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REAUTHORIZATION OF THE U.S. DEPARTMENT OF JUSTICE: EXECUTIVE OFFICE FOR U.S. ATTORNEYS, CIVIL DIVISION, ENVIRONMENT AND NATURAL RESOURCES DIVISION, EXECUTIVE OFFICE 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 EIGHTH CONGRESS

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

TUESDAY, MARCH 9, 2004

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

The Subcommittee met, pursuant to call, at 3:05 p.m., in Room 2141, Rayburn House Office Building, Hon. Chris Cannon (Chair of the Subcommittee) Presiding.

Mr. CANNON. The Subcommittee will come to order.

The Subcommittee on Commercial and Administrative Law is meeting this afternoon to receive testimony from five components of the Department of Justice as part of the Subcommittee's continuing oversight efforts. These components are the Environment and Natural Resources Division, the Civil Division, the Executive Office for United States Attorneys, the Executive Office for the United States Trustees and the Office of the Solicitor General. However, no witness will appear at today's hearing on behalf of the Solicitor General's office. Written testimony has been submitted.

[The prepared statement of Mr. Olsen follows:]

PREPARED STATEMENT OF THEODORE B. OLSEN

Mr. Chairman and Members of the Subcommittee: Thank you for inviting me to submit 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. 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 on grounds that do not implicate the executive branch's constitutional authority when a good faith defense exists. The Solicitor General also defends regulations and decisions of Executive Branch departments and agencies, and is 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 he or a member of his 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 he 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 Supreme Court requested the Solicitor General to file an amicus brief at the petition stage 24 times during the October Term 2002 and has done so 7 times during the current Term (2003). The Solicitor General generally seeks and receives permission to participate 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 as 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. In cases of particular importance to the government, lawyers from the Office of Solicitor General will directly handle litigation in the lower federal courts. Recent examples include the *Microsoft* antitrust appeal, important criminal procedural issues when addressed by the courts of appeals *en banc*, and cases involving enemy combatants.

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.

Although OSG's mission and strategic objectives will not change in FY 2005, the challenges it faces will. OSG is facing new expectations unprecedented in its history. It is being called upon to assume added responsibilities. For example, the Solicitor General was asked by the Attorney General and the White House to assume litigation responsibilities in the lower courts with regard to a number of challenges to the legality of detaining enemy combatants captured during the ongoing military operations in Afghanistan and other aspects of the global war on terrorism. These cases are being handled by a team of government lawyers headed by the Solicitor General.

* * * * *

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 his 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. These lawyers are assigned a "docket" of cases presenting a wide spectrum of legal problems under the guidance and supervision of the Deputies. 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. The Fiscal Year 2004 funding level is 49 workyears and $7,889,000.

Most of these funds are committed for nondiscretionary items. For example, only two items, personnel-related costs and GSA rent, consume nearly 83 percent of the budget. However, the Office is employing various strategies to offset the otherwise rising costs, such as re-engineering our brief preparation process, modifying service/maintenance contracts and reducing overtime costs.

The Office of the Solicitor General requests $8,538,000 for FY 2005, including increases for inflationary costs, and $293,000 to cover two new attorney positions. These additional positions will assist the Office in managing its increasing work load and representing the interests of the United States Government.

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 2002 Term of the Supreme Court (June 29, 2002 to June 27, 2003), the Solicitor General's Office handled approximately 3,731 cases in the Supreme Court. We filed full merits briefs in 70 cases considered by the Court (and presented oral argument in 62 of those cases),[1] which represented 81% of the cases that the Supreme Court heard on the merits in that Term. The government prevailed in 79% of the cases in which it participated. We filed 23 petitions for a writ of certiorari or jurisdictional statements urging the Court to grant review in government cases, 349 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 3,262 petitions for certiorari. In response to invitations from the Supreme Court, we also filed 24 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, and filed 3 amicus briefs without invitation at the petition stage. 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 2,129 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

[1] Of the 70 merits briefs filed, some were consolidated resulting in 1 oral argument.

Court; or to intervene in any court. Thus, during this one-year period, the Office of the Solicitor General handled well over 5,860 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. CANNON. By the way of explanation, our oversight responsibilities require us to examine the performance of these Justice Department components, evaluate how well they are positioned to achieve their goals and determine both the adequacy of their funding levels and the need for changes in legislation to facilitate their mission. I should state at the outset, this has not and will not be the only encounter the Subcommittee has with the Justice Department components within our jurisdiction. It is our intention to continually monitor the activities of these components during the coming year. I do not anticipate that will entail unwanted confrontation, but rather it will be undertaken in the spirit of cooperation that I am sure will be shared by other Members of the Subcommittee.

I believe that effective oversight requires that we must listen in order to learn so that we can intelligently question and suggest. We do not undertake this process, though, without expectations from the Department of Justice, expectations that are shared not only by the American people but also, I am sure, by the agency itself. We expect the Department of Justice should have and should continue to perform competently and fairly. It has been—it should be conscious of the awesome power of the Government that has been entrusted to it and of its responsibility to ensure that it is exercised in the interest of justice and for the common good. We will work with the components we hear from today and continue to critically study their activities and needs.

I wish to stress the significance of today's hearing for both the Justice Department and Subcommittee Members. The information we receive from the witnesses today will be of immediate value in determining the adequacy of funding levels proposed by the President in his budget request for the Department of Justice. It also greatly influences the crafting of the Department's reauthorization legislation.

The Subcommittee's oversight efforts were particularly instrumental in having several provisions included in the reported version of H.R. 3036, the 3-year reauthorization of the Justice Department, which is expected to be considered shortly by the House.

One of these provisions mandates the use of Federal—as opposed to private sector—facilities for Justice Department employee training, unless specifically exempted by the Attorney General with an accompanying report to the Congress. The second provision requires a senior official in the Justice Department to be designated to assume primary responsibility for privacy policy. The third requires the preparation of an annual report to Congress on bankruptcy criminal enforcement and abuse prevention.

The components that we will receive testimony from this afternoon account for funding that exceeds $2 billion. They discharge

broad litigating, appellate, support and administrative responsibilities. So broad is their mission that the attention that we give to their performance can significantly improve the lives, safety and well-being of every American.

I now turn to my colleague, Mr. Watt, the distinguished Ranking Member of this Subcommittee, and ask if he has any opening remarks.

Mr. WATT. Thank you, Mr. Chairman.

I appreciate the Chairman calling the hearing, and I will follow the Chairman's entreaty in his statement at the point of which he said we should listen and learn.

So we have got four witnesses. I welcome all of you and look forward to your testimony and particularly welcome Mr. Friedman back. He was here more recently, I think, than some of the others, talking about bankruptcy and some other issues. So I look forward to your testimony and underscore the significance of it, given the magnitude of the budgets and the scope of responsibility that your particular divisions have on the American people.

Thank you and yield back.

Mr. CANNON. Thank you.

Without objection, the gentleman's entire statement will be placed in the record.

Also without objection, all Members may place their statements in the record at this point.

Is there any objection? Hearing none, so ordered.

Without objection, the Chair will be authorized to declare recesses of the Subcommittee today at any point. Hearing none, so ordered.

I ask unanimous consent that Members have 5 legislative days to submit written statements for inclusion in today's hearing record. So ordered.

Now, Mr. Coble, would you like to do an opening statement?

Mr. COBLE. I thank you and the Ranking Member for having called the hearing today and welcome our witnesses here. And not unlike you and my colleague and the colleague from North Carolina, I am prepared to listen and learn.

Mr. CANNON. I suspect it is going to be a very interesting day.

I would like to introduce our witnesses. The first witness is Thomas Sansonetti, who serves as the Assistant Attorney General in charge of the Environment and Natural Resources Division of the Department of Justice. Prior to his career appointment, Mr. Sansonetti was the Solicitor for the Department of Interior from 1990 to 1993. During his tenure there, Mr. Sansonetti signed the $1.1 billion Exxon Valdez oil spill settlement after serving as one of the six Federal negotiators. He was also appointed counsel to the Endangered Species Committee for the spotted owl hearings in Oregon.

Previously, Mr. Sansonetti served as Interior Associate Solicitor for Energy and Resources from 1987 to 1989, which was just after I left the Interior Department as an Associate Solicitor there. He was Administrative Assistant and Legislative Director for Wyoming Congressman Craig Thomas during the 101st Congress. President George W. Bush also appointed him to chair the Presidential Advisory Council on Western Water Resources.

Mr. Sansonetti received both a BA and an MBA from the University of Virginia and received his law degree from Washington and Lee University.

Our next witness is Mr. Peter Keisler, Assistant Attorney General of the Department's Civil Division. Mr. Keisler has served in this capacity since July of 2003 and was previously the Principal Deputy Associate Attorney General and Acting Associate Attorney General. Prior to joining the Department of Justice in 2002, he was a partner in the Washington, D.C., office of Sidley Austin Brown & Wood. He also served as Associate Counsel to the President during the Reagan administration and was a law clerk to Justice Anthony Kennedy of the U.S. Supreme Court.

Mr. Keisler graduated magna cum laude from Yale college and earned his law degree from Yale Law School in 1985.

Our third witness is Guy Lewis, who is the Director of the Executive Office for United States Attorneys at the Department of Justice. Mr. Lewis is the former United States Attorney from the Southern District of Florida, where he had been an assistant since 1988 prior to being appointed as the United States Attorney in 2000.

Mr. Lewis received his undergraduate degree from the University of Tennessee and his law degree from the University of Memphis.

Our final witness is Mr. Lawrence Friedman, who serves as the Director of the Executive Office of the United States Trustees. This office provides direction and guidance to the United States Trustees Program, which is responsible for overseeing the administration of bankruptcy cases and private trustees. This program operates nationwide, except for the States of North Carolina and Alabama, through a system of 21 regions, each of which is headed by a United States trustee.

Prior to his appointment as Director, Mr. Friedman was a partner in the Southfield, Michigan, law firm of Friedman and Kohut, where his practice focused on consumer and business bankruptcy as well as commercial litigation. Mr. Friedman received his undergraduate degree from Hillsdale College in Hillsdale, Michigan, and his law degree from Thomas M. Cooley Law School in Lansing, Michigan.

I extend to each of you my warm regards and appreciation for your willingness to participate in today's hearing. In light of the fact that your written statements will be included in the record, I request that you limit your oral remarks to 5 minutes. Accordingly, please feel free to summarize or highlight the salient points of your testimony.

You will note that we have a lighting system that starts with a green light. After 4 minutes, it turns to yellow; and after a minute, it turns to a red light.

It is my habit to tap the gavel at 5 minutes. We would appreciate it if you would finish up your thoughts in that time frame. You don't need to stop. Sometimes when you are down there reading or talking, we forget the light. That is a general reminder and doesn't mean to cut you off in the middle of your statement or your thinking.

After all the witnesses have presented their remarks, the Subcommittee Members in the order they arrive will be permitted to

ask questions of the witnesses subject to the 5-minute limit and alternating between sides.

Mr. Sansonetti, would you proceed with your testimony, please.

STATEMENT OF THE HONORABLE THOMAS L. SANSONETTI, ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION, UNITED STATES DEPARTMENT OF JUSTICE

Mr. SANSONETTI. Chairman Cannon, Congressman Watt and Members of the Subcommittee, I am pleased to be here today and welcome this opportunity to tell you about the Environment and Natural Resources Division. I will summarize our work and then discuss the resources that the President and the Department are requesting for the Division for fiscal year 2005.

If Congress approves our funding for the Hazardous Materials Transportation Initiative, which will help achieve the Department's strategic goal of protecting against the threat of terrorism, and, secondly, our Tribal Trust Fund Litigation Initiative, which will provide necessary resources to defend multibillion dollar claims against the public fisc, then the Division will receive the first real increase in its budget in the last decade.

The Division's mission is to enforce civil and criminal environmental laws that protect the health and environment of our citizens and to defend suits challenging environmental and conservation laws, programs and activities. We also handle matters concerning Indian rights and claims and Federal property acquisition.

We have approximately 400 lawyers handling over 7,000 active cases, and we represent virtually every Federal agency, with cases in every judicial district in the United States. Our principal clients include the EPA and the Departments of Interior, Defense and Agriculture. Many of our cases involve defensive litigation regarding alleged violations of the United States of environmental laws, for example, in connection with Federal highway construction or an airport expansion. Another portion of our docket consists of nondiscretionary litigation involving land acquisition for important national projects.

When our defensive and our eminent domain litigation is considered together, approximately one-half of our attorney time is spent on nondiscretionary cases. Now this fact has important resource implications as we can't always anticipate what our workload is going to be. Nevertheless, we are committed to ensuring that American taxpayers are getting their money's worth.

Despite budget constraints and declining resources beginning in the 1990's, we have achieved significant cost-effective results. Fiscal year 2003 was a record-breaking year for civil penalties in environmental cases, $203 million we pulled in; and we also saw the largest civil penalty against a single company in history, $34 million. In fact, we have secured civil penalties and criminal fines for the Treasury that far exceed our budget and obtained benefits for human health and the environment to provide an impressive return on the taxpayer's dollar. We have also protected the taxpayers from invalid or overbroad monetary claims, sometimes for hundreds of millions of dollars.

One important way that we leverage our resources, we have forged partnerships with U.S. Attorneys' Offices and State and local officials across the Nation. My written testimony provides some examples that illustrate the success of these partnerships.

We approach all of our work with the spirit of teamwork and cooperation in federalism that is the hallmark of effective environmental protection.

Now, for fiscal year 2005, the President has requested a little over $105 million as part of the Department's GLA appropriation. Much of the increase over the fiscal year 2004 appropriation is for required adjustments and allowances, but we are also requesting $14.6 million for two initiatives, the Hazardous Materials Transportation Initiative and the Tribal Trust Litigation Initiative. As I mentioned at the beginning, the funding for both of these initiatives is critical.

The Hazardous Materials, or HAZMAT, Transportation Initiative will help the Department achieve the strategic goal of protecting America against the threat of terrorism by making it more difficult for terrorists and other criminals to transport hazardous materials illegally. It will also promote compliance with the HAZMAT transportation laws so as to reduce the inherent risks posed by the transportation of HAZMAT and boost the enforcement efforts of the United States Attorneys and the State and local law enforcement agencies. In fact, we have already partnered with the U.S. Attorneys Office in the Southern District of Ohio to successfully prosecute Emery Worldwide Airlines under this initiative, as is discussed in greater detail in my written testimony.

Now the Tribal Trust Fund Litigation Initiative is essential for the Government to effectively defend itself in 22 lawsuits brought by various Indian tribes alleging that the United States has mismanaged tribal assets and failed to provide an accounting of the money collected, managed and disbursed by the United States on the tribes' behalf. Some cases seek an order requiring the United States to perform a multi-million dollar, multi-year accounting, while other cases seek a money judgment for the claimed losses. In the cases filed so far, the tribes are claiming they are owed more than $200 billion, and there may be more claims coming.

In conclusion, the Environment and Natural Resources Division's work is challenging and complex. I am proud of the people in my Division who consistently provide excellent, cost-effective legal services to the American people.

I would be happy to answer any questions that you have about the Division and its work.

Mr. CANNON. Thank you, Mr. Sansonetti. I can assure we have some questions.

[The prepared statement of Mr. Sansonetti follows:]

PREPARED STATEMENT OF THOMAS L. SANSONETTI

INTRODUCTION

Chairman Cannon, Congressman Watt, and Members of the Subcommittee, I am pleased to be here today, along with my colleagues from the Department of Justice. 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 to 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 discuss the resources that the Administration is requesting for the Division as part of its fiscal year 2005 budget. In particular, I will focus on the monies we are requesting for two ENRD initiatives—the Hazardous Materials Transportation Initiative, which will promote homeland security, and the Tribal Trust Fund Litigation Initiative, which will provide resources to defend multi-billion dollar claims against the public fisc. If Congress decides to approve funding for these two important initiatives, it would constitute the first real increase that the Division's budget has seen in the last decade.

OVERVIEW OF THE ENVIRONMENT AND NATURAL RESOURCES DIVISION

The Environment and Natural Resources Division's mission is to enforce civil and criminal environmental laws and programs to protect the health and environment of United States citizens, and to defend suits challenging environmental and conservation laws, programs and activities. We represent the United States in matters concerning the protection, use and development of the Nation's natural resources and public lands, wildlife protection, Indian rights and claims, and the acquisition of federal property. We represent virtually every federal agency in over 7,000 active cases in every judicial district in the nation utilizing the efforts of approximately 400 lawyers at the present time. Our lawyers are frontline litigators, approximately 10% of whom are located in field offices around the United States, and we are considering how to expand our field office presence even further. Our principal clients include the U.S. Environmental Protection Agency, and the Departments of Agriculture, Commerce, Defense, Energy, the Interior, and Transportation. We also recently added the Department of Homeland Security to our roster of client agencies.

