

REAUTHORIZATION OF THE U.S. DEPARTMENT
OF JUSTICE: EXECUTIVE OFFICE FOR U.S. AT-
TORNEYS, CIVIL DIVISION, ENVIRONMENT AND
NATURAL RESOURCES DIVISION, EXECUTIVE OF-
FICE FOR U.S. TRUSTEES, AND OFFICE OF
THE SOLICITOR GENERAL

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW
OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

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WEDNESDAY, MAY 9, 2001

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:10 p.m., in Room 2141, Rayburn House Office Building, Hon. Bob Barr [Chairman of the Subcommittee] presiding.

Mr. BARR. Good afternoon, ladies and gentlemen.

The Subcommittee on Commercial and Administrative Law is meeting this afternoon to receive testimony from five components of the U.S. Department of Justice. This is part of the ongoing Judiciary Committee effort to consider reauthorization of that Department and its components. This authorization process provides the Committee the opportunity to examine in detail the performance of the agency and evaluate how well it is positioned to achieve its goals and determine both the adequacy of its funding levels and the need for changes in legislation to facilitate its mission.

I should state at the outset this will not be the only encounter that the Subcommittee has with the components within our jurisdiction during the 107th Congress. It is my intention to engage in active oversight during these 2 years. Oversight requires that we listen in order to learn so we can intelligently question, suggest and, if necessary, enact.

We do not, however, begin this process without expectations for the Department of Justice, expectations we certainly share with the American people. The Department of Justice is directly responsible for performing the President's responsibility to take care that the laws of the United States are faithfully executed. These laws touch virtually every region of our lives—at home, at work, at school and at play, civil rights, commerce, the environment, our community, the workplace, information and privacy, food and drugs, the list goes and on. It includes literally thousands of criminal laws and regulations, as one observer noted, covering everything from kidnapping to poultry inspection.

We expect that the Department of Justice should have and should continue to perform competently and fairly, conscious of the awesome power of the government and determine it should be exercised in the interest of justice and for the common good.

We will work with the components we hear from today both by conducting oversight hearings such as today's efforts but also through a continuing study of the departments and their components' activities and needs.

I wish to stress the importance of today's hearing for the Department of Justice and for our Members. The information we receive from our witnesses today will be of immediate value in determining adequacy of the funding levels proposed by the President in his budget request for the Department of Justice. Moreover, questions will arise as the authorization is considered by the Judiciary Committee as to whether priority should be reordered or resources reassigned. An important part of the record on which the Committee will base its decision will be the testimony at today's hearing and the questions we pose to the witnesses and the answers provided both at today's hearing and in follow-up writings.

The components that we will receive testimony from this afternoon account for funding that approaches \$1.8 billion. They discharge broad litigating appellate support and administrative responsibilities. In fact, so broad is their mission that the attention we give to their performance can significantly improve the lives, safety and well-being of virtually every American.

I would like now to recognize the distinguished Ranking Member, Mr. Watt of North Carolina, for any opening comments.

Mr. WATT. Thank you, Mr. Chairman; and I want to welcome the witnesses here and thank them for participating in today's hearing.

I especially want to welcome Mr. Calloway, who hails from Charlotte, North Carolina, and who was the U.S. Attorney. There was a transition, but I am delighted to see that he is continuing to be involved at the national level in making this presentation today. And I welcome all of the witnesses. I am not just singling him out. I thank all of you for being here.

It is great to have an oversight hearing on an agency that everybody agrees is an important agency and about which there is little partisan division. I think we can be clear in our objective to try to run the government and this Department efficiently and not get into a lot of philosophical discussions.

So I am looking forward to this oversight hearing and to subsequent oversight hearings regarding the Department of Justice. I agree wholeheartedly with what the Chairman has said in his opening comments and particularly with his entreaty that we have to listen in order to learn.

And the quicker I shut up the quicker we can start listening to the witnesses, so I think I will do that and yield back the balance of my time, Mr. Chairman.

Mr. BARR. I thank the distinguished Ranking Member.

I would now like to call on the Vice Chairman of the Committee, Mr. Flake from Arizona, for any opening comments he would make.

Mr. FLAKE. I just want to say welcome. I have no opening comments but look forward to your testimony.

Mr. BARR. Finally, I would like to call on the distinguished former Chairman of this Committee, Mr. Gekas from Pennsylvania, for any opening comments he would make.

Mr. GEKAS. I thank the Chair; and I, too, waive the privilege of an opening statement. Thank you.

Mr. BARR. Thank you.

At this time, I would like to take the opportunity to introduce all four of our witnesses here today; and then we will call on each of the one of witnesses to take a few moments, 5 minutes or so, to make their comments for the record. Of course, the entire written statement that they might care to submit will be incorporated in the record of these proceedings without objection.

Our first witness today will be Mark Calloway. Mr. Calloway has served as the Acting Director of the Executive Office for the United States Attorneys since November of last year. The United States Attorneys are our Nation's principal litigators under the Attorney General.

Prior to beginning serving in this present position, Mr. Calloway was the United States Attorney for the Western District of North Carolina. At the time he assumed that office, he was the fourth youngest U.S. Attorney in the country.

In addition, Mr. Calloway has served as Chairman of the Attorneys General Advisory Committee for United States Attorneys. Mr. Calloway earned his undergraduate degree in political science from North Carolina State University in 1980 and received his law degree from Campbell University School of Law in 1983.

We appreciate your being with us here today, Mr. Calloway.

Our second witness will be Stuart Schiffer, who is the Acting Assistant Attorney General for the Civil Division. The Civil Division is one of the six litigating divisions in the Department of Justice, representing the United States, its departments and agencies, Members of Congress, Cabinet officers and other Federal employees.

Mr. Schiffer joined the Department of Justice in 1963 and has served under 16 Attorneys General beginning with Robert Kennedy. Mr. Schiffer received his undergraduate degree and law degree from the University of Illinois.

Stu, it is very nice to have you here today. It is great to see you again.

The third witness we have today is John Cruden, who is the Acting Assistant Attorney General for the Environment and Natural Resources Division. In that capacity he is responsible for supervising a wide variety of environmental litigation, including civil enforcement actions for key environmental statutes such as the Clean Water Act, the Clean Air Act and the Safe Drinking Water Act. In addition, he supervises wetlands enforcement, challenges to EPA rulemaking and environmental actions filed against the United States.

Prior to assuming his current position, Mr. Cruden was the Chief of the Environmental Enforcement Section.

Mr. Cruden, we appreciate your being with us today and look forward to your testimony and expertise.

Our fourth and final witness today is Martha Davis. Ms. Davis currently serves as the Acting Director of the Executive Office for

United States Trustees. The U.S. Trustee program is a component of the Department of Justice responsible for overseeing the administration of bankruptcy cases and private trustees.

Prior to her appointment as Acting Director, Ms. Davis served as General Counsel. In that capacity, she was responsible for providing legal advice and litigation support to the Director and to the United States Trustees.

Prior to joining the Executive Office for the United States Trustees, Ms. Davis was in private practice where she concentrated on real estate, bankruptcy and collections. She earned her law degree in 1980 from Catholic University's Columbus School of Law in Washington, D.C., and her bachelor of arts degree in 1973 from the College of William and Mary in Williamsburg, Pennsylvania.

We very much appreciate, Ms. Davis, your being with us today and sharing your thoughts.

In addition to the four witnesses that we plan to hear from today, I will, on unanimous consent, enter into the record a statement on behalf of the Solicitor General's Office. This is not in lieu of that office's appearance at a subsequent hearing which we anticipate occurring later in this session.

[The material referred to follows:]

PREPARED STATEMENT OF BARBARA D. UNDERWOOD, ACTING SOLICITOR GENERAL OF
THE UNITED STATES

Mr. Chairman and Members of the Subcommittee: Thank you for inviting me to present testimony regarding the Office of the Solicitor General in connection with the Committee's hearing.

I. THE SOLICITOR GENERAL'S DUTIES

When Congress created the position of Solicitor General in 1870, it expressed high ambitions for the Office: the Solicitor General is the only officer of the United States required by statute to be "learned in the law," 28 U.S.C. Section 505, and the Committee Report accompanying the 1870 Act stated: "We propose to have a man of sufficient learning, ability, and experience that he can be sent . . . into any court wherever the Government has an interest in litigation, and there present the case of the United States as it should be presented."

In modern times, the Solicitor General has exercised responsibility in three general areas.

1. The first, and perhaps best-known, function of the Solicitor General is his representation of the United States in the Supreme Court. The late former Solicitor General Erwin Griswold captured the nature of this responsibility in observing:

The Solicitor General has a special obligation to aid the Court as well as serve his client. . . . In providing for the Solicitor General, subject to the direction of the Attorney General, to attend to the "interests of the United States" in litigation, the statutes have always been understood to mean the long-term interests of the United States, not simply in terms of its fisc, or its success in particular litigation, but as a government, as a people.

This responsibility, of course, includes defending federal statutes challenged as unconstitutional whenever a good faith defense exists. The Solicitor General also defends regulations and decisions of Executive Branch departments and agencies, and is generally responsible for representing independent regulatory agencies before the Supreme Court.

The Supreme Court practice of the Solicitor General includes filing petitions for review on behalf of the United States. In this regard, as the Supreme Court has stated:

This Court relies on the Solicitor General to exercise such independent judgment and to decline to authorize petitions for review in this Court in the majority of the cases the Government has lost in the courts of appeals.

The Solicitor General also responds to petitions filed by adverse parties who were unsuccessful in the lower federal courts in criminal prosecutions or civil litigation involving the government. Where review is granted in a case in which the United States is a party, the Solicitor General is responsible for filing a brief on the merits with the Court and she or a member of her staff presents oral argument before the Court. The Solicitor General also files *amicus curiae*, or friend-of-the-court, briefs in cases involving other parties where she deems it in the best interest of the United States to do so. Although most amicus filings occur only after review has been granted, the Solicitor General also submits amicus briefs at the petition stage when invited by the Court to do so or, in rare instances when Supreme Court resolution of the questions presented may affect the administration of federal programs or policies. The Solicitor General, as a rule, participates in oral argument in those cases in which the government has filed an *amicus* brief on the merits.

2. The second category of responsibilities discharged by the Solicitor General relates to government litigation in the federal courts of appeals, as well as in state, and sometimes even foreign, appellate courts. Authorization by the Solicitor General is required for all appeals to the courts of appeals from decisions adverse to the United States in federal district courts. The Solicitor General's approval is also required before government lawyers may seek *en banc*, or full appellate court, review of adverse decisions rendered by a circuit court panel. Additionally, government intervention or participation *amicus curiae* in federal appellate courts (as well as state or foreign appellate courts) must be approved by the Solicitor General. In addition, once a case involving the government is lodged in a court of appeals, any settlement of that controversy requires the Solicitor General's assent.

3. In the third category of responsibilities are decisions with respect to government intervention in cases where the constitutionality of an Act of Congress "affecting the public interest" has been brought into question at any level within the federal judicial system. In such circumstances, 28 U.S.C. Section 2403 requires that the Solicitor General be notified by the court in which the constitutional challenge has arisen and be given an opportunity to intervene with the full rights of a party on the constitutional question.

The various decisions discussed above for which the Solicitor is responsible are arrived at only on the basis of written recommendations and extensive consultation among the Office of the Solicitor General and affected offices of the Justice Department, Executive Branch departments and agencies, and independent agencies. Where differences of opinion exist among these components and agencies, or between them and the Solicitor General's staff, written views are exchanged and meetings are frequently held in an attempt to resolve or narrow differences and help the Solicitor General arrive at a final decision. Where consideration is given to an *amicus curiae* filing by the government in non-federal government litigation in the Supreme Court or lower federal appellate courts, it is not uncommon for the Solicitor or members of her staff to meet with counsel for the parties in an effort to understand their respective positions and interests of the United States that might warrant its participation.

II. ORGANIZATION OF THE SOLICITOR GENERAL'S OFFICE

The Office of the Solicitor General has a staff of 48, of which 22 (including the Solicitor General) constitute its legal staff and the remainder serve in managerial, technical, or clerical capacities. Of the 22 attorneys, four are Deputy Solicitors General, senior lawyers with responsibility for supervising matters in the Supreme Court and lower courts within their respective areas of expertise. Seventeen attorneys serve as Assistants to the Solicitor General. Sixteen are assigned a "docket" of cases presenting a wide spectrum of legal problems under the guidance and supervision of the Deputies. One of these assistant positions is currently vacant. The seventeenth, the Tax Assistant, is a senior lawyer who devotes himself almost entirely to litigation arising under the Internal Revenue Code. Additionally, OSG employs four lawyers who are recipients of the Bristow Fellowships, a one-year program open to highly qualified young attorneys, generally following a clerkship with a federal court of appeals' judge. Bristow Fellows assist the Deputies and Assistants in a variety of tasks related to the litigation responsibilities of the Office. All of the attorneys in the Office have outstanding professional credentials.

The authorized personnel levels and budget of the Office of the Solicitor General have remained relatively stable in recent years. Fiscal Year 2001 funding level is 50 workyears and \$7,102,000. About 90% of the Office's budget pertains to nondis-

cretionary items. For example, approximately 71% is devoted to personnel and personnel-related costs, 9% to GSA rent, and 5% to printing.

To offset otherwise rising costs, the Office has realized savings by moving from reliance on outside printers to an in-house desktop publishing operation.

III. OFFICE WORKLOAD

The following statistics may provide a helpful way of measuring the Office's heavy workload given the relatively small staff of attorneys. During the 1999 Term of the Supreme Court (June 25, 1999 to June 29, 2000), the Solicitor General's Office handled approximately 3000 cases in the Supreme Court. We filed full merits briefs in 58 cases considered by the Court (and presented oral argument in 51 of those cases),¹ which represented 72% of the cases that the Supreme Court heard on the merits in that Term. We filed 23 petitions for a writ of certiorari or jurisdictional statements urging the Court to grant review in government cases, 459 briefs in response to petitions for certiorari filed by other parties, and waivers of the right to file a brief in response to an additional 2479 petitions for certiorari. In response to invitations from the Supreme Court, we also filed 10 briefs as *amicus curiae* expressing the government's views on whether certiorari should be granted in cases in which the government was not a party. The above figures do not include the Office's work in cases filed under the Supreme Court's "original" docket (cases, often between States but involving the federal government, in which the Supreme Court sits as a trial court), and they also do not include the numerous motions, responses to motions, and reply briefs that we filed relating to matters pending before the Court.

During this same one-year period, the Office of the Solicitor General reviewed more than 2300 cases in which the Solicitor General was called upon to decide whether to petition for certiorari; to take an appeal to one of the federal courts of appeals; to participate as an *amicus* in a federal court of appeals or the Supreme Court; or to intervene in any court. Thus, during this one-year period, the Office of the Solicitor General handled well over 5300 substantive matters on subjects touching on virtually all aspects of the law and the federal government's operations.

IV. CONCLUSION

In carrying out the foregoing responsibilities, my staff and I have productively and efficiently adhered to the time-honored traditions of the Office of the Solicitor General—to be forceful and dedicated advocates for the government, as well as officers of the Court with a special duty of candor and fair dealing.

Mr. BARR. If there are no further opening comments—are there any other opening comments?

Mr. BARR. In that case, Mr. Calloway, we turn the mike over to you; and if you would please make such comments as you would like. Try and stay—we are not going to adhere, strictly speaking, to the 5-minute rule, but if you can limit it to that we would appreciate it. Of course, the entire statement, the written portion of it, will be placed into the record.

STATEMENT OF MARK CALLOWAY, ACTING DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES DEPARTMENT OF JUSTICE

Mr. CALLOWAY. Mr. Chairman, Congressman Watt and Members of Subcommittee, I am pleased to appear before you today with my colleagues John Cruden, Acting Assistant Attorney General for the Environment and Natural Resources Division; Stewart Schiffer, Acting Assistant Attorney General for the Civil Division; and Martha Davis, Acting Director of the Executive Office for the United States Trustees.

It is an honor to be here representing the women and men of the 94 United States Attorneys Offices nationwide, and I thank you on

¹Of the 58 merits briefs filed, some were consolidated resulting in 1 oral argument.

their behalf for your continuing support of our critical law enforcement mission.

In the next few moments, I would like to outline some of the needs of the U.S. Attorneys that are included in our fiscal year 2002 budget request. To carry out our mission in fiscal year 2002, we are requesting a total increase of 132 new positions and \$13.1 million for three initiatives, namely Project Sentry, cybercrime and habeas corpus litigation.

We are seeking 94 attorneys and \$9 million to support Project Sentry, which will add one additional Assistant U.S. Attorney in each United States Attorneys Office to work with State and local officials to ensure that our Nation's schools are safe.

The United States Attorneys' firearms strategy focuses on the vigorous prosecution of violations of the Federal firearms statute. But the strategy goes much further than that. Partnerships with State, local and tribal governments enable the Federal Government to respond to problems unique to each district by helping to establish locally tailored projects to be carried out cooperatively. This enables us to supplement and support the hard work already being conducted at the local level.

We have done much in past years, and there is more to do. With the additional investigative and prosecutorial resources provided for fiscal year 2001, we will be better equipped to address this violent crime threat.

With the resources we seek in fiscal year 2002, we can better focus on the safety of our Nation's schoolchildren in particular. The recent spate of tragedies on school grounds, coupled with the alarming rate at which gang-related violence occurs in schools and on playgrounds, makes clear the need for focused resources designed to deal with this pervasive problem.

With the designated Project Sentry coordinator in each district, United States Attorneys Offices will be well prepared to make better use of Federal statutes aimed specifically at those adults who set into motion by providing firearms to juveniles the deadly chain of events that ultimately lead to unthinkable tragedies like those we saw at Columbine and Santee. This becomes critical in our quest to prevent future school shootings.

We are seeking 24 positions and \$2.9 million to help us address another serious law enforcement challenge, cybercrime. In response to the ever-increasing threat posed by computer intellectual property and fraud crimes, the Department has launched a number of initiatives which have had promising results.

During fiscal year 1999, we filed 104 computer crime cases against 148 defendants. This represents a 22 percent increase in the number of cases filed when compared to the prior year. During fiscal year 2000, we filed 137 cases against 176 defendants, representing a 32 percent increase in the number of cases filed over fiscal year 1999. Our ability to protect businesses and citizens in a global economy that is increasingly reliant on computer networks and on the Internet hinges on our ability to detect, investigate and prosecute violations of law involving computers, intellectual property, Internet fraud and high technology.

We are also seeking 14 positions and \$1.2 million to address a growing backlog involving post-removal order immigration detention cases.

In 1996, as a result of a change in immigration laws, a rapid and dramatic increase in the number of habeas corpus petitions were filed by post-removal order detainees, often individuals who had become removable because of criminal convictions in this country. Because of their criminal convictions, these individuals lose their legal immigration status.

However, the INS cannot immediately deport these individuals despite receiving an order of removal because their country of origin delays or declines to accept their repatriation, despite a requirement under international law that every country accept its own nationals. Hence, absent judicial intervention and unless determined by the INS in its periodic reviews to be an appropriate candidate for release, these individuals are subject to INS detention. The districts with long-term INS detention facilities are being inundated with this work, and we sorely need the resources to address this continuing problem.

In conclusion, we believe that we can play an important role in making our Nation's schools safer; and we also believe that we must continue to address the growing amount of computer-related offenses being committed as more and more people worldwide gain access to the Internet; and we need to address the growing backlog of cases involving post-removal order detainees.

Again, we appreciate your continued support for the United States Attorneys Offices; and I would be glad to try to answer any questions that you may have.

Mr. BARR. Thank you, Mr. Calloway.

[The prepared statement of Mr. Calloway follows:]

PREPARED STATEMENT OF MARK CALLOWAY

Mr. Chairman, Congressman Watt, and Members of the Subcommittee, I am pleased to appear before you today with my colleagues: John Cruden, Acting Assistant Attorney General for the Environment and Natural Resources Division; Stuart Schiffer, Acting Assistant Attorney General for the Civil Division, and Martha Davis, Acting Director of the Executive Office for U.S. Trustees.

