
Full-Time Permanent	...	...	...	...	...	...
Other	2	4	4	4	2	6
Subtotal	2	4	4	4	2	6
Overtime/Holiday	...	...	...	...	...	...
Total	2	4	4	4	2	6
Total Workyears	29	28	30	30	3	33

Program Changes: The Appellate program requests 2 additional attorneys, 1 workyear and $78,000 in 1992. Given the personnel increases sought in the President's 1991 budget (i.e., 46 positions for environmental protection litigation) as well as in this present 1992 request, the appellate workload will inevitably increase.

Specifically, additional appellate attorneys are necessary to handle the growing criminal docket which is demanding ever-greater attention from this program as demonstrated by the above Accomplishments portion of this decision unit's request. The cases emanate from both the Environmental Crimes and the Wildlife and Marine Resources Sections. As stated earlier, one of the factors which affects the work of the Appellate Section is the type of case on appeal, and we are experiencing a shift in the makeup of our workload. At present, almost 60 percent of the cases on appeal derive from the Land Acquisition and General Litigation decision units. By contrast, in 1992 we expect that 57 percent of our work will arise in the Environmental Protection area. The highly complex nature of these cases in the district courts, and the voluminous trial transcripts and exhibits attendant to environmental cases, will have some impact on the appellate litigation of the cases.

In addition, by 1992, this program anticipates an influx of Federal Aviation Administration cases given the President's 1991 $4.7 billion initiative involving airport expansion and modernization. Even now, preliminary work on Environmental Impact Statements for new runways are underway at the following major airports: Dallas-Ft. Worth; Phoenix; Pittsburgh; Louisville; Memphis; Baltimore; Colorado Springs; New Orleans; Philadelphia; and Washington Dulles. While litigation is not a certainty for all of these projects, we fully expect to defend the FAA in at least of these projects. Because of a provision in the Federal Aviation Act, these suits will be brought directly in the courts of appeals as petitions for review, thereby generating significant additional work for this Section.

Schedule of Cost Inputs

Organization: Environment and Natural Resources Division Decision Unit: 2LDN01 Federal Appellate Activity

Item	1992 Base			1992 Request			Increase/Decrease		
	Pos	FTE	Amount	Pos	FTE	Amount	Pos	FTE	Amount
Attorney	16	16	$1,040	18	17	$1,091	2	1	$51
Paralegal	1	1	40	1	1	40	...	...	...
Clerical	8	9	216	8	9	216	...	...	...
Subtotal	25	26	1,296	27	27	1,347	2	1	51
Modular costs	...	...	1,162	...	...	1,189	...	...	27
Total	25	26	2,458	27	27	2,536	2	1	78

Description of Cost Inputs

Two attorney positions to handle increased environmental appellate work and NEPA-related airport construction cases in the appeals courts.

Environment and Natural Resources Division

Salaries and Expenses, General Legal Activities: 15 0128

Summary of Decision Unit Resources by Object Class
(Dollars in thousands)

Organization: Environment and Natural Resources Division

Decision Unit: 21ND01 Federal Appellate Activity

Object Class		1990 Actual		1991 Estimate		1992 Estimate		Increase/Decrease	
		Workyears	Amount	Workyears	Amount	Workyears	Amount	Workyears	Amount
11	Personnel Compensation	24	$1,190	26	$1,300	27	$1,404	1	$104
12	Personnel benefits		190		208		225		17
21	Travel & transportation of persons		76		79		82		3
22	Transportation of things		30		32		33		1
23.1	GSA rent		200		217		225		8
23.2	Rental payments to others		...		...		...		...
23.3	Communications, utilities and miscellaneous charges		24		26		27		1
24	Printing and reproduction		33		28		29		1
25	Other services		410		281		461		180
26	Supplies and materials		22		24		25		1
31	Equipment		22		24		25		1
	Total obligations	24	2,197	26	2,219	27	2,536	1	317 *

* Includes $239,000 in adjustments to base.

1060

Justification of Program and Performance
Environment and Natural Resources Division
Salaries and Expenses, General Legal Activities: 15 0128
Land Acquisition 2LDN04

Long Range Goal: To obtain real property necessary for public purposes through condemnation proceedings which exercise the sovereign power of eminent domain, securing the lowest possible compensation awards consonant with fairness to both landowners and the government.

Accomplishments and Workload: Accomplishments of the Land Acquisition program are presented in the following table. NOTE: The workload in 1992 (and several years thereafter) is expected to be significantly larger than prior years as a result of legislation authorizing two major land acquisition projects: the Act to Establish the Big Cypress National Preserve Addition in the State of Florida, signed into law April 29, 1988, and the Everglades National Park Protection and Expansion Act of 1989, signed into law December 13, 1989. The National Park Service anticipates referring about 6,600 tracts of land for condemnation for these projects over a five year period commencing the second quarter of 1992. (The National Park Service had earlier projected that the referrals of condemnations would commence in 1990, but funding for the project was not forthcoming.) The Everglades National Park protection and expansion project is the centerpiece of the President's "America the Beautiful" initiative.

Item	1989	1990	1991	1992 Base
Tracts pending, beginning of year	5,768	5,618	5,468	5,518
Tracts received	560	575	800	1,500
Tracts closed	710	725	750	800
Tracts pending, end of year	5,618	5,468	5,518	6,218
Preliminary Opinions of Title Prepared	110	150	150	150
Final Opinions of Title Prepared	79	150	150	150
Agency-delegated Title Opinions Reviewed	1,352	2,200	2,200	2,200
District Court Title Hearings (Tracts)	...	10	20	20
Appraisal Reviews (Tracts)	433	450	450	600

The currently pending workload is comprised of 5,709 cases. Of these, 3,407, or 60 percent, are handled by Assistant U.S. Attorneys, with minimal advice and assistance from the program; 1,511, or 26 percent, are handled jointly by AUSAs and Section lawyers; and the remaining 791, or 14 percent, are handled exclusively by staff from Land Acquisition. Of note, the dollars at issue in these cases are as follows: U.S. Attorney lead cases account for $34.4 million (8 percent); jointly handled cases involve $236.7 million (55 percent); and staff-lead cases account for $159.4 million (37 percent).

The workload of this section involves not only condemnation litigation but the contribution of a separate Title Unit and an Appraisal Unit. In 1989, the Land Acquisition Section handled claims of over $86 million for property which government-contract appraisers valued at $30 million. This difference of $56 million was the critical issue in the Section's lawsuits. During 1989, courts awarded judgments in these cases totaling

only $39.6 million, or $46.4 million less than the amount claimed. Since the total cost of this program in 1989 was a mere $2.6 million, the land acquisition program saved the federal fisc more than $18 for every dollar it cost.

Turning to significant cases handled this past year, one of the most notable involved the taking of part of the facilities of a hydroelectric generating plant owned by the Pacific Gas and Electric Company (PG&E) and the compensation due for the company's loss of power generating capacity. The appropriate measure of compensation in such instances involves capitalization of the net income that would have been produced by the plant over a period of time; PG&E contended that period of time should have been 50 years (the remaining economic life of the plant) which they valued at $113 million. The program contended that the proper period was less than a year, based on a provision of PG&E's federal operating license, and therefore worth only $5 million. The judge agreed, effectively obviating roughly $100 million of the company's original claim, in U.S. v. 42.13 Acres of Land in Tuolumne and Calaveras Counties, California and Pacific Gas and Electric Company, et al.

Another major case involving potentially $100 million in cost-avoidance is currently in litigation and dates back to 1977. At issue in U.S. v. 16,286.08 Acres of Land, et al. is a taking of coal lands where the landowner and government have vastly different positions on value and damage. The landowner's proposed testimony assesses the worth and damage as ranging between $198 to $244 million, inclusive of interest versus the government's claim of $10 million. After months of voluminous document discovery, the program was able to file a motion for partial summary judgment, seeking to exclude the severance damage worth over $100 million. We contend that the requisite unity of ownership between the part taken and the alleged severed area is absent because the landowner had, prior to the taking, leased all the coal in the severed area to a third party for 30 years.

This program continues its active role in educating governmental groups about the intricacies of federal eminent domain law and practice. Examples of activities include participation in a Corps of Engineers seminar in Kansas City and a similar event hosted by the FAA in Oklahoma City in May 1990. Additionally, several members of the section will participate in a Legal Education Institute seminar entitled "Advanced Environmental Law: Land Acquisitions". This latter seminar, which was devised by the Land Acquisition and Environmental Defense Sections, is designed to alert and educate our client agencies to the effect of the various environmental statutes on real property transactions; it will probably be offered twice yearly on an ongoing basis. The section is also increasingly involved with the EPA on the intricate questions presented involving land acquisition needs under the CERCLA program. Finally, the section has requested that the Advocacy Institute schedule another one week eminent domain seminar. These seminars, previously held every three years, attract approximately 200 participants, the majority of whom are Assistant U.S. Attorneys and client agency representatives.

1092

Program Funding Level Requirements
(Dollars in thousands)

Organization: Environment and Natural Resources Division Decision Unit: 21ND04 Land Acquisition

	1989	1990	1991	1992 Base Level
BUDGET AUTHORITY	$2,629	$2,694	$3,025	$3,351
OUTLAYS	2,621	2,683	2,973	3,289
Appropriated Positions	34	32	32	32
FTE Workyears:				
Full-Time Permanent	27	28	28	28
Other	...	...	...	...
Subtotal	27	28	28	28
Overtime/Holiday	...	...	...	...
Total	27	28	28	28

Justification of Program and Performance
Environment and Natural Resources Division
Salaries and Expenses, General Legal Activities: 15 0128
Environmental Protection 2LDN31

Long Range Goal: To defend and enforce federal programs to protect wildlife and the environment without undue economic costs, and to promote voluntary compliance with the Nation's environmental protection laws.

Major Objectives:
To seek and obtain stiff criminal penalties and incarceration for persons and corporations involved in illegal dumping, and in illegal plant and wildlife trading.

To vigorously enforce legal standards and limits on pollution and waste discharges.

To maintain the rational, coherent operation of agency programs through the defense of agency actions and rules and regulations in court.

To successfully defend environmental programs and regulations from narrowly restrictive or overly broad interpretation.

To defend federal agencies whose facilities are the subject of litigation, while encouraging full compliance with environmental standards.

To recover monies spent by or on behalf of federal agencies for damage to natural resources within their control.

Base Program Description: The Environmental Protection unit is comprised of the Environmental Crimes, Environmental Defense, Environmental Enforcement, and Wildlife and Marine Resources Sections. The Environmental Crimes Section prosecutes criminal violations of environmental protection statutes such as the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, and Toxic Substances Control Act, where the standards for criminal as opposed to civil sanctions involve willful, knowing violations. This criminal initiative was undertaken first in 1982 when a Crimes Unit was established as part of the Environmental Enforcement Section. In 1987, as a result of the success of the program, a separate Environmental Crimes Section was created within the Environment and Natural Resources Division.

The Environmental Defense Section defends rule-making, regulatory and permit actions and decisions made by the Environmental Protection Agency, the Army Corps of Engineers, and the Coast Guard, and represents federal agencies sued for violations of environmental laws. The Section's cases include petitions for review of agency regulations in the appellate courts, and district court cases involving permit decisions, federal facility lawsuits, and dredge and fill actions in navigable waterways. In addition to its defensive caseload, the Section has responsibility for affirmative litigation to enforce the wetlands laws.

The Environmental Enforcement Section conducts affirmative civil litigation to control and abate pollution. This program is primarily responsible for judicial enforcement of Environmental Protection Agency programs which regulate discharges into the Nation's air and water, and govern pesticide operations, solid waste storage, and nuclear waste, and natural resource damages on behalf of many other federal agencies. Approximately 90 percent of civil enforcement actions are personally handled by Environmental Enforcement Section staff attorneys. The Section also has primary responsibility for Superfund litigation to compel site cleaning and to recover federal funds.

1064

The Wildlife and Marine Resources Section handles civil and criminal litigation to halt the growth in illegal wildlife and plant trade, and to defend federal agency regulations concerning wildlife and plants and federal programs such as dam construction which are challenged on wildlife damage grounds.

Accomplishments and Workload: Accomplishments of the Environmental Protection decision unit are presented sequentially by program element:

Environmental Crimes	1989	1990	1991	1992 Base	1992 Change	1992 Request
Cases/Matters pending, beginning of year	240	337	477	607	...	607
Cases/Matters received	200	240	260	300	...	300
Cases/Matters closed	103	100	130	200	50	250
Cases/Matters pending, end of year	337	477	607	707	(50)	657

Environmental Defense	1989	1990	1991	1992 Base	1992 Change	1992 Request
Cases/Matters pending, beginning of year	1,284	1,472	2,020	2,486	...	2,486
Cases/Matters received	425	920	831	1,080	...	1,080
Cases/Matters closed	237	272	365	300	45	345
Cases/Matters pending, end of year	1,472	2,020	2,486	3,266	(45)	3,221

Environmental Enforcement	1989	1990	1991	1992 Base	1992 Change	1992 Request
Cases/Matters pending, beginning of year	1,291	1,390	1,527	1,707	...	1,707
Cases/Matters received	302	300	425	460	...	460
Cases/Matters closed	203	163	245	250	30	280
Cases/Matters pending, end of year	1,390	1,527	1,707	1,917	(30)	1,887

Wildlife and Marine Resources	1989	1990	1991	1992 Base
Cases/Matters pending, beginning of year	912	1,000	950	1,000
Cases/Matters received	283	350	350	350
Cases/Matters closed	195	400	300	300
Cases/Matters pending, end of year	1,000	950	1,000	1,050

Environmental Protection Decision Unit	1989	1990	1991	1992 Base	1992 Change	1992 Request
Cases/Matters pending, beginning of year	3,827	4,199	4,974	5,800	...	5,800
Cases/Matters received	1,210	1,710	1,866	2,190	...	2,190
Cases/Matters closed	738	935	1,040	1,050	125	1,175
Cases/Matters pending, end of year	4,199	4,974	5,800	6,940	(125)	6,815

Environmental Crimes - Since its October 1982 inception as a sub-unit within the Environmental Enforcement section, the Environmental Crimes program has returned indictments against 619 corporations and individuals; thus far, 473 defendants have pled or been found guilty resulting in $28.2 million in fines and the imposition of over 307 years of jail time, of which 118 years have been served as of April 2, 1990. The cases prosecuted have involved a broad spectrum of industry, including shipbuilders, oil refineries and pipelines, tanneries, demolition companies, chemical storage facilities, wood preservers, printing companies, emissions testing laboratories, food processors, dairies, auto body shops, dry cleaners, and companies whose sole or primary business is the handling of hazardous waste. These include a number of large, Fortune 500 companies such as Nabisco, Ralston-Purina, Keebler, W.R. Grace & Co., Orkin Exterminating, Ocean Spray, and Pennwalt.

Building on the momentum of last year, this program continues to break new ground, securing convictions and fines against major corporate violators of the environmental laws and thus furthering its deterrent message. In August, a U.S. District Court judge aided our efforts to send forth a strong deterrent message to the corporate community when he insisted that the chairman of Pennwalt (one of the largest companies in the U.S. with earnings of $1.1 billion in 1988) personally deliver the company's guilty plea, rather than accept the plea from a corporate lawyer. (U.S. v. Pennwalt Corporation, Inc., et al.; W.D.Wa) In so doing, the company acknowledged responsibility for a severely corroded steel storage tank which dumped 75,000 gallons of a hazardous substance used as a bleaching agent in the pulp and paper industry into the Puget Sound. Pennwalt agreed to pay the maximum fine of $500,000 plus reimburse the U.S. for an additional $600,000 for costs associated with the spill response and containment. This is the first time an environmental criminal violation has been linked to a knowing failure of corporate officials to perform preventative maintenance.

Following a three-and-one-half week jury trial on charges of mail fraud, false statements, illegal transportation and disposal of hazardous wastes and failure to report the release of a hazardous substance under CERCLA, a major New England hazardous waste transporter, its president and others were convicted on 18 counts. In December of 1989, sentences (including an 18-month jail term for the company president) and fines in excess of $100,000 were imposed and the company's waste transporter permit was revoked. U.S. v. MacDonald & Watson Waste Oil co., et al., (D.R.I.). Parenthetically, the company's president was the first person in Rhode Island to be sentenced as an environmental polluter.

In May of 1990, Borjohn, a metal finishing corporation and its president were the first defendants ever to be convicted of knowing endangerment under the Clean Water Act. They were charged with knowingly endangering employees whom they illegally ordered to dump industrial waste water containing toxic metals and dangerous chemicals into the Burlington sewer system. The employees were exposed to toxic levels of nickel, nitric acid and nitrogen dioxide, placing them at risk of serious burns, respiratory tract damage, skin disease, asthma and cancer. The company president is scheduled to be sentenced in October, 1990. (U.S. v. Borjohn Optical Technology, Inc., and John Borowski - D. Mass.)

Finally, this program issued what many regard as the most important environmental criminal indictment ever filed by this Division. On February 27, 1990, the Exxon Corporation and its wholly-owned subsidiary, the Exxon Shipping Corporation, were charged with criminal violations of the Clean Water Act and others, stemming from the 10+ million gallon oil spill last year of the Exxon-Valdez which resulted in the most extensive environmental damage to waters and wildlife known. The 700-mile migration of crude oil fouled waters and shorelines of both national wildlife refuges and national parks, causing the deaths of more than 36,000 migratory birds and numerous other varieties of wildlife. Sentencing under the Alternative Fines Act could result in fines exceeding $600 million, exclusive of natural resource damage civil claims. Trial is currently scheduled for the Spring of 1991.

Environmental Defense - At every step taken to enforce environmental laws, the United States is challenged by polluters and others affected by those laws. Defending these challenges is the responsibility of the Environmental Defense program. Among its accomplishments this past year, the Defense Section has successfully cleared the way not only for enforcement of numerous environmental programs, including tighter controls for toxic

10066

pollutants and protection of our nation's wetlands, but also for enforcement of its sister programs within the same decision unit. A major by-product of this activity is significant cost-avoidance because it frequently protects the government from enormous monetary losses.

The Courts of Appeals have upheld balanced EPA controls of toxic and hazardous pollutants after challenges by both the regulated entities and environmental groups. In Chemical Manufacturers Association v. EPA, the Fifth Circuit sustained a comprehensive set of regulations governing discharges to water from the organic chemicals, plastics and synthetic fibers industry. To appreciate the far-ranging scope of these regulations, one must know that they are expected to remove over 130 million pounds of toxic and other pollutants annually from the nation's lakes, rivers and streams. Twenty-nine suits were filed challenging multiple provisions of these regulations; as the court's opinion notes, the cases generated over 3,000 pages of briefing by all sides, including merits briefs and motions for stays of the rules, and culminated in an unprecedented two days of appellate arguments (such arguments normally take one hour).

On another front, the Defense program benefitted the Environmental Crimes program when it defended the FBI's conduct of a surprise search on a contract-operated nuclear and chemical facility. I so doing, the Environmental Defense program successfully thwarted the attempts of the government contractor to stop the criminal investigation (Rockwell v. United States; aka "Rocky Flats" in the District of Colorado). The decision confirmed the principle that industries cannot expect to hide from criminal environmental investigations behind their status as government contractors. The Defense Section also won significant victories in the protection of wetlands. In Leslie Salt, the Ninth Circuit upheld the principle that all the nation's waters and wetlands -- even those influenced by man-made changes -- are protected by the Clean Water Act. Confirmation that artificially created as well as natural waters must be protected assures that the nation's water quality can be properly maintained. In pursuing those who destroy wetlands, the Defense Section prevailed in several jury and non-jury enforcement trials; since the Supreme Court authorized jury trials in 1987, the government has prevailed in each case heard by a jury. In U.S. v. Mclesky, U.S. v. Gordon, and U.S. v. Hobbs, the government won jury and bench verdicts of liability for filling wetlands and obtained restoration of the disturbed environment, mitigation through creation and enhancement of wetlands habitat, and civil penalties.

When federal agencies themselves conduct activities which generate hazardous waste and pollutants, they must also comply with environmental laws. Where a state or locality tries to impose unreasonable or unjustified impositions on a federal facility, however, the Defense Section has successfully protected the federal agency from such requirements. In a landmark decision, the Ninth Circuit, in U.S. v. Washington, held that states and local governments may not assess civil penalties against federal agencies under the hazardous waste laws, finding that Congress had not agreed to allow such raids on the federal treasury. Similar civil penalty issues are pending in the Sixth Circuit, and other district courts. In two district courts, where state environmental orders were challenged as arbitrary, unnecessary for environmental protection and excessively expensive, the courts agreed with the U.S.'s position. In U.S. v. Texas Water Commission, the court set aside a Texas permit condition requiring moving and reconstructing a waste storage area, agreeing with the federal agency that the permitted location was fully protective of the environment. Similarly, in Pennsylvania v. Navy, a state court found, over the claims of the State, that the Navy's plans for remedying environmental contamination were sound and cost effective, and rejected the State's proposal for a more costly approach. In each of these instances, the Defense Section assured that the environment was sufficiently protected while still protecting federal agencies from unreasonable local regulation and unnecessary expenditures of limited agency resources. Such unrealistic state demands have ranged as high as $40 million more than the federal facility and EPA believe is appropriate. Such is the case in U.S. v. Colorado involving cleanup of the Army's Rocky Mountain Arsenal.

Finally, this summer (1990), the section obtained a record settlement in U.S. v. Sumitomo -- a wetlands case against a developer of a resort complex in Guam. The defendant agreed to pay a civil penalty of $1.3 million and fund a $200,000 wetlands enhancement program and approximately $500,000 for restoration.

Environmental Enforcement - Over the past five years, the Environmental Enforcement section has filed over 1,000 suits against polluters, entered into 725 consent decrees, obtained over 100 favorable court judgments, and forced polluters to pay over $100 million in penalties. Defendants have included a broad spectrum of industry: General Motors, U.S.X., General Dynamics, Alcoa, Exxon, Shell Oil, Dupont as well as a number of cases against municipal sewage treatment plants in our largest cities (e.g., New York, Los Angeles, Philadelphia, Boston and San Diego) for excessive discharges of pollutants into the nation's surface waters or the dumping of sewage sludge in to the oceans.

Under a consent decree negotiated in November 1989, Shell agreed to pay a total of $20 million dollars: $10.8 million plus interest to the U.S. and California for damages to natural resources resulting from the spill of 400,000 gallons of crude oil into the San Francisco Bay. Additionally, the agreement calls for $1.3 million for studies which will improve the government's ability to respond to oil spills, and $500,000 in response costs. (U.S. v. Shell Oil Co.) Additionally, Shell will pay the U.S. $2.05 million in penalties of which $50,000 is in payment for violation of Shell's permit and is the maximum amount that can be assessed under the Act for a two-day spill. The remaining $2 million is payment for violations of EPA's Spill Prevention and Control regulations — by way of contrast, the highest previously assessed penalty under these regulations was $5,000.

In March of 1988, the United States filed an action against Browning-Ferris Chemical Services, Inc., and CECOS International, for violations of the operating regulations for hazardous waste facilities at the commercial hazardous waste facility owned and operated by BFI/CECOS in Louisiana. (U.S. v. BFI/CECOS) This is the second of two such cases brought by the U.S. against the defendants and after intensive discovery, BFI/CECOS agreed to settle the case for $1.55 million in penalties, in addition to injunctive relief and extensive corrective actions at the site which are estimated to add $10-20 million to the final price tag. The settlement requires them to contract for two sets of independent environmental audits of the facility to determine whether the facility is operating in accordance with the applicable regulations and conduct an analysis of the defendants' environmental management systems, practices, and policies both at the facility and in the defendants' corporate offices having responsibility for supervision of environmental compliance.

In 1987, the section sued Eagle-Picher Industries under the Clean Water Act for discharging without a National Pollutant Discharge Elimination System (NPDES) permit since 1981 and for violating pretreatment standards at two battery manufacturing plants and a lead chemicals plant located in Missouri. (U.S. v. Eagle Picher Industries) Their permit had expired in 1981. After intensive discovery, we negotiated a consent decree that requires the company to pay a civil penalty of $1.5 million over a period of three years, with interest on the installments. The decree also provides for attainment of regulations for battery manufacturers, enforceable interim limits, and stipulated penalties.

And finally, this July, the section reached an agreement with USX where the Corporation agreed to pay $34 million in costs and penalties for the cleanup of waste water that was illegally dumped from its Gary, Indiana steel mill. (U.S. v. USX Corp.) The agreement stemmed from a 1988 lawsuit which alleged that USX had bypassed its treatment system and discharged waste water contaminated with ammonia, cyanide and heavy metals into the Calumet River, which empties into Lake Michigan. In addition to the $1.6 million penalty, an estimated $25 million will go toward upgrading USX waste-management facilities and another $2.5 million will fund a study to determine the extent of contamination and $5 million will be set aside to clean up whatever contamination is found.

Wildlife and Marine Resources - The Wildlife Section's civil workload constitutes approximately fifty percent of attorney time. The civil cases handled by the Section involve challenges to federal programs in areas involving endangered species protection, fishery issues, international whaling regulation issues, and issues relating to management of national wildlife refuges, migratory bird hunting or other forms of taking, and free-roaming wild horses and burros.

10698

Challenges brought under the Endangered Species Act (ESA) seeking to halt federal programs such as timber harvesting, offshore and on shore oil and gas leasing and mineral development, road and dam construction together with challenges to wetland development, comprise half of the section's civil docket. These challenges frequently allege that federal actions will jeopardize ESA listed species, will result in impermissible takings of such species through habitat modification, or that federal agencies are failing to adequately conserve such species. These challenges can have widespread effects. For example, environmental challenges on ESA and other grounds in NRDC v. Hancock and Exeter Irrigation District v. Hancock have forced re-analysis of the environmental impacts of critical water irrigation contract renewals in California's central valley. Protective regulations imposed by federal agencies for the protection of listed species have also resulted in a glut of litigation, most notably a case which upheld Department of Commerce regulations requiring shrimp fishermen to install turtle excluder devices in their gear for the protection of sea turtles (State of Louisiana v. Verity).

Fully forty percent of the Wildlife Section's civil docket involves fishery litigation which typically arises when previously unregulated fisheries come under the auspices of a federal fisheries management plan. (Silverman v. United States (S.D. Fla.) (challenge to new reef fish plan in Florida)). In addition, conservation and management measures which result in the often controversial allocation of scarce fishery resources among competing groups continue to spark legal challenges. (Emerald Seafoods, Inc. v. Mosbacher (Ninth Cir.) (challenge to regulation dividing the annual catch of pollack in the Gulf of Alaska into quarterly allotments). The National Oceanic and Atmospheric Administration (NOAA), which regulates fisheries management, informs us that they anticipate a dramatically increasing number of challenges as fisheries previously unregulated are subjected to management and that they will be hiring four or five new attorneys in their General Counsel office to handle such fishery enforcement-related litigation.

On the criminal side, prosecutions and related activities under the federal wildlife conservation statutes account for half of the Section's workload with the Fish and Wildlife Service referring approximately eighty-five percent of the criminal docket. Over half of the FWS referrals are from its Special Operations Unit, headquartered in Washington, D.C., which conducts sophisticated undercover operations throughout the country. For example, this past year the Section was involved in two major sets of prosecutions involving the massive illegal importation of wild parrots and macaws into the United States, and "cactus rustling." The first, dubbed "Operation Singapore," involved an intricate international network of parrot and macaw smugglers in the United States, Mexico, Argentina, Brazil, Bolivia, Singapore and Indonesia. Of the 14 original defendants (including a Singapore collector and an Argentine shipper), 12 have pled guilty. Sentences included 120 days of jail time and fines of up to $40,000. Trial is set for the two remaining defendants. "Operation Woodstar" was a four-year undercover operation which revealed a widespread practice of individuals removing valuable cacti and selling them in violation of state and federal laws. Of the twenty-one individuals indicted in "Woodstar", 10 have pled guilty so far. In early September, trial of an additional seven "Woodstar" defendants commenced and was scheduled to last four weeks. Trials for the remaining defendants are expected in late September/early October. Looking ahead, we anticipate that "takedowns" in four current undercover operations will result in prosecutions in 1991 or 1992. Each of these latter operations is likely to be multi-jurisdictional in scope, and will involve as many as 40 defendants each.

Program Funding Level Requirements
(Dollars in thousands)

Organization: Environment and Natural Resources Division Decision Unit: 2(ND)1 Environmental Protection

	1989	1990	1991	1992		
				Base Level	Change	Request Level
Resource Requirements						
BUDGET AUTHORITY	$10,812	$16,163	$24,516	$28,022	$11,199	$39,221
OUTLAYS	10,777	15,356	23,049	27,162	9,519	36,681
Appropriated Positions	145	178	224	224	65	289
FTE Workyears:						
Full-Time Permanent	131	152	200	223	33	256
Other	2	2	2	2	...	2
Subtotal	133	154	202	225	33	258
Overtime/Holiday	...	...	...	...	...	...
Total	133	154	202	225	33	258
Reimbursable Workyears:						
Full-Time Permanent	...	...	...	...	...	...
Other	204	202	202	202	14	216
Subtotal	204	202	202	202	14	216
Overtime/Holiday	...	...	...	...	...	...
Total	204	202	202	202	14	216
Total Workyears	337	358	404	427	47	474

1070

Program Changes: For 1992, substantial increases of 65 positions, 33 workyears, and $9,993,000 are requested for the Environmental Protection program including an increase of $8 million for automated litigation support ($2 million for Exxon). The increases would be distributed among three of the four activities in this program, i.e., Environmental Crimes, Environmental Defense, and Environmental Enforcement.

Together, these three sections form our front line, litigating "cutting edge" issues of environmental law. As such, five discernible trends are emerging:

I. There is a continuing need for expanded environmental enforcement, particularly criminal enforcement, to encourage voluntary compliance with the law. As with other regulatory programs, the Nation's environmental goals can best be achieved through private, voluntary compliance with environmental laws and regulations, yet controlling and treating waste and pollution is extraordinarily expensive, and high costs are a disincentive to compliance. A strong, aggressive and consistent enforcement effort is essential to prompt the regulated community to change its standard operating practices and investment decisions to move toward full conformity with environmental rules. We have found that criminal prosecution of environmental violations is particularly potent in this regard, because, unlike civil penalties, criminal convictions are not considered just another cost of doing business. In this effort, the Environment and Natural Resources Division works hand in hand with United States Attorneys, providing advice, guidance, technical expertise, focused training, and direct assistance with litigation.

II. Increasingly, the work of one program directly impacts the work of the others. Perhaps the best illustration of this phenomenon involves Exxon-Valdez. While the Environmental Crimes section has spearheaded the criminal investigation and indictment of Exxon and Exxon Shipping, the Environmental Enforcement section is presently immersed in developing the extensive natural resource damage assessment and orchestrating the work of some 36 scientific and economic expert witnesses on behalf of the four trustees (the Departments of Commerce, Agriculture, and the Interior, and the State of Alaska). And for its part, the Environmental Defense Section is positioning itself to defend potential suits brought by several environmental groups — we already have received two notices of intent to sue. This same complementary mix of expertise will likely be called upon as we proceed with the battery of recent oil spills in other areas (e.g., Long Beach California, New York Harbor's Arthur Kill) as well. Similarly, the Rocky Flats investigation (aka "Operation Desert Glow") has involved both the Environmental Crimes and the Environmental Defense Sections. Following the issuance of a 116-page search warrant alleging that the plant (which is the country's sole producer of plutonium triggers for nuclear warheads) has an eight-year history of illegal dumping, burning and polluting, over 70 FBI and EPA agents conducted an unprecedented search of the facility. The work of the Environmental Defense Section proved critical in that they successfully thwarted the efforts of the government contractor (Rockwell International) to avoid criminal liability based on contractual defenses. The cross-organizational expertise of these sections is increasingly necessary for many cases — involving the gamut of federal facility, natural resource damage claims and wetlands protection cases.

III. EPA's avowed interest in pursuing multi-media enforcement will require an off-setting infusion of resources. Commencing in 1991, environmental enforcement will be targeted to multi-media "hot spots." To staff this initiative, the Administration is requesting an increase of 20 percent for EPA's multi-media legal enforcement staff in 1991 alone and the FBI expects to more than double its related agent work force between 1990 and 1992 (from 35 to 78 agent years). The concept of multi-media enforcement is simple — the agency will identify specific geographic sites or "hot spots" with high-risk health or environmental problems (e.g., the petro-chemical belt along the Louisiana-Texas Gulf Coast, "sick" rivers). The resulting lawsuits will involve multiple claims under several environmental laws (i.e., statutes regulating air, water, hazardous waste, pesticides, and/or toxic substances). The goal is to focus a battery of resources on the most dangerous sites, and by so doing, send a message to the regulated industries.

1071

IV. Demand for Environmental Law Consultation, Training and Legislation Will Continue. Being on the cutting edge of the law has its special responsibilities. As predicted in last year's submission, the demand for client consultation, training and legislative advice escalated sharply this year. For example, the Environmental Crimes section spent 785 hours consulting clients in 1988 versus 1,439 hours in 1989 (+83 percent); corollary figures for the Environmental Defense Section zoomed from 279 hours in 1988 to 483 in 1989 (+73 percent). Similarly, along with their participation as faculty members at approximately 50 environmental and educational conferences this past year, the Environmental Enforcement Section coordinated with EPA to develop the 45-page "Enforcement Four-Year Strategic Plan" which lays out an enforcement plan for future natural resource damage (NRD) claims and led a four-day conference last fall designed to aid NOAA and Interior attorneys in the development of NRD claims. And even though it's the smallest section within this decision unit, the demand for Environmental Crimes speakers/instructors continued unabated. Last year, attorneys in this section participated as speakers or trainers at 34 separate events in the continuing effort to "get the message out"; examples of such engagements range from FLETC and in-service FBI training to appearances before the Southern Environmental Enforcement Network and the National Environmental Enforcement Counsel Meeting. Finally, the Environmental Crimes and Environmental Enforcement Sections will shortly commence preparing materials for a nationwide environmental law conference for AUSAs and state enforcement personnel in 1991. Past experience indicates that such activity will generate yet more requests for consultation and, inevitably, more case referrals.

V. Spiralling Growth in Federal Facility-related Workload Mincing no words, the President's 1991 Budget states unequivocally:

> "Federal facility compliance with environmental laws is both a moral and legal responsibility...Unfortunately, environmental safeguards previously employed were in many cases either ignored or inadequate...Consequently, this Administration has been left with the responsibility of cleaning up a legacy of contamination from Federal facilities that has developed over the last 40 years. The major increases in this budget signal a commitment to that cleanup. [p. 257; emphasis added]

OMB estimates that the cumulative Federal Government cost of cleanup and compliance over the next 30 years will be in the range of $140 and $200 billion in constant dollars. And while the primary offenders are the Departments of Energy and Defense, the President has directed that Interior, Agriculture, Transportation and NASA set aside funds for hazardous waste cleanup and compliance as well. The Division's Environmental Protection decision unit plays a critical role -- not only in negotiating the seminal consent decrees (which set forth compliance standards and time tables, and allow states to seek fines and penalties against Federal agencies for violations of the consent terms), but in bringing and defending myriad counter suits and filing contribution actions. The stakes in such cases are very high for all parties.

Before turning to each of the programs, more must be said on automated litigation support (ALS). The Exxon Valdez case provides clear evidence of our need for a greatly expanded base of resources for ALS. When this case began to take shape, we found that documents would be needed from a dozen sources, including other legal divisions, several federal agencies, the State of Alaska, and from various Exxon branch offices. We simply do not have enough money in our base to handle another case of this magnitude. In many similarly large, complex environmental cases it quickly becomes clear that the government can either invest in ALS, or stop pursuing the polluters. In these big cases, simply gathering all of the necessary documents from disparate locations around the country requires the mobilization of a small army. It is not possible to draft enough staff from the Division's ranks and muster them to the proper locations without dropping work on other ongoing cases. The answer to this problem can be found in automated litigation support.

ALS services have been provided through two competitively procured contracts to more than 100 cases in the last two years. These services include: gathering documents, microfilming them, creating full-text and partial-text databases, creating pleading indices, loading transcripts into the databases, tracking the history and status of exhibits, answering document production demands, screening for privilege, performing factual research, tracking correspondence and responses, and providing on-site computer based trial support. Computers are utilized to manage what often

1072

ends up being several million pages of documents; computer support has made it possible to store, manipulate, rearrange, analyze and retrieve relevant information from a document maze effectively and at a demonstrably lower cost than trying to accomplish these tasks with paralegals. With automation, information can be available in a timely manner for use in depositions, other pretrial preparation and trial support. In major cases, ALS service also includes the establishment of a centralized document center. The centralization of deposition and document collections, film libraries, and information management resources in such document centers has enhanced the capabilities of support staff and contractor personnel to perform the entire gamut of support tasks more effectively and efficiently.

Our request for automated litigation support is $8 million, plus restoration of $1.2 million which will be diverted from ALS in 1991 to cover the pay raise absorption and conversion to higher administratively-determined pay rates for lawyers. In the past, computer support to litigation has been viewed as a luxury, but this view no longer applies to environmental litigation. In major law enforcement cases such as Exxon Valdez and South Florida Water Management District (Everglades), the Environment Division simply lacks the resources to be effective. Because of funding limitations, we cannot afford to gather all of the relevant documents, conduct full discovery, handle document production requests, adequately screen for privilege, or analyze the information in the documents; in short, we cannot afford to prepare the case. Because this case preparation is arguably an agency function, we have in the past sought funding from client agencies for these tasks, and until now, these efforts have been quite successful. For example, in 1990 the Division will spend more than $15 million on litigation support activities; all but $3 million has been provided through reimbursable agreements with client agencies.

Our recent fund-raising efforts have not been successful, particularly in the two cases cited above. In Exxon Valdez, the three trustee agencies argued that litigation support costs are legally the Department of Justice' responsibility, and it took numerous meetings, and ultimately, intervention by the Office of Management and Budget to convince the agencies to provide reimbursable funding -- and even this effort was ultimately unsuccessful as Congressional approval for these agency reprogrammings was denied. In the Everglades case, the Department of the Interior simply refused to fund any aspect of case development, despite numerous discussions on the topic. As it now stands, the Division and U.S. Attorney Lehtinen have been forced to drastically curtail discovery in an effort to litigate the case cheaply. Reliance on client agencies for funding is not a solution to the chronic under-funding of litigation support needs in the Environment Division.

However, our 1992 budget request for $6 million for litigation support in this section will solve these problems; the Environment Division will have adequate funds to handle even unforseen cases such as Exxon Valdez. We will no longer be forced to go hat-in-hand to client agencies.

Environmental Crimes -- For 1992, this program element is requesting 21 additional positions (16 attorneys, 2 paralegals and 3 support), 11 workyears and $1,679,000 (including $1 million for automated litigation support).

The agencies involved in environmental investigations look to the Environmental Crimes Section for leadership and direction. To meet the obligations and expectations inherent in that role, and to maintain a standard of professionalism in the program, we must have both sufficient resources and a suitable organization structure. In last year's Spring Planning Call, this program requested an increase of 33 positions. Subsequently, only 12 of these were approved by OMB. For 1992, our rationale remains the same: in order to be responsive to the needs of the AUSAs and investigative agents in the field, the Crimes section must be restructured to handle discrete geographic segments of the Nation, not unlike the current structure of the Environmental Enforcement Section. Accordingly, we are seeking the balance of that earlier request, i.e, 21 positions.

In order for this section to fulfill its leadership role, a closer alignment with the EPA and FBI regional divisions as well as the Offices of the United States Attorneys is necessary. We intend to create three Washington D.C. based units, each headed by a supervising attorney, with responsibility for specific geographic areas. Minimally, we need 13 line attorneys per unit (including a complement of Superfund attorneys), which

will result in approximately four attorneys for each EPA region. In addition to 13 line attorneys, each of the three units will likewise have two paralegals and three secretaries assigned it. Decisions to open cases will, in the first instance, be made by the unit supervisor and prosecutive decisions likewise, in the first instance, will be reviewed and approved by the unit supervisor. Such a structure corresponds to that found in the criminal divisions in the U.S. Attorneys offices and, we feel, will encourage prompt yet adequate review of investigative issues and prosecutive decisions. A major premise underlying the new structure is the notion that agency rapport is essential. The Chief and the Assistant Chief will continue to meet regularly with supervisory agents of EPA and FBI to coordinate investigative efforts and policies.

To meet the needs of the U.S. Attorney districts, the Section will continue to target attorney applicants who have litigative experience. Our goal is to establish a direct line of communication between Washington and the field; one where the caller comes to know the "team member" on the other end and, in turn, the ECS team member has familiarity with the priorities and practices of the affected district or region. ECS attorneys will be sent to the districts to participate in the Law Enforcement Coordinating Committee programs to discuss the need for cooperative efforts of local, state, and federal officials in the enforcement of the environmental laws.

In addition to facilitating communication with, and support to, the field this request will enable the Section to:

-- Combat the demands of ever more referrals. Between 1989 and 1992, the FBI expects to nearly triple the number of agent years devoted to environmental criminal investigations and the EPA is currently projecting a 50% increase in OCI agents by 1992; more FBI and EPA-OCI agents translate to greater caseloads. Additionally, EPA multi-media initiative and oil spill awareness will directly affect workload;
-- Keep abreast of growing demand for legislative review. Virtually all proposed environmental legislation today includes provisions for upgrading criminal sanctions;
-- Provide for "taint-teams" in growing number of oil spill cases; as of August 1990, the section was staffing five such teams. As with the Exxon-Valdez case, the law prohibits the Government from using incriminating statements provided by ship captains to the Coast Guard at the time of an accident. To avoid "tainting" the subsequent investigation, one attorney must filter all incoming documents before the assigned prosecutor can review it; this provision necessitates effectively double-teaming all oil spill cases;
-- Permit supervisors to adequately address the growing volume of parallel civil and criminal proceedings and coordinate with their civil counterparts. Given the recent Supreme Court ruling in United States v. Halper, coupled with the advent of more environmental legislation which includes criminal sanctions and the likely result of EPA's multi-media initiative, the section is compelled to devote greater attention to parallel proceedings;
-- Meet the growing demand for resource-intensive sentencing hearings. A recent case in point was United States v. Boggs. Even though this case, which was handled jointly with the U.S. Attorney Office for the N.D.Ohio, did not involve a trial on the merits, an elaborate five-day hearing was held by the court solely for sentencing. This lengthy proceeding was required to establish, among other things, the relative harm of the conduct in question, including the cost of cleanup -- factors necessary in order to determine the appropriate sentence under the guidelines.

Environmental Defense -- For 1992, this program element is requesting 27 additional positions (18 attorneys, 4 paralegals and 5 support), 14 workyears and $1,833,000 (including $1 million for automated litigation support). The Environmental Defense Section (EDS) attorney request is grouped into three distinct categories: Federal facility work; enforcing the wetlands laws; and defending new legislation and regulations (chiefly those involving FIFRA and "hot spot" enforcement). Additionally, the program is seeking to undertake a management initiative involving the oversight of its growing volume of consent decrees and proposes the creation of a separate paralegal unit. Finally, while the bulk of the requested $500,000 for AIS is to support case specific needs, $100,000 is needed for research in connection with World War II era government activity involving rubber and other defense materiel production.

1074

In 1987 and 1988, the Environmental Defense Section averaged 30 new cases a month; in 1989, this figure jumped to over 40 a month but in the first three months of 1990 it catapulted -- to over 65 a month. At the same time, EDS is experiencing a corresponding increase in case complexity. This is attributable to a number of causes. The Section's caseload is now at the point in the evolutionary development of the environmental statutes and the enforcement programs at which the more difficult, time-consuming regulatory decisions are occurring, and must be defended on their merits. In contrast, the recent past saw many more EDS cases handled by invoking legal doctrines precluding merits consideration of premature cases. One measure of this growth in case complexity is the number of hours spent in court. In 1987, the average EDS lawyer spent fewer than 15 hours in court; today, the average is 52.

1.) Federal Facility Workload. The federal facility docket continues its unabated growth; consider:

	1985	1986	1987	1988	1989	1990 (2/1/90)	1991 (estimate)
Federal facility compliance & CERCLA contribution claims....	77	105	154	192	250	262	350

Whereas the advice and consultation services offered by the Environmental Crime Section are designed to encourage litigation, those offered by the EDS are designed, in large part, to limit or avoid litigation -- at least as it applies to Federal Facilities. More specifically, it is the view of EDS that the best long-term approach to federal government compliance with environmental laws is through the development of standard protocols for compliance agreements, and training for federal agency personnel so that non-compliance incidents can be resolved quickly, thereby avoiding protracted, expensive litigation costs. Under CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act of 1980; aka "Superfund") the federal government has the same responsibility for environmental compliance as any private party and is likewise liable for cleanup. Federal agencies are expected to fund such actions through their normal budget process (i.e., not use Superfund monies). This liability extends to the government's contractors and lessees. Since the government owns one-third of the nations's land area, this liability includes hazardous wastes sites at thousands of landfills, dumps, laboratories, military installations and hospitals, weapons productions plants and industrial facilities. In 1986, in SARA (Superfund Amendment and Reauthorization Act), Congress instructed EPA to create a federal agency hazardous waste compliance Docket, listing all hazardous waste sites owned, operated or formerly owned or operated by the government[1]. To this end, EDS has worked with the Departments of Defense and Energy to develop model language for hazardous waste clean up agreements with EPA; similarly, efforts are now underway to develop prototype agreements with States. Complementing these efforts have been the development and presentation of a series of training seminars in hazardous waste law including, last year, two programs for DOE, two for the Navy, three Justice LEI courses as well as providing attorney panelists for 10 privately-sponsored federal facility compliance programs.

Apart from negotiating and encouraging compliance agreements, this Section's federal facility workload also includes defending all EPA and other federal agency Records of Decision (RODs), which outline the EPA's game plan for addressing pollution problems. In 1991, EPA will be finalizing RODs for Energy Department cleanup plans for hazardous and radioactive waste at approximately 15-20 federal facility sites; the Department of Defense expects to refer another 15-20 in 1992. Challenges to these remedy selections can and are being brought by citizen groups, neighboring

[1]According to the Congressional Budget Office, there are currently in excess of 1,100 facilities on this docket and CBO has additionally listed another 8,357 facilities as possibly requiring cleanup. (Federal Liabilities Under Hazardous Waste Laws, May 1990, pp. 56-58.)

cities, and states seeking millions of dollars in civil penalties under state hazardous waste and water pollution statutes (for example, the civil penalties claim in Ohio v. DOE exceeded $230 million but was successfully settled for $250,000 in contingent penalties). Both because these cases involve detailed and highly technical review of thousands of record documents and decisions, and because a successful challenge could result in the loss of millions to the federal fisc, they are among the most complex cases handled by this section. In sum, the Environmental Defense Section is seeking 8 additional attorneys to handle its Federal Facility workload in 1992.

2.) Wetlands Enforcement and Defense. Wetlands litigation can be broken into four distinct categories. The first of these emanates from appeals to administratively determined penalties. Under the Water Quality Amendments of 1987 to the Clean Water Act, EPA and the Corps of Engineers were given authority to assess administrative penalties for violations of the Act if the sums involved were under $125,000. These assessments, however, are subject to judicial review in the district and appellate courts. In 1992, we expect approximately 30 judicial challenges to ensue from EPA and another 30 from the Corps. The EDS will be responsible for defending these decisions in the courts.

A second category of wetlands cases arises when EPA and the Corps disagree. As part of the Administration's avowed commitment to "no net loss" of wetlands, EPA is increasingly exercising its statutory authority under Section 404(c) to veto Corps decisions that would allow filling of wetlands. These matters generally involve sensitive policy issues between the Corps and EPA, as well as significant economic stakes on the part of those seeking to fill the wetlands, e.g., large scale developers and municipalities. Between 1984 and 1989, there were only two lawsuits involving such EPA vetoes; so far in 1990, there are four active suits, three of which involve dams that would provide a public water supply or recreational reservoirs for municipalities. These are high stakes cases where the proponents of the multi-million dollar projects are vigorously pursuing their claims.

A third category of wetlands cases is the more traditional defensive work of the EDS. In these instances, EDS defends suits against EPA and the Corps by individuals seeking to challenge the agencies' preliminary wetlands determination and permit actions. Typically, these landowners have either become frustrated with the drawn-out permit process or have affirmatively decided to ignore it. Thus, this important part of EDS's practice involves dismissing preemptive strike actions and effectively requiring landowners to "play ball with the agency" until some concrete decision has been made on a permit application. Frequently, these cases include eleventh-hour requests for temporary restraining orders and preliminary injunctions.

If a landowner has filled waters of the United States without a permit, and the agencies are unable to secure voluntary compliance with administrative orders, the fourth and final category of wetlands cases is triggered — enforcement. This is the category most directly affected by the President's wetlands initiative. Between 1986 and 1989, EDS handled 2-4 such trials per year of the several hundred pending at any given time. Within the past six months however, EDS has already had three trials and expects five more before year's end. For 1992, the section expects that 10-40 cases will be in active litigation. These enforcement actions are extremely time-consuming because they require the section to involve itself in the investigation prior to filing to insure that the case has been solidly prepared. Subsequently, the section must expend considerable time in the preparation of expert witnesses who, in turn, must defend not only the agency's determination but the appropriate remedy (eg., restoration or mitigation). The defendants in these cases increasingly seek jury trials, hoping in many instances that the extent of technical expert testimony will confound the jurors. Accordingly, we have found that jury trials require 2-3 more time than those before a judge. By way of example, consider the hours devoted to each of the section's three trials in 1989:

Non-Jury:	U.S. v. Gordon	.....519 attorney hours & 43 paralegal hours
Jury:	U.S. v. McLesky	...1,945 attorney hours & 260 paralegal hours
	U.S. v. Hobbs	.....1,352 attorney hours & 36 paralegal hours

1076

For the enforcement and defense of the President's wetlands initiative, the EDS requires 7 additional attorneys in 1992.

3.) New Legislation, Regulations and Initiatives. Although this category could include several discrete programs, only two have been singled out: multi-media "hot spot" enforcement and Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

By 1992, the full regulatory force of the Water Quality Act Amendments of 1987 will be felt. The toxic "hot spot" initiative includes the identification of water bodies in which the water quality is impaired despite the application of the best technology to control discharges of toxic pollutants. The law requires states to develop individual control strategies that will bring the waters into compliance within three years. These strategies are then submitted to EPA for review and approval. This one-time program is the centerpiece of the water quality-based permit program. Speaking of this program March 14, 1990, the General Counsel of EPA told each of the EPA regions:

> "I expect that the litigation burden...may be tremendous. Together the Regions are identifying approximately 700-800 facilities for which permits probably need modification and the Regions must approve or disapprove the state's actions on each of these."

Subsequently, these regulatory decisions will create a real surge of litigation for the EDS even before 1992 because of the huge amounts of money that will be required to reduce discharges of, for example, dioxin from pulp and paper mills. To expand upon this one example, the pulp and paper industry has reportedly set aside a multi-million dollar war chest to litigate decisions under this program, and if the first 30-40 cases are any indication, we will see the nation's highest-priced law firms zealously representing industry in these challenges. The various member companies of the American Paper Institute (the paper industry's trade association) have reportedly banded together and agreed that each permit and regulatory decision will be challenged in litigation.

On another front, EPA has recently placed pesticide issues near the top of its priorities because proper control of pesticides is a major source of groundwater and surface water contamination. The 1988 amendments to FIFRA require EPA to review chemicals and products which were authorized for use in the past, and determine under contemporary standards whether they should be suspended of cancelled. EPA decisions to cancel pesticide products are variously challenged by farmers, manufacturers, and citizen groups.

Not surprisingly, EDS's FIFRA defensive caseload before district court has swelled, reflecting a large number of FIFRA indemnification claims by consumers of cancelled pesticides. Specifically:

Pending Defensive FIFRA Caseload (District Court only)

	1985	1986	1987	1988	1989	1990 (as of 2/1/90)
FIFRA Caseload:	23	23	23	19	105	313

In light of the FIFRA amendments and EPA's priority for pesticide review, we expect continuing growth in the number of challenges to EPA determinations. Together with the water-related "hot spot" enforcement initiative, this FIFRA caseload will require an additional 3 attorneys in 1992.

1077

4.) Centralized Paralegal Support for Consent Decree Monitoring and Archival Research Activity. Presently, there is an acute need to systematically monitor the growing volume of federal facility compliance agreements and consent decrees to assure that the government is meeting its obligations. Where monitoring is lax, the U.S. is exposed to embarrassing and costly enforcement actions. For example, the state of Ohio recently sought a contempt citation, including penalties and other sanctions, based on non-compliance with a consent decree governing hazardous waste cleanup at DOE's Fernald, Ohio facility. While arguably these functions should be performed by the client involved (e.g., DOE), the fact remains that our role in effecting these agreements is such that the court infers Justice oversight. And since each such agreement includes a mechanism for dispute resolution, early intervention on our part could largely obviate non-compliance suits in that we could effectively force the parties back to the bargaining table when compliance disputes arise.

Rather than overburden EDS attorneys with this responsibility (who are necessarily preoccupied with meeting other litigation deadlines) and to ensure that the function is performed both systematically and efficiently, the EDS proposes the creation of a separate paralegal unit to monitor consent decrees.

Another function of the paralegal unit would involve the increase in litigation in which the U.S. is being named a potentially responsible party for its role in the production of rubber, specialized chemicals and other critical material during the World War II era. In 1939, a War Resources Board was formed followed by the 1942 establishment of the War Production Board; many additional product-specific government corporations were also established. These Boards worked with major manufacturers and industry to expedite production of critical defense-related material and commodities, e.g., weapons, ammunition, jeeps, uniforms, etc. Now that some of these same manufacturers and industries (e.g., Dow Chemical, Arco, Exxon, Goodyear) are being sued for creating hazardous waste sites, they are counter-suing the Government and claiming that we too are liable for a portion of the cleanup of the resulting hazardous waste sites. Currently, approximately 20-25 such counterclaims have been received and, concomitant with the EES emphasis on enforcement and efforts to ferret out more contribution actions particularly at Defense installations, we anticipate many more such counterclaims and suits. The cases also arise as freestanding suits, following state or private cleanup litigation (e.g., Cadillac Fairview v. Dow, et al.). It is therefore critical to identify all contractual obligations, agreements, or other references which may affect the government's liability. These cases involve comprehensive historical research and analysis of complex contracts, business records, and high level written communications in order to establish a thorough understanding of the Government's role in controlling or directing private businesses nearly fifty years ago; the National Archives alone has over 200 file cabinets of written material. The task is further complicated by two factors: 1.) because of national security issues, a number of salient documents have never been de-classified; and, 2.) the War Production Board was abolished by Executive Order in 1945, and most other wartime corporations (e.g., Reserve Rubber) were also dissolved in the late '40s and early '50s.

At present, we are ill-equipped to determine not only whether the government bears any liability, but the extent of that liability, if any. A number of the claims, in and of themselves, are small enough that they do not warrant a historical search of the documents housed in the Archives and the Federal Records Center. But taken together and discerning the trend, it is evident that an historical data base is necessary to determine which war production boards directed which activity of which industries at particular sites. Subsequently, we need to be able to trace the successor agencies (e.g., GSA, Commerce) involved. Because each of the cases is similar in its elements of liability, such a data base will be invaluable and assure a consistent approach to any subsequent settlements.

Put succinctly, a number of defendants are attempting to tap the deep pockets of Uncle Sam by counter-suing the same "orphan agencies" that were created by Daddy Warbucks. A paralegal unit coupled with ALS funding will effectively prevent unwarranted raids on the Treasury.

1078

Environmental Enforcement — This section is requesting 17 additional positions in 1992 (9 attorney, 2 paralegal and 6 support), 8 workyears and $6,481,000 (including $6 million for automated litigation support - $2 million for the Exxon Valdez case).

1.) Natural Resource Damage (NRD) Claims. By 1992, the greatest drain on this section's resources is likely to come from new cases alleging damages to natural resources as a result of a release of hazardous substances affecting federal lands and wildlife or oils spillage into rivers and coastal waters. Under CERCLA, whenever any site under federal agency jurisdiction is injured, the federal "trustee" may ask EES to pursue a claim for damages against those parties responsible for the contamination. (To appreciate the extent of trustee domain, Interior's Bureau of Land Management alone oversees 270 million acres of public land.) As demonstrated by our experience with Exxon-Valdez, these cases are enormously resource-intensive involving novel law at the intersection of law and economics. Moreover, unlike other CERCLA claims, these cases may be tried by juries.

Under CERCLA, the statute of limitations for claims began to run in March 1990. However, recognizing the potential resource impact of these claims on the strained resources of the program, EES lawyers met with officials of Interior and NOAA this year, and working from a list of over 200 potential sites, were able to obtain statute of limitation "tolling agreements" at a number of these sites. These tolling agreements however, only postpone enforcement action if agreements resolving the NRD claims are unsuccessful; additionally, the clients have informed us that yet other cases are in the pipeline. Specifically, Interior expects to refer six in 1991 and 12 in 1992; NOAA will refer three a year.

Compounding this drain on the program's resources is an anticipated surge in oil spill referrals also involving NRD claims. The GAO estimates that there are 10,000 spills yearly from vessels in U.S. coastal waters and EPA estimates that the 650,000 above-ground storage tanks cause 2,000-3,000 spills per year. Some of these spills have contaminated drinking water supplies and damaged sensitive environmental areas. Given the public outcry over Exxon, Ashland, Shell and the recent New York Harbor oil spills, it is clear that neither the public nor Congress will tolerate inaction and a greater enforcement effort will be necessary. Even in those oil spill cases in which we are seeking only the costs incurred by the U.S. for cleanup, we can expect a severe drain on attorney resources. The Coast Guard, which has primary responsibility for the removal of oil spilled into or upon navigable waters, has recently referred 40 Section 311 (Clean Water Act) lawsuits and expects to refer an additional 90-120 by the end of 1991. Taken together, NRD and oil spill enforcement will require at least 5 additional attorneys in 1992.

2.) Federal Facility Workload. This section represents non-EPA federal agencies in CERCLA cases. The cases arise when a federal agency, such as Interior, Energy or the Agriculture's Forest Service, identifies contamination on land or facilities under its jurisdiction to which private parties may have contributed. In such instances, EES is called upon to pursue a contribution action against the private parties to share in the costs of cleanup. Typically, these are multi-party actions involving as many as 20 defendants and including some of the Nation's largest corporations (e.g., Rockwell International). Because federal agencies are now required to survey every facility that it owns or operates for contamination and to undertake cleanup action at each such site, additional referrals for contribution cases are anticipated. Interior and Defense are expected to refer another 5-10 cases apiece in 1991-92. Indeed, Defense now has a task force specifically charged with developing contribution referrals. The EDS will need at least 3 additional attorneys in 1992 to handle these referrals.

3.) Multi-media "hot spot" litigation. While EPA expects to continue referring traditional statute-specific lawsuits against individuals in numbers roughly equivalent to those of recent years, the Agency's focus will change by 1992 to multi-statute litigation focusing on, for example, a major industrial category, a major pollutant or a specific geographical region as a result of their toxic "hot spot" initiative. The resulting lawsuits, involving multiple claims under several environmental laws in a given geographic region will be extremely complex and resource-intensive. To pursue this initiative, EPA has requested a 20 percent increase in funding in 1991 alone. By 1992, the EES anticipates a corollary increase in such referrals and will need an additional 3 attorneys to handle the influx of cases the first year.

1079

Schedule of Cost Inputs

Organization: Environment and Natural Resources Division Decision Unit: 2(DN3) Environmental Protection

Item	1992 Base			1992 Request			Increase/Decrease		
	Pos	FTE	Amount	Pos	FTE	Amount	Pos	FTE	Amount
Attorney	122	122	$7,320	165	144	$8,268	43	22	$948
Paralegal	25	26	832	32	30	938	7	4	106
Clerical	77	77	1,848	92	84	1,982	15	7	134
Subtotal	224	225	10,000	289	258	11,188	65	33	1,188
Modular costs			14,022			14,832			2,011
Automated litigation support			4,000			12,000			8,000
Subtotal			18,022			26,832			10,011
Total	224	225	28,022	289	258	39,221	65	33	11,199

Description of Cost Inputs

Environmental Crimes -- 21 positions and $1,679,000 ($1 million for automated litigation support) to provide support to growing numbers of USA, FBI and EPA regional personnel; additionally, staff for "taint teams; sentencing hearings, "hot spot" and parallel proceedings.

Environmental Defense -- 27 positions and $1,833,000 ($1 million for automated litigation support) for overall growth in caseload and complexity, attributable to federal facility client agency counseling and defense of federal facility civil penalty claims; defense and enforcement for the Administration's wetlands initiative; "hot spot" and FIFRA cases; paralegal unit to monitor federal facility compliance and establish a database for counterclaims involving World War II war production boards.

Environmental Enforcement -- 17 positions and $7,687,000 ($6 million for automated litigation support) for natural resource damage claims under CERCLA and oil spills under 311 of the CWA; for federal facility contribution actions; and for "hot spot" enforcement.

1080

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Environment and Natural Resources Division

Salaries and Expenses, General Legal Activities: 15 0128

Summary of Decision Unit Resources by Object Class
(Dollars in thousands)

Organization: Environment and Natural Resources Division

Decision Unit: 2LND31 Environmental Protection

Object Class		1990 Actual		1991 Estimate		1992 Estimate		Increase/Decrease	
		Workyears	Amount	Workyears	Amount	Workyears	Amount	Workyears	Amount
11	Personnel Compensation	154	$7,084	202	$10,100	258	$13,416	56	$3,316
12	Personnel benefits		1,133		1,616		2,147		531
21	Travel & transportation of persons		747		1,102		1,407		305
22	Transportation of things		93		153		195		42
23.1	GSA rent		1,120		1,530		1,955		425
23.2	Rental payments to others		...		...		...		...
23.3	Communications, utilities and miscellaneous charges		303		612		782		170
24	Printing and reproduction		163		214		274		60
25	Other services		5,490		8,883		18,654		9,771
26	Supplies and materials		140		184		235		51
31	Equipment		93		122		156		34
	Total obligations	154	16,366	202	24,516	258	39,221	56	14,705 *

* Includes 23 workyears and $3,506,000 in adjustments to base.

Justification of Program and Performance
Environment and Natural Resources Division
Salaries and Expenses, General Legal Activities: 15 0128
General Litigation 2LDN32

Long Range Goal: To defend and promote the public interest in federal land, water, mineral and Indian programs.

Major Objectives:
To successfully defend challenged federal programs and policies affecting the management and protection of public lands and natural resources.

To defend the Treasury against monetary claims arising from federal Indian and natural resources programs.

To represent effectively the interests of Indians where the United States is trustee, especially in water rights matters.

To provide legislative, public and Congressional liaison services for the Environment and Natural Resources Division's programs.

Base Program Description: This program includes the General Litigation, Indian Resources and Policy, Legislation and Special Litigation (PLSL) Sections which are responsible for natural resources litigation, protection of Indian rights, and various legislative, policy and liaison activities respectively. Of these, the General Litigation section is the largest, and its cases span over 70 statutory areas administered by several dozen client agencies. Traditional General Litigation cases involve inverse condemnation, in which government actions are alleged to have taken private property; Indian claims for monetary relief from government inaction or mismanagement, defense of federal programs challenged for faulty environmental impact analyses; and, mineral leasing and mining cases on land and in the Outer Continental Shelf.

The United States has established trust relationships with various Indians and Indian tribes through a myriad of treaties, statutes and Executive orders. Under these authorities, the government is obliged to perform a number of functions on behalf of these tribes, including litigation to defend their rights. The Indian Resources Section of the decision unit handles these cases, the most important involving water rights. Many Indian reservations lie in the arid portions of the country where competition for water is fierce, and tribal rights to water must be established before reservation lands can be developed. Over 50 million acres of reservation lands, and the rights to major water systems in dry western states are at stake. Other cases in which the government represents the interests of Indians involve the establishment and protection of hunting and fishing rights, and suits to answer questions about tribal rights to self-determination.

Finally, responsibility to review and comment on legislative proposals for the Division's programs rests in the Policy, Legislation and Special Litigation Section (PLSL) of this program. Many environmental statutes are the subject of new legislative proposals, which benefit from analysis by the Division. After a bill is passed by Congress, the Section's responsibility involves analysis of new issues related to the implementation of the law, particularly in the first three years when few court decisions exist to give guidance on ambiguities that result from changes in laws. Complete screening of new legislation insures that the Division has detailed information on hand concerning the legislative history for use in litigation which arises after a bill becomes a law. Coordination between the various federal, state and local government agencies involved with environmental concerns and the conservation and development of natural resources is also within the purview of the decision unit, as is the initial development of Division policies in these areas.

1082

Accomplishments and Workload: Accomplishments of the General Litigation program are presented in the following table:

General Litigation	1989	1990	1991	1992 Base	1992 Change	1992 Request
Cases/Matters pending, beginning of year	3,723	3,804	2,563	2,713	...	2,713
Cases/Matters received	831	784	900	900	...	900
Cases/Matters closed	750	2,025	750	775	50	825
Cases/Matters pending, end of year	3,804	2,563	2,713	2,838	(50)	2,788

Indian Resources	1989	1990	1991	1992 Base	1992 Change	1992 Request
Cases/Matters pending, beginning of year	552	562	618	618	...	618
Cases/Matters received	16	60	20	50	...	50
Cases/Matters closed	11	4	20	25	5	30
Cases/Matters pending, end of year	562	618	618	643	(5)	638

Policy, Legislation and Special Litigation	1989	1990	1991	1992 Base
Cases/Matters pending, beginning of year	535	735	635	760
Cases/Matters received	2,387	1,680	2,000	2,380
Cases/Matters closed	2,187	1,780	1,875	1,975
Cases/Matters pending, end of year	735	635	760	1,165

Decision Unit Total	1989	1990	1991	1992 Base	1992 Change	1992 Request
Cases/Matters pending, beginning of year	4,810	5,096	3,811	4,086	...	4,086
Cases/Matters received	3,234	2,524	2,920	3,330	...	950
Cases/Matters closed	2,948	3,809	2,645	2,775	55	855
Cases/Matters pending, end of year	5,096	3,811	4,086	4,641	(55)	4,181

The General Litigation Section's purview spans some 70 federal statutes and involves widely disparate programs and clients. As before, the General Litigation Section continues to be a solidly cost-efficient program. Of claims totaling $529 million in 1989, only $25 million in judgments were awarded for a pay-out rate of one dollar for every $21 claimed. Conversely, in their affirmative litigation (plaintiffs' suit or counterclaims) the Section returned a record $31 million.

Among the General Litigation Section's most significant victories this year was the successful defense against plaintiffs' attempted injunction of the launch of the Galileo spacecraft in Florida Coalition for Peace and Justice v. George H. Bush, et al. (D.D.C). Working with lawyers and technical staff from NASA as well as the Appellate section, General Litigation Section (GLS) attorneys worked around-the-clock to block the issuance of a temporary restraining order and preliminary injunction based on plaintiffs's assertion of inadequate National Environmental Policy

Act (NEPA) consideration; their effort was rewarded with the dismissal of an appeal thereby allowing the $1.5 billion Galileo probe to proceed unimpeded by the legal tempest that had developed around it.

As predicted in last year's submission, this program has experienced an increase in takings-related workload, particularly as they relate to wetlands and the Claims Court (e.g., Ciampitti v. United States - state permit denial will not obviate takings evaluation of separate federal permit denial; Bowen Co. v. United States - EPA guidelines make permit denial highly likely and preclude a ripeness defense in many instances; Loveladies Harbor, Inc. v. United States - on the facts, wetlands regulation did not significantly advance legitimate federal public health and safety interest; further proceedings to be held on whether the property lost all economic value). Most significantly, in Whitney Benefits Inc. v. United States, the Claims Court held that the statutory prohibition of surface mining in "important" alluvial valley floors in the West effected a taking of a surface mining enterprise. If sustained on appeal, liability for this one case alone would exceed $120 million.

In a case brought by the Indian Resources program, following a five-day trial, the Court ruled in favor of the Government and the Gila River Indian Tribes. (United States v. Gila Valley Irrigation District; D.Ariz.) The original decree dates back to 1935 and allows a water commissioner to apportion waters among contending users. He is expressly charged with making appropriate deductions for losses suffered for evaporation and seepage in order to put the upper and lower valleys on an equal basis such that the downstream (and more senior) parties receive their fair share. The Tribes alleged that the Commissioner was not properly enforcing the complex provisions. The judge ruled from the bench and commended the work of the section attorneys as being among the five best cases presented before him in his nine-year tenure as a judge. The action outlined by the Court will result in additional water for the Tribes ranging from 20,000 to 60,000 acre-feet in any one year--an amount sufficient to irrigate 3,000 to 10,000 additional acres of farm land in the San Carlos Project.

The United States brought suit in Nevada to obtain reserved water rights for the Walker River Paiute Tribe in 1924. A United States Board of Water Commissioners was created by the court to act as a water master and apportion and distribute the waters; the largest water user on the river is the Walker River Irrigation District whose irrigated lands are upstream from the Reservation. For over fifty years several attorneys have represented both the Board and the Irrigation District simultaneously. The decree also provides that the expenses of the Board, which include attorneys' fees, are to be shared by all the water users, including the Tribe. Thus, the Tribe has been in the unfair position of paying for legal fees to a lawyer who represents the Tribe's main competitor for water on the river. After three hearings, spanning from October 1987 to August 1989, the Judge finally ruled that the attorney involved has to elect to represent either the Board or the District, but not both. The Tribe is very pleased with this ruling. (United States v. Walker River Irrigation District; D. Nev.)

A third and particularly satisfying case involving this program was United States v. Platt, et al. We choose to elaborate on this case because, quite simply, it makes us feel good. For centuries, approximately 60 Zuni religious priests have been making a religious pilgrimage from their reservation in New Mexico along a sacred path learned by memory to an equally sacred area in northeast Arizona known as Kohlu/wala:wa, or "Zuni Heaven". The trek occurs once every four years at the time of the summer solstice and covers approximately 110 miles over a period of four days. The pilgrims, traveling by foot and horseback, were first witnessed by the Spanish conquistador, Coronado in 1540. In 1985, the defendant, Earl Platt, one of the intervening landowners, challenged the right of the Zunis to cross his lands. To avoid any violence, the Section secured a temporary restraining order enjoining the defendant from interfering with the pilgrimage. We also brought suit seeking to establish a prescriptive easement under Arizona law. For the next four years, the defendant, a former state senator, county attorney and one of the largest landowners in Arizona (reportedly owning or controlling 400 square miles) tenaciously opposed the prosecution of this case. The court ultimately held the defendant in civil contempt for interfering with the 1989 pilgrimage in violation of a second temporary restraining order. Prior to trial, the local area was on the brink of violence; the Zunis were outraged at this desecration of their ancient religious rite and the U.S. Marshal was alerted to the possibility of open hostilities. It was in this charged atmosphere that the trial began in January 1990. The presentation of our

1084

evidence was made difficult because the quadrennial pilgrimage had hitherto been a secretive activity unknown to most of the Anglo community. Extensive archaeological, ethno-historical and contemporaneous testimony was needed to support our claims along with interpreters who translated the testimony of several elderly Zunis. After a favorable ruling from the bench, the Zunis gathered to utter a brief prayer followed by tears from many in the courtroom. In appreciation for the efforts of the Department, the Zunis are planning an extraordinary day-long celebration with the entire 12,000 Zuni Tribe; a ceremony of this nature for an outsider is thought to be unprecedented in Zuni history.

The accomplishments of the Policy, Legislation and Special Litigation (PLSL) Section include not only responding to a record number of legislative documents, but also their recent effort to monitor citizen enforcement suits in the district courts and participate as amicus curiae in selected instances. This latter activity is intended to identify private party consent decrees, primarily involving the Clean Water Act, which could impact not only government programs but the course of subsequent legal decisions where the government is a party. The work involves extensive coordination within the Division since several other sections (Environmental Enforcement, Environmental Defense and Appellate) often have various interests in these cases.

The PLSL Section worked extensively this past year with Congress, preparing briefing papers and background analyses on the Administration amendments to the Clean Air Act for the responsible House and Senate committees. They expect to remain active in the process until enactment. As a result of their efforts, the bills that have passed the Senate and are pending in the House contain enforcement provisions that strengthen enforcement authorities and increase the criminal fines for violations. We are confident that the legislation that finally emerges will include such provisions, and will result in more effective enforcement and increased penalty recoveries for the Department. Additionally, the Section has worked with EPA, DOD, and DOE to formulate positions on various federal facilities environmental compliance bills that have been offered in Congress, and to attempt to develop an Administration federal facilities bill. Currently, some of the proposed legislation would waive the government's immunity from suits by states seeking to collect penalties for federal agency violations of state hazardous waste laws. The government's potential penalty exposure in these cases is enormous, and a satisfactory legislative resolution of the issues would be a major political and fiscal accomplishment for the Administration. As a result of our testimony concerning the inherent constitutional conflicts posed by the bill which passed the House, the bill was redrafted. Finally, the Section worked with OMB and the Department of Transportation, as well as other agencies, throughout the process to formulate critical Administration positions on legislation concerning oil spill liability (which was passed in August of 1990) and also succeeded in drafting amendments to the Ocean Dumping Ban Act which were subsequently introduced in the House; these latter amendments add a stronger enforcement program to the earlier bill which was enacted last year.

Apart from its legislative work this past year, the Section filed amicus briefs and monitored citizen suits. Among the major cases they were involved with were Preseault v. I.C.C. where the Supreme Court held that the National Trails System Act (rails to trails act) is not unconstitutional because it does not violate the commerce clause and it does not effect an unconstitutional taking of plaintiffs' property and the widely-reported Caribbean Marine v. Mosbacher, where we won summary judgment motion (S.D. Cal.) upholding the Commerce Secretary's decision to employ women as observers on tuna boats under the Marine Mammal Protection Act, denying plaintiff fishermen's claims of violation of right to privacy.

Citizen Suits - Since last June, this Section has reviewed 34 citizen suit settlements and has participated, formally or informally, in 30 of these. As a result of this effort, over $2 million in penalties have been collected for the U.S. Treasury. Currently, the Section is reviewing three of the largest settlements we've seen — $4.2 million, $2 million and $900,000. None of the money has been designated for the U.S., but the Section anticipates filing if necessary to protect our interests. Parenthetically, should the Clean Air Act be reauthorized with the proposed citizen suit amendments, this Section will be charged with reviewing many more air settlements.

Program Funding Level Requirements
(Dollars in thousands)

Organization: Environment and Natural Resources Division Decision Unit: 2LND02 General Litigation

	1989	1990	1991	1992		
				Base Level	Change	Request Level
Resource Requirements						
BUDGET AUTHORITY	$8,528	$10,006	$10,630	$11,774	$3,089	$14,863
OUTLAYS	8,503	9,781	10,477	11,578	2,626	14,204
Appropriated Positions	110	110	110	110	20	130
FTE Workyears:						
Full-Time Permanent	105	102	112	112	11	123
Other	1	1	1	1	...	1
Subtotal	106	103	113	113	11	124
Overtime/Holiday	...	...	...	...	...	...
Total	106	103	113	113	11	124

1086

Program Changes: Increases of 20 positions, 11 workyears and $3,089,000 (including $2.5 million for ALS) are requested for 1992 for the General Litigation program. These positions will enable the component sections to accomplish their objectives in the face of new legislation and Administration initiatives; particularly those involving "America the Beautiful" and stewardship of public lands, water rights, equitable treatment of Native Americans, and a reauthorized Clean Air Act.

The General Litigation section is requesting 15 positions and $2,446,000 (including $2 million for litigation support) to handle the workload associated with increased water litigation and adjudications, NEPA, takings issues, and royalty and forestry litigation, each of which is discussed below. Underlying these requests however is a general trend toward multi-issue, fact-intensive litigation despite the section's best effort to delegate cases to the U.S. Attorneys and, in the interest of economy, stress issue-narrowing devices which have resulted in an increased number of case resolutions by dispositive motion.

1.) Water litigation. The plentiful and cheap water that made much of the West rich and populous is increasingly scarce and costly; now a four-year drought in much of the West has hastened the deleterious effect of rampant population growth. As a result, water litigation is enormously contentious. This section is conducting precedent-setting water rights litigation throughout the West, the most notable example being Water Division 1. Water Division 1 is a landmark case in which the government (on behalf of the Forest Service) is claiming minimum stream flow rights through its lands, harkening back to the 1897 establishment of the Forest Service. The New York Times (Feb 4, 1990) characterized it as "a trial that could help determine the pace of economic development across the West..." On the other side are the State of Colorado (which, as of last year, had spent over $4 million in trial preparation); and 48 local governments and water developers. The Forest Service owns 20 percent of all the land in Colorado; across the West more than half of all available water either originates or flows through national forests and this case will provide the first scientific and comprehensive effort to set minimum requirements across an entire water system. Clearly the precedent will be enormous — and inevitably destined for the Supreme Court. According to one source, the U.S. is expected to present more than 1,000 technical exhibits at the trial which began in January and is expected to last at least through the summer. The presiding judge is expected to rule in about a year in this test case, which concerns only one of the seven Colorado water districts.

And it's not just happening in Colorado. Vast general stream adjudications are underway in Montana, Nevada and Utah. In Montana, the state court is orchestrating the determination of water rights throughout the state, thus affecting all of the federal land management agencies (Forest Service, Bureau of Land Management, Bureau of Reclamation and others) and Agriculture alone has asserted over 10,000 water right claims and has made over 1,500 objections to claims filed by other parties. Failure to protect these water rights in Montana will severely diminish the value of government property. For example, the FmHA has over 34,000 acres in Montana and even a delay in sale due to uncertainty of water rights will cost the agency over $2.1 million in yearly maintenance costs. In Nevada, the adjudications present both factually-intensive quantification and legal issues of first impression. An adverse decision in these Nevada cases would not only hinder the management of federal land, but would make the government vulnerable to "takings" liability. Many of these adjudications (along with some of those in Colorado) are expected to be ripe for trial in 1992.

Apart from these water rights cases, there is a more general class of water litigation. One example is Nebraska v. Wyoming which involves the interpretation of a 1945 Supreme Court decree and its application to construction of new facilities and operation of existing facilities on the North Platte River. Extensive discovery on behalf of the FWS and Bureau of Reclamation has begun and a broad spectrum of expert hiring lies ahead. By comparison, the Wyoming legislature has committed more than $8 million to this case and allocated 2-3 state attorneys and 2 private attorneys. The case will be in active litigation by early 1992.

1087

Litigation will also increase over the next several years as Interior continues to renew the 40-year reclamation contracts that are expiring throughout the West. The first such renewal has engendered a nationally publicized case: Friant. The Friant case concerns Interior's decision to renew water service contracts without completing any environmental analyses, and affects 23 water districts that comprise the Central Valley Project in California. This precipitated a law suit by environmentalists and provoked public opposition from the EPA and the President's CEQ. Significantly, Friant is merely the first of hundreds of similar contracts that will be renewed during the next 10 years. If the Bureau prepares environmental analyses on these renewals, the environmentalists will attack the adequacy of them; if they alter the water usage, the users will sue to overturn the action.

Finally, in United States v. South Florida Water Management District, the U.S. seeks to constrain the State of Florida to meet its own water quality standards in the interest of the Everglades National Park. It is destined to be one of the most complex pieces of litigation ever handled by this section and attendant resource demands will peak in 1992. This case provides another clear example of our need for expanded baseline resources for AIS. The client agency here, the Department of the Interior, will not provide funding for case development activities, yet the case needs extensive groundwork. As a result of the client's resistance and the Division's lack of funding, we have been forced to cut back drastically on our plans, and we have told the U.S. Attorney that this case will be litigated on the cheap.

Together, water litigation in 1992 will necessitate 8 additional attorneys.

2.) NEPA suits. Major federal actions significantly affecting the environment must be accompanied, under NEPA, by documentation evidencing a full consideration of environmental impacts. Among the areas likely to engender NEPA work in 1992 are:

Global Climate Change — challenging decisions of federal agencies on grounds of failure to adequately consider global climate change issues; the President's space exploration initiative will be among those affected.

Military Reductions-in-Force and Base Closings — e.g., the Temporary Restraining Order (TRO) filed (Greenpeace v. Secretary of Defense - D. Hawaii) where the plaintiffs sought an injunction against the Army's movement of chemical munitions in Germany for ultimate transportation to the Johnston Atoll in the South Pacific for destruction. While the Court denied the motion for a TRO on various and complex jurisdictional grounds, it has indicated that it will consider a Preliminary Injunction once the munitions arrive in the Atoll and NEPA provisions are applicable.

Oil and Gas Development in the Arctic National Wildlife Refuge

New Technologies — bio-technological developments, agricultural pest control, etc.

3.) "Takings" Litigation. The United States Claims Court publicly describes this section's litigation, along with intellectual property litigation, as the most complex and resource intensive on its docket. For its part, the Executive Branch has responded by requiring increased programmatic sensitivity to the private property impact of proposed governmental action. This Section has played a key role in the implementation of Executive Order 12630 and shoulders the responsibility for takings litigation in the Claims Court. The Order requires continuous coordination with 22 federal agencies engaged in a wide variety of activities, e.g., HUD proposing low income housing or OMB determining oil shale and mineral leasing policy or Treasury modifying government bond redemption provisions, and of course, EPA or Corps denial of wetlands permits. Given the programmatic significance of such unexpected "just compensation" costs and the enormous monetary exposure involved, careful coordination and precise argument is necessitated. By way of example, the current pending wetlands taking docket (12 cases; $120 million claimed) is expected to

1088

double by 1992. Additionally, the Supreme Court's ruling in Preseault v. ICC requires the Claims Court to hear all takings claims and the Court has publicly predicted a related increase in its workload, including a surge of cases from the ICC involving the "rails to trails" program where approximately 500 miles are given over annually by railroads increasingly seeking the tax advantages of turning over their abandoned track. And the Preseault ruling has implications well beyond the "rails to trails" program; it has opened the door to plaintiffs alleging that the regulatory burden imposed by government actions (e.g., the recent requirement that "turtle excluder devices" be used by shrimpers) represent unconstitutional takings in that they unfairly deprive them of their livelihood. Indicative of this surge in takings litigation is the recent OMB directive that all federal agencies covered under Executive Order 12630 submit an itemized report of takings awards to both OMB and the Environment Division.

4.) Minerals Royalty Litigation. This Administration is committed to reviewing and, where warranted, revising the present royalty management system. Interior's Bureau of Land Management has full responsibility for mineral leasing and supervision of minerals operations on 270 million acres of public land and on some 300 million acres of Federal mineral estate underlying other agency jurisdictions and ownerships. Lessees will challenge Interior audits, "final agency actions" and claims for unpaid royalties on statute-of-limitations grounds. Significant sums ride on the outcome of these cases and involve the return of an estimated $250-500 million. Although cases are already being referred, the crush of cases is expected to occur in 1992 at which time as many as 100 administrative appeals will be referred. The section will be responsible for tracking the cases and identifying those meriting high priority versus those that can be safely delegated to the U.S. Attorneys.

5.) Forest Service Litigation. Largely to support Forest Service litigation, the President requested 13 additional attorneys for Agriculture's Office of General Counsel in 1991. The National Forest system encompasses 191 million acres spread over 42 States — some 10% of the U.S. land mass — and timber revenue under the National Forest Management Act exceeds $1 billion annually. As the President's 1991 budget states [page 124]:

> "Managing the national forests to protect and maximize [their] multiple benefits is a great challenge...certain timber sales do not equal the costs incurred by the Forest Service in managing the sale. Such "below cost" timber sales occurred on 74 of the 120 national forests last year...The 1991 budget proposes to eliminate the below cost timber program on selected test forests..."

The increased scrutiny brought to bear upon this program promises to engender considerable litigation — by the timber industry, the locally affected economies and environmental groups. Of the 101 forest management plans completed, only 58 have cleared the appeals process, and there are approximately 300 administrative appeals yet to be decided. If current figures hold true, we may anticipate over 300 additional appeals on the 22 plans yet to be completed—among them some of the most contentious in California, the Pacific Northwest and the Northern Rocky Mountain Region.

Compounding this source of forest litigation is the Administration's emphasis on critical habitat and endangered species protection — elements which necessitate a careful and delicate balance of competing interests in forest management.

The Indian Resources section is requesting five additional positions (3 attorney, 1 paralegal and 1 clerical), 3 workyears and $643,000 in 1992. Included is $500,000 for AIS.

As a rule of thumb, the Indian Resources section is responsible for claims asserted by the United States on behalf of Indian tribes and the General Litigation Section handles the claims asserted by the government involving other federal interests. For the most part, the cases involve Indian water rights and the Indian Resources section handles these general stream adjudications with minimal assistance from the U.S. Attorneys; these cases are not only complex and protracted but highly political involving as they often do, States suing the U.S. in an effort to limit Indian water rights. The suits are usually filed in state court and the United States is named a defendant since the federal government claims the right to use water in sufficient amounts to honor the treaty or other document that established the reservation.

1089

> "The Administration is reviewing Native American programs to identify and seek reforms so as better to assist Native Americans...The budget requests full funding ($52 million) to settle Indian water rights claims and make restitution payments to Alaskan Natives." (page 292; The Budget for Fiscal Year 1991)

As the foregoing quote suggests, the last Administration was not especially sensitive to Indian water rights claims and in 1989 the Senate Select Committee on Indian Affairs issued a report which criticized Interior for its lax performance. By contrast, the Bush Administration increased the flow of referrals by 20% last year and Interior warns us that a full 40% increase is in the pipeline. Likewise, Interior has initiated new guidelines for reviewing and expediting water negotiations. Together, these developments are expected to result in more major trials in 1992 than at any time in its history and significantly strain this limited staff.

To appreciate what these cases can entail, we quote the Wyoming Supreme Court in the Big Horn River Water Rights Adjudication:

> "The Special Master signed his 451-page Report Concerning Reserved Water Right Claims By and On Behalf Of The Tribes...on December 15, 1982, covering four years of conferences and hearings, involving more than 100 attorneys, transcripts of more than 15,000 pages and over 2,300 exhibits."

The decision followed 11 years of litigation.

The staff of the Indian Resources program is now spending almost all of its time on general stream adjudications; they have currently assigned one lawyer per active state. Clearly, however, such staffing is inadequate as these cases approach trial. Specifically, the Snake River adjudication in Idaho, formally commenced in November 1987, has been vastly expanded, now covering the entire river system and will join 185,000 water users. The United States will make claims in this adjudication on behalf of four Indian tribes and 10 federal agencies. The Court has approved a schedule for filing either a negotiated agreement or a litigation claim for each agency or tribe at specified dates up through 1991 and 1992. In Washington v. Aquavella, trial will begin as early as 1991 and be well underway in 1992; there is virtually no possibility of settlement of claims on behalf of the Yakima Indian Tribe. The trial will last at least 2-3 months and we estimate that the Department will incur expert witness expenses in the $500,000 range; Interior has already expended $1.5 million on expert studies. The State of New Mexico v. Kerr-McGee will likely go to trial in 1991 and reach into 1992. The specter of trial also looms in Montana involving the adjudication of all water rights in the entire state; with distinct but lesser likelihood of trials in Oregon, Arizona, Colorado and Nevada.

Compounding this glut of work are the recently-published guidelines of Interior concerning the settlement of approximately 50 pending water adjudications in the West. Each adjudication will be assigned a separate "negotiating team" with a Justice Department representative on each team.

Finally, this section has just begun to witness a new phenomenon -- the advent of various environmental matters involving tribal or Indian interests — particularly ground water pollution and hazardous waste sites on Indian property. The section has initiated coordinating procedures with the Environmental Protection sections since the matters will involve the convergence of Indian and environmental law. Interior has already hired one attorney to handle these matters and instituted a formal training program for their handling by the Bureau of Indian Affairs. This initiative promises to create a whole new category of cases for the section.

To respond to this increase in workload, the section urgently needs 5 additional positions.

1090

Schedule of Cost Inputs

Organization: Environment and Natural Resources Division Decision Unit: 210N32 General Litigation

Item	1992 Base			1992 Request			Increase/Decrease		
	Pos	FTE	Amount	Pos	FTE	Amount	Pos	FTE	Amount
Attorney	62	63	$3,780	75	70	$4,053	13	7	$273
Paralegal	12	13	416	15	15	469	3	2	53
Clerical	36	37	888	40	39	916	4	2	28
Subtotal	110	113	5,084	130	124	5,438	20	11	354
Modular costs			5,690			5,925			235
Automated litigation support			1,000			3,500			2,500
Subtotal			6,690			9,425			2,735
Total	110	113	11,774	130	124	14,863	20	11	3,089

Description of Cost Inputs

General Litigation 15 positions and $2,446,000 ($2 million for automated litigation support) to handle extensive water rights litigation (e.g., Water Division I, Everglades); NEPA challenges; "takings"-related litigation involving both federal environmental and land use regulation; minerals royalty claims and forestry litigation.

Indian Resources 5 positions and $643,000 ($500,000 for automated litigation support) to handle upcoming water rights trials; staff Interior's 50 negotiating teams; and handle new breed of environmental law suits arising on Indian lands.

Environment and Natural Resources Division

Salaries and Expenses, General Legal Activities: 15 0128

Summary of Decision Unit Resources by Object Class
(Dollars in thousands)

Organization: Environment and Natural Resources Division

Decision Unit: 2LDN32 General Litigation

Object Class		1990 Actual		1991 Estimate		1992 Estimate		Increase/Decrease	
		Workyears	Amount	Workyears	Amount	Workyears	Amount	Workyears	Amount
11	Personnel Compensation	93	4,650	113	$5,537	124	$6,448	11	$911
12	Personnel benefits		744		886		1,096		210
21	Travel & transportation of persons		507		616		676		60
22	Transportation of things		70		86		94		8
23.1	GSA rent		705		856		939		83
23.2	Rental payments to others		...		...		...		...
23.3	Communications, utilities and miscellaneous charges		254		308		376		68
24	Printing and reproduction		99		120		132		12
25	Other services		2,626		2,059		4,914		2,855
26	Supplies and materials		85		94		113		19
31	Equipment		56		68		75		7
	Total obligations	93	9,796	113	10,630	124	14,863	11	4,233 *

* Includes $1,144,000 in adjustments to base.

1092

Justification of Program and Performance
Environment and Natural Resources Division
Salaries and Expenses, General Legal Activities: 15 0128
Management & Administration 61DN00

Long Range Goal: To efficiently and effectively manage the Environment and Natural Resources Division, and to provide the administrative services and support necessary to carry forward the Division's programs.

Major Objectives:
To develop program initiatives to permit effective responses to Administration policy requirements.

To provide policy direction to the Division's program managers.

To ensure that all statutory obligations are met.

To increase productivity and effectiveness through management planning and office automation technology.

To recruit and provide training for highly competent and motivated staff.

To develop and maintain systems for improved fiscal planning and accountability.

To provide adequate administrative services, including space and facilities, mail and messengers, copying and supplies.

To update and improve automated management information systems.

Base Program Description: The Management and Administration decision unit includes the Office of the Assistant Attorney General and the Executive Office for Administration. Thus, this program provides overall direction and management of the Environment and Natural Resources Division, and supervises and administers operations necessary to support the Division's litigative mission. Responsibilities of the unit include: budget preparation and execution; financial management; development, operation and maintenance of management and automated support systems; workload and resource requirements analyses; recruitment; processing of personnel actions; management of space and facilities; provision of office equipment and supplies; processing mail; and the provision of messenger, copying and printing services.

Program Funding Level Requirements
(Dollars in thousands)

Organization: Environment and Natural Resources Division Decision Unit: 6LND30 Management and Administration

	1989	1990	1991	1992		
				Base Level	Change	Request Level
Resource Requirements						
BUDGET AUTHORITY	$2,645	$3,217	$3,650	$4,041	$201	$4,242
OUTLAYS	2,637	3,130	3,562	3,965	171	4,136
Appropriated Positions	33	38	39	39	5	44
FTE Workyears:						
Full-Time Permanent	26	30	33	33	3	36
Other	1	1	1	1	...	1
Subtotal	27	31	34	34	3	37
Overtime/Holiday	...	...	...	...	...	...
Total	27	31	34	34	3	37

Program Changes: This program requests 5 additional positions and $201,000 for the Executive Office. Specifically, the increase will enable the Division's Litigation Support Group to handle the planned growth in automated litigation support. This 1992 budget request includes an additional $10.5 million for ALS; correspondingly, 5 additional litigation support case managers will be needed to manage approximately 30 cases and a related litigation support budget of $16.5 million; a far cry from just seven years ago when the Division's budget for this activity hovered below $1 million. In the ensuing years, our experience has been that each case manager should oversee an ALS budget of roughly $1 million. This assessment comports with the Civil Division's program. The 1992 request envisions Environment Division personnel managing approximately $1.5 million each.

1095

Schedule of Cost Inputs

Organization: Environment and Natural Resources Division Decision Unit: 61DN30 Management and Administration

Item	1992 Base			1992 Request			Increase/Decrease		
	Pos	FTE	Amount	Pos	FTE	Amount	Pos	FTE	Amount
Attorney	8	7	$385	8	7	$385	...	...	...
Clerical & Other	31	27	1,040	36	30	1,134	5	3	$94
Subtotal	39	34	1,425	44	37	1,519	5	3	94
Modular costs	...	...	2,616	...	...	2,723	...	...	107
Total	39	34	4,041	44	37	4,242	5	3	201

Description of Cost Inputs:

Executive Office -- Five positions are requested for enhanced service in the Litigation Support Group.

1096

Environment and Natural Resources Division

Salaries and Expenses, General Legal Activities: 15 0128

Summary of Decision Unit Resources by Object Class
(Dollars in thousands)

Organization: Environment And Natural Resources Division

Decision Unit: 61ED10 Management and Administration

Object Class	1990 Actual		1991 Estimate		1992 Estimate		Increases/Decreases	
	Workyears	Amount	Workyears	Amount	Workyears	Amount	Workyears	Amount
11 Personnal Compensation	31	$1,457	34	$1,581	37	$1,776	3	$195
12 Personnal benefits		233		253		284		31
21 Travel & transportation of persons		75		82		90		8
22 Transportation of things		19		26		28		2
23.1 GSA rent		225		258		280		22
23.2 Rental payments to others		...		...		...		...
23.3 Communications, utilities and miscellaneous charges		61		93		112		19
24 Printing and reproduction		33		36		39		3
25 Other services		1,013		1,269		1,577		308
26 Supplies and materials		28		31		34		3
31 Equipment		19		21		22		1
Total obligations	31	3,163	34	3,650	37	4,242	3	592*

* Includes $391,000 in adjustments to base.

10/97

Environment and Natural Resources Division
Salaries and Expenses, General Legal Activities
Financial Analysis of Program Changes
(Dollars in thousands)

Item	Appellate		Environmental Protection						General Litigation				Management & Administration		Total	
	Appellate		Environmental Crimes		Environmental Defense		Environmental Enforcement		General Litigation		Indian Resources		Executive Office			
	Pos	Amount	Pos	Amount	Pos	Amount	Pos	Amount	Pos	Amount	Pos	Amount	Pos	Amount	Pos	Amount
GS/GM-15	1	$64	2	$127	2	$127	1	$64	1	$64	...	...	...	...	7	$446
GS/GM-14	...	...	2	108	3	163	2	108	1	54	...	...	...	...	8	433
GS/GM-13	...	...	3	138	4	180	2	92	2	92	2	$92	1	$46	14	643
GS-12	1	39	4	154	6	231	2	77	3	116	...	...	2	77	18	694
GS-11	...	...	5	161	3	97	2	64	3	97	1	32	2	64	16	515
GS-9	...	...	2	53	4	106	2	53	3	80	1	27	...	...	12	319
GS-7	...	...	1	22	2	43	3	65	1	22	...	...	...	...	7	152
GS-5	...	...	1	18	3	53	2	35	1	18	1	18	...	...	8	142
GS-4	...	...	1	16	...	...	1	16	...	...			...	...	2	32
Total positions and annual rate	2	103	21	797	27	1,000	17	534	15	543	5	189	5	187	92	3,376
Lapse (-)	1	51	10	398	13	502	9	287	7	270	2	84	2	94	44	1,686
Absorption of prior year pay raise	...	...	...	...	...	...	...	660	...	...	...	...	...	...	...	660
Conversion to AD pay system	...	...	...	...	...	...	...	446	...	...	...	...	...	...	...	446
Total, workyears and personnel compensation	1	52	11	399	14	501	8	287	8	273	3	85	3	93	48	1,680
Personnel Benefits		14		108		136		78		73		23		25		457
Travel and transportation of persons		...			...	...			...	...			...	...		
		2		78		75		43		35		13		19		265
Transportation of things		...		3		4		3		2		1		1		14
GSA		2		24		31		18		17		6		6		104
Rent, Communications & Utilities		1		5		7		4		4		1		1		23
Printing		1		5		7		4		4		1		1		23
Other services		4		1,040		1,051		6,031		2,027		518		51		10,713
Supplies and materials		1		5		6		4		3		1		1		21
Equipment		1		12		15		9		8		3		3		51
Total, program workyears and obligations changes required, 1992	1	78	11	1,679	14	1,833	8	7,987	8	2,446	3	643	3	208		14,597

Environment and Natural Resources Division
Salaries and Expenses, General Legal Activities
Detail of Permanent Positions by Category
Fiscal Years 1990 - 1992

	1990 Authorized	1991 Authorized	1992 Program Increases	1992 Total
Attorneys (905)	207	230	58	288
Paralegal Specialists (950)	33	40	12	52
Other legal and kindred (900-998)	9	9	...	9
Gen. Admin, clerical and office services (300-399)	127	144	22	166
Accounting and Budget (500-599)	4	4	...	4
Business and Industry Group (1100-1199)	3	3	...	3
Total	383	430	92	522
Washington	369	416	92	508
U.S. Field	14	14	...	14
Total	383	430	92	522

10096

Office of Legal Counsel
Salaries and Expenses
Crosswalk of 1991 Changes

(Dollars in Thousands)

	1991 President's Budget Request			Adjustment in Permanent Positions and Workyears			Appropriation Reprogrammings			1991 Anticipated		
Activity/Program	Pos.	WY	Amount	Pos.	WY	Amount	Pos.	WY	Amount	Pos.	WY	Amount
Legal Opinions	39	43	$3,013	...	-1	...	...	...	$36	39	42	$3,049

Adjustment in Permanent Positions and Workyears. The reduction of one workyear is necessary to absorb 50 percent of the 1991 pay raise. A program increase in 1992 is requested to restore the costs of this pay adjustment absorbed in 1991.

Reprogrammings. The reprogramming of budget authority reflects the permanent effect of a reprogramming for OLC library enhancement.

1100

Salaries and Expenses, General Legal Activities
Summary of requirements
(Dollars in Thousands)

	Perm. Pos.	Work-Years	Amount
Adjustments to Base:			
1991 President's Budget Request	39	42	$3,013
Adjustment in workyears, reprogramming	--	--	-36
1991 Appropriation Anticipated	39	42	3,049
1991 Mandatory Increases:			
Additional Compensable Day	--	--	10
1991 Pay Annualization	--	--	37
1992 Pay raise	--	--	146
Within Grade Increases	--	--	24
Executive salary/SES increases	--	--	42
Health benefits	--	--	15
Federal Employees Retirement System (FERS)	--	--	11
Federal Insurance Corporation Act (FICA)	--	--	8
GPO printing costs	--	--	3
Employee Data and Payroll	--	--	1
Financial Operations Service (FOS)	--	--	6
Security Investigation	--	--	3
Security Reinvestigations	--	--	27
GSA Rent	--	--	33
General Pricing Level Adjustment (GPL)	--	--	21
Total Mandatory Increases	--	--	383
Decreases:			
Unemployment Compensation	--	--	(1)
Total Adjustments to Base	--	--	382
1992 Base	39	42	3,431

Estimates by Budget Activity	1990 Actual Perm. Pos.	1990 Actual WY	1990 Actual Amount	1991 Appropriation Anticipated Perm. Pos.	1991 Appropriation Anticipated WY	1991 Appropriation Anticipated Amount	1992 Base Perm. Pos.	1992 Base WY	1992 Base Amount	1992 Estimate Perm. Pos.	1992 Estimate WY	1992 Estimate Amount	Increase/ Decrease Perm. Pos.	Increase/ Decrease WY	Increase/ Decrease Amount
6. Legal Opinions	39	36	$2,818	39	42	$3,049	39	42	$3,431	39	43	$3,535	...	1	104
EOY employment:															
Full-time	29			34			34			34			...		
Other	6			5			5			5			...		
	35			39			39			39			...		

OFFICE OF LEGAL COUNSEL

Salaries and Expenses, General Legal Activities

Summary of Requirements

Long Range Goal:

To assist the Attorney General in his role as legal adviser to the Executive Branch, and to provide timely, thorough and reliable legal analysis in response to requests for opinions from the President, the White House staff through the Counsel to the President, the Attorney General, Justice Department components and the heads of Executive Branch agencies.

Major Objectives:

To enhance the ability of the Office of Legal Counsel (OLC) to assist the Attorney General in his role of providing general legal advice to the President and Executive Branch agencies. To improve OLC's usefulness in resolving intra-Executive Branch disputes over legal questions.

To enable OLC better to assist other components of the Department of Justice where litigation or proposed legislation raises constitutional issues or issues of general concern to the Executive Branch.

To expedite performance of OLC's role in approving Executive Orders and Orders of the Attorney General as to form and legality.

To continue to play a major role in testifying and preparing testimony in connection with pending legislation of interest to the Department and the Administration, and to assist in the drafting of legislation.

Base Program Description:

The principal duty of OLC is to assist the Attorney General in his role as legal adviser to the President and Executive Branch agencies and as arbiter of legal disputes within the Executive Branch. OLC also provides general legal assistance to other components of the Department, especially where litigation or proposed legislation raises constitutional issues or general issues of executive authority. It

reviews for form and legality all Executive Orders and proclamations proposed by the President, as well as all proposed orders of the Attorney General and all regulations requiring his approval. In addition, OLC is also involved in coordinating the work of the Department regarding treaties, executive agreements and international organizations, and performs a variety of special assignments referred to the Office by the Attorney General, the Deputy Attorney General or the Associate Attorney General. The Office has responsibility for advising the Office of Government Ethics on matters of law in the area of conflict of interest, and the Assistant Attorney General serves as ethics counselor to the Office of the Attorney General, the Deputy Attorney General, the Associate Attorney General and the Solicitor General.

The President has directed the Attorney General to establish and convene a General Counsel's Consultative Group consisting of the general counsels of the principal Executive Branch components. The purpose of this Group is to improve coordination and consistency in handling of important legal issues of common concern throughout the Executive Branch, particularly legal matters bearing upon the President's constitutional responsibilities and authority. The President has stressed to the Attorney General that he intends his Administration to be faithful to the principle of separation of powers. In this regard, he believes it is his constitutional duty to ensure that the Executive Branch maintains its unitary character. The President has advised the Attorney General that he expects all of his attorneys throughout the Executive Branch to make this one of their highest priorities. The Assistant Attorney General chairs the General Counsel's Consultative Group.

At the request of the Attorney General, the Assistant Attorney General represents the Department of Justice on various groups that report to the National Security Council.

The Attorney General has directed OLC to represent the Department of Justice on the Administrative Conference of the United States, as appropriate, on regulatory reform matters.

The Attorney General has requested that OLC advise and assist him in the consideration and selection of Federal judges.

The statutory authority pertaining to OLC is 28 U.S.C. 511-512. There are no pending or proposed legislative changes that would affect OLC.

OLC generally does not initiate any programs nor does it have control over the volume of its work, which results from requests for opinions and legal advice from the

President, the White House staff, the Attorney General, members of the Cabinet and Executive Branch agencies and other Department of Justice officials.

A small number of requests are considered appropriate for formal Attorney General opinions, which are drafted preliminarily in OLC and reviewed, revised and approved by the Attorney General. Most requests result in the preparation of legal opinions signed by the Assistant Attorney General or one of the Deputies based upon the research of one or more of the 19 staff attorneys. Other requests result in the provision of oral advice to the client agency.

Since 1977, at the direction of the Attorney General, this Office has published selected formal opinions. Volumes covering the years 1977 through 1982 have been issued, and work continues on volumes covering the years 1983 to date.

OLC's role in the Department's legislative program has increased dramatically in recent years, and includes drafting legislative opinions, testimony, and preparation of Presidential signing statements and veto messages. OLC has taken a major role in either testifying or preparing testimony in connection with pending legislation of interest to the Department and the Administration, and has assisted in the drafting of legislation. It has also provided advice to the litigating divisions and the Solicitor General on constitutional issues relating to presidential authority and separation of powers.

In addition, because of its expertise in certain areas, OLC has assumed an on-going advisory role to other Department components, on issues relating to immigration reform, Iran/Contra, the debt ceiling and budget reform, executive privilege, federalism, conflict of interest and ethics, and various independent counsel matters.

Accomplishments and Workload:

The following statistics are projections of the workload for the Office of Legal Counsel:

ITEM	1989 Actuals	1990 Estimates	1991 Estimates	1992 Estimates
Executive Orders and Proclamations	65	75	80	85
Opinions	560	600	650	675
Intradepartmental Opinions	700	775	825	875
Special Assignments	3,200	3,800	4,200	4,500

Explanation:

The "Opinions" category is an estimate of advice given to the White House, OMB and other Executive Departments and agencies. It includes both formal and informal advice as well as responses to requests for information.

The "Intradepartmental Opinions" category is an estimate of informal advice, formal opinions and bill comments given to the Office of the Attorney General as well as other Departmental units.

The "Special Assignment" category is an estimate of a number of different matters, including informal advice, responses to oral requests for information and referral, and citizen inquiries as well as review of Freedom of Information Act and Privacy Act requests. This category also includes drafting briefs in the Noriega and Alvarez-Machain prosecutions as well as other cases and matters.

During the past year, OLC has provided general legal advice to the President and the various departments and agencies of the Executive Branch on a wide range of constitutional and legal issues, particularly issues of executive authority and separation of powers and on questions relating more narrowly to the powers and duties of particular departments and agencies. For example, it has rendered important opinions on auctioning production privileges for chlorofluorocarbons, ratifying past acts of government officials, the proper scope of the Inspector Generals' authority, the proper interpretation of 18 U.S.C. 208, and the proper construction of certain legislative riders purporting to restrict the use of classification forms. This sample does not include the classified opinions that the Office has rendered on

important national security issues. Besides written opinions, OLC provides oral advice on a daily basis to a wide variety of agencies, including the White House and OMB.

OLC has provided legal opinions under Executive Order No. 12146 in a number of disputes between executive agencies. OLC responds to every request for dispute resolution it receives. For example, OLC resolved disputes between OMB and EPA, between the Department of Labor and HUD, between OMB and the Department of Labor and between OMB and the Department of Education.

OLC has reviewed numerous Executive Orders for form and legality and given advice to the President concerning suggested revisions. OLC has also reviewed all orders of the Attorney General during this period, most of them on very limited time schedules. In addition, in various emergency situations, the Office has been called on to advise the White House or the Attorney General.

OLC devoted substantial time and resources to the background preparation in connection with the nomination of Judge Souter to the Supreme Court.

Work continues on Volumes 7 through 12 of the Opinions of the Office of Legal Counsel for the years covering 1983 through 1988. These volumes will include formal opinions of the Attorney General signed during this period.

1106

Program Changes:

Program changes for OLC include funding for the 1991 pay absorption ($69,000). This increase is needed to restore resources that were effectively lost in 1991 because the Office was required to absorb 50 percent of the 1991 pay raise.

Department-wide, decisions have been made that all DOJ attorneys should be compensated under the Administratively Determined (AD) pay system ($32,000) which is currently used to fund Assistant United States Attorneys salaries.

Funding is needed ($3,000) to support the Department's implementation of the Administration's "Management Priorities for the 1992 Budget" as outlined in OMB memorandum (M-90-05) dated July 16, 1990. Funding will be used to address upgrades in financial management systems, consistent with long-standing Administration goals for consolidating, upgrading and modernizing a single integrated financial management system within each agency, with full implementation of the Core Financial Requirements and the Standard Ledger that will be capable of producing auditable financial statements.

Office of Legal Counsel
Salaries and Expenses, General Legal Activities
Financial Analysis - Program Changes

(Dollars in Thousands)

Item	Total		1991 Pay Absorption		A.D. Pay		FMIS Enhancement	
	WYs.	Amount	WYs.	Amount	WYs.	Amount	WYs.	Amount
Grades								
None								
Total workyears and personnel compensation	1	78	1	53	...	25	...	...
Personnel benefits	...	23	...	16	...	7	...	...
Other Services	...	3	...	...	...	...	...	3
Total workyears and obligations, 1992	1	104	1	69	...	32	...	3

Office of Legal Counsel

Salaries and Expenses, General Legal Activities

Detail of Permanent Positions by Category

Fiscal Years 1990 - 1992

Category	1990 Authorized	1991 Request	1992 Request
Attorneys (905)	23	24	24
Paralegal Specialist (905)	4	4	4
Secretaries (318)	6	8	8
General Administrative, clerical & office svc. (300-399)	6	3	3
Total	39	39	39
Washington	39	39	39
Total	39	39	39

Civil Rights Division

Salaries and expenses, General Legal Activities

Crosswalk of 1991 Changes
(Dollars in thousands)

Activity/Program	1991 President's Budget Request			Adjustments in Workyears			1991 Program Supplementals Requested			1991 Appropriation Anticipated		
	Pos.	WY	Amt.	Pos.	WY	Amt.	Pos.	WY	Amt.	Pos.	WY	Amt.
7. Civil rights matters:												
a. Federal appellate activity...	32	29	$2,363	...	...	...	...	...	$2	32	29	$2,365
b. Civil rights prosecution.....	45	41	3,308	...	-1	...	...	...	5	45	40	3,313
c. Special litigation.....	35	32	2,940	...	...	...	...	...	6	35	32	2,946
d. Voting.....	84	74	6,031	...	-1	...	...	...	2,150	84	73	8,181
e. Employment litigation.....	63	59	4,526	...	-1	...	...	...	6	63	58	4,532
f. Coordination and review.....	38	36	2,904	...	...	...	6	3	4,590	44	39	7,494
g. Housing and civil enforcement	80	55	4,950	...	-1	...	...	...	11	80	54	4,961
h. Educational opportunities....	30	27	2,298	...	...	...	...	...	3	30	27	2,301
i. Management and administration	74	78	10,004	...	-1	...	...	...	...	74	77	10,004
Total.....	481	431	39,324	...	-5	...	6	3	6,773	487	429	46,097

Civil Rights Division

Salaries and expenses, General Legal Activities

Summary of Requirements

(Dollars in thousands)

Adjustments to base:	Perm. Pos.	Work-years	Amount
1991 as requested	481	431	$39,324
1991 Program supplemental requested	6	3	6,773
Adjustments in workyears	...	-5	...
1991 appropriation anticipated	487	429	46,097
Mandatory increases	...	34	3,792
Decreases	...	...	-359
1992 base	487	463	49,530

Estimates by budget activity	1990 as enacted Perm. Pos.	WY	Amount	1990 Actual Perm. Pos.	WY	Amount	1991 Appropriation Anticipated Perm. Pos.	WY	Amount	1992 Base Perm. Pos.	WY	Amount	1992 Estimate Perm. Pos.	WY	Amount	Increase/Decrease Perm. Pos.	WY	Amount
7. Civil rights matters:																		
Federal appellate	32	29	$2,248	32	28	$2,248	32	29	$2,365	32	29	$2,587	32	29	$2,537	...	...	$-50
Civil rights prosecution	45	41	3,178	45	40	3,178	45	40	3,313	45	40	3,504	45	41	3,542	...	1	38
Special litigation	35	32	2,821	35	31	2,821	35	32	2,946	35	32	3,112	35	32	3,144	...	...	32
Voting	68	66	4,110	68	66	4,110	84	73	8,181	84	81	8,679	87	83	9,876	3	2	1,197
Employment litigation	63	59	4,341	63	59	4,341	63	58	4,532	63	58	4,795	75	65	5,355	12	7	560
Coordination and review	39	37	2,776	39	37	2,776	44	39	7,494	44	42	7,977	102	72	21,692	58	30	13,715
Housing and civil enforcement	33	31	2,342	33	31	2,342	60	54	4,961	60	77	6,190	80	78	6,235	...	1	45
Educational opportunities	31	28	2,202	31	27	2,202	30	27	2,301	30	27	2,438	30	27	2,465	...	...	27
Management and administration	119	104	8,495	119	103	8,495	74	77	10,004	74	77	10,328	74	78	10,790	...	1	462
Total	465	427	32,513	465	422	32,513	487	429	46,097	487	463	49,530	560	505	65,636	73	42	16,106
Reimbursable Workyears		6			6			6			6			6			...	
Total Workyears		433			428			435			469			511			42	
Other Workyears:																		
Holiday		...			...			...			...			...			...	
Overtime:																		
AUO		...			...			...			...			...			...	
Other		3			3			3			3			3			...	
Total compensable workyears		436			431			438			472			514			42	

1111

Civil Rights Division
Salaries and expenses
Summary of Change
(Dollars in thousands)

Adjustments to base:	Perm. Pos.	Work-Years	Amount
1991 as requested	481	431	$39,324
1991 Program supplemental requested	6	3	6,773
Decreases associated with 1991 pay absorption	...	-5	...
1991 Appropriation anticipated	487	429	45,952
Mandatory increases:			
One additional compensable day	...	...	106
1991 pay annualization	...	...	175
1992 pay raise	...	...	715
Within-grade increases	...	...	156
Annualization of 58 postions approved in 1991	...	31	1,392
Annualization of Supplemental	...	3	265
Annualization of Executive Level and Senior Executive Service pay increases	...	...	76
Health benefits	...	...	93
Federal Employees Retirement System (FERS)	...	...	50
Federal Insurance Corporation Act (FICA)	...	...	18
Travel: mileage	...	...	2
Postage	...	...	10
Government Printing Office (GPO) and Department printing	...	...	15
Employee data and payroll services	...	...	5
Security investigations	...	...	2
Security reinvestigations	...	...	126
General Services Administration (GSA) rent	...	...	208
GSA recurring reimbursable services	...	...	103
General pricing level adjustment	...	...	275
Decreases:			
Unemployment compensation redistribution	...	...	-6
Financial Operations and Systems Service (FOS)	...	...	-51
Nonrecurring decreases associated with positions approved in 1991	...	...	-302
1992 base	487	463	49,530

Civil Rights Division
Justification of Program and Performance
Salaries and expenses: 15-0128-0-1-752
Federal Appellate Activity - 2CRT01

Long-Range Goal: To reduce the incidence of unlawful denials of civil and constitutional rights.

Major Objectives:

To file on a selective basis, appellate level cases initiated by the government and serve as a friend of the court in appellate cases which have a substantial impact on federal civil rights enforcement.

To handle all appropriate appellate level litigation in the civil rights area rather than to have such cases handled by enforcement programs.

To provide legal counsel to government departments and agencies on civil rights issues, and legal counsel and research assistance, with respect to pending litigation, to other Division and Department programs.

To provide substantive support for the Division's legislative initiatives and to comment on the legislative proposals of others.

Accomplishments and Workload: Accomplishments of the Federal Appellate program are presented below:

Item	1989	1990	1991	Change	1992 Base Level
Cases/Matters Received	124	165	165	...	165
Briefs Filed	56	70	70	...	70
Solicitor General Recommendations	22	20	25	...	25
Decision Not to Participate or Appeal	25	20	25	...	25
Legal Counsel and Research Assistance Provided	36	70	70	...	70
Legislative Comment and Testimony	158	180	180	...	180
Cases/Matters Handled	172	188	188	...	180

Workload projections for future years in all categories are based on considerations of the program's production in previous years, and the level and complexity of activity in other litigating programs. It should be noted, however, that the work of this program is closely

42-569 O—91——36

correlated to the number of cases brought by other litigating programs. In addition, Supreme Court activity is dependent upon the types of cases which the Court decides to hear.

From October 1, 1989, through July 31, 1990, the Division filed 15 papers in the Supreme Court and 51 papers in the courts of appeals. Seventy-nine percent of all merit decisions were in full or partial accord with the Division's contentions. The Supreme Court reached the merits in four cases, two of which were favorable to the Division. The courts of appeals rendered 24 merit decisions, 20 of which were in full or partial accord with the Division's contentions. We prevailed in our public accommodations suit against a swim club, where the Third Circuit held that the club had engaged in a pattern or practice of discrimination on the basis of race in its membership practices. In another case, a non-minority contractor challenged a state's implementation of the federal disadvantaged business enterprise program, as well as the constitutionality of the program itself. The Fourth Circuit accepted our argument that the plaintiff had no standing to challenge the program because he failed to show that his business suffered an economic loss from implementation of the program. In a voting case challenging the at-large election system for Dallas County Commissioners, we successfully argued in the Fifth Circuit that the district court abused its discretion in shortening the terms of the commissioners elected from single-member districts in 1988 from four years to two.

Thus far in 1990, the program has experienced an increase in the number of legal counsel requests from other Divisions and federal agencies on civil rights issues, responding to over 60 such requests to date. This trend is expected to continue. In the legislative area, substantial resources have been devoted to the Civil Rights Act of 1990. In addition to assisting in the preparation of the Administration's bill, we have commented extensively on the House and Senate bills. Considerable effort is being devoted to analyzing cases that apply the 1988 Term Supreme Court decisions that the bills are designed to overturn. We have also prepared several other legislative proposals, including a bill to make cross burning a felony, and legislation amending the Civil Liberties Act of 1988 to make eligible for compensation non-Japanese spouses and parents who were interned during World War II with their spouses and children of Japanese ancestry.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization Civil Rights Division

Decision Unit 2CRT01 Federal Appellate Activity

Resource Requirements	1989	1990	1991	1992 Base Level Change	1992 Base Level Cum.	1992 Request Level Change	1992 Request Level Cum.
BUDGET AUTHORITY	$2,038	2,248	$2,365	$142	$2,507	$30	$2,537
OUTLAYS	1,847	2,222	2,346	140	2,486	26	2,512
Appropriated Positions	32	32	32	...	32	...	32
Workyears:							
Full-Time Permanent	28	28	29	...	29	...	29
Other	...	...	...	...	...	...	...
Subtotal	28	28	29	...	29	...	29
Overtime/Holiday	...	...	...	...	...	...	...
Total	28	28	29	...	29	...	29

Program Changes: The $30,000 is for fifty percent of the pay raise absorbed in 1991 and will enable this program to utilize all authorized workyears.

Justification of Program Performance
Civil Rights Division
Salaries and expenses: 15-0128-0-1-752
Civil Rights Prosecution - 2CRT02

Long-Range Goal: To significantly reduce police criminal misconduct as well as criminal misconduct of other public officials who violate the federal criminal civil rights statutes; eliminate or substantially reduce violent activity by private citizens which interferes with federally protected civil rights on the basis of race, religion, national origin or sex, particularly interference by organized, violent hate groups such as the Ku Klux Klan and Aryan Nations.

Major Objectives:

To expeditiously respond to and cause to be investigated all valid complaints of potential criminal civil rights violations.

To present potentially meritorious incidents to grand juries for investigation and, where warranted, for indictment.

To try cases in which indictments have been returned or informations filed.

To review and authorize criminal civil rights prosecutions proposed by the U.S. Attorneys.

To ensure uniform and effective application of the federal criminal civil rights statutes throughout the country.

To reduce the amount of time required to review and make prosecutive determinations on matters investigated and to initiate prosecutions.

Accomplishments and Workload: Accomplishments of the Civil Rights Prosecution program are presented below:

Item	1989	1990	1991	Change	1992 Base Level
Complaints Received	8,053	7,964	7,964	...	7,964
Complaints Reviewed	8,133	8,022	6,724	672	7,396
Matters Investigated	3,177	3,062	2,690	269	2,959
Matters Terminated	3,138	2,950	2,594	259	2,853
Cases Filed	59	52	48	5	53
Cases Closed	48	37	42	4	46
Average time to close without prosecution (in months)	2.3	2.1	2.8	-.3	2.5
Average time to file a case (in months)	14.6	13.1	15.1	-1.5	13.6

11116

During 1990 the program expects to receive almost 8,000 complaints alleging criminal interference with civil rights, approximately 3,100 of which will be investigated by the Federal Bureau of Investigation. It is projected that the results of 47 investigations will be presented to federal grand juries; 29 indictments will be returned and 23 informations will be filed charging 83 defendants, including 30 law enforcement officials. These projections further forecast that trials will be held in 11 cases, resulting in conviction for 14 defendants and acquittal for one defendant. In addition, 44 defendants will plead guilty to violations of criminal civil rights statutes leading to a success rate (convictions and pleas) of 97 percent.

The number of trials predicted for 1990, while substantially lower than in prior years, reflects the increase in the proportion of cases that are resolved by plea, especially in racial violence cases which constituted the majority of litigation in 1989 and 1990. We believe this is due to the enhanced sentences provided by the Sentencing Guidelines. In addition, the impact of the Sentencing Guidelines is beginning to be seen in the increase of pleas prior to indictment.

Workload estimates for 1991 are based on the average of activity for the past four years (1987-1990). Those figures were reduced by 10 percent due to the turnover among attorneys and in order to take into account the time needed to fill current vacancies and for the newly-hired to become fully productive. The loss of experienced attorneys during this past year led to a turnover rate of 23 percent and there has been unexpected difficulty in filling those vacancies with attorneys experienced in criminal litigation. In addition, for the first time in many years, each of the three supervisory deputies is personally involved in active, complex litigation resulting in somewhat more time to review matters. Moreover, in 1989 almost all cases involved direct participation by the program: the proportion of cases brought by U.S. Attorneys declined by one-third from 1988. This trend, while not increasing, is continuing into 1990 and is, we believe, due to the United States Attorneys' greater concentration of resources in drug, fraud, and other priority areas.

The 1992 estimate increase is based upon productivity expectations from an experienced attorney staff that will be fully trained.

An unknown factor that may affect the program's workload is the recently-enacted Hate Crime Statistics Act which will provide for the collection by the Attorney General of data about crimes which manifest evidence of prejudice based on race, religion, sexual orientation or ethnicity. This could result in an increase number of complaints and matters to be investigated and prosecuted. In the past few years, the number of racial violence matters received has increased and the implementation of this Act is likely to increase it further.

11117

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization: Civil Rights Division

Decision Unit 2CRT02 Civil Rights Prosecution

Resource Requirements	1989	1990	1991	1992 Base Level Change	1992 Base Level Cum.	1992 Request Level Change	1992 Request Level Cum.
BUDGET AUTHORITY	$2,872	$3,178	$3,313	$191	$3,504	$38	$3,542
OUTLAYS	2,981	3,140	3,289	183	3,472	37	3,509
Appropriated Positions	45	45	45	...	45	...	45
Workyears:							
Full-Time Permanent	41	40	40	...	40	1	41
Other	...	...	...	...	...	...	...
Subtotal	41	40	40	...	40	1	41
Overtime/Holiday	...	...	...	...	...	...	...
Total	41	40	40	...	40	1	41

Program Changes: The $38,000 is for fifty percent of the pay raise absorbed in 1991 and will enable this program to utilize all authorized workyears.

1991 Range Goal: To establish and protect constitutional rights of institutionalized persons, mentally and physically handicapped persons of all ages, persons confined in state and local prisons and jails, and enforce federal laws prohibiting racial discrimination in all public institutions, such as prisons and jails.

Major Objectives:

To investigate, upon reasonable cause, the conditions of confinement and treatment provided to persons in publicly operated institutions; obtain voluntary compliance in correcting any constitutional deficiencies or other violations of federal law; and, as a last resort, to initiate litigation on behalf of such persons when egregious conditions are found to exist.

To initiate and/or participate in litigation designed to remove racial discrimination from public institutions; establish constitutionally acceptable conditions of confinement, care and treatment of institutionalized populations; and, remove discrimination against handicapped persons.

To ensure compliance with existing judgments or consent decrees.

Accomplishments and Workload: Accomplishments of the Special Litigation Program are presented below:

Item	1989	1990	1991	Change	1992 Base Level
Cases Filed	3	6	7	...	7
Cases Closed	3	4	7	...	7
Cases Pending (end of year)	33	35	35	...	35
Matters/Complaints	1,201	1,250	1,250	...	1,250
Matters/General	121	130	130	...	130
Congressional/White House Referrals	46	50	55	...	55
Major Institutional Investigations Initiated	4	5	7	...	7
Major Institutional Investigations Closed	11	6	5	...	5
Major Institutional Investigations Pending (end of year)	29	28	30	2	32

Thus far in 1990, the program has expended major resources on monitoring compliance with consent decrees filed in Civil Rights of Institutionalized Persons Acts (CRIPA) litigation and completing pending investigations. Compliance review, in many cases, has indicated that efforts by defendants had failed to achieve constitutional minima despite specific remedies in the decrees. Because of the broad sweeping and costly nature of compliance with consent decrees filed under CRIPA, the amount of resources needed to monitor progress has proven to be significant. Similarly, the development of investigations under the statute requires substantial resources to determine the nature of the institution's provision of services to the inmates or residents. Expert consultant tours, massive document analysis, development of information sources beyond the institution requires significant personnel and service resources. Negotiations to resolve violations uncovered during CRIPA investigations have also proven to be lengthy processes requiring substantial attorney resources.

The program completed findings in eight CRIPA investigations (involving facilities in California, New York, Pennsylvania, Guam, and Hawaii). Completed findings are reflected in workload statistics until all action of the investigation is complete. Complaints were filed along with consent decrees involving Los Lunas State Hospital and the California Medical Facility which have already generated compliance activity by the program. The program sought contempt against those responsible for operating Wheat Ridge Regional Center in Colorado on the grounds that they have failed to fulfill the requirements of the remedial orders filed in the case to ensure the constitutional rights of the developmentally disabled residents of the facility are protected. The program engaged in lengthy and difficult negotiations and secured a comprehensive stipulation to resolve the issues raised by the motion for contempt. At the program's request, the court in Evans and the United States v. Barry (D.D.C.), found the defendants in contempt for failing to comply with orders filed in 1978, 1981 and 1983 to protect the rights of residents of the District of Columbia's facility for retarded citizens. The program engaged in extensive on-site monitoring activities in United States v. Oregon, culminating in the program seeking court enforcement of the consent decree through the decree's emergency provision. The program is currently investigating 26 facilities pursuant to CRIPA while litigating 23 CRIPA cases as well as nine pre-CRIPA cases.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization Civil Rights Division — Decision Unit 2CRT04 Special Litigation

Resource Requirements	1989	1990	1991	1992 Base Level Change	1992 Base Level Cum.	1992 Request Level Change	1992 Request Level Cum.
BUDGET AUTHORITY	$2,582	$2,821	$2,946	$166	$3,112	$32	$3,144
OUTLAYS	2,251	2,791	2,925	158	3,083	27	3,110
Appropriated Positions	35	35	35	...	35	...	35
Workyears:							
Full-Time Permanent	31	30	31	...	31	...	31
Other	...	1	1	...	1	...	1
Subtotal	31	31	32	...	32	...	32
Overtime/Holiday	...	...	...	...	...	...	...
Total	31	31	32	...	32	...	32

Program Changes: The $32,000 is for fifty percent of the pay raise absorbed in 1991 and will enable this program to utilize all authorized workyears.

Civil Rights Division
Justification of Program and Performance
Salaries and expenses: 15-0128-0-1-752
Voting - 2CRT08

Long-Range Goal: To prevent and eliminate systemic barriers to the full participation by racial and language minorities, overseas citizens, and voters who are blind, handicapped, disabled, or illiterate in the electoral process and to achieve effective remedies for those citizens in specific instances where their right to vote has been denied or abridged.

Major Objectives:

To prevent, through the Section 5 preclearance program, the implementation of new standards, practices and procedures that have the purpose or effect of denying or abridging racial and language minorities' right to vote throughout the 911 counties specially covered by the Voting Rights Act (VRA).

To assure the assignment of federal observers to those polling places within the specially covered counties where observer personnel are needed to document misdeeds in the electoral process or to ensure confidence of the minority community in the electoral process and actions of individuals conducting the elections, and provide a federal alternative for voter registration when the actions and practices of local authorities discriminatorily deny racial and language minorities' access to the voter registration polls.

To defend lawsuits that are brought against the United States under the special provisions of the VRA to preclear voting changes and to terminate coverage, and initiate lawsuits against jurisdictions that violate the preclearance requirements of Section 5.

To discover and remedy methods of conducting elections that dilute the voting strength of racial and language minorities, and actions of state and local election and voter registration administrators that prevent a full and fair exercise of the franchise by racial and language minorities, overseas citizens, and voters who are elderly, handicapped, blind, disabled, or are unable to read or write.

Accomplishments and Workload: Accomplishments of the Voting program are presented below:

11122

Item	1989	1990	1991 1/	Change	1992 Base Level	1992 Change	1992 Request Level
Defensive Litigation	3	4	6	...	6	...	6
Offensive Litigation	129	106	159	-84	75	35	110
Section 5 Submissions Received	3,272	3,890	5,000	1,000	6,000	...	6,000
Section 5 Submissions Processed	3,272	3,890	5,000	...	5,000	1,000	6,000
Matters Received	62	55	70	-30	40	10	50
Matters Terminated	45	30	50	-25	25	15	40
Cases Filed	10	15	18	-7	11	5	16
Cases Closed	15	10	11	-3	8	5	13

Workload for this program activity cannot be measured by sheer numbers alone because of the difficulty and unique nature of each individual case. The reduction projected for 1992 in the number of cases filed, cases closed, and matters terminated, is a reflection of the growing complexity. For example, over one half of the attorney staff was devoted to remedying discrimination in the election processes of just four jurisdictions: Arizona, Louisiana, New Mexico, and Los Angeles County, California. These cases have demonstrated that complex, personnel intensive litigation is the trend for the future, and will definitely impact the program in 1992.

On the basis of the experience for the first three quarters in 1990, the program expects to receive 3,890 submissions under Section 5 of the Voting Rights Act during 1990, a rate which is as great as that in 1986, the most recent comparable year in the quadrennial election cycle, and which is significantly greater than the 2,422 submissions received in 1980, the last decennial census year. Objections were interposed to 23 submissions during the first nine months of 1990, involving 61 changes including superior court judgeships in Georgia; city, county, and special district districting plans; the proposed imposing of staggered terms, numbered posts, and majority vote requirements in at-large elections; annexations to cities; a change in the method of selecting members of the Alabama State Democratic Executive Committee; and a change in the method of filling vacancies on a county school board.

The program has participated in 13 new lawsuits in the first three quarters of 1990 (nine as plaintiff, two as defendant, and two as amicus curiae). Of the cases filed as plaintiff, three were Section 5 enforcement actions, one which successfully challenged racially discriminatory voter registration procedures in a Georgia town, one involved an unprecleared annexation of land by a Texas school district and one which enjoined use of new qualifications to serve as probate judge in South Carolina. Three cases were filed under Section 2 of the Act: one challenged the use of a majority vote requirement in Georgia elections; another challenged the discriminatory exclusion of blacks as polling place workers in a Georgia county; and, the third case challenged the use of at-large elections in a city in Arkansas. The remaining three actions as plaintiff enforced the rights of overseas and military voters abroad to absentee voting in Colorado, New Jersey and Tennessee. Of the defendant cases, one was a Section 5 declaratory judgement action seeking judicial preclearance of the consolidation of the City of

1123

1/ Projections assume full funding of the 1991 President's request and 1991 supplemental funding.

Augusta, Georgia, with Richmond County; the other, dismissed on our motion, involved an attempt to obtain judicial review of the Attorney General's decision not to interpose an objection under Section 5. In one amicus participation, we informed a federal district court in Alabama that a change in the power of elected officials is a change covered by Section 5, and in the other amicus case we informed the court of the basis for the Attorney General's Section 5 objection to a Louisiana parish's districting plan that purported to remedy a violation of Section 2 of the Voting Rights Act.

Significant progress also was made during the first nine months of 1990 with respect to lawsuits filed in prior years. A decision was entered in our favor on June 4, 1990 in the Section 2 case challenging the 1981 electoral plan for the Los Angeles County Board of Supervisors (the largest and most complex voting lawsuit the program has ever tried), after a trial that began in January and ended in April--a remedial districting plan that cures the dilution of Hispanics voting rights in the county was adopted by the court in August. The major issues in our action against a New Mexico county and the State of New Mexico under Section 2 and the minority language provisions of the Voting Rights Act were resolved by consent with the adoption of a plan that will, for the first time, enable non-English speaking American Indians to participate effectively in the electoral process. Consent decrees resolved our challenges under Section 2 of the Voting Rights Act where at-large electoral systems wee replaced by single-member districts in a county and a city in South Carolina and a city in Arkansas, where a nondiscriminatory method of selecting polling place officials replaced a racially discriminatory method in a Georgia county, where fair voter registration procedures replaced racially discriminatory procedures in a Georgia city, where preclearance was required for changes in the qualifications for candidates for probate judge in South Carolina and for a school district annexation in Texas, and where overseas and military voters abroad were able to have their absentee ballots counted, even though they were mailed too late to be received by election officials by the usual deadlines in Colorado, New Jersey and Tennessee. By request of the court, we appeared as amicus curiae in a private Section 2 action brought by white persons challenging the method of election of the city council of Birmingham, Alabama, advising the court on the legal issues involved. In addition, we conducted a trial in a major case challenging under Section 2 the electoral system of Wicomico County, Maryland.

Under the special provisions of the Voting Rights Act that authorize the Attorney General to assign federal observers to monitor elections to ensure that the right to vote and to have the vote properly counted is not denied during the election process, 153 observers were assigned to cover elections in nine counties in six states during the first six months of 1990. In addition, the program continued to maintain contact with the Department of Defense's Federal Voting Assistance Program, the Federal Election Commission's National Clearinghouse on Election Administration, the Bureau of the Census, and the Office of Personnel Management to coordinate with and assist the personnel in those agencies who have responsibility for implementing programs relating to statutes enforced by the Division.

Moreover, in 1992 some resources will be shifted temporarily from litigating violations of federal civil rights voting laws, to staffing the review of a dramatic increase in the kind of new voting practices and procedures. This will require a more time and resource consuming review than do many of the changes normally submitted under Section 5 of the Voting Rights Act. As is true of the program's litigation, the voting changes requiring analysis and decision in the Section 5 review process are increasingly complex factually, and require increasingly higher levels of legal sophistication. Thus, it has become necessary to assign these more complex Section 5 submissions to the program's attorney staff for investigation and recommendation; the memoranda that recommends that the Attorney General object to submitted voting changes largely parallel memoranda that are prepared to recommend that a lawsuit be filed, and since objections that are interposed under Section 5 prevent racially discriminatory methods of election, reapportionments and other voting practices and procedures from taking effect, the impact of a Section 5 objection is as effective as the relief that is obtained in a lawsuit under Section 2 of the Voting Rights Act, and sometimes more so. Accordingly, although the 1992 requested resources will not allow litigation to proceed at the 1991 level, the litigation that is filed

will represent a viable level when combined with the vigorous efforts to prevent the use of other discriminatory voting practices and procedures through Section 5 objections.

It is important to note that if the enhanced level request is not provided, the program will have no alternative but to devote all of its resources to the analysis of voting changes submitted under Section 5 of the Voting Rights Act and defense of lawsuits, both of which are imperative. Thus, the program will be unable to initiate any new litigation under Section 2 of the Act or to compel preclearance for newly adopted redistricting plans that states, counties, cities or other jurisdictions adopt but fail or refuse to submit the required information. This information is needed to determine whether the plans were enacted with the intent to discriminate or will have the effect of discriminating against persons whose right to vote is protected under the Act. The program also will be unable to determine the need for the assignment of federal observers during the 1992 Presidential election in any but a few of the most egregious circumstances.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization Civil Rights Division — Decision Unit 2CRT08 Voting

Resource Requirements	1989	1990	1991	1992 Base Level Change	1992 Base Level Cum.	1992 Request Level Change	1992 Request Level Cum.
BUDGET AUTHORITY	$3,703	$4,110	$8,181	$498	$8,679	$1,197	$9,876
OUTLAYS	4,062	4,059	7,643	850	8,493	1,035	9,528
Appropriated Positions	68	68	84	...	84	3	87
Workyears:							
Full-Time Permanent	64	64	71	8	79	2	81
Other	2	2	2	...	2	...	2
Subtotal	66	66	73	8	81	2	83
Overtime/Holiday	1	1	1	...	1	...	1
Total	67	67	74	8	82	2	84

Program Changes: An increase of $1,197,000 is requested in 1992 for the Voting program. Of this amount, $56,000 is for fifty percent of the pay raise absorbed in 1991 and will enable the program to utilize all authorized workyears. The increased level also includes $976,000 for completing the acquisition of a Geographical Information System to meet workload demands resulting from the 1990 Census. The remaining $165,000 supports three additional attorney positions (one GS-13 and two GS-14s), and one workyear, thus enabling the program to continue its vigorous enforcement of Voting Rights Act requirements. For clarity of presentation, the justification has been broken into two sections--the first supporting the Geographical Information System and the second supporting the additional three attorney positions.

I. Geographical Information System (GIS)

The GIS will incorporate several sources of data: (1) the Census Bureau TIGER (Typographically Integrated Geographic Encoding and Referencing) file extracts for geographic and political boundaries and features; (2) the 1990 and 1980 Census population data for the entirety of not only the 17 states specifically covered by Section 5 of the Voting Rights Act; and, (3) data sent to the program by submitting jurisdictions. This data will be processed and optimized to select only those features required by the program. (It is necessary to note that the mapping plotter requested in the 1991 budget will still be essential and will be compatible with the GIS.)

Under the Voting Rights Act of 1965, all or portions of 17 states, which include 911 counties, and the cities, school jurisdictions and other political units that are located within those jurisdictions, are subject to the preclearance requirement of Section 5, 42 U.S.C. 1973c. Thus, within these specially covered jurisdictions, no change in voting practices or procedures can be implemented until the jurisdiction obtains a decision from the United States District Court for the District of Columbia, or from the Attorney General of the United States, that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. To obtain a decision from the Attorney General, a jurisdiction must submit a request, along with all necessary supporting materials, to the Voting program, where the submission is analyzed pursuant to the applicable legal standards. If the Voting program staff recommends preclearance, the review process ends in the Section. If, however, the staff recommends that an objection be interposed, the final decision is made by the Assistant Attorney General for Civil Rights. The implementation of the GIS is essential, in order to meet the mandatory 60 day processing time of all Section 5 submissions, given the substantial workload increases anticipated.

For each redistricting submission, the analyst will need to look at a thematic map of the proposed district and perform both visual and statistical analysis checks of the plan. Thus, we need both mapping and analytical capabilities within a GIS. Most of this should be automated so that by selecting the correct option, a map of the jurisdiction, color coded to show minority populations using standard colors, appears on the screen. Another menu selection should bring up a pop up window displaying population statistics for the plan and other information including deviations from the ideal of the districts. The analyst must be able to go from the map to the database to get information such as a list of the block numbers included in any district, or other needed data, and have it displayed along with the map. An option to send any of the information to a printer or a file is also required.

To aid in determining the racial fairness of the submitted plan, in many instances, the analyst will need to draw alternative plans. The analyst must be able to change district boundaries by using a mouse to lasso areas to be included in or deleted from a district or by selecting areas by name or, in the case of blocks, by block number, and immediately view the statistics and the checks on the new plan.

Ten years ago, after data from the 1980 Census was released, the program reviewed redistricting plans submitted under Section 5 by using hand-held calculators to add the black, white and total populations for the district in each submitted plan, and to recalculate those data each of

1127

the many times voting district boundary lines were moved to evaluate the racial effect of alternative districting plans. Moreover, the alternative districting lines, which are an integral part of the Section 5 analysis, were plotted by hand-drawing the lines on acetate overlays, and then hand-shading the areas to designate each district within the original and alternative plans. To meet this complex manual process, a significant level of personnel resources were reallocated/detailed to this function, thus jeopardizing the Division's ability to meet their total mission requirements.

The program engaged in this time-consuming process for the redistricting plans that were among the 2,931 submissions received in 1982. During 1992 it is expected that there will be 6,000 submissions under Section 5, double the number received 10 years ago. This substantial workload increase is attributed to several major factors, including: (1) the election cycle was different in the 1980s than it will be in the 1990s, causing all 911 covered jurisdictions to have submitted and obtained preclearance in advance of the primary and Presidential elections. This process occurred one year later in the 1980s--1982 and 1983, respectively; (2) in 1992 many elections will be held by district, instead of at-large as in 1982; and, (3) as a result of minority groups heightened awareness of the voting rights laws, many more areas are volunteering changes by jurisdiction. If the requested increases are not provided for 1992, the entire attorney, paralegal and specialist staff will be required nearly full-time for the analysis of redistricting plans and the other submissions under Section 5, with the result that the program will be able to provide only a minimal defense to lawsuits filed against the Attorney General, and will be severely limited in its ability to initiate new offensive cases or determine where the assignment of federal observers is needed. In summary, these resources are essential to eliminate the need to reallocate Division personnel resources, and provide a thorough as well as quality analysis in the mandated 60 day processing time.

In order to fully document the needs of the Civil Rights Division for a Geographic Information System (GIS) and to determine the state of the art in GIS technology, the Division contracted with Network Management Incorporated to prepare a functional requirements analysis and a formal technology assessment. Based on the information contained in these two studies, the Division is requesting the funding necessary to implement a GIS for the Voting program of the Civil Rights Division.

The Functional Requirements Analysis specifies the tasks or functions that the system needs to perform in assisting the Voting program to analyze redistricting plans submitted as a result of the 1990 Census. Although the scope of this document was not limited to only the Voting Section, at this time we are planning to implement the system for that section. Among the most notable objectives to be realized from the system are the following:

-The ability to handle between 4,000 and 5,000 redistricting plans for up to 80 users;

-The ability to provide for thorough analysis of plans within 60 days of receipt;

-The ability to handle a massive amount of census data, mapping files, and user-created files; and

-Be extremely "user friendly".

The Technology Assessment Advisory Report has also been completed for the GIS system and provides a comprehensive look at the state-of-the-art in GIS hardware and software. A rating system was employed to determine the best system design to accomplish the objectives outlined in the

Functional Requirements Analysis. The final recommendation of the report lists six important benefits that can be realized by implementing this system design:

-A modular design to permit phased implementation;

-Low initial project costs;

-Minimum demand on resources;

-Minimum disruption of ongoing operations;

-Rapid implementation of critical applications; and

-Relatively short time to demonstrate tangible benefits.

Benefits

The programatic task of reviewing all of these proposed redistricting plans within the 60-day mandate is enormous. The resources requested here for a GIS will provide the program with a state-of-the-art computer system with flexible software that will allow the evaluation of population patterns within the spatial context of political and geographic boundaries. Analyses will include examination of the proposed district boundaries with respect to 1990 concentrations of minority populations and historical electoral patterns. In addition, comparisons of proposals to existing boundaries as well as the evaluation of alternative plans will be necessary. This will require a redistricting program which allows for a detailed, interactive demographic study. Analyses will involve multiple layers of information which can be displayed within different types of geographic areas (e.g., state, county, city, voting district, precinct, blocks within tracts, etc.,) and in tabular format. Thus a geographical information system with both mapping and data management, analysis, and reporting functions will be needed for the Voting program to meet its operational requirements for handling a redistricting submission within 60 days. The GIS also will increase the speed and effectiveness of handling other submissions such as those dealing with annexations, changes in method of election, etc., and will have a significant impact on the program's ability to conduct litigation, as well.

1129

II. Attorney Positions

An increase of $165,000, three attorney positions (one GS-13 and two GS-14s), and one workyear for the Voting Program. These resources will enable the program to continue its vigorous enforcement of Voting Rights Act requirements.

In 1992, the program will enter an important new phase of its vigorous enforcement of the Voting Rights Act, to seek out and prevent, through administrative enforcement, from among additional thousands of newly adopted redistricting and reapportionments those that have the purpose or effect of denying or abridging the voting rights of racial and language minority groups, and through litigation to force recalcitrant cities, counties and other specially covered political entities to submit such voting changes for the federal administrative scrutiny as is required by the Voting Rights Act, and to enjoin the use of such practices and procedures which are found to be discriminatory in states, cities,

counties and other jurisdictions outside of the specially covered jurisdictions. In order to accomplish this goal in 1992, given the cumulative effect of the increases in the overall number of new voting practices and procedures that will be scrutinized by the program under Section 5 of the Voting Rights Act beginning in 1991, the program temporarily will be required to shift some of its resources from achieving incremental increases through the litigative enforcement of the Act, to the administrative enforcement of the Act and to defending lawsuits seeking judicial preclearance under Section 5 of the Act.

The program traditionally has needed to balance its offensive litigation with its mandatory responsibilities under the special provisions of the Voting Rights Act. Foremost among these are the responsibilities (1) to prevent, through objections made under Section 5 of the Act, the use of discriminatory new voting practices and procedures, including newly adopted methods of electing state and local legislative officials, and redistricting plans, and (2) to defend lawsuits, including Section 5 declaratory judgement actions that are filed after the Attorney General has interposed an objection under Section 5 to voting changes that were submitted to him. As the number of voting changes required to be investigated and analyzed under Section 5 have become not only more numerous, but also noticeably more complex and require more sophisticated legal analysis, so too has the trend toward factually larger, more complex litigation under Section 2 of the Voting Rights Act and the elements of proof outlined by the Supreme Court in Thornburgh v. Gingles necessitate expert testimony to establish statistical, historical, and sociological facts, as well as anecdotal evidence to demonstrate the importance of those facts.

Thus, at the time that a routine Section 2 dilution lawsuit is filed, the program now must be willing to devote at least three attorneys and one to two paralegals to the case for a period of five months, and to expend at least $10,000 for expert testimony. In addition, since most of the pre-filing investigation and post-filing document discovery and depositions are conducted in the field, travel expenses for such cases soar, as do overtime costs for paralegal workhours, both in the field and in the home offices. In addition, the Gingles elements of proof are becoming more and more routinely applied in declaratory judgments actions under Section 5 of the Voting Rights Act because such cases nearly always involve a claim that the voting practices and procedures sought to be precleared by the court are dilutive of minorities' voting strength since the proof in such cases requires the presentation of evidence regarding activities and records that exist only in the plaintiff jurisdiction and/or the capitol of the state in which the jurisdiction is located, the travel and overtime costs attendant to Section 5 declaratory judgment cases are similar to the expenses required by Section 2 cases.

Under these circumstances, requested workyear and attendant dollar increases will allow the program sufficient resources to maintain a vigorous litigative effort while successfully pursuing the large number of cases filed in 1991, and enhancing its focus on the administrative enforcement of the Voting Rights Act, and on non-optional defensive litigation under the Act.

Benefits

An increase of three attorney positions and $165,000 for 1992 will allow the program to effectively enforce federal civil rights voting laws and thus protect minorities' right to vote. The program's litigation staff will be able to continue its vigorous enforcement of the Voting Rights Act in a well-balanced program of lawsuits as plaintiff, plaintiff-intervenor and amicus curiae under Sections 2 and 5 of the Voting Rights Act. This litigation is projected to include three actions under Section 2 of the Act aimed at achieving remedies for unlawful fragmentation of minority population concentrations prior to the major 1992 primary and run-off elections. In addition, the voting rights of minorities will continue to be protected through the assignment of federal observers under Section 8 of the Voting Rights Act wherever they are found to be necessary to monitor polling place procedures when persons qualify as candidates for office from newly drawn districts that allow minority voters a fair opportunity to elect persons of their choice. The program will utilize these much needed attorneys to

1130

effectively review and analyze all of the voting changes that are submitted to the Attorney General, with the result that objections will be interposed to all voting changes, that submitting jurisdictions have not shown, are without a discriminatory purpose and effect.

Schedule of Cost Inputs
(Dollars in thousands)

Organization Civil Rights Division — Decision Unit 2CRT08 Voting

	Voting Rights Act Enforcement			Geographical Information System (GIS)			Request Level		
	Pos	WY	Amount	Pos	WY	Amount	Pos	WY	Amount
Positions by Type									
Attorney	3	1.5	$77	...	...	...	3	1.5	$77
Subtotal	3	1.5	$77	...	...	...	3	1.5	$77
Personnel Benefits	...	...	22	...	...	...	...	...	22
Travel	...	...	7	...	...	...	...	...	7
Rent, Communications and Utilities	...	...	11	...	...	...	...	...	11
Other Services	...	...	24	...	...	203	...	...	227
Supplies and Printing	...	...	4	...	...	...	...	...	4
Equipment	...	...	20	...	...	773	...	...	793
Subtotal	...	...	$88	...	...	$976	...	...	$1,064
Total	3	1.5	$165	...	...	$976	3	1.5	$1,141*

Description of Cost Inputs

Voting Rights Act (VRA) - An increase of three attorney positions and $165,000 is requested for enforcement of Federal civil rights voting laws to protect minorities' right to vote.

Geographical Information System (GIS) - An increase of $976,000 will provide the program with resources necessary to complete the acquisition of state-of-the-art technology essential for timely and accurate review of Section 5 submissions.

* Does not reflect the $56,000 to restore pay raise absorptions.

Long-Range Goal: To reduce discrimination in employment by state and local governmental units and federal contractors.

Major Objectives:

To develop the legal principles necessary to create a nationwide climate where voluntary compliance with laws against discriminatory employment practices can be achieved.

To secure compliance with Title VII through litigation and enforcement of consent decrees in the public sector, and based on referrals from the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance programs in the public and private sector, respectively; participate in private suits when the government's position is important to the development of case law; ensure compliance with existing court orders through active monitoring and enforcement activities; and, to defend the constitutionality and lawfulness of federal agency civil rights programs that impact upon employment and minority/women/disadvantaged businesses.

To issue right-to-sue notices to persons who have filed public sector charges with the EEOC.

Accomplishments and Workload: Accomplishments of the program are presented below:

Item	1989	1990	1991	Change	1992 Base Level	1992 Change	1992 Request Level
Agency Referrals	97	60	70	5	75	...	75
Investigative Matters Received	18	20	25	...	25	...	25
Cases Commenced	10	15	15	3	18	27	45
Cases Terminated	12	10	30	...	30	5	35
Right-to-Sue Notice Requests Received	1,485	1,500	1,650	...	1,650	...	1,650
Right-to-Sue Notices Issued	1,474	1,500	1,500	...	1,500	...	1,500
Decrees Requiring Monitoring	140	150	160	...	160	15	175
Decrees Actively Monitored	50	50	50	...	50	125	175
Decrees Obtained	11	15	15	...	15	25	40

The program has two major enforcement vehicles: (1) pattern or practice suits brought pursuant to Section 707 of Title VII; and, (2) suits brought pursuant to Section 706 of Title VII involving individual charges of discrimination that have been referred to the program by the Equal Employment Opportunity Commission.

Traditionally, pattern or practice investigations and litigation have consumed the vast majority of the program's resources. There has been successful litigation with many of the nation's major governmental employers, resulting in the entry of court orders. The extant court orders require constant monitoring and compliance efforts. Some of the more recent orders require, at Stage II, the identification of victims of the employer's discrimination and the fashioning of appropriate make-whole relief. Recently, the program was instrumental in obtaining awards of some $13 million in back-pay to identified victims and in securing job or promotional opportunities for large numbers of victims.

Recently, the program resolved four major pattern or practice cases that were poised for lengthy trials. All of the cases were filed between 1972 and 1974. Three cases had been in a compliance status for a number of years, having earlier been settled through litigation or consent decree. The resolutions in these cases resulted in modifications to existing court orders, and generally require the employer to engage in the development of job related selection procedures with the active participation of the program. The remaining case, involving the North Carolina Extension Service, was on remand from the Supreme Court. In that case, a consent decree, providing in excess of $500,000 in back-pay, was agreed to on the eve of trial. The program will continue to devote substantial resources to each of these matters for the next several years. Additional resources, as available, will be allocated to the investigation, litigation and enforcement of other matters involving a pattern or practice of employment discrimination.

The program is also responsible for handling referrals from federal agencies under Section 504 of the Rehabilitation Act of 1973, and defending federal agencies in actions that challenge their authority to enforce laws and regulations requiring affirmative action in employment and contracting. The program successfully prosecuted a Section 504 handicap referral from the U.S. Department of Agriculture, obtaining $45,000 in back-pay entitlement. The program is defending the Departments of Transportation, Defense, HUD, and Labor and the Environmental Protection Agency in several challenges to their enforcement programs. There is no choice but to defend these cases and consequently they have a priority on funding and resources.

Prior to 1989, EEOC referred to the program a significant number of individual charges of discrimination that substantially had not received careful scrutiny by that agency. The result was a large number of referrals but very few that merited attention by this program. Most of these referrals were routinely handled by the issuance of a right to sue letter and returning the file to EEOC.

Beginning in approximately 1989, EEOC referrals began to decline in quantity but improve the quality of the underlying complaints and investigations improved substantially. The result has been that the program now receives, on average, five referrals a month to investigate, of which approximately four are meritorious litigation vehicles. These referrals have placed increased and significant demands on the program's attorney and support staff. All new attorneys assigned to the program now receive at least three of these referrals to pursue to a conclusion. On average, each referral requires approximately nine months to resolve. While one referral is not a full time undertaking, three referrals will occupy a substantial portion of an attorney's time over the course of a year. In addition, a number of these referrals result in pattern or practice suits as well as suits seeking relief on behalf of the individual who filed the charge. Attorneys are also assigned to work on one or more large pattern or practice suits.

In the area of test validation, the program continues to work in conjunction with test development experts in the preparation of a valid entry level examination for law enforcement positions. In addition, important entry level and promotional test development projects for fire departments continue in San Francisco, Buffalo and New Jersey.

The program's responsibility to monitor decrees has increased significantly in the past few years. Approximately 160 decrees for which the program has enforcement responsibilities will be pending at the beginning of 1992. Until 1988, the number of cases with new decrees increased each year at a rate which far exceeded the number of cases in which decrees were dissolved. Due to limited resources, the program has had to prioritize its compliance responsibilities. The program has identified the 50 decrees which require the greatest attention and has devoted its resources almost exclusively to them. The remaining 100 decrees receive attention only when an apparent violation is brought to the program's attention.

Where the program has been unable to secure voluntary compliance with outstanding decrees, appropriate enforcement proceedings have been initiated. As a result, the program has ongoing litigation with a number of jurisdictions including, Birmingham, Alabama, Jackson, Mississippi, and the State of New Jersey. Substantial resources are devoted to these cases as they involve complicated and important legal and factual issues.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization Civil Rights Division

Decision Unit 2CRT15 Employment Litigation

Resource Requirements	1989	1990	1991	1992 Base Level Change	1992 Base Level Cum.	1992 Request Level Change	1992 Request Level Cum.
BUDGET AUTHORITY	$3,941	$4,341	$4,532	$263	$4,795	$560	$5,355
OUTLAYS	3,816	4,292	4,495	256	4,751	487	5,238
Appropriated Positions	63	63	63	...	63	12	75
Workyears:							
Full-Time Permanent	57	58	57	...	57	7	64
Other	1	1	1	...	1	...	1
Subtotal	58	59	58	...	58	7	65
Overtime/Holiday	1	1	1	...	1	...	1
Total	59	60	59	...	59	7	66
Reimbursable:							
Positions	6	6	6	...	6	...	6
Workyears:							
Full-time permanent	6	6	6	...	6	...	6

Program Changes:

The program requests an increase of $560,000 in 1992. Of this amount, $54,000 is for fifty percent of the pay raise absorbed in 1991 and will enable the program to utilize all authorized FTE workyears. The remaining $506,000 provides for an increased authorization of 12 positions and six workyears. This includes eight attorney positions (two GS-11, four GS-12, and two GS-13); two paralegals (one GS-7 and one GS-9); and, two secretaries (one GS-6 and one GS-7). These additional resources will be used to conduct and support investigations and litigation of matters referred to the program by the Equal Employment Opportunity Commission (EEOC), to investigate and litigate pattern or practice cases, and to support the issuance of right to sue notices.

As currently constituted, the program's attorney and paralegal resources are committed fully to handling the active litigation and investigations being conducted under Sections 707 and 706 of Title VII, the litigation involving the defense of other federal agencies and, to an inadequate degree, investigating referrals from the EEOC and to monitoring compliance with extant decrees.

The program now receives approximately 60 referrals from EEOC each year and anticipates that number to increase to 75 in 1992. Currently, there are insufficient resources to investigate many of these referrals. Other referrals may not be promptly pursued because of other higher priority commitments. The program attempts to assign approximately three EEOC referrals to every line attorney. In addition, these attorneys are expected to work with senior trial attorneys on one or more complex pattern or pattern cases. Further, as their case load permits, the program has assigned EEOC referrals to some senior trial attorneys. Even with this level of effort, a significant number of EEOC referrals remain unattended. To properly handle the EEOC referrals and the program's remaining litigation and investigatory responsibilities, an additional eight attorneys are required. In addition, at current levels the program is unable to initiate pattern or practice investigations. The additional attorney resources will permit the investigation of these complex matters.

Currently, the program is responsible for monitoring 150 court orders. At the current staffing level, the program is able to monitor a small fraction of the decrees, and even these are not reviewed as thoroughly and completely as is desirable. Not only will additional resources permit the effective and timely processing and resolution of EEOC referrals, but resources will become available for more aggressive and vigorous enforcement of outstanding court orders.

Recognizing the increasing size of the program's compliance obligations and the fact that many compliance problems can be addressed and resolved more effectively when they are discovered in a timely manner, it is imperative that the program refine and improve its compliance monitoring responsibilities. Improved compliance efforts will be advantageous to all parties involved by ensuring that: (a) defendants file reports regularly and on time; (b) reports are analyzed promptly; (c) the program maintains a continuity of presence with the defendants that enhance the defendant(s)' overall commitment to the requirements of decrees; and, (d) reports are compiled into a uniform format that allows comparison with the performance of comparable defendant employers and prompt responses to inquiries from program managers, other responsible officials in the Division and Congressional inquiries.

One paralegal is currently devoted, on a full-time basis, to compliance monitoring. This paralegal has assumed virtually full responsibility for enforcement of approximately 30 complex decrees in the Detroit and Chicago suburbs. Other paralegals and attorneys have compliance responsibilities, but are unable to devote any significant amount of time to monitoring because of the press of active litigation. An increase of two paralegals, along with existing staff, will allow the program to monitor the remaining court decrees for which it is responsible.

The addition of two secretarial positions will provide necessary support to the additional attorneys, paralegals and to the right-to-sue program. Base resource levels, provide an inadequate level of clerical support. Since the program is litigation oriented, there are numerous court filings and correspondence with courts or counsel. The preparation and mailing of these documents falls exclusively to the clerical staff. Further, the program frequently has large mailings that require extensive secretarial support. This only adds to the clerical staff's never-ending correspondence responsibility, with the hundreds of individual claimants at the Stage II level who constantly call to be interviewed for a status update, or require a written response to their inquiries. Finally, the clerical staff spends considerable time making travel arrangements for the attorneys and paralegals. Given all of these responsibilities, the program is always without adequate clerical support to perform routine functions. It is necessary to add two clerical positions to provide a minimal support level. Finally, the clerical positions sought here will provide support in the processing of certified mail receipts and the issuance of 1,600 right-to-sue letters each year.

Benefits

The program is responsible for enforcing federal laws and regulations that prohibit employment discrimination based upon race, color, sex, religion, national origin and handicap. In order to provide equal employment opportunity to all Americans based upon their ability to perform the job, and not the color of their skin or their gender, it is absolutely essential that the program be adequately staffed. The program, at the base funding level, is unable to meet workload requirements of referrals from the EEOC and to enforce adequately existing court orders. Employers have no incentive to voluntarily resolve allegations of discrimination, if they know that the likelihood of an enforcement action is remote. Thus, for example, EEOC will have a more difficult time obtaining settlement agreements when it investigates charges of discrimination, if there is no viable threat that the Department of Justice will file suit upon referral. Similarly, employers who have decrees with the program are less likely to meet their obligations if they know that close monitoring and enforcement are remote.

Recent decisions of the Supreme Court place greater responsibilities on the program to enforce the nation's anti-discrimination laws. Many employment cases are factually complex, require a great deal of expertise in the law, and are expensive to prosecute. Thus, the ability to vindicate employment rights is beyond the vast majority of potential plaintiffs and their attorneys. The program must assume this responsibility and it is doing so through the EEOC referral program. If suit is warranted based upon the program's assessment of the EEOC referral then it should be filed, otherwise, the charging party will be without a remedy. The addition of eight attorneys, two paralegals, and two clericals will enable the program to fulfill its responsibilities.

The increases requested here will provide the program with resources necessary to continue and improve its vigorous enforcement of Title VII and, at the same time, meet compliance monitoring responsibilities. Without the benefit of resources to meet compliance responsibilities, defendants and potential defendants have little incentive to comply voluntarily with their lawful obligations. Enforcement of existing decrees is a prophylactic measure that discourages future violations.

Schedule of Cost Inputs
(Dollars in thousands)

Organization Civil Rights Division

Decision Unit 2CRT15 Employment Litigation

	1992 Request		
	Pos	WY	Amount
Positions by Type			
Attorney	8	4.0	$153
Paralegal Specialists	2	1.0	24
Clerical (Secretaries)	2	1.0	20
Subtotal	12	6.0	$197
Personnel Benefits	...	...	60
Travel	...	...	20
Rent, Communications and Utilities	...	...	43
Other Services	...	...	79
Supplies and Printing	...	...	21
Equipment	...	...	86
Subtotal	...	...	$309
Total	12	6.0	$506*

Description of Cost Inputs

EEOC Referral Program - An increase of 12 positions and $506,000 is requested to permit the effective and timely processing and resolution of EEOC referrals as well as allow for more aggressive and vigorous enforcement of outstanding court orders.

* Does not reflect the $54,000 request to restore pay raise absorptions.

Civil Rights Division
Justification of Program and Performance
Salaries and expenses: 15-0128-0-1-752
Coordination and Review - 2CRT16

Long-Range Goal: To achieve consistent and effective enforcement of various laws and regulations prohibiting discriminatory practices in public accommodations and public services, federal programs, and federally assisted programs; maximize and coordinate the use of federal, state, and local civil rights enforcement and technical assistance resources; and minimize the costs associated with federal civil rights programs while maintaining the level of responsiveness to citizens who feel that their civil rights have been violated.

Major Objectives:

To enforce regulations implementing Titles II and III of the Americans with Disabilities Act (ADA) by investigating complaints, conducting compliance reviews, and managing a litigation program and to coordinate the enforcement programs of other federal agencies with ADA responsibilities.

To coordinate the government-wide ADA technical assistance program and to provide technical assistance to entities covered and persons protected under Titles II and III of the ADA.

To manage a program to certify state and local building codes that meet or exceed federal minimum accessibility requirements.

To maintain continuing oversight and control of all Executive agencies covered by Executive Order 12250 and liaison with other Department organizations and other federal agencies involved in civil rights litigation.

To review, evaluate and monitor, on an annual basis, implementation plans submitted by Executive agencies; review proposals or final agency regulations or substantive amendments to existing regulations promulgated under statutes subject to the Executive Order; and, provide guidance in the form of prototype regulations for implementation of Section 504 of the Rehabilitation Act of 1973, as amended, as it concerns federally conducted programs.