Many of our cases involve defensive litigation in which the United States is being sued for alleged violations of the environmental laws, for example in connection with federal highway construction, airport expansion, or military training. Effective lawyering in these cases is critical to agency implementation of Congressionally mandated programs and protection of the public fisc. This large defensive docket, which is non-discretionary, has important implications for the Division's resources because it means that we cannot always anticipate our future workload.

In addition to these defensive cases, another significant portion of our docket consists of non-discretionary eminent domain litigation. This work, undertaken pursuant to Congressional direction or authority, involves the acquisition of land for important national projects such as the construction of federal courthouses and the construction or expansion of border stations for the Immigration and Naturalization Service. When our defensive and eminent domain litigation is considered together, approximately half 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 declining resources beginning in the 1990's, we have achieved significant, cost-effective results for the public. In December 2003, the Attorney General announced that Fiscal Year 2003 was a record breaking year for the recovery of civil penalties in environmental cases. Court awards and consent decrees achieved by ENRD and our colleagues in the United States Attorney's Offices resulted in more than $203 million in penalties for civil violations of the nation's environmental laws. The Division also obtained the largest civil penalty in its history against a single company for environmental violations when it settled a Clean Water Act enforcement action on the eve of trial against the Colonial Pipeline Company in exchange for a $34 million penalty. Colonial also agreed to implement a comprehensive repair and maintenance program for its 5,500 mile pipeline, which had spilled 1.45 million gallons of oil in North Carolina, South Carolina, Tennessee, Georgia, and Louisiana.

Conserving the Superfund to ensure prompt cleanup of hazardous waste sites is also a top priority for the Division, which seeks to return money to the Superfund from responsible parties and obtain cleanup orders and commitments from those most responsible for the hazardous substances at the site. In fact, when court-ordered injunctive relief for Superfund, the Clean Air Act, Clean Water Act, and hazardous waste enforcement laws is combined, we obtained more than $7.9 billion in cleanup and compliance commitments in the first two fiscal years of this Administrations, our best years ever, and Fiscal Year 2003 was another successful year in that regard.

Altogether, the Division has secured civil penalties, criminal fines, and cleanup costs for the United States Treasury that far exceed its share of the Department's budget, and 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.

But the Division's accomplishments cannot simply be summed up in numerical terms. The Division also achieves immediate on-the-ground benefits for the American people. For example, in a recent case in Massachusetts, a local power plant agreed to a settlement that will result in significant air quality improvements for Boston school children and North Shore commuters, as well as a restored salt marsh in Chelsea and construction of a new commuter bike path across the Mystic River that will link the cities of Everett and Somerville. Among the projects to which plant owner Exelon Mystic LLC committed is retrofitting 500 Boston school buses with pollution control equipment, which it will supply with ultra low-polluting diesel fuel. The project, which will benefit more than 28,000 school children who ride the buses every day, will reduce tailpipe emissions from the buses by more than 90 percent, or more than 30 tons a year, and will make Boston the first major city in the country to have retrofitted its entire school bus fleet.

One important way that we leverage our resources and enhance our effectiveness is by forging 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 both by the Division and the U.S. Attorneys' Offices across the country, we have increased cooperation among local, state, and federal environmental enforcement offices. Our commitment to cooperative federalism has result in success after success, as shown by cases such as the far-reaching Clean Air Act settlement with agri-business giant Archer Daniel Midlands in which eleven States and three counties joined, and another settlement with Nucor Steel involving 14 steel mills in which four States joined. In each of these cases, the States that partnered with the Division to bring the actions have shared in the civil penalties as well as the benefits from the injunctive relief obtained. To assure continuity in these practices, the Division joined the National Association of Attorneys General and EPA in announcing and distributing our "Guidelines for Joint State/Federal Civil Environmental Enforcement Litigation," which will assist states and the federal government in the conduct of joint civil environment enforcement litigation.

These are only a few of the Division's many cases, but they are representative of the high-quality, cost-effective work that the Division's staff performs every day on behalf of the American taxpayer. If you are interested in learning more about the Division's work, please visit our website at http://www.usdoj.gov/enrd/pressroom.htm.

ENRD'S BUDGET REQUEST FOR FISCAL YEAR 2005

The Division receives its annual appropriation from the General Legal Activities (GLA) portion of the Justice Department's appropriation. For fiscal year 2005, the President has requested $105,457,000 for the Division within the Justice Department's GLA appropriation. Much of the increase over the FY 2004 appropriation is due to required or inflationary adjustments and allowances, including pay raises, other salary adjustments, and increases for GSA rent, which will allow the Division to maintain its current level of operations. However, as part of his proposed budget, the President is also requesting $14,601,000 for two ENRD initiatives—the Hazardous Materials Transportation Initiative (for which the President requests $594,000) and the Tribal Trust Fund Litigation Initiative. These initiatives, if funded, will, respectively, promote homeland security and enable the Division to effectively defend the United States against a wave of claims for billions of dollars. They would also constitute the first real increase that the Division's budget has seen in the last decade. For the reasons that I will now give, funding for both initiatives is critical.

The Hazardous Materials Transportation Initiative has two purposes. First, it will help the Department achieve its strategic goal of protecting America against the threat of terrorism by making it more difficult for terrorists and other criminals to transport hazardous materials ("hazmat") illegally, thereby helping to prevent, disrupt, and defeat terrorist operations before they occur. Second, it will ensure that industries regulated under the hazmat transportation laws comply with those laws so as to reduce the inherent risks posed by the transportation of hazardous materials. The Hazmat Initiative is concentrated on three tasks: 1) development of strategy and coordination with other federal, state and local agencies; 2) development of

criminal prosecutions and referrals for civil enforcement actions; and 3) development and implementation of a training program to assist federal, state and local prosecutors and investigators in uncovering and prosecuting such illegal activity. These measures will effectively marshal and focus all available resources, create an immediate deterrent effect, and ensure long-term effectiveness through training of United States Attorneys and state enforcement offices around the country, and will give state and local law enforcement agencies a considerable boost. In fact, we have already had one major successful prosecution under this initiative, involving Emery Worldwide Airlines, Inc., which fortunately did not involve terrorist activity, but did result in a $6 million criminal penalty and Emery's commitment to develop a compliance program to detect and prevent future violations.

The Tribal Trust Fund Litigation Initiative is essential for the government to effectively defend itself in twenty-two current lawsuits brought by various Indian Tribes alleging that the U.S. has mismanaged tribal assets including the money collected, managed and disbursed by the U.S. on behalf of the Tribes. Some of these cases seek an order requiring the U.S. to perform a multi-million dollar, multi-year accounting, and others seek a money judgment for losses the Tribes claim they have suffered. In the twenty-two cases filed so far, the Tribes are claiming that they are owed more than $200 billion—and approximately 300 other Tribes may be preparing claims for similar amounts. These Tribal Trust cases are similar to the significant *Cobell* v. *Norton* lawsuit, a class action on behalf of 300,000 individual Indians. Although there are some significant differences between the tribal trust cases and *Cobell* in that the tribal trust cases concern tribal assets rather than individual assets and there is potentially much more money at stake, they are similar in that they both involve millions of historical accounting documents spanning more than a century of economic activity, and the issues are legally and factually complex.

This initiative will enable the Department of Justice to effectively defend the United States in the first wave of cases filed seeking recompense for Tribal Trust accounts, and maintain an adequate staffing level in our remaining non-discretionary caseload. Failure to provide sufficient resources for these cases could lead to additional allegations of contempt, substantial and unnecessary monetary awards at taxpayer expense, and a public loss of confidence in the federal government in general.

CONCLUSION

The work of the Environment and Natural Resources 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. We have an exceptional record of assuring that polluters are made to comply with the law, that responsible private parties are made to cleanup Superfund sites rather than leaving the taxpayer on the hook, and that criminal defendants are punished appropriately. I am proud of the people in my Division, who consistently provide top-notch, cost-effective legal services to the American people and who dedicate their lives to assuring that the rule of law is met and complied with by all parties.

I would be happy to answer any questions you might have about the Division and its work.

Mr. CANNON. Mr. Keisler, would you give us your testimony.

STATEMENT OF THE HONORABLE PETER D. KEISLER, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, UNITED STATES DEPARTMENT OF JUSTICE

Mr. KEISLER. Thank you, Mr. Chairman and Congressman Watt and Congressman Coble. It is a great privilege for me to appear before you at this oversight hearing and to discuss the work of the Civil Division and to respond to any questions you have.

The Civil Division, as you know, represents the United States in court in a wide variety of matters. We don't make policy, but we represent the people who do. Virtually every executive branch agency as well as Members of Congress are clients of ours at one time or another, and the cases we handle therefore touch upon virtually every aspect of the operations of the Federal Government.

We defend the constitutionality of acts of Congress when they are challenged and the lawfulness of Government regulations. We seek to recover monies lost to the Government through fraud. We help to administer sensitive national compensation programs. We enforce important consumer protection statutes; and we represent the Government in a wide range of cases, contract cases, tort cases, immigration cases.

We have 716 attorneys who do this, supported by over 300 support personnel; and they work very hard. They work hard because, while we had pending cases numbering about 20,000 in 2001, it has climbed now to 35,000, an increase of 75 percent in just 3 years.

I am very pleased to be able to report that, notwithstanding the challenges that that kind of caseload imposes, we have had a very successful year and a lot of positive developments to report. We had record recovery last year in cases of fraud against the Government. We and the U.S. Attorneys' Offices, working together, recovered $2.2 billion of monies that otherwise had been lost. That is a partnership between Guy Lewis' U.S. Attorneys' Offices and the Civil Division that we are proud of.

In the last 3 years, we exceeded the $1 billion mark each time, which is also a record.

We also successfully defended the Government, which, as you know, is the largest commercial actor in the world, the largest purchaser of goods and services, in a range of commercial cases in which claims that we believe were meritless and the judges were convinced eventually were meritless in the billions and billions of dollars were dismissed.

We successfully defended congressional authority and executive authority against numerous challenges.

We convicted Internet pharmacy operators who were illegally selling prescription drugs.

We successfully defended the Federal Trade Commission and Federal Communication Commission's Do Not Call registry to protect people who wish to be protected from the intrusion of telemarketing.

We have helped administer sensitive national compensation programs like the Radiation Exposure Compensation Program, the Vaccine Program.

We worked closely with Special Master Ken Feinberg to help implement the 9/11 Victims Compensation Fund. We were particularly gratified that, at the close of the deadline for filing in that program, upwards of 98 percent of the eligible families who lost a loved one to that attack participated in the program, which we regard as a strong vote of confidence in its fairness and sensitivity.

We get involved in terrorism litigation when that happens on the civil side. We are particularly proud of the work we have done in the terrorist financing area, defending the Government's actions in court when they are challenged, to help the Government shut down the flow of money to international terrorist organizations.

We are in the same position as the Environment and Natural Resources Division in the sense that most of our work is defensive. Ninety percent are not cases we bring or initiate but cases that are brought against the Government to which we must respond. That

has, as Tom said, obvious budgetary implications; and it makes it difficult to predict the workload.

What we do try to do is keep this Committee and your colleagues closely and promptly informed about where we see those trends going so you can consider what action you wish to take—budgetary, policy, whatever—and we can work together for solutions when problems like that arise. If there are spikes or trends and certain types of cases are going way up, as we are experiencing in the immigration area right now, where we had 5,700 pending cases in 2001 and 12,000 in 2003, then we try to get that information to you promptly so we can work together to talk about how to address it.

When in a compensation program there is a threat that the number of eligible valid claims will swamp the amount of money to pay them, as there is in the Radiation Exposure Compensation Program, we try to bring that to your attention quickly and work together.

My testimony describes some of the areas in which we feel we need additional resources. Immigration and the radiation program are among them, and I would be happy to address that.

Let me thank you, Mr. Chairman, for the opportunity to appear before you and to answer your questions.

Mr. CANNON. Thank you, Mr. Keisler. We do have questions on those issues, and we will return to those.

[The prepared statement of Mr. Keisler follows:]

PREPARED STATEMENT OF PETER D. KEISLER

Chairman Cannon, Congressman 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 2005.

The Division represents the interests of the United States in a wide range of civil matters. Our cases encompass virtually every aspect of the Federal government—from defending the constitutionality of Federal statutes to recovering money from those who have committed fraud in connection with government programs, to the administration of national compensation programs to the representation of Federal agencies in a host of matters that arise as part and parcel of Government operations—contract disputes, allegations of negligence and discrimination, loan defaults, and immigration matters. We have 716 dedicated public servants who serve as attorneys in the Division and 336 full and part time employees who provide essential paralegal, administrative, and clerical support.

Over the last year and a half, the Civil Division has:

- Working with the United States Attorneys, recovered more than two billion dollars lost through fraud against health care and defense programs;
- Protected the public fisc from billions of dollars in claims arising from the Government's commercial activities;
- Defended against challenges to Congressional and Executive exercises of power;
- Convicted Internet pharmacy operators for illegally selling prescription drugs;
- Defended the legality of the "Do Not Call" list; and
- Played a major role in the administration of congressional programs, such as the September 11th Victim Compensation Fund; the Division has also continued its work with the Vaccine Injury Compensation Program, and the Radiation Exposure Compensation Act.
- Further, in the months since the September 11th attacks, there has been a substantial increase in civil litigation challenging the Federal government's coordinated response to those attacks and the Administration's policies designed to prevent future acts of terrorism. The Civil Division currently handles some 100 pieces of litigation directly related to the September 11 attacks and the country's response to those attacks.

- The Civil Division also helped to secure convictions in a court in Athens, Greece of 15 members of the notorious Greek terrorist group 17 November.

NATIONAL SECURITY

Among the laws and policies of most importance to the Administration, the Congress, and the public are those intended to protect our nation's security. Our leadership has committed itself to devoting all resources necessary to disrupt, weaken, and eliminate terrorist networks; to prevent or thwart terrorist operations; and to bring justice to perpetrators of terrorist attacks. And we in the Civil Division are privileged to contribute to this mission through our representation of the United States in litigation that relates to the Federal Government's efforts to protect against threats to our national security. In fulfilling our litigation responsibilities, we take seriously the Attorney General's charge to think outside the box, but never outside the Constitution.

Indeed, civil cases related to the war on terrorism often raise unprecedented issues that require novel legal strategies. And the consequences are large, as litigation losses in this area could undercut policies crucial to the security of our citizens.

Civil Division attorneys defend challenges to the USA PATRIOT Act and the AntiTerrorism Act, lead efforts to defend the decision to freeze the assets of terrorist organizations, and ensure that immigration hearings may proceed without risking harm to our nation's counterterrorism strategy. Our attorneys defend enforcement actions involving the detention and removal of suspected alien terrorists, defend designations of Specially Designated Global Terrorists, and defend our Commander-In-Chief in suits seeking to enjoin the country's military actions in Iraq. Of the 37 counterterrorism-related court decisions handed down in FY 2003, we prevailed in 35—a success rate of 95 percent.

In light of the increasingly crucial role that the Civil Division plays in the Nation's counterterrorism efforts, the President requests in his FY 2005 budget an increase of 11 positions (eight attorneys and three support staff), 6 FTE, and $856,000 for counterterrorism litigation.

* * * * *

While national security cases are paramount, they still represent a small fraction of the over 35,000 cases and matters pending with the Civil Division. This vast and diverse workload is handled by our trial attorneys who spend their time on the front lines of litigation—preparing motions, taking depositions, negotiating settlements, conducting trials, and pursuing appeals.

PROTECTING THE PUBLIC FISC

Our dockets are filled with cases that involve substantial monetary claims against the Government. The significance of these claims cannot be overstated.

Our responsibilities have included: (1) the 122 *Winstar* suits in which hundreds of financial institutions have sought tens of billions of dollars for alleged losses that occurred in the wake of banking reforms enacted in the 1980s; (2) the *Cobell* class action—perhaps the largest ever filed against the Government; and (3) the Spent Nuclear Fuel cases, in which nuclear utilities allege a multi-billion dollar breach of contract against the Department of Energy for its failure to begin acceptance and disposal of spent nuclear fuel.