OVERVIEW

The Executive Office for United States Attorneys (EOUSA) provides legal, policy and administrative support for the 93 United States Attorneys and their staffs in 94 United States Attorneys' offices nationwide. EOUSA deals with issues involving the United States Attorneys' offices, their legal and policy concerns, overall operations, budgets, management, personnel matters and evaluations. In addition, EOUSA is the voice of the United States Attorneys within the Department of Justice. As such, EOUSA supports and represents the interests of the United States Attorneys, voiced through the Attorney General's Advisory Committee, on a host of legal and policy issues presented within the Department, the Administration and Congress.

The work of the United States Attorneys is among the most fundamental of any in the government: criminal law enforcement; affirmative civil litigation; and defending the government when it is being sued. EOUSA and the United States Attorneys also recognize the need for cooperation with Congress on matters affecting how federal laws are enforced and the interests of the American public. For example, the Government Accounting Office (GAO) recently completed a report that responds to concerns raised by health care providers about our enforcement of the federal False Claims Act. I am pleased to tell you that the GAO report is very favorable in its assessment of our efforts to comply with guidance issued by the former Deputy Attorney General on June 3, 1998, on enforcing the False Claims Act in a fair and

even-handed manner in civil health care fraud matters. Among other things, the report said that United States Attorneys' offices appropriately considered individual circumstances in their interactions with hospitals on a case-by-case basis.

Each year, United States Attorneys' offices handle a wide variety of criminal and civil litigation that is often complex and significant. The important cases handled just in the past year by the United States Attorneys' offices are truly impressive, and represent a remarkable range of issues and subjects. A brief description of some of the more significant recent cases is provided for the Subcommittee's benefit. These cases reflect our prosecution of criminal and civil offenses with the goal of reducing violent crime, firearms related violence, computer crime, and guaranteeing rights for all Americans.

- In the Northern District of Georgia, a jury returned a guilty verdict, after 12 minutes of deliberation, against a defendant for using, and traveling in, interstate commerce to entice a minor to engage in sexual activity. The defendant established a relationship with a person he believed to be a 13-year-old girl via the Internet in America Online chat rooms. For 3 days, he carried on increasingly sexually explicit chats with the "girl", who was, in fact, a sheriff's deputy assigned to the Innocent Images Task Force targeting Internet sexual crimes against minors. The defendant attempted to arrange a meeting with the girl at a Georgia shopping mall, giving her the explicit reason for the meeting. He was arrested at the mall without incident.
- After a 10-week jury trial in the Eastern District of Wisconsin, five members of a notorious, violent gang that has chapters throughout the United States were found guilty of RICO and RICO conspiracy counts that included 9 homicides, 21 attempted homicides, kidnaping, sexual assault, and an 11-year drug enterprise. Two of the defendants were convicted of homicides for which they had previously been acquitted in state court. Prior to trial, 28 additional defendants pleaded guilty. To date, 33 of the 34 indicted defendants have been convicted.
- In the Northern District of Georgia (Atlanta), a defendant was arrested by the Atlanta Police on April 2, 1999, after speeding and running a stop sign. The officer signaled the defendant to pull over, but the defendant raced away and lost control of his car, striking a curb. The defendant jumped out and began to run; he was caught about 100 yards away. He had on his person some marijuana and three .357 bullets. A fully loaded .357 magnum revolver was found under the driver's seat of his car, along with some cocaine. The defendant gave a false name; the gun was stolen. The defendant became violent, and after he was placed in the patrol car he began ramming the screen and window with his feet. He was then placed in a police wagon, and rammed his own head into the screen of the wagon. (He later tried to blame the police for his self-inflicted injuries.) The defendant's criminal history resulted in his being sentenced as an Armed Career Criminal (fifteen-year minimum). He had eleven prior felony convictions, seven for drug trafficking, others included armed robbery, theft of auto and assault. He also had 16 other arrests which did not result in convictions, including charges of assault, theft, armed robbery and possession and sale of cocaine.
- In the Southern District of New York (Manhattan) a member of a hacker group known as "Conflict" pleaded guilty to charges of breaking into two computers owned and maintained by the National Aeronautics and Space Administration's Jet Propulsion Laboratory (JPL) in Pasadena, California. The defendant used one of those computers to host an Internet chat room and installed programs designed to obtain user names and passwords from the other computer. The defendant admitted that, operating from his residence in New Rochelle, New York, he used his personal computer to run programs designed to search the Internet and seek out computers vulnerable to intrusion. One of the computers the defendant accessed was used by NASA to perform satellite design and mission analysis for future space missions; another was used by JPL's Communications Ground Systems Section as an e-mail and internal web server. The defendant also pleaded guilty to intercepting user names and passwords traversing the computer networks of a computer owned by San Jose State University, possession of stolen passwords and user names that he used to gain free or unauthorized computer access, and possessing stolen credit card numbers, which he stored in his computer.
- In New Jersey, a former penny-stock broker and financier was convicted last month of bankruptcy fraud and money laundering. All but one of the guilty verdicts concerned the defendant's hiding of \$4 million in assets during the

same time that he was seeking bankruptcy protection from creditors. Testimony revealed a high-living defendant, who treated himself to a charter yacht on the Mediterranean, other world travel, and massive securities investments and gains accomplished through his overseas money manager—the government’s main witness—all while the defendant was in bankruptcy and facing an SEC judgment, as well as a judgment for millions of dollars owed to New Jersey securities regulators.

These cases, and countless others, reflect the work that the attorneys, paralegal and support staff do every day enforcing our laws. Moreover, the United States Attorneys work with all of the other Department of Justice components and other Federal agencies, as well as with their local and state counterparts, to enforce this country’s laws. Indeed, while the United States Attorneys target criminal organizations and crimes that are often beyond the resources of our state and local counterparts, reliance on such partnerships and close cooperation with state and local law enforcement allow the United States Attorneys to leverage the resources provided by Congress to exert the greatest impact on crime and civil rights. And, in all phases of this work, EOUSA promotes the efforts of the United States Attorneys’ offices by providing administrative support, policy, and legal guidance, advanced technology throughout the country, and representation in Main Justice.

While we have achieved considerable progress in the past year, more needs to be done to ensure the safety of our communities. In addition to our base appropriations request, we are asking for a total of 132 new positions and a \$13.2 million increase for three initiatives summarized below.

PROGRAM ENHANCEMENTS

In developing our requests for program enhancements, which led to our Fiscal Year 2002 budget request, we worked closely with federal investigative agencies. Our request represents important policy and strategic planning, coupled with a careful fiscal plan for the United States Attorneys’ offices to provide the best possible services in the most effective and efficient manner for the American people. These policies will require additional funding in the amount of \$13.2 million (132 new positions). We respectfully request that the Subcommittee authorize these amounts.

PROJECT SENTRY

We propose to place an Assistant United States Attorney in each of our 94 districts and to dedicate that prosecutor to creating federal-state-county-local-tribal partnerships by establishing “Safe School Task Forces” involving law enforcement, community groups, and schools. These task forces will: (1) focus on gun crimes involving or affecting juveniles; (2) prosecute adults who illegally furnish firearms to juveniles; and (3) promote school safety through community outreach efforts. For this, we request that you authorize \$9 million.

We believe that every young American should have the opportunity to go to a good school and acquire the skills necessary to advance in today’s high technology society. This opportunity is hindered when a young person’s school safety is not adequately assured. The safety of America’s youth in school is a grave concern as gun violence becomes an increasingly visible issue nationwide.

Our time is marred by a series of school massacres. Names such as Paducah, Jonesboro, Fayetteville, Springfield, Moses Lake, Olivehurst, and Littleton, Colorado, where two gunmen shot and killed 12 classmates and a teacher before taking their own lives at Columbine High School, reverberate like the names of battlefields. Less than three months into the new millennium, it is evident that the deadly trend continues. Two days after a 15-year old freshman at Santana High School in Santee, California, went on a deadly shooting spree, firing more than 30 rounds from a .22 caliber revolver, which left two students dead and 13 wounded, an eighth-grade student at a high school in Williamsport, Pennsylvania, shot a classmate during lunch, while a group of teens in Perris, California were overheard talking about their desire to murder their schoolmates. Add to these cases the alarming rate at which gang-related violence occurs in schools, on playgrounds and at parks, and it becomes evident that Federal prosecutors must work with state, local, and tribal law enforcement to pursue serious juvenile offenders. While schools remain safer than the streets that surround them, we have a special duty to protect the young people entrusted to schools by their parents.

While juveniles who illegally use or possess firearms and the adults who furnish them should be vigorously prosecuted, we should also undertake simultaneous efforts geared toward prevention if we are to improve comprehensively the safety of our schools. Project Sentry will allow United State Attorneys to make better use of

federal statutes aimed specifically at those adults who, by providing firearms to juveniles, set in motion the deadly chain of events that lead to tragedies like Columbine and Santee. This is critical in our quest to prevent future school shootings given the ease with which many school-aged children, including gang members, are able to acquire guns. Early intervention is necessary to prevent youth violence.

We must also educate young people about the use of guns, in addition to prosecuting adult suppliers as a means of prevention. Age-appropriate training in self-esteem and stress management, particularly for students living in poverty or experiencing family conflict can help too. Our goal is to bring about a change in the students and school climate so that every young American has the opportunity to flourish in a safe school environment. Bringing Project Sentry Coordinators to schools to discuss crime and violence will work toward this goal by providing students with positive role models.

CYBERCRIME

The United States' technological edge is threatened by domestic and international high technology criminals engaged in the theft and piracy of trade secrets, copyrighted software, and other intellectual property of our nation's businesses. The United States' ability to protect its businesses and citizens in a global economy depends on our ability to deter, detect, investigate, and prosecute violations involving computers, technology, intellectual property, and child pornography.

The growing complexity of computer systems and the networks that allow the computers to communicate mean that the investigation and prosecution of many high-technology cases will require the expertise that is possessed by federal investigative agencies, such as the Treasury Department (the Secret Service, the U.S. Customs Service, the Internal Revenue Service, and the Bureau of Alcohol, Tobacco and Firearms) and the Federal Bureau of Investigation (FBI), and thus will require commensurate expertise and resources for the United States Attorneys.

The United States Attorneys seek to address the continually increasing caseload generated by the federal investigative agencies listed above, especially the increased caseload that was generated by the addition of the 153 FBI agents received in the FY 1999 budget. For that reason, we ask the Subcommittee to authorize \$2.9 million.

In response to the growing threat posed by high-technology crimes, the Department has launched a number of initiatives. For example, the Department launched an Internet Fraud Initiative to combat the migration of practically all traditional fraud crimes to the Internet. Much of the workload generated by these initiatives has fallen upon the Computer and Telecommunications Coordinators (CTCs). Each United States Attorney's office has at least one CTC prosecutor. The CTCs coordinate with their counterparts in other United States Attorneys' offices, investigate and prosecute high-technology crimes, provide training to other Assistant United States Attorneys in their offices and to local, federal, and state law enforcement officers, conduct community outreach, and coordinate with the Computer Crime and Intellectual Property Section of the Criminal Division.

In 1999, in recognition of the growing importance to the U.S. economy of intellectual property—including copyrights, trademarks, and trade secrets—and their vulnerability to theft, the Justice Department, along with the FBI and the U.S. Customs Service, launched the Intellectual Property Enforcement Initiative. This Initiative is multi-faceted and has a variety of international, educational, and outreach components. It also has an important domestic enforcement component, which calls on United States Attorneys' offices to focus more attention on bringing cases involving the theft of intellectual property, especially copyright piracy and trademark infringement.

Two important factors will accelerate the importance of IP crime on the United States Attorney's dockets during the coming years, suggesting that special budgetary attention is crucial. First, organized crime, lured by high profits and low risk, has increasingly infiltrated the distribution networks of trademark counterfeiting and pirated copyrighted works. Organized crime's involvement signals the unwelcome addition of other criminal law violations, such as money laundering. Second, the United States Sentencing Commission has recently amended the sentencing guideline for copyright and trademark violations, which will raise the average sentences for these criminals.

American consumers are increasingly relying on the Internet to purchase high-value goods and services. Electronic commerce is undergoing explosive growth throughout the world. Computer-related crime has a significant impact upon electronic commerce as demonstrated by the distributed denial of service attacks upon popular Internet sites. Likewise, traditional fraud schemes, such as Ponzi schemes

and bait and switch frauds are quickly finding their way onto the Internet and are being used to defraud a new set of victims. In addition, the “information age” crime of identity theft has emerged as an increasingly prevalent element in Internet fraud schemes. CTCs and other specially-trained fraud prosecutors are uniquely equipped and positioned to respond to Internet fraud. Swift and effective prosecution of these crimes is necessary to maintain consumer confidence in electronic commerce.

The United States Attorneys are also responsible for the prosecution of crimes involving the possession and distribution of child pornography and the sexual exploitation of children. Due to the rapid advances in computer technology, complexity of issues, and continual need to expand forensic technology capabilities, many child pornography cases are referred for federal prosecution because states often lack adequate resources to aggressively prosecute them. Furthermore, some state statutes and penalties have not kept pace with the rapid increases in technology and may not deter or punish those who commit computer crimes, including child pornography. In addition, child pornographers can reach not only across state lines for access to child pornography, but also across foreign borders. In these cases, state laws and resources may be wholly inadequate, and if the federal government doesn’t prosecute the case, it won’t get prosecuted at all.

Child pornography, which was once limited largely to illicit books, magazines, and mailings, has emerged as a significant problem on the Internet. This medium has enabled pedophiles to contact each other and strike up anonymous electronic conversations with or about potential victims. Also, the Internet provides pedophiles with a means to store, distribute, and exchange electronic images of child pornography. The Child Pornography Prevention Act of 1996 amended the federal child pornography and abuse statutes by creating new child pornography offenses, increasing penalties for both child sexual abuse and child pornography crimes, and most importantly, establishing a separate statutory scheme for computer-generated or altered child pornography.

These child abuse cases encompass a cohort of pedophiles that present an exceptionally serious threat to children. Known as “travelers”, they seek to meet children online and then travel—or induce the child to travel—in an attempt to meet and have sex with the child. In 1995 the FBI began the Innocent Images National Initiative, which addresses the illicit activities conducted by users of commercial and private online services and the Internet. This has led to increased arrests, indictments, and convictions.

The growth in violations of computer-related statutes from FY 1995 to FY 2000 has been huge. For example, the existing backlog is reflected in the growth of matters pending with the United States Attorneys. There has been a 378 percent increase in computer crime matters pending over these last five years. Just over the last year, matters pending have grown by 52 percent. As these figures demonstrate, we require additional attorneys to thwart attempts at computer and other high-technology crime generated by the steadily accelerating role of computers in businesses throughout the Nation, the personal lives of our citizens, the exploding growth of online services and Internet use, the vulnerabilities of computer systems to attack and abuse, and the ability of computer criminals to attack anonymously and from locations throughout the country and the world. These computer cases are very fact-specific and time intensive. They require the involvement of the United States Attorneys in the drafting of subpoenas and search warrants, the examination, development, the preservation of evidence, and at other various stages prior to the actual prosecution of cases, in order to ensure the effectiveness of investigating and developing cases for favorable prosecution.

POST-REMOVAL ORDER IMMIGRATION LITIGATION

The United States Attorneys are requesting 14 positions (including 9 attorneys) and \$1.2 million to support habeas corpus litigation as a result of “post-removal order” immigration detention cases. In 1996, as a result of a change in the immigration laws, there was a rapid and dramatic increase in the number of habeas corpus petitions filed by post-removal order detainees—often individuals who had become removable because of criminal convictions in this country. Because of their criminal convictions, these individuals had lost their legal immigration status. The Immigration and Naturalization Service (INS) cannot, however, immediately deport these individuals, despite receiving an order of removal, because their country of origin refuses to accept them—and notwithstanding a requirement under international law that every country accept its own nationals. Hence, absent judicial intervention, and unless determined by the INS in its periodic reviews to be an appropriate candidate for release, these individuals are subject to INS detention. This change in the law has resulted in an overwhelming increase in workload for several districts. For ex-

ample, in 1999, the Western District of Washington docketed some 225 immigration-related civil cases, comprised mostly of habeas corpus petitions filed on behalf of post-removal order detainees. The dramatic increase in immigration-related caseload has had a detrimental impact on several districts' ability to carry out other important missions of the Department.

CONCLUSION

Crimes in the new millennium can be expected to increase in technological complexity and sophistication. The United States Attorneys must be equipped with the resources needed to bring to completion the efforts of the investigative agencies by ensuring the appropriate prosecutorial actions. The United States Attorneys have sustained their leadership roles in our communities by coordinating efforts with federal, state, and local law enforcement in fighting crime in our neighborhoods and nationally. We will continue to fight to keep our neighborhoods safe from violent crime, to minimize the prevalence of computer crime, and to protect the safety, interests, and rights of our citizens. We hope to build on our successes, in cooperation with this Subcommittee and with its support, through authorizations in the amounts we have sought in the President's FY 2002 Budget request for the offices of the United States Attorneys.

Again, I would like to thank you, Mr. Chairman, Congressman Watt, and all the Members of this Subcommittee for your continued support of the United States Attorneys' offices. I would be happy to answer any questions you may have at this time.

Mr. BARR. Mr. Schiffer.

STATEMENT OF STUART SCHIFFER, ACTING ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, UNITED STATES DEPARTMENT OF JUSTICE

Mr. SCHIFFER. Thank you, Mr. Chairman. Good afternoon. And good afternoon, Members of the Subcommittee.

I, too, am very pleased to be here with my colleagues and to be able to answer any questions that you might have about the work of the Civil Division, in part because we are not seeking any program increases and because the breadth of our caseload is such that I really can't describe it in 5 minutes. I won't try. I will take simply a minute or two and answer any questions that you might have.

The Chairman already made clear, introducing the panel, that I am old. This is, I think, the fifth occasion which I have been privileged to be the acting head of the Division. It is always an education for me just to marvel at the growth in our caseload, not merely in terms of absolute numbers but complexity of cases.

I must say, in terms of the additional zeros on the dollars that are at issue in the cases dealing with our colleagues in the U.S. Attorneys Office, we are truly money-makers and money-savers for the American public. We are operating on a tight budget, but I think that the efficiencies that we bring to the job really do pay dividends for the American public. As the Subcommittee knows, we do everything from defending the constitutionality of acts of Congress, which is certainly one of our most serious responsibilities, to defending executive branch programs, bringing defensive and affirmative cases.

As is true with your colleagues in the U.S. Attorneys Office, we have, frankly, have very little control over our caseload. We represent virtually every agency in the United States, and the defensive sides in your caseload is over four-fifth defensive. We have an obligation to show up in court. We don't have the ability to decide that we can't do so with our resources.

Even on the less than one-fifth of the cases that are affirmative in nature, we have precious little discretion. When the Food and Drug administration tells us it is essential that we seek injunctive relief because unsafe drugs are being marketed or because a warehouse is contaminated, that is really not the kind of case one can turn down.

The same is true in many other areas. When we get serious allegations of fraud, whether through government investigators or at the behest of citizens under the provisions of the False Claims Act that permit private parties to initiate suits on behalf of the Federal Government, we have an obligation to look into every one of those cases and to intervene and litigate them when that is called for.

Again, I can no more than stress that we are here to serve both this Committee and the American public. I think we do it effectively, and I would be happy to answer any questions that the Subcommittee may have.

Mr. BARR. Thank you, Mr. Schiffer.

[The prepared statement of Mr. Schiffer follows:]

PREPARED STATEMENT OF STUART SCHIFFER

Chairman Barr, Ranking Member Watt, and Members of the Subcommittee:

I appreciate the opportunity to discuss the work of the Civil Division of the Department of Justice and our budget and resource needs for Fiscal Year 2002.

The Division represents the interests of the United States in a wide range of civil matters. The principal responsibility of the Civil Division is to represent the Federal Government in important and complex civil litigation brought in courts nationwide. The litigation we handle encompasses virtually all aspects of government programs and all federal entities; and, because the Federal Government acts not only in a regulatory capacity but is engaged in innumerable activities similar to those undertaken by private corporations, our litigation also presents the full spectrum of legal problems encountered by large modern business enterprises engaged in buying, selling, construction, shipping, production of energy, housing, banking, insurance and the like.