To provide staff support to the Assistant Attorney General for Civil Rights as Chairman of the Interagency Coordinating Council and as a member of the Architectural and Transportation Barriers Compliance Board.

To provide assistance to Departmental organizations as well as other federal agencies to enable them to implement the requirements of Section 504 regulations covering their programs and activities.

To provide support to the Office of the Solicitor General, the Civil Division, and other federal agencies in various lawsuits which includes providing advice on the strategy of a case or on particular motions or briefs, writing pleadings and affidavits, preparing court requested status reports, answering interrogatories, and furnishing testimony.

Base Program Description:

The Coordination and Review program enforces regulations implementing Titles II and III of the Americans with Disabilities Act (ADA). These Titles prohibit discrimination against individuals with disabilities in public accommodations and the receipt of public services. The regulations affect millions of entities including privately operated entities providing public accommodations and state and local government units that provide public services. The program is responsible for both the coordination of administrative enforcement by other agencies, and for the Department's own enforcement program. Enforcement of the ADA requires the program to perform complaint investigations and compliance reviews. In addition, the program is responsible for managing litigation under Titles II and III as well as Title I cases referred by the Equal Employment Opportunity Commission. As part of its enforcement activities, the program is also responsible for certification of state and local building codes to assure that all buildings with public access meet or exceed the ADA's minimum accessibility standards.

The program is also responsible for coordinating the government-wide technical assistance program mandated by the ADA. The program works with other federal agencies that have responsibilities under the ADA to ensure that all agency technical assistance programs provide consistent and accurate information to covered entities.

Technical assistance is also provided to millions of entities affected by Titles II and III of the ADA. Technical assistance is delivered directly by program staff and indirectly through third parties acting under grants and contracts managed by the program. Technical assistance includes training, information dissemination, the operation of a telephone information line, the production of technical manuals, and the provision of solutions to specific compliance problems.

The program ensures that all federal Executive agencies effectively and consistently implement the nondiscrimination provisions of federal grant statutes prohibiting discrimination on the basis of race, color, nation origin, handicap, religion, or sex. Under Executive Order 12250, the program undertakes a diverse array of regulatory and administrative initiatives. The program reviews all new civil rights regulations for consistency, adequacy, and clarity; assists agencies on new civil rights plans; offers agencies training and technical assistance to improve their civil rights enforcement procedures and programs as well as outreach programs; and, promotes interagency information sharing and cooperation.

Support is provided to the Office of the Solicitor General, the Civil Division and other federal agencies in various lawsuits. This assistance includes providing advice on the strategy of a case or on particular motions or briefs, writing pleadings and affidavits, preparing court requested status reports, answering interrogatories, and furnishing testimony.

Accomplishments and Workload: Accomplishments of the Coordination and Review program are presented in the following table:

Item	1989	1990	1991	1992 Change	1992 Base Level	1992 Change	1992 Request Level
Litigation							
Cases Initiated	...	...	...	...	...	180	180
Complaints:							
Complaints Received	...	...	...	...	...	200	200
Investigations Initiated	...	...	...	...	...	125	125
Complaints Closed	...	...	...	...	...	25	25
Compliance Reviews:							
Reviews Initiated	...	...	...	...	...	15	15
Reviews Completed	...	...	...	...	...	5	5
Agreements Monitored	...	...	...	...	...	5	5
Standards Certification:							
Requests Received	...	...	...	...	...	200	200
Requests Processed	...	...	...	...	...	200	200
Requests Approved	...	...	...	...	...	100	100
Technical Assistance:							
Projects Initiated	...	0	2,800	...	2,800	8,400	11,200
Covered Entities Receiving Assistance	...	250	78,500	...	78,500	129,500	208,000
Individuals Receiving Assistance	...	600	8,400	...	8,400	25,200	33,600
Documents Distributed	...	30,000	350,000	...	350,000	150,000	500,000
Executive Order 12250 Activities:							
Non-regulatory Documents Generated	294	295	323	32	355	200	200
Responses to Citizens and Public Officials	224	246	271	27	298	...	298
Documents Reviewed as Part of Special Projects	211	200	220	24	244	...	244
Reviews Conducted of Agency Programs	24	28	36	4	40	...	40
Delegation Agreements Developed and Implemented	2	4	4	...	4	...	4
Litigation Documents Prepared and Reviewed	797	965	1,061	104	1,165	...	1,165
Regulations Reviewed	73	15	20	...	20	...	20

The workload statistics are based on the program's accomplishments for 1989. The data for 1990 are based on the first ten months of the year, with the ADA enacted in the last month of that period (July 26, 1990).

The workload factors for the E.O. 12250 activities have been revised to more accurately reflect the program's activities. "Non-Regulatory Documents Generated" was refined. Special projects (e.g., handling Office of Revenue Sharing (ORS) complaints, documents reviewed and generated as part of the program's efforts to assist other federal agencies implement Section 504 regulations affecting their programs and activities) are listed under "Documents Reviewed as Part of Special Projects." In addition, items requiring only cursory attention by the program are no longer counted.

In the first ten months of 1990, the program reviewed the civil rights plans and statistical reports of 26 agencies and received eleven regulations for review and comment. The regulations that have been reviewed have been major regulations that have raised unusually complex and difficult issues. A project to process complaints and compliance reviews, that remained unresolved when ORS ceased operations, was continued and the program is reviewing 115 such complaints and compliance reviews. Under an agreement with the National Institute of Corrections (NIC) the program initiated, in March 1990, a project to investigate complaints referred from NIC and has received 39, responded to 26, and closed three complaints.

Throughout the year the program has initiated a variety of major activities to meet the Department's responsibilities under the ADA. The program has begun to develop the complex regulations implementing Titles II and III of the ADA and has also begun work on the government-wide technical assistance plan required by the ADA. In addition, the program has begun to provide technical assistance to entities covered and individuals protected, as well as other federal agencies and the general public. For example, technical assistance documents have been developed and are being disseminated, and an ADA telephone information line is in operation.

The program anticipates providing technical assistance to an estimated 250 entities covered by the ADA and 600 individuals protected by the ADA, in addition to distributing 30,000 technical assistance documents. The program will also make substantial progress on the development of regulations implementing Titles II and III.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization Civil Rights Division

Decision Unit 2CRT16 Coordination and Review

Resource Requirements	1989	1990	1991	1992 Base Level Change	1992 Base Level Cum.	1992 Request Level Change	1992 Request Level Cum.
BUDGET AUTHORITY	$2,528	$2,776	$7,494	$483	$7,977	$13,715	$21,692
OUTLAYS	2,472	2,746	6,876	887	7,763	11,932	19,695
Appropriated Positions	39	39	44*	...	44	58	102
Workyears:							
Full-Time Permanent	35	36	38	3	41	30	71
Other	1	1	1	...	1	...	1
Subtotal	36	37	39	3	42	30	72
Overtime/Holiday	...	...	...	...	...	...	...
Total	36	37	39	3	42	30	72

* Reflects a one position reduction for A-76 management savings.

42-569 O—91——37

Program Changes

In order for the program to meets its responsibilities associated with the ADA, an increase of $13,676,000 is requested. This resource level includes an increase of 58 positions, 29 workyears and $3,676,000. The remaining $10,000,000 will provide the program with resources necessary to render technical assistance consistent with the ADA. In addition, $39,000 is requested to offset the fifty percent pay raise absorbed in 1991, and will enable the program to utilize all authorized FTE workyears.

Litigation

The program requests an increased authorization of 25 positions, 13 workyears and $1,435,000. This includes eighteen attorney positions (2 Level I SES, 5 GS/GM-15s, 3 GS-14s, 2 GS-13s, 2 GS-12s, and 4 GS-11s) and seven paralegals (1 GS-12, 2 GS-11s and 4 GS-9s). These additional resources will be used to develop a litigation strategy and initiate litigation with respect to ADA's coverage of public accommodations. The ADA authorizes the Attorney General to bring civil actions against entities covered by its public accommodations provisions in pattern or practice cases or cases of general public importance. Given the large number of entities covered (approximately 3.9 million enterprises), and the fact that most of these entities are being subjected to disability nondiscrimination requirements for the first time, the potential for worthwhile lawsuits is immense. These resources will also be used for joint actions with the Equal Employment Opportunity Commission (EEOC) to enforce the employment provisions of the ADA in accordance with the remedies and procedures available under title VII of the Civil Rights Act of 1964 and to handle referrals from Federal agencies that are unable to achieve voluntary resolution of complaints of discrimination by entities of State and local governments.

State and Local Government Operations Enforcement Coordination and Complaint Investigations

The program requests an increase of 10 positions, 5 workyears and $594,000. This includes one SES Level I Program Officer, one GS/GM-15 program specialist, one GS/GM-15 attorney, five general investigators (3 GS-14s and 2 GS-13s), and two secretaries (1 GS-8 and 1 GS-7). These additional resources will be used to coordinate the enforcement activities of other agencies that provide financial assistance to State and local governments and to carry out Justice's own complaint investigation duties with respect to State and local judicial systems, law enforcement agencies, and towns and municipalities. The ADA provides that complaints relating to State and local government services shall be processed in accordance with the remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973. The Department must assign and coordinate responsibility for the investigation and resolution of complaints to the appropriate Federal agencies. In addition, the Department is responsible for investigating complaints against such agencies as law enforcement agencies that generally do not receive financial assistance from other Federal agencies.

Public Accommodations Complaint Investigations and Compliance Reviews

The program requests an increase of 6 positions, 3 workyears and $380,000. This includes one GS/GM-15 program manager and five general investigators (2 GS-14s and 3 GS-13s). These additional resources will be used to investigate alleged violations of Title III of the ADA and to undertake periodic compliance reviews of entities covered under this Title. Because the universe of public accommodations is so large (3.9 million enterprises) the potential burden investigating complaints and performing compliances reviews is enormous. These resources will enable the program to establish only a minimal enforcement mechanism.

Attorney General Certification of State Accessibility Codes

The program requests an increase of $931,000. Of this amount, $706,000 will support 12 positions and 6 workyears. This includes one GS/GM-14 program manager, two GS/GM-15 attorneys, seven program specialists (4 GS-14s and 3 GS-13s), and two GS-7 secretaries. The remaining $225,000 will be used by the program to conduct ten public hearings. These additional resources will be used to respond to petitions by State and local governments for the Attorney General to certify that State and local building codes meet or exceed the minimum ADA accessibility requirements. Certification will require analysis of extremely complex and technical material and involves holding public hearings before certification can be granted. Because there are thousands of jurisdictions that could petition the Department for certification, significant resources are needed to begin to address this responsibility.

Comprehensive Technical Assistance Program

The program requests an increase of $10,336,000. Of this amount, $336,000 will support 5 positions and 2 workyears (two GS/GM-15 program managers and three GS-14 program specialists). The remaining $10 million will provide for technical assistance grants and contracts. These additional resources will be used to continue and expand the Department's ADA technical assistance activities begun in fiscal years 1990 and 1991 and continue to coordinate the government-wide technical assistance effort. The program officers and specialists (along with other existing resources) will be used to manage the technical assistance contract and grant program. The $10 million will be used to fund a variety of technical assistance projects aimed at covered entities and disabled persons. The ADA requires the Attorney General to provide technical assistance relating to public employment, State and local government operations (other than transportation), and public accommodations and commercial facilities. This level of resources is required to mount an effective ongoing program of technical assistance, given the extraordinary number of individuals and entities affected by the ADA's requirements.

Benefits

The requested resource level will enable the program to address ADA responsibilities in the following areas:

Litigation: 180 ADA lawsuits will be initiated.

Complaint investigations: 125 investigations will be initiated.

Compliance reviews: 15 comprehensive reviews will be initiated and 5 completed.

State and local building code certification: 200 requests for certification will be accepted and 100 completed.

Technical assistance: 129,500 additional covered entities and over 25,000 additional individuals will receive assistance, over 8,000 technical assistance projects will be initiated, and 150,000 technical assistance documents distributed.

Schedule of Cost Inputs
(Dollars in thousands)

Organization Civil Rights Division

Decision Unit 2CRT16 Coordination and Review

	Request Level		
	Pos	WY	Amount
Positions by Type			
Attorney	21	11	$561
Program Specialists	16	8	456
Paralegal Specialists	7	5	105
General Investigators	10	4	249
Clerical (Secretaries)	4	2	45
Subtotal	58	30	$1,416
Personnel Benefits	...	...	406
Travel	...	...	344
Rent, Communications and Utilities	...	...	435
Other Services	...	...	10,593
Supplies and Printing	...	...	87
Equipment	...	...	395
Subtotal	...	...	$12,260
Total	58	30	$13,676*

Description of Cost Inputs

Americans with Disabilities Act of 1990 (ADA) - Of the increased resources requested here, $3,451,000 will support the 58 positions requested; $225,000 will provide sufficient funds to conduct public hearings on ADA regulations; and, $10,000,000 will be available for technical assistance grants and contracts.

* Does not reflect the $39,000 request to restore pay raise absorptions.

Civil Rights Division
Justification of Program and Performance
Salaries and expenses: 15-0128-0-10752
Housing and Civil Enforcement - 2CRT17

Long-Range Goal: To eliminate a significant portion of the illegal discrimination in housing opportunities and credit transactions related thereto; to eliminate a significant portion of the illegal discrimination in places of public accommodation; secure general compliance with the Equal Credit Opportunity Act (ECOA) and its implementing regulations; and, secure general compliance with federal statutes requiring nondiscrimination in the provision of municipal services.

Major Objectives:

To investigate compliance with and initiate litigation to enforce the Fair Housing Act and the ECOA, monitor final court orders resulting from such suits, and move for contempt of court or other relief where the facts warrant.

To initiate litigation, upon referral from the Department of Housing and Urban Development (HUD), to remedy local government bodies' noncompliance with their housing-related obligations under the 1974 Housing and Community Development Act.

To communicate equal housing and equal credit opportunity information to the public by liaison with federal, state and local enforcement agencies.

To investigate compliance with and initiate litigation to enforce the provisions of Title II of the Civil Rights Act of 1964 relating to public accommodations.

Accomplishments and Workload: Accomplishments of the program are presented below:

Item	1989	1990	1991	Change	1992 Base Level
Matters Received	305	400	500	150	650
Investigations Conducted	101	150	250	100	350
Matters Closed	42	75	175	25	200
Cases Filed	35	50	150	100	250
Cases Closed	15	35	40	10	50
Judgments/Decrees Obtained	17	25	75	25	100

The number of cases filed in 1989 increased significantly because of the new enforcement responsibilities assumed by the program as a result of the Fair Housing Amendments Act of 1988, which became effective on March 12, 1989. This new law significantly increases the authority of

the program to combat unlawful housing discrimination. It requires the program to initiate new cases which come to it as a result of HUD authorizations to seek prompt judicial action as well as the federal court election option in the HUD enforcement scheme. The Division has no prosecutorial discretion with respect to these cases. The new law also significantly expands the enforcement authority of the program by (1) prohibiting, for the first time, discrimination against families with children and against handicapped persons, and (2) authorizing the program to seek monetary damages for victims of discrimination and civil penalties in pattern and practice fair housing lawsuits, a remedial authority that was not available under the 1968 Act.

For the period of October 1, 1988, until March 12, 1989, when the program's jurisdiction continued to be limited in the fair housing area to pattern and practice cases involving discrimination on the basis of race, color, national origin, sex and religion, six new fair housing cases were filed. The program also initiated a major public accommodations and equal credit opportunity suit against a large health club chain located on the east coast. For the period from March 12, 1989 until the end of 1989 the program filed an additional 21 fair housing lawsuits, a substantial increase reflecting the start of the expected workload increase as a result of the 1988 Amendments to the Act. Twelve of these lawsuits were initiated pursuant to the program's pattern or practice authority; seven were prompt judicial action lawsuits filed at the request of HUD; and the remaining two cases were election lawsuits under the amended Act. In addition the program is defending the HUD in two suits which attack the constitutionality of the Amended Act and filed an amicus curiae brief in another case addressing one of the provisions of the Amended Act. Finally, from March 12, 1989 until the end of the 1989 the program also filed a Title VI lawsuit upon referral from the Department of Health and Human Services, two additional Title II public accommodations lawsuits, and is defending the Department of Justice in a suit challenging the constitutionality of an important statute designed to compensate Japanese persons who were interned during World War II which is being implemented by the Civil Rights Division.

Thus far in 1990 the increase in case filings pursuant to the amended Fair Housing Act continues. Thirty-three additional Fair Housing Act cases have been filed; in addition, the program is participating as amicus curiae in four other Fair Housing Act cases and has initiated four new Title II public accommodations lawsuits in this period. While the increase in workload under the Amended Act has already been substantial, it is expected to increase even more significantly in the future. Thus far, most of the increase in the program's workload has been in its traditional pattern and practice cases. Indeed, this aspect of the program's work has increased more dramatically than initially projected as the program has initiated cases in an effort to clarify new provisions of the Amended Act; a number of cases examining the rights of handicapped persons in group homes is one area where there has been significant activity. It is expected that the number of such pattern and practice filings will continue to increase as new issues arise under the Act and with greater public awareness of the Amended Act's provisions. However, in the future it is expected that the number of cases filed as a result of referrals from HUD will increase even more dramatically. Thus far, the number of such referrals has been below initial projections because HUD is in the start-up phase of processing its investigations. As the efficiency of this process increases, the cases flowing to the program and requiring the filing of lawsuits will greatly increase as well.

The workload projections are based on this expected increase in cases over the next two to three years. In addition, it reflects the substantial increase in staff that we expect as a result of our 1991 budget request which will be phased in over two years -- 23 workyears in 1991 and 24 workyears in 1992. In short, we expect a substantial increase in workload in this period because (1) the flow of new cases from HUD will continue to increase, and (2) the addition of new staff in 1991 and 1992 will provide us the ability to initiate increased numbers of pattern and practice cases.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization Civil Rights Division

Decision Unit 2CRT17 Housing and Civil Enforcement

Resource Requirements	1989	1990	1991	1992			
				Base Level		Request Level	
				Change	Cum.	Change	Cum.
BUDGET AUTHORITY	$2,135	$2,342	$4,961	$1,229	$6,190	$45	$6,235
OUTLAYS	2,077	2,316	4,617	1,352	5,969	48	6,017
Appropriated Positions	33	33	80	...	80	...	80
Workyears:							
Full-Time Permanent	30	30	53	23	76	1	77
Other	1	1	1	...	1	...	1
Subtotal	31	31	54	23	77	1	78
Overtime/Holiday	...	...	...	...	...	...	...
Total	32	31	54	23	77	1	78

Program Changes: The $45,000 is for fifty percent of the pay raise absorbed in 1991 and will enable this program to utilize all authorized workyears.

11150

Civil Rights Division
Justification of Program and Performance
Salaries and expenses: 15-0128-0-1-752
Educational Opportunities - 2CRT18

Long-Range Goal: To eliminate segregation in districts formerly operating dual school systems and reduce, in substantial measure, the need for court supervision of public elementary and secondary school desegregation in these districts; make substantial progress in eliminating unlawful segregation and discrimination in public schools in districts where there is no history of a statutorily required dual system; eliminate continuing denials of equal educational opportunities in public school systems; eliminate discrimination in and/or denial of educational opportunities to Native Americans; eliminate the vestiges of unlawful, racially dual systems of higher education; and, assist the Department of Education (ED) in enforcing assurance of compliance with civil rights laws.

Major Objectives:

To initiate and/or participate in litigation designed to bring about the orderly desegregation of schools pursuant to federal laws; eliminate denial of equal protection of the law in educational institutions on account of sex; and, secure equal educational opportunities for students in public school systems and educational institutions receiving federal financial assistance.

To seek supplemental relief designed to eliminate the vestiges of racially dual school systems and to achieve compliance with constitutional requirements. Such relief in southern school districts will lead to the elimination of the need for judicial supervision of many of these school districts.

To file lawsuits, upon referral from ED, to enforce nondiscrimination assurances made by educational institutions receiving federal funds and defend ED against court challenges to its authority to enforce civil rights assurances by federal recipients through the administrative process.

To coordinate activities with ED in ensuring that cases referred are worthy of litigation; investigative efforts are not duplicated; litigation reports are secured from client agencies; and, litigation is jointly planned (strategy, preparation of court documents, utilization of personnel).

Accomplishments and Workload: Accomplishments of the program are presented below:

Item	1989	1990	1991	Change	1992 Base Level
Cases/Matters Received	425	525	525	...	525
Investigations Conducted	330	450	450	...	450
Matters Closed	325	425	425	...	425
Cases Filed	15	30	30	...	30
Cases Closed	150	150	150	...	150
Defensive Cases in Progress	3	8	12	...	12
Judgments/Decrees Obtained	121	225	225	...	225

Recently, an adverse district court decision in the Mississippi higher education case was reversed on appeal. The defendants filed a further appeal which is pending; if this appeal is unsuccessful, this case will involve further litigation in the district court on liability within the next six months. The Alabama higher education case is currently in formal discovery; trial is set for October, 1990, and more than three hundred witnesses are expected to testify. In the Louisiana higher education case, the Supreme Court recently refused to hear the State's appeal of the district court's favorable liability ruling; recently the government motioned the district court to require the State to begin implementing a desegregation plan approved by the court in 1989. This is expected to lead to further litigation in the district court. In the Tennessee higher education, a party recently filed a motion for further relief which will require discovery and litigation in the case this year. A fifth higher education case is being investigated and a suit recommendation is expected within the near future. The program recently filed a major suit against a university which has a policy of not admitting females; and an investigation has been started involving a second university which does not admit females. The latter two are high profile cases and each is expected to involve protracted and costly litigation. In the past, the program has not been involved in active litigation of more than two complex and costly higher education cases in a year. During 1990, the program has been required to handle at least four such cases and these cases are expected to carry over into 1991.

The program conducted a substantial number of hearings and trials in elementary and secondary cases and 40 cases advanced to hearings and trials. Court orders and consent decrees have been obtained in 119 cases and 130 investigations and reviews are in progress. An adverse decision was entered in the Charleston school case and appeal is being considered. The program has also successfully prosecuted several cases in which remedial plans will be implemented by school districts and, therefore, the program will have to devote resources to monitor the implementation of these plans. Finally, to enhance cooperation with civil rights groups and local community members, extensive outreach efforts have been undertaken, e.g., meetings and attendance at conference.

As reflected in the workload estimates, the Compliance Monitoring Unit has been extremely productive in monitoring and taking appropriate enforcement action with respect to districts operating under court orders. Unit personnel handled 250 reports to the court from school districts, received a voluminous amount of written and telephonic complaints, continued to follow up on 242 information requests to school districts which have failed to file required reports, and handled 49 investigations. The information request letters have generated a tremendous amount of increased activity as guidance and assistance have been sought by many of the districts on the proper methods for providing the required data. The material which is ultimately provided by about 200 districts is being analyzed to determine each district's compliance status. Additionally, the staff conducted on-site reviews, provided assistance to districts developing and implementing plans, and

actively coordinated its activities with ED. The unit has been very successful in urging districts to initiate and adopt magnet school plans to remedy illegal student segregation. Many districts have had virtually no experience in this area, therefore, the unit has made its staff readily available to provide technical support and direction to facilitate the establishment and adoption of appropriate magnet schools.

The program continued a case review initiative, which was implemented in 1988, involving the review of at least 300 old school cases which have had desegregation orders in place for approximately 20 years. The purpose is to determine whether the school systems involved have fully complied with their orders to determine whether the court should be requested to dismiss these cases. The project includes the review of voluminous case files and meeting and/or discussing issues with school officials in each district. To date, 20 school districts have been contacted and dismissal proceedings will proceed as appropriate. Private parties have objected to some cases being dismissed and, therefore, litigation has ensued; nine districts in Georgia are currently in litigation. This project has resulted in a number of complaints from parents and students which are now under investigation. Moreover, a number of districts have failed to provide requested information, resulting in an increased workload for the program. For districts which simply refuse to provide information, orders will be sought from the court.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization Civil Rights Division

Decision Unit 2CRT18 Educational Opportunities

Resource Requirements	1989	1990	1991	1992 Base Level Change	1992 Base Level Cum.	1992 Request Level Change	1992 Request Level Cum.
BUDGET AUTHORITY	$2,006	$2,202	$2,301	$137	$2,438	$27	$2,465
OUTLAYS	2,024	2,178	2,284	131	2,415	27	2,442
Appropriated Positions	31	31	30	...	30	...	30
Workyears:							
Full-Time Permanent	27	27	27	...	27	...	27
Other	...	...	...	...	...	...	...
Subtotal	27	27	27	...	27	...	27
Overtime/Holiday	...	...	...	...	...	...	...
Total	37	27	27	...	27	...	27

Program Changes: The $27,000 is for fifty percent of the pay raise absorbed in 1991 and will enable this program to utilize all authorized workyears.

Justification of Program and Performances
Civil Rights Division
Salaries and expenses: 15-0128-0-1-752
Management and Administration - 6CRT30

This budget activity includes resources for executive and administrative direction and control of the Civil Rights Division as well as its responsibilities as a result of the Civil Liberties Act of 1988. For clarity of presentation, this program is broken out into two sections, Executive Direction and Control and Redress Administration.

Executive Direction and Control

Long-Range Goal: To reduce the incidence of illegal discrimination in the nation through provision of guidance and definition of the Civil Rights Division's mission and priorities and provide to the public such access to Division records as is permissible under controlling law; provide all necessary executive direction, administrative support, training, and operational support required to the enforcement and regulatory activities of the Division in order to enable the program to substantially reduce discrimination in all subject areas enforced; and, improve and maintain more cost-effective systems support and equipment to allow increased efficiency and work performance per employee.

Major Objectives:

To coordinate the Division's enforcement activities appropriately with related activities of other components of the Department and other enforcement agencies.

To participate effectively in Departmental, Executive Branch and governmentwide efforts to clarify or strengthen jurisdiction and authority and to establish or improve policies and procedures which govern litigation, administrative enforcement and program operation.

To evaluate policies, procedures and systems; anticipate the workload, as well as resource and time expenditures of the programs; and, to develop and implement plans for changes which would render them more efficient, effective and responsive to constituent concerns.

To establish and maintain relationships with public interest groups, members of Congress and other constituent representatives which permit constituent concerns to be communicated to the Division and Division activities to be explained to constituents' representatives.

To answer Freedom of Information Act (FOIA) requests within 10 days and Privacy Act (PA) requests within 20 days; minimize the number of appeals from denials of records requests by adhering to a standard of maximum disclosure permissible under controlling law; and, assist the Civil Division and U.S. Attorneys defending the Department in litigation arising from the denials of FOIA requests and out of cases and matters of historic interest on which the Department file is closed.

To provide cost-effective and responsive management and automation systems capabilities to address management, administrative and litigative requirements.

To review, analyze and respond (on behalf of the Assistant Attorney General) to letters, memoranda and other communications directed to the Division by the White House, Congress, other federal agencies, private corporations and citizens; and issue Criminal Non-Prosecution Notices to government and private sector organizations and to citizens as appropriate.

To provide all of the general administrative support necessary to enable Division personnel to enforce federal civil rights laws, including the following administrative activities: budget formulation and execution; personnel services and training; outside contracts and procurement; mail distribution; space management; supply, equipment and reproduction services; and, other support services not specifically defined in other programs.

The Division is committed to the effective use of automated data processing to develop and implement systems to increase productivity. Management and other key personnel have completed specially designed computer courses and are playing integral roles in developing litigation systems within their programs. Through the use of a centralized shared information system--AMICUS--and decentralized personal computers for task specific requirements, programs are able to address their substantive and administrative requirements promptly and appropriately, saving time and money. Increased litigation support is obligatory to compete with private counsel using the most efficient technology available.

Accomplishments and Workload: Accomplishments relating to the Division's office automation initiative are presented below:

Item	1989	1990	1991	Change	1992 Base Level
Litigation Support Projects	115	125	125	25	150
Litigation Support Reports	1,400	1,500	1,600	125	1,725
AMICUS/EAGLE Microcomputer Users	442	442	474	16	490
Requests for Assistance	1,050	1,100	1,200	100	1,300
Software Elements Supported	340	350	400	25	425

The data set out above reflects the program's continuing effort to refine and fully implement AMICUS as well as databases and other specialized software on personal computers. The Division also plans to begin conversion from AMICUS to EAGLE in 1992, providing funds are made available through the Legal Activities Office Automation (LAOA) fund.

The management activities of this program are by nature non-quantifiable and are best measured by the performance of the other programs which it manages. However, the Division is developing a Work Measurement System within AMICUS which will assist Division managers in measuring, in a more efficient statistical fashion, the inputs, outputs and performance of the other programs. The system will be in direct support of the Department's case management system.

A major goal of the Administrative Management Unit of the program continues to be increasing productivity within the Division through the development and use of information technology. The focus of this initiative is the expansion of network office automation combined with the phasing out of less efficient systems and dedicated word processors. These two initiatives converge in a common developmental theme. The Division has continued its implementation of AMICUS, the network office automation system developed by the Civil Division and adopted by other

divisions in the Department. At the conclusion of 1989, the Division had over 410 users on the system in the Main and HOLC Buildings. Productivity gains, as a result of AMICUS, surpassed original estimates. At the beginning of 1987 (first year of AMICUS implementation), the Division's attorney/clerical ratio was 2:1; the Division's current attorney/clerical ratio is 3:1. In September, 1986, the Division's on-board clerical staffing level was 85; during 1989, the number of on-board clerical staff had dropped to 57, approximately 33 percent fewer clerical support staff. Because of very stringent fiscal constraints resulting in the Division's inability to back-fill vacant clerical positions, productivity gains realized from the implementation of AMICUS have proven invaluable to the day-to-day operations of the Civil Rights Division. Scarce available resources have been used to hire attorneys and other types of professionals in support of the litigative effort. Desktop access to legal databases such as JURIS, LEXIS, and WESTLAW via AMICUS has enabled lawyers and others to rededicate their time to more productive activities. The use of databases and other specialized software on personal computers for docketing, scheduling, record-keeping and direct litigation support has made the Division more efficient and is bringing essential information to the fingertips of its personnel.

Other accomplishments/activities of the Administrative Management Unit include:

--Provided extensive support to the Office of Redress Administration (ORA) by designing and implementing two software systems, SUPER MARIO and JARMUS, and provided management oversight for JARVIS, ORA's consolidated information system.

--Supported the Division's review in the Home Mortgage Disclosure Act Data Analysis Project by providing extensive data processing assistance.

--Began programming for the Division's administrative management module. This network will enable the various units within Administrative Management to share program information.

--Developed a prototype case management tracking system, which is currently being tested by several programs within the Division.

--Implemented an automated procedure for reviewing legal research costs (e.g. WESTLAW, JURIS).

The FOIA/PA Unit has stabilized the backlog of pending requests. In the period of January through June of 1990, FOIA litigation activity in ongoing matters and additional matters temporarily increased. The unit has continued to focus its resources upon the more complex and voluminous requests involving 10,000 pages or more of documents.

11157

Redress Administration

Long-Range Goal: To provide payment to all eligible individuals: those of Japanese ancestry who were evacuated, relocated or interned in the United States during World War II, as set forth in the Civil Liberties Act of 1988.

Major Objectives:

To identify and locate eligible individuals as defined by the Act without requiring application.

To implement and refine the process for verification of eligibility.

To notify all applicable individuals of eligibility.

To initiate payment to eligibles from the Civil Liberties Public Education Fund.

Accomplishments:

The Office of Redress Administration was established on September 7, 1988. The accomplishments of the program include establishment of a toll-free number, a post-office box, an information number in Tokyo, and printed materials in English and Japanese. Over 250,000 pieces of literature about the program, including 150,000 Voluntary Information Forms, have been distributed. A temporary office was established in San Francisco in October 1988 to assist with public outreach, and successfully completed its mission.

Over 50 outreach meetings have been conducted in major metropolitan areas of 15 states; half-page advertisements have been submitted to ten U.S. Japanese vernacular newspapers reaching a circulation of 69,800; a statement to the Japanese American Citizens League affiliates has been circulated to 25,000 in all 50 states; press releases have been sent to 14 Japanese vernaculars newspapers reaching a circulation of 137,300; media interviews have been conducted, including radio, television, and a full press conference for native Japanese press; and 400 letters have been mailed to community leaders in key organizations in 16 states.

It is estimated that 75,000 or more individual contacts have been made through the receipt of correspondence and utilization of the toll-free numbers. A special file system and archive for this correspondence and for documentation of all telephone contacts has been developed, offices and staffing secured, and the system put into full operation. This documentation is now quickly and easily accessible when needed in the verification process.

From various historical sources, ORA has compiled a master list of potentially eligible individuals. This list has been computerized, refined to eliminate duplications and errors, and through extensive research, expanded to include all but a very small number of those individuals defined as eligible by the implementing regulations. This master list is ORA's main tool in the verification of eligibility. ORA has constructed verification procedures, and devised and implemented computerized information management and case tracking systems to support them. These manual and computerized systems have been tested for comprehensiveness, efficiency, and security.

ORA has confirmed the estimated number of eligible survivors, and with the assistance of an independent actuarial consulting firm, has

projected the number of expected deaths in the eligible population over the ten year span allotted by the Act. This exercise has provided a basis for important projections regarding the expected future cost of administering the program.

Death records have been obtained from four states with major populations of Japanese-Americans, Oregon, California, Hawaii, and Illinois in order to account for those deceased prior to the signing of the law. Preliminary matching of these records with the master list has been completed.

Proposed regulations governing eligibility and implementation of the Act were developed by ORA, approved by the Department, and published for a thirty day period for public comment. Shortly following their publication, ORA staff conducted public forums in nine major cities to explain the regulations and to answer questions about them. After considering the comments received, ORA revised the regulations and once again received Departmental approval. Final regulations were signed by the Attorney General on August 10, 1989, just one year after the enactment of the Civil Liberties Act.

With the final regulations in place, official verification of eligibility has begun, in preparation for the availability of full funding for payments in October 1990, to the first 25,000 eligible individuals. Form letters, which vary to fit the person's present circumstances eligibility for payment, and the facts of their individual case have been sent to over 26,000 individuals.

The Division plans to implement a comprehensive information system (JARVIS) by September 15, 1990. JARVIS will consolidate several existing data bases and improve the effectiveness of case processing.

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization Civil Rights Division

Decision Unit 6CRT30 Management and Administration

Resource Requirements	1989	1990	1991	1992 Base Level Change	1992 Base Level Cum.	1992 Request Level Change	1992 Request Level Cum.
BUDGET AUTHORITY	$6,122	$8,495	$10,004	$324	$10,328	$462	$10,790
OUTLAYS	5,951	8,125	9,756	501	10,257	393	10,650
Appropriated Positions	79	119	74	...	74	...	74
Workyears:							
Full-Time Permanent	48	81	55	...	55	1	56
Other	22	22	22	...	22	...	22
Subtotal	70	103	77	...	77	1	78
Overtime/Holiday	1	1	1	...	1	...	1
Total	71	104	78	...	78	1	79

Program Changes:

The program requests an increase of $462,000 in 1992. This request provides $381,000 for 157 attorneys currently on-board to convert to the AD pay system. This increase is based on the median difference ($2,420) in salary between the GS and AD pay system for attorneys of comparable length of service. This is the first year requirement for a proposed two-year conversion to the AD pay system. Because this is a relatively minor request, we did not include costs for related benefits. The request for 1993 will include the remaining differences between the pay systems, related benefits, and the increase needed for the lifting of the pay cap in January 1991.

Also included in the request is a program increase of $19,000 necessary to support the Department's implementation of the Administration's "Management Priorities for the 1992 Budget" as outlined in OMB memorandum (M-90-05) dated July 16, 1990 to all Executive Departments and Agencies. The funding will be used to specifically address upgrades in financial management systems consistent with the Administrative long standing goals for consolidating, upgrading and modernizing a single integrated financial management system within each agency, the full implementation of the Core Financial Requirements, the Standard Ledger and capable of producing auditable financial statements.

The remaining $62,000 is for fifty percent of the pay raise absorbed in 1991 and will enable the program to utilize all authorized workyears.

Schedule of Cost Inputs
(Dollars in thousands)

Organization Civil Rights Division

Decision Unit 6CRT30 Management and Administration

	1992 Request		
	Pos	WY	Amount
Positions by Type			
Conversion to AD Pay System for attorneys	...	...	$381
Subtotal	...	...	$381
Other Services	...	...	19
Subtotal	...	...	19
Total	12	6.0	$400*

Description of Cost Inputs

Converstion to AD Pay System - Provides resources necessary to convert 157 attorneys to the AD pay system.

Financial Management Information System - Resources necessary to support the Department's implementation of the Administration's "Management Priorities for the 1992 Budget".

* Does not reflect the $62,000 request to restore pay raise absorptions.

1162

Civil Rights Division
Salaries and expenses, General Legal Activities
Financial Analysis - Program Changes
(Dollars in thousands)

Item	Federal Appellate		Civil Rights Prosecution		Special Litigation		Voting		Employment Litigation		Coordination and Review		Housing and Civil Enforcement		Educational Opportunities		Management and Administration		Total	
	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount
Grades																				
ES-1	...	...	...	...	...	...	...	...	...	...	3	$230	...	...	...	...	...	...	3	$230
GS/GM-15	...	...	...	...	...	...	...	...	...	...	13	829	...	...	...	...	...	...	13	829
GS/GM-14	...	...	...	...	...	...	2	$108	...	...	15	813	...	...	...	...	...	...	17	921
GS-13	...	...	...	...	...	...	1	46	2	$91	10	459	...	...	...	...	...	...	13	596
GS-12	...	...	...	...	...	...	...	...	4	153	3	116	...	...	...	...	...	...	7	269
GS-11	...	...	...	...	...	...	...	...	2	64	6	193	...	...	...	...	...	...	8	257
GS-9	...	...	...	...	...	...	...	...	1	26	4	104	...	...	...	...	...	...	5	130
GS-8	...	...	...	...	...	...	...	...	...	...	1	24	...	...	...	...	...	...	1	24
GS-7	...	...	...	...	...	...	...	...	2	42	3	63	...	...	...	...	...	...	5	105
GS-6	...	...	...	...	...	...	...	...	1	19	...	...	...	...	...	...	...	...	1	19
Total positions and annual rate	...	...	...	...	...	...	3	154	12	395	58	2,831	...	...	...	...	...	...	73	3,380
Lapse (-)	...	...	...	...	...	...	-2	-77	-6	-198	-28	-1,415	...	...	...	...	...	...	-36	-1,690
Absorption of prior year pay raise	...	38	1	38	...	32	1	56	1	54	...	39	1	45	...	27	1	62	5	383
AD pay system	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	381	...	381
Total workyears and personnel compensation	...	38	1	38	...	32	2	133	7	251	38	1,455	1	45	...	27	1	443	42	2,454
Personnel benefits	...	...	...	...	...	...	...	22	...	68	...	486	...	...	...	...	...	...	...	488
Travel and transperation of persons	...	...	...	...	...	...	...	7	...	28	...	344	...	...	...	...	...	...	...	371
GSA rent	...	...	...	...	...	...	...	7	...	29	...	365	...	...	...	...	...	...	...	401
Other rent, communications & utilities	...	...	...	...	...	...	...	4	...	14	...	70	...	...	...	...	...	...	...	88
Printing and reproduction	...	...	...	...	...	...	...	2	...	8	...	42	...	...	...	...	...	...	...	52
Other services	...	...	...	...	...	...	...	227	...	79	...	10,593	...	...	...	...	...	19	...	10,918
Supplies and materials	...	...	...	...	...	...	...	2	...	13	...	45	...	...	...	...	...	...	...	60
Equipment	...	...	...	...	...	...	...	793	...	84	...	395	...	...	...	...	...	...	...	1,274
Total program workyears & obligations changes requested, 1992	...	38	1	38	...	32	2	1,197	7	560	38	13,715	1	45	...	27	1	442	42	16,106

Civil Rights Division
Salaries and expenses, General Legal Activities
Detail of Permanent Positions by Category
Fiscal Years 1990 - 1992

Category	1990 Authorized	1991 Request	1991 Program Supplemental	1991 Total	1992 Program Increase	1992 Total
Attorneys (905)	179	210	6	216	32	248
Paralegal Specialists (950)	56	70	...	70	9	79
Other Legal and Kindred (900-998)	10	10	...	10	...	10
Social Sciences, Economics and Kindred (100-199)	20	23	...	23	...	23
General Admin. Clerical and Office Services (300-399)	193	161	...	161	22	183
Accounting and Budget	4	4	...	4	...	4
Information and Arts Group (1000-1099)	1	1	...	1	...	1
Mathematics and Statistics Group (1500-1599)	2	2	...	2	...	2
General Investigating (1801-1810)	...	...	...	...	10	10
Total	465	481	6	487	73	560
Washington	465	481	6	487	73	560
Total	465	481	6	487	73	560

INTERPOL-U. S. NATIONAL CENTRAL BUREAU

Salaries and expenses, General Legal Activities

Crosswalk of 1991 Changes
(Dollars in thousands)

Activity/Program	1991 President's Budget Request			Approved Reprogrammings			1991 Appropriation Anticipated		
	Pos.	Workyears	Amount	Pos.	Workyears	Amount	Pos.	Workyears	Amount
INTERPOL-U S. National Central Bureau	79	79	5,639	...	. .	...	79	79	5,639

INTERPOL-U. S. NATIONAL CENTRAL BUREAU

Salaries and expenses, General Legal Activities

Summ ry of Requirements
(Do lars in thousands)

Adjustments to base:	Perm. Pos.	WY	Amount
1991 appropriation anticipated	79	79	5,639
Mandatory increases	..	..	418
Decreases	..	..	- 7
1992 base	79	79	6,050

Estimate by budget activity	1990 Enacted Perm Pos.	WY	Amt.	1990 Actual Perm Pos.	WY	Amt.	1991 Appropriation Anticipated Perm. Pos.	WY	Amt.	1992 Base Perm. Pos.	WY	Amt.	1992 Estimate Perm. Pos.	WY	Amt.	Increase/Decrease Perm. Pos.	WY	Amt.
INTERPOL-U.S. National Central Bureau	79	75	$5,682	79	63	$5,682	79	79	$5,639	79	79	$6,050	79	79	$6,291	..	..	$241
Total	79	75	$5,682	79	63	$5,682	79	79	$5,639	79	79	$6,050	79	79	$6,291	..	..	$241

	Approp.	Reimb.	Total	Approp.	Reimb.	Total	Approp.	Reimb.	Total	Approp.	Reimb.	Total	Approp.	Reimb.	Total	Approp.	Reimb.	Total
EOY Employment:																		
Full-time permanent	79	..	79	68	..	68	79	..	79	79	..	79	79	..	79	..	..	..
Other	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Total	79	..	79	68	..	68	79	..	79	79	..	79	79	..	79	..	..	..

Justification of Program and Performance
INTERPOL-U. S. National Central Bureau
Salaries and Expenses, 6INTO1

Long Range Goal: To stem the growth of international crime by providing efficient communications, exchange of information, and coordination of investigations among the member countries of INTERPOL, the INTERPOL General Secretariat (headquarters), and law enforcement agencies within the United States.

Major Objectives:

To represent the United States in the International Criminal Police Organization (INTERPOL).

To provide timely responses to requests for information from domestic and international law enforcement agencies in accordance with the INTERPOL constitution and Department of Justice regulations and to coordinate investigations in their behalf.

To use the USNCB's network of state liaison offices and technological advancements in information processing to improve delivery of police information to Federal, state and local jurisdictions, regional subbureaus, and their foreign counterparts, thereby maximizing the effectiveness of all investigative entities and reducing duplication of effort.

Accomplishments and Workload

In 1990, the USNCB initiated the INTERPOL US Canadian Interface, a program that is increasingly playing an important role in curbing movement of criminals on both sides of the U.S.-Canadian border. This project allows the 50 states and their Canadian counterparts, through the National Law Enforcement Telecommunications System (NLETS), to exchange police information in a semi-automated fashion using the USNCB and INTERPOL Ottawa as the necessary interface. In 1987 the decision was made by the Attorney General to implement this program on a semi-automated basis in order that information could be verified before release, thereby protecting privacy rights of U.S. citizens. The data are verified by the respective INTERPOL National Central Bureaus before they are released to its foreign counterpart in order to reduce the risk of wrongful detention based on incorrect or out of date information. This is essential in that many of the identified "hits" are invalidated when information is confirmed by INTERPOL analysts manning the interface.

This project is expected to greatly contribute to the apprehension of wanted persons and recovery of stolen vehicles. It will also serve to limit the relatively easy access now enjoyed by criminals on both sides of the US/Canadian border. It is expected to be effective in interrupting drug trafficking patterns up and down the I-95 corridor, as well as routes through the Ohio Valley and westward.

Since May 1990, the system has been available to all fifty states, and expectations are that 750,000 messages per year will be exchanged.

INTERPOL-U. S. NATIONAL CENTRAL BUREAU

Salaries and expenses, General Legal Activities

Summary of Change
(Dollars in thousands)

	Perm. Pos.	WY	Amount
1991 as requested	79	79	$5,639
1991 Program supplemental	..	..	..
1991 appropriation anticipated	79	79	$5,639
Adjustments to base:			
Savings resulting from management initiatives	..	..	..
Mandatory increases:			
One additional compensable day	..	..	18
1991 pay annualization	..	..	20
1992 pay raise	..	..	82
Within-grade increases	..	..	19
Executive Level/SES pay increase	..	..	6
Health benefits	..	..	10
Federal Employees Retirement System (FERS)	..	..	9
Federal Insurance Corporation Act (FICA)	..	..	7
Distributed Administrative Support (DAS)	..	..	8
Postage	..	..	2
GPO and Department printing	..	..	1
Employee data and payroll services	..	..	1
Security Investigations	..	..	1
Security reinvestigations	..	..	36
General Services Administration (GSA) rent	..	..	51
GSA recurring reimbursable services	..	..	74
General Pricing Level Adjustments	..	..	15
INTERPOL dues assessment increase	..	..	58
Total, Mandatory increases	..	..	418
Decreases:			
Unemployment compensation	..	..	(2)
Financial Operations Service	..	..	(5)
Total Decreases	..	..	(7)
1992 Base	79	79	$6,050
Program increases	..	..	241
1992 Request	79	79	$6,291

To better support the war on drugs, the USNCB has established a new investigative division devoted to drug cases and drug-related matters. The DEA presence in the USNCB has been expanded by the assignment of three additional agents to this specialized unit, one of whom serves as the Assistant Chief for Drug Investigations. In addition to DEA agents, the unit's staff includes an agent from the Naval Investigative Service. The DEA increased its detail of agents to the USNCB as a result of an assessment conducted in 1989 of its level of participation and utilization of the INTERPOL channel.

To meet the challenges created by the increased internationalization of crime, particularly as it impacts state and local jurisdictions, the USNCB has established a network of liaison offices throughout the fifty states through which inquiries to the USNCB can be channelled. This coordinative function, which is performed by an investigative agency within each of the states, makes it easier for local law enforcement to access INTERPOL and eliminates many querying errors at the source. As a result, investigative information going to or coming from foreign sources is more efficiently exchanged with over 20,000 police entities throughout the United States. In April 1990, a national assembly of state liaison coordinators was held in Chicago, Illinois, and hosted by the Illinois State Police. The three-day conference focused on worldwide criminal activity in various areas of crime, how the INTERPOL network can best be used by the states, and served as forum through which states could address specific needs and concerns to the USNCB. The Second Annual Conference of INTERPOL State Coordinators will take place in January 1991 and will be hosted by the State of Nevada's Division of Investigation.

In 1990 and 1991, the USNCB is making significant improvements to its telecommunications and information processing capabilities through the installation of a local area network, multipurpose workstations, message formatting and transmitting, and establishment of electronic files. By instituting such changes, the USNCB hopes to absorb projected workload increases through automation rather than workyears.

The INTERPOL network represents an efficient and cost-effective way for domestic and international law enforcement to pursue investigations with a minimum expenditure of manpower. In 1989, the USNCB opened 12,127 cases and other investigative matters and processed 95,833 messages. In 1990, the USNCB expects increases in message traffic from full implementation of the Caribbean/Central America Telecommunications Network and the INTERPOL US Canadian Interface.

1169

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization INTERPOL-U.S. National Central Bureau — Decision Unit: 6INT01 INTERPOL-U. S. National Central Bureau

Resource Requirements	1989	1990	1991	1992 Base Level Change	1992 Base Level Cum.	1992 Request Level Change	1992 Request Level Cum.
BUDGET AUTHORITY	4,313	5,682	5,639	411	6,050	241	6,291
OUTLAYS	4,331	5,491	5,618	354	5,972	235	6,207
Appropriated Positions	70	[illegible]	79	...	79	...	79
Workyears:							
Full-time Permanent	43	58	79	...	79	...	79
Other	18	5	...	...	...	...	...
Subtotal	61	63	79	...	79	...	79
Overtime/Holiday	1	3	2	...	2	...	2
Total	62	65	81	...	81	...	81

1170

Program Changes

The INTERPOL-USNCB requests $241,000 in 1992 to meet operational costs for message traffic for the INTERPOL U S. Canadian Interface, funding for technical enhancements deferred in 1991 due to the required absorption of one-half of the 1991 pay raise, and enhancements to the Department of Justice's financial management system.

In order to communicate with INTERPOL Ottawa and access NCIC, the USNCB utilizes JUST, a communications line maintained by Justice's Computer Technology and Telecommunications Staff (CTTS). The USNCB and CTTS have worked closely to project precise costs to operate this program in 1992 to meet operational needs which may involve as many as 750,000 messages a year. Actual costs for software development, line charges, maintenance, and trouble-shooting are estimated at $198,000 in 1992.

As a result of the requirement to absorb half of the 1991 pay raise, the USNCB will divert resources from other program areas to provide for personnel compensation in 1991. To accommodate the 1991 pay absorption, the USNCB deferred the purchase of ten workstations needed to complete the USNCB's local area network as part of its planned technical improvements. Funding in the amount of $39,000 is requested to permit the purchase of these items in 1992 to complete the system.

In addition to the above, the USNCB requests $4,000 for its share of costs for enhancements to the Department of Justice's financial management system. This high-priority project is one of the needed management improvements identified by OMB, and will provide significant automation enhancements.

Schedule of Cost Inputs
(Dollars in thousands)

Organization: INTERPOL-U.S. National Central Bureau Decision Unit: 6INT01 INTERPOL-U.S. National Central Bureau

	Request Level		
	Pos.	WY	Amt.
Rents, Leases, Utilities	...	..	198
Other Services	...	..	43
Total	...	..	241

Description of Cost Inputs

This request includes $39,000 for the purchase of workstations to complete the USNCB's local area network, deferred in 1991 due to the required absorption of one-half of the 1991 pay increases; $198,000 for operational costs of messages through the Department of Justice's JUST telecommunications line for the INTERPOL U.S. Canadian Interface, and $4,000 for enhancements to the Department of Justice's financial management system.

1171

U. S. National Central Bureau
Salaries and Expenses
Summary of Decision Unit Resources by Object Class
(Dollars in thousands)

Object Class		1990 Actual WY	1990 Actual Amount	1991 Estimate WY	1991 Estimate Amount	1992 Estimate WY	1992 Estimate Amount	Increase/ Decrease WY	Increase/ Decrease Amount
11	Personnel Compensation	63	$2,112	77	$2,438	79	$2,605	2	$167
12	Personnel benefits		355		475		520		45
21	Travel and transportation of persons		100		100		110		10
22	Transportation of things		10		10		15		5
23.1	GSA Rent		615		615		666		51
23.2	Rental payments to others		...		...		...		...
23.3	Communications, utilities and miscellaneous charges		335		320		550		230
24	Printing and reproduction		20		20		25		5
25	Other Services		545		520		665		145
26	Supplies and materials		45		30		35		5
31	Equipment		500		170		100		(70)
41	Grants, Subsidies, and Contributions		1,045		941		1,000		59
	Total Obligations	63	5,682	77	5,639	79	6,291		652

INTERPOL-U. S. NATIONAL CENTRAL BUREAU

Salaries and expenses

Financial Analysis - Program Changes

(Dollars in thousands)

Item	Program Operations		INTERPOL U.S. Canadian Interface		Financial Management		Total	
	Pos.	Amount	Pos.	Amount	Pos.	Amount	Pos.	Amount
Total workyears and personnel compensation	...	...	...	...	...	...	...	...
Rent, Communications, and utilities	...	...	...	$198	...	...	...	198
Other services	...	$39	...	...	...	4	...	43
Total program workyears and obligation changes requested, 1992	...	39	...	198	...	4	...	241

INTERPOL-U.S. NATIONAL CENTRAL BUREAU
Salaries and expenses, General Legal Activities
Detail of Permanent Positions by Category
Fiscal Years 1990 - 1992

Category	1990 Authorized	1991 Request	1992 Total
Criminal Investigating Series (1801-1811)	1	1	1
General Administration, Clerical, Office Services (300-399)	74	74	74
Paralegal Specialist (950)	1	1	1
Information and Arts (1000-1099)	3	3	3
Total	79	79	79
Washington	79	79	79
U. S. Field	...	...	...
Total	79	79	79

Legal Activities Office Automation
Salaries and expenses, General Legal Activities

Summary of Requirements
(Dollars in thousands)

Adjustments to base:	Amount
1991 as requested (appropriation anticipated)	$23,171
Mandatory increases:	
Financial Operations Services	6
Maintenance/Lease Annualization - Project EAGLE	14,225
1992 base	$37,402

Estimates by Budget Activity	1990 as enacted	1990 actual	1991 Appropriation Anticipated	1992 Base	1992 Estimate	Increase/Decrease
Legal Activities Office Automation	$12,014	$10,320	$23,171	$37,402	$42,771	$5,369

1175

Legal Activities Office Automation
Justification of Program and Performance
Salaries and expenses, General Legal Activities; 15-0128-0-1-752
Office Automation - 2LOA01

Long-Range Goal: The mission of the Legal Activities Office Automation Fund is to improve the productivity of the Department's legal activities programs through modernization and enhancement of office automation systems.

Major Objectives:

Install systems which meet the central requirements of the litigating organizations and the information needs of the Department's management officials, and allow reliable interfaces with Department-wide data processing systems.

Implement cost effective methods for electronic exchange of documents and messages among Departmental organizations. Institutionalize the planning and acquisition processes for office automation resources to:

- Build on the installed base of office automation systems in the litigating organizations;

- Build cooperative processing systems wherever possible;

- Ensure installation of compatible hardware and software in all future acquisitions.

Base Program Description: In 1986, the Deputy Attorney General directed that the Department develop a comprehensive policy and strategy for the design and acquisition of automated systems for the six legal divisions, the offices of the U.S. Attorneys and offices of senior departmental management. The objective was to achieve management efficiencies and productivity gains in office automation systems and to move the Department toward a more coordinated and unified approach to these systems.

During 1986, the Department developed and integrated project plans for all the litigating components and senior management offices. It was recommended that the Department proceed immediately to implement coordinated office automation systems throughout the litigating organizations. The Department is pursuing this recommendation through two major approaches -- the AMICUS and EAGLE office automation systems.

AMICUS - Beginning in 1982, the Civil Division developed the Automated Management Information Civil Users System (AMICUS) office automation system to provide attorneys, clerical staff and managers with access to an array of services supporting the operations of a modern law office. In addition to word processing, electronic mail and other office services, AMICUS provides on-line access to legal research data bases such as JURIS, Lexis/Nexis, Westlaw and other special data bases. With the funding appropriated for 1987 - 1989, the Department installed the AMICUS system in the Environment and Natural Resources and Civil Rights Divisions. By 1991, these Divisions are scheduled to have completed the buy-out of their AMICUS installations for current staffing levels.

EAGLE - EAGLE (Enhanced Automation for the Government Legal Environment) is the name used to describe a strategic Department of Justice procurement of integrated office automation hardware, software and support for litigating organizations. The EAGLE contract was awarded in June, 1989. The Tax, Criminal, and Justice Management Divisions , offices of the U.S. Attorneys are currently implementing office automation systems nationwide.

AMICUS and EAGLE are similar in architecture and operation, using the same family of Data General minicomputers. Both provide employees with desktop access to the tools necessary to increase productivity:

Legal word processing - the document production, spell-checking and printing tools necessary for preparing lengthy legal materials with multiple footnotes, indices, tables of authorities, etc.

Electronic mail - a cost-effective electronic alternative to telephones, the postal system, and overnight delivery services for short and informal communications, especially for organizations with a nationwide field office network.

Calendar management - tools for personal and group scheduling of court dates, meetings, conferences and events.

42-569 O—91—38

Communications and file-transfer - tools for access to online legal research services (JURIS, Lexis, Westlaw, etc.), for linkage to the Department of Justice Data Centers for centralized data management activities, and for transferring documents and computer files from one location to another.

Database management - tools for automated organization, analysis and retrieval of various types of records, including both evidentiary and administrative data.

Not only are the AMICUS and EAGLE systems compatible with each other, but they are also compatible with current and future directions (e.g., the interconnection of systems in a data communications network under the FTS 2000 contract).

The Attorney General, in a memorandum dated August 23, 1989, stated that "One of my objectives is to achieve uniformity of systems throughout the Department. EAGLE provides the means to achieve this objective." This memorandum established an EAGLE Policy and Steering Committee to guide the implementation of the EAGLE contract throughout the Department. This Committee, consisting initially of senior management representatives from the Criminal, Tax, and Justice Management Divisions, and the United States Attorneys, provides policy guidance and reaches agreements on cross-cutting issues among EAGLE participants.

Funding in 1990 has allowed the charter EAGLE organizations to begin to satisfy enormous demand for integrated legal office automation. Funding also provided the Office of the Solicitor General with initial EAGLE capability. Although EAGLE was developed primarily to meet the needs of the litigating organizations without integrated office systems, the advanced capabilities of EAGLE are flexible enough to meet the office automation needs of other Department of Justice organizations, including the Justice Management Division. To move toward EAGLE compatibility, other DOJ organizations, not funded through LAOA, also are acquiring office automation equipment through the EAGLE contract.

Funding in 1991 will permit the completion of the United States Attorneys' installations, a limited number of new installations in Tax and Criminal Divisions, and continue lease payments on all systems installed in 1990. The Justice Management Division also intends to establish a facilities management capability to support EAGLE users.

Accomplishments: The joint planning initiative by the litigating organizations has yielded impressive dividends. The AMICUS system meets the current needs of over 2,000 users in the Civil Division, the Environment and Natural Resources Division, the Civil Rights Division, the senior management offices, and the General Counsel's Office of the Immigration and Naturalization Service.

By the end of the 1990, nearly 4,000 EAGLE workstations will be installed throughout the United States. This is possible because the EAGLE organizations chose a lease to purchase acquisition method, allowing these organizations to install a larger number of workstations in 1990 than if a straight purchase strategy were used. The Criminal and Tax Division EAGLE implementation will be essentially complete, with 530 and 568 workstations in operation by the end of 1990, respectively. The United States Attorneys will have completed EAGLE installations in 28 small and medium-sized districts, as well as the Executive Office for United States Attorneys in Washington, D.C., totaling 2,157 workstations. The remaining 63 districts are scheduled for implementation during 1991. The Justice Management Division anticipates 55 workstations installed in 1990. The EAGLE contract has supported other departmental automation requirements, from small offices such as the Office for Special Counsel for Immigration Related Unfair Employment Practices to the United States Marshals Service, the Bureau of Prisons and the Immigration and Naturalization Service.

In July, 1990, a communications gateway was successfully tested that allows EAGLE and AMICUS users to communicate electronically and to transmit documents instantaneously. This is a very important step in connecting the two major office automation systems. In addition, a common resource local area network was designed and installed to provide interconnection between departmental organizations and offer high speed connections to legal research services and the Justice Data Centers, thereby reducing the number of expensive communications circuits that would otherwise be necessary.

As of September 1990, the Washington, DC EAGLE training center provided hands-on instruction for 1,090 employees, including over 120 system managers. This 30-workstation facility offers the following courses: EAGLE orientation, Basic Word Processing, Advanced Word Processing, Basic System Operations, System Manager, Introduction to Oracle for Developers, and Williams Automated Management Service (WAMS - the EAGLE Text Storage and Retrieval software).

These accomplishments lay the foundation to reach the goal of uniformity envisioned in 1986. The funding request presented herein describes a plan that will ensure that the Department can obtain the benefits of integrated legal office automation and remain effective in carrying out its litigating responsibilities.

1177

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization Legal Activities Office Automation — Decision Unit 2LOA01 Office Automation

Resource Requirements	1989	1990	1991	1992			
				Base Level		Request Level	
				Change	Cum.	Change	Cum.
BUDGET AUTHORITY	6,408	10,320	23,171	14,231	37,402	5,369	42,771
OUTLAYS	4,486	7,224	24,949	10,745	35,694	4,671	40,365

Program Changes: An increase of $5,369 in budget authority is requested in 1992 for the Legal Activities Office Automation Fund. The requested increase will be largely committed to the conversion of AMICUS systems to EAGLE configurations in the Civil Division, Environment and Natural Resources Division, Civil Rights Division, and the conversion of the Wang system in the Antitrust Division. The benefits of uniform office automation systems in the litigating organizations can be fully realized only if sufficient funding is provided.

In January, 1994, the AMICUS contract expires, along with the control over an extensive structure of proprietary software that provides the customized functionality that has made AMICUS such an effective tool for litigators and managers. Even though AMICUS currently meets users' needs, it is not possible or desirable to maintain the status quo indefinitely. As the system's technology becomes increasingly outdated, maintaining the system and adding enhancements promises to be very difficult and expensive. Therefore, with the direction provided by the Attorney General, and the departmental scope of the EAGLE contract, it is appropriate and cost-effective that AMICUS organizations begin an orderly migration to EAGLE systems beginning in 1992. The Civil Division plans to conduct a requirement analysis/feasibility study to update their attorneys' office automation needs and confirm that the conversion to EAGLE will satisfy system objectives.

As described earlier, the similarities between EAGLE and AMICUS allow the effective use of existing equipment to accomplish the transition to EAGLE. For example, some organizations already own compatible models of the Data General minicomputers and/or personal computers that can be integrated into an EAGLE configuration. Funding requirements will differ depending on the installed equipment base and the need for system upgrades or replacement. In all cases, there will be some level of site preparation, which includes cabling, possible computer room renovation and communications equipment.

The conversion will extend over a two-year period for the Civil, Civil Rights, and Environment and Natural Resources Divisions. This will allow the Divisions to conclude the life cycle of existing AMICUS equipment. By 1994, when the AMICUS contract expires, the Divisions will be completely converted to EAGLE. The Antitrust Division will complete conversion in 1992, since Wang equipment will not be compatible with EAGLE. In addition, it is anticipated that initial conversions will take place at mid-year 1992, under a 36-month lease to ownership acquisition plan.

The requested increase of $5,369,000 is based on the following requirements:

The Civil Division requests $1,518,000 to begin the transition to EAGLE by converting shared AMICUS servers to EAGLE configurations under a lease to purchase arrangement. With previously upgraded minicomputers and the acquisition of personal computers, the Civil Division will begin the migration of the first 450 workstations to EAGLE (340 Civil Division users and 110 on-site contractors). During 1993, additional workstations will be converted to EAGLE, with the remainder to be completed in 1994, to coincide with the expiration of the AMICUS contract. This strategy, as well as those that are described below, allows the Civil Division to avoid a forfeiture of the substantial investment in its current configuration. In addition, the Division expects to continue to realize a positive yield on the existing contract vehicle, at a relatively low cost. Finally, this transition method permits AMICUS users to maintain the utility of the AMICUS system and when cost-effective, enhance the system to meet user requirements, promote productivity and avoid service deterioration. As a first step in this transition process, the Civil Division will conduct a requirements analysis/feasibility study to update attorneys' office automation needs and confirm that the planned conversion will satisfy requirements and system objectives. Also, the Division will provide personal computer support for employees so that they may become acclimated to the PC environment before EAGLE arrives. This will reduce the learning curve associated with the implementation of a

new system.

The Civil Rights Division requests $665,000 to convert systems in the Main Justice building to EAGLE in 1992. The Civil Rights Division already uses personal computers with the AMICUS system and plans to upgrade existing servers, which results in a cost savings of approximately $200,000 per minicomputer. The Civil Rights Division expects that the distributed architecture available under EAGLE will permit the Division to use the minicomputers for more database applications, since the office automation functions can be performed on the personal computer. The Division will begin conversion in April with cabling and other network activities. Two minicomputers will be upgraded in July and August 1992 and acquisition of necessary personal computers to replace dumb terminals will also take place. The emphasis will be to convert Main Justice building offices first, with potentially 300 employees using EAGLE during 1992. The HOLC building will be converted during 1993, adding another 200 employees (under current staffing levels).

The Environment and Natural Resources Division requests $563,000 to replace AMICUS equipment that was installed beginning in 1986. The Environment and Natural Resources Division will acquire personal computers and laser printers for employees and contractor personnel on board at the beginning of 1992. It will be necessary to replace nine minicomputers that will not be used in the EAGLE configuration, with eight EAGLE servers. The Division anticipates the conversion of offices in the 601 Pennsylvania Avenue building, along with a small number of offices in the Main Justice building. It is also planned that the Denver and San Francisco field offices will also be migrated to EAGLE systems. The balance of employees in the Main Justice building will be transferred to EAGLE beginning in 1993.

The Antitrust Division requests $622,000 to allow full conversion from its current systems (Wang VS) to EAGLE. At this time, interoperability between the Antitrust Division's Wang OFFICE electronic mail system and EAGLE is not possible. This is because there are no standard communications protocols that exist between WordPerfect Office and Wang to allow interconnection of the electronic mail systems. A similar situation exists with the exchange of word processing documents, which would require the use of utility programs and manual correction. The Antitrust Division is currently located in the Main Justice Building, the Judiciary Center Building, and in seven field offices. The proposed configuration calls for 10 EAGLE servers, 484 personal computers, 49 portable workstations, and 160 laser printers.

The Justice Management Division requests $500,000 to acquire services to convert application software from standalone personal computers, local area networks and other systems that existed previously, to the EAGLE database management system. These services are necessary to move the Division to a unified EAGLE information management environment, that can effectively serve departmental components.

To provide facilities management capability to serve all EAGLE components, the Department requests $1,500,000. This capability will augment EAGLE operations with enhanced user support/training, troubleshooting, and testing. In addition, this contractor support will provide an information clearinghouse capability focused both on EAGLE end-users and technical managers. Finally, the facilities management contractor will support nationwide network management, providing troubleshooting assistance on the interconnection of EAGLE systems.

This request also includes $1,420 for enhancement efforts associated with the Department's Financial Management System.

Implementation of this coordinated office automation program will end the proliferation of incompatible systems which now preclude the rapid and efficient transfer of information, documents, and work products among the litigating components. Also, this initiative will markedly expand the availability and use of automated legal research and litigation support.

Without full funding for EAGLE, attorneys will not have adequate modern tools available to successfully prosecute high level criminals associated with drugs, white collar crime, and fraud, and to defend the Federal Government against civil claims. Specifically, the ability to send mail to all users, to schedule meetings, to create and share databases for litigation support, and establish local brief banks would be limited only to those users on installed EAGLE systems. The benefits of uniform systems that permit full interconnectivity would be missed.

Schedule of Cost Inputs
(Dollars in thousands)

Organization General Legal Activities

Decision Unit 2LOA01 Legal Activities Office Automation

	Request Level Amount
Communications, utilities and misc. charges	$1,946
Other services	2,277
Equipment	1,146
Total	$5,369

Description of Cost Inputs

Cost inputs consist of a combination of purchase of equipment and services and the lease of equipment for the conversion of AMICUS organizations to EAGLE, the conversion of software to an EAGLE platform for the Justice Management Division, and the funding of a facilities management capability to support the EAGLE community.

For the Civil Division, Civil Rights Division, the Environment and Natural Resources Division and the Antitrust Division, there will be various startup costs related to EAGLE conversion. As an example, there may be some renovation required prior to the installation of minicomputers, installation of cable and telephone lines, and upgrading and/or isolation of electrical circuits. Some items are one time purchase (cable, adapters, documentation etc.) or expendables, such as blank tapes. Services may also be obtained during this conversion period to provide assistance with managing initial operations or other technical and engineering services. Finally, the actual lease costs that are incurred after the system is accepted and operational, as well as maintenance for the entire system.

The Justice Management Division expects to acquire services to convert applications from microcomputer and local area network-based programs to the EAGLE platform. This is primarily the case with database applications that will be converted to the ORACLE database management system. The Justice Management Division will also obtain facilities management services from a contractor. This service will provide and information clearinghouse capability focused on EAGLE end-users and technical managers, including support for nationwide network management and troubleshooting on the interconnection of EAGLE systems.

1180

Summary of Decision Unit Resources by Object Class
(Dollars in thousands)

Object Class	1990 Actual Amount	1991 Estimate Amount	1992 Estimate Amount	Increase/ Decrease Amount
23.3 Communications, utilities and miscellaneous charges	$3,833	$11,635	$28,022	$16,387
25 Other services	3,966	9,756	13,279	3,523
31 Equipment	2,521	1,780	1,470	($310)
Total obligations	$10,320	$23,171	$42,771	$19,600

1181

Legal Activities Office Automation

Salaries and expenses, General Legal Activities

Financial Analysis - Program Changes
(Dollars in thousands)

	Legal Activities Office Automation
	Amount
Communications, Utilities and Misc. Charges	$1,946
Other services	2,277
Equipment	1,166
Total obligations, changes requested 1992	$5,369

1182

Special Counsel for Immigration Related Unfair Employment Practices
Salaries and Expenses
Crosswalk of 1991 Changes
(Dollars in thousands)

Activity/Program	1991 President's Budget Request Pos.	WY	Amount	1991 Program Supplementals Requested Pos.	WY	Amount	1991 Appropriation Anticipated Pos.	WY	Amount
Special Counsel for Immigration Related Unfair Employment Practices.....	36	34	$3,858	40	20	$6,846	76	54	$10,704

Supplementals Requested. The total supplemental request for the Office of Special Counsel is $6,846,000. Of this amount, $6,840,000 provides for 1) the establishment of three regional offices in areas of high alien population, and where a substantial need for additional public education has been demonstrated, and 2) the development of a comprehensive nationwide public information campaign on the antidiscrimination provision, as recommended by the General Accounting Office and the statutory interagency task force authorized by Section 101 of the Immigration Reform and Control Act. The additional $6,000 request provides funding to cover 1991 transcription costs.

Special Counsel for Immigration Related Unfair Employment Practices
Salaries and expenses, General Legal Activities
Summary of Requirements
(Dollars in thousands)

Adjustments to base:	Perm. Pos.	Work-Years	Amount
1991 as requested	36	34	$ 3,858
1991 Program supplemental requested	40	20	6,846
1991 Appropriation Anticipated	76	54	10,704
Mandatory Increases			
One Additional Compensable Day	...	...	7
1991 Pay Annualization	...	...	18
1992 Pay Raise	...	...	50
Within-Grade Increases	...	...	15
Annualization of 1991 Supplementals	...	20	779
Health Benefits	...	...	5
Federal Employees Retirement System (FERS)	...	...	4
Federal Insurance Corporation Act (FICA)	...	...	3
Travel: Mileage	...	...	1
GPO and Department Printing	...	...	24
Financial Operations Services	...	...	19
Security Reinvestigations	...	...	6
General Services Administration (GSA) Rent	...	...	25
Forced Relocation Expenses	...	...	89
GSA Recurring Reimbursable Services	...	...	25
General Pricing Level Adjustment	...	...	22
Total Mandatory Increases	...	20	1,092
Decreases	...	...	- 489
1992 Base	76	74	11,307

Estimates by Program	1990 Enacted Perm. Pos.	WY	Amount	1990 Actual Perm. Pos.	WY	Amount	1991 Appropriation Anticip. Perm. Pos.	WY	Amount	1992 Base Perm. Pos.	WY	Amount	1992 Estimate Perm. Pos.	WY	Amount	Increase/Decrease Perm. Pos.	WY	Amount
13. Special Counsel for Immigration-Related Unfair Employment Practices	36	29	$3,596	36	29	$3,596	76	54	$10,704	76	74	$11,307	76	74	$11,377	...	...	$ 70
Other Workyears																		
Overtime		1/30			1/30			1/55			1/75			1/75			...	
Total compensable workyears																	...	

Special Counsel for Immigration Related Unfair Employment Practices
Justification of Program and Performance
Salaries and expenses
(Dollars in thousands)

Long-Range Goal To reduce and deter national origin and citizenship status discrimination.

Major Objectives:
To remedy discrimination based on national origin or citizenship status under the Immigration Reform and Control Act of 1986.

To investigate charges of discrimination and to initiate and file complaints with administrative law judges in appropriate cases.

To undertake public education initiatives intended to inform employers, victims, and public interest groups of the protections provided under Section 102

Accomplishments and Workload: In 1990, the program received 521 charges of discrimination (a 35 percent increase over the previous year), and initiated 110 independent investigations (a 77 percent increase over the previous year). During this period, the program filed eight complaints and negotiated 28 formal settlements of charges and 7 settlements of independent investigations. Many other investigations were resolved through voluntary changes in personnel policies and practices or the demonstration of legitimate justification for a U.S. citizen only policy. In 1990, the program won $144,000 in backpay based on settlements or final judgments of 28 charges (compared with $89,000 for 1989). Over its three-year history, the program has won all merits decisions in cases in which it filed a complaint. The program maintains liaison with nearly a dozen federal agencies and has continued extensive mailings to inform public interest and community groups, as well as INS offices and legal aid centers, of the antidiscrimination requirements under Section 102. Furthermore, the program has participated in numerous seminars and conferences before public interest immigration rights and employer groups across the country. Television and radio public service announcements have been aired nationwide, newspaper advertisements placed, and a task force of federal agencies under the leadership of the Special Counsel has ensured a coordinated federal strategy for educating the public about IRCA's antidiscrimination provision.

Some of our cases have affected entire industries engendering widespread reforms. This is particularly true of the airline and defense industries. Through far-reaching settlements with the OSC, four major airlines have abandoned citizenship status restrictive hiring practices. Similarly, defense contractors have agreed to drop company-wide citizens-only policies due to the Office of Special Counsel's intervention. As a result of these cases, tens of thousands of jobs in the defense and airlines industries are now open to aliens who intend to become citizens.

In addition to a memorandum of understanding with the Equal Employment Opportunity Commission, the Office of Special Counsel has invited 117 state and local civil rights enforcement agencies to enter into similar agreements, whereby they would serve as agents of the government for purposes of receiving charges of immigration-related unfair employment practices. So far, we have signed agreements with 26 such agencies, and have conducted training sessions for 20 state and local fair employment agencies. These agreements serve a dual purpose: they will ensure that discrimination claims are efficiently investigated by the right agency, and they will alert state and local civil rights agencies

to be watchful for IRCA discrimination cases.

In light of evidence of extensive discriminatory noncompliance, the program has expanded its public education activities, enabled by additional funding provided by the conferees in 1990. This funding has been used to produce and distribute in English and in Spanish a non-technical illustrated booklet on the antidiscrimination provision, and to fund a limited program to provide grants to non-profit community-based organizations for the development and dissemination of information on the law. Both initiatives have received enthusiastic support, although it is still premature to evaluate the success of those efforts.

In addition, the program has begun development of a training film or videotape for use in educating public officials and private employers on IRCA's antidiscrimination requirements, and has participated in the evaluation of proposals by states for funding under the State Legalization Impact Assistance Grant program.

Item	1989	1990	1991	Change	1992 Base	1992 Change	1992 Request
Total Investigations	447	631	720	55	775	...	775
Charges Received	385	521	600	50	650	...	650
Independent Investigations	62	110	120	5	125	...	125
Complaints Filed	8	8	10	4	14	...	14
Formal Settlements of Charges	48	28	40	10	50	..	50

During 1990, administrative law judges have issued two merits decisions in program cases, each of which was consistent with the government's position. In one, involving a New York importer and wholesaler, the administrative law judge found that IRCA protects citizens from citizenship status discrimination, and that an employer's failure to understand its obligations under the law does not free that employer from culpability; the ALJ ordered civil damages and back and front pay

11186

Decision Unit Funding Level Requirements
(Dollars in thousands)

Organization Office of Special Counsel

Decision Unit 2SCD01 Office of Special Counsel

Resource Requirements	1989	1990	1991	1992 Base Level Change	1992 Base Level Cum	1992 Request Level Change	1992 Request Level Cum
BUDGET AUTHORITY	$2,023	$3,596	$10,704	$ 603	$11,307	70	$11,377
OUTLAYS	2,075	2,403	9,744	1,342	11,086	61	11,147
Appropriated Positions	30	36	76	. .	76	. .	76
FTE Workyears:							
Full Time Permanent	29	29	54	20	74		74
Other	...	...	...	...	...	...	...
Subtotal	29	29	54	20	74	...	74
Overtime/Holiday	1	1	1	...	1	...	1
Total	30	30	55	20	75	...	75

Program Changes: An increase of $70,000 is requested to cover 1991 pay absorption and administratively determined pay increases. This request will restore 1991 reductions in training and personnel compensation, such as overtime and performance recognition awards, thus resulting in higher productivity and improved efficiency.

Schedule of Cost Inputs
(Dollars in Thousands)

Organization Office of Special Counsel

Decision Unit 2SCD01 Office of Special Counsel

	1992 Request Level		
	Pos	FTE	Amount
1991 Pay Absorption	...	...	27
Administratively Determined Pay Increase	...	...	39
DOJ-Financial Management Information System	..	...	4
TOTAL	...	...	70

Special Counsel for Immigration-Related Unfair Employment Practices

Salaries and expenses, General Legal Activities

Detail of Permanent Positions by Category
Fiscal Years 1990 - 1992

Category	1990 Authorized	1991 Request	1991 Program Supplemental	1991 Total	1992 Increases	1992 Total
Attorneys (905)	16	16	6	22	..	22
Paralegal Specialists (950)	5	5	4	9	...	9
Investigators	...	...	5	5	...	5
Outreach Specialists	...	..	8	8	...	8
General Admin. Clerical and Office Services (300-399)	15	15	17	32	...	32
Total	36	36	40	76	...	76
Washington	36	36	4	40	...	40
Field Offices	...	...	36	36	...	36

Office of Special Counsel for Immigration Related Unfair Employment Practices

Grades	Pos	Amount
NONE		
Total positions and annual rate		
Lapse (-)		
Total workyears and personnel compensation	..	66
Personnel benefits		4
Travel and transportation of persons		
Transportation of things		
GSA rent		
Other rent, communications & utilities		
Printing and reproduction		
Other services		
Supplies and materials		
Equipment		
Total program workyears & obligations, changes requested, 1992		70

Mr. EARLY. The Committee is pleased to welcome for his first appearance Deputy Attorney General William P. Barr. We will insert your biography and written testimony into the record, and ask that you proceed with your statement.

STATEMENT OF MR. BARR

Mr. BARR. Thank you. Good afternoon, Mr. Chairman. We are pleased to have the opportunity to appear before you to support the 1992 budget request for General Legal Activities. I would like to express my appreciation and the appreciation of the entire Department of Justice for the support that this Subcommittee has consistently given the Department.

Without that support the critical mission of the Department in law enforcement and litigation could not be achieved. I would like to read a brief introductory statement concerning the appropriations request.

The components of the General Legal Activities, GLA, appropriation, together with the United States Attorneys, and the Antitrust Division, from whom you will receive testimony later, represent the core of the litigative and prosecutorial functions of the Department of Justice. Combined, they constitute the United States Government's "law firm" carrying the government's cause into court. Every day, the Department's attorneys appear in courtrooms around the Nation striving to bring criminals to justice and defend the public's interests in litigation involving the Federal government. I believe our lawyers have done an impressive job in this role.

In the fiscal year ending September 30, 1990, the Department prosecuted 38,279 criminal cases and litigated 120,369 civil cases. In 1992, we expect to prosecute nearly 45,000 criminal cases and litigate over 128,000 civil cases. This represents a 17 percent increase in criminal cases and a 6 percent increase in civil cases. These figures, of course, include the workload of the United States Attorneys, our principal litigation component.

ROLE OF THE LITIGATING DIVISIONS

While the bulk of all Federal litigation is handled by the U.S. Attorneys, the litigating divisions in main Justice become directly involved in selected cases. These may be particularly complex or novel cases that require special expertise, they may be cases that belong to a group of cases requiring uniformity of treatment to ensure proper development of Federal policy, or they may be multidistrict or national cases requiring centralized strategy and coordination. In addition to this direct litigative function, the headquarters-based divisions perform the critical role of providing legal support and advice to field attorneys and investigators.

The litigation contributions of the components in the GLA appropriation, along with their substantial effort in supporting the work of Federal attorneys in 94 judicial districts across the Nation, cannot be overlooked. Nor can we fail to recognize the contributions of the litigating divisions in carrying out the vital function of ensuring that the Department maintains control over all criminal prosecutions and civil suits in which the United States has an in-

terest. The need for improved centralized litigation management to effectively meet our responsibilities for the prosecution of criminal offenses, the protection of the Treasury from thousands of unwarranted monetary claims filed each year, the recovery of money owed to the United States, and the enforcement of key Federal programs has never been more apparent.

FISCAL YEAR 1992 BUDGET REQUEST

To continue to meet these responsibilities in 1992, we are requesting a total budget of $407.742 million to fund 3,884 positions in the General Legal Activities appropriation. This request represents a net increase of $62.862 million or 18.2 percent over 1991 resources.

Of this amount, $35.92 million represents mandatory adjustments to our base budget that will allow us to fund the requirements of ongoing operations. We request full funding for most of our mandatory requirements related to salaries and benefits such as pay annualization for the position enhancements enacted in the 1991 budget, the pay requirements anticipated for the proposed 1992 pay raise, and increases in the costs of health and retirement benefits. In addition, we seek full funding for non-salary items such as increase in space rental costs and the costs associated with conducting security clearance investigations. This is the first time in several years that we have requested virtually full funding of these base adjustments. Without additional appropriated funds to cover these items, we will be forced to absorb these required costs, as we have in the past, to the detriment of program initiatives.

Mr. Chairman, the remaining $26.942 million of our 1992 increase is requested for program increases and I would like to outline for you the program enhancements we propose.

CIVIL LITIGATION

The President's budget seeks critical resource enhancements to support the Department's increasing civil litigation workload. A program enhancement of 17 positions, including 11 attorneys, and $1.985 million is requested for litigation expenses and automated litigation support (ALS) costs anticipated to arise from claims under the Radiation Exposure Compensation Act of 1990. This act offers compensation to individuals exposed to radiation released during above-ground nuclear testing and uranium mining. The Civil Division also requests $480,000 to engage the services of foreign counsel to represent U.S. Government interests in contract fraud cases at Defense Department bases overseas.

ENVIRONMENTAL PROTECTION

Mr. Chairman, we must also protect our environment for future generations, and we can only do that if we pursue an aggressive agenda. Therefore, we request additional positions and funding for the civil litigation efforts of the Environment and Natural Resources Division. Eight positions, including four attorneys, and $1.117 million are requested to handle an increasing litigation and ALS workload associated with such issues as water rights litigation and adjudications on public and Indian lands in the West; "tak-

ings" litigation involving compensation for rights lost through governmental action; challenges to the adequacy of Federal environmental impact assessments; and cases involving public land management, particularly the collection of royalties for leased public resources. For environmental protection, the division requests 31 new positions, including 20 attorneys, and $2.943 million to pursue natural resource damage claims and to handle increasing litigation involving Federal facilities, enforcement of wetlands laws, and defense of new legislation and regulations. In addition, the division requests three positions and $63,000 to provide increased support staff for the division's automated litigation support projects. The 1992 budget request also includes an additional 19 reimbursable work years for Superfund activities. This will bring total reimbursable resources for Superfund to 231 work years and $32.324 million in 1992.

TAX LITIGATION

The work of the tax division will also expand during 1992, Mr. Chairman, and we request enhancements of five positions, including four attorneys, and $270,000 to handle appellate work required to support the division's major case initiative. The Tax Division's Appellate Section is facing a deluge of cases which are unprecedented in their size and complexity. One recent appeal involved a $247 million tax deficiency and had six major issues, several of which have industry-wide importance. And there are several cases pending in the Tax Court that dwarf all prior cases; one case alone involves a $1.5 billion deficiency. There are currently 15 cases on the Tax Court's docket that involve over $100 million; cumulatively, these cases are worth $5.6 billion. These cases are wending their way to the Tax Division's Appellate Section where the outcome of appeals will determine issues affecting entire industries and will mean billions of dollars to the Federal fisc.

In addition, we are requesting 16 positions, including 12 attorneys, and $850,000 to deal with an increasing number of bankruptcy cases. Many of these cases are arising from the failure of corporations financed through high-yield, low-rated bonds and some involve billions of dollars of tax liability.

CIVIL RIGHTS INITIATIVES

The Civil Rights Division requests 20 positions, including 16 attorneys, and $1.098 million to address its litigative responsibilities under the Americans with Disabilities Act (ADA) of 1990. These resources will enable the division to provide the nation's 43 million disabled persons with civil rights protections similar to those provided on the basis of race, sex, national origin and religion. Other enhancements requested by the Civil Rights Division include six positions, four of which are attorneys, and $250,000 to address the increasing number of referrals received from the Equal Employment Opportunity Commission; and three attorney positions and $165,000 to handle litigation resulting from the submission of redistricting plans occasioned by the completion of the 1990 Census. The division plans to reduce resources allocated to its Educational Opportunities Section by $200,000 and three positions, including one

attorney position. This reduction reflects the Department's decision to defer to the retained counsel of local school districts and allow that counsel to determine the propriety of seeking to lift school desegregation orders.

Also, to support civil rights initiatives, 16 positions, including two attorneys, and $1.256 million are needed for ADA technical assistance and compliance review. Technical assistance will provide individuals with the information necessary to understand and meet the requirements imposed under the ADA. The Department will also coordinate the technical assistance activities of other organizations in order to prevent a duplication of effort.

In addition, an enhancement of $1.850 million is needed to purchase a Geographical Information System (GIS) along with the necessary data for its use. This new state-of-the-art system will provide the Civil Rights Division with the necessary technology to address the enormous workload expected as a result of the 1990 Census. The division anticipates that the number of Section 5 and Section 2 cases it receives this year will expand considerably due to the increase in redistricting plans submitted. The Geographical Information System will enable the division to accurately review these incoming plans and address any litigative concerns in a timely manner.

The Office of Special Counsel for Discrimination requests four positions, including one attorney, and $905,600 to expand its grant program to community-based non-profit organizations that perform outreach into the language-minority population. Also, the office will begin a nationwide multimedia public education campaign targeting employers.

CRIMINAL PROSECUTIONS

Turning to increases for criminal prosecutions, Mr. Chairman, the Criminal Division seeks additional resources to expand its pursuit of white collar and drug-related crimes. Program enhancements totaling 20 positions, including 13 attorneys, and $1.166 million are needed to increase the Department's emphasis on the prosecution of fraud cases involving defense procurement, HUD, insurance, health care, and pension fund violations. Also required are 10 positions, including six attorneys, and $800,000 to fund additional money laundering cases related to drug-trafficking offenses in 1992.

Resources required to support the prosecution of criminal cases are also requested in the 1992 budget. The growing number of wiretap requests and the increasing workload associated with witness protection prompts a request for 13 additional positions, including two attorneys and approximately $609,000 to better support field attorneys with these services. The Criminal Division also requests $874,000 for automated litigation support expenses associated with an increasing caseload in the division, particularly for financial institution fraud cases; and $150,000 for a requirements analysis to determine the potential of expanding the use of automated litigation support in criminal cases.

A program enhancement of six positions, including five attorneys, and $712,000 is sought by the Environment and Natural Resources Division to expand the advice and litigation support provid-

ed to Federal prosecutors in the field by the Environmental Crimes Section.

An increase of $965,000 is requested for the Tax Division's criminal tax prosecution program. Of this amount, 10 positions, including eight attorneys, and $540,000 are requested to support the division's motor fuel excise tax initiative. Let me pause here and anticipate a topic that I understand will be coming up next.

In the criminal area the Attorney General mentioned last week at the crime summit that we are seeking in our 1992 request for U.S. Attorneys $12.8 million to start a new violent crime initiative in select cities.

VIOLENT CRIME TASK FORCES

While the outlines of his program are still being developed, as the Attorney General mentioned, this will be an initiative to support Federal, local, and State task forces with community involvement to target violent criminal groups and gangs, many of which are involved in the drug trade.

At the crime summit, an example of that kind of task force was presented. Philadelphia's Violent Traffickers Project has been very successful in taking down entire street organizations that have been involved in violent crime and putting away, under mandatory sentences, people who have used firearms.

With that I will just submit the rest of my statement for the record. I would like to say that we are very pleased with the request for the General Legal Activities Appropriation. Part of the reason for the significant GLA increase is really due to the dedication and commitment of our component heads and the very effective presentations that were made by them both in our internal budget review and the Administration's OMB process. I have asked all the component heads to come with me today.

If you have any questions about their specific programs, they are available to address them.

Thank you, Mr. Chairman.

[Mr. Barr's biography and written statement follow:]

15a

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

Biographical Information for William P. Barr

Mr. Barr was nominated by President Bush in May 1990 to be Deputy Attorney General. He began serving as Deputy Attorney General at that time pending Senate confirmation which occurred July 18, 1990. Prior to his service as Deputy Attorney General, Mr. Barr served in the Department of Justice from April 1989 to May 1990 as Assistant Attorney General for the Office of Legal Counsel, a position known as "the Attorney General's lawyer."

Mr. Barr received his BA and MA degrees, in 1971 and 1973 respectively, from Columbia University in New York. He received his JD degree with highest honors in 1977 from George Washington University.

From 1973 to 1977, Mr. Barr served with the Central Intelligence Agency. From 1977 through 1978 he served as law clerk to Judge Malcolm Wilkey of the U.S. Court of Appeals for the District of Columbia Circuit. From 1982 to 1983, Mr. Barr served on the Domestic Policy staff at the White House.

Mr. Barr has been in private practice for nine years, first as an associate (1978-82) and then as a partner (1984-89), with the Washington law firm of Shaw, Pittman, Potts, and Trowbridge. He left the firm in April 1989 to serve as Assistant Attorney General for the Office of Legal Counsel. Mr. Barr, his wife Christine, and three children reside in Virginia.

DEPARTMENT OF JUSTICE
GENERAL LEGAL ACTIVITIES
STATEMENT OF THE DEPUTY ATTORNEY GENERAL
WILLIAM P. BARR
BEFORE THE HOUSE APPROPRIATIONS SUBCOMMITTEE ON THE
DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE,
THE JUDICIARY, AND RELATED AGENCIES

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you in support of the 1992 budget request for the General Legal Activities appropriation. I would like to express my appreciation for the support that this Subcommittee has consistently given the Department. Your efforts on our behalf are critical to the success of our law enforcement and litigation missions.

The components of the General Legal Activities (GLA) appropriation, together with the United States Attorneys, and the Antitrust Division, from whom you will receive testimony later, represent the core of the litigative and prosecutorial functions of the Department of Justice. Combined, they constitute the United States Government's "law firm" carrying the government's cause into court. Every day, the Department's attorneys appear in courtrooms around the Nation striving to bring criminals to justice and defend the public's interests in litigation involving the Federal Government. I believe our lawyers have done an impressive job in this role.

In the fiscal year ending September 30, 1990, the Department prosecuted 38,279 criminal cases, and litigated 120,369 civil cases. In 1992, we expect to prosecute nearly 45,000 criminal cases, and litigate over 128,000 civil cases. This represents a 17-percent increase in criminal cases and a 6-percent increase in civil cases. These figures, of course, include the workload of the United States Attorneys, our principal litigation component.

While the bulk of all Federal litigation is handled by the U.S. Attorneys, the litigating divisions become directly involved in selected cases. These may be particularly complex or novel cases that require special expertise, they may be cases that belong to a group of cases requiring uniformity of treatment to ensure proper development of Federal policy, or they may be multi-district or national cases requiring centralized strategy and coordination. In addition to this direct litigative function, the headquarters-based divisions perform the critical role of providing legal support and advice to field attorneys and investigators.

The litigation contributions of the components in the GLA appropriation, along with their substantial effort in supporting the work of Federal attorneys in 94 judicial districts across the Nation, cannot be overlooked. Nor can we fail to recognize the

contributions of the litigating divisions in carrying out the vital function of ensuring that the Department maintains control over all criminal prosecutions and civil suits in which the United States has an interest. The need for improved centralized litigation management to effectively meet our responsibilities for the prosecution of criminal offenses, the protection of the Treasury from the thousands of unwarranted monetary claims filed each year, the recovery of money owed to the United States, and the enforcement of key Federal programs has never been more apparent.

To continue to meet these responsibilities in 1992, we are requesting a total budget of $407,742,000, to fund 3,884 positions in the General Legal Activities appropriation. This request represents a net increase of $62,862,000 or 18.2 percent over 1991 resources.

Of this amount, $35,920,000 represents mandatory adjustments to our base budget that will allow us to fund the requirements of ongoing operations. We request full funding for most of our mandatory requirements related to salaries and benefits such as pay annualization for the position enhancements enacted in the 1991 budget, the pay requirements anticipated for the proposed 1992 pay raise, and increases in the costs of health and retirement benefits. In addition, we seek full funding for non-

salary items such as increases in space rental costs and the costs associated with conducting security clearance investigations. This is the first time in several years that we have requested virtually full funding of these base adjustments. Without additional appropriated funds to cover these items, we will be forced to absorb these required costs, as we have in the past, at the expense of program initiatives.

Mr. Chairman, the remaining $26,942,000 of our 1992 increase is requested for program increases; and I would like to outline for you the program enhancements we propose.

Civil Litigation

The President's Budget seeks critical resource enhancements to support the Department's increasing civil litigation workload. A program enhancement of 17 positions (including 11 attorneys) and $1,985,000 is requested for litigation expenses and automated litigation support (ALS) costs anticipated to arise from claims under the Radiation Exposure Compensation Act of 1990. This Act offers compensation to individuals exposed to radiation released during above-ground nuclear testing and uranium mining. The Civil Division also requests $480,000 to engage the services of foreign counsel to represent U.S. Government interests in contract fraud cases at Defense Department bases overseas.

Mr. Chairman, we must also protect our environment for future generations, and we can only do that if we pursue an aggressive agenda. Therefore, we request additional positions and funding for the civil litigation efforts of the Environment and Natural Resources Division. Eight positions (including 4 attorneys) and $1,117,000 are requested to handle an increasing litigation and ALS workload associated with such issues as water rights litigation and adjudications on public and Indian lands in the West; "takings" litigation involving compensation for rights lost through governmental action; challenges to the adequacy of Federal environmental impact assessments; and cases involving public land management, particularly the collection of royalties for leased public resources. For environmental protection, the Division requests 31 new positions (including 20 attorneys) and $2,943,000 to pursue natural resource damage claims and to handle increasing litigation involving Federal facilities, enforcement of wetlands laws, and defense of new legislation and regulations. In addition, the Division requests 3 positions and $63,000 to provide increased support staff for the Division's automated litigation support projects. The 1992 budget request also includes an additional 19 reimbursable workyears for Superfund activities. This will bring total reimbursable resources for Superfund to 231 workyears and $32,324,000 in 1992.

The work of the Tax Division will also expand during 1992, Mr. Chairman, and we request enhancements of 5 positions (including 4 attorneys) and $270,000 to handle appellate work required to support the Division's Major Case initiative. The Tax Division's Appellate Section is facing a deluge of cases which are unprecedented in their size and complexity. One recent appeal involved a $247 million tax deficiency and had six major issues, several of which have industry-wide importance. And there are several cases pending in the Tax Court that dwarf all prior cases; one case alone involves a $1.5 billion deficiency. There are currently 15 cases on the Tax Court's docket that involve over $100 million; cumulatively, these cases are worth $5.6 billion. These cases are wending their way to the Tax Division's Appellate Section where the outcome of appeals will determine issues affecting entire industries and will mean billions of dollars to the federal fisc.

In addition, we are requesting 16 positions (including 12 attorneys) and $850,000 to deal with an increasing number of bankruptcy cases. Many of these cases are arising from the failure of corporations financed through high-yielding, low-rated bonds and some involve billions of dollars of tax liability.

The Civil Rights Division requests 20 positions (including 16

attorneys) and $1,089,000 to address its litigative responsibilities under the Americans with Disabilities Act (ADA) of 1990. These resources will enable the Division to provide the nation's 43 million disabled persons with civil rights protections similar to those provided on the basis of race, sex, national origin and religion. Other enhancements requested by the Civil Rights Division include 6 positions (4 of which are attorneys) and $250,000 to address the increasing number of referrals received from the Equal Employment Opportunity Commission; and 3 attorney positions and $165,000 to handle litigation resulting from the submission of redistricting plans occasioned by the completion of the 1990 Census. The Division plans to reduce resources allocated to its Educational Opportunities Section by $200,000 and 3 positions (including 1 attorney position). This reduction reflects the Department's decision to defer to the retained counsel of local school districts and allow that counsel to determine the propriety of seeking to lift school desegregation orders.

Also, to support civil rights initiatives, 16 positions (including 2 attorneys) and $1,256,000 are needed for ADA technical assistance, and compliance review. Technical assistance will provide individuals with the information necessary to understand and meet the requirements imposed under the ADA. The Department will also coordinate the technical

assistance activities of other organizations in order to prevent a duplication of effort.

In addition, an enhancement of $1,850,000 is needed to purchase a Geographical Information System (GIS) along with the necessary data for its use. This new state-of-the-art system will provide the Civil Rights Division with the necessary technology to address the enormous workload expected as a result of the 1990 Census. The Division anticipates that the number of Section 5 and Section 2 cases it receives this year will expand considerably due to the increase in redistricting plans submitted. The Geographical Information System will enable the Division to accurately review these incoming plans and address any litigative concerns in a timely manner.

The Office of the Special Counsel for Discrimination requests 4 positions (including 1 attorney) and $905,000 to expand its grant program to community-based non-profit organizations that perform outreach into the language-minority population. Also, the Office will begin a nationwide multimedia public education campaign targeting employers. go to pg 10

Mr. Chairman, a quantitative measure by which the performance of the Department can be judged is the magnitude of cash and property collections generated by our litigative efforts.

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Historically, this has been measured by the amount of cash that the Department has received through its lock-box. In Fiscal Year 1990, the Department collected $508 million through the lock-box. Criminal fines generated by our prosecutions are, by law, paid directly to the Clerks of the United States District Courts. Our lock-box collections and the criminal fines generated total $644 million in 1990. This figure represents a 28 percent increase over average collections for the previous five years. Based on these numbers alone, we collect 78 cents for each dollar spent on the United States Attorneys and the Legal Divisions.

These figures, however, tell only part of our story. The Department of Justice routinely requires defendants to make payments directly to the client agencies in an effort to speed up disposition and, in cases such as student loan defaults, to replenish specific accounts. In addition to these collections, our affirmative litigation efforts frequently secure property for an agency, such as foreclosure, or result in off-sets against amounts owed by an agency to the defendant. If we take all these activities into account, the Department generated $1.1 billion in collections in 1990. And this figure does not include any asset forfeitures or user fees.

Criminal Prosecutions

Turning to increases for criminal prosecutions, Mr. Chairman, the Criminal Division seeks additional resources to expand its pursuit of white collar and drug-related crimes. Program enhancements totaling 20 positions (including 13 attorneys) and $1,166,000 are needed to increase the Department's emphasis on the prosecution of fraud cases involving defense procurement, HUD, insurance, health care, and pension fund violations. Also required are 10 positions (including 6 attorneys) and $800,000 to fund additional money laundering cases related to drug-trafficking offenses in 1992.

Resources required to support the prosecution of criminal cases are also requested in the 1992 budget. The growing number of wiretap requests and the increasing workload associated with witness protection prompts a request for 13 additional positions (including 2 attorneys) and $609,000 to better support field attorneys with these services. The Criminal Division also requests $874,000 for automated litigation support expenses associated with an increasing caseload in the Division, particularly for financial institution fraud cases; and $150,000 for a requirements analysis to determine the potential of expanding the use of automated litigation support in criminal cases.

A program enhancement of 6 positions (including 5 attorneys) and $712,000 is sought by the Environment and Natural Resources Division to expand the advice and litigation support provided to Federal prosecutors in the field by the Environmental Crimes Section. In addition, an increase of 1 attorney and $48,000 is requested for the Appellate Section to handle the growing docket of environmental crimes appeals. These requested enhancements will allow the Department to pursue the Administration's policy of sending out a strong message that criminal violations of environmental laws will no longer be tolerated.

An increase of $965,000 is requested for the Tax Division's criminal tax prosecution program. Of this amount, 10 positions (including 8 attorneys) and $540,000 are requested to support the Division's motor fuel excise tax initiative. The U.S. Treasury estimated that perpetrators of motor fuel excise tax schemes avoid paying $1 billion in taxes annually. The remaining $425,000 is to support 8 additional positions (including 6 attorneys) who will target the "tax gap" between the amount of taxes owed and paid.

Infrastructure and Management Improvements

Mr. Chairman, funding for a number of program initiatives is

sought to strengthen the infrastructure of GLA organizations. The Department is requesting a program enhancement of $4,027,000 for legal activities office automation to support the nationwide implementation of Project EAGLE in the U.S. Attorneys offices and to begin the phased conversion of Washington-based legal divisions from other systems to EAGLE. In addition, the Tax Division requests $500,000 for Project EAGLE facilities management.

The extraordinary space costs incurred by the Dallas Bank Fraud Task Force and the need for additional computer room space at headquarters, combined with the need to enhance building security, accounts for a Criminal Division request for an additional $1,231,000 to fund administrative costs in 1992. Also, funding to cover an additional $400,000 for increased access to legal data bases is requested.

In 1992, the U.S. National Central Bureau - INTERPOL is requesting $198,000 to fund the operational and developmental costs associated with the U.S./Canadian Interface -- a message transmission system designed to allow the 50 states and their Canadian counterparts to exchange police information. Also requested is $39,000 to cover unforeseen decreases in the value of the dollar against the swiss franc, which is the currency used for the assessment of annual INTERPOL dues.

Finally, Mr. Chairman, the Department requests funding for GLA's litigating divisions in the amount of $2,000,000 to cover the costs associated with a decision by the Judicial Conference to raise by over 50 percent the fees paid by the Federal Government for transcription services. We also request funding amounting to a total of $200,000 for GLA's share of the upgrade of the Department's Financial Management Information System.

Mr. Chairman, this concludes my prepared statement. I will be pleased to respond to any questions that you or the other Members of the Subcommittee may wish to ask.

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Mr. EARLY. Actually that is a pretty generous increase. That is a 30 percent increase.

Mr. BARR. I think for all the components in the General Legal Activities appropriation it is an 18 percent increase.

MOTOR FUEL EXCISE TAX INITIATIVE

Mr. EARLY. Mr. Barr, you request an increase of $965,000 in support of the Tax Division's motor fuel excise tax initiative. Would you explain this initiative and how much additional revenue you hope to obtain with it?

Mr. BARR. I think the Tax Division is estimating that the various tax evasion schemes in this area may be costing the Treasury $1 billion. It is my understanding the Tax Division has 10 people working on these cases.

This request would provide for an additional 10. Shirley Peterson is here to take questions on this matter.

Mr. EARLY. I think the key witnesses should refer to the specialists much more often than they do. But I want whoever you turn it over to identify himself or herself.

Ms. PETERSON. I am Shirley Peterson, Assistant Attorney General in charge of the Tax Division. When this Administration came into office in 1989 it came to our attention that there was an enormous motor fuel excise tax evasion scheme going on in New York originating with organized crime. Unfortunately, it has now begun to spread into legitimate business. With the recent increase in the motor fuel excise tax from 9 to 14 cents a gallon, about a 50-percent increase, the incentive to cheat on these taxes is enormous.

We have information that these evasion schemes are now spreading across the country. The government has over 100 investigations going on in 18 different locations. They are very difficult cases to investigate and to prove but the amount at stake is absolutely enormous.

In a recent case we obtained conviction of Getty Terminals Corp., a subsidiary of Getty Oil who, in just five months, evaded over $1 million in excise tax. That is literally a drop in the bucket. So there are enormous amounts of money at stake. We regard this as a very, very important initiative.

Mr. EARLY. How did you determine 10 positions to recover that amount of money? From your comments I would think there is even more out there, if we increased it even further.

Ms. PETERSON. Yes, sir. Our goal is not to attempt to prosecute all these cases ourselves. At the present time our task force is leading the charge in the prosecution of these cases. However, we are working very closely with the United States Attorneys across the country. As we develop the expertise we are sharing that expertise with U.S. Attorneys in many locations across the country and they will help bear the burden of ultimately prosecuting the cases.

Mr. EARLY. Are you satisfied with the cooperation with the U.S. Attorneys or are you having the typical turf battle?

Ms. PETERSON. Absolutely no turf battle. The relations between U.S. Attorneys and the Tax Division have never been better.

Mr. EARLY. Why don't you identify some specific cases as far as the dollar amount that we recouped and what we might be able to recoup if we grant your requested increase for the record.

Ms. PETERSON. In the Getty Terminals case there were five months of tax involved.

Mr. EARLY. I would like for you to do it in the record in writing so when we mark up I can refer to it.

Ms. PETERSON. I will be happy to.

[The information follows:]

MOTOR FUEL EXCISE TAX

We estimate that motor fuel excise tax in excess of one billion dollars is evaded annually. This estimate is based upon information gained by the multi-agency task force, which is composed of Federal, State, and local prosecutors and investigators.

The amount of taxes evaded can be illustrated by some recent successful prosecutions in the Eastern District of New York in which the Government proved that more than $5.5 million in gasoline excise taxes was evaded in a few months On October 11, 1990, Richard Kennon and Robert Kennon were convicted for evading approximately $1.3 million in about 18 months. On November 16, 1990, a jury convicted Getty Terminals Corp., a Getty Terminals executive, and two independent gasoline wholesalers of charges of conspiracy to evade gasoline excise taxes. In that case, more than $1 million in tax was evaded in just four months. And, on December 12, 1990, a jury returned a guilty verdict against Joseph Aracari, John Papandon and Anthony Zummo for their involvement in the evasion of approximately $3.2 million in about one year. Another recent indictment alleges that five defendants evaded $14 million in gasoline taxes in just ten months.

Based on our knowledge of the activities of fuel terminals in New York State, we estimate that Federal motor fuel tax evasion in that area is at least $200 million annually. The remainder of the $1 billion estimate is based upon information received from other geographic areas. The Tax Division has discussed the problem with Federal and State representatives in the areas where motor fuel excise tax evasion is known to exist. The total estimate is reached by adding the amounts provided. Since our estimate is based largely on investigative information developed by grand juries, we are prevented from being more specific until ongoing investigations are completed and formal charges can be filed.

BANKRUPTCY LITIGATION

Mr. EARLY. You request $850,000 for increased bankruptcy litigation. What is Justice's role in this type of litigation and how much are you currently spending on it?

Ms. PETERSON. The Tax Division represents the United States with regard to tax claims in all bankruptcy actions throughout the country.

We have seen an enormous increase in the number of bankruptcies in recent years going from 5,000 in 1986 to close to 18,000 in 1990

Needless to say, in virtually all these bankruptcies, tax is owed to the Federal Government. In the large corporations that are going bankrupt under the terrible burden of debt taken on in the 1980's, sometimes there are literally billions of dollars of tax assessed by the IRS. Nine cases that I am familiar with currently involve corporations that involved leveraged buy-outs in the 1980's. We have billions of dollars at stake in those nine corporations alone.

Mr. EARLY. Tell the Committee why it is not a duplication of something the U.S. Trustees are supposed to do?

Ms. PETERSON. The Trustees do not represent the United States with respect to determining the tax liability. The question is how

much is owed to the United States. We serve a different function from the Trustees in that respect.

Mr. EARLY. Why isn't that in conflict with IRS?

Ms. PETERSON. We represent the IRS. It is the Justice Department that is authorized to represent the IRS in Article III Courts. The IRS is our client in these courts.

WHITE COLLAR CRIME

Mr. EARLY. Are you focusing most of the Criminal Division's fiscal year 1992 increases in white collar crime?

Mr. BARR. Let me have the Assistant Attorney General for the Criminal Division, Bob Mueller, answer that question.

Mr. MUELLER. Congressman, what we requested was a total of 20 positions that address directly white collar crime in HUD, health care, pension plan and Defense procurement fraud.

An additional 10 positions are requested for money laundering. Money laundering positions can target narcotics as well as white collar fraud. Both will be utilized in the white collar crime area.

Mr. EARLY. Money laundering is electronic; isn't it, rather than electronic money transfers?

Mr. MUELLER. I agree it is staggering. That is part of the problem with wire transfers. However, the big issue for narcotics traffickers and others involved in cash is getting $10, $20, or $50 bills into the system and then, through the use of wire transfers, it can be lost in the myriad of banks and banking transactions.

We have a substantial battle to keep abreast of the new money laundering schemes, especially in tracking money internationally and working with countries overseas in order to seize those funds and forfeit them either overseas, or in the United States for use in the Asset Forfeiture Fund.

Mr. EARLY. I read an article in a Miami newspaper a few months ago. It showed that money would pile from the floor to the ceiling; it was just an astronomical amount of money. Do you have an idea how much you will recover?

Mr. MUELLER. I could calculate that and provide it for the record. Additional money laundering prosecutions lead to additional forfeitures and the additional forfeitures more than pay back to the government the sums allocated for the resources to recoup those funds.

Mr. EARLY. Will you include for the record several specific cases and the amounts recovered so we can see how much we are getting back.

Mr. MUELLER. I will be happy to.

[The information follows:]

RECOVERIES IN MONEY LAUNDERING CASES

In "Operation Polar Cap," the largest Federal money laundering investigation ever conducted, which involved the Colombian cocaine cartel, near $1.2 billion has been identified and traced for forfeiture action. As part of this operation, both Canada and Switzerland assisted by freezing assets in each country belonging to Banco de Occidente, which was laundering the money for drug traffickers. After the bank entered a guilty plea to money laundering charges and agreed to forfeit $5 million, the Attorney General was able to provide $1 million to each country as part of the international-sharing program. This was a major step in international cooperation in effecting forfeiture of narcotics traffickers' assets.

In the largest bank forfeiture case to date, two branches of a Luxembourg-based banking company pleaded guilty to charges of money laundering and agreed to cooperate with Federal prosecutors. The Bank of Credit and Commerce International Overseas Ltd. and the Bank of Credit and Commerce International S.A. forfeited a record $15 million to the Federal Government in connection with this case.

The Criminal Division's Money Laundering Office, in conjunction with the United States Attorney's Office for the District of Hawaii, has recently collected $360,000 in forfeitures from cases involving money laundering through casas de cambio in Peru that were dealing with drug traffickers in the Huallaga Valley, where coca plants are grown. Additional monies will be forfeited as these cases come to fruition.

The Money Laundering Office has recently provided assistance in a major case in the Middle District of Pennsylvania, which has the potential to result in an $8 million forfeiture. The case involves a wholesale gun distributorship, whose owner was illegally structuring bank deposits in amounts under $10,000, in violation of 31 U.S.C. §5313, in order to evade reporting requirements and who was also evading tax reporting requirements.

In addition to the above several examples, numerous banks and financial institutions have been convicted of Bank Secrecy Act violations and money laundering and have received criminal fines. Numerous other institutions have received civil penalties. A list of such institutions is attached.

FINANCIAL INSTITUTIONS CONVICTED OF BANK SECRECY ACT VIOLATIONS AND MONEY LAUNDERING

1986

INSTITUTION, LOCATION	CRIME	CRIMINAL FINE
Metropolitan National Bank McAllen, TX	BSA violation	$ 310,000
Border Money Exchange Brownsville, TX	BSA violation	8,250
Bank of New England Boston, MA	BSA violation	1,240,000
Caribbean Federal Savings San Juan, PR	BSA violation	450,000
Commercial Bank & Trust Lowell, MA	BSA violation	202,100
First Missouri Bank Warrenton, MS	BSA violation	75,000
Housatenic Bank & Trust Ansonia, CT	BSA violation	750
Magnolin Federal Bank Hattiesburg, MS	BSA violation	22,000
McLean Bank Mclean, VA	BSA violation	80,050
Provident Institution for Savings Boston, MA	BSA violation	100,000
Seaway National Bank Watertown, NY	BSA violacion	2,000
Union County Bank Maynardville, TN	BSA violation	10,000
	1987	
Citizen First National Bank Ridgewood, NJ	BSA violation	2,000
Inco Bank & Trust Ltd. Cayman Islands	conspiracy	456,000

INSTITUTION, LOCATION	CRIME	CRIMINAL FINE
Merchants National Bank Indianapolis, IN	BSA violation	500,000
Merchants Trust Bank Kennon, LA	BSA violation	1,000
	1988	
Extebank Hauppauga, NY	BSA violation	$ 100,000
American National Bank Hamden, CT	BSA violation	222,000
National Bank of Fairhaven Fairhaven, MA	BSA violation	150,000
Central National Bank/Alamo Austin, TX	BSA violation	250,000
Ramsey Savings & Loan Assn. Ramsey, NJ	BSA violation	6,000
Bank J. Vonotobel Co. Not Specified	BSA violation	20,000
	1989	
Peoples Bank NA Belleville, NJ	BSA violation	3,000
Ponce Federal Bank Ponce, PR	BSA violation	2,500,000
Smithfield State Bank Smithfield, PA	BSA violation	51,600
United Orient Bank New York, NY	BSA violation	2,000,000
	1990	
Bank Leumi New York, NY	BSA violation	42,000
LBS Bank Philadelphia, PA	BSA violation	50,000
First Bank of Georgia East Point, GA	money laundering	85,000

CIVIL PENALTIES AGAINST FINANCIAL INSTITUTIONS

PENALTY	FINANCIAL INSTITUTION	DATE
$4, 50,000	Bank of America and BA Cheque Corp. San Francisco, CA	21 Jan 86
$1,010,000	Oscar's Money Exchange Hidalgo, TX	29 July 88
$2,250,000	Crocker National Bank San Francisco, CA	27 Aug 85
$1,900,000	Texas Commerce Bancshares Houston, TX	12 Feb 86
$ 697,000	Seattle First Nat'l Bank Seattle, WA	25 Nov 85
$ 605,000	Security Pacific Nat'l Bank Los Angeles, CA	22 May 86
$ 600,000	MCorp Brownsville, TX	19 Sept 86
$ 500,000	Bank of Boston Boston, MA	7 Feb 85
$ 500,000	Ponce Federal, FSB Ponce, PR	9 Feb 89
$ 360,000	Chase Manhattan Corp. New York, NY	18 June 85
$ 320,000	Manufactures Hanover Trust Co. New York, NY	18 June 85
$ 315,000	InterFirst Corporation Dallas, TX	11 Apr 86
$ 295,000	Irving Trust Company New York, NY	18 June 85
$ 295,000	Shawmut Bank, N.A. Boston, MA	6 May 87
$ 269,904	Norstar Bancorp Inc. Albany, NY	27 Dec 85

PENALTY	FINANCIAL INSTITUTION	DATE
$ 269,750	Riggs National Bank Washington, D.C.	10 Oct 85
$ 250,000	United Orient Bank New York, NY	6 Jan 89
$ 248,160	First Bank System, Inc. Minneapolis, MN	3 July 86
$ 220,000	Connecticut Nat'l Bank Hartford, CN	24 April 86
$ 219,000	Michigan National Corp. Detroit, MI	10 Oct. 86

AUTOMATED LITIGATION SUPPORT

Mr. BARR. To follow up, there is also a request for $874,000 for automated litigation support which is also directly tied to complex white-collar fraud cases, document-intensive cases. So when you put together the appropriation for that as well as the litigation for the complex fraud cases, your statement that the bulk of enhancements are for white collar fraud is accurate.

Mr. EARLY. As far as ALS is concerned, you appear to rely heavily on contracts for this requirements. Is the ALS requirement for each case contracted for separately or do you have on-going contracts with companies to provide the service for any number of cases?

Mr. BARR. I believe there are a number of contracts in the Department. We would expect the Criminal Division to piggyback onto existing contracts wherever possible rather than enter into new contracts for ALS support.

The Civil Division does the bulk of ALS work and we think their existing contracts would be used for the Criminal Division.

Mr. EARLY. Are these competitive cases?

Mr. BARR. Yes, sir.

Mr. EARLY. I don't think you can legislate morality. I think there are some contracts that should not be done on a competitive basis.

Mr. ROPER. The practice we have gone through the last several years is to get more than one contractor available to each division. So if major cases come along, there are several contractors available.

Mr. EARLY. Can a case be made for centrally procuring all department ALS contracts in different geographical areas in order to reduce duplication of effort and potentially reduce costs?

Mr. ROPER. I have asked our people to look at the possibilities of having overall contracts with multiple firms. As I understand there are five major firms in the United States who do this work. They are nationwide in a sense and if those firms were on one contract and we could generate task orders against them, they would be available nationwide.

Mr. EARLY. So you are satisfied that the contracts are competitive?

Mr. ROPER. We go through a pretty thorough competitive process in going to the contract.

Mr. EARLY. How much paper work is involved?

Mr. ROPER. Significant amounts of paper work are involved. But these contractors are saving us a lot of work in terms of the billions of documents that we won't have to look at.

Mr. EARLY. What can be done to speed up the process, given all the contracts and stop all the delays? Anytime we drag it out and stretch it out, it costs money.

You may do that for the record.

Mr. ROPER. Yes, sir.

[The information follows:]

CONTRACTING FOR AUTOMATED LITIGATION SUPPORT SERVICES

The litigating divisions of the Justice Department are engaged in three distinct automation projects. To clarify the differences between them, a brief description of these projects follows:

Office Automation: This program brings word processing, electronic mail, and document transfer capabilities (among others) to every lawyer's desk, and replaces older equipment. Department-wide networking efforts started in earnest when the Civil Division awarded a contract for the creation of a system (called AMICUS) of linked minicomputers, workstations and printers. AMICUS is presently in use in the Civil, Civil Rights, and Environment Divisions as well as in the Office of the Solicitor General and the Office of the Attorney General. Within the past few years, "office automation" has been expanded to include all of the remaining litigating divisions, the Justice Management Division, and United States Attorneys, in a new system (called EAGLE), which is a network of linked minicomputers, printers, and personal computers. Since these networks were designed to be compatible, efforts are underway to link them.

Case Management Systems: Each Division and U.S. Attorneys Office has a need to track the cases on its docket and related attorney/paralegal hours in order to do workload and staffing reporting and projections. Each component has established some form of case management system to meet these needs. These systems collect information such as the nature of a case, its filing date and litigation history, the court in which the case is brought, the name(s) of attorneys assigned and the names of the parties to the litigation. The Attorney General is committed to developing a coordinated approach to case management systems and work is underway to assess existing systems, identify requirements and begin the design of a common case tracking system for Department-wide use.

Automated Litigation Support (ALS): Unlike case management and office automation, ALS is not a "system." Instead, ALS is a an approach and a set of tested procedures which involve the use of computers, micrographics, and document management techniques to prepare for and conduct trials. The Justice Department obtains ALS through competitively-procured contracts which are managed by experienced Department litigation support personnel.

The questions raised focus on automated litigation support. Three litigating Divisions presently have ALS contracts, and under these contracts, there is no problem with delay. Response time for initiating ALS work on specific cases is

virtually immediate. As new cases or requirements arise, case managers from the divisions' litigation support staffs meet with case attorneys, analyze ALS needs, and issue delivery orders to the contractors describing the services to be provided and obligating funds. Often the turnaround time for this process is only one day.

Each of these ALS contracts was awarded after a fully competitive negotiated procurement, generally with a 5-year performance period, consisting of a base year and 4 option years. Competitive procurement of these contracts has resulted in pricing which is significantly lower than that paid by private law firms for similar services. The contracts are of the fixed-unit-price variety, which allow the Department to tailor orders to fit the particular requirements of a given case. For example, the Civil Division's experience with contracting for ALS services has shown that having a contractor workforce of flexible size protects the Department from having to hire and fire permanent staff to accommodate the "peak and valley" nature of litigation and also allows for flexibility in obtaining specialized skills on an as-needed basis.

The Civil Division's contracts are now in their final option year, and the Division is currently conducting a new fully-competitive procurement for providing ALS for its cases. Contract award is anticipated by mid-1991 to up to two ALS contractors, each of which will be capable of rapidly responding to ALS needs for any and all of the Civil Division's cases. These contracts will be fixed-unit-price contracts with a base year and 4 option years, for a potential of 5 annual performance periods. The two Environment Division contracts each have another option year remaining, after which the Environment Division will engage in a similar procurement exercise during 1992. The third division with ALS contracts is the Antitrust Division, which completed the procurement process during 1990.

While there is a long lead time during the procurement process before a contract of this nature can be awarded, this "delay" need not interfere with current litigation, because the extant litigation support contracts are available for use throughout the Department. Other Department components have often "piggybacked" on these contracts; for example, the Civil Rights Division's Redress Administration Project, the INS' Mariel Cuban Repatriation and Parole Project, and the U.S. Attorney for Teamsters civil RICO litigation are all being supported by these contracts. Components within the Department which lack ALS contracts have been encouraged to conduct pilot projects using these existing contracts. In addition, the Civil and Environment Divisions' ALS staffs have worked together to provide joint ALS services to the Exxon Valdez matter.

As to the question of central contracts for regional service and the potential for lower costs, we are not aware of any benefits from such an approach. Since ALS projects are tailored to fit the needs of individual cases, and each

division has a unique litigating mission, there is little opportunity for broad economies of scale. The design of ALS projects is an integral part of the litigation strategy adopted by our lawyers for each complex case; the projects may encompass a host of discovery and trial-support activities inseparable from litigating events. Intrinsic to the success of an ALS program is its flexibility to respond to case-specific day-to-day litigation developments and case-strategy decisions. For example, the price-fixing cases in the Antitrust Division involve a different ALS focus than the Civil Division's defensive tort claims cases. Similarly, tracking and plotting clean air act violations or assessing natural resource damages involves yet other types of documents and information requirements.

Meanwhile the Criminal Division is completing its statement of work for multiple-award ALS contracts that will be announced in April. The Division's bank, insurance, and savings and loan fraud cases require unique, immediate and local ALS services that can be closely monitored by Division personnel. The workload involved here makes it impractical to continue "piggybacking" ALS contracts of the other legal components, or to perform the work through small individual contracts.

In ALS programs, litigation success is optimized when the trial lawyer familiar with a case is closely involved in the trade-offs and decisions about the use of ALS resources. ALS contracts must be managed in close proximity to the trial lawyers served, and we believe that the present decentralized structure has contributed to the Department's ALS successes over the years, demonstrated recently in the Exxon Valdez case, but visible as long ago as in the early AT&T antitrust settlement, various Asbestos case victories, and the Rocky Mountain Arsenal case.

Competitive ALS Contract Cycle

	Description of Event	Time Required
1.	Develop Work Statement/Evaluation Plan/ Determine Estimated Quantities/Obtain Internal Approvals	30-90 days*
2.	Obtain Dept of Labor Minimum Wage Determination(s)	60 days**
3.	Assemble Request for Proposals (RFP)	15 days
4.	Synopsize in Commerce Business Daily	15 days**
5.	Issue RFP to Interested Vendors	5 days after Event #3
6.	Conduct Preproposal Conference with Prospective Vendors	14 days after Event #5
7.	Respond to Vendor Questions which were asked at Preproposal Conference and Make any necessary Amendments to the RFP	14 days after Event #6
8.	Receive and Open Proposals	14 to 28 days after Event #7
9.	Complete Initial Technical Evaluation	30 to 60 days after Event #8
10.	Conduct Technical and Price Negotiations with Vendors Determined to be Within a Competitive Range (price and technical factors considered)	14 to 28 days after Event #9
11.	Request Best & Final Offers from those firms with whom Negotiations were Conducted	Concurrent with Completion of Event #10
12.	Receive Best & Final Offers	14 days after Event #10
13.	Complete Final Technical Evaluation of Best & Final Offers	14 days after Event #12
14.	Perform Price Reasonableness Evaluation	7 days after Event #13
15.	Make Tentative Contract Award Decision Based Upon the RFP's Evaluation for Award Criteria	7 days after Event #14

16. Determination of Responsibility for Proposed Awardees	Concurrent with Event #15
17. Negotiate Small/Minority Business Sub-Contracting Plans with Proposed Awardees	7 days after Event #16
18. Request and Receive EEO Clearance from EEOC	30 days**
19. Complete Summary of Negotiations and all required Contract File Documentation	7 days after Event #17
20. Obtain Legal Sufficiency Review from Supervisor and from Office of Procurement Executive	10 days after Event #19
21. Award Contract(s)	Concurrent with Event #20
Total Timeframe with No Protest:	200 - 320 days
22. Conduct Debriefings for Unsuccessful Offerors	10 days after Event #21
23. Process GAO or GSBCA Protest, if received	60 - 120 days after receipt
Total Timeframe with Protest:	270 - 450 days

* When we began doing ALS contracts in 1983, this step routinely took eight to twelve months. With experience gained over the years, we have achieved significant reductions in this element and, consequently, in the overall length of the procurement.

** This timeframe can be combined with other Event(s) and is, therefore, not counted in this tabulation.

ALS Contract Paperwork

Following is a picture representing the amount of paperwork it takes to handle a competitive ALS contract for the Civil Division. The picture consists of one of ten copies of the proposal from each of the seven offerors, the pre-award file and the final award contract files.

BEST AVAILABLE COPY

LITIGATING CIVIL CASES

Mr. EARLY. Mr. Barr, I have problems with your comments on the Civil Division as far as the requests you have for 17 new positions. We hear testimony from one judge in Florida who says their district they are not going to hear civil cases due to their large criminal caseload.

I know that is different all over the country. I think the processing for civil cases is being delayed extensively. I am not sure the new people that you are requesting will speed that up.

Mr. BARR. We received authorization for 85 additional Federal judgeships this year.

Mr. EARLY. I understand we might get 20 of those judges this year. I would hope that they could approve more than 20 judges, but with the delay in the administration sending up the names, the type of research the FBI has to do, and the confirmation process, we are just not getting any more approved.

RADIATION EXPOSURE COMPENSATION

You request $1.985 million to develop and implement regulations pursuant to the Radiation Exposure Compensation Act of 1990. What actions is the Department taking in fiscal year 1991 to implement this act?

Mr. BARR. Principally we prepared the regulations for the claims process and the procedures that will be followed in processing the claims. We expect that over a 20-year period there will be 13,000 claims filed in this area for payments ranging between $50,000 and $100,000. That is principally the activity that we are engaged in.

Mr. EARLY. Can you give us a specific date when you think you will pay your first claim?

Mr. BARR. Right now we do not have the funds appropriated into the fund for the payment of claims. It is a little difficult to project when claims would be ready for payment. We project that sometime in 1992 we might have as much as $40 million eligible for payment but we don't have appropriated funds yet to pay those claims.

Mr. EARLY. There is no money appropriated to pay them. All we are doing is the paper work evidently.

Mr. BARR. Our judgment was that as a new statute, the first phase was to get in place a system for processing the claims.

Again, it is difficult to project when these claims will be ready for payment. At the time the budget was presented, and in fact right now, there is some question as to which account would appropriately request the appropriations to fund these claims.

I am not sure that this issue has been resolved. It was our view that if we could get in place the claim system and proceed in processing the claims there would be time to come back for the necessary funding.

Mr. EARLY. Have you developed an opinion as to whether funds for payment of claims should come from defense monies since the root cause of the radiation exposure was nuclear bomb tests performed during the World War II era?

Mr. BARR. I think that issue is still under discussion within the Administration.

GEOGRAPHIC INFORMATION SYSTEM ACQUISITION

Mr. EARLY. In the Civil Rights Division you request a transfer of $604,000 to acquire a state-of-the-art geographic information system to evaluate redistricting plans. That issue has a little interest up here on the Hill. Give us the specifics on this request.

Mr. BARR. I would like to ask John Dunne, the Assistant Attorney General for the Civil Rights Division, to respond.

Mr. DUNNE. This is in two phases. The first phase is to enable us in the first year of new redistricting lines to handle them on a state-of-the-art computer basis which will be utilized by the submitting jurisdictions. The $604,000 is for the purpose of leasing the necessary electric equipment as well as the software in order to accomplish this mission.

In fiscal 1992, the funding will allow us to continue the purchase of the GIS equipment so that we will be able to use it thereafter. We anticipate in fiscal 1991 there will be somewhere in the neighborhood of 11 to 12 redistricting submissions from municipalities.

It is essential for us to be able to evaluate not only the submissions from the appropriate State and local agencies but also from community groups who will be submitting alternative proposals to us so we can make a determination whether the submissions are in compliance with the Voting Rights Act.

Mr. EARLY. Should we be purchasing that equipment or should we consider contracting for the service?

Mr. DUNNE. We have already contracted for the lease and the purchase. We believe that this equipment will be necessary for our on-going responsibility. This equipment is not only going to be used in the rush of 1991 and 1992 submissions, but also it will continue to allow us to carry out our mission under Section 2 and to initiate our own challenges to redistricting, which are not covered under Section 5. In addition, we expect to be able to utilize this equipment in other sections of our division as well, namely to address employment discrimination and education.

Mr. EARLY. Was it your decision to lease rather than purchase the system in 1991 because of budget shortfalls, or is it the right way to go economically?

Mr. DUNNE. We believed it was the right way to go. The contract gave us the option to purchase, which is something the vendor is favorably inclined toward.

By leasing it for the first term we retain the equipment while we work out the bugs in the system, then we will have their input for implementing the system in a correct operating order.

Mr. EARLY. What is the cost of the second phase of the system?

Mr. DUNNE. Approximately $1.8 million.

Mr. EARLY. That is an acquisition.

Mr. DUNNE. That is the acquisition in 1992.

Mr. EARLY. So that is the total cost for acquisition?

Mr. DUNNE. Acquisition costs for hardware and software requirements alone total $3,238,000. This does not include data conversion, system support and maintenance.

Mr. EARLY. If $2.454 million were provided in fiscal year 1991 for GIS acquisition, would you be able to obligate the full amount in

fiscal year 1991, and would it alleviate any funding requirements in fiscal year 1992?

Mr. DUNNE. We believe we could, but if I may, Mr. Chairman, it is going to be a very difficult challenge for us to review all the submissions in 1991.

We believe that it makes more sense for us to become acquainted with the system before we make the commitment to purchase it.

Mr. EARLY. I will yield to the ranking member, Mr. Rogers of Kentucky.

TASK FORCE SPACE REQUIREMENTS

Mr. ROGERS. Thank you, Mr. Chairman.

You have an increase for your activities in Dallas as part of the Dallas Bank Fraud Task Force. It is my understanding that the FBI has the lion's share of manpower at the regional office.

Do they cover any space costs involved?

Mr. BARR. No, not in the newly acquired Task Force space.

Mr. ROGERS. Is there any reason why?

Mr. BARR. Apparently, Congressman, for two years the FBI did support the task force by providing their own space for task force use. I think out of comity we are bearing the cost of the additional space requirements now.

ENVIRONMENTAL PROTECTION LITIGATION

Mr. ROGERS. The cost to handle the Valdez case continues to rise. Next year you are going to be needing $2 million for litigation support.

Mr. BARR. I will ask Miles Flint of the Environment and Natural Resources Division to give you an update.

Mr. FLINT. We are having some discussions with respect to the Valdez case as you probably read in the newspapers. The criminal trial is expected to commence next month. There is no civil case at this juncture although one may be initiated prior to any settlement process being completed.

I think that it is important to note that the major litigation that we confront rising out of the Exxon Valdez situation is litigation with Exxon shipping and Exxon Corporation. But there is potential for on-going litigation involving claims against the United States and Aleyska, the pipeline company that was required to provide clean-up activities and support equipment after the oil spill. And there is a potential for some significant expenditures by the United States even if we were to settle litigation, to close down the existing operations that we have as well as maintaining support for the potential litigation that we face.

Mr. ROGERS. Thank you.

CAUSES FOR ENVIRONMENTAL REQUESTS

Mr. EARLY. Ms. Pelosi.

Ms. PELOSI. My question is also related to the environment. Your budget requests 31 positions for environmental protection activities. Is this request directly related to recent legislation or are some other factors involved?

Mr. BARR. I believe it is across-the-board in enforcement of all environmental protection acts.

Mr. FLINT. A substantial portion is not related to any new legislative initiative. We expect substantial litigation concerning Federal facilities, substantially defensive litigation which we anticipate will increase and we will be spending time on that.

We will be spending additional time as a result of the passage of the new Clean Air Act and we will be spending additional time on initiatives that are being undertaken by the EPA to focus on hot spots, areas where there are substantial environmental issues that involve a variety of environmental statutes, such as clean air and clean water, and where the focus will be to target major litigations, so we can resolve and really concentrate on the significant environmental problems.

Ms. PELOSI. I am very glad to hear that. You requested an additional attorney to help with the growing docket environmental crimes appeals. How many do you have in this area?

Mr. FLINT. I believe it is 22.

Ms. PELOSI. Then it will be 23.

Mr. FLINT. My environmental crime section is a trial section, not appellate.

CASE REFERRALS FROM THE EEOC

Ms. PELOSI. You are requesting six positions and $250,000 to address the increasing number of referrals from the EEOC. Could you please elaborate on what happens when EEOC refers a case to you?

Mr. BARR. I would like to ask John Dunne of the Civil Rights Division to respond.

Mr. DUNNE. When we receive those referrals we start our own investigations from the beginning and then we will initiate a suit on behalf of the plaintiff.

The most fruitful by-product of the individual complaints is that it brings to our attention more wide-spread cases or more practiced cases and then we can bring the cases in the name of the United States rather than EEOC and that individual.

The purpose of the request is to catch up with the backlog from EEOC.

Ms. PELOSI. Do you anticipate that this number will grow?

Mr. DUNNE. The trend indicates that, yes, it will increase.

Ms. PELOSI. That is the understanding we had from EEOC, that there would be more opportunity for referrals?

Mr. DUNNE. There will be.

AMERICANS WITH DISABILITES ACT RESPONSIBILITIES

Ms. PELOSI. Are you in charge of the Americans with Disabilities Act as well?

Mr. DUNNE. I am.

Ms. PELOSI. I thought so. You request funds for two attorneys and technical assistants for review of the ADA. How do they differ from the attorney involved with litigation associated with the ADA?

Mr. DUNNE. We have a two-fold responsibility. One on which we are now focusing is in terms of technical assistance to acquaint the

public generally, and those in particular who will have to be in compliance with the ADA, with the hope that the success of that program will reduce the number of, if you will, adversarial claims which we are charged under ADA with representing when a person claims that a provider of transportation, or a Federal Government entity, is not in compliance.

That is why we are placing this emphasis on carrying out our technical assistance program. We believe it is good preventive medicine because it is our judgment that the ADA will succeed and it will succeed because we will educate the public as to what its meaning is and how important it is to society generally.

We believe that money is well invested at the initial stage.

Ms. PELOSI. That is two attorneys for outreach and technical assistance?

Mr. DUNNE. That is right.

Ms. PELOSI. The others who will be involved in litigation will be different?

Mr. DUNNE. Yes.

Ms. PELOSI. How does that differ from the 14 non-attorney positions?

Mr. DUNNE. They will be in the field, working with disability advocate groups and lawyers and people in places of public accommodation who will be in place in a year. They will be doing the hands-on training and assisting those with training on how to meet obligations under ADA.

Ms. PELOSI. So you have 14 attorneys doing that and two attorneys driving the four non-attorneys and others in litigation?

Mr. DUNNE. That is right.

Ms. PELOSI. From what I have been hearing, I am concerned about duplication of effort but not with your department. Is there a clearing house to be sure that everybody gets the message?

Mr. DUNNE. We are the clearing house. Since we have been the lead agency, we have been conferring with other agencies—transportation and employment agencies—who will be involved with enforcing the ADA. We think we have a sufficiently non-duplicative working arrangement.

We cut duplication to a minimum.

OVERLAP OF RESPONSIBILITIES

Ms. PELOSI. That would not relate to your special counsel for non-discrimination.

Mr. DUNNE. We have a special counsel for immigration discrimination.

Ms. PELOSI. It is not a special counsel for discrimination.

Mr. DUNNE. No because virtually our entire division deals with problems of discrimination.

Ms. PELOSI. That is why I thought there might be an overlap.

Mr. DUNNE. No, they are totally separate.

Ms. PELOSI. One of the reasons I asked about overlap was that when the EEOC was here we had the impression that the regulations would be coming out the next day, and they did.

They told us that they were the lead agency in technical assistance.

Mr. DUNNE. Well, let's put it this way, ordinarily when it comes to matters of discrimination the Justice Department provides the lead.

However, let me say this, I have been working very closely with Evan Kemp. He and I will be discussing how we will work together next year. The initial complaints come to them but when they send matters to us, we have no choice but to follow through and we see it as a partnership.

Ms. PELOSI. I was referring to technical assistance. Have they staked out technical assistance to employers?

Mr. DUNNE. It is interesting. No, we have not, for this reason. The reason why we have to function together is that there are places of employment which must comply with accessibility standards for those who work there. The bulk of these places of employment are also places of public accommodation where accessibility for non-employee members of the public have to be complied with. Therefore, there is obviously an overlap.

We will be working together, but our relationship is such that there will not be a duplication. While the responsibility is overlapping, there would not be a duplication of resources.

Ms. PELOSI. If there is a problem, they refer it to you?

Mr. DUNNE. I would fully expect so, because of our working relationship.

Ms. PELOSI. Thank you very much.

VOTING RIGHTS ACT RESPONSIBILITIES

Mr. Chairman, forgive me if I am duplicating anything that went before me.

You are requesting three attorney positions and $165,000. That is pretty good, three attorneys for $165,000 to handle litigation resulting from the submission of restricting plans because of the 1990 census. Was there a similar cost in 1980? Was it comparable?

Mr. BARR. That figure reflects half year costs.

Ms. PELOSI. That answers my next question. What are you basing these costs on?

Mr. BARR. In terms of—is there a fiscal year 1991 expense?

Mr. DUNNE. Not for that—under the Voting Rights Act we have dual responsibility. Pre-clearance under Section 5 and also enforcement of Section 2 which is vigilant with regard to all voting arrangements, to make sure that the opportunity of minorities is not in any way diluted. Under the Section 5 coverage there are 17 states which must submit their voting changes for pre-clearance.

I think you probably know in your own state there are three affected counties in the southern portion of it. While we are going to be, if you will, principally involved with Section 5 pre-clearance submissions in 1991 and 1992 as a result of the Census, we must also remain vigilant under our Section 2 responsibility, if you will, to keep the rest of the country honest with regard to their proposals.

Although they don't require pre-clearance, we will need additional personnel to make sure that those tens of thousands of changes which don't require pre-clearance are in conformity. Most of those cases are very people-intensive, and resource-intensive.

That is why we felt during this early two or three-year period we had to maintain the strength of our Section 2 enforcement tradition.

Ms. PELOSI. I understand. Thank you very much.

Thank you, Mr. Chairman.

RESOURCES FOR OFFICE AUTOMATION

Mr. EARLY. Mr. Barr, what is the total amount requested for Project EAGLE in fiscal year 1992 and how does that compare to the total available in 1991?

Mr. BARR. The total amount requested for 1992 is $35 million. I think in 1991 it was $17 million, $16.9 million.

Mr. EARLY. How much of the 1992 Project EAGLE fund is associated with finishing the procurement to offices currently without an office automation system? How much is requested to replace outdated systems such as the Antitrust Division's current system?

Mr. BARR. Of the $35 million, I think $14.2 million is for the annualization of the costs for the systems that have already been installed, that is, paying under the lease/ownership arrangements for 1991 installations. Fourteen million in 1992 would be paying for 1991 installations. Of the amount we are seeking in 1992, $4 million will go to installation of new systems.

Mr. EARLY. For the record, please identify the systems to be replaced by Eagle, the age of the systems being replaced and the reason why the current system is not usable.

[The information follows:]

LEGAL ACTIVITIES OFFICE AUTOMATION

Over the years, Department of Justice components independently approached office automation support. At one point in the early 1980's, there were more than 40 different word processing systems in use throughout the Department, resulting in a virtual electronic Tower of Babel. Documents that needed review and editing in a different division generally required retyping. Other automated tools, such as litigation support and legal research, were developed on separate, incompatible systems.

There are now seven Department of Justice components using EAGLE office automation systems. The systems replaced by EAGLE are described below.

TAX DIVISION - EAGLE replaced the Tax Division's word processing system that was provided by an IBM 5520, shared-logic word processor. A shared-logic system is one in which word processing capabilities are provided from a centralized processor, thus limiting its range to the terminals wired to the processor. The IBM 5520 system was state-of-the-art technology when the Tax Division first acquired it in 1979. By 1988, even IBM stopped providing maintenance support for the equipment and parts were extremely difficult to obtain. More importantly, the IBM 5520 lacked the capability to provide the technological requirements developed in Tax Division's long range office automation plans.

These technical requirements which are provided by the EAGLE office automation network include: word processing; electronic mail; calendar management; communications and file transfer; database management; and document storage and retrieval. In addition to these specific requirements, the EAGLE system is compatible with the major office automation systems installed throughout the Department of Justice. As a result, legal briefs and other documents can be readily exchanged with virtually all other litigating components in the Department.

CRIMINAL DIVISION - Between 1973 and 1989, the Criminal Division leased and purchased approximately 100 IBM Displaywriter word processors. These machines were the only investment made by the Division in office automation. There was no electronic mail, file transfer, calendaring, laser printing or other functions now associated with modern office automation systems.

In 1985, the Criminal Division acquired a used IBM System/38 minicomputer for case tracking and management, plus other automated tracking systems.

The only litigation support tools available to Division staff workers were a single LEXIS legal information system terminal in the Division library and one JURIS legal information system terminal in each litigating component of the Division. Often,

these terminals were out of service for extended periods of time.

In mid-1989, the Criminal Division installed the first EAGLE systems and an IBM AS/400 mid-range computer. Regardless of the advent of EAGLE, the Division would have had to replace its office automation equipment in 1989/1990 as the equipment was simply worn out from daily use.

UNITED STATES ATTORNEYS - Beginning in 1988, the Executive Office for United States Attorneys began replacing word processing systems in the United States Attorneys' offices with personal computers. The word processing equipment to be replaced included equipment manufactured by Lanier, Xerox, CPT, NBI, Lexitron, IBM, Wang, and Syntrex. The equipment included stand-alone and network word processing systems. At that time, these systems were all more than 5 years old and were not compatible. Because of the various types of operating systems, software and types/sizes of media, it was difficult to share information, even within the same office. In addition, due to the age and technology level of the equipment, many of the manufacturers ceased to provide maintenance and/or repair parts.

As a result, the U.S. Attorneys began a concerted effort in 1988 to replace these machines with personal computers. At the present time, all but a few U.S. Attorneys' offices have been converted to PC-based word processing. With the signing of the EAGLE contract and the subsequent installation of the EAGLE equipment in the districts, the U. S. Attorneys have been upgrading these PCs and incorporating them into the EAGLE networks.

OFFICE OF THE SOLICITOR GENERAL - The Solicitor General's Office first installed the NBI System in 1980 and continued to upgrade that system -- the last upgrade taking place in 1988. NBI notified the Department on November 1, 1989, that they were no longer releasing upgrade enhancements to their Office Works software package, which was the "backbone" of the office's network. At that time, the Office of the Solicitor General determined that it would be in the best interest of the Government and the Solicitor General's office to install the Department's EAGLE system. This would allow greater compatibility with other litigating divisions within the Department. The NBI system was replaced with the EAGLE system on September 4, 1990.

At the present time, the Case Management Section is using a Digital PDP-11/24 computer for case tracking. This system was installed in 1982. The Office of the Solicitor General plans to replace the Digital case-tracking system with Data General hardware and Oracle software in the EAGLE environment. This new system will allow more flexibility in accessing data from each workstation, which is now impossible. This new system in the EAGLE environment is expected to allow for an easier transition into the proposed Department of Justice Case Tracking System.

OFFICE OF PROFESSIONAL RESPONSIBILITY - The EAGLE system in OPR

will replace a Syntrex word processing system which OPR obtained in October of 1984. In addition, the EAGLE system will replace a Syntrex mini-computer system used for case tracking. The decision was made to use the EAGLE system because the Syntrex system was outdated and was no longer supported by Syntrex with respect to word processing software enhancements, and Syntrex no longer supported either the mini-computer's hardware or software. Moreover, the EAGLE system is much more modern, is fully supported, provides us with much better electronic communication with all of the Department's components, including the U.S. Attorneys' Offices, has an integrated text storage and retrieval and case tracking system (instead of separate systems), and gives us a system which will be standardized throughout the Department.

OFFICE OF POLICY DEVELOPMENT - The Office of Policy Development is replacing AMICUS office automation equipment that was installed in 1987-1988. The Office of Policy Development required the capability to work locally on personal computers to allow the use of floppy disks and the AMICUS system uses dumb terminals. In addition, there is a need to access external data sources that were not previously available.

JUSTICE MANAGEMENT DIVISION - The Justice Management Division is replacing obsolete personal computers that were acquired by Division staffs since 1985 with EAGLE workstations and upgrading EAGLE-compatible PC's to integrate all equipment into an EAGLE system. Previously, there was not a centralized office automation system to serve Justice Management Division employees, who are located in five buildings in the metropolitan Washington, D.C. area. In 1989, it was determined that effective communications and document transfer was essential to streamline JMD services and improve efficiency.

OTHER EAGLE FUND REQUESTS

Mr. EARLY. Are there any of the EAGLE funds requested for any Justice activity other than Main Justice and the U.S. Attorneys?

Mr. BARR. I don't believe so.

Mr. EARLY. Also for the record, what are your plans for office automation for other DOJ activities.

Mr. Rogers?

Mr. ROGERS. No further questions.

Mr. EARLY. Ms. Pelosi?

Ms. PELOSI. No further questions.

Mr. EARLY. Thank you, Mr. Barr.

[The following questions were submitted for the record:]

QUESTIONS SUBMITTED BY CONGRESSMAN SMITH

General Legal Activities

Environment Division

QUESTION: You request an increase of $3,858,000 to allow for the handling of an unprecedented growth in the number of environmental protection cases.

A. Is the Department prosecuting these cases or defending other Federal agencies?

ANSWER: The Department is both prosecuting and defending. The bulk of the Environmental Protection program's 1992 increase ($2,744,000 or 71%) is sought for the Environmental Enforcement and Environmental Crimes sections. As their names suggest, their work is affirmative and prosecutorial. The balance of the requested increase is for the Environmental Defense Section, which is charged with defending new government regulations and laws challenged by industry and others, as well as protecting the Federal fisc against unjustified claims or penalties when the Government is sued.

B. Do you have specific cases in mind when you request these funds, or are you suggesting a general expansion of your role?

ANSWER: For the most part, we do not have specific cases in mind. Instead, our request for increased funding is in response to our workload which has greatly increased on a variety of fronts as a result of heightened environmental awareness, new legislation, emerging case law and an increasingly sophisticated environmental bar. Our request for 1992 is largely premised upon review of our current docket coupled with client agency projections of future referrals.

C. How much do you estimate you will spend on environmental cases in FY 1991?

ANSWER: For 1991, the Environmental Protection program (as distinct from other Division programs) anticipates funding of $24,313,000.

QUESTION: How do you propose to "better protect the rights of Native Americans" with the $1,230,000 increase you request for 1992, and how much did you spend for this purpose in 1991?

ANSWER: In 1990, the Division's Indian Resources section spent $1,360,000; in 1991, our budget calls for $1,430,000 for the section. In 1992, an additional $560,000 (of the $1,230,000 program increase requested for the General Litigation program) is sought for affirmative litigation on behalf of Indians. Fully $500,000 of this $560,000 request

is earmarked for Automated Litigation Support (ALS) services in complex water rights adjudications. This will be the first effort to provide the sophisticated tools of ALS to the litigators in the Indian Resources Section, and the need for ALS is readily apparent given that a number of complex water rights trials have been scheduled in several Western states. Further, the section anticipates participating on a number of Department of Interior "negotiating teams," the purpose of which is to review possible settlements of pending water adjudications on Indian lands.

Americans with Disabilities Act

QUESTION: Please describe the Department's responsibilities under the Americans with Disabilities Act, and why you require the $2,262,000 requested in the FY 1991 supplemental, and the $2,345,000 requested for FY 1992?

ANSWER: Department responsibilities under the Americans with Disabilities Act (ADA) include the issuance of regulations as well as the development and delivery of technical assistance to entities covered by the Act.

Regulations

Within one year of the date of enactment of the ADA, the Attorney General is required to issue regulations implementing Titles II and III of the ADA.

The Title II regulation will establish compliance standards for State and local government operations that are consistent with the ADA and with current requirements under Section 504 of the Rehabilitation Act of 1973, as amended. The regulation will also establish compliance procedures and develop an enforcement scheme apportioning responsibilities among Federal agencies, including the Department of Justice (DOJ).

The Title III regulation will establish compliance standards for public accommodations having a significant effect on almost all businesses in the country. The process of developing this regulation will be a complex matter likely to generate a high level of public controversy. Because of the far reaching impact of Title III and the intense interest of trade associations and advocacy groups in these regulations, we held public hearings after publication of the proposed regulations in Dallas, San Francisco, Chicago and Washington, D.C.

Technical Assistance

The ADA requires the Attorney General to develop an overall plan for the provision of technical assistance by Federal agencies to entities covered by the Act.

The ADA places responsibility for implementing the plan with five Federal agencies, including the Department of Justice. The program has direct responsibility for technical

assistance relating to public employment, State and local government operations, and public accommodations and commercial facilities. Other agencies with implementation responsibilities include the EEOC (private employment), the Department of Transportation (public and private transit), the ATBCB (transportation, public accommodations, and commercial facilities), and the Federal Communications Commission (telecommunications).

In developing the plan, the Attorney General is required to consult with these four agencies and the National Council on Disability. The bill also authorizes the Attorney General to seek the assistance of the President's Committee on Employment of People with Disabilities, the Small Business Administration, and the Department of Commerce.

I. 1991 Supplemental

The 1991 supplemental budget request of $2,262,000 will support new responsibilities associated with the Americans with Disabilities Act of 1990. Of this amount, $222,000 will provide resources necessary for four attorney positions and two workyears. The balance of $2,040,000 will be used to meet regulatory and technical assistance responsibilities.

In 1991, the program will initiate limited technical assistance activities through contracts and grants to begin multi-year projects that will:

--disseminate accurate information about the requirements imposed on covered entities by the legislation;

--provide training and information that will enable covered entities to make their programs, services, activities, and facilities accessible to and usable by disabled persons; and,

--develop solutions to specific problems that inhibit the access of disabled persons to programs, services, activities, and facilities.

As currently planned, the program will provide such assistance directly or through contracts to national organizations and organizations of disabled persons at the regional and state levels. These organizations will train and disseminate the information to covered entities.

II. 1992 Enhancement

Resources requested for 1992 will enable the program to address ADA responsibilities as follows:

--Litigation, 20 positions and $1,089,000. Includes 16 attorneys and 4 paralegals to develop and initiate litigation strategy to enforce the provisions of the ADA.

--Coordination and Complaint Investigation, 7 positions and $416,000 to coordinate the enforcement activities of state and local government agencies; investigate complaints against State and local government agencies.

--Compliance Reviews, 2 positions and $125,000 to investigate alleged violations of Title III of the ADA and undertake periodic reviews.

--State and Local Building Code Certification, 5 positions and $431,000 to certify codes and conduct public hearings.

--Technical Assistance, 2 positions and $284,000 will be used to manage and coordinate the government-wide technical assistance effort. Resources will also be used for dissemination of information through publications and public information conferences. ADA base level resources, from the 1991 Supplemental request, will also be used to support technical assistance responsibilities in 1992.

Environment Division's Accomplishments

QUESTION: Your budget identifies significant workload increase in the Environment Division over the past several years, but it is all in the context of numbers of cases received and briefs filed. Can you document some instances where the Department has made a difference and can you demonstrate a clear return on the investment of additional resources for environmental litigation?

ANSWER: In 1990, the Environmental Crimes section collected nearly $10 in fines, restitution and forfeitures for every dollar spent. Even more dramatically, the Environmental Enforcement section recovered or avoided costs to taxpayers of $34 for every dollar spent. The latter figure includes civil penalties and the value of injunctive relief granted in Superfund cases by the courts (the costs of corrective action by private parties to clean or restore hazardous waste sites, or to install pollution control devices). In 1990, the estimated value of this cleanup work, borne by the polluters and not by the taxpayers, totalled an unprecedented $1,155,670,705. (By way of contrast, clean-ups and cost recoveries in 1989 totalled $783,612,813 -- the preceding record for such injunctive relief.) Among the more significant case accomplishments this past year were:

Environmental Crimes:

--A record number (134) of indictments were returned, 78 % of which were against corporations and their top officers.

--The first jury conviction under the Clean Water Act for knowing endangerment of others from intentional violations.

--The longest jail term ever imposed -- 12 years-- for offenses related to illegal waste disposal.

--The largest criminal wetlands disposition ($2 million in fines and restitution).

--The first indictments for illegal shipment of waste to another country.

--The largest single criminal fine under the Resource Conservation and Recovery Act (RCRA) -- $1.25 million in U.S. v. Unichem.

Civil Environmental Enforcement:

--The largest civil penalty recovery figure for any fiscal year in history -- $32,134,021.

--The highest number of Superfund cases ever filed in a given year -- 151.

--The first ever major recoveries for damages to natural resources harmed by pollution activities -- $23 million under the Clean Water Act and Section 107 of CERCLA (aka "Superfund").

--The single largest environmental civil penalty ever assessed -- $15 million in the Texas Eastern pipeline case. (Previous high was $5 million assessed against Chevron in 1985.)

Special Counsel for Discrimination

QUESTION: Is the $915,000 requested by the Special Counsel for Immigration Related Unfair Employment Practices for public education associated with immigration reform?

ANSWER: A total of $905,000 will be used to conduct additional public education initiatives associated with immigration reform in response to the findings and recommendations of the General Accounting Office and the Interagency Task Force. Of the total increase, $6,000 will be used to cover increases in court transcription costs and another $4,000 will be used to update and consolidate the financial management information system.

QUESTION: Is this increase in addition to the $1 million provided for such education in FY 1991?

ANSWER: This requested increase for public education of the antidiscrimination provision is in addition to funds provided by the conferees in 1990.

QUESTION: What have you accomplished with these education funds and why is more required?

ANSWER: In 1990, the Office of Special Counsel's (OSC) commitment to antidiscrimination public education and

outreach outpaced the Congressional appropriation for that purpose. Congress appropriated $1 millon for conducting outreach. OSC responded with a three-pronged outreach program: an OSC administered outreach grants program, outreach activities financed by State Legalization Assistance Grants (SLIAG) as authorized pursuant to the Immigration Nursing Relief Act of 1989, and its own self-developed outreach activities.

OSC spent more than $1.1 million on a public education grants program alone. The purpose of the grants program was to develop new and novel methods of educating potential discrimination victims and employers about their rights and responsibilities under IRCA's antidiscrimination provision. During the course of the fiscal year, OSC determined there were no legal impediments to a grants program, developed criteria for awarding grants, arranged for the fiscal oversight of awarded grant funds, announced the program, and received 120 proposals. The competitive process resulted in 15 grants being awarded to grantees in 8 states. The grants range in size from $46,000 to $100,000. Though matching funds or services were not one of the award criteria, voluntary matches augmented Federal grant funds by over 15%. The impact of the grant program is just now beginning to be felt. There are two major reasons for this. First, because of the necessary preparatory activities described, grants were awarded late in the fiscal year. Second, as a result of amendments to IRCA's antidiscrimination provision made by the Immigration Act of 1990 much of the educational material being developed had to be modified to reflect these amendments.

The Immigration Nursing Relief Act of 1989, passed in December 1989, authorizes (but does not mandate) States to use SLIAG funds to conduct educational activities after consultation with OSC. To implement this prong of its outreach program, OSC worked with the Department of Health and Human Services (HHS) to develop the most meaningful and least intrusive consultation process possible. In 1990, under this program, OSC approved and HHS allowed expenditures by 15 states. This level of participation has already been surpassed this year. In an effort to utilize the ideas of grant applicants it couldn't fund, OSC has encouraged SLIAG states to contact these applicants. In this way, these two prongs of OSC's outreach program reinforce each other.

Finally, OSC conducted its own self-initiated outreach activities, many of which were carried on in conjunction with the IRCA Antidiscrimination Outreach Task Force created by the Attorney General in March of 1989. Through this Task Force, composed of OSC, the Immigration and Naturalization Service (INS), the Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC), and the Small Business Administration (SBA), OSC-developed educational material was distributed to employers. California, in a quarterly newsletter sent to all employers who report paying state taxes, has published educational material as a result of Task Force efforts.

OSC in 1990, as part of an experimental "media blitz" in El Paso, Texas, arranged to have material distributed to a targeted high school district. Through the cooperation of the school district, IRCA's antidiscrimination plan was included in social studies lesson plans. OSC took out newspaper ads and aired public service announcements. Finally, an OSC attorney appeared on local television news and talk shows.

OSC supplied English and Spanish close captioned public service announcements on IRCA's antidiscrimination provision via satellite transmission to approximately 650 television stations nationwide. Followup sampling reports showed they were aired in at least 5 of the top 15 media markets. The announcements were aired in markets that include Philadelphia, Cleveland, San Francisco, Boston, Houston, Atlanta, Miami, Denver, Phoenix, Sacramento, San Diego, Albuquerque, Tulsa, Chattanooga, Las Vegas, Salinas, Savannah, and Yuma, among others.

As part of its continuing effort to provide educational literature that is both readable and informative, OSC produced an illustrated brochure, in comic book format, entitled "But I Can Work." It was produced in both English and Spanish versions. A printing of nearly 1.7 million Spanish brochures and 900,000 of the English version was distributed to more than 5,000 selected organizations nationwide, ranging in scope from local Federal government offices and State agencies, to small businesses, qualified designated entities, educational course providers, and community-based organizations. Distribution of the comic book was accompanied by a letter making available other outreach services, such as public presentations by our staff attorneys, and additional literature. Earlier in the fiscal year, a test distribution of 100,000 English and 160,000 Spanish brochures was made to the five high alien population states.

OSC continued to urge State and local fair employment practice agencies to enter into memoranda of understanding with it. These agreements allow agencies to receive IRCA discrimination charges as OSC's agents for purposes of tolling IRCA's 180 day statute of limitations. In 1990, OSC attorneys provided training to 13 agencies who had entered in such agreements.

Finally, OSC lawyers and other professionals have traveled around the country making over 250 formal presentations concerning the anti-discrimination provision of IRCA to employer groups, business organizations, immigration lawyers and service providers, immigrant advocacy groups, community based organizations, church associations, labor unions and others. They were available for radio and television talk shows and have been interviewed by the print and electronic media.

While not detailing all OSC outreach activities last year,

this does provide an overview. Unfortunately, more education is needed because the General Accounting Office (GAO) found that IRCA's employer sanctions provision is causing a widespread pattern of discrimination and suggested that the remedy was more education. The Task Force mandated by IRCA made the same recommendation (see answer below).

QUESTION: Why is it necessary to expand education of immigration reform a full five years after passage of IRCA?

ANSWER: Congress expressed its concern that the employer sanctions provisions of the Immigration Reform and Control Act (IRCA) might result in employment discrimination by including an antidiscrimination provision and by requiring the General Accounting Office (GAO) to issue three annual reports assessing the discriminatory impact of employer sanctions. In its report released March 29, 1990, GAO found that employer sanctions resulted in a widespread pattern of national origin discrimination. It stated "OSC, INS, and other agencies are . . . engaged in efforts to educate employers on the anti-discrimination provision of IRCA. We believe these efforts need to be intensified if IRCA is to work properly."

GAO's findings also triggered the creation of a statutory task force to make recommendations to the Congress on how to remedy or deter such discrimination. The statutory members of this task force were the Attorney General and the chairs of the Equal Employment Opportunity Commission and the Commission on Civil Rights. This Task Force on IRCA Related Discrimination issued its report in September 1990, concluding that "greater efforts need to be made to educate employers and employees about the specific provisions of this law."

In November 1990, Congress included in the Immigration Act of 1990 an authorization for $10,000,000 for the Office of Special Counsel to conduct an education campaign aimed at increasing the knowledge of employers, employees, and the general public about their rights and responsibilities under IRCA's antidiscrimination provision. Despite this express statutory responsibility, no funds were appropriated.

Thus, based on its own assessment, as well as the conclusions of the Congress, GAO, and the Task Force that additional education is needed, the Office of Special Counsel seeks the 1992 program increase.

Department of Justice

September 10, 1990

Honorable Thomas S. Foley
Speaker
House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

This letter presents the views of the Department of Justice and the Administration on H.R. 5269, the proposed "Comprehensive Crime Control Act of 1990," as reported by the House Judiciary Committee. We understand that this bill is to be considered by the full House in the near future. The Administration strongly opposes enactment of H.R. 5269 in its current form.

H.R. 5269 would deal a heavy blow to law enforcement. Its overall effect would be an enormous step backward in the fight against violent crime and drug crime. Indeed, many of the proposals contained in the bill actually reverse recent Supreme Court decisions favorable to law enforcement. If H.R. 5269 were presented to the President in its present form, the Attorney General and other senior advisers would recommend that the President disapprove the bill.

The Administration's detailed comments on the specific provisions of H.R. 5269 are attached. Those comments identify the numerous sections of the bill that the Administration considers unsound, on both legal and policy grounds. I wish to emphasize certain of the Administration's chief concerns:

The habeas corpus provisions contained in title XIII and section 2212 of the bill completely reject the reasonable reform proposals made by Justice Powell's Committee. In addition, title XIII and section 2212 reach out to overrule a number of recent Supreme Court decisions that have attempted to place reasonable limits on habeas corpus filings. As both Justice Powell and the National Association of Attorneys General have indicated, enactment of such provisions would have the practical effect of abolishing the death penalty in the States.

The federal death penalty provisions of title II of H.R. 5269 are defective both as to the federal crimes covered and as

to the sentencing procedures to be followed at the penalty phase of federal capital cases. Title II omits a number of federal crimes that now carry a sentence of death, including, for example, causing death by mail bombing or the murder of hundreds of people by exploding a bomb in an airplane. With regard to procedural issues, title II takes the unprecedented view that the jury must find <u>two</u> aggravating factors in order to impose a sentence of death. Thus, under title II aggravating factors such as assassination of the President or torture murder or murder for hire would not allow a jury to conclude that the death penalty was appropriate -- a second aggravating factor would be required.

Title XVIII, the "Racial Justice Act," creates a presumption, based on highly questionable statistical showings, that race discrimination has infected capital sentencing. The showing can generally be rebutted only by clear and convincing evidence that non-racial factors justify any statistical disparities. The use of any quota system in applying the death penalty is legally and morally unacceptable. Present law already contains important safeguards against consideration of race by prosecutors, judges, or jurors in any individual case. Moreover, the Administration continues to support additional procedures, such as juror certifications, to ensure that race is not a factor in capital sentencing. Title XVIII is a step backward in the fight for colorblind justice; it would ultimately have the effect of establishing race as a central consideration in charging decisions.