In these and thousands of other defensive monetary matters, our mission is to ensure that the will of Congress and the actions of the Executive Branch are vigorously and fairly defended, and that meritless claims are not paid from the public fisc. Thus far, we have been largely successful. Fifty-five of the original 122 *Winstar* suits have been resolved without the government paying any money whatsoever. And in fiscal year 2003, we defeated, in total, $12 billion in unmeritorious claims asserted against the United States.

In any given year about 15 to 20 percent of our cases involve affirmative litigation to enforce Government regulations and policies, and to recover money owed the Government from commercial transactions, bankruptcy proceedings, and fraud. In one such case, the hospital chain Columbia/HCA agreed to pay the government a total of $1.7 billion in criminal fines and civil penalties for systematically defrauding federal health care programs. The conclusion of this multi-year probe in June 2003 marked the largest recovery ever reached by the government in a health care fraud investigation. Rivaling HCA in terms of size and potential recoveries are numerous ongoing investigations against many pharmaceutical companies or other related entities, charging various allegations of fraud on the Medicare and Medicaid programs in the pricing or delivery of drugs. Recoveries in the last three years have already exceeded $1 billion with potential recoveries totaling $1.5 billion in the next three

years. In total, in fiscal year 2003, the Civil Division, working in concert with the United States Attorneys, recovered approximately $2.2 billion in fraud suits and investigations, thus setting precedents that will deter future efforts to defraud the American people.

WORKLOAD TRENDS

In 2001, the Civil Division handled about 20,000 cases and matters with a staff of 722 trial attorneys. In just two years our pending caseload grew 75 percent to nearly 35,000, while the number of trial attorneys has actually dropped to 716.

During this time we witnessed significant growth in appellate cases and matters—driven largely by the steep rise in challenges to immigration enforcement actions. Cases in the Court of Federal Claims, the Court of Appeals for the Federal Circuit, the Court of International Trade, and in foreign courts continued to account for a very significant portion of our workload—some 34 percent. In contrast, the number of trial cases assigned to district courts declined both numerically and as a proportion of our total workload. Most notably, the sharpest increases are attributable to our expanding responsibilities for administering compensation programs.

ALTERNATIVES TO LITIGATION

The Vaccine Injury Compensation Program was created in 1986 by the National Childhood Vaccine Injury Act—to encourage childhood vaccination by providing a streamlined system for compensation in rare instances where an injury results. To date, nearly 1,800 people have been paid in excess of $1.4 billion.

In FY 2003, nearly 2,500 claims were filed under the Program, compared with just 213 in FY 2001—a nearly twelve-fold increase largely attributable to claims alleging that a vaccine preservative, thimerosal, caused autism. As the Court of Federal Claims increases its staff of Special Masters, we expect further growth in vaccine-related work. By the end of FY 2005, more than 3,400 additional cases are expected to be filed.

The Vaccine Injury Compensation Trust Fund derives its funding from an excise tax on vaccine manufacturers and is used to make compensation payments to eligible claimants and to reimburse the Court of Federal Claims, and the Departments of Justice and Health and Human Services for expenses related to the administration of the Program. The annual appropriations that set the Civil Division's reimbursement level have stayed flat at $4,028,000 since 1996. The FY 2005 President's Budget seeks an increase in reimbursable authority of $2,305,000 to handle the exponential growth in vaccine injury claims alleging injuries caused by thimerosal. Increasing the Civil Division's reimbursement level so it can adequately address this significant workload growth will help to assure that qualifying claims are paid while the long term viability of the Trust Fund is protected.

Congress passed the Radiation Exposure Compensation Act (RECA) in 1990 to offer an apology and compensation to people who suffered disease or death as a result of the nation's nuclear weapons program during the Cold War era.

In July 2000, RECA Amendments were enacted. Major changes included new categories of beneficiaries; expansion of eligible diseases, geographic areas, and time period; and a reduction in the radiation threshold that miners must meet to receive compensation. As a result, over 3,800 new claims were filed in FY 2001—more than in the prior six years combined.

Awards rose sharply too, from an average of about $20 million a year to over $172 million in 2002 alone. To administer the expanded program and avoid the development of backlogs, the Consolidated Appropriations Act for Fiscal Year 2004 earmarked an additional $1,000,000 for FY 2004 over the base of $1,996,000.

The Amendments also precipitated a need for additional Trust Fund resources. In FY 2001, Congress appropriated an emergency supplemental appropriation to address immediate requirements. Long-term needs were addressed through the Fiscal Year 2002 National Defense Authorization Act. That Act made the RECA Trust Fund a mandatory appropriation and established annual funding caps through FY 2011 totaling $655 million. The caps set by the Act were based on the assumption that there would be a sharp decline in the number of claims approved each year. To date, the claims have not been declining as rapidly as assumed, and it has become obvious that these annual Trust Fund caps are insufficient for eligible claimants. The General Accounting Office recognized this problem in its April 2003 report to Congress. In FY 2003, approximately $10 million in awards could not be paid until FY 2004. For FY 2004, funds are projected to be exhausted this summer, meaning that almost $28 million, will not be paid until FY 2005. Without an increase, FY 2005 funds are projected to be exhausted by December, bringing the cumulative shortfall to $72 million. Accordingly, to ensure that adequate resources are

available to pay all eligible claimants through FY 2005, the President's Budget seeks a discretionary appropriation of $72 million.

The most recent addition to the Division's responsibility for compensation programs is the September 11th Victim Compensation Fund of 2001. The Air Transportation Safety and System Stabilization Act (P.L. 107–42) created the Program to pay compensation to families of deceased individuals and to those physically injured as a result of the September 11th terrorist attacks.

The sheer complexity of the determinations and the deep, emotional context of the decision-making makes the Program one of the Division's greatest challenges arising out of the devastation of September 11th.

Under the law, all claims were to be filed by December 22, 2003. The success of the Program is borne out by the eligible claimants' phenomenal level of participation. Under the leadership of Special Master Kenneth Feinberg, the Program received a total of 7,357 claims, 2,970 death and 4,387 injury. An extraordinary 98 percent of those eligible filed a death claim, far exceeding the Special Master's most optimistic projections in December 2001.

The Program has already paid over $2 billion to claimants. The amounts approved for deceased victims range from $250,000 to $6.9 million. Awards approved for physically injured (but not deceased) victims ranged from $500 to $7.9 million.

There remains much work to be done before the last award is issued. Justice and compassion demand that claims be resolved as expeditiously as possible. For FY 2004, a total of $38.3 million was appropriated to ensure the Program has access to the resources needed to meet the administration's goal—to judiciously resolve all claims in FY 2004.

Due to the volume of claims filed immediately before the deadline, some percentage of claims may not be finally closed in FY 2004. The FY 2005 President's Budget seeks $11.4 million to ensure that each and every claim is fully resolved, each payment is made, and the substantial amount of administrative close-out operations is completed seamlessly.

Because the enacting legislation provided an indefinite appropriation for making compensation payments, there will be sufficient funds to pay an estimated $5.4 billion in approved claims over the life of the program.

IMMIGRATION LITIGATION

The Office of Immigration Litigation ("OIL") defends the Government's immigration laws and policies, and handles challenges to immigration enforcement actions. At no time in history has this mission been so important, and never before has it consumed as large a percentage of the Civil Division's resources as it does today.

Immigration attorneys have defended the government's efforts to detain and remove known terrorists and other criminal aliens. In addition, OIL has helped to preserve the government's policy of closing hearings for aliens who were deemed to be of interest to the post-9/11 terrorism investigation. Vigorous defense of these cases is critical to the nation's counter-terrorism strategy.

Immigration has been, by far, the fastest growing component of the Civil Division's docket. The Civil Division handles all federal court challenges to decisions of the Board of Immigration Appeals (the "BIA"). These challenges have more than doubled in the past five years. Whereas OIL handled roughly 5,700 cases in 2001, it handled over 12,000 in 2003.

The primary reason for this growth is that the BIA has reduced a 56,000 case backlog, as a result of the Attorney General's initiative to streamline the agency's procedures. As the BIA's output has increased, so has our workload. Moreover, further contributing to the growth in immigration cases are three other factors: (1) an increase in new BIA cases as a result of heightened immigration enforcement; (2) the substantial increase in the percentage of BIA decisions that are appealed to the federal courts; and (3) the Supreme Court's recent decisions opening up additional avenues for judicial review that Congress attempted to foreclose just eight years ago.

This enormous growth is driving the per attorney caseload to over 130 cases in FY 2004, a more than doubling of the historic caseload of 60 cases per attorney. Without additional resources in FY 2005, the attorney caseload is expected to exceed 160 cases per attorney, which is more than three cases per week. The Divisions's temporary, stopgap measure of assigning immigration cases to other Branches (such as Torts and Commercial)—which do not share OIL's experience in immigration law and which do not have the capacity to handle these cases indefinitely—is not a permanent solution.

OIL attorneys are the last line of defense in immigration enforcement. Any attempt to strengthen our borders and to protect ourselves from terrorists must en-

sure that OIL has adequate resources to defend the BIA's decisions. A failure to provide these resources would necessarily weaken our country's efforts to protect homeland security.

The President therefore requests in his FY 2005 budget a program increase of 30 positions (22 attorneys and eight support staff), 15 FTE, and $3,500,000 for immigration litigation.

PERFORMANCE

By concentrating on the Civil Division's top priorities, this testimony provides little elaboration on the thousands of cases and matters that form the traditional core of our work.

The Civil Division has a longstanding commitment to maximizing the effectiveness of scarce Government resources. It is with pride that I can report that performance targets across the board were met or exceeded in FY 2003—as we succeeded in recovering substantial funds owed to the Government, defeating unmeritorious claims and prevailing the vast majority of cases involving challenges to the programs of some 200 agencies that are our clients.

PRESIDENT'S BUDGET REQUEST

The President's FY 2005 request seeks 1,115 positions, 1,157 FTE and $193,110,000. Included in this request are the base resources required to maintain superior legal representation services that have yielded such tremendous success. Please note that the reduced funding for administration of the September 11th Victim Compensation Fund results in the overall request level being $19.4 million less than the FY 2004 appropriated level.

The President's request includes additional funds to: defend the government in some of the most contentious terrorism-related cases; support the Office of Immigration Litigation's key role in protecting our nation's borders; handle the exponential growth in vaccine injury claims alleging injuries caused by thimerosal; and ensure adequate resources are available to pay all eligible RECA claimants.

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

Mr. CANNON. Mr. Lewis.

STATEMENT OF GUY A. LEWIS, DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES DEPARTMENT OF JUSTICE

Mr. LEWIS. Good afternoon, Mr. Chairman, Congressman Watt, Members of the Subcommittee. Thank you very much for the opportunity to be here.

I, too, am pleased to appear here with my colleagues from the Department of Justice. It is also my honor to be representing the outstanding men and women of the 94 United States Attorneys' Offices around the country, the prosecutors that are on the front lines trying cases, and the support staff that are making these cases happen.

Let me thank you, Mr. Chairman, and this Committee and your staffs for your continued support of the important work being done by the United States Attorneys Offices around the country. The Nation's prosecutors are a critical part of the Department of Justice in fulfilling our promise to the American people and to protect them from terrorism, from corporate fraud, from the gun violence that occurs and basically enforcing the criminal laws as well as the civil law in each district.

The U.S. Attorneys Offices are responsible primarily for investigating and prosecuting criminal cases as well as civil cases. We work with the FBI, the DEA, other departments like Homeland Security and our State and local partners. I said many times as a U.S. Attorney in South Florida, we couldn't do what we do without

participation from State and local officials. U.S. attorneys serve not only as the chief Federal law enforcement agent, as I said, in their district, they are also the chief Federal civil litigator in their districts as well.

Let me briefly outline our 2005 budget request. In fiscal year 2005 we are requesting a budget of just over $1.5 billion to support more than 10,000 positions. As part of that request, we are seeking an additional $12.4 million to support an increase of 148 positions.

The President, the Attorney General, and the Deputy Attorney General have directed that we focus our efforts, and that we invest our monies in the programs that are critical to the Department's strategic goals; and we are doing that.

Our request recognizes that prevention of terrorism and prosecution of terrorist acts are the most important responsibility of every U.S. Attorney. In fiscal year '03, the United States Attorneys responded to the Attorney General's directive to use the full array of antiterrorism statutes to detect and disrupt terrorist activities and to prosecute terrorist cases.

Last year alone, the U.S. Attorneys' Offices around the country were involved in more than 1,000 terrorism and terrorism-related cases, last year alone, including many that you know of—John Walker Lindh, Zacarias Massaoui, the Lackawanna Six up in New York, the shoe bomber in Massachusetts, the Ernest James Ujama case in Washington State who was the defendant who pled guilty for providing material support to the Taliban.

Another priority for the United States Attorneys in '03 was the prosecution of corporate fraud. We have spent a lot of time and effort trying to prosecute those cases that, again, many that you have seen in the news and otherwise.

The President, as you know, formed the Corporate Fraud Task Force in '02, and a number of United States Attorneys Offices around the country have participated in that task force. Since '02, over 300 major corporate fraud cases have been brought, resulting in over 250 convictions. Again, very strong cases that I think send the right message.

Another important priority for the United States Attorneys is the flow of illegal firearms. Project Safe Neighborhood, a very important program from the President and from the Department. Last year alone, we were up over 68 percent in terms of prosecutions of Federal gun crimes.

The enhancement that we request is offset by a number of cost saving, managerial moves that we are making. We are going through and making some cuts because, frankly, we are—the net change to our program with the request and the offsets is a $5.8 million mark. So we are going through and tightening our belt in a number of areas. That has been difficult, but we are going to make that happen.

In conclusion, Mr. Chairman, Members of the Committee, the men and women of the United States Attorneys Office and the Executive Office are dedicated to working hard to earn the public's trust. We appreciate your continued support. This Committee support has been very important to the people out in the field that really are making the cases, and we appreciate your continued support.

I would be glad to answer any questions at the end of the hearing.

Mr. CANNON. Thank you, Mr. Lewis.

[The prepared statement of Mr. Lewis follows:]

PREPARED STATEMENT OF GUY A. LEWIS

Mr. Chairman, and Members of the Subcommittee, I am pleased to appear before you today with my colleagues from the Department of Justice.

INTRODUCTION

It is my honor to be here representing the outstanding women and men of the 94 United States Attorneys' offices, and I thank you on their behalf for your continuing support of their efforts. The Executive Office for United States Attorneys (EOUSA) provides administrative support for the United States Attorneys, their offices, and their staffs around the country. EOUSA provides leadership and support on every issue involving the U.S. Attorneys' offices, including their overall operations, budgets, management, personnel matters, and performance evaluations. In addition, EOUSA serves as the voice of the United States Attorneys within the Department of Justice.

OVERVIEW

Each United States Attorney serves as both the chief federal law enforcement officer and the chief federal litigator, both criminal and civil, in their respective districts, and works closely with the six litigating divisions of the Department of Justice.

The investigation and prosecution of terrorism continues to be the number one priority for every United States Attorney. The United States Attorneys are aggressively pursuing criminal investigations throughout the United States, prosecuting and, whenever possible, preventing terrorist-related activity aimed at the United States and its citizens. Some of the important terrorism prosecutions during the past year include:

- **Eastern District of Virginia.** Zacarias Moussaoui was charged with six counts of conspiracy connected with the September 11 attacks. John Walker Lindh pled guilty to aiding the Taliban and was sentenced to 20 years in prison. Seven defendants known as the Northern Virginia Jihad have been charged with conspiracy to violate the Neutrality Act, a number of weapons offenses, and in the case of one defendant, conspiracy to provide material support to al-Qaida.
- **Western District of New York.** The so-called "Lackawanna Six" pled guilty to providing material support to Osama bin Laden and al-Qaida and have been sentenced to significant terms in prison.
- **District of Massachusetts.** Richard Reid, the "shoe bomber," pled guilty to terrorism charges and was sentenced to life in prison.
- **District of New Jersey.** Hemant Lakhani was charged with attempting to smuggle shoulder-fired missiles into the United States and sell them to a person whom he believed to be a representative of a terrorist group.