Our work largely is defensive: up to eighty-five percent of our caseload consists of challenges to government programs and policies, and claims seeking monetary damages amounting to millions and often billions of dollars. Our core mission includes the responsibility for ensuring that the will of Congress and the actions of the Executive Branch are vigorously and fairly defended, and that claims without merit are not paid from the public fisc. In fiscal year 2000, we successfully defended against claims seeking nearly \$24 billion in damages from the United States. The fact that in the vast majority of our cases we are in a defensive posture has several important implications: it means that our caseload is largely not under our control, so we have a limited ability to project resource needs and allocation; and it means that we cannot realistically abandon most of the cases for lack of resources—our inability to defend these cases can have catastrophic financial consequences.

The remainder of the Civil Division docket involves affirmative actions to enforce important government regulations and policies, and to recover money owed the government in commercial transactions, bankruptcy proceedings or secured through fraud. In fiscal year 2000, we recovered, through judgments and settlements, approximately \$2.6 billion.

The overwhelming majority of cases within the Civil Division's purview—approximately 97 percent—are handled by the United States Attorneys' Offices throughout the country, though the Assistant United States Attorneys primarily responsible for litigating these cases frequently solicit the advice and counsel of Civil Division attorneys on complex or abstruse issues.

The Civil Division retains the responsibility, however, to litigate a range of significant cases—cases that involve issues of nationwide importance and scope; that are brought in specialized courts or otherwise require special expertise; that present major policy implications; and that present appreciable risks of significant losses to the Treasury.

Our caseload continues to increase in size and complexity. As of the start of fiscal year 2001, 723 Civil Division attorneys, with the assistance of 359 support staff, represented the United States in over 22,000 cases in which \$74 billion is at risk.

We defend the federal government in a number of massive contract disputes in which billions of taxpayer dollars are sought. We are continuing our efforts to combat fraud against government programs, using the statutory tools Congress has provided, and toward this end we have brought an increasing number of actions in the health care area resulting in recoveries of over \$850 million in fiscal year 2000. We also continue to enforce vigorously the federal consumer protection statutes, through our actions to protect citizens from dangerous products, including misbranded and adulterated drugs, and fraudulent schemes offered over the internet have resulted in an increasing number of cases and convictions. We continue to devote substantial resources to the critical portion of our docket comprised of challenges to important Congressional enactments and Executive actions, and recent amendments to anti-terrorism and immigration laws have led to substantial increases in the number of immigration claims we handle.

COMMERCIAL LITIGATION BRANCH

Few areas of civil litigation more clearly affect Federal budgetary issues, and the ability of the Federal Government to accomplish myriad objectives, than disputes relating to government contracts and commercial law.

The majority of our commercial docket is defensive, and consists of claims by contractors against the government. These contract disputes, most often brought in the Court of Federal Claims, include some of the largest, most resource intensive, precedentially important lawsuits in the federal courts, and present the risk of enormous losses to the Treasury. For example, we are representing the United States in the litigation arising out of the termination of the A-12 stealth aircraft program, in which plaintiffs seek \$1.7 billion in damages. We are defending several lawsuits brought by commercial nuclear utilities seeking \$8.5 billion in damages for the federal government's failure to construct a permanent repository for commercial nuclear waste; we anticipate that as many as 40 additional claims may be filed, raising the total damages claim to \$50 billion.

Our defensive commercial docket also includes the so-called *Winstar* litigation—120 cases involving more than 400 financial institutions throughout the United States, seeking over \$30 billion in damages allegedly resulting from the breach of contracts formed during the savings and loan crises of the 1980s.

These cases come with massive evidence collections that require the use of automated litigation support to organize and provide ready access to evidentiary information; they require extensive use of industry experts and consultants to analyze and explain complex subject matter and estimate damages. We have invested significant budgetary resources in these cases, and this investment has yielded huge savings.

We continue to place considerable emphasis on affirmative actions to recoup billions of dollars of taxpayer money lost through fraud, bankruptcies and loan defaults. One of the Division's top priorities remains our use of the False Claims Act to combat health care fraud by a small minority of providers, carriers, suppliers and fiscal intermediaries against Medicare and other federal health care programs. Of note, earlier this year the Department reached a record-setting health care fraud settlement—\$840 million—with Columbia/HCA. Since Congress amended the False Claims Act in 1986 to enhance our ability to combat fraud, the Civil Division has recovered over \$3 billion in health care fraud cases alone; in fiscal year 2000, judgments and settlements in health care fraud actions exceeded \$850 million. In this last fiscal year, the Division also recovered over \$176 million in procurement fraud cases. Many of these actions are *qui tam* cases brought on behalf of the Federal Government by private citizens ("relators"), and the Division is supportive of the rights of these plaintiffs-relators.

TORTS BRANCH

One of the principal responsibilities of the Civil Division is to defend the United States and its officials and employees against lawsuits seeking monetary damages for harms allegedly caused by the wrongful or negligent conduct of government officials and employees. These lawsuits can involve hundreds of plaintiffs, seek damages in the millions of dollars, and present complex and arcane issues of fact and law. Not infrequently these cases involve allegations of government conduct that generate considerable public attention and controversy. In fiscal year 2000, Torts Branch attorneys were defending the United States in almost 2900 cases in which over \$23 billion was at stake. The need to protect the public fisc from billions of dollars in unwarranted claims (while attempting to settle meritorious cases), and to ensure that federal officials are not chilled in the pursuit of their responsibilities, demands that we devote substantial resources to the defense of these cases.

The Division is also responsible for administering two important administrative compensation programs enacted by Congress—the National Childhood Vaccine Injury Compensation Act and the Radiation Exposure Compensation Act. The Vaccine Injury Compensation Program offers a streamlined, expeditious mechanism for presenting claims alleging vaccine-related injuries. The Radiation Exposure Compensation Program provides a non-adversary, administrative claims process to provide compassionate payments to individuals who contracted certain specified serious illnesses presumably as a result of exposure to radiation associated with the federal government's nuclear weapons testing program during the Cold War era.

The attorneys in this Branch successfully litigate a wide array of cases alleging wrongful conduct by the government, and these suits represent many of the most challenging and high visibility claims handled by the Department. Suits are brought against the United States under the Federal Tort Claims Act, and against federal officials and employees in their individual capacities for harms allegedly resulting from actions taken in the course and scope of their official duties (Bivens suits).

We secured the dismissal of an \$800 million lawsuit against the government alleging that the negligent operation of the Jet Propulsion Laboratory in Pasadena, California led to contamination of the environment and exposures to toxic substances. Working with the Environmental and Natural Resources Division of the Department, Branch attorneys secured over \$83 million for clean-up costs related to a 1994 barge grounding that caused a major oil spill near San Juan, Puerto Rico; nearly \$60 million of that amount is designated for the congressionally-created Oil Spill Liability Trust Fund, the largest recovery to date in the Fund's history.

We continue to have great success in defending individual federal officials and employees who are the subject of "Bivens" claims. Because these cases challenge the ability of public servants from Cabinet officials to federal law enforcement officers to accomplish their mission, they must continue to receive our unstinting attention and support.

We anticipate that the resources required to administer the Radiation Exposure Compensation Program will continue to increase dramatically as a result of the passage of P.L. 106-245, the Radiation Exposure Compensation Act Amendments of 2000. This Act markedly increased the population eligible for compensation under the Act; this has led to an almost ten-fold increase in the number of claims filed with the Program, and a need for a correspondingly significant increase in the Program's funding requirements if we are to ensure that the government fulfills its promise of compensation to these claimants, many of whom are suffering from terminal illnesses.

Lastly, the Tobacco Litigation Team is responsible for the litigation filed by the United States against nine tobacco companies and two industry organizations.

FEDERAL PROGRAMS BRANCH

A core component of the Civil Division's workload is our defense of federal agencies and officers in suits challenging the constitutionality of federal statutes and the validity of programs, regulations, policies and initiatives. Responding to these challenges entails the representation of nearly every federal agency and entity, the President, Members of Congress and the Federal Judiciary.

Attorneys from this Branch recently have defeated challenges to anti-terrorism, immigration and prison reform legislation, and are presently defending the constitutionality of the Religious Land Use and Institutionalized Persons Act, the Child Pornography Prevention Act of 1996, and the Children's Internet Protection Act. The Division has filed statements of interest in various federal courts advancing the foreign policy interests of the United States in support of settlements of Holocaust-related claims against German, Austrian and French companies. Its attorneys are currently defending challenges to the 2000 Decennial census; the outcome of these cases will determine the census counts that serve as the basis for congressional reapportionment and the allocation of billions of dollars in federal spending. Branch attorneys also continue to represent the Department of Agriculture in resolving individual claims of discrimination brought by members of a nationwide class action of African-American farmers (*Pigford*). The Branch's defense of lawsuits involving the Medicare and Medicaid Programs implicates tens of billions of federal dollars.

Challenges under the Constitution, the Administrative Procedure Act and other federal statutes to important federal initiatives will continue to comprise a significant and critical portion of the Division's caseload.

OFFICE OF CONSUMER LITIGATION

To protect the health and safety of the Nation's consumers, attorneys from the Office of Consumer Litigation bring civil and criminal actions under a host of fed-

eral consumer protection laws, including the Food, Drug and Cosmetic Act, the Consumer Product Safety Act, the Federal Hazardous Substances Act, the Federal Trade Commission Act, and the Motor Vehicle Information and Cost Savings Act. On behalf of our client agencies we have brought cases to prosecute fraud perpetrated by manufacturers and distributors of misbranded, adulterated or defective drugs and consumer products, as well as illegal conduct involving unfair credit practices and deceptive advertisements and sales that extracts billions of dollars from unsuspecting consumers. In fiscal year 2000, the Office of Consumer Litigation obtained a record \$135 million in criminal fines and civil remedies.

Widespread access to the Internet has vastly expanded opportunities to commit fraud against unsuspecting consumers. In particular, Internet pharmacies—which often dispense powerful prescription drugs without a valid prescription from a doctor—according to public health experts, can pose a significant danger to consumers and the public health. We are also targeting schemes involving deceptive promotion of drugs and devices that are misrepresented as being safe and effective for diagnosing or treating diseases, the sale of other dangerous consumer products, and fraudulent business opportunity scams. In one recent case, we successfully prosecuted and secured a 38-month prison sentence for an individual who manufactured and sold over the Internet almost 14,000 “kits” containing the chemical ingredients to make gamma hydroxy butyrate (GHB), an unapproved “designer” drug used, among other things, to get high, and on occasion, to facilitate rape. In another we obtained a civil penalty of \$1.49 million against a company that made unfounded health-benefit and other claims on the Internet and elsewhere.

OFFICE OF IMMIGRATION LITIGATION

It is impossible to overstate the increasing importance of immigration litigation. The Office of Immigration Litigation (OIL) defends the government’s immigration laws and policies, and handles challenges to immigration enforcement actions, including individual suits and class action suits directed against the officers of the Immigration and Naturalization Service, the State Department and other immigration-interested agencies.

Challenges to significant reforms by Congress of the nation’s immigration and anti-terrorism laws have resulted in the continued explosive growth of immigration litigation before the federal courts, and the work of this section. The Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA), both enacted in 1996, rewrote much of the law pertaining to the rights and remedies of aliens and the role of the federal courts in immigration disputes. OIL’s docket has grown exponentially since enactment of the 1996 reforms, with case receipts for the current fiscal year expected to reach 4500 cases, far exceeding all prior estimates. Three of OIL’s cases reached the Supreme Court this term, involving issues of citizenship, judicial review, and detention of potentially dangerous criminal aliens pending removal. The Office also handles myriad challenges by illegal aliens to decisions by the Attorney General to deny relief from removal, such as political asylum. An increasingly important aspect of OIL’s work is antiterrorism litigation, including cases in which suspected alien terrorists challenge orders for their removal from the United States.

APPELLATE STAFF

The Civil Division’s role in defending congressional and Executive Branch actions does not end with the resolution of the litigation in the trial courts. Many judgments favorable to the United States at the trial level are appealed by the opposing parties to the federal courts of appeals and, not infrequently, to the United States Supreme Court. Similarly, the federal government must on occasion prosecute an appeal of an adverse trial court decision that misstates our understanding of the law or establishes an unfortunate precedent that could frustrate important federal interests and policies.

The Appellate Staff oversees the United States’ interests in the majority of appellate matters arising out of the work of the Civil Division. In addition, the Appellate Staff has responsibility for the many cases which are appealed directly from administrative agencies to the courts of appeals. The Staff also works with the office of Solicitor General in the handling of Civil Division cases that reach the Supreme Court. The Appellate Staff’s centralized jurisdiction over civil appellate litigation enables the Division to ensure uniform treatment of issues affecting the government in litigation.

The Staff’s work mirrors the broad and varied jurisdiction of the branches of the Civil Division. They regularly litigate cases involving issues of the constitutionality of federal statutes and regulations; issues of national security and executive author-

ity; challenges to executive decisions and administrative actions; and claims against the financial interests of the United States. Thus, in recent years, for example, the Staff has successfully defended the constitutionality of the Telecommunications Act of 1996 against bill of attainder challenges; successfully defeated a challenge to the North American Free Trade Agreement; overturned a judgment of over one billion dollars against the United States in the A-12 litigation; successfully represented the interests of the State Department in a number of situations, including filing an amicus brief that was relied on by the court of appeals to reverse a \$234 million default judgment against the Russian government; and filed an amicus brief relied on by the Ninth Circuit to uphold the district court's preliminary injunction against Napster.

CIVIL DIVISION'S BUDGET REQUEST

The Civil Division is funded from the General Legal Activity (GLA) portion of the Department's annual appropriation. For fiscal year 2001, the GLA appropriation provided 1,034 positions, 1,055 FTE, and \$153.8 million. For fiscal year 2002, the President has requested for the Civil Division the same number of positions and FTE, and \$161 million. The increase from our present year appropriation covers mandatory adjustments and allowances, such as pay raises, salary adjustments and GSA rent increases.

We believe that this investment of resources in the Civil Division will continue to yield significant benefits to the federal taxpayers. The work of the Civil Division is critical to the effective and successful implementation of myriad government programs and initiatives, and essential to the integrity of the public fisc. We believe that we have succeeded in this work by any measure. Our ability to achieve results favorable to the government in the overwhelming majority of cases—90% of the cases in fiscal year 2000—proves the benefits of investing adequate resources in the Division. Without continued adequate funding, our ability to defend the actions of federal agencies and officials in some of the largest and most resource-intensive litigation, and to protect the Treasury from huge losses, will be severely compromised.

These resources will also allow us to continue our extraordinarily successful efforts to recover monies owed the United States. In fiscal year 2000, judgments and settlements in our affirmative cases—which comprise only 20% of our docket—totaled \$2.6 billion, many times more than the Division's annual appropriation. While some of these awards and settlements mandate long-term payment plans, in 2000 we collected more than \$1.5 billion for the Treasury and our client agencies.

At this time, Mr. Chairman, I would be happy to address any questions you or members of the Subcommittee may have.

Mr. BARR. Mr. Cruden.

STATEMENT OF JOHN CRUDEN, ACTING ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION, UNITED STATES DEPARTMENT OF JUSTICE

Mr. CRUDEN. Chairman Barr, Congressman Watt, Members of the Subcommittee, thank you for inviting me to come; and I welcome the opportunity to tell you a little bit about the Environment and Natural Resources Division.

Our Division is now over 90 years old, and we have a rich history of acting in court to enforce and defend the various congressional programs that have been enacted to protect the Nation's environment and natural resources.

Mr. BARR. Excuse me, Mr. Cruden. Could you bring your mike closer and make sure it is on?

Mr. CRUDEN. Is that better?

Mr. BARR. Yes.

Mr. CRUDEN. Our principal clients in that regard are the Department of Transportation, the Environmental Protection Agency and the Departments of Commerce, Defense, Energy; and, in fact, in our over 12,000 cases we probably represent every single agency of the United States in all of the 94 districts that are in our Nation. We handle cases that involve over a hundred statutes, but our

work actually falls more or less into five categories which I am going to try to summarize for you.

Pollution is a category, natural resources and public lands, wildlife, condemnation and then Native Americans.

First, on pollution, this includes both bringing enforcement actions against people or entities who violate those statutes or, in fact, defending Federal agencies. Let me give you just one recent example that occurred just a month ago in Texas.

Working in cooperation with the Texas Environmental Enforcement Task Force, we have obtained a guilty plea from a company that had tried to cover up its environmental violation in Corpus Christi. As part of the felony plea agreement, that company is not only going to pay a \$10 million fine, but it also pays \$10 million in projects that is going to go back into that community and to try to somehow compensate for what had occurred during those years where they were violating the law. I am led to believe now that that is the largest case of its kind in the State of Texas.

In our natural resources and public lands docket, we represent lands and resource management agencies such as the Department of Interior and the Forest Service. Like the Civil Division, this is most often defensive. We are being sued by environmental groups and industry and individuals challenging some variety of our environmental and natural resources laws. For instance, right now we are joining with the State of Utah in defending now two or three challenges against the large Legacy Highway project in Salt Lake City.

In our wildlife cases, we predominantly defend the Departments of Interior and Agriculture against claims related to the Endangered Species Act and fisheries management. We also, however, bring enforcement actions such as criminal actions against illegal smugglers, because there is a huge international wildlife market.

Just one example, just a month ago in San Francisco, Anson Wong, a Malaysian international wildlife trafficker, pled guilty to 40 felony charges in connection with smuggling into this country endangered reptiles, including the very valuable Komodo dragons. The Komodo dragons actually sell for about \$30,000 each.

We have also an active land acquisition docket with substantial involvement by U.S. Attorneys where we litigate the fair market value that will be paid for land the United States acquires. Examples are courthouses, acquisition for military bases, and then right now the expansion of the Everglades National Park in southern Florida.

Finally, the Native American cases, including litigation both defending against claims by tribes regarding government actions and then filing lawsuits to protect tribal rights and natural resources.

As you can tell from this summary, our large litigation docket is diverse, and it contains a mixture of civil and criminal cases. Approximately 60 percent of our cases are either defensive or nondiscretionary, such that we have very little control over how that happens at the outset.

The Department is committed to ensuring that American taxpayers are getting their money's worth, and we have achieved significant cost-effective results for the public. We have secured civil penalties and criminal fines and cost reimbursement to the United

States which dramatically exceed our yearly budget, and I think we have obtained impressive results for human health and the environment.

To enhance our effectiveness, we have forged partnerships with U.S. Attorney Offices, but we have also developed very effective working relationships with State Attorneys General and other State and locals across the Nation. We also explore opportunities to resolve disputes through alternative dispute resolution whenever we can. Then, finally, in this Division we emphasize integrity and ethics in every single thing that we do.

In closing, I would like to credit the outstanding work of our Division's personnel but also highlight the numerous Assistant U.S. Attorneys and agency officials who work diligently to protect the Nation's environment and natural resources. Whatever accomplishments we have would not be possible without their efforts.

Again, thank you for inviting me; and I welcome your questions. Mr. BARR. Thank you, Mr. Cruden.

[The prepared statement of Mr. Cruden follows:]

PREPARED STATEMENT OF JOHN CRUDEN

Chairman Barr, Congressman Watt, and Members of the Subcommittee, I am pleased to be here today, along with my Department of Justice colleagues on this panel. I welcome this opportunity to discuss the Environment and Natural Resources Division, one of the principal litigating Divisions within the Department of Justice, and to answer any questions that the Subcommittee may have about the Division.

In my testimony today, I will first summarize the Division's work and provide an outline of the scope of our responsibilities. Our work is essential to the implementation of Congressional programs to protect the nation's environment and its natural resources, and defend federal agencies sued by others. We have a long and distinguished history, and the Division's attorneys have built a record that demonstrates their commitment to legal excellence. In the second part of my testimony, I will summarize the resources that the Administration is requesting for the Division as part of its fiscal year 2002 budget.