The exclusionary rule provisions of H.R. 5269 are couched as a codification of some of the existing exceptions to that rule. The bill's formulation, however, is significantly narrower than exceptions already recognized by the Supreme Court, and thus could further hamper law enforcement in situations where the exclusionary rule serves no legitimate deterrent function.

Federal financial assistance to state and local law enforcement also would be seriously impaired by the bill. Section 402 would jeopardize a program that has provided more than $450 million to state and local law enforcement agencies by limiting sharing of forfeited assets with such agencies. Sections 106 and 107 would substitute an ill-advised formula for the present effective system for allocating federal justice assistance funding to local governments. Section 101 would earmark $300 million annually for a poorly conceived program of federal assistance for state intermediate sanctions projects, even though existing federal programs already provide assistance for such projects.

I would also like to emphasize that H.R. 5269 omits many reforms proposed by the Administration. For example, H.R. 5269 does not adopt a general objective reasonableness ("good faith")

exception to the exclusionary rule, nor, as indicated above, does it usefully address the need for a federal death penalty and for habeas corpus reform. H.R. 5269 makes no improvements in state drug treatment plans and programs, includes nothing to increase the effectiveness of international narcotics control and interdiction, lacks effective provisions to facilitate prompt deportation of criminal aliens, and contains nothing on the subject of public corruption, including drug-related public corruption. H.R. 5269 also has no provision for drug-testing of federal offenders on post-conviction release nor a provision for state drug-testing of offenders as a condition of federal justice assistance funding.

Basic reforms in all these important areas are included in the President's proposed Comprehensive Violent Crime Control Act (H.R. 2709), and in the proposed National Drug Control Strategy Implementation Act of 1990. Most of the major elements of these Administration bills have been incorporated in the proposed Violent Crime and Drug Control Act of 1990 (H.R. 5055), along with other important proposals that the Administration supports. The Administration's proposals also include more than one hundred amendments to strengthen and improve federal laws relating to firearms, asset forfeiture, controlled substances, money laundering, and other matters.

In our view, these serious and comprehensive Administration proposals, and not H.R. 5269, provide the proper starting point for Congress in dealing with the urgent problem of crime in this country. In sum, the Administration strongly urges the House of Representatives to reject H.R. 5269, a bill that contains provisions that seem more likely to shackle police and prosecutors than violent offenders. We further urge the House to take favorable action on the provisions within H.R. 5055 that are the same as the anti-crime initiatives proposed by the Bush Administration.

The Office of Management and Budget advises that there is no objection to the submission of this report to Congress, and that the enactment of H.R. 5269 would not be in accord with the President's program.

Sincerely,

William P. Barr
Deputy Attorney General

TABLE OF CONTENTS

		Page
I.	Correctional Options Incentives Amendments	1
II.	Federal Death Penalty	5
III.	Anabolic Steroids	7
IV.	Asset Forfeiture	9
V.	Computer Crime	12
VI.	Law Enforcement Scholarships and Recruitment Incentives	12
VII.	Firearms Provisions	14
VIII.	Chemical Diversion and Trafficking	15
IX.	Drug Paraphernalia	15
X.	Licit Opium Imports	16
XI.	Sentencing For Methamphetamine Offenses	17
XII.	Obstruction of Justice	17
XIII.	Habeas Corpus	18
XIV.	Prisons	21
XV.	Criminal Aliens	22
XVI.	Shock Incarceration	23
XVII.	Public Safety Officers' Disability Benefits	24
XVIII.	Racially Discriminatory Capital Sentencing	25
XIX.	Intoxication and Restitution	27
XX.	Child Abuse	28
XXI.	Banking Law Enforcement	31
XXII.	Miscellaneous	31

DETAILED COMMENTS ON H.R. 5269

I. Correctional Options Incentives Amendments

Sections 101, 102, and 104 of Title I of H.R. 5269 propose a new program of federal assistance to state intermediate sanctions projects, such as community-based and weekend incarceration, boot camps, electronic monitoring, and intensive supervision probation.

Section 101 establishes a special discretionary grant program for intermediate sanctions, to be administered by the Bureau of Justice Assistance (BJA), including a maximum of four grants to public agencies, and grants to private nonprofit organizations without numerical restriction. The program would be funded at $300 million in FY 1991. Section 102 requires transfer without reimbursement of certain excess military property to public agencies for use in the proposed intermediate sanctions program in preference to all other non-Department of Defense uses of such property, where the Director of BJA has determined to utilize the property for that purpose. Section 104 requires the Bureau of Prisons to notify state and local governments of the availability of underutilized military facilities suitable for use as minimum security, intermediate sanctions, or nonviolent offender facilities, and to assist state and local corrections agencies in adapting such facilities for correctional use. Presumably the functions assigned to the Bureau of Prisons by section 104 are meant to be carried out by the National Institute of Corrections (NIC), which is responsible for federal assistance to state and local corrections agencies.

This proposal is based in part on H.R. 4158. The views of the Department of Justice on this issue were presented through testimony before the Subcommittee on Crime by the Office of Justice Programs and the National Institute of Corrections on March 21 and May 24 of this year. As explained in that testimony, the Department of Justice strongly supports expansion of the range of available criminal sanctions to enhance public safety. However, we believe that the program proposed in Title I of H.R. 5269 is unnecessary and excessive, and includes features that are unsound.

The Department of Justice currently supports and assists a wide-range of intermediate sanctions projects through the programs of the Office of Justice Programs (including BJA) and the National Institute of Corrections. We see no adequate reason for separating out this particular function from the existing funding and assistance programs. The proposed annual funding of $300 million vastly exceeds any amount that could effectively be programmed and utilized in federal assistance to state and local intermediate sanctions efforts. It is, for example, six times greater than the entire discretionary grant program that is

currently administered by BJA. Funding at this level is likely to supplant (rather than supplement) state and local sources of funding, in contravention of the spirit and purpose of the federal justice assistance program.

The limitation of grants to public agencies under the proposed new program to no more than four is unnecessarily restrictive and arbitrary. Assigning administration of this new program to the Bureau of Justice Assistance would also be unwarranted, since the National Institute of Corrections is the lead federal agency providing assistance to state and local corrections. We see no adequate basis for according this program priority over all other uses of excess military facilities covered by section 102 -- including use of these facilities for regular federal or state prisons -- or for requiring transfer of facilities to state public agencies without reimbursement, even where a state may be willing and able to pay for such facilities. The Department of Justice accordingly opposes enactment of sections 101, 102, and 104 of Title I.

We do, however, support enactment of section 103. Section 103 would generally require use by a state of at least 5% of BJA block grant funding to upgrade criminal history information systems. The requirement could be waived or reduced if it was determined that such an expenditure was not warranted in light of the quality of the state's criminal justice records. Currently, BJA has committed $27 million in discretionary grant funding over the next three years, to be administered by the Bureau of Justice Statistics, for the upgrading of criminal records systems. The proposal in section 103 would carry this effort further. It would not change the overall level of block grant funding, but would ensure an appropriate commitment of such funding by the states in furtherance of this important objective.

Section 105 would reduce the matching fund requirement in federal justice assistance funding from 50% to 25% for years following 1990. The Department of Justice opposes this change. A 50/50 funding ratio will increase the recipients' investment in the programs, thereby promoting their commitment to maintain programs after a reasonable, but statutorily limited, period of federal assistance. The purpose of the justice assistance program is to promote innovative programs offering a high probability of improving state and local drug control and system improvement efforts -- not to foster state and local dependence on ongoing infusions of federal cash -- and the underlying intent is that recipient agencies should assume responsibility for the support of programs that are effective. Constituting the program as an equal partnership of the federal government with state and local governments promotes this important objective, and is particularly important in an era of fiscal restraint.

We note further that the states were advised in the Bureau of Justice Assistance's Formula Grant Program Guidance document in 1988 that the match requirement would be increased to 50%, and accordingly have been on notice that appropriate measures would need to be taken to support the higher match. In addition, other sources of federal funds are available to the states, such as proceeds from the Federal Asset Forfeiture Program, which may potentially be used by states to meet the match requirement. Finally, if a state does not qualify for its entire formula allocation due to a shortage of matching funds, the Bureau of Justice Assistance is authorized to award the balance directly to local jurisdictions within that state based on demonstrated need.

Sections 106 and 107 would effectively abolish the current system of allocating federal justice assistance funding to local jurisdictions on the basis of actual need and enforcement priorities pursuant to a statewide planning process. It would substitute an entitlement system in which allocation would generally be based on the level of criminal justice expenditures in the various localities in a state. The Department of Justice strongly opposes enactment of these provisions.

Winning the war on drugs and crime requires coordinated national and statewide enforcement strategies and programs. Sections 106 and 107, however, would grossly fragment the statutorily mandated statewide strategies by effectively requiring direct entitlement funding of local governments, based on the amount of their criminal justice expenditures, regardless of actual need. The Department's monitoring of the current program does not show any significant dysfunctions, either in terms of effective allocation of resources within the states or in terms of the efficiency with which states award subgrants to local jurisdictions. In contrast, the alternative proposed in sections 106 and 107 would result in gross misallocations of resources, denying needed federal assistance to some jurisdictions with serious enforcement problems, while providing a windfall to others that do not warrant favored treatment under any rational criterion of allocation. The revenues available to a local jurisdiction for expenditure on criminal justice requirements have no necessary relationship to its actual need for supplementary federal assistance.

Among the most damaging effects of the proposed change would be the impact on multijurisdictional task forces, which now account for nearly one-half of formula grant expenditures, and on smaller and rural jurisdictions. Crime and drugs are not contained within jurisdictional boundaries, and the hundreds of multijurisdictional task forces that cast a large net, including metropolitan areas coordinating with smaller and rural areas, have often proven to be of critical value to effective law enforcement. The proposed entitlement approach would jeopardize the statewide strategies that create state and local coordination

and multijurisdictional efforts, and would potentially replace them with locally controlled funds focusing drug and crime control efforts only within the jurisdictional boundaries of the recipient.

Finally, we note that the system proposed in sections 106 and 107 would be far more costly and burdensome to administer than the current system, and could adversely affect the flow of funds to state and local jurisdictions because of delays entailed in obtaining the data needed to carry out the proposed entitlement formula. The Bureau of Census has estimated a biennial information-gathering cost of $3 million, with an initial delivery date of 1992 (approximately 18 months from now). Monitoring this entitlement program could also vastly increase administrative costs. Our initial estimate indicates that the combined administrative budget of the Bureau of Justice Assistance and the Office of the Comptroller of the Office of Justice Programs could increase from approximately $7.7 million to approximately $24 million as a result.

Section 108 would encourage states to adopt a driver's license revocation sanction for drug offenders by providing for a re-allocation of 10% of formula grant funding from states that do not have such a sanction to those that do. The Department of Justice favors the utilization of this sanction for drug offenses. In most contexts, we do not favor inducing states to adopt such reforms by withdrawing or reducing justice assistance funding. However, section 108 includes a proviso that enables states to "opt out," if they do not wish to have it apply, by the enactment of legislation. In light of this feature of the proposal, the Department of Justice has no objection to its enactment.

Section 109 would amend the "court effectiveness" objective in the list of purposes for justice assistance funding to include expansion of "prosecutorial, defender, and judicial resources." This objective, as currently formulated, was established to develop innovative methods to handle the court activity due to increases in drug arrests and prosecutions. The Department of Justice opposes funding discretionary programs that would provide legal representation for indigent criminal defendants. The Bureau of Justice Assistance also discourages states from utilizing federal formula grant funds for this purpose. Funding public defenders would be contrary to the primary focus of the Edward Byrne Memorial State and Local Law Enforcement Assistance Programs. This focus is to promote innovative drug control projects, rather than to supplant state and local resources in covering the routine costs of running a criminal justice system, including provison of defense services. The Department of Justice accordingly opposes the enactment of section 109.

II. Federal Death Penalty

The death penalty proposal in Title II of H.R. 5269 is wholly inadequate and regressive. It does not include numerous offenses that are already capital crimes under current federal law, including aggravated killings in violation of 18 U.S.C. 34, 115, 844, 1111, 1716, 1992, 2113. The deficiencies are truly striking in comparison with the death penalty authorizations of the Administration's legislation and Title VI of H.R. 5055. For example, H.R. 5269 would not authorize the death penalty in the following cases, which would be capital crimes under H.R. 5055:

-- Murdering hundreds of people by planting a bomb in a plane, a train, a bus, or a federal building (18 U.S.C. 34, 844, 1992).

-- Murdering civil rights lawyers or personnel of civil rights organizations by sending them bombs through the mail (18 U.S.C. 1716).

-- Murdering members of the families of federal officials for purposes of intimidation or retaliation (18 U.S.C. 115), such as a retaliatory killing of a spouse or child of an FBI agent, a federal judge, or a Member of Congress.

-- Murders of non-official participants in federal proceedings for purposes of obstruction of justice or retaliation -- including witnesses, victims, and jurors -- unless the victim happens to be in the Witness Protection Program (18 U.S.C. 1503, 1512-13).

-- Murders in the course of bank robberies (18 U.S.C. 2113).

-- Murders by federal prisoners serving life terms (proposed 18 U.S.C. 1118 in H.R. 5055).

-- Murder for hire or in aid of racketeering, except in contract killing cases involving interstate travel (18 U.S.C. 1958-59).

-- Murder in furtherance of genocide (18 U.S.C. 1091).

H.R. 5269 also does not authorize capital punishment for the most aggravated drug offenders and offenses, including the leaders of the largest drug cartels and trafficking enterprises, drug kingpins who attempt to murder witnesses, jurors, or public officers to obstruct justice, and other drug offenders who cause death intentionally or through aggravated recklessness. The death penalty would be authorized in such cases under proposed 18 U.S.C. 3591(3)-(5) in H.R. 5055.

Beyond these deficiencies in coverage of offenses, H.R. 5269 generally permits capital punishment only for "intentionally"

causing death. This rejects the principle that a murder conviction may be based on, and the death penalty imposed for, highly aggravated reckless conduct. This is a basic departure from prior federal death penalty law and the general pattern of state death penalty laws.

Most existing federal death penalty statutes do not require an intent to cause death. For example, the general federal murder statute, 18 U.S.C. 1111, defines murder as killing with malice aforethought, which does not require a subjective intent to kill, but may be satisfied by highly reckless conduct. See United States v. Shaw, 701 F.2d 367, 392 n. 20 (5th Cir. 1983). Capital (first degree) murder under that statute is also not limited to intentional killings, but includes any murder committed in the course of other highly dangerous crimes, such as arson, escape, kidnapping, burglary, or robbery.

As Justice O'Connor wrote for the Supreme Court in Tison v. Arizona, 481 U.S. 137, 157 (1987), "reckless indifference to the value of human life may be every bit as shocking to the moral sense as 'intent to kill.'" The bank robber who sprays bullets into a crowd to make his escape or the terrorist who bombs an occupied federal building may not intend to kill, but both have demonstrated a callous indifference to the lives of others that American law has traditionally considered punishable as capital murder when death results from such conduct. H.R. 5269 would overturn this traditional conception of capital murder by not even allowing the jury to consider the death penalty in murder cases involving aggravated recklessness. It would require the government to disprove disclaimers of intent to cause death beyond a reasonable doubt, even where the offender's culpability is great enough to warrant consideration of capital punishment in the absence of a specific intent to kill.

In addition, Title II contains a new chapter for the criminal code (proposed chapter 228) that sets out death penalty procedures that are unsound.

One remarkable provision of this procedural chapter would bar imposition of the death penalty unless at least two aggravating factors are found, even in a case where there are no mitigating factors whatsoever, or a single aggravating factor clearly outweighs any mitigating factors. This would, for example, preclude capital punishment in a wholly unmitigated case on the basis of the following individual aggravating factors which are included in the proposed chapter:

-- The defendant had a previous murder conviction.

-- The defendant was already serving a sentence of life imprisonment for earlier offenses.

-- The defendant committed the murder for hire.

-- The murder involved torture of the victim.

The proposed procedures also do not include an important aggravating factor in H.R. 5055 that covers cases involving murders of federal officials and officers. Hence, for example, there could be no death penalty in an unmitigated case in which the defendant assassinated the President of the United States, assassinated a Justice of the Supreme Court, or murdered a federal law enforcement officer, unless some other aggravating factor listed in the proposal was also found to be present.

The procedural chapter in H.R. 5269 includes many other provisions that are unsound. For example, a mitigating factor would be established if "any member of the jury finds the existence of [the factor] supported by any evidence" (emphasis added), even if the government provided overwhelming evidence to the contrary and every member of the jury was persuaded that the factor did not exist. In contrast, the Supreme Court's decisions indicate that requiring proof of mitigating factors by a preponderance of the evidence comports with constitutional requirements. See Walton v. Arizona, 58 U.S.L.W. 4992, 4994-95 (1990).

Under other provisions of the proposed procedural chapter, the jury would be barred from considering a non-statutory aggravating factor unless the trial judge felt that the factor justified the imposition of the death penalty on the particular defendant as opposed to others. The search-and-seizure exclusionary rule would be extended to death penalty sentencing proceedings. New restrictions on capital punishment relating to the defendant's mental status would be imposed, which depart from settled legal standards concerning insanity and incompetence. On review, both the courts of appeals and the Supreme Court would be required to review the proportionality of the sentence in relation to sentences "given other similarly situated Federal defendants in similar cases on a national basis," although the Supreme Court held in Pulley v. Harris, 465 U.S. 37 (1984), that this type of review is not constitutionally required.

III. Anabolic Steroids

This Title would make anabolic steroids a schedule III controlled substance, provide criminal penalties for coaches or others who endeavor to persuade or induce athletes to take anabolic steroids, control further the trafficking in human growth hormones, and establish an interagency coordinating council on steroids abuse. Much of this proposal is substantially the same as that contained in H.R. 4658.

The views of the Department of Justice on H.R. 4658 were explained at length in a statement submitted to the Subcommittee on Crime by Deputy Assistant Attorney General Leslie Southwick on May 17 of this year. As noted in that statement, the issues presented by the control of steroids are complex, and we believe that it would be premature to enact new legislation pending the report of the Interagency Task Force on Anabolic Steroids. Recommendations should be forthcoming from the Task Force within three months.

The particular proposal in this bill also involves a number of problems and inadequacies in formulation. For example, the bill would create an offense covering physical trainers and advisers who "endeavor to persuade or induce" persons in their charge to use steroids. The "endeavor" language in this provision is unnecessary because attempts to violate the Controlled Substances Act are already unlawful under 21 U.S.C. 846. Substantively, the scope of the provision -- restricted to steroids -- is unduly limited. It is equally serious for persons in positions of authority to induce those under their control to use other controlled substances, but there is no existing offense that is defined in terms of inducing or persuading others to use drugs. Hence, if the creation of such an offense is contemplated, it would more sensibly be formulated as a separate provision of the Controlled Substances Act that applies to all types of controlled substances.

The bill's approach of generally making anabolic steroids (under a broadly worded definition) Schedule III controlled substances is unlike the normal scheduling process under the Controlled Substances Act. The Act now subjects a Schedule III substance to its strict controls only if it is specifically listed (generally by chemical designation) in the pertinent schedule in regulations promulgated by the Drug Enforcement Administration and the Department. In contrast, H.R. 5269 generally covers substances meeting its generic definition of anabolic steroids, including those that do not appear in its proposed statutory list, and does not give DEA any new authority to add substances it finds to be anabolic steroids to Schedule III. Moreover, the existing scheduling authority under 21 U.S.C. 812 does not appear to be applicable to steroids. Hence, there may be no adequate means of providing notice to manufacturers and other affected persons of what chemicals will be regarded as controlled steroids -- outside of the non-exhaustive list in the bill -- and difficulties for enforcement could arise from the need to litigate the coverage of particular chemicals under a broadly worded definition.

The general definition of "anabolic steroids" in the proposal is also seriously deficient. The definition, as currently formulated, includes any drug or hormonal substance (other than estrogens, progestins, and corticosteroids) that is

chemically and pharmacologically related to testosterone and that promotes muscle growth. The requirement of a "pharmacological" relationship to testosterone would present serious problems of proof for the government and should be deleted.

The definition is also deficient in failing to include counterfeit substances. Counterfeit anabolic steroids, which often are made with no active ingredient, are a significant enforcement problem on the black market and are directed at the younger and less experienced user. The definition should be amended to take account of this problem. This could be done in substantially the manner proposed in the version of this proposal passed by the Senate as Title XXXVI of S. 1970. Specifically, "or purports to promote muscle growth" should be added after "promotes muscle growth" in the definition, and a subparagraph (B) should be added to the definition as follows: "(B) any substance which is purported, represented or labeled as being or containing any amount of any drug described in subparagraph (A)."

The provision in the bill for a statutory Interagency Coordinating Council appears to be modeled in large measure on the existing administrative Task Force. The function of the proposed Council -- developing a strategy for dealing with improper use and abuse of steroids -- is also similar to the function of the existing Task Force. The addition of this provision to the proposal reflects a sound recognition that there is need for further study of this complex and important issue, and reinforces our position that hasty legislative fixes should not be attempted in advance of such study.

The formulation of the Interagency Coordinating Council provision also raises some concerns. It calls for representation by the Drug Enforcement Administration, rather than the Department of Justice. This would apparently preclude direct participation by the Civil Division, although the Civil Division has taken the lead in steroids enforcement, and both DEA and the Civil Division participate in the current administrative task force. The provision also arbitrarily excludes the Customs Service and the U.S. Postal Service from representation on the Council. The governmental members of the Coordinating Council would be appointed by the Secretary of Health and Human Services, but it would be preferable in an interagency body of this type to have the participating Departments appoint their own representatives.

IV. Asset Forfeiture

This Title contains eleven sections relating to forfeiture. Sections 403, 405, 406, and 407 are substantially identical to Administration proposals, and we support their enactment.

We also generally support section 401, which authorizes quarterly transfers from the Special Forfeiture Fund. This is similar to the proposal in Subtitle A of Title VII of the Administration's proposed National Drug Control Strategy Implementation Act of 1990. However, the words "and on a quarterly pro rata basis" should be deleted in the amendment because a requirement of transfers pro rata assumes a certainty of projected income to the Fund that does not exist. Also, "to meet forfeiture program expenses" should be substituted for "for asset-specific expenses" in the amendment. We would be pleased to provide interested Members of Congress with further technical assistance in the formulation of this proposal.

Section 402 would effectively bar sharing with state and local law enforcement agencies of forfeited assets, where the forfeiture is based on information developed through state or local investigation, unless state law authorizes the same uses of forfeited assets as federal law. This provision would damage federal-state cooperation in law enforcement and could seriously impair one of the most effective legal tools against drug trafficking. It jeopardizes a program that has provided <u>over $450 million</u> in forfeited cash and property to state and local police agencies throughout the nation. Deputy Attorney General William P. Barr sent a letter to the Members of the House of Representatives, dated July 26, 1990, detailing the disbursements under this program and the Justice Department's opposition to section 402.

Currently, state and local police agencies can advise federal authorities of assets that may be subject to federal forfeiture, and they can reap the benefits of providing such information through sharing in the proceeds of any resulting forfeiture. If such sharing is foreclosed, there is relatively little incentive for conducting investigations directed to discovering federally forfeitable assets, or for advising federal authorities of the existence of such assets. Thus, the principal beneficiaries of the change proposed in section 402 would be the drug traffickers and other criminals whose assets are subject to federal forfeiture and sharing with state and local law enforcement agencies under current law. The Department of Justice strongly opposes enactment of this misguided proposal.

Section 404 amends the civil forfeiture provisions of the Controlled Substances Act to provide for the seizure and forfeiture of "moneys" in the manner authorized for conveyances in 19 U.S.C. 1607. The objective of this section has already been accomplished through Congress's recent amendment of 19 U.S.C. 1607 in section 122 of Public Law 101-382. As amended, 19 U.S.C. 1607 explicitly authorizes administrative forfeiture of monetary instruments without limitation of amount.

In lieu of section 408 of H.R. 5269, Congress should enact the Department's proposal for enlargement of the authority to make awards for information leading to forfeitures, which appears in section 1012 of H.R. 5055. The Department's proposal would authorize awards for information or assistance leading to "a civil or criminal forfeiture under any law enforced or administered by the Department of Justice." The more limited provision in section 408 would be an improvement over current law, but it would not allow payment of awards for information leading to forfeitures under the child pornography, obscenity, and gambling statutes, among others, and would prevent payment of awards for newly created offenses with civil or criminal forfeiture provisions.

Section 409 requires, in relation to the Asset Forfeiture Fund, an annual report to Congress containing audited financial statements in the form prescribed by the Comptroller General. The Department of Justice agrees that production of audited financial statements is desirable in this area, and we are moving forward administratively with the definition and production of informative financial statements on the Fund. We do not agree, however, that legislation is either necessary or desirable in order to achieve that end, and we strongly oppose legislation giving the General Accounting Office authority to direct the form and content of our financial statements. Conformity to GAO requirements could potentially entail the investment of millions of dollars and significant modification of existing operational procedures. Moreover, granting such authority to an official of Congress to direct officials of the Executive Branch could pose constitutional problems. See generally Bowsher v. Synar, 478 U.S. 714 (1986). This section should therefore be deleted.

The language of section 409, taken in context, would also require a report within 4 months of the end of the fiscal year. Since financial accounts are not even closed until November, this leaves only two months to conduct a financial audit. This requirement is simply impractical.

Section 410 would amend the Controlled Substances Act to provide for civil forfeiture of drug paraphernalia "as defined in section 1822 of the Mail Order Drug Paraphernalia Act." Title IX of H.R. 5269 would somewhat inconsistently repeal the same Act and reenact it as part of the Controlled Substances Act. Independent of its relationship to Title IX, the formulation of section 410 is inadequate because it would not extend civil forfeiture authority to the Customs Service. This issue is more fully discussed in connection with Title IX.

Section 411 amends the Controlled Substances Act to authorize civil forfeiture of firearms involved in criminal drug activities. This section is an improvement over more restrictive standards concerning forfeiture of firearms under the general

provision of 18 U.S.C. 924(d)(1), and the Department of Justice supports its enactment.

V. Computer Crime

This Title is evidently meant to provide more effective protection against computer "viruses." It prohibits recklessly accessing a Federal interest computer without authorization and by means of such conduct altering, damaging, or destroying information. We agree with the objective of this provision, but its formulation is inadequate. The proper focus of a new provision should not be on reckless access, but rather on recklessly causing damage to a computer system or the information it contains. This is, in fact, the approach taken in the proposed "Computer Security Improvements Act of 1990," which the Department of Justice transmitted to Congress on June 22, 1990. Moreover, lack of coverage of reckless damage by means of computer viruses is only one of many deficiencies in current computer crimes law that are addressed in the Department's proposal. Accordingly, we recommend that Congress consider the Department's comprehensive computer crimes bill in lieu of the limited provision in Title V of H.R. 5269.

VI. Law Enforcement Scholarships and Recruitment Incentives

This title would establish, at a cost of $30 million annually, a program of scholarships for law enforcement officers and part-time employment for students who are interested in a career in law enforcement. The program would be administered by the Bureau of Justice Assistance, and would be subject to a 50% matching funds requirement. The scholarship program would receive 75% of the federal funding and the employment program would receive 25% of the federal funding under the Title. The scholarship program would provide one-year scholarships to officers with at least two years of service. Officers receiving scholarships would generally be required to continue to work in a law enforcement position for a period of one month per credit hour. The employment program would provide part-time and summer employment in law enforcement agencies for students in institutions of higher education who are interested in law enforcement careers.

Currently, states may apply BJA block grant funding to law enforcement training and career development, and general federal student loan and grant programs are available to persons involved or interested in law enforcement, as in other areas. The BJA funding program has grown sevenfold in recent years, from $70 million in 1988 to $492 million proposed for 1991. Moreover, any value of this type of program in increasing the number of law

enforcement officers is purely speculative. We accordingly oppose establishing a special program as proposed in Title VI.

With respect to section 607, we object to the preferential award of scholarships and employment on the basis of race, ethnicity, and gender. If Congress desires to aid the socially, educationally, or economically disadvantaged, that objective should be accomplished through the use of non-racial criteria.

Moreover, the proposed preference might be deemed constitutionally suspect. Achieving proportional representation by race, solely for its own sake, is not a constitutionally permissible objective. See, e.g., University of California v. Bakke, 438 U.S. 265, 307 (1978) (Powell, J.) (the desire for proportional representation by race in a profession or school, standing alone, is "discrimination for its own sake" and prohibited by the Constitution). A bare statistical disparity between the percentage of a minority group in a police force and its percentage in the general employment-eligible population ordinarily stems from many interacting causes, and is not probative of discrimination: "[i]t is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance." Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 992 (1988) (plurality op.). The Supreme Court's recent decision in Metro Broadcasting, Inc. v. Federal Communications Comm'n, 110 S.Ct. 2997 (1990), is fully consistent with this analysis. While recognizing that Congress in limited circumstances could employ race-conscious classifications that were substantially related to "important" governmental objectives, the Court was careful also to emphasize, among other things, that Congress should first explore nonracial alternatives, before resorting to racial preferences. Id. at 3019; see also id. at 3019-25.

With respect to section 608(b)(2), a physician's affidavit should not necessarily be regarded as conclusive proof of disability, and a person disabled from law enforcement work should not necessarily be relieved of the obligation of repayment if he obtains other employment or otherwise has the financial resources to make repayment.

Section 609, which provides for parallel reporting by the Director of BJA to the Attorney General, the President, the Speaker of the House of Representatives, and the President pro tempore of the Senate, could be construed to interfere with the President's constitutional authority to supervise subordinates if interpreted to preclude presidential review of the Director's report before it is transmitted to Congress. The words "the Attorney General, the President," should therefore be deleted. Section 609(4), which would require the Director to "make recommendations for changes" in the program, could be read to

interfere with the President's constitutional authority to submit only such legislation as he deems necessary and appropriate. It should not be understood as requiring the submission of legislation unless the Executive concludes that such submission is warranted.

VII. Firearms Provisions

This title contains firearms amendments that are largely based on provisions of Title I of the President's violent crime bill (H.R. 2709). Sections 701-04 are substantially identical to the corresponding provisions in the President's proposal, and the Department of Justice supports their enactment.

Sections 705, banning domestic assembly of semiautomatic rifles and shotguns that are barred from importation, differs from the President's proposal in failing to exclude from the ban weapons that are already being assembled on a specified date, and in failing to exclude weapons assembled for exportation. The failure to exclude weapons intended for export would mean, for example, that such weapons could not be domestically assembled for sale to foreign governments for law enforcement use. This would take American manufacturers out of the legitimate international market for such weapons. We therefore recommend enactment of our original formulation of this proposal in lieu of section 705.

Section 706 would authorize up to two years of imprisonment for unlawful possession of firearms in federal court facilities, in comparison with the general one-year maximum for unlawful firearms possession in federal facilities under current law. Section 707 would provide a mandatory minimum penalty of ten years of imprisonment for using a short-barreled rifle or shotgun in a drug trafficking crime or crime of violence (in comparison with five years under current law), and would equate the mandatory penalty for using a destructive device in such a crime to the penalty for using a machine gun or silenced weapon (thirty years). The Department of Justice supports these provisions.

Overall, however, we regard the amendments proposed in Title VII as seriously deficient. They omit the vast majority of the firearms amendments proposed in Title I of the President's violent crime bill. The omitted provisions include many important proposals including, for example, treating serious drug offenses by juveniles as predicate offenses for the Armed Career Criminal Act, strengthening the disqualification of violent firearms offenders and serious drug offenders from firearms ownership, permitting consideration of pretrial detention in relation to certain highly dangerous firearms and explosives offenses, establishing a ten-year mandatory minimum sentence for using a semiautomatic firearm in connection with a violent crime

or drug trafficking crime, enacting new federal offenses punishable by up to ten years of imprisonment for stealing firearms or smuggling firearms in furtherance of violent crimes or drug crimes, extending disqualification from firearms ownership to persons convicted of violent or serious drug misdemeanors, mandatory revocation of supervised release for persons who possess firearms in violation of release conditions, and increased penalties for making false statements in connection with firearms purchases. H.R. 5269 also does not include the proposal in Title III of the President's violent crime bill for a general ban on large capacity gun clips and magazines.

We strongly recommend enactment of the full range of firearms proposals in Titles I and III of H.R. 2709 in lieu of the fragmentary proposal in Title VII of H.R. 5269.

VIII. Chemical Diversion and Trafficking

This Title expands the statutory list of precursor chemicals. The Department of Justice opposes this proposal as currently formulated because it does not provide a sound or accurate identification of chemicals that merit inclusion in an expanded list.

D-lysergic acid is a Schedule III controlled substance and should not be included as a listed precursor chemical. N-ethylephedrine and N-ethylpseudoephedrine are not precursors to controlled substances under federal law. Hydriodic acid (misspelled "hydriotic" in the bill) does not meet the definition of a precursor and is more correctly listed as an essential chemical. If methylamine and ethylamine are included, their salts should also be included. If N-methylephedrine and N-methylpseudoephedrine are included, their salts, isomers, and salts of isomers should also be included. It is open to question whether a number of the chemicals listed in the bill are sufficiently used in drug production to warrant inclusion, and a number of the chemicals in the bill are not more important than other chemicals that are not included.

IX. Drug Paraphernalia

This Title would amend the drug paraphernalia statute (21 U.S.C. 857) to make it a federal offense to sell or offer for sale drug paraphernalia. It also makes changes in the language concerning interstate trafficking in paraphernalia and use of the mails in such trafficking, moves the drug paraphernalia provisions into the Controlled Substances Act, and authorizes $5 million to be appropriated annually from FY 1991 through FY 1995 for the Attorney General to establish task forces to enforce the revised drug paraphernalia law.

The Department of Justice supports strengthening the drug paraphernalia provisions. Improvements in those provisions have been proposed as Title III of the Adminstration's proposed National Drug Control Strategy Implementation Act of 1990 (incorporated as Subtitle B of Title II of H.R. 5055), including a new authorization of civil forfeiture of drug paraphernalia. However, we must oppose Title IX of H.R. 5269 as it is currently formulated.

Moving the drug paraphernalia provisions into the Controlled Substances Act would divest the Customs Service of jurisdiction to investigate violations, although the Customs Service has taken the lead in enforcement of these provisions under current law. This would pointlessly terminate the Customs Service enforcement program in this area and effectively require the Department of Justice to assume exclusive responsibility for such enforcement.

The current formulation of proposed section 418(a)(2) in Title IX of H.R. 5269 includes interstate but not foreign commerce. It should be amended to read: "to use the mails or any facility of interstate or foreign commerce to ship or transport drug paraphernalia."

The bill also does not include significant provisions in the Administration's drug paraphernalia proposal that authorize civil penalties of up to $100,000 and injunctions against future violations.

X. Licit Opium Imports

This Title directs that the Executive Branch carry out a review of the 80-20 rule governing the importation of narcotics raw materials. A review encompassing the same subjects as this proposal was carried out last year as required by the Anti-Drug Abuse Act of 1988, and a report based on that review was submitted to Congress on May 18, 1989. In light of this recent review, we see no need for another review at this time, and we oppose enactment of this proposal.

Section 1001(c)(4) of the bill, if understood to require the submission of legislation by the President, would interfere with the President's constitutional authority to submit only such legislation as he deems necessary and appropriate to Congress. However, there would be no constitutional infirmity in a hortatory provision requesting the submission by the President of any legislation he considers to be warranted.

XI. Sentencing for Methamphetamine Offenses

Section 1101 directs the Sentencing Commission to promulgate or amend guidelines to provide more substantial penalties in methamphetamine cases in which the substance is smokable crystal amphetamine ("ice"). We have no objection to this proposal.

Section 1102 would create an "Interagency Coordinating Council on the Abuse of Smokable Crystal Methamphetamine." This council would assess the movement of smokable crystal methamphetamine and develop a strategy to control its spread. The Department of Justice opposes this provision. It is unnecessary because mechanisms already exist to accomplish the purposes of the Council. The Office of National Drug Control Policy (ONDCP) was created to coordinate anti-drug efforts and to develop a comprehensive National Drug Control Strategy. Legislation creating special bodies to deal with particular drug problems potentially undermines the function of the ONDCP and works counter to the objective of a comprehensive national strategy.

Existing interagency forums at the federal level already provide information exchange among law enforcement, treatment, and prevention agencies. There are also effective mechanisms in place for sharing intelligence and coordinating enforcement efforts at all levels of government in relation to "ice" and other drug problems. The Law Enforcement Coordinating Committees carry out this function at the district level. The Executive Working Group for Federal-State-Local Prosecutorial Relations -- composed of officials of the Department of Justice, state attorneys general, and district attorneys -- provides a national forum for information exchange between federal prosecutors and their state and local counterparts. The Justice Department's Office of Liaison Services maintains consistent liaison with state attorneys general and district attorneys throughout the country.

Moreover, DEA closely monitors the trafficking of methamphetamine, including the appearance of the drug in a crystallized form more suitable for smoking. Through DEA's state and local task forces, close liaison is maintained and information regarding illicit drug trends is regularly exchanged. This liaison is especially active in California regarding methamphetamine.

XII. Obstruction of Justice

This title would provide more adequate penalties for extreme acts of criminal violence against witnesses, jurors, and court officers. It is identical to the proposal in Subtitle B of Title V of the Administration's proposed National Drug Control Strategy

Implementation Act of 1990, which has been incorporated as Subtitle C of Title IX of H.R. 5055. The Department of Justice strongly supports enactment of this proposal.

We would note, however, that the value of this proposal is undermined by H.R. 5269's failure to authorize a usable federal death penalty with adequate coverage of offenses. In the context of H.R. 5055, the death penalty would be available for murders of witnesses, jurors, and court officers in violation of 18 U.S.C. 1503, 1512, or 1513, through these provisions' incorporation by reference of the penalties under the federal murder statute (18 U.S.C. 1111). In contrast, H.R. 5269 does not authorize the death penalty pursuant to 18 U.S.C. 1111, and only authorizes (in section 205) the death penalty for intentional killings of witnesses in the Witness Protection Program. Moreover, since the federal death penalty proposal in Title II of H.R. 5269 is fundamentally flawed, for reasons discussed above, H.R. 5269 would not actually permit the use of the death penalty for the murders of witnesses, jurors, and court officers in federal proceedings.

XIII. Habeas Corpus

This Title is derived, with some amendment, from H.R. 4737. In testimony on May 24 of this year before the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice, Justice Lewis F. Powell observed that support for H.R. 4737 "would mean support for increased delay, piecemeal litigation, and more last minute appeals . . . . A vote for H.R. 4737 would in practical effect be a vote to eliminate capital punishment in the United States."

The same is true of the current formulation of this proposal. A vote for Title XIII of H.R. 5269 would in practical effect be a vote to eliminate capital punishment in the United States. It creates an extraordinary array of burdensome new requirements and unsound procedural rules that would make continued state use of the death penalty untenable as a practical matter. Moreover, Title XIII contains a number of provisions -- applicable in non-capital cases as well as capital cases -- that would overturn or seriously weaken the most important existing rules developed by the Supreme Court that limit litigation abuse by prisoners and safeguard the integrity of state judgments in all types of criminal cases.

We would emphasize that there is before Congress a real habeas corpus reform proposal, supported by the Administration, that would deal effectively with the crisis in death penalty litigation. Subtitle A of Title VII of H.R. 5055 incorporates the approach recommended by the distinguished Committee headed by Justice Powell (as set out in that Committee's Report of August

23, 1989). A state could elect coverage by the Powell Committee procedures by appointing counsel meeting articulated standards of competence for indigent capital defendants in state collateral proceedings, in addition to the constitutionally required appointment of competent counsel at trial and on direct appeal. Under these procedures, a 180 day limitation period would generally apply to the filing of an initial federal habeas corpus petition. Once the defendant had one full course of litigation through the state courts and federal habeas corpus proceedings (up to the Supreme Court), that would normally be the end of litigation and, assuming the defendant did not prevail, the death penalty would then be carried out. Further federal review beyond that point would be limited to extraordinary cases involving a claim that cast doubt on the defendant's guilt of the offense for which the death penalty was imposed.

The differences between this fair and sensible approach to habeas reform, and the proposal in Title XIII of H.R. 5269, are fundamental. Title XIII does not give the states any say concerning the procedures to be applied in their cases, or reward states that provide broader representation for defendants with stronger rules of finality. Rather, it creates mandatory new rules and requirements that would greatly aggravate the existing problems of the system and create many new problems.

Section 1301 sets a one-year time period for habeas filing in capital cases. This is <u>double</u> the fully adequate six month period proposed by the Powell Committee, and many times greater than the time provided for seeking review of criminal judgments in other contexts. This overly long limitation period is accompanied by automatic stay-of-execution provisions in section 1302 that would remove the pressure of upcoming execution dates that currently limits delay by the defense in filing. The combined effect of these provisions would be <u>increased</u> delay in comparison with the current system.

Section 1303 rejects the core recommendation of the Powell Committee -- limiting second and successive habeas petitions in capital cases to new claims that cast doubt on the factual guilt of the defendant -- by permitting challenges to the validity of capital sentences in repetitive filings. This would allow convicted murderers whose guilt is not in doubt to engage in extended litigation concerning alleged technical defects in their sentences. Remarkably, section 1303 goes even further, and does not limit second and successive petitions to matters that could not reasonably have been raised in earlier petitions. Rather, even claims that had already been rejected by the federal courts in earlier habeas corpus petitions could be re-litigated under an amorphous "interests of justice" standard.

Section 1305 would overturn in both capital and non-capital cases the general retroactivity rules deriving from the Supreme

Court's decision in Teague v. Lane, 109 S.Ct. 1060 (1989), as well as more recent decisions refining the notion of "new law" for retroactivity purposes (Butler v. McKellar, 110 S. Ct. 1212 (1990), and Saffle v. Parks, 110 S. Ct. 1257 (1990)). It would also overturn the accepted concept of "finality of judgment" -- which occurs at the conclusion of direct review -- by stipulating that a sentence does not become final until the conclusion of state collateral proceedings and subsequent Supreme Court review. These changes would vastly enlarge the opportunities for prisoners to attack and potentially overturn their convictions and sentences on the basis of alleged "new law" that did not exist at the time the judgments in their cases became final. The effects would be particularly severe in capital cases, in which alleged "new law" in subsequent judicial decisions has been routinely invoked by defendants as the basis for raising supposedly "new" claims and recycling essentially old claims in repetitive habeas corpus filings.

Section 1306 would seriously weaken (in both capital and non-capital cases) the rules established by the Supreme Court that limit claims in federal habeas corpus proceedings that were not properly raised before the state courts. For example, it would allow claims not raised in state court to be heard in federal court under a wholly undefined "miscarriage of justice" standard, as well as in cases involving "cause and prejudice." The definition of "cause" excusing a procedural default in section 1306 also represents a radical break with current law, since it includes any case in which a claim was not asserted due to the "ignorance or neglect" of counsel. In other words, a prisoner's allegation that his lawyer did not happen to think of a particular claim at the time of state proceedings would potentially be enough to enable him to raise it for the first time in federal habeas proceedings, years later. In contrast, existing caselaw treats counsel error as "cause" only if it amounted to constitutionally ineffective assistance. See Murray v. Carrier, 477 U.S. 478, 488 (1986). The general effect of this section's weakening of the existing rules in this area would be to reward habeas petitioners in federal court for ignoring the procedural rules of the state courts.

Section 1307 would require every state seeking to enforce a death penalty statute to create an elaborate and expensive system for appointing counsel in capital cases. The system would have to be run (and appointments made) by a defender organization or defense "resource center." Judicial appointment of counsel would be barred, and state capital counsel would have to meet more exacting standards than those prescribed by federal law for attorneys representing federal capital defendants. The normal rules of deference to state court determinations and procedural default would be completely waived if an attorney failed substantially to meet the proposal's counsel qualification standards or performance standards created by the defense entity

that runs the system. Like the rest of Title XIII, this section is inimical to the principles of federalism inherent in our constitutional system, and to the need for reasonable finality of state criminal judgments.

XXV. Prisons

This Title contains various provisions relating to prisons. We support section 1401, which directs a study of new areas of business growth for Federal Prison Industries (FPI). We do not object to section 1402, which requires that federal government customers of Federal Prison Industries report to the General Services Administration all acquisitions of FPI products and services, that reported information be entered in the Federal Procurement Data System, and that FPI publish a catalog of the goods and services it offers for sale.

We oppose as currently formulated sections 1403 and 1404. These sections would eliminate the cap on the length of prerelease custody under 18 U.S.C. 3624(c) -- six months or 10% of sentence -- and would modify the general designation authority in 18 U.S.C. 3621(b) to broaden the variety of facilities in which an inmate may be confined and to allow designation to home confinement.

Section 1403 would eliminate the cap entirely for any sort of prerelease custody. This would authorize an unlimited period of prerelease custody even, for example, for inmates serving twenty year (or longer) sentences. We do not believe that unlimited periods of prerelease custody for inmates serving lengthy sentences should be permitted.

We do agree with an apparent general objective of section 1404, which is to clarify the authority of the Bureau of Prisons to place qualified prerelease inmates in home confinement (with or without monitoring by telephonic or electronic signaling devices). However, section 1404 as now formulated unjustifiably alters important language of the Sentencing Reform Act restricting the types of facilities within the general designation authority of the Bureau of Prisons. This could significantly alter the nature of the sentence. Clarification of home confinement authority does not require such a far-reaching change. Adequate flexibility could be provided through a narrower provision that would expressly permit prerelease custody in home confinement for up to six months.

This change could be implemented by inserting the following after the first full sentence of 18 U.S.C. 3624(c): "When appropriate, the Bureau of Prisons may place a prisoner in home confinement with or without monitoring by telephonic or electronic signaling devices for a period not to exceed the last

six months of the prisoner's term." It would also be advisable to include a provision stating that this amendment "shall apply regardless of the date of a prisoner's offense or conviction," so as to make it uniformly applicable to all prisoners.

We oppose section 1405, which mandates treatment for all prisoners determined to have "a treatable condition of substance addiction or abuse." The Bureau of Prisons already provides extensive substance abuse treatment programs for consenting inmates who can profit from them. Section 1405 could be construed to eliminate the consensual aspect of substance abuse programs, which we believe is an important element of their success, and also appears to eliminate BOP's discretion to decide whether an inmate whose condition may theoretically be treatable is in fact an appropriate candidate for a treatment program.

XV. Criminal Aliens

This Title contains provisions relating to "criminal aliens" including, for example, the addition of illicit trafficking in any controlled substance to the definition of "aggravated felony" under the immigration laws, some change in the arrest authority of INS officers, and clarification that the Attorney General must take into custody an alien convicted of an aggravated felony on release from incarceration. Other provisions would require states to provide conviction records of aliens within 30 days to INS as a condition of justice assistance funding, and would direct the Attorney General to submit a report to Congress concerning criminal alien removal.

The proposal in this Title is a seriously inadequate substitute for the proposal in Subtitle A of Title VI of the Administration's 1990 drug control strategy implementation bill, which has been incorporated in Title VIII of H.R. 5055. The main provisions of the Administration proposal do not appear in Title XV of H.R. 5269. For example, Title XV does not include provisions that would allow the immediate exclusion from the United States of individuals convicted of aggravated felonies, and that would allow the conduct of summary deportation proceedings while an alien aggravated felon is incarcerated. Moreover, under the Administration's bill, aliens convicted of aggravated felonies would no longer be eligible for political asylum, or for "withholding of deportation" relief. The Administration's proposal also provides a necessary and significantly broadened definition of aggravated felony that would encompass crimes punishable by five or more years of imprisonment that include the use or attempted or threatened use of physical force against persons or property as an element, drug felonies, crimes involving illicit firearms trafficking, and any attempt or conspiracy to commit such a crime in the United States, as well as offenses committed overseas.

Moreover, a number of the provisions in Title XV are seriously flawed. For example, the arrest authority for INS officers in section 1502 is narrower than that proposed in the Administration's bill. Moreover, section 1502 would unjustifiably condition the exercise of arrest powers by INS officers on a number of new regulatory requirements, including "human relations training" for all INS officers who will make such arrests, and establishment of an "expedited review process" for complaints against INS officers.

Section 1510 would require that a particular form of notice be included in all orders to show cause alleging deportability. The form of notice is currently governed by regulations and case law; the proposed new statutory rule would limit the ability of a court to determine whether a particular form of notice was sufficient under the circumstances of a case. Section 1510 would also impose new address notification procedures for aliens that are no improvement over those currently appearing in section 262 of the Immigration and Nationality Act and 8 CFR 265.1. Moreover, there is no guarantee under section 1510 that an alien would actually receive notice, but the section does not appear to authorize challenging an in absentia deportation order on that basis. The Department of Justice accordingly opposes enactment of these sections.

In addition, section 1503(a)(5) would require that certain aliens, released from incarceration, be released by the Attorney General on bond, so long as they are not a threat to the community and are likely to appear before scheduled hearings. The section should also specify that such individuals must be likely to appear in response to all INS notices to appear. Finally, section 1504 would eliminate judicial recommendations against deportation only where the alien has been convicted of an aggravated felony. The Administration's proposal would eliminate such recommendations entirely.

Overall, Title XV of H.R. 5269 does little to effectively address the problems in this area, and contains a number of provisions that are counterproductive or unsound. Congress should adopt the Administration proposal in lieu of this Title.

XVI. Shock Incarceration

This Title would authorize the Bureau of Prisons to place in "shock incarceration" programs consenting federal prisoners who are serving sentences of between 12 and 30 months of imprisonment. Qualifying prisoners could be placed in such a program for up to six months, which would involve a military-like training regimen and educational and counseling programs, including drug counseling. This proposal is the same as H.R.

3446. The Department of Justice has already provided a statement of views on this proposal (dated May 23, 1990) to the Subcommittee on Courts, Intellectual Property, and the Administration of Justice.

As noted above in relation to Title I of H.R. 5269, the Department is currently supporting comparable "boot camp" programs at the state level. We also agree with the objective of establishing a viable intensive confinement program for federal inmates. However, we oppose the enactment of Title XVI. The Bureau of Prisons is currently establishing a pilot program of this type within existing authority and budgetary resources. Additional statutory authority and appropriations are therefore not needed at this time.

Moreover, we oppose a provision in the proposal which states that inmates who successfully complete the program would remain in custody for such period as the Bureau of Prisons determines, up to the remainder of the sentence. This would apparently give the Bureau unrestricted authority to release any such prisoner from any remaining portion of his judicially imposed sentence, with no required period of supervision or authority to reincarcerate the individual in case of further criminality or misconduct.

This proposal also raises a number of other issues, including the desirability of making home confinement available as an incentive for successful completion of the program; the relationship of the option under the proposal to the sentencing guidelines; the role of sentencing judges; and the effect of the proposed program on the goals of the Sentencing Reform Act of 1984, which include reducing uncertainty and unwarranted disparity in sentences. We believe that further study of these issues is essential before any particular approach is written into the United States Code.

XVII. Public Safety Officers' Disability Benefits

This proposal would authorize a one-time $100,000 federal benefit (adjusted for inflation) for public safety officers who become permanently and totally disabled in the line of duty. It would apply to a wide class of safety officers including firemen, rescue squad, and ambulance personnel, and would become effective on October 1, 1990.

An earlier version of this proposal would have created an open-ended liability for the federal government under this new disability program. Yearly costs were estimated to exceed $75 million. However, since no one has reliable estimates of likely claim requests, the liabilities could have been higher. Benefits are also currently available to injured public safety workers

under state workers compensation and disability programs. We accordingly opposed Title XVII as originally formulated.

However, the Judiciary Committee has adopted our recommended changes in the proposal. Specifically, it now limits overall payments of benefits under the program to not more than $5 million annually, and provides for a proportionate reduction in the amount awarded to beneficiaries if sufficient funds are not appropriated to provide the full proposed amount. The Department of Justice supports the enactment of Title XVII as amended.

XVIII. Racially Discriminatory Capital Sentencing

This Title is a variant formulation of the so-called "Racial Justice Act" proposal, recently defeated by a large margin in the Senate, which would authorize the invalidation of capital sentences on the basis of statistical disparities among various offender and victim classes in the imposition of capital punishment. The Department has previously expressed its views on this issue in testimony given on May 3, 1990, before the House Judiciary Subcommittee on Civil and Constitutional Rights, and on October 2, 1989, before the Senate Judiciary Committee.

As we explained in our May 3 testimony, this ill-conceived proposal would apply to every state defendant now on death row and would likely result in the invalidation of every capital sentence now in effect, as well as precluding the future use of capital punishment in the United States. This would occur, not because racial prejudice permeates the criminal justice system, but because the proposal would impose unrealistic burdens of proof on the prosecution in response to statistical disparities.

The effects of this proposal are not ameliorated by a new provision in proposed 28 U.S.C. 2921 which provides that information concerning statutory aggravating factors -- if "compiled and publicly available" -- is to be taken into account in determining if a prima facie case of "discrimination" has been established on the basis of statistical disparities. This qualification would be of little or no value in limiting attacks on the roughly 2,350 capital sentences which are now in effect, because the states have not heretofore had any reason to retain and compile comprehensive information concerning the presence or absence of statutory aggravating factors in potential death penalty cases. Moreover, in relation to both past and future capital cases, Title XVIII's prima facie case standard does not take account of the effect of non-statutory aggravating factors, the effect of statutory and non-statutory mitigating factors, and the effect of other factors (such as strength of the evidence) which influence the likelihood of capital convictions and sentences, and which may vary among offenses committed in different ethnic or racial groups.

In at least one important respect, Title XVIII of H.R. 5269 is even more extreme than earlier versions of the proposal: It would apparently authorize the invalidation of capital punishment on the basis of statistical disparities relating to national origin as well as race. While the language of Title XVIII is not fully consistent on this point, proposed 28 U.S.C. 2921(a) and the initial language in proposed 28 U.S.C. 2921(b) explicitly cover "national origin" as well as race.

Hence, for example, death sentences could potentially be overturned on the basis of statistical disparities between the imposition of the death penalty on defendants of English descent as opposed to defendants of German, Irish, or Chinese descent (or any other group defined by national origin), and on the basis of disparities relating to victim classes defined by national origin. Rebuttal of a prima facie case under this standard could require the government to prove "by clear and convincing evidence" that specific neutral factors were the cause of statistical differences between the offender or victim class involved in a case and corresponding classes in any of hundreds of other ethnic groups. This is, of course, impossible as a practical matter, and would inevitably bring about Title XVIII's evident objective of abolishing the death penalty.

In other respects, the differences between this proposal and earlier formulations primarily relate to matters of detail or wording, and the essential criticisms in our testimony of May 3 remain applicable. Without attempting to reproduce in full the analysis set out in that testimony, we wish to underscore the following points:

This proposal cannot fairly be characterized as in any sense a civil rights measure. Its practical abolition of capital punishment would gravely harm the security of the American people, including minority groups who often experience at first hand the most devastating effects of criminal violence. For example, close to one-half of all victims of murders and willful homicides are black. Enactment of this proposal would ensure that the death penalty is not available to punish the perpetrators of such murders, or to deter future murders. Thus, Title XVIII would make no contribution to the cause of civil rights, but would instead deal a heavy blow to the most fundamental of all civil rights -- the right of all citizens to freedom from fear of lethal criminal violence.

The factual premises underlying this proposal are also flawed. The courts have consistently rejected statistical studies purporting to show racial bias in the imposition of the death penalty, finding that such studies failed to take account of pertinent non-racial factors or involved other fundamental flaws. Similarly, the conclusions of a General Accounting Office

report issued in February of this year, which claimed that empirical studies strongly supported the existence of racial discrimination based on the race of the victim, are not well-founded. Rather, the Department's independent review showed that the studies properly characterized as high quality studies meeting National Research Council standards support the conclusion that race-neutral factors overwhelmingly account for apparent disparities relating to the race of the victim or the offender. These points are fully set forth in the Department's May 3 testimony.

The proposal's provision for an effectively irrebuttable presumption of "discrimination" based on a failure to achieve the "right" numerical proportions could also serve for the first time to introduce considerations of race and ethnicity into capital sentencing. For example, since some studies have found that white defendants are more frequently sentenced to death than blacks defendants, it would arguably be necessary to charge and sentence more black defendants to death, or to consciously reduce the number of white defendants for whom a death penalty is sought, in order to achieve the racial proportions deemed proper by this proposal. In practical terms, compliance would require a death-by-the-numbers system of quota justice that introduces race and national origin into capital sentencing in a constitutionally impermissible manner.

Finally, it must be emphasized that the Supreme Court's constitutional decisions already bar all actual racial discrimination in criminal justice decisions, and ensure that convictions and sentences will not stand if discrimination has occurred at any stage of the process. Moreover, under the Administration's federal death penalty proposals, the jury's deliberations would be focused on non-invidious aggravating and mitigating factors, and each juror would be required to certify that such factors as race and national origin were not considered. Measures like these provide effective protection against discrimination, without quota justice or the imposition of unjustified standards that cannot realistically be met.

XIX. Intoxication and Restitution

This Title includes provisions that are designed to clarify that the bar to discharge in bankruptcy for debts arising from driving while intoxicated includes intoxication resulting from drugs other than alcohol, and to make criminal restitution debts nondischargeable in chapter 13 bankruptcies. The Department of Justice supports nondischargeability of debts arising from both alcohol and drug intoxication while driving, and supports making criminal restitution debts nondischargeable in all types of bankruptcies.

The amendment relating to driving-while-intoxicated debts, however, involves an apparently inadvertent narrowing in comparison with current law. The language of the current provision is broad enough to cover debts for property damage in such cases, such as damage to another vehicle in a collision, but the amended provision would only apply to debts relating to death or personal injury. The scope of the bar to discharge should not be narrowed in this manner.

XX. Child Abuse

Title XX create several new grant programs relating to the handling of child abuse cases -- multidisciplinary investigation and prosecution programs, specialized technical assistance and training programs for prosecutors, court-appointed special advocate programs, and child abuse training programs for judicial personnel and practitioners. The title authorizes a total of $30 million for these grant programs during FY 1990 and such sums as may be necessary in the next three years.

Title XX also amends title 18, United States Code, to include special procedures applicable to child witnesses and victims in federal proceedings, and it establishes mandatory child abuse reporting on federal lands or in federally operated or contracted facilities. Other provisions of the Title require a criminal histories check for child care workers hired by federal agencies or facilities under federal contract.

We note with approval that Title XX does not contain a provision found in the version of this proposal passed by the Senate as part of S. 1970 which would create a federal crime of drug-related child abuse. The Department has opposed such a provision in connection with the proposal in the Senate.

We oppose the new grant programs proposed in Title XX. We do not believe that the multidisciplinary grants and specialized training grants under Subtitle A are necessary; $9.3 million is already available from the Crime Victims' Fund for grants under the Children's Justice Act (CJA) for similar purposes. CJA grants are made by the Department of Health and Human Services to state-designated agencies to improve the handling of child abuse cases, especially child sexual abuse, in a manner that will reduce trauma to the child and improve the investigation and prosecution of such cases. The requirements of the Act include a strong emphasis on multidisciplinary involvement in investigation and prosecution, reducing the number of interviews of the child victim, and addressing the needs of the child victim. We recommend that the progress and accomplishments of these CJA grants be reviewed before additional legislation is passed to create further grant programs for multidisciplinary child abuse investigation and prosecution. We are also concerned about the

limitation of grants under section 2002 to "national" organizations that have, or are affiliated with organizations having, "broad membership among attorneys who prosecute criminal cases in State court."

We do not believe that the new grants for the court-appointed special advocate program under Subtitle B are necessary, because authority for support of CASA programs already exists, and the types of activities referred to in the bill are already being supported and funded by the Department's Office of Juvenile Justice and Delinquency Prevention (OJJDP) and by HHS. Special authority for this program is not needed.

The child abuse training grant program under Subtitle C is also unnecessary, because the authority for such grants already exists in OJJDP, the Bureau of Justice Assistance, the Office for Victims of Crime, and the State Justice Institute, and activities have already been funded for these general purposes. Moreover, HHS administers a grant program under Pub. L. No. 96-272, which authorizes hundreds of millions of dollars for child welfare activities in the states, including discretionary grants used for purposes substantially similar to those authorized under section 2007(b). We do not see a need for such a program within the Department of Justice.

We support in concept the provisions of Subtitle D, respecting victims' services, protections, and rights. In some respects, Subtitle D is preferable to the version passed by the Senate in S. 1970. It amends title 18, United States Code, instead of amending the Federal Rules of Criminal Procedure. It omits a provision in the Senate version creating a civil cause of action on behalf of the child against a person who fails to report abuse "as soon as possible." We also prefer the fixed deadline for mandatory reporting of child abuse in Subtitle D, although we believe 72 hours may be a more feasible deadline than the 24 hours provided in section 2012(a).

In addition, Title XX improves upon the Senate version in S. 1970 in that it states explicitly that the prosecution may move for televised testimony and videotaped depositions; has less onerous requirements for notice to the other party; specifies that the images and voices of all participants are to be included on the videotape of an examination; and omits a provision in the Senate version requiring that the videotape of a deposition be destroyed after 5 years.

However, under proposed 18 U.S.C. 3509(c) in Section 2009, the essential criterion for the use of televised testimony (or a videotaped deposition) for a child witness is whether a failure to use this procedure is likely to result in the loss of the child's testimony. Utilization of televised testimony (or a videotaped deposition) on this ground is unobjectionable.

However, we think that a likelihood of emotional trauma to the child, independent of a likely loss of evidence, is also a sufficiently compelling reason for the utilization of such a procedure. Moreover, proposed 18 U.S.C. 3509(c) requires proof of grounds for using this procedure by clear and convincing evidence. We believe that this sets too high a burden of proof, and that proof by a preponderance of the evidence should be sufficient. Finally, the provision in proposed 18 U.S.C. 3509(c) that the defendant's image must be displayed in the room in which the child is testifying and "within the child's field of vision" is not constitutionally required. See Craig v. Maryland, 110 S. Ct. 3157 (1990). This provision is a departure from the predominant approach in state statutes of authorizing one-way televised testimony, see id. at 3167-68, and could undermine the value of this procedure in protecting child victims from traumatization and intimidation.

We believe that Title XX could also be improved in a number of other respects, including the following: First, proposed 18 U.S.C. 3509(a), relating to guardians ad litem, should state that a guardian ad litem's access to grand jury materials is limited to that allowed to other victims or representatives of a victim.

Second, proposed 18 U.S.C. 3059(c)(6) puts the prosecutor and defense attorney in the room with the child, but without the judge. We recognize that the judge's presence is required in the main courtroom, but we think it may be advisable to provide for the presence of a judicial officer such as a magistrate, not to make rulings but essentially to keep order and to preserve appearances.

Third, in proposed 18 U.S.C. 3509(g), although we are sympathetic with the interest in maintaining privacy, we are concerned that the prohibition of the use of identifying information is so broad that it could, for example, make it impossible for the prosecution to name a parent charged with molesting his child in an indictment. In addition, the scope of criminal liability in this paragraph is unclear; at a minimum, some level of intent should be specified. We would prefer a formulation along the lines of proposed Fed. R. Crim. P. 52.1(d) in the Senate bill.

Fourth, with respect to proposed 18 U.S.C. 3509(h) (victim impact statement), we would prefer that the more detailed language from proposed Fed. R. Crim. P. 52.1(h) in S. 1965 (as opposed to the final Senate version in S. 1970) be used.

Fifth, we cannot support proposed 18 U.S.C. 3509(i) (speedy trial) without a change. The authority to move for expediting the proceedings should be limited to the prosecutor, because the government's ability to gather evidence and develop a solid prosecution in multi-victim cases (surely among the ones that are

of the most "special public importance") may be hampered if such a case is expedited against the will of the prosecutor.

Sixth, we believe it would be helpful in section 2012(a), relating to child abuse reporting, to clarify that "reasonable corporal punishment" by a parent or guardian does not constitute reportable child abuse.

XXI. Banking Law Enforcement

This Title has been passed by the House of Representatives as a separate bill and will not be addressed in these comments.

XXII. Miscellaneous

This Title contains "miscellaneous" amendments. Sections 2206-11, which concern drug penalties and a definition in the money laundering statute, are Administration proposals. The Department of Justice supports their enactment.

Section 2201 would authorize $25,000 annually for the FBI and $25,000 annually for DEA to pay certain "humanitarian expenses" for employees or members of their families. This is an important provision to help alleviate the suffering of agents and family members in the aftermath of personal tragedies related to their official duties, such as the murder or serious injury of an agent by a criminal or serious illness occurring at a remote post while on official business. The Department of Justice supports enactment of this provision.

Section 2202 contains amendments to 18 U.S.C. 1307 relating to sports-related lotteries. The Department of Justice takes no position with respect to this proposal at this time.

Section 2203 amends 21 U.S.C. 853a. As one of the "user accountability" provisions enacted by the Anti-Drug Abuse Act of 1988, 21 U.S.C. 853a gives federal and state judges the discretion to punish persons convicted of drug offenses by making the offender ineligible for certain federal benefits for specified periods of time.

Section 2203 would substitute a mandatory rule of ineligibility for federal benefits for specified periods. An automatic loss of eligibility would be triggered by a conviction of either a drug distribution offense for which the prison sentence imposed is more than one year or two or more drug offenses (including misdemeanors) within a 10-year period. While this change will result in an increased burden on various federal agencies affected by this provision, it improves the benefits ineligibility sanction for the purpose of punishing and

deterring drug use. Therefore, the Department supports this change.

The Department is concerned, however, with a few aspects of section 2203. First, the section extends rule-making authority to the Secretary of Health and Human Services rather than the Attorney General. The Department of Justice has expended substantial resources on the implementation of current 21 U.S.C. 853a. In recent months, the Office of Justice Programs has devoted considerable effort to developing its role as the clearinghouse for ineligibility notification to the appropriate federal agencies. We accordingly believe that the assignment of rulemaking authority proposed in section 2203 would be conterproductive at this juncture, and recommend that section 2203 be amended to vest such authority in the Attorney General. Second, section 2203 does not contain the exception included in the current provision for individuals cooperating in the prosecution of a federal or state offense. This exception is important for prosecutors who must persuade certain offenders to testify on behalf of the government. Third, the definition of federal benefit in section 2203 does not include the language of the definition in current 21 U.S.C. 853a which read as follows: "the term 'Federal benefit' . . . means the issuance of any grant, contract, loan, professional license, or commercial license. . ." (emphasis added). The words "the issuance of," which are not in the definition of federal benefits in section 2203, appear to limit the loss of eligibility to future benefits. This formulation avoids several difficulties with terminating benefits after they have been received.

We also recommend including in the amendment in section 2203 a definition of "drug or narcotic offense that consists of the distribution of a controlled substance" which makes it clear that the full range of trafficking activities is covered. An appropriate definition would be "any offense that consists of manufacturing, creating, importing, distributing, or dispensing a controlled substance or counterfeit substance, possession with intent to engage in such conduct, or an attempt or conspiracy to engage in such conduct."

Section 2205 provides that state-certified or commissioned railroad police officers may exercise pertinent enforcement functions in other states, subject to regulation by the Secretary of Transportation. The Department of Justice has no objection to this provision.

Section 2213 would increase the number of pilot prison industries projects authorized under 18 U.S.C. 1761(c) from 20 to 50. The Department of Justice supports this change.

The other sections in Title XXII -- sections 2204 and 2212 -- raise fundamental concerns, and the Department of Justice strongly opposes their enactment:

Section 2204 is purportedly a "codification" of three of the existing exceptions to the exclusionary rule -- the Leon "good faith" exception for searches under warrants, the "inevitable discovery" exception, and the "independent source" exception. However, enacting a statute that just said what the Supreme Court's caselaw already says would do little for law enforcement. Moreover, the language of section 2204 is actually much narrower than the existing exceptions, and it could discourage or prevent desirable caselaw developments.

The attempted codification in paragraph (1) of section 2204 of the "good faith" exception of United States v. Leon, 468 U.S. 897 (1984), limited to warrant cases, could inhibit the courts from extending the same exception to non-warrant cases in which officers acted in an objectively reasonable belief that their conduct was lawful. The federal courts in the Fifth and Eleventh Circuits have applied such a broader exception for 10 years (since the decision in United States v. Williams, 622 F.2d 830 (5th Cir. 1980)) with no adverse consequences. The Supreme Court may adopt such a general "good faith" exception when it decides a case that squarely presents the issue.

Paragraph (2) of section 2204 limits the "inevitable discovery" exception to the exclusionary rule, see Nix v. Williams, 467 U.S. 431 (1984), to cases where the evidence would inevitably have been discovered by lawful means "within a reasonable time" and "in essentially the same condition." These limitations on the exception -- "within a reasonable time," "in essentially the same condition" -- do not exist under current law. The meaning of "reasonable time" and "essential sameness" of condition would give rise to endless litigation, and reliable evidence of guilt that is admissible under existing law would be excluded on the basis of these novel requirements.

Similarly, paragraph (3) of section 2204 would narrow the "independent source" doctrine. See Murray v. United States, 487 U.S. 533 (1988); Nix v. Williams, 467 U.S. at 443-44. This doctrine, in part, admits evidence that is observed or discovered in an unlawful search, if the same evidence is later independently obtained by lawful means. The independent source doctrine now applies in both warrant and non-warrant cases, but the formulation of paragraph (3) would arbitrarily limit it to warrant cases.

A further problem with section 2204 is that it selects a few of the existing exceptions to the exclusionary rule, but says nothing about the many other exceptions that are recognized under current law. For example, the exclusionary rule does not bar the

use of evidence to impeach a defendant's testimony at trial, does not bar the use of evidence obtained in objectively reasonable reliance on an invalid statute, and does not bar the use of evidence having a sufficiently attenuated relationship to a Fourth Amendment violation. See James v. Illinois, 110 S. Ct. 648, 651-52 (1990); Illinois v. Krull, 480 U.S. 340 (1987); United States v. Ceccolini, 435 U.S. 268 (1978). The exclusionary rule is also generally inapplicable in habeas corpus proceedings and wholly inapplicable in grand jury and deportation proceedings. See Stone v. Powell, 428 U.S. 465 (1976); United States v. Calandra, 414 U.S. 338 (1974); INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

Under the formulation of section 2204, defendants could argue that a codification limited to three specific exceptions reflects implicit legislative disapproval of the other existing limitations on the exclusionary rule, and that the other limitations should accordingly be reconsidered. Hence, section 2204 not only fails to provide an accurate codification of the exceptions it purports to address, but also potentially jeopardizes the exceptions and limitations it does not address.

Section 2212 would eliminate all procedural default and retroactivity limitations on raising race-related claims in challenges to capital sentences imposed before the enactment of the bill, where a claim is based on Supreme Court decisions preceding the bill's enactment and a habeas petition raising the claim is filed within a year of enactment. Moreover, even if the same claim has already been considered and rejected by the federal courts, another determination on the merits would be required if it were raised in the specified time period. This section has potentially devastating consequences for the integrity of the capital sentences that are now in effect.

One obvious target of section 2212 is the Supreme Court's decision in Allen v. Hardy, 478 U.S. 255 (1986). The Court in that case declined to apply retroactively the rule of Batson v. Kentucky, under which a prosecutor may be required to provide a non-invidious reason for the use of peremptory challenges to strike potential jurors from a particular racial group. However, as the Court explained in Allen v. Hardy, this change was not fundamental to the integrity of the truthfinding process because pre-Batson law already provided effective assurances of an unbiased jury (478 U.S. at 259). Moreover, the costs of retroactive application to the administration of justice would be extreme, since a prosecutor could rarely if ever recall and explain why he struck particular jurors in a particular case, if the issue was raised for the first time years after the trial (478 U.S. at 260-61).

Section 2212 also goes far beyond its unjustified overruling of Allen v. Hardy. It would allow any race-related claim based

on current law (e.g., a challenge to grand jury composition) to be raised for the first time in a federal habeas corpus petition challenging an existing capital sentence, even if there was no justification at all for failing to raise the same claim in state proceedings, and even if the lapse of time from the trial has made it difficult or impossible to answer the claim. This provision is irreconcilable with a rational system of criminal procedure in which rules exist to ensure that claims are presented in an orderly and timely manner.

Finally, section 2212 would establish an arbitrary discrepancy between race-related claims and every other type of claim in terms of retroactivity and procedural default rules. While claims alleging racial discrimination implicate fundamental values in our system, the same is true of other types of claims, such as claims of gross judicial or prosecutorial misconduct, and claims impugning the reliability of the fact-finding process at trial. There is no basis for providing uniquely lenient rules for the particular class of claims covered by section 2212 in relation to attacks on capital sentences.

EXHIBIT A

Office of the Attorney General
Washington, D. C. 20530

August 27, 1990

Honorable Richard G. Darman
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Darman:

Below are some details of the Department of Justice's plans to implement the sequester mandated under the Balanced Budget and Emergency Deficit Control Act of 1985, as amended. The sequester for the Department of Justice is $3,168,455,000 from total available resources. This includes $577,873,000 from the Federal Bureau of Investigation (FBI), $401,031,000 from the Immigration and Naturalization Service (INS) and $186,475,000 from the Drug Enforcement Administration (DEA).

A sequester of nearly one-third of available resources has severe effects, including furloughs ranging from 22 to 110 days. Besides a furlough of 22 days, the FBI is proposing a reduction in force (RIF) of 6,160 staff to save $308 million because the FBI believes it is fairer to employees to terminate them so they can find other full-time jobs, rather than paying only two-thirds of their salaries for a full year.

Of course, all discretionary spending has been curtailed, and the Attorney General has already issued a hiring freeze and cancelled administrative travel.

Highlights of the effects include:

The sequester of 32.4 percent would greatly reduce the U.S. Parole Commission's ability to protect the public from criminal behavior by Federal offenders. The sequester would result in furloughs of up to 111 days for each employee.

The Tax Division would have to furlough all staff for 77 days. While the revenue effect on the Federal Treasury is difficult to quantify, the amounts at issue in the Tax Division's current and anticipated litigation suggest that the revenue loss could be in the billions of dollars. The reduction in the Tax Division's Criminal Tax Prosecution Activity would severely impair the Division's ability to participate in special enforcement programs targeting narcotics trafficking, financial institutions fraud, motor fuel excise tax cases and public corruption.

The Criminal Division would be unable to carry out its mandate in resolving the savings and loan crisis. The Division has committed over 50 percent of its Fraud Section resources to the investigation and prosecution of financial institution fraud. A sequester of 32.4 percent will result in the virtual shut down of the Dallas Bank Fraud Task Force as staff will be unavailable to investigate and prosecute even the high priority cases. Further, there will be no "rapid response teams" (as the Attorney General promised recently) to respond to potential criminal activity in financial institutions, thus preventing further deterioration in the assets of an institution or preserving documents for use in later prosecutions.

The Criminal Division's Office of International Affairs, because of a one-third reduction in its workforce, would have to stop processing requests from U.S. attorneys and foreign governments for legal assistance and prisoner extraditions.

A sequester of 32.4 percent will result in devastating consequences for the bulk of the Department's civil litigation programs. The Civil Division expects to implement across-the-board furloughs of 86 days, eliminate most of its automated litigation support program, and shut down litigation in hundreds of cases. In particular, the Division will be unable to pursue litigation in many of the savings and loan cases, and other important litigation will be deferred or dropped. The cost to the Treasury of the loss of this caseload will result in expenditures or lost revenues that could go as high as $108 billion.

The Environment and Natural Resources Division projects a probable furlough of 50 days. The Division will cut all discretionary spending, drop litigation in support of private party actions, scale back its support of the Exxon-Valdez case, and discontinue some 200 affirmative wetlands cases. As a result of the sequester, the consequences for the Nation's environment will be severe.

Under the Americans with Disabilities Act of 1990 (ADA), the Civil Rights Division has new major responsibilities in the areas of regulation and policy development, technical assistance, administrative enforcement, complaint investigations, compliance reviews, and litigation. The sequester would effectively eliminate the accomplishment of any of the ADA objectives within the time frames established by Congress and the President. Furthermore, the Division would be unable to meet the public outreach requirements of the Act.

Under the proposed sequestration level, the Civil Rights Division would prosecute existing cases only. The Division would not conduct any new investigations or bring new cases to trial

and, as a result, the civil rights of Americans in the areas of employment, education, and housing would not be secure.

The U.S. Attorneys expect that the sequester will result in a furlough of approximately 105 days. In the area of criminal litigation and prosecutions, the President's Violent Crime initiative would be severely curtailed, and the asset forfeiture program would be severely hampered. Civil litigation would be deferred where possible, and many cases would be settled at potentially less than favorable outcomes for the Government.

For the U.S. Marshals Service (USMS), certain court proceedings will require continuances due to the inability to guarantee safety, resulting in the release of defendants in cases that violate Speedy Trial Act requirements. The number of new witnesses accepted into the Witness Protection Program will be reduced. Most prisoner productions will be delayed, disrupting court schedules and exacerbating overcrowding of Federal detention space.

In the Support of U.S. Prisoners appropriation, the USMS would be forced to remove prisoners from State and local jails in May 1991, requiring outright release of prisoners or transfer to already overcrowded Federal Prison System (FPS) facilities. The elimination of funding for the Cooperative Agreement Program would reduce the guaranteed detention space available to USMS in State and local jails by approximately 375 beds.

A sequester of the Assets Forfeiture Fund would seriously curtail funds available for investigative expenses, i.e., awards for evidence, purchase of evidence, and equipping of conveyances; and program management including special contract services, ADP equipment, and training. Maintenance and upkeep of seized assets will also have to be kept to a minimum, thus possibly reducing their potential future value. To avoid additional costs of managing real property, agents may have to defer action on real property and other assets with high management expenses on new cases. In addition, the Department may have to reduce the number of equitable sharing cases it chooses to take in order to absorb reductions in the equitable sharing program. An indirect effect is the reduction in revenues that will ultimately result from cutbacks in other Federal programs. Forfeiture revenues could drop from the $500,000,000 currently estimated to $400,000,000 or lower in 1991 and remain depressed in 1992.

The required staffing reductions and severe restrictions placed on operational travel and the infrastructure in general, would destroy the basic foundation of the Organized Crime Drug Enforcement Task Force (OCDETF) program. The OCDETF program's unprecedented success in fostering cooperation among law enforcement agencies from all jurisdictions would be at risk. Coordination of multiple investigations, use of financial

investigations to reach otherwise invulnerable targets, and the effective use of attorneys at the early stages of investigations would be in jeopardy.

For the FBI, the 1991 sequester would significantly reduce the Bureau's ability to thwart terrorist activity that may result from the current Iraqi crisis. The President's financial institution fraud initiative would be severely hampered, curtailing current investigations and prohibiting the initiation of new investigations. In addition, the FBI's current efforts to address the Organized Crime National Strategy would be lessened, causing a potential for the full reemergence of criminal organizations. The sequester would also preclude the FBI from initiating investigations which target Asian Organized Crime groups, leaving this country vulnerable to this increasing threat. Another important responsibility which would be diminished is the FBI's involvement in the war on drugs.

For DEA, the 1991 sequester will result in the loss of <u>one-third</u> of DEA's agent workforce at a time when drug law enforcement remains a top priority of this nation. There would be a drastic reduction to the Andean initiative. The safety of DEA investigators and chemists would be put in jeopardy as worn out or obsolete equipment will not be replaced in 1991.

For the INS, the 1991 sequester would cause delays of up to four hours at land ports-of-entry because INS will have to furlough staff for 48 days. The Border Patrol would be forced to drastically curtail its border and checkpoint operations. Only stationary border watches will be possible as fuel and maintenance funds would be reduced. Similar reductions would result in the air operations program, signaling to illegal border crossers and drug smugglers that INS's ability to detect this activity is severely constrained. INS would be forced to reduce the number of detainees by 40 percent. Extensive backlogs in processing of deportation cases would result, causing additional burden on detention space.

In the Inspections User Fee account, the reductions in temporary inspections staff and furloughs of approximately 49 days per person will double the average wait to two hours for inspections at international airports. Resources will not be available to expeditiously process excludable aliens. In that case, inadmissable aliens will have to be paroled into the community.

The Legalization program will be phasing down in 1991. However, under sequestration the program will close down much earlier than planned, without completion of the Phase II caseload. It is possible that INS could be found in contempt of court if cases are not reviewed in a timely fashion. In

addition, orderly processing of applications for permanent residents under Phase II of the program would be impossible.

In the Immigrations Examinations Fee account programs, INS will furlough staff for 13 days and postpone filling new positions (approved in 1990 because of increased workload). This action will cause case processing delays, creating extensive backlogs in adjudications cases. Other plans for expansion in newly-implemented programs such as the Family Fairness Program and the Employment Authorization Program will have to be delayed even though fees are being collected for provision of these as well as other adjudication services.

The Federal Prison System will furlough staff for 85 days. Considering the current overcrowding in Federal prisons, a 1991 sequester to FPS would compromise security at Federal institutions and jeopardize the lives of inmates, staff, as well as the safety of the community. The probability of prison disturbances and incidents of violence would increase as would escapes and damage to property. Approximately 4,000 inmates in contract facilities would have to be returned to already overcrowded FPS facilities. Overcrowding would rise from the current 170 percent to 186 percent. Finally, FPS would be unable to activate any new facilities, totaling 3,000 beds; hence, millions of dollars in capital investment would sit idle.

The sequester of 32.4 percent for the Office of Justice Programs (OJP) would have a profound impact on OJP's State and local grant programs. The reduction for the Anti-Drug Abuse program would reduce the number of arrests and prosecutions of drug offenders in every state in the nation. For the National Institute of Justice (NIJ), the sequester would restrict NIJ's ability to conduct evaluations of drug grant programs and in the Bureau of Justice Statistics the sequester would create irreplaceable data gaps in series which have been continuous for nearly two decades. It is also projected that the sequester would result in the necessity to furlough OJP employees for 65 days, which equates to approximately 2.5 days per pay period for each employee.

As instructed in your memorandum of August 7, enclosed are the program, project and activity listings and the plans by Department component.

Sincerely,

William P. Barr
Acting Attorney General

Enclosures

U.S. Department of Justice

Office of the Deputy Attorney General

EXHIBIT B

The Deputy Attorney General

Washington, D.C. 20530

August 2, 1990

Mr. Sheldon Krantz
Chairperson
ABA Criminal Justice Section
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, D.C. 20036

Dear Mr. Krantz:

This letter conveys the views of the Department of Justice on the draft revisions of the ABA's Prosecution Function Standards that have been circulated for comment in anticipation of discussion and possible action by the Criminal Justice Section at the ABA meeting in Chicago.

We have serious objections to several of the Standards, which we believe would have a harmful effect on the criminal law enforcement process. A few appear to be attempts to make substantive changes in the rules of criminal procedure in favor of defendants, in areas where the defense bar has been unsuccessful in convincing legislatures or courts of its position. In this regard, two of the proposed new Standards are of particular concern to us: the restrictions on the issuance of subpoenas to lawyers in Standards 3-3.6(c) and (d), and the limitations on the use of statutory fee forfeiture provisions in Standard 3-3.9(f).

Before discussing in detail our substantive objections to these and other provisions of the Standards, we must raise more fundamental questions about the American Bar Association's role in promulgating rules of conduct for government prosecutors, and the process by which these particular rules were developed.

The Prosecution Function Standards purport to provide a comprehensive set of guidelines for prosecutorial conduct in virtually every situation encountered in the course of a criminal prosecution. But the "prosecution function" is already subject to a multiplicity of overlapping rules and standards created and enforced by politically accountable institutions responsible under law for regulating the conduct of attorneys in general and of prosecutors in particular.

Prosecutors are first and foremost bound by their oaths of office faithfully to execute the laws which the legislature has promulgated, in accordance with applicable statutory and constitutional standards. They must also adhere to codes of conduct imposed by their own executive agencies. Federal prosecutors must comply with this Department's Standards of Conduct, and with its policies and practices governing other aspects of the prosecution function, such as the Principles of Federal Prosecution. State prosecutors are generally governed by analogous rules and policies of their employing authority. In addition, both state and federal prosecutors must comply with procedural rules established by the courts for the conduct of criminal prosecutions. Finally, this Department has historically required its prosecutors, insofar as it is consistent with carrying out their federal law enforcement responsibilities, to conduct themselves in accordance with the ethical requirements of those state and local jurisdictions in which they are licensed to practice.

By contrast, the American Bar Association has no mandate, formal or informal, to make rules for the government's conduct of its law enforcement business. Whatever claim the ABA may have to set standards of conduct for the legal profession generally, this claim is at best attenuated where the particular subset of lawyers targeted for regulation is already by law subject to regulation by duly constituted governmental authorities.

Furthermore, to the extent that the ABA's standard-setting authority has historically derived from a consensus of the affected parties, that basis for legitimacy is conspicuously absent in this case. The entities within the ABA that were given responsibility for promulgating revisions to the Prosecution Function Standards - the Criminal Justice Section and its Committee on Standards - have disproportionately few prosecutors among their members, so that their qualification to make rules governing the conduct of a prosecution must presumptively be questioned. Indeed, with respect to a number of the proposed Standards, we understand that the few prosecutors on the Standards Committee each voted to oppose adoption, but were overwhelmingly outvoted by the other members of the Committee. The Section's failure to include at least a majority of prosecutors on the committee charged with developing and recommending standards of prosecutorial conduct undermines at the outset any legitimacy these standards might otherwise have enjoyed within the prosecutorial community.

Given their origin, we question whether the Standards can even properly claim that title. In its ordinary sense, a "standard" is a model or guide generally sanctioned by the custom or consensus of the community which is its object. While standards may of course be aspirational, they may not seek to

impose requirements that the relevant community would find unrealistic, impracticable, unnecessary, or contrary to proper practice. Accordingly, in order to be accepted, prosecutorial standards must embody or typify the conduct of prosecutors acting in conformity with the common understanding of proper prosecutorial behavior. Insofar as these "standards" break new ground, or seek to regulate conduct that has not heretofore been regulated, one might have thought it particularly important to test their validity within the prosecutorial community itself.

But the Council has done nothing to ensure that the views of prosecutors are given any weight in the rulemaking process. The process in this case unfortunately lends support to an argument that these Prosecution Function Standards are in fact more reflective of the interests of the defense bar than they are of prosecutors themselves.

The shortcomings in the process leading to their adoption are predictably reflected in the standards themselves. While it is true that many of the Standards state perfectly straightforward and uncontroversial ethical and legal precepts to which most prosecutors are already required to adhere by one of the regulating authorities previously mentioned, in other respects the Standards would require prosecutors to act in a way that does not reflect the practice in state and federal courts, and is not required by any law or applicable rule of conduct. In a few cases, as will be discussed at greater length below, the Standards actually conflict or potentially conflict with other requirements with which prosecutors are legally bound to comply. Thus, the Standards represent an unwarranted and ill-conceived intrusion into a domain that properly belongs to the legislature, the executive authority, and, where appropriate, the courts. It is these government entities, not the ABA, to which the prosecutor is ultimately answerable for his conduct under law.

We take little comfort from the partial disclaimer that introduces the Standards (they "are not intended to be used as criteria for the judicial evaluation of alleged misconduct by the prosecutor to determine the validity of a conviction," though they "may . . . be relevant" in this regard, Standard 3-1.1). In the past a number of courts, including the Supreme Court, have found the Standards "relevant" support for a holding. See, e.g., Caldwell v. Mississippi, 472 U.S. 320, 334 & n. 6 (1985); United States v. Young, 470 U.S. 1 (1985). And, while we appreciate the fact that the Criminal Justice Section Council voted last fall not to make the Standards the vehicle for an explicit expansion beyond the Model Rules of the range of conduct that can be labeled "unprofessional," we fully expect that some courts and local bar associations will still be receptive, as they have been in the past, to suggestions that a failure to comply with the Prosecution Function Standards should be the occasion for sanctions against individual prosecutors. See, e.g., United

States v. Starusko, 729 F. 2d 256, 264 (3d Cir. 1984); People v. Terry, 720 P. 2d 125, 130-31 (Colo. 1986).

In sum, we believe that the ABA has no authority to set standards for the conduct of prosecutors, particularly where they have been promulgated without the substantial participation and consent of the prosecutorial community, and that in many of their particulars these standards go beyond and even conflict with what is already required of prosecutors under applicable laws and judicial decisions.

Turning to the merits of the Standards themselves, we discuss first those dealing with attorney subpoenas and attorney fee forfeiture. These Standards strike us as stark examples of regulation without reference to, indeed in apparent defiance of, the common understanding of proper prosecutorial conduct, as mandated by the legislature and affirmed by the courts. We object to them, and urge that they be deleted from the Standards in their entirety.

Standard 3-3.6(c) and (d): Standard 3-3.6(c) prohibits prosecutors from issuing subpoenas to attorneys to provide evidence "concerning a person or entity who or which is or has been represented by the lawyer/witness" without "prior judicial approval after an opportunity for a judicial hearing." Standard 3-3.6(d) adds that a prosecutor "should not seek or issue a subpoena to a lawyer to present evidence about a past or present client, unless it is essential and all reasonable attempts to obtain the information from alternative sources have proven unsuccessful." Standard 3-5.6(e) extends the requirements of Standard 3-3.6(c) to the context of trial.

In previous correspondence between Department officials and the ABA regarding changes in the Model Rules of Professional Conduct, the Department has vigorously opposed any attempt to use ethical and disciplinary rules to impose restrictions on the issuance of attorney subpoenas. Standards 3-3.6(c) and (d), as well as Standard 3-3.5(e), represent a continuation of the ABA's effort to use extra-judicial and extra-legislative means to create such restrictions. The Department continues to regard the ABA's pronouncements in this area as illegitimate and wholly unwarranted.

The Department believes that the restrictions embodied in these standards would impede legitimate criminal investigation by restricting the government's ability to subpoena attorneys to testify regarding unprivileged matters. Requiring judicial approval and an adversary hearing would obstruct and delay the grand jury's function and interfere with its historic independence. The grand jury's right to every person's evidence has never been construed to exclude an attorney's testimony regarding unprivileged matters. Such hearings also would

needlessly consume judicial resources and threaten the secrecy of grand jury proceedings.

The Standards are unnecessary to protect the attorney-client relationship. The grand jury cannot be used to obtain evidence subject to the attorney-client privilege, and internal Department of Justice procedures guarantee that grand jury subpoenas will not be abused. In actual practice, there has been no demonstration of abuse; indeed, most subpoenas are complied with uneventfully.

Standard 3-3.12: "[A] prosecutor should not use statutory forfeiture provisions to prevent a defendant from paying counsel of choice or paying other expenses incident to presenting an effective defense, in the absence of reasonable grounds to believe that there payments constitute a sham, fraud, or criminal conduct."

This Standard represents the most extreme example of overreaching in the Prosecution Function Standards. Several duly enacted provisions of federal law, as well as the statutes of several states, require the forfeiture of money or property used in or derived from criminal activity. See, e.g., 18 U.S.C. 1963(a); 21 U.S.C. 853(a) and 881. These statutes contain no exceptions for funds that a defendant intends to use to pay counsel. Indeed, the United States Supreme Court has expressly held that these statutes authorize the forfeiture of funds to be used for attorneys fees and that the forfeiture of such funds does not violate the Constitution. See Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989); United States v. Monsanto, 109 S. Ct. 2657 (1989). Federal prosecutors have a duty, imposed by statute, regulation, and the prosecutor's oath of office, to institute proceedings to implement these statutes. See 28 U.S.C. 544, 547.

To the extent that Standard 3-3.12 would prohibit a federal prosecutor from taking action that has been authorized by Congress, found constitutional by the Supreme Court, and required by statute and the prosecutor's oath of office, it conclusively demonstrates that the promulgators of the standards do not represent the prosecution community, as no prosecutor would endorse a standard that would force her or him to violate the law. Indeed, it is hard not to see Standard 3-3.12 as an undisguised attempt by the defense bar to overturn the Monsanto and Caplin & Drysdale decisions. The ABA has no authority or right to seek to impose on prosecutors a restriction that they are duty-bound to ignore.

Other Standards provide further illustrations of their overall incongruity with accepted prosecutorial practice.

Standard 3-2.8: Standards 3-2.8(a), (b) and (c) properly urge prosecutors to act ethically in dealing with courts and opposing counsel. Subsection (e), however, appears to impose a new and extremely questionable requirement on prosecutors. After stating that prosecutors should "strive to develop good working relationships with defense counsel," this Standard adds the following: "In particular, a prosecutor should assure defense counsel that if counsel finds it necessary to deliver physical items which may be relevant to a pending case or investigation to the prosecutor, the prosecutor will not offer the fact of such delivery by defense counsel as evidence to a tribunal for purposes of establishing defense counsel's client's culpability." The discussion of this provision states only that the commentary will note "that there can be exceptions to this rule."

Without further commentary or explanation, the Department must oppose this Standard. The language is vague, and the scope of the provision is unclear. For example, the phrase "finds it necessary" may refer both to compliance with subpoenas and to a perceived need to cooperate with the government.

Moreover, as written, the Standard appears to go far beyond what the law requires. In some circumstances, the Fifth Amendment privilege against self-incrimination prohibits the government from using a defendant's act of producing evidence against the defendant. See Fisher v. United States, 425 U.S. 391, 410 (1976). Obviously in those cases the Department would have no complaint with the Standard. The act of production doctrine has no application to any non-compelled production, however. To the extent that the Standard would prevent the government from introducing evidence against a defendant when defense counsel turns over evidence to the government in response to something less than legal compulsion, the Standard is unacceptable.

More significantly, corporations and other collective entities do not have a Fifth Amendment privilege; thus, the act of producing evidence or documents can be used at trial to authenticate documents or to prove the corporations' possession of evidence. See Braswell v. United States, 487 U.S. 99 (1988). In these cases, the ABA Standard appears to impose an unwarranted and wholly unsupported restriction on the government.

Standard 3-3.4(b): "Prosecutors should take reasonable care to insure that, absent exceptional circumstances, no arrest warrant or search warrant should issue without a prosecutor's approval."

This is not a new standard, but the Department believes that it does not reflect current practice and imposes an unnecessary burden on federal criminal investigations. Although Assistant United States Attorneys frequently are involved in the search warrant process, that practice is far from universal. Federal

investigatory personnel are adequately trained to determine when an investigation has gathered sufficient probable cause to seek a search warrant. They do not require the aid of an Assistant United States Attorney in every case. The Department suggests that the Standard should state instead that prosecutors should take reasonable care to ensure that investigators working at their direction or under their authority are adequately trained in the standards governing the issuance of arrest and search warrants and should inform investigators that they should seek the approval of a prosecutor in close or difficult cases.

Standard 3-3.9 (f): "The prosecutor should not condition a dismissal of charges, nolle prosequi, or similar action on the accused's relinquishment of the right to seek civil redress."

As the discussion of this Standard acknowledges, the Supreme Court has held that in the absence of a prosecutorial misconduct or overreaching, it does not violate public policy for a prosecutor to condition dismissal of charges on the accused's agreement not to bring a suit under 42 U.S.C. 1983. See Town of Newton v. Rumery, 108 S. Ct. 1187 (1987). In light of this holding, the proposed standard is unjustified, and the Department opposes it.

Standard 3-5.3: "The prosecutor should not peremptorily strike jurors solely on the grounds of race, religion, national or ethnic background, or sex." The discussion of the Standard states that "this constitutional requirement should also be an ethical requirement."

This Standard for the most part is a restatement of the Supreme Court's decision in Batson v. Kentucky, 476 U.S. 79 (1986). The Department does not condone the use of peremptory challenges for any improper purpose and therefore largely endorses this Standard. The Department notes, however, that the Standard represents an extension of the Batson decision. Batson addressed only the use of peremptory challenges to exclude members of minorities from petit juries. The government has argued, and at least one court of appeals has held, that Batson does not extend to peremptory challenges based on sex. See United States v. Hamilton, 850 F.2d 1028 (4th Cir. 1988), cert. denied, 110 S. Ct. 1109 (1990). Thus, this Standard appears to impose an unsupported restriction on prosecutors, and to this extent the Department opposes it.

* * * * * * *

It should be clear that the Department has substantial misgivings about the efficacy and propriety of a private organization such as the American Bar Association making rules for the conduct of government prosecutors outside the channels duly established by law for doing so. Nonetheless, the

Department would be willing to participate in reformulating the Prosecution Function Standards if appropriate measures could be taken to ensure that the end product would in fact be consistent with the actual standards of our profession. At this time, however, the Department must object to the proposed Standards in their entirety.

Sincerely,

William P. Barr
Deputy Attorney General

cc: L. Stanley Chauvin, Jr.
President, ABA

S. HRG. 101-651, PT. 7

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

CONFIRMATION HEARINGS ON APPOINTMENTS TO THE FEDERAL JUDICIARY

JUNE 27, JULY 11, 16, 18, AND 19, 1990

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Senator THURMOND. I think you may have heard what I said about judicial temperament. There is no excuse in the world for a Federal judge to yell out at witnesses or jurors or other people in the courtroom. I have seen that done and seen people embarrassed unnecessarily. Do you think as judge you can restrain yourself and treat people with all courtesy?

Judge MORENO. I think so, Senator Thurmond. I think it is very important for judges to never forget that we are human beings, that we were lawyers once representing parties, and I think courtesy is one of the first lessons that I learned at home. And I haven't lost it through my judicial career, I hope.

Senator THURMOND. Now, suppose you had a personal feeling about a matter, but the courts had handed down a different decision on that subject. How would you act?

Judge MORENO. I would follow precedent and set aside my personal feeling.

Senator THURMOND. That is all, Mr. Chairman. Thank you very much.

Judge MORENO. Thank you, Senator Thurmond, Mr. Chairman.

Senator KOHL. Thank you, Senator Thurmond. Thank you, Judge Moreno.

Senator THURMOND. Hope you have a successful tenure on the bench.

Judge MORENO. Thank you, sir.

Senator KOHL. Our last nominee here today is William Barr who has been nominated to be Deputy Attorney General. That is the number two slot at the Justice Department, and it is an extremely important position in our Government. If confirmed, Mr. Barr will help the Attorney General formulate and implement Department policies and programs. He also will be responsible for supervising all the organizational units of the Justice Department.

Mr. Barr, if you will raise your right hand, do you swear that the testimony you shall give in this proceeding shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BARR. I do.

Senator KOHL. Mr. Barr, if you have any members of your family with you, we would be delighted to meet them.

TESTIMONY OF WILLIAM P. BARR, FALLS CHURCH, VA, TO BE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. BARR. Thank you, Mr. Chairman. I would like to introduce my wife Chris and my daughters, Mary, Patricia, and Meg.

Senator KOHL. It's nice to have you all with us here today.

Mr. Barr, recent newspaper reports have criticized Attorney General Thornburgh for a rigid management style. For example, the New York Times reported that he "bypassed the traditional hierarchy in favor of running the Department through a handful of intensely loyal aides, most of whom have served him since he was Governor of Pennsylvania."

In response to these criticisms, you recently were quoted as saying, "There is a need to improve communications within the Department and open things up." If confirmed, Mr. Barr, what specific steps will you take, in your words, to "open things up"?

Mr. BARR. Mr. Chairman, the Attorney General has asked that I play the traditional role of the Deputy Attorney General in the Department, and I see my immediate tasks as reestablishing traditional reporting lines within the Department. That means having the divisions, the bureaus, and the various components report through the Deputy to the Attorney General; to ensure that there are open and good communications within the Department through regular meetings, both within the Deputy's office with the various components and between the Attorney General and the various components on matters that require his attention, and also to ensure good and open communications between the Department and the other agencies in the executive branch, the White House, and, of course, Congress.

My own relationship with the Attorney General is a direct one. I meet with him one on one every morning. I meet with him and other staff members every morning at 8:30. I have regular contact with him during the day, both by direct line with him on the telephone or just walking into his office. I meet with him at the end of every day to review the issues of the day and talk about what is coming up the next day. There is no one standing between me and the Attorney General.

Now, I think that the fact is that through circumstance, a situation developed at the Department where the Attorney General's personal aides were playing more of a management role than they traditionally have or should, given the structure of the Department of Justice. That came about partly because of the circumstances under which the Attorney General took office in the last days of the Reagan administration. There were just a few more months in the administration; people were leaving the appointed positions. It was hard to induce people to come in to take positions. And so I think starting at that time, the staff started playing more of a management role than was healthy.

That carried on, of course. The Attorney General was unable to get his first pick as deputy Attorney General, and things with my predecessor did not work out between the Attorney General and that deputy. And so there has been a period of time where the traditional role of the deputy has not been adhered to. But I think those days are behind us, and if the indication of the last few weeks is any indication, things are back on track as far as the management structure of the Department is concerned.

Senator KOHL. During your confirmation hearing last year, you described the Office of Legal Counsel as the "one place where you could go in the executive branch for that objective opinion not driven by any particular policy concerns." I suspect that you view the Office of the Deputy Attorney General quite differently as more policy- and goal-oriented. What do you hope to achieve if confirmed to your new position?

Mr. BARR. I think my principal goal is to perform the job that the Attorney General has asked me to perform effectively, and the job he has asked me to perform is to oversee the day-to-day work of the Department. And I don't want to gloss over what that means, that idea of the day-to-day work in the Department.

What is the business of the Department on a daily basis? It is enforcing all the laws of the United States across the board, not

necessarily running from crisis to crisis. And every day in the Department, there are dedicated men and women throughout the country doing just that. Sometimes there is not a lot of hoopla attached to it. Sometimes it is not the stuff of what headlines are made of. But every day in the Civil Division there are people winning cases for the United States, getting restitution from people who have defrauded the Government. There are people in the Civil Rights Division vindicating the civil rights of individual Americans. There are people in the Lands Division or the Environmental and Natural Resources Division catching polluters and bringing them to justice. There are investigators in the FBI throughout the country working and investigating cases at great personal sacrifice to themselves.

All of that work goes on on a daily basis, and it is the job of the deputy, as a politically accountable official, to see that that work is carried out with integrity, with constancy, with fairness, and with efficiency. In this day and age where law enforcement is being asked to do so much more with less, it is important that we use our resources efficiently. And that is part of the job of the deputy, to make sure that resources are brought to bear.

The bottom line is that is my goal. If at the end of my time in Government people say that I have accomplished that, that I worked with the Attorney General to enforce the laws across the board in that way, then I would be a happy man.

Now, beyond that, there are priorities that come up in our country, and it means sometimes shifting resources, making sure that there is energy there to deploy the resources and to respond to crises, such as the S&L crisis that we now have. Part of the role of the deputy is to see that those things are done.

Again, I hope at the end of my time in Government that people will say that I worked with the Attorney General to try to meet the crises in the best way possible.

Senator KOHL. Within the Department's broad jurisdiction, what particular areas interest you more than others from a broad policy point of view?

Mr. BARR. Well, I used to think constitutional law interested me when I was in OLC. I think the last few weeks have been an education for me about the breadth of activity in the Department.

I think that the issues that interest me most right now are the war on drugs, how we can more effectively combat the plague of drugs; white-collar crime, particularly in the S&L area; and from a management standpoint, how we can tell the story of the effective job that the men and women in the Department are doing, and keep a better handle on the activity that is occurring on a regular basis out in the field.

A lot of people in Washington forget that the Department is largely a field organization with 94 U.S. attorneys' districts out there and the FBI, DEA, the Border Patrol, INS out there doing a job throughout the country and throughout the world. Sometimes we don't capture all that they are doing and bring them to the attention of the country.

Senator KOHL. Will other officials in the Department have the same access to the Attorney General as you do, or do you plan to make them go through yourself first?

Mr. BARR. I think the normal reporting line would be through the Deputy Attorney General, but I think any Presidential appointee heading a component has the prerogative any time they want to go in and see the Attorney General. That was always the feeling that I had when I was Assistant Attorney General, and I never had any problems seeing the Attorney General. And I am trying to make clear to people that they should feel free if they feel they have to talk to the Attorney General to walk in and talk to him. I think there will be more regular meetings with the Attorney General.

I am not by nature someone who tries to exclude people. I try to include people, and I believe in teamwork, bringing people together, and not really caring who gets the credit, just as long as the job is done.

Senator KOHL. In what ways do you imagine that your role will be different as you play it out from the role played by Mr. Ayer, your predecessor?

Mr. BARR. I think in practice, the way things evolved, Mr. Ayer did not perform the role of the deputy, the traditional role of the deputy. He had a number of areas where he had responsibility, but generally a lot of components were reporting directly to the Attorney General and not through the deputy. And in that respect, I think certainly things have changed.

Senator KOHL. Mr. Barr, Senator Glenn has a bill to overturn a Justice Department effort to curtail the investigative authority of the inspectors general. I am a cosponsor of that bill. Although you did not write the legal opinion that restricts IG investigations, you supported it and enforced it. Aren't there two sides to this issue? And would you comment?

Mr. BARR. Yes, Mr. Chairman, there are two sides to the issue, as there usually are to most things.

The opinion you refer to was issued by my predecessor, and I would like to take a little time on this because it is an important issue. The opinion was issued by my predecessor, Doug Kmiec, on March 9, 1989. It was requested by the Department of Labor, and the issue was the general issue of whether the role of inspectors general also encompassed carrying out regulatory investigations that were by statute committed to enforcement components within the Department of Labor, for example, OSHA inspection or the Fair Labor Standards Act. And the IG at Labor was making what was thought by OLC to be a very broad claim of jurisdiction; that he could, if he was dissatisfied with the way an Assistant Secretary was carrying out an enforcement program such as OSHA inspections of plants, the IG could go in and start carrying out those regulatory inspections.

OLC wrote an opinion, the March 9 opinion, saying that, no, there is a basic distinction between the role of an IG and the enforcement components in a Department; that the IG is fundamentally a watchdog and should be overseeing the enforcement people but not actually supplanting them and carrying out their enforcement activity, because then there is no watchdog watching the watchdog and there are no clear lines of jurisdiction.

That was the general line drawn in the March 9 opinion. It was in response to that very broad question propounded by Labor Department.

I should say that OLC tried—I wasn't there, but I did go back and review the correspondence, and OLC tried to evade answering this question. They attempted to fend it off by telling Labor Department please come to us if you have a specific dispute and a specific investigation; but this is sort of a broad question you want us to answer, and unless you have a specific case, we really don't want to get into it. But both the IG, my understanding is, and the general counsel were adamant that they wanted guidance on this, and ultimately the opinion was issued.

That raised a lot of concern in the IG community that apparently had a number of effects. One, there was not clarity as to what that line meant in a number of particular circumstances, and there was also a concern that there was a chilling effect, that if an investigation was close to the line, that it might deter the IG from aggressively pursuing a matter.

I think a lot of that was confusion among the IG's and confusion as to what the opinion stood for. And since I took over at OLC, I think I have dealt with three or four matters, I have found in each one that the IG had jurisdiction. The one exception was in the situation with HHS and the FDA, where Secretary Sullivan delegated, my understanding is, all the criminal enforcement powers of FDA, took them away from FDA and delegated them to the inspector general, which gave us concern because that issue was also addressed in the OLC opinion. There, while I was concerned about that delegation, what I suggested was instead of fighting the whole macro issue of IG jurisdiction, let's focus on the specific cases we are worried about. Those were the generic drug cases.

So I took the position there that we could keep the IG operating in those cases. I felt the IG had jurisdiction in those cases because there already had been corruption or malfeasance in FDA, and there was a potential of collusion in these cases. So I felt the IG could operate on these cases, and I also wanted to keep the IG involved even in those cases where it ultimately turned out that the IG might not have jurisdiction because of the learning curve and because of the special expertise of the IG investigators. So we worked out a plan with HHS which kept the IG's involved and kept those cases moving.

Now, at the same time, I have been trying to address the broader concerns of the IG's. There was a hiatus period where—OLC started these negotiations while I was at OLC, and then when the new deputy came in, those negotiations were carried out by the deputy's office. Those negotiations didn't reach fruition, and after Don Ayer left, I was asked to take back up that task.

As Senator Glenn has pointed out, I did testify before his committee on, let me see, when was that? I guess April 25. I testified extensively about my views on the opinion, why I thought the general line that was drawn in the March 9 opinion was an important distinction to keep, but that I recognized that there might be specific factual circumstances that would lead us to try to adjust that line, but at the same time we shouldn't throw the baby out with the bath water and just forget about any distinction. Within those

parameters, we have taken up discussions again with the IG's under the auspices of OMB, and we have had a number of very productive meetings. Most of the areas of concern that were raised we have resolved, and I am happy to say that most of the areas of concern were areas where we agreed with the IG's that they had jurisdiction.

There are a few tough areas that we have been working on, and I made a proposal that I feel is quite reasonable and was well received by the two IG's with whom we are negotiating. And they have, I believe, taken it back to the rest of the IG's to see if we could work this out administratively.

At the same time, I think people have to recognize that we are not negotiating policy here. We are negotiating within the confines of a statute. I understand what negotiations are all about, and I understand what negotiating policy, when policy is on the table, what it is all about. But we have a view as to what the law means, and within that framework, we are trying to negotiate an administrative agreement. And we have gone a long way, and I am hopeful that we can do that.

Now, there is a statute or a proposed legislation that I believe it was reported out of the Senate Government Operations Committee, and my understanding is that if I fail to reach agreement with the IG's, that Congress or the Senate will act on that legislation—and of course, we are opposed to that legislation. We think it goes too far, but I understand the consequences of not being able to work this out administratively.

Senator KOHL. Senator Glenn and others would like your assurance, to the extent that we still have differences, that you will work as hard as possible with us to try and resolve those differences?

Mr. BARR. Absolutely, Mr. Chairman. I have been working very hard on this issue. I think very highly of the IG's. We had an excellent IG at the Department. We now have a new IG that I am looking forward to working with, and now in the deputy's position, I see more fully the value of having an IG. But the IG's are the natural allies of the Department of Justice, and I intend to work closely with the IG's. And I think those who have had the chance to deal with me directly understand that I don't commit this with any predisposition against IG's, and that my position is based on the prior opinion in OLC which I think was a good-faith reading of the law.

Senator KOHL. One other question before I turn it over to Senator Thurmond and Senator Specter. At your confirmation hearing last year to head the Office of Legal Counsel, you told this committee that OLC's role is not "to try to push the law one way or another or to play an activist role in the evolution of the law," but I am not so sure that OLC's role was quite so limited last year.

Last year, OLC told the President, as you know, that he could use the pocket veto between sessions of Congress to kill the Chinese student legislation, and you were quoted as going even further saying that "any adjournment of either House for longer than three days gives the President an occasion for a pocket veto if he should so desire."

Your advice seems to be in conflict with two D.C. circuit cases which suggest that a President can only use the pocket veto after

the final adjournment of Congress. Couldn't this be construed as pushing the law in a particular way?

Mr. BARR. I don't think it could be fairly construed that way, Mr. Chairman. I have testified on this extensively, and I would welcome anyone reviewing my testimony.

Our position is based on two Supreme Court cases, the pocket veto cases and the *Wright* case. I think one was decided in the 1920's and the other in the—I forgot. It might be the 1930's. And we feel that those Supreme Court cases are still controlling, and that the one D.C. circuit case does not trump the pocket veto case, which is a Supreme Court case. The other D.C. circuit case was vacated.

Now, this has been a long-standing issue with people lining up on all sides. My understanding is that the consistent position of OLC has been the position that I took. It was a position taken by my predecessors; it was the position taken by the head of OLC, Justice Scalia, when he was head of OLC. I know that there have been differences in the Department over time. Judge Bork took the opposite position, and there was internal debate in the Department. But it was a close issue of law, and my judgment was that we should adhere to the Supreme Court cases even though they were older Supreme Court cases.

Senator KOHL. Suppose we in Congress passed a bill that prohibited the President from using pocket vetoes except after the final adjournment of a Congress. Would that settle the matter in your mind?

Mr. BARR. Well, no. I think that the pocket veto case, the Supreme Court case which construes the Constitution specifically deals with intersession vetoes and anticipates the issue of whether Congress can prevent pocket veto during an intersession by appointing an agent to receive messages. It specifically anticipates that and rejects it, if my recollection of the case is correct. So if I am right on the constitutional issue, then you couldn't solve it by statute.

Now, this is an area that is causing a lot of uncertainty, and it is one that I think should be resolved in the courts. And ultimately the Supreme Court will have to decide this issue. Even if a statute was passed, the constitutionality of that statute would ultimately have to be decided. So at the appropriate time, I think there should be a test case on the pocket veto, as I have told the House Rules Committee.

On the Chinese student matter, we didn't just pocket veto the bill. What we did was a protective return what it did is it said we think we are pocket vetoing it, but if we are wrong, here is a return. And that permitted the override vote to occur on the Chinese students matter.

Senator KOHL. Thank you.

Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Barr, I think your statements have covered most of the questions I had in mind. I would like to propound this question to you: Do you intend to take an active role in the selection of potential nominees for the Federal bench? And if so, what criteria will you use in evaluating these individuals?

Mr. BARR. The judicial selection process currently is located in the Office of the Attorney General and is largely coordinated by Mr. Dickman, one of the assistants to the Attorney General. And I believe the current plan is to leave that as it is and not shift judicial selection down to the deputy's office.

My role in the past year plus that I have been in the Department has been doing some of the interviewing for that. I have to say I haven't been doing many recent interviews, but I am one of the people that is called on from time to time to do judicial interviews, and I expect that that will continue.

The criteria I use—well, most of the questions that I usually ask when I am talking to someone were asked by you, Mr. Chairman, today when you were talking to the candidates here. Many of the questions you asked are the same ones I ask. What I am looking for is, above all, integrity, judicial temperament, which I think was well defined by one of the candidates here today, competence, intelligence, and compatibility with the President's philosophy that the role of judges in a democratic society is to apply the law and not to make law. And when we put people in the judiciary on life tenure, there are very few checks and balances on the judiciary. It is important to have a good feeling that a particular candidate is someone who will serve the law.

Senator THURMOND. Mr. Barr, has the Department of Justice taken any particular position on these private clubs, or does it plan to prepare a position paper on that subject or not?

Mr. BARR. Not that I am aware of. I think it is a legitimate area of inquiry. I think like other things, I judge each person based on the facts of each case. And I look at each individual. I look at the surrounding circumstances and other indicia of the person's character and philosophy, and I make a decision on a case-by-case basis. And one of the factors that certainly is taken into account in the Department of Justice would be membership in a club that practices invidious discrimination.

Senator THURMOND. That is about the only way you can honestly and justly do it, consider each individual, is it not, and his particular qualities?

Mr. BARR. That is the way I do it.

Senator THURMOND. Now, I want to ask you this: Concerning the question of legal counsel and inspector general, Senator Glenn stated in a letter he wrote me that the efforts to resolve these differences have been unsuccessful to date. So I just want to ask you, if you are confirmed as Deputy Attorney General, would you be willing to work to resolve that issue?

Mr. BARR. Absolutely. In fact, as soon as the hearing broke up, we agreed to meet with the inspectors general. OMB has been serving as an honest broker. They convened the meeting in my conference room. We have exchanged drafts. The last draft that we sent was well received by the two inspectors general that we are dealing with.

There are a lot of inspectors general, and they are not a monolith. A lot of them have their own views, and there is a range of opinion among them. All I can react to are the two people that have been asked to deal, and we have a good relationship and things are moving. And I am hopeful we can work this out.

Senator THURMOND. Thank you. You are well qualified to be a Deputy Attorney General. I will be happy to support you. I hope you have a successful tenure of service.

Mr. BARR. Thank you, Senator.

Senator KOHL. Thank you, Senator Thurmond.

Following custom, Senator Leahy is next.

Senator LEAHY. Thank you very much, Mr. Chairman.

Mr. Barr, let me just ask you a couple questions. I understand a number have been already covered. I understand Senator Thurmond asked whether you will have a role in selecting the judicial nominee. I am chilled by your answer that that function will continue to be handled by the office headed by Murray Dickman, but I guess that is a decision that has been made, unfortunate as it might be.

Now, if you are confirmed, you communicate directly with the Attorney General, or is somebody else going to control that gate?

Mr. BARR. I am presently communicating directly and regularly with the Attorney General, as I mentioned here earlier. I see the Attorney General every morning privately. I just stroll into his office and we chat. Then there is a staff meeting at 8:30 every morning on——

Senator LEAHY. Do you expect the traditional role to be there?

Mr. BARR. Absolutely. The office of executive assistant to the Attorney General is no longer in existence, and there is no one between me and the Attorney General.

Senator LEAHY. At another hearing I had sent a written question to the Attorney General about agency unresponsiveness. I got a lengthy explanation saying how they are going to improve paper flow and so on, and I appreciated finally getting an answer to a question of mine, even if it had to come through a congressional hearing. Obviously, we can't have you or the Attorney General here every couple weeks to ask questions, although it might be helpful. I must admit if I ask a question in committee of the Attorney General, I will get some answer. If I submit a question, I will eventually get some answer. I have yet to find any way I can get a letter answered. Even if it is sent as a personal letter, the Attorney General won't respond. I understand also that a similar complaint is being made by both Republican and Democrat Senators.

Some have said—I have not—but some have said that they have a feeling that being a member of the Judiciary Committee, you are sort of treated as such inferior people that they should not be responded to. That may be a management decision. I understand the Attorney General did have the chance of being chief executive of one of the 50 States, and he must also get a lot of mail.

Is there any conceivable way that one could actually get a response from the Attorney General if they are a Member of the Senate, or even the Deputy Attorney General?

Mr. BARR. Well, obviously——

Senator LEAHY. I ask the question seriously, incidentally.

Mr. BARR. I have limited knowledge of history in this regard, and obviously it is possible for a member of the Judiciary Committee or will be possible for them to get a direct response from the Attorney General. But responsiveness of the Department to Congress is certainly something that I am interested in improving. I understand

that it is very important to have a good working relationship with one's committee and with Congress more generally. I have worked in legislative affairs myself, and I understand the need for getting back to people quickly, returning telephone calls and answering the mail quickly.

There is a backlog of mail which I have noticed of unanswered responses, and we are trying to address that and clear up that backlog. And I would make one of my high priorities in the months ahead making the Department more responsive, getting our answers out more quickly, and communicating more readily with members of the committee.

My standing rule is if I come back into my office and see a phone call from a Senator, a Member of Congress, it is the first call I return.

Senator LEAHY. I appreciate that. I voted for Attorney General Thornburgh both in this committee and for his confirmation. I voted against former Attorney General Meese both in this committee and on the floor. Given my relationship with Attorney General Meese and Attorney General Thornburgh, if I had those votes to do over again, I would do them just the opposite. I would have voted for Mr. Meese and against Mr. Thornburgh. With Mr. Meese, even though I had voted against him, I found I could always get an answer from him. I might or might not agree with the answer, but I got an answer. I found that if I asked him something, he would respond, and I could rely on the response.

That, for whatever reason, has not been my experience with Attorney General Thornburgh, and I think it is unfortunate because I think he is a very talented man. I think he has great potential ability. I am not asking anybody at the Department of Justice to agree with me on issues. I am not asking that at all. I would just like to get an answer, and I would like to know that I could rely on the response. With Attorney General Meese and every single Attorney General previous to that—I have served here for 16 years—Republican and Democrat alike, I could.

One last question, if I might——

Mr. BARR. Can I just say something, Senator?

Senator LEAHY. Certainly.

Mr. BARR. I think part of the responsibility should be on the Deputy Attorney General to make sure that those communications are being satisfactorily handled, and I am going to take responsibility for it in the future. In addition, the President has sent up the nomination of a new Assistant Attorney General for Office of Legislative Affairs, Lee Rawls, who previously worked in the Senate, and I am looking forward to working with him to build upon the relationship that we have here in the Senate.

Senator LEAHY. There has also been legislation introduced in the Senate regarding the broad issues involving the savings and loan industry during the past decade. One proposal would create a new Financial Services Crime Division in the Justice Department with an Assistant Attorney General for Financial Services Crime. Do you have a feeling about that?

Mr. BARR. I understand what is animating that, and I am in sympathy with the motives. I am not sure whether that is the best way of dealing with the problem we are confronting right now.

I have spent the last couple of weeks trying to get a handle on it, an education about it myself. Right now I think we are starting to get a good handle on what is out there. Some of the numbers that are being thrown around I think distort the true circumstances.

I think we are going to end up seeing a number of priority cases in the various districts that are in the hundreds. The numbers of tens of thousands being thrown around are referrals and aren't really the cases, the significant cases that we are focusing on. And based on our initial survey, we were pleased to see that these priority cases are by and large being actively worked by the U.S. attorneys. They understand the importance of white-collar crime generally. They understand the importance of this crisis that we have with financial institutions, both S&L and banking institutions. And I think the important thing is making sure that we are allocating the resources out in the field properly, and in that regard, as you may know, I have asked three U.S. attorneys to come into the office of Deputy to assist me, at least for a temporary period. One of them is the U.S. attorney from Vermont.

Senator LEAHY. Yes. In fact, I talked to him on the plane Sunday. We just happened to be on the same plane coming back from Vermont, and I talked with him about it.

I don't plan on doing this for the record, unless you want to, and I realize you are looking at the whole thing and this is a new proposal. After you have had a chance to look at it and if you have some views, would you let me know what your views are? If you disagree with this proposal, what you think can be best done, if there are areas where you need more resources, what they would be and where they would be most effective. I do not want to—and I would hope nobody else would—get stampeded into just trying to put out a scatter-gun effect just because of the frustration we feel. But that frustration is a real one. We see one of the most massive redistributions of wealth from about 75 or so percent of the country to 20, 25 percent, and we see that being done because of the fraud and negligence and whatnot, people within that part of the country. Of course, the natural reaction is we want to see somebody nailed to the courthouse door as a result of it. In some instances, it may be pure negligence, and maybe nothing could be done. But there is also a strong feeling—and I think it is shared by you and others in the Justice Department—there are also a number of other areas where there was criminal conduct, and it would be such a miscarriage of justice that those involved in criminal conduct are not brought to trial, not only because of what they did but also, hopefully, for a deterrent that this sort of thing would never happen again.

Mr. BARR. Absolutely, Senator. As far as your first request goes, we would like to work with anyone who is interested in strengthening the tools we have to deal with this S&L crisis, and I would be glad to come up and talk to you about that.

Senator LEAHY. Thank you, Mr. Barr.

Thank you, Mr. Chairman.

Senator KOHL. Thank you, Senator Leahy.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Barr, I join my colleagues in welcoming you here to this hearing. I would have expected that for a position of this importance there would have been more Senators and at least some klieg lights and some cameras. But you might be thinking that you prefer it to be a nice quiet hearing.

I know of your work. I have had the opportunity to work with you to some extent in the past, and I look forward to working with you in the position of Deputy Attorney General. It is a position of enormous importance. I don't think there is a job of greater importance in the entire Government, and that includes the Attorney General, the President of the United States, and even the chairman of the Judiciary Committee. You have responsibilities which are very weighty. You are in the enviable position of avoiding most of the ceremonial responsibilities, so you can concentrate your time on the hard decisions. You will have a lot of them to make in the position of Deputy Attorney General.

I want to discuss with you a couple of subjects. One is on the issue of the career criminal bill which I have a special interest in because I authored it in 1985, and we expanded it in 1986. I want to compliment your U.S. attorney, Tom Corbett in Pittsburgh, who recently convened a group of district attorneys from the State, and your U.S. attorney in Philadelphia, Mike Baylson, who has spearheaded the strike force which we finally got under way in 1988 after a little misunderstanding with the Department of Justice which directed the funds in other ways. I had to put a brief hold on the nominee for Deputy Attorney General in 1988. We got those funds in gear, but the drug programs are very important.

I would ask you to take a look at the administration of that program. There has been some specific direction from the Justice Department assistant U.S. attorneys around the country, and we have moved the funding to a very considerable extent. It is now $50 million a year for Alcohol, Tobacco and Firearms. And although that is under Treasury, it is really a Justice Department operation on enforcement spearheaded by U.S. attorneys. That is really, I think, the principal weapon against firearms and against major drug dealers in this country today. I would appreciate it if you would take a look at it personally and respond to me in your evaluation as to how well it is working and any ways you think it might be improved upon, because I will work with you, both on this committee, Judiciary, and on Appropriations to help you get what ever additional resources you need.

Mr. BARR. I would be very pleased to do that, Senator, and that is something I think would have done even if you hadn't asked me to. I am not that familiar with it, but in my cramming for this position as deputy in the last few weeks, it has come across my desk. It is an excellent piece of legislation and an excellent concept to really target the career criminals. It really targets the career criminals, incapacitates them, and it deals with the use of firearms as well.

My sense is that there has been some improvement over the past five years or so on it, but there is a lot more that can be done. I am generally familiar with a number of initiatives that have been taken in cities to try to use these laws and crack down on the career criminals. But I think there is probably more that can be

done, and that is one of the reasons that I have asked U.S. attorneys to come into the deputy's office so that we can take certain issues like this and work with the U.S. attorneys in the field to make sure that they are more thoroughly implemented.

Senator SPECTER. Along the same line, I would appreciate it if you would take a look at the jail situation in the eastern district. You have an excellent director of prisons, and I have had contacts with him and I think we are on target to have a 700-unit detention facility constructed in Philadelphia, hopefully at 7th and Arch Streets. This has been discussed in public before. At the present time, it is necessary to lodge many Federal prisoners in the Philadelphia County Detention Center, which is overcrowded and in violation of law, and to transport some as far as North Dakota and upstate New York. That is a very, very high priority, and, of course, the President has responded to requests from Attorney General Thornburgh and from this Senator and others so that the funds are available. But I would ask you to take a look at that, because I think you will agree that it is a very high priority item. Obviously, in the Justice Department, you will have a very large role in establishing priorities with the Bureau of Prisons. I would appreciate your taking a look at that and giving me your views on the subject.

Mr. BARR. I would be glad to do that, Senator.

Senator SPECTER. There is a third item that I consider to be a very high priority, and that is the electronic system which the Justice Department has been working on which would check on criminal records for those who purchase guns, very much like American Express now gives an instantaneous check on whether Joe Blow has exceeded his credit allowance.

We asked in 1988 in the crime bill and the drug bill that that be completed within a year, and we have an enormous problem with gun violations in this country. And we had a major outburst in Florida recently where, according to the news accounts, that person should never have been permitted to buy a gun. We had the situation in California about a year ago where that individual also should have been in detention. We are always debating the waiting period, which is very controversial, and you do have a check on machine gun purchases which has a relatively limited number, but totally outdistances the ability of the checkers of records to respond so that there is an urgent need to work through that electronic system.

Of course, that depends upon cooperation from the States. I would like you to let me know, let this committee know, where the overall project stands, what we have to do to get compliance from the States. Perhaps we have to condition a funding, like our drug money, to the States to get compliance with whatever they should be doing, just like we have had a condition on highway funds to the legal limit on drunk driving.

Mr. BARR. I will review that matter, Senator.

Senator SPECTER. OK. Now, I have tried to limit my requests to you to some reasonable, manageable lot because you are going to have a lot of requests. I will be in contact with you with some frequency. I find that picking up the phone gets results. I know it is hard. I am not delighted with responses on letters, but I do not

share Senator Leahy's critical comments. When I do pick up the phone, I get a response. I don't always get a response from the person I call, but a response from an assistant, and I understand that. That is the best I can do a lot of the time, but about those three items I do have a special concern.

The question of independent counsel is a difficult one, and there has not been independent counsel appointed in the case involving Mr. Henry Barr. There has been some question raised as to the absence of independent counsel, and the matter now has been delegated, as I understand it, to the career Deputy Assistant Attorney General in the Criminal Division. I would be interested in your comments, to the extent you can comment in this public hearing, because I think there is a public interest in it. I raise it both from a national concern as a member of the Judiciary Committee and also as a Pennsylvania Senator, because Mr. Barr is a Pennsylvanian, and has a lot of contacts with a lot of people in the Justice Department. I think it is important that there be a public statement on this. Perhaps you can't comment extensively and would want to supplement it privately. But to the extent you can comment publicly, I would be interested to know the status, focusing first on why not appoint independent counsel there, and to what extent you can tell us about where that matter is proceeding.

Mr. BARR. Well, without suggesting or addressing the issue of an investigation of that specific individual, my understanding is that the Attorney General recused himself from that matter. The Deputy Attorney General, Don Ayer, was not recused, and, therefore, it was under the control and direction of the Deputy Attorney General and now is currently under my supervision because I am not recused from the matter. I don't know Henry Barr from Adam.

Senator SPECTER. Is it under your supervision now?

Mr. BARR. Yes.

Senator SPECTER. Are you acting Deputy?

Mr. BARR. I am acting Deputy.

Senator SPECTER. I see.

Mr. BARR. I don't think it ever rose to the Deputy's level because I just don't think an issue has had to go up that far the chain of command.

Senator SPECTER. I thought that the Assistant Attorney General Ed Dennis also recused himself.

Mr. BARR. Correct, and so Jack Keeney is reporting to me on it currently.

Senator SPECTER. Then Mr. Dennis had recused himself at a time when Mr. Ayer was not in the Department, because it wouldn't have gone to Mr. Dennis had Mr. Ayer been in charge, or would it have had that recusal even if Mr. Ayer was present?

Mr. BARR. I am not sure of the timing, but I think that recusal would have occurred even if Mr. Ayer was present, because he was in the chain of command.

Senator SPECTER. Well, what are the standards which were not met and I understand your reluctance to talk about a named individual. I don't disagree with that. Although as we talk about it, there are people who are subject to investigation by independent counsel, like former Secretary Pierce. People are identified when

they are under investigation, when it rises to the level calling for independent counsel or consideration for independent counsel.

My question is: What considerations does the Department apply in coming to a conclusion as to whether or not to appoint independent counsel?

Mr. BARR. The independent counsel statute itself, obviously, has defined positions that are covered positions and that absolutely require appointment of a special counsel. My understanding of the statute is that in this context, the Attorney General could recuse himself and then leave that decision to the next official, in this case the Deputy.

Senator SPECTER. Mr. Barr, I have been advised by the chairman that my time is about up. Let me ask you to respond to that in writing, and let me move on to just two other topics because I don't want to keep the committee in session any longer than absolutely necessary.

The question on oversight is a major matter where this committee is limited from obtaining access to a great deal of what the Department of Justice does because of rule 6(e), and I have legislation pending which would change that rule. I would prefer not to have a legislative change if we could find some way of accommodating an oversight inquiry where we are not precluded in specific cases from finding out what has happened.

I would invite your attention to that or perhaps some of your subordinates' attention to that, perhaps at the request of the chairman, ranking member, perhaps limiting access in some way. We have found quite a number of cases where there has been an unsatisfactory resolution of that issue.

The last question I want to take up with you is the issue of extraterritorial jurisdiction. I note that you have had a leading role in that, and I have been active in that field on legislation providing extraterritorial jurisdiction to make it a violation of U.S. law to attack, maim, or murder a U.S. citizen anywhere in the world. I have been pursuing this line for the past 6 years with extensive questioning of Secretary of State Shultz, FBI Director Webster and CIA Director Webster, and FBI Director Sessions and Attorney General Meese and Attorney General Thornburgh and Legal Counsel Sofaer, practically anybody I can find. And I think that we made some advances looking toward terrorism and drugs where we have very, very difficult times.

I do not know all the facts about what has happened in the Mexican situation, and I would be interested to know. It seems to me that there is a lot to recommend a forceful U.S. presence where we have drug agents who are tortured and murdered and where we are not able to get, through extradition, perpetrators of heinous crimes brought into our custody. I do not know whether we are right, wrong, or indifferent on the Mexican situation. Because of the shortness of time and we are passed the 12:30 mark, perhaps this is something you and I might talk about at a later date. But I just wanted to say that I think there is considerable support in the Congress for the use of lawful authority which we have had since *Kerr* v. *Illinois* in 1886 and Justice Hugo Black's opinion in *Frisbee* in the 1950's to pursue criminal prosecutions in the United States, where the decisions are made at the highest level, where there are

serious national interests involved, as in terrorism, fighting terrorism or fighting drugs, to use the full extent of the laws allowed by the Supreme Court of the United States to bring those people to justice.

Mr. BARR. I would like the chance to talk to you about that, Senator. One of the interesting aspects of working at OLC this past year is when we thought we were operating in unknown, uncharted territory, we inevitably ran across your footprints in such areas as extraterritoriality, which is sort of an area at the cutting edge right now.

I think from your work in it you do understand the position that we took and the fact that we were speaking about a narrow legal issue as to the domestic legal authority. And I would enjoy the opportunity to discuss that issue with you and any legislative initiatives that you have in mind in that area.

Senator SPECTER. Well, thank you very much, Mr. Barr. I am hopeful you will have relatively smooth sailing. You can never tell, but the nature of this hearing bodes well for that. I for one look forward to working with you.

Thank you very much, Mr. Chairman.

Mr. BARR. Thank you.

Senator KOHL. Thank you, Senator Specter.

I would like to insert in the record before we adjourn this hearing a letter that arrived from Senator Glenn to Senator Biden with respect to the curtailment of the IG's authority in investigatory matters.

[The letter of Senator Glenn follows:]

JOHN GLENN OHIO CHAIRMAN

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United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

June 26, 1990

The Honorable Joseph Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to share my concern about the nomination of Mr. William Barr to be Deputy Attorney General. Of particular concern are the significant problems created by the Department of Justice OLC opinion purporting to limit the authority of inspectors general throughout the government. Mr. Barr has been a leading defender of this opinion.

For eleven years, 1978-1989, the inspectors general (IG's) successfully conducted thousands of audits and investigations designed to reveal fraud, waste and abuse of government assets. Unfortunately, in March of 1989 the Department of Justice (DOJ) Office of Legal Counsel (OLC) issued an advisory legal opinion which severely restricted the formerly broad authority of the IG's.

According to OLC, in order to undertake an investigation or audit, the IG's must find Federal dollars being directly expended (such as a government contract), or a Federal employee engaged in misconduct. However, the IG Act (P.L. 98-452) did not contain such a limitation -- it directed IGs to "prevent and detect" fraud in programs and operations of the agencies, not just those progarms where there is a direct expenditure or a government employee engaged in misconduct. What the DOJ opinion leaves out are whole categories of criminal investigations previously worked by IG agents: for example fraud relating to false certifications, and false applications for non-monetary Government benefits such as a Federal license, job, visa, passport or other benefit. It even leaves out less common but necessary investigations, such as those directed at persons impersonating agency officials.

These types of investigations have traditionally been conducted by IG's. It makes sense to let them continue. I have chaired a series of hearings on this issue and have received testimony from the IGs of HUD, State, HHS, Labor, Interior, DOT, Railroad Retirement Board, USIA, and EPA, all of whom believe this OLC opinion constrains their activities and has caused some of those IGs to stop such investigations. I have introduced and my Committee has marked-up S. 2608, which would only re-establish the IG's powers as they existed before the OLC opinion. This bill is cosponsored by Senators Lieberman, Kohl, Pryor, Metzenbaum, Levin, Sasser, Cohen, Nunn, Bingaman, Bumpers, Harkin and Kennedy. (The House bill, H.R. 4617 was introduced by Representative Silvio Conte.)

Mr. Barr did not create the problem as Assistant Attorney General for the OLC, but he perpetuated it. On April 25, 1990, shortly before he was nominated for the Deputy Attorney General's position, Mr. Barr testified before the Governmental Affairs Committee in favor of these limitations, and embraced the reasoning of the OLC opinions. At the hearing, I respectfully requested that Mr. Barr and the IG's work out their differences. To date these efforts have been unsuccessful. This issue should be resolved.

For the Congress, the problem at its root is that the Justice Department can write legal opinions knocking out the underpinnings of these laws faster than we can legislate. I hope you will be able to raise this issue with Mr. Barr. I am very intent on obtaining some resolution of this matter, and I look forward to reviewing this matter with you as Mr. Barr's nomination is processed by your Committee and the Senate.

Sincerely,

John Glenn
Chairman

JHG/sr

Senator KOHL. With that, I declare this hearing closed. We have enjoyed talking to you. It has been very informative, and we wish you all the best.

Mr. BARR. Thank you, Mr. Chairman.

[Whereupon, at 12:37 p.m., the committee was adjourned, subject to the call of the Chair.]

[Questionnaires follow:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

The following supplements the information provided in my questionnaire submitted to the Committee on March 14, 1989. Those earlier responses not supplemented here remain in effect.

2. **Address: List current place of residence and office address(es).**

Office: Department of Justice
10th & Constitution, N.W.
Washington, D.C. 20530

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

spouse's occupation: Librarian/Housewife
employer: None, at present

6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

At the end of the employment chronology listed in my March 14, 1989 response, please add the following:

1989 - 1990 Assistant Attorney General
Office of Legal Counsel
Department of Justice

1990 - Acting Deputy Attorney General
Department of Justice

12. **Published Writing: List the titles, publishers, and dates of books, articles, reports, or other published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

On January 20, 1990, I served on a panel at a conference on separation of powers sponsored by the Federalist Society. I understand the proceedings will be published by the Washington University Law Quarterly. I am supplying the text of my remarks and responses to questions which will be included in that publication.

13. **Health**: What is the present state of your health? List the date of your last physical examination.

Excellent. March 5, 1990 (complete physical)

15. **Legal Career**:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. Whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were clerk;
2. Whether you practiced alone, and if so, the address and dates;
3. The dates, names and address of law firms or offices, companies or government agencies with which you have been connected, and the nature of your connection with each;

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?
2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.
2. What percentage of these appearance was in:
(a) federal court
(b) state courts of record;
(c) other courts
3. What percentage of your litigation was:
(a) civil;
(b) criminal.
4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.
5. What percentage of these trials was;
(a) jury;
(b) non-jury

At the end of the narrative in my March 14, 1989 response, please add the following:

In April 1989, I left Shaw, Pittman to serve as the Assistant Attorney General for the Office of Legal Counsel. My principal responsibility in that position was the preparation of legal opinions for Executive

branch departments.

17. **Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)**

In addition to the activities described in my March 14, 1989 response, the following are some of the significant matters I handled while serving as Assistant Attorney General for OLC:

Flag Desecration: I opined that various statutory proposals to protect the United States' flag from physical desecration would not be constitutional under Texas v. Johnson. My analysis is reflected in my testimony before the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary (July 19, 1989); and my testimony before the Senate Judiciary Committee (August 1, 1989).

Extraterritorial Arrests: I provided legal advice concerning the authority of the FBI, as a matter of domestic U.S. law, to make arrests overseas which do not comply with customary international law. This advice is reflected in my testimony before the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary (November 8, 1989).

Posse Comitatus: I advised that the restrictions of the Posse Comitatus Act do not apply extra-territorially. This advice is reflected in legal briefs, drafted in OLC and filed in the Noreiga case in Miami.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

As noted in my March 14, 1989 response, I received in 1989 a withdrawal payment from Shaw, Pittman, Potts & Trowbridge. The payment was made pursuant to the firm's January 1987 Partnership Agreement which was reviewed by DOJ ethics officials. The payment consisted of (i) my capital account; (ii) a severance payment based on a fixed formula; and (iii) the pro rata share of my 1989 draw up to my withdrawal from the firm. The amount of the payment was $67,328.60. Pursuant to the partnership agreement, this payment was received in two installments -- part in April 1989 and part in December 1989.

In addition, as noted in my March 14, 1989 response, I sold my interest in 2300 N Street Associates, a real estate partnership that owns an interest in the commercial office building located at 2300 N Street, N.W., Washington, D.C. I sold my interest to 2300 N Street Associates for the fixed amount of $40,000 on April 19, 1989, with payment to be made before the end of 1989. I received full payment in December 1989.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining in the areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

Due to the nature of my assets, I am not likely to have a financial conflict. If I do, I will follow the requirements of 18 U.S.C. §208 by either disqualifying myself or, if appropriate, obtaining a waiver.

While I do not have a continuing financial relationship with Shaw, Pittman, Potts & Trowbridge, matters involving the law firm may arise. If this occurs -- or if other potential non-financial conflicts arise -- I will consult with my assigned ethics counsellors at the Department. I understand the Department follows the guidelines of the Administrative Conference of the United States to

resolve potential non-financial conflicts of this sort.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.**

No.

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Government Act of 1978, may be substituted here.)**

Please see my SF278.

5. **Please complete the attached financial net worth statement in detail (Add schedules as called for).**

Please see attached financial statement.

6. **Have you ever had a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your titles and responsibilities.**

Vice Chairman, D.C. Lawyers for Reagan-Bush, 1984
Bush for President 1988 (Vice Presidential Candidate Screening Team)

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household. (Rounded to nearest thousand)

ASSETS		LIABILITIES	
Cash on hand and in banks	129,000*	Notes payable to banks—secured	
U.S. Government securities—add schedule		Notes payable to banks—unsecured	12,000
Listed securities—add schedule		Notes payable to relatives	
Unlisted securities—add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	1,000
Due from relatives and friends		Unpaid income tax	
Due from others		Other unpaid tax and interest	
Doubtful		Real estate mortgages payable—add schedule	235,000
Real estate owned—add schedule	400,000	Chattel mortgages and other liens payable	12,000
Real estate mortgages receivable		Other debts—itemize:	
Autos and other personal property	65,000		
Cash value—life insurance			
Other assets—itemize:			
Retirement Accounts:			
TIAA-CREF, IRA, Keogh	45,000		
		Total liabilities	260,000
		Net worth	379,000
Total assets	639,000	Total liabilities and net worth	639,000
CONTINGENT LIABILITIES		**GENERAL INFORMATION**	
As endorser, comaker or guarantor	None	Are any assets pledged? (Add schedule.)	No
On leases or contracts		Are you defendant in any suits or legal actions?	No
Legal Claims		Have you ever taken bankruptcy?	No
Provision for Federal Income Tax			
Other special debt			

*See SF278 for names of money market accounts

Real Estate Schedule	Value	Mortgage
Residence in Falls Church	$400,000	$235,000 (includes first mortgage and home equity improvement loan)

III. GENERAL (PUBLIC)

No changes to my March 14, 1989 responses.

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full Name (including any former names used.)**

   William Pelham Barr

2. **Address: List current place of residence and office address(es).**

   home: 6460 Spring Terrace
   Falls Church, Virginia 22042

   office: Shaw, Pittman, Potts & Trowbridge
   2300 N Street, N.W.
   Washington, D.C. 20037

3. **Date and place of birth.**

   May 23, 1950
   New York, New York

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

   spouse: Christine Moynihan Barr
   spouse's occupation: Librarian (part-time)
   employer: International Monetary Fund
   Washington, D.C.

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

   Columbia College — 1967 - 1971
   N.Y., N.Y. — A.B. 1971

   Columbia University — 1971 - 1973
   N.Y., N.Y. — M.A. 1973
   (Political Science/Chinese Studies)

   National Law Center — 1973 - 1977
   George Washington University — J.D. 1977
   Washington, D.C.

6. **Employment Record:** List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1971 - 1972	Central Intelligence Agency Summer Intern Program
1973 - 1977	Central Intelligence Agency (1973 - 75 Intelligence Directorate) (1975 - 77 Office of Legislative Counsel)
1977 - 1978	Law Clerk to the Honorable Malcolm R. Wilkey U.S. Circuit Judge U.S. Court of Appeals for the D.C. Circuit
1978 - 1982	Shaw, Pittmam, Potts & Trowbridge Washington, D.C. (Law Firm - Associate)
1982 - 1983	Deputy Assistant Director Office of Policy Development White House
1983 - 1989	Shaw, Pittman, Potts & Trowbridge * 1983-84 Associate 1985-89 Partner
1984 - 1989	2300 N Street Associates real estate investment partnership with a number of other Shaw, Pittman partners

* In connection with law practice at Shaw, Pittman, when the firm was asked to set up a new corporation for a client, I would occasionally be listed as an incorporating director/officer for purposes of filing incorporation papers but would be replaced by the permanent director/officer at the first corporate meeting. In one case, however, I actually did serve on a client's board. In April 1986, Scottish Widows Fund Assurance Society, a U.K. insurance company, asked me to serve on the board of its two wholly-owned U.S. subsidiaries, "Dalkeith Corporation" and "1146 19th Street Corporation". These corporations own a commercial office building in Washington, D.C. I served as a director, vice president, and treasurer of each subsidiary from April 1986 to January 1989.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe should be of interest to the Committee.

NDFL Fellowship (Mandarin Chinese)

Order of the Coif

J.D. With Highest Honors

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Virginia State Bar

District of Columbia Bar

American Bar Association

10. Other Membership: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

American Bar Association

Knights of Columbus

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapse if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Virginia Supreme Court 1977 to present

District of Columbia Court of Appeals
1978 to present

U.S. District Court for the District of Columbia
1978 to present

U.S. Court of Appeals for the District of Columbia Circuit
1978 to present

U.S. Court of Appeals for the Federal Circuit
1988 to present

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. September 28, 1988 (complete physical)

14. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any successful candidacies for elected public office.

None, other than the government positions listed in no. 6 above.

15. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. Whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were clerk;
2. Whether you practiced alone, and if so, the address and dates;
3. The dates, names and addresses of law firms or offices, companies or government agencies with which you have been connected, and the nature of your connection with each;

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?
2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.
2. What percentage of these appearance was in:
(a) federal court
(b) states courts of record;
(c) other courts.
3. What percentage of your litigation was:
(a) civil;
(b) criminal.
4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.
5. What percentage of these trials was;
(a) jury;
(b) non-jury.

I attended law school at night from September 1973 to June 1977, while I was working for the Central Intelligence Agency. From February 1975 forward, I served in the Agency's Office of Legislative Counsel. My principal duties were analyzing the impact of proposed legislation on Agency operations, drafting Agency bill comments, drafting Hill testimony, carrying on liaison with Congressional committee staffs, drafting Agency-proposed legislation, and coordinating legislative activities with other agencies and OMB.

In July 1977, I left the Agency to serve as law clerk to the Honorable Malcolm R. Wilkey, U.S. Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit. I completed my clerkship in September 1978.

In October 1978, I started as an associate with the Washington, D.C. law firm of Shaw, Pittman, Potts & Trowbridge. I was the 55th lawyer at the firm. I remained at the firm as an associate until May 1982.

During this period as a Shaw, Pittman associate, I functioned largely as a generalist, with about 70% of my time devoted to litigation and about 30% to other areas of the firm's practice. The firm's clients were mainly national or large local corporations. My responses to questions no. 16 and 17 below describe some of the matters upon which I worked.

The litigation -- all civil -- was varied, although a significant part of it involved environmental cases. Virtually every case I worked on was staffed by a total of two lawyers

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-- one supervising partner and me. Although, in number, I handled more state court cases than federal, I devoted substantially more time to the federal cases because they tended to be more complex. Appearances in federal cases were infrequent and were generally handled by the supervising partner. I occasionally appeared in state court cases, usually to argue motions. Most of the cases upon which I worked either were settled or disposed of on motion.

One complex environmental case went to non-jury trial in federal district court. Atchinson, T.& S.F.Ry.Co. v. Alexander, 480 F.Supp. 980 (D.D.C. 1979). We represented defendant-intervenor and played a substantial role in the case. I assisted the partner who tried the case for our client. Judgment was for defendant and was upheld in all material respects on appeal. Izaak Walton League of America v. Marsh, 655 F.2d 346 (D.C. Cir. 1981). See my response to question no. 16 for further details.

An arbitration I handled went to a final award. Berlin v. Chevy Chase Lake Corp., 16 10 0071 81 (American Arbitration Association). The case involved valuation of a closely-held corporation. We represented the defendant. I assisted the supervising partner who tried the case. The final award was substantially below the amount sought by plaintiff.

Examples of some of the non-litigation matters I worked on during this period are provided in response to question no. 17 below.

In May 1982, I left Shaw, Pittman, Potts & Trowbridge to accept a position as Deputy Assistant Director for Legal Policy in the Office of Policy Development at the White House. My responsibilities included (1) preparing briefing papers for senior White House staff; (2) coordinating preparation of briefing papers and decision documents for the Cabinet Council on Legal Policy; (3) representing the White House on inter-agency working groups; and (4) reviewing agency bill comments and testimony in conjunction with the OMB process.

In September 1983, I left the White House and returned to Shaw, Pittman, Potts & Trowbridge. In October 1984, I was elected as a partner, effective January 1985. The firm currently has over 225 lawyers.

Since returning to Shaw, Pittman, the nature of my practice has been different than it was during my earlier period with the firm. In recent years I have spent less time on litigation and more on administrative/regulatory matters before federal agencies. For examples of these non-litigation projects see responses to question no. 17 below.

In the litigation area, while I have taken on fewer cases, I have now assumed lead responsibility on these matters. My court appearances have been more frequent, and have been either in federal court or in federal administrative tribunals. I have tried one case to verdict as co-counsel in a non-jury administrative trial. (See Murray v. Henry J. Kaiser Co. in response to question no. 16 below.)

16. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

The following include cases that were decided on motion and some that were settled. On all the listed cases, except for no. 10, I was the sole associate, supervised by one partner. On no. 10, I am the supervising partner assisted by one associate.

1. Atchinson, T.& S.F.Ry. Co. v. Alexander, 480 F.Supp. 980 (D.D.C. 1979), aff'd in part, rev'd in part sub nom., Izaak Walton League of America v. Marsh, 655 F.2d 346 (D.C. Cir.), cert. denied, 454 U.S. 1092 (1981). (District Judge: Richey) (Circuit Judges: Wright, Robb, Penn).

Almost one-quarter of my time from October 1978 through July 1981 was devoted to defending against an action brought by 18 midwestern railroads and three environmental groups challenging, under NEPA and the APA, a Corps of Engineers' decision to construct an expanded replacement facility for Lock & Dam 26 on the Mississippi River. We represented the defendant-intervenor, Association for the Improvement of the Mississippi River ("AIMR"), an association of over 350 municipalities, businesses, farm and labor organizations, waterway carriers, and shippers that depend on waterway transportation. The case involved extremely complex technical and legal issues. Although the Corps was represented by DOJ, AIMR played a leading role in all aspects of the case. I was responsible for legal research; developing factual and

expert evidence; discovery; trial preparation; drafting numerous motions, pre-trial brief, post-trial brief, appellate brief and reply brief, opposition to cert. petition. The trial court found for the Corps and AIMR; the Court of Appeals upheld the trial court on all material points. Government counsel was Fred Disheroon, Esq., Lands Division, U.S. Dep't of Justice, Washington, D.C. Opposing counsel was Joe Karaganis, Karaganis & Gail Ltd., 150 N. Wacker Drive, Chicago, Ill. 60606. (312)782-1905.

2. Potomac Electric Power Co. v. EPA, 650 F.2d 509 (4th Cir.), cert. denied, 455 U.S. 1016 (1981). (Circuit Judges: Widener, Phillips, Ervin).

From May 1980 through November 1980, I represented PEPCO in its petition for review of an EPA decision that the Chalk Point 4 Unit was subject to the new source performance standards for fossil-fuel steam generating units under the Clean Air Act. I was responsible for legal research and drafting a substantial portion of the brief. The Court of Appeals upheld the EPA decision. Opposing counsel was Bingham Kennedy, Esq., Lands Division, Department of Justice, Washington, D.C.

3. Group Health Ass'n, Inc. v. Blumenthal, 453 A.2d 1198 (Md.Ct.App. 1983)

From February 1981 through January 1983, I defended Group Health Association (GHA) in a negligence and wrongful death diversity action in U.S. District Court for the District of Maryland. GHA moved to dismiss on the grounds (1) that the claims were subject to mandatory arbitration under Maryland's Health Care Malpractice Claims Act, and (2) that Maryland did not recognize a wrongful death action for a non-viable child born alive. The district judge certified questions to the Maryland Court of Appeals. The Court of Appeals held for GHA that the action was subject to arbitration, but held also that an action did lie for wrongful death of a non-viable child. I was responsible for factual investigation; legal research; discovery; drafting pleadings, motion to dismiss, brief and reply brief in Court of Appeals. Opposing Counsel were Jonathan Azrael, Esq., Azrael & Gann, Baltimore, Md. and John Jude O'Donnell, Esq., Rockville, Md.

4. Berlin v. Chevy Chase Lake Corp., 16 10 0071 (American Arbitration Association)

From March 1981 through March 1982, I represented B.F. Saul and Chevy Chase Lake Corporation in an arbitration over the valuation of a minority interest in a closely-held corporation. We were urging a low value. I was responsible for

development of facts, legal research, all aspects of trial preparation, development of expert testimony, pre-trial brief, post-trial brief. The final award was higher than our position, but substantially lower than that urged by our opponent. The arbitrators were Daniel Coon, David Gruber, Michael Jackley, c/o American Arbitration Association, 1730 Rhode Island Ave., N.W., Washington, D.C. Opposing counsel was Charles Lee Eisen, Esq., Kirkpatrick, Lockhart, 1800 M St., N.W., Washington, D.C. 20036.

5. Murray v. Henry J. Kaiser Co., 84-ERA-4 (DOL ALJ Roketenetz, 1984)

From September 1983 through May 1984, I defended Henry J. Kaiser Co. (HJK), constructors of the Zimmer nuclear power plant, against a "whistleblower" suit brought by a discharged employee (Murray) under the Energy Reorganization Act. The case was highly sensitive because it was litigated during a pending grand jury investigation into alleged illegal conduct by HJK in the construction of Zimmer, including some of the allegations raised by Murray. (See response to question no. 17 below.) I was responsible for factual development, discovery, drafting pre-trial statement, trial preparation, and post-trial brief. The case was tried before a Dep't of Labor ALJ in Cincinati, Ohio. I personally tried half the case, with a Shaw, Pittman partner trying the other half. The ALJ decided for defendant HJK. Opposing counsel was Andrew B. Dennison, Esq., 200 Main Street, Batavia, Ohio 45103.

6. Arlex, Inc. v. B. Francis Saul, et al., Law No. 19962, Circuit Court of Arlington County (1978) (Winston, J.)

From November 1978 through September 1979, I represented the B.F. Saul Real Estate Investment Trust, defendant ground lessor in a suit by lessee who operated a Howard Johnson's hotel on the leased site. The dispute was over the proper method for calculating lease payments. On March 5, 1979, the trial court granted judgment to defendant on cross-motions for summary judgment. The plaintiff petitioned for appeal to the Virginia Supreme Court, which denied the petition on March 15, 1979. I was responsible for factual investigation, legal research, preparing motion for summary judgment, preparing brief in opposition to petition for appeal in the Virginia Supreme Court. Opposing counsel was LeRoy E. Batchelor, Esq., 2060 N. 14th St., Arlington, Va. 22201. (703)525-0102.

7. Rapps v. United States, et al., Civil No. 78-0612 (D.D.C.) (Parker, J.)

From October 1978 to March 1980 defended a former high-level CPSC official (Dimcoff) in an action brought by another former CPSC official (Rapps) against the CPSC and several current and former CPSC officials for violation of constitutional, statutory, and common law rights. The other federal defendants were represented by the Department of Justice. The case, which involved numerous complex legal issues, was settled on the eve of trial. I was responsible for factual investigation; extensive legal research; conducting most discovery; drafting numerous motions, including motions to dismiss, motions for summary judgment, pre-trial statement, etc. During discovery, I successfully overcame a claim of newsman's privilege by a journalist witness. Plaintiff Rapps was represented by Raymond Battocchi, Esq., Cole & Groner, 1730 K St., N.W., Washington, D.C. (202)331-8888. The other federal defendants were represented by Lawrence Moloney, Esq., U.S. Dep't of Justice, Civil Division, Washington, D.C.

8. Provident Life Ins. Co. v. Life Investors, Inc., v. Equitable of Iowa Companies, Civil Action No. A 78-1061 (D.N.D.)

From October 1978 through October 1979, I represented Equitable of Iowa, third-party defendant in a 16(b) short-swing profits suit. Provident Life Insurance Co. sued Life Investors, Inc. to recover short-swing profits realized by Life Investors on the sale of Provident stock to Equitable. Life Investors impleaded Equitable as a third-party defendant. The case was settled prior to trial. I was responsible for factual investigation, discovery, legal research, legal advice on settlement. Opposing counsel for Provident Life: James Collins, Esq., Boodell, Sears, Sugrue, Giambalvo & Crowley, One IBM Plaza, Suite 2650, Chicago, Ill. (312)222-9400; for Life Investors: Charles Mulaney, Jr., Esq., Mayer, Brown & Platt, 231 South LaSalle St., Chicago, Ill. (312)782-0600.

9. Marshall v. Schlumberger Well Services, OSHRC Docket No. 79-3912, Region III (ALJ Cutler)

From October 1979 to May 1980, I represented a Schlumberger subsidiary in defending against an OSHA complaint arising from a fatal explosion at a West Virginia job site. The case was settled by joint stipulation in May 1980. I was responsible for factual investigation, legal research, pleadings, settlement discussions. Opposing counsel were Marshall Harris, Esq. and Joseph Crawford, Esq. of the Office of Solicitor, U.S. Dep't of Labor, 3535 Market Street, Philadelphia, Pa. 19104. (215)596-5165.

10. Gutherz, et al. v. U.S. News & World Report, 86 Civ. 2517 (GLG) (S.D.N.Y.) (Judge G. Goettel).

From January 1986 to the present I have been lead counsel defending U.S. News & World Report in a large, multi-plaintiff age discrimination suit under the ADEA. The suit arises from the termination of half of U.S. News' advertising sales force after the magazine was taken over by a new owner. I have conducted and defended extensive discovery, represented U.S. News in all court appearances, drafted and argued motion for summary judgment. The motion was denied. Trial has been postponed until summer 1989. Opposing counsel are Judith Vladeck and Anne Vladeck of Vladeck, Waldman, Elias & Engelhard, 1501 Broadway, New York, N.Y. (212)354-8330.

17. Legal Activities: **Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)**

1. I worked on the following matters as an associate at Shaw, Pittman, Potts & Trowbridge. (Except where otherwise noted, I was the sole associate, supervised by one partner.)

First Pennsylvania Bank (6/80 - 9/80) Prepared legal opinion for Board of Directors of First Pennsylvania Corporation (FPC) re propriety of advancing indemnification to Board Chairman who had retained separate counsel to defend lawsuit against FPC, the Chairman, and other individuals, alleging violations of antitrust laws and the Bank Holding Company Act. I did the factual investigation, legal research and analysis, drafted legal opinion, and made part of oral presentation to the Board.

Zimmer Grand Jury Investigation (9/83 - 9/84) Spent the substantial part of a year successfully defending Henry J. Kaiser Co. in connection with a grand jury investigation into possible violations of federal law in the construction of the "Zimmer" nuclear plant in Cincinnati, Ohio. Also handled a parallel NRC investigation and three related whistleblower cases. Extensive factual investigation, witness interviews, etc.

United States v. A.B. Chance Co., Civil Action No. 80-0034-P(H) (N.D.W.Va.) (1/79 - 5/80) Represented Parkersburg, West Virginia plant charged with violating Clean Water Act. The case was settled by consent decree

entered May 19, 1980. I was responsible for factual investigation, legal research and drafting pleadings. Opposing counsel was Assistant U.S. Attorney William A. Kolibash, Dep't of Justice, Wheeling, West Virginia.

King v. GPU Nuclear, 83-ERA-10 (Dep't of Labor) (8/84 - 11/84) Defended GPU in whistleblower case arising out of Three Mile Island. Extensive discovery, trial preparation. Settled on eve of trial.

American Management Systems, Inc. v. Delphi Associates, Civil Action No. 79-2467-T (D.Mass.) (1/79 - 3/82) Worked with a partner and another associate representing AMS in a suit seeking damages for breach of contract and in quantum meruit. Defendant Delphi had been prime contractor on a project to design MMIS computer system for State of Illinois. AMS sued under its subcontract with Delphi to recoup substantial losses. Participated in extensive discovery and motions. Case was settled.

Miscellaneous Litigation: (10/78 - 3/82) Handled numerous smaller cases, including defense of Group Health Association in a series of medical malpractice suits, all of which settled: Robinson v. WMATA, Civil Action No. 6610-80 (D.C. Sup.Ct.); Davis v. Patow, M.D., Civil Action No. 12220-79 (D.C.Sup.Ct.); Stribling v. Mel-Art, Inc., Civil Action No. 650-80 (D.C.Sup.Ct.). Also handled numerous smaller commercial cases which were either decided on motion or settled, including Westminster Investing Corp. v. Nordheimer, Civil Action No. 2924-80 (D.C.Sup.Ct.); Malawer & Associates v. Centennial Contractors, Inc., Chancery No. 62053 (Cir.Ct. Fairfax Cty.)

GHA Labor Matters (1979-82, 84) Represented Group Health Association in a half dozen labor disputes with its physicians' union. All involved arbitration of grievances under the collective bargaining agreement -- one major grievance related to working conditions, the others related to individual disciplinary actions. All disputes were settled prior to, or during, arbitration. Extensive factual investigation, legal research, arbitration preparation, negotiation.

Virginia Condominiums (1979) Prepared all legal documents, prospectuses, etc., in connection with three of the earliest condominium conversions under the Virginia Condominium Act. The three projects were: Horizon House, Huntington Club, and Telegraph Hill. The Horizon House documents were distributed by the state as "models".

B.F. Saul REIT (1981) Worked on various securities matters for REIT, including advice and submissions to SEC pursuant to Rule 14a-8 re omission of shareholders' proposals from proxy material.

2. I handled the following matters as a partner at Shaw, Pittman:

National Air Transportation Association (3/85 - 5/85) Represented NATA in connection with proposed IRS regulations on the use of employer-provided aircraft. Prepared and submitted formal comments.

National Automobile Dealers Association (2/85 - present) Represent NADA on a variety of tax issues. In 1985 and 1986 prepared and submitted a series of formal comments on proposed IRS regulations re taxation of auto salesmen's demonstrators.

Knights of Columbus (12/84 - present) Represent Knights of Columbus in connection with preserving the tax exemption for "fraternal benefit societies" under Section 501(c)(8). Prepared and submitted numerous comments during 1985 and 1986. Assisted K of C in prevailing on Administration and House Ways & Means Committee to preserve exemption in "Treasury II" and subsequent Tax Reform legislation.

Mutual of Omaha (7/85 - 12/85) Represented Mutual of Omaha in connection with OPM proposed regulations relating to the Federal Employees Health Benefit Program, a substanial part of the company's business. Prepared and submitted formal comments.

Carolina Power & Light (4/85 - 7/85) Researched and prepared comprehensive legal memorandum assessing CPL's potential claims against Westinghouse for installing allegedly defective generators in CPL's nuclear power plant.

Sallie Mae (1/88 - 3/88) Represented SLMA in connection with Department of Education regulations relating to due diligence requirements under the Guaranteed Student Loan Program. Analyzed potential legal challenges to regulations.

Taiwan Power (9/86 - 10/88) Represented the government-owned utility of Taiwan in connection with its pre-sanction, long-term supply contracts for Namibian uranium. Unsuccessfully sought from Treasury Department an interpretation of sanctions legislation that would allow for "in transit" processing of Taiwan Power's uranium. Also sought legislative relief.

Pico Ski Resort (6/87 - present) Represent Vermont ski resort in resisting initial efforts by the Department of Interior to locate Appalachian Trail through the resort in a way that would cripple future operations. Prepared extensive submissions and presentations to DOI relating to its legal obligations under the National Trail Systems Act.