In fighting the war on terrorism, the United States Attorneys have been greatly aided by the tools made available by the Congress through the USA PATRIOT Act. The Patriot Act has been invaluable in allowing investigators to use in terrorism cases the same tools long used in organized crime, drug trafficking, fraud and other types of cases. The Patriot Act has also aided our efforts by allowing for the sharing of information among government agencies so that we can better "connect the dots" in the course of investigating terrorism cases. In addition, the Act has proven effective in updating the law to reflect new types of threats and technologies used by terrorists and by helping the government uncover, track, and freeze terrorist finances worldwide. The United States Attorneys very strongly urge the Congress to renew those provisions of the Patriot Act that are due to expire next year.

The prosecution of corporate fraud also continues to be a priority for the United States Attorneys. Since the creation of the Corporate Fraud Task Force by President Bush in 2002, over 300 corporate fraud cases have been filed, with more than 250 convictions obtained through December 31, 2003. Some examples of the United States Attorneys' successes in this area during the past year include the following:

- **Middle District of Pennsylvania.** Five former executives of Rite-Aid, Inc., the nation's third largest drug store chain, pled guilty to various charges in connection with a scheme to inflate the company's earnings. Five defendants pled guilty and a sixth was convicted by a jury.
- **Southern District of Texas.** Three former executives of Dynegy, Inc. were indicted on charges relating to a complex scheme of accounting fraud intended to mislead the investing public. Two defendants pled guilty and a third was convicted.
- **Northern District of Alabama.** Several former executives of HealthSouth Corporation were charged with offenses arising out of their scheme to artificially inflate the company's earnings, misrepresent its true financial condition, and mislead lenders. To date, fourteen defendants have pled guilty.

The Department's continued emphasis on prosecuting corporate fraud during 2003 also included investigations into mutual fund and hedge fund fraud. To date, more than 35 such investigations have been opened.

Another important priority for the United States Attorneys is the aggressive enforcement of our nation's gun laws through Project Safe Neighborhoods (PSN). PSN continues to provide a multi-faceted approach to deterring and punishing gun crime by providing every United States Attorney with the tools they need to combat the gun problem in their respective districts. The number of federal firearms prosecutions has increased significantly every year that PSN has been in place, increasing 68% since the program began. In FY2003, the Department filed 10,556 federal firearms cases, the highest number ever recorded. The United States Attorneys are committed to working closely with state and local authorities to ensure that those who violate our nation's gun laws are prosecuted to the fullest extent of the law.

Prosecuting human trafficking cases is another priority for the United States Attorneys. Trafficking victims are being lured to this country in alarming numbers, with false promises of better economic opportunity, only to be forced to work under inhumane conditions in prison-like factories or as prostitutes. Examples of recent trafficking cases include the following:

- **Western District of Texas.** Several defendants have recently been charged with, inter alia, transportation of minors for sexual activity. According to the indictment, the defendants participated in a conspiracy to recruit and smuggle female aliens under the age of 18 from Mexico to the United States.
- **Southern District of Texas.** Jose Ricardo Sanchez Morales, of Honduras, was sentenced to 78 months in federal prison for unlawfully transporting 11 undocumented aliens, one of whom died when the vehicle they were being transported in was involved in a roll-over accident.
- **District of Nevada.** Quinton Williams was sentenced to 125 months in prison for operating an interstate prostitution business in which he transported women, including minors, from various cities to Las Vegas for prostitution.

The United States Attorneys will continue to devote considerable resources to aggressively prosecuting this most heinous of crimes.

While we have achieved considerable success in the past year, more can and must be done to ensure the safety of our communities. Our Fiscal Year 2005 budget request will enable us to meet this challenge.

FISCAL YEAR 2005 BUDGET REQUEST

To carry out our mission in Fiscal Year 2005, we are requesting a budget of just over $1.5 billion to support 10,262 positions. As part of our request, we are seeking $12.4 million to support an increase of 148 positions.

The President, Attorney General, and Deputy Attorney General have continued to ask that we look for opportunities to re-prioritize activities before seeking new resources, that we concentrate our investment in programs that are of the highest priority and greatest value, and that we abandon activities that are not effective. Our 2005 budget request complies with these requests and includes savings to help us fund the enhancements we seek.

The request before you recognizes that the prevention of terrorism and the investigation and prosecution of terrorist acts are the most important priorities of every United States Attorney. Our 2005 request also recognizes that, in addition to the pressing priority of terrorism, there are other crime problems that must be addressed at the federal level. To this end, our request also seeks the resources necessary for the continued support of the Corporate Fraud Task Force, PSN, and other important initiatives.

As additional attorneys have been allocated to our offices in past years to address the strategic priorities of fighting terrorism, corporate fraud, and gun violence, a continuing need exists for additional support staff assistance. As a result, we are asking for 26 new paralegal positions in order to address the current workforce imbalance and enhance attorney productivity.

In addition to our role as the federal government's prosecutors, the civil divisions within the United States Attorneys' offices handled over d that, in addition to the pressing priority of terrorism, there are still other crime problems that we must address. One example of this is firearmsThe Administration, in partnership with state and local law enforcement agencies, is As a result, w191,000 civil cases this past fiscal year and collected money on behalf of the Treasury equal to over seven times the cost of our civil programs. Our request for 24 new civil defensive positions will ensure that our offices can continue to adequately defend the United States in civil actions brought against the federal governmentofficials and agencies,.

Our Fiscal Year 2005 budget request for enhancements totaling 148 positions and $12.4 million also includes $18.2 million in program offsets. As a result, the net change to our program is a negative $5.8 million. The United States Attorneys will be reducing their Office of Legal Education travel by $1.8 million. Also, the Department proposes toWe will offset the additional $5.1 million in pay annualization through other management efficiencies, and. Finally, the United States Attorneys will be further reducinge their non-personnel expenses by an additional $11.3 million. in management efficiencies, such as reductions in legal research.

We recognize that stewardship of appropriated funds is a serious responsibility, and our commitment to sound management runs deep. Consistent with As suggested in the President's Management Agenda, without proper planning, the skill mix of the federal workforce will not reflect tomorrow's changing mission. T the composition of the United States Attorneys' workforce recognizes that it must adapt in terms of size and competencies to accommodate changes in mission, technology, and labor markets. We are also in the process of offering a buyout available to 600 employees in specific job series , toin order to facilitate restructuring toward a more technological and efficient workforce. with attorneys and paralegals with information technology skills and budget analysts with auditing and accounting backgrounds. We expect to achieve substantial savings through these efforts.

CONCLUSION

In conclusion, the men and women of the United States Attorneys' offices and the Executive Office for United States Attorneys are dedicated to fighting terrorism, protecting our neighborhoods and schools from gun violence and drug-related crimes, upholding civil rights, and prosecuting those who commit corporate fraud. We believe that our FY 2005 budget request is a responsible one that will allow us to maintain the important programs designed to carry out the Department's priorities within its strategic plan. We hope to build on our successes in cooperation with this Subcommittee and with its support for the President's FY 2005 Budget request for the offices of the United States Attorneys.

Again, we appreciate your continued support for the United States Attorneys' offices, and I look forward to answering any questions that you may have.

Mr. CANNON. The record should also reflect the attendance of Mr. Chabot from Ohio, our colleague and friend.

Mr. Friedman.

STATEMENT OF LAWRENCE A. FRIEDMAN, DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES, UNITED STATES DEPARTMENT OF JUSTICE

Mr. FRIEDMAN. Thank you, Mr. Chairman, Congressman Watt and Members of the Committee. I appreciate the opportunity to appear before you today to discuss the President's fiscal year 2005 budget request and to update you on some of the U.S. Trustee Program's most recent accomplishments.

Our mission is to enforce the bankruptcy laws, to protect the bankruptcy system from fraud and abuse and to supervise the administration of bankruptcy cases. We carry out broad, administrative, regulatory and litigation duties under both title 11, the Bankruptcy Code, and under title 28 of the United States Code.

It is an exciting time in the history of the program. We are transforming the agency into a litigating component dedicated to combating fraud and abuse. With 1.6 million new bankruptcy cases filed last year, we are enforcing our civil bankruptcy laws and assisting prosecutors in obtaining criminal convictions.

In fiscal year 2002, the program launched a National Civil Enforcement Initiative to identify and remedy debtor fraud and abuse and to protect consumer debtors against unscrupulous attorneys and others who prey upon those in dire financial straits. Our results are impressive. During fiscal year 2003, program offices took more than 41,000 civil enforcement actions, yielding more than half a billion dollars in remedies. The potential benefit to creditors due to these actions is more than three times the program's fiscal year 2003 appropriation.

Examples of the type of abuses we have addressed include false statements and the concealment of assets in Kentucky, where a debtor failed to disclose various property interests, including an ownership interest in six companies, full use of a Lexus and a 401(k) and a brokerage account;

Substantial abuse in Tennessee, where joint debtors earning $145,000 annually sought to discharge $184,000 in credit card debt while continuing to live an extravagant lifestyle, including a new Cadillac and a timeshare in Hawaii;

Sanctioning of petition preparers in the Northern District of California, who preyed upon an elderly woman with dementia, attempting to use the bankruptcy system to gain access to equity in her home;

Attorney misconduct in Indiana, where attorneys at a law firm there coerced their clients to pay fees without disclosure and without court authorization;

And unscrupulous credit solicitations in New Jersey, where a finance company purported to have approval of the bankruptcy court to authorize automobile financing.

I can tell you from my visits to more than 70 of the 95 program offices that a significant benefit of the initiative has been the invigoration of the program staff. Field offices are sharing successful practices in their districts with others in the program, and there is an energy that is spreading throughout the country. Similarly, we have integrated the private trustees into this effort, and this has maximized the role they play in protecting the integrity of the system.

Finally, I have attended hundreds of meetings throughout the country this year with judges, practitioners and others in the bankruptcy community and have found wide support for our efforts to improve the system.

Some abuses of the bankruptcy system merit criminal sanction in addition to civil action. Bankruptcy fraud is also linked to other crimes such as tax fraud, mortgage fraud, credit card fraud and identity theft. The program identifies criminal violations, and assists in their investigation and prosecution of bankruptcy crimes. Program staff cooperate with and provide specialized expertise to other components of the Department, including U.S. Attorneys and the FBI.

A key improvement in the criminal enforcement area has been the program's creation in July of 2003 of the Criminal Enforcement Unit staffed by experienced career prosecutors. A second key improvement has been the development of a new criminal enforcement tracking system to more accurately track allegations and referrals and to identify types of crimes and trends that are occurring.

The program's fiscal year 2005 budget request of $174,355,000 is essentially a current services budget. It will allow us to continue our enforcement efforts and to provide a modest enhancement for our information technology program.

In closing, I would like to say I am very proud of the effort of the dedicated men and women of the United States Trustee Program. Through their commitment and tenacity, they are transforming this agency into a professional litigating organization. I also want to thank the Members of the Subcommittee, your staffs and the rest of the Members for their support of the program.

I am pleased to respond to your questions.

Mr. CANNON. Thank you, Mr. Friedman.

[The prepared statement of Mr. Friedman follows:]

PREPARED STATEMENT OF LAWRENCE A. FRIEDMAN

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to appear before you once again on behalf of the Department of Justice to discuss the important work of the United States Trustee Program, outline for you some of our accomplishments over the last year, and walk you through the President's FY 2005 budget request for the Program.

The United States Trustee Program ("the Program") is the component of the Department of Justice with responsibility for the oversight of bankruptcy cases and trustees. Our mission is to enforce the Federal bankruptcy laws, protect the bankruptcy system from fraud and abuse, and supervise the administration of bankruptcy cases. We carry out broad administrative, regulatory, and litigation duties under both title 11 (the Bankruptcy Code) and title 28 of the United States Code.

It is an exciting time in the history of the United States Trustee Program. We are transforming the agency into a litigating component of the Department dedicated to combating fraud and abuse. Although estimates of the amount of bankruptcy abuse vary widely, it is clear that fraud and abuse add up to billions of dollars at stake for creditors, as well as added costs for consumers. Overseeing nearly 1.6 million of the new bankruptcy cases filed last year, the Program is vigorously enforcing the nation's civil bankruptcy laws and assisting prosecutors in obtaining criminal convictions.

CIVIL AND CRIMINAL ENFORCEMENT

The National Civil Enforcement Initiative

In FY 2002, the Program launched a National Civil Enforcement Initiative (NCEI) with two major objectives:

- To identify and remedy debtor fraud and abuse, and
- To protect consumer debtors against unscrupulous attorneys and others who prey upon those in dire financial straits.

To accomplish these objectives, we are using existing statutory tools to combat fraud and abuse in the bankruptcy system and to protect consumers. Civil enforcement actions include taking steps to dismiss abusive filings, deny discharges to ineligible or dishonest debtors, limit improper refilings by debtors, curb unfair practices by attorneys, sanction unscrupulous bankruptcy petition preparers and scam operators, and attack identity fraud in bankruptcy.

Since the inception of the NCEI in October 2001, civil enforcement related projects have included the development and implementation of annual enforcement strategies in all 95 field offices; the appointment of national civil enforcement coordinators who oversee the Initiative by issuing standard guidance, providing technical assistance and training, and coordinating multi-district litigation; the forma-

tion of a civil enforcement resource team consisting of some of the Program's most experienced attorneys, financial analysts, and litigation support personnel; and the marshalling of resources to assist staff in their enforcement responsibilities.

The results of the NCEI are impressive. During fiscal year 2003, Program offices reported taking more than 41,000 formal and informal civil enforcement actions, yielding more than $500 million in debts not discharged in chapter 7, fines, and other remedies. The potential benefit to creditors as a result of these actions is more than three times the Program's FY 2003 appropriation of $155.7 million.

The ability to measure the results achieved by Program staff in civil enforcement is possible through the Program's development of an automated Significant Accomplishments Reporting System that is available to our staff on their desktop computers. This new system was launched in May 2003, and provides a tool for managers to measure both the amount of civil enforcement activity in their offices and the bottom line results of their efforts.

A significant benefit of the NCEI has been the invigoration of the Program's staff. Identifying abuse and successfully combating it is generating a feeling of pride and accomplishment among our staff at all levels. Field offices are sharing successful practices in their districts with others in the Program, and there is an energy that is spreading not only among the Program's regions and districts, but to the greater bankruptcy community as well. We are confident that our efforts to make this Initiative known to all parties in the bankruptcy system will increase voluntary compliance with the bankruptcy statutes and rules.

Some recent examples of the Program's civil enforcement successes include:

- **Substantial Abuse:** In the Middle District of Tennessee, joint debtors earned $145,000 annually and sought to discharge $184,000 in credit card debt while continuing to live an extravagant lifestyle, which included keeping a new Cadillac and a timeshare in Hawaii. After the U.S. Trustee filed a motion seeking dismissal for substantial abuse, the debtors converted to a chapter 13 repayment plan.
- **False Statements and Concealment of Assets:** In the Eastern District of Kentucky, a debtor failed to disclose various property interests, including ownership interests in six companies, free use of a Lexus, a 401(k) account, and a brokerage account. After trial, the court denied the debtor's discharge based upon the debtor's "reckless disregard" in completing his bankruptcy petition and his failure to disclose assets.
- **Bankruptcy Petition Preparers (BPP's):** In the Northern District of California, an elderly woman with dementia deeded her home jointly to herself and two Bankruptcy Petition Preparers (BPPs). To delay her creditors, the BPPs placed the woman in bankruptcy. The BPPs then sold the home below-market value and attempted to dismiss the bankruptcy case to collect their purported share of the equity. The Bankruptcy Court granted the U. S. Trustee's request for relief under § 110 and certified the case to the District Court. The District Court subsequently awarded the elderly debtor $62,680 in damages, based on a motion by the case trustee. The District Court also ordered the BPPs to pay a $4,948 fine.
- **Attorney Misconduct:** In the Southern District of Indiana, attorneys at a law firm were collecting fees from clients without disclosure and without proper court authorization. Based on action by the U.S. Trustee, attorneys at the firm were barred from filing new bankruptcy cases in Region 10 (Central and Southern Districts of Illinois and Northern and Southern Districts of Indiana), removed as counsel in approximately 100 pending chapter 13 cases, and the court froze $20,000 in fees for distribution to replacement counsel or overcharged debtors.