I. DESCRIPTION OF THE ENVIRONMENT AND NATURAL RESOURCES DIVISION

A. Background

The Environment and Natural Resources, formerly known as the Land and Natural Resources Division, was created in 1909. For the first half-century years of its existence, the Division primarily represented federal agencies in matters related to federal lands, water rights, eminent domain issues, and Indian disputes. As the nation grew and developed, the Division's responsibilities expanded dramatically to include defensive and affirmative litigation concerning the use of the Nation's natural resources and public lands; wildlife protection; Indian rights and claims; cleanup of hazardous waste sites; the acquisition of private property for public purposes; defense of environmental challenges to government activities; and civil and criminal environmental law enforcement. Now we represent virtually every federal agency in over 10,000 active cases in every judicial district in the nation. Our principal clients include the Departments of Agriculture, Commerce, Defense, Energy, the Interior, and Transportation, and the U.S. Environmental Protection Agency.

Many of our cases involve defensive litigation in which the United States is being sued. For instance, we are joining with the State of Utah in defending against the challenges to the Legacy Highway project in Salt Lake City. These defensive cases are non-discretionary. This large defensive docket has important implications for the Division's resources because we cannot always anticipate our future workload. Effective lawyering in these cases is critical to agency implementation of Congressionally mandated programs and protection of the public fisc.

In addition to our defensive work, another significant portion of our docket consists of non-discretionary eminent domain litigation. This important work, undertaken with Congressional direction or authority, involves the acquisition of land for important national projects such as Everglades National Park and the construction of federal buildings including courthouses. When our defensive and eminent domain

litigation is considered together, in cases funded from the General Legal Activities (GLA) appropriation over 60 percent of our attorney time is spent on non-discretionary cases.

The Division is committed to ensuring that American taxpayers are getting their money's worth. Despite budget constraints and limited resources, we have achieved significant, cost-effective results for the public. We have secured civil penalties and criminal fines for the U.S. Treasury that exceed the Division's GLA budget, and we have obtained benefits for human health and the environment that provide an impressive return on the taxpayer's dollar. We also have protected the taxpayer from invalid or overbroad monetary claims against the United States, claims that sometimes involve hundreds of millions of dollars.

To leverage our resources and enhance our effectiveness, we have forged partnerships with U.S. Attorneys' Offices and state Attorneys General and other state and local officials across the nation. Through Law Enforcement Coordinating Committees and other task forces developed in U.S. Attorneys' Offices across the country, we have increased cooperation among local, state, and federal environmental enforcement offices. We approach our work with the spirit of teamwork, cooperation, and federalism that is the hallmark of effective environmental protection. I would like to take a moment to discuss two recent cases that illustrate the success of this approach.

Just one month ago, working together with the Texas Environmental Enforcement Task Force, comprised of federal and state agencies including the FBI, the EPA's Criminal Investigation Division, and the Texas Natural Resource Conservation Commission's Special Investigations Unit, we obtained a guilty plea from a company that had tried to cover up its environmental violations at a facility in Corpus Christi. Under the plea agreement, the company will pay a total of \$20 million dollars: \$10 million in criminal fines and \$10 million for special projects to improve the environment in Corpus Christi—a record amount imposed in an environmental prosecution. The plea agreement also requires the company to adhere to a strict new environmental compliance program.

On the civil side, in March, we joined the States of Delaware, Louisiana and the Northwest Air Pollution Authority, a regional air agency in Washington State, in announcing agreements with three petroleum refiners that will reduce air emissions by over 60,000 tons per year. These emissions contain pollutants that can cause serious respiratory problems, exacerbate cases of childhood asthma, and cause cancer. The reductions will be achieved by using innovative technologies, improved leak detection and repair practices, and other pollution-control upgrades that will also benefit workers and local communities by reducing the risk of accidental release of pollutants. The companies also will collectively pay a \$9.5 million civil penalty under the Clean Air Act and spend about \$5.5 million on environmental projects in communities affected by the refineries' pollution. The States and the regional air agency will share the penalties and environmental projects with the federal government.

Firm and fair enforcement helps ensure that our citizens can breathe clean air, drink pure water, and enjoy our Nation's natural resources; that law-abiding businesses have a level economic playing field on which to compete; and that those who fail to comply with the law know they will be penalized. In fiscal year 2000, our civil enforcement efforts led to injunctive relief worth approximately \$1.6 billion and nearly \$59 million in civil penalties.

Although our primary responsibility is to litigate, we seek to avoid litigation where possible and to resolve cases quickly and efficiently through the use of Alternative Dispute Resolution (ADR). The Division urges all Division attorneys to use ADR techniques whenever ADR may be an effective way to reach a consensual result that is beneficial to the United States. ADR may achieve not only cost savings for the taxpayer, but also faster cleanup of pollution and implementation of environmental protections.

B. Description of Sections Within the Division

The Division is divided into nine litigating sections, which I will now describe.

The Attorney General has recently stated that "Protecting our natural resources through strong enforcement of environmental law is a top priority for the Department of Justice," and that he "look[s] forward to continuing our fight for cleaner air and water." The two sections of the Division that are primarily responsible for carrying out this charge are the Environmental Enforcement Section and the Environmental Crimes Section. (As I will explain in more detail in a moment, the Environmental Defense Section also has responsibility for carrying out one aspect of Clean Water Act enforcement.)

The Environmental Enforcement Section brings civil enforcement cases that seek to control and/or prevent pollution of our air and water and to obtain cleanup of

hazardous waste sites across the country. The statutes enforced by the Section include the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, more commonly known as Superfund), the Resource Conservation and Recovery Act (RCRA), the Clean Air and Water Acts, the Toxic Substances Control Act, and the Safe Drinking Water Act. In the hazardous waste area, cases are brought under the Superfund statute for the purpose of protecting the public health and ensuring that the parties responsible for contamination, rather than the public, bear the burden of paying for the cleanup of the sites.

The Environmental Crimes Section is responsible for prosecuting individuals and corporations that have violated laws designed to protect the environment. As part of this effort, the Section works closely with criminal investigators for the Environmental Protection Agency (EPA), the Federal Bureau of Investigation (FBI), the Coast Guard, and the Defense Criminal Investigative Service, among others. The Section also acts as a resource for the FBI and the EPA, U.S. Attorneys, and state and local investigators and prosecutors by providing trained and experienced prosecutors to assist in resource-demanding trials, offering advice and expertise to Assistant U.S. Attorneys and agents in their cases, and providing training to improve criminal enforcement.

The Wildlife and Marine Resources Section is responsible for both civil and criminal cases arising under fish and wildlife conservation statutes. Litigation under these statutes occurs in three different contexts: defense of federal agencies whose programs are challenged as inconsistent with federal conservation statutes; criminal prosecutions; and civil enforcement, usually to enjoin persons from violating federal conservation statutes. This Section's portfolio includes our efforts to crack down on international wildlife smuggling, which constitutes a major worldwide black market.

The Environmental Defense Section represents the United States in suits challenging the government's administration of federal environmental laws. The goal of the Section's litigation is to assure that the environmental laws are implemented in a fair, consistent manner nationwide. The lawsuits arise in federal district and appellate courts, and include claims by industries that regulations are too strict, claims by environmental groups that government standards are too lax, and claims by states or citizens that federal agencies themselves are out of compliance with environmental standards. Among its varied responsibilities in appellate and district courts, this section handles both defensive and enforcement litigation involving the Clean Water Act's wetlands program. The Section saves American taxpayers millions of dollars every year by defending against unfounded or exaggerated claims.

The General Litigation Section litigates cases arising from more than 70 different environmental and natural resource statutes, including the National Environmental Policy Act, the National Forest Management Act, the Coastal Zone Management Act, and the National Historic Preservation Act. Many of the Section's cases involve issues concerning the stewardship or ownership of our national parks, forests, rangelands, wildlife refuges, and offshore resources. Ongoing examples of this litigation include original actions in the U.S. Supreme Court to resolve state boundary and water allocation disputes, affirmative actions to protect the Everglades, and defensive litigation to defend the proposed World War II Memorial.

The Indian Resources Section litigates on behalf of federal agencies when they are protecting the rights and resources of federally recognized Indian tribes. This includes both defending against challenges to statutes and agency action designed to protect tribal interests and bringing suits on behalf of federal agencies to protect tribal rights and natural resources. The Section currently is defending the United States in a number of challenges, including a challenge to the Crow Boundary Settlement Act. The Section also has brought suit concerning treaty rights (for example, hunting and fishing rights), environmental enforcement in Indian country, establishing reservation boundaries, and protecting tribal natural resources. In the past year, the Section successfully has negotiated settlements in a number of long-standing suits.

The Land Acquisition Section is responsible for acquiring land for public purposes ranging from establishing public parks to creating missile sites. The legal and factual issues involved are often complex and include the ascertainment of the market value of property, applicability of zoning regulations, and problems related to subdivisions, capitalization of income, and the admissibility of expert testimony.

The Appellate Section handles appeals in all cases tried by Division attorneys and either handles directly or coordinates closely on appeals in Division cases tried by U.S. Attorney Offices. These appeals arise in the thirteen federal circuit courts of appeal around the country and occasionally in State supreme courts. The section evaluates all adverse district court decisions for purposes of deciding whether to appeal. It also prepares draft certiorari petitions, oppositions, and merits briefs for the Solicitor General in Division cases reaching the Supreme Court.

The Policy, Legislation and Special Litigation Section researches and assists the Assistant Attorney General on policy issues, and coordinates with the Office of Legislative Affairs on legislative activities, testimony for Department officials, and analysis of legislation and response to congressional inquiries. The section also responds to requests from the public (including under the Freedom of Information Act), serves as the Division's ethics officer; provides Alternative Dispute Resolution advice and training, and has a counsel for state and local intergovernmental relations. The section also does special litigation. Finally the section coordinates the Division's activities on international environmental matters such as addressing border and global pollution and conservation.

The work of all nine sections is supported by an Executive Office.

II. ENRD'S BUDGET REQUEST FOR FISCAL YEAR 2002

The Division receives its annual appropriation from the General Legal Activities (GLA) portion of the Justice Department's appropriation. In fiscal year 2001, our GLA budget is \$68.7 million. Pursuant to the direction of Congress, EPA also provided approximately \$28.5 million to reimburse the Division for Superfund-related work in fiscal year 2001. The President has requested \$71.3 million for the Environment and Natural Resources Division within the Justice Department's GLA appropriation for fiscal year 2002. Mandatory adjustments and allowances, including pay raises, other salary adjustments, and increases for GSA rent account for the difference between the FY 2001 budget and the FY 2002 request.

CONCLUSION

The work of the Division is both challenging and complex. It is vitally important to the implementation of Congressional programs and priorities regarding public health and the environment, to the protection of the public fisc, and to the advancement of the public interest generally.

I am happy to answer any questions you might have.

Mr. BARR. Ms. Davis, do you have an opening statement, please?

STATEMENT OF MARTHA DAVIS, ACTING DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES, UNITED STATES DEPARTMENT OF JUSTICE

Ms. DAVIS. Good afternoon.

Mr. Chairman and Members of the Subcommittee, I welcome the opportunity to appear before you this afternoon to discuss the work of the United States Trustee Program in the Nation's bankruptcy system.

Let me start first by giving you an overview of our organization. We have, of course, an executive office here in Washington; and we have 21 regional United States Trustees located throughout the country. The roughly 1,000 men and women that make up our organization are dispersed throughout 93 field offices. Most of these offices are very small. Over a third of them have less than six employees, and only 10 of them have—excuse me, only 20 of them—I got that wrong. Only 10 of them have more than 20 employees. Our attorneys appear in court in over 150 locations, and we also conduct meetings of creditors and debtors in another 287 sites.

When Congress first created the program over 20 years ago, it referred to us as a watchdog for the system. That continues to be a very apt description of our role today. Our mission is to promote the integrity and to promote the efficiency of the bankruptcy system. These responsibilities are vital to uphold public confidence in what today is probably the largest Federal court system in the country in terms of simple case filings. Last year alone, over 1.2 million individuals and businesses sought debt relief by filing a bankruptcy petition.

Aside from the sheer numbers of filings, the integrity of the system is particularly important to us because we rely upon debtors to honestly and accurately report all their assets and liabilities, and all their expenses and their income. A lot of money and property interests are transacted through bankruptcy proceedings. For example, our chapter 7 and chapter 13 trustees in fiscal year 2000 disbursed over \$5.1 billion to creditors and parties in interest. This is precisely the type of system in which you need the role of the watchdog.

To carry out our mission, we wear many hats. The U.S. Trustees are litigators, but they are also investigators, they are administrators, and they are regulators.

Let me take a few moments to highlight two key areas.

One is that we bring enforcement actions and litigate issues before the bankruptcy court to protect the system from abuse and to ensure compliance with the Bankruptcy Code. It is very important to hold people accountable to what the law requires, particularly in the bankruptcy setting. This is a priority for the U.S. Trustees. It is also a cornerstone of our 2002 budget request. It is also an underlying concern throughout all the bankruptcy reform proposals that have been pending in Congress for the last several years.

Abuse takes many forms. We are most concerned, of course, with debtor abuse, but abuse is also committed by others such as unscrupulous bankruptcy petition preparers who are non-attorneys that lure people into filing bankruptcy. It is also committed by attorneys who render shoddy services to their client or who engage in egregious patterns of misconduct.

With regard to debtor abuse in particular, the U.S. Trustees file approximately 1,400 motions to convert or dismiss individual consumer chapter 7 cases because these individuals demonstrate that they have the ability to, in fact, repay some of their debts or their financial circumstances otherwise indicate that they do not need or deserve bankruptcy relief.

I should also point out that scores of other cases are voluntarily converted or dismissed when our attorneys or analysts start questioning their financial circumstances and they see the handwriting on the wall.

The complement to the U.S. Trustees' civil enforcement efforts is our work in the area of criminal bankruptcy fraud. In this regard we have worked very closely with U.S. Attorneys, the Federal Bureau of Investigation and many other law enforcement components to help ensure prosecution of criminal offenses that affect the bankruptcy system. This is a very important effort because the bankruptcy system needs a strong deterrent to encourage honest, lawful behavior.

The U.S. Trustees refer criminal violations to the U.S. Attorneys and provide assistance in regard to prosecutions. We also work with the U.S. Attorneys and other law enforcement agencies to create local bankruptcy fraud working groups. These have been instrumental in the success of this area. We are very proud of the Department's accomplishments to date. It is an ongoing problem, and it requires constant vigilance.

With regard to our fiscal 2002 budget request, the President and the Attorney General have requested \$154 million in funding and

1,218 positions to support our work. Let me emphasize that none of this request includes anything for the pending bankruptcy reform bill, if and when it passes. Further, it is also important that note that the program is funded entirely by users' fees. These are fees paid by debtors during a bankruptcy proceeding.

Finally, let me briefly mention our work in bankruptcy reform legislation that was passed by both Houses of Congress earlier this year. We welcome the opportunity and challenge that it will bring. The legislation brings a number of new reforms.

We have plans under way to address five major areas that are new. These are means testing, credit counseling, debtor education, debtor audits and the new small business chapter 11 and individual chapter 11 cases.

Beyond these five areas, we recognize that there are many other requirements that we will have to address, such as data collection, analysis and reporting. We are working to lay the groundwork for the new bill so that we will be prepared on the effective date, which will take place 180 days after the bill is passed.

Thank you for your attention. I welcome any comments that you have.

Mr. BARR. Thank you, Ms. Davis.

[The prepared statement of Ms. Davis follows:]

PREPARED STATEMENT OF MARTHA DAVIS

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to appear before the Subcommittee to discuss the work of the United States Trustee Program ("Program"). My testimony summarizes the work of the United States Trustees throughout the country and provides the Subcommittee with a sense of the scope of this organization's responsibilities. It also summarizes the resources requested for the Program as part of the Administration's Fiscal Year 2002 budget.

When Congress established the United States Trustee Program more than 20 years ago, it referred to us as a "watchdog" for the bankruptcy system and recognized the public interest to be served in the proper administration of bankruptcy cases. The word "watchdog" continues to be an apt description of our role today. The Program's mission is to promote the integrity and the efficiency of the Nation's bankruptcy system. These responsibilities are vital to provide appropriate relief to eligible debtors, provide proper return to creditors, and to uphold public confidence in what, today, is the largest federal court system—in terms of case filings—in the country.

This past year, over 1.2 million individuals and businesses filed for bankruptcy. Like the internal revenue system, the bankruptcy system depends upon debtors to self-report honestly and accurately all their assets and liabilities when they file for bankruptcy protection. According to most estimates, well over \$30 billion dollars in unsecured debt is discharged each year; billions more in property and secured debt is disposed of through bankruptcy proceedings. The bankruptcy system touches the lives of many millions of American families and businesses. Some are debtors, while others are creditors, including not just banks, credit card issuers, and taxing authorities, but also landlords, employees, suppliers, and customers. Each day in offices throughout the country, the United States Trustees work to ensure that the laws which safeguard the bankruptcy system are strictly enforced, and that the system is not a safe-haven for those who think they can abuse or flout the law.

To carry out our mission, the United States Trustees exercise broad administrative, regulatory, and litigation responsibilities:

- we commence enforcement actions and litigate issues to protect the system from abuse and to ensure compliance with the Bankruptcy Code; we work closely with the United States Attorneys, the F.B.I. and other law enforcement agencies to help ensure prosecution of criminal violations that affect the bankruptcy system;
- we oversee the administration of chapter 11 reorganization cases, which involve some of the Nation's leading companies, to ensure financial account-

ability and regularity, compliance with the Code, and plans for prompt disposition; and

- we appoint and supervise the private bankruptcy trustees who administer cases filed under chapter 7 and chapter 13 to ensure prompt administration and maximum returns to creditors.

Under pending bankruptcy reform legislation, passed by both Houses of Congress earlier this year, our responsibilities would increase and expand into important new areas, such as credit counseling, debtor education and debtor audits. We welcome the opportunity and the challenge that the new reforms will bring to the bankruptcy system, should this legislation be enacted.

The 1.2 million bankruptcy cases filed last year represent an increase of more than 40 percent over the past 6 years, and nearly 100 percent over the last dozen years. Most of the rise has occurred in consumer cases (i.e., chapter 7 liquidation and chapter 13 wage-earner repayment plans), but chapter 11 business reorganizations continue to demand a significant share of the resources of the bankruptcy system. From 1989 to 2001, our staffing levels have risen from 849 to 1,016—or about one-fifth of the increase in case filings.

To a significant extent, our success has been achieved by targeting priority areas of responsibility. In the past, we have focused on such matters as expediting the chapter 11 process and enhancing trustee oversight. More recently, we have devoted increased attention to combating fraud and abuse. Although resources have not permitted us to pursue all of our initiatives with equal vigor, we believe that our prudent approach has allowed us to maximize our positive impact on the bankruptcy system.

ORGANIZATION AND STAFFING

The United States Trustee Program consists of an Executive Office for United States Trustees and 21 regions established in the statute. Each region is led by a United States Trustee appointed by the Attorney General. The Director of the Executive Office provides policy guidance, leadership, and administrative support to the United States Trustees who, in turn, are responsible for their regions. There are a total of 93 field offices located throughout the country. In general, each office is staffed by an Assistant United States Trustee, along with attorneys, financial analysts, paraprofessionals and administrative support staff.

Our modest staff of about 1000 is spread thinly around the country. (1) More than one-third of the field offices have 6 or fewer employees, and less than 10 offices have more than 20 employees. Program attorneys appear in court in more than 150 locations and conduct or oversee section 341 administrative meetings of debtors and creditors in approximately 280 other sites.

The integrity of the bankruptcy system depends upon the United States Trustees' ability to enforce the bankruptcy laws using both the civil and criminal code provisions that pertain to bankruptcy. Our work in combating fraud and abuse in the bankruptcy system is a priority responsibility of the Program. Using all the tools at our disposal, the United States Trustees focus on full disclosure and accountability, as well as the proper interpretation and enforcement of the law. Much of the United States Trustees' work occurs in the courtroom, but a significant amount of it also takes place outside the courtroom in monitoring debtors' filings and financial reports, following-up on any problems, and investigating complaints and allegations.