Equitable of Iowa (11/87 - 9/88) Represented Des Moines-based company in opposing a UDAG grant for the development of a major shopping mall on the outskirts of Des Moines. Prepared extensive submissions to HUD. Prepared complaint. The grant was not awarded.

U.S. News & World Report (8/87 - 9/87) Successfully assisted U.S. News in obtaining FCC recognition of exception to Equal Time rule for television series featuring David Frost interviews of Presidential candidates. Made written and oral presentations to FCC staff and commissioners.

Miscellaneous Litigation Currently representing Emerson Electric in prosecuting claims against the United States for "over and above" work on two defense-related contracts. Matters are pending before the Armed Services Board of Contract Appeals.

Other Legal-Related Activities In 1986 I served on two peer review panels for the National Institute of Justice. In the fall semester of 1987, I assisted a Shaw, Pittman colleague by teaching one of his Legal Research & Writing sections at GMU Law School on a voluntary, unpaid basis. In 1985 and 1986, I spoke regularly on "The Presidency" to high school students as part of the Close-Up Foundation's program.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

None, except for my withdrawal payment from Shaw, Pittman, Potts & Trowbridge. The payment will be made pursuant to the firm's January 1987 partnership agreement, which has been reviewed by appropriate Department of Justice ethics officials. Under the agreement, I will receive: (i) my capital account; (ii) a severance payment based on a fixed formula; (iii) the pro rata share of my 1989 draw up until my withdrawal of the firm. I expect the total amount of my withdrawal payment from Shaw, Pittman, Potts & Trowbridge will be approximately $75,000. The amount of payment is fixed at the time of my departure, and I will have no continuing interest in the firm. The firm has the option of making the payment in installments over two years, but I expect full payment within a year.

In addition, I am considering selling my interest in 2300 N St. Associates, a real estate partnership that owns interest in the commercial office building located at 2300 N St., N.W. Washington, D.C. As noted in my SF278, I estimate the value of my interest is between $50,000 and $100,000.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining in the areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

Due to the nature of my assets and the position I have been nominated for, I am not likely to have a financial conflict. If I do, I will follow the requirements of 18 U.S.C. §208 by either disqualifying myself or, if appropriate, obtaining a waiver.

While I will not have a continuing financial relationship with Shaw, Pittman, Potts & Trowbridge, matters involving the law firm may arise. If this occurs -- of if other potential non-financial conflicts arise -- I will consult with my assigned ethics counsellors at the Department. I understand the Department follows the guidelines of the

Administrative Conference of the United States to resolve potential non-financial conflicts of this sort.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Government Act of 1978, may be substituted here.)

Please see my SF278.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Please see attached financial statement.

6. Have you ever had a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your titles and responsibilities.

Vice Chairman, D.C. Lawyers for Reagan-Bush, 1984
Bush for President 1988 (Vice Presidential Candidate Screening Team)

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household. (Rounded to nearest thousand)

ASSETS		LIABILITIES	
Cash on hand and in banks	203,000	Notes payable to banks—secured	
U.S. Government securities—add schedule		Notes payable to banks—unsecured	12,000
Listed securities—add schedule		Notes payable to relatives	
Unlisted securities—add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	1,000
Due from relatives and friends		Unpaid income tax (approx '88)	8,000
Due from others		Other unpaid tax and interest	
Doubtful		Real estate mortgages payable—add schedule	194,000
Real estate owned—add schedule	425,000	Chattel mortgages and other liens payable	15,000
Real estate mortgages receivable		Other debts—itemize:	
Autos and other personal property	54,000		
Cash value—life insurance			
Other assets—itemize:			
Retirement Accounts:			
TIAA-CREF, IRA, Keogh	35,000		
		Total liabilities	230,000
		Net worth	487,000
Total assets	717,000	Total liabilities and net worth	717,000
CONTINGENT LIABILITIES *		**GENERAL INFORMATION**	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule.)	No
On leases or contracts			
Legal Claims		Are you defendant in any suits or legal actions?	No
Provision for Federal Income Tax		Have you ever taken bankruptcy?	No
Other special debt			

* As a partner in Shaw, Pittman, I am contingently liable for the partnership's obligations. However, upon withdrawing from the partnership, I will be released from all such contingent liability. Apart from this, I have no other contingent liabilities

Real Estate Schedule	Value	Mortgage
House In Falls Church, Va.	350,000	194,000
Interest in 2300 N St. N.W. Washington, D.C.	75,000	

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

My law partnership has, for the past several years, made substantial cash contributions to groups providing legal services to the indigent and needy. The firm also supports an active in-house pro bono program which has been widely commended in the Washington legal community.

In 1980 I reviewed and critiqued a brief prepared by another associate in a pro bono Bivens action against a government official, and I served on a mock appellate panel to prepare the associate for oral argument. (4.5 hrs.)

In 1981 I represented pro bono a young retarded woman who was discharged from her job at a large department store. After my calls and correspondence to the parent company, the store rehired the woman and apologized. The matter involved legal research into possible state and federal claims, drafting demand letters, etc. (9.0 hrs.)

In early 1982 I brought into the firm, as a pro bono matter, two Ethiopian nationals seeking asylum. The work on these cases was done by a more junior associate with expertise in immigration. One of the clients obtained asylum, the other ultimately decided not to seek it. (2.0 hrs.)

In 1985 I agreed to assist, on a pro bono basis, the Catholic League for Religious & Civil Rights in bringing an action challenging an A.I.D. policy which barred natural family planning groups from receiving grants unless those groups also promoted artificial methods of birth control. The matter was settled in its early stages when A.I.D. agreed to change its policy. (12 hrs)

In early 1986 I assisted on a pro bono basis the Jamestown Foundation with respect to legislation to assist defectors. I also supervised an associate providing pro bono assistance to a defector. (30.50 hrs.)

In 1987 I assisted, on a pro bono basis, the parents' association of a parochial school in their legal efforts to keep the school from being closed. (53 hrs.)

2. **Do you currently belong, or have you belonged, to an organization which discriminates on the basis of race, sex, or religion -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies.**

I am currently a member of the Knights of Columbus, which is an all-male Catholic fraternal order. I have been a member since 1984.

While an undergraduate at Columbia University (1968-71), I was a member of Sigma Nu Fraternity, a national social fraternity. It was, at least, de facto all-male, and probably was so de jure.

TESTIMONY OF WILLIAM P. BARR, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. BARR. Thank you, Mr. Chairman. I appreciate the opportunity to testify before this Committee this morning. I ask that my prepared statement be entered into the record in its entirety.[1]

The focus of this hearing is the March 1989 OLC opinion issued by my predecessor, Doug Kmiec. I believe that the opinion is right on target and properly addressed the issues that were presented to OLC, and I would like to take a moment to describe for you the background of that opinion, or at least my understanding of it.

There was a dispute between the Solicitor of the Department of Labor and the Inspector General of the Department of Labor at that time concerning the scope of the IG's authority. It was a broad issue. OLC had tried to concretize it and have the parties focus on a specific investigation and specific facts that were at issue. There was correspondence back and forth on that matter, but both parties to the dispute asked OLC to resolve the general issue of whether the IG had authority to conduct investigations pursuant to the regulatory statutes of the Department of Labor and which were investigations what were integral to the Labor Department's program.

The examples that we were told to treat as paradigmatic were, for example, investigations under the Fair Labor Standards Act and OSHA, which are statutes that are enforced by the Labor Department. There are line units there that have authority to investigation noncompliance with OSHA and the Fair Labor Standards Act and to refer matters for criminal prosecution or for civil penalties or whatever to the Department of Justice.

And the IG at Labor was taking the position that he had authority to conduct investigations under the Fair Labor Standards Act and OSHA and those kinds of statutes, and that indeed under the Inspector General Act in 1978 that he had supervisory authority over all investigations of that nature.

Because the parties asked us to resolve that issue, OLC issued an opinion which looked at the statute and the legislative history and concluded that the Act was intended to draw a distinction between investigations pursuant to regulatory statutes that are an integral part of the program of the Department and the kind of auditing and in-house investigation that was contemplated for the Inspectors General, and the basic principle was that the Inspectors General were intended to be watchdogs who oversaw the administration of the program, who investigated the agency's activities and operations and the operations of federally funded programs, and that that was the basic dichotomy drawn in the statute, and that it was not the intent of the statute to give Inspector generals a roving commission to come in and conduct investigations under regulatory statutes when they felt that the responsible Assistant Secretary was not doing a good job.

If they disagreed with the way the Assistant Secretary for Occupational Safety and Health was doing his job and felt he was not properly bringing cases that should be brought, then the IG's role is to write reports to that effect to the Secretary and to Congress

[1] See p. 101.

and to call attention to what he believes is mal-administration of a program, it is not to step in and conduct OSHA investigations himself, and that was our conclusion.

Now, I think that the line that we believed Congress was drawing in the 1978 Act is a good one and a sound one, and I think there are four basic reasons why there should be this division of responsibility. The first goes to the independence of the Inspector General. There is a lot of evidence in the legislative history that Congress was concerned that the persons who were responsible for critiquing, overseeing, finding fault with and malfeasance in a program not be involved in carrying out the program themselves. And carrying out the program includes carrying out investigations to determine compliance with a program by regulated parties.

So that if the Inspector General decided to go out and conduct OSHA investigations himself, he was then becoming part of implementing the policy of the Labor Department and lost the detachment and independence that the statute sought to preserve for him.

I think the second reason we think it is a salutary division of labor is the question of who watches the watchdog. Part of the purpose of Inspector General is to make sure that there is someone protecting the rights of the American people and making sure that Government officials do not abuse their power. And I know in private practice myself I have had occasion to raise with Inspectors General complaints I have had about the way particular Government officials are carrying out a program.

If the Inspector General was out conducting the investigation himself against regulated third parties, private citizens, there is no one watching him. There is no watchdog for the Inspector General, and that's why I think it is important that the jurisdiction generally be the jurisdiction to oversee the operations of the Department, and federally financed programs carried out by that department.

I think the third reason for maintaining this division of responsibility is coherent administration and policy in a regulatory program. All programs require that decisions be made as to allocation of resources and enforcement strategy, and that is what we pay, in most departments, assistant secretaries to do when they are operating a program. Assistant secretaries have to make decisions about what kind of offenses are going to be pursued as criminal, what are going to be pursued as civil, Whether certain kinds of deviations are going to be treated as violations of regulations and so forth, and all of these decision go into putting together a coherent and hopefully a fair policy so that people in California are treated the same way as people in New York.

When you have a roving linebacker who feels that if a case is not brought properly by an assistant secretary that he can come in and do it himself under some plenary investigative authority, that breaks down the coherence and unity of purpose of a program and results I think in the Government working at cross purposes and in some cases unfairly.

And I think the fourth reason for the division of responsibility is the question of allocation of resources. My understanding of one of the purposes here is to ensure that there are resources being used overseeing the conduct of programs in the Executive Branch to

make sure that there is no malfeasance, corruption, waste, fraud and abuse in those programs. And when Congress puts money into that basket and gives resources and monies to the IG to carry out that function, it is good for Congress to know that money it is putting into that basket is going to be used for that oversight purpose, and money it puts in the assistant secretary's basket to carry out OSHA inspections is going to be used for the program. But if you break down the line between those two functions and you permit Inspectors Genera1 to go in and fill in the gaps wherever they see gaps in the program, it seems to me there is a bleeding of resources and a supplementation of resources out from the oversight function into the program itself. Now that may or may not be the proper allocation of resources in the real world, but it is not the allocation of resources that was originally determined by Congress to be appropriate.

Now, after attempting to make this distinction, which we think is the drawn in the statute and very clear in the legislative history, and doing so in a context where the specific issue was whether or not the Inspector General could carry out regulatory investigations under such statutes as OSHA and the Fair Labor Standards Act, a number of Inspectors General raised profound concerns and there was a lot of hoot and holler about it.

We asked the Inspectors General to come—and I asked the Inspectors General—to come and talk with me about the opinion in areas of concern where they felt that areas they really should be investigating would be precluded by this opinion. Very few Inspectors General took me up on this. Those that did presented some concerns which we wrote opinions about, OLC issued further opinions. In three areas we found that the issues that had been raised were clearly within the authority of the Inspector General. For example, one of the examples that was cited to us was the issue of DOT's IG and his ability to review the qualifications of pilots who have applied for pilot's licenses and to make sure that there are no false statements in those applications. And he said if we apply the OLC opinion to that then I am precluded from doing that.

We pointed out to him that our March 1989 opinion dealt with Sections 4 and 6 of the Inspectors General Act. That is the general authority to conduct and supervise investigations relating to the agency's program. We did not address part of Section 9, which is the grandfathering provision. Each Inspector General, or most of the Inspectors General under Section 9 of the Act have certain specific investigative functions grandfathered and transferred over to them, and we pointed out to the Inspector General of DOT that the very function that he was concerned about is specifically covered in Section 9 by the transfer of authority.

Now, much is made about the caveat in the letter and a lot is read into that. All we were saying there is usually OLC will deal with a specific concrete dispute, "Can I conduct this investigation against Joe Blow."

We were being asked here—because of the strident suggestions that there were a lot of investigations being shut off—we were simply pointing out that in a general sense the issue he raised generically of the ability to go in and look at these pilot applications was something that was not foreclosed by the March opinion, but

indeed was specifically covered by Section 9 and we said that he had very broad authority under those functions. The caveat was simply, since you haven't asked us about a specific case we are not going to opine on a specific case, but let me tell you you have very broad authority that has been grandfathered over to you in this area. Nothing sinister should be read into the caveat.

The examples that have been provided us to date by the Inspectors General have not proved to be difficult from our standpoint, and so far in three areas we found that Inspectors General clearly have authority to act.

Now, much has been made of this concept of fraud against the agency or fraud against the program, and this has been thrown up as you are precluding us from engaging against activity that constitutes fraud against an agency program. Well, I am skeptical of that very broad concept because a lot of what I see being called fraud against an agency program is simply another way of saying noncompliance with a regulatory program. It is very hard to conceive of situations that constitute noncompliance with most regulatory programs that don't involve, arguably, something that we might also call fraud against the program. If EPA issues a license, a water permit under the Clean Water Act saying you can discharge so much into the water and that is how much you can do under this permit and someone violates that, is that fraud against the program because there are false statements involved, or is that noncompliance with the EPA Clean Water Act regime that is in force and there is a specific enforcement unit in EPA that is supposed to go out and measure that and determine how that is to be handled.

So virtually any instance of noncompliance with a regulatory program can be referred to as a species of fraud against an agency. I am not talking specifically here about the tax statutes because they are sui generis and they have their own specific provisions, but conceptually, for example, is claiming a deduction or a credit you are not entitled to on your income tax fraud against the agency? And if it is, does that mean the Inspector General can audit and discipline a taxpayer rather than the IRS that is charged with doing that? The same is true with OSHA action, FLSA, most regulatory programs instances of noncompliance involve some species of misstatement that can be characterized as fraud.

Now, I did have discussions with Sherman Funk and I thought they were quite profitable and they helped me understand where the real issues were, and my recollection of those discussions was they basically ended up where it seemed to be one big question mark. And that is, are there instances of fraud against an agency which are not the kind of activity for which there is an investigative program in a compliance unit? That is, it is not an integral part of the program to go out and police those kinds of, quote, "fraud," so that there is in fact a gap there and there is no compliance unit that has statutory responsibility for policing that conduct.

And my view is that if someone can come and show me that species of fraud, then OLC will be glad to address the issue of whether or not that is within the jurisdiction of the IGs. Now, there have been some examples thrown out this morning that I have not

heard of before because, as I said, a lot of the IGs were skeptical about coming to us and raising any concerns they had, and we would be glad to look at them if they would like.

But I think a basic question that has to be asked is, is there such an animal out there, and if so, what is the best way of addressing it? In fact, I think there are basically 3 issues at this stage in my own mind. I think that the basic principle is that the line is a good one and it is a distinction that should be kept. Now, if someone can show that there are a segment of investigations that are not being done, that it doesn't make sense for the FBI to do them, that there is a special reason for the IGs to do them or that they are only the available resources and that it is a kind of fraud that does not supplant the enforcement program of the agency, and I think we should take a look at that, but the answer is not to throw out the basic distinction, the answer is to look at each of these cases that are brought up and see, A, do they fall into the jurisdiction of the IG; and B, if they don't fall into the jurisdiction of the IG what is the best way of dealing with them? After all, the IG Act is somewhat of a patch quilt because it does give certain IGs specific authorities in Section 9 that others don't have.

I think the second basic issue is this idea of a chilling effect of having a line. Well, I'm not very sympathetic to that. Most people in Government have to operate with lines, and I think the fact that just because there is a line that generates questions is not a reason to do away with the distinction and the line. I think my suspicion is that the overwhelming majority, 99.9 percent of the issues confronting the IG clearly fall on one side of the line or the other, and like most Government officials, where this is a question I don't consider it to be that substantial a burden to have to go and seek legal counsel. Everyone else in Government has to do it.

Now, OLC has not set itself up as the arbiter of all these issues. Our role is if someone comes and asks us a question, if Executive Branch officials come and ask us a question, we will give them an opinion. They are free to go to their own lawyer. If they disagree with the opinion they get from their own lawyer they are free to appeal it and come to us. We are not saying we have to approve these things on a case-by-case basis. We are saying in a close question if someone feels uncomfortable about their authority we would be glad do give them guidance.

Chairman GLENN. But will you commit to defending anybody who has a charge brought against them though pursuing what they think is their proper action under the IG Act?

Mr. BARR. Well, I have never suggested otherwise, but I think Stu Gerson would be better to answer that question. That really doesn't fall into my——

Mr. GERSON. The answer is yes. I will talk about it in more detail when my turn comes.

Mr. BARR. I am generally sympathetic though that it would be a good idea perhaps to look at the question of how to eliminate any adverse consequences that come up through a step over the line in a close case. In other words, I think the question of distinction in authority should be preserved. It is very important that the IGs have their work to do and the agency officials that are carrying out a regulatory program have their work to do. And that is a distinc-

tion that should not be fuzzed, but in a close case where there is some inherent fuzz and someone does step over the line, or at least some judge down the road decides at the beckoning of some private party that the IG has gone across the line, I think it is a fair point that maybe we should look at making sure that in those cases that the IG is insulated, that there is no chance he is operating without authority, and that whatever fruits of that investigation and ultimate conviction are preserved. I think that is a fair point, but that doesn't mean that we should do away with the line, and try to draw as clear a line as we can.

I think the third issue is a question of resource allocation. A lot of the examples that were discussed with me by IGs really don't relate to authority, they relate to resources. In fact, if you look at page 3 of Dick Kusserow's statement, very interesting on the FDA issue. I don't read it as disputing the fact that the FDA has criminal enforcement authority precisely over these generic drug cases. That is part of their regulatory statute and they have the authority to go out and conduct criminal investigations.

What Dick was saying was I have the skilled criminal investigators and they don't have any. And you run across that quite frequently. We also heard it from Sherman Funk.

There are two different statutes on visa fraud. One statute says that employees of the State Department commit a crime when they engage in fraudulently procuring or producing a visa, and the other one has to do with private parties, making that a felony. And the Bureau of Consular Affairs in the State Department has the authority to go out and enforce the law that is directed at non-employees, and Sherman Funk's operation has responsibility for conducting it where State Department employees are involved or colluding with outsiders. But I understood Sherman to say this morning that, "Gee, I have all the skilled criminal investigators and the Bureau of Consular Affairs is stretched pretty thin on providing security, and even though it is their authority, it doesn't make much sense in the real world for me not to be using my guys in those kinds of investigations."

I think those are really questions of resource allocation. There is no question that FDA or the Bureau of Consular Affairs has the enforcement responsibility, but the IGs come and say, "Look, I have all of these thoroughbred investigators that are crackerjacks and I should be using them in those cases."

Well, I think there is currently flexibility to do that, but I think conceptually those resources should be subject—should be detailed and made subject to the authorities that have the responsibility for carrying out that program. So, for example, the proper way to do it conceptually would have been for Dick Kusserow to detail his investigators to the FDA Commissioner if they are spare resources that can be used in FDA investigations, not to take over the investigation himself. But there are other devices that could be used to make those resources available.

But I think those are basically the three issues as I see it in application of the Inspector General Act in a way that still preserves a fundamental distinction that I think is important to the operation of Government generally.

With that I will stop.

Chairman GLENN. Thank you. Mr. Gerson.

TESTIMONY OF STUART M. GERSON, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE [1]

Mr. GERSON. Well, you have just heard, Senator Glenn, from your professor of aerodynamics, if you will. I am the guy whose troops fly these planes. In that context, it is clear that the Civil Division in particular, and the Justice Department as a whole, and the Inspectors General are functioning supportively and well and that each of these components is acting upon a firm commitment of fighting fraud wherever it might be found. I think that is important to note. I will return to that and document it.

I do want to make some mention of the practical effect of the OLC opinion, and suggest that its critics at once are making too much of it at the same time as they are making too little of it. They make too much of it because it is clear that at least as far as the Justice Department is concerned the IGs are being deflected from few if any cases in fact, and that all cases are being investigated by one or more appropriate agencies.

They make too little of the opinion letter in the sense that they suggest that is the product of a mere turf battle. It is, as was suggested in Senator Roth's testimony, and as Mr. Barr has just described in some detail, a matter of the intent behind the law, what this body originally intended for the IGs to do. And while this body can change or expand that law to satisfy its concerns and the concerns of various Inspectors General, one ought to recognize that that may be at odds with the original Congressional purpose in setting up independent Inspectors General. This issue of who watches the watchdogs is not an insignificant one and it does have practical effect. We are concerned about it in the Justice Department as well, because we think that when they are performing their appropriate role, that is, looking at the people who have fundamental regulatory and investigative responsibilities, they are indeed filling what was a dire gap in the way the law was being enforced, and if in various cases the Inspectors General simply become that which they ought to be looking after, that oversight function will be lost. You could change it, but we suggest that you do it only with the greatest of care.

Turning to the way that we are acting in the real world, I note, for example, that with the cooperation of the Inspector General of the Department of Defense we have in the most novel fashion successfully for the very first time attacked overseas bid rigging in military contracts, we are actively engaged in suits involving allegations of falsified testing results and other forms of defense fraud, and in these cases we are working hand in hand with the Inspector General without any indication of deflection on the Inspector General's part.

With the critical assistance of the Inspector General of the Department of Health and Human Services, the Civil Division has made a very good start in cases designed to vindicate the Congressionally mandated policy that Medicare must be a secondary payer

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[1] See p. 116 for Mr. Gerson's prepared statement.

when other forms of health insurance are available. These cases could save the public treasury many millions, indeed, hundreds of millions of dollars, and the working relationship with the IG, Mr. Kusserow by his own account, and mine, is highly professional and effective. I note that in particular because that is a classic case of where the Government isn't getting money on the pay-in side. Mr. Kusserow was one of the Inspectors General who at least asked me about that form of case. My response is I only wish that he had more resources to devote to those investigations. It hardly seems a matter of whether it is a direct payment out by the Government or the failure of payment in. In either regard, this has direct impact upon appropriated funds. It is clearly within the jurisdiction of the Inspector General. Mr. Kusserow has no problem with that. I have no problem with that. To the extent that the Inspector General of the Department of the Interior here has announced an area of concern that I haven't heard about before that seems similar to that, it would seem to me it is controlled by the same situation.

As far as those cases go, to the extent that Mr. Kusserow and I have any problem, it is the same one. We wish there were more resources that could produce more cases, because both he and I think there are more cases to produce, but there isn't any problem with his jurisdiction.

Let me stay on the subject of the Department of Health and Human Services and its IG for a few moments, for the reasons that that particular IG is among the most active and most competent in the whole Government, and his testimony and criticisms are, at least on the surface as I have read them last night, are the most compelling that you have received. The problem that led to whatever difficulties we had had with that Inspector General—and I believe these are largely abated—originated less with his entering any specific case than it did with the matter that the Secretary of the Department had delegated to him essentially all of the investigative responsibility of an Executive Branch agency.

Mr. Barr talked about the role of the FDA, and that delegation, as far as I could see it, was the heart of the matter or the only matter in dispute. But even looking at that in its worst light, we were talking about an area which by Mr. Kusserow's reckoning amounted to between 6 and 7 percent of the cases with which he deals, and by my count only about 3 percent of the convictions that resulted from these cases. And as to the residuum of cases that was left over after the investigative delegation was withdrawn, we got in a number of them a substantial portion of which should never have come to us in the first place because they were clearly within the Inspector General's jurisdiction. They involved allegations of direct misconduct by agency officials, some of those were generic drug cases, and he belongs in those cases.

To the extent that Mr. Kusserow's remarks might be interpreted as saying that the generic drug investigations were shut down, it was only for the briefest of periods and then only because of some doubt. We believe that that jurisdictional doubt has been allayed. Indeed, during the last 3 days I myself am aware that one of his investigators has been resident in my Office of Consumer Affairs working on these very cases. They are proceeding quite well. They are, as I see it, well within the jurisdictional metes and bounds of

that Inspector General, and I think we are doing, together, a very good job in prosecuting those cases, most of which are being prosecuted by the U.S. Attorney in Baltimore and the hides are going on the wall. We are getting those convictions and I expect that is going to continue.

In fact, I think the most difficult issue that we are going to face in those cases is less obtaining convictions than it is keeping that component of the industry where there are honest people viable, because they do offer a good cost containment device. But as far as the corrupt aspects of that industry, we are going to bring it to the ground. Mr. Kusserow is highly dedicated to doing that, and I and my people are no less dedicated to doing it, and it is clearly within his jurisdiction.

The Department of Defense related fraud, another area that we hear the most about, as we toted up the numbers between April 1 and September 30, 1989, the Office of the Inspector General of the Department of Defense conducted 4,811 investigations. By my analysis not a single one of them is adversely affected by Mr. Barr's opinion, or the opinion of the Office of Legal Counsel that preceded Mr. Barr and his clarifications of that.

You, Senator Glenn, and others on this Committee have asked for assurance that fully appropriate attention will be given to subsequent investigations. Mr. Barr and I assure you that we are committed to investigating criminal conduct and our activities will integrally involve the Inspectors General. If a particular agency with responsibility over an investigation needs assistance from its Inspector General and the Inspector General's authority would not encompass the assistance needed, we are aware of mechanisms, some of which Mr. Barr discussed, that could be utilized to deploy those people.

I think the fundamental question, of course, is the one that Senator Roth raised, which is one of resources. And if there is an agency that has investigative responsibility and they are not fulfilling it, the people running that agency perhaps ought to be replaced, or if they are working hard and can't get the job done because they have inadequate resources, they ought to get those resources on the main sequence. They ought not to get them as a result of the elimination of an important oversight function. I think we all agree about that. We all want those investigations to proceed.

In terms of another question that you raised, I guess you just asked Mr. Barr, and it also was raised in the materials that I got, was what are we going to do about allegations of personal liability on the part of Inspectors General and their staff if improper actions were taken. These are so-called Bivens cases alleging constitutional torts and it is my folks who are charged with the defense of those cases and with making at least the initial calls on whether or not to engage in their representation.

I guess there are three things to say about it. The first is nothing that we have done is going to change. The second is nothing that we could do, or nothing that relates to Mr. Barr's opinion would have much effect anyway, because the issue of these often vexatious tort claims is something that we face every day. No matter where the line is drawn we are going to face these things, but I

would have to say, as we have looked at the cases, even if the Inspector General is acting outside of his jurisdiction under the Office of Legal Counsel memo, I would be hard pressed to think of any case where a person adversely affected, that is, somebody who was the subject of one those investigations, would have any constitutional claim to complain about the activity of the Inspector General.

That is not the problem here. We don't think any investigation or conviction is going to be imperiled, whether or not we are right, or any given Inspector General is right, or you are right, or Jack Anderson is right about what the jurisdiction ought to be. The question, as we said, is the interpretation of the statute and what the Congress intended by it. Whatever the Congress intended by it, it didn't create any constitutional right that any citizen has that he didn't have irrespective of this determination. So that I don't think any of these cases is going to be in trouble, and I don't think any of the Inspectors General or their staffs are in any trouble that wouldn't have been in otherwise, the same one that I am in when I get up every day and go to work, and we are not going to change the avidity with which we represent Inspectors General or anybody else who are charged in these torts suits. We wish there were less of them.

Chairman GLENN. If there is a tort suit filed, will it make any difference on whether or not you pick up the defense of that person? Will it be based on whether that particular investigation was previously authorized by Justice or not?

Mr. GERSON. It won't matter. The answer is yes to the first part, no to the second part. It won't make any difference. It doesn't have anything to do with prior authorization, because the issue in those cases is whether there was any constitutional tort that was being committed, and as I say, I don't see that any right has been created that would be violated. I think that any suit that was based upon that kind of theory, in my view, would be inherently meretricious. I can't gainsay that some adventurous lawyer wouldn't try to phrase a case like that, but I don't think it would have any merit at all.

Chairman GLENN. Well, the IGs feel it has been put into some doubt, and that is the reason I pursue it a little bit. Your testimony reflects you "see no useful reason to highlight the specific arguments that might be raised to attack the validity of a prosecution "

In light of the fact the Justice Department chose to make this issue a problem for the IGs, I think it is a very important question——

Mr. GERSON. Well, I think I have just answered it.

Chairman GLENN [continuing]. One which you have given Congress no choice but to address.

Is it your position that the U.S. Attorneys will be instructed not to prosecute a case based on an unauthorized IG investigation?

Mr. GERSON. Well, I haven't stated any such opinion and I don't think it is within my jurisdiction ever to say that. Mr. Barr may be called upon to decide about the validity of a given investigation or whether or not we are going to prosecute, and we don't generally reveal our reasons for prosecuting or not prosecuting anyway. What I can within my competency answer is whether I am going to

defend any Inspector General or Inspector General staff member who is charged in a tort action as a result of one these cases whether or not we prosecute, and the answer to that is yes, assuming all the other criteria for the defense of one of those cases is met, that the individual was acting within the scope—even an erroneous view of it, that doesn't matter——

Chairman GLENN. Well, have you clarified this to any extent with the IGs, because they are laboring under an apprehension here that I believe is was well-justified.

Mr. GERSON. Well, I can't do that in a general sense, other than I think I have done it now. No IG has asked me. There was some conversation between Mr. Kusserow and a member of the Justice Department over this question. I was dissatisfied with the clarity of the discussion on both sides. If I have clarified it now I have accomplished at least something here. I don't know what else to say about it.

I know of no case that anybody can cite where I have refused, where I have made a non-scope determination, recommended to the Attorney General on this basis. I don't anticipate any. As far as specific questions about specific cases, there are not any. I don't know what else I can tell you.

Chairman GLENN. All right. Go ahead.

Mr. GERSON. Well, I think I have presented what I believe is our objective view of the way that this issue is working itself out. I don't think there is much of a problem, if any. I don't think we are losing cases any place, at least I don't see any. We have had to scramble a little bit to find the right kind of investigative personnel where we need them, but I think that is a problem no matter who has jurisdiction. There is a lot more to do than we have people to do it, and I think we all concede that, and I see a lot of that at the root of your statement which I read this morning, and many of the comments that I have heard today.

The value judgments that we are going to make, we haven't heard anything related to the Constitution raised here today, we are talking about some practical judgments. The value judgment you are going to make in recommending legislation is whether or not you can consider the kinds of broadening that you are talking about while maintaining the essential Inspector General function that we all desire, one of oversight. That, as I see it, is the issue. I would ask that my formal statement be made part of the record.

Thank you.

Chairman GLENN. It will be included as part of the record.

We have had testimony today from the IGs that with the exception of one item that came up within the State Department back in 1984 I believe. There was no complaint that IGs were exceeding their investigative authority.

Thirteen years later, why is this the time that we make this challenge? Either one of you.

Mr. BARR. Senator, I think the fact that there was no complaint should tell you something, which is that this is not a question of Department of Justice off on a toot going after the IGs. We have no axe to grind here. The issue was presented for the first time to the Department of Justice in the context that I described.

Chairman GLENN. Well, can you state unequivocally that the creation of the Department of Justice IG in 1988, which the Department of Justice opposed bitterly, was not a factor in the decision to issue the OLC opinion, which in effect weakened the IGs?

Mr. BARR. Well, I wasn't in the Department of Justice when the opinion was issued, so I would like to answer it that way. I have looked at the correspondence, I have looked at the papers back and forth between Doug Kmiec and the people in Labor who were presenting this to him. OLC was not interested in addressing this issue in the way it was presented and tried to avoid addressing the issue and said, come to us when you have a specific, concrete fight, we don't like addressing these general issues. And so it didn't look to me as if OLC was going off trying to draw a line in the sand, as has been described. And it was not meant—and I think people should go and read the opinion. It is not an attack on the IGs. There is nothing in there suggesting that there is a problem with IGs being rogue elephants or anything like that. We are not saying that there is a big problem out there. A specific dispute was presented and an opinion was written, and from what I can tell, there are not that many issues out there.

Chairman GLENN. Well, is the Department of Justice in favor of the IG system that we have set up, or do you oppose it?

Mr. BARR. As far as I am aware, we support the IG system.

Chairman GLENN. Well, you opposed bitterly putting it into the Department of Justice. We went through quite a wrangle on that, and we made some special arrangements because of the special nature of the Department of Justice. It wasn't that we were ramming something down their throats, we wanted to be very cooperative.

Mr. BARR. Well, I think that any suggestion that the Office of Legal Counsel was doing this in a vindictive way because of the creation of the IG in Justice is way off the mark. I understand that part of your request was for the Department to describe our experience with the Inspector General, and I understand that a letter is being prepared reviewing that. But from what I can ascertain of the record, and I can tell you in my own conduct over the past year when these issues have been presented to me, I am interested in applying the law as written by Congress as best I can construe the intent of Congress. I'm not interested in——

Chairman GLENN. Well, the reason I question the support for the IG community is the Department of Justice was put under the IG Act itself in October of 1988. In April 1989 the office began to function. It took the Administration until January 29, 1990, to nominate an IG.

Why such an extensive delay if you are all behind the IG program?

Mr. BARR. Well, I can't answer that, I wasn't involved in selecting the IG.

Mr. GERSON. Nor was I. Indeed, I don't know exactly what to say about.

Chairman GLENN. Well, I know that making those nominations is a little above your pay grade, I agree with you on that. But it is a thing where we look at the implementation of the IG Act as it is

applying to DOJ and we see a lot of foot dragging, we think, from our vantage point here.

Mr. BARR. Can I say, Mr. Chairman, that the position has been well handled by the acting IG, Tony Moscato, a career Department of Justice lawyer who I think would tell you he has received complete support from Attorney General Thornburgh and this Department.

Chairman GLENN. I guess what my bottom line is, I don't question that the Department of Justice is just as dedicated to right and justice and wanting to root out fat, fraud, waste and abuse as everybody else is. You are the leaders in that field, and I would think you would welcome the help of the IGs. You have already prosecuted 5,600 cases. This has been a successful program for 13 years, and nobody has raised any questions about it.

And why not welcome this help? We are all trying to head in the same direction on this, and yet we seem to be into a turf fight, and my ego is involved, and your ego is involved, and somebody else's ego is involved. And so what happens, we are about to kill something that has worked very, very well over the last 13 years I think.

It has fit in this area where there are not great big monstrous FBI investigations of some kind. All the areas that have been mentioned here by the IGs this morning, they are going to fall in the crack without this. And instead of welcoming this we seem to be fighting it. I don't understand why.

We talked to Mr. Darman. Yes, he is going to get on this. Mr. Hodsoll says yes, we have had meetings. DOJ apparently digs in their heels. Then somebody else digs in their heels and we get nothing done. It is all a turf fight and an inside-the-beltway type scrap here and what is going to happen, we are going to wind up weakening the IGs' authority to do things and to root out all these things that I think you are all working together on, or should be.

Mr. GERSON. We think so too.

Chairman GLENN. Well then why weaken their authority?

Mr. GERSON. I don't think it is a turf fight.

Chairman GLENN. Well, why weaken their authority?

Mr. GERSON. Well, we are not talking about weakening their authority.

Chairman GLENN. It has already been done.

Mr. GERSON. Well, let me suggest something, that to the extent it is done it shouldn't have been done. It certainly wasn't mandated by the OLC opinion. The OLC opinion, as I read it—and, of course, I read it coming into the Justice Department long after it was published—responded to a question of what the Inspector General authorities were.

Now, there is a legal question there and it is reflective of a philosophy that the primary purpose of the Inspector General is one of oversight, it is to serve as a watch dog.

Chairman GLENN. Well, why has there been such a hesitancy to get together and talk these things out so we can all decide where we are going from here? We depended on the Administration to do that and we have gotten nothing, zip so far.

Mr. GERSON. From the standpoint of the Civil Division there has been no hesitancy to do anything. Where we have had even the

specter of a problem being raised I myself sat down with the Inspectors General and we are moving the cases, and I think the results show that.

Chairman GLENN. Well, will you sit down once again with whoever from Justice, sit down with Mr. Funk representing the IG community, or whoever is going to represent it now, and Mr. Darman and his people from OMB or whoever, and try and work this out?

I don't particularly want to go the legislative route. We have legislation here to propose, and once again that will be taken as ramming something down your throat that you don't want and there will be even more foot dragging, and I don't want to go ahead that way, I truly don't. Isn't there a chance that you can still get this thing worked out to where it smooths it out for everybody and leaves the IGs doing the good job they have done all these years?

Mr. BARR. I think so Senator, and that is what I have been trying to do. Let me just say that no one here is talking about weakening or bringing down the Inspector General system. I believe that they have extremely broad investigative authority within the framework of the statute. The issue is whether or not they can also carry out regulatory investigations when those are properly the functions that are assigned to other components within the Department.

But as I have said, I would like to sit down, would welcome the opportunity to sit down, and have asked since September for IGs to present concrete examples of where they feel they have been blocked off. Now, the three that have been presented to me so far, I have ruled or issued the advice that they are not blocked off, that they are well within their authority, and that the examples that were being thrown up were——

Chairman GLENN. Well, you say they could continue with regulatory investigations. Define "regulatory investigations."

Mr. BARR. Well, I think where there is a statute that authorizes an agency to impose rules of conduct on regulated parties outside the agency, and then empowers the agency to conduct enforcement activity to ensure that there is compliance by the private citizens, and that that this is part, as the legislative history says, of the integral function of the agency's program, that is what we mean by a regulatory investigation. So an OSHA investigation, a Fair Labor Standards Act investigation, specifically referred to in the legislative history.

Chairman GLENN. You wouldn't get in the way of the IGs doing that kind of investigating——

Mr. BARR. Oh no, that is what we are saying they cannot do.

Chairman GLENN [continuing]. Even though it involves third parties outside, no Federal money, no Federal dollars or employees involved?

Mr. BARR. No. That is what we are saying they cannot do.

Chairman GLENN. They cannot do?

Mr. BARR. They cannot do those.

Chairman GLENN. Why?

Mr. BARR. Because that is the job of the Department of Labor's Assistant Secretary for Occupational Safety and Health. That is the integral part of the program they are supposed to be oversee-

ing. The House report specifically cites—one of the thing that made this opinion somewhat easy, I think, for my predecessor was the House report specifically says look, we are talking about oversight investigations, that is what the IG should be doing. They should not, for example, be carrying out investigations under the Fair Labor Standards Act. That is an integral part of the program of the Department of Labor. They should be overseeing that.

Chairman GLENN. But where there may be malfeasance of some kind in administering those programs, the IG couldn't get into it if it involves an outside third party?

Mr. BARR. No, where there is malfeasance within the Department——

Chairman GLENN. It may be from with inside, but they couldn't go outside and——

Mr. BARR. No, in fact, I told—let's take the FDA case. In the FDA situation there had been three convictions—I believe three convictions—at the time there had been three convictions of FDA employees, and what we said was that we thought the IG had authority to conduct those generic drug investigations initially against third parties because there was a sufficient basis to believe that there was collusion and that part of the problem here was malfeasance within FDA. And Sherman Funk raised the example of the visa counterfeiting rings, and I told Sherman, and I will say it here today, if there is a basis for believing—if he has some basis for an investigation because he believes that a ring in Beirut or wherever is linked to misconduct within the Department, he can conduct that investigation, including targeting the people on the outside because there is a basis for his jurisdiction.

Mr. GERSON. I would go further and say he also could be wrong and still be allowed to go forward, because the issue is whether as a matter of logic your experience tells you, or besides a specific allegation, that the fraud would only work with the complicity of somebody inside, we certainly countenance the Inspector General going forward first to see whether his preconception based upon experience or a specific allegation is true, and if it is, to continue on.

Chairman GLENN. Can you point to any cases investigated by an IG prior to your OLC opinion in 1989 where an IG exceeded his authority and undertook responsibilities that were not his?

Mr. BARR. No.

Chairman GLENN. Mr. Gerson, can you?

Mr. GERSON. I don't think so. I mean, there is some dispute over a body of FDA cases that has come to us, and my own reaction to that has been at this point I am less concerned about engaging in a debate with the Inspector General than I am in making sure that we don't lose any cases. So that we sent some back which clearly involve corruption. We have sent some others to the FDA with our oversight to make sure they are going to do their job, and we have offered the backup of the FBI. I don't want to engage in that kind of microscopic analysis to see who is right or wrong and risk losing a case. So my only hesitancy is about that. I wanted to make sure that every case had a home where some good was going to be done on it, but I concur with Mr. Barr's remark.

Chairman GLENN. In almost 13 years of operation there has never been a time that you know of where the IGs exceeded their authority, and yet you feel you need to limit what they are doing?

Mr. GERSON. But that is the point of all this. If you place this in its historical perspective, you see why everything you say is correct and there is no problem. There was no problem to begin with, because we think there was a generally acceptable and uniform understanding of what it is that the Congress did, hence there wasn't anything to oppose. As far as the way this is working in practice, there still wasn't anything to oppose or to describe any concern about until we were asked a specific question. That was answered.

Now, that raised a whole bunch of straw men, not of the Justice Department's creation, of others. If we have done some good as far as wiping away those straw men, then this exercise and others like it are proving of some merit and we can go forward without any legislation. But I think that that is a fair analysis of what has happened.

Chairman GLENN. Mr. Barr, you made a point a while ago that I wanted to respond to. You stated that the legislative history compels the conclusion that IGs do not have authority to conduct investigations that are, "an integral part," of the agency's programs. For support you cite the House Government Operations Committee report which states that the IGs would not have the responsibility for such investigations—responsibility for such investigations.

Now, there is a big distinction between authority to act and having the responsibility to act. Don't you see that big difference?

Mr. BARR. Well, I don't think there is a big difference in this context. I think that when the legislative history talked about responsibility there they were talking about authority. The statute itself also uses the word "responsibility and duty" when it assigns authorities to the IG. But that is not the only legislative history.

Chairman GLENN. The IGs were to have the authority to get into areas as they see things that need to be looked into.

Mr. BARR. Excuse me?

Chairman GLENN. The IGs were supposed to have the authority to look into areas that they think need to be looked into, but the ability to run the program was not theirs. That is what we talked about a little while ago here. That was never intended.

Mr. BARR. Well Senator, looking into things is frequently part of the program. Now again, using the examples we dealt with in the March opinion, if the Assistant Secretary for OSHA, part of his job is to go out and inspect plants and to do the paperwork and make sure that plants are conforming to the standards that are required. Now, that is his job, that is a statutory, regulatory program and the power of the Government over that factory owner is by virtue of that statute, that regulatory statute.

Now, what the IG's role is—and I agree with Senator Roth, at least that is our understanding of what the intent of Congress was—the IG's role there is not to look into things that need looking into. If he decides, "Well, I don't like the way that assistant secretary is carrying out his program, he is not bringing enough criminal charges, he is treating too many things as civil violations, I think there is an imbalance there so I am going to go out and investigate factory X."

Now, what am I investigating factory X for? We are saying if the IG says, I am going out to investigate factory X to see if they are complying with OSHA, that is not what he is authorized to do. His job is to look over the shoulder of the assistant secretary who is enforcing that statute and if he doesn't like the way he is doing it, to call that to people's attention.

Now, I do want to get back to one thing, and that is there is some latitude to go out and investigate private regulated parties. Let's take this example again. In assessing the efficacy of the OSHA program, for example, I think the Inspector General has to have latitude to go out and look at some of the regulated parties and to determine whether or not OSHA is doing a good job in enforcing compliance, sort of a spot check kind of thing. But they don't have a roving commission to go out and investigate factories for the purpose of enforcing OSHA. That is someone else's job.

Chairman GLENN. Let me give you an opinion of one of your former assistant attorney generals at the Justice Department. In 1987, former Assistant Attorney General Markman provided testimony before this Committee that showed an understanding of the IG's "authority to make whatever investigations he or she might deem appropriate."

And he stated that the Attorney General would be without authority to halt or redirect those investigations. During negotiations over the 1988 IG law, we provided for the Attorney General to specifically halt certain investigations of the Justice IG if he provided notice to Congress. No problem. That was special just for the Department of Justice. We did not change the basic authority of the IG to investigate in the first place.

This would appear to be a real change of position for the Department. How do you explain the Department's change of position?

Mr. BARR. Well, I can't say what Steve Markman meant, but I don't read it necessarily as a change of position. I went back and looked at the Attorney General's letter to you of September 13, 1988, and my understanding of the thrust of the concerns of the Department were precisely interference in pursuing mismanagement, malfeasance, fraud, waste and abuse within the Department, and I don't read Steve Markman's comments as suggesting that the Department of Justice in 1988 construed the Inspectors General Act as giving Inspector Generals plenary investigative authority over the jurisdiction of the Department of Justice. I don't think that was ever in people's minds, but I really cannot put myself in Steve Markman's head.

Chairman GLENN. The legislative history of the IG Act shows that unlike the House bill the Senate version included a broad definition of "investigation," which authorized the IGs to investigate, "misconduct, malfeasance, non-feasance, fraud or criminal activity on the part of any employee, person or firm directly or indirectly connected," with the agency.

However, even this definition was rejected by the key House and Senate members as being unnecessary, and Senator Eagleton explained its deletion from the final bill saying, "Investigation is a term with a generally well understood meaning."

It appears that 12 years later Justice has overturned that policy without demonstrating there was a pressing public policy reason to do so. Is that what Justice intended?

Mr. BARR. Well, what the Justice Department did was do its job, which is to provide legal advice to people who ask for it. Now, in our view there is a clear distinction in the statute between two different types of investigations, and that is investigations that are within the jurisdiction of IG, which are oversight investigations, and then those investigations which are part of the regulatory program itself against regulated parties and are an integral part of the program that the IG should be overseeing, not conducting.

Chairman GLENN. Mr. Gerson, let me ask you, I think the IGs would like a very direct answer on this.

Is your testimony today that in every instance in the future where individual IG agents will face legal challenges to their authority to investigate, the Justice Department will defend those agents in court and not require them to hire personal lawyers?

Mr. GERSON. Well, I can't answer that question "yes" or "no" but what I can say is that no determination as to not representing somebody will depend upon whether the IG——

Chairman GLENN. Well, let me say, unless there was criminal activity on their individual part for some reason or other. Outside of that——

Mr. GERSON. Well, that is not the standard for representation. That it is the difficulty. What I can guarantee you is that this jurisdictional question will have nothing to do with any decision made to represent somebody in such a case. In other words, I can't foresee not representing an Inspector General who was performing the job of an Inspector General, irrespective of what the appropriate jurisdiction is. If somebody under the guise of being an Inspector General went into an agency other than the one for which that Inspector General had authority—just to pull a very far fetched example of misconduct that would probably be criminal as well, then you would have an activity that was not within the scope of that person's duty. But that scope doesn't depend upon a correct jurisdictional determination, as I said earlier, and we will not disqualify from representation by the Government anyone on that basis. I think I have said that as clearly as it can be said.

Chairman GLENN. Okay. And that would apply whether or not they had applied to you for prior permission to investigate a certain area?

Mr. GERSON. That is right. I said that, and I don't expect that it would be appropriate or useful to have such case-by-case applications in any event, especially in view of both my testimony and Mr. Barr's that we foresee a rather broad jurisdictional permit for the Inspectors General. The area that Mr. Barr just talked about is a relatively limited area, and even when you touch upon the issue of regulation it still admits, as Mr. Barr himself has said, of Inspector General jurisdiction to look into mismanagement, misconduct, improper activity by the people who are conducting those regulatory programs that the Inspector General otherwise doesn't have jurisdiction to look into it.

Chairman GLENN. Senator Levin was unable to be here this morning because of other responsibilities. He has asked that I ask these two questions on his behalf, and I will. I am glad to do so.

The Program Fraud Civil Remedies Act authorizes the IG to conduct investigations against fraud. You have said any noncompliance with a regulatory program can be called fraud against the program. Doesn't that mean under the Program Fraud Civil Remedies Act the IG is authorized to investigate noncompliance with a regulatory program?

Mr. GERSON. I don't think so, and I think Mr. Barr's earlier testimony hit exactly that point. I think in a large number of these cases, as both he and I have testified, you are talking about just the kinds of things that come within the civil program remedies that you are talking about and that the IG has jurisdiction. Mr. Barr also I think accurately described the particular areas where the IG doesn't have jurisdiction.

Chairman GLENN. A follow-up on that. During that investigation, if the IG turns up evidence of criminal conduct, can he refer the criminal allegations to the Attorney General?

Mr. BARR. Of course.

Mr. GERSON. Of course.

Mr. BARR. That is what he is supposed to do.

Mr. GERSON. I'm not sure if something is being missed in the translation of that question, but that is exactly what the Inspector General is supposed to do.

Mr. BARR. Let me just say on the question of the Program Fraud Civil Remedies Act, we have never been asked to address that. That was not part of the March opinion. That is a self-contained, freestanding statute that confers additional investigative authority on Inspectors General.

What I was saying was that the Sections 4 and 6 which were addressed in the March opinion, we were discussing in that opinion the scope of that authority, and incantation of the words "fraud against program" as being sort of a key by which you can walk through that door or brush aside any inherent restrictions in Section 4 and 6 I don't buy off on.

Chairman GLENN. Mr. Gerson, exactly what assurances have been given and by whom to make you comfortable that the FBI will handle significant criminal investigations for which no other resource is available? For instance, what is significant? Who decides significant? Who is going to pick up the insignificant cases?

Mr. GERSON. Well, that is a more difficult question than the first part.

Chairman GLENN. Well all right, let's break it down then. Are you comfortable the FBI will handle significant criminal investigations for which no other resource is available?

Mr. GERSON. Well, I made the representations that I made consistent with what my criminal jurisdictions is and, of course, I am the head of the Civil Division, but I have criminal jurisdiction over matters under the food and drug laws. So what I had to say on that subject was with respect to that, and I said it, so that is where that authority came from. But I also said it with the permission and knowledge of my boss, the Attorney General.

I am not aware of other specific references in that regard, though their existence doesn't surprise me. I just won't attribute the source.

Chairman GLENN. Who defines significance so we will know whether the IG or FBI is supposed to be doing something?

Mr. GERSON. Well, there are some cases which both the Inspectors General, the United States Attorneys, and I and the Attorney General believe are insignificant, because each of us turns down cases in these cares we are talking about because they are isolated incidents, de minimis in value, there isn't anything than an allegation to support them, so we all turn them down, and we do know those when we see them. But those are matters of prosecutorial discretion that all of us have and that is what we are talking about.

A significant case then in my view is one that has evidence to support it and there are misdemeanors, for example, prosecuted by United States Attorneys all over the country, so the distinction can't be between a felony and a misdemeanor. The distinction has to relate to the gravity of the offense, the amount of evidence available to support it, and the available resources to go after it.

Mr. BARR. Mr. Chairman, you before asked whether or not there was any willingness to continue discussions with the Inspectors General, and I would welcome that opportunity. I think I had some initial discussions, as I said, with Sherman Fund and I felt we made some progress in narrowing and defining the areas of potential disputes. There was a time then where the Inspectors General were not sure they wanted to be talking to OLC, and now I understand that there might be willingness to talk to OLC about it. And some of the examples they gave this morning are things that we would like to talk to them about. I think some of them will not pose a problem. My tentative view is that it would not pose a problem.

But at least I would like to pursue with the Inspectors General the three issues that I raised at the beginning. I would like to look at where are these frauds in the program that do not implicate regulatory programs, and second, what are ways of preserving the distinction and the line of authority that I think is important as a policy matter, but eliminating consequences for crossing that line in terms of protecting the Inspectors General from personal liability and making sure that cases or convictions aren't thrown out, and thirdly, ways of adjusting resources. For example, there are cases where we would like—the U.S. Attorneys would welcome greater participation by the IGs in investigating cases because of learning curve, because of special expertise, because of high quality of Inspector General investigators, and we would like some flexibility in being able to use them without some of the financial difficulties that entails.

Chairman GLENN. As I said earlier, we are all trying to head in the same direction on this and trying to get at the same difficulties in Government and restore some confidence to Government, and I hope even at this point you can do exactly what you just indicated, get together with the IG Community, OMB, whoever else was involved in those original discussions. We were assured last fall that these were going on and the likelihood was it was all going to be worked out, there would be an agreement and that would be that.

Nothing has happened. That is the reason for this hearing this morning, as to point out that this cloud that the IGs see over their operations is still there.

And I think it is in the interest of everybody to get this done, and whether we put in a bill or not and try and bring it through to hearings, additional hearings and/or markup and so on, still remains to be seen. We could put that in and may do that, I don't know. But I would hope that you could get together and work this thing out so we don't need legislation. It has become a very bad situation, so I hope you can do that.

Thank you all very much. You may get some additional questions from other members of the Committee that were unable to be here this morning. We hope you would respond to those and we appreciate you being here. Thank you much.

The hearing will stand in recess.

[Whereupon, at 12:20 p.m., the hearing was adjourned subject to the call of the Chair.]

STATEMENT OF WILLIAM P. BARR
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

Thank you for this opportunity to testify about the Department of Justice's views on a number of legal issues concerning the authority of the Inspectors General (IG). As you know, the Department's Office of Legal Counsel issued an opinion on March 9, 1989, concluding that the IG of the Department of Labor lacked authority to conduct regulatory investigations that are an integral part of the programs administered by that Department. Let me first discuss the background and rationale of the Opinion and then turn to some questions about its application. When I have finished, Stuart Gerson, the Assistant Attorney General for the Civil Division, will discuss the actual impact of the Opinion on law enforcement.

The OLC Opinion grew out of a dispute between the Solicitor and the Inspector General of the Department of Labor. When the Solicitor requested OLC to issue an opinion on the IG's authority, we first tried to limit ourselves to the specific situation that had led to the dispute. However, the Solicitor advised us that the dispute was not confined to any specific statute or set of facts, but concerned the IG's general authority regarding alleged violations of any statute administered or enforced by the Department of Labor. The OLC Opinion necessarily dealt with principles broad enough to cover the dispute as presented to us.

After considering the legal arguments submitted by the Solicitor and the IG, OLC issued an opinion concluding that the Act does not generally vest in the IG of the Department of Labor the authority to conduct investigations into alleged violations of the regulatory statutes administered by that agency, such as the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, and the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678. Underlying the Opinion was a distinction between, on the one hand, the oversight role that IGs properly perform by investigating the manner in which agencies discharge their responsibilities and, on the other hand, "a direct role in investigations conducted pursuant to regulatory statutes" (Opinion at 1), which IGs may not undertake.

On its face, the language in the Inspector General Act of 1978 that defines the authority of IGs is not particularly clear. The Act empowers IGs to conduct investigations "relating to the programs and operations" of their agencies, 5 U.S.C. App. § 4(a)(1), and to take action for the "detection of fraud and abuse in such programs and operations," id. § 4(a)(2). To interpret the meaning of such language, the OLC Opinion turned to the legislative history of the Act.

The Opinion pointed to legislative history that supported the distinction between an oversight role and a direct role in

investigations under regulatory statutes. Congressman Levitas, for example, stated

> The Inspectors General to be appointed by the President with the advice and consent of the Senate will first of all be independent and have no program responsibility to divide allegiances. The Inspectors General will be responsible for audits and investigations only . . . . Moreover, the offices of Inspector General would not be a new 'layer of bureaucracy' to plague the public. They would deal exclusively with the internal operations of the departments and agencies. Their public contact would only be for the beneficial and needed purpose of receiving complaints about problems with agency administration and in the investigation of fraud and abuse by those persons who are misusing or stealing taxpayer dollars.

124 Cong. Rec. 10,405 (1978).

In particular, the legislative history compels the conclusion that IGs do not have authority to conduct investigations that are an "integral part" of the agency's programs:

> While Inspectors General would have direct responsibility for conducting audits and investigations relating to the efficiency and economy of program operations and the prevention and detection of fraud and abuse in such programs, they would not have such responsibility for audits and investigations constituting an integral part of the programs involved. Examples of this would be audits conducted by USDA's Packers and Stockyards Administration in the course of its regulation of livestock marketing and

> investigations conducted by the Department of Labor as a means of enforcing the Fair Labor Standards Act. In such cases, the Inspector General would have oversight rather than direct responsibility.

H.R. Rep. No. 584, 95th Cong., 1st Sess. 12-13 (1977) (emphasis added).[1] Thus, where an agency's compliance and enforcement unit has authority to detect and investigate non-compliance under a regulatory statute such as the Fair Labor Standards Act, the IG may not supplant the work of that compliance and enforcement unit. If the agency unit is not performing its responsibilities effectively, the IG has full authority to report on the shortcomings and recommend improvements. But the Act, as the legislative history makes plain, does not enable the IG to undertake himself the investigative tasks that Congress has made an integral part of the agency's programs.

This conclusion comports with one of the primary purposes behind the Inspector General Act, namely that IGs be independent and objective. See, e.g., H.R. Rep. No. 584 at 15. Under the Act, IGs are not to conduct the day-to-day operations of the agencies whose honesty and efficiency they must oversee. IGs, in short, are not to be put in a position where they must oversee themselves. An IG should have "no conflicting policy responsibilities which could divert his attention or divide his

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[1] In addition, section 9(a)(2) of the Act forbids delegating to IGs any "program operating responsibilities."

time; his sole responsibility is to coordinate auditing and investigating efforts and other policy initiatives designed to promote the economy; efficiency and effectiveness of the [agency's] programs . . . ." S. Rep. No. 1071, 95th Cong., 2d Sess. 7 (1978). The OLC Opinion sought to be faithful to this Congressional purpose of providing for independent IGs who are detached from the day-to-day development and implementation of policy in agency programs.

It would be contrary to the whole purpose of the Act -- and profoundly ironic -- if the Act were interpreted so that IGs would give up their impartial and independent roles, assume policy and operational responsibilities for agency programs, and become another "layer of bureaucracy" in the federal government. See 124 Cong. Rec. 10,405 (1978) (statement of Cong. Levitas). In that event, an Act aimed at economy and efficiency would create a duplicative establishment within an agency to do the same tasks that Congress had directed the agency to perform.

Moreover, it is hardly surprising that Congress did not provide the IGs with authority to undertake regulatory investigations as they chose, because to invest such authority in the IG would have circumscribed the power of the head of the department or the official designated by statute to control a department's regulatory policy. Regulatory enforcement policy necessarily requires complex choices about resource allocation

and prosecution priorities. The IG may legitimately conduct oversight review of such enforcement policies and may criticize them, but he does not have authority to change these policies through choosing his own investigations. It is no answer to say that the IG may be required to follow the policies laid down by the officials responsible, because application of these policies to particular facts necessarily requires judgment and the policies themselves will be continually reevaluated in light of the experience gained in their application. Thus, Congress wisely chose to leave regulatory enforcement decisions under the operational control of the agency's official responsible for regulatory enforcement.

As the Opinion and subsequent advice of OLC have made clear, an IG does have wide and suitable investigative authority. For example, an IG may investigate not only the actions of the agency and its employees, but also alleged wrongdoing by private parties acting in collusion with such employees. In the course of an oversight investigation, an IG may also conduct "spot checks" of agency actions, by investigating particular instances in which regulated persons have failed to comply with regulatory requirements. Furthermore, an IG may investigate the recipients of federal funds, such as contractors and grantees, since the legislative history demonstrates a special concern with financial wrongdoing. S. Rep. No. 1071 at 27 ("The [Inspector General's] focus is the way in which Federal tax dollars are spent by the

agency, both in its internal operations and its federally-funded programs"). And grandfather provisions of the Inspector General Act specifically give additional investigative authority to IGs in many agencies. The OLC Opinion simply declares, in accordance with the plain legislative intent, that an IG may not take over the programs that the agency is charged with administering, by conducting the investigations that form an integral part of such programs.

In response to generalized expressions of concern by some IGs about their investigative authority in light of the OLC Opinion, on September 11, 1989 the Department sent a letter to all IGs inviting inquiries from any IG who is concerned that the Opinion might constrain his ability to carry out any investigation he believes he has authority to carry out. We made it clear that we would work with any such IG to consider how the Inspector General Act and any other statutes governing that IG's authority apply to specific types of investigations -- as well as ways of structuring specific investigations in light of the authority of the various investigative bodies that might be available.

To date the IGs of the Transportation, Health and Human Services, and Labor Departments have responded to our invitation. We promptly provided them with advice that addressed their concerns and made it clear they could carry out the types of investigations they had inquired about. There was no need in

those instances to consider alternative ways of structuring investigations because we advised the IGs that they had the requisite authority.

Chairman Glenn's letter of invitation for the hearing today raises some questions about the OLC Opinion's conclusions in light of other provisions of the Inspector General Act and the later-enacted Program Fraud Civil Remedies Act of 1986. These provisions do not alter our conclusions.

The letter points out that IGs "are empowered to investigate a variety of matters reported by 'whistleblowers.'" In particular, Section 7 of the Inspector General Act provides that an IG

> may receive and investigate complaints or information from an employee of the establishment concerning the possible existence of an activity constituting a violation of law, rules, or regulation, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.

5 U.S.C. App. § 7(a). Furthermore, the IG may not reveal the identity of the employee unless the disclosure is "unavoidable," 5 U.S.C. App. § 7(b). Chairman Glenn's letter states that this requirement could "mak[e] it problematic for any other office to undertake the investigation." The letter suggests that Section 7

thus calls for IG investigations that would be outside the scope recognized as proper by the OLC Opinion.

Because the type of investigations discussed in the OLC Opinion did not result from "whistleblowing" by agency employees, the Opinion did not interpret Section 7. By its terms, Section 7 applies only when an agency employee has conveyed a complaint or information to an IG. In the absence of such a communication from an agency employee, Section 7 could not, even on the most generous reading, be the basis for an investigation by an IG. Thus, it cannot disturb the general conclusions of the OLC Opinion.

In fact, OLC has never been asked to interpret the scope of the whistleblower provision. Generally, it is most productive to interpret statutes in the context of specific facts that can sharpen and illuminate the issues, and I would be reluctant to state any definitive position about Section 7 in the abstract. However, in a tentative way, I can outline some of the considerations that should help to shape an interpretation of Section 7.

The overriding intent behind the section was to provide a secure channel to the IGs for whistleblowers. Congress noted that "it is never easy to 'blow the whistle' on one's supervisors or colleagues," S. Rep. No. 1071 at 35, but that "the employees

of an establishment can be valuable sources of information about fraud, waste, and mismanagement within the agency," id. at 36. The OLC Opinion expressly recognized that IGs have authority to investigate the actions of agencies and their employees. Given that the legislative history of this section suggests that it addresses internal problems caused by an agency's dereliction of duty, I am skeptical that the provision would generally authorize investigations going beyond the broad range of investigations already discussed. However, our office cannot opine on this issue without a concrete case in which the IGs and other interested components of the government could make their views known.

Chairman Glenn's letter also notes that the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801-3812, empowers IGs to investigate certain false statements or claims submitted to the government. The sanctions levied under that Act, however, are administrative in nature. Thus, the Act does not give an IG authority to seek civil or criminal sanctions in regulatory compliance programs. The OLC Opinion did not address any authority for administrative investigations that an IG might exercise under that Act. Where an IG has authority under that statute, the Opinion does not limit that authority in any way.

Let me now turn to an issue concerning the scope of the OLC Opinion. Noting that the OLC Opinion addressed a situation where

the IG at the Labor Department asserted inherent authority under the Inspector General Act to conduct regulatory investigations, Chairman Glenn's letter asks whether the OLC Opinion also precludes an agency head from delegating such authority to an IG pursuant to Section 9(a)(2) of the Act. The OLC Opinion expressly answered that question in the affirmative (Opinion at 11-12). The immediately preceding subsection of the Act (Section 9(a)(1)) transferred to the newly-established IG Offices a number of existing government offices that performed audit and investigative functions. Consistent with the transfers made by that subsection, Section 9(a)(2) also transferred to the IG Offices

> such other offices or agencies, or functions, powers, or duties thereof, as the head of the establishment involved may determine are properly related to the functions of the Office and would, if so transferred, further the purposes of this Act, except that there shall not be transferred to an Inspector General under [this subsection] program operating responsibilities.

Since an IG is precluded under the Act from conducting regulatory investigations, it follows that the agency head cannot delegate such authority to the IG, because it is not "properly related" to the IG's statutory functions and would not "further the purposes of this Act," as required by Section 9(a)(2).

Because of the preceding conclusion, it was not necessary for the OLC Opinion to discuss explicitly the question of whether the conduct of regulatory investigations also constitutes a "program operating responsibility," the delegation of which to an IG is prohibited under Section 9(a)(2). We believe that an affirmative answer to that question was implicit in the rationale of the OLC Opinion and wish to make it clear to the Committee today that that is our view. As previously stated, Congress intended that the IGs would oversee but not conduct agency operations, and we find no basis in the Act or its legislative history for concluding that agency regulatory investigations should be treated any differently in this regard from any other agency operations.

This conclusion is supported by the discussion of Section 9(a)(2) contained in the House and Senate reports on the Act. See H.R. Rep. No. 584, 95th Cong., 1st Sess. 15 (1977) ("In order to prevent compromising the independence and objectivity of the Offices of Inspector General, transfer of program operating responsibilities to the offices is prohibited."); S. Rep. No. 1071, 95th Cong., 2d Sess. 38 (1978) (substantially identical language). In our view, Congress' interest in preserving the IGs' "independence and objectivity" regarding oversight of an agency's regulatory investigative operations would certainly be threatened if an IG were to undertake some of those operations

himself, thereby putting himself in the position of overseeing his own performance of an agency function.

The legislative history of the 1988 amendments to the Act demonstrates a congressional understanding that is fully consistent with this conclusion. In responding to concerns that extending the Act to the Department of Justice would interfere with the Department's investigative and law enforcement functions, the House report stated that:

> A simple extension of the 1978 act to include the Department of Justice would not result in a direct and significant distortion and diffusion of the Attorney General's responsibilities to investigate, prosecute, or to institute suit when necessary to uphold Federal law. The investigation and prosecution of suspected violations of Federal law and the conduct of litigation are parts of the basic mission or program functions of the Department of Justice. The 1978 act does not authorize inspectors general to engage in program functions and, in fact specifically prohibits the assignment of such responsibilities to an inspector general.

H.R. Rep. No. 771, 100th Cong., 2d Sess. 9 (1988) (footnote omitted). Just as the 100th Congress understood the Act to prohibit the Justice Department IG from being assigned the "program function" of investigating suspected violations of federal law, we understand the Act to prohibit any IG from being assigned pursuant to the Act the function of investigating

suspected violations of a regulatory statute, where investigating such violations is an integral part of the agency's programs.

Chairman Glenn's letter suggests that the OLC Opinion rests on Congressional intent and asks whether there is any bar to Congress' clarifying that intent. As long as the President retains control over the appointment and activities of the IGs, there would, in principle, be no constitutional bar to expanding the IGs' jurisdiction into the areas where the OLC Opinion concluded that the Act now excludes the IGs.[2] But Congress can clarify its intent -- or, more precisely, can reformulate the intent of a previous Congress -- only by passing another statute. Congressional intent can legitimately be inferred from the language, structure, and history of a law because the entire Congress has had an opportunity to examine all of these matters during the course of passage and has then voted on the bill and presented it to the President for his consideration. Therefore, although Congress may amend or clarify the Inspector General Act, it may do so only through the process for enacting a law as provided in the Constitution.

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[2] Of course, we would need to review any specific language expanding IG jurisdiction, in order to determine whether other constitutional issues that we cannot now foresee have been raised.

I will close, Mr. Chairman, by stating that we remain convinced that the OLC Opinion sets forth the correct interpretation of the scope of Inspector General investigative authority under the Inspector General Act. I look forward to answering your questions about the Opinion and my testimony, but with your permission we would appreciate the opportunity for Stuart Gerson first to present the Department's testimony concerning the actual impact of the Opinion on law enforcement.

STATEMENT OF STUART M. GERSON
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

We welcome this timely opportunity to discuss the views of the Department of Justice on various issues dealing with the authority and role of the Inspectors General of the various Executive Branch components, and to reiterate our firm commitment to supporting these officials and, most of all, to fighting fraud and corruption wherever it might be found.

Indeed, in the time that I have been the Assistant Attorney General for the Civil Division, I believe that there has been extremely useful and effective cooperation with the Inspectors General, especially in the areas where fraud can be the most costly: defense and federally-guaranteed health services.

For example, with the cooperation of the Inspector General for the Department of Defense, we have successfully attacked overseas bid-rigging in military contracts and we are actively engaged in suits involving allegations of falsified testing results and other forms of defense fraud.

With the critical assistance of the Inspector General of the Department of Health and Human Services, the Civil Division has made a good start in cases designed to vindicate the congressionally-mandated policy that Medicare must be a secondary payer when other forms of health insurance are available. These cases could save the public treasury many millions of dollars, and the working relationship with the IG, by his account and mine, has been highly professional and effective. We believe that our offices also are working effectively with regard to food

and drug regulation and other areas of mutual interest and jurisdiction.

Notwithstanding the clearly documentable success of the coordinated work of the Justice Department and Inspectors General, there has been some confusion generated by the legal opinion rendered by the Department's Office of Legal Counsel. While the Assistant Attorney General for that Office, my colleague Mr. Barr, is here today to explain that opinion and its ramifications, I note two things about it.

First, the scrutiny that it has gotten has been centered on one form of case in a single department. That is a testament to the fact that the Inspectors General as a whole have no difficulty exercising their jurisdiction effectively. Second, even in one area of inquiry, i.e., Food and Drug Administration matters involving the IG of the Department of Health and Human Services, the cases are proceeding with reasonable dispatch. Moreover, because of the option of detailing employees, Inspector General personnel have not necessarily been displaced from these matters.

Nevertheless, if there has been doubt or confusion, either by some Inspectors General or by other segments of government, then part of our goal today is to eliminate that uncertainty.

Assistant Attorney General Barr has presented the legal rationale underlying the OLC Opinion. I shall inform you of how we are actually working on cases in view of it.

It is natural and necessary to focus on the specifics of Inspector General authority. However, fully to appreciate the soundness of the views expressed by the Department of Justice, it might be better first to step back to look at the overall concept of an office of Inspector General. A broader perspective also will assist in explaining the corrective steps that we have suggested could be taken to further investigations which might be technically outside of the general authority of an Inspector General, but where it is desirable to continue the IG's involvement.

An Executive-Branch Department's traditional investigators can be analogized to a police force. The Office of Inspector General, created by statute in 1978, established in-house investigators, a segregated internal affairs arm, if you will, to make certain that fraud, waste and abuse within that police force are ferreted out and lead to punishment. That of course is not their only function, as Inspectors General not only police the regulators' actions, but have the additional roles that in greater detail have been described by Mr. Barr. Of particular importance, IG's become the "front-line" investigators as to possible wrong-doing by recipients of federal funds, such as contractors and grantees.

This police of the police are responsible for assuring that the traditional investigators faithfully perform their roles in pursuing criminal conduct and are not themselves violating the law. However, if the "watch-dog" investigator entirely supplants

the main-sequence investigator, the very potential abuse that the IG system is designed to uncover necessarily will go undetected. The Inspector General's purpose cannot be served if the Inspector General takes over the integral programs administered by an agency.

We have no reason to doubt that Inspector General personnel are as honest and dedicated as any public servants. We likewise believe that most federal agency employees are well-intentioned. There either is or is not a reason for an Inspector General system in the first place. Once it is determined that a sentinel is needed to detect the malfeasance of those given responsibility for specific categories of investigations, that very determination answers whether one group cannot be both watchdog and street cop.

One specific concern, expressed in this Committee's request for testimony, was the possible impact on the validity of criminal prosecutions if evidence obtained by Inspectors General acting outside of their statutory authority was to be used at trial. We could not discount the possibility that a defendant would attempt to set aside a conviction or block a prosecution because it was based on an investigation that was beyond an Inspector General's authority. We see no useful reason to highlight the specific arguments that might be raised to attack the validity of a prosecution. In sum, however, we believe the Government has a strong position that would protect convictions and prosecutions based on evidence obtained during such

investigations that were beyond the scope of Inspector General authority. Even so, prosecutions frequently present significant hurdles in proving to the jury both that the defendant was engaged in unlawful conduct and that such conduct was performed with the requisite criminal intent. These prosecutions should not be burdened by unnecessary extra questions about the Inspector General's authority to participate in the investigation.

For your information, we are aware of only three challenges to convictions or prosecutions that were brought in the year since the OLC Opinion was issued. None of those was successful.

We are not able specifically to divide the prior convictions obtained in part through IG investigatory work, and state in what number an IG might have been operating inconsistently with that office's authority. In many respects, only each individual Inspector General Office would have the information in sufficient detail to indicate the subject matter of each investigation. Still, we agree with the Committee that quantifying the issue is relevant. The following should be helpful in that regard.

We will discuss two Inspector General offices to explain our analysis of their work. The first, and the one that has been much discussed in relation to the authority issue, is the IG for the Department of Health and Human Services. In a report submitted to this Committee in March, 1990, entitled "Summary of OIG Involvement in Food and Drug Administration Criminal Investigations," Inspector General Richard P. Kusserow has stated that investigations conducted by his office during FY 1990 have

led to 1278 convictions against individuals and entities who committed offenses involving HHS programs. During that same time period, 30 arrests or convictions were obtained pursuant to the delegation of investigatory authority for Food and Drug Administration matters. There were also 8 employee disciplinary actions or referrals involving FDA, though it would appear the delegation was not a necessary predicate for those. Thus, only approximately 3% of the convictions obtained through HHS-IG investigatory endeavors were dependent upon the purported delegation of authority.

Indeed, after HHS Secretary Sullivan withdrew the delegation, a total of 212 investigations in which IG involvement at some level occurred were identified by the IG as being subject to the authority question. It appears to us that this includes the 30 for which convictions were obtained. Our examination of a printout we received from the IG in February revealed that in perhaps 50 or more matters the OIG had jurisdiction without regard to the Secretary's withdrawal of the delegation. Moreover, approximately 30 additional matters were closed by OIG, generally because the OIG determined that the allegations were unsubstantiated or a United States Attorney declined prosecution, without any regard to questions about the OIG's authority. Thus, at most only approximately 130 matters were left for possible referral to the Food and Drug Administration for whatever further development was required. As of April 20, 1990, the Inspector General has referred 90 files to the Department of Justice. The

Food and Drug Administration already had been investigating many of these. Many of the remainder were minor allegations received by the Inspector General that had apparently not yet been investigated, and did not include evidence of serious criminal wrongdoing.

Though we do not find in the Inspector General's March, 1990 report to this Committee the total number of cases handled by the HHS-IG during a one-year period, we did discover that in the 1990 appropriation hearing for his office, Mr. Kusserow testified the HHS-IG had an average of 3755 investigations underway. If that means that on any given day during the year that was the average, then the total number of cases with which the IG was involved for the year would in addition include other cases opened or closed. Such a computation might dramatically alter the total. Yet even just using the 3755 figure, and even employing the full number of 212 "affected" cases, which clearly is at least twice too large, less than 6% of what the IG investigated are questioned FDA matters.

It is also instructive that the HHS Inspector General's own statement to me in a meeting in February, 1990, was that the FDA matters were an "insignificant" part of his office's total investigation inventory. After viewing these figures, that assertion rings true. Thus, as to the work of this particular Office of Inspector General, the number of past investigations affected by the authority question is minimal.

A separate set of figures puts the questions raised about the impact of the OLC opinion in perspective. For the large number of IG offices that have not taken a role in regulatory matters, this clarification of authority is virtually irrelevant. For example, we examined information from the Department of Defense Office of Inspector General. Their latest semi-annual report reveals that for the six month period from April 1 through September 30, 1989, that office conducted 4811 investigations. Our review of the twelve categories used by the Defense Department IG to describe its investigations, indicates none of those investigations would be affected by the authority issues.

This Committee itself may have reports from individual Inspectors General that indicate their perception of the breadth of the impact of the authority issue. Our very clear perception is that although from a few offices there are statements that a large segment of initiatives have been impeded, the overwhelming majority of investigations government-wide are unaffected by this clarification of jurisdiction. In part that is because most IG's have only conducted investigations that fall within the traditional understanding of Inspector General authority. Since a group of Inspectors General will also be testifying before this Committee, their individual view of the scope of the authority issue will be presented as well.

The Committee has asked (Question E) for assurances that fully appropriate attention will be given to subsequent investigations. Let me assure this body that we are committed to

investigating criminal conduct and believe the answers for the future are not that complicated. For example, we have previously submitted written guidance to the HHS-IG regarding that Office's authority. We present that to the Committee here today.

This guidance indicates that there is an incredibly broad range of IG responsibilities that are totally consistent with the proper statutory authority of that office. The most significant is the traditional fraud, waste and abuse within the agency. If this kind of violation is coupled with allegations of substantive violations of the statutes regulated by the agency, the IG's involvement in the intertwined aspects of the case is generally appropriate. The component of the Department of Justice that traditionally deals with that particular agency and its IG stands ready to provide advice as to specific questions.

As part of the analysis of the tools available for future investigations, we should mention the additional advice that we have given the HHS-IG. There are obvious resource allocation problems within almost every agency. If a particular agency with responsibility over an investigation needs assistance from its IG, and the IG's authority would not encompass the assistance needed, we believe a detail of the necessary IG investigators to the appropriate agency in most cases would statutorily be permitted. The relevant agency or Executive branch department's specific statutes, including its appropriations, need to be examined before a specific answer can be given. The advantage of a detail is that it is consistent with the concept of having a

separate IG office of watchdogs. Once detailed to the regulatory agency, the IG personnel become supervised by that agency, not the IG's office, and they become part of the overall regulatory mission. For purposes of that specific investigation, they are as much part of the regulatory agency as any other employee, and also as subject to the IG office's traditional oversight for misconduct, fraud, waste and abuse.

The Federal Bureau of Investigation also has a role. We in no way belittle the substantial responsibilities the FBI has in countless other areas. But specific assurances have been given that make us comfortable in stating that the FBI will handle significant criminal investigations for which no other resource is available.

The whole question of which is the proper office to handle an investigation has also raised concerns about liability if improper actions were taken. Specifically, Senator Glenn's letter asked about possible Bivens constitutional tort actions against Inspector General agents who participate in unauthorized investigations. We do not believe that any constitutional rights are implicated by the question of whether a particular investigation is authorized by the Inspectors General's Act. Thus, that question should have no bearing upon an investigator's exposure to Bivens liability. A court should not perceive an IG's potential actions outside the scope of his statutory authority as a violation of a constitutional right that would lead to Bivens litigation. Any investigation, clearly within or

clearly outside an IG's authority, has the technical potential for Bivens exposure, but only if the actions violated the plaintiff's clearly established constitutional rights of which the government employee should have known. See Harlow v. Fitzgerald, 457 U.S. 800 (1982). Thus, the employee's liability is determined by an examination of the nature of the acts in question, rather than whether the acts were authorized.

Of course, a Bivens constitutional tort is not the only possible liability that a government employee might have. As to common law torts, there is potential protection from liability by operation of 28 U.S.C. § 2679. That statute provides that, upon the certification by the Attorney General that the employee was acting within the scope of his employment with regard to the acts in question, the United States shall be substituted as defendant in any common law tort action against a government employee.

The determination of whether to authorize representation when an employee is sued in his individual capacity is determined upon a case by case basis after a thorough analysis of the facts of each case. The determination is governed by a two part test: (1) was the employee acting within the scope of his employment, and (2) is representation otherwise in the interest of the United States. 28 C.F.R. § 50.15.

In general, resolution of the first question depends upon the purpose of the employee's actions. If the employee is acting to further the interests of the government, rather than some

personal interest or motive, his actions, even if mistaken or misguided, will be viewed as being within the scope of employment. This is particularly true if the actions were taken at the instruction of the employee's supervisor.

The determination of whether representation is in the interest of the United States is also dependent upon an analysis of the facts and circumstances of the individual case. Obviously, it is not in the government's interest to represent an individual if the known facts indicate that he has engaged in serious improprieties or criminal conduct. By contrast, it is in the government's interest to minimize the disruption caused by individual liability lawsuits that result from an employee's good faith attempt to perform his duties.

Because of uncertainties some Inspectors General have had regarding their authority, a certification could still be proper that employees who conducted questioned investigations pursuant to instructions from their supervisors were acting within the scope of their employment.

You have requested some additional history on the steps the Department of Justice took regarding the withdrawal of a delegation of investigatory authority from the Secretary of Health and Human Services to that Department's IG. You specifically ask "why DOJ felt it was necessary to insert itself?" It has been alleged by some that this was nothing more than a "turf battle." Such an allegation is the almost instantaneous explanation for some when an issue of authority is

raised. Such a view is both unfortunate and unfair. In summary, the Department "inserted itself" because prosecutions might have been adversely affected, and IG participation in certain substantive FDA matters would have been a violation of the letter and purpose of the Inspector General Act. If the Department of Justice cannot pursue concerns such as these without its motives being questioned, then that fact is indeed portentous.

CONCLUSION

We have presented here today our objective view on the impact the IG authority issue will have on work already performed by those 24 offices, and the ability of each IG to perform necessary investigations in the future. We believe that the past investigations and convictions cannot be successfully questioned in court action, but continuing and magnifying the risk of that was inexcusable. We firmly believe that a proper understanding of the expansive IG authority leads inescapably to the conclusion that most future investigations should continue unimpeded. Those areas in which questions arise can be dealt with through the mechanisms that we have suggested. There is no reason for past, present or future malefactors to feel comfort over the issues that have been raised regarding IG authority. Vigorous investigatory efforts are unhampered and in only a small minority of cases diverted to other resources. Prosecutions and convictions are now even less subject to needless technical

attacks, and the letter and the purpose of the Inspector General Act is being fulfilled.

Yes, problems will remain in the investigation, prosecution and conviction of criminal conduct. These problems are no worse, however, and we in all candor believe they are actually lessened, by proper understanding of and respect for the appropriate role of the Inspectors General in the Executive Branch.

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

March 28, 1990

Richard P. Kusserow
Inspector General
Office of the Inspector General
Department of Health & Human Services
Washington, D.C. 20201

Dear Mr. Kusserow:

Over the past six weeks, members of our respective staffs have engaged in a number of what I hope have been productive discussions concerning the scope of Inspector General jurisdiction and permissible activity as to Food and Drug Administration cases (as well as generally) in view of the opinion on the subject issued by the Office of Legal Counsel. In the wake of those exchanges between our offices, I thought it useful to confirm in writing what the metes and bounds of that considerable jurisdiction are.

As you can see from the attached summary, your office has a broad range of authority regarding the FDA. As cases arise, IG jurisdiction most often will be determinable from the face of the subject matter of the allegation raised. In cases of doubt, the Department of Justice and the Office of the Inspector General shall meet promptly to discuss the matter. Where it is determined that, under the Office of Legal Counsel opinion, the Inspector General does not have independent jurisdiction, the Civil Division will consider alternative means for Inspector General involvement on a case by case basis.

The legal issues that undergird jurisdictional limitations are matters of importance which can be adhered to without prejudice to the effective development of food and drug cases. We thus look forward to continuing to work with you as

our respective offices assure that violations of the food and drug laws are vigorously investigated and that culpable individuals are brought to justice.

Sincerely,

Stuart M. Gerson
Assistant Attorney General

cc: Michael J. Astrue
General Counsel
Department of Health and Human Services

General Guidance Regarding HHS Office of Inspector General Investigations or Referrals of FDA Related Matters

The following describes the appropriate handling by the Department of Health and Human Services' Office of Inspector General (OIG) of allegations and cases relating to the Food and Drug Administration.

1. The OIG has full authority to investigate matters focusing on mismanagement within FDA, employee misconduct matters, and fraud, waste and abuse by recipients of FDA funds. Such matters are within the OIG's investigative jurisdiction, and need not be referred to the Justice Department until such time as the investigation is completed.

2. Upon completion of the OIG investigation, the matters referred to in paragraph 1 above are to be referred to the Criminal Division of the Department of Justice or to an appropriate United States Attorney's office for prosecution, with immediate notice of such referral being given to the Office of Consumer Litigation of the Civil Division.

3. As to matters relating to the Food and Drug Administration (other than matters set forth in paragraph 1 above) which solely involve violations of the Federal Food, Drug, and Cosmetic Act ("FFDCA") (including the Prescription Drug Marketing Act), or related statutes [for instance 18 U.S.C. § 1001 (false statements); 18 U.S.C. § 371 (conspiracy); 18 U.S.C. §§ 1341, 1343 (mail and wire fraud)], the OIG may not investigate unless arrangements are made for OIG involvement consistent with the Office of Legal Counsel (OLC) opinion of March 9, 1989. Such arrangements could include a temporary detail to other appropriate agencies. Examples covered by this paragraph include: steroids cases; distribution of counterfeit drugs; illegal distribution of drug samples; illegal diversion of drugs; failures by regulated entities to report information or false statements in the approval, post-approval or inspection process; and the unapproved use, marketing, misbranding or adulterating of products regulated by FDA.

4. If the OIG desires involvement in any of the allegations, matters and cases falling within the categories described in paragraph 3 above, it may request that the Department of Justice determine whether the OIG may do so consistently with the OLC opinion. The request should be directed to the Office of Consumer Litigation.

5. As to any investigation that will involve matters within paragraph 1 above and also associated violations of the

FFDCA or related statutes by regulated industry, the OIG's continued participation is generally appropriate. Thus, if there are alleged violations both within and without the proper jurisdiction of the OIG, both may be pursued if there is a sufficient nexus between them. The Office of Consumer Litigation will, upon referral of such an investigation, certify the propriety of OIG's participation. This may require input from the relevant United States Attorney's office.

6. If OIG has any question as to whether a particular FDA related allegation or matter falls within its investigative jurisdiction, it should discuss it with the Office of Consumer Litigation.

7. Referral of new matters received by the OIG should be in accordance with the responsibilities and referral procedures within HHS in place prior to July 24, 1989. Matters normally investigated by FDA prior to referral (assuming they do not suggest improper action by FDA personnel) should be investigated by FDA unless it is concluded that a particular matter should receive Office of Consumer Litigation attention in the first instance.

Authority of HHS Inspector General to Investigate Private Party Fraud Against FDA

The HHS Office of Inspector General may investigate fraud by those who contract with, or receive grants from, the FDA. In connection with an oversight investigation of a regulatory program, the office may perform "spot checks" of the FDA's own investigations by looking into some of the specific cases of alleged fraud that the agency is or could be pursuing. Furthermore, the office has authority to investigate private parties' collusion in, or inducement of, wrongdoing by FDA personnel. However, as explained below, it is our view that the Inspector General Act of 1978 ("Act") does not authorize the Inspector General to undertake investigations that are an integral part of the FDA's programs. We believe that certain investigations of fraud against the FDA would fall into this category.

The Act makes it the "duty and responsibility of each Inspector General, with respect to the establishment within which his office is established . . . to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment" and "to conduct, supervise, or coordinate other activities carried out or financed by such establishment for the purpose of . . . preventing and detecting fraud and abuse in . . . its programs and operations." 5 U.S.C. App. § 4(a)(1) & (3). There have been disputes over the scope of Inspector General (IG) authority to conduct investigations. As noted above, the Office of Legal Counsel in the Department of Justice issued an opinion on March 9, 1989, which dealt with the scope of an IG's authority in the context of regulatory investigations. The Opinion concluded that the Act does not generally vest in the IG of the Department of Labor the authority to conduct investigations into alleged violations of the regulatory statutes administered by that agency. Underlying the Opinion was a distinction between, on the one hand, the oversight role that IGs properly perform by investigating the manner in which agencies discharge their responsibilities and, on the other hand, "a direct role in investigations conducted pursuant to regulatory statutes" (Opinion at 1), which IGs may not undertake.

The Opinion pointed to legislative history that supported this distinction. Congressman Levitas, for example, stated

> The Inspectors General to be appointed by the President with the advice and consent of the Senate will first of all be independent and have no program responsibilities to divide allegiances. The Inspectors General will be responsible for audits and investigations

> only . . . . Moreover, the offices of Inspector General would not be a new 'layer of bureaucracy' to plague the public. They would deal exclusively with the internal operations of the departments and agencies. Their public contact would only be for the beneficial and needed purpose of receiving complaints about problems with agency administration and in the investigation of fraud and abuse by those persons who are misusing or stealing taxpayer dollars.

124 Cong. Rec. 10,405 (1978).

In particular, the legislative history compels the conclusion that IGs do not have authority to conduct investigations that are an "integral part" of the agency's programs:

> While Inspectors General would have direct responsibility for conducting audits and investigations relating to the efficiency and economy of program operations and the prevention and detection of fraud and abuse in such programs, they would not have such responsibility for audits and investigations constituting an integral part of the programs involved. Examples of this would be audits conducted by USDA's Packers and Stockyards Administration in the course of its regulation of livestock marketing and investigations conducted by the Department of Labor as a means of enforcing the Fair Labor Standards Act. In such cases, the Inspector General would have oversight rather than direct responsibility.

H. R. Rep. No. 584, 95th Cong., 1st Sess. 12-13 (1977) (emphasis added).[1] Thus, where an agency's compliance and enforcement unit has authority to detect and investigate non-compliance by a regulated party that could also be characterized as fraud against the agency, the IG may not supplant the work of that compliance and enforcement unit. If the agency unit is not performing its responsibilities effectively, the IG has full authority to report on the shortcomings and recommend improvements. But the Act, as the legislative history makes plain, does not enable the IG to

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[1] In addition, section 9(a)(2) of the Act forbids delegating to IGs any "program operating responsibilities."

undertake himself the investigative tasks that Congress has made an integral part of the agency's programs.

As the Department's Office of Legal Counsel observed in its Opinion, a division of authority based on whether investigations are an integral part of an agency's programs is not only mandated by law but essential to protect the independence of IGs. The officials designated by law to make and carry out policy for an agency are to direct the investigations that are required for the discharge of their responsibilities. The IGs, who oversee the efficiency and integrity with which these policies are carried out, retain their independence because they do not themselves become responsible for the implementation of the agency's policies. Thus, the IG may investigate the agency's conduct of regulatory investigations but may not conduct such investigations himself.

The division of responsibility set up by the Act leaves wide and appropriate scope for investigations by IGs. IGs may investigate the recipients of federal funds, such as contractors and grantees, see, e.g., S. Rep. No. 1071, 95th Cong., 2d Sess. 4, 6, 27 (1978). A special concern with financial wrongdoing led Congress to give IGs' this power, and the power is recognized in the legislative history of the Act: "The [Inspector General's] focus is the way in which Federal tax dollars are spent by the agency, both in its internal operations and its federally-funded programs." S. Rep. No. 1071 at 27. See id. at 4 (concern was with "fraud, abuse and waste in the operations of Federal departments and agencies and in federally-funded programs"); id. at 6 (noting the need "to insure that Federal funds are spent carefully and in accordance with law"). IGs may also investigate the actions of agencies and their employees, see, e.g., id. at 4, 28, and this authority also permits the IGs to investigate private persons alleged to have colluded with agency employees in wrongdoing. Furthermore, in the course of an oversight investigation of a regulatory program, an IG may make "spot checks" of the effectiveness of the agency's activities, by looking into the facts of particular instances where a regulated person has allegedly defrauded the agency.

These general principles apply to the relation between the investigatory authority of the FDA and that of the HHS Office of Inspector General (OIG). It seems clear that the FDA, as a central part of its regulation of the food and drug industries, is responsible for investigating fraud allegedly committed against the agency by persons that the agency regulates. For example, as to drugs, the FFDCA expressly assigns that responsibility to the agency, providing that the "Secretary [of Health and Human Services] shall, after due notice and opportunity for hearing to the applicant, withdraw approval of an application with respect to any drug under this section if the

Secretary finds . . . that the application contains any untrue statement of a material fact." 21 U.S.C. § 355(e)(5); see 21 C.F.R. § 5.10(a)(1) (delegating functions under FFDCA to Commissioner of FDA). Furthermore, the FDA is responsible, more generally, for enforcing laws applicable to drug manufacturers and other licensees of the agency. See, e.g., 21 U.S.C. § 360; see also 21 U.S.C. § 335 (FDA hearing before reporting criminal violation of FFDCA to the Justice Department). Therefore, should fraud result in violations of those laws, the FDA's jurisdiction would cover investigations, including investigations of possible criminal offenses. The FDA maintains a staff of investigators and compliance personnel, whose duties include determining whether persons regulated by the agency have committed such fraud in connection with the agency's regulation. See 21 U.S.C. § 372(a). Investigations of fraud against the FDA, therefore, will as a general matter be an integral part of the FDA's programs and thus outside the OIG's jurisdiction. Of course, we are not addressing here any specific matter involving the FDA, and the facts in particular cases might affect whether an investigation was "an integral part of the programs involved."

Although we believe that it is not proper to turn over to the OIG the responsibility for regulatory investigations that are an integral part of FDA's programs, it may be appropriate to detail OIG personnel to FDA's enforcement and compliance unit in order to assist in such investigations. OIG personnel, for example, may offer expertise not otherwise available to the agency. Through such details, FDA can have the benefit of the special expertise of OIG personnel and yet maintain control over the discharge of its statutory responsibilities. Moreover, this approach permits the OIG to maintain its necessary independence from program responsibilities.

Mr. HUGHES. Mr. Barr, welcome.

STATEMENT OF WILLIAM P. BARR, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. BARR. Thank you, Mr. Chairman. As you indicated in your opening statement, the administration really has two proposals, and in addition to those the administration will shortly be proposing a death penalty for drug kingpins. You outlined the three basic prongs that that proposal will have. Let me just review them briefly and then discuss why we believe it is constitutional.

Under the first prong, we would essentially take what Congress has made a mandatory life without parole offense and convert that to a death-eligible defense. The elements there would be proof of leadership of a continuing criminal enterprise that engages in very substantial drug trafficking, measured either by $10 million annual gross receipts or 300 times the transactions amounts of 21 U.S.C. 841(b)(1)(B); that is about 30 kilos of heroin, 150 kilos of coke.

The second prong would provide for the death penalty for a CCE leader, so that would again be the predicate, a CCE leader, who, to obstruct justice or an investigation or a prosecution, attempts to kill or directs another to attempt to kill any public officer, juror, witness, or a family member.

The third prong of the proposal has three elements. First, a felony violation under Federal law. Second, reckless disregard posing a grave risk of death. And third, an actual death that results in the course of the violation. Of the three prongs, this is the only prong that actually one of the elements of proof is proof of causation of a death.

Now all three of these that I have been referring to as prongs are essentially predicates to becoming death eligible. They do not automatically trigger the death penalty provisions. In order to impose the death penalty, the jury would have to find one of several aggravating factors, and they are, for example, previous conviction where a death or a life sentence was authorized, previous conviction of serious narcotics felonies, use of a firearm, employment or endangerment of youth, or use of lethal adulterants in the drugs.

We at the Department of Justice believe that the imposition of the death penalty on leaders of large-scale drug production and distribution operations would be consistent with the proportionality rule of the eighth amendment. The eighth amendment's proportionality rule essentially requires that the severity of the punishment be proportionate to both the gravity of the injury caused and the moral culpability or the blameworthiness of the offender.

We believe that imposing the death penalty on drug kingpins as crafted in our proposal would be constitutional because of the grave public harm which their trafficking activities cause, and because of the culpable state of mind that these individuals have.

Now there are two ways of measuring the gravity of harm caused by a crime. There is the private harm and the public harm, and the Supreme Court has recognized both of these. In the *Coker* case which either you or some of the other members of the panel

referred to, that dealt with a rape of an adult woman and the Court there focused on the private harm, the direct injury to the immediate victim of that act; although it did refer to the public harm, and it pointed out that there was public harm and it characterized it as assisting in the engendering of a sense of insecurity in the community. That is how they gauged the public harm there.

In that case they found that the death penalty was not proportionate for a nonaggravated rape of an adult woman. However, in the past, Congress has dealt with grave threats to the Nation and to the public by the death penalty even where no death can be demonstrated to result. In the very first statute defining Federal crimes, for example, in 1790, Congress prescribed the death penalty for treason. The Supreme Court has upheld the imposition of the death penalty for treason. Similarly, since 1917, Federal law has authorized the imposition of the death penalty for the crimes of espionage, and, in 1946, Congress responded to the enormous threat posed by the release of sensitive information concerning nuclear technology to hostile powers by imposing the death penalty under certain circumstances for such conduct.

As these historical and other examples indicate, Congress has the power to respond to conduct posing a serious threat to public safety and national security by imposing the death penalty, even in situations where the defendant has not personally and directly engaged in the killing of another human being. That Congress should use this power to respond to the drug crisis we believe is clear. We believe the threat that the massive influx of drugs into the Nation is presenting to the public welfare of the American people is obvious. The scope of the public harm caused by those who introduce large quantities of drugs into our society is staggering. Over one-third of all violent felonies in this country are committed by persons under the influence of drugs. Statistics are set forth in my testimony which attempt to portray the staggering impact of the narcotics traffic on American society.

Recent Federal court decisions have recognized that the harm to society caused by the distribution of illicit drugs may at least be as serious as those involved in the case of the killing of an individual human being. And there is one rather florid passage, written by Judge Gee, in my testimony, where he says, "Except in rare cases, the murderer's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image—others who create others still, across our land and down our generations, sparing not even the unborn."

We believe that Congress has substantial latitude, far more than any individual State has, in determining the necessary punishment for crimes that affect the general public welfare and the security of the Nation as a whole, and we believe that in reviewing Congress's determination that past measures have been ineffectual and that sterner penalties are necessary, substantial deference would be given to congressional factfinding. This is particularly so in the eighth amendment context.

Federal legislation passed by Congress and signed by the President represents the views of the representatives of all the people and should be entitled to great weight in making the determina-

tion whether American society as a whole regards a particular penalty for a particular crime as disproportionate.

Some have suggested that, under the eighth amendment, the death penalty can only be imposed for criminal conduct causing the death of another human being. While we believe that the eighth amendment imposes no such requirement, imposition of the death penalty on the leaders of large-scale drug distribution organizations meets even this standard. In its recent decision in *Tison* the Supreme Court discussed the moral culpability necessary to justify a sentence of death in the felony murder context.

Tison involved the imposition of the death penalty on defendants who assisted two inmates in escaping from an Arizona correctional facility. The defendants armed the escapees with weapons and aided them in flagging down a family on the road to steal their vehicle. The two inmates killed the family members after seizing their car. Thus, the actual defendants in *Tison* did not have an intent to kill, nor did they accomplish the actual killing. The Supreme Court noted, however, that they had a reckless indifference to the value of human life and that this was a highly culpable state of mind which was sufficient to support the death penalty.

We believe that when we are dealing with the phenomenon of drug trafficking on a large scale the nexus between the trafficking in these drugs and the death that is caused in America is clear and compelling, and we set forth some evidence in the prepared statement.

With that I will end the summary of my statement, and I would be glad to answer any questions, along with Ed Dennis.

Mr. HUGHES. Thank you, Mr. Barr.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF WILLIAM P. BARR, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear today to discuss various death penalty proposals before the Subcommittee. My testimony will focus principally on the constitutionality of the Administration's proposal that the death penalty be extended in certain circumstances to those who lead and organize large drug distribution enterprises, individuals commonly referred to as "drug kingpins."

Federal law currently prescribes the death penalty for a number of serious offenses. For example, death is a prescribed penalty for crimes such as treason, death resulting from the use of mail bombs, and the assassination of the President and other high-ranking federal officials. In 1972, however, the Supreme Court held in Furman v. Georgia, 408 U.S. 238 (1972), that the death penalty could not be imposed without procedures designed to channel the jury's sentencing discretion. In the wake of Furman, state legislatures that chose to retain capital punishment enacted sentencing procedures designed to guide the jury's penalty determination. These procedures, designed to focus the jury's attention on aggravating and mitigating factors connected with the crime and the defendant's background, were upheld by the Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976), and

subsequent cases. More than two-thirds of the States have responded to Furman and Gregg by enacting the constitutionally adequate procedures to allow for continued application of the death penalty to the most serious crimes.

Although public sentiment nationwide reflects overwhelming agreement with the proposition that capital punishment should be an available sanction for the most serious offenses, Congress has not, as yet, responded to Furman by enacting proper procedures for enforcement of federal death penalty statutes. Thus, despite the fact that Congress itself has determined by statute that certain federal crimes should carry a penalty of death, Congress has not adopted proper procedures for imposition of the death penalty, leaving these federal criminal statutes empty shells.

Starting in 1983, Administrations have repeatedly submitted comprehensive death penalty legislation to Congress; however, no action has been taken to reestablish the federal death penalty. Nearly a decade of delay is enough. It is time to act.

President Bush's Comprehensive Violent Crime Control package, H.R. 2709, contains in Title II death penalty procedures that satisfy the standards established by the Supreme Court. Those procedures would apply to existing federal capital crimes such as murder of federal law enforcement officers, murder through the use of mail bombs, and espionage and treason. In

addition, the President's proposal would extend the death penalty to certain other crimes, such as an attempted assassination of the President that comes close to succeeding. The details of H.R. 2709 are well known to the Subcommittee.

In addition to the proposals included in the Violent Crime Control package, the Administration will soon transmit to Congress legislative proposals to implement the National Drug Control Strategy, including extending the death penalty to drug kingpins. First, let me briefly outline the scope of the Administration's proposal, and then I will turn to a discussion of the constitutionality of imposing the death penalty on individuals who engage in large-scale distribution of dangerous narcotics.

In addition to the death penalty provisions already contained in H.R. 2709, Director Bennett's Drug Control Strategy Implementation Bill for 1990 sets forth three situations in which the leaders of large scale drug distribution networks could be subject to capital punishment.

First, the death penalty would be available for the leaders of continuing criminal drug distribution enterprises where the enterprise itself received more than $10 million per annum in drug revenues or engaged in certain importation or distribution

offenses involving extremely large amounts of controlled substances.

Second, the death penalty would be an available sanction where the leader of a continuing criminal enterprise participated in or authorized an attempt on the life of a judge, juror, witness or other participant in the criminal justice process. The importance of the availability of the death penalty in this situation stems in part from the fact that the leaders of such organizations already face the possibility of life imprisonment without parole, and thus have every incentive to attempt to obstruct the investigation of their organizations through violence directed against judges, other law enforcement personnel, or potential witnesses. This proposal recognizes the vast resources and viciousness of these organizations, and their proven disposition to engage in this kind of terrorism. Drug barons operating out of Colombia have murdered scores of Colombian judges. As we attempt to bring the heads of drug organizations to justice, we cannot allow that type of terrorism to spread here. Indeed, the FBI recently reported that in fiscal year 1989 there was a 55% increase in threats of violence against federal judges and United States Attorneys, and much of this increase was related to drug prosecutions.

Finally, under the Administration proposal, the death penalty would be a permissible penalty where an individual

committed a drug felony with reckless disregard for human life and caused the death of another human being. Under present law, the death penalty is not available for reckless killings connected with drug felonies, such as a shoot-out among rival drug dealers that results in the death of innocent bystanders. The Administration's proposal would fill this gap, and allow the jury to consider imposing the death penalty in such situations.

In each of these three situations a penalty phase hearing would be held in which the jury would receive and consider information offered by the prosecutor and by the defendant with respect to the appropriateness of the death penalty under the facts of the specific case. No defendant could be sentenced to death unless the jury unanimously found the presence of at least one aggravating factor and further found that the aggravating circumstances outweighed any mitigating factors.

Let me turn now to the constitutionality of the Administration's new proposals.

I. The Death Penalty for Drug Kingpins is Constitutional

The Administration strongly believes that the death penalty may constitutionally be extended in certain circumstances to those drug kingpins who knowingly engage in the massive and ongoing sale of dangerous illegal drugs. As noted above, the National Drug Control Strategy contains such a proposal. In addition, Senator D'Amato, with numerous co-sponsors, has introduced legislation containing such a proposal in the Senate, and Representative McCollum's anti-crime bill (co-sponsored by, among others, Representatives Smith, Gekas and DeWine) contains a similar proposal. Other proposals with analogous provisions are also before the Subcommittee.

It is the considered view of the Department of Justice that imposition of the death penalty on the leaders of large-scale drug production and distribution operations would be consistent with the proportionality requirement of the Eighth Amendment. The Eighth Amendment's rule of proportionality requires that the severity of punishment be proportionate to (1) the gravity of the injury caused by the offense and (2) the moral culpability, or blameworthiness, of the offender's state of mind. See Tison v. Arizona, 481 U.S. 137, 148-49 (1987); Coker v. Georgia, 433 U.S. 584, 598 (1977); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (principal opinion). We believe that imposition of the death

penalty on the leadership of major drug organizations would be constitutionally permissible because of the enormous magnitude of the public harm they cause and the depraved state of mind -- the reckless disregard for human life -- involved in managing these death-dealing enterprises.

The Supreme Court has held that the death penalty -- the ultimate sanction -- must be reserved for cases where the harm caused by the offense is especially grievous. See Gregg, supra, at 187 (principal opinion). The Court has recognized two ways to measure the gravity of a crime. One is the degree of injury done to the individual who is the direct victim of the offense. Coker, supra, at 598. The death penalty is appropriate for the cold-blooded murderer because the degree of injury inflicted on the individual victim -- the taking of the victim's life -- is enormous. Gregg, supra, at 187. However, the gravity of a crime can also be measured by the magnitude of the "public injury" caused by the offense. Coker, supra, at 598. Thus, capital punishment has historically been considered appropriate for certain crimes that profoundly endanger the public welfare. Since the inception of our Republic, it has been recognized that certain criminal conduct -- even though it may not directly involve homicide -- may inflict such egregious injury to society at large, or may pose such a clear and present danger to the lives of a large number of citizens, that the death penalty is

warranted for those who purposefully engage in such conduct.

In the past, Congress has dealt with broad threats to the security of the Nation and the people's welfare by imposing the death penalty on individuals who -- although they have not directly taken the life of another individual human being -- engage in conduct that profoundly injures the Nation as a whole. In the first statute defining federal crimes aiter the framing of the Constitution, Congress prescribed the death penalty for those guilty of treason. See Act of April 30, 1790, 1 Stat. 112 (1790). The Supreme Court has noted that legislation passed by the First Congress sheds significant light on the scope of constitutional limitations on legislative action, see Marsh v. Chambers, 463 U.S. 783 (1983), and the Court has upheld the imposition of death sentences for treason. See Kawakita v. United States, 343 U.S. 717, 745 (1952). Federal law still prescribes the death penalty for treason today. See 18 U.S.C. § 2381. Similarly federal law has, since 1917, authorized the imposition of the death penalty for certain crimes of espionage. In 1946, Congress responded to the enormous threat posed by the release of sensitive information concerning nuclear technology to hostile powers by imposing the death penalty under certain circumstances for such conduct. See Act of August 1, 1946, 60 Stat. 766-767 (1946). The death penalty remains available for peacetime espionage today, including espionage involving nuclear secrets. See 10 U.S.C. § 906a. In 1961, Congress responded to

the threat to public safety posed by aircraft piracy by making the death penalty applicable to airliner hijackings. See Act of September 5, 1961, 75 Stat. 466 (1961). As these historical examples indicate, Congress has the power to respond to conduct posing a serious threat to public safety and national security by imposing the death penalty, even in situations where the defendant has not personally and directly engaged in the killing of another human being.

That Congress should use this power to respond to the drug crisis is clear. Not since the dawn of the nuclear age have we faced a threat more pernicious, more dangerous to the security and welfare of the Nation than the current crisis involving the large-scale importation and sale of narcotics. The importation of drugs into this country by large-scale distribution organizations violates the sovereignty of our borders and affects our foreign relations with our neighbors in Central and South America. At home, drug use destroys lives through dependency, overdoses, violent crime associated with drug use, and the facilitation of the spread of diseases like AIDS. The scope of the public harm caused by those who introduce large quantities of drugs into our society is staggering. Over one-third of all violent felonies in this country are committed by persons under the influence of drugs. U.S. Department of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics -- 1988 624 (1989). In New York City, in 1988, 90 percent of all

male arrestees tested positive for drug use. U. S. Department of Justice, Bureau of Justice Assistance, 1988 Report on Drug Control 2 (1989). A recent study of the criminal activity of 573 narcotics users conducted in Miami graphically illustrates the connection between drugs and violent crime. In a twelve month period these 573 drug users were responsible for 6,000 robberies and assaults, 6,700 burglaries, nearly 900 vehicle thefts, and more than 26,000 prostitution offenses. Id. at 18. In 1983, it was estimated that the cost of drug use to American society in terms of lost productivity, crime, and health care services was almost sixty billion dollars. U.S. Department of Justice, Report to the Nation on Crime and Justice 114 (2d ed. 1988). Indeed, the Supreme Court itself has recognized in the context of drug testing that the importation, sale, and use of illegal drugs is "one of the greatest problems affecting the health and welfare of our population." National Treasury Employees Union v. von Rabb, 109 S. Ct. 1384, 1392 (1989).

Recent federal court decisions have recognized that the harm to society caused by the distribution of illicit drugs may be at least as serious as that involved in the case of the killing of an individual human being. In Terrebonne v. Butler, 848 F.2d 500 (5th Cir. 1988), cert. denied, 109 S. Ct. 1140 (1989), the Court of Appeals for the Fifth Circuit rejected the argument that the Eighth Amendment's proportionality requirement prohibited a

sentence of life imprisonment without parole for the sale of a small amount of heroin. Judge Gee wrote for the en banc court:

> Except in rare cases, the murderer's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image -- others who create others still, across our land and down our generations, sparing not even the unborn.

Id. at 504.

Similarly, in Young v. Miller, 883 F.2d 1276 (6th Cir. 1989), the Court of Appeals for the Sixth Circuit upheld a sentence of life imprisonment without parole for possession with intent to sell 1300 grams of heroin. In finding that the sentence was not disproportionate under the Eighth Amendment, the Court noted that the crime of large-scale distribution of drugs "is one of the gravest that a person can commit today," and that "[t]he ripple effect on society of such a large quantity of heroin is staggering to contemplate." Id. at 1283. Given the widespread harms wreaked by those at the top of the very largest of drug distribution operations, the Department believes that Congress would be within its constitutional powers in determining that this class of individuals, narrowly and appropriately

defined, presents the same danger to the health and welfare of the Nation as those who engage in treason or espionage. As a consequence, imposition of the death penalty in these cases would not be disproportionate under the Eighth Amendment.

Congress has significantly more latitude than any individual State in determining the necessary punishment for crimes that affect the security of the Nation as a whole. The Supreme Court has repeatedly recognized that "[t]he Constitution gives Congress broad comprehensive powers '[t]o regulate commerce with foreign Nations,'" and that "[h]istorically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry." United States v. Montoya de Hernandez, 473 U.S. 531, 537-38 (1985) (quoting United States v. Ramsey, 431 U.S. 606, 618-19 (1977)). Thus, in reviewing Congress' determination that past measures have been ineffectual and that sterner penalties are necessary, substantial deference would be given to congressional fact-finding. This is particularly so in the Eighth Amendment context. In determining whether a particular state law penalty is disproportionate, the Supreme Court inquires into the legislation of the fifty States to determine the "conceptions of decency" shared by "modern American society as a whole." Stanford v. Kentucky, 109 S. Ct. 2969, 2974-75 (1989). Federal legislation, passed by Congress and signed by the President, represents the views of the representatives of all the people, and should be entitled to great weight in making the

determination whether American society as a whole regards a particular penalty for a particular crime as disproportionate.

Some have suggested that, under the Eighth Amendment, the death penalty can only be imposed for criminal conduct causing the death of another human being. While we believe that the Eighth Amendment imposes no such requirement, imposition of the death penalty on the leaders of large-scale drug distribution organizations meets even this standard. In its recent decision in Tison v. Arizona, 481 U.S. 137 (1987), the Supreme Court discussed the moral culpability necessary to justify a sentence of death in the felony murder context. Tison involved the imposition of the death penalty on defendants who assisted two inmates in escaping from an Arizona correctional facility. The defendants armed the escapees with weapons and aided them in flagging down a family on the road to steal their vehicle. The two inmates killed the family members after seizing their car. Thus, the actual defendants in Tison did not have an intent to kill, nor did they accomplish the actual killing. The Supreme Court noted that "[a] critical facet of the individualized determination of the culpability required in capital cases is the mental state with which the defendant commits the crime." Id. at 156. The Court found in the legislation of the States and the common law support for the proposition that "reckless indifference to the value of human life may be every bit as

shocking to the moral sense as an 'intent to kill.'" Id. at 157. The Court stated in conclusion:

> [W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment . . . .

Id. at 157-58.

In our view, those who lead large-scale drug distribution enterprises "knowingly engage in criminal activities known to carry a grave risk of death" under Tison and thus exhibit a mental state which the Supreme Court has indicated can support a sentence of death. As the Supreme Court noted in Tison, "[d]eeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished." Id. at 156. In the case of so-called drug kingpins, we deal with a conscious decision to introduce into society addictive substances whose destructive capacity is unlimited. Thus, unlike the murderer or rapist who generally strikes only one victim, the large-scale drug distributor threatens millions, indeed society at large. Cf. Gregg v. Georgia, 428 U.S. 153,

202-203 (1976) (principal opinion) (creating "risk of death to more than one person" is an aggravating factor which may properly be considered in capital sentencing). Moreover, the large-scale drug distributor engages in this destruction of human life solely for pecuniary gain. This, too, is a factor the Supreme Court has considered relevant in adjudging moral blameworthiness in the capital context. Id. at 197. Finally, the link between the activities of large-scale drug enterprises and death is clear. In the four-year period from 1985-1988, the Drug Abuse Warning Network reports that over 14,000 overdose deaths were reported in 26 metropolitan areas, excluding New York City. Secretary Bennett's 1989 National Drug Control Strategy report indicates that drug use is now the single largest source of new AIDS infections, and that one-half of all AIDS deaths are drug related. The report further indicates that the number of drug-related emergency hospital admissions increased by 121 percent between 1985 and 1988. A recent survey of state prisoners incarcerated for murder indicated that over 28 percent were on drugs when they killed. U.S. Department of Justice, 1988 Report on Drug Control, at 19. The deadly effect of drugs even reaches to future generations. The Centers for Disease Control report that 75 percent of infant AIDS cases are attributable to drug use. Recent newspaper accounts indicate that the infant mortality rate in the District of Columbia is three times the national average. Drug use by pregnant mothers is the cause. In our view, Congress could find that the link between the

activities of large-scale drug dealers and the destruction of human life is such that the harm they cause, combined with their reckless indifference to the value of human life, justifies the ultimate penalty.

Let me turn briefly to the relevance of the Supreme Court's decision in Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion), to the constitutionality of prescribing the death penalty for drug kingpins. In Coker, the Supreme Court held that the death penalty was excessive punishment under the Eighth Amendment for the crime of the rape of an adult woman. The plurality opinion in Coker relied heavily on the fact that Georgia alone among the fifty States allowed imposition of the death penalty for rape, and that juries in Georgia itself seldom returned sentences of death for rape. The Coker plurality also indicated that in its view, "in terms of moral depravity and injury to the person and public, [rape] does not compare with murder." Id. at 598. The reason given was that "rape by definition does not include the death of or even the serious injury to another person." Id. (footnote omitted).

Coker's analysis of the past legislative practice of the States and juries within the States has little relevance to the constitutionality of a federal statute prescribing the death penalty for those who lead large-scale drug enterprises. Rape was a crime at the English common law, and thus the Court could

look to a significant history of legislative choice of punishment by the States. In contrast, large drug enterprises, particularly those of international scope, are a relatively recent phenomenon. The situation is much as if a weapon were invented which reduced its victims to a vegetative mental state but did not otherwise affect their physical well-being. The constitutionality of imposing the death penalty for the use of such a weapon could not be measured by past practices of the States.

Moreover, the absence of state legislation in this area is not necessarily an indication of public disapproval of the death penalty for the leaders of large-scale drug distribution rings. A far more likely explanation is that given the international and interstate ramifications of the activities of these massive enterprises, the States rightfully view the problem as beyond their capacity to cope with and as demanding a comprehensive federal solution.

In addition, Coker dealt with a common law crime perpetrated against a single individual, and the Court focused only on the harm to that individual. As several commentators have noted, Coker did not purport to pass on the proportionality of the death penalty in situations where significant risk of serious injury or death is posed to many individuals. See Note, Coker v. Georgia: Disproportionate Punishment and the Death Penalty for Rape, 78 Colum. L. Rev. 1714, 1729 (1978) (indicating that aircraft

hijacking and espionage may be outside the Coker framework); accord The Supreme Court, 1976 Term--Leading Cases, 91 Harv. L. Rev. 70, 128 (1977).

Finally, it should be noted that even as to state legislation, the Coker decision does not purport to hold that the death penalty is disproportionate to any crime which does not directly result in the death of another human being. Coker involved the crime of rape of an adult woman, and the Coker plurality explicitly left open the question whether crimes comparable to murder in terms of "moral depravity" and "injury to the person and public" might be punished by death. Coker, 433 U.S. at 598. Indeed, after Coker a number of States continue to maintain the death penalty for crimes not necessarily involving the death of another human being where those crimes involve either serious permanent injury to an individual, or a serious threat to society at large. See, e.g., Cal. Penal Code § 37 (West 1988) (treason); Ga. Code Ann. § 17-10-30 (1982) ("The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case."); Idaho Code § 18-4504 (1987) (first degree kidnapping); La. Civ. Code Ann. art. 14:113 (West 1986) ("Whoever commits the crime of treason shall be punished by death."); Mont. Code Ann. § 45-5-303 (1987) (aggravated kidnapping); id. § 48-18-220 (1987) (attempted murder and aggravated assault while imprisoned); S.D. Codified Laws Ann. § 22-19-1 (1988) (kidnapping with bodily injury); Utah Code Ann.

§ 76-5-103.5(2)(b) (1987) (aggravated assault while imprisoned).

In sum, the Administration is of the view that Congress may impose the death penalty for non-homicidal crimes which imperil national security or threaten the fabric of our society, or pose a mortal danger to a large number of our people. The Department also believes that under Tison v. Arizona, Congress could find that the link between large-scale drug organizations and human destruction is such that the leaders of these organizations exhibit "reckless indifference to the value of human life," and thus may be subject to the death penalty.

As reflected in the Administration's legislative proposal, we believe Congress should use this power in order to deter and punish those who commit these grave offenses against the American people. The Administration's proposal narrowly and appropriately identifies the category of offender, so as to target those most culpable of wreaking broad societal harm, and those for whom the link between the destruction of human life and drug kingpin activities are the most well-documented. In addition, it seeks to deter the use of violence by drug organizations against witnesses, judges, and law enforcement personnel.

Many members of Congress evidently agree with the

Administration on this key point. Of the bills before the Subcommittee, four -- H.R. 3871, H.R. 3238, H.R. 3342, and H.R. 3119 -- call for some form of death penalty for drug kingpins. H.R. 3119 would also provide for the death penalty for analogous offenses such as espionage, treason, and the attempted murder of the President. The Administration is eager to work with Congress to craft an appropriate drug kingpin death penalty provision that will withstand constitutional scrutiny.

II. Habeas Corpus Reform

Congress must also address habeas corpus abuse, if federal death penalty provisions are to be enforced seriously. As the Attorney General recently noted in his statement before the Federal Courts Study Committee, delay in capital litigation has now reached crisis proportions. The average delay from time of conviction and sentence to time of execution presently stands at six years and eight months. See U.S. Department of Justice, Bureau of Justice Statistics, Capital Punishment 1988, at 1. In 1988, only 11 death sentences were actually carried out; more death row inmates died of natural causes than had their sentences executed. Id. As Justice Powell told the Senate Judiciary Committee, "[t]he hard fact is that the laws of 37 States are not being enforced by the courts" as a result of habeas corpus

abuses. Statement of Justice Lewis F. Powell, Jr. (Retired), November 8, 1989, at 4.

The Administration strongly endorses the proposals for habeas corpus reform put forth by the Ad Hoc Committee of the Judicial Conference on Federal Habeas Corpus in Capital Cases, chaired by Justice Powell. In essence, the Committee's report proposes legislation that would afford States the option of establishing effective systems for providing indigent capital defendants with competent representation in state collateral proceedings. If a State chose to establish such a system, stronger rules of finality would apply in subsequent federal review. Specifically, the defendant would normally be limited to a single federal habeas corpus petition. Following the affirmation on appeal of the district court's denial of such a petition, and affirmation of the judgment or denial of certiorari by the Supreme Court, further federal review would be barred except on grounds that undermine confidence concerning the defendant's factual guilt of the underlying capital offense for which the sentence had been imposed.

A legislative proposal fairly embodying the Committee's recommendations will soon be sent to Congress by the Administration. We believe that the legislation enacting the Powell Committee's proposals should be passed in conjunction with the general habeas corpus reform proposal and federal death

penalty proposal in the President's violent crime bill, H.R. 2709. Habeas corpus reform is as necessary as adoption of appropriate death penalty procedures.

III. Recent Supreme Court Decisions Addressing Capital Sentencing Procedures

Recently, the Supreme Court issued several decisions that, in the Department's view, can significantly improve the uniformity and reliability of penalty phase proceedings in capital litigation.

In Blystone v. Pennsylvania, No. 88-6222 (February 28, 1990), and Boyde v. California, No. 88-6613 (March 5, 1990), the Supreme Court made it clear that the legislature may significantly channel the jury's discretion in weighing aggravating and mitigating factors. Thus, the Court held that the Eighth Amendment is not violated where a statute provides that the jury must impose a sentence of death where it finds either (1) an aggravating circumstance and no mitigating circumstances; or (2) where it finds that the aggravating circumstances outweigh the mitigating circumstances. In other words, while the jury may consider any and all evidence in mitigation, once the jury has made its decision on the presence or absence of mitigating factors, the legislature may define the consequences of that decision. In a third case, Saffle v. Parks, No. 88-1264 (March 5, 1990), the Court approved a jury

instruction designed to insure that the members of the jury did not base their decisions on their own personal prejudices or other nongermane and arbitrary factors.

The Administration intends to incorporate the holdings of these cases into its own death penalty proposals, and we would welcome the opportunity to work with Congress in this regard.

That concludes my prepared testimony. I will be happy to answer any questions that the Subcommittee may have.

Mr. HUGHES. Mr. Kreczko, welcome. We, likewise, have your statement which will be made a part of the record, without objection.

STATEMENT OF ALAN J. KRECZKO, DEPUTY LEGAL ADVISER, U.S. DEPARTMENT OF STATE

Mr. KRECZKO. Thank you, Mr. Chairman. I am pleased to have this opportunity to testify today concerning the potential impact of a Federal death penalty upon the availability to the United States of international extradition.

The extradition question is prompted by the fact that over the last several decades a number of foreign countries have eliminated altogether the death penalty or have limited significantly those offenses for which the death penalty is available. Nine European states, for example, have become parties to an international convention which provides that no one shall be condemned to the death penalty or executed.

Nevertheless, as explained more fully in written testimony, we do not believe the passage of bills which authorize the Federal death penalty would have a significant adverse effect on our ability to extradite terrorist murderers or drug traffickers to the United States for prosecution. A number of our bilateral extradition treaties contain a death penalty provision. This provision gives the foreign state the option to require the U.S. Government to assure that the death penalty will not be imposed or, if imposed, will not be carried out. In such cases, whether extradition occurs is in the hands of the United States; that is, whether the United States is willing to give an assurance that it will not prosecute the fugitive for an offense which carries the death penalty.

Moreover, in some cases States may decide not to exercise this death penalty option even when it is available to them. For example, despite the existence of a death penalty provision in our extradition treaty with Canada, the Canadian Attorney General decided that the Government of Canada would not seek assurances regarding the death penalty when it recently extradited an accused mass murderer to stand trial in California.

I should note, however, that in cases in which the relevant bilateral extradition treaty does not contain any provision relating to the death penalty, the possibility of capital punishment could nevertheless lead a foreign state to either request a death penalty assurance even though there is no applicable provision or to articulate an alternative treaty basis for denial of extradition, particularly when the case involves one of its own nationals.

I would also be happy to answer any questions.

Mr. HUGHES. Thank you, Mr. Kreczko.

[The prepared statement of Mr. Kreczko follows:]

PREPARED STATEMENT OF ALAN J. KRECZKO, DEPUTY LEGAL ADVISER, U.S. DEPARTMENT OF STATE

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Thank you Mr. Chairman. I am pleased to have this opportunity to testify today concerning the potential impact of a federal death penalty upon the availability to the United States of international extradition, in light of the fact that a number of our extradition treaty partners do not extradite a fugitive who faces the death penalty. This issue is raised by H.R. 3539, a bill that enables the Federal Government to impose the death penalty upon terrorists convicted of murdering United States nationals. The present maximum federal penalty for such acts is life imprisonment. The Report of the Vice President's Task Force on Combatting Terrorism, which has served as the blue print for our counter-terrorism policy since 1986, recommended, as an important weapon in the legal battle against terrorism, the enactment of federal legislation such as H.R. 3539, which permits the death penalty if a terrorist takes the life of a U.S. national.

Although I have been asked to focus on H.R. 3539, I wish to stress that my remarks are equally applicable to the other Bills the committee is presently considering -- H.R. 3871, 3342, and 3238 -- which would permit imposition of the death penalty for certain federal drug-trafficking offenses.

As the Committee may be aware, over the last several decades, a number of countries have eliminated altogether the death penalty or have limited significantly those offenses for

which the death penalty is available. An area in which this trend has been most evident is Europe. For example, those European States comprising the Council of Europe concluded in 1953 the European Convention for the Protection of Human Rights and Fundamental Freedoms, which recognized the legitimacy of the death penalty under international law. In particular, Article 2 of the Convention States:

> No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

However, on March 1, 1985, the Council of Europe adopted Protocol VI to the Convention, which provides:

> "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."

Nine European States -- Austria, Denmark, France, Iceland, Luxembourg, Netherlands, Portugal, Spain, and Sweden -- have become Parties to this Protocol. Those States, as well as others whose constitutions, laws or practices eliminate or limit the use of the death penalty, can be expected to seek conditions or assurances related to the death penalty when

considering extradition to a State that makes a broader use of the death penalty.

This is reflected in "death penalty provisions," which are present in our modern extradition treaties. Of the 25 bilateral extradition treaties that the United States has concluded since 1960, 23 contain a death penalty provision along the following lines:

> "Extradition may be refused unless the requesting Party furnishes such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed."/1

One of those 23 treaties, moreover, the 1972 US-UK extradition treaty, applies to 10 U.K. dependencies and 9 newly independent states./2 The remaining seventy or so bilateral extradition treaties do not contain any provisions explicitly relating to imposition of the death penalty./3

In our view, a federal death penalty for terrorist murderers of U.S. nationals would not substantially impair the ability of the United States to obtain the extradition of terrorists from abroad. In cases in which the relevant bilateral extradition treaty contains a death penalty provision, it would give the foreign State the option to

require the U.S. Government to assure that the death penalty would not be imposed or, if imposed, would not be carried out. In such cases, whether extradition occurred would be in the hands of the United States; i.e., whether the United States was willing to prosecute the fugitive knowing that it would not be possible to subject him to the death penalty. In contrast to state prosecutions, in federal capital cases, the Executive Branch could provide such assurances.

Moreover, in some cases countries may decide not to exercise this option even when it is available. For example, despite the existence of a death penalty provision in our extradition treaty with Canada, the Canadian Attorney General decided that the Government of Canada would not seek assurances regarding the death penalty when it recently extradited accused mass murderer Charles Ng to stand trial in California.

In the majority of cases, our bilateral extradition treaties do not contain any provision relating to the death penalty. In such cases, a foreign country would not lawfully be entitled to decline extradition because the offense is a capital one. Nevertheless, we can not rule out that the possibility of capital punishment could lead a foreign state to either request a death penalty assurance or to articulate an alternative treaty basis for denial of extradition, particularly when the case involves one of its own nationals.

In conclusion, we do not believe the passage of the federal death penalty bills would have a significant adversel effect on our ability to extradite terrorist murderers or drug traffickers to the United States for prosecution.

/1_ Countries whose extradition treaties with the United States contain the death penalty provision include: Argentina (1972), Australia (1974), Brazil (1961), Canada (1971), Columbia (1979), Costa Rica (1982, not in force), Denmark (1972), Finland (1976), Federal Republic of Germany (1978), Ireland (1983), Israel (1963), Italy (1983), Mexico (1980), The Netherlands (1980), New Zealand (1970), Norway (1977), Paraguay (1973), The Philippines (1981, not in force), Spain (1970), Sweden (1983), Thailand (1983, not in force), United Kingdom (1972), and Uraguay (1973).

/2_ The 1972 US-UK Treaty applies to the following U.K. dependencies: Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibralter, Hong Kong, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St. Helena, and the Turks and Caicos Islands. In addition, it continues in force with the newly independent states of Antigua and Barbuda, Belize, Dominica, Kiribati, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Solomon Islands and Tuvalu.

/3_ But see, Extradition Treaty Between the United States and Finland, Article 7(1)(c), which provides: "Extradition may be refused if . . . in special circumstances, having particular regard to the age, health or other personal conditions of the person concerned, the requested State has reason to believe that extradition will be incompatible with humanitarian considerations."

Mr. HUGHES. Mr. Dennis, what is the overall policy or philosophy of the Justice Department relative to the appropriateness of the death penalty under Federal law?

Mr. DENNIS. Well, I think our benchmark and our first priority was to look at those statutes which imposed the death penalty prior to *Furman,* and to put on our legislative, highest part of our legislative agenda enacting the procedures necessary to make those death penalty provisions effective again. So that was I think number one, and H.R. 2709 certainly does that.

The second issue was a question of whether there are additional offenses given the fact that it has been almost 18 years since the *Furman* case that require evaluation insofar as the death penalty is concerned, and in that area there were a number of offenses, which are new offenses, which carry the death penalty, among those being the killing of a Federal prison guard by one who is under a life imprisonment sentence. Of course, the 1988 drug bill imposed the death penalty or enacted a death penalty provision with regard to those who commit murder in the course of drug dealing, those who are major drug traffickers, or those who kill a law enforcement officer in the course of drug trafficking.

And, finally, in this third area in which there is no legislation currently in the Congress, but was referred to by Mr. Barr, is the question of the extent to which drug trafficking itself can be a basis for the death penalty. I think that Senator Specter testified earlier this morning that there have been a number of bills which would impose the death penalty, if enacted into law, for drug trafficking where in fact there is no murder in the sense of a direct killing or even death proven insofar as a specific death associated with the drug trafficking. That issue has been evaluated and, based upon the analysis of and comparison with cases involving substantial national interest and national security, we feel that if the drug trafficking is extensive enough and with the proper findings for which there is a factual basis, and based upon the tremendous drug problem that we have seen increasing over the years that there is a basis for imposing the death penalty for drug kingpins and that it would be constitutional.

And the President has made it very clear that if it does not run afoul of the Constitution that this is the direction in which we should be going. So that is definitely our policy.

Mr. HUGHES. Mr. Dennis, if the death penalty for drug cases is so critical, why isn't it included in H.R. 2709?

Mr. DENNIS. I think at the time that H.R. 2709 was being pulled together, as I said, our first priority was to resurrect the death penalty in those statutes that it had previously been appropriate, or legislated. And there was an issue, I think, in terms of how far the *Coker* case went and whether it stood for the proposition that unless there was a death resulting from the act a death penalty provision would be constitutional in that context

Mr. HUGHES. You have led me to where I want to be. Is *Coker* still good law?

Mr. DEWINE. Well, actually Mr. Barr is more of an expert in the constitutional issues than I am.

Mr. HUGHES. Mr. Barr, is *Coker* still good law? Has *Coker* been overruled?

Mr. BARR. *Coker* has not been overruled.

Mr. HUGHES. Is it still good law?

Mr. BARR. It may well be still good law. I would have to predict how the Supreme Court, its current membership would vote on saying that the rape of an adult woman is not, you know, substantial private injury. But it hasn't been overruled. It is not apposite, however, to dealing with such phenomena as treason, espionage, or other activities that are viewed as imperiling the general public welfare to a substantial extent.

Mr. HUGHES. But you would concede it is a case which raises some serious questions as to whether we can legislate the death penalty for a crime where death has not ensued?

Mr. BARR. Actually, I am fairly confident that the execution of drug kingpins engaged in the kind of activity prescribed in our bill would be sustained by the Supreme Court. I don't think it is really that close a question.

Mr. HUGHES. Mr. Barr, the Supreme Court remanded *Tison,* did it not? Didn't the Supreme Court remand the *Tison* case?

Mr. BARR. It may have remanded it. I can't remember.

Mr. HUGHES. Wasn't it remanded because the Court felt that the lower court had not applied the proper standard and expressed some concern about the nexus to the death that ensued?

Mr. BARR. Excuse me?

Mr. HUGHES. Didn't the Court remand it because of some concern that there was an insufficient nexus between the actions of the defendants and the subsequent deaths?

Mr. BARR. Well, I think what the Court said in *Tison* and made clear is, if an individual acts with reckless disregard and indifference to human life, regardless of whether he specifically intended the killings to occur, that is a sufficiently culpable state of mind if death results.

Mr. HUGHES. Was it remanded for the court below to make that determination?

Mr. BARR. The factual determination, perhaps. But under the old common law rule, the felony murder rule, you didn't necessarily have to show the culpable state of mind of the accomplice. If someone was killed in the bank, the fact that you were there or involved in the plan, you automatically became subject to the death penalty. What the Supreme Court said in *Edmond* was, "Sorry, that is not enough." You cannot execute the getaway driver simply because he was a part of the felony plan and the felony crime out of which a death resulted.

In *Tison,* they amplified that by saying: However, if the accomplice is involved and their actions do betray a wanton disregard of human life, that is a culpable state of mind.

Mr. HUGHES. My recollection of the facts in that case, and correct me if I am wrong—and I know you will—was that two sons had taken some weapons to their father, assisted him in breaking out of prison knowing of the father's violent propensities, and were present when his father brutally murdered the family. They were the circumstances that made that particular offense so egregious.

Mr. BARR. What the Court said there was that the acts——

Mr. HUGHES. Am I incorrect?

Mr. BARR [continuing]. The acts by the accomplice of setting loose his father and his sidekick, arming them, and then assisting them in waving down a car was——

Mr. HUGHES. Knowing their propensities.

Mr. BARR [continuing]. Was setting loose a chain of circumstances which show that they were acting with a highly culpable state of mind.

Mr. HUGHES. Let me give you another factual situation, Mr. Barr. I had indicated to Mr. Burton that one of my concerns has been the diversion of licit drugs into the illicit market. It is a major problem, as you well know, in this country. Reports show that the vast majority of overdoses and deaths result from use of illegal diversion of licit drugs not from the consumption or use of illicit drugs.

First, would you extend the reckless disregard standard to a physician who has dispensed a vast quantity of legal prescription drugs into the illicit market, where there was a direct connection between a person's death and that physician's act of dispensing? And the second example is where no death ensued but where such a death was foreseeable?

Mr. BARR. There are two, as you say, different situations. One is a situation where you would be imposing a death penalty on a pattern of conduct where you cannot show a direct link, causal link between the individual and a specific death. OK? Now, in that situation what I am saying is that the Court will look to the magnitude of public injury that the specific conduct that Congress is trying to police——

Mr. HUGHES. No. I asked you whether you would extend it. I am asking you whether you believe that that could be constitutionally extended.

Mr. BARR. I am answering the question.

Mr. HUGHES. Well.

Mr. BARR. Because we have been sliding back and forth between two different situations.

Mr. HUGHES. No. Let's take the first example. Would you say that it would be constitutional for a court to impose the death penalty on a physician who dispenses prescription drugs illegally to someone who does not die, but where such a death could be foreseeable due to the large number of cases involving such circumstances? Is that constitutional or not?

Mr. BARR. It depends on the circumstances. Congress has to define the type of conduct that it views as a basic threat to the fabric of society whether it be treason, espionage or massive drug smuggling and trafficking activity.

Mr. HUGHES. Let's assume Congress says that we have a national security problem. We have a diversion problem that has reached epidemic proportions. It is destroying our society. And we make a determination that a physician who dispenses prescription drugs into the illicit market, whether death ensues or not, has committed a capital offense. Constitutional? Not constitutional?

Mr. BARR. Well, I would have to look at the factual basis for the decision. The drugs we are talking about are not prescription drugs. They are not drugs that cause the devastation to society based on individual happenstance.

Mr. HUGHES. Mr. Barr, we know that.

Mr. BARR. They are drugs that cause addiction and all the associated problems—the social problems they cause. They are drugs that directly cause death. They are drugs that cause and bring about the criminal environment we are talking about. That nexus between the trafficking of the illegal substances we are talking about, not prescription drugs, and the social harm to the United States is clear and demonstrable.

Now, if Congress made that decision in this situation, we believe it would be sustained. But let's take another example. Suppose all of a sudden it becomes the latest phase to shoot at aircraft landing at airports, and people at airports are taking pot shots at airplanes with their .22 caliber rifles as they are landing, and it just becomes sort of a city sport, so to speak, and some planes go down, and you can never tell who exactly fired the shot. Now that kind of reckless conduct may reach such proportions and become such a danger to our system and our transportation system that Congress might say we will impose the death penalty on someone who shoots at an airplane whether or not we can prove he caused the airplane to crash.

It depends upon the circumstances, and the Court will defer a great deal to Congress' judgment.

Mr. HUGHES. And, in your judgment, that would pass constitutional muster, if that was a national crisis?

Mr. BARR. The plane one?

Mr. HUGHES. Yes.

Mr. BARR. The one I just gave?

Mr. HUGHES. Yes.

Mr. BARR. Oh, yes. No doubt about it.

Mr. HUGHES. How about the second instance I gave you?

Mr. BARR. OK. The second instance is where death results.

Mr. HUGHES. An instance where a physician dispenses prescription drugs which are diverted into the illicit market, under circumstances where he knew or should have known that the drugs would be divested and death results.

Mr. BARR. Where a death results and under common law principles as embellished by the Supreme Court recently, if someone engages in activity that shows willful disregard of human life and causes the death, they could be death eligible. And there are statutes on the Federal books today that say that, and there are statutes in State law that say that.

For example, we have a statute that says, if you destroy Federal property and cause a death, you are death eligible. There is no requirement that you intend to cause the death. It is the destruction of Federal property which is presumed to show a reckless disregard of human life. Now, whether that statute would now pass constitutional muster without the additional laws put on by *Tison* is a separate question. Wrecking a train that causes death, also. You don't have to show intent. Again, it is the reckless disregard of human life.

Mr. HUGHES. Let me take you to the next stage, because time is running on. I am just trying to find out where you believe the parameters of what is constitutional and what is not constitutional lie.

Drunken driving is a major problem in this country, causing many deaths. It is a national epidemic. We have major initiatives under way today to deal with drunken driving. Can we constitutionally apply the same reckless standard to a drunken driver?

Mr. BARR. Well, the issue is what kind of latitude the legislature has in determining who could be eligible for the death penalty, and again the general principle, as the Supreme Court says, that if you engage in activity that shows wanton and reckless disregard for human life, you can be death eligible.

Now, under our proposal, we are just talking about whether that can serve as a predicate for the imposition of the death penalty. Under our proposal, you have to show three elements before you can even look at the aggravating circumstances.

Mr. HUGHES. I understand. I am just trying to find out the parameters of the reckless standard. Would it be good policy to extend it to drunken driving, Mr. Dennis?

Mr. DENNIS. I don't think it would be because I think the thrust of our proposal in this area is the emphasis on the national security aspects presented.

Mr. HUGHES. Would it be good policy to apply capital punishment to physicians who dispense pharmaceutical products?

Mr. DENNIS. Yes. I believe under our proposal, theoretically, a physician could be death eligible.

Mr. HUGHES. So that is good policy?

Mr. DENNIS. Yes. I think the question there is to what extent do you have to be involved in the drug trafficking. Under our proposal and our language, you would have to be making at least $10 million a year and the quantities of drugs would have to be so large that it couldn't be a matter of being inadvertent.

Mr. HUGHES. I understand. The other two prongs that you talked about.

Mr. DENNIS. Yes.

Mr. HUGHES. The other two prongs that have to be satisfied.

The gentleman from Florida.

Mr. MCCOLLUM. Thank you, Mr. Chairman.

Mr. Dennis, I want to make a couple of comments, first of all, in regard to your testimony that I think will demonstrate that we really don't have much, not even the little disagreement you have brought out.

First of all, technically, it was not originally the intent of this member to adopt any procedures on the death penalty which were different from the administration's bill.

Mr. DENNIS. I understand.

Mr. MCCOLLUM. And I think in legislative drafting we got it mixed up with Gekas' original stuff, and there is a whole history on that. But at any rate, the work that has been done in the Attorney General's Office to develop and refine these standards since the original proposals procedurally were first contemplated down here has been great. It has been very, very good, and I think that your testimony today outlining those is very helpful for the record. So that historically we will understand why, and I think we will adopt these eventually—why these standards came into being and why some of the others were not adopted. I think it is very excellent testimony in that regard.

Second, with regard to the drug kingpin death penalty proposals, again you are still formulating some of this technically and officially. But it would seem to me that in all probability much of what you are submitting would be embraced by our members as good additions, perhaps even substitutes. As far as whether it ought to be 300 kilos or 150 kilos, I think that is a political judgment call. I am sure Mr. Barr would probably say that both were constitutional, though some of our attorneys have looked and tried to say, well, what is egregious. And, of course, that is somewhat subjective. Perhaps a Justice sitting on the Supreme Court might differ with another Justice.

So, I am not sure where that line ought to be, but myself, my own gut says that 150 kilos is fine. Probably something less than that would be acceptable provided the nexus were there. But nonetheless, I wanted to point out that I think that these are important changes and additions, and that there are new things that we ought to be looking at that were not contemplated at the time that earlier legislation was created.

Also, Mr. Barr, I am very pleased, even though it wasn't touched on earlier, that you discussed the habeas corpus status in your testimony with us, as far as Justice Powell's Commission's recommendations, and we are looking forward to seeing the legislative proposals that come down to augment what the administration has already sent down to give us further guidance with respect to trying to tighten up the endless appeals that go on with regard to not only death penalty cases but to lots of other criminal cases in this country. So I think you properly used the word in conjunction, because I do think that that is needed.

Now, with regard to some questions—and I'm going to jump to the third witness for one of those—Mr. Kreczko, you have indicated the State Department essentially does not have a problem with the extradition issue in the death penalty cases. But I would like for you to elaborate for us on those countries that you noted in your last comments, where you don't have a bilateral extradition treaty and there might be more hesitancy. I'm not completely sure the degree to which your concerns lie there, even though you said earlier in your testimony that the passage of the Federal death penalty bills would not have a significant adverse effect. You used the word "significant."

Would it have an adverse effect here, and what are you thinking where there is no bilateral agreement?

Mr. KRECZKO. I was really trying to address the situation where we have a bilateral extradition agreement, but there is no death penalty provision in it.

Mr. MCCOLLUM. OK, where there's no death penalty provision in the agreement.

Mr. KRECZKO. Exactly. That is the case where, as a strictly legal matter, the foreign state does not have the right to ask us to give them an assurance that the death penalty will not be imposed.

Now, in fact, even in those situations, foreign countries have, on occasion, asked us for an assurance that the death penalty will not be imposed and we have, in circumstances, given that assurance.

In anticipation of this hearing, we looked back over the records for the past 10 years. There is no case where a foreign country has

denied extradition to us explicitly because of the death penalty in the United States.

Now, we can't rule out, but it would be speculative on our part, that there were cases where they denied an extradition request on some other basis because in their minds they were concerned about the death penalty. But that would be speculative on our part.

Mr. MCCOLLUM. So basically, you feel that overall, on balance, the death penalty is simply not going to be a problem in most extradition cases; is that a fair assessment of your testimony?

Mr. KRECZKO. Yes, sir. It may be that a country will not extradite unless we assure them that the death penalty will not be imposed, but the decision will be ours on whether we're willing to give that assurance.

Mr. MCCOLLUM. And just putting it on the books statutorily as a possibility is not going to have a material impact on your ability to give that assurance, is it?

Mr. KRECZKO. Correct.

Mr. MCCOLLUM. Mr. Barr, I just want to follow up with one question with respect to some of the chairman's line of reasoning here. It seems to me that we're getting into a very academic question, and yet it is the very nature of the question of constitutionality of the death penalty to be somewhat academic.

In talking about these cases—*Tison, Coker, Gregg*—my assessment of these, having reviewed some of this and having just chatted with my counsel up here, is that the *Tison* case is a state of mind case. While there are state of mind instances in some of the proposals of the administration, such as the attempted killing of judges, in the broader context of the drug trafficker, where we're talking about having a death penalty where you traffic in very large quantities of drugs—and you described the societal impacts—that we're really dealing not with the kind of rationale that would be involved in *Tison* but, rather, with the rationale in *Gregg,* and that even *Coker* is not applicable because that deals specifically with rape, that *Gregg,* frankly, is a case that has much more of the basis for judging what the Supreme Court is likely to do.

I assume, from looking at your testimony and listening to what you said in response to the chairman, that generally that is the bedrock case you have relied on to make your assessments and predictions on where the Court would go as to the constitutionality of the major drug trafficking proposed legislation.

Is that correct?

Mr. BARR. I have relied on the *Gregg* case substantially, *Coker* and *Tison.*

Mr. MCCOLLUM. And the conclusions, regardless of which ones you're looking at, are that these would be constitutional without question in your mind if we passed the capital punishment provisions?

Mr. BARR. I am confident that the administration's proposal would be upheld.

Mr. MCCOLLUM. That's the bottom line.

The last question, Mr. Chairman, I would like to ask Mr. Dennis—and I may be preempting my colleague from Michigan, I don't know. But I am concerned about this, just because it is raised so often. I think it's very significant.

The NAACP is going to testify later today about their longstanding position that there is a racial bias in death penalty cases. I know there are some statistics that might show that.

How do you respond to that? How do you feel about our adding the death penalty in these situations? How do we respond to that?

Mr. DENNIS. Well, I think we have responded very specifically in H.R. 2709, under the provisions that guide the jury's determination on the question of imposing the death penalty. The requirements are very specific, in fact, along with special findings insofar as mitigating circumstances and aggravating circumstances, to make sure that the jury is making its judgment based upon objective factors and has identified those factors.

Mr. MCCOLLUM. You heard my colleague earlier today—I heard him—say "So what? We know that's there, but a jury instruction can't erase the racial bias from a jury." What do you say to that?

Mr. DENNIS. Well, first of all, as a general proposition—and again, based on my own experiences—I think juries try to be conscientious. First of all, not everyone is responsible, but we have many procedures with regard to ensuring the fairness of the jury, and not all of them are even related to the death penalty.

First, of course, you do have the polling of the jurors and the voir dire with regard to their backgrounds, questioning whether or not they can be fair in even determining guilt or innocence, opportunities for preemptory challenges on any basis whatsoever, many times favoring the defense. So that if there's a perception that one or two jurors might not be to the defendant's liking, that person can be struck before you even get to a jury panel, and then, on top of that, the instruction of the court in general about the way in which a jury responsibly discharges its responsibilities in the weightiness of its decision, and then, in the process of evaluating whether the death penalty should be imposed, actually a special precaution in very specific language as well as an affidavit which each juror would have to individually execute saying that, in fact, race, sex, gender, national origin, religion, were not taken into account.

I think that is the way, and I think the bill is absolutely on target with how you deal with the potential that a verdict might be based upon bias. Remember, it has to be unanimous. You know, one person might be biased, but the chances that one person is going to be able to persuade 11 others to his or her position based on bias——

Mr. MCCOLLUM. That's what has always bothered——

Mr. DENNIS. I think, as a practical matter of understanding the procedures, you have to realize that these procedures should be adequate to the task.

Mr. MCCOLLUM. You know, that's what has always bothered me about the statistics on this point, even though I don't doubt that there has been racial bias in sentencing in parts of the country from time to time. But overall, with the unanimous jury requirement, it seems to me, in this day and age, that I believe we have improved dramatically in regard to racial bias in this country. I just have a hard time believing there would be very many cases in this country ever in the future where you get a full jury that would

be racially biased. Maybe I'm living in a fairyland, but I think we've made those kinds of improvements.

Mr. DENNIS. I would be the last one to say that racial bias has been purged from our country. I know that that's not true. But the safeguards against racial bias insinuating itself into the process of jury deliberations and selection and the sentencing phase and that sort of thing I think are a function of the laws that we have and the faithful execution of those laws by the judges, the prosecutors, the defense lawyers, and the court of appeals judges. My own experience is that, on the whole, those procedures work well out of the context of the death penalty situation, and with these additional procedures, I think the safeguards are adequate.

Mr. MCCOLLUM. Thank you very much, Mr. Dennis.

Thank you, Mr. Chairman.

Mr. MAZZOLI [presiding]. Thank you very much.

The gentleman from Michigan is recognized for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

Gentlemen, have you seen the General Accounting Office study released last week, entitled "Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities?"

Mr. DENNIS. I have reviewed a summary of that report.

Mr. CONYERS. Which confirms that racism affects the use of the death penalty in the United States and concludes that the race of a victim influences whether or not the defendant is sentenced to death 82 percent of the time; it goes on to confirm not only the Balda study in the *McCleskey* case, but a number of other comparable studies that have gone before it. So what we're finding is that the criminal justice system now is being confirmed as being racist in impact, if not by design or intention.

Doesn't that have some bearing on this new wave of death penalty proposals that are coming out?

Mr. DENNIS. Well, certainly I think the subcommittee should take into account all information and studies related to this question. With a study that has been published by GAO, or at least a review of other studies published by GAO, I am sure that the question of the significance of those findings will be thoroughly thrashed out. For my part, at least, the procedures are adequate.

Now, whether or not what is being demonstrated here, or what is sought to be proven here, with regard to the application of the death penalty and those figures, I'm not sure. My sense is—and I'm not a statistician—is that, in general, those that review the subject look at our prisons and look at death row and they see black men for the most part in those institutions and on death row. Maybe you don't need to be a statistician to observe that.

But, on the other hand, I think the question of who is on death row, if it's being determined by fair procedures, and if, in fact, the evidence is there and the jury has done its job, if there are a large number of black men on death row, then so be it. I think that we have to——

Mr. CONYERS. What do you mean by "so be it?"

Mr. DENNIS. Well, "so be it" in the sense that——

Mr. CONYERS. "So be it;" what does that mean?

Mr. DENNIS. "So be it" in the sense that if the cases are being decided based on the evidence, then the jury should make that de-

termination, not based upon the race of people who are on death row but based on that individual case. I think that's the way jurors should make their judgments, one case at a time. It should not be based upon whether or not there are too many black men who are being subjected to the death penalty and, therefore, we will not impose it on this case or will not charge it on that case. It should be one case at a time.

Mr. CONYERS. Well, what do you make of the study, then? I can't agree with you more, that there should be justice in the justice system. But the study came to some conclusions about race and the imposition of the death sentence. Do you concur with them or do you think it's not relevant, or——

Mr. DENNIS. No, I didn't say it wasn't relevant.

Mr. CONYERS. Do you question it?

Mr. DENNIS. Yes, I do question it.

Mr. CONYERS. You do question it.

Mr. DENNIS. The Bureau of Justice Statistics has reviewed the study. There are certain questions that are being raised with regard to the validity of the studies, the quality of the studies. I believe there were 28 that were being reviewed. Some were more scientific than others. So I think the import or the GAO report will certainly be questioned.

I'm not saying it shouldn't be taken into consideration. I think that those who have reviewed the GAO report with a statistical and scientific background and a credible experience in this area, their findings should also be considered. The committee and the Congress should certainly make its judgments based upon the best evidence available. But I think those findings are being questioned as to whether or not they indicate that either the procedures are being——

Mr. CONYERS. Are you questioning the General Accounting study, or are you questioning the studies that they studied?

Mr. DENNIS. The GAO report, as I understood it, reviewed other studies.

Mr. CONYERS. Right.

Mr. DENNIS. They reviewed a series of studies that had been conducted.

Mr. CONYERS. Is that what you're challenging, the GAO?

Mr. DENNIS. What I said was that the studies that were the basis for the GAO report had varying degrees of validity or persuasiveness based upon the methodology used in those particular studies.

Mr. CONYERS. Yes, that's what they studied, sir. That was why they conducted the study of these particular kinds of examinations.

Look, if you don't like it, it's a free country; if you don't like the GAO, which merely reviewed the studies which were in dispute, and came to this conclusion, you're free to say so. But I thought that you agreed with the general thrust that they found that race was a factor in the imposition of capital punishment. If you don't, you'll be the first person I've heard that has questioned that conclusion.

Mr. DENNIS. I don't accept that conclusion uncritically, let's put it that way.

Mr. CONYERS. Well, what is your criticism? You know that blacks are caught up in the criminal justice system.

Let me approach it a different way. Let me go back to my colleague, Mr. Traficant, when I asked him the fundamental question that gets to this.

Do you perceive that there is a problem of race and class in the criminal justice system? In other words, that the rich get off and the poor get clobbered, and minorities get shorter shrift? That's the race and class problem. You are familiar with it?

Mr. DENNIS. Pardon?

Mr. CONYERS. I said you are familiar with this problem?

Mr. DENNIS. Yes, I'm familiar with this problem.

Mr. CONYERS. Do you conclude that this is a real problem that exists in the criminal justice system?

Mr. DENNIS. I think it's a problem which the criminal justice system tries to address through its procedures. It's a problem in our society which the criminal justice system takes into account. Again, we're talking in generalities here, 50 States, plus Federal procedures as well.

The procedures that I spoke to in addressing Mr. McCollum's question are the very procedures that are in place to ensure that racism and discrimination and class concerns do not insinuate themselves into the decisionmaking process.

Now, I'm sure that that does happen on occasion, but the criminal justice system has procedures in order to determine whether or not decisions are being made on that basis and to correct it.

Mr. CONYERS. Well, they have procedures, but the Supreme Court just cut off one of them just a few days ago in the habeas corpus restriction, in which half of the death sentences were being overturned by implementing habeas corpus. That is going to be very seriously restricted on a tight decision.

Let me ask Mr. Barr this question, if I might. I'm worried about what the policy or the philosophy of expanding the death penalty is. Maybe I heard it when the chairman asked that question, but it's not clear to me. I would invite you to restate it, if you would, succinctly.

Mr. BARR. The death penalty generally serves three functions: deterrence, attributive justice, and incapacitation. Now, was your question what is our philosophy on drug kingpins, or generally what is our philosophy?

Mr. CONYERS. I'll repeat the question.

The question is, what is the philosophy or policy behind the administration in extending the death penalty in the Federal law, the proposals you're bringing forward here?

Mr. BARR. On the drug kingpins?

Mr. CONYERS. On all of it, everything.

If there isn't one, I will accept that, too. I'm not trying to create one out of whole cloth.

Mr. BARR. Prior to 1972, Congress had made the decision that the death penalty was appropriate in a range of circumstances, such things as assassinating a President, treason, espionage, those kinds of offenses, the most egregious offenses in the Federal system. In 1972, the procedures that were necessary to carry out the death penalty were called into question by the Supreme Court's decision in *Furman,* and since that time Congress has not provided the pro-

cedures whereby the laws that are on the books can be carried into effect.

Therefore, we have a situation where Congress has prescribed the penalty for blowing a plane out of the sky in a terrorist act as death. That's what Congress says is the appropriate penalty. Congress——

Mr. CONYERS. I'm asking you for the administration's policy. I'm fairly familiar with what Congress has done. But succinctly. My time is running out, sir.

Mr. BARR. The Congress has not provided the procedures whereby what's on the books can be carried out. So as Assistant Attorney General Dennis said, one of our priorities is to provide the procedures whereby the death penalties that are already on the books can be carried out. In addition to that, we have added some additional ones.

Mr. CONYERS. What's the policy behind it? I know what you're doing. Isn't there a reason for doing this?

Mr. BARR. We believe the death penalty is an effective deterrent. We think it should be used on serious offenses. Moreover, we believe that the death penalty reflects justice. That is what attributive justice is all about. If the American people believe, as we believe they do, that there are some crimes for which the death penalty is the only fit penalty, that reflects a sense of justice which the Government has a duty to vindicate. That is what our social compact is about. That's retributive justice.

Third is incapacitation. There are some offenses that we are asking for the death penalty for where we believe it is the most effective form of incapacitation. One of those is the drug kingpin death penalty.

Mr. CONYERS. I can tell you, sir, I definitely don't agree with your interpretation of how this Government runs. I think that's our job as much as yours, maybe more so.

But in extending the cases, we can't operate on the polls. I mean, there was a time when lynching was generally thought of as an appropriate remedy. There have been all kinds of times when maybe the public was right and maybe they were wrong. Maybe they understood; maybe they didn't. So I'm very disturbed about some of your responses in that regard.

But in extending——

Mr. BARR. May I respond to that?

Mr. CONYERS. Just a moment.

In extending it, we are now going into the whole question of justifying the death penalty in, among other things, drug overdose cases, and how it's going to apply to people that may not have had the appropriate intent for homicide. I'm thinking about the manufacturers of cigarettes, which the Surgeon General tells us causes maybe up to 400,000 deaths a year.

Could they be brought in under this statute that you propose, the bill that you propose here today?

Mr. BARR. No. The bill we propose today requires a felony. We're talking about a state of mind, which the Supreme Court described in the *Tison* decision. "We hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities, known to carry a grave risk of death, represents a highly culpable

mental state, a mental state that may be taken into account in making a capital sentencing judgment."

Now, what we're talking about is a substantial drug felony, some circumstance that shows that the actor is acting with wanton disregard for human life and a death, such as, for example, selling to minors, adult doses to minors, selling adulterated drugs. That's what we're talking about.

Mr. CONYERS. Well, short of the felony conduct, that would apply to the manufacturers of cigarettes.

Mr. BARR. No, it doesn't apply to manufacturers of cigarettes.

Mr. CONYERS. Let me ask you this. It would apply to doctors that violate the law and prescribe illicit drugs illegally.

Mr. BARR. The third aspect of our penalty, of our proposed penalty, applies to people who commit felonies under the Substance Control Act.

Mr. CONYERS. So the answer is it might or it might not?

Mr. BARR. If you're talking about a felon who has violated that act, who does so under circumstances——

Mr. CONYERS. No, I'm talking about a doctor who is not a felon.

Mr. BARR. If there's no felony involved, then it doesn't apply.

Mr. CONYERS. So there's no law against doctors illegally prescribing illicit drugs?

Mr. DENNIS. If I could answer that, as someone who has dealt with some of these cases of diversion, if a doctor distributed controlled substances outside of the process of prescriptions——

Mr. CONYERS. They write phony prescriptions, which is not an uncommon——

Mr. DENNIS. Then that's a distribution, the same as if I came up on the corner and handed you the drugs and wasn't a doctor.

Mr. CONYERS. So what's the answer?

Mr. DENNIS. The answer to what?

Mr. CONYERS. OK. I'll repeat the question.

Would they be covered under the proposed bills that you present to us today? Would that be illegal conduct?

Mr. DENNIS. Yes, if doctors were involved in drug transactions, drug distribution, and they met the other criteria with regard to the money amounts—which I think is $10 million, within 1 year, in their drug trafficking activities—as well as the amounts of drugs that they were distributing, yes, there is no exemption for doctors. Doctors act legally when they act as doctors prescribing controlled substances for medical purposes. Otherwise, they have no immunity from criminal prosecution and these penalties would apply.

Mr. MAZZOLI. The gentleman's time has expired.

We thank the panel very much. If there are further questions that the chairman and members of the subcommittee would submit, we will do so in writing.

We would call forth our next panel and thank them for their patience. This has been a fairly long day, but a very interesting one.

Our next panel consists of Mr. Henry Schwarzschild from the American Civil Liberties Union; Mr. Julius Chambers and Mr. Richard Burr from the NAACP Legal Defense and Education Fund.

Mr. Schwarzschild has been the director of the capital punishment project of the American Civil Liberties Union since 1976. He was the founder and first executive director, and remains the vice

chair of the National Coalition To Abolish the Death Penalty. From 1972 to 1976, Mr. Schwarzschild was a director of the ACLU's project on amnesty for Vietnam war resistors. Prior to that position, he was a staff associate of the Field Foundation and, from 1964 to 1970, he was the executive director of the ACLU's Lawyers Constitutional Defense Committee. This committee was a civil rights lawyers' group with offices in Alabama, Louisiana, Mississippi, and Florida. He worked closely with the late Dr. Martin Luther King, Jr., and other leaders of the civil rights movement.

Our second panelist is Mr. Julius Chambers, director-counsel of the National Association for the Advancement of Colored People Legal Defense and Educational Fund. Mr. Chambers has held this position since July 1984. He has had a distinguished career working principally with civil rights cases. He has received numerous honors and is a member of a myriad of organizations, such as the Order of the Golden Fleece, Prince Hall Masonic Lodge, American Bar Association, National Bar Association, North Carolina Association of Black Lawyers, and the Board of Directors of the Children's Defense Fund, to name but a few.

Our final panelist is Mr. Richard Burr, director of the capital punishment project for the NAACP Legal Defense and Educational Fund. Mr. Burr has held this position since January 1987. In this capacity, he has served as counsel in 20 death cases in 12 States, and as counsel in most death penalty cases heard by the U.S. Supreme Court. Mr. Burr has been a consultant on more than 100 death penalty cases nationwide and to death penalty resource centers in Arizona, Florida, Oklahoma, Texas, and Tennessee. Prior to joining the NAACP, he served with the office of the public defender in West Palm Beach, FL.

Gentlemen and lady, we are delighted to have you with us today. Perhaps the lady might identify herself for the record, for the reporter.

Ms. RUST-TIERNEY. My name is Diann Rust-Tierney. I am legislative counsel with the American Civil Liberties Union Washington office.

Mr. MAZZOLI. Fine. Thank you.

Gentlemen and lady, we are delighted to have you with us today. Welcome to the subcommittee. We have received your written statements which, without objection, will be made a part of the hearing record. We will begin with Mr. Schwarzschild and proceed however you would like.

Mr. SCHWARZSCHILD. Mr. Chairman, would you permit Mr. Chambers and Mr. Burr to speak first? They have a slightly tighter travel schedule than I do.

Mr. MAZZOLI. Certainly. I appreciate that. We will certainly do so.

Mr. Chambers.