The Program's civil enforcement efforts also have led to significant decisions by Circuit Courts of Appeal. For example, the U. S. Court of Appeals for the Sixth Circuit recently decided a case in favor of the U. S. Trustee. In *In re Behlke* (6th Cir.), ____F.3d____ (2004 WL 314905 6th Cir. Feb. 20, 2004), decided on February 20, 2004, the Sixth Circuit affirmed the dismissal of a chapter 7 case on grounds of substantial abuse pursuant to 11 U.S.C. § 707(b). The court ruling clarified existing law in a number of respects. Among other things, the court held that an "ability to repay" analysis could include a debtor's voluntary payments to a 401(k) retirement plan. The court also rejected arguments that there was no substantial abuse because the debtor could repay only a modest percentage of general unsecured debt. In Behlke, the Sixth Circuit held that it was not in error to dismiss the debtors' case when the debtors could repay 14 percent ($22,824) of their unsecured debt over three years and 23 percent ($38,040) over five years.

Debtor Audit Pilot Project

Since bankruptcy, like the income tax, is based on self-reporting, the accuracy and veracity of bankruptcy schedules are pivotal to the integrity of the bankruptcy system. In September 2003, the Program started a six-month Debtor Audit Pilot Project to develop better techniques to identify the presence or absence of significant errors in bankruptcy schedules.

The Program contracted with six certified public and forensic accounting and investigative firms to review an estimated 64,000 chapter 7 consumer bankruptcy petitions filed in 10 districts around the country. These firms are conducting "paper" audits in an estimated 1,400 of these cases. The cases are being selected in one of two ways for audit from cases filed between October 1, 2003 and March 31, 2004. First, one out of every 250 cases is randomly selected for an audit. Second, cases are targeted based on certain income and debt thresholds that have been defined for each field office during the pilot. While Program staff have long conducted these types of reviews, this pilot is the first time that independent public firms have been retained to conduct the reviews. The pilot project will be fully completed by the end of the fiscal year.

Criminal Enforcement

Some abuses of the bankruptcy system merit criminal sanction in addition to civil action. The U.S. Trustee Program advances criminal enforcement by identifying criminal violations and assisting in the investigation and prosecution of bankruptcy crimes. Program staff cooperate with and provide specialized expertise to other components of the Department, including the U. S. Attorneys and the FBI. Bankruptcy fraud is often linked to other crimes such as tax fraud, mortgage fraud, credit card fraud, and identity theft. Consequently, the Program's efforts involve extensive collaboration with many other Federal and state agencies.

In March 2003, the Department's Office of the Inspector General (OIG) issued a report regarding the Program's efforts to prevent bankruptcy fraud and abuse. The report generally endorsed our civil and criminal enforcement initiatives and provided helpful guidance on the implementation of those activities.

A key improvement in the criminal enforcement area has been the Program's creation, in July 2003, of a Criminal Enforcement Unit (CrEU) to strengthen its criminal referrals; serve as a resource on bankruptcy fraud issues nationwide; train Program staff, private trustees, and law enforcement personnel; build relationships with the law enforcement and bankruptcy communities; and support the prosecution of and, in some cases, directly assist in the investigation and prosecution of bankruptcy crimes.

The CrEU is headed by a veteran prosecutor, formerly with the Public Integrity Section of the Criminal Division. He is assisted by an Assistant U.S. Trustee, who has been active in our criminal enforcement effort for many years, and a team of three career prosecutors located around the country, who have devoted their professional lives to the investigation and prosecution of complex white-collar crime and have strong ties to U. S. Attorneys offices.

Program staff assist the U. S. Attorneys in the prosecution of criminal referrals by participating in investigations and at trial by serving as expert witnesses or as Special Assistant U. S. Attorneys (SAUSAs). In addition, approximately two-thirds of the Program's 95 field offices participate in bankruptcy fraud working groups headed by U. S. Attorneys.

Most criminal cases identified by the Program involve the concealment of assets. For example, a Federal jury recently convicted husband and wife chapter 7 debtors in Des Moines, Iowa, of concealing approximately $6 million in real estate, equipment, livestock, and cash during their bankruptcy proceeding, *United States* v. *Alfred and MaryAnn Ryder*. This case was referred to the U. S. Attorney by the U. S. Trustee.

Many different fraudulent schemes involve the bankruptcy system. Among other duties, the CrEU will focus on emerging bankruptcy crimes.

- One emerging fraudulent scheme targeted by the CrEU is the credit card bust-out. The primary objective of a bust-out is to use multiple credit card accounts to obtain hundreds of thousands of dollars through credit card cash advances or the purchase of goods that are then sold for cash. In a credit card bust-out, individuals run up large credit card debts and then file bankruptcy to discharge the debt. Typically, the purchases and cash advances occur within a two to three month period. Often, individuals are recruited by others who promise to split the cash and proceeds. After the fraud is perpetrated, the recruiters may recommend a bankruptcy lawyer who files the paperwork and arranges for the debts to be discharged. Possible charges in these schemes in-

clude: Bankruptcy Fraud, 18 U.S.C. § 157(1); Credit Card Fraud, 18 U.S.C. § 1029(a); Mail and Wire Fraud, 18 U.S.C. § 1341 and § 1343; and Bank Fraud, 18 U.S.C. § 1344. Recently, the Program assisted the United States Attorney for the District of New Jersey to obtain a credit card bust-out conviction involving fraudulent charges totaling $6.8 million over a 7-year span, *U.S.* v. *Ali Qaraeen.*

- Other emerging areas are the use of mortgage foreclosure and equity schemes that utilize the bankruptcy system's automatic stay provisions and schemes where individuals use falsified or forged bankruptcy documents by individuals in an attempt to persuade creditors that they have either filed bankruptcy or received a bankruptcy discharge.

A second key improvement in the Program's criminal enforcement efforts has been the development of a new, automated Criminal Enforcement Tracking System (CETS) that more accurately tracks allegations, as well as referrals made to law enforcement authorities. The new national system contains a number of important features:

- *Preliminary Allegations:* The new system permits the tracking of pre-referral matters. For example, if a private party notifies a U. S. Trustee of a potential bankruptcy crime, a file can be opened in CETS in a "pre-referral" status, allowing staff to track the matter until it is either referred to law enforcement or closed out.
- *Criminal Referrals:* Using a national numbering system, the system will track all actual referrals, from the date of referral to the date of disposition. We will work with the Bureau of Justice Statistics and the Executive Office for United States Attorneys (EOUSA) to determine if it is possible to match our referrals with official disposition data maintained by EOUSA.
- *Type of Crime:* Field offices will identify the type of crime that may have been committed (e.g., concealment of assets, destructions of records). This new tracking system will help us not only to measure the volume of our criminal referrals, but also to identify types of crime referred and trends.

CETS is in the pilot stage and will be fully implemented in the field by the end of FY 2004.

Training

Our civil and criminal enforcement efforts and our transition to a litigating component of the Department have been bolstered by the training we offered at the National Bankruptcy Training Institute (NBTI) located at the National Advocacy Center (NAC) in Columbia, South Carolina. Using the resources available at the NAC, we have reached out to many participants in the bankruptcy process to improve skills and share ideas and techniques that improve the administration of bankruptcy cases and help to combat fraud and abuse.

Over the last three fiscal years, the NBTI has hosted more than 1,800 students at 42 training courses in four major categories: civil and criminal enforcement; litigation; business and finance; and management and administration. Our enforcement classes emphasize proven field practices and methods for identifying fraud and abuse. In addition, all courses, including those for non-attorney personnel, have a unit on civil enforcement. Participants in the training have included not only Program staff, but also private trustees and individuals from other components of the bankruptcy system.

OTHER PROGRAM ACTIVITIES

In addition to its focus on civil and criminal enforcement, the Program continues to carry out its many other duties. Other major areas of activity include our chapter 11 reorganization responsibilities and the oversight of private trustees.

Chapter 11 Reorganization Responsibilities

The United States Trustee Program oversees the administration of chapter 11 debtors and enforces the Bankruptcy Code to help ensure that all parties, including small creditors, are protected in accordance with the law. As part of this oversight, the Program prescribes and analyzes periodic financial and operating reports, appoints official committees to represent the interests of large and small creditors, monitors professionals employed in the cases to protect against conflicts of interest, reviews professional fees, and takes action to convert or dismiss faltering cases.

In the last three years, some of the largest bankruptcy cases in history have been filed. With the accompanying allegations of financial impropriety and fraud, the potential loss of confidence in our business infrastructure and its corporate leaders has

increased exponentially. As a result, in appropriate cases, the Program has taken additional steps to ensure the accountability and transparency of the bankruptcy system.

In the Enron and WorldCom cases, the Program appointed special examiners to investigate alleged fraud and mismanagement. In Enron, the Program appointed eminent bankruptcy expert Neal Batson and, in WorldCom, the Program appointed former Attorney General Richard Thornburgh. Over a period of approximately 18 months, each examiner completed exhaustive studies of the causes of the companies' collapse and identified those who may be liable to the shareholders and creditors.

The Enron examiner identified $7 billion in pre-bankruptcy transactions that were improper and which contributed to the collapse of the company. He also identified $6 billion in improper claims against the estate by banks and other financial institutions which contributed to the fraud. Finally, the examiner identified lawyers, directors, and others whom he concluded may be sued by Enron or others whose investments and retirement savings were wiped out.

The WorldCom examiner revealed gross corporate mismanagement, including alleged inappropriate conduct by some senior officials who remained employed by the company after the bankruptcy filing. The examiner's reports detailed tax avoidance schemes deemed improper and which continued long after the bankruptcy filing. The examiner identified accountants, officers, institutions, and others who may be liable to the debtor for their nonfeasance or improper actions, and estimated that that the company potentially may try to recover billions of dollars.

Oversight of Private Trustees

United States Trustees are responsible for appointing and supervising about 1,400 private trustees who administer bankruptcy estates and distribute dividends to creditors. The Program trains trustees and evaluates their overall performance, reviews their financial operations, ensures the effective administration of estate assets, and intervenes to investigate and recover loss of estate assets when embezzlement, mismanagement, or other improper activity is alleged.

The Program works closely with the various bankruptcy trustee associations to improve case administration and to address other matters of mutual concern and interest. These efforts have resulted in a marked improvement in the degree of cooperation and collegiality between the Program and the private bankruptcy trustees. Progress on this front is evident in a number of initiatives over the past few years, as exemplified by the following examples:

- The Program and the trustees are jointly focusing their efforts on the National Civil Enforcement Initiative.
- The Program and trustee associations are working together to provide educational seminars on meaningful topics designed to improve core competencies, such as finding assets, maximizing returns to creditors, and enhancing the integrity of the bankruptcy system.
- The Program has worked jointly with the National Association of Bankruptcy Trustees and the National Association of Chapter Thirteen Trustees to develop Standards of Excellence and to improve the quality and effectiveness of trustee performance.
- Program staff and private trustees have worked successfully to develop critical management reports, updated standards for insurance and bonding, and a new information technology security initiative.

FY 2005 BUDGET REQUEST

The Program is entirely self-funded through user fees paid by participants in the bankruptcy system. Approximately 60 percent of our funding comes from quarterly fees paid in chapter 11 (reorganization) cases and 40 percent from filing fees, interest earnings, and other miscellaneous revenues.

For FY 2005, the Program is requesting essentially a current services budget with a modest enhancement for information technology. The President's budget request transmitted to the Congress in February totals $174,355,000, 1,198 permanent positions (265 attorneys) and 1,190 work years. The request represents an increase of $8.2 million over the FY 2004 enacted appropriation of $166,157,000. The increase is comprised of adjustments necessary to maintain a current services base level, and an enhancement of $2 million for our Information Technology (IT) program.

We have made significant progress in the last few years in our efforts to modernize information systems and implement sound IT investment practices. The Program has hired a Chief Information Officer and implemented an Information Technology Investment Management (ITIM) process. We have established an IT advisory

group of key Program managers and an Executive Review Board to review IT investment concepts in conjunction with Program priorities and available resources. This process ultimately ensures that the Program is spending its IT dollars wisely and in accordance with performance management goals.

The requested FY 2005 increase will fund the following activities:

- **Life-Cycle Replacement/Technology Refreshment of Equipment ($1,375,000)** This initiative will permit the Program to replace a portion of its equipment in accord with industry IT recommendations. The funding will replace our JCON and Database Management Servers and 500 personal computers.
- **Electronic Case Filing (ECF) Initiative ($625,000)** This request will enhance the Program's Automated Case Management System to examine the feasibility of integrating the management of electronic documents received from the bankruptcy courts with the extraction of key data from those documents. It is an initial step in developing the capability to streamline the collection of bankruptcy case information, including amounts and types of liabilities, as well as types and values of assets. This information will be invaluable in our identification of abusive filings.

Our FY 2005 ECF Initiative builds on the Program's FY 2003 and 2004 efforts to work alongside the courts and with the private trustees to transition to the courts' ECF System. As of the end of 2003, approximately 60 percent of the bankruptcy courts had converted to the new ECF system, with the remaining bankruptcy courts planned for 2004. The implementation of ECF has allowed the Program and private trustees to enhance and streamline the exchange of electronic data.

In late 2003, the courts implemented a new ECF module, jointly developed with the U. S. Trustee Program that provides for the efficient exchange of bankruptcy data and associated electronic records. This new module paves the way for our FY 2005 request to enhance financial data extraction from electronic records and to further reduce manual review of bankruptcy petitions and schedules for potential fraud and abuse.

Other Information Technology accomplishments include:

- The creation of a central repository of all bankruptcy data that staff will begin to access in late FY 2004 to identify nationwide trends in serial filers, as well as other potential civil and criminal abuses at the national and local levels.
- With the migration to a centralized data system, the Program is working to establish a remote "continuity of operations" (COOP) site, which will serve as a back-up for all the Program's electronic data. Should our primary IT operation be compromised in any way, the COOP site would become fully operational.
- Since May 2003, all Program staff have been entering their civil enforcement activities in "real-time" mode into the Significant Accomplishments Reporting System (SARS) readily available through their desktop computer. This new system gives Program managers a tool to summarize their offices' immediate impact on the bankruptcy system and to monitor staff resources to ensure activities are occurring in accordance with Program goals.
- As mentioned earlier, the Program is currently piloting a Criminal Enforcement Tracking System (CETS), which allows the real-time tracking of criminal activities. This new system will be available to all offices in late FY 2004.

Our efforts to improve our IT infrastructure have enhanced the Program's ability to collect performance data and integrate it with the budget. This has led to the creation of a new outcome performance measure—"Potential Additional Returns to Creditors Through Civil Enforcement and Related Efforts." This new measure provides an indicator of the public benefit of the United States Trustee Program's work.

CONCLUSION

I am proud of the efforts of the dedicated men and women of the United States Trustee Program. They have not only kept abreast of record-breaking filings and moved the cases through the bankruptcy system efficiently, but they have exercised creativity in identifying and addressing abuses. They also have demonstrated flexibility in streamlining procedures and processes so that they can devote their energy to addressing fraud and abuse. Through their commitment and tenacity, they are transforming this agency into a professional litigating organization that is being rec-

ognized within the greater bankruptcy community for its contributions to combating fraud and abuse.

In closing, I would like to thank this Subcommittee for the assistance you have provided the Program through your support of resource requests and your foresight and guidance on substantive issues. I look forward to continuing to work with you on matters of mutual interest and critical importance.

Mr. CANNON. You mentioned that your program cost has three times the benefit to creditors, and let me suggest to society and creditors you get a lot more than that because a lot of people don't commit fraud because they know you are going to be out there, and that is one of the reasons your program is important to us. This is an extraordinary, cumbersome process, and we appreciate your role in being here today.

Let me assure the Members of the Committee, those here and not here, that you will have an opportunity to provide written questions. We are not going to get through a tenth of the questions that we have. We think it is important we get those questions to you and work through some of these issues.

Mr. Watt, would you like to take 5 minutes?

The gentleman is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

Let me start with Mr. Sansonetti and Mr. Keisler, just because you all function a little bit different than the other two gentlemen, and inquire of you in this way. A lot of our representational assumptions are built on the fact that if people pay their own legal costs and companies pay their own legal costs, they will be incentivized to be more responsible for their actions. Our system is set up a little bit different here in the sense that we fund your operations independently of the agencies that you represent.

I am wondering whether you could conceive of a system where that changed, where basically Federal agencies would come to the Justice Department, retain—in effect, retain the Justice Department's services for the legal needs that they have and be charged for that and have that included in their budget as a means of making them more cognizant of what the expectations are legally, more cognizant of the cost of litigation and particularly—I don't mean to signal one thing out, but this tribal trust thing, it seems to me if this were being done out of the Interior Department's budget or whoever has responsibility for administering those programs and the funding for the litigation was coming out of their budget, I wonder whether they might have been more responsible than they appear to have been in the handling of their fiduciary responsibilities. I know you can't assume that they did anything wrong, but I am talking about a theoretical model that would be modeled on the same set of assumptions that the private side of our life is modeled on, which I think works reasonably well and encourages more responsibility, more cost consciousness.