CIVIL ENFORCEMENT

The Program has broad statutory powers to ferret out fraud and abuse through civil enforcement actions. These actions, which are brought directly by Program attorneys in the field, may relate both to criminal conduct and to other improper conduct that does not rise to the level of a criminal violation. Typical civil enforcement includes actions by the United States Trustee to dismiss abusive filings, to deny discharges sought by dishonest debtors, to curb unfair practices by attorneys and creditors, and to sanction unscrupulous bankruptcy petition preparers. Major features of the Program's civil enforcement actions include the following:

SUBSTANTIAL ABUSE

Section 707(b) of the Bankruptcy Code provides that a debtor's chapter 7 case may be dismissed for "substantial abuse." The term "substantial abuse" has been interpreted by most judicial circuits to refer to a debtor's ability to pay creditors or to a totality of circumstances that indicate that a debtor does not need or deserve chapter 7 discharge. Program attorneys file approximately 1,400 "substantial abuse"

motions per year, but scores of other cases dismiss or convert voluntarily once our accountants or attorneys start questioning a debtor's circumstances.

Let me give you a couple of examples to illustrate the kind of cases we bring under the "substantial abuse" provisions:

- The United States Trustee in Ohio successfully moved to dismiss the chapter 7 case of a lawyer who earned \$225,000 per year plus bonuses. The debtor sought to discharge more than \$100,000 in unsecured debt while maintaining extravagant expenses including \$320 for maid service, \$800 for new automobiles, and \$1,150 for life insurance.
- The United States Trustee in South Dakota succeeded in getting a chapter 7 case dismissed after learning that the debtor had won \$25,000 at a local casino. This was more than enough for the debtor to pay her \$18,000 in debts.

COMPLAINTS TO BAR OR REVOKE A DEBTOR'S DISCHARGE

The most important benefit that chapter 7 debtors seek when they file bankruptcy is to obtain a discharge of all their pre-petition debts. Under section 727 of the Bankruptcy Code, however, a chapter 7 debtor's discharge may be denied on certain grounds, most of which center on the debtor's fraudulent conduct, dishonesty, or failure to obey a court order. The United States Trustees are taking an increased role in filing complaints to bar a debtor's discharge in the appropriate circumstances; however, because these actions can involve fairly time-consuming discovery in the course of litigation, they are very much a function of resource availability. Examples of cases recently filed by the United States Trustees include the following:

- In Georgia, the United States Trustee recently succeeded in obtaining a denial of discharge for a chapter 7 debtor who failed to disclose the sale of assets and concealed the receipt of monies both pre- and post-petition. The debtor had denied under oath at the section 341 meeting that the property had been sold. Over \$834,000 in debts were not discharged as a result of this action.
- In California, the United States Trustee succeeded in getting the discharge denied of a debtor who received an inheritance within 180 days after filing and then refused to turn the funds over to the trustee even in the face of a court order. In another action in California, the United States Trustee got the debtor's discharge revoked for failure to disclose partnership interests and real property that only came to light after the debtor's partners tried to dissolve the partnership and discovered the bankruptcy filing.

BANKRUPTCY PETITION PREPARERS

Some of the most egregious abuses in the bankruptcy system are perpetrated, not by debtors, but by those who prey upon debtors. Most people who file bankruptcy are in dire financial straits, and they are not well equipped to scrutinize offers of assistance. Many of these debtors face imminent foreclosure on their homes. Non-attorney bankruptcy petition preparers solicit clients from publicly available lists of those facing foreclosure, often from the local newspaper. Under section 110 of the Bankruptcy Code, bankruptcy petition preparers must, among other things, disclose in court filings their identities and the fees they received. Preparers sometimes charge exorbitant rates, fail to make necessary disclosures, and engage in the unauthorized practice of law. As a result of a bankruptcy petition preparer's nefarious activities, debtors literally may pay their last dollar, receive worthless services, and still lose their homes. In such cases, the United States Trustee may file civil actions through which they may obtain orders to repay the debtors, impose substantial fines, and provide injunctive relief. The United States Trustee also refers many of these cases to state bar authorities and to the United States Attorney for criminal prosecution. Program attorneys filed 1,600 actions under section 110 in the 2-year period immediately after Congress imposed new restrictions on petition preparers.

- In 2 very recent cases prosecuted both civilly and criminally in the Washington, D.C. area, petition preparers defrauded both debtors and mortgage lenders by filing bankruptcy cases in violation of section 110 in the names of debtors who paid significant fees to the defendants in return for refinancing or real estate services that were never provided. In one case, the defendant, while on pre-trial release, also took over properties facing foreclosure, filed bankruptcy petitions to delay foreclosure, and then rented the properties to innocent families with a purported option to buy. The renters uncovered the scheme when the mortgage lender finally was able to restart foreclosure pro-

ceedings. In one case, the victimized family of eight faced eviction shortly before Christmas.

- In California, this past March the court approved a settlement between the United States Trustee and bankruptcy petition preparers, and entered a judgment for sanctions of \$29,000. Under the settlement, the bankruptcy petition preparers agreed to a permanent injunction against their acting as such in any jurisdiction in the United States.

ATTORNEY CONDUCT

The United States Trustee Program is the principal component of the bankruptcy system which monitors attorney conduct and professional standards. Our staff review applications to employ attorneys and file objections when the attorneys possess impermissible conflicts of interest. The Bankruptcy Code contains extensive rules to prevent conflicts by professionals. The United States Trustee often is the only party in a case that brings such issues to the attention of the court. In addition, misconduct or poor performance by attorneys requires the United States Trustee to file motions to disgorge fees or to sanction counsel. When the court issues a “show cause” order, for example, United States Trustee attorneys often prosecute the matter. Based upon anecdotal information from Program attorneys and many bankruptcy judges, the bankruptcy system continues to suffer from substandard representation by many debtors’ counsel. Thus, it is important that the United States Trustee Program step up its already significant activity in this area of increasing judicial concern.

- In the last year, for example, the United States Trustee reached an agreement with an Oklahoma practitioner who was the subject of 15 motions to disgorge attorney fees, to cease bankruptcy practice for 5 years, disgorge \$9,100, and make other refunds to debtors. The attorney had failed to disclose the source of his fees and to list the loan companies that had paid him.
- In Georgia, on a motion by the United States Trustee, the court ordered the disgorgement of fees and barred an attorney from the practice of law before the bankruptcy court for 3 years. The court found that this attorney had permitted a disbarred lawyer to engage in the unauthorized practice of law and prohibited client contact, and failed to provide compensable service to the debtor. The court also ordered disgorgement of fees.
- In Pennsylvania, the court granted the United States Trustee’s motion to impose sanctions against an attorney who served as debtor’s counsel in 2 chapter 7 cases in which he submitted and advocated clearly inaccurate schedules in “a reckless disregard” for the Bankruptcy Code and Rules. The attorney was assessed \$5,000 in fines and reimbursement for the United States Trustee’s time and expense of filing the motions in these cases. Meanwhile, another sanctions motion against the same attorney was resolved by stipulation under which the attorney agreed to be suspended from bankruptcy practice for one year, obtain ethics training, and reimburse the United States Trustee \$6,000 for expenses in the 3 matters.
- An investigation in Oregon by the United States Trustee culminated in the suspension of an attorney, and the imposition of fines, costs and the forfeiture of fees totaling over \$20,000. The lawyer represented the debtor both in the bankruptcy proceeding and in a personal injury action. The personal injury action was not disclosed in the debtor’s schedules. Upon closer review, the United States Trustee found other cases in which the firm engaged in similar nondisclosures of personal injury actions.

CRIMINAL FRAUD

The United States Trustees have an affirmative duty to refer instances of possible criminal conduct to the United States Attorney and to assist in prosecutions. This is an effort we have pursued with vigor, because the bankruptcy system needs a strong deterrent to encourage honest, lawful behavior. The message being sent is loud and clear: you cannot lie, cheat, or steal with impunity in a bankruptcy case and hope to get away with it. There are consequences for that kind of behavior in bankruptcy. Judging by some of the cases we see, however, it is an ongoing problem that requires vigilance.

For example:

- A Texas debtor recently pleaded guilty to concealment of assets and making false statements. Investigation by the United States Trustee had revealed significant concealed assets, including real estate in California and Utah and a

DeLorean automobile. The FBI discovered additional concealed assets, including a castle in Scotland that is used as a hotel.

- In Arizona, early this year a grand jury indicted a debtor on charges arising from alleged concealment of a 60 percent interest in real property and approximately \$240,000 in proceeds from selling that property. According to the indictment, the debtor failed to list the property on a Chapter 11 petition, failed to disclose the post-petition sale and its proceeds, and falsely testified about the property in the bankruptcy proceeding.
- In Pennsylvania, last month a debtor was convicted on three counts of bankruptcy fraud and four counts of money laundering involving offshore accounts. The debtor failed to report more than \$4 million in bonds on his bankruptcy schedules and made a false statement on a monthly operating report by failing to list more than \$500,000 received from cashing casino chips.
- In Illinois, a chapter 7 debtor who had claimed less than \$3,000 in assets, plead guilty to concealing five fur coats, two diamond rings, a diamond bracelet, a pair of diamond earrings, her cosmetics business, and a 1981 Rolls Royce.

In 1992, then-Attorney General Barr designated bankruptcy fraud as a “high priority” for the Department of Justice. This policy was reiterated by former Attorney General Reno. Subsequent to these directives, the number of bankruptcy fraud investigations and prosecutions has increased dramatically. In most districts throughout the country, Program field offices have helped establish local working groups with the United States Attorney and other federal law enforcement agencies, and actively worked to train and educate investigators on bankruptcy and bankruptcy-related issues and techniques. It is now commonplace for Program field offices to identify a case of suspected fraud, to investigate and refer the matter to the United States Attorney, and to assist the prosecution of the case, including by testifying as an expert witness.

For example:

- Just 2 weeks ago, the United States Attorney for the Northern District of Illinois joined by the United States Trustee and the FBI announced the indictment of 10 defendants in 8 unrelated bankruptcy cases. This coordinated effort was the result of the Chicago Bankruptcy Fraud Task Force, which was organized in 1987 and which brings federal prosecutors together with the United States Trustee, agents of the FBI, IRS, Postal Service, HUD, the Social Security Inspector General and the Department of Labor. The charges in the most recent announcement ran the gamut from concealing assets to bank fraud, mail fraud, wire fraud, perjury and social security fraud.
- The South Dakota Bankruptcy Fraud Task Force recently obtained its 24th bankruptcy fraud conviction, when a couple pleaded guilty to concealing the wife’s interest in a women’s apparel store.
- In Texas, a similar cooperative effort called “Operation Payback” involved the United States Attorney, the United States Trustee, the Postal Inspection Service and HUD, with FBI undercover agents acting as homeowners facing eviction. The year-long investigation was aimed at a bankruptcy fraud and equity skimming operation which had defrauded homeowners in the Dallas area of approximately \$500,000. While further indictments are expected, at this point 2 individuals have been charged, and another has plead guilty.

We are extraordinarily proud of the Department’s efforts in this regard and know the bankruptcy system is the better for it. Our experience is also teaching us. Today, we know that bankruptcy fraud often is linked to other crimes, such as mortgage fraud, tax fraud, identity theft, Internet crimes, federal benefits fraud, and money laundering. The bankruptcy process relies on self-reporting and requires substantial information and financial accountability. Those who use the bankruptcy system to further their other crimes may provide a road map or present additional indictable offenses of interest to law enforcement authorities, particularly as the world’s economy moves increasingly toward an electronic environment.

IDENTITY THEFT

Through our work with the other Department of Justice components and federal agencies, we recently developed an initiative to address identity theft in bankruptcy cases. A large number of criminal referrals made by Program staff involve the perpetrator’s use of a false name or social security number. In January, after discussions with advocates for victims of identity theft, we launched in 19 districts a pilot project that is based upon an experiment conducted by the United States Trustee

in Region 11 and a practice found in several other districts around the country. In the pilot districts, the identifying information that debtors disclose on their bankruptcy petition is being confirmed at the section 341 meeting. In the past, a number of bankruptcy cases have been filed in the names of individuals who did not learn of the bankruptcy filing until years later, such as when they were seeking to purchase or refinance a home. Many of the incorrect social security numbers we are discovering involve typographical errors which can now be corrected to prevent future injury to some unsuspecting person. A number of them, however, are suspicious and are being investigated. We expect this pilot project will be expanded to all offices this Summer and will help decrease the incidence of identity theft in the bankruptcy system.

- In Illinois, a woman pleaded guilty to 3 counts of a 19 count superseding indictment. Among other things, she committed bankruptcy fraud by using aliases and filing false bankruptcy petitions as part of a scheme to defraud the Department of Housing and Urban Development (HUD), other mortgage holders, creditors, and Chapter 13 trustees. She filed 21 bankruptcies solely to stop foreclosure, never disclosing the properties she held or the bankruptcies she filed under other names. Staff of the United States Trustee testified as fact and expert witnesses.
- In New Jersey, a debtor plead guilty to filing a false bankruptcy petition, seeking to discharge about \$69,000 in debt. She admitted that she used a false Social Security number on her petition and that she had incurred the debt under the false number.

TRUSTEE OVERSIGHT

United States Trustees appoint and oversee roughly 1,800 private case trustees who administer cases filed under chapters 7, 12, (2) and 13. (3) In Fiscal Year 2000, these trustees distributed more than \$5.1 billion. Trustees are fiduciaries for bankruptcy estates. It is a bedrock duty of the United States Trustee to regulate and monitor the activities of these private trustees, and to ensure their compliance with fiduciary standards. The Program administers a formal system for merit selection of trustees, trains trustees and evaluates their overall performance, regularly reviews their financial operations, and intervenes to prevent loss of estate assets when instances of embezzlement, egregious mismanagement, or other improper activity are uncovered. One of the most significant indicators of effective trustee oversight is the speed with which chapter 7 consumer cases are closed and funds are distributed to creditors. In a report issued in 1994, the General Accounting Office identified a link between the age of a case and the percentage of receipts distributed to creditors. In other words, in an older case, administrative costs are higher and more fees are paid to professionals rather than to creditors. Since 1992, when the Program undertook an initiative to reduce the backlog of older cases, we have reduced the number of chapter 7 cases that had been lingering in the system for 10 years or more from nearly 4,000 cases to fewer than 140 such cases. In addition, only 2.3 percent of the total caseload was more than three years old in October 2000, compared with 8.2 percent in January 1994.

Enhanced trustee oversight not only has improved case administration, but also has improved our ability to detect those rare instances of embezzlement or theft of estate assets. Over the past 10 years, the Program has investigated and helped obtain convictions in 60 cases of embezzlement by bankruptcy trustees or their employees, with losses to the estate of \$14 million. When an apparent embezzlement is discovered, Program employees investigate the allegations, reconstruct financial records, determine the loss to the bankruptcy estate, assist in developing the bond claim for reimbursement of the loss, and assist the United States Attorney in the prosecution of the perpetrator.

- Just last month, a federal court in Texas sentenced the former employee of a chapter 13 trustee to 51 months in prison, followed by 3 years supervised release and full restitution for the \$511,510 she had embezzled over a 7-year period.
- Last December, a grand jury in Puerto Rico indicted the former accounting clerk of another chapter 13 trustee on charges of embezzling over \$173,000 over a 4-year period.

While trustee oversight continues to be an important part of the United States Trustees' oversight, we are very proud that the cadre of trustees that administers cases today is more professional and expert than ever before. These trustees recover more assets and manage debt repayment plans more efficiently. We are on the verge

of publishing a preliminary report on the chapter 7 asset cases that have been administered over the past eight years. What we are moving toward next is to analyze the data even further, and work with the panel trustees to improve the identification and liquidation of estate assets.

CHAPTER 11 CASE ADMINISTRATION

A significant share of Program resources is devoted to chapter 11 business reorganization cases. Even though chapter 11 filings represent less than 1 percent of all bankruptcy filings, these cases generally require urgent attention and on-going oversight.

The role of the United States Trustee in a chapter 11 case typically starts with an initial interview of the debtor shortly after the case is filed to assess the general financial condition of the debtor and to convey information about local and statutory filing requirements and deadlines. The United States Trustee then conducts a formal section 341 administrative meeting on the case, appoints official committees of creditors, monitors financial transactions, examines the retention of professionals for conflicts, evaluates the reasonableness of attorney and other professional fees, and ensures adequate disclosure of relevant financial and other information to creditors before they vote to confirm a reorganization plan. The United States Trustee often files motions to dismiss, or to convert to chapter 7 liquidation, those cases that have little likelihood of success, drain funds, and leave creditors without recourse; objects to the employment of professionals with disqualifying conflicts of interest; or objects to disclosure statements supporting plans of reorganizations that contain insufficient or misleading information.

The role of the United States Trustee is especially important in smaller chapter 11 cases in which creditors lack a sufficient financial stake to participate actively. In this regard, the pending bankruptcy reform legislation codifies many Program activities in smaller cases (e.g., on-site visits to review books and records) and provides new tools to strengthen our role in such cases (e.g., encouraging scheduling orders soon after a case is filed).

As with consumer cases, a good indicator of effective chapter 11 case management is a reduction in the amount of time a case remains in chapter 11 before emerging with a confirmed plan of reorganization. For cases filed in 1989, only about one-half were completed (by conversion, dismissal, or confirmation) within one year after filing, and 81 percent were completed within 2 years. Today, more than 60 percent of chapter 11 cases are completed within one year, and 90 percent are completed within two years. The result is that cases do not languish as long in chapter 11, and cases are converted to chapter 7 before available assets are dissipated. Moreover, between 1980 and 1986, only about 17 percent of chapter 11 cases resulted in a confirmed plan of reorganization. Since 1989, the confirmation rate has exceeded 25 percent each year and is now slightly over 30 percent.

BUDGET AND APPROPRIATIONS

In Fiscal Year 2001, the Program will operate on a budget of \$127.2 million with an average on-board employment level of 1,016 employees. The President and Attorney General have requested \$154 million in funding and 1,218 positions in Fiscal Year 2002 to carry out the Program's current duties. If approved by Congress, the additional resources will be used to expand our civil enforcement efforts to combat abusive filings and other improper activities in consumer cases, to devote additional staff to identify criminal fraud and assist United States Attorneys in prosecuting bankruptcy crimes, and to improve our outdated automation systems.

It is important to note that the Program is funded entirely from fees paid by debtors in bankruptcy cases. In recent years, this has created a lack of a stable funding base and has caused workloads significantly to exceed staffing levels. For example, about 60 percent of the Program's annual funding derives from chapter 11 quarterly fees. Accordingly, any decline in chapter 11 filings has a disproportionate effect on Program revenues. The impact of decreased revenues is even more severe, because 86 percent of the Program's budget is fixed—comprising rent, salaries, benefits, and other personnel related costs. As a result, from Fiscal Year 1998 through 2000, the Program could not fund 11 percent of its authorized positions. This effectively resulted in a staffing decrease. Fortunately, the Fiscal Year 2002 budget helps to rectify past budget difficulties and provides resources to pursue important priorities.

BANKRUPTCY REFORM LEGISLATION

The pending bankruptcy reform legislation would confer many new responsibilities on the United States Trustee Program. The legislation would, for example, provide us with more tools to pursue civil enforcement actions against those who abuse

the bankruptcy system. The reform bills would also impose a number of new administrative and reporting requirements, as well as mandates to litigate in court. It is clear that Congress has identified the Program as a primary vehicle to accomplish the goals of the pending legislation. Accordingly, it is essential that the Program make necessary adjustments in priorities and resource allocations to achieve the new goals that would be set for us under the pending legislation.

In anticipation of the possibility of enactment of comprehensive bankruptcy reform, the Program is preparing implementation plans that include proposals to address 5 major areas of new responsibilities: means testing and abuse, credit counseling, debtor education, debtor audits, and small business chapter 11's. Most of the provisions of the new law would become effective six months after its enactment, so it is important that we make rapid progress.