STATEMENT OF JULIUS L. CHAMBERS, DIRECTOR-COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Mr. CHAMBERS. Thank you, Mr. Chairman, and thanks to Mr. Schwarzschild. We are trying to get back to New York. I do appre-

Department of Justice

STATEMENT OF WILLIAM P. BARR
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

HEARING

BEFORE THE

COMMITTEE ON
RULES AND ADMINISTRATION

UNITED STATES SENATE

REGARDING S. 1727, THE
"COMPREHENSIVE CAMPAIGN FINANCE
REFORM ACT OF 1989"

FEBRUARY 27, 1990

Mr. Chairman:

It is a pleasure to appear today to present the Administration's views on S. 1727, the Comprehensive Campaign Finance Reform Act of 1989. This Administration believes there is a lot wrong with the current system of campaign finance -- a system that funnels special interest monies into the campaign coffers of incumbent office-holders already too well-shielded from the effects of real campaign competition. The system is wrong both because it thwarts the goal of providing voters with a real choice between competitive candidates and because it promotes undue influence (or the appearance of undue influence) by narrowly-focused interest groups that have become a prime source of campaign revenues.

S. 1727, legislation proposed by the President and introduced last session by Senators Dole and McConnell, among others, proposes far-reaching and much needed reforms. The Administration proposal directly confronts the twin evils of the current system -- practices which give incumbents unfair advantages and the role played by special interest "PACs" subsidized by corporations, labor unions, and trade associations. These narrowly-focused entities aggregate vast sums of money, with receipts of about $280 million in 1987-1988. This special interest money is then funnelled largely to the campaigns of incumbent congressmen, all too frequently by Washington

powerbrokers intensively involved in the legislative process. Inherent in this inside-the-Beltway financing system is the opportunity for the quid pro quo, undue influence, and abuse.

While curbing the influence of special interests, the Administration bill enhances the role of individuals in the political process, strengthens political parties, reduces unfair advantages with which incumbents now protect themselves, adds to disclosure requirements, and seeks to guard against the fundamental unfairness of gerrymandering by setting standards for fair redistricting in federal elections. By taking the financing of Congressional elections out of the hands of special interests and by eliminating certain inappropriate incumbent advantages, the President's proposal helps to increase the level of competition in congressional elections and to restore public confidence in the campaign financing system. And it would do so without shifting the cost of campaigns onto the back of the American taxpayer.

The over-arching consideration that must guide any reform is fidelity to the principles of the First Amendment. Political speech related to election campaigns is above all else what the First Amendment is designed to protect. The First Amendment "'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" Buckley v. Valeo, 424 U.S. 1, 15 (1976) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)). The marketplace of ideas is nowhere so real or so important as at the polling place, where the people

actually choose among political principles. Accordingly, we must not treat the First Amendment as an unwelcome constraint to which we give grudging acquiescence. Instead, we should seek to adopt neutral principles that will foster competition and give the freest possible rein to political speech and hence popular government. Today, we look around the world in wonder at the mighty works of America's ideas: individual liberty and unhindered political debate. It would be a betrayal of those ideas, of the Revolution that was fought for them, and of the 200 years during which we have lived free because of them, to abandon political liberty in the pursuit of passing electoral advantage.

President Bush has been a leader in championing campaign financing reform. Almost one year ago, at the outset of his Administration, the President submitted ethics legislation to Congress and at the same time asked for a comprehensive review of federal campaign finance laws. The reforms that the President endorsed last year, embodied in S. 1727, have waited long enough. They deserve action.

The problem of special interest PAC money becoming a greater factor in a system already heavily weighted in favor of incumbents is obvious. There seems a clear correlation between the increased influence of PAC contributions and the decline in electoral competition offering voters a real choice. While PAC contributions balloon as a proportion of campaign funds, election competitiveness sinks. The facts speak for themselves. Although overall candidate spending by congressional candidates held

roughly level from the 1986 to the 1988 elections, PAC contributions grew by 11%. As a percentage of campaign receipts, PAC contributions to House races grew from 21% in 1978 to 37% in 1988. At the same time, one commentator calculated that "[t]he 1988 House elections were the least competitive since 1792."

The connection between special interest contributions and the evisceration of electoral choice is not hard to discern. The vast bulk of PAC money goes to incumbents -- 75% in 1988. Less than 12% goes to challengers. The strong attraction of PAC monies to incumbents is bi-partisan: Incumbents of one of the major parties received almost 40% of their campaign funds from PACs, and the other party's incumbents looked to PACs to supply 52% of their entire funding. In fact, contributions from individuals and the political parties provided less than half of the money used in the most recent House campaigns. In the Senate, PAC contributions have more than doubled as a percentage of total campaign receipts over the last ten years from 11 to 23 per cent.

Coupled with other advantages of incumbency -- the continued ability to send unsolicited mass mailings at taxpayer expense, the vast head start most congressmen have in name recognition and media exposure, their sophisticated office staffs and equipment, the war chests of accumulated funds that can be built up over the years to keep potential opponents from even thinking about mounting a challenge -- on top of all this, channeled special interest funding has resulted in a system that now re-elects

House incumbents at a rate of 98%. In the 1980's, Senate incumbents had an 85% success rate. Worse, the great majority of congressional races do not offer any real contest: in only 9% of House races last election did the winner take less than 55% of the vote, while 83% of the elections were landslides with the winner getting more than 60% of the vote total.

We all can agree that vigorous political competition -- holding incumbents to account for their performance and raising the intensity of scrutiny and debate -- is a fundamental precept of our democratic system. As Norman Ornstein of the American Enterprise Institute has written, the problem is not that there is too much spending to provide political information: communicating with the voters is essential, and the per-voter cost for campaigning here is about average for Western democracies. The problem, rather, is the concentrated source of the money. "Incumbents increasingly have monopolized political action committee contributions, worsening the financing problems of challengers. Add this to the other advantages of incumbents . . . and the obstacles to challengers become insurmountable," Ornstein observes.

As President Bush has said: "PACs weaken the parties, restrain competition, and deaden the political debate." The solution, proposed by President Bush, is to lessen the impact of special interests and increase the role of individuals and the political parties. "Modern democratic government works best," as the President noted, "when organized by strong political

parties." Individual participation in the electoral process also ought to be encouraged, not excluded by new limitations that would lock in PACs as the most significant campaign contributors.

The Administration's Proposal

S. 1727 comes directly to grips with the problem of special interests. Section 2 of the bill does not merely tinker with corporate, union, and trade association PACs: It eliminates them. These special interest PACs funnelled approximately $140 million into candidates' coffers in the last election cycle. About half of this money came from a mere 100 PACs. Consistent with First Amendment guarantees, S. 1727 would still permit independent, unsubsidized issue-oriented PACs unconnected with corporations, unions, or trade associations. (These groups accounted for about 12% of total PAC money contributed in 1987-1988.) S. 1727 would reduce these PACs' maximum permitted contribution from $5000 to $2500 per candidate per election.

This PAC reform is vital. The current system favors special interest PACs and therefore channels political contribution through institutions organized around narrow economic interests. The interposition of PACs weakens the individual as a political factor and divorces Congress from the citizenry, weakening the vital link between the sovereign people and those who temporarily serve them in government. The elimination of special interest PACs would force candidates to rely on contributions from political parties and a broad range of individuals.

In addition, S. 1727 would address potential loopholes by which special interests can circumvent the present contribution limits. Section 4 of the bill addresses the problem of "bundling," whereby an organization or its officials solicit contributions from their employees or members, "bundles" that money, and sends it along to a candidate without affecting the organization's own contribution limits. The bill prohibits intermediaries from arranging delivery of contributions from more than two people who work for the same employer or who are members of the same labor union or trade association.

In addition to curbing the special interests, S. 1727 would enhance competition in elections by reducing unfair advantages enjoyed by incumbents. The American tradition of rotation in office -- so essential to preserving democracy -- requires robust competition in elections. Here, also, there is an urgent need for fundamental change. One of the gravest threats to a functioning democracy is the danger that incumbents will manipulate the system so that those who are in office stay in office. Like distortion in favor of special interest PACs, rigging the system to hold on to power weakens democracy.

Three aspects of the President's proposal specifically seek to reduce unfair incumbent advantages. First, one especially egregious form of manipulation is the current system of one-sided public financing of campaigns, through which incumbents are able to use tax dollars unavailable to their opponents for essentially political purposes. In fiscal year 1988, Senators and

Representatives sent out nearly four times as much mail as they received: 210.4 million pieces of mail at a cost of $113.4 million. House rules still do not limit spending by individual members; Senate rules, while allocating franking funds by State population, nonetheless allow Senators to borrow from unused quotas of colleagues not up for reelection. Section 9 of S. 1727 would ban unsolicited mass mailings at taxpayer expense. That way, the frank will be used to do the business of government, not the business of re-election.

Second, Section 7, by eliminating campaign rollovers, will dislodge a particularly pernicious form of incumbent advantage: the permanent "war chest" that has the effect of deterring potential challengers. In 1988, incumbents had $63 million left over for the next election. Such war chests function like nuclear weapons: their purpose is served if they never have to be used. A potential challenger who sees that his opponent -- the incumbent -- already has a million dollars on hand may be deterred from undertaking the difficult process of mounting a campaign. But if serious challengers are deterred, the incumbent need not spend much of the war chest; the money does its work just by being there, like a missile in its silo. The practice of rolling over campaign funds is also unfair to political contributors, who may well not realize that they are contributing, not for this year's election against a particular identified opponent, but to ensure the incumbent's permanent hold on an office against all future comers.

Third, Section 11 of S. 1727 would eliminate, so far as possible, political gerrymandering with respect to congressional districts -- the drawing of electoral lines in order to favor a political outcome. Gerrymandering is one of those things that everyone agrees is evil; but no one is willing to correct it. The fundamental insight of constitutional government is that the party in power at the moment must not be able to change the rules to keep themselves in power. Gerrymandering represents a weakness in that system, since electoral lines are re-drawn by those who are in power. Accordingly, we would impose the neutral rule that boundaries must be drawn for non-political reasons. In drafting the provision, we have of course been sensitive to federalism concerns and the need to minimize the substantive role of the courts while facilitating the prompt resolution of disputes concerning district lines. The Administration believes that the mandates of the Voting Rights Act must be followed in this process.

One particular aspect of the President's reform relates closely to two guiding principles of controlling special interests and reducing unfair incumbent advantages: the strengthening of political parties. Section 6 increases the amount of coordinated expenditures parties may make on behalf of congressional and senatorial campaigns. Under the proposal, a party could make coordinate expenditures of up to 5 cents per voter instead of the current 2 cents. Broad-based political parties, as opposed to narrow economic interests like

corporations, unions, and trade associations, aggregate a range of individual concerns and articulate competing visions of the public good, not merely demands for favorable treatment. Parties are thus a far more desirable form of organization than special interest PACs. In addition, state and national parties are an invaluable support for challengers who need an early base of support to get started against an incumbent. In 1988, both of the two major parties gave roughly 30% more to challengers than to incumbents. Thus, strengthening the parties will broaden the base of financial support for candidates and increase the public's ability to choose between incumbents and challengers.

Finally, let me deal separately with three aspects of the plan. First, section 4 would codify the rule of Communications Workers of America v. Beck, 108 S. Ct. 2641 (1988), under which unions may not use agency fees, which they are authorized by law to charge to non-members, for advancing political viewpoints. I think we can take it as axiomatic that political contribution must be voluntary and that taking someone's money and spending it to advance someone else's political views is not simply undemocratic, it is tyrannical. Similarly, the bill would permit union members to "opt out" of their union's political activities by reducing their dues in an amount corresponding to the political component of union expenditures.

Second, S. 1727 deals with independent expenditures -- political speech by people who are not affiliated with candidates or parties. We would increase the current disclosure

requirements to ensure that the public is able to distinguish between a candidate's own message and the messages of independent persons who support the candidate but are not actually connected with him. Independent political speech is at the heart of democracy -- it is at the very core of First Amendment guarantees -- and the Administration is fundamentally opposed to any suggestion that only candidates and other "authorized" people may speak out on the issues. On the other hand, a political candidate, just like anyone else who addresses the public, has a right to be able to identify his message as his own and to make clear who speaks for him and who does not.

Third, S. 1727 enhances enforcement of the election laws in several significant respects. Section 10 imposes new disclosure requirements for "soft money." It also directs the Federal Election Commission to issue regulations which would mandate a realistic allocation of soft money between state and federal elections. This corrects a weakness in the current system, which may be abused by treating an unrealistic proportion of these dollars as related to state races.

Other enforcement improvements include restrictions on contributions to "leadership PACs." Section 3 of S. 1727 would require that contributions to leadership PACs be counted as contributions to the individual candidate who controls the PAC as well, thus eliminating a loophole that permits double contributions. Section 8 of the bill also aids enforcement by authorizing the Federal Election Commission to provide

information to the Attorney General in connection with law-enforcement investigations and trials.

In sum, the President urges Congress to move toward the unmediated democracy the Framers envisioned, to eliminate the institutionalized special interests that stand between the people and their representatives, and to eliminate the artificial barriers that make it harder for the people, when they choose to do so, to replace their servants with others more suitable to the popular will.

As well as being sound as matter of policy, S. 1727, in the view of the Department of Justice, fully comports with the requirements of the Constitution. In particular, the ban on political action committees established or administered by corporations or labor unions is consistent with the principles of the First Amendment as interpreted by the Supreme Court. In a number of cases, the Court has recognized that restrictions on campaign expenditures by corporations, labor unions, and other such organizations must be evaluated in light of the "special characteristics" of such entities and the "special treatment historically accorded corporations."

Thus, in FEC v. National Right to Work Comm., 459 U.S. 197, 209-10 (1982), the Court held that section 316's prohibition of corporate solicitation of contributions from those who were not members of the corporation reflected a permissible "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." The Court

held that the prohibition was justified by the compelling government interest in preventing actual corruption or the appearance of corruption, which might result if large financial contributions drawn from the substantial aggregations of wealth made possible by the corporate form of organization were used to create political debts from legislators. Id. at 207-08. The Court concluded that section 316 was sufficiently narrowly tailored to support these interests in light of the "considerable deference" accorded to the "careful legislative adjustment" of the federal election laws, over a substantial period of time, "to account for the particular legal and economic attributes of corporations and labor organizations." Id. at 209.

In subsequent cases, the Court has reiterated that "[d]irect corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace" and that Congress has a legitimate interest in avoiding "the corrosive influence of concentrated corporate wealth." FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 257 (1986). Furthermore, although the Court has struck down a state statute prohibiting a corporation from making expenditures to influence or affect the vote in a referendum election, see First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978), the Court went out of its way to point out that this did not imply that corporations had a First Amendment right to make expenditures in the "quite different context" of "a political campaign for election to

public office." Id. at 788 n.26. The Court left it open to Congress to "demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." Id.

In our view, Congress would be justified in concluding that further restrictions on the campaign-related activities of corporations and labor organizations are necessary to avoid the danger of real or apparent corruption. Corporate and labor PACs pay their expenses from corporate and union treasuries and thus benefit considerably from their association with "'substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization.'" Massachusetts Citizens for Life, 479 U.S. at 257 (quoting National Right to Work Comm., 459 U.S. at 207). The large expenditures that these PACs have made, especially on behalf of incumbents, create the public perception of "political debts from legislators who are aided by the contributions." National Right to Work Comm., 459 U.S. at 207. We believe that Congress may justifiably conclude that a ban on such PACs is necessary to eliminate this appearance of corruption. We also believe that, in light of the Congress' "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,'" such a congressional judgment concerning corporate activity would be entitled to "considerable deference." Id. at 209 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46 (1937)).

The provisions in the Administration's proposal that concern contribution limitations are also fully constitutional. The decreased spending limits on PACs contained in section 2(b) of the bill simply tighten to a permissible degree restrictions that have already been upheld by the Supreme Court. See Buckley v. Valeo, 424 U.S. 1, 35-36 (1976). Section 3(a) also tightens contribution limits by counting, for purposes of these limits, all contributions made to political committees "established or financed or maintained or controlled by any candidate." This provision, which closes a major loophole in the existing law, prevents contributors from circumventing the candidate contribution limits by giving a second round of contributions to candidate-controlled committees.

Defects of Other Proposals

I would now like to address the kind of alternative campaign financing proposals that seem to be taking shape. The key feature of these proposals is a scheme of coercively-imposed spending limits, coupled in some cases with partial "public financing" of campaigns.

As a matter of policy, the Administration believes these kinds of proposals would take us in exactly the wrong direction. They do not address the central problem of special interest PAC money; they perpetuate it. Their reliance on PAC money and taxpayers' dollars would weaken the role of individual contributors. Their coercively-enforced expenditure limitations

would create an even greater bias in favor of the incumbent. Although these proposals involve a complex financing scheme weaving together PAC money, tax dollars, and individual contributions, the net result would be to entrench incumbents even further.

The centerpiece of such plans would be a mechanism to coerce candidates into accepting public money and the expenditure limits that would come with it. Under this system of enforced parity, if a challenger dares to raise or spend $1 over the limit, the Treasury sluice-gates would open up and taxpayers' dollars would pour out into the hands of the incumbent, mounting into the millions for a single State. If the challenger presses on and raises one-third over the limit, massive amounts of additional money would flow to the incumbent. And let's not play games about this: the effect, if not the purpose, of this "massive retaliation" with taxpayers' money would be to coerce challengers to limit the scope of their challenge.

The system of enforced parity as envisioned by some would extend beyond the actual participants in the campaign. If an independent person or group of people -- wholly unconnected with the challenger's campaign -- decided to spend to advocate the election of the challenger or the defeat of the incumbent, yet more public funds would come to the incumbent. There can be no question about the nature of this scheme: it is a coerced limit on the total volume of political speech in a campaign, whether that speech be by candidates or simply by citizens who want to

speak out, coupled with a guarantee that the incumbent would have enough money -- taxpayers' money -- to offset -- indeed overwhelm -- what his critics spend.

Such a restriction on political speech exacerbates the advantages of incumbency, because spending limits favor incumbents. Incumbents have a built-in advantage at the start of a campaign, including name recognition, media exposure, and sophisticated office staffs and equipment. As the Supreme Court noted in Buckley v. Valeo, 424 U.S. at 56-57:

> the equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.

In Norman Ornstein's colorful analogy to the 100-yard dash, "[c]urrently, most incumbents start out on the 50-yard line, with their challengers back in the starting blocks. Capping campaign expenditures is like shortening the race to 80 yards -- but leaving the candidates where they were to start with." For this reason, expenditure limits that are nominally equal are unequal in effect.

The fundamental error with all proposals that we need to limit campaign spending is that they fail to understand the true problem with our system of campaign finance. Our problem is not with the amount of spending. The money spent per voter in American federal elections is roughly equal to that spent in other Western democracies. Moreover, there is nothing wrong with political speech, so that we should want to restrict it. Rather,

our problems come, not from the amount of campaign spending, but from its source: in particular, special interest money funnelled through PACs. Our system as it now works channels the people's political spending through intermediaries that are tied to narrow economic interests. That's the problem.

Proposals to restrict the total quantity of political speech do nothing to address that underlying flaw. Under such proposals, when a candidate accepts expenditure limits (which as a practical matter he must) he can still seek funds from sources other than private persons and parties. Indeed, under these approaches, a candidate can receive a substantial portion of his funds -- in some bills up to 30% -- from special interest PACs. Because the vast bulk of special interest PAC money goes to incumbents, this perpetuation of the PAC system continues to confer substantial advantages on incumbents, as would the limits themselves.

The use of special interest PAC money, particularly when combined with tax-supported seed money and tax-supported matching funds, also would devalue the importance of individual contributions, because those contributions end up as a limited slice of the total that may be spent. The underlying premise seems to be that it is better for campaign money to come from institutions like government and PACs than voluntarily from individuals, that it is somehow corrupting for politicians to ask people to involve themselves by contributing to campaigns.

This premise is exactly wrong. The need to raise funds from a broad base of individuals puts the candidate in touch with his true constituency -- the people, not the PACs -- and thus democratizes the process of campaign finance. A politician has a strong incentive to put his views before the people when he needs to persuade them to support his campaign with their own money. Democracy and the market both work as well as they do because of competition.

Furthermore, these proposals do very little to address the most blatant current abuse of incumbency: use of the frank for what are effectively campaign mailings. Some plans merely call for a 6 month hiatus in mass mailings prior to elections. That still gives incumbent Senators 5 1/2 years during which they can campaign with mass mailings at public expense.

In sum, these proposals fortify the positions of incumbents, giving them the new advantage of enforced parity while letting them keep their current edge. And they would do it in the worst way possible -- by restricting political speech, and by emphasizing PAC money while devaluing individual contributions. This would be a long stride in the wrong direction. In contrast, the Administration's proposal is aimed at cleansing the system and restoring competition without increasing the taxpayer's burden.

Constitutional Concerns

The Department of Justice is also concerned that these alternative campaign finance proposals raise serious

constitutional difficulties. In particular, the features of the proposals that are designed to coerce candidates into accepting expenditure limits differ substantially from the existing voluntary program for presidential elections as upheld by the Supreme Court. Moreover, the proposals are not justified by any constitutionally sufficient objective. Overall expenditure limitations do not serve to prevent electoral corruption but merely to maximize the advantages of incumbents -- clearly an inadequate justification for imposing penalties on free speech.

Among the most troubling features of the expenditure limitation proposals are provisions that would give increased federal grant money to participating candidates when expenditures made by a nonparticipating opponent exceed certain limits. The participating candidate would be free to spend this additional grant to defray expenditures in the general election without regard to the general election spending limits.

As a practical matter, these bills would force nonparticipating challengers to choose between observing the spending limits applicable to participants or facing a participating incumbent who has millions upon millions in federal funds with no aggregate expenditure limitation. The obvious intent and effect of these bills would be to coerce candidates into participating in the public financing system, even if they believed that they could raise more funds through their own resources and contributions. In doing so, the provisions would place unconstitutional burdens on the rights of individual

candidates to make campaign expenditures as well as on the rights of contributors.

Direct limitations on campaign expenditures, whether derived from a candidate's personal resources, or from contributions, are unconstitutional limitations on the quantity of political expression. See Buckley, 424 U.S. at 51-59. Similarly, direct limitations on independent expenditures in support of or in opposition to a candidate are unconstitutional. Id. at 39-51. The proposals to impose such restrictions indirectly would place what amounts to a penalty on any expenditures a nonparticipating candidate makes in excess of the limits set for participating candidates. Under some plans, independent expenditures would be penalized even more harshly; every dollar of such expenditures on behalf of a candidate would lead to a government dollar being given to that candidate's participating opponent. We believe that such coercive penalties cannot be squared with the principles set down in the Buckley decision.

No government interest exists that would justify the limitations on political speech that would inevitably result from these coercive penalties. The "only legitimate and compelling government interests thus far identified for restricting campaign finances" are those of "preventing corruption or the appearance of corruption." FEC v. National Conservative Political Action Comm., 470 U.S. 480, 496-97 (1985). The Court believed at the time of Buckley in 1976 that the government interest in avoiding "the corrupting influence of large contributions is served by the

[existing] contribution limitations and disclosure provisions." 424 U.S. at 55. The Administration believes that experience since then has shown that total elimination of special interest PACs, along with increased disclosure requirements, is necessary to avoid corruption and the appearance of corruption and is thus constitutionally justified. The same cannot be said, however, for proposals that would encourage the existence of special interest PACs but at a certain level ban even small contributions from individuals. It is difficult to see how an appearance of corruption arises when a candidate successfully raises a large amount of small contributions. Rather than suggesting corruption, such fundraising would indicate nothing more than the popularity of the candidate and his or her ideas. Furthermore, to the extent the candidate uses a large amount of his own personal resources, there can be no appearance of corruption; a candidate cannot exert undue influence on himself.

Indeed in some circumstances, the effect of these proposals could well be entirely to deny individuals the opportunity to contribute to their favored candidates if other individuals or groups have been diligent or fortunate enough to have their checks arrive first. These proposals thus raise the very real possibility -- indeed the likelihood -- of a total ban on contributions by some individuals. This goes far beyond the regulations upheld in Buckley. The Buckley Court made clear that the limitations it was upholding were reasonable and had only a "limited effect upon First Amendment freedoms." 424 U.S. at 29.

In rejecting a challenge to the $1,000 individual contribution limit as too low, the Court noted that "[s]uch distinctions in degree become significant only when they can be said to amount to differences in kind." Id. at 30 (emphasis added). A restriction that can amount to a total ban on contributions by certain individuals is surely "differen[t] in kind" from a dollar limit of $1,000.

The real purpose of the penalty features of these proposals would be to equalize the resources available to participating and nonparticipating candidates. This goal is wholly illegitimate. As the Supreme Court has recognized, "[t]here is nothing invidious, improper, or unhealthy in permitting [funds derived from contributions or a candidate's resources] to be spent to carry the candidate's message to the electorate." Buckley, 424 U.S. at 56. Indeed, the very notion that the government should attempt to limit the speech of some persons "in order to enhance the relative voice of others is wholly foreign to the First Amendment." Id. at 48-49. Whether achieved through direct limitations on speech or indirectly through coercive penalties, the effect is equally impermissible. The approach of these bills is analogous to a government attempt to "equalize" editorial resources by mandating that, unless a newspaper reduces the amount of space it devotes to editorials, the government will provide large financial subsidies to a competing cross-town newspaper that has, or is willing to, reduce its editorial space to what the government believes is the correct amount. This

highly coercive form of government intervention in the marketplace of political speech and ideas is inconsistent with the principles of the First Amendment.

Furthermore, the Court has noted that government attempts to equalize campaign spending may not in fact serve to equalize electoral opportunities. Given the substantial advantages of incumbency, any statute designed to bring about an equalization of campaign expenditures will handicap challengers "who lack[] substantial name recognition or exposure of [their] views before the start of the campaign." Buckley, 424 U.S. at 57. Thus, an equal expenditure rule serves few interests other than that of protecting incumbents -- which is plainly an inadequate justification for burdening First Amendment rights.

There is yet another way in which the penalty provisions raise troubling constitutional concerns. In a number of cases, the Supreme Court has struck down statutes or regulations that compel an individual to subsidize opposing viewpoints as the price for exercising First Amendment rights. For example, in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Court held that the First Amendment prohibits the government from requiring a newspaper to provide free space for a reply by a candidate whom the paper has criticized. The statute in that case was defended in part on the grounds that it did not prevent the newspaper from publishing whatever it wanted. The Court rejected this argument, holding that the statute "exact[ed] a penalty on the basis of the content of a newspaper." Id. at 256.

By forcing the newspaper to subsidize views with which it disagreed, the statute deterred the newspaper from speaking out in the first place. See also Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (holding that compelling non-union public employees to pay union dues violated their First Amendment rights when those dues were used to advance political causes with which the forced contributors disagreed); Pacific Gas & Electric Co. v. Public Utilities Comm'n, 475 U.S. 1, 14 (1986) (plurality opinion) (vacating a Commission order that required PG & E to include in its billing envelopes speech of a third party with which the company disagreed, because it was unconstitutional to require the company to disseminate hostile views).

The public funding components of such proposals raise analogous concerns. "Excessive" candidate speech would be penalized by making the size of the public subsidy to the candidate's participating opponent vary depending upon the amount of such speech. Thus, the more the candidate did to promote his own views, the more he would foster the promotion of views he opposes. Although the candidate's funds do not themselves go to his opponent, the effect is the same. Under these schemes, as a nonparticipating candidate increases the amount of expenditures he makes in connection with political speech, he causes a larger public subsidy to be provided to his participating opponent.

Moreover, the rights of contributors also would be implicated because their contributions would end up spreading, not only the ideas that they support, but also those that they

oppose. The inevitable result would be a chilling effect on the right to contribute or to make independent expenditures. While the Buckley Court upheld reasonable restrictions on the amount that individuals and groups can contribute to candidates, see 424 U.S. at 23-29, such limitations implicate protected First Amendment interests, id. at 22-23, and were subjected by the Buckley Court to a "rigorous standard of review." Id. at 29. They passed constitutional muster because of "the weighty interests served by restricting the size of financial contributions to political candidates." Id. These interests are not served to the same degree, if indeed they are served at all, by "counterbalancing" small contributions above a statutory maximum with public funds.

These provisions cannot be justified on the theory that the government has certain limited discretion to subsidize some forms of speech but not others. See Regan v. Taxation With Representation, 461 U.S. 540, 545-46, 549 (1983). Although Congress' power to provide evenhanded subsidies in Presidential elections has been upheld, see Buckley, 424 U.S. at 85-109, Congress has no authority to adopt a sliding-scale subsidy designed to punish and deter those candidates whom Congress thinks are engaging in too much speech.

Similar constitutional problems are presented by proposals which would increase the size of the individual contributions a candidate may receive if an opponent spends more than $250,000 of his or her personal funds. This provision would attempt

unconstitutionally to limit a candidate's right to promote his own speech, without in any way promoting the government interest in avoiding the appearance of corruption.

We also believe unconstitutional a provision of one proposed bill which would require, as a condition of eligibility for public funding, that the candidate refrain from making any expenditure before the date that is six months in advance of the senatorial primary, and that, during the same period, the candidate refrain from making "any expenditure, directly or indirectly, for any political advertisement or broadcast communication on a television broadcast." These provisions are not justified by any interest in avoiding corruption or the appearance of corruption and thus impose unconstitutionally burdensome conditions on the candidate's entitlement to receive public financing. Since expenditures are broadly defined to include most spending for the purpose of influencing any federal election, see 2 U.S.C. § 431(9), such conditions would require candidates to abstain from a very large amount of political activity during the pre-election period. Indeed, provisions that would bar a participating candidate from making even indirect expenditures related to political advertisements or broadcast communications on television might be read as prohibiting such candidates from appearing on television programs if the candidate's purpose is partly to influence a federal election and if the appearance could not be considered a "news story, commentary, or editorial." Congress may not require such a

"time-out" from the First Amendment as the price of public funding.

Indeed, these conditions are even more burdensome when it is recognized that incumbents will largely be able to evade the restrictions by issuing press releases (at taxpayer expense), and by asserting that all of their TV appearances and public speeches are "news" events, exempted from the definition of "expenditures." 2 U.S.C. § 431(9)(B). Furthermore, because an incumbent almost always begins with a substantial advantage in terms of name recognition and other factors, advance campaign work is often necessary to unseat a well-entrenched incumbent. A short race benefits those who start with a lead. The First Amendment does not permit Congress to condition a challenger's eligibility for public funding on his refraining from such early campaign activities.

In closing I want to emphasize that the task before us is not to muffle political speech or restrain the interchange of ideas. Nor should the goal be to divert further taxpayer dollars to the use of individual congressional candidates. Rather, our purpose must be to reduce the pernicious influence of the large institutionalized interests, restore a strong voice to individual citizens, enhance the role of our political parties, and return the disinfectant of true competition to congressional elections. This is precisely what S. 1727 would achieve.

Mr. FRANK. Are there any other opening statements? We will then turn to our first witness and we appreciate the cooperation of the Department of Justice and we have before us Mr. William Barr, who is an Assistant Attorney General in the Office of Legal Counsel, and I would note that, typing to the contrary, the Office of Legal Counsel is not a body of people who sit and deliberate. It is a group of attorneys and "cil" should have been "sel" and the record will so stand.

Mr. Barr, if you wish to identify the gentlemen accompanying you, please proceed as you wish.

STATEMENT OF WILLIAM P. BARR, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, ACCOMPANIED BY JOHN McGINNIS, DEPUTY ASSISTANT ATTORNEY GENERAL

Mr. BARR. Thank you, Mr. Chairman.

Accompanying me today is John McGinnis, Deputy Assistant Attorney General for the Office of Legal Counsel.

I would ask that my prepared statement be entered into the record in full——

Mr. FRANK. Without objection, it will be.

Mr. BARR. Thank you. I am just going to read a few excerpts from it.

The Department has encouraged and continues to support the use of ADR techniques in those cases where ADR can reduce the time and expense devoted to litigation. H.R. 2497 is an ambitious attempt to promote ADR in administrative disputes.

Although many of the ADR techniques covered by the bill may already be available to agencies, H.R. 2497 would increase the use of ADR by adding the authority of a specific congressional enactment. Throughout the Government, the bill would exert a gravitational pull toward use of ADR as a means of deciding disputes.

H.R. 2497 would authorize and encourage agencies to explore a number of ADR techniques that we, like the sponsors of the bill, would like to see used more frequently—conciliation, facilitation, mediation, factfinding, minitrials and settlement negotiations.

All too often, the parties to a dispute expend their energies in litigating the case to a decision when less formal processes would have produced a faster, less-costly and equally just outcome.

As I will explain, we are troubled by the arbitration provisions in H.R. 2497 as it was drafted, or it is drafted, and we believe that those provisions raise serious practical, as well as constitutional problems. However, when we presented this position at some length in the hearings on the parallel Senate bill, S. 971, the chairman of the subcommittee suggested that representatives of the Department of Justice and of the American Bar Association, a principal supporter of the bill, engage in some alternative dispute resolution of our own. And in an attempt to reach a compromise that would satisfy our concerns, we did work closely with the ABA.

I am happy to report that those discussions have been fruitful and we are offering today for your consideration a proposed modification of the bill that is acceptable to both the Department of Justice and the ABA.

I also understand the Administrative Conference of the United States supports this compromise.

We hope that you will incorporate the modification into the bill and, in any event, I would like to thank the ABA, and in particular, Phil Harter, who will be testifying today, for his energy and imagination in working with us on this compromise.

The only area of concern to the Department of Justice in this bill really was the binding arbitration provisions and I testified as to our practical concerns over those provisions—why we felt binding arbitration was, in many ways, inconsistent with the concept of administrative law—and also I testified previously in the Senate as to our constitutional concerns.

What we have worked out with the ABA and with the Administrative Conference is a compromise. The proposed compromise, in essence, would provide that an arbitral award would be reviewable by an agency head for a period of 30 days before becoming final. Although we expect that an agency head would seldom vacate an award, this proposal would ensure that an officer of the United States would be responsible for each arbitral award. In this sense, the arbitrator's decision would be nonbinding.

The proposal, we believe, maintains the utility and effectiveness of arbitration as foreseen by the bill's sponsors, while providing for the accountability of an officer of the United States.

Under the proposal, in the unusual instance where the agency head vacates an award, the decision of the agency head would not be reviewable in a court. This feature of the proposal is necessary to prevent overjudicialization of the ADR process and to make arbitration attractive to agencies that might otherwise choose to avoid it.

Of course, if an award is overturned, the private litigant can still pursue his claim through the usual administrative procedures for which arbitration would have been a substitute.

The specific language of the proposal is attached to my testimony and I hope that Congress sees fit to incorporate this proposal into the bill.

Just one last word, and that is that, as I mentioned in my Senate testimony, I think there is general agreement that one of the reasons that makes ADR attractive in the administrative process is an increased tendency toward judicialization of the administrative process. I think that it is important that at the same time as providing this safety valve, if you will, or a parallel track of private arbitration, Congress also examine how the administrative process can be reformed in itself.

If there are problems of delay caused by docket delay, then I think it is important to review the allocation of administrative law judges and steps that could be taken within the administrative process to expedite administrative proceedings.

If proceedings themselves have been cumbersome and if part of the reason for delay is that the proceedings have become overly judicialized and time-consuming, when, in fact, as originally conceived, proceedings were supposed to be shortcuts or less formal kinds of dispute resolution, then I think Congress should give some consideration to streamlining those administrative proceedings and, in fact, perhaps providing alternative dispute resolution mech-

anisms within the administrative process so that parties could opt for less formal hearings before an administrative law judge and have that option as well, because I think, while ADR offers a lot of advantages and private arbitration does as well, depending on the circumstances, we should also look at reforming the administrative process itself, which is part of the reason that we are looking to ADR.

With that, I will conclude my prepared remarks and I would be happy to answer any questions.

Mr. FRANK. Thank you, Mr. Barr.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF WILLIAM P. BARR, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Thank you for the opportunity to present the views of the Department of Justice on H.R. 2497, which would authorize agencies to use a number of alternative dispute resolution, or "ADR," techniques. The Department has encouraged, and continues to support, the use of ADR techniques in those cases where ADR can reduce the time and expense devoted to litigation. H.R. 2497 is an ambitious attempt to promote ADR in administrative disputes. Although many of the ADR techniques covered by the bill may already be available to agencies, H.R. 2497 would increase the use of ADR, by adding the authority of a specific Congressional enactment. Throughout the government, the bill would exert a gravitational pull toward use of ADR as a means of deciding disputes.

H.R. 2497 would authorize and encourage agencies to explore a number of ADR techniques that we, like the sponsors of the bill, would like to see more frequently used -- conciliation, facilitation, mediation, factfinding,[1] mini-trials, and settlement negotiations. See § 2(3). All too often, the parties to a dispute expend their energies in litigating the case to a decision, when less formal processes would have produced a faster, less costly, and equally just outcome.

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[1] "Factfinding" can be binding or non-binding. We support the use of non-binding factfinding.

As I will explain, we are troubled by the arbitration provisions of H.R. 2497 as now drafted, which we believe would raise serious constitutional questions. However, when we presented this position at some length in the hearings on the parallel Senate bill (S. 971), Senator Levin suggested that representatives of the Department of Justice and of the American Bar Association, a principal supporter of the bill, engage in some alternative dispute resolution of our own, in an attempt to reach a compromise that would satisfy our concerns but preserve a useful and effective form of arbitration as an ADR mechanism. The negotiations that followed, I am happy to report, have been fruitful, and we will be offering today for your consideration a proposed modification of the bill that is acceptable to both the Department of Justice and the ABA. We understand that the Administrative Conference of the United States also supports this compromise. We hope that you will incorporate the modification into the bill. In any event, I want to thank the ABA and in particular Phil Harter for the energy and imagination that have gone into achieving this compromise.

ADR IN GENERAL

Because we believe it essential to develop alternatives to the full-scale litigation of disputes involving the government, we have encouraged participation by our attorneys in a variety of

experimental ADR methods. Our efforts have included the issuance of a policy statement encouraging the use of mini-trials, actual participation in mini-trials, and support for judicially supervised alternative dispute resolution techniques. The Civil Division's Commercial Litigation Branch has cooperated with the United States Claims Court in the development of General Order No. 13, which establishes an alternative method of dispute resolution using a settlement judge. The Civil Division's Torts Branch participates in and is responsible for the administrative claims process developed under 28 U.S.C. § 2672 for Federal Tort Claims Act cases, and regulations issued by the Department of Justice for implementing that administrative process (28 C.F.R. Part 14) are applicable throughout the government. Through this process in 1988, 214 administrative tort claims for amounts exceeding $25,000 were resolved with Justice Department approval, and the total paid to resolve these claims was $34,282,097.

Of course, ADR is not the solution for every problem of delay and expense in litigation. Each ADR procedure itself has a cost, and the Department tries to reach balanced judgments about whether that cost is justified in specific cases. In making these judgments, the government is sometimes under constraints that would not apply to private litigants. For example, in resolving non-meritorious claims, private litigants might resort to ADR as an avenue toward a settlement that would avoid the expense of litigation. The government, however, may find ADR

unhelpful in that situation, because the government lacks authority to pay money in settlement of non-meritorious claims. ADR thus may be wasteful in cases where principled disputes on legal issues make settlement unlikely. The government, as a frequent litigant, also resists frivolous claims, in order to discourage such claims in the future. Still, in many instances, ADR can save time and money in the resolution of disputes involving the government.

ARBITRATION

In addition to providing for the use of ADR techniques like conciliation and mediation, which we support, the bill as drafted would allow agencies and private parties, by mutual consent, to submit disputes to binding arbitration. Both sides would participate in the selection of the arbitrator. § 587(a). After hearing evidence, the arbitrator would issue a decision, setting out a "brief, informal discussion of the factual and legal basis" for the award, unless the agency provided otherwise by rule. § 590(a)(1). The award would then be "final and binding on the parties." § 590(b). Despite our general support for ADR, such binding arbitration, in our view, would raise serious constitutional concerns.

Arbitrators with the powers conferred under H.R. 2497 as drafted could be viewed as Officers of the United States, engaged

in execution of the laws, but would not be ppointed in the manner required by the Appointments Clause. Art. II, § 2, cl. 2. Nor would they be subject to supervision and removal by the President and his delegates, as required by the President's constitutional responsibility to see to the faithful execution of the laws. Art. II, § 3.

Before I go into the details of the constitutional discussion, let me set out the common sense of our position. H.R. 2497 would dilute accountability and disrupt the making of policy by responsible officials. When the President appoints and supervises executive officials as the Constitution provides, he can be held accountable for how the laws are carried out. In cases submitted to binding arbitration, H.R. 2497 would remove the power to execute the laws from Cabinet officials and agency heads who are in turn responsible to the only figure in American government elected by all of the people, and would transfer that power to arbitrators accountable to no one. This transfer of the power to make decisions not only would blur responsibility but also would threaten the ability of the executive to set and carry out policy. While I want to spend some time today discussing the intricacies of the legal arguments, our concern is really that simple, and that fundamental. H.R. 2497 thus raises a serious issue about conformity with the Constitution.

Under H.R. 2497, agencies would be encouraged to use ADR for the entire range of administrative disputes in which they might become involved. The bill specifically mentions disputes arising in formal or informal adjudication, rulemaking, enforcement, issuance or revocation of permits, and litigation. § 3(a)(2). The bill appears to contemplate that binding arbitration would not be used for resolving disputes that raise issues of policy, require the formulation of precedent, endanger consistency in an area where consistency is important, significantly affect persons who are not parties to the proceeding, call for a public record, or entail a need for continuing jurisdiction by the agency. § 582(b). But H.R. 2497 would not forbid arbitration in cases that involve any or all of these factors.[2]

Arbitrators acting under H.R. 2497 could be said to be "perform[ing] . . . a significant governmental duty exercised pursuant to a public law," Buckley v. Valeo, 424 U.S. 1, 140-41 (1976), and thus to be "Officers" of the United States in constitutional terms. Id. at 141. They would be involved in "functions necessary to ensure compliance with . . . statute and rules -- informal procedures, administrative determinations and hearings, and civil suits." Id. at 137. The bill would require

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[2] Furthermore, the bill may suggest that binding arbitration could not be used in a rulemaking, because arbitral awards are not to have any precedential value or be considered in any future proceeding, § 590(c), and rules are by definition orders of future effect, 5 U.S.C. § 551(4). Once again, however, the bill does not explicitly forbid the use of arbitration to resolve disputes about rulemaking.

arbitrators to "interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives," § 589(c)(5), and "[i]nterpreting a law enacted by Congress to implement the legislative mandate" is a function that "plainly entail[s] execution of the law in constitutional terms." Bowsher v. Synar, 478 U.S. 714, 733 (1986).

The Appointments Clause, Art. II, § 2, cl. 2, directs how "Officers" of the United States are to be appointed. Principal Officers are to be appointed by the President, with the advice and consent of the Senate. Congress, however, may vest the appointment of inferior Officers in the heads of departments, courts of law, or the President alone.

H.R. 2497 would raise a serious issue regarding the commands of the Appointments Clause, as discussed in Buckley.[3] Under H.R.

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[3]In his study The Constitutionality of Arbitration in Federal Programs (May 27, 1987), prepared for the Administrative Conference of the United States, Professor Harold H. Bruff argues that, in Buckley, the Court "was considering whether Congress could assume the President's appointments power, not whether it could authorize or require the delegation outside the government of some functions that could be performed by the executive. The problem of congressional aggrandizement disappears when Congress allocates the appointment power elsewhere." Id. at 19 (footnote omitted). Professor Bruff's argument assumes that the Appointments Clause rests only on concerns about separation of powers and has nothing to do with accountability in government. Although the Appointments Clause has a critical role in ensuring the separation of powers (see Buckley, 424 U.S. at 124-25), it also aims at accountable government: "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation." The Federalist No. 76 (Rossiter ed.) at 455 (discussing Appointments Clause).

2497, arbitrators would be authorized to exercise significant authority with respect to such agency functions as adjudication and licensing. These arbitrators, however, would not be appointed in accordance with the Appointments Clause, but rather would be chosen by the parties. §§ 583, 587.[4]

In addition, H.R. 2497 presents constitutional problems concerning the accountability of arbitrators to the President for their executive actions. As I have noted, H.R. 2497 would authorize arbitrators to perform a broad range of executive functions, from making "determinations of eligibility for [federal] funds," Buckley, 424 U.S. at 140 (involved in making monetary awards enforceable in the courts), to granting licenses or resolving enforcement disputes. These functions involve "[i]nterpreting a law enacted by Congress to implement the legislative mandate," which "plainly entail[s] execution of the law in constitutional terms." Bowsher v. Synar, 478 U.S. 714, 732-33 (1986). It has generally been thought that the President must have the power to remove the officer performing such core executive duties, in order to ensure the officer's accountability to the President. See Bowsher, 478 U.S. at 721-27, 732-33; Myers

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[4]The appointment of "permanent or temporary officer[s] or employee[s] of the Federal Government," § 583(a), would raise no less serious a question about violation of the Appointments Clause. To the extent a mere "employee" is also granted executive power as an "Officer" of the United States independent of his other duties, see Buckley, 424 U.S. at 126 & n.162, the constitutional problem is identical to that involved in the appointment of private persons.

v. United States, 272 U.S. 52, 161-164 (1926); cf. Morrison v. Olson, 108 S.Ct. 2597, 2616-2622 (1988). Even the head of a so-called "independent agency," performing "quasi-legislative" or "quasi-judicial" duties, is subject to removal by the President for inefficiency, neglect of duty, malfeasance, or other good cause. Mistretta v. United States, 109 S. Ct. 647, 673 (1989); Humphrey's Executor v. United States, 295 U.S. 602, 619 (1935); cf. Morrison, 108 S. Ct. at 2617, 2619.

Here, by contrast, arbitrators appointed under H.R. 2497 as drafted would be subject neither to executive review nor to executive removal.[5] If the arbitrator exceeded the scope of his assigned duties or exercised them in an improper manner, the decision would still be binding against the executive branch.[6] There is serious doubt that H.R. 2497 gives the Executive

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[5]Although H.R. 2497 declares that the United States could "terminate" an arbitration before completed, subject to judicial review of the termination, §§ 591(c), 6(d), 8(a), this authority would provide an avenue for effective review only before the arbitrator rendered his final decision, and in any event would be limited to termination "on the ground that continuing the proceeding would be inconsistent with the factors set forth in section 582(b)" dealing with whether use of an ADR proceeding is appropriate.

[6] This should be contrasted with the remedies available for review of improper executive action by Independent Counsel, at issue in Morrison. If an Independent Counsel acts improperly, for example by engaging in "misconduct" or bringing a prosecution that is not justified under applicable Department of Justice policy guidelines, see Morrison, 108 S. Ct. at 2620-22, the Attorney General may remove him (subject to judicial review) before the consequences of the Independent Counsel's errant conduct have come to fruition. There would be no comparable ability to exercise any degree of control or supervision over the executive actions of arbitrators appointed under H.R. 2497.

"sufficient control over the . . . [arbitrator] to ensure that the President is able to perform his constitutionally assigned duties" as Chief Executive to take care that the laws be faithfully executed. Morrison, 108 S.Ct. at 2622.

I note that the Administrative Conference of the United States ("ACUS") contends that, notwithstanding these constitutional difficulties, several statutes already provide for private persons to render binding arbitral awards on claims involving the government. I discusssed and distinguished these statutes in my testimony and supplemental responses on the parallel Senate bill. I will not repeat that discussion here, except to say that the existing statutory provisions on arbitration, we believe, are weak authority for the wholesale authorization of binding arbitration that H.R. 2497 as drafted would create, even assuming that the existing statutes could cast some light on the constitutional issues. But see INS v. Chadha, 462 U.S. 919 (1983)(overturning legislative veto, despite numerous statutes with such provisions).

We believe, however, that there is a way around these difficulties. The proposed compromise on which the ABA and the Department of Justice have agreed would provide, in essence, that an arbitral award would be reviewable by the agency head, for a period of thirty days, before becoming final. Although we expect that an agency head would seldom vacate an award, this proposal

would ensure that an Officer of the United States would be responsible for each arbitral decision. In this sense, the arbitrator's decision would be non-binding. The proposal, we believe, maintains the utility and effectiveness of arbitration as foreseen by the bill's sponsors, while providing for the accountability of an Officer of the United States.

Under the proposal, in the unusual instance where the agency head vacates an award, that decision of the agency head would not be reviewable in a court. This feature of the proposal is necessary to prevent over-judicialization of the ADR process and to make arbitration attractive to agencies that might otherwise choose to avoid it. Of course, if an award is overturned, the private litigant can still pursue his claim through the usual administrative procedures for which arbitration would have been a substitute.[7]

The specific language of the proposal is attached to my testimony. I hope that Congress will see fit to incorporate this proposal into the bill. With that modification (and some other drafting changes discussed in the Appendix to my testimony), we would support H.R. 2497 as a promising experiment for achieving administrative justice with greater speed and less cost.

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[7]Furthermore, as we would construe the bill if modified along these lines, it would not foreclose other forms of non-binding dispute resolution, including non-binding arbitration.

APPENDIX -- OTHER PROBLEMS OF POLICY AND DRAFTING

H.R. 2497 also raises a number of other problems of policy and drafting.[8]

Section 584(c) should be revised to make clear that vacated or rejected awards, like "dispute resolution communications" and "dispute resolution documents," are inadmissible in later actions. Similarly, Section 584(i) would allow information introduced in an ADR proceeding to be used in a later action against the neutral (even though it could not be used in a later action on the issue in the ADR proceeding). Without further restriction, the entire record of the action against the neutral, including information submitted by the parties in the ADR proceeding, could become public. Section 584(i) thus should be revised to provide for procedures (such as sealing records or issuing protective orders) that will guard against any disclosures that are not absolutely necessary.

Section 3(d) would require each federal agency to review and consider whether to amend each standard contract, grant, and

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[8]We expect that some other agencies will be communicating directly with the Committee about provisions relating to the Contract Disputes Act.

other assistance agreement to authorize and encourage the use of ADR. We read that section as applying prospectively. If the section were intended to require review and possible revision of existing contracts, grants, and assistance agreements, it would impose a severe burden on the affected agencies (assuming it would be lawful to revise all of the existing contracts in the first place). The meaning of the section should be clarified. Furthermore, because there may be contracts, grants, or agreements that are likely to generate disputes not amenable to resolution through ADR techniques, it is appropriate that H.R. 2497 does not require insertion of the ADR provision.

Section 6 of H.R. 2497 would amend the Contract Disputes Act ("CDA"). Section 6(a) would require each contracting officer to "make all reasonable efforts to resolve a claim or dispute consensually." Under this provision, the contracting officer's efforts to resolve claims or disputes consensually might themselves become subjects of controversy. Moreover, it has been the Department's experience that disputants use voluntary ADR programs more successfully than mandatory programs. Therefore, we recommend that the proposed amendment to the CDA encourage, but not require, the use of ADR techniques.

If ADR were used in a contract dispute, there would still be a need to ensure the integrity of the dispute resolution process. We therefore recommend that the following sentence be added to

Section 6(b) of the bill (proposed Section 6(d) of the CDA), after the term "$250,000": "In such instances, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable."

Section 6(d) might be read as amending the CDA (41 U.S.C. § 607(g)) to provide for district court review when the contracting officer agrees to arbitration and an arbitral award is issued. That alteration of the CDA would not be desirable. Under the CDA, a contractor has two choices for obtaining review of a contracting officer's decision. The contractor may proceed directly to the Claims Court, 41 U.S.C. § 609, or may appeal to a board of contract appeals. 41 U.S.C. § 606. In either case, the next appeal is to the Federal Circuit. 41 U.S.C. § 607(g)(1); 28 U.S.C. § 1295(a)(3). There is no reason to provide for review in district court when the contracting officer agrees to arbitration, especially since the ordinary CDA review procedures apparently are to be followed if the contracting officer agrees to a form of ADR other than arbitration. Section 6(d) should be revised to make clear that the district courts would not obtain new powers to review CDA cases.

Language that appears in S. 971, the Senate counterpart to H.R. 2497, should also be included in Section 6(d), so that the subsection to be added to 41 U.S.C. § 607(g) would provide that the reviewing court "may set aside any award that is found to violate limitations imposed by Federal statute." The language could be clarified by adding "or limit" after "set aside."

Finally, some ADR procedures may be inappropriate in cases affecting public health or the environment, but H.R. 2497 as drafted may not sufficiently recognize this limitation. Therefore, we recommend that Section 582(b) be revised to include: "(7) the matter may affect human health or the environment." Sections 584(a)(4)(C) and 584(b)(4)(C) should be amended to read: "prevent harm to the public health or safety or the environment."

PROPOSED COMPROMISE AMENDMENT TO H.R. 2497

SUBSTITUTE FOR PROPOSED SECTIONS 590 AND 591 OF TITLE 5, UNITED STATES CODE

§ 590. Arbitration awards

(a) Unless the agency provides otherwise by rule, the award in an arbitration proceeding shall include a brief, informal discussion of the factual and legal basis, but formal findings of fact or conclusions of law shall not be required. The prevailing party shall file the award with all relevant agencies, along with proof of service on all parties.

(b) The award in an arbitral proceeding shall become final thirty days after it is served. Any agency that is a party to the proceeding may extend this period for an additional thirty days by serving a notice on all other parties prior to thirty days after the award is served.

(c) The head of any agency that is a party to an arbitration proceeding conducted under this subchapter is authorized to terminate the arbitration proceeding or vacate any award issued pursuant to this section prior to the award becoming final by serving on all other parties a written notice to that effect, in which case the award shall be null and void. Notice shall be provided to all parties to the arbitration proceeding of

any request that the agency head terminate the arbitration proceeding or vacate the award. An employee or agent engaged in the performance of investigative or prosecuting functions for an agency may not, in that or a factually related case, participate or advise in the decision pursuant to this subsection to terminate an arbitration proceeding or vacate an arbitral award, except as witness or counsel in public proceedings.

(d) A final award is binding on the parties and may be enforced pursuant to sections 9 through 13 of title 9, United States Code. No action brought to enforce such an award shall be dismissed nor shall relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party.

(e) An award entered under this subchapter may not serve as an estoppel in any other proceeding for any issue that was resolved in the proceeding, nor may the award be used as precedent or otherwise be considered in any proceeding, whether conducted under this subchapter, by an agency, in a court, or in any other arbitral proceeding.

§ 591. Judicial Review

(a) Notwithstanding any other provision of law, any person adversely affected or aggrieved by an arbitral award made in a

proceeding conducted under this subchapter may bring an action only pursuant to the provisions of sections 9 through 13 of title 9, United States Code.

(b) The decision to use or not to use a dispute resolution proceeding shall be committed to the discretion of the agency and shall not be subject to judicial review.

(c) The decision of the head of an agency to vacate an arbitral award pursuant to section 590 shall be committed to the discretion of the agency and shall not be subject to judicial review.

SECTION 5. AMENDMENT TO THE ARBITRATION ACT

Section 10 of title 9, United States Code, is amended by adding a new paragraph that reads as follows:

The United States court in and for the district wherein the award was made may make an order vacating the award upon application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by an award issued pursuant to section 590 of title 5, United States Code, where the use of arbitration or the award is clearly inconsistent with the factors listed in section 582(b) of title 5.

DELETIONS

In Section 6(b), proposed Section 6(d) of the CDA, delete "including binding arbitration of claims" and the two sentences from "An agency may terminate" to "section 706 title 5, United States Code."

In Section 8(a), delete from "An agency may terminate" to "review under section 706 of title 5."

Mr. FRANK. We will begin—I will defer and we will begin with Mr. Glickman, who has been our lead person on this issue.

Mr. GLICKMAN. Thank you, Mr. Barr.

As I understand it, most of your written testimony has predated the compromise. Is that a fair statement? You talk about the bill as having some constitutional problems, but I believe you agree that the agreement that has been worked out in principle negates those constitutional problems. Is that correct?

Mr. BARR. That is correct. The testimony really goes to the bill as originally drafted. Obviously, I am asking you to accept this compromise. With the compromise, we have no objection to the bill and would support the bill.

Mr. GLICKMAN. I think it is acceptable to me as well. It reminds me a little bit, Mr. Chairman, of what we did on the fair housing bill. The compromise gives the agencies of government decision-making authority that those agency heads theoretically should have, but at the same time, recognizing that in most cases, the arbitration award will stand. I think that is what your testimony is today.

Let me ask you a couple of things. The requirement to go to arbitration is a voluntary requirement. Nobody is compelled to do that at all.

At the back of your testimony, you indicate some concern about health and safety—or health and the environment. You are saying that some ADR procedures may be inappropriate in cases involving public health or the environment.

I wonder if you might explain that.

Mr. BARR. Yes, Congressman. First, we are not suggesting that that is a categorical ban on the use of ADR. We think it is a factor that should be considered by the Government officials when they are turning something over for arbitration, and we can conceive of circumstances where it is perfectly appropriate.

But one of the principles here is that when other people's rights are at stake, it may be inappropriate to have a private citizen resolve that dispute because, ultimately, it is the Government—it is Congress and the officials in the executive branch who have that responsibility for protecting the rights of third parties when they are going to be somehow affected by an adjudication.

In the area of environment, it is sometimes difficult to see—it is difficult to identify, perhaps—an affected third party. Perhaps a third party would not have direct standing himself to come in and participate and say, "Hey, you can't arbitrate this thing because my rights are affected." Nevertheless, because we are dealing with the environment, which is the common property of the whole community, we think that it is important to be very careful about private arbitration when those kinds of issues are being decided.

Mr. GLICKMAN. But you are not saying it should be a categorical ban. There may be cases where you are talking about health and environmental issues that you could arbitrate. You are just saying that it ought to be understood that the Government may not ultimately agree to an arbitration award where health or environment is involved, and therefore, parties will be more careful about entering arbitration in the first place.

Mr. BARR. That is right, Congressman, and there are some areas in the environmental area where arbitration is used now quite successfully.

Mr. GLICKMAN. OK. I don't have any objection to that. That seems fair.

Let me ask you one final question. What about if the Government backs out of an arbitration decision after the private parties have spent an awful lot of money to reach that arbitration decision? Do you think that the Equal Access to Justice Act should apply to provide attorneys' fees in those cases?

Mr. BARR. I think that is something that we may want to consider down the road. I think, generally, we don't expect these decisions to be flipped very frequently, except when there are legitimate policy concerns with the decision, and in a way, we are putting the private parties in the same position they would have been in had they just gone through, for example, an administrative law judge. Parties right now can spend money in a procedure for an administrative law judge. That decision can be overturned within the agency, and yet that doesn't mean that the party is entitled to all the money he spent in the administrative law judge phase of the proceeding, so we think it is not inequitable.

Now, another reason why I think we would like to proceed on the current basis, or at least the current compromise, is we think, in fact, the fact that it is not formally binding will actually expand the use of arbitration. Government officials would be less concerned that they are going to get locked into a position or that there is going to be a policy position that may be taken that they can't live with if they feel that there is the safety valve of the review. So I think it will lead to much broader use of ADR.

We have a sunset provision in the bill now and I think we should revisit it in 5 years. If it looks as if these things are not being upheld, they are being vacated too frequently, and the parties are backing away from them because of the expense, I think we could look at the proposal you have just made as a way of resolving that.

Mr. GLICKMAN. I want to thank you for your personal help in trying to resolve this. As I said, I think this sends a good signal on the whole issue of trying to resolve disputes without going through costly legal processes. This may also permit people who don't have a wealth of means, who can't afford high-powered Washington counsel, to come in and be involved in arbitration much easier than they would through a formal administrative process. I think that is a good, positive, constructive thing to do in our society.

Anyway, I thank you very much.

Mr. BARR. Thank you, Congressman.

Mr. FRANK. Thank you, Mr. Barr.

Before I call on Mr. James, let me just interject. You responded to one of Mr. Glickman's questions that you didn't think something was inequitable because we do it elsewhere. I would just note that those are two very separate issues.

What we do elsewhere and whether or not we are acting equitably, whether it is our institution or yours, I don't think that the two questions have a complete overlap. Precedent doesn't create equity; it creates precedent and one of the things we may be looking at is the equity.

Mr. James.

Mr. JAMES. Thank you so much.

Mr. Barr, I want to thank you for your testimony. It was very enlightening and helpful.

I understand the concerns on the behalf of the Government about needing to review an award, but we already have a provision for review in 591 Judicial Review under the Administrative Code approach, the way I read it, in the bill. That is correct, isn't it, under the section 591? You could review it in court later in any event? You could review the negotiation award.

Mr. BARR. In other words, under the bill, there would be judicial review?

Mr. JAMES. Right.

Mr. BARR. I believe that is correct.

Mr. JAMES. Yes, under 591, I think it says, "Any person adversely affected or aggrieved by an award made in an arbitration proceeding conducted under this subchapter may bring an action only pursuant to the provisions of sections 9 through 13 of title IX."

Mr. BARR. We don't understand that to include the United States.

Mr. JAMES. OK. you say the United States still has an independent—they could appeal any decision anyway.

Mr. BARR. No, I think under the bill, as originally drafted, the Government could not open up an award——

Mr. JAMES. Then you——

Mr. BARR [continuing]. But a third party adversely affected by an award could——

Mr. JAMES. Neither party could.

Mr. BARR. That is correct. It would be binding on——

Mr. JAMES. The third party could. It says, "Any person adversely affected or aggrieved by an award made in an arbitration proceeding conducted under subchapter," so it would also include an individual party, but not the United States. If it says "any party," would that not include anyone?

Mr. BARR. A party, as I understand it, could have challenged an award for going outside the scope of the arbitration—in other words, if the arbitral award went beyond the charter of the arbitrator—but in terms of challenging the arbitration award on its merits, the parties could not do so, but a third party who was affected by it could.

Mr. JAMES. Then the language, perhaps, should be changed to any person other than a party because any person is all-inclusive. It says any person adversely affected or aggrieved by an award made in an arbitration proceeding conducted under this chapter.

Mr. BARR. I believe our proposed compromise does pick up that change.

Mr. JAMES. But yours picks up—gives only the Government the right to, in effect, say, "Well, we don't think the award is correct," and not go with the negotiated award, right?

Mr. BARR. That is correct.

Mr. JAMES. Only the Government has that right?

Mr. BARR. That is correct.

Mr. JAMES. That doesn't seem——

Mr. BARR. And a third party who is affected by it.

Mr. JAMES. Yes, under the separate section, but you pick up on page 21, line 8—you would say, where it reads here, "Finality and enforcement of awards" is the section you want to modify. "The award shall be final and binding on the parties to the matter and may be enforced pursuant to section 9, title IX," and then you skip down 15 lines and you read, "Pursuant to title IX, any person adversely affected."

Then you are saying that doesn't include the parties because they are bound by the paragraph above. In other words, they are bound by the earlier section that says you have stipulated and you are going to have to live with the award.

It would seem to me that if you only let the Government say, "No, we won't go with this, we won't be bound by this award, now you start back to base zero and proceed either administratively or in a court of law, depending on the cause of action," it would be both possibilities depending on the cause of action, would it not?

Mr. BARR. This would be administrative.

Mr. JAMES. It would be purely administrative, OK. You would go back, roll it back to the administrative proceeding if the Government didn't like it? Correct?

Mr. BARR. Correct.

Mr. JAMES. It wouldn't be like an administrative proceeding where you advance forward, so what you would have is a redundancy of factual determinations if you exempt the Government from being bound, is the way I would read it, in other words. You would roll the clock back and pretend like it never happened if the Government could back off. You would start off with the administrative proceeding and then the Government would have the second bite at the apple, or at least the Department would be able to say, "We don't accept the proceeding." So don't you think you——

Mr. BARR. It is the Government that is the decisionmaker here. The administrative process now provides for the hearing before an administrative judge. That is not final. That can be——

Mr. JAMES. I understand.

Mr. BARR [continuing]. Reversed by a higher level of——

Mr. JAMES. I understand that. What my point is is this, and I am not arguing with you on that point, I understand that. It is the same in States, at all State administrative hearings and the Federal Government—they are similar in that nature. In fact, most States pattern it after the Government's administrative hearings.

My point is this, why would anyone be foolish enough to want to go through negotiation and go through the expense of a negotiation which would be nothing more than giving the Government a chance to say I don't like the award and forcing you all the way back through an administrative proceeding which is what—you agree with that—that would be the net effect. Your next choice would be start from ground zero, go through the administrative proceeding, and then if the Government—if the Department decides that they don't like that, they can overturn the decision. Then you at least are going forward through the courts, if the overturn is inappropriate based on the factual evidence in the law.

So I am saying, with your addition, you are doing more damage—you are better off not having the Glickman bill, it would

seem to me, because someone may be misled by thinking this might work because you could frustrate totally a plaintiff who, in good faith, said, "Let's arbitrate." He spends the money he arbitrates; the Government says, "No, we won't accept that," send it back to the administrative proceeding and have to go all the way up the chain again.

Do you think maybe your suggestion is too strong and would thwart the whole purpose of the bill or not?

Mr. GLICKMAN. Would the gentleman yield on that?

Mr. JAMES. Sure.

Mr. GLICKMAN. Two problems. I would prefer to take your position, but I think they make the point, and I haven't fully explored it, but there are constitutional problems if you don't allow that additional review at the top.

But the second thing is a practical matter. Nobody would ever go into arbitration if what you are saying were happening. It would die instantaneously.

My judgment is that people will find this is a much more expeditious, sane way of dealing with it.

Mr. FRANK. Will the gentleman yield to me?

It is my understanding of the gentleman's position that he is not talking about ultimately derogating from the Government the constitutional power to make a decision, but he is talking about how many procedural steps you go through and at whose initiation in the interim.

I mean, you are not talking about the Government ultimately losing the right to make its decision.

Mr. JAMES. No. I am saying—I see why you want to have it in there for the constitutional reasons. I totally understand your concerns and your fears. I am glad you testified about it.

What would bother me, though, is what is the incentive for a party to ever take the risk of negotiating in the first instance if it is not binding if—because then, he has wasted all that effort and all that time and money and then he still has to go through the administrative proceeding where, once again, the Government can disagree.

Mr. GLICKMAN. If the gentleman would just yield for one moment.

As I understand it, most of these things will be—at least early on—will be experimented on small cases where the Government would not want to start over and litigate from ground zero. It would be more expensive for the Government to do that.

I admit to you there is some risk involved. All I am saying is if they start doing it, the whole process will become useless.

Mr. FRANK. Just let me say, I think we probably have other things that more properly belong in markup. Would the witness like to respond at this point?

Mr. BARR. Yes. I think as a practical matter, that is not going to be a problem. Right now, you have a very low reversal rate of administrative law judge decisions. Theoretically, agency heads can be overturning a lot of decisions that are currently reached in the formal process that exists. That is not done.

I think that the bill itself contemplates that these things should be used in proceedings where there are not policy issues, signifi-

cant policy issues, where third parties' interests aren't affected—for example, mass Justice cases, like Social Security cases, other kinds of cases where the amounts of claims are small. They are fact-intensive. They are fact-specific. There are no big policy issues to be decided.

The Government does not have an interest in flipping decisions because of a $300 difference in the arbitral award. That doesn't happen today; it won't happen under arbitration.

I think that it will result in broader use of arbitration if the Government reserves the right to reexamine this thing to make sure that policy issues haven't been decided.

Mr. JAMES. If the gentleman will indulge me just one more minute.

If there were a way to write it so that, even though the award may not be—would be--may be binding, but you can appeal the legitimacy of the award just the same as you could an adverse administrative ruling that either party could appeal it. If you could avoid a de novo process, you might save the Government money, is all I am saying. In other words, there seems little point in going through a negotiation, going through a whole negotiation and evidence-finding process and then doing it the second time if, somehow, the award would have the same status, the same status, a different proceeding, but the same status, if it were possible.

Mr. BARR. That is the problem you already have with the administrative law because if you create a right to review on the record, as opposed to going back to the formal proceeding, then the informal proceeding will become formalized because people will be creating the record for review.

Mr. JAMES. I like the effort and I understand the reason for it and maybe it will work, but quite frankly, a plaintiff is taking a very high risk in selecting and then agreeing to pay the negotiation fees, for—I mean, to pay the parties to the arbitration fees, to pay that and then to have to perhaps start all over again.

It may be better to consider the suggestion of payment of attorneys' fees and costs, et cetera, if the Government turns it down, and maybe you should—what about the neutrality of a right—what about mutuality of right to not live with the award? Why don't you then let the plaintiff have the right not to live with the award, too? Mutuality-of-remedy concept.

Mr. BARR. We have no objection to that. In mass Justice cases, I don't think it is going to be a problem. It will be a problem only where an arbitral award does implicate policy considerations.

In the private sector, people use ADR all the time where there is a theoretical risk that it is not going to be accepted. That is what mini-trials are and other things. I think, by and large, people still think it is worth it to go through that kind of proceeding——

Mr. FRANK. But don't they have in the private sector mutuality?

Mr. BARR. Yes.

Mr. FRANK. And that is one of the points. In the private sector, you have mutuality of refusal, whereas—so, if you had mutuality rather than a one-way street, it might be a different story.

Mr. JAMES. Thank you so much for your testimony. I am sure we will work out a lot of these at markup.

Mr. FRANK. Mr. Edwards. Don, do you have any questions?

Mr. EDWARDS. I have no questions, Mr. Chairman.

Mr. FRANK. Mr. Smith.

Mr. SMITH of Texas. Thank you, Mr. Chairman.

Let me confess at the outset to a keen interest in this particular subject. Long ago and far away, when I was a county commissioner in San Antonio, TX, I proposed a mediation center which actually took off and is now a thriving business in San Antonio. So I believe in the concept, believe in what we are trying to do today.

Mr. Barr, I missed the first couple of minutes of your testimony. Have you addressed the—or have the mentioned the constitutional questions that you raised in your testimony yet?

Mr. BARR. I did mention them.

Mr. SMITH of Texas. My question is you mentioned a proposed modification to the bill that is acceptable both to the Department of Justice and the ABA, and I wonder if you discussed that modification and the constitutional questions with Mr. Glickman and have made any progress to resolving the differences.

Mr. BARR. I think yes. With the compromise that we have worked out with the ABA and ACUS, we think that obviates the constitutional problem and we think it would actually lead to a more effective bill.

Mr. SMITH of Texas. If I could ask my colleague from Kansas, have you been able to address that, the constitutional problem?

Mr. GLICKMAN. We have talked about it and Mr.—we have raised it a little bit in Mr. James' questions as well.

Mr. FRANK. Can I just say at this point again, as I said before, we have some markup type issues that I think——

Mr. SMITH of Texas. OK.

Mr. FRANK. We will discuss that. Let me say for the record, ACUS is A-C-U-S, standing for the Administrative Conference of the United States.

Mr. SMITH of Texas. I understand the constitutional problems that you mentioned in your testimony and I am hopeful that we can resolve those.

I don't have any other questions, Mr. Chairman. Thank you.

Mr. FRANK. Thank you. It does sound like there is enough of an interest in this, so we will be actually having a session when we will have a premarkup session to talk about it and then give the staff some instructions.

Mr. Staggers.

Mr. STAGGERS. No questions, Mr. Chairman.

Mr. FRANK. Mr. Douglas.

Mr. DOUGLAS. I also wanted to commend the sponsor. I think this is a good way to go and if I can share some personal experiences, too, I founded a mediation program in New Hampshire 10 years ago, a New Hampshire mediation program still in effect. We also used mediation, arbitration, conciliation in the court system and I see you do have a training component in here, because it is very, very important that folks understand the difference between mediation and arbitration. All too often, I think agencies just go to arbitration, which is like a minitrial.

I also see we have the use of neutrals and outside neutrals. My only technical question, Mr. Barr, is it says you can contract for services of neutrals outside the agency. Do they need any appro-

priation for that or is that an authorization that they can take funds that aren't otherwise appropriated to hire a neutral that all parties agree is a former official or someone who is fair? How do they mechanically get that person in a building to sit down and hear the dispute?

I suppose the money would have to come out of an appropriation that—where Congress has allowed the money to be used for that purpose, either general operations or the appropriation to the unit that is litigating the case. But do we need some kind of an all-encompassing sentence that will authorize agencies to be able to draw out of contract services or whatever the buzz word is down here to be able to hire someone who they agree may be involved in a 2- or 3-week event, but all agree is the perfect person to resolve the dispute?

Mr. BARR. No, I don't think you would need any further authorization than this statute. It would be a lawful purpose for a department to take money that isn't otherwise limited by Congress and spend it on this.

Mr. SMITH of Texas. Good. OK, thank you.

Mr. FRANK. Thank you.

I think there are no further questions and we appreciate it and we will be back to you as we proceed. I think the hearings have uncovered a couple of things and we will probably want to do some further work.

Next, we will hear from Marshall Breger, Chairman of the Administrative Conference of the United States. Mr. Breger, please proceed.

STATEMENT OF MARSHALL J. BREGER, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY GARY J. EDLES, GENERAL COUNSEL, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, AND CHARLES POU, STAFF ATTORNEY

Mr. BREGER. Thank you very much, Mr. Chairman.

First, let me ask that my statement already provided to you be incorporated into the record.

Mr. FRANK. If there is no objection, it will be part of the record.

Mr. BREGER. Let me introduce the two gentlemen accompanying me. Gary Edles, the General Counsel of the Administrative Conference, and Charles Pou, Staff Attorney at the Conference. You will forgive, also, my voice. I am battling a winter cold.

Mr. FRANK. I hold people to a pretty low voice standard myself, so you don't have to worry about that.

Mr. BREGER. This matter has already been before you last year and I think the discussion already this morning has advanced the ball considerably, so I am going to make only a few oral remarks and then hold myself open for any questions you may have.

I think it is important to understand that 10 years from now, there will be substantial ADR built into Federal Government activity. The question that you have before you is whether the Federal Government is going to back into its ADR activity or whether it is going to shape it ahead of time and plan the kind of activity it is going to have.

FBI AUTHORITY TO SEIZE SUSPECTS ABROAD

HEARING

BEFORE THE

SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

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CONTENTS

HEARING DATE

	Page
November 8, 1989	1

WITNESSES

Barr, William P., Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice	2
Sofaer, Abraham D., the Legal Adviser, U.S. Department of State	22
Revell, Oliver B., Associate Deputy Director-Investigations, Federal Bureau of Investigation	43

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Barr, William P., Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice: Prepared statement	9
Sofaer, Abraham D., the Legal Adviser, U.S. Department of State: Prepared statement	26
Revell, Oliver B., Associate Deputy Director-Investigations, Federal Bureau of Investigation: Prepared statement	46

APPENDIX

Letter from Chairman Edwards to Attorney General Thornburgh, dated November 2, 1989	73
Letter from Assistant Attorney General Crawford to Chairman Edwards, dated November 7, 1989	74
Office of Legal Counsel opinion, March 31, 1980	75
Letter from Chairman Edwards to Attorney General Thornburgh, dated November 20, 1989	91
Letter from Attorney General Thornburgh to Chairman Edwards, dated November 28, 1989	92
Letter from Chairman Edwards to Attorney General Thornburgh, dated December 7, 1989 through January 24, 1990	94
Letter from Assistant Attorney General Barr to Chairman Edwards, dated January 24, 1990	99
Letter from Chairman Brooks to Attorney General Thornburgh, dated January 31, 1990	101
Memorandum from the General Counsel to the Clerk of the House dated November 8, 1989, re: "Justice Department Assertions of Unconstitutionality of Laws Implementing Congressional Authority"	103
Letter from Attorney General Thornburgh to Chairman Brooks, dated February 20, 1990	118
Letter from Attorney General Thornburgh to Chairman Brooks, dated May 17, 1990	122
Executive Order 12146, "Management of Federal Legal Resources"	124

FBI AUTHORITY TO SEIZE SUSPECTS ABROAD

WEDNESDAY, NOVEMBER 8, 1989

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:50 a.m., in room 2141, Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Don Edwards, Geo W. Crockett, F. James Sensenbrenner, Jr., William E. Dannemeyer, and Craig T. James.

Also present: James X. Dempsey, assistant counsel, and Colleen Kiko, minority counsel.

Mr. EDWARDS. The subcommittee will come to order.

This morning the subcommittee considers whether or not the FBI can seize a suspect from a foreign country without the cooperation or the consent of that country.

We are going to have witnesses from the Department of Justice and from the State Department and I will reserve any further comments until after the testimony.

Mr. Sensenbrenner.

Mr. SENSENBRENNER. Mr. Chairman, I have an opening statement.

Mr. EDWARDS. The gentleman is recognized.

Mr. SENSENBRENNER. Mr. Chairman, we're here today still suffering from a hangover of Jimmy Carter's last month in office. After he was defeated for the Presidency by Ronald Reagan in 1980, his Justice Department came up with guidelines relative to FBI activities in the seizing of international terrorists abroad.

We're having a hearing on these guidelines now, over 8 years after the fact, and after two more Presidential elections, where the sons of Jimmy Carter did not make it through the polling place.

I am concerned about the timeliness of this hearing and I am also concerned about the fact that there appears to be an attempt to hamstring the efforts of the FBI in the apprehension of international terrorists abroad and returning them to justice in the United States.

If the Carter administration guidelines are continued in force, the only people who will take joy in that are the Muammar Qadhafis, the Manuel Ortegas, and the drug bosses of the Medillin drug cartel, and that is an accomplished fact.

We're no longer fortress America. It seems to me that our law enforcement personnel ought to be able to project themselves

abroad in certain narrowly selected cases where the national interest of the United States and, indeed, the safety and peace of the world is at hand.

I think those are the guidelines that the FBI has conducted itself during the present administration as well as during President Reagan's two terms in office.

To suggest that the President's power in international law is absolutely barred to do this, in my opinion, is unconscionable. It seems to me that we ought to be able to do the right thing, as Ronald Reagan did in the *Achille Lauro* hijacking attempt and the bringing of the Egyptian plane down in Italy in the apprehension of some of the terrorists there.

I thank the chairman.

Mr. EDWARDS. I thank the gentleman for his observation.

I will only make one point. I'm not going to make a speech, but I would like to point out that already the Iranian Parliament has cited this Justice Department opinion and says that they have the same right to come into the United States and arrest Iranian fugitives without our knowledge and kidnap them.

Mr. Dannemeyer, do you have an opening statement?

Mr. DANNEMEYER. No, Mr. Chairman.

Mr. EDWARDS. The gentleman from Florida.

Mr. JAMES. No.

Mr. EDWARDS. No statement.

Our witnesses today are Mr. William P. Barr, Assistant Attorney General, Office of Legal Counsel, Department of Justice; the Honorable Abraham D. Sofaer, Legal Adviser, U.S. Department of State, and our friend of many years, Oliver B. Revell, Associate Deputy Director for Investigations, Federal Bureau of Investigation.

Mr. Barr, I believe that you're going to be first.

[Witnesses sworn en masse.]

Mr. EDWARDS. Thank you.

Without objection, the full statements of all three witnesses will be made a part of the record. We welcome you, and Mr. Barr, you may proceed.

STATEMENT OF WILLIAM P. BARR, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. BARR. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Barr, you'll have to give the whole statement insofar as it only arrived this morning. I might point out, that all three testimonies violated the rules of the House. We're supposed to get this testimony 48 hours in advance and several of them got here late last night but none of them complied with the rules. So insofar as you're concerned, Mr. Barr, please read the entire statement.

Mr. BARR. I am pleased to be here today to discuss the extent to which the United States has authority under its own domestic laws to carry out extraterritorial arrests which may depart from principles embodied in international law.

The United States is facing increasingly serious threats to its domestic security from both international terrorist groups and narcotics traffickers. Many of these criminal organizations target the United States and U.S. citizens while operating from foreign sanctuaries.

While many nations have cooperated in our efforts to combat terrorism and narcotics trafficking by entering into extradition agreements and providing us with other forms of assistance, some foreign governments have unfortunately failed to take steps to protect the United States from these predations, and others actually act in complicity with these groups.

It was in this context that the Office of Legal Counsel reexamined an opinion that was issued in 1980, the last year of the Carter administration. The 1980 opinion had potentially broad ramifications for the conduct of extraterritorial law enforcement activities by the Federal Bureau of Investigation and other executive branch officials.

The question presented was whether the FBI had the authority under U.S. law to arrest a fugitive in a foreign country without that country's consent under classic principles of customary international law.

Assuming on the facts before them that the apprehension in question would most likely constitute a violation of customary international law, the authors of the 1980 opinion determined that the FBI had no authority under domestic law to perform such an arrest. The 1980 opinion based its conclusion on two separate grounds.

First, the 1980 opinion determined that "U.S. agents have no law enforcement authority in another nation unless it is the product of that nation's consent," reasoning that the authority of the United States, as a sovereign, is necessarily "limited by the sovereignty of foreign nations."

In other words, the 1980 opinion suggested that the President and the Congress are legally powerless under U.S. law to authorize action in a foreign country that departs from customary international law.

Second, regardless of whether the United States, as a sovereign, has the authority to act in contravention of customary international law, the 1980 opinion concluded that the FBI could never make apprehensions in contravention of customary international law under its own general enabling statutes.

Although the statutes themselves do not restrict the extraterritorial reach of the agency's authority, the 1980 opinion reasoned that they must be construed restrictively to preclude the FBI from departing from customary international law norms in all circumstances.

Because such limitations may impair our ability to defend ourselves from overt physical assaults on our citizens by terrorists and the equally pernicious large-scale trafficking of drugs into the United States by foreign criminal organizations, the FBI asked the Office of Legal Counsel and the Department of Justice to reexamine its 1980 opinion.

On June 21, 1989, we issued an opinion partially reversing the 1980 opinion. Although the content of the 1989 opinion, like other

advice rendered by the Office of Legal Counsel, must remain confidential, I am happy to share with the committee our legal reasoning and our conclusions.

Before turning to these legal issues, I think it is important that the committee understand——

Mr. EDWARDS. Mr. Barr, may I interrupt?

Why does it have to remain confidential? Is this a change in policy? We have a copy of other nonclassified opinions. This is not a classified document, Mr. Barr. Why are you withholding it from this committee, and have you sent it to any other committees?

Mr. BARR. No, we have not sent the opinion to any other committee.

Mr. EDWARDS. Yes, I believe you did.

Mr. BARR. No.

Mr. EDWARDS. Well, you sent the assassination one to the Intelligence Committee.

Mr. BARR. We issued an opinion concerning Executive Order 12333 at the request of the Director of Central Intelligence when he asked for our advice. It was in the context of a dialog he was having with the House and Senate Intelligence Committees, and he asked us to prepare a memo, an opinion, which he would share with those committees. So that opinion was written with the expectation that it would be shared with the Intelligence Committees.

Now, this is not a change in policy, Mr. Chairman. Since its inception, the Office of Legal Counsel's opinions have been treated as confidential.

Mr. EDWARDS. Up until 1985 you published them, and I have it in front of me—opinions of the Office of Legal Counsel—the previous opinion.

[The previous opinion, published in 1985, is reproduced in the appendix.]

Mr. BARR. Our office has a limited publication project, where after a number of years have transpired, we review opinions and select certain opinions that we think it's in the public interest to publish. And after careful review in the executive branch, including review at the White House and within the Department of Justice, and all concerned agencies, we publish them.

A 1980 opinion was published in 1985—5 years after its publication. Prior to that time, it was not published.

I'm sure you can appreciate that the Attorney General serves—one of his core functions is to provide legal advice to the President, and the Office of Legal Counsel performs that function on behalf of the Attorney General. We provide legal advice to the White House and to Cabinet agencies.

It has been the long established policy of OLC that except in very exceptional circumstances, the opinions must remain confidential. We do not even share our opinions with other executive branch agencies that are unconcerned, and we do not even share our opinions within the Department of Justice to different components within the Department. We try to keep them confined to the clients who are directly operationally affected by it.

This policy is based on the very same principles that the attorney-client privilege in general is based upon. It's very important

that people in government, in all three branches, be able to seek legal advice.

Mr. EDWARDS. I understand that, Mr. Barr, but this is public business, the subject of much discussion in the United States and you're going to have to tell the public and the Congress sometime why you changed the rules on this arresting of fugitives overseas.

Mr. BARR. That's what I'm here doing. We have no objection to explaining our conclusions and our reasoning to the committee.

Before turning to the legal issues, I think it is important that the committee understand exactly what the 1989 opinion did and what it did not do.

Although the 1989 opinion has been characterized by the press as a document that changed Department of Justice policy, the 1989 opinion did no such thing. It is strictly a legal analysis of the FBI's authority, as a matter of domestic law, to conduct extraterritorial arrests of individuals for violations of U.S. law.

The 1989 opinion expressly takes no position supporting or opposing, as a matter of policy, the use of the FBI or any other executive branch officials to make apprehensions in contravention of customary international law It explicitly cautions that apart from the question of legality under domestic law such operations raise serious policy considerations that obviously must be carefully weighed.

Moreover, the 1989 opinion does not address the legal implications of deploying the FBI in violation of provisions of self-executing treaties or treaties that have been implemented by legislation.

Now let me turn to the reasons we think the 1980 opinion was flawed. The 1980 opinion expressed the view that the United States, as a sovereign, has no authority under its own laws to conduct law enforcement operations in another country without that country's consent.

It based this view on the conclusion that the de jure authority of the United States is necessarily limited by the sovereignty of the nations.

We do not agree with this proposition, and believe that the 1980 opinion's reliance on the *Schooner Exchange* v. *M'Faddon* was misplaced. Under our constitutional system, the executive and legislative branches, acting within the scope of their respective authority, may take or direct actions which depart from customary international law. At least as respects our domestic law, such action constitute "controlling executive or legislative acts" that supplant legal norms otherwise furnished by customary international law.

In the early 19th century, the Supreme Court, speaking through Chief Justice Marshall, recognized that while customary international law may provide rules of decision in the absence of a controlling executive or legislative act to the contrary, it does not absolutely restrict the Nation's sovereign capacity to act in the international arena.

In *Schooner Exchange,* Chief Justice Marshall opined that under principles of customary international law a French warship was impliedly immune from judicial process within the territory of the United States, but expressly acknowledged that "the sovereign, the United States, is capable of destroying this implication, either by employing force, or by subjecting such vessels to the jurisdiction of its ordinary tribunals."

In the *Brown* case, Marshall observed that the rule of customary international law:

"is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded."

In acknowledging the United States' sovereign authority in this area, Chief Justice Marshall did not attempt to draw any distinction between actions that infringe on the territorial sovereignty of foreign nations and other types of departures from customary international law.

Since that time, the courts have repeatedly recognized that the executive and legislative branches may, in exercising their respective authority, depart from customary international law norms.

In particular, it has been stated that in the exercise of his constitutional authority, the President may depart from customary international law by a "controlling executive act." The 1980 opinion utterly failed to consider the Supreme Court's recognition of the President's authority in this area.

The 1980 opinion also concluded, as its second ground, that the FBI could not make apprehensions in contravention of customary international law under one of its general enabling statutes, reasoning that general enabling statutes must be construed restrictively to prohibit absolutely any departure from the standards of customary international law. Again, we reject this analysis.

The FBI's general enabling statutes, 28 U.S.C. 533(1) and 18 U.S.C., section 3052, give the FBI authority to "detect and prosecute crimes" and "make arrests" without any express geographical limitation.

The Office of Legal Counsel has previously opined that there does not appear to be any room for serious dispute, that these statutes confer extraterritorial law enforcement authority on the FBI. For example, when a foreign sovereign has consented to the FBI's conduct of an arrest within its territory, we see no basis to conclude that the FBI is powerless to make the arrest.

Thus, the narrow question presented is whether the FBI's enabling statutes absolutely bar the FBI from undertaking extraterritorial apprehensions whenever such actions depart from customary international law.

The gravamen of the 1980 opinion is that customary international law imposes absolute restrictions on the authority of the United States to take extraterritorial action, and that these restrictions, when read into the FBI's general enabling statutes, absolutely bar the FBI from conducting extraterritorial arrests that depart from customary international law norms.

We think that that position is untenable. Both of the enabling statutes are statutes that carry into execution the President's core executive law enforcement power which, where extraterritorial action is concerned, intersects with this constitutional responsibilities in the field of foreign relations.

In our view, because the President has recognized authority to override customary international law, restrictions imposed by customary international law should not be read into such general ena-

bling statutes in a manner that precludes the exercise of his authority.

As Justice Jackson said in his famous concurring opinion in the steel seizure case, "I should indulge the widest latitude of interpretation to sustain the President's exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."

To the extent that principles of customary international law are read into these broad enabling statutes, we reject the notion that the statute must be read as transforming customary international law principles into absolute restrictions on executive action.

Accordingly, the FBI's general enabling statutes should be construed as permitting the agency to take extraterritorial action either when such actions are consistent with customary international law—as with the consent of a foreign sovereign—or when the agency has been directed to do so by a "controlling executive act" that supplants customary international law.

Quite apart from the question whether the FBI has statutory authority to override customary international law in accordance with an appropriate directive from the executive or legislative branches, the 1980 opinion failed to consider the President's inherent constitutional power to authorize law enforcement activities.

Even in the absence of 28 U.S.C., section 533(1) and 18 U.S.C., section 3052, the President, in accordance with his general executive authority under article II and his constitutional responsibility to "take care that the laws be faithfully executed," nevertheless has the power to authorize agents of the executive branch to conduct extraterritorial arrests.

The Supreme Court's decision in the *In re Neagle* case in 1890 supports this conclusion. A recitation of that case is set forth in the testimony and I'd like to skip that, if I may, and continue.

Mr. EDWARDS. Without objection, so ordered.

Mr. BARR. Our conclusion also finds support in the recent decision of the U.S. Court of Appeals for the Eleventh Circuit in *Garcia-Mir* v. *Meese,* a 1986 case, and again, the facts of that case and the court's decision is set forth in the testimony.

Moreover, the conclusion that the President has the authority to depart from customary international law is consistent with the very nature of customary international law. Customary international law is not a rigid canon of rules, but an evolving set of principles founded on a common practice and understanding of many nations.

It is understood internationally that this evolution can occur by a state departing from prevailing customary international law principles, and seeking to promote a new rule of international custom or practice—although a state remains liable under international law for breaches until a new rule develops.

In the absence of authority under the Constitution to take actions departing from customary international law, the United States would be absolutely bound under its own fundamental laws to international customs and practices, and largely powerless to play a role in shaping and changing those customs and practices.

Under our constitutional system, where the President is primarily responsible for the conduct of our foreign affairs, it therefore

makes sense that the President has the discretion to depart from customary international law norms in the exercise of his constitutional authority.

As my colleague Judge Sofaer will also discuss, there are instances where extraterritorial arrests without the host sovereign's consent may be justified under international law. For example, in response to an actual or threatened terrorist attack, we would have good grounds under general principles of international law to justify extraterritorial law enforcement actions over a foreign sovereign's objections.

Moreover, in appropriate circumstances, we may have a sound basis under international law to take action against large-scale drug traffickers being given safe haven by a government acting in complicity with their criminal enterprise. Thus, it may well be that the President will choose to direct extraterritorial arrests only when he believes that he is justified in doing so as a matter of self-defense under international law.

However, it is ultimately the President's judgment as to the need for a particular operation that is controlling for purposes of domestic law.

In closing, I want to emphasize that the United States strongly believes in working cooperatively with other nations and fostering respect for international rules of law, and we continue to work together with foreign governments to stem the threats that international terrorism and drug trafficking pose to the world community. The 1989 opinion does not change that policy.

Furthermore, in light of the serious international consequences that could follow from deploying the FBI to conduct an extraterritorial apprehension in contravention of customary international law, I can assure you that the administration would take such action only in the most compelling circumstances after appropriate deliberation among the Departments of State and Justice and appropriate executive branch officials.

The administration is well aware that adherence to a system of just international norms contributes to world peace and stability.

That concludes my testimony. I would be happy to address any questions that you might have.

Mr. EDWARDS. Thank you, Mr. Barr.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF WILLIAM P. BARR, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee:

I am pleased to be with you today to discuss the extent to which the United States has authority under its own domestic laws to carry out extraterritorial arrests which may depart from principles embodied in international law.

The United States is facing increasingly serious threats to its domestic security from both international terrorist groups and narcotics traffickers. Many of these criminal organizations target the United States and United States citizens while operating from foreign sanctuaries. While many nations have cooperated in our efforts to combat terrorism and narcotics trafficking by entering into extradition agreements and providing us with other forms of assistance, some foreign governments have unfortunately failed to take steps to protect the United States from these predations, and others actually act in complicity with these groups. Congress has enacted laws to criminalize certain terrorist conduct wherever it occurs, such as 18 U.S.C. § 1203 (implementing International Convention Against the Taking of Hostages) and 18 U.S.C. § 2331 (terrorist acts abroad against United States nationals). Viewed against this backdrop, the extraterritorial enforcement of United States laws is of growing importance to our ability to protect vital national interests.

It was in this context -- particularly in the face of the growing menace of anti-U.S. terrorism -- that the Office of Legal

Counsel reexamined an opinion that it had issued in the last year of the Carter Administration. 4B Op. O.L.C. 543 (March 31, 1980) (the "1980 Opinion"). The 1980 Opinion had potentially broad ramifications for the conduct of extraterritorial law enforcement activities by the Federal Bureau of Investigation ("FBI") and other Executive Branch officials. The question presented was whether the FBI had the authority under United States law to arrest a fugitive in a foreign country without that country's consent under classic principles of customary international law. Assuming on the facts before them that the apprehension in question would most likely constitute a violation of customary international law, the authors of the 1980 Opinion determined that the FBI had no authority under domestic law to perform such an arrest. The 1980 Opinion based its conclusion on two separate grounds.

First, the 1980 Opinion determined that "U.S. agents have no law enforcement authority in another nation unless it is the product of that nation's consent," reasoning that the authority of the United States, as a sovereign, is necessarily "limited . . . by the sovereignty of foreign nations." 4B Op. O.L.C. at 551. In other words, the 1980 Opinion suggested that the President and the Congress are legally powerless under United States law to authorize action in a foreign country that departs from customary international law. Second, regardless of whether the United States, as a sovereign, has the authority to act in contravention of customary international law, the 1980 Opinion

concluded that the FBI could never make apprehensions in contravention of customary international law under its general enabling statutes. Although the statutes themselves do not restrict the extraterritorial reach of the agency's authority, the 1980 Opinion reasoned that they must be construed restrictively to preclude the FBI from departing from customary international law norms in all circumstances.

Because such limitations may impair our ability to defend ourselves from overt physical assaults on our citizens by terrorists and the equally pernicious large-scale trafficking of drugs into the United States by foreign criminal organizations, the FBI asked the Office of Legal Counsel to reexamine the 1980 Opinion. On June 21, 1989, we issued an opinion partially reversing the 1980 Opinion (the "1989 Opinion").[1] Although the content of the 1989 Opinion, like other advice rendered by Office of Legal Counsel, must remain confidential, I am happy to share with the Committee our legal reasoning and conclusions.

Before turning to these legal issues, I think it is important that the Committee understand exactly what the 1989 Opinion did and did not do. Although the 1989 Opinion has been characterized by the press as a document that changed Department of Justice policy, the 1989 Opinion did no such thing. It is strictly a legal analysis of the FBI's authority, as a matter of

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[1] The 1989 Opinion reaffirmed the conclusion reached in the 1980 Opinion that, absent cruel or outrageous treatment, the mere fact that a fugitive is brought within the jurisdiction of a United States court against his will would not impair the court's power to try him.

domestic law, to conduct extraterritorial arrests of individuals for violations of United States law. The 1989 Opinion expressly takes no position supporting or opposing, as a policy matter, the use of the FBI or any other Executive Branch officials to make apprehensions in contravention of customary international law. It explicitly cautions that -- apart from the question of legality under domestic law -- such operations raise serious policy considerations that obviously must be carefully weighed. Moreover, the 1989 Opinion does not address the legal implications of deploying the FBI in violation of provisions of self-executing treaties or treaties that have been implemented by legislation.

Now let me turn to the reasons we think the 1980 Opinion was flawed. The 1980 Opinion expressed the view that the United States, as a sovereign, has no authority under its own laws to conduct law enforcement operations in another country without that country's consent. It based this view on the conclusion that the de jure authority of the United States is necessarily limited by the sovereignty of other nations, citing The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812).

We do not agree with this proposition, and believe that the 1980 Opinion's reliance on The Schooner Exchange v. M'Faddon was misplaced. Under our constitutional system, the executive and legislative branches, acting within the scope of their respective authority, may take or direct actions which depart from customary international law. At least as respects our domestic law, such

actions constitute "controlling executive or legislative act[s]" that supplant legal norms otherwise furnished by customary international law. The Paquete Habana, 175 U.S. 677, 700 (1900).

In the early nineteenth century, the Supreme Court, speaking through Chief Justice Marshall, recognized that while customary international law may provide rules of decision in the absence of a controlling executive or legislative act to the contrary, it does not absolutely restrict the Nation's sovereign capacity to act in the international arena. Brown v. United States, 12 U.S. (8 Cranch) 110, 128 (1814); The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 145-46 (1812). In The Schooner Exchange, Chief Justice Marshall opined that, under principles of customary international law, a French warship was impliedly immune from judicial process within the territory of the United States, but expressly acknowledged that "the sovereign [i.e., the United States] . . . is capable of destroying this implication. . . . either by employing force, or by subjecting such vessels to the [jurisdiction of its] ordinary tribunals." 11 U.S. (7 Cranch) at 146. In Brown, Marshall observed that the rule of customary international law

> is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

12 U.S. (8 Cranch) at 128. In acknowledging the United States' sovereign authority in this area, Marshall did not attempt to draw any distinction between actions that infringe on the

territorial sovereignty of foreign nations and other types of departures from customary international law.

Since that time, the courts have repeatedly recognized that the executive and legislative branches may, in exercising their respective authority, depart from customary international law norms. See, e.g., The Paquete Habana, 175 U.S. at 700; Tag v. Rogers, 267 F.2d 664, 668 (D.C. Cir. 1959), cert. denied, 362 U.S. 904 (1960); The Over the Top, 5 F.2d 838, 842 (D. Conn. 1925). In particular, in the exercise of his constitutional authority, the President may depart from customary international law by a "controlling executive . . . act." The Paquete Habana, 175 U.S. at 700. The 1980 Opinion utterly failed to consider the Supreme Court's recognition of the President's authority in this area.

The 1980 Opinion also concluded that the FBI could not make apprehensions in contravention of customary international law under one of its general enabling statutes, 28 U.S.C. § 533(1),[2] reasoning that general enabling statutes must be construed restrictively to prohibit absolutely any departure from the standards of customary international law. Again, we reject this analysis.

The FBI's general enabling statutes, 28 U.S.C. § 533(1)[3] and

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[2] The 1980 Opinion did not consider the scope of the FBI's authority under the agency's second general enabling statute, 18 U.S.C. § 3052.

[3] Section 533(1) provides, "The Attorney General may appoint officials . . . to detect and prosecute crimes against the United States. . . ."

18 U.S.C. § 3052,[4] give the FBI authority to "detect and prosecute crimes" and "make arrests" without any express geographic limitation. The Office of Legal Counsel has previously opined, and there does not appear to be any room for serious dispute, that these statutes confer extraterritorial law enforcement authority on the FBI. For example, when a foreign sovereign has consented to the FBI's conduct of an arrest within its territory, we see no basis to conclude that the FBI is powerless to do so. Thus, the narrow question presented is whether the FBI's general enabling statutes absolutely bar the FBI from undertaking extraterritorial apprehensions whenever such actions depart from customary international law. The gravamen of the 1980 Opinion is that customary international law imposes absolute restrictions on the authority of the United States to take extraterritorial action, and that these restrictions, when read into the FBI's general enabling statutes, absolutely bar the FBI from conducting extraterritorial arrests that depart from customary international law norms.

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[4] Section 3052 provides:

> The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

Id.

We think that this position is untenable. Both 28 U.S.C. § 533(1) and 18 U.S.C. § 3052 are broad enabling statutes that carry into execution the President's core executive law enforcement power which, where extraterritorial action is concerned, intersects with his constitutional responsibilities in the field of foreign relations. In our view, because the President has recognized authority to override customary international law, restrictions imposed by customary international law should not be read into such general enabling statutes in a manner that precludes the exercise of this authority. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645 (1952) (Jackson, J., concurring) ("I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."). To the extent that principles of customary international law are read into these broad enabling statutes, we reject the notion that the statute must be read as transforming customary international law principles into absolute restrictions on executive action. Accordingly, the FBI's general enabling statutes should be construed as permitting the agency to take extraterritorial action either when such actions are consistent with customary international law (as with the consent of a foreign sovereign), or when the agency has been directed to do so by a "controlling executive act" that supplants customary international law.

Quite apart from the question whether the FBI has statutory authority to override customary international law in accordance with an appropriate directive from the executive or legislative branches, the 1980 Opinion failed to consider the President's inherent constitutional power to authorize law enforcement activities. Even in the absence of 28 U.S.C. § 533(1) and 18 U.S.C. § 3052, the President, in accordance with his general executive authority under Article II and his constitutional responsibility to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, nevertheless has the power to authorize agents of the Executive Branch to conduct extraterritorial arrests.

In In re Neagle, 135 U.S. 1 (1890), the Supreme Court considered the question whether the Attorney General had the authority, in the absence of an express grant of statutory authority, to assign a Deputy United States Marshal to safeguard the life of a Justice of the Supreme Court. In concluding that he did, the Supreme Court reasoned that the President's constitutional duty to see that the laws be faithfully executed is not limited to the enforcement of acts of Congress or treaties according to their terms, but extends also to the "rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution." Id. at 64-67. In passing, the Neagle Court highlighted the President's power in the area of foreign affairs as one area in which he enjoys

considerable inherent presidential power to authorize action independent of any statutory provision. Id. at 64.

The Neagle Court's decision reflects the fundamental principle stated by John Jay that "[a]ll constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature. . . ." The Federalist No. 64, at 394 (C. Rossiter ed. 1961). Where, as here, the President's constitutional authority to enforce the laws intersects with his foreign affairs power, we believe that he retains the constitutional authority to order enforcement actions in addition to those permitted by statute. Commensurate with these inherent constitutional powers, this authority carries with it the power to direct Executive Branch agents to carry out arrests that contravene customary international law and other international law principles which our legislature has not acted upon to make part of our domestic law.

Our conclusions find support in the recent decision of the United States Court of Appeals for the Eleventh Circuit in Garcia-Mir v. Meese, 788 F.2d 1446, 1455 (11th Cir.), cert. denied, 479 U.S. 889 (1986). In Garcia-Mir, the Court of Appeals considered whether the United States was authorized to detain indefinitely Cuban aliens who had arrived as part of the Mariel boatlift, notwithstanding that such a detention was inconsistent with customary international law. The Attorney General had ordered the detention pursuant to 8 U.S.C. § 1227(a) which, like

28 U.S.C. § 533(1) and 18 U.S.C. § 3052, contains a broad grant of authority, but does not specifically authorize the Executive Branch to take action that departs from customary international law.[5]

With respect to one group of the Mariel detainees, the Court of Appeals concluded that there was insufficient evidence of an express congressional intention to override international law. 788 F.2d at 1453-54. The Court of Appeals nevertheless held that the President could override international law, and that the Attorney General's decision to detain the aliens indefinitely constituted a sufficient "controlling executive act." Id. at 1454-55. Garcia-Mir thus supports our general view that in an area such as law enforcement, where the President has constitutional authority and his agents have broad statutory authority, the President and high level Executive Branch officers may act in the national interest contrary to international law.

Moreover, the conclusion that the President has the authority to depart from customary international law is consistent with the very nature of customary international law. Customary international law is not a rigid canon of rules, but an evolving set of principles founded on the common practices and understandings of many nations. It is understood internationally that this evolution can occur by a state departing from

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[5] Section 1227(a) provides in relevant part, "[a]ny alien . . . arriving in the United States who is excluded under this chapter, shall be immediately deported, . . . unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper."

prevailing customary international law principles, and seeking to promote a new rule of international custom or practice (although a state remains liable under international law for breaches until a new rule develops). In the absence of authority under the Constitution to take actions departing from customary international law, the United States would be absolutely bound under its own fundamental law to international customs and practices, and largely powerless to play a role in shaping and changing those customs and practices itself. Under our constitutional system, where the President is primarily responsible for the conduct of our foreign affairs, it therefore makes sense that the President has the discretion to depart from customary international law norms in the exercise of his constitutional authority.

As my colleague Judge Sofaer will also discuss, there are instances where extraterritorial arrests without the host sovereign's consent may be justified under international law. For example, in response to an actual or threatened terrorist attack, we would have good grounds under general principles of international law to justify extraterritorial law enforcement actions over a foreign sovereign's objections. Moreover, in appropriate circumstances we may have a sound basis under international law to take action against large-scale drug traffickers being given safe haven by a government acting in complicity with their criminal enterprise. Thus, it may well be that the President will choose to direct extraterritorial arrests

only when he believes that he is justified in doing so as a matter of self-defense under international law. However, it is ultimately the President's judgment as to the need for a particular operation that is controlling for purposes of domestic law.

There may also be occasions when we are permitted to perform an extraterritorial law enforcement operation with the informal cooperation of representatives or departments of a foreign government while the government publicly withholds its formal consent. We believe that in these circumstances too we should retain the option of bringing international terrorists and drug traffickers to justice.

In closing, I want to emphasize that, as Oliver Revell will indicate, the United States strongly believes in working cooperatively with other nations and fostering respect for international rules of law, and we continue to work together with foreign governments to stem the threats that international terrorism and drug trafficking pose to the world community. The 1989 Opinion does not change that policy. Furthermore, in light of the serious international consequences that could follow from deploying the FBI to conduct an extraterritorial apprehension in contravention of customary international law, I can assure you that the Administration would take such action only in the most compelling circumstances after appropriate deliberation among the Departments of State and Justice and appropriate Executive Branch officials. The Administration is well aware that adherence to a system of just international norms contributes to world peace and stability.

That concludes my testimony. I would be happy to address any questions that you might have.

Mr. EDWARDS. We will now hear from Judge Abraham D. Sofaer, Legal Adviser, U.S. Department of State.

STATEMENT OF ABRAHAM D. SOFAER, THE LEGAL ADVISER, U.S. DEPARTMENT OF STATE

Mr. SOFAER. Mr. Chairman, I apologize for the delay in submission of my statement. I can only say that coordinating the statements of three individuals just added somewhat to the normal processes. But I do ask your indulgence in allowing me to summarize my statement so we don't have to spend the entire time listening to that.

Mr. EDWARDS. Yes.

Mr. SOFAER. Thank you, sir.

It is a privilege to testify before this committee on behalf of the State Department on the important questions of international law and policy that nonconsensual arrests in a foreign country would raise.

The Office of Legal Counsel, as the Office within the Department of Justice responsible for articulating the executive branch view of domestic law, recently issued an opinion concerning the FBI's domestic legal authority to conduct arrests abroad without host country consent.

Mr. Barr has summarized its conclusions for you. As Mr. Barr has indicated, that opinion addressed a narrow question—the domestic legal authority to make such arrests. The opinion did not change administration or Department of Justice policy concerning such arrests.

As the White House recently made clear, an interagency process exists to ensure that the President takes into account the full range of foreign policy and international law considerations before making any such decision.

My role today is to address issues not discussed in the OLC opinion—the international law and foreign policy implications of a nonconsensual arrest in a foreign country.

The Federal courts have treated international law, Mr. Chairman, as part of U.S. law since our early days as a Nation. The *Paquete Habana* is probably best known, and most frequently cited, for language in Justice Gray's opinion concerning the authority of the executive branch to violate international law by controlling act.

In fact, however, the decision in that case found no controlling executive act, affirmed the relevance of international law to the conduct of executive branch officials, and disallowed an action by a lower official because it violated international law.

In reaching this conclusion, Justice Gray stated, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

Numerous subsequent cases have adopted this conclusion.

Presidents, and other executive officials, have also recognized the importance and authority of international law. Our first Attorney General, Edmund Randolph, declared in 1792: "The law of nations,

although not specially adopted by the Constitution or any municipal act, is essentially a part of the law of the land."

And most recently, President Bush, in his statement to the United Nations General Assembly, emphasized the organization's role in promoting the notion that law, not force, should govern relations among States.

Congress, similarly, has demonstrated substantial respect for international law. While the principle that Congress can override international law for purposes of our domestic law is well established, actual examples of such actions are few, and the record is overwhelmingly to the contrary. Even when dealing with issues of national urgency, the Congress has acted with respect for our international obligations.

Recent examples that I've cited in my testimony are in the Omnibus Diplomatic Security and Antiterrorism Act of 1986 where Congress declined to include a provision authorizing self-help measures. And in the Anti-Drug Abuse Act of 1986, where Congress explicitly found that the Coast Guard required foreign flag consent to board a foreign flag vessel on the high seas.

Given this tradition of respect for international law, it is not surprising that our courts assume in all cases of doubt that our political branches have acted consistently with international law.

While Congress and the President have the power to depart from international law, the courts have in effect insisted that they do so unambiguously and deliberately. This doctrine reflects how our Nation's respect for international law is built into our domestic legal system, and the high value accorded that law in theory and practice.

Our tradition of support for international law is not simply naive American idealism. International law rules reflect the practices of nations and are based on human experience. They are, therefore, predictions of the type of conduct to which nations will be driven by the practical necessities of international relations.

I have a quotation from former Secretary Kissinger to this effect.

Now, territorial integrity is a cornerstone of international law; control over territory is one of the most fundamental attributes of sovereignty. This control includes a prohibition on the sending of agents for the purpose of apprehending within a foreign territory persons accused of having committed a crime.

The United States has repeatedly associated itself with the view that unconsented arrests violate the principle of territorial integrity. I have cited examples, Mr. Chairman, in which other nations have seized Americans and have apologized and returned those Americans because we objected to those seizures as well as examples of situations in which U.S. persons seized foreigners in other countries in which we have apologized for those actions and returned those abducted persons.

States have sought to overcome the limitations on international law enforcement activities arising from the principle of territorial integrity by cooperating in dealing with extraterritorial crime and in apprehending fugitives.

An array of international agreements, institutions, and practices have developed to help nations deal with the difficulties in pursuing criminals caused by our respect for each other's borders. This

has been going on for thousands of years, Mr. Chairman, and most recently, and most heroically, Colombia has extradited individuals under its extradition treaty with the United States despite enormous pressure felt by them from narcotics dealers and criminals within their jurisdiction.

We also have multilateral conventions which impose an obligation on parties to prosecute or extradite for hijacking, hostage-taking, aircraft sabotage, and other forms of terrorist behavior. Other agreements deal with international drug dealers, and create an obligation on parties to prosecute or extradite those criminals as well.

Despite the importance of the principle of territorial integrity there are situations in which that principle is not entitled, under international law, to absolute deference. Every state retains the right of self-defense, recognized in article 51 of the U.N. Charter.

Thus, a state may take appropriate action in order to protect itself and its citizens against terrorist attacks. This includes the right to rescue American citizens and to take action in a foreign state where that state is providing direct assistance to terrorists, or is unwilling or unable to prevent terrorists from continuing attacks on U.S. citizens. Any use of force in self-defense must meet the standards of necessity and proportionality to be lawful. But if these conditions are met, the fact that the use of force breaches the territorial integrity of a state does not render it unlawful.

During the Reagan administration and in other prior administrations, the United States has defended the use of force by Israel and other states, and by the United States, in defending themselves from attack and defending their citizens from attack, and in rescuing their citizens abroad.

This brings me to the increasingly serious threat to the domestic security of the United States and other nations by narcotics traffickers. In recent months, Mr. Chairman, evidence has accumulated that some of these traffickers have been trained in terrorist tactics. They have enormous resources and small armies at their command. Their modus operandi is to try to intimidate or disrupt the legal process in states. They have threatened violence against U.S. citizens, officials, and property, both here and abroad. They have been provided safe haven, or given approval to transit, by governments in complicity with them.

We are reaching the point, Mr. Chairman, at which the activities and threats of some drug traffickers may be so serious and so damaging as to give rise to the right to resort to self-defense.

The evidence of imminent harm from traffickers' threats would have to be strong to sustain a self-defense argument. Arrests in foreign states without their consent have no legal justification under international law aside from self-defense. But where a criminal organization grows to a point where it can and does perpetrate violent attacks against the United States, it can become a proper object of measures in self-defense.

These actions, actions in self-defense, Mr. Chairman, must be considered carefully by the Secretary of State, who is statutorily responsible for the management of foreign affairs and for the security of U.S. officials overseas, and by the Ambassador to the country in question, who has statutory responsibility for the direction

and supervision of U.S. Government employees in the country to which he or she is assigned.

The actual implications of a nonconsensual arrest in a foreign territory may vary with a variety of factors that I have reviewed in my statement. But I want to say that such operations create substantial risks to the U.S. agents involved. Actions involving arrests by U.S. officials on foreign territory require plans to get those officials into the foreign state, to protect them while in the foreign state, to remove them and the abducted persons from that state, and finally, to bring them safely back to the United States.

While the officials involved might include FBI agents seeking to make an arrest, such operations may also require the use of a wide range of U.S. assets and personnel.

Apart from being killed in such an action, U.S. agents could risk apprehension and punishment for their actions abroad. Our agents would not normally enjoy immunity from prosecution or civil suit in the foreign country involved for any violations of local law which occur.

The United States could also face requests from the foreign country for extradition of the agents. Obviously, the United States would not extradite its agents for carrying out an authorized mission. But our failure to do so could lead the foreign country to cease extradition cooperation with us. Our agents would also be vulnerable to extradition from third countries that they might visit.

Beyond the risks to our agents, the possibility also exists of suits against the United States in the foreign country's courts for the illegal actions taken in that country.

An unconsented, extraterritorial arrest would inevitably have an adverse impact on our bilateral relations with the country in which we act. Less obviously, such arrests could also greatly reduce law enforcement cooperation with that or other countries.

The United States has attached substantial importance over the past decade to improving bilateral and multilateral law enforcement cooperation. For many countries, these agreements reflect the commitment of the United States to confine itself to cooperative measures, rather than unilateral action, in the pursuit of U.S. law enforcement objectives.

We need to consider the fact that our legal position may be seized upon by other nations to engage in irresponsible conduct against our interests. Reciprocity is at the heart of international law; all nations need to take into account the reactions of other nations to conduct which departs from accepted norms.

It is the seriousness of these various policy implications, and our general respect for international law, that has led each witness today to emphasize that no change has been made in U.S. policy concerning extraterritorial arrests.

Our policy remains to cooperate with foreign states in achieving law enforcement objectives. As the White House has emphasized, any deviation from this policy would take place only after full interagency consideration of the range of implicated U.S. interests.

Thank you, Mr. Chairman, for this opportunity to testify.

Mr. EDWARDS. Thank you very much, Judge Sofaer.

[The prepared statement of Mr. Sofaer follows:]

PREPARED STATEMENT OF ABRAHAM D. SOFAER, THE LEGAL ADVISER, U.S. DEPARTMENT OF STATE

Mr. Chairman and Members of the Subcommittee:

It is a privilege to testify before this Committee on behalf of the State Department on the important questions of international law and policy that nonconsensual arrests in a foreign country would raise.

The Office of Legal Counsel, as the office within the Department of Justice responsible for articulating the Executive Branch view of domestic law, recently issued an opinion concerning the FBI's domestic legal authority to conduct arrests abroad without host country consent. Mr. Barr has summarized its conclusions for you. As Mr. Barr has indicated, that opinion addressed a narrow question -- the domestic legal authority to make such arrests. The opinion did not change Administration or Department of Justice policy concerning such arrests. As the White House recently made clear, an interagency process exists to ensure that the President takes into account the full range of foreign policy and international law considerations before making any such decision.

My role today is to address issues not discussed in the OLC opinion -- the international law and foreign policy implications of a nonconsensual arrest in a foreign country.

Bill Barr has explained that the Congress and the President have the power under the Constitution in various circumstances to act inconsistently with international law. That is true. The practical import of this statement of domestic legal authority, of course, must be evaluated in the context of our actual behavior as a nation. In practice, despite their power to act otherwise, each of the branches of our government has shown a healthy respect for international law.

The federal courts have treated international law as part of United States law since our early days as a nation. The Paquete Habana is probably best known, and most frequently cited, for language in Justice Gray's opinion concerning the authority of the Executive Branch to violate international law by controlling act. In fact, however, the decision in that case found no controlling Executive Act, affirmed the relevance of international law to the conduct of Executive Branch officials, and disallowed an action by a lower official because it violated international law. In reaching this conclusion, Justice Gray stated, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination". [175 U.S. 667, 700 (1900)]. Numerous subsequent cases have endorsed this conclusion.

Presidents, and other Executive officers, have recognized the importance and authority of international law. Our first Attorney General, Edmund Randolph, declared in 1792: "The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modifications on some points of indifference." (1 OAG 26 (1792)). In signing the Foreign Sovereign Immunities Act of 1976, President Ford described the law as continuing "the long-standing commitment of the United States to seek a stable international order under the law". President Bush in his statement to the United Nations General Assembly earlier this fall emphasized the organization's role in promoting the notion that law -- not force -- should govern relations among states.

Congress, similarly, has demonstrated substantial respect for international law. While the principle that Congress can override international law for purposes of our domestic law is well-established, actual examples of such actions are few, and the record is overwhelmingly to the contrary. Even when dealing with issues of national urgency, the Congress has acted with respect for our international obligations.

Recent examples from the areas of terrorism and drugs, issues affecting vital U.S. interests, illustrate how Congress has considered and decided against actions which would violate international law. Thus, in passing the Omnibus Diplomatic Security and AntiTerrorism Act of 1986, Congress declined to include a provision authorizing "self-help" measures. Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearing on S.1373, S.1429, and S.1508, Before the Subcommittee on Security and Terrorism of the Senate Committee on the Judiciary, 99th Cong., 1st Sess. 63 (1985). In the 1980's Congress responded to the increasing problem of drug smuggling from the high seas, with the Anti-Drug Abuse Act of 1986. In passing the act, Congress explicitly found that the Coast Guard required foreign flag consent to board a foreign flag vessel on the high seas, and urged the Secretary of State to negotiate agreements with the relevant countries to facilitate the interdiction of drug vessels. 100 Stat. 3207-6.

Given this tradition of respect for international law, it is not surprising that our courts assume in all cases of doubt that our political branches have acted consistently with international law.

While Congress and the President have the power to depart from international law, the courts have in effect insisted that they do so unambiguously and deliberately. This doctrine reflects how our nation's respect for international law is built into our domestic legal system, and the high value accorded that law in theory and practice.

Our tradition of support for international law is not simply naive American idealism. International law rules reflect the practices of nations and are based on human experience. They are therefore predictions of the type of conduct to which nations will be driven by the practical necessities of international relations. Former Secretary Kissinger explained in 1975,

> An international order can be neither stable nor just without accepted norms of conduct. International law both provides a means and embodies our ends. It is a repository of our experience and our idealism--a body of principles drawn from the practice of states and an instrument for fashioning new patterns of relations between States.... The United States is convinced in its own interest that the extension of legal order is a boon to humanity and a necessity.... On a planet marked by interdependence, unilateral action and unrestrained pursuit of the national advantage inevitably provoke counteraction and therefore spell futility and anarchy....

We have reached that moment in time where moral and practical imperatives, law and pragmatism, point toward the same goals. [Statement to the Annual Convention of the American Bar Association, August 11, 1975.]

"Territorial integrity" is a cornerstone of international law; control over territory is one of the most fundamental attributes of sovereignty. Green Hackworth, one of my predecessors as Legal Adviser, explained in 1937 that "it is a fundamental principle of the law of nations that a sovereign state is supreme within its own territorial domain and that it and its nationals are entitled to use and enjoy their territory and property without interference from an outside source". 5 Whiteman, Digest of International Law 183 (1965). Forcible abductions from a foreign State clearly violate this principle. In his important Survey of International Law in 1949, Sir Hersh Lauterpacht wrote of "the obligation of states to refrain from performing jurisdictional acts within the territory of other states except by virtue of general or special permission. Such acts include, for instance, the sending of agents for the purpose of apprehending within foreign territory persons accused of having committed a crime." Lauterpacht, E. (ed.), International Law, Vol. 1, 487-488 (1970). See also Section 433, Restatement 3rd of the Foreign Relations Law of the United States.

The United States has repeatedly associated itself with the view that unconsented arrests violate the principle of territorial integrity. In 1876, for example, Canadian authorities subdued a convict in Alaska in the course of transferring him between two points in Canada. Secretary Fish protested the action, contending "a violation of the sovereignty of the United States has been committed". The abducted individual was released following an official British inquiry. In another case, the Canadian government abducted two persons from the United States and brought them back to Canada for trial. After an official complaint by the United States, the Canadian government apologized and offered to return the two. Satisfied with the apology, the United States permitted Canada to try the two men for their felonies.

On the other side of the ledger, in 1872 British authorities protested the seizure by a U.S. citizen of an individual from Canada. Although the United States denied any official involvement in the abduction, the United States acceded to a British request that charges be dropped against the abducted individual, and informed the British, "I trust that I need not assure you that the government of the United States would lend no sanction to any act of its officers or citizens involving a violation of the territorial independence or sovereignty of her Majesty's dominions".

More recently, two American bail bondsmen seized an individual from Canada and brought him to Florida for trial before the State courts. After vigorous Canadian protest, and intervention by the federal government, the State of Florida released the individual; the bail bondsmen were extradited to Canada and convicted.

States have sought to overcome the limitations on international law enforcement activities arising from the principle of territorial integrity by cooperating in dealing with extraterritorial crime and in apprehending fugitives. An array of international agreements, institutions, and practices has developed to help nations deal with the difficulties in pursuing criminals caused by our respect for each other's borders. States have voluntarily returned fugitives from justice through legal devices such as extradition, deportation, and expulsion for literally thousands of years. Where such cooperation is possible, no question of unilateral action even arises. Colombia, for example, while suffering serious threats from criminal narcotics organizations, has demonstrated strong resolve to counter the threat, and has extradited several individuals for prosecution in the United States. We are working with Colombia to counter the narcotics threat in this region of the world, and look forward to increasing our cooperation.

Further, certain forms of criminal activity have been subjected to universal jurisdiction. Multilateral conventions impose an obligation on parties to prosecute or extradite for hijacking, hostage-taking, aircraft sabotage, and other forms of terrorist behavior. Other agreements deal with international drug dealers, and create an obligation on parties to prosecute or extradite those criminals as well.

The adverse effects of the principle of territorial integrity on law enforcement are also mitigated by the willingness of States to consent to foreign law enforcement action on their territory. No particular formality or publicity is required for such consent to be legally effective. Even tacit consent is sufficient if given by appropriate officials. For political reasons a State may decide to deny after the fact that it had consented to an operation. This would not vitiate the legality of an action, if consent had in fact been given. In still other cases, a foreign State may cooperate by quietly placing an individual wanted by the United States on board a plane or vessel over which the United States has jurisdiction.

Despite its importance, however, the principle of territorial integrity is not entitled to absolute deference in international law. Every State retains the right of self-defense, recognized in Article 51 of the UN Charter.

Thus, a State may take appropriate action in order to protect itself and its citizens against terrorist attacks. This includes the right to rescue American citizens and to take action in a foreign State where that State is providing direct assistance to terrorists, or is unwilling or unable to prevent terrorists from continuing attacks upon U.S. citizens. Any use of force in self-defense must meet the standards of necessity and proportionality to be lawful. But if these conditions are met, the fact that the use of force breaches the territorial integrity of a State does not render it unlawful.

Thus, the United States defended Israel's rescue mission at Entebbe in 1976, notwithstanding the temporary breach of Uganda's territorial integrity. The U.S. representative to the United Nations stated that "given the attitude of the Ugandan authorities, cooperation with or reliance on them in rescuing the passengers and crew was impracticable." The United States was acting consistently with international law in taking forcible action against Libya in ~~1982~~ 1986 for its role in terrorist attacks against the United States. Even in the area of forcible abductions, the international community seems willing to take into account particular circumstances in assessing a violation of territorial integrity.

While the international community criticized the forcible abduction of Adolf Eichman from Argentina, it did not call for his return and even Argentina was satisfied by an Israeli expression of regret for any violation of Argentine law and sovereignty.

In considering the availability of the doctrine of self-defense to justify a breach of territorial integrity, it is essential to recognize that the President is not bound by the interpretations of international law taken by other States. The President should carefully consider those views, since the U.S. must be prepared to defend its interpretation of the law. But self-defense is a right deemed "inherent" in the Charter. Here, more than anywhere else in international law, a State must act in good faith, but must also be free to protect its nationals from all forms of aggression. State-sponsored terrorism has created new dangers for civilized peoples, and the responses of the United States in Libya and elsewhere have gained ever wider recognition as having been necessary and effective methods for defending Americans.

While the law must be given full respect even in matters of self-defense, we must not permit the law to be manipulated to render the free world ineffective in dealing with those who have no regard for law.

We must not allow law to be so exploited, but rather must insist on the continued development of legal rules that enable states to deal effectively with new forms of aggression.

This brings me to the increasingly serious threat to the domestic security of the United States and other nations by narcotics traffickers. In recent months evidence has accumulated that some of these traffickers have been trained in terrorist tactics. They have enormous resources and small armies at their command. Their modus operandi is to try to intimidate or disrupt the legal process in States. They have threatened violence against United States citizens, officials, and property. They have been provided safe-haven, or given approval to transit, by governments in complicity with the drug traffickers.

We are reaching the point, Mr. Chairman, at which the activities and threats of some drug traffickers may be so serious and damaging as to give rise to the right to resort to self-defense. The evidence of imminent harm from traffickers' threats would have to be strong to sustain a self-defense argument. Arrests in foreign States without their consent have no legal justification under international law aside from self-defense. But where a criminal organization grows to a point where it can and does perpetrate violent attacks against the United States, it can become a proper object of measures in self-defense.

While international law therefore permits extraterritorial "arrests" in situations which permit a valid claim of self-defense, decisions about any extraterritorial arrest entail grave potential implications for US personnel, for the United States, and for our relations with other States. These considerations must be carefully weighed by the Secretary of State, who is statutorily responsible for the management of foreign affairs and for the security of U.S. officials overseas (22 U.S.C. 2656 and 22 U.S.C. 3927), and by the Ambassador to the country in question, who has statutory responsibility for the direction and supervision of U.S. government employees in the country to which he or she is assigned (22 U.S.C. 3927).

The actual implications of a nonconsensual arrest in foreign territory may vary with such factors as the seriousness of the offense for which the apprehended person is arrested; the citizenship of the offender; whether the foreign government itself had tried to bring the offenders to justice or would have consented to the apprehension had it been asked; and the general tenor of bilateral relations with the United States. However, any proposal for unilateral action would need to be reviewed from the standpoint of a variety of potential policy implications.

First, such operations create substantial risks to the U.S. agents involved. Actions involving arrests by U.S. officials on foreign territory require plans to get those officials into the foreign State, to protect those officials while in the foreign State, to remove the officials with the person arrested from that State, and finally to bring them safely back to United States territory. While the officials involved might include FBI agents seeking to make an arrest, such operations may also require the use of a wide range of U.S. assets and personnel.

Apart from being killed in action, U.S. agents involved in such operations risk apprehension and punishment for their actions. Our agents would not normally enjoy immunity from prosecution or civil suit in the foreign country involved for any violations of local law which occur. (In 1952, the Soviets abducted Dr. Walter Linse from the U.S. sector of Berlin to the Soviet sector, where he was tried and convicted by a Soviet Tribunal. Two of Linse's abductors were subsequently apprehended in West Berlin and sentenced for kidnapping.) Moreover, many States will not accord POW status to military personnel apprehended in support of an unconsented law enforcement action. The United States could also face requests from the foreign country for extradition of the agents.

Obviously the United States would not extradite its agents for carrying out an authorized mission, but our failure to do so could lead the foreign country to cease extradition cooperation with us. Moreover, our agents would be vulnerable to extradition from third countries they visit.

Beyond the risks to our agents, the possibility also exists of suits against the United States in the foreign country's courts for the illegal actions taken in that country. For example, U.S. courts held that Chile was not immune from suit in the United States for its involvement in the assassination of a Chilean, Letelier, in the United States. The United States could also face challenges for such actions in international fora, including the International Court of Justice.

An unconsented, extraterritorial arrest would inevitably have an adverse impact on our bilateral relations with the country in which we act. Less obviously, such arrests could also greatly reduce law enforcement cooperation with that or other countries. The United States has attached substantial importance over the past decade to improving bilateral and multilateral law enforcement cooperation. For many countries, these agreements reflect the commitment of the United States to confine itself to cooperative measures, rather than unilateral action, in the pursuit of U.S. law enforcement objectives.

If the United States disregards these agreed law enforcement norms and mechanisms, and acts unilaterally, we must be prepared for States to decline to cooperate under these arrangements or to denounce them. Foreign States have reacted adversely to extraterritorial US laws, even when those laws involve enforcement action taken only in the United States. The breadth of our discovery practices and antitrust laws have led some States to pass blocking and secrecy statutes that preclude cooperation with the United States. Their reaction to unconsented extraterritorial arrests could be more extreme.

Finally, we need to consider the fact that our legal position may be seized upon by other nations to engage in irresponsible conduct against our interests. Reciprocity is at the heart of international law; all nations need to take into account the reactions of other nations to conduct which departs from accepted norms.

It is the seriousness of these various policy implications, and our general respect for international law, that has led each witness today to emphasize that no change has been made in United States policy concerning extraterritorial arrests.

Our policy remains to cooperate with foreign States in achieving law enforcement objectives. As the White House has emphasized, any deviation from this policy would take place only after full inter-agency consideration of the range of implicated U.S. interests.

Thank you for this opportunity to testify. I would be happy to address any questions you might have.

Mr. EDWARDS. We will now hear from the third member of the panel, Mr. Oliver B. Revell, Associate Deputy Director-Investigations, Federal Bureau of Investigation. Mr. Revell, welcome.

STATEMENT OF OLIVER B. REVELL, ASSOCIATE DEPUTY DIRECTOR-INVESTIGATIONS, FEDERAL BUREAU OF INVESTIGATION

Mr. REVELL. Thank you, Mr. Chairman.

I am pleased to appear before the committee this morning to discuss the FBI extraterritorial jurisdiction and operations abroad. You have expressed an interest in this area and through my prepared remarks, I will present the FBI's mandate in this area. I will also discuss general procedures, and detail some examples of when extraterritorial investigative measures have been utilized in the area of counterterrorism.

As a starting point, let me briefly touch upon the issue of lead agency status relating to counterterrorism investigations. In April 1982, the Reagan administration refined specific responsibilities for coordination of the Federal response to terrorist incidents.

This mandate assigned to the Department of State responsibility for the coordination of counterterrorism abroad. The FBI, through the Department of Justice, was designated the lead agency for investigating acts of terrorism perpetrated within the United States. In addition, the Attorney General has designated the FBI as the responsible agency for investigations abroad, when authorized.

In October 1982, in response to the growing problem of terrorism, then FBI Director William Webster elevated the counterterrorism program within the FBI to a national priority status, bringing it on par with other critically important investigative programs such as foreign counterintelligence and organized crime.

As the primary Federal agency for combating terrorism in the United States, there exists for the FBI a twofold mission: First, and I think most importantly, to prevent terrorist acts before they occur and; second, should they occur, to mount an effective investigative response.

The prevention phase involves acquiring, through legal means, intelligence information relating to terrorist groups and individuals who threaten Americans or U.S. interests, or foreign nationals within the United States.

The response phase involves prompt and effective investigation of criminal acts committed by members of terrorist groups. It is the FBI's view that swift and effective investigation of terrorist acts, culminated by arrests, convictions, and incarcerations, sends a powerful and effective message to terrorists and serves as a deterrent to future acts of terrorism.

As a result of legislation passed in 1984 and in 1986, a new era began for the FBI with expanded involvement in the investigation of international terrorism.

Since 1985, we have been involved in at least 50 separate investigations outside the United States, as a result of U.S. citizens or interests having been targeted by terrorists.

This FBI extraterritorial jurisdiction is derived from a number of U.S. statutes to include the Comprehensive Crime Control Act of 1984, which created a new section in the U.S. Criminal Code for

hostage-taking, and the Omnibus Diplomatic Security and Antiterrorism Act of 1986, which established a new statute pertaining to terrorist acts conducted abroad against U.S. nationals.

These laws allow the United States to assert Federal jurisdiction outside of our borders when a U.S. national is either murdered, assaulted, or taken hostage by a terrorist. Internal FBI and Department of Justice oversight, host country concurrence, and coordination with the U.S. Department of State are prerequisites in the implementation of this jurisdiction.

The FBI is aware of the public attention generated by the Department of Justice opinion of June 21, 1989, in its opinion regarding extraterritorial matters.

However, this opinion is a statement of legal authority and does not alter existing FBI policy regarding arrests in foreign countries. FBI policy has been, and will continue to be, that a request for an arrest in a foreign country will be coordinated, approved, and conducted with the appropriate authorities of that country. Any departure from our current policy would have to be directed and coordinated by the Justice Department.

The extraterritorial statutes have afforded the United States a legal mechanism to investigate and, when warranted, to seek the prosecution of terrorists who attack U.S. nationals abroad. Our investigations of extraterritorial matters have met with considerable success. Numerous indictments have been obtained against individuals who have committed such acts. Others have been arrested and tried abroad—many times with our evidence—and yet others are currently the subject of extradition requests.

While time will not permit a complete review of all extraterritorial cases, I have cited several of the more significant investigations in my formal statement.

These include the TWA 847 hijacking and the subsequent arrest and conviction of Mohammad Hammadei; the June 1985 hijacking of the Royal Jordanian airliner and the eventual arrest and conviction here in Washington of Fawaz Younis; the seizure of Pan Am flight 73 in Pakistan and the conviction of the perpetrators by the Pakistani authorities, again using our evidence; the June 1987 mortar attack and car bomb attack near the U.S. Embassy in Rome, for which the Japanese Red Army is believed responsible; the April 1988 suspected JRA car bomb in Naples and a coincidental arrest of a Japanese Red Army member, Yu Kikumura, in New Jersey, at the same time; the June 1988 assassination of Navy Capt. William Nordeen in Athens; the Pan Am flight 103 tragedy in Scotland in December of last year; the assassination of Colonel Rose in the Philippines; the murder of two American missionaries in La Paz, Bolivia; and the attempted bombing by the same group of former Secretary of State Shultz's motorcade in August 1988.

These cases represent but a sampling of the extraterritorial efforts that we've conducted over the past few years in carrying out the congressional mandate.

To carry out our international liaison responsibilities and to assist in extraterritorial pursuits, the FBI maintains legal attachés in 16 foreign countries. The primary mission of the Legal Attaché Office is to establish and sustain effective liaison with principal law enforcement, intelligence, and security services throughout the

designated foreign countries, thereby providing channels through which the FBI investigative responsibilities can be met.

The legal attaché function also provides a prompt and continuous exchange of law enforcement information.

Legal attachés and associated liaison activities play a vital role in the successful fulfillment of FBI responsibilities abroad. These activities are maintained in strict accordance with limitations imposed by statute, Executive order, Attorney General guidelines, and our own internal policy.

This is not a one-way street. The FBI assists cooperative foreign agencies with their legitimate and lawful investigative interests in the United States, consistent with U.S. policy and the law of foreign police cooperation matters.

We also work extensively through international organizations such as the U.N., Interpol, NATO, the Trevi organization, the International Association of Chiefs of Police, and others, to properly coordinate and enhance international cooperation in law enforcement matters.

In conclusion, I would like to stress that the FBI International Counterterrorism Program is a strong and effective program. This is due in part to our expanded role in extraterritorial matters which has led to a growing and improved relationship with friendly foreign services.

However, we recognize that there is much to be done in order to continue our success in combating terrorism. Through enhanced cooperation, better sharing of information, and improved investigative techniques, we will strive to keep Americans worldwide free from the threat of terrorism.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Revell.

[The prepared statement of Mr. Revell follows:]

PREPARED STATEMENT OF OLIVER B. REVELL, ASSOCIATE DEPUTY DIRECTOR-INVESTIGATIONS, FEDERAL BUREAU OF INVESTIGATION

GOOD MORNING MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE. I AM PLEASED TO HAVE THIS OPPORTUNITY TO APPEAR BEFORE YOU TO DISCUSS FBI EXTRATERRITORIAL JURISDICTION AND OPERATIONS ABROAD. YOU HAVE EXPRESSED AN INTEREST IN THIS AREA AND THROUGH MY PREPARED REMARKS, I WILL PRESENT THE FBI'S MANDATE IN THIS AREA, DISCUSS GENERAL PROCEDURES, AND DETAIL SOME EXAMPLES OF WHEN EXTRATERRITORIAL INVESTIGATIVE MEASURES HAVE BEEN UTILIZED IN THE AREA OF COUNTERTERRORISM.

AS A STARTING POINT, LET ME BRIEFLY TOUCH UPON THE ISSUE OF "LEAD AGENCY" STATUS RELATING TO COUNTERTERRORISM INVESTIGATIONS. IN APRIL 1982, THE REAGAN ADMINISTRATION REFINED SPECIFIC RESPONSIBILITIES FOR COORDINATION OF THE FEDERAL RESPONSE TO TERRORIST INCIDENTS. THIS MANDATE ASSIGNED TO THE U.S. DEPARTMENT OF STATE RESPONSIBILITY FOR THE COORDINATION OF COUNTERTERRORISM ABROAD. THE FBI, THROUGH THE DEPARTMENT OF JUSTICE, WAS DESIGNATED THE "LEAD AGENCY" FOR INVESTIGATING ACTS OF TERRORISM PERPETRATED IN THE UNITED STATES. IN ADDITION, THE ATTORNEY GENERAL HAS DESIGNATED THE FBI AS THE RESPONSIBLE AGENCY FOR INVESTIGATIONS ABROAD, WHEN AUTHORIZED. IN OCTOBER 1982, IN RESPONSE TO

THE GROWING PROBLEM OF TERRORISM, THEN FBI DIRECTOR WILLIAM WEBSTER ELEVATED THE COUNTERTERRORISM PROGRAM WITHIN THE FBI TO NATIONAL PRIORITY STATUS, BRINGING IT ON PAR WITH OTHER CRITICALLY IMPORTANT INVESTIGATIVE PROGRAMS SUCH AS FOREIGN COUNTERINTELLIGENCE AND ORGANIZED CRIME.

AS THE PRIMARY FEDERAL AGENCY FOR COMBATING TERRORISM IN THE UNITED STATES, THERE EXISTS WITHIN THE FBI A TWO-FOLD MISSION: TO PREVENT TERRORIST ACTS BEFORE THEY OCCUR AND, SHOULD THEY OCCUR, TO MOUNT AN EFFECTIVE INVESTIGATIVE RESPONSE. THE PREVENTION PHASE INVOLVES ACQUIRING, THROUGH LEGAL MEANS, INTELLIGENCE INFORMATION RELATING TO TERRORIST GROUPS AND INDIVIDUALS WHO THREATEN AMERICANS, U.S. INTERESTS, OR FOREIGN NATIONALS WITHIN THE UNITED STATES.

THE RESPONSE PHASE INVOLVES PROMPT AND EFFECTIVE INVESTIGATION OF CRIMINAL ACTS COMMITTED BY MEMBERS OF TERRORIST GROUPS. IT IS THE FBI'S VIEW THAT SWIFT AND EFFECTIVE INVESTIGATION OF TERRORIST ACTS, CULMINATED BY ARRESTS, CONVICTIONS, AND INCARCERATIONS, SENDS A POWERFUL AND EFFECTIVE MESSAGE TO TERRORISTS AND SERVES AS A DETERRENT TO FUTURE ACTS OF TERRORISM.

AS A RESULT OF LEGISLATION PASSED IN 1984 AND 1986, A NEW ERA BEGAN FOR THE FBI WITH EXPANDED INVOLVEMENT IN THE INVESTIGATION OF INTERNATIONAL TERRORISM. SINCE 1985, WE HAVE BEEN INVOLVED IN AT LEAST 50 SEPARATE INVESTIGATIONS OUTSIDE THE UNITED STATES, AS A RESULT OF U.S. CITIZENS OR INTERESTS HAVING BEEN TARGETED BY TERRORISTS. THIS FBI EXTRATERRITORIAL JURISDICTION IS DERIVED FROM A NUMBER OF U.S. STATUTES TO INCLUDE THE "COMPREHENSIVE CRIME CONTROL ACT OF 1984," WHICH CREATED A NEW SECTION IN THE U.S. CRIMINAL CODE FOR HOSTAGE TAKING, AND THE "OMNIBUS DIPLOMATIC SECURITY AND ANTITERRORISM ACT OF 1986," WHICH ESTABLISHED A NEW STATUTE PERTAINING TO TERRORIST ACTS CONDUCTED ABROAD AGAINST U.S. NATIONALS/INTERESTS.

THESE LAWS ALLOW THE UNITED STATES TO ASSERT FEDERAL JURISDICTION OUTSIDE OF OUR BORDERS WHEN A U.S. NATIONAL IS EITHER MURDERED, ASSAULTED, OR TAKEN HOSTAGE BY A TERRORIST. INTERNAL FBI AND DEPARTMENT OF JUSTICE OVERSIGHT, HOST COUNTRY CONCURRENCE, AND COORDINATION WITH THE U.S. DEPARTMENT OF STATE ARE PREREQUISITES IN THE IMPLEMENTATION OF THIS JURISDICTION. THE FBI IS AWARE OF THE PUBLIC ATTENTION GENERATED BY THE DEPARTMENT OF JUSTICE OPINION OF JUNE 21, 1989,

REGARDING EXTRATERRITORIAL MATTERS. HOWEVER, THIS OPINION IS A STATEMENT OF LEGAL AUTHORITY AND DOES NOT ALTER EXISTING FBI POLICY REGARDING ARRESTS IN FOREIGN COUNTRIES. FBI POLICY HAS BEEN, AND WILL CONTINUE TO BE, THAT A REQUEST FOR AN ARREST IN A FOREIGN COUNTRY WILL BE COORDINATED, APPROVED, AND CONDUCTED WITH THE APPROPRIATE AUTHORITIES OF THAT COUNTRY. ANY DEPARTURE FROM OUR CURRENT POLICY WOULD HAVE TO BE DIRECTED AND COORDINATED BY THE DEPARTMENT OF JUSTICE.

THE EXTRATERRITORIAL STATUTES HAVE AFFORDED THE UNITED STATES A LEGAL MECHANISM TO INVESTIGATE AND, WHEN WARRANTED, TO SEEK THE PROSECUTION OF TERRORISTS WHO ATTACK U.S. NATIONALS ABROAD. OUR INVESTIGATIONS OF EXTRATERRITORIAL MATTERS HAVE MET WITH CONSIDERABLE SUCCESS. NUMEROUS INDICTMENTS HAVE BEEN OBTAINED AGAINST INDIVIDUALS WHO HAVE COMMITTED SUCH ACTS, OTHERS HAVE BEEN ARRESTED AND TRIED ABROAD, AND YET OTHERS ARE CURRENTLY THE SUBJECT OF EXTRADITION REQUESTS. WHILE TIME WILL NOT PERMIT A COMPLETE REVIEW OF ALL FBI EXTRATERRITORIAL CASES, ALLOW ME TO CITE A NUMBER OF THE MORE SIGNIFICANT INVESTIGATIONS.

IN JUNE 1985, TWA FLIGHT 847 WAS HIJACKED BY SHIA TERRORISTS WHILE EN ROUTE FROM ATHENS, GREECE TO ROME, ITALY. THE HIJACKERS SUBSEQUENTLY FORCED THE AIRCRAFT TO LAND IN BEIRUT, LEBANON. FORTY-TWO AMERICANS WERE HELD HOSTAGE FOR TWO WEEKS. DURING THIS ORDEAL A U.S. SERVICEMAN WAS MURDERED. INVESTIGATION INTO THIS INCIDENT DETERMINED THAT MOHAMMAD HAMMADEI WAS ONE OF THE INDIVIDUALS RESPONSIBLE FOR THE HIJACKING. HAMMADEI WAS ARRESTED IN FRANKFURT, WEST GERMANY, BY GERMAN AUTHORITIES IN JANUARY 1987, AND THE UNITED STATES IMMEDIATELY INITIATED EXTRADITION PROCEEDINGS. HOWEVER, WEST GERMANY REFUSED THE EXTRADITION REQUEST AND INDICATED IT WOULD PROSECUTE HAMMADEI FOR MURDER AND AIR PIRACY. DURING THIS TRIAL, FBI AGENTS TESTIFIED ON THE INVESTIGATION OF THIS HIJACKING AND MURDER. HAMMADEI WAS CONVICTED IN MAY OF THIS YEAR AND SENTENCED TO LIFE IMPRISONMENT.

ALSO DURING JUNE 1985, A ROYAL JORDANIAN AIRLINER IN BEIRUT, LEBANON WAS THE TARGET OF A TERRORIST HIJACKING. BECAUSE U.S. NATIONALS WERE ABOARD THE FLIGHT, A WARRANT WAS ISSUED FOR THE ALLEGED PERPETRATOR OF THE HIJACKING, FAWAZ YOUNIS, A LEBANESE NATIONAL. IN SEPTEMBER 1987, YOUNIS WAS ARRESTED BY THE FBI IN INTERNATIONAL

WATERS IN THE MEDITERRANEAN SEA. HE WAS RETURNED TO THE UNITED STATES SHORTLY THEREAFTER. YOUNIS WAS CONVICTED IN MARCH OF THIS YEAR IN FEDERAL DISTRICT COURT IN WASHINGTON, D.C. AND SENTENCED TO 30 YEARS' IMPRISONMENT. THE FACT THAT YOUNIS WAS CAPTURED IN INTERNATIONAL WATERS SERVED NOTICE THAT THE U.S. GOVERNMENT IS WILLING TO GO TO SUBSTANTIAL LENGTHS TO APPREHEND THOSE RESPONSIBLE FOR ACTS OF TERRORISM AGAINST U.S. NATIONALS.

FOUR GUNMEN, DISGUISED AS AIRPORT SECURITY GUARDS, BOARDED PAN AM FLIGHT 73 IN SEPTEMBER 1986, AS IT WAS PREPARING FOR TAKEOFF FROM KARACHI, PAKISTAN EN ROUTE TO FRANKFURT, GERMANY; LONDON, ENGLAND; AND NEW YORK. THE FLIGHT ORIGINATED IN BOMBAY, INDIA. THE HIJACKERS WOUNDED 2 AIRPORT WORKERS AT THE START OF THE SEIGE, THEN KILLED A U.S. CITIZEN AND DUMPED HIS BODY ONTO THE TARMAC. IN ALL, 2 U.S. CITIZENS WERE KILLED. THE HIJACKERS DEMANDED THAT THE AIRCRAFT BE FLOWN TO CYPRUS WHERE 3 PALESTINIANS WERE IMPRISONED. THE TAKEOVER LASTED 17 HOURS, DURING WHICH THE 3-MAN FLIGHT CREW ESCAPED THROUGH A HATCH IN THE COCKPIT. THE SITUATION ENDED WITH A GUNFIRE EXCHANGE AND GRENADE-THROWING SPREE. THE 4 HIJACKERS CLAIMED MEMBERSHIP IN A FACTION OF THE

ABU NIDAL ORGANIZATION, A RADICAL PALESTINIAN TERRORIST GROUP. THE GOVERNMENT OF PAKISTAN PROSECUTED AND CONVICTED THE PERPETRATORS AND THEY ARE CURRENTLY SERVING LIFE SENTENCES.

THE JAPANESE RED ARMY (JRA) IS BELIEVED TO HAVE BEEN RESPONSIBLE FOR A MORTAR ROCKET/CAR BOMB ATTACK IN ROME, ITALY, IN JUNE 1987. A CAR BOMB SHATTERED WINDOWS AND SET FIRE TO 2 PARKED CARS NEAR THE U.S. EMBASSY, AND ROCKETS EXPLODED ON THE GROUNDS OF THE U.S. AND BRITISH EMBASSIES IN ROME. THE 3 EXPLOSIONS OCCURRED WITHIN A HALF-HOUR OF EACH OTHER AND HAPPENED WHILE THE VENICE ECONOMIC SUMMIT WAS IN PROGRESS. THERE WERE NO REPORTED INJURIES. A TELEPHONE CALL TO THE UNITED PRESS INTERNATIONAL OFFICE IN LONDON, ENGLAND, CLAIMED THAT THE ATTACKS WERE COMMITTED BY THE ANTI-IMPERIALIST INTERNATIONAL BRIGADE (AIIB), A SUSPECTED COVER NAME USED BY JRA OPERATIVES, IN PROTEST TO WESTERN "STATE TERRORISM" AND CONDEMNED THE STANCE OF THE VENICE ECONOMIC SUMMIT ON THE ISSUE OF TERRORISM. SUBSEQUENT INVESTIGATION BY ITALIAN AUTHORITIES AND THE FBI IDENTIFIED JRA MEMBERS AS THE PERPETRATORS OF THE BOMBINGS.

DURING APRIL 1988, A CAR BOMB EXPLODED OUTSIDE THE USO BUILDING IN NAPLES, ITALY, KILLING 5 PERSONS AND INJURING 18 OTHERS, INCLUDING 4 AMERICANS THAT WERE OUTSIDE AT THE TIME OF THE EXPLOSION. ONE OF THE DEAD WAS IDENTIFIED AS A U.S. NAVY SERVICEWOMAN; THE OTHER 4 WERE ITALIAN NATIONALS. THREE ANONYMOUS TELEPHONE CALLS WERE RECEIVED CLAIMING CREDIT FOR THE BOMBING. INVESTIGATION AT THE CAR RENTAL AGENCY, FROM WHICH THE AUTOMOBILE UTILIZED IN THE ATTACK WAS LEASED, IDENTIFIED A JRA MEMBER AS THE INDIVIDUAL WHO RENTED THE AUTOMOBILE. THIS JRA BOMBING WAS APPARENTLY INTENDED TO COINCIDE WITH ANOTHER BOMBING IN NEW YORK CITY. FORTUNATELY, YU KIKUMURA, A KNOWN JRA MEMBER, WAS ARRESTED OUTSIDE NEW YORK ON APRIL 12, 1988. IN HIS POSSESSION AT THE TIME OF HIS ARREST WERE 3 IMPROVISED EXPLOSIVE DEVICES WHICH HE HAD CONSTRUCTED.

DURING JUNE 1988, U.S. NAVY CAPTAIN WILLIAM E. NORDEEN, A U.S. DEFENSE ATTACHE, WAS KILLED WHEN A PARKED CAR EXPLODED AS HE DROVE PAST IT ON HIS WAY TO WORK IN ATHENS, GREECE. THE TERRORIST GROUP "17 NOVEMBER" CLAIMED RESPONSIBILITY FOR THE ASSASSINATION. THIS IS THE SAME GROUP WHICH HAS CLAIMED RESPONSIBILITY FOR

NUMEROUS TERRORIST ATTACKS IN GREECE. SINCE 1975, "17 NOVEMBER" HAS CLAIMED RESPONSIBILITY FOR 7 ATTACKS AGAINST U.S. TARGETS IN GREECE, INCLUDING THE ASSASSINATIONS OF RICHARD WELCH, SPECIAL ASSISTANT TO THE U.S. AMBASSADOR IN ATHENS IN 1975, AND CAPTAIN GEORGE TSANTES, CHIEF OF THE U.S. NAVY MISSION IN GREECE IN 1983.

PAN AM FLIGHT 103 EXPLODED AND CRASHED AT LOCKERBIE, SCOTLAND, IN DECEMBER 1988, KILLING 270 PEOPLE. THIS INCIDENT HAS THE EARMARK OF A WELL-ORCHESTRATED ACT OF TERRORISM. THIS AIR DISASTER IS PROOF OF THE DEVASTATING POTENTIAL FOR LOSS OF LIFE AND DESTRUCTION OF PROPERTY AT THE HANDS OF TERRORISTS.

THE PAN AM 103 INCIDENT VIVIDLY ILLUSTRATES THE INTERNATIONAL COOPERATION AND COMPLEX COORDINATION NECESSARY TO CONDUCT AN EXTRATERRORITORIAL INVESTIGATION AFTER A TERRORIST ACT HAS OCCURRED. FOR EXAMPLE, FOLLOWING THE INCIDENT AND HOST COUNTRY INVITATION, THE FBI DISPATCHED NUMEROUS PERSONNEL TO SCOTLAND, ENGLAND, AND WEST GERMANY IN PURSUIT OF THIS INVESTIGATION TO INCLUDE INTERVIEWS, RECORDS REVIEWS, AND FORENSIC COLLECTION AND EXAMINATION. BRITISH, SCOTTISH, GERMAN, AND U.S. LAW

ENFORCEMENT REPRESENTATIVES HAVE BEEN WORKING CLOSELY TOGETHER AND ARE ENGAGED IN EXTENSIVE CONSULTATION ON ALL ASPECTS OF THIS COMPLEX INVESTIGATION. IN THE UNITED STATES, ATTORNEY GENERAL DICK THORNBURGH, SECRETARY OF TRANSPORTATION SAM SKINNER, CENTRAL INTELLIGENCE AGENCY DIRECTOR WILLIAM WEBSTER, FBI DIRECTOR WILLIAM SESSIONS AND NUMEROUS OTHER SENIOR OFFICIALS INVOLVED IN THIS CASE, HAVE ACTIVELY CONSULTED AND EXCHANGED INFORMATION WORKING TOWARD A SOLUTION TO THIS MOST HEINOUS ACT. THIS CRIME MUST BE SOLVED AND THOSE RESPONSIBLE IDENTIFIED AND BROUGHT TO JUSTICE.

IN APRIL OF THIS YEAR, U.S. ARMY COLONEL JAMES N. ROWE WAS ASSASSINATED IN MANILA, PHILIPPINES BY AUTOMATIC WEAPON FIRE WHILE TRAVELING IN HIS CAR. HIS DRIVER WAS SLIGHTLY WOUNDED IN THE ATTACK. INVESTIGATION HAS DETERMINED THAT THERE WERE 6 TO 7 ASSASSINS, 4 WERE IN THE AMBUSH VEHICLE AND 2 OR 3 WERE IN A BACK-UP VEHICLE. THE NEW PEOPLE'S ARMY (NPA), THE MILITARY ARM OF THE PHILIPPINE COMMUNIST PARTY, CLAIMED CREDIT FOR THE ATTACK. THE FBI IMMEDIATELY DISPATCHED INVESTIGATORS AND FORENSIC EXPERTS TO WORK WITH PHILIPPINE LAW ENFORCEMENT AUTHORITIES. BASED UPON THIS COOPERATIVE EFFORT,

ON JUNE 16, 1989, DONATO B. CONTINENTE, AN NPA MEMBER, WAS ARRESTED BY THE PHILIPPINE CONSTABULARY CRIMINAL INVESTIGATIVE SERVICE (CIS) AND CHARGED AS AN ACCESSORY TO THE MURDER OF COLONEL ROWE. ON AUGUST 27, 1989, NPA MEMBER JUANITO ITAAS WAS ARRESTED BY THE CIS AND CHARGED WITH THE MURDER. AN EYEWITNESS POSITIVELY IDENTIFIED ITAAS AS ONE OF THE GUNMEN. UPON CONFESSING, HE FURTHER IDENTIFIED SEVEN OTHER INDIVIDUALS INVOLVED IN THE ATTACK. ARREST WARRANTS HAVE BEEN ISSUED BY PHILIPPINE AUTHORITIES.

ON MAY 24, 1989, TWO U.S. CITIZENS WERE SHOT TO DEATH IN FRONT OF THEIR RESIDENCE IN LA PAZ, BOLIVIA, BY TWO INDIVIDUALS IN A VAN. THE VICTIMS WERE MISSIONARIES OF THE MORMON CHURCH. A GROUP NAMED "FUERZAS ARMADAS DE LIBERACION ZARATE WILLCO" CLAIMED RESPONSIBILITY FOR THE ATTACK. AGAIN, THE FBI DISPATCHED A TEAM OF INVESTIGATORS TO WORK CLOSELY WITH BOLIVIAN LAW ENFORCEMENT PERSONNEL. AS A DIRECT RESULT OF THIS JOINT INVESTIGATION, THIS SAME GROUP WAS IMPLICATED IN THE ATTEMPTED BOMBING OF THE MOTORCADE OF FORMER SECRETARY OF STATE GEORGE SCHULTZ IN LA PAZ DURING AUGUST 1988. FOUR INDIVIDUALS HAVE BEEN ARRESTED BY BOLIVIAN AUTHORITIES AND OTHERS

ARE BEING SOUGHT AS FUGITIVES.

TO ASSIST IN FBI EXTRATERRITORIAL PURSUITS, THE FBI MAINTAINS LEGAL ATTACHE OFFICES IN 16 FOREIGN COUNTRIES. THE PRIMARY MISSION OF FBI LEGAL ATTACHE OFFICES IS TO ESTABLISH AND SUSTAIN EFFECTIVE LIAISON WITH PRINCIPAL LAW ENFORCEMENT, INTELLIGENCE, AND SECURITY SERVICES THROUGHOUT DESIGNATED FOREIGN COUNTRIES THEREBY PROVIDING CHANNELS THROUGH WHICH FBI INVESTIGATIVE RESPONSIBILITIES CAN BE MET. THE LEGAL ATTACHE FUNCTION ALSO PROVIDES FOR A PROMPT AND CONTINUOUS EXCHANGE OF LAW ENFORCEMENT INFORMATION.

LEGAL ATTACHES AND ASSOCIATED LIAISON ACTIVITIES PLAY A VITAL ROLE IN THE SUCCESSFUL FULFILLMENT OF THE RESPONSIBILITIES OF THE FBI ABROAD. THESE ACTIVITIES ARE MAINTAINED IN STRICT ACCORDANCE WITH LIMITATIONS IMPOSED BY STATUTE, EXECUTIVE ORDER, ATTORNEY GENERAL GUIDELINES, AND FBI POLICY. BUT THIS IS NOT A "ONE WAY" STREET. THE FBI ASSISTS COOPERATIVE FOREIGN AGENCIES WITH THEIR LEGITIMATE AND LAWFUL INVESTIGATIVE INTERESTS IN THE UNITED STATES, CONSISTENT WITH U.S. POLICY REGARDING "FOREIGN POLICE COOPERATION" MATTERS.

IN CONCLUSION, I WOULD STRESS THAT THE FBI INTERNATIONAL COUNTERTERRORISM PROGRAM IS A STRONG AND EFFECTIVE PROGRAM. THIS IS IN PART DUE TO OUR EXPANDED ROLE IN EXTRATERRITORIAL MATTERS WHICH HAS LED TO GROWING AND IMPROVED LAW ENFORCEMENT RELATIONSHIPS WITH FRIENDLY FOREIGN GOVERNMENTS. HOWEVER, WE RECOGNIZE THAT THERE IS MUCH TO BE DONE IN ORDER TO CONTINUE OUR SUCCESS IN COMBATING TERRORISM. THROUGH ENHANCED COOPERATION, BETTER SHARING OF INFORMATION, AND IMPROVED INVESTIGATIVE TECHNIQUES WE WILL STRIVE TO KEEP AMERICANS WORLDWIDE FREE FROM THE THREAT OF TERRORISM.

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE, THIS CONCLUDES MY PREPARED REMARKS. I WILL NOW ADDRESS ANY QUESTIONS.

Mr. EDWARDS. Judge Crockett.

Mr. CROCKETT. Thank you, Mr. Chairman.

Both you, Mr. Barr, and you, Judge Sofaer, have——

Mr. EDWARDS. We have called the electrician. He has been here twice. I hope next time the electrician comes he can find out what's wrong.

[Brief pause]

Mr. CROCKETT. To what extent is there formal cooperation between the State Department and Justice in determining whether or not the situation in a foreign country is such as to justify our going in without the consent of that country to make arrests or apprehensions?

Mr. SOFAER. I think to the fullest extent necessary, Judge Crockett, I think there would be interagency coordination, but beyond that there would be coordination through the National Security Council as has been reaffirmed by General Scowcroft.

Mr. CROCKETT. Is there any policy of also consulting responsible agencies of the Congress before you take such action?

I say that because I notice, Mr. Barr, in your testimony at the bottom of page 4, you seem to suggest that the decision is left entirely to the executive authority and that there is no compelling necessity for him to consult the legislative branch of the government.

Is that true?

Mr. BARR. If the operation entails exercise of war powers then the administration would act consistently with the War Powers Resolution. If it required covert action, then the administration would adhere to the reporting provisions applicable to covert action.

Mr. CROCKETT. My final question. While there's a tendency to analogize the so-called war on drugs with the idea of war generally, I think all of us recognize that there are certain material differences.

It seems to me that it sort of strains a bit to say that the attempt to bring narcotics into this country presents the same character of national threat to our security that would be true in the case of some other military action.

I say that because I'd like to have you comment on the circumstances under which, in carrying on the so-called war against drugs, we would be justified, for example, in making what amounts to a military strike in some country in South America or in the Caribbean.

Can you visualize circumstances that would justify doing that?

Mr. BARR. As a matter of international law I'll defer to Judge Sofaer.

Mr. SOFAER. Judge, a few years ago I would have said probably not. But recently, we have been confronted with groups in some countries that have armed bands of people working for them who have received training in terrorist and other types of activities and they have made public threats, which in some instances they have carried out, not only against local authorities who are enforcing local laws against them, but against Americans just because America is so much a part of this war against drugs. And not only

against Americans in the local country but Americans in the United States.

There has been a recent statement by one drug syndicate which said that they would come over here and kill Americans systematically, including Government officials.

I simply have to deal with that—if someone makes that kind of an assertion that he's going to kill my legislators and my executive officials, I have to say to them, if you start doing that and you have in effect a military type operation under your command, with billions of dollars at your disposal, I'm going to have to tell my officials: You can treat this as an attack. You might be able to exercise force in self-defense against this kind of a force.

It hasn't happened yet to the extent that it would justify it. We have never asserted this power. But years ago, we wouldn't have said this about terrorism and now I think it's pretty much accepted, as Oliver Revell has testified, that terrorism raises self-defense threats, threats amounting to justifying self-defense.

I can envision, if this drug thing continues, Judge, that we will be confronted with that kind of a situation in the area of drugs as well.

Mr. BARR. Following up on that, Judge, I think that the international trafficking in drugs is as pernicious a threat as many wars could be.

As Judge Sofaer said, we are talking about organizations that have at their command billions and billions of dollars, more money than most countries in the world. They have private armies. They are heavily armed. They use ruthless tactics that wouldn't be used by most countries in the world. That's why we call them "narco-terrorists."

The impact on the United States is equally drastic. One-third of all felonies committed in the United States are committed by people under the influence of drugs. Ninety percent of all male arrestees in New York City are people who test positive for drugs.

Mr. CROCKETT. Thank you, Mr. Chairman.

Mr. EDWARDS. I'm curious as to why we have two Departments obviously at odds.

Were both of these statements cleared by the OMB?

Mr. BARR. Mr. Chairman, I don't think the statements are at odds. Both statements were cleared by OMB and cleared by the respective departments.

The Department of Justice issues legal advice on matters of domestic legal authority. The issue very simply is whether or not there is legal authority in the United States, under our own domestic laws, to engage in extraterritorial arrests without the consent of the host government.

We issued an opinion, as a matter of law, saying, yes, that was not a policy decision.