Mr. SANSONETTI. Peter, let me take a crack at that. We could spend a good hour or two just on this one subject. It is a great question. I am going to answer it for you from the standpoint of being the Assistant Attorney General For the Environment and Natural Resources Division.

About a third of my cases come from the Department of the Interior, for instance; and once upon a time, having been the Solicitor at the Department of Interior for 3 years, from '90 to '93, the fact

is is that we have basically got the system set up right now kind of the way England runs. If you have folks that are solicitors, you handle everything up to the point of going into a court. You grab the guy with the white-powdered wig, and he goes in there as the barrister and actually argues the case.

So right now, for instance, in these tribal trust cases, there is a financial responsibility on Interior to come up with the money inside their budget to produce the documents for the accounting. So they have got a whole line item over there that is supposed to be for tribal trust help. I am sure they have one for Cobell as well, the difference being he is handling the Cobell case where the individuals are involved. I have the 22 cases where we are talking about tribes seeking their money.

Interior is actually involved from the get-go as far as having to spend its own money to protect itself because they have to come up with the witnesses, the documents and papers. It is their people that are being deposed, et cetera; and their solicitor's offices are the ones that got involved in this case immediately.

When you get sued, though, no longer do they have the ability to go into court under our system to represent themselves. That is when they come to us.

As far as an incentive is concerned, if they had to pay for my attorneys to defend them, obviously, the way budgets are, they couldn't afford it. One of the biggest incentives, though, that hung over the head of those at DOI, the Damocles sword, is actually whether or not, once a judgment comes out, that they did do something wrong. If any of the monies have to come out of an individual agency's account, that is when you get peoples' attention real quick. So it is not so much on the front end who is going to have pay money to help defend, because you are right. They could be innocent, too. The real stick comes in the back end.

Mr. KEISLER. Congressman Watt, it is a very thought—provoking question; and I have two responses that I would like to share. One is that what Tom said is absolutely correct about how material it is whether an agency or Department is thinking a judgment is going to come out of its own budget or out of a judgment fund, which to an agency or a Department may seem like free money.

I can tell you that the discussions I have about settling cases with departments and agencies are very, very different when the money is going to come out of the agency's budget than when it is going to come out of the judgment fund. One thing the Justice Department regards itself as is the protector of the judgment fund, to make sure that we only enter into responsible settlements. Because from an agency's perspective, you settle a case, if you don't have to pay the price tag—no depositions, no document discovery—a whole lot of trouble is taken off your shoulders.

Having said that, there is one critical difference between the private sector model and our model. When I was in the private sector, the client would ask my advice. I would give the client my advice. And if the client directed me to do the opposite, as long as it was ethical, I would salute and go do it.

That is not the relationship the Justice Department has with its client agencies. Under the statute, the Attorney General and the Justice Department control the course of the litigation. We consult

very carefully and very closely with the clients, but if they want to settle a case and we don't, if they want to bring a case and we don't, if they want to appeal and we don't, it is ultimately our determination that holds. If they were paying for it, that could get in the way of that process.

I think that process serves very important goals in making sure the United States speaks with one voice in court, that you don't have different departments and agencies taking different, conflicting positions and serves a very useful centralizing function within the Government and in speaking for the Government to Congress, the courts and the public. But it is certainly, as I said, a very thought-provoking issue and there are certain aspects of it that are attractive.

Mr. WATT. I think I am well over my time, not because I used it in asking the question, but because of the thoughtful answers I got from these two gentlemen. If we go around, I might get to the other side with an equally provocative question, but I will let that go.

Mr. CANNON. A very thoughtful question, and we appreciate the thoughtful answers.

The gentleman from North Carolina, Mr. Coble, is recognized for 5 minutes.

Mr. COBLE. Thank you, Mr. Chairman.

Mr. Lewis, you indicated that the '05 budget is $1.5 billion. I was taking notes as you spoke, and I took the amount of $12.4 million. In my hurried effort, I assume that is for the support of proposed increased positions, is that correct?

Mr. LEWIS. Yes, sir.

Mr. COBLE. How many will there be?

Mr. LEWIS. One hundred forty-eight positions.

Mr. COBLE. That will bring you to 10,300 total?

Mr. LEWIS. Yes, sir.

Mr. COBLE. Mr. Keisler, I want to talk about whistle-blowing cases, of which I am supportive, by the way. I have heard horror stories that in some cases the whistle-blower is the one that ends up being the victim. Could you elaborate or could you assuage my discomfort about that?

Mr. KEISLER. Any whistle-blower who comes forward to report some action of wrongdoing always takes a great personal risk. If you assume the classic whistle-blower case, an insider in a company, they are going against their colleagues, they are threatened with loss of a job, and sometimes it can be a long time before the case is ultimately proved. So there is at least a period of time of great uncertainty and jeopardy and financial difficulty for many whistle-blowers. There is nothing we can do to completely take that risk and cost and uncertainty out of the system.

The one thing that has been done in these fraud cases since 1986 with the qui tam amendments to the False Claims Act is that there are great incentives for those people to come forward. Because, at the end of the day, if they and we do succeed in proving a fraud, they get a substantial piece of the recovery, 15 to 25 percent in cases in which we participate, higher in cases in which we don't. When we are talking about fraud in the health care or the defense contractor area, which sometimes can be tens, even hundreds of

millions of dollars, you know, at the end of that process, there can be some significant compensation. But it is true that as that process works its way through it can impose great costs.

Mr. COBLE. If you all learn of any abuse today, I am sure you will share it with us.

Mr. Lewis, you indicated you all are tightening your belts, and I think all of us are tightening our belts in this fragile economic times. Give us some examples by which you all are doing that.

Mr. LEWIS. We have gone through and we have identified a number of areas where we are going to save money. One is in the Office of Legal Education. We have a wonderful facility down in Columbia, South Carolina, called the National Advocacy Center, which does a terrific job of training and teaching. Over 20,000 students were trained there last year. We are going to have to cut back in terms of some of our training.

We are trying to figure out how to use more effectively our Justice Television Network, our ability to go out from Columbia in a small television studio there to all the U.S. Attorneys Offices. Each Assistant U.S. Attorney has a computer on her or his desk that allows us to telecommunicate with that person. So we are trying to figure out ways to do that.

We are trying to offset through management efficiencies. We are trying to reduce nonpersonnel expenses of the U.S. Attorneys and the offices by over $11 million. We are looking at a process of early buyouts for some 600 employees around the country. That is going to save us a lot of money. I believe the U.S. Attorneys understand how important it is for us to be fiscally responsible.

Mr. COBLE. I thank the gentleman.

Mr. CANNON. I would like to yield another 5 minutes to the Ranking Member, Mr. Watt.

We have a large group of students in the audience today. We appreciate you being here. We generally are a little bit more raucous than this, but we appreciate the fact that you guys are very, very quiet and the record would not know that you were here without an overt comment.

Mr. COBLE. They hail from where?

UNIDENTIFIED SPEAKER. The Close Up Foundation here in Washington, D.C. I have 22 high school students representing the honorable States of Alabama, Arizona, California, Connecticut, Michigan and Montana.

Mr. CANNON. Thank you very much for that introduction and welcome today. This is a great program that you guys are involved in. We hope you learn a lot from it and get engaged in the political process and maybe even engaged politically running for office. Could we have a bipartisan agreement that that is a hard life?

Mr. Watt, would you like to ask an equally thought-provoking question?

Mr. WATT. Thank you, Mr. Chairman.

I just happened to hear a report the other day about what we are doing in Iraq, and I am wondering if Mr. Lewis could enlighten us on whether the resources that we are providing to assist with the preparation and prosecution of Saddam Hussein is coming out of Justice or is it coming out of Defense or how is that being han-

dled. Then if I have any more follow-up questions I will ask him in writing. I just wanted to know where to direct the questions to.

Mr. LEWIS. The Department, as you know, has a counterterrorism section within the Department that is overseeing much of the Nation's litigation with regard to terrorism. I don't have the specifics or the details, but I will be glad to get them for you and forward to you some of the issues. But the Department is looking at issues in terms of prosecutors and others to assist the Iraqi government in terms of prosecution.

Mr. WATT. I heard the figure $350 million in the news report. I have no idea whether that is an accurate figure or not. Whatever the figure is, would that come out of Defense or would it come out of Justice?

Mr. LEWIS. Frankly, Congressman, I am not 100 percent sure on where the source money is going to come from. I know that, as you know, the Justice Management Division, JMD, handles a large part of the Department's budget. We, the Executive Office, primarily focus on the field prosecutors. I will be glad to follow up on that.

Mr. WATT. That would be helpful. I didn't mean to catch you off guard. If you could find out and give us some parameters within which either you all or Defense are operating and what the impact that is going to have as a budgetary proposition, that would be helpful.

I yield back, Mr. Chairman.

Mr. CANNON. Thank you, Mr. Watt.

Let me just point out to the witnesses I am going to wrap up fairly quickly and try and stay within my 5 minutes. But I would like to start, Mr. Friedman, with a question of you.

In light of last year's DOJ Inspector General's audit report on the United States Trustee Program's efforts to prevent bankruptcy fraud and abuse—which I think was critical of the program's efforts to detect criminal fraud and abuse—what efforts has the program undertaken to respond to the audit report's findings?

Mr. FRIEDMAN. Mr. Chairman, I appreciate the opportunity to respond to the question.

The OIG report that came down about this time last year actually studied a period of time in the program prior to this Administration and my taking over at the program in March of 2002. But what the OIG report has done is assisted us and given us guidance and confirmation of the steps that we had already implemented and continue to implement to move forward in our mission of identifying and detecting and prosecuting fraud and abuse within the system.

For example, we created a significant accomplishments reporting system, a way of tracking the cases in which we are identifying fraud and abuse within the system and reporting that. We have recently rolled out a pilot program on the criminal enforcement tracking system in order to better track the cases that we have identified for criminal prosecution and the work that we do in conjunction with the U.S. Attorney's Offices around the country and Mr. Lewis' office as well, and that system will be rolled out nationwide this year.

We have taken a number of other steps that, as I said, the OIG report gives confirmation to that we are headed in the right direc-

tion which has assisted us in the identification of 41,000 actions last year and over half a billion dollars.

Mr. CANNON. We would hope to—what you are doing is very important, and we hope to give you some assistance with a Bankruptcy Reform Act, which we hope the other body acts upon it sometime this year.

Mr. Sansonetti, I would like to ask a couple of questions about the Endangered Species Act and the Equal Access to Justice payments that are going to plaintiffs. There is a lot of anxiety over here I think on both sides of the aisle but certainly out West where there are fewer people but a disproportionate number of actions on endangered species. Can you give us a little information on how many actions you have pending and the burden that is on you? In addition, what our payouts under the Equal Access to Justice were last year, if you know, and what do you anticipate about future payouts.

Mr. SANSONETTI. I will have to get back to you as far as the exact number of cases. I have mentioned we have over 7,000 cases in my entire Division, but exactly the number of those that happened to fall into the area of our wildlife and marine resource section, I don't know off the top of my head, nor do I know the exact dollar figure. But I would note the nature of the problem, and you are very correct that it is a large one.

The fact is that we have got about 25 to 27 folks that are dedicated to defending wildlife and marine resource actions nationwide. The number of dollars that are available for the Department of the Interior's Fish and Wildlife Service, for instance, and the number of dollars that are available for our National Marine Fisheries Service, which handles the endangered species cases and saltwater, offland at the Department of Commerce have not been enough to keep up with the demands on the system.

For instance, under section 4, the Endangered Species Act, once a group comes forward with a petition that says that a particular plant or a particular animal should be listed as either threatened or endangered, what do you think about that, Fish and Wildlife Service, then they have a set amount of time to get back to those petitioners and say, our biologists or our botanists looked at this and the answer is, yes, we are going to propose it for threatened or endangered listings or, no, you are wrong. We don't think it needs to be.

So many petitions are out there that the potential listings are overwhelming the number of people at the Department of Interior to look at each and every case. Consequently, they miss the deadline.

The petitioner then files suit. Interior calls us. We have to send one of our folks in from our Washington, D.C., office to Spokane, California, whatever. These cases are, frankly, laydowns for the petitioners in front of a judge. He says, hey, you had so much time under the Endangered Species Act. Did you come within your 180 days? Well, no, we haven't gotten to it yet. Well, then you lose. Then he sets a timetable, and you have to come back with a response. Because the Endangered Species Act also says that the winner in those cases gets to prevail on attorney's fees, then we have little say.

Of course, the judge is going to say, I grant you your attorney's fees. They submit their fees. We have to go over them to make sure they are reasonable. But in every event they end up taking those fees, turn around and file another lawsuit. It is a big problem.

Mr. CANNON. I ask unanimous consent to extend my time by 3 minutes.

Hearing no objection, Mr. Lewis, could I ask you a couple of questions on your situation as currently being engaged with what U.S. Attorneys have done?

We have had a couple of cases recently in Utah that were thrown out after the Federal Government made its case. In one case, the defendant was told by the FTC that they would settle with him if he would show them his financial net worth and then they would decide how much they wanted to take. He said, why don't you tell me what I did wrong and then we will work out a solution, which they refused to do.

At the end of their case, they provided a list of 350 witnesses they were going to call. That cost attorney time at $300, $400 an hour to check the witnesses out. They had to do it because they were given those witnesses and the witnesses did not make the case that the FTC said they would make and the case was dismissed. The man got $200,000, as I recall, in attorney's fees, leaving him a million dollars shy because the FTC had the opportunity to beat him up. Now you had a U.S. Attorney who was present during the presentation of that case.

In addition to that, we had a very famous case in Salt Lake City with the Salt Lake Olympic Committee. That was a case right out of Washington, but you also had a U.S. Attorney from Utah present, did you not, at that case?

Mr. LEWIS. We actually didn't have anyone in the Olympic case from the U.S. Attorney's. Paul Warner had been conflicted out.

Mr. CANNON. Dropping that case since you didn't have any involvement in it, this is a terrible problem when the prosecutorial authority is misused and dramatically misused. The three witnesses that were called in the FTC case didn't say anything near what it would take to make a case. I did not look at the record, but I looked at what the judge said afterward, and I looked at what the witnesses had said afterward. They didn't get in the ball park. So it looks like a terrific misuse of prosecutorial discretion.

How do you deal with agencies like the FTC.

Mr. LEWIS. It is likely that the U.S. Attorneys Office itself wouldn't have been involved in a prosecution involving the FTC. I am not sure if it was a regulatory action where the FTC would have gone in to enforce a regulation.

Mr. CANNON. You had a U.S. Attorney, I think, there with the FTC lawyers. They were presenting the case, and he was the local counsel. But do you train your U.S. Attorneys to look at those cases where they are sitting at the bar with members of the prosecution team?

Mr. LEWIS. We do, and what occurs often is, working with the gentlemen at this table, when a matter that is uniquely within the province of, say, the Civil Division, the U.S. Attorney will act as a local counsel where we try to go in. Many times, it doesn't hap-

pen; sometimes it does. We go in and attempt to participate in the case, attempt to assist in any way we can.

I am not familiar specifically with this FTC case.

Mr. CANNON. I am only using the FTC case because it is a pretty dramatic example. But let me focus the question more clearly.

If a U.S. Attorney goes into a case brought by the FTC or another agency where the U.S. Attorney is acting as local counsel, how much authority or influence do they have over the case and how it is presented? Do they have the time to look at the case and say, wait, this is a stinker, or do they just have to walk in and sit down and hope the agency has a competent team?

Mr. LEWIS. I like to think that we, more often than not, perform the latter in terms of trying to work with the outside agency.

Again, going back to my experience in Miami as a U.S. Attorney, it wasn't unusual that we would be working with the Tax Division, Civil Rights Division, very active with the ENRD, Civil Division where we would be working together. There were those instances where the U.S. Attorney's Office was not actively involved—Social Security cases, for example, that would be prosecuted. Because of the volume, we just didn't have the time or the opportunity to actively participate in those kinds of cases.