I can report that we have made legislative implementation a top priority within the Program. Our staff have devoted a great deal of attention in recent months to the development of our implementation plans. We are also beginning discussions with the private trustee organizations and the court system concerning a number of areas of mutual responsibility, including the development of new official forms and proposed amendments to the Federal Rules of Bankruptcy Procedures.

In addition to requiring the Program to adopt new procedures, regulations, and litigation strategies, the new legislation would create an urgent demand for data collection, analysis, and reporting. We are carefully reviewing these proposed requirements, including the significant new computer and other automation improvements that would be necessary.

Although our implementation designs are far from complete, we have made substantial progress. In addition, training for all our professional and paraprofessional staff, as well as the private trustees we supervise, will be critical to acquaint them with the new legislation and the responsibilities it would assign, if it is enacted.

We are both excited and optimistic about the prospects for implementing the new legislation. We recognize, however, that we may not have the necessary resources in place during the early days of implementation. As noted above, the adjustments in filing fees included in the legislation should provide adequate funds, subject to appropriation, for us to carry out the new duties that would be assigned to us. The precise cost of implementation currently is the subject of discussion within the Department.

CONCLUSION

The United States Trustee Program has diligently carried out its important mission in the bankruptcy system. We look forward to building upon this success as we make plans to implement the critical new reforms embodied in the pending bankruptcy legislation.

I would be happy to answer questions from the Subcommittee.

1. By statute, the Program does not operate in the 6 judicial districts in Alabama or North Carolina. Bankruptcy administrators, who are part of the Judicial Branch, carry out similar duties in those States.

2. Although the authority to file under chapter 12 (family farmer provisions) expired on July 1, 2000, recently-passed H.R. 256 would restore chapter 12 from that date through June 1, 2001. Pending bankruptcy reform legislation (H.R. 333/S.420) would make chapter 12 permanent.

3. In unusual cases involving fraud or egregious mismanagement, a bankruptcy court may order the United States Trustee to appoint a trustee to replace a chapter 11 "debtor-in-possession." When so ordered, the United States Trustee has a statutory duty to consult parties in interest on the selection of a candidate and to oversee the trustee's performance.

Mr. BARR. We will proceed now—did you have a statement, Ms. Waters, an opening statement?

Ms. WATERS. Yes.

Mr. BARR. The gentlelady from California is recognized.

Ms. WATERS. Thank you very much. I appreciate the fact—to give an opening statement despite the fact that you have moved on.

Mr. Chairman and Members, I recognize what our role here today is, to try and give some oversight and take a look at what these departments are doing. These agencies—I have a concern that I would like to just talk a little bit about and that the time

that you give us perhaps for questions, perhaps we could get some response.

I would like to thank Mr. Schiffer, I believe it is, for responding to me when I attempted to track down a very complicated process that has to do with the class action suit that was filed by the black farmers in America and the whole system that was set up by the courts, Track A and Track B.

Mr. Chairman, I guess even though I will attempt to raise some questions during the time that we have for questions that you give us, I think this is something that requires a lot more time to find out exactly what has happened. How many claims have been filed? How many have been settled? What happened with the requests by claimants who came after the deadline date? What is happening to them? All of that.

But I also would like to try and clear up the relationship between the Civil Division and the Members of Congress.

Like I said, I got to you, Mr. Schiffer, and you were very helpful in trying to help me understand what was taking place, with the way it all operated. I do have to tell you that I talked with a liaison, a congressional liaison person, who, when I attempted to get some assistance and find out who the attorneys were that were handling the appeals in a particular case, I was told that they had been told that under no circumstances were they to allow the Members of Congress to talk with the attorneys who had the direct responsibility for handling the cases, particularly where they were appeals.

I don't understand that. I don't particularly like that. I want to clear that up.

Again, I want to say that your response to me is very much appreciated and the way that you attempted to help me, but I think the Members of Congress need to understand what is being told to them when somebody says, I'm sorry, I can't allow you to talk to the attorneys in the case. What is that all about? This is not the time for the question I suppose, but that is where I am going with this, and you can think about it. And when we come back for questions I will ask you, and maybe you will have an answer for me by then.

Thank you very much, Mr. Chairman.

Mr. BARR. Yes, ma'am.

We will proceed with questions, Subcommittee Members. We will proceed in 5-minute blocks according to our 5-minute rule, and we will have probably two or three rounds of questioning.

I will begin, if I could, with a couple of questions for you, Mr. Calloway, regarding both the operation of the Executive Office for U.S. Attorneys and the U.S. Attorneys Office.

If you could please describe what we might expect will be the new Attorney General's initiative on stemming gun violence. For example, will a program such as Project Exile, which has been employed very successfully in the Richmond, Virginia, district, be the basis or provide a basis for the Attorney General's initiative or is another approach under consideration?

Mr. CALLOWAY. Thank you. I will be happy to answer that as best I can.

When the Attorney General took office, he established a Gun Enforcement Task Force consisting of representatives of the relevant components at Main Justice as well as representatives of the FBI and ATF. The task force has been examining the best practices as they relate to gun violence efforts in U.S. Attorneys Offices across the country. While I cannot speak for the Attorney General, but my understanding is that the plan will be presented in the near future.

It is also my understanding, based on what the Attorney General has said, that it is designed to build on past successes such as Project Exile, Operation Ceasefire, and other local efforts complemented by substantial new resources and tools. I understand the initiative will mount a newly invigorated and intensified approach to gun violence reduction through heightened coordination among law enforcement and proactive, aggressive prosecution of all gun criminals.

Project Sentry is part of that and is also part of the administration's Safe Schools for the 21st Century. The strategy builds on, but does not duplicate, the resources we received last year.

Project Sentry, if you allocate those 94 positions, is designed to put a safe schools coordinator, an AUSA—Assistant United States Attorney—to serve as a safe schools coordinator in each United States Attorney's Office across the country. That person's responsibility would be working along with the United States Attorney to coordinate with State, local and tribal law enforcement on the prosecution of adults who provide handguns or firearms to juveniles, as well as to engage with the schools and the community and local officials in prevention efforts, because it is far better to prevent a crime of violence in a school than it is to prosecute in its aftermath.

Mr. BARR. We can expect then a very vigorous program from the Attorney General working through the U.S. Attorneys Office to stem gun violence in our communities.

Mr. CALLOWAY. Yes, sir. The Attorney General has indicated that the prosecution of gun crime is one of his top priorities.

Mr. BARR. Thank you.

Also, Mr. Calloway, turning your attention to the so-called McDade law with which I know you are familiar, which Congress passed a few years ago providing that Federal prosecutors are subject to State laws and rules and local Federal court rules in each State where the prosecutor, quote, engages in that attorney's duties, could you describe for us briefly what has been the impact of the McDade law since its adoption in April, 1999, and what are some of the problem that have developed?

Mr. CALLOWAY. Thank you. I will be happy to try to do that.

First, let me assure you that all Federal prosecutors I know take their ethical responsibilities very seriously. It is a high priority of the Justice Department. It was when I was U.S. Attorney, to make sure that our prosecutors followed all ethical rules. For, after all, we represent the United States in court, and we should maintain the highest ethical as well as professional standards.

Having said that, there are concerns among the prosecutors in the field and at Justice that 28 USC 530(b), otherwise known as the McDade law, has caused some very serious problems for law enforcement that we think were not intended. The most dramatic example of what we are facing has occurred in Oregon where the

State Supreme Court last August refused to find a law enforcement exception to State law and bar rules prohibiting attorneys from engaging in conduct involving misrepresentation, dishonesty, fraud, and deceit.

It was the Gatti decision, and the court ruled that there was, among other things, no prosecutors' exception for engaging in misrepresentation or deceit. What that means is, in Oregon, for the most part, undercover operations have come to a standstill, or at least the prosecutors who advise the agents to ensure that they comply with the law and an individual's constitutional rights can no longer be involved in undercover operations because of the Gatti decision and because their State bar rule 1—I believe it is 1-102—prohibits lawyers from being engaged in conduct that involves misrepresentation or deceit.

An example of that would be that a lawyer could not provide advice to a drug task force that is going to engage in undercover operations. And, as you know, one of the most effective ways of combating the drug trade is to engage in an undercover operation. You don't go to the drug dealer and say, hi, I am from the Federal Government. I would like to buy drugs.

As well as in child pornography investigations. You have often got to pose as someone interested in child pornography on the Internet in order to obtain it. That is engaging in misrepresentation or deceit, because you are a law enforcement office using the Internet, trying to find people who are willing to sell you child pornography, or who want to travel across State lines to find children with whom to engage in sexual intercourse.

That is a particularly troublesome problem because that State bar rule in Oregon means that our Federal prosecutors in the U.S. Attorney's Office, as well as State prosecutors, cannot advise or participate with law enforcement in undercover operations.

Also, with respect to rule 4.2, there has been a great debate about that in terms of contacts with represented parties. There have been times when corporate counsel has swept in and said, "You can't talk to any employees in the corporation because I represent them all." We dealt with that issue at the State bar level in North Carolina when I served as an ethics advisor to the North Carolina State bar. We tried to reach a good compromise there that allowed law enforcement and others to talk with certain low-level employees, but that is also an issue of concern.

I would say this. More than anything, it has had a chilling effect on AUSAs. We are asking them to go out and enforce Federal law, but we are also asking them at times to put their law license on the line. And I don't believe there is anybody out there who wants to put his/her law license on the ethical altar to prove a point with respect to 530(b). If anything, they are going to say no to what has otherwise been sanctioned or legitimate court activity if it is an undercover operation or the like. So it has had a chilling effect on what we can do.

From the U.S. Attorney's perspective for supervisors in the office, it also can cause difficulties because the McDade law, basically, based on our interpretation, could subject you to inconsistent bar rules. Let me give you an example.

For example, this could occur if you have a prosecutor in your office who is licensed in another State—and that is common throughout the U.S. Attorney's Offices. In my office, the Federal court allowed AUSAs to be licensed in another State and practice in front of the Federal court. You could have a prosecutor who is licensed in Pennsylvania but is working in North Carolina, and who would be theoretically subject to both the North Carolina State bar rules and the Pennsylvania State bar rules. Their rules may be inconsistent. You may, as a U.S. Attorney or a Criminal Division Chief, have to pick which lawyers you put on the case based upon where they are licensed and whether the State bar rules would allow you to engage in otherwise court-sanctioned activities. So it has caused quite a problem and quite a chilling effect on prosecutors.

Mr. BARR. Thank you. We may want to revisit that, but we will do so in a later round or perhaps in future proceedings.

I would ask unanimous consent to include in the record at this point an article of the Oregonian entitled "Oregon's top court rejects plan by State bar on prosecutors' role" dated Thursday, April 12, 2001. Without objection.

[The material referred to can be found in the Appendix.]

Mr. BARR. I would like to now recognize the distinguished Ranking Minority Member, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

Ms. Davis, I am looking at page 20 and 21 of your prepared statement and trying to make sure that I understand your funding mechanism. Page 20 says you operate on a budget of \$127.2 million. Page 21 says that you are funded entirely from fees paid by debtors in bankruptcy cases. Those two things—is there a direct tie between fees and your budget or has there just historically been this correlation?

Ms. DAVIS. We collect fees, a portion of every filing fee and fees in every chapter 11 case called quarterly fees which go into what we have called the U.S. Trustee system fund; and from the fund we are appropriated the sums I think that you refer to. The 127—that is an operating budget. But if I understand your question—

Mr. WATT. So are you saying that if the fees are not collected in the bankruptcy court it—further down on page 21 you say, as a result, from fiscal year 1998 through 2000 your program could not fund 11 percent of its authorized positions. Are you saying that—

Ms. DAVIS. We did not receive enough of our mandatory increases; and so, while we were authorized the positions, we could not fund those positions. We had to cover our mandatory increases. And so, effectively, we could not fill the slots that we had been authorized.

Mr. WATT. Okay, I am not sure I understand what you are saying. Is that because there were not enough bankruptcy fees collected or because we didn't appropriate enough money? Did we have appropriate money to fund up?

Ms. DAVIS. Yes.

Mr. WATT. And then—

Ms. DAVIS. We have did not get enough in the appropriations to cover our mandatory increases.

Mr. WATT. So there is no direct tie between bankruptcy fees and your budget then.

Ms. DAVIS. I am not sure—.

Mr. WATT. It is not a trick question. I am trying to understand. We have appropriate—we may look at how much fees you collect in determining how much to appropriate.

Ms. DAVIS. Correct. In any given year we are looking at what we anticipate the receipts to be. Because, traditionally, we are not going to ask for more than we collect that year.

Mr. WATT. Okay. That raises then the question, I guess, about what happens in the event of bankruptcy reform. Because all of the hearing testimony in the bankruptcy—in preparation for bankruptcy indicated there was going to be just substantial additional cost and responsibilities to bankruptcy trustees and to the bankruptcy courts as a result of this proposed bankruptcy reform.

The other side of that, I take it, would be that if the bankruptcy reform has the impact that it is supposed to have or anticipated to have, there would be a dramatic decrease in the number of bankruptcy filings which would be less fees, more work. How would that be reconciled in the budget process?

Ms. DAVIS. Well, we are currently working on projections. A lot of it I think will depend on what our revenues are projected to be, and we will assess it once a bill is passed.

Mr. WATT. So are you saying you will look at what you anticipate collecting and then work back from there to determine what the need will be.

Ms. DAVIS. Right now we are looking at need in terms of projected resources.

Mr. WATT. Would you ask for more than you will project that you will get in fees?

Ms. DAVIS. If we have to, we will.

Mr. WATT. Have you done that historically?

Ms. DAVIS. Not traditionally, no, sir.

Mr. WATT. So in effect then the government would end up subsidizing the revision to the Bankruptcy Code.

Ms. DAVIS. Well, currently in the bill there is an adjustment of the percentage, the filing fee, so that funding would be going into the U.S. Trustee system fund. From that fund you would still have to be appropriated to cover the costs of the bill, at least for the U.S. Trustee program.

Mr. WATT. Thank you, Mr. Chairman. My time has expired.

Mr. BARR. Thank you. We will have an additional round for additional questions.

I would like to note the presence of Mr. Chabot from Ohio; and, Mr. Chabot, do you have any statements that you would like to make?

Mr. CHABOT. No, thank you. Did you ask me if I have any questions or a statement?

Mr. BARR. No questions, just a statement. I am about to call on the distinguished Vice Chairman for questions.

Mr. CHABOT. No, Mr. Chairman, thank you.

Mr. BARR. Does the gentlelady from Pennsylvania have an opening statement?

Ms. HART. No, thank you.

Mr. BARR. The vice Chairman, Mr. Flake of Arizona, is recognized for 5 minutes.

Mr. FLAKE. Thank you, Mr. Chairman.

I would like to follow up with Mr. Cruden for a minute. With regard to takings, you have a land acquisition section.

Mr. CRUDEN. We do.

Mr. FLAKE. I wonder if you have had an individual who has had a takings and is not pleased with the compensation there, walk me through the steps the person has to take.

Mr. CRUDEN. Let me start off with the land acquisition process. In order for a Federal agency to acquire lands, two things have to occur. They have to have congressional authority to do that; and, second, they need money and so there actually has to be an appropriation somewhere that allows them to do that.

If those two things happen, then ordinarily whether it is the military or some other group, the agency first tries to buy it. If that is unsuccessful—and sometimes it is unsuccessful even if the party wants to sell because the various groups cannot agree what the title is—then we still have to acquire it through court. But when we do that the fifth amendment actually requires that the fair market value be paid.

And sometimes, actually, if we are going to take the land right away, that estimated value, which is done by an appraiser, is immediately available to the landowner, and they will have a jury trial perhaps as to what is the appropriate fair market value for a particular land. So that is the process when we are actually acquiring land.

Sir, was that your question or did you have something else in mind?

Mr. FLAKE. Somewhat. There are other, I guess, more complicated arrangements. For example, with the latest monument designations in Arizona you have examples where individuals have land that is now cut off and easements are not provided. And therefore they could argue that they have had diminished value. How would one of those individuals come forward?

Mr. CRUDEN. One of the beauties of our constitutional system and what has been set forth by courts is that even the process that I have described to you where we are acquiring land and some parties think they did not receive enough and we think you have taken more than has been compensated, Congress has set up a specialized court, the Court of Federal Claims, and under the authority of the Tucker Act allows individuals who you think have taken some of their property or all of their property or done something that disturbs their use and you go in and make that claim to the Court of Federal Claims and then we will adjudicate that case.

We have been following Supreme Court precedent as to what the standards are in that regard, but we will actually adjudicate the claim. If the claimants are successful, they will get compensation in that regard; such compensation could be for the examples you were using.

Mr. FLAKE. Just give me an idea, how many such cases are you working right now?

Mr. CRUDEN. Right now, in this year, we have about 150 cases that are in the Court of Federal Claims where there is some allega-

tion of taking. And I want to compare that because, right now, we have around 12,000 cases that our Division is responsible for. But in the takings cases, and that is in that jurisdiction I was telling you about, the Court of Federal Claims, we have about 150 active cases.

Mr. FLAKE. Are there complaints from the landowners that the process is slow or are they working with the agency okay there?

Mr. CRUDEN. Sir, I will tell you in virtually every case of this nature we hear issues about it could be faster; and, truthfully, we want it to be faster. One of the things that we are doing now with the Court of Federal Claims is we are working with them, as we speak, trying to enhance and develop their alternative dispute resolution process. That way, in fact, you can settle more effectively or get a quicker resolution than is occurring right now; and we are working on it right now.

Mr. FLAKE. Are you expecting given the monuments that were designated, Arizona has five, for example, and strange configurations, have you received or do you expect more cases because of that?

Mr. CRUDEN. I am not aware of any cases we have that are specifically in that area. Interestingly enough, in the last 3 or 4 years the 150 takings cases has been relatively constant, so it may, in fact, energize people to file more takings claims. But we haven't seen much of a growth in that area of the law in the last 2 or 3 years.

Mr. FLAKE. The minute I have left, Mr. Calloway, with regard to habeas corpus, you have requested \$1.2 million in addition there. I understand the INS has a lot of people detained whose home country will not take them back. Therefore, we continue to have to pay the cost. What happens, we hear reports of some just being released because INS simply doesn't have the funds to keep them. Is that happening and will this increased appropriations ensure that that doesn't happen in the future?

Mr. CALLOWAY. I would have to defer to INS on that. I know that the habeas corpus—the individual who is detained can file a habeas corpus to seek his release, and that can happen through that means. I know there are primarily seven U.S. Attorney's Offices that have been effected. There is a huge increase in the number of those petitions filed because of the INS detention facilities in their districts.

So that is why we are seeking those additional positions to try to provide the Assistant U.S. Attorneys to address that problem so they can respond to the petitions appropriately. We have no choice but to defend the petitions when they are filed; and we can't control, from a U.S. Attorney or AUSA perspective, the number that are filed. All we can do is be prepared to defend them. But as to what is happening, I would have to defer to the INS on that.

Mr. FLAKE. Thank you.

Mr. BARR. The gentlelady from California is recognized for 5 minutes.

Ms. WATERS. Thank you very much.

Mr. Schiffer, as you know, some of us have been working on the case of discrimination against black farmers for quite some time. We had several things that happened. We had a class action suit,

and we had an administrative remedy where we had the statute of limitations waived so that there could be some administrative responses to it.

The A/B track of the class action suit is very much bothersome, and we get a lot of complaints, a lot of unhappy farmers who feel as if the process has dragged out so long, feel as if maybe they haven't been treated right, et cetera. And at this time we are still getting calls from farmers who are losing their farms, waiting after they have been awarded, given awards. Some of these awards have been appealed by the Justice Department. And of course the farmers don't feel as if they are being treated fairly.

Then for those of us who are trying to help these people save their homes and save their farms to be told by the liaison that will not tell us who the attorney is that is working on the case and that they have been told not to let us contact those attorneys, it is a little bit bothersome.