The bottom line is if we find a terrorist, for example, someone who blows an American 747 out of the sky, and if we find him basking him in some safe haven, enjoying the payoff that he received for blowing Americans out of the sky, the issue is whether or not we have the legal authority under our own laws to go in and arrest him and bring him to justice.

The Department of Justice says, yes, we do have the authority under our own laws. I don't think the State Department disagrees with that.

Mr. EDWARDS. So you believe that if you feel that you want to arrest somebody in a friendly country, a country with which we're not at war, that you can send a secret agent in there, violating the law of that country without asking the permission of that country, and kidnap that individual and put him on an airplane and bring him back home?

Mr. BARR. Both my statement and the example I've just given indicate that we're talking about a limited range of circumstances in the areas of——

Mr. EDWARDS. Limited or unlimited, Mr. Barr, my statement is what you have testified to.

Mr. BARR. Let me say what I testified to, and that is that we're talking about a limited range of circumstances in the area of counterterrorism and counternarcotics.

The Department of Justice understands and agrees with the Department of State that when the President is making a decision in the area of extraterritorial law enforcement, we have the intersection of a number of responsibilities. He acts as the foremost law enforcement officer in the country. He acts as the administrator of the foreign relations of the United States and as Commander in Chief. He has a range of responsibilities, including the responsibility to take into account international law and the international obligations of the United States.

He also must consider the practical consequences of what a particular operation may bring about.

He has to consider the precedential value, or danger of the action; and the practical difficulties of carrying out an operation, and the impact it might have on the cooperative relationships we have abroad.

But when push comes to shove, after he has weighed all of those factors, and he determines that it's in the national interest to pursue a particular law enforcement operation overseas, that judgment, as a matter of domestic law, overrides customary international law, and that is an authorized, legal, constitutional action for American agents to engage in.

At the same time, it is a violation, or under many circumstances it could be a violation of international law and we would have to be prepared to take the consequences of that violation.

Mr. EDWARDS. The consequences could be that the FBI agent, whoever you send over to kidnap this person, could be arrested and tried, and the United States could be sued and, of course, the individual would also be liable in a civil action; isn't that correct, and you're going to take that chance?

Mr. BARR. Those, in a given circumstance, could be risks, just like a national security operation could pose risks for the United States, such as the bombing of Libya, that posed risks to the people involved; in fact, pilots lost their lives in that raid.

Mr. EDWARDS. Why did you feel this was necessary at a time when we have for the first time in my 26 years in Congress, a detente with more nations than we have ever had before, with communism crumpling in all parts of the globe, and for us to come out

with this very radical proposal, why did you have to do it at this time?

You're talking about you're so worried about drugs, is that it?

Mr. BARR. The Office of Legal Counsel, we're lawyers; we give legal advice. We give advice as to what the scope of potential legal authority is. We don't make law enforcement policy. Our Office was asked by the FBI to reexamine the 1980 opinion, and we did that, and I think there was broad consensus within the administration that the 1980 opinion was fundamentally flawed and should be reexamined. So the easy answer to the question is, I looked at it because OLC was asked to look at it by one of our clients.

But more than that, it is true that in the postwar confrontation between the United States and communism there have been a number of changes recently. But at the same time, we are facing an increasing menace in the area of terrorists and narco-terrorists. There are still lawless countries in the world that sponsor terrorism that is directed against the United States.

Mr. EDWARDS. Mr. Barr, we keep very careful count in this committee, having oversight jurisdiction over the FBI, of acts of terrorism in the United States. To the great credit of the FBI, where there were more than 100 incidents a decade ago, the incidents this year and last year are infinitesimal; so what's the crisis?

Mr. BARR. Mr. Chairman, I'm sure the families of the people on Pam Am 103 will be glad to know that the incidences in the United States were infinitesimal.

Mr. EDWARDS. Mr. Revell, Mr. Barr said that the FBI asked for this opinion.

Why did the FBI ask for this opinion at this time?

Mr. REVELL. It wasn't at this time, sir; it was about 2 years ago that our Office of Legal Counsel was asked to look at a number of different scenarios.

Mr. EDWARDS. You were asked by whom?

Mr. REVELL. Our Office of Legal Counsel, within the FBI, was asked by our Criminal Investigative Division to look at a number of different scenarios and to determine what the extent of the FBI authority was under those various scenarios.

As a result of that examination internally, our Legal Counsel Division went to the Office of Legal Counsel at the Department and asked that the 1980 opinion be examined in light of the new extraterritorial responsibilities assigned by the Congress under the two acts that I specified.

I must say that we have not asked for any specific authorization to carry out any rendition in any foreign territory of any fugitive without the permission or the consent of that country.

We have had on occasions, however, situations where there have been informal processes utilized. In other words, the law enforcement agencies of a particular country, the judicial authorities of a particular country, or other competent authority have indicated to us a desire to deal with an expulsion rather than an extradition; a turning over at the border rather than a formal process, and so forth.

So what we were attempting to do was to determine the extent of our legal authority so we could stay well within that authority in carrying out our extraterritorial responsibilities.

Mr. EDWARDS. I can certainly think of no law passed by Congress or any provision of the Constitution that licensed the United States to be an international outlaw. What you have described, the administration, any administration, would have these long conferences, say that the situation is so serious that we must do this extraordinary thing, and then somehow or another license the FBI to go kidnap somebody without asking the consent of the nation involved.

I just think it's extraordinary that you would do that, especially at this time when we have these nations emerging into the sunshine of democracy; we want them to copy us as the beacon of democracy. And yet at the same time, we say that we're going to thumb our nose at international law, when really, whenever the President makes that decision that it's so serious—in my lifetime, we've had these situations where in the long run we lose terribly.

In 1941, it was Japanese in America that were so dangerous, and so we locked up 40,000 of them. The next thing we had in this country was communism, and it was so dangerous, with Senator McCarthy running wild. We persecuted people for communism in this country, even though it wasn't a crime. And now, of course, it's the war on drugs.

We're not going to give up our liberties or our reputation as an international friend of other countries because we have a perceived threat overseas.

Mr. REVELL. And we haven't asked to do that, sir.

Mr. EDWARDS. Something triggered all of this publicity. We didn't start this argument. We started to read it in the newspapers that you people have come to this wonderful conclusion that the FBI can go overseas and kidnap somebody. And Mr. Barr has a long opinion that says, yes, he can, under certain circumstances, and so forth.

Mr. SOFAER. Under domestic law. That doesn't mean that the President would in fact order such action when it was inconsistent with international duties or treaties, or other law.

Mr. EDWARDS. I wish I would hear the President say, or somebody say, that we're not going to do it. That we are going to be good international citizens.

Mr. BARR. You're not fairly characterizing the opinion or our statements today, Mr. Chairman.

Mr. EDWARDS. You haven't shown us the opinion, Mr. Barr—it would be helpful. We're all lawyers, too, we're grown up and we're also very security-minded here.

Mr. BARR. We're saying that there is authority under domestic law to depart from customary international law. We're not saying that we should thumb our noses at international law. International law is something that should be taken into account. And we're not saying as a matter of policy that this should be done at all or that any particular type of operation should be performed.

Mr. EDWARDS. Do you think that Mr. Rafsanjani in Iran, if his parliament passes or authorizes him to do the same that it would be appropriate for Iran, or Noriega to do the same thing, when they want to arrest somebody in the United States without our permission?

Mr. BARR. Arresting, at least in the case of Iran, would be a step forward. Up until now they've felt free to assassinate their enemies.

But I reject any notion of moral equivalence between the United States and countries that are outlaw countries that engage in terrorism. The United States does not engage in terrorism. We do not allow terrorists from the United States and to use the United States as a base to launch attacks on citizens of other countries. We are leading the fight in the world against terrorism.

Now the purpose of law ultimately is to protect innocent people from predators. And the people we're fighting are ruthless predators. They're not restrained by law. They mock the law, and they manipulate international rules of law to shield themselves.

We are acting in the service of freedom in the civilized world. And in a just system the laws protect the innocent from predation.

Mr. EDWARDS. I understand, Mr. Barr, that there has been another opinion issued since June and we formally request a copy.

Mr. BARR. I've issued a lot of opinions since June.

Mr. EDWARDS. On this subject. Well, perhaps not.

If there is one, we make a request for it.

Judge Crockett, do you have further questions?

Mr. CROCKETT. Yes, Mr. Chairman.

I would like to know how these principles we have been discussing here relate to or apply to the situation in Panama.

We have in effect said that Noriega is a criminal and he has violated American law, who said the same thing with respect to the issuance of an indictment—the Department of Justice has issued an indictment.

My question is whether or not we make an exception for either de jure or de facto heads of government and that under no circumstances are we prepared to go in and arrest the head of government and bring him back to the United States for trial? Is there such an exception?

Mr. BARR. An exception to what?

Mr. CROCKETT. To the application of this principle that whenever we feel that the national security of the United States is affected, we are justified in going into the country without its consent and arresting whoever needs to be brought to justice and bring them back here.

Mr. BARR. I repeat: As all three witnesses said today, there has been no change in U.S. policy. Our policy is to work cooperatively with governments to suppress terrorism and illegal narcotics trafficking. Any deviation from that policy would be considered at the highest levels of government within the framework of the National Security Council and would involve consultation between the Secretary of State and the Department of Justice.

Mr. CROCKETT. Your answer then is "yes." In any case where the situation is so serious that we have returned any indictment against him, we are justified in going in and arresting him; is that what you're saying?

Mr. BARR. No, that's not what I'm saying.

Mr. CROCKETT. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Dempsey.

Mr. DEMPSEY. Mr. Barr, in preparing the opinion, did you take into account the law that makes it a crime to kidnap or abduct a foreign official?

Mr. BARR. Which law are you talking about?

Mr. DEMPSEY. Section 1201 of the Federal Criminal Code, as I read it, makes it a crime under U.S. law for anybody to kidnap or abduct a foreign official and the United States may exercise jurisdiction over the offense if the alleged offender is present in the United States.

Mr. BARR. The opinion did not address either how specific treaties would apply in a given context or how other statutes, other than the FBI's enabling statute, would apply.

It reserved those questions and reviewed the rationale of the 1980 opinion.

So the answer is, I did not specifically consider that statute in the 1989 opinion.

Mr. EDWARDS. If the gentleman would yield—Executive orders are not necessarily law. The law in this country are acts of Congress, signed by the President under the Constitution, Mr. Barr.

Mr. BARR. Which Executive order are you referring to, Mr. Chairman?

Mr. EDWARDS. You are quoting the 1980 opinion and I believe an Executive order as giving the authority for what we're talking about today.

Mr. BARR. No, I didn't cite an Executive order. I referred to the Executive order in the context of the longstanding ban on assassination by employees and officials of the United States.

Mr. DEMPSEY. So in considering the legal authority of the FBI to override international law, you did not consider statutes that, on their face at least, appear to be make it a crime for the FBI or anybody else to kidnap a foreign official.

Mr. BARR. I think the opinion, as I recall, notes that there may be statutes that affect any particular operation, but that we do not survey various statutes that could be applicable. That's not to acknowledge that the specific statute you cite would prohibit an authorized operation.

Mr. DEMPSEY. Did you consider, when you did the opinion, the adoption in 1986 of the Omnibus Diplomatic Security Antiterrorism Act which extended extraterritorial jurisdiction over terrorist crimes committed against Americans abroad? And did you consider that in adopting that law, Congress declined to include a provision authorizing self-help measures—Congress declined to include a provision authorizing seizure abroad without host country consent?

Mr. BARR. No.

Mr. DEMPSEY. Now, when Judge Sofaer testified on that bill in 1984, he testified, "I want to emphasize that I do not read this bill as granting any authority for self-help in the enforcement of its provisions."

Now, in exercising jurisdiction over crimes committed abroad, under the provisions of that statute would you consider it relevant that Congress declined to authorize self-help?

Mr. BARR. If I was considering that statute as a source of authority, obviously that would be relevant.

Mr. DEMPSEY. In interpreting the general authority of the FBI, is it relevant that in a subsequent statute extending extraterritorially the authority of the FBI—extending extraterritorially the jurisdiction of the United States—isn't it relevant that Congress declined to grant authority for the type of self-help that you're talking about?

Mr. BARR. As I say, if I was relying on that statute as a source of authority in a particular operation, I would have to review the legislative history and determine its relevance.

Mr. DEMPSEY. And your opinion didn't do that?

Mr. BARR. No, it did not.

Mr. DEMPSEY. Just to be clear, have you reviewed this issue since the June opinion?

Mr. BARR. What do you mean by reviewed?

Mr. DEMPSEY. Reviewed it in terms of another opinion from your office?

Mr. BARR. Do you mean have I reexamined the propositions in the June 21 opinion?

Mr. DEMPSEY. No, have you supplemented the opinion?

Mr. BARR. By issuing a supplementary opinion?

Mr. DEMPSEY. That's the question, yes.

Mr. BARR. No.

Mr. DEMPSEY. Judge Sofaer, have you or the State Department received any expressions of interest or concern from other countries about press reports on this opinion?

Mr. SOFAER. Yes, we have.

Mr. DEMPSEY. What has been the tenor of those communications?

Mr. SOFAER. Several foreign countries have either approached our ambassadors overseas or have come in to see officials within the Department, including myself, and expressed their concern about the newspaper stories that they read which indicated that somehow a new law had been passed, or a new authority had been given to the FBI to engage in extraterritorial arrest without consent.

We have explained to those countries that no new law has been passed and no new authority has been created; and that the policy of the United States regarding extraterritorial unconsented arrest has not changed.

Mr. DEMPSEY. Would they have been concerned if it had changed?

Mr. SOFAER. I have no doubt about it; they would be greatly concerned.

Mr. DEMPSEY. Obviously if this authority were exercised in a particular country, it would have an adverse impact on our relationships with that country.

Do you think that it would also have an adverse impact, in terms of the State Department's ability to deal with other countries in seeking cooperation and negotiation of treaties?

Mr. SOFAER. Yes, if we acted inconsistently with international law, fairly interpreted, yes, I think it would. But I want to emphasize that we do occasionally engage in extraterritorial activity such as the *Achille Lauro* diversion. And while those kinds of actions have created trouble, they have been generally accepted, because

we were acting within what I consider to be a fair interpretation of international law.

Mr. DEMPSEY. Mr. Revell, has the FBI been contacted through any of its legal attachés or otherwise about this opinion?

Mr. REVELL. Yes, it has.

Mr. DEMPSEY. And what's been the nature of those communications?

Mr. REVELL. Concern that we were going to mount up like the Lone Ranger and go out and start seizing fugitives all over the world, which, of course, was never contemplated under any circumstance. And we've given advice back that there is no change in our policy or our procedure; that the Department has rendered a legal opinion, but that opinion does not mean that there are operations or activities that will take place under that opinion.

And we have given assurances to those countries with which we deal that there will be no change in our practice and our policy of coordinating with them and getting their approval for all law enforcement activities that would occur within their territory on behalf of the FBI.

Mr. DEMPSEY. All of the testimony has said that this is a legal opinion and not a change of policy.

When will we know when there's a change of policy? When we read about the seizure of someone in the newspaper?

Mr. BARR. I think the President's—or at least the White House statement, states the policy of the United States.

Mr. DEMPSEY. And that is?

Mr. BARR. In any given case, the President must weigh his constitutional responsibilities for formulating and implementing both foreign policy and law enforcement policy. An interagency process exists to ensure that the President takes into account the full range of foreign policy in international law considerations as well as the domestic law enforcement issues raised by any specific case.

There will be no arrests abroad that have not been considered through that interagency process.

Counsel, if I could clarify a statement I made earlier when you asked if I had issued a supplementary opinion.

I have not issued any supplementary written opinion. Obviously, since that opinion was issued, I've been asked a lot of questions about it, and I have expounded upon it and its potential application in given circumstances. But I have not gone back and revised or changed the opinion.

Mr. EDWARDS. Is it your testimony that in each of these cases the President would have to give his permission, personally?

Mr. BARR. That doesn't seem to be what the White House statement says.

Mr. EDWARDS. Is it your opinion that if an FBI agent is sent into some friendly country to grab somebody that the President would, of necessity, have to make that decision?

Mr. BARR. As a matter of law or as a matter of policy?

Mr. EDWARDS. What do you think would happen? You're the legal adviser, tell us, do you think that the President would have to be—would be advised, or would give permission—of policy, as a matter of policy?

Mr. BARR. As a matter of policy, the interagency process is a National Security Council process, and I expect that the President would be involved. But this statement from the White House is a statement of what the process is.

Mr. EDWARDS. Mr. Revell has testified on page 4, paragraph 1, that the FBI would send in agents to a foreign country if they are directed to do so by the Department of Justice. That's your testimony, Mr. Revell.

Mr. BARR. I think what Mr. Revell was saying is that the FBI is not going to internally make these decisions. It's going to take its directions from the Department of Justice, which will in turn take its directions from the National Security Council process.

Mr. EDWARDS. We don't have testimony on that, Mr. Barr. We have the testimony of Mr. Revell, who says that if the Department of Justice to do it, the FBI will do it.

Mr. BARR. Normally an order for a particular operation would not come directly to the FBI; it would come through the Attorney General. But the process is a National Security Council process that would involve review by the deputy's committee at the National Security Council. The deputy's committee may recommend Presidential consideration.

So I believe that the framework contemplated now would provide for presidential consideration.

Mr. EDWARDS. Thank you.

Judge Sofaer, I have one more question.

In your testimony you emphasize that this kind of power could be exercised in the event that there is really great danger, that the United States is under attack, so to speak.

Is it your testimony that if the President decides that there is some drug guy in Colombia, for example, that is so menacing to the United States that that alone would be of sufficient danger to the United States so that Mr. Revell could send in some FBI agents?

Mr. SOFAER. No, Mr. Chairman. My testimony would be to that, that there would have to be specific acts or dangers that amounted to an attack on the United States under the U.N. Charter, and that the President would then have to be able to act in self-defense, which requires action that does not go beyond what is necessary and proportional.

But once these tests have been met, yes, it is conceivable that that would be an action. And I would consider that action to be one which the Nation as a whole would support, including Congress, because it was an action in self-defense.

Mr. EDWARDS. Thank you.

Mr. BARR. Just to follow up on that, with respect to Colombia in particular, there's obviously no consideration whatever being given to this kind of operation in a situation like Colombia where the Government is actively cooperating with us and is engaged in extradition.

I think Judge Sofaer was talking about a hypothetical situation.

Mr. SOFAER. Absolutely. We salute Colombia, Mr. Chairman, and we would not interfere whatsoever in Colombia without its consent. They are facing up to tremendous adversity and fulfilling all their obligations under international law in terms of cooperation with us.

Mr. EDWARDS. Then you could send agents into Panama or Iran, right, because they don't cooperate internationally, or with us in sending some defendants back to the United States?

Mr. SOFAER. We're not contemplating sending agents anywhere right now, Mr. Chairman.

Mr. DEMPSEY. Judge Sofaer, is it correct that there are some people in the United States whom we have not extradited, accused terrorists whom the United States has failed to extradite?

Mr. SOFAER. That is correct. Occasionally that happens.

Mr. DEMPSEY. Do you read this opinion at all as implicitly recognizing the authority of the country seeking extradition to seize those suspects here and take them back?

Mr. SOFAER. Absolutely not.

Mr. DEMPSEY. Why not?

Mr. SOFAER. Because I would assume that most other countries also would reach the same conclusion as this opinion; they would say, we have the domestic law authority to act perhaps in this kind of seizure. But because of our international legal obligations, either of themselves or as read into domestic law through treaties and otherwise, we will not do so.

I would assume that they would reach that conclusion as we would.

Mr. BARR. Let me just add to that, that the Department of Justice works very hard to extradite terrorists to face justice in other countries; and frequently, because we do have a system of laws, we have to work through the court system.

Mr. DEMPSEY. Would an operation involving U.S. agents arresting a suspect abroad be a covert action requiring a Presidential finding?

Mr. BARR. It depends upon the circumstances.

Mr. DEMPSEY. What sort of circumstances would require it, and what sort would not?

Mr. BARR. If the action was going to be acknowledged by the United States and the people involved were going to be acknowledged by the United States as carrying out an operation of the United States, it was not going to be covert, although it might involve tactical surprise, then that would not necessarily be a covert action.

Mr. DEMPSEY. Judge Sofaer, how many armed officials or agents would we have to send into another country without that country's consent to conduct activities there before it rose to the level of an act of war?

Mr. SOFAER. Any act of war?

Mr. DEMPSEY. Yes.

Mr. SOFAER. I don't mean to suggest that I have any difficulty as such with that concept in the abstract, but in terms of present-day international law, that is not a concept that is used.

Mr. DEMPSEY. So sending armed agents into another country to conduct activities there without the consent of that country, in your view would not be an act of war?

Mr. SOFAER. No. Under the U.N. Charter, this kind of an action could possibly create a right of self-defense. It would be regarded as a form of aggression or perhaps even an attack. But the concept of act of war is really defunct under the U.N. Charter.

We believe—and all of us, I think, support this—that if some act of that kind happens, we're not supposed to go to war. We are supposed to act what we think necessary to stop that kind of action, but not beyond that.

Mr. DEMPSEY. But the insertion of agents into a foreign country would then trigger a right of self-defense on the part of that nation?

Mr. SOFAER. It could. In certain circumstances, it could.

Mr. DEMPSEY. And how isn't that moral equivalency?

It seems to me like you are saying that sauce for the goose, sauce for the gander.

Mr. SOFAER. No one here is advocating these kinds of actions when they would amount to attacks or other forms of aggression. If we were acting in self-defense, it would follow that we would not be acting in a manner that could be characterized as aggression.

An act in self-defense is a justifiable act under international law. It might violate the territorial integrity of another state. They may claim that we are acting as aggressors; and in fact, Libya did claim that we were acting as aggressors. But we believe that in good faith on the basis of very, very powerful evidence, that we were acting in self-defense.

If you agree that we were acting in self-defense, then Libya has no justification for treating our action as a form of aggression.

Mr. DEMPSEY. Mr. Revell, how could you possibly send agents into a country without host country permission and carry out an abduction and expect them to get out of the country safely?

Mr. REVELL. I don't think that I can discuss ways that we could carry out an operation like that tactically in an open session; of course, it can be done.

The difference between that and a covert operation would be that as in the the Fawaz Younis case, which was, of course, an arrest on the high seas, we would immediately bring the person before a magistrate and the charges would be read in public and the circumstances of the arrest would be made a matter of public record. And, of course, the individual defendant would have a right to challenge the authority of that arrest in court.

But, again, let me emphasize that we have no such plans and we have no such intentions. But let me give you an example of where we believe that it would be justified: A situation where there is no law; where there is no effective government—and where from that territory there were attacks being made against our civil aviation, hostages being held, and there was an inability of the law enforcement agencies of Government to do anything to protect U.S. citizens, under those circumstances we would be derelict if we did not attempt to execute in a positive fashion the law of the United States.

That would not be our decision. That would be the decision of the President, the Attorney General, and so forth.

But I think we would have to propose, where there was no other alternative, and American lives had been lost and were further at risk, that that be an alternative.

Mr. EDWARDS. That's a different formula than described by the other witnesses, but we'll accept that.

Mr. REVELL. That was our intention.

Mr. EDWARDS. And different in your testimony, too, your testimony is that if the Attorney General says do it, you do it.

Mr. REVELL. That was not the intent of my testimony, sir. My intent was that that you take orders from the Attorney General.

Mr. EDWARDS. But your explanation is quite different than Judge Sofaer's and Mr. Barr's. It is much more restrictive, much more restrictive.

Mr. SOFAER. I certainly didn't mean to suggest that I had a more expansive view of the situation, but I think the record will speak for itself, Mr. Chairman.

Mr. EDWARDS. Thank you very much, gentlemen.

I want to point out that this committee did not initiate this national or international argument that is going on, that we only read about it in the newspapers—it came from you people. There is a great deal of concern, and I share it. Other nations and most people in the United States who have read the accounts and watched whatever takes place on television understand or believe that there has been a new announcement by this administration that hereafter the FBI can go into friendly countries, countries with which we are not at war, and kidnap people that we want back in the United States, without the consent of the host country.

That's the way it has been reading and the voluminous opinion, Mr. Barr, that we haven't seen, apparently—I'm not quite sure what it says, other than to say that, yes, indeed, in some circumstances this can happen.

Mr. BARR. My testimony summarizes the principal conclusions of the opinion.

Mr. EDWARDS. We thank you. We thank you all for being here. It has really been very helpful and we appreciate your testimony.

The hearing is adjourned.

[Whereupon, at 11:30 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

seems to me like voluntary spirit is a necessary part of encouraging it.

Senator LEVIN. Thank you so much for your work in this area. I appreciate your coming this morning.

We next have a panel made up of Edward Reich, who is the Acting Assistant Administrator for Enforcement and Compliance Monitoring of the Environmental Protection Agency; we have Mr. William Barr, an Assistant Attorney General in the Office of Legal Counsel for the Department of Justice; and Llewellyn Fischer, who is General Counsel of the U.S. Merit Systems Protection Board.

We will call on you in the order in which your names appear on the witness list, here. So, Mr. Reich, we welcome you. We thank you for appearing this morning.

TESTIMONY OF EDWARD E. REICH, ACTING ASSISTANT ADMINISTRATOR FOR ENFORCEMENT AND COMPLIANCE MONITORING, U.S. ENVIRONMENTAL PROTECTION AGENCY [1]

Mr. REICH. Thank you, and good morning, Mr. Chairman. With your permission, I would like to summarize my statement and ask that the full statement be included in the record.

Senator LEVIN. It will be made part of the record.

Mr. REICH. Thank you, sir.

My name is Edward Reich, and I am here in my capacity as Acting Assistant Administrator for Enforcement and Compliance Monitoring at the U.S. Environmental Protection Agency. I am very pleased to be here today to testify on S. 971, the Administrative Dispute Resolution Act of 1989. That EPA has been asked to testify is an honor to EPA in that it recognizes the agency's leadership in the use of alternative dispute resolution techniques. Both the EPA Administrator and Deputy Administrator advocate and support the use of ADR for a range of disputes involving the agency. As I will describe shortly, EPA has used ADR in a number of different types of disputes, including enforcement actions and rulemakings. EPA intends to continue in its efforts to use ADR and believes that this legislation can aid both EPA and other agencies in doing so.

One of the primary uses of ADR at EPA has been in the area of enforcement. In August 1987, former Administrator Lee Thomas issued guidance on the use of ADR in EPA enforcement actions. In addition to descriptions of the different forms of ADR and their applications within EPA's enforcement program, the guidance specifically endorses the use of ADR in selected enforcement cases and requests our regional offices to nominate appropriate cases for ADR. This guidance established the only formal program for the use of ADR in an enforcement program by a Federal agency.

Since that time, EPA regional personnel have proposed the use of ADR in more than a dozen enforcement and defensive actions. Of these proposals, the parties mediated three cases to settlement, and three others are now in mediation. Interestingly, almost all of the other cases nominated for ADR were then quickly settled by means of traditional negotiations among the parties. Additionally,

[1] See p. 72 for Mr. Reich's prepared statement.

a half dozen of the Agency's consent decrees and consent orders provide for the use of ADR techniques to resolve certain potential future disputes.

I believe it would be useful at this point to briefly describe two of our more significant enforcement ADR experiences. In the *Sheridan, Wyoming* case, EPA and the city had been attempting to resolve a violation of the Safe Drinking Water Act since 1979. The violation of drinking water standards involved the water supply to 300 persons by the city. In 1986, EPA proposed ADR as a means of resolving this long-standing problem. After considerable discussion, the city and the agency agreed to a process involving both mediation and fact-finding. One of the mediator's first acts was to bring in additional parties not directly involved in the enforcement action, but whose participation was essential to solving the underlying environmental problem, such as the county, relevant State agencies, the State legislature, and citizens groups.

The ultimate solution reached after less than a year of mediated discussions included the formation of a joint City-County Powers Board to address long-range drinking water problems throughout the valley where the city is located. This solution will result in improved drinking water for 5,000 people rather than just the 300 who were the basis for EPA's original enforcement action. This resolution would have been unlikely to emerge from the traditional adversarial process.

The underlying infractions in the *Union Carbide* case involved violations of Section 8(e) of the Toxic Substances Control Act for failure to report information about a certain chemical which allegedly posed a substantial risk to human health or the environment. The parties settled this action, and as part of the agreement, the company was to conduct an audit of its studies of other chemicals. As part of this audit, the parties anticipated information might be discovered that EPA would believe was reportable and the company would claim was not. To resolve these anticipated disputes, the parties set up a fact-finding process with neutrals of particular technical expertise to make certain factual determinations prior to the initiation of a civil action for penalties by EPA. Although no disagreements have yet arisen under this portion of the consent agreement, the ADR provision enabled the parties to establish a workable process to resolve any future, factual disputes.

EPA is also beginning to implement the use of arbitration in Superfund cost recovery actions under $500,000. Regulations addressing this effort were effective August 28th.

In the regulatory context, EPA established the Regulatory Negotiation Project in 1983 to explore and demonstrate the value of negotiation and other consensus-building techniques for developing better regulations which can be implemented in a less adversarial setting. Since that time, the project has run seven regulatory negotiations and is beginning an eighth. In five of the seven, the parties reached consensus on the proposed rule. Of the six rules that have been promulgated, only two have been challenged in court. In contrast, significant rulemakings using the more conventional approach tend to be challenged in court approximately 80 percent of the time. We believe that with careful selection of rulemaking projects, negotiated rulemaking can result in proposed rules that

meet statutory requirements and which are pragmatic, innovative, environmentally effective, and acceptable to all parties.

Pursuant to its commitment to expand the uses of ADR, EPA has taken a number of steps to encourage its use within the Federal Government. The Agency is working with the Administrative Conference of the United States to develop a computerized roster of neutrals available for all Federal agencies. The Agency is also an active member of the Conference's ADR Roundtable which fosters ADR use in Federal practice. In this respect, the efforts of other agencies in using ADR should not be overlooked.

As you noted, Mr. Chairman, the Army Corps of Engineers has used ADR extensively to resolve disputes with contractors, and the Navy has made it a policy to presumptively use ADR in small contract disputes.

Relative to the legislation under consideration today, EPA welcomes the introduction of S. 971 as a generally positive step towards incorporating the use of effective ADR processes into Federal agency practices. However, we believe that there is no need for legislation authorizing the use of ADR in grant disputes, and thus recommend deletion of Section 3(b)(1).

EPA strongly supports the provisions of the bill regarding confidentiality of communications in ADR processes. Without this provision, parties may be unwilling to consider the use of ADR. We suggest that the provision be clarified to ensure that protected documents are not subject to disclosure under the Freedom of Information Act.

In conclusion, EPA believes that S. 971 provides the framework for an excellent piece of legislation. We appreciate the efforts of the Subcommittee in fostering the use of ADR and your interest in EPA's program. I would be pleased to answer any questions you may have.

Senator LEVIN. Mr. Reich, thank you so much.

Our next witness is William Barr, Assistant Attorney General in the Office of Legal Counsel, Department of Justice. Mr. Barr, we welcome you.

TESTIMONY OF WILLIAM P. BARR, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE,[1] ACCOMPANIED BY JOHN O. McGINNIS, DEPUTY ASSISTANT ATTORNEY GENERAL

Mr. BARR. Thank you, Mr. Chairman.

Accompanying me today is John McGinnis, who is a Deputy Assistant Attorney General in the Office of Legal Counsel, and I ask that my statement be entered into the record in its entirety. Permit me to summarize some of the key points in it.

Senator LEVIN. Thank you.

Mr. BARR. The Department of Justice has encouraged and continues to support the use of ADR techniques in those cases where ADR can reduce the time and expense devoted to litigation. S. 971 is an ambitious attempt to promote ADR in the administrative disputes area. Although many of the ADR techniques covered by the

[1] See p. 86 for Mr. Barr's prepared statement.

bill may already be available to agencies, S. 971 would increase the use of ADR by adding the authority of a specific congressional enactment. Throughout the Government, the bill would exert a gravitational pull toward use of ADR as a means of deciding disputes.

S. 971 would authorize and encourage agencies to explore a number of ADR techniques that we, like the sponsors of the bill, would like to see more frequently used: conciliation, facilitation, mediation, fact-finding, minitrials, and settlement negotiations.

Because we believe it essential to develop alternatives to the full-scale litigation of disputes involving the Government, we have encouraged participation by our attorneys in a variety of experimental ADR methods. Our efforts have included the issuance of a policy statement encouraging the use of minitrials, participation in minitrials, and support for judicially supervised alternative dispute resolution techniques.

We have one major concern with the proposed legislation, and that is its provisions regarding binding arbitration. We believe that the binding arbitration provisions create practical problems as well as raising serious constitutional concerns. Let me focus first on the practical questions we think binding arbitration raises.

We agree with Senator Grassley that the principal problem here is judicialization of the administrative process. But the administrative process was essentially created to be arbitration. Arbitration is different than these other dispute resolution techniques we've been talking about. It is a trial. It's an adversary proceeding where both sides go to the mat for a decision.

The reason we've set up this administrative state is so that that process can take place in an informal and expeditious setting outside Article III courts. That's why we've created administrative agencies. Now, if the problem is that these processes have become overly judicialized within the administrative agencies and ossified over the years, we believe we should directly address that problem and reduce the amount of judicialization within the administrative agencies and provide alternative avenues within the administrative agencies so that parties can essentially get informal arbitration within the framework of the agency administrative process. That would obviate the legal questions, and certainly it doesn't go about trying to solve a problem by just letting the problem exist and throwing on another layer of procedures.

If the problem is delay in the docket, if the reason for delay and cost is that we don't have enough administrative law judges who are arbitrators—they're the neutral expert party—if we don't have enough of them or if they're misallocated, then we can address that within the existing administrative framework. If the problem is not the delay in the docket but the cumbersomeness and time-consuming nature of the procedures used in the decisional process, then we can provide alternative measures that can be used consensually by the parties within that process.

The second problem we have with the use of private binding arbitration is that it's really inconsistent with the whole rationale of administrative law. The reason we create administrative agencies, expert agencies, with neutral administrative law judges is precisely so that we can have a coherent application and development of the law in accordance with Congress' intent in setting up the structure.

Now, one ensures that policies are achieved and effectuated by the consistent application of principles in specific cases, which means precedent, or where we depart from precedent and change the way the law is applied to somebody, we do so in a principled, reasoned way that essentially creates another rule, which again has precedential value. And it's that way that we develop a coherent program. That's why we have an administrative agency.

Private arbitration of disputes creates just the opposite. It's desultory decisions that have no precedential value. As a consequence, similarly situated citizens could get different treatment from the Government because there is no precedential value in these decisions. That doesn't mete out justice.

Also, it deprives the agency of a framework in which to develop the law in a coherent fashion. Agencies frequently in the context of a specific case say, yes, well, the rule we've been following would lead to such-and-such a result. But this case throws into bold relief that that's not a good rule that we've been applying or that there are facts here that maybe we should have sort of a subpart B of this rule. And it's in the framework of dealing with these cases that the expert agency responsible, constitutionally responsible and responsible to Congress and the laws that Congress has passed, can work out a fair regulatory regime. You cannot get that with private arbitrators.

Also, when the Government applies or when a Government official makes a decision within the administrative process, it's the very fact that that serves as a precedent that acts as a constraint on the decision. And it ensures that neutral principles are applied. So that when a decision is made according to a rule and a finding by the decision-maker, the decision-maker has to say this is going to serve as a precedent. We have to be willing to apply this rule to every similarly situated person. That way you ensure that the rule is a neutral principle, and that's what this system of justice is all about, and that's what the administrative process is all about. But when you have people making decisions in individual cases where there's no precedential value to their decisions, that constraint is removed.

Third, these arbitration provisions go way beyond the justifying rationale for them. Remember, in the typical administrative process, you start with the initial decision-making level, typically a hearing where the facts are pinned down and there's an initial decision, and then you have layers of review to ensure that you do have a coherent program from the standpoint of policy.

Now, if the argument for arbitration is that you want to cut down on the cumbersomeness of that initial decision-making process, the hearing, then that might justify theoretically substituting the arbitration for the ALJ decision. But it doesn't justify doing away with review by responsible Government officials at superior levels, particularly from a policy perspective. The binding arbitration provision here, then, is being offered not as a substitute for the cumbersome hearing at the beginning, but as a way of short-circuiting the entire decisional process. We don't think that the case has been made to justify that apart from the constitutional concerns that that raises.

Now, the defenders of binding arbitration say, when push comes to shove, that we're not interested in getting into policy disputes or policy issues. This is a device that can be used, really, in pure fact-bound situations, really just pure fact-finding, where there's no policy component. There are a few problems with that. One, that's not what the bill says. And Senator Grassley said, well, as a matter of prudence, there are some areas you might not want to get into. It goes beyond prudence. I think all constitutional scholars would agree that there are areas where binding arbitration—where it serves as a binding precedent, where it affects third parties, where it does get into policy areas—is unconstitutional. Even those Law Review articles that are cited in support try to make this distinction between fact-finding and policy resolution.

Well, that's a very hard line to draw. You have Law Review articles and treatises written on what's a question of fact, what's a mixed question of fact and law, what's a question of law. It's very hard to define in any given context what a policy is, but it's particularly hard to say in advance whether a particular decision will implicate policy matters.

One of the fundamental defects with this bill is it commits the Government to living with a decision where the commitment has to be made in advance of the decision. That decision could involve—it's impossible to predict whether any given decision is going to involve—a policy component. So this is not a bill that's limited by its terms to fact-finding. Fact-finding is a term of art. This is not a bill limited to fact-finding. It's a bill that would permit arbitration of policy matters and policy-laden disputes.

Let me just briefly turn to constitutional issues. As we say in our testimony, we have serious constitutional concerns about binding arbitration. We believe that it is inconsistent with the appointments clause and with the President's responsibilities to see that the law is faithfully executed.

Now, there is a way of structuring arbitration so that you would obviate these constitutional concerns. The arbitrator could be selected and could be removed by the head of an agency with the arbitral decision not to become final until reviewed and approved by the head of the agency who is accountable to the President. This form of arbitration would avoid the constitutional issues, as I said. Arbitrators would be inferior officers appointed by the heads of the agencies and accountable to them, and their decisions would be subject to review. Under this arrangement, if the private party disapproved of the arbitrator selected by the agency, he could be allowed to withdraw his consent to arbitration.

While this method of structuring arbitration would be constitutional, in our view, it would not obviate the practical concerns we expressed about arbitration in the administrative context. Therefore, the option that we would recommend to the Committee would be to drop arbitration altogether and, instead, encourage the use of simpler procedures within the system of the administrative process.

Thank you, Mr. Chairman.

Senator LEVIN. Thank you, Mr. Barr.

Our third witness on this panel is Llewellyn Fischer, who is the General Counsel of the Merit Systems Protection Board. Thank you for being here, Mr. Fischer, and please proceed.

TESTIMONY OF LLEWELLYN M. FISCHER, GENERAL COUNSEL, U.S. MERIT SYSTEMS PROTECTION BOARD [1]

Mr. FISCHER. Thank you, Mr. Chairman. I'd like to make my written statement a part of the record. I do have a few points I would like to summarize.

I'm very pleased to appear before the Subcommittee on behalf of the Merit Systems Protection Board. The Board, as we said in our written statement, has made extensive use of ADR over the past 5 years, and this use has resulted in an eight-fold increase in how we've utilized ADR.

A few points that are worth mentioning: The Board's use of ADR, of course, is limited to the employment field. We're confined to hearing employee appeals challenging agency personnel actions.

Secondly, the Board already has a statutory basis for use of ADR techniques. Title V, Section 7701(h) expressly authorizes the Board to implement alternative methods for deciding its cases.

The Board's ADR program is flexible. Except for mandatory prehearing conferences, no particular procedure or ADR device is required for use by its administrative judges in hearing cases.

Another feature that bears emphasis is that the Board has provided for a very thorough and continuing training program for its administrative judges in ADR methods.

In summary, the ADR techniques used by the Board have resulted in faster and less expensive case processing. For example, in the year 1988, cases using ADR were disposed of in 65 days, and cases adjudicated on the merits through the usual Board procedure took 99 days. Another feature and another favorable factor about ADR, mentioned in Senator Grassley's, testimony is that it avoids some of the acrimony that is fostered by the formalized judicial type of procedures between an employee and his or her agency.

The way ADR works at the Board is that when an appeal is filed, an order is issued that acknowledges the appeal. Both parties are then given the opportunity at that point to provide additional information to the administrative judge assigned to the case. And after that, there is a prehearing conference for simplification of the issues and some initial discussions on settlement.

One of the features at this point of the process is that the parties are asked to approve waiver of ex parte communications, and the Board makes sure that the representatives of the various parties have the authority to engage in settlement talks and bind their respective clients for purposes of disposing of the controversy.

If the parties agree to settle as part of this ADR process, the agreement is deemed final, and the Board dismisses the action with prejudice. The settlement agreement can be entered into the record, and if it is, then the Board can also enforce the settlement agreement.

A few brief comments on S. 971—the Board is committed to use of ADR procedures and that commitment is demonstrated by Board activity over the past 5 years utilizing ADR. Authorizing ADR techniques by legislation will, based on our experience, encourage the use of ADR. The provision for training those who utilize the

[1] See p. 107 for Mr. Fischer's prepared statement.

techniques in the legislation is crucial in our view, because training of our administrative judges has been a key factor in the success of the ADR program at the Board.

Flexibility is also crucial, and this legislation seems to give some flexibility concerning use of particular techniques. One thing that we found noteworthy based on our experience is that the bill does provide for participation of neutrals. The Board has not found it necessary in conjunction with its use of these techniques to have some outside neutral appointed. The administrative judge assigned to the case has been able to use these techniques effectively without the use of someone from outside.

That concludes my brief remarks. I'd be pleased to answer any questions at this point.

Senator LEVIN. Thank you, Mr. Fischer.

Let me first ask both Mr. Reich and you some questions about the current use of binding arbitration. Do you use binding arbitration currently? What you would consider to be binding?

Mr. REICH. Sir, the single instance where EPA has expressly adopted regulations for arbitration is in the solid waste program and, more specifically, under Section 122(h) of the Superfund law, which directed the Agency to adopt regulations for arbitration for cost recovery; that is, recovery of money spent by Superfund for claims of $500,000 or less. The regulations we have adopted are styled as binding arbitration.

There is, however, one very important caveat that I should make regarding Section 122(i) of Superfund. We are required, once we have a proposed decision by the arbitrator, to give public notice and entertain comments on that proposed decision. If the comments convince us that the decision is either inappropriate or improper or inadequate, then we have an obligation to seek modification of the decision so that it no longer is inappropriate, improper, or inadequate. If we then seek yet fail to obtain modification, we would withdraw from the proceeding, the decision would become null and void, and we would be basically back to square one.

Senator LEVIN. That's as close you come to binding arbitration?

Mr. REICH. Yes, sir.

Senator LEVIN. Mr. Fischer?

Mr. FISCHER. We do not use it at all, Mr. Chairman. Our use of these techniques is confined to an employee of the Board, an administrative judge who uses the techniques. We do not use outside neutrals.

Senator LEVIN. Outside what?

Mr. FISCHER. We do not use outside neutrals or arbitrators.

Senator LEVIN. Mr. Reich, could you describe for us any general types of cases which in your opinion are unsuitable for ADR?

Mr. REICH. Based on our admittedly still limited experience, I think the kinds of considerations that S. 971 puts forward reflect many of the concerns we have. We consider it generally inappropriate to use any kind of ADR process when dealing with policy issues or where the law is unsettled, and, therefore, where there is the potential for somebody to make legal decisions in the absence of clear precedent.

In the context of regulation development, and where the issue is one of fundamental value, we have found that the ADR process

does not work as well. Thus our focus has tended to be on those kinds of cases where the law is well settled, we have a lot of experience, and we're dealing primarily with factual disputes.

Senator LEVIN. Going back to your answer to the last question, that you have a new regulation in Superfund which allows you basically to ditch the decision of the arbitrator if you don't like it or find it unsuitable or whatever those other words are; I would not describe that as binding arbitration. I don't know whether in the industry it's described that way, but as a lawyer, I would not describe that as binding arbitration. But without getting into the labeling of it for a moment, under those regulations, do both the parties to the arbitration have the rights to ditch it, or only the agency?

Mr. REICH. Only the agency, though only based on public comment that leads to a determination of inappropriateness, impropriety, or inadequacy. We could not simply withdraw from the arbitration process on our own initiative.

I should note that we have as of yet no experience with that regulation though it is my opinion that because a majority of these types of cases involve a single party and a small penalty, public comments will be rare.

Senator LEVIN. Is that a final regulation?

Mr. REICH. That is a final regulation. It only became effective August 28th.

Senator LEVIN. Did the proposed regulation contain that approach?

Mr. REICH. It did, sir, but the statutory provisions are very explicit.

Senator LEVIN. That follows the statutory language?

Mr. REICH. It follows a specific statutory requirement for that kind of process. Obviously, if we start using arbitration and many decisions wind up getting undone because of the public comment process, I think that will have an effect on people's willingness to use the process. We don't believe that will happen, but we do not yet have any practical experience.

Senator LEVIN. Is there an ALJ process which also can be used in that same area that you described, or is it limited to that option of the notice and comment process?

Mr. REICH. There is a different administrative process, but it does not involve the use of an ALJ.

Senator LEVIN. So there's not an option to use either the arbitration approach or the ALJ in that particular area?

Mr. REICH. Not in that particular area.

Senator LEVIN. Mr. Barr, do you by any chance know of any existing arbitration approach in any Federal agency which goes beyond the one which Mr. Reich just described for Superfund? When I say "goes beyond," do you know what I mean?

Mr. BARR. Right.

Mr. MCGINNIS. I believe there are some in the Federal Labor Relations Authority area where there are certain arbitrations between unions and Government that are or could be understood as binding arbitration. We think that what happened in that area was that arbitration is such a prevalent form of dispute resolution in

the private labor context that it was just brought right over. But that is the really one exception in the area.

Senator LEVIN. Has that been tested constitutionally, do you know?

Mr. MCGINNIS. I'm not aware that there has been ever any decision under the appointments clause or under the President's supervisory authority.

Senator LEVIN. Have there been a lot of decisions by arbitrators in that area?

Mr. MCGINNIS. I'm really not aware of the practical decisions in that area.

Senator LEVIN. You don't know how many arbitrators have been appointed in that area and have rendered decisions?

Mr. MCGINNIS. No, I don't.

Senator LEVIN. Do you know if the arbitrator can be removed by either party in that area?

Mr. MCGINNIS. I don't.

Senator LEVIN. Okay. Back to the EPA. Do you train employees in the use of ADR?

Mr. REICH. Yes, sir, we do.

Senator LEVIN. Would you submit for the record your training processes?

Mr. REICH. I would be delighted to.

[The information of Mr. Reich follows:]

EPA ENFORCEMENT ADR TRAINING PROGRAM

The ADR training program for EPA enforcement employees involves two efforts which center on the agency's Negotiation Skills Training Course. This course is held in every EPA regional office and at headquarters every year, and instructs EPA enforcement personnel, both attorneys and technical staff, how to negotiate enforcement disputes. As part of this course, the instructors briefly cover the basics of ADR, and EPA's policy to use it in appropriate cases. Additionally, in conjunction with the course, one of the instructions usually convenes a meeting of regional enforcement personnel, under the auspices of the Regional Counsel's Office, to discuss specific applications of ADR to the Region's enforcement docket.

Senator LEVIN. Do you notify parties involved with EPA as to the availability of ADR?

Mr. REICH. I do not think we do it systematically or routinely. If there is a case where we think it has some potential value, we will raise it. But we do not do so as a matter of course.

Senator LEVIN. I believe we had some data from Mr. Fischer on time savings. You may have given us some of that, too, in your testimony. I may have missed it. Did you? And if not, do you have any data on time savings, if any, resulting from the use of ADR?

Mr. REICH. I do not have any in the enforcement context. I would be glad to see if the Agency has some in the regulatory context and submit it if we do.

Senator LEVIN. That would be helpful if you would do that.

[The information referred to follows:]

TIME SAVINGS IN EPA'S REGULATORY PROGRAM THROUGH USE OF ADR

Of the seven negotiated rulemakings undertaken by EPA, five resulted in a final rule. We estimate that the average duration of the rule promulgation period decreased from 42 months for a traditional major rulemaking, to 26 months for a negotiated rulemaking. It is important to note, however, that this estimate is based on very little empirical evidence. Nonetheless, the results are promising.

Senator LEVIN. Does this statute give you tools that you now don't have? Are there areas that you now are not using these tools where you would if this authority were put into law?

Mr. REICH. I think the legislation touches on many of the areas for which we are trying to use ADR. It certainly provides greater encouragement to use ADR and make it more acceptable for people both within the agency and who deal with the agency. From my perspective in the enforcement process, I think some of the provisions in the bill creating support mechanisms such as the development of a roster of neutrals, would support efforts we are making. So, while I think we can do a lot of things without legislation I certainly believe it is helpful.

Senator LEVIN. Going back for one more minute, again, to the Superfund area, when your interim regs, your temporary regs were published and during your comment period, did you receive much comment on that ability of the agency to ditch the decision? Was that the subject of a great deal of debate, discussion, comment?

Mr. REICH. I am not aware that it was, again, because that provision tracks very carefully the statutory language; and all we did was to amplify some of the mechanics. As to the question of whether the Agency ought to have that right, there was not a lot of comment. I think there were perhaps a couple of people who felt that it was an imbalanced process.

Senator LEVIN. Do you think the agency should have the right if the other party doesn't have a similar right?

Mr. REICH. Because of the particular concerns that we have as a Government agency, I think so.

Senator LEVIN. Aren't these factual matters? Then, again, we can separate facts from policy.

Mr. REICH. My basic assumption is that because of the very narrowly defined issues that will normally arise, the small monetary amounts involved, and because we will need to be very careful about cases that we agree to submit to arbitration, it is not likely to lead to a lot of public comment. Therefore, the Agency would not have to exercise its right of withdrawal pursuant to that provision very often. If that turns out not to be the case, then I think that there may be a little inbalance.

Senator LEVIN. Is it intended that this approach be used in purely factual matters? Is that what the intent of the statute and the regs are? Or is it intended that the arbitration approach also apply, for instance, to questions of congressional intent or other policy issues?

Mr. REICH. I think it is not intended to apply to policy issues, but rather to factual issues.

Senator LEVIN. If it is intended to apply only to factual issues, why should the agency have a right to ditch a fact-finding that's binding on the other party if the other party can't do the same? Why is it a one-way street if it's really a pure fact determination?

Mr. REICH. Part of the reason may go to the——

Senator LEVIN. Excuse me for interrupting. I'm talking in terms of fairness now.

Mr. REICH. I understand that.

Senator LEVIN. In terms of statutory scheme, your answer could be because that's what the Congress decided in its "wisdom."

Mr. REICH. Right. One possible reason is that in Superfund cases, as you are well aware, we are dealing with a large number of potentially responsible parties on the same side of a controversy. It is entirely possible that the arbitration proceeding might only involve participation by some subset of those parties. For instance, parties who have chosen not to participate in the arbitration proceeding, as they have a right to, could be concerned that the decisions reached may have an impact on them down the road. Thus, while the contribtion proceeding might deal only with factual issues, there may be other parties who might be concerned by the implications of the decision.

Senator LEVIN. Mr. Fischer, just a couple questions for you, and then we'll ask Mr. Barr some questions.

Do you encourage the parties to use ADR techniques?

Mr. FISCHER. Yes.

Senator LEVIN. Is there a formal process where you notify parties?

Mr. FISCHER. Usually, it's at the first prehearing conference on the controversy that the parties are advised of different options that they can pursue in terms of devices, ADR devices.

Senator LEVIN. Do you consult with the Administrative Conference or the Federal Mediation and Conciliation Service regularly on this, or do you just now have the process pretty well put in place that you don't have to have those regular consultations?

Mr. FISCHER. Well, we do have an established process, and we have considerable experience. But we also engage in regular communications with ACUS, in particular.

Senator LEVIN. Mr. Barr, on the ALJ's versus arbitrators issue, as I understand your testimony, you have got less difficulty with using the arbitration process with certain restrictions if it is part of an ALJ process.

Mr. BARR. That's right, Mr. Chairman. We go to a lot of trouble to create this expert neutral body of decision-makers, to keep them neutral, to keep them expert, and to keep them politically accountable and responsible within the framework of a Government agency. Reading Senator Grassley's article about the use of ADR, really the one substantive achievement that he was able to point to, to quantify savings and greater efficiency, was the program in the Merit Service Protection Board, the VEAP program, which is a reform taken fully within the context of the administrative process and permits short-circuiting of some of the judicialization that has grown up.

The other point I'd like to mention on this is the question of why should it be binding. Now, ALJ decisions are reviewable, and they can be reversed within the agency by the top levels of the agency. And yet every day thousands of decisions are reached by the lower level people that are never reversed.

I don't understand why an arbitral award should be given greater dignity and greater insulation from review, particularly policy review, than a decision of the ALJ.

Senator LEVIN. Perhaps for two reasons, arguably. One is that there are, as I understand it, a large number of factual disputes that are not now subject to an ALJ proceeding. Secondly, isn't the ALJ intended to be part of an agency process, kind of one foot in,

one foot out; whereas, an arbitrator would be somebody, as I understand it, who would be more independent than an ALJ? It would be someone outside of the agency, is that not generally what is assumed?

Mr. BARR. Well, no. I think we would say that an ALJ is genuinely independent.

Senator LEVIN. They are independent, but they are also in a sense part of an agency.

Mr. BARR. They are part of an agency in that they have a governmental duty in addition to their independence, which a private arbitrator doesn't have.

Senator LEVIN. Would a private arbitrator not be more independent than an ALJ?

Mr. BARR. No, I don't believe an outside arbitrator would be more independent.

Senator LEVIN. Would he be less independent?

Mr. BARR. I think it's hard to tell because I'm not sure what kind of policing mechanisms we would have to determine their independence.

May I say something?

Senator LEVIN. Yes.

Mr. BARR. I think the literature is pretty clear that the way arbitrators make their living frequently is by splitting the difference. If an arbitrator gets a reputation for being too harsh in one direction or the other, he is not going to be agreed to by either side. And so very frequently, arbitrators tend to split the baby and to impose not as much insistence on legal niceties as an ALJ might.

Now, that's not a good thing from the Government's standpoint, in my opinion, when we're trying to protect the public fisc.

Senator LEVIN. Public?

Mr. BARR. The fisc. Taxpayers' money. The Government is the ultimate deep pocket.

Senator LEVIN. Are there a large number of disputes which you would consider factual disputes which are now not subject to the ALJ process?

Mr. BARR. Yes. There probably are in Government.

Senator LEVIN. If there were an arbitration process that were adopted which had the same kind of protection that the ALJ process has in terms of regulatory review, would that not be a useful mechanism? Since there are disputes which are now not subject to the ALJ approach, why not find an approach that will resolve those factual disputes which meets the constitutional test of agency review, if, in fact, that is a constitutional requirement?

Mr. BARR. Well, to the extent that the process was within the Government, done by Government officials, neutral officials, and to the extent it was subject to review, we'd have no problem with that, as long as it was a suitable subject matter for that kind of fact-finding.

Senator LEVIN. Do you think that the arbitrator would have to be a Government official in order for this to be constitutional, providing the Government had the right to discard the decision?

Mr. BARR. No. As long as the decision was reviewable, then I think private arbitration would be permissible.

Senator LEVIN. To meet both the constitutional test and the practical test, then it's the reviewability by the agency which is the standard for you?

Mr. BARR. Yes.

Senator LEVIN. And if that reviewability were built in here, the way it was on that Superfund statute, then your practicality argument and your constitutional argument would be met?

Mr. BARR. If there was reviewability, for example, to the same extent there was reviewability of an administrative law judge's decision, yes.

Senator LEVIN. In your view, is this process more or less formalistic than the ALJ process?

Mr. BARR. I haven't seen any evidence that it's either.

Senator LEVIN. It can be either, in other words?

Mr. BARR. Well, you know, arbitration can be a pretty cumbersome process. There's not that much difference between arbitration and a trial. I've participated in arbitrations in the private sector, and it's very much like a trial. It has a certain mystique because the word sounds less nasty than "trial." But the fact of the matter is I doubt that there's that much time saved in the actual time of litigating a matter, between an arbitration where there's a lot of money at stake and an administrative process within the agency. I haven't seen the case made.

Senator LEVIN. Have you seen the case attempted?

Mr. BARR. Attempted? Not yet.

Senator LEVIN. No, have you heard anyone argue the case that arbitration is less cumbersome than litigation or an ALJ process? Have you ever had somebody set before you those arguments?

Mr. BARR. Yes.

Senator LEVIN. You're just not persuaded by them, then?

Mr. BARR. Well, I haven't seen the data. In the private sector, there's no doubt that arbitration saves a lot of time. Now, a lot of that is docket waiting. It takes a long time to get before an Article III court. So you can save a lot of time. And depending upon the nature of the arbitration and amount of money involved, you can short-cut a lot of the cumbersome Federal Rules of Civil Procedure. So when you're juxtaposing it to a trial in Federal district——

Senator LEVIN. No, no, to an ALJ process.

Mr. BARR. ALJ. I haven't seen the case made that the time it takes to arbitrate is significantly less than the time it would take to have an administrative hearing before an ALJ.

Senator LEVIN. Can you give us a status report on the Department of Justice experimental program in mandatory arbitration? Apparently, you've got an experimental program, at least you did a couple years ago, in 10 Federal district courts across the country. It was run by the Federal Judicial Center, and certain types of cases were removed from the usual judicial process and submitted to resolution with kind of a streamlined hearing and a neutral arbitrator. Are you familiar with that?

Mr. BARR. Well, if I am, what I'm thinking about are minitrials. The results of those are not binding on the Federal Government, so it's not a binding arbitration situation. But I'll be glad to get the facts from the Civil Division and give you a report on it.

Senator LEVIN. The article in the Administrative Law Journal indicated—this is a 1987 Law Review article—that it was just under way for only 2 years. The preliminary results indicate the programs may have induced early settlements, reduced time and costs associated with litigation and increased litigant satisfaction with the judicial process. So if you would, dig into that for us and get us what the Justice Department position is on that program that was run by the Judicial Center, as to whether you like it, don't like it, whether it's still in place or whatever.

Mr. BARR. Can I make another point, Mr. Chairman?

Senator LEVIN. Sure.

Mr. BARR. I think that reviewability would actually increase the use of arbitration in the Government because, as I said, it's very hard to predict in advance what the policy implications of a given case may be. And so there is going to be a natural reticence for the Government to agree to arbitration where it has to commit, before it even sees the decision, to be bound by it. Whereas, as long as there can be assurance of appropriate review so that there is administrative coherence and so that policy concerns can be decided by the appropriate officials, I think you would see a much wider use of summary kinds of procedures.

I think the experience in agencies is that very few of these decisions are overturned when they're decided by ALJ's.

Senator LEVIN. I may have asked this question; if so, forgive me. Is it intended that the ALJ's be limited to findings of fact in all cases where we now have ALJ's? Or do we have them making policy decisions? They do both.

Mr. BARR. Right.

Senator LEVIN. And it's intended they do both.

Mr. BARR. Right.

Senator LEVIN. And in the pure fact-finding situations, though, the agency still has the review power to the same extent that they do in policy decisions of ALJ's?

Mr. BARR. Well, I think that varies from statute to statute. In some statutes, it's a more narrow review, and in others it's de novo review.

Senator LEVIN. On the record?

Mr. BARR. Right.

Senator LEVIN. Anybody want to add anything before we call on our next panel?

[No response.]

Senator LEVIN. We may have some questions for the record for each of you. We're grateful for your being here. Thank you.

We finally call upon three true experts in the area of dispute resolution, a very distinguished panel made up of Gail Bingham, Vice President of The Conservation Foundation; Eldon Crowell, who is an attorney with Crowell and Moring; and Phil Harter, who is representing the American Bar Association.

We want to thank you all for your work in this area. You're a prestigious panel, indeed, and we'll call on you in the order that we have you on our witness list. Ms. Bingham, you're first. Please proceed.

STATEMENT OF
EDWARD E. REICH
ACTING ASSISTANT ADMINISTRATOR
OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT
COMMITTEE ON GOVERNMENT AFFAIRS
UNITED STATES SENATE

September 19, 1989

Good morning, Mr. Chairman and members of the Subcommittee. I am pleased to appear before you today to discuss the United States Environmental Protection Agency's (EPA) experience with alternative dispute resolution (ADR) techniques and the Agency's analysis of and comments on S. 971, the "Administrative Dispute Resolution Act of 1989." EPA supports the practice of using ADR in certain disputes involving many federal agencies and is of the opinion that S. 971 contains most of the necessary elements of a tool for implementing such practice. Both the Administrator of EPA, William K. Reilly, and the Deputy Administrator, F. Henry Habicht II, have spoken in support of the use of ADR. In fact, at a recent Agency-hosted meeting on EPA's use of negotiated rulemaking and ADR, attended by senior American and French jurists, Administrator Reilly remarked that he has a strong professional and personal interest in the subject of informal dispute resolution, and that ADR methods should be more extensively utilized within the federal government. We believe EPA has demonstrated leadership in incorporating ADR techniques in its regulatory and enforcement programs and that the benefits we have witnessed could be achieved by other agencies.

The Agency is convinced of the effectiveness of ADR processes, utilizes them to facilitate several aspects of its enforcement and regulatory activities, and continues to explore ways to increase the appropriate uses of ADR. Specifically, the Agency has used ADR mechanisms to expedite resolution of protracted enforcement disputes, to lessen the potential that future disputes will require legal action, to expedite development of several key regulations, and to facilitate effective discussions with community and industry representatives.

As members of the Subcommittee are aware, alternatives to litigation as a means of dispute resolution have long been utilized in the private sector to resolve contractual and commercial disputes. Alternative dispute resolution processes have not, however, been widely used in the public sector, and particularly by federal agencies, to resolve disputes which arise out of regulatory conflicts or enforcement cases. EPA believes that S. 971 may be a positive step toward encouraging the use of appropriate ADR processes into federal agency practices.

This is not to say, however, that the bill is perfect. EPA has several areas of concern including whether protected documents are subject to disclosure under the Freedom of Information Act and the applicability of the bill to grants and other assistance agreements. As to the grants question, Section 3 (d) (1) of the bill requires agencies to amend their standard contract, grant and other assistance agreements to authorize and encourage ADR where disputes arise under future grant agreements to allow and foster

the use of ADR by grantees in resolving disputes with other parties.

EPA believes Section 3(d)(1) should be amended to delete the reference to grants and other assistance agreements. This will help ensure that agencies continue to make program officials who implement legislative policy objectives through assistance agreements responsible for dispute resolution. Agencies would, of course, continue to be able to use alternative means to resolve assistance disputes as a matter of discretion. Several agencies, including EPA, resolve disputes involving grants and other assistance agreements through the use of informal, nonlegalistic procedures administered by program managers.

Moreover, there appears to be no need for legislation authorizing the use of ADR by grantees. As a general rule, grantees may exercise broad discretion in resolving disputes with other parties. This is reflected in the government-wide regulations governing federal grants to state and local governments. For example, under those regulations, grantees and subgrantees are fee to resolve disputes arising out of procurements in accordance with good administrative practice and sound business judgment. This provision certainly includes the use of ADR.

EPA strongly supports Section 584 of the bill regarding the confidentiality of communications in the ADR process. Without this provision, parties may be reluctant or unwilling to consider the use of ADR. We suggest that the provision be clarified to ensure that protected documents are not subjected to disclosure under the

Freedom of Information Act. Under current case law, agencies may be required to release to the public, agency documents exchanged in dispute resolution proceedings.

Substantial incentives exist for the use of ADR processes by EPA. At this time of budgetary constraints and increasing statutorily mandated responsibilities, it is imperative that EPA make every effort to increase the effectiveness of its enforcement and regulatory activities. In this regard, the use of ADR processes may substantially shorten the time required to promulgate regulations, allow the Agency to process greater numbers of enforcement actions and achieve the environmental benefits of those actions, more quickly, and greatly enhance the effectiveness of other Agency activities.

ENFORCEMENT

In enforcement activities of various statutes within its jurisdiction, the Agency has found that ADR processes can be effective in expediting resolution of difficult settlement negotiations. Primarily, EPA utilizes ADR processes to provide assistance to Agency personnel in the negotiation of statutory civil violations. On average, over 90 percent of all civil actions initiated by EPA are resolved through settlement negotiations. Though most of these actions are effectively resolved through traditional negotiation methods, a number of complex and multiparty negotiations are greatly aided by the effective use of ADR processes to augment EPA settlement activities. The Agency has

not, however, used ADR processes to replace the aggressive litigation of appropriate civil and criminal actions, but instead has used ADR as an aid to this overall goal.

In order to establish and foster the use of ADR processes in EPA enforcement activities, the Agency has established a National Enforcement ADR Program. On August 14, 1987, former Administrator Lee Thomas issued a "Guidance on Use of Alternative Dispute Resolution Techniques in Enforcement Actions". A copy of the Guidance is available for your information. This Agency-wide Guidance, which is one of the first of its kind among federal agencies, has the full support of EPA Administrator Reilly and establishes a preference for the use of ADR in appropriate enforcement cases. The Guidance provides basic information on ADR processes, suggests criteria for selection of cases for use of ADR and for selection of ADR professionals, and establishes procedures to employ ADR professionals and to approve cases for ADR use. Model ADR agreements and procedures for conduct of ADR processes are also included.

Issuance of the Guidance has been followed by an ongoing effort to educate Agency personnel about the advantages of ADR and to actively solicit appropriate cases for ADR assistance. Senior attorneys with extensive expertise in negotiations and ADR serve as resources for regional and headquarters staff in the selection of appropriate cases for ADR assistance and the employment of ADR professionals. Training of Agency staff and management in negotiation techniques and the use of other ADR processes is

provided regularly. The Agency has been greatly aided in its efforts to utilize ADR processes.

ADR processes utilized by the Agency include mediation, fact-finding, arbitration, mini-trials, and settlement judges. The Agency has explored the use of ADR processes in more than a dozen enforcement and defense actions, including cases in all EPA enforcement programs. Of these efforts, three civil actions have been resolved through the use of mediation, and three others are now in mediated settlement negotiations. EPA has also utilized a minitrial to assist settlement negotiations. Additionally, a half dozen of the Agency's consent decrees provide for the use of mediation or fact-finding to resolve specified future disputes regarding compliance with the consent agreements should the parties fail to negotiate their disagreements.

As part of its Federal Facility Compliance Strategy, EPA has provided for the use of ADR processes in resolving disputes with other agencies. It is possible that ADR may provide, in the future, a useful approach in these situations.

Some examples of the Agency's use of ADR processes in the enforcement context are provided for your information.

oo Settlement Mediation - U.S. v City of Sheridan (Wyoming)
This was a civil action for violations of the Safe Drinking Water Act, involving numerous parties with a long history of mistrust and protracted negotiations. Parties included federal, state, and local governments, industry and local citizen organizations. After

extended unsuccessful negotiations between EPA and the City of Sheridan, the parties, with assistance from EPA, employed a professional mediator to facilitate settlement discussions. The mediator expanded discussions to include affected citizens and other affected interest groups allowing for a full review of the issues preventing settlement by the local government. A settlement agreement was obtained shortly after employ of the mediator. We believe that the ability to use ADR professionals in this situation provided an effective venue for settlement discussions that would not have existed under traditional negotiation methods.

oo Fact-Finding Settlement Provision -- U.S. v Union Carbide Corp.

This civil action was initiated for violations of reporting requirements of the Toxic Substances Control Act. As part of the administrative settlement agreement, the parties included a section which provided that future factual disputes that arose over the company's compliance with statutory reporting requirements would be forwarded to a panel of neutral experts selected by the parties for factual determination prior to initiation of civil action for penalties by EPA. EPA agreed to submit the issues to the experts for a non-binding factual determination in deciding whether enforcement action was warranted.

oo Private Industry Mediation Services

Agency enforcement actions under the Superfund law often involve sites where liability for site cleanup costs are shared

jointly and severally by numerous companies. Some hazardous waste sites involve hundreds of potentially liable companies, each legally liable for the full cost of site cleanup. This multiplicity of defendants makes traditional settlement negotiations extremely difficult. To assist the numerous codefendants to reach agreement on a common negotiating position for settlement discussions, private firms provide mediation expertise to industry. ADR services generally include mediation of the negotiations between the numerous liable defendants and data evaluation efforts to appropriately allocate the costs of cleanup among the defendants. The Agency wholly supports the efforts of such private ADR services firms. In many cases, the employment of private mediation services by liable industrial parties is crucial to the Agency's subsequent ability to complete settlement negotiations without resort to lengthy court procedures.

oo Small Claims Arbitration - CERCLA

EPA is investigating the use of ADR for statutory claims for which the compensation sought by the Agency is small in relation to the cost of traditional legal approaches to enforce the claim. The use of an arbitration process to determine the appropriate amount of recovery could save federal resources while expediting the resolution of claims. In this regard, EPA is preparing to implement the use of arbitration to establish claims by the Agency for costs under $500,000 expended under the Superfund program. Regulations addressing this effort have been published in the

Federal Register and have recently become effective.

oo Administrative Settlement Judges

The court-mandated use of jurists as settlement mediators in filed civil actions has been used with great success by several state and federal courts. In an effort to expedite the resolution of cases filed with the EPA administrative court system, the Agency's Administrative Law Judges (ALJ) have begun to use mediation in appropriate disputes prior to hearing. The ADR process will be conducted by an ALJ not associated with the substance of the dispute. EPA is currently training ALJ jurists in ADR techniques. EPA believes that the use of settlement judges will expedite the resolution of a number of Agency administrative actions.

CONSENSUAL APPROACHES TO REGULATION AND POLICY DEVELOPMENT

The Agency has found that under the right circumstances the use of ADR processes provides many benefits in terms of time and resources in the promulgation of regulations. The average time required for promulgation by EPA of a major regulation through the traditional method used by federal agencies is in excess of twenty-four months. This approach involves the Agency researching and preparing a draft regulation for publication in the Federal Register and subsequent response by the Agency to public comments. The regulation is then modified as deemed appropriate in response to comments by the Agency and promulgated in final form. The

Agency has found that this process generally requires EPA response to numerous duplicative public comments and in approximately 80% of the cases, results in the filing of legal action against the Agency.

In order to increase the efficiency of its rulemaking activities, EPA is committed to and is using negotiation and other consensus-building techniques, such as policy dialogues and research strategies, to develop regulations and policies. Negotiated rulemaking or regulatory negotiation (Reg-Neg) and policy dialogues are two of the most prominent ADR activities undertaken by the Agency. Both are consensus-building processes designed to improve communication between the Agency and the public.

oo **Negotiated Rulemaking**

A regulatory negotiation brings together EPA and representatives of affected interest groups (industry, environmentalists, citizens, unions, state and local governments, etc.) in a federally-chartered committee for public face-to-face negotiations. The committee's goal is to reach consensus on resolving the major issues or the actual language of a proposed rule. The Agency provides assistance to the committee by providing expertise in design and conduct of the Reg-Neg process, providing access to neutral facilitators and funding of EPA expenses, and facilitating communications between the parties and with OMB and congressional staff.

The Reg-Neg process results in both benefits and costs for the Agency. It presents an opportunity to build consensus among potential antagonists and thereby reduce litigation. It may also provide EPA with access to information important to the regulatory decision early in the process. On the other hand, Reg-Negs are time consuming for senior Agency staff and provide no guarantee that consensus will be reached and litigation avoided. Also, while successful Reg-Negs may save time, unsuccessful Reg-Negs may take more time as the Agency in such cases will have to go back to the normal rulemaking process. In addition, it may be difficult to pull together the parties that reflect all views and interests in regulatory issues.

EPA used the Reg-Neg process in development of seven regulations and is about to commence an eighth negotiation. Included are rules under the Toxic Substances Control Act (Asbestos in Schools, Emergency Pesticide Exemptions, and Farmworker Protection Standards), the Clean Air Act (Nonconformance Penalties for Heavy Duty Trucks, and Performance Standards for Woodburning Stoves), and the Resource Conservation and Recovery Act (RCRA Minor Permit Modifications, and Underground Injection Well Standards). In five of the seven efforts, the parties reached consensus on the proposed rule while the other two failed to achieve agreement. Of the six rules that have been issued as final regulations, only two have been challenged in court. In both cases the issues at trial were substantially reduced, resulting in expedited outcomes. In addition, we believe that public comments on all negotiated

proposed regulations were substantially reduced due to the process. However, for the Farmworker Protection Standards Rulemaking consensus was not reached and the rule has not been finalized.

Agency assessment of the Reg-Neg program to date has determined that with careful selection of rulemaking projects negotiated rulemaking can produce proposed rules that meet statutory requirements which are pragmatic, innovative, environmentally effective, and which are more likely to be accepted by affected industries, concerned environmental groups, and other interested parties. Negotiated rulemaking is most appropriate in regulatory situations which involve the resolution of a limited number of related issues, none of which involve fundamental questions of value or extremely controversial national policy.

COMMUNITY RELATIONS ACTIVITIES

The siting of hazardous waste landfills and incinerators, and the cleanup of contaminated sites under statutory enforcement actions, are matters of extreme sensitivity and public concern. A siting or cleanup decision often raises public interest and desire for involvement in decisions affecting the site. Unfortunately, these situations often involve emotional and divisive positions which make discussions difficult. The Agency has found that employment of ADR professionals by the parties to such a dispute is extremely useful in facilitating discussions. A neutral professional can explore positions and ensure that all necessary parties are represented. This approach has been used by

the Agency and state officials with success at several sites. We believe that use of ADR professionals to facilitate discussions with community and industry representatives greatly enhances the Agency's ability to make environmentally sound siting decisions acceptable to all interested parties.

In 1987, EPA conducted a pilot effort using ADR to resolve conflicts between the Agency and citizens at three Superfund sites in Massachusetts, Ohio, and Washington. The project was initiated to explore the use of dispute resolution techniques to assist EPA in implementation of response actions at Superfund sites, and to involve communities in a communication process which would reduce tensions while addressing community and Agency concerns pertaining to proposed response actions. As an outcome of this experience, we believe that ADR can be useful when normal community relations activities have not or are not likely to be successful. The Agency will explore further use of ADR to aid citizen understanding of the Superfund process in specific communities.

INCORPORATION OF ADR INTO FEDERAL PRACTICE

In addition to the incorporation of ADR processes into the normal enforcement and regulatory activities of the Agency, EPA has taken a number of steps to foster the use of ADR within the federal government. The Agency has funded and is currently working with the Administrative Conference of the United States to develop a computerized roster of "neutrals" for all federal agencies. This roster, which will be administered by the Conference, will provide

a mechanism for interested parties to obtain information on ADR professionals available for disputes involving federal agencies or statutes.

EPA is a member of the Conference's ADR Roundtable through which different agencies meet periodically to discuss developments in ADR, and how the use of ADR in federal practice might be fostered. The ADR efforts of other agencies in using ADR should be recognized. Specifically, the U.S. Army Corps of Engineers has used ADR extensively to resolve disputes with contractors on projects, and the Navy has made it a policy to presumptively use ADR in small contract disputes.

In closing, let me reemphasize that the Agency's experience with the use of ADR in our enforcement and regulatory programs has been very positive; we will continue to explore further appropriate uses and encourage the expansion of ADR by private firms in support of Agency activities. We greatly appreciate the efforts of the Subcommittee to foster the expanded use of ADR processes in federal agency practice. I would be pleased to answer any questions you may have at this time.

Department of Justice

STATEMENT OF WILLIAM P. BARR
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF
GOVERNMENT MANAGEMENT

COMMITTEE ON GOVERNMENTAL AFFAIRS

UNITED STATES SENATE

REGARDING THE USE OF

ALTERNATIVE DISPUTE RESOLUTION

BY FEDERAL AGENCIES

SEPTEMBER 19, 1989

Thank you for the opportunity to present the views of the Department of Justice on S. 971, which would authorize agencies to use a number of alternative dispute resolution, or "ADR," techniques. The Department has encouraged, and continues to support, the use of ADR techniques in those cases where ADR can reduce the time and expense devoted to litigation. S. 971 is an ambitious attempt to promote ADR in administrative disputes. Although many of the ADR techniques covered by the bill may already be available to agencies, S. 971 would increase the use of ADR, by adding the authority of a specific Congressional enactment. Throughout the government, the bill would exert a gravitational pull toward use of ADR as a means of deciding disputes.

S. 971 would authorize and encourage agencies to explore a number of ADR techniques that we, like the sponsors of the bill, would like to see more frequently used -- conciliation, facilitation, mediation, factfinding, mini-trials, and settlement negotiations. See § 3(a)(2). All too often, the parties to a dispute expend their energies in litigating the case to a decision, when less formal processes would have produced a faster, less costly, and equally just outcome. However, as I will explain, we believe that the arbitration provisions of S.

971 involve practical problems, raise serious constitutional questions, and should be deleted.

Because we believe it essential to develop alternatives to the full-scale litigation of disputes involving the government, we have encouraged participation by our attorneys in a variety of other experimental ADR methods. Our efforts have included the issuance of a policy statement encouraging the use of mini-trials, actual participation in mini-trials, and support for judicially supervised alternative dispute resolution techniques. The Civil Division's Commercial Litigation Branch has cooperated with the United States Claims Court in the development of General Order No. 13, which establishes an alternative method of dispute resolution using a settlement judge. The Civil Division's Torts Branch participates in and is responsible for the administrative claims process developed under 28 U.S.C. § 2672 for Federal Tort Claims Act cases, and regulations issued by the Department of Justice for implementing that administrative process (28 C.F.R. Part 14) are applicable throughout the government. Through this process in 1988, 214 administrative tort claims for amounts exceeding $25,000 were resolved with Justice Department approval, and the total paid to resolve these claims was $34,282,097.

Of course, ADR is not the solution for every problem of delay and expense in litigation. Each ADR procedure itself has a cost, and the Department tries to reach balanced judgments about

whether that cost is justified in specific cases. In making these judgments, the government is sometimes under constraints that would not apply to private litigants. For example, in resolving non-meritorious claims, private litigants might resort to ADR as an avenue toward a settlement that would avoid the expense of litigation. The government, however, may find ADR unhelpful in that situation, because the government lacks authority to pay money in settlement of non-meritorious claims. ADR thus may be wasteful in cases where principled disputes on legal issues make settlement unlikely. The government, as a frequent litigant, also resists frivolous claims, in order to discourage such claims in the future. Still, in many instances, ADR can save time and money in the resolution of disputes involving the government.

ARBITRATION -- PRACTICAL PROBLEMS

In addition to providing for the use of ADR techniques like conciliation and mediation, which we support, the bill would allow agencies and private parties, by mutual consent, to submit disputes to binding arbitration. Both sides would participate in the selection of the arbitrator. § 587(a). After hearing evidence, the arbitrator would issue a decision, setting out a "brief, informal discussion of the factual and legal basis" for the award. § 590(a). The award would then be "final and binding on the parties." § 590(b). Despite our general support for ADR,

such binding arbitration, in our view, creates practical problems, as well as raising serious constitutional concerns.

The bill would set up a system of private, binding arbitration that would exist side-by-side with the present system for adjudication before administrative law judges. Like administrative law judges, arbitrators to be empowered under S. 971 would be "neutral[s]," with no personal stake in the controversies, § 587(b), and would regulate proceedings, administer oaths, take evidence, preside over cross-examination, and hand down decisions. § 589(c).

As a practical matter, we believe that arbitration is both less necessary and less attractive in the administrative context than in the context of disputes between private parties. Private parties in cases not involving the government agree to arbitration because they want a procedure more streamlined than the alternative -- litigation in a court. S. 971, however, would establish an alternative to administrative procedures that are already supposed to be streamlined and informal. There may be legitimate concern about the "judicialization" of these procedures -- about the complexity, delay, and expense of proceedings before administrative law judges. The way to deal with that problem, however, is to address it directly, by simplifying procedures and, where appropriate, changing the allocation of resources. Instead of addressing the problem

directly, S. 971 would create a duplicative system of arbitral litigation that would lack the regularity of proceedings before administrative law judges. And because arbitral awards under S. 971 would not have a precedential or estoppel effect, § 590(c), litigation under this system would not lead to the development of legal principles that might guide and thus simplify future cases. Moreover, in providing an alternative to litigation before administrative law judges, binding arbitration under S. 971 could enable agencies to escape their responsibilities for the formulation and execution of policy and the interpretation of law.

In other respects, too, the analogy of arbitration between private parties is inapplicable to arbitration involving the government. Private parties may resort to arbitration because they want a decision-maker who is an expert in the area of law or business in which the dispute arises. But administrative law judges offer exactly such expertise, so that substituting an arbitrator will provide no advantage.

Furthermore, arbitrators have an unfortunate tendency to split the difference between the parties' positions. See Behre, Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?, 16 Pub. Cont. L. J. 66, 72 (1986). Even if private parties do not like that practice, they often can tolerate it. As I have

observed, however, the government is in a rather different position with regard to "split the difference" outcomes. Unless there is a legal basis for a claim, we do not consider ourselves free to pay the claim or any portion of it in order to avoid the expense of a full-blown evidentiary hearing. Because the government takes this view, a private party with a weak claim is likely to find great appeal in the prospect of arbitration. To the extent an arbitral decision may be less principled than the decision that an administrative law judge would issue, a litigant with a weak claim will prefer arbitration and may seek to put political pressure on the agency to arbitrate the dispute.[1]

It is not an adequate defense of binding arbitration under S. 971 to say that, under the bill, the government could refuse to arbitrate any case where there was a need for the procedural regularity and the precedential function of litigation before an administrative law judge or where the private party's position was especially weak. The existence of a procedure for binding arbitration would create pressure to use that procedure. In many cases, an agency might find it easier to ignore the need for regularity and precedent and simply turn to binding arbitration as a means for escaping responsibility. It would be unwise to open up that possibility through the permissive terms of S. 971.

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[1]S. 971 would require the arbitrator to give "a brief, informal discussion of the factual and legal basis" for an award, but he would not make formal findings of fact or conclusions of law or otherwise duplicate the more rigorous exposition that an administrative law judge would provide. § 590(a).

Given these practical problems, we should not rush to promote arbitration before determining whether the problems of delay and expense in the administrative process can be handled through reform of the procedures now used by admininistrative law judges. At present, the problems of delay and expense cannot definitively be traced to the absence of arbitration, rather than to a failure to deal directly with the "judicialization" of the existing administrative process. Furthermore, because the arbitral process itself can become quite formal and elaborate, the "problem" that S. 971 eliminates may not turn out to be the delay and expense that the bill is intended to reduce, but the accountability that administrative procedures should encourage. We should try well-directed reform of the present process before resorting to change on the broad scale that the arbitration provisions of S. 971 would involve. We therefore recommend that the arbitration provisions of S. 971 be eliminated and that changes to streamline the existing system before administrative law judges be explored.

ARBITRATION -- CONSTITUTIONAL PROBLEMS

S. 971 also raises a serious question as to constitutionality. Arbitrators with the powers conferred under S. 971 could be viewed as Officers of the United States, engaged in execution of the laws, but would not be appointed in the

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manner required by the Appointments Clause. Art. II, § 2, cl. 2. Nor would they be subject to supervision and removal by the President and his delegates, as required by the President's constitutional responsibility to see to the faithful execution of the laws. Art. II, § 3.

Before I go into the details of the constitutional discussion, let me set out the common sense of our position. The constitutional problem with the arbitration provisions of S. 971 parallels the practical problems I have been discussing. S. 971 would dilute accountability and disrupt the making of policy by responsible officials. When the President appoints and supervises executive officials as the Constitution provides, he can be held accountable for how the laws are carried out. In cases submitted to binding arbitration, S. 971 would remove the power to execute the laws from Cabinet officials and agency heads who are in turn responsible to the only figure in American government elected by all of the people, and would transfer that power to arbitrators accountable to no one. This transfer of the power to make decisions not only would blur responsibility but also would threaten the ability of the executive to set and carry out policy. While I want to spend some time today discussing the intricacies of the legal arguments, our concern is really that simple, and that fundamental. S. 971 thus raises a serious issue about conformity with the Constitution.

Under S. 971, agencies would be encouraged to use ADR for the entire range of administrative disputes in which they might become involved. The bill specifically mentions disputes arising in formal or informal adjudication, rulemaking, enforcement, issuance or revocation of permits, and litigation. § 3(a)(2). The bill appears to contemplate that binding arbitration would not be used for resolving disputes that raise issues of policy, require the formulation of precedent, endanger consistency in an area where consistency is important, significantly affect persons who are not parties to the proceeding, call for a public record, or entail a need for continuing jurisdiction by the agency. § 582(b). But S. 971 would not forbid arbitration in cases that involve any or all of these factors.[2]

Arbitrators acting under S. 971 could be said to be "perform[ing] . . . a significant governmental duty exercised pursuant to a public law," Buckley v. Valeo, 424 U.S. 1, 140-41 (1976), and thus to be "Officers" of the United States in constitutional terms. Id. at 141. They would be involved in "functions necessary to ensure compliance with . . . statute and rules -- informal procedures, administrative determinations and hearings, and civil suits." Id. at 137. The bill would require

[2] Furthermore, the bill may suggest that binding arbitration could not be used in a rulemaking, because arbitral awards are not to have any precedential value or be considered in any future proceeding, § 590(c), and rules are by definition orders of future effect, 5 U.S.C. § 551(4). Once again, however, the bill does not explicitly forbid the use of arbitration to resolve disputes about rulemaking.

arbitrators to "interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives," § 589(c)(5), and "[i]nterpreting a law enacted by Congress to implement the legislative mandate" is a function that "plainly entail[s] execution of the law in constitutional terms." Bowsher v. Synar, 478 U.S. 714, 733 (1986).

The Appointments Clause, Art. II, § 2, cl. 2, directs how "Officers" of the United States are to be appointed. Principal Officers are to be appointed by the President, with the advice and consent of the Senate. Congress, however, may vest the appointment of inferior Officers in the heads of departments, courts of law, or the President alone.

S. 971 would raise a serious issue regarding the commands of the Appointments Clause, as discussed in Buckley.[3] Under S. 971,

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[3]In his study The Constitutionality of Arbitration in Federal Programs (May 27, 1987), prepared for the Administrative Conference of the United States, Professor Harold H. Bruff argues that, in Buckley, the Court "was considering whether Congress could assume the President's appointments power, not whether it could authorize or require the delegation outside the government of some functions that could be performed by the executive. The problem of congressional aggrandizement disappears when Congress allocates the appointment power elsewhere." Id. at 19 (footnote omitted). Professor Bruff's argument assumes that the Appointments Clause rests only on concerns about separation of powers and has nothing to do with accountability in government. Although the Appointments Clause has a critical role in ensuring the separation of powers (see Buckley, 424 U.S. at 124-25), it also aims at accountable government: "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation." The Federalist No. 76 (Rossiter ed.) at 455 (discussing Appointments Clause).

arbitrators would be authorized to exercise significant authority with respect to such agency functions as adjudication and licensing. These arbitrators, however, would not be appointed in accordance with the Appointments Clause, but rather would be chosen by the parties. §§ 583, 587.[4]

In addition, S. 971 presents constitutional problems concerning the accountability of arbitrators to the President for their executive actions. As I have noted, S. 971 would authorize arbitrators to perform a broad range of executive functions, from making "determinations of eligibility for [federal] funds," Buckley, 424 U.S. at 140 (involved in making monetary awards enforceable in the courts), to granting licenses or resolving enforcement disputes. These functions involve "[i]nterpreting a law enacted by Congress to implement the legislative mandate," which "plainly entail[s] execution of the law in constitutional terms." Bowsher v. Synar, 478 U.S. 714, 732-33 (1986). It has generally been thought that the President must have the power to remove the officer performing such core executive duties, in order to ensure the officer's accountability to the President. See Bowsher, 478 U.S. at 721-27, 732-33; Myers v. United States, 272 U.S. 52, 161-164 (1926); cf. Morrison v. Olson, 108 S.Ct.

[4]The appointment of "permanent or temporary government employee[s]," § 583(a), would raise no less serious a question about violation of the Appointments Clause. To the extent a mere "employee" is also granted executive power as an "Officer" of the United States independent of his other duties, see Buckley, 424 U.S. at 126 & n.162, the constitutional problem is identical to that involved in the appointment of private persons.

2597, 2616-2622 (1988). Even the head of a so-called "independent agency," performing "quasi-legislative" or "quasi-judicial" duties, is subject to removal by the President for inefficiency, neglect of duty, malfeasance, or other good cause. Mistretta v. United States, 109 S. Ct. 647, 673 (1989); Humphrey's Executor v. United States, 295 U.S. 602, 619 (1935); cf. Morrison, 108 S. Ct. at 2617, 2619.

Here, by contrast, arbitrators appointed under S. 971 would be subject neither to executive review nor to executive removal.[5] If the arbitrator exceeded the scope of his assigned duties or exercised them in an improper manner, the decision would still be binding against the executive branch.[6] There is serious doubt that S. 971 gives the Executive "sufficient control over the . . . [arbitrator] to ensure that the President is able to perform his constitutionally assigned duties" as Chief Executive

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[5]Although S. 971 implies that the United States could "terminate" an arbitration before completed, § 591(c), this authority would provide an avenue for effective review only before the arbitrator rendered his final decision.

[6] This should be contrasted with the remedies available for review of improper executive action by Independent Counsel, at issue in Morrison. If an Independent Counsel acts improperly, for example by engaging in "misconduct" or bringing a prosecution that is not justified under applicable Department of Justice policy guidelines, see Morrison, 108 S. Ct. at 2620-22, the Attorney General may remove him (subject to judicial review) before the consequences of the Independent Counsel's errant conduct have come to fruition. There would be no comparable ability to exercise any degree of control or supervision over the executive actions of arbitrators appointed under S. 971.

to take care that the laws be faithfully executed. Morrison, 108 S.Ct. at 2622.

We note that the Administrative Conference of the United States ("ACUS") contends that, notwithstanding these constitutional difficulties, several statutes already provide for private persons to render binding arbitral awards on claims involving the government. Most of the statutes cited by the ACUS, however, do not unambiguously call for binding arbitration. The statute dealing with arbitration under the National Flood Insurance program, 42 U.S.C. § 4083, specifies that the arbitration is to be non-binding. Two provisions concerning admiralty claims do not state that the arbitration is to be binding, and they do not create a comprehensive framework that might indicate binding arbitration was contemplated. 46 U.S.C. §§ 749, 786.[7] The statute relating to investment guarantees under the foreign assistance program provides for arbitration "on such terms and conditions as the President may direct." 22 U.S.C. § 2395(i).[8] The Superfund Amendments allow for

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[7]46 U.S.C. § 748 refers to payment of "any arbitration award or settlement had and agreed to under . . . section 749," upon presentation of a duly authenticated copy. 46 U.S.C. § 787 refers to "[a]ny final judgment . . . [or] any settlement had and agreed to under . . . section 786," but does not mention arbitration awards. Neither section 748 nor section 787 is inconsistent with reading the arbitration provisions as limited to non-binding arbitration.

[8]The provision for private decision-makers to resolve disputes over Department of Education grant allowances has been repealed. 20 U.S.C. § 1234.

arbitration under regulations to be issued after consultation with the Attorney General but do not specify that the arbitration will be binding. 42 U.S.C. § 9622(h)(2). Thus, any regulations issued under the statute could be amended at any time to provide for the agency to have the ultimate power of decision.[9]

The statute that was at issue in Schweiker v. McClure, 456 U.S. 188 (1982), authorizes the Secretary of Health and Human Services to contract with private insurers to make decisions about claims against Medicare funds. See 42 U.S.C. § 1395u. But the Secretary could resume the power of decision at any time.[10]

In sum, the existing statutory provisions on arbitration, we believe, are weak authority for the wholesale authorization of binding arbitration that S. 971 would create, even assuming that the existing statutes could cast some light on the constitutional

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[9]Under current litigation practice, the Department of Justice does not participate in arbitration proceedings in which an award could be enforced directly against the government, without subsequent de novo judicial or administrative examination.

[10]With respect to arbitration of federal labor disputes, we would certainly oppose any reading of S. 971 under which the bill expanded the category of arbitrable issues in that field.

The ACUS also mentions provisions of the U.S.-Canada Free Trade Agreement that transferred review functions from the Court of International Trade to a binational panel of private decision-makers. The constitutional questions about those provisions were such that when Congress passed implementing legislation, it included a back-up provision that would apply if the panel were declared unconstitutional. Pub. L. No. 100-449, § 401(c), 102 Stat. 1851, 1882 (1988).

issues. But see INS v. Chadha, 462 U.S. 919 (1983)(overturning legislative veto, despite numerous statutes with such provisions).

It would be possible to resolve these constitutional difficulties (although the practical problems I have discussed would remain). The arbitrator could be selected (and could be removed) by the head of the agency, with the arbitral decision not to become final until reviewed and approved by the head of the agency, who is accountable to the President. This form of arbitration would avoid the constitutional issues that S. 971 presents. Arbitrators would be inferior officers, appointed by the heads of the agencies and accountable to them, and their decisions would be subject to executive review. Under this arrangement, if the private party disapproved of the arbitrator selected by the agency, he could be allowed to withdraw his consent to arbitration.

While this method of structuring arbitration would be constitutional, it would not obviate the practical concerns we expressed about arbitration in the administrative context. Therefore, the option that we would commend to the committee would be to drop arbitration altogether and instead encourage the use of simpler procedures within the current system of

administrative adjudication.[11] By such encouragement, we can learn whether delay and expense can be reduced without a sacrifice of accountability. We can find out whether the "judicialization" of the administrative process can be reversed, where appropriate, by direct measures, before assuming that these measures will fail and that only a duplicative system of administrative arbitration can offer a solution. If this encouragement of change in the existing system does not succeed in producing a streamlined process, arbitration can be considered in the future.

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[11]The bill could provide: "In any hearing before an administrative law judge, the parties may agree to simplified procedures, notwithstanding any regulation to the contrary."

APPENDIX -- OTHER PROBLEMS OF POLICY AND DRAFTING

S. 971 also raises a number of other problems of policy and drafting.

Confidentiality is essential to the effective use of ADR techniques. Section 590(c) might not adequately protect the confidentiality of arbitral proceedings, because it would not expressly forbid the introduction of evidence about an arbitration at a later proceeding involving the same parties. For example, Section 590(c) would not expressly prohibit evidence about the arbitral proceeding at a trial de novo after an award has been rejected or vacated. The section should be revised to forbid any use of evidence about the ADR proceeding in a later action on the dispute submitted to the ADR procedure. Similarly, Section 584(h) would allow information introduced in an ADR proceeding to be used in a later action against the neutral (even though it could not be used in a later action on the issue in the ADR proceeding). Without further restriction, the entire record of the action against the neutral, including information submitted by the parties in the ADR proceeding, could become public. Section 584(h) thus should be revised to provide for procedures (such as sealing records or issuing protective orders) that will guard against any disclosures that are not absolutely necessary.

Section 3(d) would require each federal agency to review and amend each standard contract, grant, and other assistance agreement to authorize and encourage the use of ADR. We read that section as applying prospectively. If the section were intended to require review and revision of existing contracts, grants, and assistance agreements, it would impose a severe burden on the affected agencies (assuming it would be lawful to revise all of the existing contracts in the first place). The meaning of the section should be clarified. Furthermore, there may be contracts, grants, or agreements that are likely to generate disputes not amenable to resolution through ADR techniques. Thus, it would be preferable not to require insertion of the ADR provision.

Section 5 of S. 971 would amend the Contract Disputes Act ("CDA"). Section 5(a) would require each contracting officer to "make all reasonable efforts to resolve a claim or dispute consensually." Under this provision, the contracting officer's efforts to resolve claims or disputes consensually might themselves become subjects of controversy. Moreover, it has been the Department's experience that disputants use voluntary ADR programs more successfully than mandatory programs. Therefore, we recommend that the proposed amendment to the CDA encourage, but not require, the use of ADR techniques.

If ADR were used in a contract dispute, there would still be a need to ensure the integrity of the dispute resolution process. We therefore recommend that the following sentence be added to Section 5(b) of the bill (proposed Section 7(b) of the CDA), after the term "$250,000": "In such instances, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable."

Section 5(d) might be read as amending the CDA (41 U.S.C. § 607(g)) to provide for district court review when the contracting officer agrees to arbitration and an arbitral award is issued. That alteration of the CDA would not be desirable. Under the CDA, a contractor has two choices for obtaining review of a contracting officer's decision. The contractor may proceed directly to the Claims Court, 41 U.S.C. § 609, or may appeal to a board of contract appeals. 41 U.S.C. § 606. In either case, the next appeal is to the Federal Circuit. 41 U.S.C. § 607(g)(1); 28 U.S.C. § 1295(a)(3). There is no reason to provide for review in district court when the contracting officer agrees to arbitration, especially since the ordinary CDA review procedures apparently are to be followed if the contracting officer agrees to a form of ADR other than arbitration. Section 5(d) should be

revised to make clear that the district courts would not obtain new powers to review CDA cases.

Finally, some ADR procedures may be inappropriate in cases affecting public health or the environment, but S. 971 as drafted may not sufficiently recognize this limitation. Therefore, we recommend that Section 582(b) be revised to include: "(7) the matter may affect human health or the environment." Section 584(a)(4)(C) should be amended to read: "protect the public health or safety or the environment."

STATEMENT OF LLEWELLYN M. FISCHER

GENERAL COUNSEL

U.S. MERIT SYSTEMS PROTECTION BOARD

ON S. 971

THE ADMINISTRATIVE DISPUTE RESOLUTION ACT

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT,

COMMITTEE ON GOVERNMENTAL AFFAIRS

UNITED STATES SENATE

SEPTEMBER 19, 1989

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear on behalf of the Merit Systems Protection Board. The Board has made extensive use of alternative dispute resolution procedures in its adjudication of cases over the last five years. During this period, the Board has found ADR procedures to be extremely effective in achieving faster processing of cases and just results for the parties. The Board's settlement rates are quite dramatic. Between 1984 and 1988, the settlement rate of cases not dismissed has climbed from 6 percent to 48 percent, an eightfold increase. The following remarks are directed toward the Board's experiences with ADR procedures.

A few points should be noted at the outset about the Board's ADR program. First, the Board's primary use of ADR procedures has been in the context of administrative adjudication of employee appeals challenging agency personnel actions.

Second, the Board has a statutory basis for its use of ADR techniques. Section 7701(h) of Title 5 expressly authorizes the Board to implement alternative methods for settling cases.

Third, the Board's ADR program is flexible. In implementing its ADR program, the Board recognized that a variety of ADR techniques are professionally accepted. Accordingly, other than a requirement that a prehearing conference be held, the Board has not mandated any single or formal procedure for dispute resolution. Rather, it leaves to the discretion of its administrative judges--who sit as presiding officials in Board appeals--the ADR techniques to be applied in any particular case.

Fourth, the Board has provided for thorough and ongoing training of the administrative judges in ADR methods. In handling cases, the Board's administrative judges employ a variety of ADR techniques--including identification of issues, mediation, factfinding, stipulations, settlement negotiations, conciliation, facilitation, and, on occasion, mini-trials. The Board has found that the administrative judges' familiarity with, and facility and skill in using, a number of ADR techniques has been a key factor in the success of its program.

The Board's reliance on ADR procedures has generally resulted in faster, less expensive case processing. Our records show that for fiscal year 1988, the average processing time for settled cases was 65 days, compared to 99 days for cases adjudicated on the merits. Leaving aside any savings to parties, the Board estimates that during

fiscal years 1987 through June 30, 1989, the settlement of cases saved the Board approximately $3,000,000. In addition to the savings in time and money achieved by consensual resolution of disputes, we believe that the parties and public also benefit because avoidance of what is often acrimonious litigation may well minimize the dislocation of the relationship between the agency and its employees.

Now, let me explain briefly how the Board's ADR program fits into the Board's adjudicative process. After an appeal has been filed, the regional office issues an order acknowledging receipt of the appeal and raising any questions of timeliness or jurisdiction. The agency is required to file a response and to provide the agency file to the appellant and the administrative judge assigned to the case. The appellant and the agency then have an opportunity to present additional information for the administrative judge's consideration. The administrative judge may initiate attempts to settle an appeal informally at any time. Presiding officials have all powers necessary to conduct fair and impartial hearings and to avoid delay in the disposition of all proceedings.

Under the Board's ADR procedures, absent some unusual circumstance, at least one prehearing conference for settlement and simplification of issues is required in every timely-filed case falling within the Board's jurisdiction. The parties may agree to waive the prohibitions against ex parte communications during settlement discussions. The Board requires that a representative of a party at a prehearing conference have authority to settle the case--or have immediate access to someone with that authority. Other than the required prehearing conference, the ADR mechanisms used in any particular case are left to the discretion of the administrative judge.

If the parties agree to settle their dispute, the settlement agreement is the final and binding resolution of the appeal, and the presiding official will dismiss the appeal with prejudice. If the agreement is made a part of the record, the Board will retain jurisdiction to ensure compliance with the agreement. If the agreement is not entered into the record, however, the Board will not retain jurisdiction to ensure compliance.

There have been some new issues before the Board as a result of its increased reliance on ADR procedures. For example, a petition for enforcement of a settlement agreement may raise questions relating to construction of the terms of the agreement and issues relating to the burden of proof. Some settlement agreements have also brought about new issues in attorney fee cases--for example, questions relating to identification of the prevailing party.

There have been remarkably few problems in the Board's ADR program. Some petitions for review have been filed in cases where the initial appeal was settled. Such cases include allegations that the settlement process was unfair, that there were mutual mistakes, or that there was coercion by agency or Board officials. On review by the Board, almost all of these allegations have been found unsupported. Moreover, no court has found that settlement practices engaged in by the Board's judges coerced the parties or were otherwise improper with respect to the rights of the parties.

With respect to the proposed legislation, the Board will limit its comments to those areas in which it has had some experience. As an initial matter, the Board fully endorses ADR procedures as constructive alternatives to litigation. The procedures that I described earlier for adjudicating appeals demonstrate that commitment to ADR techniques.

Second, in authorizing agencies to use ADR techniques, the bill goes a long way in ensuring the effective use of ADR methods. The Board attributes its success in its use of ADR techniques in part to the statutory basis for its program.

Third, in the Board's view, the requirement in the bill that agencies provide training in ADR techniques is critical to the bill. The Board has found that training of its administrative judges on an ongoing basis was a key factor in the success of its program.

Fourth, the Board's experience has been that the efficacy of its ADR program rested in large part on the flexibility built into its system. The proposed bill appears to permit that same kind of flexibility.

Finally, the bill provides for the participation of neutrals in dispute resolution proceedings. The Board has not required that a separate settlement judge be appointed in every case. Rather, the Board allows either party to request appointment of a separate settlement judge. Such requests have been made infrequently. In our experience, a separate settlement judge has not been necessary to effect fair settlements, and, the Board's settlement practices have not been found coercive or otherwise improper.

Thank you, Mr. Chairman. I would be pleased to answer any questions you or the other members of the Subcommittee may have.

JOHN GLENN, OHIO, CHAIRMAN

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United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

October 2, 1989

The Honorable Richard Thornburgh
Attorney General of the United States
U.S. Department of Justice
Tenth Street and Constitution Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Attorney General:

On September 19, 1989, the Senate Subcommittee on Oversight of Government Management held a hearing on S. 971, the Administrative Dispute Resolution Act of 1989. The testimony given by William Barr, Assistant Attorney General, Office of Legal Counsel, was informative and useful.

During the hearing, Mr. Barr indicated that the Justice Department would provide data on the savings, in time and costs, realized as a result of the experimental mandatory arbitration program conducted by the Federal Judicial Center. We look forward to receiving that information.

In addition, the Subcommittee would appreciate answers to the following questions.

(1) Is the arbitration used in your agency's mandatory arbitration program binding arbitration? If so, under what authority was this program developed? If this program utilizes binding arbitration, how has the Department designed the program to meet constitutional tests? What types of cases have you found suitable for this program?

(2) According to Mr. Barr's testimony, the Department of Justice is now using mini-trials as an alternative to litigation. What factors are Justice Department attorneys required to consider and what procedures are they required to follow when deciding whether to pursue mini-trial procedures? What types of cases are most suitable for this method? Please provide the Subcommittee with any information you may have available on the time and cost savings realized from using the mini-trial procedure.

The Honorable Richard Thornburgh
October 2, 1989
Page Two

(3) At the hearing, Mr. Barr also indicated that all arbitration programs currently authorized and used by federal agencies except, perhaps, the FLRA, provide for some type of agency review of the arbitral decision and, therefore, are not technically binding. Does that remain the conclusion of the Justice Department?

Thank you for your assistance. We'd appreciate your response to this request by October 16, 1989. If your staff has any questions regarding this matter please have them contact Kay DeKuiper or Melinda Loftin of the Subcommittee staff at 224-3682.

Sincerely,

Carl Levin
Chairman

William S. Cohen
Ranking Minority Member

Subcommittee on Oversight of Government Management

CL:WSC:kd

U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

November 8, 1989

The Honorable Carl Levin
The Honorable William Cohen
U.S. Senate
Committee on Governmental Affairs
Subcommittee on Oversight of Governmental Management
442 Hart Senate Office Building
Washington, D.C. 20510-6260

Dear Senators Levin and Cohen:

I am pleased to transmit the following response to your letter of October 2, 1989, following up on my testimony about alternative dispute resolution. Your letter asked the Department to provide information for use in the consideration of S. 971, the Administrative Dispute Resolution Act of 1989.

(1) In the experimental mandatory arbitration program, cases are submitted to arbitration, subject to a later trial de novo at the request of either party. The arbitrations are thus a method for helping parties achieve settlements and are not binding.

Each judicial district having such a program has created somewhat different rules, but the policy of the Department regarding all so-called "court-annexed arbitration" programs is set out at 28 C.F.R. § 50.20 (1988). I am attaching a copy of that policy.

As you will see, the Department "recognizes and supports the general goals of court-annexed arbitrations, which are to reduce the time and expenses required to dispose of civil litigation." § 50.20(a)(1). On the basis of our experience, the Department generally endorses the inclusion in the program of cases seeking only money damages of less than $100,000 and arising under the Federal Tort Claims Act, the Longshoreman's and Harbor Worker's Compensation Act, or the Miller Act. § 50.20(b)(2). Our policy provides that arbitration under these experimental programs is not suitable for "cases that may involve complex issues of liability or other unsettled legal questions," § 50.20(a)(2), cases under the Constitution or a common law theory "against an employee of the United States in his personal capacity for actions within the scope of his employment which are alleged to

have caused injury or loss of property," § 50.20(d)(2), and cases for declaratory or injunctive relief, § 50.20(d)(3).

The policy also deals with the circumstances in which we will seek a trial de novo. For example, we seek a trial de novo when "[s]ettlement of the case on the basis of the amount awarded would not be in the best interests of the United States." § 50.20(d)(1)(i).

The Department's experience with court-annexed arbitration programs has varied. Our contact with these programs comes principally by way of the United States Attorneys' offices. I am informed that some of the personnel in those offices have found that arbitration can promote settlement of simple cases; others have found that arbitration adds another step to litigation without clear benefits in promoting settlements. Our position has been that, when such programs are tried, they should continue to be designed and implemented on a dist· ·ct-by-district basis. See 28 U.S.C. §§ 651-658.

We have also located some publications containing statistics about the operation of court-annexed arbitration. The Federal Judicial Center, under whose auspices the experimental program is conducted, published in 1983 a revised version of Evaluation of Court-Annexed Arbitration in Three Federal District Courts, by E. Allen Lind and John E. Shapard. That volume collected data on court-annexed arbitration in the Eastern District of Pennsylvania, the District of Connecticut, and the Northern District of California. Furthermore, in 1988 and 1989, the Federal Judicial Center published a series of reports on court-annexed arbitration in 10 federal district courts.[1]

(2) In my testimony, I referred to the Department's use of mini-trials as a mechanism for alternative dispute resolution. In mini-trials, both sides to a litigation use flexible, expedited procedures to present summary versions of their cases, and the principals of the parties then meet to discuss settlement.

As I stated in my testimony, the Department has issued a policy statement on the use of mini-trials. This policy statement was prepared by the Commercial Litigation Branch of the Civil Division, which has engaged in mini-trials in some of its cases. The policy, which we attach, sets out the procedures for agreeing to mini-trials.

The Department believes that mini-trials may be useful in cases where, as far as it is possible to predict, the issues are

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[1]This response (1) also answers the request for more information made at the hearing.

factual but do not involve questions of credibility. Mini-trials are not suitable in cases that will establish precedent. Policy, III.

The policy states that if the non-government party asks for a mini-trial, the government trial attorney should submit that request, along with his or her recommendation and that of the interested agency, to his or her supervisor. On the government's side, the trial attorney has the initial responsibility for identifying cases in which a mini-trial may be productive. The trial attorney, upon identifying such a case, is to obtain the recommendation of the interested agency and the approval of his or her supervisor, before approaching the other party. Id. at IV.

Under our policy, a mini-trial takes place only if the two sides enter into a written agreement governing the procedure. The agreement sets time limits for each part of the procedure, stipulates that the procedure is non-binding, and calls for the parties to seek suspension of the proceedings in the pending litigation while the mini-trial procedure goes forward. Id. at VI.

The mini-trial itself ordinarily is to take no more than a day. Id. at VII.e. The proceedings are not transcribed or recorded. Id. Typically, the parties select a neutral adviser to act as a "judge," informing the parties about the probable outcome of the case if it were to go to trial. Id. at VII.f. Either party may terminate the mini-trial proceedings at any time. Id. at VII.i.

Last year, testifying on ADR before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, Deputy Assistant Attorney General Stuart E. Schiffer stated: "We have been actively seeking additional cases which would be suitable for mini-trials. For reasons that are unclear, we have not been approached by members of the private bar with suggested cases despite the wide publicity accorded our policy statement. In other cases in which we have suggested the use of the technique, we have not obtained the agreement of counsel for the private party." Alternative Dispute Resolution Use by Federal Agencies: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 100th Cong., 2d Sess. 48 (1988). We believe that these facts have not changed. Furthermore, we are not aware of any statistical data on time or money saved as a result of those mini-trials that have taken place.

(3) Of the arbitration programs currently used in the federal government, the results of the arbitral proceedings, in our view, cannot properly be characterized as binding on the

government as a matter of statute, except possibly for arbitration of labor disputes.

In the area of federal labor disputes, 5 U.S.C. § 7121(b) provides that if grievances are not resolved under negotiated grievance procedures, they "shall be subject to binding arbitration which may be invoked by either the exclusive representative [of the employees] or the agency." However, even this "binding" arbitration is subject to a measure of agency review. Either party to the arbitration may ask the Federal Labor Relations Authority to review the arbitral award, and that review extends not only to the "grounds similar to those applied by Federal courts in private sector labor-management relations" but also to the question whether the award "is contrary to any law, rule, or regulation." 5 U.S.C. § 7122(a). Although this scope is narrower than in the typical review by agencies of decisions by administrative law judges, it is far broader than in judicial review of arbitral awards.

At the hearing before the Subcommittee, there was a discussion of the Environmental Protection Agency's regulations for arbitration of Superfund cases where the costs at issue are less than $500,000. These regulations, issued under 42 U.S.C. § 9622(h)(2), provide (as does the statute) for notice and comment on any proposed arbitral decision; EPA may overturn the decision if the comments "disclose . . . facts or considerations which indicate the proposed decision is inappropriate, improper or inadequate." 54 Fed. Reg. 23186 (1989) (to be codified at 40 C.F.R. § 304.33(e)(1)(iii)). Furthermore, in cases where no public comments are filed, the statute itself does not expressly forbid agency review of arbitral awards. The statute thus leaves to the agency a choice about how its regulations deal with such review. But although S. 971 would allow an agency to choose whether to arbitrate a particular dispute, the statute would mandate that, if arbitration were used, the arbitration would be binding. See § 590(b). In this respect, S. 971 would go farther than the Superfund amendments under which EPA issued its regulations.

Arbitrations under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a(c)(1)(D)(ii), fix the amount that one private party owes another for use of data about a pesticide. Although the entitlement to compensation "bears many of the characteristics of a 'public' right" under federal law and so the amount of compensation may be determined outside an Article III court, see Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 589 (1985), the arbitral award will

not direct the government to do anything or make any payment and cannot fairly be characterized as binding the government.[2]

Under regulations issued by the Secretary of Health and Human Services, disputed claims against Part B Medicare funds are resolved through a binding hearing procedure conducted by the private insurance carriers that administer the program under contract with the Secretary. See Schweiker v. McClure, 456 U.S. 188 (1982). The statute, while favoring contracts under which private carriers make such decisions, does not foreclose the Secretary, upon giving adequate reasons, from taking back the power to administer the program and setting up his own decision-making procedures. 42 U.S.C. § 1395u. Once again, S. 971 goes farther, by directing that arbitration, if used at all, will be binding. § 590(b).

Finally, as explained in my testimony, a number of other statutes have been cited in support of S. 971 but do not unambiguously call for binding arbitration. To our knowledge, binding arbitration does not take place in the execution of these laws. Arbitration under the National Flood Insurance Program, by the express terms of the statute, is non-binding. 42 U.S.C. § 4083. The two statutory provisions on admiralty claims do not state that arbitration of the claims will be binding. 46 U.S.C. §§ 749, 786. Arbitration of disputes about investment guarantees under the foreign assistance program is to be "on such terms and conditions as the President may direct." 22 U.S.C. §2395(i).

I hope that this information is useful to the Subcommittee. Of course, if you have any additional questions, I would be happy to respond to them.

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[2] Cf., e.g., Shearson/American Express, Inc. v. McMahon, 107 S. Ct. 2332 (1987)(under agreement made before controversy arose, Court upholds arbitration of claims between private parties under Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); Rodriguez De Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917 (1989)(same, under Securities Act of 1933); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985)(arbitration of antitrust claims arising from international transaction).

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Subcommittee.

Sincerely yours,

William P. Barr
Assistant Attorney General
Office of Legal Counsel

counsel conducting litigation pursuant to agreement with or authority delegated by the Attorney General, without the prior written approval of the Assistant Attorney General having ultimate supervisory power over the action in which recusal or disqualification is being considered.

(b) Prior to seeking such approval, Justice Department lawyer(s) handling the litigation shall timely seek the recommendations of the U.S. Attorney for the district in which the matter is pending, and the views of the client agencies, if any. Similarly, if agency attorneys are primarily handling any such suit, they shall seek the recommendations of the U.S. Attorney and provide them to the Department of Justice with the request for approval. In actions where the United States Attorneys are primarily handling the litigation in question, they shall seek the recommendation of the client agencies, if any, for submission to the Assistant Attorney General.

(c) In the event that the conduct and pace of the litigation does not allow sufficient time to seek the prior written approval by the Assistant Attorney General, prior oral authorization shall be sought and a written record fully reflecting that authorization shall be subsequently prepared and submitted to the Assistant Attorney General.

(d) Assistant Attorneys General may delegate the authority to approve or deny requests made pursuant to this section, but only to Deputy Assistant Attorneys General or an equivalent position.

(e) This policy statement does not create or enlarge any legal obligations upon the Department of Justice in civil or criminal litigation, and it is not intended to create any private rights enforceable by private parties in litigation with the United States.

[Order No. 977-82, 47 FR 22094, May 21, 1982]

§ 50.20 Participation by the United States in court-annexed arbitration.

(a) *Considerations affecting participation in arbitration.* (1) The Department recognizes and supports the general goals of court-annexed arbitrations, which are to reduce the time and expenses required to dispose of civil litigation. Experimentations with such procedures in appropriate cases can offer both the courts and litigants an opportunity to determine the effectiveness of arbitration as an alternative to traditional civil litigation.

(2) An arbitration system, however, is best suited for the resolution of relatively simple factual issues, not for trying cases that may involve complex issues of liability or other unsettled legal questions. To expand an arbitration system beyond the types of cases for which it is best suited and most competent would risk not only a decrease in the quality of justice available to the parties but unnecessarily higher costs as well.

(3) In particular, litigation involving the United States raises special concerns with respect to court-annexed arbitration programs. A mandatory arbitration program potentially implicates the principles of separation of powers, sovereign immunity, and the Attorney General's control over the process of settling litigation.

(b) *General rule consenting to arbitration consistent with the department's regulations.* (1) Subject to the considerations set forth in the following paragraphs and the restrictions set forth in paragraphs (c) and (d), in a case assigned to arbitration or mediation under a local district court rule, the Department of Justice agrees to participate in the arbitration process under the local rule. The attorney for the government responsible for the case should take any appropriate steps in conducting the case to protect the interests of the United States.

(2) Based upon its experience under arbitration programs to date, and the purposes and limitations of court-annexed arbitration, the Department generally endorses inclusion in a district's court-annexed arbitration program of civil actions—

(i) In which the United States or a Department, agency, or official of the United States is a party, and which seek only money damages in an amount not in excess of $100,000, exclusive of interest and costs; and

(ii) Which are brought (A) under the Federal Tort Claims Act, 28 U.S.C.

1346(b), 2671 *et seq.*, or (B) under the Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. 905, or (C) under the Miller Act, 40 U.S.C. 270(b).

(3) In any other case in which settlement authority has been delegated to the U.S. Attorney under the regulations of the Department and the directives of the applicable litigation division and none of the exceptions to such delegation apply, the U.S. Attorney for the district, if he concludes that a settlement of the case upon the terms of the arbitration award would be appropriate, may proceed to settle the case accordingly.

(4) Cases other than those described in paragraph (2) that are not within the delegated settlement authority of the U.S. Attorney for the district ordinarily are not appropriate for an arbitration process because the Department generally will not be able to act favorably or negatively in a short period of time upon a settlement of the case in accordance with the arbitration award. Therefore, this will result in a demand for trial de novo in a substantial proportion of such cases to preserve the interests of the United States.

(5) The Department recommends that any district court's arbitration rule include a provision exempting any case from arbitration, sua sponte or on motion of a party, in which the objectives of arbitration would not appear to be realized, because the case involves complex or novel legal issues, or because legal issues predominate over factual issues, or for other good cause.

(c) *Objection to the imposition of penalties or sanctions against the United States for demanding trial de novo.* (1) Under the principle of sovereign immunity, the United States cannot be held liable for costs or sanctions in litigation in the absence of a statutory provision waiving its immunity. In view of the statutory limitations on the costs payable by the United States (28 U.S.C. 2412(a), 2412(b), and 1920), the Department does not consent to provisions in any district's arbitration program providing for the United States or the Department, agency, or official named as a party to the action to pay any sanction for demanding a trial de novo—either as a deposit in advance or as a penalty imposed after the fact—which is based on the arbitrators' fees, the opposing party's attorneys' fees, or any other costs not authorized by statute to be awarded against the United States. This objection applies whether the penalty or sanction is required to be paid to the opposing party, to the clerk of the court, or to the Treasury of the United States.

(2) In any case involving the United States that is designated for arbitration under a program pursuant to which such a penalty or sanction might be imposed against the United States, its officers or agents, the attorney for the government is instructed to take appropriate steps, by motion, notice of objection, or otherwise, to apprise the court of the objection of the United States to the imposition of such a penalty or sanction.

(3) Should such a penalty or sanction actually be required of or imposed on the United States, its officers or agents, the attorney for the government is instructed to:

(i) Advise the appropriate Assistant Attorney General of this development promptly in writing;

(ii) Seek appropriate relief from the district court; and

(iii) If necessary, seek authority for filing an appeal or petition for mandamus.

The Solicitor General, the Assistant Attorneys General, and the U.S. Attorneys are instructed to take all appropriate steps to resist the imposition of such penalties or sanctions against the United States.

(d) *Additional restrictions.* (1) The Assistant Attorneys General, the U.S. Attorneys, and their delegates, have no authority to settle or compromise the interests of the United States in a case pursuant to an arbitration process in any respect that is inconsistent with the limitations upon the delegation of settlement authority under the Department's regulations and the directives of the litigation divisions. See 28 CFR Part 0, Subpart Y and Appendix to Subpart Y. The attorney for the government shall demand trial de novo in any case in which:

(i) Settlement of the case on the basis of the amount awarded would not be in the best interests of the United States;

(ii) Approval of a proposed settlement under the Department's regulations in accordance with the arbitration award cannot be obtained within the period allowed by the local rule for rejection of the award; or

(iii) The client agency opposes settlement of the case upon the terms of the settlement award, unless the appropriate official of the Department approves a settlement of the case in accordance with the delegation of settlement authority under the Department's regulations.

(2) Cases sounding in tort and arising under the Constitution of the United States or under a common law theory filed against an employee of the United States in his personal capacity for actions within the scope of his employment which are alleged to have caused injury or loss of property or personal injury or death are not appropriate for arbitration.

(3) Cases for injunctive or declaratory relief are not appropriate for arbitration.

(4) The Department reserves the right to seek any appropriate relief to which its client is entitled, including injunctive relief or a ruling on motions for judgment on the pleadings, for summary judgment, or for qualified immunity, or on issues of discovery, before proceeding with the arbitration process.

(5) In view of the provisions of the Federal Rules of Evidence with respect to settlement negotiations, the Department objects to the introduction of the arbitration process or the arbitration award in evidence in any proceeding in which the award has been rejected and the case is tried de novo.

(6) The Department's consent for participation in an arbitration program is not a waiver of sovereign immunity or other defenses of the United States except as expressly stated; nor is it intended to affect jurisdictional limitations (*e.g.*, the Tucker Act).

(e) *Notification of new or revised arbitration rules.* The U.S. Attorney in a district which is considering the adoption of or has adopted a program of court-annexed arbitration including cases involving the United States shall:

(1) Advise the district court of the provisions of this section and the limitations on the delegation of settlement authority to the United States Attorney pursuant to the Department's regulations and the directives of the litigation divisions; and

(2) Forward to the Executive Office for United States Attorneys a notice that such a program is under consideration or has been adopted, or is being revised, together with a copy of the rules or proposed rules, if available, and a recommendation as to whether United States participation in the program as proposed, adopted, or revised, would be advisable, in whole or in part.

[Order No. 1109-85, 50 FR 40524, Oct. 4, 1985]

§ 50.21 Procedures governing the destruction of contraband drug evidence in the custody of Federal law enforcement authorities.

(a) *General.* The procedures set forth below are intended as a statement of policy of the Department of Justice and will be applied by the Department in exercising its responsibilities under Federal law relating to the destruction of seized contraband drugs.

(b) *Purpose.* This policy implements the authority of the Attorney General under Title I, section 1006(c)(3) of the Anti-Drug Abuse Act of 1986, Pub. L. 99-570 which is codified at 21 U.S.C. 881(f)(2), to direct the destruction, as necessary, of Schedule I and II contraband substances.

(c) *Policy.* This regulation is intended to prevent the warehousing of large quantities of seized contraband drugs which are unnecessary for due process in criminal cases. Such stockpiling of contraband drugs presents inordinate security and storage problems which create additional economic burdens on limited law enforcement resources of the United States.

JUN 19 1986

COMMERCIAL LITIGATION BRANCH POLICY CONCERNING THE USE OF MINI-TRIALS

I.

STATEMENT OF POLICY

It is the policy of the Commercial Litigation Branch of the Department of Justice to consider carefully and, where appropriate, implement methods for resolving disputes that are alternatives to judicial proceedings. In furtherance of that policy, the Branch will participate in mini-trials as a form of alternate dispute resolution. Branch attorneys are encouraged to assess cases assigned to them for the potential for resolution by mini-trial and are requested to forward requests for mini-trials from opposing counsel to obtain a decision by an appropriate Department of Justice official. Branch attorneys should make it clear to opposing counsel, however, that the Branch will not participate in a mini-trial unless appropriate Departmental officials, in the exercise of their discretion, determine that participation is appropriate and in the best interests of the Government.

II.

GENERAL

1.- Definition. A mini-trial is a voluntary, expedited, nonjudicial procedure through which management officials for each party meet to resolve disputes.

2. Purpose. A mini-trial is intended to reduce the cost, disruption and delay associated with litigation.

3. Description. A mini-trial is not actually a trial; rather, it is a process designed to facilitate settlement by educating the parties' principals regarding the strengths and weaknesses of the positions of both parties. The process combines the salutary aspects of negotiation and litigation, using flexible procedures designed to meet the needs of each individual case.

4. Attributes. The following are characteristic of all mini-trials in which the Department will participate:

a. Involvement of Principals: Management officials with settlement authority (or with the authority to make a final

recommendation as to settlement) for both parties participate directly.

b. Expedited Time Period: The time period allowed for a mini-trial is brief and deadlines are expedited.

c. Non-binding Discussions By Principals: At the close of the presentation, the principals meet by themselves to attempt to resolve the dispute. These discussions are not binding and may not be used by either party in any subsequent proceedings.

d. Informality: All proceedings are informal.

In addition, where appropriate, the parties may select a neutral advisor to provide advice to the management officials involved in the mini-trial.

III.

CRITERIA FOR SELECTING CASES

Cases likely to be governed by clear legal precedent are not good candidates for resolution by mini-trial. Cases which involve factual disputes, which do not depend upon the credibility of the witnesses, are preferred. Cases which are expected to establish important legal precedent and those which are clearly without merit do not lend themselves to resolution by mini-trial.

IV.

INITIATION OF PROCESS

The suggestion that a mini-trial be conducted may emanate from either party. If the non-governmental party requests a mini-trial, the Department's trial attorney is requested to submit that request, along with his or her recommendations and those of the interested agency, to his or her supervisor. If the Department's attorney, in the absence of a request by the non-governmental party, concludes that a mini-trial would be advantageous, he or she shall obtain the recommendations of the interested agency, obtain approval from appropriate supervisors and then propose this procedure to the opposing party. The opposing party will be supplied with a copy of this memorandum and will be advised that a written agreement between the parties is a prerequisite to initiating the procedure. The decision to participate in a mini-trial requires the approval of the Deputy Assistant Attorney General in charge of the Branch and is solely within the discretion of the Department.

V.

PARTICIPANTS

The Government's principal participant will be the Department of Justice official with settlement authority or, where that is not feasible, the official with the authority finally to recommend acceptance of a settlement. Usually, the official or officials within the interested agency or agencies with authority to make recommendations which are binding upon the agency or agencies will participate as a secondary principal for the Government.

The non-governmental party's principal participant must be a senior level management official who possesses authority to settle the dispute in the absence of litigation. Where possible, the official should be an individual who has not participated in preparing the case for litigation.

Each party will designate one representative who will be responsible for conducting the mini-trial and ensuring that procedures are followed. The Department's attorney of record will be the Government's representative.

Where appropriate, the parties may agree upon a neutral advisor to advise the management officials who participate in the mini-trial. The neutral advisor should be a person with either legal or substantive knowledge in a relevant field. The neutral advisor should have no prior involvement in the dispute or the litigation and must possess no interest in the result of the mini-trial. The neutral advisor and the parties must agree in advance that the neutral advisor will have no further involvement in the litigation should the mini-trial fail to result in a settlement.

VI.

THE MINI-TRIAL AGREEMENT

The mini-trial agreement is a written document, signed by the principals and the representatives, in which the parties agree to the procedures to be used. While each mini-trial agreement should be structured so as to meet the needs of each individual case, every agreement must contain specific expedited time limitations for each aspect of the procedure, a statement regarding the non-binding nature of the procedure, and an agreement that the parties will seek a suspension of proceedings in the pending litigation while the mini-trial process is continuing. The mini-trial agreement will be negotiated by the representatives, with the approval of the principals. A sample mini-trial agreement is Appendix A to this memorandum.

VII.

PROCEDURES

While the procedures to be used are subject to negotiation and should be designed to meet the needs of each individual case, the following procedures are generally considered to be appropriate:

a. Time Limits: Time limitations are to be explicit, brief and strictly observed.

b. Discovery: Discovery procedures should be expedited and should be the subject of a specific provision contained in the mini-trial agreement. The parties should consider including in the agreement a limitation upon the scope of discovery as well as the number and length of depositions and interrogatories. Discovery conducted prior to the initiation of mini-trial procedures shall not be duplicated during the mini-trial process. A nongovernmental party may not conduct discovery under the mini-trial agreement if it has pending a request or requests for disclosure of information under the Freedom of Information Act. The mini-trial agreement should normally provide that discovery shall be completed at least two weeks prior to the mini-trial.

c. Written Submittals: The parties should normally provide for an exchange of written submittals prior to the mini-trial. The mini-trial agreement should set forth the timing, format and length of the submittals. The written submittal of the nongovernmental party must include an analysis of its quantum claim which includes information regarding the source of the figures. At the time the written submittals are exchanged, the parties should also exchange exhibit lists and, if applicable, witness lists.

d. Location of the Mini-Trial: The location of the mini-trial shall be specified in the mini-trial agreement. Government facilities may be used; the Government will not agree to pay any part of a fee charged for the use of nongovernmental facilities.

e. Manner of Presentation at the Mini-Trial: The allocation of the time agreed upon for presentation of the case to the principals shall be set forth in the mini-trial agreement. The presentation should exceed one day only in exceptional circumstances. The time allotted to each representative may be used as that representative desires, including examination of or presentations by witnesses, demonstrative evidence and oral argument. Recording or verbatim transcription of the testimony shall not be allowed. The mini-trial agreement may provide for an opportunity for the principals to examine any witnesses.

f. Neutral Advisor: The parties may agree that a neutral advisor shall be present during the mini-trial in order to provide an opinion, upon request, to the principals on any issue upon which the parties agree in advance. The neutral advisor should be selected by agreement of the parties. The advisor should be a person with legal and/or relevant substantive knowledge and should be a person who has had no prior involvement in the dispute or the litigation. The parties shall agree in advance upon the amount of compensation to be paid to the neutral advisor and the manner in which this compensation shall be paid. The neutral advisor shall agree in advance that he or she will have no further involvement in the case should the mini-trial fail to dispose of the litigation.

g. Settlement Discussions: The principals shall meet immediately following presentation of the mini-trial to discuss the possibility of settling the claim. This meeting shall be private, although the mini-trial agreement may provide that each principal may designate an individual to act as his or her technical advisor. This individual may not be the party's representative. A principal may consult with his or her attorneys, although they may not take part in the discussions regarding settlement.

h. Confidentiality: The discussion which takes place between the principals shall not be used for any purpose in any subsequent litigation.

i. Termination: Any party may terminate mini-trial proceedings at any time.

APPENDIX A

MINI-TRIAL AGREEMENT
BETWEEN THE
UNITED STATES
AND
_____

This mini-trial agreement dated this _____ day of _____, 19__, is executed by ____[name]_____, ____[title]____, on behalf of the United States and by _____[name]_____, on behalf of ____[name of plaintiff]____, hereinafter referred to as plaintiff.

WHEREAS: On the _____ day of _____, 19__, plaintiff and the United States entered into Contract No. _____ ____for the _____ _____;

WHEREAS, under the Contract Disputes Act of 1978, plaintiff on _____, 19__, filed a suit in the United States Claims Court alleging _____ _____ _____ _____;

WHEREAS, the United States and plaintiff have agreed to submit [name of case] No. [docket no.] to a "Mini-Trial";

NOW THEREFORE, subject to the terms and conditions of this "Mini-Trial" agreement, the parties mutually agree as follows:

1. The United States and plaintiff will voluntarily engage in a non-binding mini-trial on the issue of _____

_____

_____.

The mini-trial will be held on _____, 19__, at [time of day] at _____[location]_____.

2. The purpose of this mini-trial is to inform the principal participants of the position of each party on the claim and the underlying bases of the parties' positions. It is agreed that each party will have the opportunity and responsibility to present its "best case" on entitlement and quantum.

3. The principal participants for the purpose of this mini-trial will be _____ for the United States and _____ for plaintiff. The principal participants have the authority to settle the dispute or to make a final recommendation concerning settlement. Each

party will present its position to the principal participants through that party's designated representative, _____, for the United States, and _____, for plaintiff.

4. The parties have agreed that _____ shall serve as a neutral advisor to the principals. The neutral advisor shall be compensated as set forth in a separate agreement with the advisor. The advisor has warranted that he or she has had no prior involvement with this dispute or litigation and has agreed that he or she will not participate in the litigation should the mini-trial fail to resolve the dispute.

The neutral advisor shall participate in the mini-trial proceedings and shall render an opinion, upon request, on the following issues: _____

_____

_____. NOTE: This clause is to be used only if the parties have agreed that the participation of a neutral advisor would be useful.

5. All discovery will be completed in the twenty working days following the execution of this agreement. Neither party shall propound more than 25 interrogatories or requests for admissions, including subparts; nor shall either party take more than five depositions and no deposition shall last more than three hours. Discovery taken during the period prior to the mini-trial shall be admissible for all purposes in this litigation,

including any subsequent hearing before any board or competent authority in the event this mini-trial does not result in a resolution of this appeal. It is agreed that the pursuit of discovery during the period prior to the mini-trial shall not restrict either party's ability to take additional discovery at a later date. In particular, it is understood and agreed that partial depositions may be necessary to prepare for the mini-trial. If this matter is not resolved informally as a result of this procedure, more complete depositions of the same individuals may be necessary. In that event, the partial depositions taken during this interim period shall in no way foreclose additional depositions of the same individual into the same or additional subject matter for a later hearing.

6. No later than _____ weeks prior to commencement of the mini-trial, the plaintiff shall submit to the United States a quantum analysis which identifies the costs associated with the issues that will arise during the mini-trial and which identifies the source of all data.

7. The presentations at the mini-trial will be informal. The rules of evidence will not apply, and witnesses may provide testimony in narrative form. The principal participants may ask any questions of the witnesses. However, any questioning by the principals, other than that occurring during the period set

aside for questions, shall be charged to the time period allowed for that party's presentation of its case as delineated in paragraph 9.

8. At the mini-trial proceeding, the representatives have the discretion to structure their presentations as desired. The presentation may include the testimony of expert witnesses, the use of audio visual aids, demonstrative evidence, depositions, and oral argument. The parties agree that stipulations will be utilized to the maximum extent possible. Any complete or partial depositions taken in connection with the litigation in general, or in contemplation of the mini-trial proceedings, may be introduced at the mini-trial as information to assist the principal participants to understand the various aspects of the parties' respective positions. The parties may use any type of written material which will further the progress of the mini-trial. The parties may, if desired, no later than _____ weeks prior to commencement of the mini-trial, submit to the representatives for the opposing side a position paper of no more than 25 - 8 1/2" X 11" double spaced pages. No later than ___ week(s) prior to commencement of the proceedings, the parties will exchange copies of all documentary evidence proposed for use at the mini-trial and a list of all witnesses.

9. The mini-trial proceedings shall take one day. The morning's proceedings shall begin at ____ a.m. and shall continue until _____ a.m. The afternoon's proceedings shall begin at ____ p.m. and continue until ____ p.m. (A sample schedule follows.)

SCHEDULE

9:00 a.m. - 10:00 a.m.	Plaintiff's position and case presentation.
10:00 a.m. - 11:00 a.m.	United States' cross-examination.
11:00 a.m. - 11:30 a.m.	Plaintiff's rebuttal.
11:30 a.m. - 12:00 noon	Open question and answer period.
12:00 noon - 1:00 p.m.	Lunch
1:00 p.m. - 2:00 p.m.	United States' position and case presentation.
2:00 p.m. - 3:00 p.m.	Plaintiff's cross-examination.
3:00 p.m. - 3:30 p.m.	United States' rebuttal.
3:30 p.m. - 4:00 p.m.	Open question and answer period.
4:00 p.m. - 4:30 p.m.	Plaintiff's closing argument.
4:30 p.m. - 5:00 p.m.	United States' closing argument.

10. Within ____ day(s) following the termination of the mini-trial proceedings, the principal participants should meet, or confer, as often as they shall mutually agree might be productive for resolution of the dispute. If the parties are unable to resolve the dispute within ____ days following

24-971 O - 90 — 9

completion of the mini-trial, the mini-trial process shall be deemed terminated and the litigation will continue.

11. No transcript or recording shall be made of the mini-trial proceedings. Except for discovery undertaken in connection with this mini-trial, all written material prepared specifically for utilization at the mini-trial, all oral presentations made, and all discussions between or among the parties and/or the advisor at the mini-trial are confidential to all persons, and are inadmissible as evidence, whether or not for purposes of impeachment, in any pending or future court or board action which directly or indirectly involves the parties and the matter in dispute. However, if settlement is reached as a result of the mini-trial, any and all information prepared for, and presented at the proceedings may be used to justify and document the subsequent settlement. Furthermore, evidence that is otherwise admissible shall not be rendered inadmissible as a result of its use at the mini-trial.

12. Each party has the right to terminate the mini-trial at any time for any reason whatsoever.

13. Upon execution of this mini-trial agreement, if mutually deemed advisable by the parties, the United States and the plaintiff shall file a joint motion to suspend proceedings in the Claims Court in this case. The motion shall advise the

court that the suspension is for the purpose of conducting a mini-trial. The court will be advised as to the time schedule established for completing the mini-trial proceedings.

DATED _____

BY: _____

Principal participant for the United States

_____

Attorney for the United States

DATED _____

BY: _____

Principal participant for _____

_____

Attorney for _____

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV - 7 1990

OFFICE OF CONGRESSIONAL
AND LEGISLATIVE AFFAIRS

Honorable Carl Levin
Chairman
Subcommittee on Oversight of
Government Affairs
Committee on Governmental Affairs
United States Senate
Washington, D. C. 20510-6250

Dear Mr. Chairman:

Thank you for the opportunity to clarify some of the issues discussed at the September 19, 1989 hearing on S. 971, the Administrative Dispute Resolution Act of 1989. I have enclosed our responses to your questions and those of Senator Lieberman which were addressed in your October 3, 1989 letter.

The Office of Management and Budget has advised that there are no objections to the presentation of these views from the standpoint of the President's program.

We appreciate the opportunity to provide you with this information. If we can provide you with additional information, please do not hesitate to contact us.

Sincerely,

Charles M. Hassett
Acting Director
Legislative Analysis Division

Enclosure

Printed on Recycled Paper

U.S. ENVIRONMENTAL PROTECTION AGENCY'S ANSWERS TO SENATOR LEVIN'S QUESTIONS FROM SEPTEMBER 19, 1989 HEARING

Q.1. What are the percentage of cases which are submitted to ADR techniques and, in particular, the percentage of these cases which are enforcement cases?

(A) The percentage figure for cases submitted to ADR at EPA is so small as to be negligible. This is to be expected, however, with fledgling programs such as ADR. Approximately, fifteen cases have been nominated by our Regions for use of ADR, including a few which were defensive actions. Of these nominations, three enforcement cases were mediated to settlement, and three are now in the process of being mediated. In the one case where the Agency attempted to use a minitrial, the case was not resolved. Curiously, almost every other nominated case was settled by traditional negotiation prior to even suggesting ADR to the other parties to the dispute.

Additionally, there are provisions for ADR use in approximately half a dozen of the Agency's consent orders and agreements which prescribe ADR for certain future disputes between the parties.

Q.2. Please provide data on the savings in time and cost experienced as a result of EPA's use of ADR methods.

(A) Of the seven negotiated rulemakings undertaken by EPA, five resulted in a final rule. We estimate that the average duration of the rule promulgation period decreased from 42 months for a traditional major rulemaking, to 26 months for a negotiated rulemaking. It is important to note, however, that this estimate is based on very little empirical evidence. Nonetheless, the results are promising.

There is no numerical data on the savings in time and cost experienced as a result of EPA's use of ADR in enforcement litigation. All those who have been involved in an ADR process at the Agency, however, have stated that the process saved them a great deal of time and effort.

Q.3. Please provide information about EPA's employee training program on how and when to use ADR methods.

(A) Information about how and when to use ADR methods can be found in the "Final Guidance on Use of Alternative Dispute Resolution Techniques in Enforcement Actions," dated August 14, 1987, a copy of which is attached.

The ADR training program for EPA enforcement employees involves two efforts which center on the Agency's Negotiation Skills Training Course. This course is held in every EPA regional office and at headquarters every year, and instructs EPA

enforcement personnel, both attorneys and technical staff, how to negotiate enforcement disputes. As part of this course, the instructors briefly cover the basics of ADR, and EPA's policy to use it in appropriate cases. Additionally, in conjunction with the course, one of the instructors usually convenes a meeting of regional enforcement personnel, under the auspices of the Regional Counsel's Office, to discuss specific applications of ADR to the Region's enforcement docket.

Q.4. In Mr. Reich's prepared testimony, he indicated strong support for the confidentiality provisions contained in S. 971. Does S. 971 also provide adequate protection of the public's right to know the outcome of proceedings which are of concern to the affected community?

(A) S. 971 has no effect on the public's right to know the outcome of proceedings which are of concern to the affected community. It is important to remember that ADR techniques are only processes, the means by which parties reach an outcome. EPA continues to support the public's right to know relevant outcomes of disputes, whether in the ADR context or otherwise.

Q.5. At the hearing, there was discussion of EPA's current use of arbitration as authorized by Congress. S. 971 would expand this authority. Please provide the Subcommittee with a description of each legal challenge, if any, that has been made to EPA's use of arbitration and the outcome of each such case. Is there a need to expand the use of arbitration within the Agency?

(A) While there were some comments on EPA's Superfund arbitration rules, there have been no challenges to EPA's use of arbitration. Because these rules only became effective on August 28 of this year, we have had no case experience with them as yet.

Arbitration has been approved by Congress for our Superfund programs for cases that are routine, non-precedential, and which usually involve small amounts of money. This use of arbitration can augment the work being done by our Administrative Law Judges. Arbitration should be thought of as an adjunct to existing litigation tools where the parties prefer a rapid decision in a small case which offers no important issues.

Q.6. Should neutrals use in a matter involving the federal government be government employees? To what extent should neutrals have expertise in the area which is the subject of the dispute?

(A) There are cases where neutrals used in a matter involving the federal government could be federal employees. In some cases a neutral may be available from a different agency than the one involved in the dispute. Certainly, the Federal Mediation and Conciliation Service and the Community Relations Service at the

Department of Justice could provide ADR services at appropriate times.

A mediator should have sufficient general knowledge of the subject matter of the dispute to understand and follow the issues, assist the parties in recognizing and establishing priorities and the order of consideration of those issues, ensure that all possible avenues and alternatives to settlement are explored, and otherwise serve in the most effective manner. In other forms of ADR requiring either a decision or an opinion from the neutral such as arbitration or factfinding, it is mandatory that the neutral selected have expertise in the area which is the subject of the dispute.

U.S. ENVIRONMENTAL PROTECTION AGENCY'S ANSWERS TO SENATOR LIEBERMAN'S QUESTIONS FROM SEPTEMBER 19, 1989 HEARING

Q.1. Do you support the use of alternative dispute resolution mechanisms in cases involving the issuance or revocation of a permit?

A. ADR mechanisms can be very useful in resolving disputes which cannot be effectively resolved through traditional negotiation activities. Disputes may arise in the permit issuance process which would be appropriate for use of ADR mechanisms.

Q.2. Many of EPA's cases involve threats to the public health or the environment. In some cases, the nature of the threat may not be evident until the middle of a case. How would EPA deal with a serious threat to public health or the environment that arises in a case where the Agency has committed to binding arbitration or some other ADR procedure? Can ADR procedures provide for the emergency type of relief that can be secured through the judicial process?

A. EPA is sensitive to the concern raised about maintaining the Agency's ability to address situations which involve threats to public health or the environment. This concern is incorporated into the procedure followed by the Agency in selecting appropriate cases for the use of ADR procedures.

If the use of an ADR mechanism would in any way restrict or diminish EPA's ability to address a situation that presents a threat to public health or the environment, ADR will not be used. In addition, the use of an ADR mechanism does not affect EPA's normal authorities for addressing emergency relief situations. Should an emergency arise or become apparent during the use of an ADR process, EPA would respond as necessary to protect human health and the environment.

EPA is presently using binding arbitration only in disputes in which binding arbitration is authorized by statute. Specifically, is includes monetary disputes involving Superfund reimbursement claims for amounts less than $500,000. Because the authorized arbitration procedures are limited to monetary reimbursement disputes, the use of arbitration cannot limit the ability of EPA to address threats to public health or the environment.

Q.3. Is ADR appropriate for cases where the Agency is seeking compliance with a regulation? Studies indicate that arbitrators or mediators tend to split the difference between the parties. Is this approach appropriate in cases where the Agency is seeking injunctive relief to comply with the law?

A. Where the Agency is seeking compliance with a specific regulation, it is inappropriate for EPA to use ADR to make determinations regarding the legal liability of the alleged violator or whether it needs to comply with the regulation. However, ADR may be appropriate to assist the Agency in reaching determinations relative to the precise form or appropriate timing of compliance.

Mediators do not make decisions or offer opinions on substance to the parties; rather they assist the parties in reaching their own decisions.

Q.4. One of the main purposes of penalties in environmental cases is to deter other potential violators. What can EPA do to ensure that ADR procedures achieve this deterrence effect?

A. ADR mechanisms are not a substitute for EPA's aggressive prosecution of statutory violations. Rather, ADR mechanisms are a tool for use by EPA in effectively resolving enforcement disputes. The use of an ADR mechanism does not restrict EPA's final responsibility to assess the appropriateness of a settlement of an action for statutory violations.

Q.5. How do ADR procedures take into account the need for public involvement in many of EPA's programs? For example, if ADR is used in the decisions about whether to grant a permit, how would the public become involved in the process? If the Agency starts using ADR on a wide-scale, would public interest groups or other members of the public have the necessary resources to participate in the process?

A. The use of ADR mechanisms will not affect the current participation of the public in EPA programs. To the extent that express provision exists by statute or regulation for public participation in EPA programs, EPA will not use any ADR mechanism in such a way as to hinder such public participation. In fact, the use of an ADR professional by EPA may in, some situations, allow broader participation of the public in environmental decisions. In a recent EPA civil action against the City of Sheridan, Wyoming, the use of a mediator to assist EPA negotiations allowed the public expanded participation which produced an outcome that was more environmentally beneficial than would have been possible through traditional enforcement processes.

Q.6. Is ADR ever appropriate to use in the decision about which remedy should be selected at a Superfund site?

A. The use of an ADR mechanism by the Agency is not appropriate as a method of selecting a remedy at a Superfund site. It may, however, in regard to a Superfund site, be appropriate to use an ADR mechanism to facilitate EPA's discussions with the local community regarding a selected remedy.

Q.7. Would use of ADR in general at Superfund sites exclude the public participation that the statute envisions? What, specifically, would be the effect of binding arbitration on this participation?

A. The use of ADR mechanisms will not affect the current participation of the public in the EPA Superfund program. To the extent that express provision exists by statute or regulation for public participation in EPA programs, EPA will not use any ADR mechanism in such a way as to hinder such public participation.

At present no authority exists for EPA to use binding arbitration to determine remedies at Superfund sites. Regarding the use of binding arbitration in Superfund reimbursement claims for amounts under $500,000, the statute specifically provides for public comment following arbitration decisions.

The CHAIRMAN. Without further adieu, our next witness will be William Barr, the Assistant Attorney General for the Office of Legal Counsel at the Justice Department.

Mr. Barr, I don't think we've seen you up here since your nomination, so I extend a hardy welcome to you with your first appearance before the Senate Judiciary Committee at least. I believe you testified before the House Judiciary Committee, and we welcome your comments and recognize your interest as well as your scholarship.

STATEMENT OF WILLIAM P. BARR, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, ACCOMPANIED BY MICHAEL LUDIG, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL

Mr. BARR. Thank you, Mr. Chairman. Accompanying me today is Mike Ludig, who is the principal Deputy Assistant Attorney General of the Office of Legal Counsel.

Thank you for providing me the opportunity to appear here today. I am pleased to present to the committee the administration's views on a constitutional amendment to allow Congress and the States to prohibit the physical desecration of the flag of the United States.

At the outset, let me say that the administration applauds your leadership and the committee for moving forward with such dispatch to consider this very important matter of protecting the flag.

For reasons which I will explain, we believe that a constitutional amendment is the only way to protect the flag in the weight of the court's expansive decision. The President supports the constitutional amendment which has been cosponsored in the Senate by Senators Dole and Dixon. That proposal would amend the Constitution to provide simply this. The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States.

Most of us share a common ground. We believe that the flag should be protected from physical desecration. We want to do what is necessary to protect it. The question before us is this. How do we accomplish this?

Now, the central issue seems to be can we protect the flag with a statute or do we need a constitutional amendment. The Department of Justice, at the President's request, has carefully considered whether it is possible to protect the flag through a statute.

You have my assurance that the President and the Attorney General would be the first to support a statute if they thought a statute could survive constitutional challenge and protect the flag from desecration.

Unfortunately, we are convinced that in light of the expansive decision of the court, a statute simply will not suffice and that the only way to insure protection of the flag is through a constitutional amendment.

During my remarks this morning, I want to try to cover three points. First, why we believe a statute will be struck down and why a constitutional amendment is, therefore, necessary. Second, why we have serious concerns about the kind of statute being proposed

even apart from its unconstitutionality. And third, what the constitutional amendment would do and why we think it is a reasonable way to proceed.

This is one of those rare instances where a fundamental policy call really turns on legal analysis. So first let me start with why we think an amendment is necessary. As you know, the court has held repeatedly that the first amendment covers not only speech, verbal and written but also certain kinds of conduct, conduct that is intended to convey a message. This is the symbolic speech doctrine.

So if someone wears an arm band for the purposes of conveying a message, the first amendment covers that person's activities and extends first amendment protection. Now, when someone is engaged in this kind of expressive conduct and the government comes along and says, stop. We have a rule that says you cannot engage in that conduct. We have a collision between the actor's first amendment interest in trying to convey his message through that conduct and the Government's interest behind the rule that says you cannot engage in that conduct.

When you have that collision, who wins? The court has applied two standards to determine who wins. The first is a very strict standard. It's called exacting scrutiny. Some people call it level one scrutiny.

Under this standard, the Government almost never wins. Then there's a more lenient standard which the court refers to as the *O'Brien* standard. Some people call this level-two scrutiny. Whereas under level one the Government needs a compelling interest to prevail, under level two the Government can win if it can show an important interest. So it's a more lenient standard.

Now, the whole issue here really is whether we can conjure up a statute by which we can escape level one exacting scrutiny and get down to the more lenient level-two scrutiny, *O'Brien* scrutiny.

Well, what does the court look to to determine whether you're going to be subject to exactly scrutiny or *O'Brien* scrutiny? Here's the key. The court looks to the Government's interest in seeking to control the conduct. The test is what is the Government's reason for the rule. If the Government's reason for the rule has nothing whatever to do with concern about the communicative effect of the conduct, then you can get under the lenient standard of *O'Brien.*

The CHAIRMAN. Would you repeat that last comment?

Mr. BARR. If the Government can show that its interest has nothing whatever to do with concern about the expressive or communicative effect of the conduct, then you can get under *O'Brien* lenient scrutiny.

If the Government's interest is related to concern about the communicative effect of the conduct, then you're under level-one scrutiny and the Government's rule is basically dead on arrival. If the Government's reason for the rule is that it ultimately wants to have an effect on expression, it's going to lose, the Government is going to lose.

A good question to ask yourself whenever you're looking at a rule is can the Government point to a public harm that is caused by the conduct that has nothing to do with the communicative as-

pects of that conduct. Now, let's see how these principles have been applied in the flag case.

Why do we want to protect the flag? Well, without exception, everyone today who talked about the reason for protecting the flag, and without exception everyone in the House that I've heard talk about why we want to protect the flag, has said we want to protect it as a symbol. As you have eloquently testified, Mr. Chairman, before the House committee, you said, "The flag is truly the nation's most revered and profound symbol representing what this country stands for."

Well, the court agrees. In the flag cases it says that the Government's interest is to protect the flag as a symbol of the Nation. Now, a symbol inherently has expressive content. That is what a symbol is. The flag stands for something. It has a meaning. It is not the Nation, but it stands for the Nation, and it stands for the Nation's values. It is not freedom itself, but it stands for freedom.

As the Court says, the flag is a form of symbolism, an effective way of communicating ideas, a shortcut from mind to mind. And as the court in *Johnson* said, "the flag is pregnant with expressive conduct."

Now, here is the central point. In two successive cases, *Spence* and *Johnson*, the Court has said that the Government's interest in protecting the flag as a symbol is necessarily and inherently related to expression, and consequently, a rule based upon a desire to protect the flag as a symbol, will fall under strict scrutiny, and it will fail because the Government's interests are not compelling enough.

In other words, the reason the Government wants to place restrictions on the use of the flag is because it wants to strengthen the flag's ability to convey a positive message as a symbol. So the Government wants to discourage conduct with the flag that impairs that positive message. To permit people to do bad things with the flag, conveys a bad message about the flag. It says that the things the flag stands for are not that important.

So *Spence* says, the Government has an interest in preserving the National flag as an unalloyed symbol of our country. If this interest is valid, we note that it is directly related to expression, therefore, *O'Brien* is inapplicable. And in *Johnson*, the same thing:

> The Government's interest in preserving the flag's special symbolic value is directly related to expression, thus it is outside of *O'Brien* all together.

Now, what does this mean?

The reason *Johnson* together with *Spence* is so devastating, is that it decisively has decided two things, first, the Government's interest in protecting the flag is inherently related to expression, and therefore, any rule to protect the flag is subject to strict scrutiny, exacting scrutiny, and second, the Government's interest is not sufficiently compelling to survive exacting scrutiny.

There is simply no way, if our interest is to preserve the flag as a symbol, there is no way to get around these two decisive points. Any statute, based upon protecting the flag as a symbol, will be subject to strict scrutiny, and it will be dead on arrival.

Now, I know Chairman Biden, you have proposed a statute, and others have proposed similar statutes. The House has proposed one

that is similar, or at least will be considering one that is similar. And the idea behind it is that, well, the statute in *Johnson* seemed to just punish contemptuous conduct toward the flag, or at least offensive conduct toward the flag, therefore, if we broaden this statute beyond that scope, and punish conduct with respect to the flag regardless of whether it's offensive or contemptuous, then we can pass constitutional muster.

Well, there are two fundamental problems with this approach. First, it does not fix the constitutional problem, and second, it leaves you with an absurdly broad statute that no one really wants. It does too much.

Now, what is the flaw in the logic? The flaw in the logic is the mistake in thinking that the level of scrutiny depends upon the scope of the rule, how broad the rule is, rather than the reason for the rule. It's the reason for the rule that determines whether you are subject to strict scrutiny or lenient scrutiny. It does not depend on the scope of the rule.

Now, it's not just me saying this. The Supreme Court has specifically addressed this in *Spence*. In *Spence* there was a neutral statute very much like the statute you're proposing. It prohibited affixing anything to the flag. Intent did not matter. You did not need to have a contemptuous intent, nor did it make any difference whether you were trying to convey a message. It was just a flat out prohibition on attaching any foreign object to the flag. It covered the veteran who put his battalion pin. It covered someone who put a swastika on the flag. The court said, it doesn't matter that's neutral or appears to be neutral. The Government's interest is to protect the flag as a symbol, therefore, you are subject to strict scrutiny.

Consider the logic behind the statute, and think about how it would be applied in other contexts. Suppose that the premise is that you can sustain a prohibition on expressive conduct as long as you are also willing to extend a prohibition to people who have no expressive motive. Well, this is wrong. The thing that counts is the Government's motive, not the motive of the actor. If the Government's reasons are related to expression, the Government will lose.

Black arm bands. Suppose the Government starts out with a statute and says, we don't want you wearing black arm bands. The court strikes it down. It's not viewpoint neutral.

The State comes back and says, OK. You can't wear anything black above your waist in school, nothing, no shirt, no sweater, no black arm band. So we're not really—we don't care about expression. How long would that statute last?

Book burning, suppose the Government starts out with a statute and says, we like these 10 books. You can't burn them to show your dissatisfaction with the ideas contained therein. That's struck down. The State comes back and says, you can't burn these books, period. These 10 books, we don't want you destroying them. This is not because of the content of the books. This is because we want to protect the physical integrity of the books. Well, why do we want to protect the physical integrity of the books? Why the books and not something else?

A red flag, suppose we have a law which says, you cannot bear a red flag in order to show support for the Communists. It's struck

down. Congress comes back with a statute and says, OK. You can't carry a red flag at all. Whether or not you intend to communicate anything. A flag is inherently expressive and it's clear that the reason for the rule is related to expression. The Government will lose on all those examples. Then we are left with an absurdly overbroad statute.

The problem, the constitutional amendment will permit Congress and the States to go and punish, as they have in the past, contemptuous conduct, which is the stuff that people find offensive. The statute will punish completely innocent conduct that no one is concerned about, and, in fact, patriotic conduct.

Let me give you an example. The statute has an absolute prohibition on defacement. Well, in order to be neutral, you have to prohibit any kind of defacement, whether it's patriotic or not. You cannot make a distinction between a swastika and a regimental emblem. If you do, you lose even the pretext of neutrality. And so you would have to prohibit patriotic inscriptions on flags, which have been permitted for time and memorial.

There's an absolute prohibition on any mutilation. Well, we can't make a movie now, under this statute, of Fort McHenry because the rockets red glare actually lit up the flag and it did damage to the flag. We can't show that. You cannot mutilate the flag as part of making a film.

Regardless of your intent, your purpose can be to ennoble the flag to help its symbolic value, and we're saying, no, you can't do it. As people have pointed out, the current statute extends to depictions of the flag. And so what we would have under the statute, newspapers could not print a masthead that covered the flag. You couldn't throw away an object, crumple it up and mutilate it, that had a depiction of the flag on it.

Now, these absurd results are not really what Congress wants. If Congress could do without this statute, it would. It would pass a statute like it did in 1968.

Now, let me give you an example of, you know, the kind of result that we get under this statute. This is the actual flag carried up San Juan Hill. It was carried by the lead unit, the 13th Regiment U.S. Infantry, and they proudly emblazon their name right across the flag, as you see; 1,078 Americans died following this flag up San Juan Hill.

Now, the bullets were like a hail storm that day, and so a lot of damage was done to this flag. Not all of it is evident because of the way it's folded, but a lot of battle scars are on this flag. Under the statute, you can't have regiments put their name on the flag, that's defacement. Nor could you ever show an accurate rendition of this battle. You could not show damage being done to the flag. Now, is that what we are really after? No. That doesn't make any sense.

And the reason we're doing this, the reason we're going through this is to get to the people who really engage in contemptuous conduct toward the flag. And the only way that can be done in a narrow and focused manner is through a constitutional amendment.

Mr. Chairman, I'll end my prepared remarks there and answer any questions that you might have.

[The statement of Mr. Barr follows:]

STATEMENT

OF

WILLIAM P. BARR
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE

THE

COMMITTEE ON THE JUDICIARY

OF THE

UNITED STATES SENATE

IN SUPPORT OF

A CONSTITUTIONAL AMENDMENT TO PROHIBIT
PHYSICAL DESECRATION OF THE FLAG
OF THE UNITED STATES

AUGUST 1, 1989

Mr. Chairman and Members of the Committee:

Thank you for providing me the opportunity to appear today. I am pleased to present to the Committee the Administration's views on a constitutional amendment to allow Congress and the States to prohibit the physical desecration of the Flag of the United States. This proposed amendment is prompted by the Supreme Court's recent decision in Texas v. Johnson, 57 U.S.L.W. 4770 (June 21, 1989), which ruled that a State cannot punish a person for burning the Flag. For reasons which I will explain, a constitutional amendment is the only way to protect the Flag in the wake of the Court's expansive decision. An amendment is the only way to adequately respond to the overwhelming--and understandable--sentiment of the American people that the Flag must be protected. I trust that few among us would disagree that the Flag is deserving of protection. As the symbol of our Nation, the Flag is the embodiment of our commitment to freedom. It stands in sacred honor of those who have sacrificed their lives in defense of that freedom. It holds in sacred trust the spirit of the American people.

Given the deserved reverence accorded the Flag, it is not at all surprising that the American people reacted with outrage when they were told that this Flag can be burned, shredded and spat upon with impunity. It would have been surprising had they reacted otherwise.

The President shares the profound sense of personal violation felt by the American people. He firmly believes that

we have an obligation to the people to act swiftly and decisively to protect the Flag from those who would break our spirit through desecration of this one symbol that unites us.

We must be mindful that we here in Washington are but trustees of the will of the people; our authority is derivative. The will of the people is unmistakable. They want the Flag of the United States protected from those who would defile it.

I. INTRODUCTION

The issue that has occupied the lion's share of the time thus far is not <u>whether</u> to provide protection for the Flag, but <u>how</u> to provide that protection. Specifically, the debate has centered around whether an amendment to the Constitution is required or whether a statute would suffice. The Department of Justice, at the request of the President, has carefully considered whether it is possible to protect the Flag through a statute. You have my assurance that the President and the Attorney General would be the first to support a statute if they thought a statute could survive constitutional challenge and protect the Flag from desecration. Unfortunately, we are convinced that, in light of the expansive decision of the Court, a statute simply would not suffice, and that the only way to ensure protection of the Flag is through a constitutional amendment. This is confirmed by even the most cursory reading of the Court's opinion.

The reason that a statute purporting to protect the Flag would be unconstitutional is simple. In Texas v. Johnson, the Court held that whenever someone burns the Flag for expressive purposes, that conduct is protected by the First Amendment; that to prohibit such conduct, the Government must have a compelling reason that is unrelated to expression; that the Government's reason for protecting the Flag (to preserve it as a symbol of national unity) is inherently and necessarily related to expression; and that the Government's interest in protecting the Flag as a symbol of our national unity can never be sufficiently compelling to overcome an individual's First Amendment interest in burning the Flag for communicative purposes. This reasoning plainly would extend to any Flag desecration statute enacted to protect the Flag as a symbol of our Nation.

We do not believe that it is necessarily unfortunate that an amendment is required. The amendment process serves as a reminder, lest we forget, that the law is of the people.

II. ANALYSIS OF TEXAS v. JOHNSON

To make an informed judgment as to whether an amendment is required, it is necessary to understand both the way in which the Supreme Court analyzes symbolic speech cases, and the reasoning employed by the Court in reaching its decision in Texas v. Johnson.

The Court has repeatedly held that the First Amendment extends to symbolic speech where the conduct was intended to convey a message and the likelihood was great that the message conveyed would be understood. See Spence v. Washington, 418 U.S. 405, 410-411 (1974). For example, the Court held in Brown v. Louisiana, 383 U.S. 131 (1966), that a peaceful sit-in in a public library to protest the library's policy of segregation was protected by the First Amendment. Where the Government attempts to prohibit, punish or otherwise burden communicative conduct, the Court carefully analyzes the Government's interest in imposing the burdens. If the Government's interest is unrelated to suppression of expression, the regulation is subjected to the comparatively more lenient standard set forth in the Court's opinion in United States v. O'Brien, 391 U.S. 367 (1968). Under that standard, the Government's interest must only be important or substantial to justify the regulation. Id. at 377. If, on the other hand, the Government's interest is related to suppression of expression, the regulation is subjected to the "most exacting scrutiny." Texas v. Johnson, 57 U.S.L.W. 4770, 4774 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)). Under this standard, the Government's interest must be compelling.