I do know one thing that is important is that the U.S. Attorney who is in that district, she or he—as far as the judges are concerned, as far as the community is concerned, as far as the legal bar is concerned, she or he is responsible for the litigation that occurs in that district. So that is something I will be glad to look at and follow up on, because it is an important issue.

Mr. CANNON. Actually, in this particular case, I would like that follow-up. Because this seems to me to be one of the cracks where we have a huge potential failure of the system. In the case where we have a million dollars this guy spent defending himself, heaven help the guy who doesn't have a million dollars to stand against the Government, the FTC and not the U.S. Attorney. I appreciate that.

Without objection, the record will be left open 7 days for further questions. We do have many questions, and I wish we had more time today, but we are probably getting a good staffing out of this anyway. I want to thank my staff and the minority staff that do a marvelous job on this Committee. With that, we will adjourn.

[Whereupon, at 4 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

POST-HEARING RESPONSES FROM THE HONORABLE THOMAS L. SANSONETTI

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 21, 2004

The Honorable Chris Cannon
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Attached are the responses to follow-up questions submitted to Mr. Thomas J. Sansonetti, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, following the Subcommittee's March 9, 2004, hearing on the "Reauthorization of the United States Department of Justice: Environment and Natural Resources Division, Civil Division, Executive Office for United States Attorneys, Executive Office for United States Trustees, and Office of Solicitor General." The attachment also includes a response to a question that the Chair asked at the hearing about the Environment and Natural Resources Division's Endangered Species Act caseload.

We hope that this information is helpful. Please do not hesitate to contact this office if we may be of further assistance.

Sincerely,

William E. Moschella
Assistant Attorney General

Attachment

cc: The Honorable Melvin L. Watt
Ranking Member

**ANSWERS BY ASSISTANT ATTORNEY GENERAL TOM SANSONETTI
TO QUESTIONS FOR THE RECORD FROM HEARING ON
"REAUTHORIZATION OF THE UNITED STATES DEPARTMENT OF JUSTICE:
ENVIRONMENT AND NATURAL RESOURCES DIVISION, CIVIL DIVISION,
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, EXECUTIVE OFFICE
FOR UNITED STATES TRUSTEES, AND OFFICE OF SOLICITOR GENERAL"
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
HOUSE COMMITTEE ON THE JUDICIARY
MARCH 9, 2004**

Written Questions

1) **In your written testimony, you indicate that the requested increase of funds designated for the Hazardous Materials Transportation Initiative has two purposes, the first of which is to "help the Department achieve its strategic goal of protecting America against the threat of terrorism by making it more difficult for terrorists and other criminals to transport hazardous materials ("hazmat") illegally, thereby helping to prevent, disrupt, and defeat terrorist operations before they occur". The increase requested is only $594,000. How, exactly, will this increase of funds specifically aid in the effort to combat terrorism, and how will it help preventively?**

(A) Experts who have considered the issue of possible terrorist targets in the wake of the September 11th attacks have identified our Nation's hazmat transportation and handling system as a vulnerable area. Deaths and injuries could result if a terrorist with a fraudulent hazmat license commandeered a tractor trailer or a vessel laden with flammable or poisonous materials, or attacked a pipeline or other facility handling hazmat that does not have proper safety and security measures in place. Because uncovering and prosecuting hazmat crimes can help to serve as a deterrent to terrorists or other criminals, the amount requested for this initiative is in addition to the Department's overall counterterrorism funding levels. The Environment and Natural Resources Division's (ENRD) Environmental Crimes Section, which has considerable experience in carrying out similar initiatives, would use a substantial portion of the amount requested to prosecute hazmat cases that result from the initiative, and to train other Federal, state, and local prosecutors and investigators in uncovering and prosecuting hazmat crime. Just as other initiatives have served to reduce crime in other areas, we believe that teamwork between the Environmental Crimes Section and prosecutors and investigators nationwide will serve to decrease the likelihood of criminal activity involving the hazmat system. Also, like our other initiatives, this initiative is an example of the ENRD's cost-effective work to protect the American people.

2) **According to your testimony, there may be substantial similarity to the upcoming Tribal Trust cases, for which you are requesting an additional $14 million dollars, and the *Cobell* litigation which originated in your Division.**

   a. **What safeguards do you anticipate might prevent the same ethical and**

litigation pitfalls that befell the Division and the Department in the *Cobell* case from recurring in this upcoming litigation?

b. Additionally, the named tribes currently are claiming damages of $200 billion, but only represent less than 7 percent of all potential claimants. That means that potential liability for the United States could reach nearly $3 trillion. What forecast can you provide as to the likelihood of these cases being substantial and, if they may be, will a $14 million infusion into the Division be sufficient to guarantee successful defense of these actions?

(A) While there are some similarities between the Tribal Trust cases and *Cobell*, our hope is to avoid from the outset another Cobell-like situation by using the $14 million that we have requested to hire a team of attorneys dedicated to effectively defending the tribal trust cases, which we believe will also facilitate reaching a mutually acceptable resolution of these cases. Also, much of the requested $14 million will be used to cover the expenses involved with the discovery and management of the documents required for litigation, which is critical to successful resolution of the cases. We estimate that the current cases will require the review of approximately 46 million pages of documents from multiple agencies to locate relevant information. A portion of these documents date back to the nineteenth century and are extremely difficult to collect and unravel from a multitude of locations.

The $14 million request is based upon our assessment of the government's defensive needs for those cases that have already come in the door, not other cases that may be filed. Recent events highlight the need to be vigilant about avoiding the *Cobell* pitfalls. In two Tribal Trust cases – *The Pueblo of Laguna v. U.S.* and *Jicarilla Apache Nation v. U.S.* – the Court of Federal Claims entered orders the week of March 15, largely drawn from the *Cobell* litigation, that impose far-reaching document preservation obligations on the Department of the Interior, and a host of other Executive agencies. As the Court stated:

> If nothing else such a preservation order will reemphasize that defendant needs to take extraordinary precautions, at least equivalent to those more recently adopted in *Cobell*, to prevent either the purposeful or inadvertent destruction or loss of records. Such an order also serves as fair warning that sanctions may be imposed should defendant instead fail adequately to protect records relevant to this action.

The measures required to comply with these orders, if they are not narrowed, could be substantial.

Although your point is well taken about the number of tribes that have filed so far and the number remaining who might file, we are unable to speculate about the likelihood or size

of potential claims against the government. There can be no question, however, that any such claims would only add to the already substantial amounts being sought in the cases on file.

3) **There has been a good deal of attention – particularly here on Capitol Hill – focused on the new so-called "new source review" provisions of the Clean Air Act. I understand your Division is handling several pending enforcement actions stemming from past alleged violations, as well as the defensive litigation regarding proposed reforms to those standards. I further understand that these are complex, resource intensive cases but that you just recently filed another new action last month for alleged violations of new source review provisions. Would you briefly describe the history of your Division's involvement and the current status of the various NSR/PSD lawsuits?**

(A) As your question indicates, ENRD has been devoting significant resources to cases involving the Clean Air Act's new source review (NSR) provisions, including both enforcement and defensive cases. We have brought enforcement actions for NSR violations in several industrial sectors, including the wood products industry, and the petroleum refining industry, and have had considerable success in cleansing our Nation's air, and otherwise obtaining compliance with the law. For example, in the refinery sector, we have settlements resolving violations in a significant portion of our domestic refining capacity. In just one of our cases from last fall, the refiner agreed to reduce emissions of air pollutants by almost four thousand tons in total.

Although these settlements are great news for the American people, the area of our NSR work that draws the most attention is our coal-fired utility cases. ENRD first brought a series of nine cases on behalf of the Environmental Protection Agency against coal-fired utilities in 1999. Of these, one has been settled, and the others are pending. Another four actions have been filed by this Administration, with three of the four already being settled. Of the ten pending cases, we have tried the issue of liability in two, for a total of two months of trial so far. We were successful in one, and are now preparing for the remedy phase of trial. We are awaiting decision in the other. Five of the remaining eight cases are in active discovery, with trial dates set for various times in the next two years. Recently, we moved to reopen discovery in the Alabama Power case.

We have also filed for certiorari in *Tennessee Valley Authority v. EPA*, and are defending two EPA rulemakings that would change the current NSR provisions. In one of the rule challenges, the United States will file its brief in August of this year; in the other, the court has not yet set a briefing schedule.

Recent press accounts, along with one Senator, have raised questions about Assistant Attorney General (AAG) Sansonetti's testimony before a joint hearing of the Senate Judiciary and Environment and Public Works Committees on July 16, 2002. On June 13,

2002, a few weeks before that hearing, the Environmental Protection Agency had issued an announcement concerning proposed NSR rule changes. However, it did not decide on which proposal it would adopt until December 2002, well after the July 16 hearing. At both the hearing and in written questions submitted after the hearing, AAG Sansonetti was asked about the impact of EPA's proposals, which had not been finalized, on ongoing NSR litigation. AAG Sansonetti responded that:

> Based on years of bringing enforcement actions, it is our experience that defendants will raise a wide variety of issues in their defense. Although we generally can anticipate such issues, e.g. potential use of EPA's June 13 announcement, and how we respond to them depends, among other things, on the context in which they are raised. At the time of my testimony, no defendant in any of our NSR cases had raised EPA's June 13 announcement of its proposals as a basis for dismissal, and that continues to be the case. Since then, one company has raised the announcement in a brief, but not in the context of requesting a dismissal.

This was true at the time, and continues to be so. It has also been reported that a letter had been sent to the Department of Justice asking that AAG Sansonetti be investigated. This is incorrect, as no such letter has ever been received. As described above, the Department of Justice has been and will continue to vigorously enforce existing NSR law.

Response to Chairman's Question At The Hearing

At the March 9, 2004, hearing, the Chairman asked AAG Sansonetti how many Endangered Species Act (ESA) cases ENRD had pending, and how much has been paid in attorneys' fees in ESA cases over the last year. After reviewing ENRD's records, we have determined that ENRD has approximately 251 ESA cases pending, and that the Federal government has paid approximately $2.67 million in attorneys' fees under the ESA's attorneys' fees provision in the last year. This figure does not include fees paid under the Equal Access to Justice Act, under which the government also pays attorneys' fees in Administrative Procedure Act cases which involve ESA-related questions not falling under the ESA fee-shifting provision. We do not track these fees, as they are paid directly by individual client agencies rather than the Judgment Fund.

POST-HEARING RESPONSES FROM THE HONORABLE PETER D. KEISLER

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

May 24, 2004

The Honorable Chris Cannon
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Please find enclosed responses to the Subcommittee's questions for Assistant Attorney General Peter Keisler, arising from his March 9, 2004, appearance before the Subcommittee concerning reauthorization of the Justice Department's Civil Division.

We appreciate the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this report.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Melvin L. Watt
Ranking Minority Member

Questions for the Honorable Peter Keisler, Assistant Attorney General, Civil Division from the Honorable Chris Cannon, Chairman Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary

1) What are the estimated funding requirements for the Radiation Exposure Compensation Program Act (RECA) Trust Fund for FY 2006?

Answer: While the GAO published some long term projections of awards under the RECA program in its April 2003 report ("RADIATION EXPOSURE COMPENSATION: Funding to Pay Claims May Be Inadequate to Meet Projected Needs"), the Department has refined annual funding requirements through Fiscal Year ("FY") 2005. These requirements are addressed in the President's FY 2005 budget request. We currently are reviewing the most recent trends in order to determine the most accurate projections possible for FY 2006.

2) Why, in your opinion, have RECA claims not declined as sharply as assumed when the funding caps were established by the FY 2002 National Defense Authorization Act?

Answer: The 1990 Radiation Exposure Compensation Act ("RECA" or "the Act") and the RECA Amendments of 2000 were designed to provide compensation to individuals harmed as a result of their employment in the uranium industry or exposure to fallout from nuclear weapons testing. The RECA statute created a trust fund to pay eligible claimants. The National Defense Authorization Act for Fiscal Year 2002 made the RECA trust fund a mandatory appropriation and established annual funding caps through FY 2011 totaling $655 million.

Receipts and awards peaked, as expected, in FY 2001 and 2002. They are declining gradually. However, based on the data collected over the last three years, no significant reduction is expected before FY 2005. Any estimation, however, is approximate. Calculations for disease incidence and mortality rates over broad populations such as those covered by the Act can only be generally described. The caps set by the National Defense Authorization Act assumed a sharp decline in the number of claims filed and approved each year and thus a decline in the value of awards. The Defense Authorization caps, however, were based on a possible statutory change that would have reduced the scope of the RECA Amendments of 2000. That proposal was never introduced. Initially, the Congressional Budget Office ("CBO") estimated the total costs of the Amendments, as enacted, at $855 million, reflecting $200 million more than the amount appropriated through FY 2011. Thus, the Defense Authorization Act caps underestimated the overall cost.

3) Assuming future RECA Trust Fund Requirements exceed the funding cap, would you recommend that Congress seek a legislative solution (*i.e.* additional authorization) or would another request for discretionary resources in the coming fiscal years be the more efficient route?

Answer: The President's FY 2005 request sought a discretionary appropriation to supplement existing authorized caps. Congress is currently deliberating on the request. Future estimates of Trust Fund payments for the outyears will better determine whether claims will continue to exceed the funding caps.

4) Given the escalating number of cases to be handled by the Office of Immigration Litigation, are structural changes to the program also necessary? How does the Civil Division plan to manage OIL in the future?

Answer: Over the past 22 years, OIL's federal court docket has grown from fewer than 400 to more than 13,000 new case receipts each year. OIL has responded (a) by building a system of small litigation teams (initially four, and now eight teams) that provide flexibility and encourage collegiality and productivity; (b) by developing rigorous and continuing training for its staff and its counterparts in the United States Attorney Offices; and (c) by initiating aggressive outreach efforts to all of the immigration-interested Department components and agencies to improve communication and coordination. This management model and structure have proven effective for over two decades. Thus, we are confident that OIL will continue to provide a proper defense of its clients' policies and determinations without any changes to its management model or structure.

5) Please describe the Division's approach to fostering and supporting *qui tam* litigation under the Federal False Claims Act.

Answer: The Division has made enforcement of the False Claims Act a priority. As nearly four out of five new fraud matters docketed each year are *qui tam* suits, this of course means that *qui tam* litigation is an utmost priority and our success in this area bears this out. Seventy-five percent of our recoveries since 1998 have been associated with *qui tam* suits, that is, $6 billion out of a total of $8 billion in total fraud recoveries over the last six years.

The Division fosters this success by a strong emphasis on working as a team. Members of the team include United States Attorneys' offices, client agencies, Offices of the Inspector General, the Federal Bureau of Investigation, state health care and law enforcement agencies, and, of course, relators and the resources they bring to bear on a case. Many of the Division's cases (for example, HCA) involve the integration of relator's counsel with Government counsel.

This team approach and the importance of a coordinated effort is taught at training programs geared toward the Government's affirmative civil enforcement attorneys, investigators, auditors, and paralegals. These programs place a heavy emphasis on *qui tam* litigation and the dynamics of working with relators.

In addition, I have met with groups of relators' counsel and defense counsel to consider their views about our enforcement efforts and suggestions for improving the process and making

it more efficient. The Division's goals are to reduce fraud through education and deterrence and to remedy fraud once it occurs. Undoubtedly, *qui tam* suits are one of the most valuable tools to achieve these goals.

Please include responses to the following:

a. For each year from 1998 to 2003, what percentage of the False Claims Act cases on your docket were whistleblower-initiated lawsuits? For the same period, what percentage of the Division's recoveries resulted from whistleblower-initiated lawsuits?

Although we do not maintain historic data on the number of matters pending from year to year, a fair measure of the balance between whistleblower-initiated suits and non-whistleblower matters can be seen in the number of new fraud matters the Division dockets each year. As shown below, since 1998, an average of 79% of the new fraud matters docketed by the Division were initiated by whistleblowers and 75% of the recoveries were made in whistleblower-initiated suits.

Fiscal Year	1998	1999	2000	2001	2002	2003
Percentage of New Fraud Matters Initiated by Whistleblowers	80%	78%	79%	78%	84%	78%
Percentage of Recoveries Made in Whistleblower-Initiated Suits	76%	72%	77%	72%	91%	68%

b. For each year from 1998 to 2003, what percentage of *qui tam* cases filed by relators has the United States joined?

Of those *qui tam* cases in which an election decision was made, the United States intervened in an average of 22% annually since 1998.