Again, I want to thank you for your response and the way that you handled my inquiry. But is there some policy that Members of Congress are to be kept from speaking with the attorneys who are working on the case of these farmers who are trying to get us to help them move the process along or trying to help them save their homes? What do you know about this?

Mr. SCHIFFER. Congresswoman Waters, first of all, I appreciate the remarks that you made about my responsiveness to you. We take very seriously our obligation to respond to Members of Congress in general and certainly this Committee and its Members in particular. And I should emphasize you refer to a member of our Office of Legislative Affairs, and nobody reinforces the idea to us more often than our Office of Legislative Affairs. It is their job to see that we are responsive.

We have indeed had a policy as long as I have been in the Department that has applied not just to Congress but to the White House as well that principally responses should come from supervisors or people at policy levels. And certainly your inquiries are understandable and your interest in this program is laudable, but it is really to prevent even the appearance of pressures being put on line attorneys who are, of course, not themselves supposed to be responsive to political concerns. And I am not suggesting yours were in any way here.

Ms. WATERS. What should she have said? How should she have handled the inquiry?

Mr. SCHIFFER. She should have referred it to me or to someone else at the supervisor's level; and I think she did in that instance, by the way. I know that you called me, and I also received a call from a woman who—

Ms. WATERS. I threatened her. That is why she probably called you.

Mr. SCHIFFER. Well, she was troubled that she had not been able to respond. I think she would have felt the same way, whatever the tone of—

Ms. WATERS. Well, all she has to do is just say, well, let me try and help you; and if you don't feel that I am I will refer it to the head of the division of—you know—or something like that. But to say that we have been—I cannot allow you to speak to the attorney

of record on a case is a little bit bothersome, but I think that won't happen again. I think that is cleared up for the time being.

Let me ask, what about the appeals by the Justice Department on some of these cases? I know we can't talk about any case in particular, but it seems that there is a feeling out there that the Justice Department worked a little bit overtime in appealing the awards that had been granted I think by the monitors on the case. Is that who grants the awards?

Mr. SCHIFFER. Well, let me say there were two tracks, as you indicated, set up in the consent decree. I have not spoken personally to counsel for the class, but I think they regard this as a very favorable decree, certainly from their perspective.

The first, the so-called track A, is a streamlined procedure providing for an amount of \$50,000—assuming \$50,000 to be paid to farmers who submit valid claims. It is an extremely expedited, streamlined procedure.

Track B—

Ms. WATERS. Excuse me, but let me just ask, so we can make use of the time. Some of those were appealed, is that right? Some of the ones on the first track were appealed, also.

Mr. SCHIFFER. I am aware of that. Track B is a more formal procedure, still not resembling a judicial proceeding but providing for some limited discovery where farmers believe they are either entitled to more money or they need certain documents that they don't otherwise have. Plaintiff's counsel estimated when the decree was being negotiated that we might receive as many as 2,000 or 2,500 claims from black farmers who are believed to have been victimized by discrimination.

Under track A we have received now something like 21,000 timely filed claims and an additional substantial amount of claims that were not timely filed. Track B, we received only about 200 claims.

I think we have had a remarkable record of processing these in an efficient manner. Over \$560 million has been paid out to claimants. There have been a few appeals in track B, but it is not a substantial number. For the most part, claims are proceeding expeditiously, so that 99 percent of the timely filed claims have been processed; and all but a very few of those claims have, in fact, been paid.

Mr. BARR. The time of the gentlelady has expired. If I could note for the gentlelady that we will have additional rounds of questioning, so that if there are further follow-up there will be time.

The gentlelady from Pennsylvania, Ms. Hart, is recognized for 5 minutes.

Ms. HART. I yield back my time.

Mr. BARR. Okay. Thank you.

In that case, I will proceed. Since we have all had one round, we will start a second round.

Mr. Schiffer, you heard earlier a little discussion that we had with Mr. Calloway with regard to the impact of the McDade rule or the McDade law. Does your Division get involved at all in those cases where problems arise?

Mr. SCHIFFER. Well, we get involved in two ways. First, while we have very few people who do criminal work—we have some, due to the high jurisdictional lines that we deal with—but we do get in-

volved in such areas as civil fraud investigation in the same manner as a prosecutor would be handicapped. We also get involved when consideration is given to litigation.

Some U.S. Attorneys, for example, have filed suit challenging particular State bar rules. Without getting into a case that might have to be brought, the Oregon situation is one where there is at least some question of whether the so-called McDade amendment was really meant to go as far as the Oregon Supreme Court took it. But we do confer with the prosecutors in the field about problems that they are encountering.

Mr. BARR. In your view, and also, Mr. Calloway, if you could address this just very briefly, is this—are the problems that are going to arise under McDade sufficiently in focus now so that this would be an appropriate time for Congress to take a look at this, or is it still a little bit too out of focus?

Mr. SCHIFFER. I am told repeatedly that as a career official I don't have a view on what Congress should look at, but it certainly has been a—it is difficult to describe. I mean, as Mr. Calloway said, when one states the proposition that Department of Justice lawyers should act ethically in conformance with rules of ethics, it is very difficult to argue with that proposition.

We then run into situations such as Mr. Calloway described with undercover operations. We run into problems with conflicts between our rules, our Washington-based lawyers, for example.

Mr. BARR. Electronic surveillance in certain statutes—in certain jurisdictions.

Mr. SCHIFFER. Or even figuring out which rule applies.

Our lawyers that are Washington-based argue cases throughout the country. We only require—and by statute Congress requires that our lawyers be admitted in any State jurisdiction. So we run into the situation where I am a native of Chicago, I am a member of the bar in Illinois, I am litigating a case in North Carolina, and a deposition is being taken in Iowa. One of the courses in law school I was most pleased to get over was conflict of laws, but it is even difficult in some cases knowing which rules apply. And, as Mr. Calloway indicated, we want our lawyers to step back, make sure that what they are doing is appropriate.

My concern has always been that things that ought to be done aren't going to be done because I can't tell my lawyers, don't worry about your law license, we are going to take care of you.

Mr. BARR. Mr. Calloway, do you have any other thoughts on that?

Mr. CALLOWAY. I do. I think you will have to draw your own conclusions whether it is time.

One thing the Department did was establish the Professional Responsibility Advisory Office, what the lawyers know as PRAO, to field questions from Assistant U.S. Attorneys and trial attorneys at the Department of Justice about McDade and other ethical issues. So we set up an entire unit to deal with that, headed by Claudia Flynn, to look at those questions.

In addition, we established in each U.S. Attorney's office across the country a professional responsibility advisory officer to be the first line in the U.S. Attorney's office to answer assistant U.S. Attorney questions.

I know that PRAO has received hundreds of inquiries. I don't know the exact number. We could probably get that for you so you could factor that into deciding whether it is time to take a look at that or not. And our PRAOs handle inquiries every week, so it has become quite a problem for us.

Mr. BARR. Mr. Cruden, we had a hearing in another Committee that I serve on earlier today, and we had several very high-ranking military leaders in, and the main issue that we were focused on—this is on the Government Reform Committee—is the impact of various Federal statutes—Endangered Species, Marine Mammals Act, wetlands legislation, Clean Water Act and so forth—and the impact of these laws and subsequent regulations on the ability of our military to carry out its fundamental function, which includes, as part of our national defense needs, training and conducting live-fire exercises and beached landings and so forth. And every one of these military leaders—and we had all four branches of the service represented—pleaded with us to try and do something to loosen some of the restrictions.

One of the questions that came up at that hearing, and I would like to address it to you and see if you can answer it for us, are there any circumstances under which the Attorney General, the Secretary of Defense or the President himself could craft exceptions for military training and exercises necessary for the national defense so that they are not bound by some of these environmental laws that prohibit some of what is now becoming very necessary military operations?

Mr. CRUDEN. Congressman, I think that is a superb question; and I will say two things. First of all, our Division just finished receiving a very complimentary letter from the admiral of the fleet for the Navy exercises around Puerto Rico because we did defend that process. So we are very often defending the very issues you talk about because, as I mentioned, we have both an offensive and a defensive role.

Second, I actually went to West Point and spent a lot of time in the military after that, and so I am very interested in making sure that the national security functions of the military are able to occur. I will say, however, though the military has been actually quite good in general and as I describe the various client agencies that we had, and we have a number of military law suits, but the number is actually not that high.

In many of the environmental statutes, there is in fact a national security exemption available to the President, and I will tell you that has not been used very often. When I say not very often, I cannot give you dates when they were, but I am thinking on the magnitude of four or five times, perhaps even less.

Mr. BARR. Has it ever been used for purposes of exercises—training and exercises, as opposed to direct offensive military operations?

Mr. CRUDEN. You know, not that I am aware of. I actually think you probably could do that.

I will also say though, again, with the naval challenges, like the one we just went through, we prevailed. On the other hand, there are consultation requirements that the military has to go through for Endangered Species Act issues; and for many of the other envi-

ronmental statutes they have the same set of requirements as anybody else does to include requirements for compliance with State laws. States also can take action and require military facilities to do—to come into compliance with State law in some instances.

So I do not minimize the impact on DoD, although I will tell you again, my experience working with the military is they have been quite good about taking this seriously and trying to meet all the environmental statutes; and there is, in fact, the—there is, again a national security exemption in about four of the environmental statutes, I think.

Mr. BARR. Okay. We may want to explore that a little bit further, too. Thank you.

The gentlelady from California is recognized for 5 minutes. Ms. Waters.

Ms. WATERS. Continuing on the way that the cases have been handled, did I ask—I don't know if I asked—whether or not you knew how many of these cases, either A or B track, had been appealed by the Justice Department.

Mr. SCHIFFER. I think you did, and I think I gave an insufficient answer because I said I am not sure of the exact number, other than it has been a very small number. I could get you more exact—.

Ms. WATERS. Could you get that information for me later on that?

Mr. SCHIFFER. I would be happy to.

Ms. WATERS. On both tracks.

In addition to that, I talked to you about a particular case in which I won't go into in this hearing except to say that the bank was foreclosing on the property, and this particular family have small children, and they are pretty desperate, and I have gone so far as to see what I could do to keep them from putting this family outdoors. He has been awarded, but it has been appealed by the Justice Department. There was some indication that there was possibly a way of working out the concerns of the Justice Department and another part of this award—of these persons that they had appealed.

This person has been granted, based on some intervention, about another 30 days. He can't redeem the house but can buy it back now. Is there anything that you can do to speed up that process if that person is ready and willing to resolve this? Is there anything you can do to speed it up?

Mr. SCHIFFER. I appreciated the concerns that you expressed both about the individual and about the need not to discuss details. We have been in communication with his newest counsel, and we have indicated we would very much like to see a settlement offer that we thought was in a reasonable range, and we will do everything we can.

The individual in question was dissatisfied, as you know, with the award and also filed an appeal, and so anytime, anytime money is an issue, there are always middle grounds where parties can reach settlements if people of goodwill on both sides come together, and we would be happy to do everything we can to get to that point.

Ms. WATERS. Mr. Schiffer, do you know what happens if a settlement cannot be reached? Then what does the process dictate?

Mr. SCHIFFER. My understanding is there is one level of appeal to a neutral, neutral party, not a government employee, who would then consider the arguments raised by both sides. It is not as formal as a court proceeding and would not take as long as a judicial proceeding.

Ms. WATERS. I see. Is it possible that you could let me know—I would like to know how long the case has been going on. I understand it is over 2 years now that this has been going on.

Mr. SCHIFFER. I think it is about a year and a half since the deadline for filing claims, and I think it is indeed remarkable that some 20,000 claims have been processed in that year and a half. And so it has been in the main, obviously, except for those people who believe they are entitled to money and don't have the money yet, but that is a very small number. As I said, 99 percent of the claims that were timely filed.

There is another group—

Ms. WATERS. But those were basically classed under the A track where the documentation requirement was a little bit different. They could not get more than \$50,000. Those were the easier ones, weren't they?

Mr. SCHIFFER. They certainly were. But, of course, that was, you know, something negotiated by the parties; and, you know, no individual was coerced into A track or B track. It is simply that—

Ms. WATERS. No, no, no, I know that they weren't. Most of them went into A track because these discrimination complaints went all the way back for a number of years, and the kind of records and documentation, the sale of farms, all of that, some of these—some of the business took place word of mouth, and these are not farmers with a lot of legal support and lawyers and all the documentation. So some of them just threw their hands up and went for the \$50,000 rather than try to get, you know, the intricate documentation that was needed in order to support some claims that they thought should have been much higher. So even though these were easier to settle, and I understand that, some of them gave up an awful lot by just going for the \$50,000 rather than what many of them really deserved because they simply didn't have the records and they simply didn't have the legal support and assistance that they need.

Now, having said all of that and recognizing that, this class action within itself was an extraordinary thing, but the work that many of us did was extraordinary work to get to that point. I started it when I was chair of the Congressional Black Caucus. We had a big hearing and all of that, and I kind of want to see it through. It appears that when it is all over a lot of people will still be unhappy, but for those who are left in the system who could be saved and their homes not foreclosed on while they are trying to do this, I want to help them. I want to help get this done.

So, again, I would appreciate continuing to be able to work with you for additional information and for those claimants who want me to get as involved as I have gotten with the one case that I am working with. They will all sign the—whatever documents are nec-

essary to allow me to have confidential information to help them. I will do that, and I look forward to working with you.

If there is somebody else in the Department that you would like to assign to do the work, because I know you can't do all this, shouldn't probably, I will be happy to work with them, but I am not going to work with your congressional liaison to answer any questions about these cases. I want to work with you or some attorneys who can help move this stuff along.

Mr. SCHIFFER. I appreciate that. I say, again, we have wonderful people at our Office of Legislative Affairs.

Ms. WATERS. Oh, no, not this lady. I am not going to call her name, but she can't—

Mr. SCHIFFER. I am sure she appreciates that.

Ms. WATERS. Yeah, yeah. I have gone as far as I will go, but we can't work together, so I really need somebody I can work with. Thank you.

Mr. BARR. The Vice Chairman, the gentleman from Arizona, is recognized for 5 minutes.

Mr. FLAKE. Ms. Davis, you mentioned in your testimony that you are preparing to deal with the increased workload that will come by virtue of the bankruptcy bill. It calls for increased responsibilities for some of the trustees. What specifically are you doing in that regard?

Ms. DAVIS. Well, for example, on the means testing, we are taking the provisions that are proposed in the bill and figuring out how the paper would flow, what types of people we would need, what kind of expertise we are going to need. With regard to debtor education and credit counseling, these are brand new areas for us. So we are exploring what exists out there today, what does the industry look like in terms of standards.

We are going to be the ones approving the credit counselors, for example, that all these individual debtors will have to go see before they go file bankruptcy; and our dealings with bankruptcy petition preparers today certainly informs our experience that there are a lot of people out there that would like to take advantage of this opportunity. So we are a bit concerned that we exercise our judgment correctly and reasonably so we get the right people in place and don't approve people who are going to take advantage of these individuals.

And the same with debtor education. We are not traditionally educators, and so we are looking to explore what is out there and who has the expertise to help us in setting up the proper mechanisms and procedures. So there is a lot of groundwork and information on our part that we need to gather so we can do our work correctly.

Mr. FLAKE. Nothing further. Thanks.

Mr. BARR. Thank you.

Mr. Schiffer, turning for a few moments here to the issue of tobacco. In September, 1999, the Civil Division brought an action against certain cigarette manufacturers to recover health care costs associated with lung cancer and other tobacco-related illnesses. Among the statutory predicates cited in the complaint were various provisions of the RICO law.

Last June, former Attorney General Reno is reported to have predicted that the estimated cost of this litigation would total at least another \$20 million for 2001 alone. I noticed in your written statement that you make a reference to the so-called tobacco litigation team without any explanation of its budgetary needs. The new Attorney General, Mr. Ashcroft, on the other hand, stated during a hearing last month, I believe, before a Senate appropriations Subcommittee that he did not plan to ask for additional money to support the government's lawsuit against tobacco companies despite I think seeing a reported request from the Department of Justice lawyers for an additional \$57 million. Could you please tell us what is the present status of this litigation and the Division's intention with respect to it?

Mr. SCHIFFER. As far as intention, Mr. Chairman, the Attorney General has indicated that this is one of a number of cases that the new administration was going to be reviewing; and so, in part, I guess the answer gets somewhat circular. It really depends on what priorities and policies for that suit are enunciated by the administration.

The funding request, as far as base funding that is in next year's budget, is the same as was in this year's budget. It is a fairly small base amount; and then additional funding came from a variety of sources, principally a fund set up to fund health care fraud litigation and contributions from so-called client agencies. And, obviously, if the suit is to continue, the \$57 million number you mentioned is not a number that I think anyone—anyone in a responsible role—has adopted as an absolute number.

Mr. BARR. It is probably good.

Mr. SCHIFFER. Pardon me?

Mr. BARR. That is good.

Mr. SCHIFFER. The number of documents though that if the case were to go to trial is large, and there certainly would be expenses involved in dealing with documents, witnesses and—

Mr. BARR. Do you have any indication—I know the new Attorney General has a lot of major issues that he is looking at. One that we have already touched on and that has to do with strategy for gun violence, and we hope to hear from him shortly on that. Do you know what his time frame is for reaching some decisions with—policy decisions, that is, with regard to the tobacco litigation issue?

Mr. SCHIFFER. I do not, sir, other than knowing he is running as fast as he can as the only confirmed official in place in the Department.

Mr. BARR. Okay.

Also, Mr. Schiffer, with regard to illegal immigrants and the—some of the problems that—litigation problems that presents the Department, I think also, if I recall from your written statement, you noted the increasing importance of immigration litigation; and in particular you noted that significant legislative reforms concerning immigration and anti-terrorism have contributed to the explosive growth of immigration litigation, your words, and that the work of the Division's Office of Immigration Litigation, OIL, has grown exponentially. In addition, the statistics document a substantial increase in illegal immigrants coming into our judicial sys-

tem. How has this growth in immigration litigation impacted the Office of Immigration Litigation in your office?

Mr. SCHIFFER. That office has grown over the years. It is actually one of the newest components in the Civil Division. It has only been in place for about—I think about a dozen years. And, as the Chairman knows, any litigation that contains the word “reform” by definition is going to bring us a barrage of lawsuits, even if the effort was made to simplify processes and cut down on lawsuits.

We have dedicated lawyers. We work with our AUSA colleagues, especially in those districts that are impacted by these problems, and we also run as fast as we can.

Mr. BARR. Does the office have a backlog of immigration cases awaiting intervention by the Office of Immigration Litigation?

Mr. SCHIFFER. I don’t think so. Not in the sense that—again, most of the case are essentially defensive. And whether it is someone filing habeas corpus or challenging a statute or seeking review, we have to operate on the time lines that are set for litigation, but it certainly has a large case load and a group of hard-working lawyers.

Mr. BARR. Would you check on that and get back to us on that fairly quickly, if there is any backlog of cases and their magnitude, so we can take that into account in our authorizing legislation?

Mr. SCHIFFER. I will do that, Mr. Chairman.

Mr. BARR. Thank you.

Mr. Cruden, I think you mentioned in your statement, maybe it was in the written part, that defensive cases are nondiscretionary. That is, the Division is required to participate in defending Federal agencies when they are sued for alleged environmental allegations. Who are the major plaintiffs in those cases generally, or could you give us some examples?

Mr. CRUDEN. I would say predominantly we are being sued by industrial groups, environmental groups, sometimes individuals and then sometimes local groups or even States. That happens occasionally as well, but it is that group of people that are traditionally suing a Federal agency, alleging that they are violating some of the environmental laws.

Mr. BARR. Some have perceived—I have seen some writings on this that the Division’s environmental defense section has too readily settled cases brought against Federal agencies by environmental groups such as the Sierra Club and the Natural Resources Defense Council. Some have even questioned whether ideologically sympathetic officials within your Division have settled otherwise defensible claims to advance the policy goals of environmental groups that they have a duty to oppose in court. Over the last several years, how much money has the Division provided these groups when settling cases?

Mr. CRUDEN. Mr. Chairman—I don’t have a quick answer for you in terms of how much money has gone out of the Division. I think you are probably talking about attorney’s fees that would have been paid. As you know—

Mr. BARR. Pursuant to settlements.