Turning to the decision in Texas v. Johnson, the threshold question addressed by the Court was whether Johnson's burning of the Flag constituted expressive conduct protected by the First Amendment. Noting that the Flag is "[p]regnant with expressive content," id. at 4772, the Court readily determined that

Johnson's burning of the Flag was "'sufficiently imbued with elements of communication'" id. (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)), to justify invocation of the First Amendment.

The Court then analyzed the interests advanced by the State in support of its Flag burning prohibition to determine whether those interests related to the suppression of expression. Texas v. Johnson, id. at 4772. The State of Texas asserted two interests in support of its prohibition on Flag burning: preventing breaches of the peace, and preserving the Flag as a symbol of nationhood and national unity. The Court held that the State's interest in preventing breaches of the peace was not implicated on the record because there was no evidence that Johnson's burning of the Flag actually caused a breach of the peace, and he was not prosecuted for breach of the peace. Id. at 4772-4773.

Significantly, however, the Court held that the government can never assume that Flag burning will cause a breach of the peace. Id. at 4773. Moreover, said the Court, Johnson's burning of the Flag as a "generalized expression of dissatisfaction with the policies of the Federal Government" was not the equivalent of "fighting words" that could cause a breach of the peace because "[n]o reasonable onlooker" would regard it as a "direct personal insult or an invitation to exchange fisticuffs." Id. The Court went on to say that its precedents "recognize that a principal 'function of free speech under our system of government is to

invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" Id. (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

The Court then turned to the State's asserted interest in preserving the Flag as a symbol of our Nation. It held that this interest was directly related to the suppression of expression: "[T]he Government's interest in preserving the flag's special symbolic value 'is directly related to expression in the context of activity'" intended to express a message. Id. (quoting Spence, 418 U.S. at 414 n.8). Because the State's interest in preventing Flag burning was related to expression, the Court held that the considerably less demanding standard of O'Brien did not apply, and that the State's interest must be subjected to the "most exacting scrutiny." Id. at 4774.

The Court held that Texas' interest in preserving the Flag as a symbol of our Nation and national unity could not justify its prohibition on Flag burning. The Court reasoned that governmental protection of the Flag because of its symbolic importance to the Nation would be tantamount to a governmental directive that the "symbol be used to express only one view of that symbol or its referents." Id. at 4775. The Government, said the Court, may not "foster its own view of the flag by prohibiting expressive conduct relating to it." Id. Any attempt to preserve the Flag as a symbol offends the "bedrock principle" that "the Government may not prohibit the expression of an idea

simply because society finds the idea itself offensive or disagreeable." Id. at 4774. Finally, the Court explicitly refused to accord the Flag any special constitutional significance, finding "no indication - either in the text of the Constitution or in [its] cases interpreting it - that a separate juridical category exists for the American flag alone." Id. at 4775.

III. CONSTITUTIONALITY OF FLAG DESECRATION STATUTES AFTER TEXAS V. JOHNSON

We think it is plain under this reasoning that any statute prohibiting desecration of the Flag for communicative purposes would be unconstitutional. The Flag is by nature communicative. It is a symbol "[p]regnant with expressive content." Id. at 4772. Thus, the Government's interest in preserving the Flag as a symbol is inherently related to expression. It is precisely because the Flag is the symbol of this Nation that the Government wants it protected against conduct that will undermine its communicative force, i.e., conduct that will prevent or interfere with the message communicated by the Flag. As the Court observed in Texas v. Johnson, the Government "is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, we do not enjoy unity as

a Nation." Id. at 4773. Accordingly, any Flag desecration statute will be subject to the "most exacting scrutiny."

The Court has held that under this exacting scrutiny the Government's interest in preserving the symbolic value of the Flag can never be sufficiently compelling to stop an individual from desecrating the Flag whenever the desecration is done for communicative purposes.

An asserted interest in preventing breaches of the peace would not save the statute because the Court also held that the Government may never assume that Flag burning or other Flag desecration will cause a breach of the peace. Moreover, the Court has said that desecration of the Flag as a "generalized expression of dissatisfaction with the policies of the Federal Government" cannot cause a breach of the peace because "[n]o reasonable onlooker" would regard it as a "direct personal insult or an invitation to exchange fisticuffs." Id. at 4773. The Court's categorical rejection on these grounds of the only two conceivable interests for prohibiting the desecration of the Flag render it certain that the Court would strike down any such statute.

It has been argued that the Court would uphold a statute if it prohibited all Flag desecration, whether in public or private, and whether done with contempt or not. This argument is demonstrably wrong because it assumes that the Government's reason for enacting a facially neutral prohibition (that is, a statute neutral as to the particular viewpoint expressed) would

be "unrelated to expression." It would not be. The Government's reason for passing a viewpoint-neutral prohibition would be the same as its reason for passing a prohibition on contemptuous desecration only: protection of the symbolic value of the Flag. The Supreme Court has held in two successive cases, Spence v. Washington and Texas v. Johnson, that it is the Government's reason for the prohibition, not the scope of the prohibition, that determines the level of scrutiny. Because the Government's reason for protecting the Flag is necessarily related to expression, the prohibition would always be subjected to exacting scrutiny, and therefore would never prevail over an individual's First Amendment interest in expressive conduct.

In essence, the argument fails to appreciate that a statute neutral as to the particular viewpoint expressed can nonetheless be unconstitutional if its prohibition is content-based (i.e., related to expression). The Supreme Court has distinguished between "content" and "viewpoint" regulation. See, e.g., Boos v. Barry, 108 S. Ct. 1157, 1163-1164 (1988). If the regulation is either content-based or viewpoint-based, it is subject to the "most exacting scrutiny." Id. Importantly, a regulation can be viewpoint-neutral, but content-based. Id. Even assuming that the proposed statute would be held to be viewpoint-neutral (which itself is doubtful), it would never be held content-neutral.

A statute is content-neutral only if its restrictions on communicative activity "are justified without reference to the content of the regulated speech." Id. at 1163 (quoting Virginia

Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)). Its restrictions must have "nothing to do with that speech;" the statute must not have been "aim[ed] at the suppression of free expression." Id.; see also Texas v. Johnson, 57 U.S.L.W. 4770, 4774.

The restrictions imposed on speech, even by a facially neutral Flag desecration statute, neither would nor ever could be justified by anything other than the Government's interest in protecting the symbolic value of the Flag. (Any legislative determination to the contrary would plainly be pretext and would be recognized by the Court as such. See, e.g., Wallace v. Jaffree, 472 U.S. 38 (1985)). Indeed, in Spence v. Washington, the Court considered a facially neutral statute virtually identical to the statute now proposed. Prosecution under the statute at issue in that case, like under the statute proposed here,

> [did] not depend upon whether the flag is used for communicative or noncommunicative purposes; upon whether a particular message is deemed commercial or political; upon whether the use of the flag is respectful or contemptuous; or upon whether any particular segment of the State's citizenry might applaud or oppose the intended message.

Spence, 418 U.S. at 422-23 (Rehnquist, J., dissenting). In holding the statute unconstitutional as applied to a person engaged in communicative conduct, the Court explained that

> [even] [i]f [the government's interest in preserving the value of the Flag as a symbol of our Nation] is valid, we note that it is directly related to expression in the context of activity like that undertaken by appellant.

Id. at 414 n.8. Justice Brennan, the author of the Court's opinion in Texas v. Johnson, in fact has previously written that,

> the only basis for a governmental interest (if any) in protecting the flag is precisely the fact that the flag has substantive meaning as a political symbol. Thus, assuming that there is a legitimate interest at stake, it can hardly be said to be one divorced from political expression.

Kime v. United States, 459 U.S. 949, 953 (1982)(Brennan, J., dissenting). And the Supreme Court in Texas v. Johnson has now held that the Government's interest in protecting the Flag as a national symbol is, by definition, related to the suppression of free expression. Thus, it simply could never be successfully maintained that such a statute was content-neutral. The statute is not rendered content-neutral merely because it prohibits private desecrations as well as public desecrations of the Flag. The Government's purpose in prohibiting the desecration is the same whether or not the statute extends to private conduct.

Because any statute would necessarily relate to expression, the more relaxed standard of O'Brien would never apply, and the statute would always be subject to the "most exacting scrutiny." The Supreme Court in Texas v. Johnson has now unequivocally held, however, that the government's interest in protection of the symbolic value of the Flag will never support a prohibition on the communicative desecration of the Flag under this heightened standard. As Justice Brennan has said, "any governmental interest in protecting the flag's symbolism is one that cannot pass muster under the third branch of the O'Brien test." Kime v. United States, 459 U.S. at 953 (cert. denied, Brennan, J.,

dissenting). Moreover, the Court has flatly refused to recognize a separate constitutional or juridical category for the Flag.

In the face of the Court's holdings in Texas v. Johnson, and Spence v. Washington, and especially given the sweeping reasoning in those cases, it cannot be seriously maintained that a statute aimed at protecting the Flag would be constitutional. Significantly, Justice Brennan himself has even written that a statute "that simply outlawed any public burning or mutilation of the flag, regardless of the expressive intent or nonintent of the actor," would be "invalid for the reasons stated in . . . Spence." Kime v. United States, 459 U.S. at 955 n.7.

IV. PROPOSED CONSTITUTIONAL AMENDMENT

If we are interested in protecting the Flag from desecration, the focus should be on the various amendments that have been proposed in the two Houses of the Congress. Today, I would like to discuss the amendment that has been proposed by Senators Dole and Dixon, and endorsed by the President. That amendment reads: "The Congress and the States shall have power to prohibit the physical desecration of the Flag of the United States."

The first, and perhaps most important, point to be made is that the amendment does not itself prohibit Flag desecration. The amendment merely empowers Congress and the States to prohibit legislatively the physical desecration of the Flag, and

establishes the boundaries within which they may legislate. With the ratification of this amendment, Congress and State legislatures, the representatives of the people, would be able to decide if they want to prohibit Flag desecration, and if so, in what manner. We believe it is fitting that the people should decide through their elected representatives the extent to which they wish to prohibit desecration of their national symbol. This amendment gives them that opportunity.

The amendment would define the framework within which the legislative authority of the Congress and the States could be exercised. Within this framework, however, the Congress and the States would have wide latitude to prohibit that conduct toward the Flag that they believe deserves proscription.

If Congress and the States chose to legislate, as we anticipate they would, they would be permitted and obliged to draw lines. For example they would have to determine how they wished to define "Flag" and "physical desecration" of the Flag. They would have to decide whether to make intent a necessary element of a Flag desecration offense. Doubtless, there would be other questions as well. I can describe the general nature of the decisions that would have to be made on the principal issues. But again I would emphasize that this amendment creates only the necessary framework; the bulk of the decisionmaking would be left to the legislatures.

The first question that the legislatures would face is how to define "Flag." There would be any number of options that

would be permissible under the amendment. Let me discuss three of the most obvious. First, "Flag" could be defined narrowly as only a cloth, or other material readily capable of being waved or flown, with the characteristics of the official Flag of the United States, as described in 4 U.S.C. § 1. (This definition could also include historic versions of the Flag (i.e., a 13-star version)). A benefit of such an objective definition is that there would be absolute certainty as to what one would be prohibited from desecrating. One of the costs of such a narrow definition, however, is that legislatures would not be prohibiting acts that are just as damaging to the symbolism of the Flag as desecration of the Flag itself. People would simply circumvent any statutory prohibition by desecrating a Flag that is slightly different in an undetectable way from the actual Flag. For instance, they would burn or shred a Flag that has only 49 stars, or one on which the stripes are of incrementally different dimension, but is otherwise identical to the official Flag. While we believe the amendment would certainly permit the legislatures to define "Flag" in this manner, legislatures would be free to adopt a broader definition, as Congress itself has done.

A second option for the legislatures would be to define "Flag" as anything that a reasonable person would perceive to be a Flag of the United States meeting the dimensions and having the characteristics of the Flag as set forth in 4 U.S.C. § 1, and capable of being readily waved or flown, whether or not it is

precisely identical to the Flag as so defined. This definition would extend protection to any Flag with a slight variation (i.e., a Flag with a stripe missing). However, it would not prohibit destruction of a poster or a painting of the Flag, or the painting of a picture of the Flag with a swastika on it, because a reasonable observer would not mistake such an object as an actual Flag. In this regard, the definition is substantially narrower than the existing federal statute, which extends to any object that "an average person seeing the same without deliberation may believe . . . to represent" the Flag. 18 U.S.C. § 700(b).

A third option for Congress and the States would be to define "Flag" as it is defined in the existing federal Flag desecration statute, 18 U.S.C. § 700(b). The federal statute prohibiting Flag desecration, 18 U.S.C. § 700(b), defines "Flag" as follows:

> any flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, color, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America.

18 U.S.C. § 700(b). In general terms, this definition includes any Flag, portion of a Flag, or any picture or representation of a Flag. It would allow the legislatures to protect depictions of

the Flag, such as posters, murals, pictures, buttons, and any other representation of the Flag. This definition would be consistent with the Government's interest in preserving the Flag's symbolic value because it recognizes that the desecration of representations of the Flag damage that interest as much as desecration of the Flag itself. I would note that even the legislative proposals proffered to redress the Court's decision would retain this definition of Flag.

Regardless of how "Flag" is defined, however, Congress and the State legislatures would have to define the term clearly to avoid successful challenge on the ground that they are unconstitutionally vague. In fact, it is worth noting that many Flag desecration statutes have been invalidated on the ground that they were unconstitutionally vague. See, e.g., Smith v. Goguen, 415 U.S. 566 (1974).

We believe the phrase "physical desecration," too, would provide some latitude to Congress and the States, although the amendment would significantly channel the legislative decision. There are two discrete aspects of the term "physical desecration," "physical" and "desecration." The amendment would not permit Congress or the States to punish or penalize any non-physical desecration of the Flag. Some contact with the Flag, some physical touching of the Flag, whether by the person himself or caused by the person would be essential. The legislatures thus could not punish or penalize mere words or gestures directed at the Flag, regardless of their offensiveness.

The amendment would simply import the common-sense understanding of the term "desecration." Webster's Ninth New Collegiate Dictionary defines "desecrate" as follows: "1. to violate the sanctity of: PROFANE 2: to treat irreverently or contemptuously often in a way that provokes outrage on the part of others." Black's Law Dictionary contains a similar definition of "desecrate": "To violate sanctity of, to profane, or to put to unworthy use." These definitions capture the essence of the term as used in the amendment. Indeed, these definitions make clear that a ban on "desecration" is particularly well suited for preserving the symbolic value of the Flag.

There are an infinite number of forms of desecration. I will not attempt even a representative listing here. But obviously, the legislatures could clearly prohibit the burning, shredding and similar defilement of the Flag.

I would note, however, that we do not understand that the legislatures could ever prohibit the proper display of the Flag merely because they believe the particular surroundings of the display are unfitting for the Flag. The proper display of the Flag, without more, could never constitute an act of physical desecration. We simply do not believe the Government should be in the position of making value judgments about whether the proper display of the Flag in particular settings and by particular persons is nonetheless demeaning. As long as the Flag is displayed in a customary manner, and not physically mistreated, the amendment would not authorize punishment or

penalty. Of course, the legislatures could constitutionally prohibit the display of the Flag in a manner that they deemed inappropriate because such proscriptions would not require value judgments about who could display the Flag or where it could be displayed. Thus, they could prohibit, for example, the display of the Flag on the floor or the upside-down display of the Flag.

Beyond this, I would simply urge the Committee not to lose sight of the ultimate objective of protecting the Flag by becoming mired in countless hypotheticals that can be posed to test at the margins choice of the term "desecration." One can always construct hypotheticals that push the limits of any word in the language. This is as true of statutory language as it is of constitutional language. In the end, those who are responsible for the ultimate choice of language, must simply choose terms that most clearly reach the conduct they wish to reach, and only that conduct. At the margins, one has no choice but to rely upon the individual legislatures in the first instance, and ultimately on the courts, to prevent application of the language in a manner that would do injustice to the drafters' intent.

We believe that the phrase "physical desecration" is sufficiently flexible to permit the Congress and the States to reach all physical acts of desecration with which the people are concerned, yet sufficiently exacting to prohibit them from reaching activity that is properly protected.

The third area in which Congress and the States will have to draw lines relates to the actor's state of mind. The amendment only authorizes prohibition of voluntary actions; involuntary acts--such as accidents--could not be punished. The more difficult issue is whether the actor must intend to be contemptuous toward the Flag. We believe Congress and the States are, and should be, free to decide whether to require intent. We suspect that they will choose to require that the actor intend to cast contempt. Because the overwhelming number of physical acts that are of concern to us are intended to express contempt for the Flag, we would not be especially troubled were they to choose to require intent. Nevertheless, there may well be conduct that the legislatures would want to prohibit, irrespective of the intent of the actor, and they would be permitted to do so under the amendment. The legislatures would be free to impose an intent requirement or not, as they deemed appropriate.

We think offering legislatures the option of prohibiting only intentionally contemptuous, physical desecration represents a significant advantage of the amendment over the proposed statute. Presumably to convince the courts that its proscriptions are unrelated to expression, the proposed statute would <u>require</u> that the Government prohibit acts without regard to whether they cast contempt. Thus, a child who innocently steps on a Flag, a person who crumbles a Fourth of July Flag-decorated paper cup, or a veteran who burns an old Flag out of reverence and respect would all presumably be prosecutable under the

proposed statute. While we do not believe that most people want to prohibit actions, such as those identified above, when they are not done to cast contempt, we believe that Congress and the States should be free to make that determination as they see fit, to create the exceptions that logic and reason compel.

By way of summary, the Dole-Dixon amendment confers substantial discretion on Congress and the States to determine precisely the degrading acts toward our Flag that are to be prohibited. The amendment gives them the latitude to draw reasonable lines that will reflect the conscience of the people. The Administration believes that this is as it should be. The proposed statute not only prohibits much conduct that no one wishes to prohibit; ultimately it would not constitutionally prohibit the very acts that we wish to prohibit.

CONCLUSION

On behalf of the President, I urge the prompt approval of the Dole-Dixon Amendment so that the ratification process may begin.

23-977 O - 89 - 4

The CHAIRMAN. Tell me how the constitutional amendment works if you will, please.

Mr. BARR. Sure. The constitutional amendment itself does not prohibit flag desecration. It empowers Congress and the States to pass laws that prohibit physical desecration. Now, like a statute, the legislature will have certain choices to make in drawing those lines. The problem with the statutory approach that's being proposed is that you don't have a choice. You have to draw the line all the way out on the extreme point. In other words, the statute that's being proposed goes to the very fringe of what would be permissible for any legislative body to pass under the constitutional amendment.

Now, the amendment sets a general framework, certain boundaries. And within that, the legislatures can make certain choices. For example, what is a flag? Basically three options, you could say it would be the official flag of the United States, but it has to actually be the flag. You could say it's what a reasonable person would perceive to be a flag. So a 49-star flag that's burned would be covered. Or you could go still further and say that representations or depictions of the flag would also be covered. And, in fact, it's that last step that Congress took in the 1968 statute. Congress has already gone the whole hog and covered all three of those. Physical desecration would be the next term that the legislatures would deal with.

We read "physical" as requiring a physical contact with a flag by a person or caused by a person. So you can't punish words or gestures. It actually has to be physical contact with the flag.

The word "desecrate" we believe imports the common sense understanding of that term, and requires that the contact would have to be such that an objective observer would reasonably perceive it to be contemptuous.

Legislatures could not prohibit the proper display of the flag merely because they believe the particular surroundings unfit. There would actually have to be contact with the flag that a reasonable observer would view as contemptuous conduct.

Then the final choice would be state of mind. Now, the legislatures will have a choice as to whether to require a contemptuous state of mind or not. Now, 48 States and Congress have generally required contemptuous intent, because 99 percent of the conduct is contemptuous toward the flag. And so if you look at the State laws and if you look at what Congress has already passed, it's limited to contemptuous actions. We think that most States and Congress will continue to require a contempt state of mind. There may be circumstances, however, where they would like the latitude to go beyond that, for example, to prohibit the display of the flag on the ground without having to show intent. So there is flexibility under the constitutional amendment.

The problem with the statute is that in order to try to slalom through the constitutional obstacles, the statute requires that there be no intent requirement, no contemptuous intent requirement, and that people can be punished regardless of their motives.

The CHAIRMAN. So what we are trying to get at here in the amendment is not only preventing physical desecration, but we're also trying to get at the reason, the intent. We're trying to get at

the communicative impact. We're trying to get at the speech; is that right?

Mr. BARR. No. Under the constitutional amendment, we are trying legislatures the latitude to identify the kind of conduct they want to prohibit.

The CHAIRMAN. But if they want to do that, they can? In other words, if the legislature wants to, under the President's amendment, get at speech, they can do that? In other words, they can define what contemptuous is, can't they? They can say, if you say anything that relates to positions held by the Communist Party or the Fascist Party or relates to criticisms about elected officials in the State, the Governor, the Senators, that's contemptuous?

Mr. BARR. No, Mr. Chairman. As I said, the constitutional amendment would not permit the prohibition of words or gestures. It would only permit legislatures to prohibit physical contact with the flag that could be reasonably understood to be contemptuous. So it would permit States to say, trampling on the flag is prohibited.

The CHAIRMAN. That's the kind of statute a State could pass. Could they pass a statute allowing me to burn the flag saying, I burn this because my heart is broken and because x number of marines were killed in Lebanon, and I'm offering this flag up as a symbol of the fire and tragedy that they underwent prior to their death? Could they——

Mr. BARR. Well, under your statute, that person would have to be prosecuted regardless of intent.

The CHAIRMAN. That's correct.

Mr. BARR. Under the existing law, the Government would have to show the person was intending to cast contempt upon the flag.

The CHAIRMAN. I see.

Mr. BARR. The constitutional amendment would give the legislatures the discretion along that spectrum.

The CHAIRMAN. So what the legislatures could do, they could effectively make judgments about censoring certain kinds of speech related to the rationale of desecrating the flag, destroying the flag, and distinguish among them. They could say, you can destroy the flag if you're doing it in the name of the Democrat and Republican Party and offering it up as a symbol of the heroism of those who were consumed in the flames of war, and they could allow that. But they could say it was contemptuous if the flag was being burned, burning the flag saying, I burn this flag because I believe the Government of this State and this Nation is represented by that Governor who is a bonehead sitting up there and is an absolute idiot, and so I burn the flag to demonstrate my contempt for him, for the State legislature, and for the State government.

Mr. BARR. The constitutional amendment would permit the legislature to make a distinction between contemptuous treatment of the flag and innocent treatment of the flag. So the legislature could say, for example, that it is not defacement of the flag to permit military units to put their insignias on the flag, which they have done for time and memorial. That seems to us to be quite reasonable.

The CHAIRMAN. The State could also make distinctions of what—it could affect free speech associated with—in defining what is con-

temptuous, the legislature could be as pernicious or as consistent with what is heretofore been considered the latitude of speech in this country in making a judgment whether the action was, in fact, legitimate or illegitimate, was a violation of the law or not a violation of the law; is that right?

Mr. BARR. Well, within the confines of the constitutional in the language, the legislature has latitude in the three areas that I suggested. Your amendment prohibits a lot of speech.

The CHAIRMAN. Let's assume for purposes of this discussion that my amendment makes no sense.

Mr. BARR. Your statute, I mean.

The CHAIRMAN. My statute, let's assume it makes no sense. So I will grant that to you for the purposes of this discussion. So my statute makes no sense.

Now, let's move to the constitutional amendment, and let's just focus on that. We've now concluded my statute not only is not constitutional, would not pass constitutional muster, but it would be bad policy even if it would pass constitutional muster, because that's essentially what you're saying, right?

Mr. BARR. Yes.

The CHAIRMAN. Now, let's talk about the amendment.

As I understand the amendment, because the legislature has the latitude, at least in three areas under the amendment, one of those areas is actually to regulate speech; is that not correct? That's the latitude it has, the speech related to the destruction for purposes of a court determining whether or not it was contemptuous.

Mr. BARR. I'm not sure what you mean by regulate speech. The legislature can determine whether it wants to limit the prohibition to contemptuous handling of the flag.

The CHAIRMAN. But it defines what contemptuous is, doesn't it? It can define what contemptuous is?

Mr. BARR. Well, as long as—well——

The CHAIRMAN. Let's assume the legislature passed a law saying that if there's any destruction or desecration of a flag and associated with that destruction is criticism of the existence of a deity, the sanctity of the government of the State of South Carolina, and the wisdom of the leadership of the United States; it could do that, couldn't it?

Mr. BARR. Well, the limitations would be that the conduct would have to be the physical desecration of the flag.

The CHAIRMAN. That's right. It would have to result in the physical desecration.

But whether or not the physical desecration was done contemptuously, because obviously if it wasn't done contemptuously, it's not a crime. If you go under the existing rules, whether it's the Boy Scout Handbook, and I'm not being facetious, or military regulations and destroy a flag, "desecrate a flag," it's not desecration, per se, by burning the flag, destroying the flag, because that's the way it is done under the handbook, the rules. I'm not being facetious when I say this. So that's not contemptuous.

So whether or not you are guilty of violating the law will depend upon what the legislature and/or the court in that State defines as contemptuous, correct?

Mr. BARR. Well, let me approach it this way. Contemptuousness can come in in two ways. First, the physical act itself, the physical desecration itself has to be the kind of conduct that a reasonable observer would understand to be contemptuous. So that the legislature could not prohibit kissing the flag because the act itself does not fall within the common import of the word desecration.

The CHAIRMAN. Oh, I see. I'm confused now.

Mr. BARR. Now, second, the legislature would have discretion to determine whether there was a mens rea requirement in the sense that there was a requirement that the act, which would normally be understood as contemptuous, was in fact contemptuous.

The CHAIRMAN. Understood by the person——

Mr. BARR. The reasonable observer. So that——

The CHAIRMAN. Wait. You said mens rea, mens rea is——

Mr. BARR. State of mind.

The CHAIRMAN [continuing]. State of mind of the person perpetrating the act, not the observer.

Mr. BARR. Correct.

The CHAIRMAN. So there's two points you're making here, as I understand it. I'm sorry to take so long, but I'm having trouble understanding this.

The first point is whether or not the observer—I take a flag, and it's an actual flag, and I stand here and I look to all of you and I say, I'm going to burn this flag. That's all I say. I don't say anything. I just take it up, I borrow a match from Senator Kennedy or Senator Thurmond, light, end up putting it in an ashtray and burn it.

Now, the first test of whether or not I am guilty of a crime would be what you all thought of it. If reasonable people looking at what I did thought what I did was a contemptuous act, then one of the tests is met toward my guilt, correct?

Mr. BARR. Right. The legislature would have made a reasonable judgment that burning the flag could be interpreted as physical desecration.

The CHAIRMAN. Right. OK. Now, there's a second test, mens rea. What was Joe Biden thinking of at the time? What Joe Biden was thinking, did he understand what he was doing? What was his intent? Was Joe Biden's intent to cast contempt upon, to desecrate the flag? Because we both agreed that if I, through a ceremony, and I'm not being facetious with General Thurmond—and he is a general—with General Thurmond, we in this room take a tattered flag and we burn it, don't say a word, but we go through a process silently, and we burn it, we may be burning it by the book, by the handbook. So although I desecrated it, you know, it's been burned, it's been destroyed, I'm not guilty of anything?

Mr. BARR. That's the reason we do not prosecute people who are cremated with the flag today. That's the reason we do not prosecute veterans who destroy the flag.

The CHAIRMAN. Right. I understand that.

So the point I'm trying to make, though, is that you all looking on are going to say, well, General Thurmond and his assistant, Mr. Biden, they just burned that flag because that's the way you do it with tattered flags, that's the way the military does it. But if Joe Biden, or anyone else, burns the flag, doesn't say a word, just stood

here and burned it. I walked out here, and just to make a point, and had a large trash can behind it, which is not unusual for things like this to happen for demonstrable purposes in the Senate or in the House or Congress or with Presidents, and just turned and lit the flag and sat down, and just sat here and smiled while it burned behind me. One of the things is, would a reasonable person sitting out there think the act that I just did, lighting a match to that flag, was it contemptuous? Did I do it because I was casting contempt upon that flag?

Mr. BARR. That would be the first inquiry.

The CHAIRMAN. That would be the first test, right?

Mr. BARR. To determine whether——

The CHAIRMAN. Whether I'm guilty or not?

Mr. BARR. No. That would be—if the statute prohibits burning, the first issue is——

The CHAIRMAN. Wasn't that desecration? Isn't burning desecration?

Mr. BARR. The inquiry on whether it's physical desecration comes in when you're looking at the statute to see if the statute is within the scope of the constitutional power.

The CHAIRMAN. OK.

Mr. BARR. So if the statute says, we prohibit burning of the flag to cast contempt on the flag, let's just say that that's the statute, which is essentially what the statute is today. The first issue is, well, could the legislative body have prohibited burning? The answer is yes, because it falls within the framework of physical desecration.

How do we know that? Because the ordinary person would say that burning can be——

The CHAIRMAN. Can be.

Mr. BARR [continuing]. Can be contemptuous, would normally be perceived as contemptuous if you're burning the flag. That's where that inquiry comes in.

Then if you were prosecuted, the question would be, did you meet the state of mind requirement of the statute, which would be——

The CHAIRMAN. Well, wouldn't you have to establish in court in prosecuting me that it did meet the test, the first threshold test that it was contemptuous?

What would happen if I stood in court under the hypothetical statute we are talking about that the Constitution allows and said in court I burned that flag out of love of my country, I burned that flag because I felt so strongly about it? I wanted everyone in here to look at that flag and understand what it meant, and the most stark way to have that happen would be to burn it.

Mr. BARR. The Government would have the burden of establishing beyond a reasonable doubt that you were casting contempt upon the flag.

The CHAIRMAN. Right, OK. Now, we are back to the only thing I was trying to establish.

So the Government has the burden of establishing that my action was contemptuous. Then the Government would also have the burden of proving that I knew it was contemptuous, I meant it to be contemptuous, that that was my intent?

Mr. BARR. That is what I just said. That is what I was just talking about.

The CHAIRMAN. OK. Where does the mens rea come in?

Mr. BARR. The mens rea——

The CHAIRMAN. That is the mens rea?

Mr. BARR. Right.

The CHAIRMAN. OK.

Mr. BARR. Now, what happens if the legislature passes a law that says that if one were to burn the flag and while burning it suggest that the burning was for the purpose of casting contempt not only upon the flag but God and the elected officials of this State and this country?

Mr. BARR. Well, I do not think that that would be within the framework of the constitutional amendment.

The CHAIRMAN. Why?

Mr. BARR. Because the constitutional amendment empowers punishing, physical desecration of the flag. Now, that power cannot be exercised—it does not grant you the power to protect, for example, the name of the deity.

The CHAIRMAN. Well, I am talking too much time here. I have other questions. I will come back.

Let me yield to my colleague from South Carolina.

Senator THURMOND. Mr. Chairman, I would like to discuss with you just a moment. Judge Bork is here. He has got to catch a train at 4 o'clock; he has to leave here by 3:30. Would it be possible if we can get Mr. Barr to agree to stand aside and take him and Mr. Cooper now? Or would you want him to come back at another hearing?

The CHAIRMAN. Well, I do not want to inconvenience Judge Bork. But the same request has been made by two other of our witnesses who are from out of town, and also by our former colleague who wished to come back. I would be reluctant to do that unless we could have the staff go out and find out whether everyone who is to testify is willing to change—because the order was known for some time.

Senator THURMOND. We can run as late as necessary to accommodate everybody.

The CHAIRMAN. Sure.

Senator THURMOND. But those catching a plane or a train at a certain time, I thought we could take then first.

The CHAIRMAN. I would be happy to attempt to do so.

Let us keep going with Mr. Barr, and I will ask the staff to contact each of the witnesses now to see what their scheduling requirements are.

In the meantime, let us continue. Any of the other three people, they may also have 4 o'clock trains or planes. So I do not want to take it out of order unless we know that we are not inconveniencing the other witnesses as well.

Senator THURMOND. If the other witnesses have schedules at a definite time.

The CHAIRMAN. That is what I am trying to find out.

Mr. BARR. I have to leave the country this evening.

Senator THURMOND. What?

Mr. BARR. I have to leave the city by 5 o'clock.

The CHAIRMAN. Mr. Barr has to leave the country.

Mr. BARR. I am leaving the city and then leaving the country tonight.

Senator THURMOND. Well, you would have a little more time if Judge Bork went on to catch his train, would you not, if you stand aside now? Would you be willing for Judge Bork to go ahead, and it should not take over 30 minutes, and then bring you back, Mr. Barr? I am asking you if you want to do this. It is up to you though.

Mr. BARR. Yes, I am willing to stand aside for 30 minutes.

The CHAIRMAN. You are willing to stand aside for 30 minutes assuming everyone is willing to stand aside.

Now, let us just continue the questioning. Our staffs, yours and mine, are out there trying to figure out what the witnesses 'schedules are. I promise you I will attempt to accommodate Judge Bork. His testimony is important. I want to hear it. But let us move on and not waste time while we are asking those questions. It will take another five minutes to find out what the schedules are.

Senator THURMOND. Well, Judge Bork has to leave here in 30 minutes to catch his train.

The CHAIRMAN. I understand that.

Senator THURMOND. Well, if the witnesses are here, let them stand up now and say what they can do.

The CHAIRMAN. Is there any witness that has to leave town, as Mr. Barr does, by 5 o'clock?

Senator THURMOND. By 4, he has to leave at 4 o'clock.

The CHAIRMAN. I know. This is not a fruitful discussion in open session. Let me——

Senator KENNEDY. Mr. Chairman, I have just a few questions for Mr. Barr. I will be glad to proceed in any way that you——

The CHAIRMAN. Why do you not proceed with questions while I check this out.

Senator KENNEDY. Mr. Barr, in your testimony, you point out the Congress and the states would have wide latitude if this amendment should go in effect to prohibit that conduct towards the flag that they believe deserves proscription.

In construing the amendment I imagine that future courts will look to Congress' intent. And one major place where that intent is apparent is in the preamble to the amendment. And that preamble makes it clear that physical desecration includes "displaying the flag in a contemptuous fashion."

And then in your testimony you define this desecration. Your own testimony quotes Black's Law Journal as defining desecration to include "To put to an unworthy use." Put to an unworthy use. And as the chairman has tried to better understand, you know, what we are really driving at, to be put to an unworthy use, couldn't this amendment authorize Congress or a legislature in the future to decide that using the American flag in political commercials is an unworthy use?

Mr. BARR. Well, no, Senator. What I testified before was that we understand the term "physical desecration," first the term "physical" requires some kind of physical contact with a flag apart from its normal display. We do not believe that the government can get into the business, or legislatures can get into the business, of deter-

mining who is worthy, the moral worth of individuals or contexts in which the flag is displayed. As long as the flag is displayed in a customary manner in a way that does not involve some kind of contemptuous contact, with the flag, we do not believe it would be within the power of the legislature to proscribe.

Senator KENNEDY. Well, the preamble mentions that "the physical desecration may include, but is not limited to," and then it says, "or displaying the flag in a contemptuous manner." And your testimony describes contemptuous manner, as I said, "to put to an unworthy use." And wouldn't you say that there are those who believe that using the flags in a political commercial is an unworthy use?

Mr. BARR. Well, my whole testimony, and what I have just said is, that the word "physical" requires physical contact with the flag. We understand the word desecrate to require a contact that would be such that an objective observer would reasonably perceive it to be contemptuous.

We do not believe that the constitutional amendment, for example, would authorize a legislature to prohibit some kinds of people from displaying the flag because the display of the flag does not involve an abusive physical contact with the flag and it does not involve desecration within the common import of that word. And we do not think that the legislature should get into the business of deciding who is morally worthy to display the flag.

Senator KENNEDY. Well, as to "displaying the flag in a contemptuous manner," what if a politician were to wrap him or herself in the flag, how does that fit into your requirement? Particularly when you are saying with your definition of an unworthy use, there are plenty of Americans who believe that politicians wrapping themselves in the flag would be an unworthy use of the flag.

Mr. BARR. First, let me say that the constitutional amendment, the preamble language has to be interpreted against the language of the actual amendment itself. It is the language of the amendment itself that would appear in the Constitution. And as I say, the legislature would have the power under this amendment, which is the power they had prior to June 21—so this is nothing new—they would have the power to prohibit the physical desecration of the flag, which requires contemptuous contact with the flag.

Senator KENNEDY. Well, in the preamble that talks about physical desecration—at the top of page 2, you define that as including "displaying in a contemptuous manner." You cite the definition of desecration as "to be put to an unworthy use." That is pretty broad, I would think. There are a lot of people that think that the American flag that has been carried in battle should not be put on slippers, should not be worn as scarves, should not be made into bathing suits, that they have such honor for it in terms of the American history, and when they see people wearing these as bathing suits or displaying them as towels, beach towels, that that is certainly an unworthy action.

And I think you can probably find a lot of people who would think it was unworthy. Do you not?

Mr. BARR. Well, I am not sure whether it really matters whether people think it is unworthy. The issue is whether the legislatures, the people's representatives, want to prohibit certain kinds of phys-

ical desecration of the flag. As we say, desecration requires physical action toward the flag, on the flag, that a reasonable person would perceive as contemptuous.

These lines would have to be drawn by the State legislature or the Congress regardless of whether you went by constitutional amendment or a statute. Senator Biden's statute would prohibit people from wearing slippers with the imprint of the flag on it.

Senator KENNEDY. Well, the only point is this amendment would authorize the legislators to legislate in that particular way. Otherwise, I do not know what the words themselves and your understanding of the words in your testimony, what the rest of the meaning would be.

And it just seems that it just leads to the kinds of examples where they may say—and I would think there would be a lot of Americans who would feel that either political figures wrapping themselves in it or by using the American flag as towels or whatever kind of display, represented in this particular way is an unworthy and undignified use.

And given the language in both the article and the definition, I do not see how you would expect to preclude that from happening.

And I would think that that brings us into a very dangerous kind of position with regards to the American flag.

Let me, if I——

Mr. BARR. Well, Senator, could I respond to that.

Senator KENNEDY. Yes.

Mr. BARR. For over 100 years, the people's representatives have been making these decisions.

Senator KENNEDY. Not with regard to the first amendment.

Mr. BARR. There are 48 State statutes which prior to June 21 were presumably good law. Congress passed a law in 1968. Now, on June 21, all those laws were nullified. and prior to that time the people's representatives had prohibited contemptuous treatment of the flag.

All this constitutional amendment would do would be to restore that power to the people's representatives and set boundaries. And one of those boundaries are that they have to be protecting the flag, they have to be protecting the flag from physical desecration.

Senator KENNEDY. Well, not in the last 100 or 200 years has there been changes in that first amendment in this Constitution, Mr. Barr.

Let me ask you: In 1943 in *West Virginia* v. *Barnett* the Supreme Court held that no person could be required to salute the flag. President Bush made a major issue during the fall election of Governor Dukakis vetoing a bill that would have required teachers to salute the flag.

I was just wondering, since the President, Mr. Bush, feels so strongly about that kind of legislation, even though it would be unconstitutional, does the administration support a constitutional amendment to overturn that court case?

Mr. BARR. No.

Senator KENNEDY. Why not?

Mr. BARR. Well, because what we are trying to do with this constitutional amendment is to protect the symbolic value of the flag from people who are assaulting it. We are not attempting to force

people to salute the flag or to necessarily to embrace the ideas it stands for. But we do not want people assaulting the flag as a symbol. They are two different things.

Senator KENNEDY. Well, obviously they are two different things. But we heard so much about it during the course of the campaign, every day during the course of the campaign, I just wanted to find out if he had a position with regard to that. He made a good deal of it in the course of the campaign. He obviously must believe in that very deeply because he talked about it so much. I was just wondering whether you wanted to have some adjustment made in terms of that particular position as well.

The CHAIRMAN. Mr. Chairman, I think we can work it out. I think we can do this. What we should do is, Mr. Barr, we will ask you to step aside for 10 to 15 minutes, and we will bring Judge Bork on. We will not have any time to question Judge Bork. We will submit the questions in writing.

Mr. Cooper, you are going to be on your own and not be on a panel as originally scheduled. I am, with all due respect, not going to move you up, OK, on this because we do not want to bump everybody.

So what we are going to do is extend everyone's prospects of being able to testify by 15 minutes.

I would ask unanimous consent that in order to accommodate Judge Bork, we will bring him on now because he has to leave here, let him testify. There will be no questions of Judge Bork. We will submit our questions in writing to Judge Bork. And we will then move on with the regular order.

Mr. Barr, you are very gracious. We will have you out of here in time for you to get out of the country and every one to make their planes, as I understand the schedules.

So if we can bring Judge Bork on now for his testimony. And again, there will be no questions, so that he is able to make his train. He and I spoke about it for a moment. I would like to accommodate all of you and him if I can. And his need seems the most urgent.

Senator THURMOND. Thank you, Mr. Chairman.

The CHAIRMAN. Happy to do it.

Judge Bork, welcome. You were unable to hear what I said, but the agreement is what we will do is you will testify, if you are willing, and we will refrain from questions and submit our questions to you in writing.

If you will take the center seat, Judge. Welcome. It is an honor to have you here. Please proceed with your testimony.

STATEMENT OF HON. ROBERT H. BORK, AMERICAN ENTERPRISE INSTITUTE

Judge BORK. Thank you, Mr. Chairman.

If there is any point, I would be willing to return in September to take any questions. But today my schedule did not work out too well.

I am pleased to testify at the invitation of this committee concerning the proposals to restore to Congress and the States the power to prevent the physical desecration of the American flag.

The CHAIRMAN. Now, Mr. Barr, thank you also for being willing, as I said, to stand aside for a moment.

I yield to Senator Thurmond to ask Mr. Barr questions.

Senator THURMOND. Mr. Barr, some people have suggested that if the Government can protect eagles and monuments from desecration or destruction, that it can do so for the flag. Would you care to comment?

Mr. BARR. Yes. These are false analogies. Remember the basic structure of symbolic speech analysis. The issue is what is the Government's reason for the rule? If the Government's reason is related to expression, the Government loses. So the Government has to show some interest, some reason for its rule, that is unconnected with expression.

One interest the Government does have that is unconnected to expression is the conservation interest. The Government wants to protect certain things from physical destruction because they are inherently rare and irreplaceable. They are one of a kind or one of a few.

The reason we protect rain forests is not because of their symbolic value. It is because they are rare. The reason we protect bald eagles is because they are rare. Now, sometimes the Government's conservation interest—before I get to that, let me say, that is the reason we also protect historic buildings. That is another one that is thrown around. We protect historic buildings because they are one of a kind. If they are destroyed, that is it.

Now, the flag is inherently reproducible. We can protect the flag that flew over Fort McHenry or this flag that went up San Juan Hill because they are historic artifacts, one of a kind.

Now, sometimes the Government's conservation interest coexists with the symbolic nature of the article. For example, the Statue of Liberty is both unique, one of a kind, and it is symbolic. But the reason we protect it is because of our conservation interests. I could build an exact replica of the Statue of Liberty in my front yard and blow it up, and I have not violated any kind of government interest.

Senator THURMOND. Mr. Barr, are you familiar with Representative Brooks' proposal that was approved by the House Judiciary Committee?

Mr. BARR. Yes, I am, generally.

Senator THURMOND. Would you give us your view on that proposal?

Mr. BARR. There are several defects with the bill that was reported out of the House Judiciary Committee. First, we believe it is unconstitutional for the reasons we have set forth here, and that is that the reason is acting, the reason the Government is trying to protect the physical integrity of the flag, is because of its symbolic value, and therefore it is inherently related to expression. And for that reason, it will be struck down under exacting scrutiny.

Moreover, the bill is completely ineffectual. It deletes from its coverage the word "defile," thus permitting soiling of the flag. And then it provides an absolute defense for anyone who destroys a soiled flag. So anyone who wants to destroy the flag contemptuously can simply soil the flag first and then burn it. So the statute does not protect the flag.

Moreover, the statute is again over broad. It covers any kind of conduct with the flag, any kind of mutilation of the flag, or any kind of defacement of the flag, regardless of intent. And that means that it would prohibit such things as putting unit designations on the flag, and it would also prohibit making a movie that showed the flag mutilated, as numerous movies that you can go and rent today show the flag being destroyed.

Moreover, in order to soften the impact of its overbreadth, it limits protection only to official flags of the United States. Now, that means that it cuts back from what Congress has done in the past and it cuts back from what Senator Biden wants to do, because it would permit the desecration of depictions of the flag. So under the statute you could have a billboard or a mural with a swastika across it, and as long as it was not the actual flag, as long as it was a depiction, a perfect depiction, you could not prohibit that kind of conduct. Moreover, you could burn 48-star flags, 13-star flags. So it cuts substantially back from the protection that Congress thought was necessary in 1968.

Senator THURMOND. Are you familiar with a proposal of the distinguished Chairman of this committee, Senator Biden?

Mr. BARR. Yes, I am.

Senator THURMOND. Would you care to comment on that.

Mr. BARR. Well, most of my testimony actually focused on Senator Biden's proposal. And I pointed out——

Senator THURMOND. Just briefly. In other words, I will ask you this: Do you think Congressman Brooks' proposal, Senator Biden's proposal, or a proposal by anybody else in the form of a statute, would guarantee results?

Mr. BARR. No, it would not guarantee results. It would be unconstitutional and struck down as unconstitutional.

One of the flaws of the statutory approach, we have already described why we think it is unconstitutional, why we think it is over broad. Now, the premise of the statute is that it is neutral, that is the premise of the statute. But let us really take a look at that neutrality. It is not neutral.

Where did these verbs come from? Trample, deface, lay on the ground, burn, those are not things people do when they are using the flag in a positive way normally? Why have we not included other verbs in that prohibition? A purely neutral approach to the flag would say either everyone can use it or no one can use it. These verbs were picked for a reason. They are things that people commonly do to show disrespect, deface the flag, usually.

Now, the one thing is burn, because we can burn flags respectfully. And low and behold, we say now that there is an exception for respectful burning of the flag. There goes your neutrality.

Moreover, it said, well, we are really concerned about the physical integrity of the flag. Is that true? There are some things that are prohibited that have nothing to do with the physical integrity of the flag. And there are things that can devastate the physical integrity of the flag that are not covered.

For example, to maintain it on the ground, that does not necessarily hurt the physical integrity of the flag. Putting the flag in a high wind, if anyone has seen a flag really go in a high wind, now that affects the physical integrity of the flag.

Where is the physical integrity of the flag safest? On my living room floor under plexiglass, where it would be prohibited by this statute, or flying it on a skyscraper where it will be ripped into shreds in a few weeks. But the statute does not protect the physical integrity of the flag in a high wind. Why not? Because that is the kind of conduct we want to encourage. This is not neutral.

If we are really concerned with the physical integrity of the flag why are we prohibiting maintaining it on the ground and yet we carry it into battle and put it on ships where its physical integrity can be affected. We are not really interested purely in the physical integrity of the flag.

The reason we want to protect the flag is its symbolic value. Everyone has said that. It is no secret. It is on the record. No one has set forth any reason other than protecting the symbolic value of the flag to support a statute. We have not heard it from anyone.

And as long as that is the reason, protecting the symbolic value of the flag, the statute is dead on arrival.

Senator THURMOND. Now, Mr. Barr, I believe your opinion is in consonance with that of the Attorney General, the Honorable Dick Thornburgh, on this subject, is that right?

Mr. BARR. That is correct.

Senator THURMOND. And, Mr. Chairman, without objection, I would ask unanimous consent that a letter to me dated July 31, 1989, be placed in the record at this point.

[The July 31, 1989, letter to Senator Thurmond follows:]

Office of the Attorney General
Washington, D. C. 20530

July 31, 1989

The Honorable Strom Thurmond
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

The Committee on the Judiciary asked for the views of the Department of Justice on whether an amendment to the Constitution is necessary, or whether a statute would suffice, to protect the Flag of the United States from burning and other forms of desecration. The need to take action to protect the Flag is prompted by the Supreme Court's recent decision in Texas v. Johnson, 57 U.S.L.W. 4770 (June 21, 1989), that a State cannot punish a person who burns or otherwise desecrates the Flag to communicate a message.

The Department has carefully considered the question and determined for the reasons set forth in the Department's testimony before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee that any statute that prohibits desecration of the Flag to protect its symbolic value, which is the only reason that Congress would pass such a statute, would be unconstitutional. Consequently, we believe that the only way to ensure protection of the Flag is through a constitutional amendment. You have my assurance that the President and I would be the first to support a statute if we thought it could survive constitutional challenge.

We think it is plain that even a statute prohibiting all Flag desecration would be held unconstitutional under Texas v. Johnson. Under the decision, it is the government's reason for prohibiting Flag desecration--not whether the statute indiscriminately prohibits all destruction or damage to the Flag--that determines the constitutionality of the prohibition. The reason for prohibiting all Flag desecration is the same as for prohibiting only contemptuous desecration--protection of the symbolic value of the Flag. Thus, a statute that prohibits all physical destruction or defacement of the Flag to preserve the symbolic value of the Flag is as unconstitutional under the reasoning of Texas v. Johnson as one that prohibits only contemptuous desecration.

The President and I have endorsed the amendment proposed by Senators Dole and Dixon and Congressmen Michel and Montgomery. This amendment would restore to Congress and the States the power to prevent the physical desecration of the Flag that was taken away by the Supreme Court in Texas v. Johnson. In contrast to a statute, it would enable the Congress and the States to define and prohibit only the specific conduct necessary to preserving the Flag's symbolic value. This flexibility to prohibit only the contemptuous conduct that concerns the American people can only be secured with a constitutional amendment.

The President and I urge the Congress to move expeditiously to send this amendment to the States so that the people may decide whether they want their Flag protected.

Sincerely,

Dick Thornburgh
Attorney General

Senator THURMOND. I will agree he is not here, so I guess I will have to——

Mr. BARR. Senator Thurmond, there have been some snide remarks about the President's motivations in this. The President right after the decision was issued asked the Department of Justice, asked the Attorney General, to analyze the opinion to determine how we could best go about protecting the flag of the United States.

People have referred to the fact that there was a delay, and only after some time did the President come out and endorse an amendment. Well, it is true that the Department of Justice did engage in a painstaking analysis to determine whether this could be done by statute.

Senator THURMOND. In other words, they gave a study that looked into it, investigated it, and determined that a statute will not get results, that if we are going to get results it will take a constitutional amendment. Is that correct?

Mr. BARR. That is right, Senator. I personally reported that to the Attorney General and to the White House. And the next day the President supported the constitutional amendment.

Senator THURMOND. I guess that is all the questions I have.

The Senator from New Hampshire.

Senator HUMPHREY. Mr. Barr, I am wondering if we can define the scope of the problem which flag burning presents. According to the press, the Attorney General undertook a survey to determine how many persons were incarcerated under the Federal flag statute. Can you tell us what the report of that was, the conclusion?

Mr. BARR. As best as we can tell, or at least as I am informed, on June 21 there was one Federal prisoner in custody who had been prosecuted for desecration of the flag. And he was released on June 30.

Senator HUMPHREY. Why are there not more?

Mr. BARR. I do not know what the situation is in the states.

Senator HUMPHREY. But I am talking about under the federal statute, why are there not more?

Mr. BARR. Well, I guess there are a number of reasons. One is that for 100 years, we have had laws on the books making it criminal to desecrate the flag. When those laws are nullified and they are no longer that inhibition, it is hard to say what kind of problem it would be.

Another reason is, like any extremely offensive action or action that is essentially tabu in some respects, it is not that common an offense. But after all, we adopted a poll tax constitutional amendment when there were only two jurisdictions, two districts in the United States, that had a poll tax. I am sure you would not suggest that just because there was a small problem at the time, we should not have a constitutional amendment ensuring that there would be no poll tax.

Senator HUMPHREY. Well, that the poll tax existed in two jurisdictions, as you say, is not to say that it did not affect a great many people.

Mr. BARR. Well, if there was——

Senator HUMPHREY. I do not want to get sidetracked, if you do not mind. I am trying to really understand the Department's position.

Have there been many cases where the Department just decided not to prosecute? I mean is the fact that there was only one person incarcerated in recent times indicative, or have there been many cases where the Department just declined to prosecute?

Mr. BARR. I did not say that there was only one case in recent times. What I said was the survey done on June 21 revealed that there was still one Federal prisoner in custody. Now, there were other prosecutions in the past, some of which went through the court system. After all, in 1982, there was the *Kyme* case where someone was successfully prosecuted for burning the flag and was incarcerated, and the fourth circuit upheld Congress' statute and the Supreme Court denied certiorari. But after all, in 1968 it was sufficient enough problem for Congress to turn its attention to it and pass a statute.

Senator HUMPHREY. 1982, and apparently one in more recent times. Any others that you can point to in recent times?

Mr. BARR. Well, I did notice that right after the Court's opinion some pro-abortionist did burn the flag.

Senator HUMPHREY. Yes. Well, you can always expect a few people to capitalize on press interest while it is high. And the annulment of these statutes may have an adverse effect, you might be right. But it is too darn early to tell I think. And we should weight that if it happens and cross that bridge when we come to it.

I mean, if it did come to threaten the Republic, that would be a different story, no question about that. But I do not see it as a threat today, or it is not even on the radar scope as far as I can tell.

Mr. BARR. Well, I——

Senator HUMPHREY. Certainly the Department statistics would indicate the same thing.

Mr. BARR. Well, I disagree with that, Senator. I think that when conduct is wrong—as Judge Bork said, we live by symbols. And I believe it is right for the United States to have an unalloyed symbol, an inviolate symbol of the nation that draws us together.

I could not put it better than Senator Biden did in his testimony before the House Judiciary Committee. That is important. It is a compelling government interest. And just because offenses appear to be rare at that point does not mean there should not be laws against it.

Senator HUMPHREY. In any event, you oppose the statute unequivocally, is that correct? You think it just would not suffice? It would not work, it would be struck.

Mr. BARR. It is not only unconstitutional, it is over broad and the logic behind it would have a pernicious effect on the first amendment.

Senator HUMPHREY. Under either statutory remedy or constitutional amendment, it would remain for the Congress and the states to define "flag" and define "desecration," is that correct?

Mr. BARR. Define "flag" and "physical desecration."

Senator HUMPHREY. Physical desecration. Well, the amendment, as you know, is by design not very specific. It is quite general. In

the preamble, I guess you would call it, it says: "Whereas physical desecration may include but is not limited to such acts as burning, mutilating, defacing, defiling or trampling on the flag, or displaying the flag in a contemptuous manner," et cetera. So clearly it is going to be for the legislatures to define what is left out of this rather general description. Because even the general description admits in the preamble that "desecration may include but is not limited to the acts described."

Let me establish this: is the administration supporting the Michel resolution?

Mr. BARR. In the Senate, I believe it is cosponsored by Senators Dole and Dixon.

Senator HUMPHREY. Yes, they are identical as far as I know. The administration has officially endorsed those?

Mr. BARR. That is correct.

Senator HUMPHREY. Under that, assuming that those resolutions were to become amendments to the Constitution, what recourse would a citizen have who felt aggrieved if, for example, a State legislature defined the flag as the likeness of a flag printed on paper. What recourse would someone have?

Mr. BARR. Well, that statute could be challenged on the ground that that definition was outside the scope of authority. We do not believe it would be. We believe that under the language of the constitutional amendment, the legislature could cover the official flag, objects that could reasonably be perceived as the flag, as well as representations or depictions of the flag.

Senator HUMPHREY. Reasonable in whose mind?

Mr. BARR. A reasonable person. That is a standard we have throughout the law. That is the standard Congress used in 1968, and it is a good standard.

Senator HUMPHREY. Well, what would the court or courts consult in resolving such a case? They would go back to the amendment obviously, and they would go back to the legislative history. I do not think in this history we are going to define "flag" conclusively. And I am certain we are not going to define "desecration" conclusively. So what would they draw on?

This amendment is general and vague and broad. And surely we are not going to define conclusively flag in this history.

Mr. BARR. What we are going through here is what we go through on every law. First we have some language that is being proposed as a constitutional amendment. In fact, it is more specific than many provisions in the Constitution. And partly through this process of testimony, and partly through the ratification process in the states, where the State legislatures say what the meaning of those words are, what they understand them to be, we give fuller content to the meaning of this language. And ultimately it has to be construed by the courts.

Before that, the legislatures have to make a determination as to what kinds of laws they are going to pass. They have been passing laws for over 100 years. And all the spector of not being able to drive from coast to coast because of lack of uniformity is just nonsense. Forty-eight States have had these laws on the books.

We are going back to the situation before June 21, which four Justices of the Supreme Court thought is consistent with the Constitution.

Senator HUMPHREY. The thrust of Judge Bork's testimony seemed to be that as long as other forms of expression are available to express the same idea, then the Government may proscribe that form or those forms which are offensive to majorities. Is that the point from which the administration is proceeding or what? What actually motivates this?

Mr. BARR. We are being very—a constitutional amendment, as I understand it, is a very up front approach to it. We make no bones about the fact that what we are trying to do is to protect the symbolic value of the flag.

Now, if in fact we are so worried about the physical integrity of the flag that we find unit inscriptions on the flag to be offensive, if we really find it offensive for people to be cremated with the flag, if that is the kind of thing that strikes at the soul of the Nation, why have we had no statutes in 200 years doing that, protecting against that kind of innocent conduct?

Well, we have not had those kinds of statutes, because that is not the kind of thing that strikes at the symbolic value of the flag. In fact, some of that kind of conduct strengthens the symbolic value of the flag.

Senator HUMPHREY. Are anyone's rights injured by this decision?

Mr. BARR. Excuse me?

Senator HUMPHREY. Are anyone's rights injured by this *Texas* v. *Johnson* decision?

Mr. BARR. I am not sure what you mean by rights. Obviously their constitutional rights are not violated.

Senator HUMPHREY. Beg your pardon?

Mr. BARR. Obviously their constitutional rights are not violated. The Supreme Court has said that it is constitutional to burn the flag as a form of political protest. I do not know what you mean by rights. I think the Nation does have a compelling interest in protecting the flag.

Senator HUMPHREY. Yes, I know, I understand that is your point of view. I do not necessarily dispute that.

But what I am asking is something else. There are various elements, various aspects and facets to this matter. And one about which I am now asking you is this: are the rights of any individual harmed by this decision?

Mr. BARR. I guess my question is what do you mean by rights? I think if you mean——

Senator HUMPHREY. You are an Assistant Attorney General, and you are asking me what I mean by rights?

Mr. BARR. Yes. Do you mean constitutional rights, you mean legal rights?

Senator HUMPHREY. I mean the rights that we believe under the Constitution and our body of law.

Mr. BARR. I would say that in this case the court had found that there were no constitutional rights or legal rights that were violated by the burning of the flag.

Senator HUMPHREY. But you are not answering my question. Are anyone's rights injured by this decision?

Mr. BARR. As I say, no constitutional or recognized legal rights are, which is exactly why we want to amend the Constitution, because we believe that the Government does have a legitimate and compelling interest in protecting the flag.

Senator HUMPHREY. But no one's rights are injured?

Mr. BARR. Well, in colloquial sense I believe the rights of the Nation are injured.

Senator HUMPHREY. No, I am talking about individuals.

Mr. BARR. Well, I believe individuals comprise the Nation. I believe they should have the right to fend against physical desecration of the flag of the United States.

Senator HUMPHREY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. And thank you for yielding to me at this time, although the stage is not too crowded.

We have just taken our first break in the Hastings hearings, and I wanted to come over and participate in these hearings because they are very important ones.

Mr. Barr, I would like to discuss a couple of points with you in just a few minutes because I have to get back to the other hearings. But the first subject I would like to take up with you—and I am going to condense this because of the brevity of time that I have and you do as well—is the issue on the desirability of dealing with a statute as opposed to a constitutional amendment, in the first instance to see if the statute will pass muster. My sense is that there are good reasons to think that it will.

But before getting into the substance of what a statute might provide, I would refer you to the case of *Escambia County, Florida* v. *McMillan,* not that it is a very astounding case, but it is a modern statement by the Supreme Court of the United States in 1984, 466 U.S. 48, that the courts will not reach constitutional questions where they "may rest alternatively upon a statutory grounded decision."

Perhaps the most famous statement was the dissent of Justice Brandeis in *Ashwander* v. *Valley Authority* when he said, and this appears at page 347 of 297 U.S.:

> Thus if a case can be decided on either of two grounds, one involving a constitutional question, the other the question of statutory construction of general law, the court will decide only the latter.

And my question to you, assuming there is a reasonable chance, colorable chance of getting a statute by, is it not preferable as a matter of general principle of law to go after a statutory remedy as opposed to a constitutional remedy?

Mr. BARR. If we believed a statute was constitutional in the wake of the Supreme Court's decision, and if we believed that a reasonable statute could be fashioned then, yes, that would be the preferable way to go. We do not believe that a statute can pass constitutional muster and could be consistent with first amendment principles articulated by the Court. You cannot write a statute that could be sustained, in our view.

Moreover, the statute that is being presented here in our view is a very bad idea from the standpoint of policy because it is so over

broad. It goes to the extreme limits of what would be authorized by a constitutional amendment. It does away with any kind of intent requirement or any kind of contemptuous intent requirement, which 48 State legislatures and Congress had previously required.

And it does it, in our view, as sort of a pretext to really get at the kind of conduct that people find objectionable.

Senator SPECTER. Well, you are talking about Senator Biden's statute, but there might be another statute besides Senator Biden's statute. He might not have a corner on the market.

Let me hypothesize——

The CHAIRMAN. I am flattered with the interest though.

Senator SPECTER. Pardon me?

The CHAIRMAN. I said I am flattered by the interest.

Senator SPECTER. I quoted Senator Biden very broadly. We were on the—which bill were we on, Senator Biden? Was it Friday afternoon, I commented to him yesterday, it was a quarter to 6 and I was rushing to the train. He always catches the 6 o'clock train. And there he was on television. And I knew he must have been doing something very important. I did not have the sound on. I never do when Senator Biden is on television.

We were just finishing up—what bill were we on, Senator Biden? But at any rate, he——

The CHAIRMAN. Next witness.

Senator SPECTER. That is better than next Senator.

But hypothesize if you will, for a moment, a different statute, one which is on my mind, which would say that if there is desecration of the flag and there is an intent to offend those who see it, intent to cause personal injury, pain and suffering, damage to individuals, and suppose you provide an affirmative defense for someone who says, well, it is political expression or it is artistic expression—we have a statute in Pennsylvania, for example, which prohibits someone from speaking in a way to harass someone, with intent to harass. You cannot call somebody up on the telephone and harass them, repeatedly call them, or you cannot call them names. And the general category is harassment. So you have a right to freedom of speech, but freedom of speech has its limits if it causes personal injury, defamation for example.

But suppose we could structure a statute along that line, Mr. Barr.

Mr. BARR. That statute would fall. The——

Senator SPECTER. Why?

Mr. BARR. The basic question the court asks in determining whether it is going to be subject to exacting scrutiny, in which case the Government needs a compelling interest, which it can almost never show, and lenient scrutiny is what the Government's reason for the rule is, and if the reason for the prohibition is related to expression or expressive content of the activity, then you are going to be subject to exacting scrutiny.

Now, therefore, the Government has to be able to point to some harm, some public harm, that does not flow from the expressive content.

Senator SPECTER. How about a private harm?

Mr. BARR. Excuse me?

Senator SPECTER. How about a private harm, like the statute on harassment?

Mr. BARR. OK, right. The public's purpose there is to protect private right. So for example, you can prohibit sound trucks regardless of whether they are actually speaking or whether they are blaring rock music, you can prohibit them after 10 p.m. because the Government's interest does not flow from the communicative content. It is the noise.

You can prohibit physical intimidation because that actually works injury on someone. So you can prosecute someone for physically intimidating, going up and threatening an individual.

Senator SPECTER. You can prosecute someone for verbal harassment?

Mr. BARR. When it reaches a certain level. But if the Government's interest merely is to avoid harassment or offense, that goes right to the content.

Senator SPECTER. Political offense, but not personal offense, not personal harassment.

Mr. BARR. Excuse me.

Senator SPECTER. The cases you speak about cannot limit speech or expressive conduct if some unpopular political view is expressed or someone hears something they do not like to hear. But if a matter of personal harassment, if it is repeated telephone calls and verbal statements over the telephone late at night, freedom of speech does not prohibit the state from categorizing that conduct as a crime. Does it?

Mr. BARR. No.

Senator SPECTER. Well, how about a statute——

Mr. BARR. Well, there is a difference. Let me give you an example. It is one thing for the Government to say you cannot go in to someone else's house and intrude into their domain and take their property if I have a flag over my mantle. It is one thing to say you cannot go in and use that other person's property and trespass on his rights to put a swastika on the flag. There the Government is protecting my legal rights as owner of the flag to do what I want to. And it is going to protect me so that my phone is not ringing in my house in the middle of the night.

But it is a big jump to go from there and to say that the Government has a right to tell someone else what they can do with their own flag. So the Government can prohibit someone from going and putting a swastika on my flag, it has a legitimate interest in doing that, protecting my rights, my property interest, and my expression interests.

But it does not have a right, under the Supreme Court's reasoning, to go and say to someone you cannot put a swastika on your own flag, because that is his own private right and interest and expression.

Senator SPECTER. Mr. Barr, let me change the subject a bit because of the brevity of time and explore with you a few moments the possibility that a slightly different statute might pass constitutional muster because of the public outcry about the decision in *Texas* v. *Johnson*.

There is a very interesting doctrine articulated by Justice Scalia in *Sanford* v. *Kentucky* involving the matter of the death penalty

for juveniles. And Justice Scalia moves to a question of what is a "national consensus," as articulating a constitutional standard.

Now, it is obvious that there is a significant difference between what is a national consensus on cruel and unusual punishment. Under the 18th amendment there is the due process clause of the 14th amendment which would pick up the eighth amendment. But there is some analogy.

And I think there has been a very strong national consensus that flag desecration goes too far, that there are other ways, many, many, many other ways of freedom of speech and freedom of expression. Perhaps that is wrong, perhaps there cannot be too many ways.

But in terms of a national consensus, I think we have certainly seen one on this case based on my observations around Pennsylvania. Maybe it has lessened. But I think it is fair to say that there is a national consensus.

What effect do you think that might have on the Supreme Court when they get the next case, which is slightly different, perhaps just a little stronger?

Mr. BARR. I would not think it would have any effect. I think that the Justices were aware of the national consensus on the flag and the special feelings toward the flag. It was not the first time the issue was raised. Congress had passed a statute in 1968. The dissent pointed out that the surest indication of national consensus was the fact that 48 State legislatures have passed these statutes, and the dissent made the point about national consensus.

It was an agonizing decision obviously for some of the Justices to make. I think they made their cut. And I do not think that the fact that there is an outcry will affect change in constitutional principle in the area of the first amendment. I am not in favor of using brute force to roll over the Supreme Court when they have enunciated principles.

I do not think it is an apt analogy to the eighth amendment, because the constitutional standard is usual. And so there is a basis for consulting what is usual in society.

But in the first amendment area, the "bedrock principle," as has been said, is that unpopular views, views that do not enjoy consensus and support should nevertheless be protected.

Senator SPECTER. Well, I do not agree with you about the Court expecting the kind of a public response which it received here. But let me pass on to one final question.

And that is looking back at a couple of lines of cases from the past—and they could be may-sided, and I would be very interested in Professor Tribe's response to the national consensus issue and to this question, about what has appeared to be changes in Supreme Court rulings in the past in response to a very forceful public reaction.

I would go back to the thirties with the complex cases that faced the Supreme Court of the United States, and to the case of *West Coast Hotel Company* v. *Paris,* where Supreme Court Justice Owen Roberts is reputed to have made a shift in significant response to a public outcry with the famous quote that "a switch in time saved nine," referring to the Justices and the pork packing plant, or to another line of cases—and I would not expect you to be familiar

with these. I have just been reviewing them myself in light of this thought.

But referring to Gunther's analysis of constitutional law, he refers to the decisions in *Watkins* and *Swenzey* back in the late forties, early fifties, together with hearings on subversion in *Yates* and *Konigsburg* which provoked considerable criticism and were frequently mentioned in congressional debates on the 1958 proposals to curtail the court's appellate jurisdiction.

Then he notes a comparison of *Barrenblatt* and *Uphas,* the Federal and State investigation cases of 1959 which follow. He poses the question: Can those decisions be explained as responses to the hostile congressional reaction?

Is there a basis for the allegations that the 1959 decisions were inconsistent with and marked a retreat from *Watkins* and *Swenzey,* the 1957 cases?

This question is somewhat similar to the national consensus cases. But do you think there is some significant likelihood that the Court might retreat from this decision in *Texas* v. *Johnson* in view of the public outcry?

Mr. BARR. In determining what is constitutional and living up to the oath that we all have to uphold the Constitution, I think we have an obligation to use constitutional principles and logic to get us from point A to point B. And if we can't get from point A to point B based on principled analysis, then I'm reluctant to say that because you might use brute force and intimidate an individual to change his vote, that that would permit us to override the principles that have been articulated by the Court as a sheer exercise in sort of an intimidation of one justice.

But if that was our game plan, if we really felt that the national consensus was sufficient and the outcry was sufficient to ram this thing through the Supreme Court once again, then I wouldn't go with a—then I would go with a statute we really want. I would go—if we think that the outcry has been sufficient to cow one of the five in the majority, I would pick out a rational statute, one that's really focused on what we want to accomplish and make no pretext about the fact that we're trying to bully one justice into changing his vote.

Senator SPECTER. Well, then you're picking a different statute, but you're implicitly accepting the thought that the court is influenced by public reaction.

Mr. BARR. Well, apparently in some context it is. I don't believe it would be in this context. My own view is that the statute—that a statutory approach that focuses on fighting words or on incitement to riot or on any of those theories would essentially provide no protection to the flag. The flag is a political symbol, and normally when it is desecrated, as part of first amendment protected activity, it's done as political expression. And none of the other statutory alternatives would provide any kind of protection. In other words, the protection afforded by these other statutory alternatives are far too narrow.

The statutory approach suggested by Senator Biden does provide protection, but we think it goes too broad, and it would be better to provide a constitutional amendment that would permit the legislatures to focus on the kind of conduct that is really offensive. And

Senator Biden has said, and I believe it's still his position, that he, in good faith, is attempting to find a way to short—you know, so we don't have to go through the long process of amending the Constitution and see if this can be done by statute, but as far as I am aware, is not suggesting this as a ploy to sidetrack the constitutional amendment. I believe he still has an open mind on that question.

Senator SPECTER. Thank you very much, Mr. Barr. The issues are complicated, and I have, perhaps, overly boiled them down because of the brevity of time here. And I'm not suggesting that the Supreme Court ought to yield to the public passion. I'm raising the considerations which have been raised over a long period of time about whether the Supreme Court follows the election returns, as Dooley said about 100 years ago. We've seen changes in the Supreme Court decisions on affirmative action. Law has been changed. Maybe that's more a result of the change in personnel as opposed to a change in feeling in the country.

But you have a very tight decision in *Texas* v. *Johnson,* a very close decision, obviously close for the Justices who wrote the opinion. It might not take a whole lot more to sway them. It might have a fine tuning of the statute, as Senator Biden has proposed it or as otherwise. And I wouldn't rule out a constitutional amendment either. But it seems to me if we could structure a statutory remedy as a principle matter, it is vastly preferable.

Thank you very much, Senator Biden.

The CHAIRMAN. You're welcome. Notwithstanding you never have the sound on, you're still welcome.

My problem is I like the Senator from Pennsylvania too much.

Senator SPECTER. It's reciprocal.

The CHAIRMAN. I have a number of questions, but since you're the only person who belongs to an outfit that's always going to be in town, I would ask you only one, and then ask you if you would be willing to come back in the second, third, or fourth hearing, depending on the scheduling, because there's much to pursue here, and you're an extremely articulate witness. I'm not being solicitous. You state your case extremely well, and I'd just like to speak to one—ask you one aspect of it.

The significant portion of your case against the statute—there's two major pieces. One piece I'd like to speak to, and that is that to attempt to protect the flag because of its symbolic value is in and of itself an acknowledgement that there is a communicative impact, that it is in and of itself designed to affect expression, that it is expressive, that it falls into the speech category. That puts it under what you define as category one under stricter scrutiny because merely by acknowledging it's symbolic, notwithstanding that the statute would say it would be neutral, the language of the statute would be neutral, notwithstanding that, the fact that this all would be taking place, to quote Judge Bork, who apparently shares your view, he said, in his statement he said that legislative history of my legislation—meaning Biden legislation to protect the flag—or any legislation on flag burning, for that matter, would, in his words, "reveal that it was designed to prevent the expression of an idea by desecrating the flag." He went on to say that if in fact the Supreme Court—all the Supreme Court would have to do is to look

to the legislative history for evidence of this unconstitutional motivation. That what the unconstitutional motivation is the desire to prevent the expression of an idea.

What I want to ask you is this. In the free speech area, the Supreme Court—how can I shorten this? The Supreme Court has not in the past, in my view, and will not void a statute that's neutral on its face because legislative history shows that there is an unconstitutional motivation. That is the practice of the court in looking at a statute is not to look at, not to look at the legislative intent, the legislative history if the statute is neutral on its face.

And the statute you've acknowledge is neutral on its face.

Mr. BARR. Actually, Senator, when you were out of the room, I explained why it's not neutral on its face.

The CHAIRMAN. OK. Then, I'll read the record in the interest of time.

Mr. BARR. But, just to respond to that, I think you put your finger on the nub of our position, which is that when the Government's interest is to protect a symbol, then it's inherently related to expression.

The CHAIRMAN. Right.

Mr. BARR. We don't—maybe you should ask Professor Tribe about the extent to which you can inquire into motives of the legislature, because he has a chapter in his treatise saying, yes, you should look at the motivations of the legislature in the first amendment area, but put that aside.

The Government's interest in protecting the symbol can result in rules that not only are directed at people who are attempting to engage in expressive conduct——

The CHAIRMAN. But those who are not.

Mr. BARR [continuing]. But those who are not, because——

The CHAIRMAN. Now, I understand that. That's the second part of your argument, it seems to me.

The first part of your argument is that it's unconstitutional. The second part is that it's bad policy.

Mr. BARR. No. What I'm saying is, when you're dealing with a symbol, the fact that the Government is prohibiting—why is the Government even prohibiting people who are burning the flag or acting contemptuously toward the flag but without an intent? They have no intent to communicate an idea. But what is the Government's interest in addressing that? It is also linked to the symbolism.

You strengthen the symbolism by requiring certain conduct toward the flag. And I call your attention to the footnote in the *Johnson* opinion where it points out that the statute in *Johnson* did not depend upon an intent, and it said that someone who was just tired and dragging the flag through the mud, but did not intend any offense toward the flag, would still be subject to the statute.

The CHAIRMAN. Well, I really am anxious to debate that further with you. I'd like to submit some questions, writing and asking if you could come back.

One parting question. You say, for example, the analogy for protecting bald eagles. You protect bald eagles because they're rare. Would it be unconstitutional for the legislature to pass a bill

saying even if we had 10 million bald eagles to protect bald eagles because they're a symbol of what America stands for?

Mr. BARR. The issue would be whether or not you could prosecute someone who was chopping the head off a bald eagle as a form of political protest.

The CHAIRMAN. Yes. That's the question I'm asking.

Mr. BARR. And then the issue would be whether the Government's interest in protecting wildlife from suffering was compelling.

The CHAIRMAN. How about if they just said they wanted to protect them, period? Not because they're rare, not because they're extinct, not because of anything, just because they want to protect them.

Mr. BARR. I would say that would be unconstitutional under the Supreme Court's current ruling.

The CHAIRMAN. OK. I appreciate very much your testimony.

Mr. BARR. Thank you.

[The questions of Mr. Barr follow:]

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

September 5, 1989

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your request of August 8, 1989, that I answer a few written questions from Senator Grassley as a result of the August 1 hearing on Flag desecration. I hope these answers will aid your committee in its important work on this issue.

1. How much tolerance do we show to those who -- if their views were to prevail -- would show us none?

Clearly, we should not tolerate acts of physical violence toward other persons or their property. It is equally clear that as a general rule we should not limit a person's right to expression except in the most unusual of situations. The First Amendment reflects our commitment to the preservation of a marketplace of ideas. However, we believe society has a compelling interest in preserving the Flag as a unique and unalloyed symbol of this Nation. In our view, prohibiting the physical desecration of the Flag would not place an appreciable burden on free speech. The Supreme Court itself has previously made clear that "the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places." Los Angeles City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984). And as Justice Rehnquist said in dissent in Texas v. Johnson, "flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others." While we believe that flag desecration, a mode of expression, should be prohibited, all citizens are and must remain free to speak freely their views of the government itself, regardless of their motives.

2. Let me ask you a question that a constituent of mine asked me: Do all acts of disrespect, undisciplined behavior, and violence have to be excused, accepted, or tolerated as a right of

personal freedom? Is there no longer a recognized difference between liberty and license?

There must be limits to what we tolerate in the name of freedom. Freedom is not absolute. Our entire set of criminal laws reflects the fact that we believe that for the sake of society at large, we must set certain limits on personal freedoms. Through its elected representatives, society determines what limits should be placed on individual freedoms. This is the essence of democracy.

3. Critics of using a Constitutional Amendment to protect the physical integrity of the Flag maintain that there is a problem with defining just exactly what is a "Flag of the United States". What is meant when the term "Flag of the United States" is used in the proposed amendment and what are the potential problems with determining what is a "Flag" under the language of the proposed amendment -- will the proposed amendment allow a state to criminalize the use of anything resembling a "Flag" in any fashion?

In short, we believe that Congress and the state legislatures would be empowered under the Amendment to define Flag. A broad interpretation was adopted by Congress in 1968 and may be found today in the existing Federal Flag desecration statute. Because Congress and many of the States had defined Flag in a broad fashion in their Flag desecration statutes, we believe it reasonable for the Amendment to enable Congress and the States to provide again the type of protection they provided prior to the Supreme Court's recent decision. My prepared statement explains more fully what the term "Flag of the United States" means as it is used in the proposed constitutional amendment.

4. Opponents of amending the Constitution to protect the Flag contend that the term "physical desecration" of the Flag is an ambiguous term that could encompass a wide array of displays that are a part of other lawful activity and whose meaning can only be divined by those foolish enough to attempt such a definition. How do you respond to the criticism of the proposed amendment that the term "Flag desecration" is hopelessly vague and that it could result in the prohibition of displays that are a part of other lawful activity?

It should be remembered that the proposed amendment does not itself prohibit anything. It merely empowers Congress and the States to define and prohibit acts of physical desecration. While my prepared statement explains more fully what the term "physical desecration" means, a few important points should be made. First, the requirement that the desecration be "physical" makes clear that there must be physical contact with the Flag. Thus, Congress and the States could not punish mere words or

gestures. Second, "desecration" should be interpreted to reflect a common-sense understanding of the term, such as that found, for example, in Webster's dictionary, which defines "desecration" as "to treat irreverently or contemptuously often in a way that provokes outrage on the part of others." Such a definition makes plain that the proposed amendment would authorize only the prohibition of contact that an objective observer could reasonably perceive to be contemptuous. Thus, legislatures could not prohibit proper displays of the Flag merely because they believed the particular surroundings were unfitting. Finally, it should be remembered that if and when Congress and the States enact new desecration statutes, they will have to define with specificity the types of conduct they are prohibiting to ensure that the statutes are not unconstitutionally vague.

5. Some who are knowledgeable in constitutional law have correctly pointed out that amendments to the Constitution take precedence over the constitutional provisions on the same subject which precede them. What section or sections of the Constitution will be amended by the proposed amendment? Will the proposed amendment modify in some way the "Equal Protection" clause of the 14th amendment or any constitutional "due process" requirements?

The proposed amendment would not modify in any way the important rights and guarantees of the Fourteenth Amendment. It is important to understand that a Flag desecration statute could still be challenged on the ground that it is unconstitutionally vague, which is a Fourteenth Amendment claim. The Constitution must be read as a whole, and that includes the amendments later added to it. This amendment makes clear that the Government's interest in preserving the Flag as a symbol of this Nation is compelling, and that it is constitutionally derived. In Texas v. Johnson, the Court observed that there was nothing in the Constitution indicating that the Flag was special. This was important to the Court when it concluded that the government's interest in the Flag was insufficiently compelling to justify a prohibition on Flag desecration. Thus, while the Amendment will give extra weight to the government's interests in preserving the Flag, which will affect the balancing analysis of the First Amendment, it will not impact in any way Fourteenth Amendment doctrine.

6. Opponents of an amendment to protect the Flag maintain that if the Flag is indeed a national symbol, then it should have the same meaning throughout the country. Therefore, Congress should want to establish a uniform and national regulation that will protect the Flag, rather than allowing the states to enact various Flag-protection statutes themselves, as is permitted by the President's amendment. Please give your opinion regarding the policy behind allowing the states to enact different statutes to prevent the physical mistreatment of the Flag, as opposed to

the Congress having the sole power to preempt and regulate this issue?

Prior to Texas v. Johnson, 48 of the 50 states had statutes prohibiting various types of Flag desecration. We believe that this amendment is intended to undo the damage caused by the Court's decision, and to restore to Congress and the States the power they had been exercising for nearly a century. State legislatures are the legislative bodies closest to the people and have been historically responsible for the enactment of most criminal laws. It is only natural then that the States should again have the power to prohibit Flag desecration as they once did. I have indicated previously, however, that there are arguments for the suggestion that Congress alone should be responsible for determining what protection to provide the Nation's Flag. Whether Congress alone should possess this responsibility, however, is ultimately a policy decision for Congress to make.

7. In your opinion, do you believe that the President's amendment - according to some opponents of a constitutional amendment - "confers power of uncertain dimension on the 50 states and countless local governments"?

No, I do not. I believe the proposed Amendment is really quite narrow. It only empowers Congress and the States to take action in a very limited context. In fact, compared to most of the other constitutional provisions that confer power on the Government, this provision would be one of, if not the most narrow.

8. In his statement before the House Judiciary Subcommittee on Civil and Constitutional Rights, Duke University Law Professor Walter Dellinger said that the Supreme Court's decision in Texas v. Johnson "emphasizes that (Gregory) Johnson was convicted under a statute that made his criminality turn on the communicative impact of his message." Professor Dellinger continued "the court thus draws a distinction between (presumably valid) statutes that protect the physical integrity of the Flag by, for example, forbidding all burning, and those, like the Texas law, that impermissibly criminalize impairment of the Flag only when it is done to communicate a certain message or only when it has a particular communicative impact." What is your opinion of Professor Dellinger's analysis of the court's opinion in the Texas v. Johnson case?

As my prepared statement more fully explains, we are convinced that the single most important factor in determining the level of scrutiny is not the scope or the terms of the statute, but the government's reasons for the statute. A Flag desecration statute that protects the physical integrity of the Flag would be enacted for the same reason as any desecration

statute: to preserve the symbolic value of the Flag. The Supreme Court would obviously recognize that, even if Congress drafted a statute that had absolutely no exceptions to the prohibitions. The Court, however, has now said that the preservation of the Flag's symbolic value is inherently related to expression and therefore is subject to exacting scrutiny. Using that scrutiny the Court would never uphold the application of such a statute to the kind of conduct Americans want punished. I do not believe Professor Dellinger could possibly disagree with me on this point; I do not believe he has suggested that a statute protecting the physical integrity of the Flag would be unrelated to preserving the Flag as a symbol.

9. If you do not agree with it in whole or in part, how do you assess this particular point in the decision, and how can the Congress best address the result of the decision?

The Texas statute was explicitly directed at the communicative impact of the conduct; it was not, however, the fact that it was directed at that conduct but that it reached that conduct that rendered the statute unconstitutional. I think that if Congress wants to put a stop to those who would physically desecrate the Flag, there is but one option--amend the Constitution. A statutory approach clearly will not protect the Flag, and I believe the American people, and most members of Congress want the Flag protected.

10. Professor Dellinger further testified that the court's opinion in the Johnson case appears to conclude that "the Government can prohibit and punish Flag Burning in all circumstances -- even Flag Burning done as part of a political protest -- as long as the Government has (a 'non-speech') interest that is unrelated to the message being conveyed" or "unrelated to the expression of ideas." Do you agree or is this a distinction without a difference and does this preclude the necessity for a constitutional amendment?

I disagree. As I stated above, the government's reason for the prohibition, not its scope, is the key to determining how it would fare in court. If it was possible to articulate an interest or reason that was wholly unrelated to expression, then a statute would work. The problem, though, is that any interest in protecting the Flag because of its symbolic value is necessarily related to expression. That was the central holding of Texas v. Johnson. Because the Flag is a symbol, and our interests are in protecting it as a symbol, a prohibition on Flag burning is necessarily related to expression, according to the Supreme Court.

11. Professor Dellinger continued "unless this proposed amendment is understood to override or trump the provisions of the Bill of Rights, it does nothing. This . . . is not what its

sponsors intend." Consequently, Professor Dellinger proposed adding the following to the proposed amendment to cure the problem he sees due to the amendment's lack of specificity as to what part of the Constitution it changes. He would add: "The power conferred upon Congress and the states by this provision shall not be subject to the constraints of the First Amendment guarantees of freedom of expression or freedom of the press." Do you think that -- like Professor Dellinger -- in the absence of such a change, the text of the amendment seems to suggest either that the amendment overrides none of the Bill Of Rights -- and therefore does nothing -- or that it trumps all of the Bill of Rights -- and therefore confers unlimited and unreviewable power with respect to the subject of the amendment?

As we have said previously, we do not interpret or understand the amendment to limit in any way the other rights and guarantees contained in the Bill of Rights. I do not think it is necessary, therefore, to add the phrase he has suggested. It is clear that this amendment is being proposed in response to the Court's decision in Texas v. Johnson and that it should be interpreted to restore to Congress and the states the power they had prior to the decision. It does this by making clear that the Government's interests in preserving the symbolic value of the Flag are compelling. Given the context of this Amendment's proposal and ratification, it would be irresponsible (not to mention inconceivable) for a court to interpret the narrow power conferred to be itself in conflict with the First Amendment. When understood in this way, I think it is quite plain that the proposed amendment would not override any of the Bill of Rights.

12. Professor Dellinger further testified that "adoption of the proposed amendment could set a dangerous precedent for frequent resort to the amendment process for the curtailment of the rights (of those considered to be) unpopular." In your opinion, do you agree with his assessment of this effort to modify the Supreme Court's Johnson decision?

No. On this logic, we would never have adopted the Fourteenth Amendment. It is hard to imagine any cause uniting more people than the Flag of the United States. Despite the virtually unanimous overwhelming sense of the American people that the Flag is worthy of protection, it is still difficult to get the Constitution amended to provide that protection. This demonstrates how truly difficult it is to amend the Constitution. This Amendment would not make it any easier for other proposals to be ratified. Future proposals will be as carefully scrutinized as this one. They, too, will succeed or fail on the basis of their own merits.

13. Finally, Professor Dellinger stated that he is of the opinion that the President's amendment may "undermine the moral legitimacy of the First Amendment" because for 200 years, the

American people have understood that we must maintain the fundamental principle that "the Government may not prohibit expression simply because it disagrees with its message." In your opinion, what would this proposed amendment do to the "moral legitimacy" of defending expression that offends many Americans as deeply as Flag Burning?

The "moral legitimacy" of the First Amendment will not be endangered in any respect. I suspect that if damage has been done to the moral legitimacy of the First Amendment it occurred when the Court decided that the First Amendment's guarantee of Free Speech included protection for burning the Flag. The American people do not understand why a guarantee of Free Speech should include a guarantee of freedom to burn the Flag. For 200 years the American people thought that Flag desecration could and should be punished. Very few people believed that the First Amendment indicated otherwise. It is illogical to suggest that a return to the status quo that existed prior to June 21, 1989, would undermine the moral legitimacy of the First Amendment.

14. Is there any statutory language that you could recommend to the committee that would remedy the Johnson decision?

No. If the Administration saw any way that a statute could be drafted that would remedy that decision, we would support it. Unfortunately, any careful analysis of the Court's decision confirms that a statute could not withstand constitutional challenge. We have a duty not to play games on an issue of this magnitude. The American people and the Congress should understand that only a constitutional amendment would remedy the decision.

15. Columnist James J. Kilpatrick concluded an opinion piece that appeared in the June 28th, 1989 Washington Post by saying:

> . . . I am consoled by the thought that the Flag itself, and the American ideals for which it stands, will survive the puny assaults of such contemptible maggots as Gregory Lee Johnson. In the wake of the court's opinion, presumably we will see more Flag Burnings, but these too will pass. If the Press will ignore such odious demonstrations, their point will be lost. Meanwhile our most cherished ideal -- the ideal of Freedom -- will be maintained."

Would you care to comment on Mr. Kilpatrick's statement on the effect of the court's Johnson decision on the ideal of Freedom and contrast that with the effect of the President's amendment on

that same ideal?

I disagree with Mr. Kilpatrick's suggestion that Flag burning is essentially harmless. Even the majority opinion in Texas v. Johnson recognized that society has a legitimate interest in the Flag as a symbol. Senator Biden has expressed well how the preservation of the Flag as an unalloyed symbol helps unite a heterogeneous society. The Flag inspires emotional attachment to the values for which it stands. It rallies the spirit of this nation. If we permit the desecration of this unique symbol, these important societal interests are, in fact, injured.

William P. Barr

William P. Barr
Assistant Attorney General
Office of Legal Counsel

Mr. Barr, we appreciate your coming this morning and I appreciate your testimony.

Mr. BARR. Thank you, Mr. Chairman.

Chairman DERRICK. We will be glad to have you insert your statement in the record and, without objection, you can read it all or summarize it or proceed however you wish.

Mr. BARR. Thank you, Mr. Chairman.

STATEMENT OF WILLIAM P. BARR, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. BARR. Mr. Chairman, members of the subcommittee, I appreciate the opportunity to present the views of the Department of Justice concerning H.R. 849, a bill to define the type of adjournment that prevents the return of a bill by the President, and to amend the Rules of the House of Representatives to require the Clerk to make certain notifications to the Speaker.

The Department opposes enactment of this legislation, and would recommend disapproval were it presented to the President.

Mr. Chairman, I ask the full text of my statement be entered into the record in its entirety.

Chairman DERRICK. Without objection.

Mr. BARR. Mr. Chairman, the Constitution sets forth very clear rules on the process by which laws are made. Recently in the *Chadha* case, the Court emphasized how far it is that the rules of the game remain unambiguous and clear even if it means a sacrifice in efficiency.

In *Chadha*, the argument was under the modern conditions and modern administrative state, it was far more efficient to permit legislative veto, and the Court rejected that argument, and said that the Constitution has a blueprint, a set of rules by how laws come into being. They are not always efficient, but the rules have to be observed, because the worst thing that can happen under our Constitution is there to be ambiguity and confusion when a law becomes a law.

So they rejected the efficiency argument. After all, they said, a 10-day rule for the President to review legislation—and, as we know, at the end of a Congress or the end of a session of Congress, there are a lot of bills to be reviewed, some of them several feet high—10 days is, under modern circumstances, not very long to review legislations.

Should we say, under modern conditions, why don't we pass a bill and double that time or triple that time because things have changed? No. There are two ways to change the Constitution. Well, there is one way to change the Constitution, and that is through an amendment.

If the Department of Justice is wrong on its interpretation of the Constitution, then as the Court told us as early as *Marbury* v. *Madison*, it is emphatically the duty and province of the Supreme Court to say what the Constitution means.

So our view is that Congress cannot change the meaning of the Constitution by passing a statute defining what the word adjournment means for purposes of pocket veto clause.

Now, a lot has been made of this argument that the pocket veto really gives an absolute veto to the President. That argument was made in the first time pocket veto was considered by the Supreme Court, and was rejected.

In the *Pocket Veto* case, the Court said this is not an absolute veto, this is not an expansion of Presidential power, that Congress has the built-in capacity to avoid the pocket veto by staying in session for 10 days to permit the review by the President and then rapid reconsideration should the President veto the bill, return veto the bill.

So it is always within the power of the Congress to avoid a pocket veto and it said the party responsible for a pocket veto, that responsibility lies with Congress, not the President.

This is not a question of expanding Presidential powers. We think the Court was right in that decision.

Now, the basic issue here is, what is the real reason behind the pocket veto clause? There are basically two schools of thought.

One is the ducking Congress school of thought. The only reason behind the pocket veto clause was to protect the President if the Congress was going to be ducking out after passing a bill and evade service of process, so to speak. That is the only purpose according to this school of thought.

All we have to do is provide a mailbox. If we provide a mailbox and a registered agent to accept service of process, then the whole problem of the ducking Congress is gone and we can just ignore what the Constitution says.

That is the underlying rationale for this bill. We think it is wrong. We think, one, it does not comport with the history of the Constitutional Convention by adoption of this clause, it is inconsistent with the language of the clause, and it contradicts the two Supreme Court decisions that have interpreted the clause.

In the Constitutional Convention, the original—in practical terms, the effect of requiring the President to deliver a bill to the Clerk for subsequent delivery to the House would be the same practically as if the President simply retained the bill and returned it directly to the House or to the Congress when Congress returned from its adjournment on the first legislative day. That, in fact, was the first proposed pocket veto clause.

The first draft given to the committee on detail during the Constitutional Convention said, "Unless the Legislature, by their adjournment, prevents return"—that is very close to the existing language. And then it says, "In which case, it shall be returned on the first day of the next meeting of the Legislature."

So they had a clause that solved the ducking Congress problem initially proposed to the committee on detail, saying the President could hold on to the bill, and as soon as Congress came back, boom, he gives them a return veto.

The committee on detail changed it. They took out that last proviso and have gone with the automatic pocket veto. There is no provision whereby it is held in abeyance until the Congress returns from adjournment.

We think that that reflects that the Convention had other interests besides the ducking Congress problem. That was brought to our attention in the Supreme Court's *Pocket Veto* case. There, the

Court said an adjournment in the clause does not mean final adjournment. That is what this bill is trying to define it as. It doesn't mean a final adjournment.

The word adjournment in the Constitution can mean adjournment even for 1 day, and it is used throughout the Constitution to mean adjournments of various lengths including from day to day. So they said the word adjournment doesn't mean just final adjournment.

They said that part of the reason—our reading of the case is that the Court was saying that the reason an adjournment prevents a return is because it was the purpose of the Framers to have the Legislature present with the capacity to give immediate consideration. That is used repeatedly throughout that case, immediate consideration to the veto.

They wanted a process whereby the confrontation between the Executive and the Legislature, which they considered to be a momentous occasion, very important, solemn occasion, the President has a solemn duty to review the legislation. He is given 10 days to do it. When he vetoes, they wanted again this confrontation to be capable of immediate resolution, immediate consideration in Congress. That is why the Court, in the *Pocket Veto* case, said that the House must be in session and the return must be made to the House sitting in an organized capacity with the ability to act immediately.

They rejected the notion in that case that delivery to an agent could comply with the constitutional mandate, and said that would permit delay in reconsideration, which the Constitution intended to avoid.

We think that the *Pocket Veto* case makes it clear that an adjournment prevents return because Congress is not then in a circumstance where it can proceed immediately to reconsider or to consider the objections of the President and determine whether to override the veto.

So we think that part of the rationale for the pocket veto clause was the ducking Congress problem, but there was another reason, which was to eliminate or to minimize periods of uncertainty, to focus the debate on to permit the legislative process to rapidly resolve and immediately address differences that arose between the Executive and Congress.

The *Wright* case that came along 9 years later, we think, is completely consistent with the *Pocket Veto* case. There, the Court had the insight to say that the clause requires or contemplates an adjournment by Congress, not adjournment by one of the Houses. And it referred to another clause in the Constitution which requires the House that goes into adjournment for more than 3 days to obtain the consent of the other House.

We think this is consistent with the Supreme Court in *Wright* and the *Pocket Veto,* that adjournment of Congress is the key concept in the clause and it is a concept that is capable of mechanical application, and therefore leads to clear results and predictability. If Congress is in adjournment, then the President can pocket veto a bill and it doesn't matter whether or not there is an agent there. If Congress is not in recess, but not in adjournment, the President has to use the return veto.

We think that where one House seeks the consent of another House and goes out on a recess for more than 3 days, you have bicameral action, which constitutes an adjournment of Congress. Congress is then adjourned even if one House remains in session because you have had bicameral action.

Where a House goes out on a brief recess and does not obtain the consent of the other House because it is not going to be over 3 days, then Congress remains in session and not adjourned for purposes of the pocket veto clause. Congress is not adjourned.

Under those circumstances, the pocket veto clause is not applicable and the President has to return veto because Congress is not adjourned and he can return it in any way suitable. If Congress wants him to return it to an agent, fine, Congress is not adjourned at that point.

Let me just say a few words about history. The Court has repeatedly said that history—history here I don't think supports the sweeping bill that is before the committee now, historical practice.

In any event, the Court has repeatedly said that historical practice is never sufficient alone to alter the meaning of the Constitution. The Court will occasionally look at historical practice where there is ambiguity and reasonable arguments can be made on both sides, and they will look to see what the practice has been.

But as far as the meaning of the Constitution is concerned, the reason the Court has looked to the First Congress and the practices of the first Congress—which was the example cited by one of the witnesses up here before, the removal power issue—is because the Court has said that Members of the first Congress, a majority of them were also involved in the drafting and ratification of the Constitution, and therefore maybe they had a good idea of what the Constitution meant. And then the Court will look to see whether or not there was explicit consideration of the issue at hand by the Members of the First Congress.

If there was not explicit consideration given to the issue, then their practice is entitled to very little weight. If they explicitly considered something and discussed this constitutionality question and came to a conclusion on it, their views are entitled to very great weight. The removal power case is just that example.

There was extensive debate in the early Congresses over the President's removal power and what the Constitution contemplated. That is why the history of the First Congress and the debate over removal was given such weight.

But we would not accept the notion that the Constitution is—when we say it is a living document, we don't mean it to be a blank check and that the rules set in there are things that Congress can change simply by passing a statute.

Adjournment means adjournment, and the Supreme Court's interpreted that term, and we can litigate it again in the Supreme Court and maybe the Justice Department will lose, in which case we will be told by the Supreme Court what the clause means. Otherwise, the way to change the Constitution is by constitutional amendment.

I would be glad to answer any questions.

[Mr. Barr's prepared statement follows:]

STATEMENT

OF

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UNITED STATES DEPARTMENT OF JUSTICE

BEFORE

THE

SUBCOMMITTEE ON THE LEGISLATIVE PROCESS

OF THE

COMMITTEE ON RULES
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 849

JULY 26, 1989

Mr. Chairman, Members of the Subcommittee

Thank you Mr. Chairman. I appreciate the opportunity to present the views of the Department of Justice concerning H.R. 849, a bill "to define the type of adjournment that prevents the return of a bill by the President, and to amend the Rules of the House of Representatives to require the Clerk to make certain notifications to the Speaker."

The Department opposes enactment of this legislation and would recommend disapproval were it presented to the President.

H.R. 849 would add a new section to Title 2 of the United States Code and would amend the Rules of the House of Representatives. The new section, to be numbered 115, would state that "[n]o adjournment of either House of Congress, other than an adjournment sine die to end a Congress, prevents the return of a bill by the President." I will comment only on this proposed addition to Title 2.

The issue that this legislation purports to address -- whether an adjournment of a House of Congress prevents the President from returning a bill that has passed both Houses -- is significant because of the Pocket Veto Clause of Article I, section 7 of the Constitution. The Pocket Veto Clause is a proviso attached to the portion of the Constitution that prescribes how laws are to be passed. Under Article I, section 7, when both Houses of Congress pass a bill they present it to the President. If he signs the bill, it becomes law. He can also veto it by returning it to its house of origin together with

his objections. If the President neither signs the bill nor returns it within ten days of presentment (excepting Sundays), it becomes a law "in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which case it shall not be a law." The underlined passage is the so-called Pocket Veto Clause. It makes it possible for the President, when Congress is adjourned, to veto a bill without returning it simply by failing to sign it.

The pocket veto makes it impossible for Congress, by adjourning, to nullify the President's power of return veto authority; if there were no pocket veto, Congress could pass legislation and adjourn, preventing the President from exercising the veto. Similarly, the ten-day rule to which it is attached is an action-forcing mechanism in the other direction, one that makes it impossible for the President to veto a bill informally by neither signing nor returning it.

We have two objections to H.R. 849, which purports to address the operation of the Pocket Veto Clause. First, we think that the bill, considered as a statement of constitutional law, is incorrect: in fact, the Constitution implies that any adjournment by the Congress -- that is, any adjournment of either house for longer than three days -- gives occasion for a pocket veto. Second, we think that it is inappropriate for Congress to attempt to impose its own view of the Constitution by legislative fiat. Whether an adjournment prevents a return must be decided

by interpreting the Constitution, the meaning of which can be changed only by a constitutional amendment, not by legislation.

The answer to the substantive question concerning the operation of the pocket veto depends on two subsidiary questions: first, what is an adjournment of Congress for purposes of the Pocket Veto Clause, and second, what relationship does the Constitution imply between adjournments and the prevention of a return.

The Constitution answers the first question in a fairly direct fashion. The Pocket Veto Clause refers to the case where "Congress, by their Adjournment prevent [a bill's] return." Congress is a collective body consisting of two Houses, and the Constitution explicitly states which decisions to go out of session require an action by Congress collectively: Article I, section 5, states that neither House "during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days."[1] The Constitution thus implicitly defines any adjournment by either or both Houses of more than three days as an adjournment of Congress. When one or both Houses stop work from day to day or over a weekend, there is no adjournment of Congress.

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[1] The Constitution exempts the decision to adjourn from the requirement of presentment to the President: that requirement applies to "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)." Art. I, § 7, cl. 3.

This definition of an adjournment of Congress fits neatly into the Constitution's structural scheme. Congress, considered as an independent and coequal branch of the national government along with the President and the courts, consists of two Houses -- indeed, the bicameral nature of Congress reflects the Great Compromise between the small and large States, which made the Constitution possible. The President, when he deals with Congress, deals with both bodies; for example, his messages on the state of the Union are delivered to both Houses, and Article I, section 7 provides that the President acts on a bill only when both Houses have passed it. Thus, it is proper that the Constitution provide that Congress has adjourned when either House is gone for any substantial period of time.

As to the second question, it is implicit in the Constitution and in the very language of the Pocket Veto Clause itself that adjournments of Congress by definition prevent the return of a bill and thus create an occasion for the pocket veto. We believe that this reading is decisively to be preferred to the alternative, under which only some adjournments prevent return, and under which it would be necessary to determine whether any particular adjournment has done so. First, and perhaps most importantly, the reading we suggest is the more plausible because it makes the Pocket Veto Clause a clear rule capable of mechanical application, without any need to inquire into the effects of whatever arrangements Congress has made for its adjournment.

This is very significant, because the most natural reading of any structural provision of the Constitution, the one most likely to reflect the original understanding, is the one that produces the clearest rules. As the Supreme Court has explained, the Constitution is designed to provide "[e]xplicit and unambiguous provisions" to govern the structure of government, and most importantly the process whereby a bill becomes a law. INS v. Chadha, 462 U.S. 919, 945 (1983). Our system of government could not function if Article I, section 7, which governs the legislative process itself, consisted of "open-ended" principles without fixed applications. In particular, a bright line rule governing adjournment is necessary to put the President and Congress, as well as those affected by legislation, on notice as to the proper method by which the President may exercise his right to disapprove a bill. The alternative to a clear rule is uncertainty and litigation.

Moreover, to permit return of a vetoed bill to an adjourned Congress would defeat the clear plan of the veto provision, which is designed for prompt reconsideration by Congress and disposition of the issue: the clause says that the recipient house shall enter the President's objections on its journal and proceed to reconsider the matter.

Indeed, the drafting history of the Clause supports this view and is inconsistent with the suggestion that the pocket veto should operate only when Congress has neglected to provide for a return veto in its absence. The Committee of Detail of the

Federal Convention, in composing what became Article I, section 7, at one point prepared a draft providing that if Congress by its adjournment prevented a return veto, the President was to return the bill on the first meeting of the next legislature. But the Committee, in its report to the Convention, replaced that language with the pocket veto proviso essentially as we have it now.

This suggests that the Framers wanted to do more than just make sure that Congress could not defeat the return veto by adjourning. They also wanted to avoid lengthy uncertainty as to whether a bill would become a law. Rather than permit a vetoed bill to lie over until the next meeting of Congress, they provided that it would not become law if the President did not sign it.

Our position accords with the Supreme Court's two decisions concerning this subject. In the Pocket Veto Case, 279 U.S. 655 (1929), the first session of the 69th Congress passed a bill and presented it to the President on June 24, 1926. The two Houses then adjourned that session by concurrent resolution on July 3, less than ten days after the bill had been presented. The President neither signed nor returned the bill. The Court held that it had not become a law because of the Pocket Veto Clause. The Court concluded that Congress had indeed adjourned within the meaning of the Constitution, 279 U.S. at 680-681, and that the availability of an agent or officer of Congress to receive the President's return of the bill was not an adequate substitute for

a House of Congress, to which a veto must be presented according to the Constitution, id. 682-685.

The other case touching on this subject is Wright v. United States, 302 U.S. 583 (1938). That case involved the passage into law of two private relief bills, originating in the Senate, that were passed by both Houses and presented to the President on Friday, April 24, 1936. On Monday, May 4, the Senate took a recess until noon on Thursday, May 7. The President returned the bills with his objections on Tuesday, May 5; the President's messenger delivered the veto to the Secretary of the Senate. When the Senate returned on May 7, the veto message was read and the matter referred to committee, from which it never emerged. The beneficiaries of the legislation claimed that the bills had become law without the President's signature, after the passage of ten days, on the theory that the return veto was ineffective because the Senate was not in session when the veto message arrived.

The Court found that the return veto was effective because Congress, as opposed to the Senate, had not adjourned. 302 U.S. at 587-588. The Court employed the same reasoning we do: an adjournment by one House of less than three days, which does not require the consent of the other House, is not an adjournment of Congress, a bicameral body which acts as such only through both of its Houses. The Court also rejected the suggestion that the return veto was ineffective because the Senators were not actually present in the chamber (even though Congress was not

adjourned) when the President's messenger arrived. Id. at 589-591.[2]

We recognize that our position is inconsistent with two decisions of the United States Court of Appeals for the District of Columbia Circuit. In Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), the court held that an adjournment during a session (six days for one house, five days for another) did not prevent the return of a bill and therefore did not present an occasion for the pocket veto. The court therefore found that a bill the President had neither signed nor returned became a law. In Barnes v. Kline, 759 F.2d 21 (1984), vacated as moot sub nom. Burke v. Barnes, 479 U.S. 361 (1987), the court extended the rule of Sampson to adjournments that end a session of Congress, holding that such adjournments do not prevent the return of bills provided that the affected House appoints an officer to receive the President's veto message.

We sought and obtained Supreme Court review of the decision in Barnes v. Kline. The Court agreed with us that the case had become moot, and therefore did not reach the merits. On the merits, we argued, consistent with our position today, that both that case and Sampson were wrong. In an appropriate case, I

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[2] The Court explained that the Pocket Veto Case was not apposite because it dealt with an actual adjournment of Congress, not "a temporary recess . . . taken by one House during the session of Congress." Id. at 593; the Court also declined to read its earlier case as requiring that the return be made when the relevant house was actually "within the walls of its chamber." Id. at 594.

expect that we would ask the full D.C. Circuit to overrule, or the Supreme Court to disapprove, both of those cases.

As I have just explained (and as our briefs in Barnes explain in more detail), our position is fully consistent with both of the Supreme Court cases that address this matter. The same cannot be said for H.R. 849. The bill states that a return veto is prevented only by "an adjournment sine die to end a Congress." The Constitution nowhere distinguishes among adjournments and does not provide for adjournments sine die; such distinctions are created wholly by the rules of the two Houses. Moreover, on this point the bill is inconsistent with the Pocket Veto Case. There, the Court specifically rejected "the argument that the word 'adjournment' as used in the constitutional provision refers only to the final adjournment of the Congress." 279 U.S. at 680. The Court also declined to adopt the suggestion that it would be constitutionally adequate for the President to return a bill to an agent or officer of the relevant House while Congress was adjourned. Id. at 681-685. The Court thus concluded that an adjournment of Congress, by definition, prevents the return of a bill within the meaning of the Pocket Veto Clause.

Let me now turn to the second difficulty with H.R. 849. The discussion we have just gone through deals with questions of constitutional interpretation. The answers to those questions depend on the meaning of the Constitution. Whether a pocket veto is possible in any particular set of circumstances depends on the

meaning of the Constitution. I readily acknowledge that the legislative and executive branches necessarily have differing perspectives on constitutional questions that relate to their respective powers and responsibilities. The difference is particularly to be respected on a question like the scope of the pocket veto which raises difficult issues of constitutional law that inevitably give rise to good faith differences of opinion.

It is precisely respect for this difference in perspective, however, that counsels against any attempt by Congress to enshrine its constitutional view on the pocket veto by enacting it into the United States Code. Given our view on the meaning of the Pocket Veto Clause we would be constrained to recommend that the President veto this bill. Thus, passage of this bill would create a needless point of disagreement between the two political branches.

Moreover, it is unnecessary for Congress to enact legislation to express its views on pure questions of constitutional interpretation. Congress can express such views through one-House or concurrent resolutions, and of course, Members of Congress base their votes on their views of constitutional questions, just as the President must make veto decisions based on his understanding of the fundamental law. But laws of the United States should be used to establish legal rights and obligations, not to express questionable views on interpretive questions.

We defer to Congress concerning the portion of H.R. 849 that would amend the Rules of the House of Representatives.

Again, let me thank the subcommittee for the opportunity to address this question.

Chairman DERRICK. Thank you, Mr. Barr, for your testimony. You have been very thorough.

I agree with you on one thing and that is that there is ambiguity, and of course that is the primary reason that I have introduced this bill and why we are having this hearing, to try to clarify that ambiguity.

Mr. BARR. Mr. Chairman, I didn't say there was ambiguity in this clause; I said the Court will look to history sometimes when there is ambiguity.

Chairman DERRICK. I thought I understood you to say that there was ambiguity as to the situation of a pocket veto as to when it did or did not apply.

Mr. BARR. No, I said the rule proposed by those who would depart from the Supreme Court's precedence would result in ambiguity.

Chairman DERRICK. Then we don't agree on that.

Mr. BARR. OK. That is right.

Chairman DERRICK. The history of this thing, of course if you go back, as I am sure you have done, and read some of the Federalist Papers, one of the things the Framers feared the most, was a king or someone that was going to put himself in some sort of dictatorial position with the legislative body, having experienced just that for a number of years before the revolution, of course.

This was throughout the Convention brought up time and time and time again. As a matter of fact, it was brought up in arguments on the veto. What they wanted to get around was to have a President—they voted on this. They could have had absolute veto over the Houses of Congress, of course, but there is no ambiguity there as to what was intended by the Framers of the Constitution.

I think that they had no intention of giving a President what amounts to an absolute veto over the Congress to the extent that the pocket veto has been misused over the years.

In any event, it seems to me that if you look at what the Framers of the Constitution most feared and if you apply that to the modern-day situation, it seems to me that this bill is very much in order.

As far as the Congress, as the Supreme Court noted in *United States* v. *Nixon,* the Judiciary expects each branch of government in performance of its duties initially to interpret the Constitution.

Having said that, I would like to know why the administration opposes this bill. It is clear in the debates at the Constitutional Convention that the Framers deliberately avoided giving the President an absolute veto. Why is the administration now opposing this?

Mr. BARR. Because we think the bill is unconstitutional.

Chairman DERRICK. That is the only reason, just that you think it is unconstitutional?

Mr. BARR. Well, that is a good reason to oppose——

Chairman DERRICK. I know it is a good reason, but I would hope there would be more than that.

Mr. WHEAT. Would the chairman be kind enough to yield?

Chairman DERRICK. Yes.

Mr. WHEAT. I don't think unconstitutionality is a good reason in this administration. The President has clearly stated that there are

some bills, even if they were unconstitutional, that he would sign. That can't possibly be the only reason.

Mr. BARR. What did he say that about?

Mr. WHEAT. I think it was something to do with the flag.

Mr. BARR. I was the one who testified on the flag and I don't believe that that was said.

Mr. WHEAT. Were all of the news reports across the country regarding the President's statement incorrect?

Mr. BARR. I have read everything the President has said about the flag and he has never said that he would sign a statute if he believed it was unconstitutional.

Mr. WHEAT. That is a—I would yield back and talk about it more in a few minutes.

Chairman DERRICK. Let me ask you——

Mr. BARR. Can I give a broader answer to your question?

Chairman DERRICK. To my question or——

Mr. BARR. To your question.

Chairman DERRICK. Go ahead.

Mr. BARR. I think it is oversimplistic to say that the Constitutional Convention was animated principally by a suspicion of Executive power. In fact, I think it would be fairer to say that one of the miracles of the Constitutional Convention was the creation of a strong, independent Executive.

I think that, as a matter of fact, while going into the Revolutionary War, there was a tremendous amount of concern about Executive power and so forth. The experience of the revolution and the Confederation convinced the Framers that it was very important to have a strong, independent Executive.

Chairman DERRICK. Up to a point.

Mr. BARR. Up to a point, and that is why article II is in the Constitution. Really, it is one of the great stories of how political experience can frame the Constitution.

Now, it is true that there was debate over whether or not there should be an absolute veto, which a faction favored, or whether it should be a qualified veto.

This is not an issue as to whether there should or should not be an absolute veto. The Supreme Court said that in the *Pocket Veto* case. They rejected this argument, and said the argument is based on misconception of the pocket veto clause.

Congress has the power to protect itself from the pocket veto by giving the President sufficient amount of time to make his objections and to have them rapidly considered by the Legislature. The President, after all, is given 10 days to review whatever comes out of Congress at the end of a session or before a recess, 10 days at whatever comes out of Congress at any time.

What the Framers wanted was for Congress to give the President the opportunity to review it and then the opportunity to have those objections considered quickly and on their merits.

At the same time, the Framers did not want to require Congress to sit in session or to have Presidential leave, and that is why Presidential approval is not required for Congress to go on adjournment, but Congress does pay a price in a sense if it does adjourn after throwing bills into the President's lap. That is the price, the

potential of a pocket veto. But it is something the Congress has the power to prevent.

Chairman DERRICK. If that is true, why do you think that the Court opted not to rule on this matter or not to reach a decision on this matter in the *Barnes* case, if not in several other cases that have come up since then, and why would your Solicitor General then, Mr. Bork, in his memorandum in 1976, advise not carrying the matter further because he felt the Supreme Court would probably rule contrary to your position?

You know, he gives some very strong arguments and I am sure you are familiar with them.

As a result of that, the administration did not carry it forward.

Mr. BARR. The first part of your question is, why do I think the Court did not decide the issue. I think the Court did not decide the issue because there was a jurisdictional issue which was whether it was moot. If the Court determined that it didn't have jurisdiction, it didn't have to go on and decide the merits.

Normally, the Court will normally determine jurisdiction before it decides on the merits.

Chairman DERRICK. I understand.

Mr. BARR. As to Judge Bork's position, he did take the ducking the Congress position, I feel, and I think he was wrong. In other words, he presumed that the sole intent of the Framers was to make sure that there was a mailbox somewhere so the President didn't get stuck. I don't think he can presume that. I think he is wrong in doing it.

Chairman DERRICK. You don't think it is possible the Court deferred to the Congress and the President to work this thing out, because they recognized that the answer lay possibly in some legislation such as that that we are looking at today?

Mr. BARR. In the two earlier pocket veto cases, the Court hastened to jump into the fray and say they were doing so because they considered it a very important issue to resolve because of the need for clear rules of the game as to how laws are made.

Now, I think it may be the Court did not want to reach a separation of powers question particularly in a case that they felt jurisdiction was questionable.

But no amount of practice and accommodation can override constitutional requirements. You can defer a confrontation or a difference of opinion, but the Constitution says what it says and means what it means.

Chairman DERRICK. In other words, you don't think that was the reasoning behind the Court's failing to reach a decision in this case?

Mr. BARR. No, I don't.

Chairman DERRICK. Thank you.

Mrs. Martin.

Mrs. MARTIN. Just so I understand, I think I understand your position. Your position is that a statute is inappropriate because it would be unconstitutional. So you oppose it.

Therefore, if we wanted to make changes, it should be an amendment, which you would also oppose?

Mr. BARR. Well, I would have to see the amendment before we——

Mrs. MARTIN. Well, the amendment in effect changed the Constitution in ways the statute did. You would oppose that, too, right?

Mr. BARR. I haven't even considered that issue.

Mrs. MARTIN. Well, you start off your reasoning by saying that one of the reasons you can't do it or you shouldn't do it, the House shouldn't do it, is because such a statute would be unconstitutional.

Mr. BARR. Yes.

Mrs. MARTIN. Therefore, you say—let me see if I can find the line here.

I am just saying, it is an interesting box in effect you would try to put us in, which is that you can't do it by statute because I would oppose it because it is a statute; you can do it by constitutional amendment perhaps, but I will oppose that, too.

Mr. BARR. No, there are two ways to resolve it, but just remember the Supreme Court decided a case involving an intersession recess and it said that you can not leave an agent in place during intersession and the President can use the pocket veto regardless of whether there is an agent there.

That case has been decided by the Supreme Court. That case is still good law. To come along with a bill and try to overrule that case is clearly unconstitutional.

Now, there are those who say modern conditions, you know, we can sort of finesse this and talk about modern conditions and communications, and the real concern there was this rather than this. Fine. One way to resolve it is through litigation. If the President pocket vetoes a bill and some feels it was an illegitimate pocket veto because an agent was there to receive it, some beneficiary of this bill, and this is how the others came up, they can sue and say that is the law.

Mrs. MARTIN. There is a second way to start the litigation process, and that is that we pass a bill and someone says, "I don't approve of the bill," it is unconstitutional and starts the process that way.

You are saying from the start anyway—and you may well be right, I don't know—you say it is not the Congress' role to impose or to decide constitutionality.

Mr. BARR. That is where we agree.

Mrs. MARTIN. That is the Court's role.

Mr. BARR. Absolutely.

Mrs. MARTIN. So to argue we shouldn't pass something because you believe it might be unconstitutional, that is an interesting opinion and certainly one should value them, and I am not in any way suggesting you don't, and certainly we should look at that.

I will say the only time I have heard that argument is from people who oppose a certain bill. That is the only time I hear constitutional arguments. But it really isn't our judgment about constitutionality that counts.

Mr. BARR. There are a couple——

Mrs. MARTIN. Or yours.

Mr. BARR. There are a couple reactions to that. It takes two to make a bill a law. Congress wants to pass a law. We are up here telling you our position because the President also is a player in the legislative process.

Mrs. MARTIN. Right.

Mr. BARR. We believe the bill is unconstitutional. It is not the way to go.

This case could be brought to a head without a bill. In other words, by your own internal rules, you can appoint an agent. The President pocket vetoes something and a case can be brought.

You said it is not the role of Congress to impose its view, constitutional, on the law. I agree. That is why we say the bill is peculiar. It is presenting to the President, saying sign on to our theory. You can have your theory tested without legislation.

The Department of Justice will not recommend the President sign that bill because we believe it is unconstitutional.

Mrs. MARTIN. So the House and the Senate could pass this, if it turns out this is the will of the House and Senate, and we are certainly at early stages on this. And you would be in effect saying, if you pass it, your recommendation to the President will be to veto it for a number of reasons, including the fact that you believe it is unconstitutional and impinges on his rights.

So the way to have it done is the House and Senate would have to get it to that point and we would have to override the veto—unless he pocket vetoes it.

Mr. BARR. We might recommend a pocket veto, yes.

Mrs. MARTIN. What a wonderful way to end it. We could do a bill and the court case all in one.

Mr. BARR. That is right.

Mrs. MARTIN. What an efficient use of the law.

Chairman DERRICK. I am glad to see he just adopted the doctrine of congressional standing just a moment ago.

Mr. BARR. I said a beneficiary of the statute. I said a beneficiary of the statute can bring suit.

The other point you made I don't agree with, and that is that Members of Congress sort of—it is up to the courts to decide constitutionality. We sort of have to do what we are going to do.

Mrs. MARTIN. Yes, ultimately.

Mr. BARR. I agree with what Chairman Derrick said, that each branch in the first instance has a responsibility under their oath of office to use their best judgments to what the Constitution means and do their best to uphold the Constitution, so I believe Members of Congress as well as the President and members of the executive have a real responsibility to the Constitution to reach good-faith judgments.

Mrs. MARTIN. But I am not suggesting we ignore that. I am suggesting our interpretation is, it is constitutional, and yours is not. We could do a poised action, frozen in time to the end of time without the final decision. That is, the other branch we finally have to have work its will.

No one is suggesting we go around deliberately passing unconstitutional laws.

Mr. BARR. The two pocket veto cases have been decided by the Supreme Court—a doable thing. I am saying that we could not support this bill because we believe it is unconstitutional.

Chairman DERRICK. They didn't declare that this legislation, or something similar, would be unconstitutional.

Mr. BARR. I think they did in the *Pocket Veto* case.

Chairman DERRICK. What I meant to say is, they didn't say we didn't have a right to pass the legislation and that that right would be unconstitutional.

Mr. BARR. Well, I guess it is presumed that people—a branch will not knowingly do an unconstitutional thing. But if it is the good-faith judgment of Congress that it is not unconstitutional, no one is questioning the power of Congress to pass a law.

Chairman DERRICK. Mr. Wheat, I will let you question.

Mr. WHEAT. Thank you.

I agree with you completely when you say that it is not the appropriate role of Congress to attempt to change the Constitution by legislation. I think all of us would agree with that. But I think you went further in pointing out there is a matter of some interpretation as to what the Constitution actually means.

I was interested in the historical process that you were speaking of and of how the Constitution clearly meant that pocket vetoes were appropriate in intersession adjournments and perhaps even in intrasession adjournments.

I take it you extend your reasoning to intrasession adjournments even though there were no particular cases on that point?

Mr. BARR. Intrasession?

Mr. WHEAT. Intrasessions, yes.

Mr. BARR. Yes.

Mr. WHEAT. In particular, you refer to adjournment meaning adjournment and that adjournment is well defined and that there is no room for doubt on its meaning. You then went on to talk about adjournments of various lengths being used in the Constitution for an assortment of purposes. That seems to be one of the cruxes of the problem that we face.

What this legislation is is an attempt to define specifically what kind of adjournment and how long an adjournment the Constitution originally referred to in talking about pocket vetoes.

How can the length of time for adjournment be ambiguous or at least varied for different purposes, and yet seem so clear to you for pocket veto? In light of the opposite view taken by the Court in 1929, further elaboration on your point of view is necessary.

Mr. BARR. The word adjournment, referring to the adjournment of a House or Congress, can be any length of adjournment. We think there is a clear rule in the Constitution as to when Congress is deemed to be adjourned as a bicameral entity.

As I said, a House can adjourn for a day. The Constitution says that when one House wants to go out for more than 3 days, it needs the consent of the other House. There you have two Houses acting, and under *Chadha,* we believe that reflects action by Congress to adjourn itself. So you no longer have a bicameral body sitting there acting as a collective capacity as the Congress of the United States.

So it is a very clear rule. If one House goes out for more than 3 days, you have an adjournment of Congress.

Mr. WHEAT. The Chairman suggested there was ambiguity involved. Considering the fact that since 1929, the Court has found that adjournments of longer than 3 days are not adjournments for the purpose of a pocket veto, would it not seem to you that there is some need for clarification on this matter?

Mr. BARR. One case that is an extant case decided that adjournment of longer than 3 days was not an adjournment within the meaning of the pocket veto clause and the President could not use the pocket veto. That was the *Kennedy* case.

Mr. WHEAT. Yes.

Mr. BARR. We think the *Kennedy* case was wrong, and in future litigation, if the appropriate case arises, we will urge the Supreme Court to follow the *Pocket Veto* case and *Wright* case, and overrule that case, reverse it.

Mr. WHEAT. Does the administration believe that the balance of powers between the President and the Congress would be shifted in such a way as to be harmful to either the President or to this legislative body if the interpretation of the pocket veto that we propose in this bill becomes law and is determined to be constitutional?

Mr. BARR. Well, it is hard for me to say whether this individual piece of legislation would ever work a shift, standing alone. That is hard to predict.

But I think separation of powers as a principle means that we always have to be on our guard against eroding or undermining constitutionally based powers of any branch of government because either by themselves or collectively, it can work a shift in the balance of power among the branches.

Therefore, on separate of powers questions, I believe we have to be faithful to the letter of the Constitution.

Mr. WHEAT. I understand your caution about this legislation but I don't hear you saying specifically why you find it onerous or harmful other than the argument that you make against its constitutionality.

Is it your belief that it will harm the balance between the Presidency and the legislative branch of Government?

Mr. BARR. As I say, I think the bill is fundamentally flawed because it is unconstitutional. Going beyond that question to policy questions, I think the more you permit delay in considering a veto, the more you are departing from the intent of the Framers and the more, as a policy matter, that it is objectionable.

Mr. WHEAT. The world is different today than when the Constitution was framed or even since 1929. Congress can be called together much quicker and it can consider a bill basically on a contemporaneous way to the veto even though it is not actually sitting at that moment. Are you saying that you accept none of the practicality arguments put before the committee today?

Mr. BARR. No, I don't accept that. In fact, I think the Constitutional Convention history shows——

Mr. WHEAT. That is the whole argument you make about the Congress not being in session and having adjourned. You state that the Congress can't consider a bill near the time that the President vetoes it. If in fact Congress can do so, then why shouldn't that be taken into account?

Mr. BARR. I am not making any argument that modern circumstances dictate a change. On the contrary, I am saying that modern circumstances do not warrant a change.

The Framers originally started with a draft document that did leave the decision up to Congress on when to take up a veto. Remember, the original draft said that the President would hold on to

his veto until Congress came back. That is a practical equivalent of what is being proposed here, just put that in the hands of Congress, and it will be, well, this is important enough. We better get back to Washington, DC, and take a look at this. Or say, this isn't really important, I am going to continue hobnobbing with my constituents and we will take this up in due course when we return.

The Constitutional Convention rejected that and said that if Congress isn't there to deal with the President's messages, go to the pocket veto. Congress can always be there for 10 days and stay there for 10 days to make sure they complete the legislative process, but if Congress absents itself from the legislative process, the price it pays is the pocket veto. That was the call made by the Framers.

Mr. WHEAT. Thank you, Mr. Chairman.

Chairman DERRICK. Mr. Gordon.

Mr. GORDON. Is it fair for me to assume that your line of logic is that based on the stare decisis, that you have the responsibility, because these prior Supreme Court decisions would indicate to you that this legislation is unconstitutional, to oppose it as the responsibilities of your branch of government dictate; is that correct?

Mr. BARR. Yes.

Mr. GORDON. Then if that is correct, it would seem in the case of *Roe* v. *Wade* that the Court has made a pretty clear determination of what the Constitution is there.

Why are you trying to overturn that decision? Why don't you follow the same stare decisis logic?

Mr. BARR. We believe the decision in *Roe* v. *Wade* was clearly wrong and unconstitutional.

Mr. GORDON. So you are not leaving it up to the Supreme Court. There you are smarter than the Supreme Court, but in this case, the Supreme Court is the smartest?

Mr. BARR. Is what?

Mr. GORDON. Well, I am trying to distinguish why the Supreme Court understands the Constitution in one case but not in another. It seems that you are saying that you have a higher understanding and that when you think the Supreme Court is right, then it is right; but when you think it is wrong, then you should take another course.

Mr. BARR. Obviously we think the Supreme Court decisions in the *Pocket Veto* case and the *Wright* case were correct interpretations of the constitutional provisions as adopted.

If people don't like the inefficiency of what the Framers did, they can go about changing it. But we think it was a correct interpretation, and it is.

Mr. GORDON. You think the Supreme Court was wrong in *Roe* v. *Wade*?

Mr. BARR. Yes.

Mr. GORDON. But I thought you said your logic was that because of stare decisis, because you are trying to follow the precedent of the Court, that you had a responsibility in this case to oppose the legislation.

Mr. BARR. That is right, because we——

Mr. GORDON. Because of precedent.

Mr. BARR. Obviously, not solely because of precedent.

Mr. GORDON. That is what you said earlier, because of precedent. If that is the case——

Mr. BARR. I didn't say it was solely because of precedent. Obviously both branches can seek to have a law changed if it believes the law is a bad law. It can do it either through constitutional amendment and several Presidents have proposed constitutional amendments to undo *Roe* v. *Wade,* or it can do it through a litigation strategy if it wants to change the Supreme Court's position on the meaning of the Constitution.

That is exactly the strategy which I assume Congress should follow here if it believes that the *Pocket Veto* case and the *Wright* case are incorrect.

Mr. GORDON. I guess I misunderstood you. I thought you had said that because the Supreme Court had spoken clearly on this matter that you had a responsibility to uphold that position. Is that not correct?

Mr. BARR. Partially, that is correct. Partially.

Mr. GORDON. I am just looking for some consistency because I thought the Supreme Court had spoken clearly in *Roe* v. *Wade.* Apparently their clear statement was not satisfactory.

Mr. BARR. I will repeat it again, which is we believe the Supreme Court's decision in the *Pocket Veto* case and the *Wright* case were correct decisions in interpreting the Constitution as it was adopted by the Framers. We do not think *Roe* v. *Wade* was.

Therefore, through litigation and by asking the Court respectfully to reconsider its position, we will continue to work, as the President said, for——

Mr. GORDON. The basis of your argument, then, really is not precedent or stare decisis but rather what you think the Supreme Court should be doing.

Mr. BARR. I said from the beginning that each branch has the responsibility to use its good-faith judgment in the first instance, and this has been said repeatedly by Members of Congress and by the President, as to what the Constitution means.

Mr. GORDON. So if that is the case, and if Congress wants to use its good-faith judgment and try to come forth with this process to have the Supreme Court make a decision, then why are you trying to block that good-faith effort?

Mr. BARR. As I pointed out to Congresswoman Martin, Congress can advance its position without asking the President to join on something that the Department of Justice doesn't agree with at least.

The Department of Justice will recommend disapproval of a bill because the bill has to be presented to the President and signed by the President before it becomes the law of the land. The House, through its own rules, can test its theory of pocket veto.

What is happening here is an attempt to shove Congress' theory of the pocket veto down the throat of the Executive.

Mr. GORDON. It is not trying to shove it down the throat of the Executive but rather to try to raise it as an issue with the Supreme Court and allow the Supreme Court to make a decision.

Mr. BARR. Well, I will repeat: You don't have to pass a bill to raise it as an issue with the Supreme Court.

Mr. GORDON. But isn't this a valid approach?

Mr. BARR. I don't know what you mean by valid approach. I believe the bill is unconstitutional, so I don't think it is a valid approach.

Mr. GORDON. I guess we go back to Mrs. Martin's question of who makes that decision. Apparently you decided that you wanted to make the decision and you were the one; and you trust the Supreme Court sometimes and you don't other times.

Mr. BARR. Well, I am not sure what the question is.

Mr. GORDON. But you know what the answer is.

I yield back my time.

Chairman DERRICK. Mr. Pashayan.

Mr. PASHAYAN. Well, I guess just coming in late and not having heard what preceded, it strikes me first of all—and I am treading a little bit on dangerous ground when I say this—but it strikes me first of all that in the case of *Roe* v. *Wade* and the allied decisions and then the recent case, you are talking about the Bill of Rights and you are talking about really inferential law from the text of the Bill of Rights; whereas here you are dealing with the more literal text of the Constitution itself.

We don't need to infer words that are actually in article I, section 7 when it says unless the Congress, by their adjournment, prevents return, in which case it shall not be a law. That is the literal statement of the Constitution.

Mr. GORDON. Would the gentleman yield?

Mr. PASHAYAN. Let me finish.

Mr. GORDON. Sure. Go ahead.

Mr. PASHAYAN. And one could also certainly address your concern about the Supreme Court making its position by asking the same question you asked in the case of the *School Board* v. *Brown, Brown* v. *the Board of Education,* which was a reversal of an earlier case.

So I am not so sure in examining this subject what good it does us to engage in a lengthy discussion about whether or not we are putting our faith in the Supreme Court or not.

It just seems to me that what we have to do is to go back and see first of all what the text literally says.

And, second, let me put this in the form of a question, and it may have been addressed by you all before I got here, but has there been any research on the part of you or your people in the records of the Federal Convention in terms of what the Founding Fathers say at the Federal Convention when they wrote this phrase, and what was it intended to mean? Has there been any research done on that?

Mr. BARR. Yes, Congressman. There is very little on the clause itself but the history that is there, in our view, supports—surprisingly—the Department of Justice's position.

The first provision that was presented in draft to the Committee on Detail had very much the same language, but it had a proviso on the end that said, "Unless the Legislature, by their adjournment, prevents return, in which case it shall be returned on the first day of the next meeting of the Legislature."

So the original proposal was that the President—if Congress was out—the President would hold on to his veto message and when Congress came back, he could give it to Congress. That was

changed by the Committee on Detail and instead, in our view, they went to an absolute rule. They took it out of the hands of—they didn't want long periods of delay and they didn't want Congress to make the decision necessarily as to whether or not it was important to give immediate consideration to a veto message. So they went with an absolute cutoff.

Mr. PASHAYAN. OK.

Mr. BARR. That is the historical evidence.

Mr. PASHAYAN. Has there been any research done on the debates in the various State legislatures when they were debating ratifying the Constitution?

Mr. BARR. I believe it has been done and I believe there is no enlightenment that we can derive from those discussions.

Mr. PASHAYAN. That was not a point that any of the State legislatures debated when they came to ratify the Constitution?

Mr. BARR. Yes, I believe that is correct.

Mr. PASHAYAN. I am a little surprised to hear that.

I will yield.

Mr. GORDON. It is not for us to make the decision, but I was surprised on one point. Is it your feeling that there is a superior position of the so-called original text of the Constitution?

Mr. PASHAYAN. That is why I said it was dangerous to get into this. It seems to be pretty precise in this case. It is not a matter of—the only phrase you can interpret here, it seems to me, and that is what we are here to talk about, is what does adjournment mean.

Otherwise, this is a pretty precise rule of procedure rather than an exposition of some kind of right, which of course needs to be, as the Supreme Court has done in its entire history, a broad, general concept filled in with hundreds of interpretations as to what it means.

Mr. GORDON. The point you raise to some extent was very well taken by Mrs. Martin earlier. I think the situation now is bright and knowledgeable people have legitimate differences on this matter, and that would seem to be the Supreme Court; rather than for us to speculate what the Supreme Court should and shouldn't do and what they might or might not do, simply let them do it.

Mr. PASHAYAN. I think——

Mr. GORDON. I would be glad to yield back.

Mr. PASHAYAN. I imagine if forced to, they would make a decision on this.

Mr. GORDON. Or if allowed to.

Mr. PASHAYAN. What is the way to get it to the Supreme Court without the bill that is the subject of this hearing?

Mr. BARR. The way the other cases came up, there would be a pocket veto and then a beneficiary of the bill would say that the bill had actually become law and therefore he was entitled to whatever rights he had under the so-called law, and the Court would have to determine whether there had been an effective pocket veto or whether it had become law.

Mr. PASHAYAN. There are cases on that point?

Mr. BARR. Yes, that is how the pocket——

Mr. GORDON. Is there a statute of limitations on that?

Mr. BARR. I doubt there is a statute of limitations on that.

Mr. PASHAYAN. There have been cases in the Supreme Court on that point?

Mr. BARR. Yes. The first case came up that way, the *Pocket Veto* case.

Mr. PASHAYAN. I was just wondering.

Chairman DERRICK. Of course, the Congress now has standing in the D.C. Circuit.

Mr. PASHAYAN. I understand that.

What did the Court find on that?

Mr. BARR. It found that—that is a decision that this bill would directly attempt to reverse. There, there was a pocket veto during an intersession between sessions, not between Congresses.

Mr. PASHAYAN. This is part of the cobwebs on this.

Mr. BARR. The argument was raised by the participating congressional interests that this could be handled by leaving an agent in place to receive a veto message. The Court said, "Look, the adjournment does not mean final pocket veto; adjournment covers intersession adjournment." Therefore, on the plain text, adjournment applies.

Second, you can't get around a pocket veto by leaving an agent there to accept it. One of the main purposes is to have Congress there at hand to quickly consider the President's objectives, and if they are not there at hand, they pay the price of a pocket veto.

Mr. PASHAYAN. How would the author of the bill get around the concept if he were to leave an agent there to receive the veto? How would you get around the rule of requiring a quorum be present?

Chairman DERRICK. The agent receives it and then the Congress considers it.

Mr. PASHAYAN. But the Congress isn't the Congress until there is a quorum.

Chairman DERRICK. The Congress will have a quorum when it gets back.

Mr. GORDON. Unless it is challenged.

Mr. PASHAYAN. I think the other problem you face is it tends to say the Congress has to be there during those 10 days.

I think another issue is going to have to be, can a Congress receive it if there is not a quorum there?

Chairman DERRICK. The Congress will appoint its agent to receive this and address it when it gets back.

Mr. PASHAYAN. And if somebody objects—the agent under the Constitution cannot supersede the text of the Constitution, which requires a quorum to be present.

Chairman DERRICK. Let's work the reverse. The President has his agent when he is out of the country. If it is constitutional for his agent to receive this legislation, then why is not the reverse true for the Congress?

Mr. PASHAYAN. Because I don't think there is a requirement in the case of the President for a quorum.

Chairman DERRICK. If the President is not there, there is not a quorum there.

Mr. PASHAYAN. If there is an agent here, somebody could object that there is a lack of a quorum.

Mr. GORDON. They would have to do that. The quorum is presumed unless——

Mr. WHEAT. The agent of the Congress is appointed by the Congress while the Congress is in session. It is an action of the Congress to appoint an agent to act on its behalf including receiving its messages.

Mr. PASHAYAN. But the Constitution says the Congress has to be there. That is my whole point.

What you are saying is that a statute will come along and say that rather than the text of the Constitution requiring the Congress to be present, we are going to substitute an agent. That would still be subject to a quorum call, and I don't think you can get around that because the Constitution requires a quorum be present.

Mr. WHEAT. I think you are about to throw out 100 years' worth of——

Mr. BARR. I think you are correct. The Constitution vests Executive power in the individual President, Office of the President, one person. Congress is a bicameral body. It has to act collectively. You need the operation of both Houses together before you can give any effect on the legal rights and duties of anyone outside the House and Senate acting collectively.

Chairman DERRICK. You know, if I may say this, my position is that the Congress is not truly adjourned except one time; that is the end of 2 years when they adjourn the final session sine die, because that Congress never comes back. The next Congress convenes.

You know, Mr. Barr has repeatedly talked about delay of legislation. Well, by using the pocket veto as it has been used over the years by Presidents and was used by President Reagan extensively, the result is delaying legislation.

You and I both know that the Congress is in session almost year round now and that the fact of the matter is that by using the pocket veto, you do what the Founding Fathers never really intended to happen, and that is to give the President, in a large number of cases, an absolute veto over the Congress.

The Congress sits almost year round. If they want to appoint an agent while they go home to their districts for a period of time, that is not going to delay the consideration of the legislation. I don't think that that is what the Founding Fathers or anyone else really intended to happen.

As you pointed out, it is a matter of how you interpret the word "adjournment."

Mr. PASHAYAN. I am also suggesting that in addition, it points out the definition of Congress and can an agent ever be the Congress not subject to a quorum call.

Chairman DERRICK. The Congress has a right to appoint an agent to receive vetoed bills until it has an opportunity to reconsider them.

Mr. PASHAYAN. If what you are suggesting is that when the Congress, for example, in August is not adjourned, according to the use of this word here, which is what you are suggesting——

Chairman DERRICK. That is exactly what I am suggesting.

Mr. PASHAYAN. Then I would suggest that at any time in August, it is subject to a quorum call. The Congress cannot both be in session and not be in session without being——

Chairman DERRICK. We are not talking about being in session; we are talking about "adjournment."

Mr. PASHAYAN. You are talking about being in session. What you are suggesting is that in August—and I just use this as an example—I think what you suggest logically, I think you are bound by the suggestion that in August, the Congress will not be adjourned according to this word.

Chairman DERRICK. That is correct.

Mr. PASHAYAN. Therefore, the Congress must be in session.

Chairman DERRICK. In session for the purposes of receiving——

Mr. PASHAYAN. If the Congress is in session, it is always going to be subject to a quorum call.

Mr. WHEAT. If the gentleman would yield, I think you are carrying the argument past the point of sublime. What you are suggesting is that any time that we are not adjourned sine die, that we are subject to a quorum call, and that is patently untrue. We don't have quorum calls when we adjourn on a daily basis.

Mr. PASHAYAN. Just a minute, sir. Just a second. Maybe I am being a little bit simplistic here, but I really don't think I am.

Mr. WHEAT. I wouldn't insist upon that word unless you would like me to.

Mr. PASHAYAN. I do insist on it. I am a very simple creature.

Either the Congress is in session or it is adjourned. Are you suggesting a third state of being?

Mr. WHEAT. I am asking you if you think we are subject to a quorum call. Were we subject to a quorum call last night at 2 o'clock in the morning?

Mr. PASHAYAN. Not when we are adjourned.

Mr. WHEAT. Are you then suggesting that last night's adjournment is the same kind of adjournment that adjournment sine die is?

Mr. PASHAYAN. Adjourned in the Constitution. It says "adjournment." Either we are in or out of the status of adjournment in terms of article I.

You are suggesting a twilight zone.

Mr. WHEAT. I would suggest that there are two types of adjournment and that they are distinct and separate. That is one of the reasons for this legislation, to make a determination as to what kind of adjournment would allow a pocket veto.

Mr. PASHAYAN. It seems to me that this is one word, "adjournment." I am holding it upside down. No wonder I can't read it.

Mr. GORDON. If the gentleman will yield, I assume the Constitution also speaks to residency. "Residency" is one word, but there are different categories of residency. "Residency" is defined one way for registration, defined another way for tax reasons. Residency although is used, the word is used once there. There are different definitions of residency for different purposes.

But it really—again, we can have this esoteric argument and it would be very bright and lofty, but it has absolutely no effect until the folks across the street make that final determination. I think that is the argument Mrs. Martin made very articulately, is that they should have that opportunity.

Mr. BARR. If I can leap forward for a second. The word adjournment is right there in black and white. It is used throughout the Constitution.

Mr. Chairman, you said, well, we are not really going into adjournment in the true essence of the word. What is important is what the Framers meant by the word adjournment, not what we now believe the true sense of the word is today.

Mr. WHEAT. If you would hold that thought for just a moment.

Mr. BARR. Can I finish the thought is——

Mr. WHEAT. Previously, you state that adjournment does not mean adjournment. Are you now saying that adjournment refers to adjournment only for 3 days or more, when both Houses of Congress have acted.

Mr. BARR. No. Adjournment means, as the Supreme Court said, specifically said, adjournment is not just limited to final adjournment at the end of Congress. Adjournment means adjournment, and it includes intersession adjournment. That is in black and white in the Supreme Court decision.

Mr. PASHAYAN. What was the vote on that case?

Mr. BARR. Nine-zip.

Mr. GORDON. What fear is there? Why not let the Court do it again?

Mr. BARR. We are not afraid.

Mr. GORDON. Then let it go.

Mr. PASHAYAN. Well, we invited this man to come here. Let's not browbeat him.

Mr. GORDON. You are saying it is only his opinion.

Mr. PASHAYAN. Of course it is.

Mr. GORDON. And I guess the assumption is the Supreme Court is the final determiner.

Mr. PASHAYAN. I think that is right. The Supreme Court is.

Mr. GORDON. Then let's let it work its will.

Mr. BARR. The issue is, what is adjournment of Congress within the meaning of that clause. There we believe the 3-day rule is set out in black and white in the Constitution. The line was drawn by the Framers.

One approach is there is no logical stop along the way. You could go along indefinitely or for very long periods of time.

The Framers made the call that 3 days was a reasonable rule of thumb, and Congress would be deemed to be in session even if one House had adjourned for less than 3 days.

Mr. PASHAYAN. I have a strategy here for you to work on and it will require the cooperation of the President. We will have the Congress pass a pay raise bill for Members of Congress, and for the Judiciary system, we will have the President pocket veto, and I will bet you 10 to 1 the Supreme Court will overrule the pocket veto on that one.

Chairman DERRICK. Mr. Barr, I think it is on page 5 of your testimony, you speak of a "bright line" of 3 days. What makes you think that your bright line is any better than our bright line?

Mr. BARR. What is your bright line?

Chairman DERRICK. Our bright line is the legislation which means final adjournment sine die. You say it is necessary to have

that bright line so that the Congress and the President will not be confused, but what makes your bright line superior to ours?

Mr. BARR. Well, because——

Chairman DERRICK. Where in the Constitution—go ahead.

Mr. BARR. What is the principle you are using that the President is prevented somehow from making a return or is not prevented because of the physical presence of the Clerk in Washington, DC? Suppose the Clerk isn't in Washington, DC, on the 10th day? Is the President prevented from making a return?

Chairman DERRICK. When the Congress has a properly appointed agent to receive——

Mr. BARR. Excuse me.

Chairman DERRICK. When the Congress has a properly appointed agent to receive veto messages.

Mr. BARR. So we have a question of a legal nature as to whether that person was available, whether authorized or whether another obstruction prevented the President.

Chairman DERRICK. That is not my question. Why is your bright line better than our bright line?

Mr. BARR. I thought I just answered it.

Chairman DERRICK. Maybe it skipped over me. Try it again.

Mr. BARR. Your approach injects into the question the question of when something becomes a law, a lot of ancillary legal questions. Suppose your agent isn't around or is dead or not in the country on the 10th day?

Chairman DERRICK. No, that is not my question.

Mr. BARR. We have a big legal argument as to whether something is law or not.

Chairman DERRICK. What we do is we legally define it under the statute so everyone knows where they are and what to expect.

Mr. BARR. The——

Chairman DERRICK. The Congress, I would suppose if the Congress didn't have a duly appointed agent, that the Congress was adjourned.

Mr. BARR. The problem with your approach is that, as I said at the beginning, the whole rationale for it is that the only reason behind the pocket veto clause is to make sure there is a mailbox somewhere that the President can go to.

Your position essentially is as long as we provided that repository, we can go and do what we want and we can call whatever adjournment is an adjournment.

Chairman DERRICK. No, not whatever an adjournment is. We very definitely define what adjournment is. It is when we adjourn sine die at the end of the Congress.

Mr. BARR. What you are saying is, as long as you are providing that safe repository where the President knows he will always be able to get his message in there and on the public record and subject to consideration, which is what the constitutional requirements are, that as long as you provided that, you can define what the word adjournment means.

Chairman DERRICK. Any time he knocks on the door, it shall be opened.

Mr. BARR. And what that injects into the pocket veto clause is questions as to whether or not—what you are really doing is reading out the word adjournment.

Chairman DERRICK. But what you are saying is that—if your argument applies to me, why doesn't it apply to your 3-day bright line? Why not make it 1 hour? Why not make it overnight?

Mr. BARR. Because the Constitution says 3 days. That is it. The call has been made.

Chairman DERRICK. There is no connection between the 3-day rule and adjournment that prevents return of the bill. Is it written in the Constitution that 3 days shall be the period constituting an adjournment?

Mr. BARR. The *Wright* case, the Supreme Court case in *Wright*, goes right to that provision on the adjournment, 3-day rule, and brings it into the pocket veto concept, and said there was no adjournment of Congress because the adjournment was less than 3 days. So this is not a link that the Department of Justice is making. This is a link the Supreme Court has already made.

Mr. PASHAYAN. Will the gentleman yield?

Chairman DERRICK. I will be glad to yield.

Mr. PASHAYAN. I think the problem is, you just can't focus in on the adjournment clause. I think you also have to focus in on whether the Congress is in session. Let me ask you this question.

If the Congress is not adjourned, is it therefore in session?

Chairman DERRICK. For purposes of a pocket veto, yes.

Mr. PASHAYAN. But if it is in session, it must be subject to a quorum call.

That is the part that I don't think you can get around. I don't think you can have the Congress in session not subject to a quorum call.

Chairman DERRICK. What are we going to do, call a quorum at 2 o'clock in the morning? There is a difference between when it is actually sitting and when it is in session.

Mr. PASHAYAN. What I am saying is, I think even if you were to pass this bill, and you had the agent, the Speaker or whoever it is going to be, that at any time—what you are really saying is that the Congress is in session as long as that agent is.

Chairman DERRICK. It is in session at 2 o'clock in the night, then, 2 a.m. in the morning.

Mr. PASHAYAN. I suppose it is, but it is not in session for the purposes of doing business.

Chairman DERRICK. It is not sitting for purposes of a quorum.

Mr. PASHAYAN. What I am trying to say is, if you have an agent there, I think what you are saying is that agent, the action he is performing is to be the Congress in session, and I think what you are saying logically is that this agent is through—through this agent, you are going to have the Congress in session.

Chairman DERRICK. For purposes of this, yes.

Mr. PASHAYAN. But if the Congress is in session for any purpose, it is going to be subject to a quorum call.

Chairman DERRICK. Why?

Mr. PASHAYAN. Because the Constitution says so. A rule that says the Congress is going to be in session to conduct any kind of a business and yet not be subject to a quorum call violates another

section of the Constitution. That is the intellectual dilemma you are facing.

Chairman DERRICK. It is not my intellectual dilemma, it is yours.

Mr. PASHAYAN. All right.

Chairman DERRICK. On page 10 of your remarks, you assert "enactment of the bill would create a needless point of disagreement between the two political branches." From 1976 to 1981, there were no confrontations over the pocket veto and the Nation got along very well.

Wasn't it really the recent pocket vetoes by the Reagan administration which created the points of disagreement between the branches?

Mr. BARR. The point I was making there was the point I made earlier to Congresswoman Martin, which is that if Congress has this view of the pocket veto clause, there are ways to vindicate it short of expecting the executive branch to sign on to a statute which, as I say, the Department of Justice would not recommend. That was the point I was making there.

Chairman DERRICK. Are there other questions?

If not, thank you, Mr. Barr, for your excellent testimony.

The next panel consists of Mr. David Cole, who is from the Center of Constitutional Rights, New York City. Mr. Cole worked on the litigation challenging President Reagan's intersession pocket veto which led to the Court of Appeals decision in *Barnes* v. *Kline*. And Mr. Steven Ross, general counsel to the Clerk of the House of Representatives. Mr. Ross represented the Speaker of the House and the Bipartisan Leadership Group in the recent *Barnes* v. *Kline* suit.

We are glad to have you.

STATEMENT OF DAVID COLE, CENTER FOR CONSTITUTIONAL RIGHTS

Mr. COLE. Thank you, Mr. Chairman.

Chairman DERRICK. You may proceed as you wish.

Mr. COLE. I thank you for inviting me to testify on this matter.

I was going to respond to some of the issues Mr. Pashayan raised because I think, while logical——

Chairman DERRICK. Go ahead.

Mr. COLE. While logical, I think they are off the mark.

There was a lot of debate in the last 20 minutes about what adjournment is. That is irrelevant. The Supreme Court, in the *Pocket Veto* case, the first case which decided this issue, held that the answer to when a pocket veto can be used is not determined by the type of adjournment. It is determined by when an adjournment prevents return. That determination has to look to the circumstances surrounding the practices of Congress, the modern practicalities.

So it is not a question of, can Congress be called for a quorum call or what kind of adjournment is this. The question is, when is the President prevented from using a return veto? Only in that circumstance can the pocket veto be used.

The *Wright* case, which the Supreme Court decided just 9 years after the *Pocket Veto* case, established precisely that and also es-

We welcome you, Mr. Barr, and you may proceed. Without objection, your full statement will be made part of the record. I think you've been advised we're going to try to keep your statements to around 20 minutes and so we'll have a little light and let you know, but welcome.

Would you introduce your colleague, please?

STATEMENT OF WILLIAM P. BARR, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY MICHAEL LUTTIG, DEPUTY ASSISTANT ATTORNEY GENERAL

Mr. BARR. Thank you, Mr. Chairman. Accompanying me today is Mike Luttig, who is the Deputy Assistant Attorney General of the Office of Legal Counsel.

Thank you for providing me the opportunity to appear here today. I am pleased to present to the subcommittee the administration's views on a constitutional amendment to allow Congress and the States to prohibit the physical desecration of the flag of the United States.

At the outset, let me say that the administration applauds Chairman Brooks and this subcommittee for moving forward with such dispatch to consider this very important matter of protecting the flag. These deliberations are prompted by the Supreme Court's recent decision in *Texas* v. *Johnson* which ruled that a State cannot punish a person for burning the flag.

For reasons which I will explain, a constitutional amendment is the only way to protect the flag in the wake of the Court's expansive decision. An amendment is the only way to adequately respond to the overwhelming and understandable sentiment of the American people that the flag must be protected. I trust that few among us would disagree that the flag is deserving of protection. As a symbol of our Nation, the flag is the embodiment of our commitment to freedom.

It stands in sacred honor of those who have sacrificed their lives in defense of that freedom. It holds in sacred trust the spirit of the American people. The President shares the profound sense of personal violation felt by the American people. He firmly believes that we have an obligation to the people to act swiftly and decisively to protect the flag. The President supports the constitutional amendment which has been cosponsored in the House by Congressman Michel and Congressman Montgomery.

That proposal would amend the Constitution to provide simply this: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States." I want to stress at the outset what the President has said, what Chairman Brooks has said and what members of this subcommittee have said. This is not a partisan issue. This is an issue that transcends politics or partisanship.

Most of us share a common ground. We believe that the flag should be protected. We want to do what is necessary to protect it. The question before us is this. How do we get there from here? Now the central issue before the subcommittee has been, can we protect the flag with a statute or do we need a constitutional

amendment. The Department of Justice, at the request of the President has carefully considered whether it is possible to protect the flag through a statute.

You have my assurance that the President and the Attorney General would be the first to support a statute if they thought a statute could survive constitutional challenge and protect the flag from desecration. Unfortunately, we are convinced that in light of the expansive decision of the Court, a statute simply will not suffice and that the only way to ensure protection of the flag is through a constitutional amendment.

During my remarks this morning, I want to try to cover three points. First, why we believe a statute will be struck down and why a constitutional amendment is therefore necessary; second, why we have serious concerns about the kind of statute being proposed even apart from its unconstitutionality; and third, what the constitutional amendment would do and why we think it's a reasonable way to go.

First, let's turn to the issue, why an amendment. We're confronted with a legal question and I wish I could cut through it with high-sounding rhetoric and appeals to emotion. Unfortunately, we have a sworn duty to uphold the Constitution and we have to confront legal issues like lawyers.

To understand why an amendment is necessary, we first have to understand how the Court analyzes symbolic speech. We all know that the Court has repeatedly held that the first amendment does not cover verbal or written speech alone. It also protects conduct when that conduct is engaged in with the intent to convey a message. So if someone wears an armband for expressive purposes, that conduct is protected by the first amendment.

Now, when someone is engaged in conduct for expressive purposes and the Court says that that conduct can include burning the flag and the Government comes in and says stop it, we have a rule that says, you cannot engage in that conduct. We have a collision. We have a collision between the Government's rule prohibiting conduct and the expressive interests of the individual who is engaging in that conduct to convey a message. Now what happens when that collision occurs? How does the Court analyze those cases? Who wins?

The Court uses two different standards to determine who wins. First, it uses an extremely strict standard called exacting scrutiny. Some scholars call this level one scrutiny. Here the Government needs a compelling interest to overcome the first amendment rights of the person who's engaged in the conduct. The Government almost never wins at level one scrutiny.

If it's found that the Government's rule is going to be subject to level one scrutiny, exacting scrutiny, the Government is basically dead on arrival. Then there's a more lenient standard. The courts call this the *O'Brien* standard and scholars sometime refer to it as level two scrutiny. That's a much more lenient standard. Here the Government only needs an important interest and if the Government can get its rule subject to level two scrutiny, it has a fighting chance to have the rule upheld.

The whole issue here, the whole debate, is whether we can conjure up a statute that gets us out of level one and down to level

two. That's what this is all about, this argument about whether we need a constitutional amendment.

Now what does the Court look to to determine whether the Government's rule is going to be subject to level one scrutiny or level two scrutiny. What does it look to? It looks to the interests of the Government. It doesn't look at the content of the rule. It looks to what is the Government's interest. Why is the Government seeking to control conduct. What is the reason for the rule. That is what determines whether the Court will place you at level one or level two.

It's very simple. The Court has repeatedly held that if the Government's interests have nothing whatever to do with concern about expression, you can get to level two. But if the Government's interests are related in any way to concern about expression, you are at level one and you will lose. The Government will lose. If the Government's reason is that it ultimately wants to have an effect on expression, then the Government's rule will be subject to the most exacting scrutiny at level one.

Let me just give you a couple of examples. Armbands. Let's say a school prohibits anyone from wearing any armband. What's the Government's interest there? The Government comes along and says, this will be divisive. It will distract people. The Court says, that is an interest that is related to expression. You're trying to control expression because you're concerned about its impact, the consequences of that expression and no, it doesn't make a difference whether the rule says you can't wear a black armband. It's not the viewpoint. The rule can be neutral. It can say, you can't wear armbands period.

It is still subject to level one scrutiny and it will be struck down as it has been. Draft cards, burning of draft cards. This was the *O'Brien* case. What was the Government's interest in the rule? The Government's interest in the rule was a compelling administrative interest, a reason. The Constitution of the United States gives Congress the power to raise armies. In order to run a system of raising an army, you need a draft and the card served a compelling administrative purpose in administering the draft system and the Government didn't care why you burned the card, where you burned the card or whether you had an expressive reason for burning the card.

Burning the card impaired that Government interest. The Court analyzed it under *O'Brien* and upheld the rule. So there are two key points about the framework that the Court uses to analyze symbolic speech cases and those two key rules are, the Court looks at one thing to see whether it will subject the Government's rule to exacting scrutiny and that is what the Government's reason for the rule is and the second key point is that if the Government's reason is related to expression, it will be subject to exacting scrutiny.

Now, let's look at how these principles have been applied in flag desecration cases.

Why do we want to protect the flag? Chairman Brooks said it very eloquently on the first day of the hearing. We want to protect the flag because it is the revered symbol of the Nation. Senator Biden, in testifying on the first day, said the flag is truly the Nation's most revered and profound symbol, representing what this

country stands for. We want to protect the flag as the symbol of the Nation. We are interested in protecting its symbolic value.

The Court agrees. The Court says that Government's interest is to protect the flag as the symbol of the Nation. Now a symbol is inherently expressive. It has expressive content. That's what a symbol is all about. It stands for something. It represents something. It is not the Nation, but it stands for the Nation. It conveys the idea of the Nation. It is not freedom, but it stands for freedom. It conveys the idea of freedom.

As the Court says, the flag is a form of symbolism, an effective way of communicating ideas, a shortcut from mind to mind. As the Court in *Johnson* said, the flag is pregnant with expressive content.

The central point in this debate is that we have had two successive Supreme Court cases that have said that the Government's interest in protecting the flag as a symbol of the Nation necessarily and inherently is related to expression and consequently any rule to protect the flag must fall under strict scrutiny, level one scrutiny. The Government's concern is not to protect the flag simply as a piece of cloth, as Chairman Brooks said. It is to protect the flag as a symbol, its symbolic value.

In *Spence,* which was decided in 1974, the Court considered a statute which prohibited attaching anything to the flag. The statute was neutral. It didn't depend upon intent. It didn't depend upon whether the attaching was done because of a desire to express an idea. It was a purely neutral statute. The Court said the Government has an interest in preserving the flag as an unalloyed symbol of our country.

If this interest is valid, we note that it is directly related to expression. Therefore, "*O'Brien* is inapplicable." In *Johnson,* the Court reiterated this. It said, "A government's interest in preserving the flag's special symbolic value is directly related to expression." Thus, "it is outside *O'Brien* altogether."

Now what does this mean? As I said before, there are two things that the Court looks at in symbolic speech cases. What is the Government's reason for the rule, and if the Government's reason is expression, related to expression, you're subject to strict scrutiny. The reason the *Johnson* case, together with the *Spence* case in 1974, are so devastating is that they decisively decided two things: The Government's interest in protecting the flag is inherently related to expression, and therefore any rule to protect the flag is subject to strict scrutiny.

The second thing those cases decide is that the Government's interest is not sufficiently compelling to survive strict scrutiny. It is not compelling enough to prevent someone from burning the flag. There is simply no way a statute can get around these two decisive points. Any statute will be subject to exacting scrutiny and will fall. There is no way to get a flag protection statute from level one down to level two.

Now some are proposing a quick fix. They say that by adjusting the scope of the statute, we can somehow get down to level two. They look at the statute in the *Johnson* case and they say, "Well, that really only applied to people who intended to be contemptuous." Now all we have to do is broaden the scope of the statute and

cover those who have no intent to be contemptuous, and we'll have a neutral statute. Maybe then we can get under level two.

There are two problems with this. One, it doesn't fix the constitutional problem, and second, it gives us an absurdly broad statute that no one wants. The fatal flaw of the logic is that it makes the mistake of thinking that what determines whether you're subject to strict scrutiny at level one or lenient scrutiny under level two is the scope of the rule. It has nothing to do with the scope of the rule. It's the reason for the rule, not the scope of the rule that determines whether you are subject to strict scrutiny.

Now it's not just me saying this. The Supreme Court has already said this in a flag burning case, in *Spence*. As I said, there you had a neutral statute. It prohibited attaching anything to the flag or placing any mark on the flag, regardless of intent, regardless of whether you wanted to communicate a message.

It prohibited the veteran from putting his battalion pin on the flag. It prohibited someone from putting a swastika on the flag. It was neutral. The Court said "subject to strict scrutiny." You do not get into *O'Brien* simply because it appears to be a neutral statute.

Now we think the statute would be unconstitutional, but we also have serious concerns about it, apart from its unconstitutionality. A constitutional amendment permits Congress and the State legislatures to focus on precisely the kind of conduct they wish to prohibit. It permits Congress and the States, it gives them the tools to develop a narrow statute that would surgically strike at the offensive conduct.

The problem with the statutory approach that is being proposed, is that in order to make it purportedly constitutional, you are required to go out and prohibit and punish people who have taken actions wholly innocently, with no intent of desecrating the flag, with no contemptuous intent whatsoever. It would reach conduct in the home and it would reach completely innocent conduct, and that makes no sense, and we're going through this chicanery in order to get something to be constitutional.

Let me give you an example, and this should give people pause about the breadth of the statute that is being proposed. Suppose someone wants to make a movie, a glorious movie about our history and about our flag, about a battle, where someone is taking the flag across a battlefield in the Civil War or the shelling of Fort Sumter, and as part of that movie, there is damage done to the flag. The movie shows the musket balls tearing into the flag. Or it shows a Japanese zero bombing a ship at Pearl Harbor and destroying a flag on the deck of the U.S.S. *Arizona*.

Under Senator Biden's statute, that's illegal. The director and the actors are mutilating and destroying the flag. Their intent does not matter. They are trying to honor the flag. They're making a piece of art. They have no contemptuous intent, and yet the statute would make that conduct unlawful. That is absurd. That's not what the American people are upset about, that's not what Congress is upset about.