Mr. CRUDEN [continuing]. Under the environmental statutes the prevailing party does in fact get attorney fees. Or even if it is not in there, then under the Administrative Procedure Act it brings in

the Equal Access to Justice Act; and there, too, you get attorney fees if you are the prevailing party.

But I see the people in the environmental defense section day in and day out, and these are people who fight tooth and nail to win and be successful in their cases, and they want to preserve the public fisc, and they want to win their cases.

I actually asked—I don't have perfect statistics for all years, but I asked the section to go back for about a year on just their settlements and try to tell me how settlements broke down for about a year, and this is the way it did. They settled in the last year 54 cases. Twenty-six of those, so about 48 percent, were with corporations or industrial plaintiffs who sued us. Seventeen—

Mr. BARR. How many?

Mr. CRUDEN. Twenty-six, so it's about 48 percent. Another 17, so substantially less than that, were with environmental groups. Seven of those were with States, and then another four were with local groups and individuals, so still the predominant number, by far the more significant number, were again corporations or industrial groups who had sued us alleging that we did something wrong in that regard.

Mr. BARR. Okay. I am going to ask if you would to communicate with counsel in the next couple of days to try and get some additional figures on the amounts of money.

Mr. CRUDEN. Sir, I would be happy to do that.

Mr. BARR. Thank you.

The gentlelady from California is recognized for 5 minutes.

Ms. WATERS. Thank you very much Mr. Chairman.

Let me switch to, I think, Mr. Calloway, U.S. Attorneys Office. There is a consent decree for the Los Angeles City Police Department that was, I guess, finally accepted or agreed upon in some way. I would like to know what is the responsibility of the U.S. Attorneys Office in the oversight of that consent decree? What kind of reporting requirements are there? How do you determine whether or not the consent decree is being complied with?

Mr. CALLOWAY. Let me say this. We will get you an answer to that for the record. I will check with the U.S. Attorney and find out. It would depend upon the language of the decree, obviously, as to what the obligations of the parties are. But I am not familiar specifically with that. I haven't seen the decree itself, but we can certainly get you an answer to that and then take a look at the decree and see what obligation it places upon the United States Attorneys Office and all the parties.

Ms. WATERS. Okay. Thank you. You are not familiar with the Los Angeles Ramparts Police Division and the issues that arose out of that division in relationship to police abuse and harassment, are you?

Mr. CALLOWAY. No, ma'am, I am not.

Ms. WATERS. Thank you.

[The material referred to follows:]

**U.S. Department of Justice**

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Office of the Director*

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(202) 514-2121

May 16, 2001

The Honorable Bob Barr
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
B-353 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

Thank you for the opportunity to appear before the Subcommittee on Commercial and Administrative Law at your May 9, 2001, authorization hearing. I am writing to supplement my testimony with additional information that was requested at the hearing.

First, in response to your question on the impact of 28 U.S.C. § 530E, I indicated that the Professional Responsibility Advisory Office (PRAO), which advises Department attorneys on the ethics issues related to the statute, has received a large number of inquiries. In fact, during the approximately two years from the time the PRAO opened on April 20, 1999, until April 30, 2001, the PRAO received more than 1,500 inquiries. For your information, I understand that there are 7,175 authorized Department attorney positions for the current fiscal year.

Second, Congresswoman Maxine Waters asked me whether the United States Attorney's office for the Central District of California has any obligations under the consent decree in United States of America v. City of Los Angeles, California, Board of Police Commissioners of the City of Los Angeles, and the Los Angeles Police Department. This consent decree can be found on the Internet at <http://www.usdoj.gov/crt/split/documents/laconsent.htm>. According to the United States Attorney and the Civil Rights Division, although the United States Attorney is one of the signatories of the consent decree as the local representative of the Department of Justice (DOJ), all of DOJ's obligations under this matter are being handled by the Department's Civil Rights Division. If you have further questions about this matter, you may want to contact Acting Assistant Attorney General for Civil Rights William R. Yeomans through the Department's Office of Legislative Affairs, which can be reached at 202-514-2141.

The Honorable Bob Barr
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Third, in response to your question concerning any attempt by the prior Administration to involve United States Attorneys in possible civil litigation that would be brought by the Department of Housing and Urban Development against firearms manufacturers, we have checked and we are aware of no such attempt.

We hope this information is of assistance to you.

Sincerely,


Mark T. Calloway
Director

cc: The Honorable Melvin L. Watt
Ranking Minority Member

The Honorable Maxine Waters

Ms. WATERS. Thank you very much, Mr. Chairman. I yield back the balance of my time.

Mr. BARR. Thank you. I have just a few more questions.

Mr. Calloway, as you probably recall, in the prior administration HUD became involved in gun lawsuits. We actually had a hearing in another Subcommittee, the Government Reform Committee, a couple of years ago and raised some serious questions about the authority under which HUD was sort of treading into that area. Has there been any effort at all to involve U.S. Attorneys in prosecuting cases brought by HUD involving lawsuits against firearms manufacturers or distributors or lawful dealers of fire arms?

Mr. CALLOWAY. None that I am aware of, but we can check and get back to you on that. I wouldn't—it is limited to my personal knowledge, but we can check into that for you.

Mr. BARR. If you would, please. I am not aware of any. I would hope there haven't been because it was very, very questionable legal authority that HUD cited—HUD general counsel cited for involving itself in getting involved in the action against gun manufacturers.

Mr. CALLOWAY. I am not aware of it either. I know that our lawyers on the civil side are busy, and we were busy on the criminal side prosecuting felons in possession of guns.

[Please refer to the Department of Justice response dated May 16, 2001 printed in this hearing.]

Mr. BARR. With regard to wetlands, Mr. Cruden, can defendants be prosecuted for developing lands subsequently determined to be a wetland even if they have no reasonable reason to suspect it of being so?

Mr. CRUDEN. There is a permit requirement if in fact you are going to disturb wetlands. There is also a general permit require-

ment. So most often when we are prosecuting, which we can both criminally and civilly, as you know, for people who either didn't get a permit at all and very often because they inquired and still wanted to go ahead or they violated their permit in some particular way.

There is also a doctrine of fair notice that you are required, under administrative law, to know in advance what is expected of you. I don't think you could ignore either. And very often I have seen cases in wetlands where our evidence is that they consulted people, they had their own experts, their own experts told them that it was wetlands, and they decided for one reason or another to go ahead anyway, and those are the kind of cases that we end up bringing against people who actually do disturb or violate what is Clean Water Act section 404.

Mr. BARR. Does that contain a clear definition of a wetland?

Mr. CRUDEN. It has a clear definition of wetland. And then there is, of course, both the Corps of Engineers and the Environmental Protection Agency have guidance documents and other public documents describing that in a lot more detail, sir.

Mr. BARR. But there still is a lot of confusion and a lot of litigation over exactly what is a wetland, is there not?

Mr. CRUDEN. I understand there is—

Mr. BARR. There is in Georgia, I can tell you.

Mr. CRUDEN. I know there is a public debate. I can tell you in the cases I see that we actually bring there hasn't been that level of—the same level of question.

As you know, the Supreme Court just decided a case, a wetland case that we referred to as SWANCC, and it deals in an Illinois setting with what is an isolated wetland, and that is all it is. Under those circumstances, the Supreme Court said you can't do it. You can't bring a wetlands action.

So if you are talking about that issue in terms of what is or is not a wetland, that was clearly a wetland. The issue was whether or not it was jurisdictionally covered by the Clean Water Act 404, and the Supreme Court said it was not, and clearly we are going to abide by that.

I will note, though, even in those circumstances that States still do have jurisdiction. It would just be the United States that doesn't have jurisdiction in those cases that are covered by the SWANCC decision.

Mr. BARR. Thank you.

Oh, I am sorry. Mr. Flake, the Vice Chairman, is recognized for 5 minutes.

Mr. FLAKE. Just to follow up a little, Mr. Cruden, on the appraisals and the condemnation of land. What is the role of the Appraisal Institute in determining standards? Some people complain that whenever they have land condemned and they want compensation, the government will lowball it first and work up from there. First, is that the case? And, second, what is the Appraisal Institute? Can you tell me about that?

Mr. CRUDEN. Let me do first whether we "lowball" it and then go on.

As I mentioned, that would be horrible tactics for us. Eventually, you can get a jury in these kind of cases, and we are going to have

experts, and these are not government experts. We all hire private people ordinarily to come in and describe what is a fair market value. And of course we would like to win that. We would like to have our views prevail and not have the jury determine that we are wrong and that you ought to give a higher amount, and we have been very, very successful on that because we want to provide numbers that juries believe. So I actually don't think that there is any lowballing at all.

On the other hand, of course, I won't tell you that we win every case, because that is not true, but I will tell you in the vast, vast majority of cases the decisions by the jury are coming in very close to what our appraisal—our appraiser said.

There is an Appraisal Institute that is a private entity that has standards in ways, sir, that I am not exactly sure of. So if you need more information I would have to give that to you.

We have, though, in the Federal Government, standards that we put out to try to give some uniformity. Now agencies can vary from that, and agencies can have their own regulations, but to have some uniformity as to how that appraisal process goes forward, we do have standards that are available as kind of a guidance to all of the agencies of the United States.

Mr. FLAKE. Are the Appraisal Institute's standards then different from yours, and is it the next stop along the way?

Mr. CRUDEN. I actually don't believe they do, but on that one I would actually have to give you more information and submit it for the record because I am not exactly sure, again, the relationship between the Appraisal Institute and the standards that we have.

Mr. FLAKE. If you could either communicate with my office or on the record, if you wish, some information on what their standards are and how they differ, if they do, from your own. That will be interesting.

Mr. CRUDEN. I will do that.

Mr. FLAKE. Thank you.

[The material referred to follows:]



Office of Legislative Affairs

Washington, D.C. 20530

May 17, 2001

The Honorable Bob Barr
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
Washington, D.C. 20515

Dear Mr. Chairman:

On May 9, 2001, the House Judiciary Committee's Subcommittee on Commercial and Administrative Law held an oversight hearing at which representatives of the Department of Justice testified, including the Environment and Natural Resources Division. During the course of the hearing, the Subcommittee requested that the Division provide it with further information on certain issues. This letter follows up on those requests.

Attorneys' Fees

The Chairman requested further information about monies that the Environmental Defense Section (EDS) of the Division paid out in settlement of attorneys' fees claims. The Equal Access to Justice Act, 28 U.S.C. § 2412, and some of the environmental statutes allow a party who sues the United States to recover its attorney fees if the party meets certain conditions, for example that it was a prevailing party in the litigation. Based on a review of records in our case management system database, in the past year (May 2000 through April 2001), a total of \$1,244,745.83 was paid in settlement of 27 claims for attorneys' fees in EDS cases. The average settlement overall was \$46,101.70. The average settlement for attorneys' fees claims made by industry groups was \$78,041.81 (4 claims). The average settlement for attorneys' fees claims made by environmental organizations was \$39,450.08 (17 claims). The six remaining claims, which were made by community associations or individuals, were settled for an average of \$43,654.55.

In the same twelve-month period, EDS received judicial determinations in seven claims for attorneys' fees that it was unable to settle. The average judicial fee award was \$176,621.71. Only one of these litigated claims was made by a corporation or industry group; the judicial attorneys' fees award in that case was \$96,749.02. Four of the litigated claims were made by

environmental organizations; the average judicial award in those cases was \$234,793.76. The two remaining litigated claims involved individuals, and resulted in an average judicial award of \$100,214.

Appraisal Standards

The Vice Chairman also asked about appraisal standards promulgated by the Appraisal Institute and the relation of those standards to those used by the Federal Government when it acquires land or interests in land for public purposes. The Appraisal Institute is a private, professional organization which has been educating real estate appraisers for over sixty years and is the acknowledged leader in appraisal education, research, and publishing. The Appraisal Institute's activities in these areas have been instrumental in the evolution and development of professional appraisal standards, known as the *Uniform Standards of Professional Appraisal Practice* (USPAP).

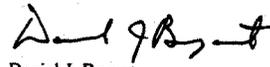
The USPAP serves as the basis for the *Uniform Appraisal Standards for Federal Land Acquisitions*. The purpose of the Federal standards is to set forth the general principles applicable to the appraisal of property for federal land acquisitions in order to promote uniformity across federal agencies in the appraisal of real property. The Federal standards are different from the USPAP in that they are solely for federal actions so they comply with federal case law regarding just compensation and with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. §4601 *et seq.*) and Federal Rule of Civil Procedure 26(a)(2)(B) relating to the degree of documentation required. The federal publication, however, is only guidance for the federal agencies that must comply with their own regulatory requirements in conducting their appraisals.

Exemptions under the Environmental Laws

Finally, the Chairman asked whether the environmental statutes had any exemptions for military exercises. Many of the statutes already contain provisions that would allow the President to exempt the military from actions of national security importance. The Clean Water Act, for instance, contains a specific provision allowing the President to exempt any department from compliance "if he determines it to be in the paramount interest of the United States to do so." Clean Water Act at 33 U.S.C. § 1323(a). Similar exemption are included in the Resource Conservation and Recovery Act at 42 U.S.C. § 6961(a); Clean Air Act at 42 U.S.C. § 7418(b); Comprehensive Environmental Response, Compensation, and Liability Act at 42 U.S.C. § 9620(j); Noise Control Act at 42 U.S.C. § 4903(b); and Toxic Substances Control Act at 15 U.S.C. § 2621.

We thank the Chairman and the Subcommittee for this opportunity to provide further information about the work of the Environment and Natural Resources Division of the Department of Justice and the statutes under which it operates.

Sincerely,



Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Mel Watt, Ranking Minority Member
The Honorable Jeff Flake, Vice Chairman

Mr. BARR. Thank you, Mr. Flake.

Ms. Waters, did you have any final questions?

Ms. WATERS. No, I don't. Thank you very much.

Mr. BARR. Thank you.

Mr. Calloway, just a couple of final issues here. Can you briefly fill us in on the status of U.S. Attorney appointments with the new administration? Where do we stand?

Mr. CALLOWAY. In the Presidential appointment process?

Mr. BARR. Yes.

Mr. CALLOWAY. I can give you—I prefer to defer to the White House on that, but the interviews are taking place of potential

Presidential-appointed candidates. We seem to be moving along fairly well.

In terms of the outgoing U.S. Attorneys, there are about 68 interims in place now. About 25 U.S. Attorneys from the last administration remain. Another 10, 12, or 15 of those will leave at the end of May, so that process is going on as well. But with respect to the actual process of the incoming U.S. Attorneys I would defer to the White House on that.

Mr. BARR. Have any Presidential appointees as U.S. Attorneys been sworn in yet?

Mr. CALLOWAY. No, there have been no nominations at this point, though I understand there will be some forthcoming.

Mr. BARR. Okay.

There was—Mr. Calloway, one final question. In an authorization measure considered by this Committee in the last Congress, the 106th Congress, there was a provision that would have enabled the Attorney General to reallocate 200 attorney positions from resources in Washington at Main Justice to the U.S. Attorneys Offices. If that legislation were reconsidered and adopted, would that be a provision that would be met favorably by the U.S. Attorneys?

Mr. CALLOWAY. I don't want to get hit by my colleague over here. I like him, but—

Mr. SCHIFFER. We are very candid people. Mr. Calloway was afraid you might ask that, and he asked me where I wished to take him to dinner before he came up with an answer. I admit I did not take him to dinner, but I know he is going to do the right thing.

Mr. CALLOWAY. Go punt.

Mr. BARR. U.S. Attorneys always do the right thing.

Mr. CALLOWAY. I know this, the Department is aware of the issue and that it has been a concern of the full Committee in the past. The new leadership of the Department is considering what its position will be on that issue. So I will be a good soldier and defer to them on that.

Mr. BARR. Okay. It is a little premature, but it is something that does come up and may come up again.

Are there any final comments? I think—has everybody concluded their questions here? Are there any final comments that any of you all would like to make you for the record?

Mr. CALLOWAY. Thank you for your time, your attention, your support.

Mr. CRUDEN. Sir, you asked me one question about the exemption, that the President had done it for national security issues, and I said on operations and training I didn't think there had been any. There could be one that was tangentially related, and so I will have to give you more information about that. But thank you very much for inviting us and for listening to the summary of our division.

Mr. BARR. Thank you.

Ms. DAVIS. Mr. Chairman, I would like to take an opportunity to perhaps clarify a point that Congressman Watt had asked me about. I may not have given him the best answer, but I would direct the Committee to the bottom of page 18. I think he was questioning the U.S. Trustees about the funding under the new reform bill, and I just wanted to point out that the bill does currently pro-

vide resources. We do think it will be adequate to fund the bill, but we are working on our exact numbers. Thank you.

Mr. BARR. Okay. Thank you.

I would like, on behalf of all Members of the Subcommittee and Chairman Sensenbrenner of the full Committee, to thank you all very much not only for being here today but for your service to the country and to the Department of Justice.

We will keep the record open for 5 days. I know ordinarily we keep it open for 7 days, but Mr. Sensenbrenner is pressing each one of the Subcommittees to conclude its work on authorizing legislation. So we will leave the record open for 5 days so that we can move forward without delay.

Again, thank you all very much for being here; and this hearing is adjourned.

[Whereupon, at 3:50 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

Oregon's top court rejects plan by state bar on prosecutors' role

A district attorney says the decision puts undercover investigations in an almost impossible position

Thursday, April 12, 2001

By Peter Farrell of The Oregonian staff

The Oregon Supreme Court on Wednesday rejected as too broad a proposed revision of an Oregon State Bar rule that would allow prosecutors to supervise undercover investigations.

After extensive debate, the state's lawyers in January voted to revise the rules to counter an August Supreme Court decision that gave Oregon the nation's strictest rules about lawyer honesty and deceit.

With apologies, the justices told the bar to try again. That is expected to take months.

"It's a highly unfortunate decision," said Josh Marquis, Clatsop County district attorney and president of the Oregon District Attorneys Association. "It will continue to put undercover investigations in Oregon in an almost impossible position."

Prosecutors do not want to risk losing their law licenses by becoming involved in undercover cases, he said. The investigations will continue but without supervision on legal matters, such as civil rights.

A recent law that requires federal attorneys to comply with state bar codes of conduct has all but stopped federal undercover work in Oregon, even in areas involving organized crime and child pornography.

In August the Supreme Court reprimanded lawyer Daniel Gatti for misrepresenting who he was in a telephone call while gathering information for a lawsuit. Some lawyers, but not all, said a strict interpretation of the rules would apply to prosecutors involved in law enforcement -- that it would be illegal for an attorney, for example, to assist police or agents in running a drug sting.

The proposed rule the justices rejected Wednesday was approved in a special House of Delegates meeting in January. It would have allowed lawyers to assist covert investigations of civil and criminal law but not to participate in them.

"This was what appeared to be the only possibility for a quick fix, and it appears to be gone now," said Michael Brown, chief of the criminal division of the U.S. Attorney's office in Portland. The FBI, the Drug Enforcement Agency and other agencies are required to obtain approval from the U.S. Attorney's office before launching undercover operations. Attorneys are now not allowed to give the approval.

A new rule would require approval by the bar's 225-member House of Delegates, which next meets in September.

In the vote Wednesday, the Supreme Court justices did not issue a formal opinion but instead voted 5-0 at a public meeting to accept the report rejecting the rule. Chief Justice Wallace P. Carson Jr. did not attend but sent word he supported the report. Justice Susan Leeson was ill.

"The problem needs to be addressed in a much more narrow fashion than the present proposed rule does," the report said. The work group said the proposed wording would leave the public unprotected against unethical acts and would harm the legal profession's reputation for honesty. Also, it said, the rule would not finally settle the issue because it is open to interpretation.

Justice W. Michael Gillette, chairing the meeting, said resolving the problem is, by law, up to the bar association, which writes the rules for the court to approve. "Our authority is limited to saying yea or nay." There was no chance, he said, that the court would initiate a rule, but he said individual justices, himself included, would be willing to help the bar come up with a rule.