That kind of statute poses a far greater risk to civil liberties than authorizing Congress and the legislatures to go in narrowly and address the kind of conduct that has people upset. Yesterday, Professor Tribe said that the constitutional amendment was like a

sledgehammer and the statute was like a scalpel. The exact opposite. The constitutional amendment wants to put the scalpel in the hands of Congress and the State legislatures. It is the statute that goes through this weird contortion and is the sledgehammer, because it is now going after anybody, regardless of intent.

Let me just point out something else. The current Federal law, section 700 of title 18, does not only apply to the flag itself. It applies to depictions of the flag. Right now, the Congress' law applies to pictures, and under Senator Biden's statute, it would prohibit newspaper mastheads that have print across the flag. It would prohibit someone with a paper cup with a flag on it from crumpling it up and throwing it away. Those people don't have a contemptuous intent. That's not what people are concerned about.

Yet we're adopting a statute like that in order to avoid giving Congress and the legislatures, the people's representatives, the power to do what most people want done. Mr. Chairman, does this mean I'm out of time?

Mr. EDWARDS. You may wind up. Go ahead.

Mr. BARR. Well, let me say that maybe in response to questions I can outline briefly what the constitutional amendment would do and the various lines that have to be drawn by State legislatures in enacting laws pursuant to this amendment. But let me say that the lines that the State legislatures and Congress would draw in enacting future statutes are exactly like the kinds of laws that you have to draw—that you would have to draw in adopting a statute right now, and don't pose an insurmountable difficulty.

I'll be glad to discuss some of the issues if some of the members would like. Thank you.

Mr. EDWARDS. Thank you very much, Mr. Barr. That's very helpful testimony.

[The prepared statement of Mr. Barr follows:]

STATEMENT

OF

WILLIAM P. BARR
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
UNITED STATES DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee:

Thank you for providing me the opportunity to appear today. I am pleased to present to the Subcommittee the Administration's views on a constitutional amendment to allow Congress and the States to prohibit the physical desecration of the Flag of the United States. This proposed amendment is prompted by the Supreme Court's recent decision in Texas v. Johnson, 57 U.S.L.W. 4770 (June 21, 1989), that a State cannot punish a person for burning the Flag. For reasons which I will explain, a constitutional amendment is the only way to protect the Flag in the wake of the Court's expansive decision. An amendment is the only way to adequately respond to the overwhelming--and understandable--sentiment of the American people that the Flag must be protected. I trust that few among us would disagree that the Flag is deserving of protection. As the symbol of our Nation, the Flag is the embodiment of our commitment to freedom. It stands in sacred honor of those who have sacrificed their lives in defense of that freedom. It holds in sacred trust the spirit of the American people.

Given the deserved reverence accorded the Flag, it is not at all surprising that the American people reacted with outrage when they were told that this Flag can be burned, shredded and spat upon with impunity. It would have been surprising had they reacted otherwise.

The President shares the profound sense of personal violation felt by the American people. He firmly believes that

we have an obligation to the people to act swiftly and decisively to protect the Flag from those who would break our spirit through desecration of this one symbol that unites us.

We must be mindful that we here in Washington are but trustees of the will of the people; our authority is derivative. The will of the people is unmistakable. They want the Flag of the United States protected from those who would defile it.

I. INTRODUCTION

The issue that has occupied the lion's share of the Subcommittee's time thus far is not whether to provide protection for the Flag, but how to provide that protection. Specifically, the debate has centered around whether an amendment to the Constitution is required or whether a statute would suffice. The Department of Justice, at the request of the President, has carefully considered whether it is possible to protect the Flag through statute. You have my assurance that the President and the Attorney General would be the first to support a statute if they thought a statute could survive constitutional challenge and protect the Flag from desecration. Unfortunately, we are convinced that, in light of the expansive decision of the Court, a statute simply would not suffice, and that the only way to ensure protection of the Flag is through a constitutional amendment. This is confirmed by even the most cursory reading of the Court's opinion.

The reason that a statute purporting to protect the Flag would be unconstitutional is simple. In Texas v. Johnson, the Court held that whenever someone burns the Flag for expressive purposes, that conduct is protected by the First Amendment; that to prohibit such conduct, the Government must have a compelling reason that is unrelated to expression; that the Government's reason for protecting the Flag (to preserve it as a symbol of national unity) is inherently and necessarily related to expression; and that the Government's interest in protecting the Flag as a symbol of our national unity can never be sufficiently compelling to overcome an individual's First Amendment interest in burning the Flag for communicative purposes. This reasoning plainly would extend to any Flag desecration statute enacted to protect the Flag as a symbol of our Nation.

We do not believe that it is necessarily unfortunate that an amendment is required. The amendment process serves as a reminder, lest we forget, that the law is of the people.

II. ANALYSIS OF TEXAS v. JOHNSON

To make an informed judgment as to whether an amendment is required, it is necessary to understand both the way in which the Supreme Court analyzes symbolic speech cases, and the reasoning employed by the Court in reaching its decision in Texas v. Johnson.

The Court has repeatedly held that the First Amendment extends to symbolic speech where the conduct was intended to convey a message and the likelihood was great that the message conveyed would be understood. See Spence v. Washington, 418 U.S. 405, 410-411 (1974). For example, the Court held in Brown v. Louisiana, 383 U.S. 131 (1966), that a peaceful sit-in in a public library to protest the library's policy of segregation was protected by the First Amendment. Where the Government attempts to prohibit, punish or otherwise burden communicative conduct, the Court carefully analyzes the Government's interest in imposing the burdens. If the Government's interest is unrelated to suppression of expression, the regulation is subjected to the comparatively more lenient standard set forth in the Court's opinion in United States v. O'Brien, 391 U.S. 367 (1968). Under that standard, the Government's interest must only be important or substantial to justify the regulation. Id. at 377. If, on the other hand, the Government's interest is related to suppression of expression, the regulation is subjected to the "most exacting scrutiny." Texas v. Johnson, 57 U.S.L.W. 4770, 4774 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)). Under this standard, the Government's interest must be compelling.

Turning to the decision in Texas v. Johnson, the threshold question addressed by the Court was whether Johnson's burning of the Flag constituted expressive conduct protected by the First Amendment. Noting that the Flag is "[p]regnant with expressive content," id. at 4772, the Court readily determined that

Johnson's burning of the Flag was "'sufficiently imbued with elements of communication'" Id. (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)), to justify invocation of the First Amendment.

The Court then analyzed the interests advanced by the State in support of its Flag burning prohibition to determine whether those interests related to the suppression of expression. Texas v. Johnson, Id. at 4772. The State of Texas asserted two interests in support of its prohibition on Flag burning: preventing breaches of the peace, and preserving the Flag as a symbol of nationhood and national unity. The Court held that the State's interest in preventing breaches of the peace was not implicated on the record because there was no evidence that Johnson's burning of the Flag actually caused a breach of the peace, and he was not prosecuted for breach of the peace. Id. at 4772-4773.

Significantly, however, the Court held that the government can never assume that Flag burning will cause a breach of the peace. Id. at 4773. Moreover, said the Court, Johnson's burning of the Flag as a "generalized expression of dissatisfaction with the policies of the Federal Government" was not the equivalent of "fighting words" that could cause a breach of the peace because "[n]o reasonable onlooker" would regard it as a "direct personal insult or an invitation to exchange fisticuffs." Id. The Court went on to say that its precedents "recognize that a principal 'function of free speech under our system of government is to

invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" Id. (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

The Court then turned to the State's asserted interest in preserving the Flag as a symbol of our Nation. It held that this interest was directly related to the suppression of expression: "[T]he Government's interest in preserving the flag's special symbolic value 'is directly related to expression in the context of activity'" intended to express a message. Id. (quoting Spence, 418 U.S. at 414 n.8). Because the State's interest in preventing Flag burning was related to expression, the Court held that the considerably less demanding standard of O'Brien did not apply, and that the State's interest must be subjected to the "most exacting scrutiny." Id. at 4774.

The Court held that Texas' interest in preserving the Flag as a symbol of our Nation and national unity could not justify its prohibition on Flag burning. The Court reasoned that governmental protection of the Flag because of its symbolic importance to the Nation would be tantamount to a governmental directive that the "symbol be used to express only one view of that symbol or its referents." Id. at 4775. The Government, said the Court, may not "foster its own view of the flag by prohibiting expressive conduct relating to it." Id. Any attempt to preserve the Flag as a symbol offends the "bedrock principle" that "the Government may not prohibit the expression of an idea

simply because society finds the idea itself offensive or disagreeable." Id. at 4774. Finally, the Court explicitly refused to accord the Flag any special constitutional significance, finding "no indication - either in the text of the Constitution or in [its] cases interpreting it - that a separate juridical category exists for the American flag alone." Id. at 4775.

III. CONSTITUTIONALITY OF FLAG DESECRATION STATUTES AFTER TEXAS V. JOHNSON

We think it is plain under this reasoning that any statute prohibiting desecration of the Flag for communicative purposes would be unconstitutional. The Flag is by nature communicative. It is a symbol "[p]regnant with expressive content." Id. at 4772. Thus, the Government's interest in preserving the Flag as a symbol is inherently related to expression. It is precisely because the Flag is the symbol of this Nation that the Government wants it protected against conduct that will undermine its communicative force, i.e., conduct that will prevent or interfere with the message communicated by the Flag. As the Court observed in Texas v. Johnson, the Government "is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, we do not enjoy unity as

a Nation." Id. at 4773. Accordingly, any Flag desecration statute will be subject to the "most exacting scrutiny."

The Court has held that under this exacting scrutiny the Government's interest in preserving the symbolic value of the Flag can never be sufficiently compelling to stop an individual from desecrating the Flag whenever the desecration is done for communicative purposes.

An asserted interest in preventing breaches of the peace would not save the statute because the Court also held that the Government may never assume that Flag burning or other Flag desecration will cause a breach of the peace. Moreover, the Court has said that desecration of the Flag as a "generalized expression of dissatisfaction with the policies of the Federal Government" cannot cause a breach of the peace because "[n]o reasonable onlooker" would regard it as a "direct personal insult or an invitation to exchange fisticuffs." Id. at 4773. The Court's categorical rejection on these grounds of the only two conceivable interests for prohibiting the desecration of the Flag render it certain that the Court would strike down any such statute.

It has been argued that the Court would uphold a statute if it prohibited all Flag desecration, whether in public or private, and whether done with contempt or not. This argument is demonstrably wrong because it assumes that the Government's reason for enacting a facially neutral prohibition (that is, a statute neutral as to the particular viewpoint expressed) would

be "unrelated to expression." It would not be. The Government's reason for passing a viewpoint-neutral prohibition would be the same as its reason for passing a prohibition on contemptuous desecration only: protection of the symbolic value of the Flag. The Supreme Court has held in two successive cases, Spence v. Washington and Texas v. Johnson, that it is the Government's reason for the prohibition, not the scope of the prohibition, that determines the level of scrutiny. Because the Government's reason for protecting the Flag is necessarily related to expression, the prohibition would always be subjected to exacting scrutiny, and therefore would never prevail over an individual's First Amendment interest in expressive conduct.

In essence, the argument fails to appreciate that a statute neutral as to the particular viewpoint expressed can nonetheless be unconstitutional if its prohibition is content-based (i.e., related to expression). The Supreme Court has distinguished between "content" and "viewpoint" regulation. See, e.g., Boos v. Barry, 108 S. Ct. 1157, 1163-1164 (1988). If the regulation is either content-based or viewpoint-based, it is subject to the "most exacting scrutiny." Id. Importantly, a regulation can be viewpoint-neutral, but content-based. Id. Even assuming that the proposed statute would be held to be viewpoint-neutral (which itself is doubtful), it would never be held content-neutral.

A statute is content-neutral only if its restrictions on communicative activity "are justified without reference to the content of the regulated speech." Id. at 1163 (quoting Virginia

Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)). Its restrictions must have "nothing to do with that speech;" the statute must not have been "aim[ed] at the suppression of free expression." Id.; see also Texas v. Johnson, 57 U.S.L.W. 4770, 4774.

The restrictions imposed on speech, even by a facially neutral Flag desecration statute, neither would nor ever could be justified by anything other than the Government's interest in protecting the symbolic value of the Flag. (Any legislative determination to the contrary would plainly be pretext and would be recognized by the Court as such. See, e.g., Wallace v. Jaffree, 472 U.S. 38 (1985)). Indeed, in Spence v. Washington, the Court considered a facially neutral statute virtually identical to the statute now proposed. Prosecution under the statute at issue in that case, like under the statute proposed here,

> [did] not depend upon whether the flag is used for communicative or noncommunicative purposes; upon whether a particular message is deemed commercial or political; upon whether the use of the flag is respectful or contemptuous; or upon whether any particular segment of the State's citizenry might applaud or oppose the intended message.

Spence, 418 U.S. at 422-23 (Rehnquist, J., dissenting). In holding the statute unconstitutional as applied to a person engaged in communicative conduct, the Court explained that

> [even] [i]f [the government's interest in preserving the value of the Flag as a symbol of our Nation] is valid, we note that it is directly related to expression in the context of activity like that undertaken by appellant.

Id. at 414 n.8. Justice Brennan, the author of the Court's opinion in Texas v. Johnson, in fact has previously written that,

> the only basis for a governmental interest (if any) in protecting the flag is precisely the fact that the flag has substantive meaning as a political symbol. Thus, assuming that there is a legitimate interest at stake, it can hardly be said to be one divorced from political expression.

Kime v. United States, 459 U.S. 949, 953 (1982)(Brennan, J., dissenting). And the Supreme Court in Texas v. Johnson has now held that the Government's interest in protecting the Flag as a national symbol is, by definition, related to the suppression of free expression. Thus, it simply could never be successfully maintained that such a statute was content-neutral. The statute is not rendered content-neutral merely because it prohibits private desecrations as well as public desecrations of the Flag. The Government's purpose in prohibiting the desecration is the same whether or not the statute extends to private conduct.

Because any statute would necessarily relate to expression, the more relaxed standard of O'Brien would never apply, and the statute would always be subject to the "most exacting scrutiny." The Supreme Court in Texas v. Johnson has now unequivocally held, however, that the government's interest in protection of the symbolic value of the Flag will never support a prohibition on the communicative desecration of the Flag under this heightened standard. As Justice Brennan has said, "any governmental interest in protecting the flag's symbolism is one that cannot pass muster under the third branch of the O'Brien test." Kime v. United States, 459 U.S. at 953 (cert. denied, Brennan, J.,

dissenting). Moreover, the Court has flatly refused to recognize a separate constitutional or juridical category for the Flag.

In the face of the Court's holdings in Texas v. Johnson, and Spence v. Washington, and especially given the sweeping reasoning in those cases, it cannot be seriously maintained that a statute aimed at protecting the Flag would be constitutional. Significantly, Justice Brennan himself has even written that a statute "that simply outlawed any public burning or mutilation of the flag, regardless of the expressive intent or nonintent of the actor," would be "invalid for the reasons stated in . . . Spence." Kime v. United States, 459 U.S. at 955 n.7.

IV. PROPOSED CONSTITUTIONAL AMENDMENT

If we are interested in protecting the Flag from desecration, the focus should be on the various amendments that have been proposed in the two Houses of the Congress. Today, I would like to discuss the amendment that has been proposed by Congressmen Michel and Montgomery, and endorsed by the President. That amendment reads: "The Congress and the States shall have power to prohibit the physical desecration of the Flag of the United States."

The first, and perhaps most important, point to be made is that the amendment does not itself prohibit Flag desecration. The amendment merely empowers Congress and the States to prohibit legislatively the physical desecration of the Flag, and

establishes the boundaries within which they may legislate. With the ratification of this amendment, Congress and State legislatures, the representatives of the people, would be able to decide if they want to prohibit Flag desecration, and if so, in what manner. We believe it is fitting that the people should decide through their elected representatives the extent to which they wish to prohibit desecration of their national symbol. This amendment gives them that opportunity.

The amendment would define the framework within which the legislative authority of the Congress and the States could be exercised. Within this framework, however, the Congress and the States would have wide latitude to prohibit that conduct toward the Flag that they believe deserves proscription.

If Congress and the States chose to legislate, as we anticipate they would, they would be permitted and obliged to draw lines. For example they would have to determine how they wished to define "Flag" and "physical desecration" of the Flag. They would have to decide whether to make intent a necessary element of a Flag desecration offense. Doubtless, there would be other questions as well. I can describe the general nature of the decisions that would have to be made on the principal issues. But again I would emphasize that this amendment creates only the necessary framework; the bulk of the decisionmaking would be left to the legislatures.

The first question that the legislatures would face is how to define "Flag." There would be any number of options that

would be permissible under the amendment. Let me discuss three of the most obvious. First, "Flag" could be defined narrowly as only a cloth, or other material readily capable of being waved or flown, with the characteristics of the official Flag of the United States, as described in 4 U.S.C. § 1. (This definition could also include historic versions of the Flag (i.e., a 13-star version)). A benefit of such an objective definition is that there would be absolute certainty as to what one would be prohibited from desecrating. One of the costs of such a narrow definition, however, is that legislatures would not be prohibiting acts that are just as damaging to the symbolism of the Flag as desecration of the Flag itself. People would simply circumvent any statutory prohibition by desecrating a Flag that is slightly different in an undetectable way from the actual Flag. For instance, they would burn or shred a Flag that has only 49 stars, or one on which the stripes are of incrementally different dimension, but is otherwise identical to the official Flag. While we believe the amendment would certainly permit the legislatures to define "Flag" in this manner, legislatures would be free to adopt a broader definition, as Congress itself has done.

A second option for the legislatures would be to define "Flag" as anything that a reasonable person would perceive to be a Flag of the United States meeting the dimensions and having the characteristics of the Flag as set forth in 4 U.S.C. § 1, and capable of being readily waved or flown, whether or not it is

precisely identical to the Flag as so defined. This definition would extend protection to any Flag with a slight variation (i.e., a Flag with a stripe missing). However, it would not prohibit destruction of a poster or a painting of the Flag, or the painting of a picture of the Flag with a swastika on it, because a reasonable observer would not mistake such an object as an actual Flag. In this regard, the definition is substantially narrower than the existing federal statute, which extends to any object that "an average person seeing the same without deliberation may believe . . . to represent" the Flag. 18 U.S.C. § 700(b).

A third option for Congress and the States would be to define "Flag" as it is defined in the existing federal Flag desecration statute, 18 U.S.C. § 700(b). The federal statute prohibiting Flag desecration, 18 U.S.C. § 700(b), defines "Flag" as follows:

> any flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, color, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America.

18 U.S.C. § 700(b). In general terms, this definition includes any Flag, portion of a Flag, or any picture or representation of a Flag. It would allow the legislatures to protect depictions of

the Flag, such as posters, murals, pictures, buttons, and any other representation of the Flag. This definition would be consistent with the Government's interest in preserving the Flag's symbolic value because it recognizes that the desecration of representations of the Flag damage that interest as much as desecration of the Flag itself. I would note that even the legislative proposals proffered to redress the Court's decision would retain this definition of Flag.

Regardless of how "Flag" is defined, however, Congress and the State legislatures would have to define the term clearly to avoid successful challenge on the ground that they are unconstitutionally vague. In fact, it is worth noting that many Flag desecration statutes have been invalidated on the ground that they were unconstitutionally vague. See, e.g., Smith v. Goguen, 415 U.S. 566 (1974).

We believe the phrase "physical desecration," too, would provide some latitude to Congress and the States, although the amendment would significantly channel the legislative decision. There are two discrete aspects of the term "physical desecration," "physical" and "desecration." The amendment would not permit Congress or the States to punish or penalize any non-physical desecration of the Flag. Some contact with the Flag, some physical touching of the Flag, whether by the person himself or caused by the person would be essential. The legislatures thus could not punish or penalize mere words or gestures directed at the Flag, regardless of their offensiveness.

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The amendment would simply import the common-sense understanding of the term "desecration." Webster's Ninth New Collegiate Dictionary defines "desecrate" as follows: "1. to violate the sanctity of: PROFANE 2: to treat irreverently or contemptuously often in a way that provokes outrage on the part of others." Black's Law Dictionary contains a similar definition of "desecrate": "To violate sanctity of, to profane, or to put to unworthy use." These definitions capture the essence of the term as used in the amendment. Indeed, these definitions make clear that a ban on "desecration" is particularly well suited for preserving the symbolic value of the Flag.

There are an infinite number of forms of desecration. I will not attempt even a representative listing here. But obviously, the legislatures could clearly prohibit the burning, shredding and similar defilement of the Flag.

I would note, however, that we do not understand that the legislatures could ever prohibit the proper display of the Flag merely because they believe the particular surroundings of the display are unfitting for the Flag. The proper display of the Flag, without more, could never constitute an act of physical desecration. We simply do not believe the Government should be in the position of making value judgments about whether the proper display of the Flag in particular settings and by particular persons is nonetheless demeaning. As long as the Flag is displayed in a customary manner, and not physically mistreated, the amendment would not authorize punishment or

penalty. Of course, the legislatures could constitutionally prohibit the display of the Flag in a manner that they deemed inappropriate because such proscriptions would not require value judgments about who could display the Flag or where it could be displayed. Thus, they could prohibit, for example, the display of the Flag on the floor or the upside-down display of the Flag.

Beyond this, I would simply urge the Subcommittee not to lose sight of the ultimate objective of protecting the Flag by becoming mired in countless hypotheticals that can be posed to test at the margins choice of the term "desecration." One can always construct hypotheticals that push the limits of any word in the language. This is as true of statutory language as it is of constitutional language. In the end, those who are responsible for the ultimate choice of language, must simply choose terms that most clearly reach the conduct they wish to reach, and only that conduct. At the margins, one has no choice but to rely upon the individual legislatures in the first instance, and ultimately on the courts, to prevent application of the language in a manner that would do injustice to the drafters' intent.

We believe that the phrase "physical desecration" is sufficiently flexible to permit the Congress and the States to reach all physical acts of desecration with which the people are concerned, yet sufficiently exacting to prohibit them from reaching activity that is properly protected.

The third area in which Congress and the States will have to draw lines relates to the actor's state of mind. The amendment only authorizes prohibition of voluntary actions; involuntary acts--such as accidents--could not be punished. The more difficult issue is whether the actor must intend to be contemptuous toward the Flag. We believe Congress and the States are, and should be, free to decide whether to require intent. We suspect that they will choose to require that the actor intend to cast contempt. Because the overwhelming number of physical acts that are of concern to us are intended to express contempt for the Flag, we would not be especially troubled were they to choose to require intent. Nevertheless, there may well be conduct that the legislatures would want to prohibit, irrespective of the intent of the actor, and they would be permitted to do so under the amendment. The legislatures would be free to impose an intent requirement or not, as they deemed appropriate.

We think offering legislatures the option of prohibiting only intentionally contemptuous, physical desecration represents a significant advantage of the amendment over the proposed statute. Presumably to convince the courts that its proscriptions are unrelated to expression, the proposed statute would <u>require</u> that the Government prohibit acts without regard to whether they cast contempt. Thus, a child who innocently steps on a Flag, a person who crumbles a Fourth of July Flag-decorated paper cup, or a veteran who burns an old Flag out of reverence and respect would all presumably be prosecutable under the

proposed statute. While we do not believe that most people want to prohibit actions, such as those identified above, when they are not done to cast contempt, we believe that Congress and the States should be free to make that determination as they see fit, to create the exceptions that logic and reason compel.

By way of summary, the Michel-Montgomery amendment confers substantial discretion on Congress and the States to determine precisely the degrading acts toward our Flag that are to be prohibited. The amendment gives them the latitude to draw reasonable lines that will reflect the conscience of the people. The Administration believes that this is as it should be. The proposed statute not only prohibits much conduct that no one wishes to prohibit; ultimately it would not constitutionally prohibit the very acts that we wish to prohibit.

CONCLUSION

On behalf of the President, I urge the prompt approval of the Michel-Montgomery Amendment so that the ratification process may begin.

Mr. EDWARDS. Mr. Kastenmeier.

Mr. KASTENMEIER. Mr. Barr, was the majority of the Supreme Court wrong in the *Johnson* case?

Mr. BARR. Well, I believe it was wrong.

Mr. KASTENMEIER. You believe it was wrong.

Mr. BARR. Yes.

Mr. EDWARDS. We have a vote in the Chamber of the House. We'll recess for 6 or 7 minutes. We'll come back and, under the 5-minute rule, have some questions, Mr. Barr.

[Recess.]

Mr. EDWARDS. The subcommittee will come to order.

Mr. Kastenmeier.

Mr. KASTENMEIER. We determined that the majority of the Court was wrong in the *Johnson* case. Now, normally, responding to a Supreme Court case, it would be the conservative approach, the traditional approach, to try a statutory approach rather than amend the Constitution, in normal circumstances. Would you not agree?

Mr. BARR. Not necessarily.

I think conservatives would generally say that we can trust the people and we can trust the people's representatives. We can trust the State legislatures to consider this, and if it's appropriate, ratify it, and if it is ratified, we can trust the Congress and we can trust the State legislatures to adopt appropriate laws.

We currently have 48 State laws in effect. We have a congressional statute in effect. The constitutionality of all those laws is now destroyed by the *Johnson* case. The constitutional amendment will not legitimate all those statutes.

Mr. KASTENMEIER. When you talk about the States, and you obviously would write a constitutional amendment with the term "States" in it, you are referring to the 50 States and all government subdivisions thereof.

Mr. BARR. That is a decision that this body is going to have to make. In submitting a constitutional amendment to the States for ratification, I think that Congress is going to have to determine whether it wants this decision vested solely in the State legislatures or whether it also wants to open up these decisions to subdivisions of State government.

My recommendation would be that if you want to limit it to State legislatures, the word "legislature" should be inserted in the amendment.

Mr. KASTENMEIER. But you support this amendment, which does not do that.

Mr. BARR. I support this amendment, which does not do that, but I believe that Congress should make that call.

Mr. KASTENMEIER. We also have no idea what these 50 States and several thousand other entities may write as statutes or ordinances or what penalties they might impose, given the freedom this constitutional amendment grants. Isn't that correct? You, personally, have no idea what these governmental entities may write in terms of law or ordinances.

Mr. BARR. No, that is not correct.

The first process is the language—is adoption of the amendment itself, and the amendment has language in it that sets a general framework and picks certain points of reference, and within that

framework, it leaves it to Congress and the States to fill in the details, but still, there are points of reference which no legislature could go beyond. So, we do know what the general parameters are.

Second, the statute that is being proposed, that would disregard intent, goes to the extreme of any statute that I think would be permissible under this constitutional amendment. That is a second point.

The third point is that we have a pretty good idea what the legislatures will do. Congress has done it. Congress has passed a statute. That statute does not disregard intent. It is aimed at contemptuous conduct toward the flag. Same with most of the 48 States. Let's face it. If Congress had the option, it would not adopt this broad statute. It would adopt the statute it has adopted, which is much more narrow. I am willing to leave that decision in the hands of the people's representatives.

Mr. KASTENMEIER. But no one really knows what laws—granted, the constitutional amendment is a very simple one and has several words defining the scope, but within that scope, it has extraordinary latitude in terms of what otherwise can be done in the field, and there would be no uniformity, of course.

Mr. BARR. Can I respond to that?

Yes, there is latitude, but as I say, the statute that is being proposed goes about as far as you could possibly go. The statutory alternative makes all the judgment calls out at the extreme point. In other words, there is a basic decision that has to be made by any State legislature as to state of mind. Are we going to prohibit merely conduct, regardless of intent, regardless of state of mind, or are we going to punish people who are really acting contemptuously toward the flag, who really want to harm the flag and harm the symbol? That is a basic judgment call.

As I say, Congress has made that judgment call. The 48 States have made that judgment call, and it is clear that what people want to do is they want to focus in on the contemptuous conduct. Now, the statute goes to the extreme. It punishes every form of conduct, regardless of intent, and why does it do it? To get to the people they really care about, and that is intellectually dishonest.

Mr. KASTENMEIER. As you know, we do have constitutional amendments proposed before us which have the Congress alone empowered to act and not the States.

If this committee or if the Congress chose to go the statutory route—perhaps the conservative approach, I would still say—would you advise the Solicitor General to oppose it if it were challenged in the courts?

Mr. BARR. I really cannot predict that, Congressman. I would have to see the statute.

Mr. KASTENMEIER. Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you, Mr. Chairman.

First of all, Mr. Barr, let me commend you for a very clear and succinct statement on the legal issues posed in the debate over whether we ought to pass a statute or whether a constitutional amendment is necessary. It was much more clear than what we heard yesterday, and I think after you are done serving here, maybe you ought to go teach at the Harvard Law School, because

they could use someone who is as clear and as straightforward as you.

Mr. BARR. Please save me from that.

Mr. SENSENBRENNER. I have a couple of questions.

First, is it your opinion that there is no way that a statute can be drafted that would fall into the test of the *O'Brien* case?

Mr. BARR. Yes. No statute can be drafted that will fall into *O'Brien.*

Mr. SENSENBRENNER. So, if *O'Brien* is unavailable to sustain the constitutionality of the statute, then the far more strict standard of the *Spence* case would apply and a statute would fall, because the statute does relate to curtailing free expression.

Mr. BARR. Absolutely.

Mr. SENSENBRENNER. OK. I agree with you.

Now, second, we have heard, relative to this whole issue, that an analogy is being drawn between the Historic Buildings Preservation Act, the law that protects the American eagles and feathers thereof, and the like, and could you tell me how this proposal is different than the other laws that are already on the books?

Mr. BARR. Yes. Those analogies are false analogies and they involve a sleight of hand.

Now, remember, the key question in determining whether you are subject to strict scrutiny or lenient scrutiny is what the Government's reason for the rule is. If it is related to expression, there is strict scrutiny and you are dead on arrival, the Government is. If it is lenient scrutiny, you have a chance.

Now, the Government can sometimes raise reasons that are unrelated to expression but are based on administrative necessity—for example, the draft card. Congress has a constitutional power to raise an army. You have to have a draft card. We do not care about expression. Administrative necessity.

Mailboxes are another example of this. You cannot destroy a mailbox if it is being used for the receipt of Federal mail. Congress has a specific power to deliver the mail, to provide for a mail system. In order to carry out that obligation, the mail system needs someplace to deliver the mail. You have to have a safe repository. So, there is administrative necessity in having a mailbox. We are not protecting mailboxes for their symbolic value. As long as I have a mailbox receiving the mail, I can go out and buy a mailbox, separate and apart, and pound it into sheet metal in front of a crowd to protest the post office and I am not violating any Federal law.

Money is the same thing. Congress has the power to make money and to control how much money is in circulation, and so, it is administrative necessity. We cannot have people out there destroying and defacing the currency.

There is another interest that can be interposed by the Government to sustain a rule, which again is unrelated to expression, and that is the conservation interest. That means that when there is something that is historically unique or very rare, its value lies in the fact that it is one of a kind or it is only one of few. It has inherent value as a discrete object, like a rare animal, like a historic flag—the flag that flew over Fort McHenry—or like a government monument.

Now, sometimes these things do not have any symbolic value themselves, like a forest. We want to save rain forests because they are rare, not because they are symbolic, but sometimes the conservation interest of the Government and the symbolic interest can coexist in one object, like a monument. It does stand for something, the Statue of Liberty, but the reason we protect it—our conservation interest is that it is unique. It is one of a kind. Now, I can go out and build an exact replica of the Statue of Liberty in my front yard and I can blow it up and I have not violated a Federal interest.

It is dishonest to suggest that the reason we want to protect the flag is that each and every flag that is manufactured and is inherently a reproducible object is a historic artifact or a very rare object in itself. We are protecting the symbolic value of the flag. I think that is where the analogies to rare historical artifacts or unique objects that the Government has a conservation interest in and also certain devices that the Government has an administrative interest in does not equate to protecting the flag.

Mr. SENSENBRENNER. My time has expired, but I would like to observe that, from what you have said, it is legal for Congress to pass a law prohibiting the burning of garbage but it is not legal for Congress to pass a law prohibiting the burning of the flag.

Thank you.

Mr. BARR. Well, that is what the Supreme Court says.

Mr. EDWARDS. The gentlewoman from Colorado.

Mrs. SCHROEDER. Thank you, Mr. Chairman. I do not have any questions at this time.

Mr. EDWARDS. We welcome the gentleman from Michigan. Do you have any questions?

Mr. CROCKETT. Thank you, Mr. Chairman.

I apologize, Mr. Barr, for my inability to be here to hear your presentation in chief.

I happen to be one of the few who voted against the resolution in the House that, in my judgment, attempted to express disapproval with the Supreme Court's decision in the flag case, and I am still of that view. I notice, however, in glancing through your statement, you describe the problem as one of protecting the flag. I confess, I am not so much concerned about protecting the flag as I am concerned about protecting the rights and privileges and obligations that the flag is supposed to symbolize, and unless and until conduct is addressed to that, I see no necessity for amending the Constitution.

Again, we speak of amending the Constitution, when actually what you are doing is amending the first amendment. I am more interested in protecting the present breadth of the first amendment than I am in curtailing it.

Let me give you another example: How far do we go with this trend of thinking? Every time a Supreme Court decision comes down and an administration disagrees with it, are we going to run over to Congress and say let's initiate the amendatory process?

Let me give you an example in chief: I and, I am sure, a lot of other minorities in this country have felt, on occasion, with respect to both Supreme Court decisions and legislation enacted by this Congress, that we would like nothing better than to take the U.S.

Constitution and tear it into shreds, because it simply had no meaning in that particular instance. That would be our feeling at that particular time.

Suppose that I, as a black congressman, felt that way about recent Supreme Court decisions in affirmative action cases, and I decided to stand on the Capitol steps and tear up the Constitution of the United States. I take it, under the recent Supreme Court decision, that would not be a criminal offense. I could not be prosecuted for that. Would the administration feel that it was necessary to again amend the Constitution to "protect the Constitution of the United States?"

Mr. BARR. Congressman, the Constitution of the United States is protected. It is in the Archives. It is in heavily vaulted area. A lot of money has been spent on protecting the actual Constitution of the United States, and if that was the Constitution you were tearing up, yes, I think you would be prosecuted, because that is the unique and rare article.

Now, the Constitution is reproducible, and there are a lot of pocket versions of it. There are probably millions of copies of the Constitution floating around, and no, we would not support a constitutional amendment to protect every copy of the Constitution, because the Constitution is valuable not like the flag is. It is not a symbol of the Nation. The Constitution is not a symbol. The Constitution is a document. It speaks for itself.

Mr. CROCKETT. Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, Judge.

Mr. Barr, we expected the Attorney General to testify. He has been on television a number of times in support of the constitutional amendment. He is the lawyer for the President, for the United States, the chief law enforcement officer of the country. Can you tell us why he did not come?

Mr. BARR. Yes, Mr. Chairman.

He would have liked to come and testify on behalf of the amendment. He feels strongly that there should be an amendment and we should move quickly toward one.

Unfortunately, he is on business. He is on a business trip that has been planned for a long time, and in honoring that——

Mr. EDWARDS. How long will the business trip take?

Mr. BARR. Well, he is there now.

Mr. EDWARDS. Yes. I mean can we reschedule him? He did not offer to reschedule. We always can reschedule for the Attorney General.

Mr. BARR. Well, I am not the Attorney General's scheduler, and I cannot commit to his time, but he is not in Washington today. He is on a business trip, and so, he asked the Office of Legal Counsel, and I am the head of that office, to testify. Because so many of the issues here relate to the everyday work of OLC, the Office of Legal Counsel, he felt I could be useful to the committee if I came and presented our views.

Mr. EDWARDS. I am sure you understand my point, that the Constitution has only been amended 16 times after the original Bill of Rights 200 years ago, and not to have the chief law enforcement officer, the distinguished Attorney General, testify indicates to us that he is not that interested. I should think that he would have

been able to cancel some kind of a business trip to—we are going to write the statute. We are going to write the constitutional amendment, if there is one.

Mr. BARR. Well, as I say, the Attorney General feels strongly about a constitutional amendment. He has spoken out about it, and hopefully, he will have an opportunity to present his views before this process is over, but it has historically been the role of the Office of Legal Counsel to provide testimony on constitutional amendments. So, this is not uncommon at all.

Mr. EDWARDS. I have been here a long time, more than a quarter-century, and this is the first time an Attorney General has not testified on such an important matter, a constitutional amendment, for goodness sakes.

You made it very clear that the Department of Justice and the President feel that you need a constitutional amendment—a weakening of the Bill of Rights' free speech provision for the first time in 200 years. That's correct? You certainly are in favor of that kind of a constitutional amendment?

Mr. BARR. Well, I would only consider it a weakening of the Bill of Rights if you believe the Bill of Rights should give someone license to burn the flag contemptuously. If you believe the Bill of Rights extends to that conduct, yes. We would like to remove that conduct.

Mr. EDWARDS. But, however, instead of passing the law ourselves, the laws that you are authorizing to be exceptions to the free speech provision of the Bill of Rights, you're assigning that to 50 State legislatures, 13,000 cities and 3,000 counties.

Mr. BARR. No, that's not accurate, Mr. Chairman. First, the States, for the past 100 years, have passed statutes on regulating the use of the flag. So this is nothing new.

As I said, I believe it's the judgment that should be made by this body whether or not it wants a national standard and therefore only wants the Congress to address the issue, or whether it will continue historic practice and give the States latitude.

Now, there are arguments on both sides, and this was the question that I believe Congressman Kastenmeier raised. I think there are arguments on both sides. I think there is an argument for one national standard. On the other hand, there is also an argument that decisions should be made by the representatives who are closer to the people and can take into account local conditions.

That's a judgment call I think Congress should make. Historically, it's been left to the States, as well as Congress. If you want to change that, I think there would be legitimate, good arguments for doing so.

Mr. EDWARDS. Well, don't you think that when we're providing an exemption from the Bill of Rights, and it being a national problem, and a national symbol, that Congress should take that responsibility?

Mr. BARR. Not necessarily. There are many national problems that Congress not only takes a lead role in, but also give States latitude to handle. You know, I think it's a question of how you want to proceed on this.

Excuse me, I'm not—when these lights go on and off during my questions and answers, is that——

Mr. EDWARDS. No, that's telling me I have to quit.
Mr. BARR. Oh.
Mr. EDWARDS. Thank you.
Does the gentleman from New Hampshire have questions?
Mr. DOUGLAS. Yes, sir. Thank you, Mr. Chairman, again for allowing me to sit in from the full committee on this. I had some technical questions relating to the Biden statute, and as you know, it says whoever knowingly defaces, burns, et cetera, shall be fined or imprisoned. It's a strict liability statute that doesn't seem to have anything to do with one's intent.
Would we not have to repeal U.S. Code, title 36, section 176, that says no disrespect should be shown to the flag of the United States of America? Wouldn't we have to get rid of that because that would be inconsistent with his solution to this problem?
Mr. BARR. Under the reasoning—it appears to me that under the reasoning of the Supreme Court's decision, that statute would also be unconstitutional.
Mr. DOUGLAS. And the other problem in 36 U.S. Code is in section J that says the flag represents a living country. That's an act of Congress already on the books as we speak today. If the flag represents a living country and therefore is a symbol, do we have to repeal that if we pass the Biden statute, or are the two able to exist side by side?
Mr. BARR. I'm not sure you would have to repeal that. I don't have the statute in front of me, but if that's all it says, you know, it seems to me that that can coexist. It merely states a fact, that the flag is a symbol.
Mr. DOUGLAS. All right.
And what about section K: The flag, when it is in such a condition as it no longer is fit for display should be destroyed in a dignified way—preferably, by burning.
I don't see how we can have the Biden statute and that section on the books at the same time.
Mr. BARR. Neither do I, Congressman. I think that one of the fundamental flaws of Senator Biden's proposal is that—well, there are a number of flaws with it. One, as I said, it says, well the trouble with the statute in *Johnson* was that it wasn't viewpoint neutral; it was only proflag. So, let's have a viewpoint neutral statute that prohibits conduct whether or not it's intended to harm the flag.
As I explained, the content of the statute is really irrelevant. It's what the reason for the statute is. But let's go beyond that point.
Once you purport to have a neutral statute, then you can't afford to have any exceptions. Once you make an exception for the dignified or respectful destruction of the flag, you no longer have this purported neutrality. I don't see a way of destroying flags under Senator Biden's proposal.
Now, I heard him say in testimony here that when it no longer becomes a symbol, then you can destroy it. Well, who makes the determination as to when it's no longer a symbol?
Mr. DOUGLAS. So that his bill, even if we were to try a statutory alternative, would have to have some repealer clauses with it. It, otherwise, facially is inconsistent with some of these other statutes we've talked about under 36 U.S. Code?

Mr. BARR. I think, for tidiness it would, but it wouldn't be—you know, there are laws passed that sometimes contradict other laws.

Mr. DOUGLAS. But knowing that this would be tested constitutionally, we'd have to be sure that if we're doing a statutory alternative, which is what some propose, that they go through and repeal those statutes that would be inconsistent with their solution to this problem?

Mr. BARR. I think that would be part of the stratagem. To make the stratagem look realistic, I think you would have to try to go through and do that. But the Court is not going to be fooled by any of this. It knows what the reason for the rule is.

Mr. DOUGLAS. And finally, one last question, Mr. Chairman. Are you aware of any cases that say that when the Constitution uses the word "States," it doesn't really mean States, it also means towns, cities, counties, school districts, village districts?

I know "persons" in the 14th amendment has a fairly broad sweep to pick up corporations and so forth, but otherwise, as "States," is used, if you could give us some research on that, I think that would be helpful because we either have to add legislatures to the amendment, or otherwise, get some clarity as to whether we mean "States" or just "Government" generically.

Thank you.

Mr. EDWARDS. Thank you very much, Mr. Barr. We appreciate your testimony.

Our next witness is Judge Robert Bork. Judge Bork is the John M. Olin scholar in legal studies at the American Enterprise Institute for Public Policy Research.

From 1982 to 1988, he served on the U.S. Court of Appeals for the District of Columbia Circuit. He was U.S. Solicitor General from 1973 to 1977, and Acting Attorney General from 1973 to 1974. Judge Bork has taught at Yale Law School, and was a partner in the law firm of Kirkland & Ellis.

Judge Bork, we welcome you. Without objection, your full statement will be made part of the record and you may proceed.

STATEMENT OF ROBERT M. BORK, AMERICAN ENTERPRISE INSTITUTE

Mr. BORK. Thank you, Mr. Chairman, members of the committee.

I'm very pleased to testify at the invitation of the committee concerning the proposed amendment to the Constitution of the United States that would restore to Congress and the States power to prevent the physical desecration of the American flag.

By the way, I should say that this is not the first time an amendment would have been adopted reversing a Supreme Court interpretation of the Bill of Rights.

There is no need to begin my testimony with a tribute to the flag as a symbol of the Republic and the freedoms for which it stands. Reverence for that is why we're all here. But it's not just reverence. If a multitude of individuals are also to be a community, they must have symbols by which they live. Symbols that express their identity as a community.

The United States is a very large and increasingly pluralistic and diverse society, and the one symbol that expresses our exist-

Mr. CHAIRMAN. Last but not least is Mr. Barr. Mr. Barr, would you please come forward?

Senator THURMOND. Mr. Barr, I have another appointment. I have to go to the White House in just a little bit. I have studied your record. You seem to be well prepared to fill this position. It is a very important position. You are practically adviser to the President and his lawyer, as well as the Attorney General. You have a big responsibility and I wish you well. I will be glad to support your nomination.

TESTIMONY OF WILLIAM P. BARR, FALLS CHURCH, VA, TO BE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. BARR. Thank you, Senator.

Senator THURMOND. Thank you, Mr. Chairman.

The CHAIRMAN. There was one reference, Mr. Barr, to Alice in Wonderland earlier by a prosecutor, and every time I hear it I think of my chairman, who is always my chairman—he is no longer chairman, but he still runs things—Senator Thurmond.

I think in "Alice in Wonderland," wasn't there a line saying "hang first and trial later," or whatever? Well, if you notice, there is some, paraphrasing—I am very careful about quoting these days—our former chairman, if you notice, announces his verdict before the hearing begins. And you should be very pleased to know, all of you, that before the hearing was held he was going to support you all.

But, Mr. Barr, we are going to proceed to your nomination now. You are going to be the Assistant Attorney General, if confirmed, in charge of the Department's Office of legal Counsel.

Mr. Barr, you are the first Justice Department nominee to appear before the committee in the One Hundred First Congress, and on behalf of the committee I want to welcome you. Mr. Barr, the position for which you have been nominated is, in my view, an extremely important one. Indeed, it is among the most important positions in the Department of Justice.

As described in a 1988 article in the New York Times, the Office of Legal Counsel, quote, "serves as the executive branch's brain trust on the most fundamental issues of Presidential power," end of quote.

One need only look at the published opinions of the Office of Legal Counsel to appreciate the breadth and complexity of the issues the office addresses. In turning the pages of some of these recent volumes, one comes across such issues as the constitutionality of recess appointments, the use of polygraph examinations, the President's authority to control the export of hazardous materials, and the constitutionality of the legislative veto.

There is no doubt that the person who heads the Office of Legal Counsel must deeply appreciate the importance of scholarship and must have a healthy enthusiasm and admiration for the Constitution.

Beyond those attributes, perhaps the most important responsibility of the Office of Legal Counsel is to provide legal advice to the

Attorney General. The person who heads the office, in effect, becomes the Attorney General's lawyer.

But like every public official, the person in charge of the Office of Legal Counsel also owes allegiance to the constitutional law of the land. In that regard, one of the issues that I intend to discuss with you today is your independence, how independent you will be.

More specifically, I would like to determine the action you should take should that inevitable situation arise where your legal advice is directly at odds with the policy that the Attorney General and the President would like to pursue.

I also want to discuss your views on the doctrine of separation of powers. The head of the Office of Legal Counsel is responsible for making recommendations to the President and the Attorney General about the resolution of legal and constitutional issues concerning the executive branch. He must be sensitive to the legitimate role of Congress and the judiciary as coequal branches of Government.

There are a number of other matters I intend to pursue with you as well. If I am unable to reach those matters today, I will submit them in writing to you, as I will to some of the judicial nominees.

Mr. Barr, your predecessors, former Judge Malcolm Wilkey, for whom you clerked, to Nicholas Katzenbach, to Antonin Scalia, to name just a few, faithfully interpreted the statutes and their legislative history, and carefully considered constitutional history and doctrine in fulfilling their responsibility as counsel to the Attorney General and ultimately to the President of the United States. Should you be approved by this committee and confirmed by the Senate, it will be my hope and expectation that you will do the same.

Now, Mr. Barr, one of the most important responsibilities is to tell high-ranking administration officials that there is no legal basis for a course of action that they may have proposed. That can be a lonesome and often difficult task, especially for a young man, and I mean that sincerely. The pressure of and the weight of the offices you are advising are significant.

I have been here for five Presidents and when I see a President in the backyard of the White House, when I see a President up here or I see a President on the stump, it is one thing. But when I get summoned into the Oval Office, no matter how many times it occurs, there is something about the majesty of this Government that has an impact. And you will be under the same pull and tug, potentially, of the majesty of the office of Attorney General, as well as the President. And as I said, it can be a lonesome task.

I would like to hear your views on the issue of your independence, which I believe is one of the most important issues that confronts the Office of Legal Counsel. What course of action would you take when faced with what you believe to be a conflict between your legal analysis and a proposed policy?

Mr. BARR. Senator, I had never met Attorney General Thornburgh before I went to talk to him about a position in the Department of Justice, and we specifically discussed this issue and he told what he expected of me.

He told me he wanted someone in the Office of Legal Counsel who would give him intellectually honest, objective advice as to

what the law is, without any tilt or spin or wiggle, but to shoot straight and let the chips fall where they may.

You know the Attorney General, Senator, and you know that is the way he operates, and it is on that basis that I accepted the position.

The CHAIRMAN. What will you do if confronted by this Attorney General or any other Attorney General with a situation where your clear legal judgment is to say no and the policy judgment is to say yes? What do you believe your responsibility is under those circumstances? Is it merely to render the opinion?

Mr. BARR. Do you mean the Attorney General's policy judgment?

The CHAIRMAN. The policy of the administration as executed either by the Attorney General or by the President.

Mr. BARR. Well, Senator, if I gave my legal opinion, my best legal judgment to the Attorney General on an issue and he disagreed with that legal judgment, I would be disappointed. I would try to persuade him that I was correct, but if he reached a different legal conclusion on an issue where there were two possible outcomes—and as you know, most of the questions that come to OLC are difficult issues—he is, after all, the chief lawyer in the administration. He is the President's lawyer; he is the lawyer for the Cabinet.

And as long as I felt it was a reasonable and plausible position he was taking in good faith, I would accept that. Now, if——

The CHAIRMAN. How about if you didn't believe that?

Mr. BARR. Excuse me?

The CHAIRMAN. How about if you reached a different conclusion; that it was not plausible?

Mr. BARR. If I believed that any official in the Government was violating the law, I would bring that to the attention of my superiors and———

The CHAIRMAN. You see, the problem is your superiors are the Attorney General and the President. This is not an idle question.

Mr. BARR. Well, Senator———

The CHAIRMAN. And your confirmation depends in large part upon how you answer the question. I mean it sincerely. In my experience here in 17 years, we have had more than one occasion when an Attorney General has pursued a policy which was clearly beyond the law.

Mr. BARR. OK. In the situation where the Attorney General was pursuing an illegal act, I would resign my position.

The CHAIRMAN. I hope you mean that.

Mr. BARR. Senator, Judge Wilkey was kind enough to share a copy of the letter that he sent to this committee, and he has known me for a long time and I think he says in that letter that he feels that I would not tolerate any illegal action and I would give up a position in Government if that were the case.

The CHAIRMAN. You are correct. We will submit for the record the Wilkey letter.

[Information follows:]

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Department of State

TELEGRAM

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FM AMEMBASSY MONTEVIDEO
TO SECSTATE WASHDC IMMEDIATE 8778
USDOJ WASHDC IMMEDIATE

UNCLAS MONTEVIDEO 01921

STATE PLEASE PASS TO SENATORS BIDEN AND THURMOND

DOJ FOR WILLIAM P. BARR, ROOM 5224

E.O. 12356: N/A
TAGS: AMGT
SUBJECT: OFFICIAL-INFORMAL

1. FOLLOWING IS TEXT OF A LETTER FROM AMBASSADOR WILKEY TO SENATORS BIDEN AND THURMOND AND FOR WILLIAM P. BARR AT DOJ.

2. BEGIN TEXT:

THE HONORABLE JOSEPH BIDEN
CHAIRMAN
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
WASHINGTON, D. C. 20510

- IN RE: WILLIAM P. BARR
- NOMINEE FOR ASSISTANT ATTORNEY GENERAL
- OFFICE OF LEGAL COUNSEL

DEAR SENATOR BIDEN:

MY LONG-TIME FRIEND AND FORMER LAW CLERK BILL BARR HAS BEEN NOMINATED BY PRESIDENT BUSH TO BE HEAD OF THE OFFICE OF LEGAL COUNSEL IN THE DEPARTMENT OF JUSTICE. THIS IS AN OUTSTANDING APPOINTMENT IN EVERY WAY. I SAY THIS FROM TWO POINTS OF VIEW. MY OWN EXPERIENCE AS HEAD OF THE OFFICE OF LEGAL COUNSEL IN THE LAST YEARS OF THE EISENHOWER ADMINISTRATION AND MY PERSONAL ACQUAINTANCE WITH THE QUALIFICATIONS OF BILL BARR. INCIDENTALLY, IF CONFIRMED, HE WILL TAKE OVER THE OFFICE OF LEGAL COUNSEL AT THE SAME AGE AT WHICH I DID, 39.

I KNOW WHAT IS REQUIRED OF THIS OFFICE. BILL BARR HAS A REMARKABLE BLEND OF INTELLECTUAL BRILLIANCE AND GOOD COMMON SENSE. BOTH ARE NEEDED TO PROVIDE WISE COUNSEL TO THE ATTORNEY-GENERAL, TO THE OTHER EXECUTIVE DEPARTMENTS AND AGENCIES, AND INDIRECTLY TO THE PRESIDENT. SOMETIMES WE HAVE HAD IN THIS OFFICE A BRILLIANT INTELLECT WHO LACKED COMMON SENSE, OR, SOMEONE WITH COMMON SENSE, BUT LACKING THE INTELLECTUAL BRILLIANCE TO GAIN THE RESPECT OF THE VERY TOP-NOTCH LAWYERS WHO MAKE UP THE OFFICE OF LEGAL COUNSEL. IN NEITHER CASE HAS THE RESULT BEEN GOOD. BILL BARR WILL BRING BOTH NECESSARY ATTRIBUTES TO THIS VERY RESPONSIBLE POSITION.

HE HAS MANY OTHER QUALITIES WHICH ARE NECESSARY. THE FIRST IS ABSOLUTE INTELLECTUAL HONESTY AND INTEGRITY. BILL BARR HAS THE GUTS TO SAY NO WHEN SAYING NO IS THE BEST ADVICE HE CAN GIVE. I THINK HE WOULD HAVE THE COURAGE TO DO WHAT IS NOW ALMOST UNTHINKABLE IN WASHINGTON: RESIGN ON A QUESTION OF PRINCIPLE, IF IT WERE THAT IMPORTANT AND APPROPRIATE. HE HAS A CAPACITY FOR BRILLIANT INTELLECTUAL ANALYSIS, A VERY CLEAR AND CONCISE WRITING STYLE, AN EASY WAY OF DEALING WITH PEOPLE AND GETTING THE MOST OUT OF THEM, AND A SENSE OF UNDIVIDED LOYALTY.

IN MANY WAYS, THE OFFICE OF LEGAL COUNSEL IS THE FOCAL POINT OF LEGAL ANALYSIS IN THE WHOLE EXECUTIVE BRANCH, AND OF THE EXECUTIVE BRANCH'S RELATIONSHIP ON LEGAL MATTERS WITH THE OTHER TWO BRANCHES. HE SERVED IN THE WHITE HOUSE UNDER PRESIDENT REAGAN FOR A YEAR AND A HALF: HE SERVED ON THE PRESIDENTIAL TRANSITION TEAMS OF 1980 AND 1988; HE CLERKED FOR ME ON THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT, FOR A YEAR. WHILE ATTENDING GEORGE WASHINGTON UNIVERSITY LAW SCHOOL HE WORKED FOR FOUR YEARS IN A FULL-TIME JOB AT THE CENTRAL INTELLIGENCE AGENCY IN THE LEGISLATIVE LIAISON SECTION, THUS GIVING HIM CONTACT AND UNDERSTANDING OF THE CONGRESSIONAL BRANCH. HE HAS HAD SEVEN YEARS OF SERVICE IN THE FEDERAL GOVERNMENT, CONTACT WITH ALL THREE BRANCHES, AND NINE YEARS OF PRIVATE LAW PRACTICE, THUS ALL IN ALL PROVIDING AN EXTRAORDINARILY WELL-ROUNDED EXPERIENCE FOR ONE HIS AGE.

YOU MAY EVALUATE MY ABOVE OPINIONS BY MY CONTACTS WITH BILL BARR. I HIRED HIM AS A LAW CLERK FOR THE 1976-77 TERM OF COURT, WHEN I FOUND HE HAD FINISHED SECOND IN HIS GEORGE WASHINGTON UNIVERSITY LAW CLASS, COMPETING WITH BOTH DAY AND NIGHT STUDENTS, WHILE

HOLDING DOWN HIS FULL-TIME LEGISLATIVE LIAISON JOB WITH THE CENTRAL INTELLIGENCE AGENCY. HE IS ONE OF THE ALL-TIME OUTSTANDING CLERKS AMONG MY 37, WHO ARE ABSOLUTELY TOP-NOTCH LEGAL BRAINS. WE KEPT IN CLOSE AND FRIENDLY CONTACT OVER THE YEARS, AND WHEN I LEFT WASHINGTON I ENTRUSTED THE SALE OF MY CONDOMINIUM TO BILL. I HAVE FOLLOWED HIS CAREER IN THE GOVERNMENT AS WELL AS IN PRIVATE PRACTICE WITH GREAT INTEREST, AND KNOW THAT HIS COLLEAGUES IN EVERY POST HAVE HAD THE VERY HIGHEST OPINION OF HIM AND HIS WORK.

BILL BARR WILL BE AN OUTSTANDING HEAD OF THE OFFICE OF LEGAL COUNSEL, IF THE SENATE SEES FIT TO CONFIRM HIM. I RESPECTFULLY URGE YOU TO DO SO.

SINCERELY,

MALCOLM R. WILKEY

CC: THE HONORABLE STROM THURMOND
- RANKING MINORITY MEMBER
- COMMITTEE ON THE JUDICIARY

- WILLIAM P. BARR
- DEPARTMENT OF JUSTICE, ROOM 5224

END TEXT. WILKEY

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The CHAIRMAN. Mr. Barr, in several important ways, the Office of Legal Counsel is similar to the Office of Solicitor General. Both offices have longstanding traditions of independence and extraordinary legal competence. The occupants for both offices for the most part have done their best to resist partisan political posturing and to avoid in any way politicizing the office. The occupants of both offices have considered their client to be not just the President of the United States, not just the Attorney General, but the Constitution itself.

Since the time that you were first considered for this office, I am sure you have had a chance to reflect upon this tradition. What are your views on the role of the Office of Legal Counsel and on your personal commitment to this tradition? More specifically, do you see your office as legal in nature, policy oriented in nature, or something else altogether?

Mr. BARR. Senator, I view the office as purely legal in nature, and I think the role of the office can be stated very simply, and that is exactly what the Attorney General asked me to do in that job, and that is to provide careful legal judgments based on objective conclusions about where the law is, where the law stands today, based on careful research and judicious weighing of all the competing arguments, and then coming to the best possible judgment as to what the law is.

And in that respect, it may differ from the role of the Solicitor General's office in the sense that I don't believe it is the role of the Office of Legal Counsel to try to push the law one way or the other, or to play an activist role in the evolution of the law. I think the office's role is to inform the Attorney General as to where the law stands.

Now, I think the tradition of the office—its great value in the Government has been precisely its capacity to do that and to build up the reputation that it is the one place you could go perhaps in the executive branch for that objective opinion that is not driven by any particular policy concerns.

And I am very concerned about maintaining that tradition, strengthening it, and carrying it forward, and if I can strengthen that tradition and at the end of my time there people have that perception of the office, then I will be satisfied with the job I did.

The CHAIRMAN. Well, I agree with your answer, and I would respectfully suggest to you that you must strengthen that position. And if you do, you will not only serve your Nation well; you will serve yourself well. You will serve yourself well not only in that office, but well beyond that office long after you have vacated that office; because, if you notice, the people we all remember in this town and this country are the people who have been the people of principle. And the job which you have been nominated for is one that should be done as you have suggested.

As you well know, the only matters that must go through your office, the Office of Legal Counsel, pertain to Executive orders. Beyond that, the Office of Legal Counsel renders an opinion only when it is asked to do so.

Now, do you have any indication, and if you do, would you share it with us, to what extent the Attorney General or the President

plan on using the office beyond what they must use it for, which is to render opinions on Executive orders?

Mr. BARR. Senator, I haven't been in an acting capacity and I haven't been in the office. I am still at Shaw Pittman, although I have tried to spend time over at the Department of Justice.

But I have talked a great deal to the Attorney General and I have talked to the counsel to the President, and I have every indication that the Office of Legal Counsel will continue to play the role it historically has of responding to executive departments and the White House and the Attorney General himself for legal advice on a broad range of issues.

A great deal of the work of the office doesn't get much play in the press. Probably 75 percent of the work of the office is responding to requests from different agencies and departments about an interpretation of some arcane law, and that takes a lot of work, but it is very important work and I think that will continue.

The CHAIRMAN. Why do you think you were nominated? I am not being facetious when I ask that question. Was it because of your—why do you think you were nominated? Obviously, there are a lot of women and men, like yourself, who possess the qualities and capabilities for this job. I mean, why do you think you got to that point?

Mr. BARR. Well, I think it is a combination of factors, Senator. First, I knew a lot of the people who are involved in the Bush administration. I started in Government at the Central Intelligence Agency in 1973 and stayed there through 1977, I believe, and I first had exposure to President Bush when he was the Director of Central Intelligence, saw him in action then and had great admiration for him and have been a supporter of his since that time, and was honored by serving in the White House for a short period of time during the first term of the Reagan administration.

And during that time, I met many of the individuals who are holding positions now at the White House and as Cabinet secretaries in other departments. Partly through those associations, I ended up at the transition and was giving legal advice to people about different matters relating to the transition.

And, of course, during the Reagan administration, even when I was on the outside in private practice, people would talk to me and ask for my judgment on various matters.

The CHAIRMAN. That seems sufficiently clear. I appreciate your answer.

Let me suggest to you that I only have a few more questions, but as you probably know, much of what you will be asked to render a judgment on relates to constitutional issues. Based on your answers to the committee questionnaire, it seems that many of the matters on which you have worked did not involve constitutional issues.

Could you fill in some of the details about, and elaborate on, your constitutional law experience?

Mr. BARR. My constitutional experience is—direct experience in practice is relatively limited, Senator. I have been in private practice for 9 years at a large Washington law firm. During that time, I have handled a few matters involving constitutional law. Those principally related to first amendment issues.

Unfortunately, I didn't have clients who would ask for my legal advice on some of the important separation of powers questions that you mentioned earlier, although I wish I had had those clients.

But at the Central Intelligence Agency, we did, obviously, encounter a lot of constitutional issues, separation of power issues in those days. You will recall that those were difficult times where the investigations of the Central Intelligence Agency were going on and people were talking about how to control the intelligence function of our Government, and that raised a number of issues. And then I clerked for Judge Wilkey on the District of Columbia Circuit, where we did handle constitutional issues.

I have always been interested in the law generally. I have read widely in the constitutional law area, and I also read widely in the area of American history and history is a very important part of our constitutional law. That is basically my background in the area, Senator.

One of my predecessors told me that—one of my distinguished predecessors told me he had never heard of the appointments clause before taking over the Office of Legal Counsel, but he soon became an expert in it. And a lot of the issues that the office deals with are not the kind of issues that you would really encounter outside the office.

The CHAIRMAN. You will also hear of the faithful execution clause a lot, too; and I will submit a couple of questions in writing to you on that issue.

Mr. BARR. Yes, sir.

The CHAIRMAN. Mr. Barr, in the famous case *Youngstown Sheet and Tube Company* v. *Sawyer*, the Supreme Court held that President Truman acted outside his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills.

In his concurrence, Justice Robert Jackson wrote:

> While the Constitution diffuses power, the better to secure liberty, it also contemplates that practice will integrate and disperse powers into a workable government. It enjoins upon its branches separateness, but interdependence; autonomy, but reciprocity.

I believe that the separateness and interdependence and this autonomy and reciprocity truly are the touchstones of our Nation's greatness. History has demonstrated time and again the genius of the system of checks and balances that the framers created.

Should you be confirmed, you will be confronted with many questions relating to that doctrine of separation of powers. In that regard, I would like you to respond to the quote I just read from Justice Jackson's concurrence and provide the committee with your views on the notion of the separation of powers doctrine.

Mr. BARR. Well, I agree with Justice Jackson's remarks in his concurring opinion in that case. It is a very broad issue, what are my views on separation of powers.

The CHAIRMAN. Start anywhere you would like.

Mr. BARR. Well, let us start with Aristotle. The idea of separation of powers does go back to—well, our Constitution is a unique document in several respects, but one of which is that it is the product of both experience and theory.

The theory of separated government goes way back to the Greeks and the Romans, and the idea that the most stable form of government and the government that is least disposed toward degenerating into some form of tyranny is a government that separates the powers.

And I think through the course of their struggle for independence, those notions took on added meaning for the framers, and through the experience of the Revolution and the federation, coupled with that theory, they formed a government with generally three divided powers.

And the purpose of it, as Justice Jackson says, is to protect the liberties of the people, not necessarily to provide the most efficient form of government, but a government that will ultimately protect the liberties of the people.

Now, in certain areas, they permitted those powers to overlap by granting and conferring on the various branches, particularly the political branches, powers that—well, actually, the powers that would theoretically be awarded to the other branch.

For example, the President is given a role in legislation through the veto power. The Senate is given a role in the appointments process through this proceeding we are going through here, the advice and consent power.

The CHAIRMAN. Some think, by the way, that the President was given a role in that process by the Constitution, but that is another issue.

Mr. BARR. OK, Senator. But by these grants of power, they gave each of the branches significant checks on the activities of the other branches. And sometimes that, as I say, doesn't lead to efficient government, but over the long run the freest government.

The CHAIRMAN. I have four more questions and what I am going to do, in the interest of time and the interest of your ability to more fairly respond to them—they all relate to things that are going to have a significant impact upon your office—is submit them in writing.

I would like to know your view and notion of stare decisis and how bound we are by it; and under those circumstances when the Solicitor General makes the occasional call to you, what you are going to be guided by. I also have a question about gray mail, as you will remember from your days at the CIA, and also questions about the faithful execution clause, which you will, I suspect, be asked to speak to more.

I will submit all of those in writing. The quicker you can get back to me in answering those questions, the quicker we can move on the vote on your confirmation.

If I was complimenting the others, I think the medal of honor goes to mom and your three beautiful girls, having absolutely amazing—it is worse than being in church, isn't it? They are looking at me like, my goodness. But you girls have been really, really lovely, and your mommy and daddy are not only brave, but they obviously knew what good girls you were before they brought you.

I compliment you both on your children——

Mr. BARR. Thank you, Senator.

The CHAIRMAN [continuing]. And also on your willingness to take this job. I know moving from the private sector to taking this job is

going to be a little sacrifice for mom and the kids. The only thing I can tell you is thank God they are not college age. So I thank you again.

[Pertinent information follows:]

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WILLIAM P. BARR

April 10, 1989

Honorable Joseph R. Biden
Chairman
Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed my responses to the written questions which you, Senator Thurmond, and Senator Grassley referred to me at the close of my hearing on April 5.

I appreciate the opportunity to make this submission.

Sincerely,

William P. Barr

cc: Honorable Strom Thurmond
Ranking Minority Member
Senate Committee on the Judiciary

RESPONSES OF WILLIAM P. BARR
TO QUESTIONS FROM SENATOR BIDEN

Question: Article II of the Constitution specifies in Section 3 that the President "shall take care that the laws be faithfully executed." This is a rather unique clause in the Constitution, as no other speaks in terms of taking "care" and acting "faithfully." It is also an exceedingly important clause, since it is a broad source of the President's power in domestic affairs. And it is a clause that the Office of Legal Counsel must often address.

Can you give me your thoughts on the Faithful Execution Clause?

In the context of the Faithful Execution Clause, let me ask you about the relationship between the Executive Branch and the Supreme Court on constitutional issues. In a now well-known speech in October 1986, former Attorney General Meese drew a distinction between "the Constitution and constitutional law." Mr. Meese asserted that

> "if a constitutional decision is not the same as the Constitution itself, if it is not binding in the same way that the Constitution is, we as citizens may respond to a decision with which we disagree."

Do you believe, as this passage from Mr. Meese's speech suggests, that the Executive Branch is free to disregard a decision by the Supreme Court that it concludes cannot be squared with the Constitution -- that the Executive Branch is free, in other words, to choose not to execute the laws because its interpretation of the Constitution differs from the Supreme Court's?

Answer:

Part 1: As part of the principle of separation of powers, the Framers believed that the power to execute the laws and the power to make the laws should be kept in separate hands. The Faithful Execution Clause reflects this belief. I read the Clause, together with the first sentence of Article II, as conferring on the President not only the power -- but indeed the affirmative responsibility -- to execute the laws. The President is not free to enforce only those laws he deems wise, while ignoring those with which he disagrees. Moreover, the Clause charges the President with responsibility for superintending the faithful execution of the law by others.

Part 2: I believe that "[i]t is emphatically the province and duty of the judicial department to say what the law is."

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Consequently, I do not believe that the Executive Branch is free to disregard a decision by the Supreme Court. I view the Supreme Court rulings as binding on the Executive and Congress.

Question: One of the most fundamental doctrines in Anglo-American jurisprudence is the doctrine of stare decisis -- "to stand by things decided." It is a principle that counsels respect for precedent. And it is a principle that must be both firm and flexible -- firm enough so that there is stability in the law, yet flexible enough so that erroneous decisions can be corrected.

There undoubtedly have been, and will continue to be, occasions when the solicitor general consults with the office of legal counsel on constitutional issues raised in cases before the supreme court.

What are the standards and principles to which you would look in determining when it is appropriate for the Justice Department to urge the Supreme Court to overturn one of its prior decisions?

Answer: I believe stare decisis is a policy of fundamental importance to our judicial system. I would not lightly recommend departure from the policy. Stare decisis promotes stability, ensuring that, from case-to-case, the law will have a predictability on which people can rely. It promotes the deliberate evolution of legal doctrine, and the impartial, even-handed administration of justice. It also fosters respect for the integrity of the courts. As Justice Frankfurter explained, however, "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." Helvering v. Hallock, 309 U.S. 106, 119 (1940).

If, in a particular case, the Solicitor General asked my advice on whether it was appropriate to urge the Supreme Court to overturn one of its prior decisions, I would consider a number of factors. These include: whether the prior ruling seems clearly inconsistent with basic constitutional principles; whether society's settled expectations and reliance interests would be substantially disrupted by overruling the prior precedent; whether the prior ruling has proved unworkable, bred confusion, distorted other well-settled areas of the law, or led to unforeseen and anomalous results; whether overruling the prior case would undermine public confidence in the integrity of the

judicial system; and whether there are other means of ameliorating the prior precedent.

Question: During the past several years, much attention has been paid to the Independent Counsel law. There have been attacks on its constitutionality, led in large part by former members of the Reagan Justice Department. Fortunately, in my view, those attacks failed, and in an opinion last year, the Supreme Court firmly upheld the constitutionality of the law.

More recently, the Independent Counsel has been in the news in the context of the Oliver North case. The question there is no so much one of constitutionality but of the operation of the Independent Counsel law in cases involving the classified information procedures act -- the so-called "Graymail" statute, which I authored in 1980. It's quite possible that at some point in the not-too-distant future, we in the Congress will have to take a look at the relationship between those two laws in that narrow set of cases in which an Independent Counsel has been appointed.

If we undertake such a review, I for one will surely want to hear the views of the Justice Department. And I suspect that the Office of Legal Counsel will offer its opinion to the Attorney General as the department prepares its views.

My question is two-fold. First, what is your opinion on the constitutionality of the Independent Counsel statute? I recognize that the Supreme Court's opinion is the law of the land, but I am still interested in your views. Second, to the extent that you've thought about the issue, what are your views on the relationship between the Independent Counsel law and the Graymail law?

Answer: First, prior to Morrison v. Olson, 108 S.Ct. 2597 (1988), I entertained doubts about the constitutionality of the Independent Counsel statute. I had thought that the statute might violate the doctrine of separation of powers by impinging upon the President's control over prosecutorial functions. I also had thought that the statute might violate the requirements of the Appointments Clause. These issues were addressed in Morrison, and, of course, I fully accept the Supreme Court's ruling. Constitutional issues will undoubtedly continue to arise in other applications of the statute in particular cases. Should such issues arise, I would attempt to resolve them in a manner consistent with the Morrison decision.

Second, I am generally aware of the Graymail statute, and my impression is that, overall, it has been successful and worthwhile legislation. To be frank, however, I have not given

thought to the relationship between the Graymail statute and the Independent Counsel law. From newspaper accounts I am aware that issues have arisen in the North case. However, I have no familiarity with how that trial is being handled or how well the two statutes have meshed in that case. My impression, however, is that, by and large, disputes concerning classified information have been handled satisfactorily to date.

If I am confirmed and ultimately asked to provide OLC's views on this matter, I would certainly want to study more closely the practical experiences to date before venturing an opinion.

RESPONSES OF WILLIAM P. BARR
TO QUESTIONS FROM SENATOR THURMOND

Question: The Assistant Attorney General in charge of the Office of Legal Counsel assists the Attorney General in his function as legal advisor to the President and the executive branch agencies. Would you tell the Committee how your background and experience have prepared you for this extremely important position?

Answer:

I believe that my experience in both the public and private sectors have helped to prepare me for this position. My government service has given me exposure to both national security and domestic legal matters, as well as exposure to the operation and interrelationship of all three branches of government. At the CIA, I worked in legislative affairs and saw the importance of cooperation between the two political branches. At the U.S. Court of Appeals, a court that handles the kind of complex administrative and constitutional matters that make up so much of the work in the Office of Legal Counsel, I learned how our judicial system works. At the White House, I was exposed to the broad range of legal issues that arises in the executive branch's operations and its relationship with Congress.

I have also practiced for nine years with a large Washington, D.C. law firm. My practice has dealt with federal regulatory and administrative matters over a wide range of issues. I believe that, through these experiences, I have developed the judgment that is essential in this position.

Question: One of the major responsibilities of the Office of Legal Counsel is to provide legal advice for the Attorney General. In effect you will serve as the Attorney General's lawyer and the General Counsel for the Department of Justice. If an occasion should arise when your best legal advice conflicted with a policy which you knew the Attorney General wished to pursue, what actions would you take in an attempt to resolve this conflict?

Answer:

As I discussed with Chairman Biden during my testimony, the Attorney General has made it clear that he expects me to provide him, the White House, and others to whom the Office renders advice, the most objective, well-reasoned legal opinions possible, irrespective of policy objectives. I accepted the appointment as Assistant Attorney General on this understanding of my role, and I fully expect to fulfill my duties in this manner.

As to particular matters, as you know, the Attorney General is the chief law enforcement officer for the United States, not the Assistant Attorney General. As a consequence, should the situation arise that the Attorney General after discussion and careful consideration of relevant authorities reaches a legal conclusion different from that reached by my Office, I will respect that good faith determination. Given the difficulty of the issues that are brought to OLC for ultimate resolution, good faith differences of opinion are to be expected and, indeed, are not uncommon.

On the other hand, should I ever conclude that officials, including my superiors, are knowingly and willfully violating the law, I would do all within my power to prevent the wrongdoing. If other means failed, I would resign my position rather than be a party to ongoing violations of law.

RESPONSES OF WILLIAM P. BARR
TO QUESTIONS FROM SENATOR GRASSLEY

Question: 1. Please give me your general views on the constitutionality of arbitration of issues in controversy arising from administrative programs. Specifically address the following:

(a) To what extent does Article I forbid Congress from delegating functions to private deciders?

(b) Is arbitration by private parties in government programs consistent with Article II's grant of executive power to the President?

2. If you believe that Appointments Clause or delegation doctrine concerns prevent conferral of decisional authority on private arbitrators, please explain how this view can be reconciled with the many federal programs in which private decisionmakers now play a role (e.g., procedures under disputed Medicare claims, appeals from Department of Education grant disallowances, employee grievance procedures under the Civil Service Reform Act of 1978).

Answer:

Based upon my experience in private practice, I am quite sympathetic toward ADR. I myself have participated in arbitration and have found this to be more efficient, expeditious, and generally more satisfactory to my clients than full-blown litigation. In some of the complex cases I have handled as a private practitioner, I have proposed the use of ADR techniques. As a general matter, I favor ADR wherever appropriate.

I have neither examined in detail nor formed an opinion on the extent to which ADR techniques can be constitutionally employed in the context of government regulatory and administrative decisionmaking. As you know, OLC has raised some constitutional concerns about such techniques in the past. The fact that the Office has previously addressed the issue, however, will not preclude me from taking a fresh look at the question. If confirmed, I will address each legal question that comes before me with objectivity and an open mind.

Your first question poses a two-fold inquiry on the extent to which vesting decisionmaking authority in a private party encroaches upon legislative power under Article I and/or executive power under Article II. These are difficult questions involving fundamental constitutional principles. As a consequence, I am not in a position to offer an opinion on either issue without fully researching applicable authorities, reflecting upon that research, and considering all pertinent arguments. For example, it is my recollection that several of

the cases that have a bearing on these issues are not necessarily consistent and would require particularly careful study.

However, without wishing to be bound, it seems to me that the constitutionality of a particular arbitral scheme under either Article I or Article II may well turn on the particular circumstances involved, including such factors as the scope of the delegation, the binding or precedential nature of a decision with respect to nonparties, the nature of the executive functions exercised, and the extent to which arbitral decisions are subject to review.

The second question assumes that I have concluded that the delegation of decisionmaking authority to private parties is unconstitutional and asks me to reconcile that conclusion with certain existing statutory schemes. As I say above, I have reached no conclusion as to the constitutionality of ADR techniques in government programs. It may well be that there would be no inconsistency between any conclusions I might reach with respect to the issues in Question 1 and the cited programs. In any event, in examining these issues, I would want to study any relevant, applicable authority under the cited programs.

The CHAIRMAN. There is testimony submitted by the People for the American Way who ask that they be able to, as others are able to, comment on the three judicial nominees. I ask unanimous consent that their statement be placed in the record at this time.

[Information follows:]

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

Other than future retirement benefits, which I will receive from Exxon Corporation due to my former employment with that company, I expect to derive no future benefits from any previous business relationships, professional services, firm memberships, former employers, clients, or customers.

2. Explain how you will resolve any potential conflict of interest, including, the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I will continue what I have done as a State District Judge, to recuse myself in any case involving my husband's law firm and any case involving as a party Exxon or one of its affiliates. I own a number of shares of Exxon stock both outright and through an IRA. Another IRA owns stock in other companies, and I keep informed of the stocks in that fund, and would recuse myself in any case involving as a party those companies. I have not had to do that at this point in my state court career.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I do not.

4. List sources and amounts of all income received during the calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (If you prefer to do so, copies of the financial disclosure report, required by

the Ethics in Government Act of 1978, may be substituted here.)

A copy of the financial disclosure report is attached.

5. Please complete the attached financial net worth statement in detail. (Add schedules as called for).

Attached.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Beyond working as a campaign worker in putting labels on envelopes, making signs, and handing out literature for various state judicial candidates over the years, I have never held a position or played a role in a political campaign except my own. In 1986 I ran for Judge of the 189th Judicial District Court. As the candidate I was involved in all aspects of the county-wide campaign from putting on mailing labels to making speeches.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

My pro bono experience has been primarily in areas of law outside of my usual legal practice, and therefore it has been particularly rewarding to me as a lawyer. Several examples are: In 1976 I wrote the will of an elderly lady who had worked all her life. She had one piece of real property which she wanted to leave to her daughter, but was otherwise disadvantaged. In 1986 she died and her son-in-law the Reverend Culverson Lee Punch, who had been named executor, asked me to file the will for probate and represent him in the probate hearing. I had never drafted a will or attended a probate hearing before but I learned how to do this as the family was unable to afford an attorney; In 1986 I performed two legal tasks for the Missionary Brothers of Charity, a branch of Mother Theresa's group which lives in strictest poverty and serves the poor. I examined the title of a piece of property which they were given, and I obtained their Non-Profit Corporation Charter from the State of Texas; I have also handled a divorce which included child custody arrangements.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that individually discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

I have never belonged to any such group.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

I am not aware of a formal selection commission in my jurisdiction that recommends candidates for nomination to the federal courts. Senator Gramm has, however, established a committee which interviews potential candidates for the federal judiciary to aid him in his recommendation process.

I interviewed with that group, but I do not know whether or not I was recommended by the committee. I believe that I was recommended, since I was one of several persons who were interviewed by Senator Gramm. My experience in the judicial selection process began with my telephone call to Senator Gramm's office, asking for information about how I could be considered for an appointment to Judge Singleton's soon to be vacant bench. I was sent a questionnaire to complete.

I sent the completed questionnaire to Senator Gramm's office, and was later contacted by one of the members of his selection committee to arrange an interview. I interviewed with the committee and was later contacted by Senator Gramm's office to arrange an interview with him. I interviewed with Senator Gramm, and was recommended by him for nomination the next day. After Senator Gramm's recommendation, I interviewed with various persons in the Justice Department, the FBI, and with Lloyd Lochridge of the American Bar Association. I was, after that, contacted by President Reagan and nominated.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal Judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

I developed my concept of the role of the Federal Judiciary within our society from United States District Judge John V. Singleton, Jr. of the Southern District of Texas, for whom I served as a law clerk for more than two years. That Court did not have the cast of "judicial activism" or "judicial restraint," but rather upheld the law as embodied by the Constitution, the rulings of superior courts, and the applicable laws of the United States and the individual states. The personal opinions or preferences of Judge Singleton, if ever at variance with those authorities, would never interfere with his duty to uphold the law.

In my brief career as a state court judge, I have tried to follow Judge Singleton's example. I believe that the primary function of a trial court is to resolve a factual dispute and determine the applicable law, thereby resolving a conflict. There will be instances in which the resolution of these disputes may have a broader implication or affect a broader area of public policy or class of individuals than those before the court,

but that would only be the result of the recognition of the precedential value of the law as determined by the trial court in its underlying dispute resolution.

I do not believe the Federal Courts have the authority to serve a legislative or executive function. As a judge, in cases presented to me, I have refused to impose my personal views upon the disciplinary rules of a private school that were not at variance with state law, and I have refused to order the local executive committee of a political party to grant power beyond that mandated by state law to the local elected chairman.

In our system the state courts are the courts of general jurisdiction. Recognition of state court authority requires a federal court, which is of limited jurisdiction, to assure that specific Constitutional or statutory criteria have been met before its power may be invoked.

WILLIAM PELHAM BARR

Date of Birth:	May 23, 1950	New York, NY
Legal Residence:	Virginia	
Marital Status:	Married	Christine Mary Barr three children
Education:	1967 - 1971	Columbia College B.A. degree
	1971 - 1973	Columbia University M.A. degree
	1973 - 1977	George Washington Univ Law School J.D. degree
Bar:	1977 1978	Virginia Bar DC Bar
Experience:	1973 - 1977	Central Intelligence Agency Ofc of Legislative Counsel Intelligence Officer & Legislative Liaison
	1977 - 1978	Law Clerk to Hon Malcolm Wilkey, U.S. Court of Appeals, DC Circuit
	1978 - 1982	Shaw, Pittman, Potts & Trowbridge Associate
	1982 - 1983	Exec Ofc of the President Ofc of Policy Development Deputy Asst Director
	1983 - pres	Shaw, Pittman, Potts & Trowbridge Partner
Office:	2300 N Street NW Washington, DC 20037 202 673-2561, 663-8422	
Home:	6460 Spring Terrace Falls Church, VA 22042	

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full Name (including any former names used.)**

   William Pelham Barr

2. **Address: List current place of residence and office address(es).**

   home: 6460 Spring Terrace
   Falls Church, Virginia 22042

   office: Shaw, Pittman, Potts & Trowbridge
   2300 N Street, N.W.
   Washington, D.C. 20037

3. **Date and place of birth.**

   May 23, 1950
   New York, New York

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

   spouse: Christine Moynihan Barr
   spouse's occupation: Librarian (part-time)
   employer: International Monetary Fund
   Washington, D.C.

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

   Columbia College — 1967 - 1971
   N.Y., N.Y. — A.B. 1971

   Columbia University — 1971 - 1973
   N.Y., N.Y. — M.A. 1973
   (Political Science/Chinese Studies)

   National Law Center — 1973 - 1977
   George Washington University — J.D. 1977
   Washington, D.C.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1971 - 1972	Central Intelligence Agency Summer Intern Program
1973 - 1977	Central Intelligence Agency (1973 - 75 Intelligence Directorate) (1975 - 77 Office of Legislative Counsel)
1977 - 1978	Law Clerk to the Honorable Malcolm R. Wilkey U.S. Circuit Judge U.S. Court of Appeals for the D.C. Circuit
1978 - 1982	Shaw, Pittmam, Potts & Trowbridge Washington, D.C. (Law Firm - Associate)
1982 - 1983	Deputy Assistant Director Office of Policy Development White House
1983 - 1989	Shaw, Pittman, Potts & Trowbridge * 1983-84 Associate 1985-89 Partner
1984 - 1989	2300 N Street Associates real estate investment partnership with a number of other Shaw, Pittman partners

* In connection with law practice at Shaw, Pittman, when the firm was asked to set up a new corporation for a client, I would occasionally be listed as an incorporating director/officer for purposes of filing incorporation papers but would be replaced by the permanent director/officer at the first corporate meeting. In one case, however, I actually did serve on a client's board. In April 1986, Scottish Widows Fund Assurance Society, a U.K. insurance company, asked me to serve on the board of its two wholly-owned U.S. subsidiaries, "Dalkeith Corporation" and "1146 19th Street Corporation". These corporations own a commercial office building in Washington, D.C. I served as a director, vice president, and treasurer of each subsidiary from April 1986 to January 1989.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe should be of interest to the Committee.

NDFL Fellowship (Mandarin Chinese)

Order of the Coif

J.D. With Highest Honors

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Virginia State Bar

District of Columbia Bar

American Bar Association

10. Other Membership: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

American Bar Association

Knights of Columbus

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapse if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Virginia Supreme Court 1977 to present

District of Columbia Court of Appeals
1978 to present

U.S. District Court for the District of Columbia
1978 to present

U.S. Court of Appeals for the District of Columbia Circuit
1978 to present

U.S. Court of Appeals for the Federal Circuit
1988 to present

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. September 28, 1988 (complete physical)

14. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any successful candidacies for elected public office.

None, other than the government positions listed in no. 6 above.

15. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. Whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were clerk;
2. Whether you practiced alone, and if so, the address and dates;
3. The dates, names and addresses of law firms or offices, companies or government agencies with which you have been connected, and the nature of your connection with each;

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?
2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.
2. What percentage of these appearance was in:
(a) federal court
(b) states courts of record;
(c) other courts.
3. What percentage of your litigation was:
(a) civil;
(b) criminal.
4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.
5. What percentage of these trials was;
(a) jury;
(b) non-jury.

I attended law school at night from September 1973 to June 1977, while I was working for the Central Intelligence Agency. From February 1975 forward, I served in the Agency's Office of Legislative Counsel. My principal duties were analyzing the impact of proposed legislation on Agency operations, drafting Agency bill comments, drafting Hill testimony, carrying on liaison with Congressional committee staffs, drafting Agency-proposed legislation, and coordinating legislative activities with other agencies and OMB.

In July 1977, I left the Agency to serve as law clerk to the Honorable Malcolm R. Wilkey, U.S. Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit. I completed my clerkship in September 1978.

In October 1978, I started as an associate with the Washington, D.C. law firm of Shaw, Pittman, Potts & Trowbridge. I was the 55th lawyer at the firm. I remained at the firm as an associate until May 1982.

During this period as a Shaw, Pittman associate, I functioned largely as a generalist, with about 70% of my time devoted to litigation and about 30% to other areas of the firm's practice. The firm's clients were mainly national or large local corporations. My responses to questions no. 16 and 17 below describe some of the matters upon which I worked.

The litigation -- all civil -- was varied, although a significant part of it involved environmental cases. Virtually every case I worked on was staffed by a total of two lawyers

-- one supervising partner and me. Although, in number, I handled more state court cases than federal, I devoted substantially more time to the federal cases because they tended to be more complex. Appearances in federal cases were infrequent and were generally handled by the supervising partner. I occasionally appeared in state court cases, usually to argue motions. Most of the cases upon which I worked either were settled or disposed of on motion.

One complex environmental case went to non-jury trial in federal district court. Atchinson, T.& S.F.Ry.Co. v. Alexander, 480 F.Supp. 980 (D.D.C. 1979). We represented defendant-intervenor and played a substantial role in the case. I assisted the partner who tried the case for our client. Judgment was for defendant and was upheld in all material respects on appeal. Izaak Walton League of America v. Marsh, 655 F.2d 346 (D.C. Cir. 1981). See my response to question no. 16 for further details.

An arbitration I handled went to a final award. Berlin v. Chevy Chase Lake Corp., 16 10 0071 81 (American Arbitration Association). The case involved valuation of a closely-held corporation. We represented the defendant. I assisted the supervising partner who tried the case. The final award was substantially below the amount sought by plaintiff.

Examples of some of the non-litigation matters I worked on during this period are provided in response to question no. 17 below.

In May 1982, I left Shaw, Pittman, Potts & Trowbridge to accept a position as Deputy Assistant Director for Legal Policy in the Office of Policy Development at the White House. My responsibilities included (1) preparing briefing papers for senior White House staff; (2) coordinating preparation of briefing papers and decision documents for the Cabinet Council on Legal Policy; (3) representing the White House on inter-agency working groups; and (4) reviewing agency bill comments and testimony in conjunction with the OMB process.

In September 1983, I left the White House and returned to Shaw, Pittman, Potts & Trowbridge. In October 1984, I was elected as a partner, effective January 1985. The firm currently has over 225 lawyers.

Since returning to Shaw, Pittman, the nature of my practice has been different than it was during my earlier period with the firm. In recent years I have spent less time on litigation and more on administrative/regulatory matters before federal agencies. For examples of these non-litigation projects see responses to question no. 17 below.

In the litigation area, while I have taken on fewer cases, I have now assumed lead responsibility on these matters. My court appearances have been more frequent, and have been either in federal court or in federal administrative tribunals. I have tried one case to verdict as co-counsel in a non-jury administrative trial. (See Murray v. Henry J. Kaiser Co. in response to question no. 16 below.)

16. **Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:**

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

The following include cases that were decided on motion and some that were settled. On all the listed cases, except for no. 10, I was the sole associate, supervised by one partner. On no. 10, I am the supervising partner assisted by one associate.

1. Atchinson, T.& S.F.Ry. Co. v. Alexander, 480 F.Supp. 980 (D.D.C. 1979), aff'd in part, rev'd in part sub nom., Izaak Walton League of America v. Marsh, 655 F.2d 346 (D.C. Cir.), cert. denied, 454 U.S. 1092 (1981). (District Judge: Richey) (Circuit Judges: Wright, Robb, Penn).

Almost one-quarter of my time from October 1978 through July 1981 was devoted to defending against an action brought by 18 midwestern railroads and three environmental groups challenging, under NEPA and the APA, a Corps of Engineers' decision to construct an expanded replacement facility for Lock & Dam 26 on the Mississippi River. We represented the defendant-intervenor, Association for the Improvement of the Mississippi River ("AIMR"), an association of over 350 municipalities, businesses, farm and labor organizations, waterway carriers, and shippers that depend on waterway transportation. The case involved extremely complex technical and legal issues. Although the Corps was represented by DOJ, AIMR played a leading role in all aspects of the case. I was responsible for legal research; developing factual and

expert evidence; discovery; trial preparation; drafting numerous motions, pre-trial brief, post-trial brief, appellate brief and reply brief, opposition to cert. petition. The trial court found for the Corps and AIMR; the Court of Appeals upheld the trial court on all material points. Government counsel was Fred Disheroon, Esq., Lands Division, U.S. Dep't of Justice, Washington, D.C. Opposing counsel was Joe Karaganis, Karaganis & Gail Ltd., 150 N. Wacker Drive, Chicago, Ill. 60606. (312)782-1905.

2. Potomac Electric Power Co. v. EPA, 650 F.2d 509 (4th Cir.), cert. denied, 455 U.S. 1016 (1981). (Circuit Judges: Widener, Phillips, Ervin).

From May 1980 through November 1980, I represented PEPCO in its petition for review of an EPA decision that the Chalk Point 4 Unit was subject to the new source performance standards for fossil-fuel steam generating units under the Clean Air Act. I was responsible for legal research and drafting a substantial portion of the brief. The Court of Appeals upheld the EPA decision. Opposing counsel was Bingham Kennedy, Esq., Lands Division, Department of Justice, Washington, D.C.

3. Group Health Ass'n, Inc. v. Blumenthal, 453 A.2d 1198 (Md.Ct.App. 1983)

From February 1981 through January 1983, I defended Group Health Association (GHA) in a negligence and wrongful death diversity action in U.S. District Court for the District of Maryland. GHA moved to dismiss on the grounds (1) that the claims were subject to mandatory arbitration under Maryland's Health Care Malpractice Claims Act, and (2) that Maryland did not recognize a wrongful death action for a non-viable child born alive. The district judge certified questions to the Maryland Court of Appeals. The Court of Appeals held for GHA that the action was subject to arbitration, but held also that an action did lie for wrongful death of a non-viable child. I was responsible for factual investigation; legal research; discovery; drafting pleadings, motion to dismiss, brief and reply brief in Court of Appeals. Opposing Counsel were Jonathan Azrael, Esq., Azrael & Gann, Baltimore, Md. and John Jude O'Donnell, Esq., Rockville, Md.

4. Berlin v. Chevy Chase Lake Corp., 16 10 0071 (American Arbitration Association)

From March 1981 through March 1982, I represented B.F. Saul and Chevy Chase Lake Corporation in an arbitration over the valuation of a minority interest in a closely-held corporation. We were urging a low value. I was responsible for

development of facts, legal research, all aspects of trial preparation, development of expert testimony, pre-trial brief, post-trial brief. The final award was higher than our position, but substantially lower than that urged by our opponent. The arbitrators were Daniel Coon, David Gruber, Michael Jackley, c/o American Arbitration Association, 1730 Rhode Island Ave., N.W., Washington, D.C. Opposing counsel was Charles Lee Eisen, Esq., Kirkpatrick, Lockhart, 1800 M St., N.W., Washington, D.C. 20036.

5. Murray v. Henry J. Kaiser Co., 84-ERA-4 (DOL ALJ Roketenetz, 1984)

From September 1983 through May 1984, I defended Henry J. Kaiser Co. (HJK), constructors of the Zimmer nuclear power plant, against a "whistleblower" suit brought by a discharged employee (Murray) under the Energy Reorganization Act. The case was highly sensitive because it was litigated during a pending grand jury investigation into alleged illegal conduct by HJK in the construction of Zimmer, including some of the allegations raised by Murray. (See response to question no. 17 below.) I was responsible for factual development, discovery, drafting pre-trial statement, trial preparation, and post-trial brief. The case was tried before a Dep't of Labor ALJ in Cinncinati, Ohio. I personally tried half the case, with a Shaw, Pittman partner trying the other half. The ALJ decided for defendant HJK. Opposing counsel was Andrew B. Dennison, Esq., 200 Main Street, Batavia, Ohio 45103.

6. Arlex, Inc. v. B. Francis Saul, et al., Law No. 19962, Circuit Court of Arlington County (1978) (Winston, J.)

From November 1978 through September 1979, I represented the B.F. Saul Real Estate Investment Trust, defendant ground lessor in a suit by lessee who operated a Howard Johnson's hotel on the leased site. The dispute was over the proper method for calculating lease payments. On March 5, 1979, the trial court granted judgment to defendant on cross-motions for summary judgment. The plaintiff petitioned for appeal to the Virginia Supreme Court, which denied the petition on March 15, 1979. I was responsible for factual investigation, legal research, preparing motion for summary judgment, preparing brief in opposition to petition for appeal in the Virginia Supreme Court. Opposing counsel was LeRoy E. Batchelor, Esq., 2060 N. 14th St., Arlington, Va. 22201. (703)525-0102.

7. Rapps v. United States, et al., Civil No. 78-0612 (D.D.C.) (Parker, J.)

From October 1978 to March 1980 defended a former high-level CPSC official (Dimcoff) in an action brought by another former CPSC official (Rapps) against the CPSC and several current and former CPSC officials for violation of constitutional, statutory, and common law rights. The other federal defendants were represented by the Department of Justice. The case, which involved numerous complex legal issues, was settled on the eve of trial. I was responsible for factual investigation; extensive legal research; conducting most discovery; drafting numerous motions, including motions to dismiss, motions for summary judgment, pre-trial statement, etc. During discovery, I successfully overcame a claim of newsman's privilege by a journalist witness. Plaintiff Rapps was represented by Raymond Battocchi, Esq., Cole & Groner, 1730 K St., N.W., Washington, D.C. (202)331-8888. The other federal defendants were represented by Lawrence Moloney, Esq., U.S. Dep't of Justice, Civil Division, Washington, D.C.

8. Provident Life Ins. Co. v. Life Investors, Inc., v. Equitable of Iowa Companies, Civil Action No. A 78-1061 (D.N.D.)

From October 1978 through October 1979, I represented Equitable of Iowa, third-party defendant in a 16(b) short-swing profits suit. Provident Life Insurance Co. sued Life Investors, Inc. to recover short-swing profits realized by Life Investors on the sale of Provident stock to Equitable. Life Investors impleaded Equitable as a third-party defendant. The case was settled prior to trial. I was responsible for factual investigation, discovery, legal research, legal advice on settlement. Opposing counsel for Provident Life: James Collins, Esq., Boodell, Sears, Sugrue, Giambalvo & Crowley, One IBM Plaza, Suite 2650, Chicago, Ill. (312)222-9400; for Life Investors: Charles Mulaney, Jr., Esq., Mayer, Brown & Platt, 231 South LaSalle St., Chicago, Ill. (312)782-0600.

9. Marshall v. Schlumberger Well Services, OSHRC Docket No. 79-3912, Region III (ALJ Cutler)

From October 1979 to May 1980, I represented a Schlumberger subsidiary in defending against an OSHA complaint arising from a fatal explosion at a West Virginia job site. The case was settled by joint stipulation in May 1980. I was responsible for factual investigation, legal research, pleadings, settlement discussions. Opposing counsel were Marshall Harris, Esq. and Joseph Crawford, Esq. of the Office of Solicitor, U.S. Dep't of Labor, 3535 Market Street, Philadelphia, Pa. 19104. (215)596-5165.

10. Gutherz, et al. v. U.S. News & World Report, 86 Civ. 2517 (GLG) (S.D.N.Y.) (Judge G. Goettel).

From January 1986 to the present I have been lead counsel defending U.S. News & World Report in a large, multi-plaintiff age discrimination suit under the ADEA. The suit arises from the termination of half of U.S. News' advertising sales force after the magazine was taken over by a new owner. I have conducted and defended extensive discovery, represented U.S. News in all court appearances, drafted and argued motion for summary judgment. The motion was denied. Trial has been postponed until summer 1989. Opposing counsel are Judith Vladeck and Anne Vladeck of Vladeck, Waldman, Elias & Engelhard, 1501 Broadway, New York, N.Y. (212)354-8330.

17. **Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)**

1. I worked on the following matters as an associate at Shaw, Pittman, Potts & Trowbridge. (Except where otherwise noted, I was the sole associate, supervised by one partner.)

First Pennsylvania Bank (6/80 - 9/80) Prepared legal opinion for Board of Directors of First Pennsylvania Corporation (FPC) re propriety of advancing indemnification to Board Chairman who had retained separate counsel to defend lawsuit against FPC, the Chairman, and other individuals, alleging violations of antitrust laws and the Bank Holding Company Act. I did the factual investigation, legal research and analysis, drafted legal opinion, and made part of oral presentation to the Board.

Zimmer Grand Jury Investigation (9/83 - 9/84) Spent the substantial part of a year successfully defending Henry J. Kaiser Co. in connection with a grand jury investigation into possible violations of federal law in the construction of the "Zimmer" nuclear plant in Cincinnati, Ohio. Also handled a parallel NRC investigation and three related whistleblower cases. Extensive factual investigation, witness interviews, etc.

United States v. A.B. Chance Co., Civil Action No. 80-0034-P(H) (N.D.W.Va.) (1/79 - 5/80) Represented Parkersburg, West Virginia plant charged with violating Clean Water Act. The case was settled by consent decree

entered May 19, 1980. I was responsible for factual investigation, legal research and drafting pleadings. Opposing counsel was Assistant U.S. Attorney William A. Kolibash, Dep't of Justice, Wheeling, West Virginia.

King v. GPU Nuclear, 83-ERA-10 (Dep't of Labor) (8/84 - 11/84) Defended GPU in whistleblower case arising out of Three Mile Island. Extensive discovery, trial preparation. Settled on eve of trial.

American Management Systems, Inc. v. Delphi Associates, Civil Action No. 79-2467-T (D.Mass.) (1/79 - 3/82) Worked with a partner and another associate representing AMS in a suit seeking damages for breach of contract and in quantum meruit. Defendant Delphi had been prime contractor on a project to design MMIS computer system for State of Illinois. AMS sued under its subcontract with Delphi to recoup substantial losses. Participated in extensive discovery and motions. Case was settled.

Miscellaneous Litigation: (10/78 - 3/82) Handled numerous smaller cases, including defense of Group Health Association in a series of medical malpractice suits, all of which settled: Robinson v. WMATA, Civil Action No. 6610-80 (D.C. Sup.Ct.); Davis v. Patow, M.D., Civil Action No. 12220-79 (D.C.Sup.Ct.); Stribling v. Mel-Art, Inc., Civil Action No. 650-80 (D.C.Sup.Ct.). Also handled numerous smaller commercial cases which were either decided on motion or settled, including Westminster Investing Corp. v. Nordheimer, Civil Action No. 2924-80 (D.C.Sup.Ct.); Malawer & Associates v. Centennial Contractors, Inc., Chancery No. 62053 (Cir.Ct. Fairfax Cty.)

GHA Labor Matters (1979-82, 84) Represented Group Health Association in a half dozen labor disputes with its physicians' union. All involved arbitration of grievances under the collective bargaining agreement -- one major grievance related to working conditions, the others related to individual disciplinary actions. All disputes were settled prior to, or during, arbitration. Extensive factual investigation, legal research, arbitration preparation, negotiation.

Virginia Condominiums (1979) Prepared all legal documents, prospectuses, etc., in connection with three of the earliest condominium conversions under the Virginia Condominium Act. The three projects were: Horizon House, Huntington Club, and Telegraph Hill. The Horizon House documents were distributed by the state as "models".

B.F. Saul REIT (1981) Worked on various securities matters for REIT, including advice and submissions to SEC pursuant to Rule 14a-8 re omission of shareholders' proposals from proxy material.

2. I handled the following matters as a partner at Shaw, Pittman:

National Air Transportation Association (3/85 - 5/85) Represented NATA in connection with proposed IRS regulations on the use of employer-provided aircraft. Prepared and submitted formal comments.

National Automobile Dealers Association (2/85 - present) Represent NADA on a variety of tax issues. In 1985 and 1986 prepared and submitted a series of formal comments on proposed IRS regulations re taxation of auto salesmen's demonstrators.

Knights of Columbus (12/84 - present) Represent Knights of Columbus in connection with preserving the tax exemption for "fraternal benefit societies" under Section 501(c)(8). Prepared and submitted numerous comments during 1985 and 1986. Assisted K of C in prevailing on Administration and House Ways & Means Committee to preserve exemption in "Treasury II" and subsequent Tax Reform legislation.

Mutual of Omaha (7/85 - 12/85) Represented Mutual of Omaha in connection with OPM proposed regulations relating to the Federal Employees Health Benefit Program, a substanial part of the company's business. Prepared and submitted formal comments.

Carolina Power & Light (4/85 - 7/85) Researched and prepared comprehensive legal memorandum assessing CPL's potential claims against Westinghouse for installing allegedly defective generators in CPL's nuclear power plant.

Sallie Mae (1/88 - 3/88) Represented SLMA in connection with Department of Education regulations relating to due diligence requirements under the Guaranteed Student Loan Program. Analyzed potential legal challenges to regulations.

Taiwan Power (9/86 - 10/88) Represented the government-owned utility of Taiwan in connection with its pre-sanction, long-term supply contracts for Namibian uranium. Unsuccessfully sought from Treasury Department an interpretation of sanctions legislation that would allow for "in transit" processing of Taiwan Power's uranium. Also sought legislative relief.

Pico Ski Resort (6/87 - present) Represent Vermont ski resort in resisting initial efforts by the Department of Interior to locate Appalachian Trail through the resort in a way that would cripple future operations. Prepared extensive submissions and presentations to DOI relating to its legal obligations under the National Trail Systems Act.

Equitable of Iowa (11/87 - 9/88) Represented Des Moines-based company in opposing a UDAG grant for the development of a major shopping mall on the outskirts of Des Moines. Prepared extensive submissions to HUD. Prepared complaint. The grant was not awarded.

U.S. News & World Report (8/87 - 9/87) Successfully assisted U.S. News in obtaining FCC recognition of exception to Equal Time rule for television series featuring David Frost interviews of Presidential candidates. Made written and oral presentations to FCC staff and commissioners.

Miscellaneous Litigation Currently representing Emerson Electric in prosecuting claims against the United States for "over and above" work on two defense-related contracts. Matters are pending before the Armed Services Board of Contract Appeals.

Other Legal-Related Activities In 1986 I served on two peer review panels for the National Institute of Justice. In the fall semester of 1987, I assisted a Shaw, Pittman colleague by teaching one of his Legal Research & Writing sections at GMU Law School on a voluntary, unpaid basis. In 1985 and 1986, I spoke regularly on "The Presidency" to high school students as part of the Close-Up Foundation's program.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

None, except for my withdrawal payment from Shaw, Pittman, Potts & Trowbridge. The payment will be made pursuant to the firm's January 1987 partnership agreement, which has been reviewed by appropriate Department of Justice ethics officials. Under the agreement, I will receive: (i) my capital account; (ii) a severance payment based on a fixed formula; (iii) the pro rata share of my 1989 draw up until my withdrawal of the firm. I expect the total amount of my withdrawal payment from Shaw, Pittman, Potts & Trowbridge will be approximately $75,000. The amount of payment is fixed at the time of my departure, and I will have no continuing interest in the firm. The firm has the option of making the payment in installments over two years, but I expect full payment within a year.

In addition, I am considering selling my interest in 2300 N St. Associates, a real estate partnership that owns interest in the commercial office building located at 2300 N St., N.W. Washington, D.C. As noted in my SF278, I estimate the value of my interest is between $50,000 and $100,000.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining in the areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

Due to the nature of my assets and the position I have been nominated for, I am not likely to have a financial conflict. If I do, I will follow the requirements of 18 U.S.C. §208 by either disqualifying myself or, if appropriate, obtaining a waiver.

While I will not have a continuing financial relationship with Shaw, Pittman, Potts & Trowbridge, matters involving the law firm may arise. If this occurs -- of if other potential non-financial conflicts arise -- I will consult with my assigned ethics counsellors at the Department. I understand the Department follows the guidelines of the

Administrative Conference of the United States to resolve potential non-financial conflicts of this sort.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Government Act of 1978, may be substituted here.)

Please see my SF278.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Please see attached financial statement.

6. Have you ever had a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your titles and responsibilities.

Vice Chairman, D.C. Lawyers for Reagan-Bush, 1984
Bush for President 1988 (Vice Presidential Candidate Screening Team)

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household. (Rounded to nearest thousand)

ASSETS		LIABILITIES	
Cash on hand and in banks	203,000	Notes payable to banks—secured	
U.S. Government securities—add schedule		Notes payable to banks—unsecured	13,000
Listed securities—add schedule		Notes payable to relatives	
Unlisted securities—add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	1,000
Due from relatives and friends		Unpaid income tax (approx '88)	8,000
Due from others		Other unpaid tax and interest	
Doubtful		Real estate mortgages payable—add schedule	194,000
Real estate owned—add schedule	425,000	Chattel mortgages and other liens payable	15,000
Real estate mortgages receivable		Other debts—itemize:	
Autos and other personal property	54,000		
Cash value—life insurance			
Other assets—itemize:			
Retirement Accounts:			
TIAA-CREF, IRA, Keogh	35,000		
		Total liabilities	230,000
		Net worth	487,000
Total assets	717,000	Total liabilities and net worth	717,000
CONTINGENT LIABILITIES*		GENERAL INFORMATION	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule.)	No
On leases or contracts		Are you defendant in any suits or legal actions?	No
Legal Claims		Have you ever taken bankruptcy?	No
Provision for Federal Income Tax			
Other special debt			

* As a partner in Shaw, Pittman, I am contingently liable for the partnership's obligations. However, upon withdrawing from the partnership, I will be released from all such contingent liability. Apart from this, I have no other contingent liabilities

Real Estate Schedule	Value	Mortgage
House In Falls Church, Va.	350,000	194,000
Interest in 2300 N St. N.W. Washington, D.C.	75,000	

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

My law partnership has, for the past several years, made substantial cash contributions to groups providing legal services to the indigent and needy. The firm also supports an active in-house pro bono program which has been widely commended in the Washington legal community.

In 1980 I revieved and critiqued a brief prepared by another associate in a pro bono Bivens action against a government official, and I served on a mock appellate panel to prepare the associate for oral argument. (4.5 hrs.)

In 1981 I represented pro bono a young retarded woman who was discharged from her job at a large department store. After my calls and correspondence to the parent company, the store rehired the woman and apologized. The matter involved legal research into possible state and federal claims, drafting demand letters, etc. (9.0 hrs.)

In early 1982 I brought into the firm, as a pro bono matter, two Ethiopian nationals seeking asylum. The work on these cases was done by a more junior associate with expertise in immigration. One of the clients obtained asylum, the other ultimately decided not to seek it. (2.0 hrs.)

In 1985 I agreed to assist, on a pro bono basis, the Catholic League for Religious & Civil Rights in bringing an action challenging an A.I.D. policy which barred natural family planning groups from receiving grants unless those groups also promoted artificial methods of birth control. The matter was settled in its early stages when A.I.D. agreed to change its policy. (12 hrs)

In early 1986 I assisted on a pro bono basis the Jamestown Foundation with respect to legislation to assist defectors. I also supervised an associate providing pro bono assistance to a defector. (30.50 hrs.)

In 1987 I assisted, on a pro bono basis, the parents' association of a parochial school in their legal efforts to keep the school from being closed. (53 hrs.)

2. **Do you currently belong, or have you belonged, to an organization which discriminates on the basis of race, sex, or religion -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies.**

I am currently a member of the Knights of Columbus, which is an all-male Catholic fraternal order. I have been a member since 1984.

While an undergraduate at Columbia University (1968-71), I was a member of Sigma Nu Fraternity, a national social fraternity. It was, at least, de facto all-male, and probably was so de jure.

AFFIDAVIT

I, WILLIAM P. BARR, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

3/14/89
(DATE)

William P. Barr
(NAME)

Margaret Mae Gardiner
(NOTARY)

Commission Expires: 5/14/90

The CHAIRMAN. The hearing is adjourned.
[Whereupon, at 4:27 p.m., the committee was adjourned.]

U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

April 4, 1990

MEMORANDUM FOR C. BOYDEN GRAY
Counsel to the President

Re: Transportation for Spouses of Cabinet Members

The President believes that Cabinet spouses provide direct and important services to the federal government when they participate in representational activities with their Cabinet member spouses and, you have informed us, he believes spousal travel to and from such activities should be paid for by the Government.[1] The President is prepared to authorize issuance of a directive describing the circumstances in which he believes spousal participation (and therefore their travel) would further the missions of the respective Executive departments. We understand that the President is considering issuing a memorandum that would include the following determination:

> [A]lthough spouses of Cabinet members are not considered employees of the Federal Government by virtue of their husband or wife's position in the Cabinet, certain activities on their part have an official Government purpose and may appropriately be supported by the Government, including --
>
> - attending receptions and similar functions in a representative role on behalf of the United States Government, whether or not accompanied by the Cabinet member;
>
> - speaking or other appearances as an official representative of the U.S. Government;
>
> - attendance, with other Cabinet spouses and/or the First Lady, at meetings or events concerned with U.S. Government functions; and

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[1] Memorandum for William P. Barr, Assistant Attorney General, Office of Legal Counsel from C. Boyden Gray, Counsel to the President, January 8, 1990. This memorandum includes a Draft Guidance Memorandum (Draft Guidance Memorandum) for proposed use by agency heads.

- other activities approved by and directly supporting the mission of the Cabinet member's agency.

Draft Guidance Memorandum, at 1. If the President authorizes issuance of this directive, the concerned agencies are prepared to promulgate any needed implementing regulations.

You have asked for our advice on whether spousal travel, either by air or ground transportation, in the circumstances recited by the proposed directive may be paid for by the Government. We conclude for the reasons set forth below that Cabinet spouses who participate in these activities may travel at government expense.

I. Automobile Travel by Spouses

There are two statutes applicable to spousal travel by automobile.[2] See Pub. L. No. 101-194, § 503, 103 Stat. 1716, 1755 (1989) (Ethics Reform Act); 31 U.S.C. § 1344. Section 1344 authorizes the use of agency automobiles for official purposes.[3]

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[2] There is no specific statute addressing travel by Cabinet spouses, as there is for Presidential and Vice-Presidential spouses. See 3 U.S.C. §§ 105(e), 106(c).

[3] Section 1344 provides:

> (a)(1) Funds available to a Federal agency, by appropriation or otherwise, may be expended by the Federal agency for the maintenance, operation, or repair of any passenger carrier only to the extent that such carrier is used to provide transportation for official purposes. Notwithstanding any other provision of law, transporting any individual other than the individuals listed in subsections (b) and (c) of this section between such individual's residence and such individual's place of employment is not transportation for an official purpose.
>
> * * *
>
> (b) A passenger carrier may be used to transport between residence and place of employment the following officers and employees of Federal agencies.
>
> * * *
>
> (2)(A) officers compensated at Level I of the Executive Schedule pursuant to section 5312 of title 5

(continued...)

Section 503 of the Ethics Reform Act authorizes agencies to issue rules governing "incidental use" of automobiles for unofficial purposes.[4]

As discussed below, we believe that the spousal travel by automobile that would be authorized by the directive may properly be characterized as "official" within the meaning of 31 U.S.C. § 1344. To the extent any portion of such travel is determined to be "unofficial," or should the White House instead choose to characterize the travel as "unofficial," we believe such travel at government expense would nevertheless be authorized under section 503 as "incidental" unofficial travel. Consequently, we recommend that any implementing regulations provide that the authorized categories of spousal travel may be paid for as "official" travel or, alternatively, as "incidental" unofficial travel.

A. "Official" Travel Under Section 1344

Section 1344 authorizes use of government automobiles for spousal transportation if such use is for "official purposes." Id. at § 1344(a)(1).[5] Whether spousal travel in any particular

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[3](...continued)
[Cabinet officers].

(Emphasis added.) See also 31 U.S.C. § 1345 (no appropriation may be used to pay for transportation expenses of anyone except a federal officer or employee carrying out official business); 31 U.S.C. § 1349 (mandatory one month suspension without pay for willful misuse of cars).

[4] Section 503 of the Ethics Reform Act provides, in pertinent part:

> Notwithstanding any other provision of law, the head of each department, agency, or other entity of each branch of the Government shall prescribe by rule appropriate conditions for the incidental use, for other than official business, of vehicles owned or leased by the Government.

See generally Report of the Bipartisan Task Force on Ethics on H.R. 3660, 101st Cong., 1st Sess. (Comm. Print 1989), at 35-37.

[5] The term "official purposes" is defined to include certain home-to-work transportation. By the terms of the statute, home-to-work transportation by government vehicle is available only to Cabinet members themselves. General Services Administration (GSA) regulations implementing 31 U.S.C. § 1344, however, define
(continued...)

circumstance is for an "official purpose" has proven to be a nettlesome question over the years.[6] GAO has taken a restrictive

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[5](...continued)
limited conditions under which family members may be beneficiaries of this privilege:

> If an employee is authorized transportation between his/her residence and an official duty site, this privilege does not extend to his/her spouse, other relatives, or friends unless --
>
> (1) It is consistent with the agency's policy,
>
> (2) They are with the employee when he/she is picked up, and
>
> (3) They are transported to the same place or event.

53 Fed. Reg. 26773, 26777 (July 15, 1988), to be codified at 41 C.F.R. § 101-6.402(f) (emphasis added). Thus, spouses may use government automobiles that are provided to Cabinet members for home-to-work transportation, but only when they are accompanying their Cabinet spouse to or from the same function. Id. This limited exception is obviously not broad enough to encompass the full range of spousal transportation contemplated by the President. It can and should be relied upon, however, as additional authority for that portion of the agencies' regulations to which it will pertain.

GSA recently advised that its authority over home-to-work transportation did not include authority over spousal transportation because spouses are not federal employees entitled to such transportation. Letter to Mr. Abraham D. Sofaer, Legal Advisor, Department of State from Richard G. Austin, Acting Administrator, GSA, September 5, 1989. It took the position that the agency must determine whether spousal transportation is for an "official purpose" within the meaning of 31 U.S.C. § 1344(a)(1): "A determination that [transportation of the Secretary of State's wife] is for an 'official purpose' can only be made by the Department of State, based upon whether or not the transportation furthers the mission of the agency." Id.

[6] The question has also attracted considerable press attention. See, e.g., Wash. Post, September 20, 1985, at A10, col. 1 (review of GAO report covering misuse of automobiles by spouses); Wash. Post, March 28, 1984, at A21, col. 1 (wife of the Secretary of the Treasury, wife of the Attorney General); id. at A22, col. 1 (wife of the Secretary of Defense); Wash. Post,
(continued...)

view of agency authority in this area, concluding that only spouses who are performing a "direct service" to the government may have their travel expenses paid by the government. The GAO justifies the payment of travel expenses in these circumstances under 5 U.S.C. § 5703 which provides that "An employee serving intermittently in the Government Service as an expert or consultant and paid . . . or serving without pay or at $1 a year, may be allowed travel or transportation expenses . . . while away from his home or regular place of business and at the place of employment or service." The "direct services" test -- which is not based on any statutory language -- is not met, according to GAO, merely because the individual's activities may in some way enhance the agency's objectives. Principles of Federal Appropriation Law (GAO 1982), at 3-39. While GAO has occasionally approved limited spousal travel, it has rejected attempts to have the government pay more generally for spousal travel expenses.[7]

In the past OLC has taken a similarly restrictive view of "official purposes" spousal travel. The Office concluded in 1984, for example, that the Department of Justice could not pay for transportation of the Attorney General's spouse to events very similar to those listed in the Draft Guidance Memorandum.[8]

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[6](...continued)
March 27, 1984, at A21, col. 3 (wife of an Undersecretary at HUD); Wash. Post, May 20, 1983, at A15, col. 1 (wife of an Undersecretary at HUD).

[7] Compare GAO Op. B-111642 (1957) (unpublished) (government could pay travel expenses of surviving spouse to attend ceremony where departmental award would be given to deceased employee); GAO Op. B-169917 (1970) (unpublished) (government can pay wife's expenses to accompany employee-husband who became incapacitated while on official travel) with GAO Op. B-210555.9, Letter to Sen. Jake Garn from Milton J. Socolar, Comptroller General, June 28, 1984, at 3 ("the fact that a spouse of a government official may be performing services which would benefit the Government would not, in itself, satisfy the statutory requirement" of an official purpose); GAO Op. B-204877 (Nov. 27, 1981) (unpublished) ("With a few statutorily established exceptions, we are not aware of any authority to pay the travel and per diem expenses of individuals who are not federal employees. This is true even though the presence of spouses might in some way enhance the achieving of the purposes of the trips.").

[8] Memorandum for Michael E. Shaheen, Jr., Counsel, Office of Professional Responsibility from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, January 23, 1984, at 14-15.

In 1986 GAO adopted a modest exception to its strict position on spousal transportation. It concluded that spouses of government employees entitled to routine home-to-work transportation may be transported in government vehicles when the spouse is being transported to or from an official or quasi-official function, the spouse's presence at the function is in the government's interest, and circumstances make it awkward or impossible for the official to accompany the spouse enroute.[9] GAO thus concluded that the presence of a Cabinet spouse at certain activities could be "in the government's interest," thereby authorizing as an "official purpose" spousal transportation to and from those activities. OLC subsequently adopted this view in a 1986 opinion that relied on the GAO Report.[10] Neither GAO nor OLC, however, has generally permitted spousal travel under the authority of section 1344.

The President proposes to determine categorically that certain spousal activities serve the "official purposes" of the Executive branch. As head of the Executive branch, the President ultimately has this authority to determine what falls within the Executive branch's official activities. Thus, he clearly would be in a position to make a categorical determination that certain spousal transportation furthers the mission of the Executive branch as a whole, and therefore the individual Executive departments. The President cannot define the statutory term "official purposes" to include anything he wishes. Presumably, there must be a meaningful nexus between the spouses' participation in the proposed activities and the advancement of agency objectives before the statute would be satisfied. However, the President has significant discretion as the Chief Executive to decide what activities advance the official business of the executive agencies he supervises, and there obviously is a sufficient nexus in this case to satisfy the statute. The activities listed in the Draft Guidance Memorandum will be undertaken either on behalf of or to advance the interests of the United States government or to advance a specific agency's mission. Accordingly, were the President to conclude that the activities listed in the Draft Guidance Memorandum were "official purposes" within the meaning of 31 U.S.C. § 1344(a)(1), we

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[9] GAO, Use of Government Motor Vehicles for the Transportation of Government Officials and the Relatives of Government Officials, Report to the Chairman, Subcommittee on Legislation and National Security, Committee on Government Operations, House of Representatives, at 50 note a (GAO Report GGD-85-76) (1985).

[10] Memorandum for Harry H. Flickinger, Acting Assistant Attorney General for Administration from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, October 23, 1986.

believe that agencies could utilize their cars to transport spouses to and from the activities identified by the President.

B. "Incidental" Unofficial Travel Under Section 503

Even if section 1344 did not provide authority for the kind of automobile travel proposed by the President, section 503 of the Ethics Reform Act, see note 4 supra, exists as an alternative source of authority. This section accords agency heads broad discretion to authorize incidental, nonofficial use of government vehicles. If section 503 were relied upon, the White House directive would be that agencies and departments shall deem the specified travel to be "incidental" and "unofficial" within the meaning of section 503. We believe that if each Cabinet agency issued regulations pursuant to such a White House directive stating that spousal transportation to and from these activities constitutes "incidental use" of government vehicles "for other than official business," the Cabinet spouses could permissibly travel to and from the activities by government vehicle. Given the breadth of the agency heads' discretion under section 503, this statute provides clear authority for the transportation of Cabinet spouses within metropolitan Washington for the purposes listed in the Draft Guidance Memorandum: transportation from home to receptions and similar functions, speaking appearances on behalf of the federal government, and meetings with the First Lady and other Cabinet spouses. Accordingly, we believe that a presidential directive and the ensuing agency regulations could also be based on section 503, should the President choose to characterize the designated travel as "incidental" and "unofficial."

II. Aircraft Travel by Spouses

The proposed directive would contemplate spousal travel by aircraft, in addition to travel by government car. The directive would provide that:

> To the extent that travel funds are available, a Cabinet spouse may travel domestically or abroad at Government expense (including travel on a Government plane with an official delegation) if the travel is required for official spousal activities.

The directive would go on to explain that under certain circumstances such spousal aircraft travel may be paid for either by nonprofit organizations[11] or by foreign govern-

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[11] The directive would provide in this regard that "to the extent that both Office of Personnel Management and agency regulations permit, a Cabinet member may accept travel [expenses] for (continued...)

ments.[12] Finally, the directive would emphasize that under soon-to-be-issued GSA regulations, all agencies will be permitted to accept gift funds to pay for spousal travel.[13] We believe that the broad authorization of spousal aircraft travel is supportable under existing law, and that the draft directive otherwise reflects the current authorities that could be relied upon for such travel.

1. The government may pay for air travel that is required for official spousal activities. An agency may pay for spousal travel on government, 31 U.S.C. § 1344,[14] and commercial, 5 U.S.C. § 5703,[15] aircraft as long as the spouse is serving an

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[11](...continued)
himself or herself and his or her spouse from a non-profit organization recognized under section 501(c)(3) of the Internal Revenue Code in connection with attendance at meetings and conferences, provided there is no conflict of interest."

[12] The directive would provide that "under the Foreign Gifts and Decorations Act, a Cabinet member may accept from a foreign Government expenses for travel wholly inside a foreign country for himself or herself and a spouse, if refusal to accept would embarrass the foreign country and if consistent with U.S. interests."

[13] Under the authority of section 302 of the Ethics Reform Act of 1989, regulations are to be issued by GSA that will give all agencies the authority to accept gift funds to pay for travel of a spouse accompanying a Federal employee (including a Cabinet member), subject to conflict-of-interest standards.

[14] Section 1344 imposes limitations on the use of federal funds for a "passenger carrier." Section 1344(g)(1) defines "passenger carrier" to include aircraft owned or leased by the government.

[15] See page 5 supra. Although we cite 5 U.S.C. § 5703 as general authority, most agencies have broad authority to use their appropriation to pay for all necessary expenses. This includes official travel expenses, such as air fare and hotel accommodations. See, e.g., Pub. L. No. 101-162, 103 Stat. 988, 995 (1979) (Department of Justice appropriation for necessary expenses for Department's administration). Once the President has made his determination that such travel should be deemed official, and the agency has made the case-by-case determination that the proposed travel falls into one of the approved categories of official spousal activity, the agency can use its appropriation to pay for the travel, just as it now uses the appropriation to pay for its employees' official travel expenses.

official purpose.[16] The President's determination that the specified spousal activities are official activities of the federal government would clearly establish the necessary predicate for reliance upon these statutes.

There are many instances, especially in the context of foreign travel, where it may not even be necessary for the agency to pay for spousal travel. For example, a department often pays the Department of Defense a lump sum for use of a military aircraft. In those instances, spouses have traditionally, and permissibly, traveled on a space-available basis.[17] If this method of travel is otherwise available, agencies may wish simply to continue that method of accounting for spousal travel.[18]

2. An employee's spouse may accept travel expenses from a charitable organization. Employees may, consistent with any other applicable conflicts rules, accept reimbursement for travel expenses for official travel from any organization that is tax-

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[16] See, e.g., Memorandum for the Attorney General from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, March 12, 1988, at 2-3 ("Spousal expenses on foreign trips may also in certain circumstances be borne by the U.S. Government, if a spouse's presence on a foreign trip can be said to serve an official purpose."); Memorandum for the Attorney General from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, October 16, 1982, at 2 (where spouse's travel "serves the diplomatic interests of the United States"); Memorandum for the Attorney General from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, December 19, 1980, at 1-2; Memorandum for the Attorney General from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, September 21, 1979, at 3 (where "the Government would be benefited"); 2 Op. Off. Legal Counsel 327 (1978) (government can pay travel expenses of a relative of the President who is traveling on official business on behalf of the President).

[17] GAO Op. B-204877 (Nov. 27, 1981) (unpublished) (transportation of congressional spouses); Memorandum for the Attorney General from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, Oct. 18, 1982 (Attorney General's wife may travel on foreign visit on space-available basis).

[18] The disadvantage of this method is that the Cabinet member must reimburse the agency for any additional expenses, such as in-flight meals, that may be personal to the spouse. Nevertheless, there may be Cabinet spouses who would prefer that they not be treated as an official member of the party. For example, a spouse who worked at a law firm that did business with the agency might prefer to pay his or her personal costs in order to avoid even the appearance of impropriety.

exempt under section 501(c)(3) of the Internal Revenue Code. 5 U.S.C § 4111(a).[19] The Department of Justice has long taken the position that an employee's acceptance of reimbursement for a spouse's travel expenses is also permissible.[20] In the interim until GSA promulgates its regulations, see discussion infra, and even after the regulations issue, this will remain as authority for acceptance of spousal travel expenses.

3. A Cabinet member may permit a foreign government to pay for a spouse's travel expenses. The Foreign Gift Act permits the acceptance of travel expenses from a foreign government for a

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[19] This section provides:

> (a) To the extent authorized by regulation of the President, contributions and awards incident to training in non-Government facilities, and payment of travel, subsistence, and other expenses incident to attendance at meetings, may be made to and accepted by an employee, without regard to section 209 of title 18, if the contributions, awards, and payments are made by [a § 501(c)(3)] organization[.]

See, e.g., 28 C.F.R. § 45.735.14a(a). Thus, section 4111 permits acceptance of these payments without regard to 18 U.S.C. § 209, and there is no statutory bar to an employee's spouse accepting them as well.

[20] See generally Memorandum for the Attorney General from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, March 2, 1988, at 2; Letter to David Martin, Esquire, Director, Office of Government Ethics from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, April 11, 1984; Letter to David Scott, Esquire, Office of Government Ethics from Ms. Beth Nolan and Ms. Janis Sposato, Attorney-Advisers, Office of Legal Counsel, July 8, 1983; Memorandum for Carolyn B. Kuhl, Special Assistant to the Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, September 16, 1982, at 2-3; Memorandum for the Attorney General from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, December 19, 1980, at 3 n.5; Memorandum for Terrence B. Adamson, Special Assistant to the Attorney General from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, June 19, 1978, at 3 n.2. See also 28 C.F.R. § 45.735-14a(d) (spousal travel expenses may, with the permission of the Deputy Designated Agency Ethics Official, be accepted from most non-profit organizations).

federal employee and a spouse. 5 U.S.C. § 7342(c)(1)(B)(ii).[21] As the proposed Memorandum notes, the statute only covers travel that is "entirely outside" the United States. The flight to and from the foreign country is not covered.[22]

4. Agencies may accept the cost of spousal travel expenses from sources outside the government. Section 302 of the Ethics Reform Act of 1989, to be codified at 31 U.S.C. § 1352, directs the Administrator of GSA in consultation with the Office of Government Ethics (OGE), to issue regulations prescribing

> the conditions under which an agency or employee in the executive branch may accept payment from non-Federal sources for travel, subsistence, and related expenses with respect to attendance of the employee (or the spouse of such employee) at any meeting or similar function relating to the official duties of the employee.

Id. (emphasis added). Once these regulations are issued, agencies and employees will be able to accept travel expenses for all spouses, including Cabinet spouses, under the conditions set forth in the regulations. Even agencies, such as the Department of Justice, that do not have gift acceptance authority, will be able to accept funds for spousal travel. Under these regulations, agencies and employees should have much greater flexibility in permitting non-government sources to pay for spouses accompanying government officials.[23]

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[21] The Foreign Gift Act defines employee to include spouse. 5 U.S.C. § 7342(a)(1)(G). Employees may accept gifts of more than minimal value where refusal would cause offense or embarrassment. 5 U.S.C. § 7342(c)(1)(B). Employees are specifically authorized to

> accept gifts of travel or expenses for travel taking place entirely outside the United States . . . if such acceptance is appropriate, consistent with the interests of the United States, and permitted by the employing agency and [its regulations].

5 U.S.C. § 7342(c)(1)(B)(ii).

[22] See, e.g., Memorandum for the Attorney General from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, March 2, 1988.

[23] The Draft Guidance Memorandum includes a statement that

> if a trip has multiple purposes, a reasonable alloca-

(continued...)

CONCLUSION

We believe, based upon the foregoing authorities, that the President can ensure that Cabinet spouses may use government vehicles, or otherwise travel at government expense, to and from the activities that he would identify, through issuance of the contemplated directive and promulgation of conforming regulations by the respective agencies and departments.

We would be glad to assist in implementing this proposal. Please let me know if we can be of further assistance.[24]

William P. Barr
Assistant Attorney General
Office of Legal Counsel

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[23](...continued)
tion of costs should be made between official activities and others, just as costs of travel by Presidential appointees are now allocated between official, personal, and political travel.

We would recommend that this language be redrafted to eliminate any suggestion that Cabinet members may use government transportation for personal activities. The following language might be used instead:

> if, during an official trip, an agency official also undertakes personal or political activities, a reasonable allocation . . . .

[24] To the extent travel is for official purposes, we do not believe that the value of transportation would be treated as taxable income. However, this should be confirmed with the Department of the Treasury which is responsible for administering the tax laws.

The Memorandum should also note that certain items, such as reimbursement of a spouse's travel by a private organization, may have to be reported on the Cabinet member's financial disclosure report. 5 U.S.C. app. § 202(e)(1)(C), (D).

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

October 3, 1989

Edith E. Holiday, Esq.
General Counsel
Department of the Treasury
Washington, D.C. 20220

Robert Damus, Esq.
Acting General Counsel
Office of Management and Budget
Washington, D.C. 20500

Re: Sequestration Exemption for the
Resolution Funding Corporation

Dear Ms. Holiday & Mr. Damus:

This responds to your request of September 29, 1989, for the opinion of this Office on whether the Department of the Treasury and the Office of Management and Budget are correct in their determination that "backup" payments made by the Treasury to cover interest obligations of the Resolution Funding Corporation ("Refcorp") would not be subject to sequestration under the Balanced Budget and Emergency Deficit Act of 1985, as amended ("Balanced Budget Act"). 2 U.S.C. § 901 et seq. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73 ("FIRREA"), 103 Stat. 183, exempts Refcorp from any sequestration order under the Balanced Budget Act. We conclude that Treasury and OMB are correct that this exemption extends to Treasury's "backup" payments.

Refcorp is a privately capitalized corporation organized solely to provide funds to the Resolution Trust Corporation to resolve the financial problems of the thrift industry. Federal Home Loan Bank Act ("FHLB Act"), § 21B(a), as added by FIRREA, § 511(a), 103 Stat. 394 (1989). In addition to receiving private funding from the thrift industry, Refcorp may issue "bonds, notes, debentures, and similar obligations in an aggregate amount not to exceed $30,000,000,000." FIRREA, § 511(a), 103 Stat. 400. Interest on these obligations is to be paid by Refcorp from four specified sources. Id. To cover shortfalls from these sources, Congress established a "Treasury [b]ackup," directing the

Secretary of the Treasury to "pay to [Refcorp] the additional amount due, which shall be used by the [Refcorp] to pay such interest." See § 21B(f)(2)(E) of the FHLB Act, as added by the FIRREA, § 511(a), 103 Stat. 183, 401-402. The FIRREA "appropriate[s] to the Secretary [of the Treasury] for fiscal year 1989 and each fiscal year thereafter, such sums as may be necessary to [fund]" Treasury's "backup" payments. Id. § 21B(f)(2)(E)(iii).

The Department of the Treasury and the Office of Management and Budget have concluded that Treasury's "backup" payments to Refcorp are not subject to sequestration under the Balanced Budget Act. That Act directs the President under certain circumstances to "sequester" appropriated funds to meet targeted budget reductions. 2 U.S.C. §§ 901, 902. The Act defines "sequestrable resources" as

> new budget authority; unobligated balances; new loan guarantee commitments or limitations; new direct loan obligations, commitments, or limitations; spending authority as defined in section 651(c)(2) of [title 2]; and obligation limitations for budget accounts, programs, projects, and activities that are not exempt from reduction or sequestration under this subchapter.

Id. § 907(9). Congress has exempted from sequestration a number of "budget accounts and activities." Id. § 905(g). On August 9, 1989, Congress amended the Balanced Budget Act to add the "Resolution Funding Corporation" to the list of "budget accounts and activities" that "shall be exempt from reduction under any order" issued under the Balanced Budget Act. Pub. L. No. 101-73, FIRREA § 743(a)(4), 103 Stat. 437. The simple question posed is whether Congress intended by this amendment to exempt from sequestration Treasury payments to Refcorp made pursuant to § 21B(f)(2)(E) of the FHLB Act.

Refcorp is a "mixed-ownership Government corporation," see FIRREA, § 511(b)(1) (amending 31 U.S.C. § 9101(2)(M) to include Refcorp), which, apart from the proceeds of obligations issued pursuant to § 511(a) of FIRREA, is funded only through investments by and assessments against the Federal Home Loan Banks, id., 103 Stat. 396-397, 401; assessments against Savings Association Insurance Fund members, id., 103 Stat. 400; and FSLIC Resolution Fund receivership proceeds, id. OMB has advised us that for budget purposes Refcorp is a private corporation entirely outside the budget process. Refcorp thus is not included in the calculation of the budget "deficit," 2 U.S.C. § 622(6), which forms the basis for sequestration under the Balanced Budget Act, 2 U.S.C. § 901(a)(1), and is not subject to the Balanced Budget Act. Consequently, there would have been no need to exempt Refcorp itself from reductions under the Balanced

Budget Act. The only conceivable purpose of the exemption for Refcorp therefore must have been to ensure that payments to Refcorp such as the Treasury's "backup" payments would be exempt from reduction. Accordingly, we believe that the exemption must be understood as extending to these payments.

We recognize that Congress expressly exempted payments to other funds and entities, see 2 U.S.C. 905(g)(1)(A). We do not believe that Congress' failure to exempt the Treasury payments expressly, however, reflects an intent that they be sequestrable. If the amendment adding Refcorp were construed not to extend to the Treasury "backup" payments, it would be meaningless.

The legislative history provides no guidance as to Congress' intent in adding the exemption for Refcorp. H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 436 (1989). However, construing the exemption to refer to Treasury's "backup" payments furthers the indisputable congressional purpose of saving the thrift industry at the least cost to the Government. Interpreting the exemption not to extend to the Treasury's payments could frustrate, if not defeat, the objectives of FIRREA by seriously undermining the marketability of the obligations issued by Refcorp, and/or forcing purchasers to demand a higher rate of return to offset the risk of sequestration.

For the reasons stated, we conclude that Treasury and OMB are correct in their determination that "backup" payments made by the Department of the Treasury to cover interest payment obligations of Refcorp are not sequestrable under the Balanced Budget and Emergency Deficit Act of 1985, as amended. 2 U.S.C. § 901 et seq.

Please let me know if this Office can be of further assistance.

Sincerely,

William P. Barr
Assistant Attorney General
Office of Legal Counsel

U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

September 18, 1989

MEMORANDUM FOR MARTIN L. ALLDAY
Solicitor
United States Department of the Interior

Re: Payment of Interest on Awards of Back Pay in Employment Discrimination Claims Brought by Federal Employees

This memorandum responds to your office's request for our opinion as to whether the federal government is liable for interest on back pay awards made pursuant to claims of employment discrimination brought by federal employees under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1973 (ADEA), or the Rehabilitation Act of 1973.[1] Many other federal agencies have requested our opinion on this question as well.[2] We also understand that the Equal

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[1] Letter from Ralph W. Tarr, Solicitor, Department of the Interior to William P. Barr, Assistant Attorney General, Office of Legal Counsel, Department of Justice, June 16, 1989. As your letter indicates, you have submitted this question to us pursuant to a settlement agreement you reached with the plaintiffs in Osolinik v. Department of the Interior, EEOC Request No. 05870101, Appeal No. 01842566. The settlement agreement provides that the opinion of this Office shall resolve the disagreement between the parties regarding the availability of interest on the back pay awarded to the plaintiffs. Also pursuant to the settlement agreement, we have received and reviewed the briefs and reply briefs submitted to this Office by the Department of the Interior and the Georgetown University Law Center Sex Discrimination Clinic (on behalf of the plaintiffs).

[2] See Letter from Steven Y. Winnick, Acting General Counsel, Department of Education to Douglas Kmiec, Assistant Attorney General, Office of Legal Counsel, Mar. 6, 1989; Letter from L. Niederlehner, Deputy General Counsel, Department of Defense to William Barr, Assistant Attorney General, Office of Legal Counsel, June 15, 1989; Letter from Edith E. Holiday, General Counsel, Department of the Treasury to William P. Barr, Assistant Attorney General, Office of Legal Counsel, June 30, 1989; Letter from Richard D. Komer, Legal Counsel, U.S. Equal Opportunity Commission to William P. Barr, Assistant Attorney General, Office of Legal Counsel, July 5, 1989 [hereinafter EEOC letter].

Employment Opportunity Commission (EEOC) is considering issuing proposed regulations on the availability of interest on back pay in cases it decides. For the reasons described in this memorandum, we conclude that the United States is not liable for the payment of interest on back pay awards for employment discrimination prohibited by Title VII or the ADEA. We do not now decide whether a similar conclusion is warranted with respect to the Rehabilitation Act.

I. Discussion

A. Liability for Interest on Back Pay Under Title VII

Section 706(g) of Title VII of the Civil Rights Act of 1964 authorizes an award of back pay to federal employees who have suffered discrimination prohibited by Title VII. See 42 U.S.C. §§ 2000e-5(g), 2000e-16.[3] The language of section 706(g) does not provide for the payment of interest on such awards.[4] Thus, the United States cannot be held liable for interest on Title VII back pay awards because it has not expressly waived its immunity from such liability.[5] See, e.g., Library of Congress v. Shaw,

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[3] Section 717 of Title VII prohibits the federal government from discriminating against its employees on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-16. As incorporated by section 717(d), section 706(g) of Title VII authorizes an award of back pay to federal employees who have suffered discrimination prohibited by Title VII. Id. § 2000e-5(g).

[4] Section 706(g) provides that the court may

> order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the [EEOC]. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

42 U.S.C. § 2000e-5(g).

[5] Nor does section 717(b), which grants the EEOC the authority to order "appropriate remedies, including . . . back pay, as will effectuate the policies of this section," contain

(continued...)

478 U.S. 310, 314-16 (1986) (Title VII does not waive the United States' immunity from liability for interest on attorneys' fees awards under that statute).

The EEOC and the Interior plaintiffs acknowledge that Title VII does not authorize interest on a back pay award, but they contend that interest is available for Title VII claimants pursuant to the Back Pay Act. Since 1987, that Act has permitted federal employees who are affected by an unjustified or unwarranted personnel action to receive back pay with interest under some circumstances. 5 U.S.C. § 5596(b). We conclude, however, that the relief authorized by the Back Pay Act is not available to federal employees to redress claims brought under Title VII because Congress intended the remedial provisions of Title VII to provide the exclusive framework by which a federal employee may obtain relief for violation of rights created by Title VII.

In Brown v. GSA, 425 U.S. 820 (1976), the Supreme Court ruled that Title VII provides the exclusive cause of action for federal employees to challenge employment discrimination. The Court concluded that Congress intended Title VII to create "an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." Id. at 829. Thus, it held that a federal employee may not sue for employment discrimination under 42 U.S.C. § 1981, for example, because Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." Id. at 835.

The EEOC and the Interior plaintiffs argue that Brown does not control the question presented here, which is whether the Back Pay Act may provide relief for violations of the substantive rights created by Title VII. They contend that Brown held only that Title VII provides the exclusive cause of action to redress violations of Title VII rights. In their view, Brown did not reach whether Title VII is the exclusive source of relief available for Title VII violations. They argue that the Back Pay Act creates no competing substantive rights, but simply provides relief for violations of rights created by a host of other statutes, including Title VII. Thus, they conclude that the Back Pay Act may be used to obtain interest on a back pay award in a Title VII case notwithstanding Brown.

This argument is answered by Great American Federal Savings & Loan Association v. Novotny, 442 U.S. 366 (1979), in which the Court made clear that the Title VII cause of action is wholly exclusive with respect to violations of Title VII rights -- that

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[5](...continued)
language specific enough to constitute a waiver of immunity with respect to interest on back pay awards. See 42 U.S.C. § 2000e-16(b).

is, that Title VII provides both the exclusive means of challenging violations and the only source of relief available. In Novotny, the Court considered whether the rights created by Title VII can be redressed under 42 U.S.C. § 1985(3), which provides a cause of action for the recovery of compensatory and possibly punitive damages for a deprivation of "the equal protection of the laws, or of equal privileges and immunities under the laws." The Court observed that "[s]ection 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." Id. at 372. It thus considered "whether the rights created by Title VII may be asserted within the remedial framework of section 1985(3)." Id. at 377 (emphasis in original). Following Brown, the Court concluded that permitting a violation of Title VII to be asserted through section 1985(3) would allow a plaintiff to circumvent vital portions of the comprehensive and exclusive remedial scheme Congress had intended Title VII to provide. The Court described the interrelationship between Novotny and Brown as follows:

> The problem in this case is closely akin to that in Brown v. GSA, 425 U.S. 820. There, we held that § 717 of Title VII provides the exclusive remedy for employment discrimination claims of those federal employees that it covers. . . . Here, the case [for holding Title VII is exclusive] is even more compelling. In Brown, the Court concluded that § 717 displaced other causes of action arguably available to assert substantive rights similar to those granted by § 717. Section 1985(3), by contrast, creates no rights. It is purely a remedial statute, providing a civil cause of action when some otherwise defined federal right -- to equal protection of the laws or equal privileges and immunities under the laws -- is breached by a conspiracy in the manner defined by the section.

442 U.S. at 376 (emphasis in original). Because the Court concluded that Congress intended the Title VII cause of action to provide the exclusive relief for violations of Title VII rights, as well as the exclusive means for challenging the substantive violations, the Court held that the remedial framework of section 1985(3) is not available to redress Title VII rights. Id. at 378.

Novotny controls here. Like section 1985(3), the Back Pay Act is a remedial statute that creates no substantive rights. See H.R. Rep. No. 32, 89th Cong., 1st Sess. 2 (1965) (the Back Pay Act "does not create any new rights of tenure, review, or appeal"). Moreover, like section 1985(3), the Back Pay Act may not be employed to provide relief unless there has been a violation of a substantive right that is created by some other federal law. Spagnola v. Stockman, 732 F.2d 908, 912 (Fed. Cir.

1984).[6] Both the EEOC and the Interior plaintiffs concede this much. See EEOC letter at 6; Interior plaintiffs' brief at 9-10 & n.9. What the EEOC and the Interior plaintiffs fail to understand is that like section 1985(3), the Back Pay Act creates its own cause of action to redress violations of rights created by other statutes. E.g., United States v. Hopkins, 427 U.S. 123, 128 (1976); United States v. Testan, 424 U.S. 392, 407 (1976). A federal employee must bring an action under the Back Pay Act in order to obtain the relief, including interest, provided by that act. But Novotny holds that an employee may not rely upon a cause of action established by a different remedial statute in order to obtain relief for the violation of a right created by Title VII, because the relief available under the cause of action established by Title VII is exclusive.[7] Therefore, under Novotny a federal employee may not bring an action under the Back Pay Act to obtain relief for Title VII claims.

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[6] The requisite law can be, for example, regulations guaranteeing certain procedures before an agency can take adverse action against an employee, see Summers v. United States, 648 F.2d 1324, 1327 (Ct. Cl. 1981), the statutory right to engage in "impact and implementation" bargaining, see Professional Airways Systems v. FLRA, 809 F.2d 855, 857-59 (D.C. Cir. 1987), or a collective bargaining agreement requiring the promotion of a federal employee who is detailed to a higher grade position, see 61 Comp. Gen. 492, 495 (1981). See also 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4101 at 321 & n.65 (1988) (statutory right of a federal employee to have wages fixed in accordance with prevailing rates can be vindicated pursuant to the Back Pay Act).

[7] The decisions concerning the relationship between 42 U.S.C. § 1983 and Title VII also support this conclusion. Section 1983 creates a cause of action for anyone who suffers "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by an individual acting under color of law. 42 U.S.C. § 1983. Section 1983, like section 1985(3) and the Back Pay Act, is a remedial statute. See Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979). Recovery under section 1983 can be based on either a constitutional or a statutory violation. When an individual alleges a constitutional violation, Title VII is not exclusive because different underlying rights are involved, so the section 1983 action is available. See, e.g., Starrett v. Wadley, 876 F.2d 808, 814 (10th Cir. 1989). But when an individual alleges a violation of a right created by Title VII itself, Title VII is exclusive because only one underlying right is involved, so the section 1983 action is unavailable. See, e.g., Tafoya v. Adams, 816 F.2d 555, 558 (10th Cir.), cert. denied, 108 S. Ct. 152 (1987); Irby v. Sullivan, 737 F.2d 1418, 1427-29 (5th Cir. 1984).

The extreme care with which Congress fashioned the back pay remedy of section 706(g) of Title VII fortifies our conclusion that the Back Pay Act may not be used to supplement the relief provided by Title VII. When Congress extended the coverage of Title VII to federal employees in 1972, it also amended Title VII's back pay remedy. The legislative history of the amendments to section 706(g) shows Congress carefully determined the precise contours of the back pay remedy available under Title VII.[8] In particular, Congress decided in 1972 that a two-year limitation on the recovery of back pay in Title VII cases was fair.[9] Reliance upon the Back Pay Act, which contains no such limitation, would be contrary to the balance that Congress struck in Title VII.[10]

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[8] Before 1972, Title VII did not impose any limitation on the duration of an employer's liability for back pay. In September 1971, the House proposed a two-year limitation on the recovery of back pay "to preclude the threat of enormous backpay liability which could be utilized to coerce employers and labor organizations into surrendering their fundamental rights to a fair hearing and due process." 117 Cong. Rec. 31981 (1971) (statement of Rep. Erlenborn). At a committee hearing on the Senate bill in October 1971, proponents of the two-year limitation argued that the availability of unlimited back pay produced coercive settlements, and they noted that other federal statutes contained similar limitations that resulted in rapid settlements. See, e.g., Equal Employment Opportunities Enforcement Act of 1971: Hearings on S. 2515, S. 2617 & H.R. 1746 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Works, 92d Cong., 1st Sess. 189-90 (1971) (statement of Rep. Erlenborn). Opponents of the limitation feared it would provide an incentive to employers to delay settlement negotiations, and they defended unlimited back pay as appropriate relief for a Title VII violation. See, e.g., id. at 240-42, 249-50 (statement of Jack Greenberg, NAACP Legal Defense and Education Fund). After hearing these competing views, the Senate bill included a two-year limitation on back pay. See S. Rep. No. 415, 92 Cong., 1st Sess. 38, 58 (1971). Congress passed the bill with this limitation in March 1972.

[9] See, e.g., 118 Cong. Rec. 1071 (1972) (statement of Sen. Beall) ("We are interested in being fair to all parties . . . but should there be a finding in favor of the plaintiff in one of these cases, we want to make sure that the penalty is within the balance of fairness.").

[10] The EEOC buttresses its argument against Title VII's exclusivity by asserting that the Back Pay Act was an available remedy for employment discrimination against federal employees before 1972. In fact, however, the majority view in 1972 was

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Indeed, one court has held that a federal employee cannot use the Back Pay Act to avoid the two-year limitation in Title VII. Kulkarni v. Hoffman, 22 Fair Emp. Prac. Cas. (BNA) 1467 (D.D.C. 1977), rev'd in part on other grounds, Kulkarni v. Alexander, 662 F.2d 758 (D.C. Cir. 1978). In Kulkarni, the plaintiff, having already obtained two years of back pay pursuant to section 706(g) for a Title VII violation, sought additional back pay under the Back Pay Act. The court held that "[t]his argument is plainly at odds with the holding of the Supreme Court in Brown v. GSA . . . . It is impossible to reconcile plaintiff's position with the Court's strong affirmation of Title VII as the exclusive federal remedy." 22 Fair Emp. Prac. Cas. (BNA) at 1468-69.[11]

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[10](...continued)
that judicial relief was not available to federal employees who suffered from employment discrimination. See, e.g., Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969) (Blackmun, J.), cert. denied, 397 U.S. 934 (1970). For this reason, "Congress was persuaded that federal employees who were treated discriminatorily had no effective judicial remedy." Brown, 425 U.S. at 828. Thus, Title VII, including the modified back pay provision, was extended to federal employees in 1972 on the assumption that the Back Pay Act did not then address discrimination claims by federal employees. See 118 Cong. Rec. 4929 (1972) (statement of Sen. Cranston) (the bill will "[e]ntitle an employee to back pay if discrimination has been found to exist -- the Government has insisted it does not have legal authority to make such awards"); see also S. Rep. No. 415, 92d Cong., 1st Sess. 16 (1971).

[11] Kulkarni is the only case decided before 1987 that examines the relationship between Title VII and the Back Pay Act. The few district courts that have addressed the effect of the 1987 amendments to the Back Pay Act in Title VII cases have done so only cursorily. Compare Mitchell v. Secretary of Commerce, Civ. No. 82-3020 (D.D.C. July 14, 1989) (prejudgment interest not available because a failure to promote an employee is not covered by the Back Pay Act); Brown v. Marsh, 713 F. Supp. 20, 24-25 (D.D.C. 1989) (same); Shafer v. Commander, Army & Air Force Exch. Serv., No. CA 3-76-1246-R (N.D. Tex. May 3, 1989) (interest not available because Back Pay Act amendments do not waive sovereign immunity with respect to Title VII cases) with Rollins v. Bennett, No. C88-388C (W.D. Wash. 1988) (interest available because Back Pay Act amendments apply to ADEA cases); Parker v. Burnley, 693 F. Supp. 1138, 1153 (N.D. Ga.) (interest available because Back Pay Act amendments apply to Title VII cases), modified, 703 F. Supp. 925, 927 (N.D. Ga. 1988).

We do not believe that the Supreme Court's recent decision in Loeffler v. Frank, 108 S. Ct. 1965 (1988), permits the Back Pay Act to be used as the EEOC suggests. In Loeffler the Court held that prejudgment interest can be awarded to an employee who brings a Title VII suit against the United States Postal Service. The Court held that a "sue and be sued" clause that generally waived the Postal Service's sovereign immunity also waived the agency's immunity from awards of interest. Id. at 1969-70 (citing 39 U.S.C. § 401(1)). Since "Title VII authorizes interest awards as a normal incident of suits against private parties, and since Congress has waived the Postal Service's immunity from such awards," id. at 1971, the Court concluded that the Postal Service was subject to an interest award on an employee's Title VII claim. Thus, the Court explained that "§ 401 of the Postal Reorganization Act provides the waiver of sovereign immunity from interest awards against the Postal Service, and § 717 of Title VII provides the cause of action under which petitioner may recover interest." Id. at 1974-75.

The Court's rationale in Loeffler cannot support an award of interest, not otherwise permitted by Title VII, under the Back Pay Act. The Postal Reorganization Act at issue in Loeffler waives the sovereign immunity of the United States for interest awards in all actions against the Postal Service.[12] The Back Pay Act, however, waives the sovereign immunity of the United States from payments of interest only "on awards under the Back Pay Act" itself. H.R. Conf. Rep. No. 498, 100th Cong., 1st Sess. 19 (1987); see also H.R. Rep. No. 415, 100th Cong., 1st Sess. 1178 (1987). In order to obtain an award "under the Back Pay Act," an individual must employ the cause of action provided by that Act. As discussed above, however, under Novotny the cause of action provided by the Back Pay Act may not be used to supplement the relief provided by Title VII. Thus, the waiver of sovereign immunity for interest under the Back Pay Act does not extend to Title VII claims.

The original regulations implementing the Back Pay Act and Title VII also are consistent with this conclusion. The EEOC contends that the authority to pay interest on back pay awards pursuant to the Back Pay Act is part of the responsibilities it

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[12] In fact, Loeffler is best understood as a direct consequence of the Court's previous recognition that authorization of suits against federal corporations engaged in commercial activities waives their sovereign immunity and makes them generally liable in the manner of private parties. See, e.g., First Nat'l City Bank v. Banco Para El Comercio, 462 U.S. 611, 625 (1983) (noting that "[p]rovisions in the corporate charter [of government corporations] stating that the instrumentality may sue and be sued have been construed to waive the sovereign immunity accorded to many governmental activities").

derived from the old Civil Service Commission (CSC). During its existence, the CSC promulgated separate regulations under both Title VII and the Back Pay Act. See 5 C.F.R. §§ 550.801-.804 (1973) (Back Pay Act); 5 C.F.R. § 713.271 (1973) (remedial actions under Title VII). The CSC's Title VII regulations provided for "backpay computed in the same manner prescribed by § 550.804 of this chapter [the Back Pay Act regulations] . . . except that the backpay liability may not accrue from a date earlier than 2 years prior to the date the discrimination complaint was filed." 5 C.F.R. § 713.271 (1973). The regulations applicable to remedial actions under Title VII incorporated the procedure by which back pay awards were calculated pursuant to the Back Pay Act, but they do not suggest that the cause of action created by the Back Pay Act was available to obtain relief for a Title VII violation. Dixon v. United States, 17 Cl. Ct. 73, 78 (1989); see also 62 Comp. Gen. 239, 242 (1983). Moreover, the CSC's Title VII regulations expressly differed from the CSC's Back Pay Act regulations by including Title VII's two-year limitation on the recovery of back pay. The EEOC's regulations still reflect this difference between back pay awarded under Title VII and back pay awarded under the Back Pay Act. 29 C.F.R. § 1613.271 (1988). We believe that the EEOC's own conclusion that the Back Pay Act may not be used to circumvent the two-year limitation on back pay in a Title VII case undermines its contention that the Back Pay Act may be used to obtain interest on a back pay award in a Title VII case.[13]

Finally, we disagree with the EEOC's assertion that denying it the authority to pay interest on back pay awards remedying Title VII violations will result in forum shopping by federal employees who will bring allegations of improper employment practices to agencies, such as the Merit Systems Protection Board or the Federal Labor Relations Board, that can award interest. The proper focus is on the nature of the claim brought by a federal employee, not the forum in which the employee may bring a claim. Title VII's exclusivity prevents any forum from awarding

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[13] The EEOC suggests that Congress acquiesced in its view that the Back Pay Act may determine the relief available under Title VII when it added an interest provision to the Back Pay Act in 1987 without amending the act in any other respect. The meager congressional discussion of the interest provision, however, shows that Congress did not consider the relationship between the Back Pay Act and Title VII. See H.R. Conf. Rep. No. 498, 100th Cong., 1st Sess. 19 (1987); see also H.R. Rep. No. 415, 100th Cong., 1st Sess. 1178 (1987). Therefore, Congress cannot be said to have intended to endorse the EEOC's current view of the relationship between the Back Pay Act and Title VII when it added a provision allowing interest under the Back Pay Act in 1987.

interest on back pay as a remedy for the violation of a right created by Title VII.

We conclude, therefore, that the remedial provisions of Title VII serve as the exclusive means by which a federal employee may obtain relief for a Title VII violation by the federal government.

B. Liability for Interest on Back Pay Under the ADEA and the Rehabilitation Act

Like Title VII, neither the ADEA nor the Rehabilitation Act expressly waives the United States' immunity with respect to interest on back pay awards. Section 15 of the ADEA, which prohibits age discrimination against federal employees, authorizes the EEOC to order "appropriate remedies, including reinstatement or hiring of employees with or without backpay." 29 U.S.C. § 633a(b). Nowhere does this statute expressly provide for the payment of interest by the United States on such awards. Similarly, the Rehabilitation Act, which in section 501 prohibits handicap discrimination against federal employees, expressly incorporates the remedial provisions of Title VII. 29 U.S.C. § 794a(a)(1). Thus, that Act also cannot be read to have waived the United States' immunity with respect to interest on back pay awards. Therefore, we must consider whether these statutes provide exclusive relief for violations of their provisions. We conclude that the same analysis that shows that the Back Pay Act may not be used in a Title VII case also teaches that the ADEA serves as the exclusive means by which a federal employee may obtain relief for a violation of the rights created by that statute. For the reasons discussed below, we reach no opinion here with respect to the exclusivity of the Rehabilitation Act.

Congress patterned section 15 of the ADEA after section 717 of Title VII, so both sections should be construed consistently. See Romain v. Shear, 799 F.2d 1416, 1418 (9th Cir. 1986), cert. denied, 481 U.S. 1050 (1987). Relying on Brown, and analogizing the ADEA to Title VII, federal courts have unanimously concluded that Congress intended the ADEA to provide the exclusive remedy for claims of age discrimination in federal employment. See, e.g., Castro v. United States, 775 F.2d 399, 403 n.3 (1st Cir. 1985); Purtill v. Harris, 658 F.2d 134, 136-37 (3d Cir. 1981), cert. denied, 462 U.S. 1131 (1983); Paterson v. Weinberger, 644 F.2d 521, 524-25 (5th Cir. 1981); Rattner v. Bennett, 701 F. Supp. 7, 9 (D.D.C. 1988). Moreover, by analogy to Novotny, courts have concluded that general remedial statutes, such as section 1983 and section 1985(3), are unavailable to supplement the ADEA. See Morgan v. Humboldt County School Dist., 623 F. Supp. 440, 442-43 (D. Nev. 1985); McCroan v. Bailey, 543 F. Supp.

1201, 1208-09 (S.D. Ga. 1982).[14] Under these circumstances, we conclude that the Back Pay Act may not be employed to waive sovereign immunity from interest on awards in ADEA cases.

The Rehabilitation Act creates a cause of action by which a violation of section 501, 29 U.S.C. § 791, the provision protecting federal employees, can be challenged, and the Act expressly incorporates the remedial provisions of Title VII. 29 U.S.C. § 794a(a)(1). Additionally, section 504 of the Act prohibits handicap discrimination in any "program or activity" receiving federal funds or conducted by certain federal agencies, 29 U.S.C. § 794, and it provides that the remedies available under Title VI of the Civil Rights Act are applicable to violations of section 504. 29 U.S.C. § 794a(a)(2).

The federal courts of appeals are split on whether section 501 provides the exclusive cause of action available to federal employees. Three circuits have held that Congress intended section 501 of the Rehabilitation Act to provide the exclusive remedy for claims of handicap discrimination in federal employment. See Johnson v. Horne, 875 F.2d 1415, 1420-21 (9th Cir. 1989); Johnson v. United States Postal Service, 861 F.2d 1475, 1477 (10th Cir. 1988), petition for cert. filed, 57 U.S.L.W. 3781 (U.S. May 16, 1989) (No. 88-1859); McGuinness v. United States Postal Service, 744 F.2d 1318, 1319-21 (7th Cir. 1984); cf. Cousins v. Secretary of United States Dep't of Transp., No. 88-1106 (1st Cir. July 24, 1989) (en banc) (section 504 does not create a private cause of action against the federal government acting in its regulatory capacity). Other circuits have held that the cause of action created by section 501 is not exclusive and that section 504 affords a private cause of action to federal employees. See Morgan v. United States Postal Service, 798 F.2d 1162, 1164-65 (8th Cir. 1986), cert. denied, 480 U.S. 948 (1987); Smith v. United States Postal Service, 742 F.2d 257, 258-62 (6th Cir. 1984); Prewitt v. United States Postal Service, 662 F.2d 292, 301-04 (5th Cir. Unit A 1981). None of the submissions we have received address this issue, and we are reluctant to decide it without the opportunity to consider the views of interested agencies. Therefore, we invite your comments

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[14] Indeed, the relationship between the ADEA and section 1983 suggests that the ADEA is perhaps even more exclusive than Title VII. Unlike Title VII, some courts have held that the ADEA precludes a section 1983 action based on the alleged violation of a constitutional right. See Zombro v. Baltimore City Police Dep't, 868 F.2d 1364, 1367-71 & n.5 (4th Cir. 1989); Ring v. Crisp County Hosp. Auth., 652 F. Supp. 477, 479-82 (M.D. Ga. 1987); Frye v. Grandy, 625 F. Supp. 1573, 1575-76 (D. Md. 1986); but see Zombro, 868 F.2d at 1372-79 (Murnaghan, J., dissenting); Ray v. Nimmo, 704 F.2d 1480, 1485 (11th Cir. 1983); Price v. County of Erie, 654 F. Supp. 1206, 1208 (W.D.N.Y. 1987).

on whether Congress intended the Rehabilitation Act to provide the exclusive cause of action available to federal employees who allege handicap discrimination prohibited by the Act. If the Rehabilitation Act does not provide the exclusive cause of action against the federal government, we must then determine whether a right created by the Rehabilitation Act may be addressed in an action under the Back Pay Act.

II. Conclusion

The United States must pay interest only if it has waived its sovereign immunity. Neither Title VII, the ADEA, nor the Rehabilitation Act contains such a waiver. The Back Pay Act does contain a waiver of sovereign immunity, but because Congress intended the remedial provisions of Title VII and the ADEA to be exclusive, the Back Pay Act may not be employed to obtain relief for a violation of a right created by those statutes. Therefore, we conclude that the United States is not liable for the payment of interest on back pay awards to federal employees charging employment discrimination under Title VII or the ADEA. We express no view here as to whether the Rehabilitation Act is intended to be an exclusive remedy or whether the Back Pay Act can be used to redress a violation of that statute.

Please let me know if we can be of further assistance.

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