Fiscal Year	1998	1999	2000	2001	2002	2003
Percentage of Qui Tam Suits in Which the United States Intervened	25%	16%	28%	25%	21%	17%

c. During the last three years, how often has the Division pursued damages for the full treble amount, as authorized by Congress under the Federal False Claims Act, versus opting for a lesser settlement? Of those cases for which treble damages were pursued, how many cases resulted in full treble recoveries?

Division attorneys begin each case on the premise that the United States is entitled to recover full treble damages plus civil penalties under the Act and that only by recovering this amount is the United States compensated for the high cost of fraud, including investigation, prosecution, and restoration of lost public funds. The reality of fraud litigation, however, renders it impossible to put a number on how many cases settle for treble damages. Calculating the Government's damages is not an easy matter. Many, if not most, of our cases involve complex schemes and oftentimes multiple schemes.

First, we must determine whether the alleged violation is indeed a false claim, e.g., whether a Medicaid claim is contrary to program regulations or an invoice under a Government contract is for products or services that fail to comply with the terms of the contract. The complexity of Government programs and contracts inevitably results in many grey areas. Second, we must establish whether a false claim was made knowingly. Although we would never pursue a case without substantial evidence of knowledge, smoking gun memoranda are rare and defendants frequently assert their ignorance and innocence in submitting a false claim or providing nonconforming goods or services, or the Government's explicit or tacit acceptance of their conduct. Finally, we must assess damages, which raises issues of the scope of the Government's loss, the financial impact on the Government, the value of the product or service, and, when the provider's or the contractor's costs are at issue, how those costs are calculated (not an easy matter when the defendant is a major national or multinational corporation with a complex accounting system, as many of our defendants are).

Each of these components of a False Claims Act case presents a measure of litigative risk that may result in the Division reducing its initial assessment of damages or accepting less than full treble damages in settlement. Add to this settlements for lesser amounts with defendants who clearly lack the financial resources to pay full treble damages and it becomes apparent that the ultimate measure of a good settlement can only be made in an individualized, case-by-case determination.

d. What is the average length of time of most *qui tam* cases?

The average length of a *qui tam* case is about a year and nine months, but I hasten to add that there is nothing "average" about a *qui tam* case or any fraud litigation. The length of a case depends on the complexity of the allegations; the strength of the evidence the relator brings to the case; the resources available to prosecute the case, including relator's and Government counsel, investigators, auditors, and other experts; the cooperation (or, alternatively, the dilatory tactics) of the defendants; the number of defendants; whether there are parallel criminal proceedings to which the civil proceedings appropriately should defer; the speed with which the court schedules hearings and renders decisions; and whether there are any appeals. While some *qui tam* actions are dismissed within sixty days (the statutory period for investigation without any extensions), there are others that are not resolved for five years or more.

e. How often are there disputes between False Claims Act whistleblowers and the Justice Department over the amount of the award to which the whistleblower is entitled? How have such disputes, if any, been resolved?

The amount of the relator's share is amicably negotiated between the Government and the relator in the vast majority of *qui tam* suits. There have probably been fewer than twenty cases in which a court has had to resolve the issue in the 18 years since the 1986 Amendments were passed.

f. Does the Civil Division generate internal guidance for reviewing, joining, prosecuting and settling *qui tam* cases and/or for managing its relationship with relators and relators' counsel? Please provide a copy of such guidance.

In most respects, the criteria for reviewing, joining, prosecuting, and settling *qui tam* cases are no different than for any fraud case. In each case, the Division determines if there is a sound legal and factual basis for alleging the knowing submission of false claims by the defendant. Guidance specific to *qui tam* actions includes Relator's Share Guidelines, which set forth the criteria for determining the relator's share; form notices of intervention and declination; and a form letter sent to relators in declined *qui tam* cases informing them of the nature of the Government's continuing role in the litigation and their rights and obligations as the party assuming responsibility for litigating the case. These documents are attached. In addition, the Division provides extensive training and written materials.

g. What, if any, aspects of the Division's *qui tam* program need improvement and/or further assistance?

I believe that there are adequate incentives and publicity to encourage the filing of meritorious *qui tam* cases. There are always more allegations of fraud than there are investigators or auditors to investigate them, both in the Department of Justice and in the client agencies. We appreciate the support we have received from Congress as well as the continued support of the audit and investigative functions at agencies to ensure that federal programs are appropriately policed for fraud and that referrals of allegations of waste, fraud, and abuse are made to the Civil Division.

6) The Civil Division has had a twelve-fold increase in the number of claims filed under the Vaccine Injury Compensation Program, in large part due to claims alleging that thimerosal caused autism. What is the status of these cases. Does the Civil Division anticipate this trend to continue or abate?

Answer: On July 3, 2002, the Chief Special Master of the U.S. Court of Federal Claims created the Omnibus Autism Proceeding, by which procedures and a schedule were established to resolve the general question of whether vaccines cause autism. Nearly all cases alleging vaccine-caused autism are part of the Omnibus Autism Proceeding, and are

"stayed" pending a decision by the presiding special master on the general issue of whether vaccines can cause autism. Thereafter, the findings will be applied in each individual case. Presently, petitioners are seeking extensive discovery from various governmental health agencies and third parties. Previously established discovery deadlines and a trial date were recently lifted by the special master; no new dates have been set.

As estimated by the chief special master in July, 2002, approximately "3,000 to 5,000 such Program petitions (possibly even more)" are expected. As of March 9, 2004, the presiding special master reported a total of approximately 3,700 such cases have been filed. While a heavy volume of new claims is expected through FY 2004, the Civil Division anticipates that the filing of cases alleging autism will abate, with new filings expected to fall to 500 in 2005. Once the special master issues a decision and releases the stay, a projected 4,800 cases pending at the beginning of 2005 must be resolved individually.

7) How many *Winstar* cases remain unresolved? What is their status, and when do you anticipate a final resolution to these cases? What has been Division's resource requirement (in terms of number of attorneys and man-hours) to handle this litigation?

Answer: Sixty-four of the 122 *Winstar* cases have been fully resolved. Thirty-six of these cases were voluntarily dismissed, eight were settled, and 20 were adjudicated. In only one of the adjudicated cases were any damages awarded to the plaintiffs. To date, we have defeated over $18 billion in known claims. The amounts awarded in judgments and settlements to date have averaged around six cents on the dollar of claims.

Of the 58 remaining cases, three are before the Supreme Court, 15 are before the Court of Appeals for the Federal Circuit, four have been remanded by the appellate court to the Court of Federal Claims for further proceedings, and 36 have not yet received a final trial court decision. Of the 36 cases remaining before the trial court, all discovery has been completed, two are under submission, at least ten are scheduled for trial during the next seven months, and the remainder are subject to resolution by dispositive motion or trial.

We anticipate that most of the remaining cases will be resolved over the next few years. Decisions by the appellate court have clarified liability issues and eliminated many damages claims. However, the claims that remain are fact-intensive and frequently require resolution by trial. The plaintiffs have appealed virtually every adverse decision.

Since the Supreme Court's decision in *Winstar* in 1996, the Civil Division has devoted approximately 700,000 hours to this litigation. The number of attorneys assigned has varied depending upon trial and discovery schedules, and the press of other litigation, from a peak of 55 to the current level of 30. By contrast, the plaintiffs are represented by over 50 law firms. We expect the number of attorneys and hours to increase this fiscal year because of the unprecedented number of trials (possibly as many as 15) that have or will be scheduled, as well as the increasing number of appeals.

8) In the U.S. Attorneys FY 2002 Annual Statistical Report, there is a chart which depicts the number of civil cases disposed of by trial from FY 1993 to FY 2002. This chart demonstrates a spike in cases disposed of by trial between 2000 and 2001 – from below 500 in 1999 to over 3,000 around 2000. The Report explains that the spike was due to the use of the LIONS case management system beginning in 2000, which more accurately represents the outcomes in civil cases. Does this explanation completely explain the six-fold increase in civil cases disposed of by trial? Has this increase required the Civil Division to lend more support to U.S. Attorneys in the field or assume case responsibility that the Division had not previously? Has this affected the Civil Division's ability to manage caseloads?

Answer: The Executive Office for United States Attorneys (EOUSA) maintains centralized computer data files of case management information (LIONS). The 94 United States Attorneys' Offices ("USAOs") provide this information. LIONS files are used to publish an annual statistical report of civil and criminal litigation and to produce numerous recurring reports for various governmental entities.

Codes are used to input case management information into LIONS. One such set of codes pertains to the manner in which civil cases are disposed of, *i.e.*, "Judgment/Order/Decision for U.S. (Jury Trial) (Nonjury Trial) (No Trial)," and the same three categories of disposition (judgment, order, or decision) for the opposing party. These disposition codes were developed for use commencing November 1, 1999, and for the first time, included a definition of "trial." As of November 1, 1999, "trial" broadly includes any "hearing that is evidentiary; that is, [one in which] testimonial evidence is taken." This expanded definition includes for the first time, civil matters such as bankruptcy adversary proceedings and mental competency hearings. Prior to 1999, no formal definition for "trial" existed in the civil disposition codes. This may have resulted in USAOs not reporting cases not considered to have been disposed of by trial under a more restrictive definition. Accordingly, the apparent spike in the number of cases disposed of by trial between 2000 and 2001 was not due to the use of the LIONS case management system, but instead was due to the revision of civil disposition codes, providing for the first time a more expansive definition of "trial."

December 10, 1996

RELATOR'S SHARE GUIDELINES

Section 3730(d)(1) of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33, provides that a qui tam relator, when the Government has intervened in the lawsuit, shall receive at least 15 percent but not more than 25 percent of the proceeds of the FCA action depending upon the extent to which the relator substantially contributed to the prosecution of the action. When the Government does not intervene, section 3730(d)(2) provides that the relator shall receive an amount that the court decides is reasonable and shall be not less than 25 percent and not more than 30 percent.

The legislative history suggests that the 15 percent should be viewed as the minimum award - a finder's fee - and the starting point for a determination of the proper award. When trying to reach agreement with a relator as to his share of the proceeds, or proposing an amount or percentage to a court, we suggest that you begin your analysis at 15 percent. Then consider if there are any bases to increase the percentage based on the criteria set forth below. Having done this, consider if that percentage should be reduced based on the second set of criteria. Of course, absent one of the statutory bases for an award below 15 percent discussed at the end of these guidelines, the percentage cannot be below 15 percent (or 25 percent if we did not intervene).

Items for consideration for a possible increase in the percentage

1. The relator reported the fraud promptly.

2. When he learned of the fraud, the relator tried to stop the fraud or reported it to a supervisor or the Government.

3. The qui tam filing, or the ensuing investigation, caused the offender to halt the fraudulent practices.

4. The complaint warned the Government of a significant safety issue.

5. The complaint exposed a nationwide practice.

6. The relator provided extensive, first-hand details of the fraud to the Government.

7. The Government had no knowledge of the fraud.

8. The relator provided substantial assistance during the investigation and/or pretrial phases of the case.

9. At his deposition and/or trial, the relator was an excellent, credible witness.

10. The relator's counsel provided substantial assistance to the Government.

11. The relator and his counsel supported and cooperated with the Government during the entire proceeding.

12. The case went to trial.

13. The FCA recovery was relatively small.

14. The filing of the complaint had a substantial adverse impact on the relator.

Items for consideration for a possible decrease in the percentage

1. The relator participated in the fraud.

2. The relator substantially delayed in reporting the fraud or filing the complaint.

3. The relator, or relator's counsel, violated FCA procedures:

   a. complaint served on defendant or not filed under seal
   b. the relator publicized the case while it was under seal
   c. statement of material facts and evidence not provided.

4. The relator had little knowledge of the fraud or only suspicions.

5. The relator's knowledge was based primarily on public information.

6. The relator learned of the fraud in the course of his Government employment.

7. The Government already knew of the fraud.

8. The relator, or relator's counsel, did not provide any help after filing the complaint, hampered the Government's efforts in developing the case, or unreasonably opposed the Government's positions in litigation.

9. The case required a substantial effort by the Government to develop the facts to win the lawsuit.

10. The case settled shortly after the complaint was filed or with little need for discovery.

11. The FCA recovery was relatively large.

These items are not meant to be an exhaustive list of the criteria one should consider when trying to determine an appropriate award for a relator, but they do constitute many of the factors that routinely should be considered.

Finally, please note that section 3730(d)(1) limits the relator to no more than 10 percent of the proceeds when the complaint is based primarily on public information and that section 3730(d)(3) allows the court to reduce the percentage below 15 percent if the relator planned and initiated the fraud and requires the court to dismiss the relator if he is convicted for the actions giving rise to the submission of the false claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF **[XXX]**

UNITED STATES OF AMERICA ex rel. **[RELATOR]**,	)	
Plaintiff,	)	Civil No. **[XXX]**
v.	)	**FILED UNDER SEAL**
[DEFENDANT],	)	
Defendant.	)	

THE GOVERNMENT'S NOTICE OF ELECTION TO INTERVENE

Pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(2) and (4), the United States notifies the Court that it hereby intervenes and intends to proceed with this action. The United States intends to file its complaint within _____ days.

The Government requests that the relator's Complaint, this Notice, and the attached proposed Order be unsealed. The United States requests that all other papers on file in this action remain under seal because in discussing the content and extent of the United States' investigation, such papers are provided by law to the Court alone for the sole purpose of evaluating whether the seal and time for making an election to intervene should be extended.

A proposed order accompanies this notice.

Respectfully submitted,

[XXX]
Assistant Attorney General

[XXX]
United States Attorney

[XXX]
Assistant United States Attorney

MICHAEL F. HERTZ
[XXX]
Attorneys, Civil Division
Commercial Litigation Branch
Post Office Box 261
Ben Franklin Station
Washington, D.C. 20044
Telephone: **[XXX]**

Dated: **[XXX]**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF **[XXX]**

UNITED STATES OF AMERICA	)	
ex rel. **[RELATOR]**,	)	
	)	
Plaintiff,	)	
	)	Civil No. **[XXX]**
v.	)	
	)	**FILED UNDER SEAL**
[DEFENDANT],	)	
	)	
Defendant.	)	

ORDER

The United States having intervened in this action, pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(4), the Court rules as follows:

IT IS ORDERED that,

1. the relator's complaint, the Government's Notice of Intervention, and this Order be unsealed;

2. the United States serve its Complaint upon defendant, together with this Order, within _____ days;

3. all other papers or Orders on file in this matter shall remain under seal; and

4. the seal shall be lifted on all matters occurring in this action after the date of this Order.

IT IS SO ORDERED,

This _____ day of _____, 2003.

_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF **[XXX]**

UNITED STATES OF AMERICA	)	
ex rel. **[RELATOR]**,	)	
	)	
Plaintiff,	)	
	)	Civil No. **[XXX]**
v.	)	
	)	**FILED UNDER SEAL**
[DEFENDANT],	)	
	)	
Defendant.	)	

THE GOVERNMENT'S NOTICE OF ELECTION TO DECLINE INTERVENTION

Pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(4)(B), the United States notifies the Court of its decision not to intervene in this action.

Although the United States declines to intervene, we respectfully refer the Court to 31 U.S.C. § 3730(b)(1), which allows the relator to maintain the action in the name of the United States; providing, however, that the "action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." Id. Therefore, the United States requests that, should either the relator or the defendant propose that this action be dismissed, settled, or otherwise discontinued, this Court solicit the written consent of the United States before ruling or granting its approval.

Furthermore, pursuant to 31 U.S.C. § 3730(c)(3), the United States requests that all pleadings filed in this action be served upon the United States; the United States also requests that orders issued by the Court be sent to the Government's counsel. The United States reserves its right to order any deposition transcripts and to intervene in this action, for good cause, at a later date.

Finally, the Government requests that the relator's Complaint, this Notice, and the attached proposed Order be unsealed. The United States requests that all other papers on file in this action remain under seal because in discussing the content and extent of the United States' investigation, such papers are provided by law to the Court alone for the sole purpose of evaluating whether the seal and time for making an election to intervene should be extended.

A proposed order accompanies this notice.

Respectfully submitted,

[XXX]
Assistant Attorney General

_____
[XXX]
United States Attorney

_____
[XXX]
Assistant United States Attorney

_____
MICHAEL F. HERTZ
[Reviewer]
[Attorney]
Attorneys, Civil Division
Commercial Litigation Branch
Post Office Box 261
Ben Franklin Station
Washington, D.C. 20044
Telephone: **[XXX]**

Dated: **[XXX]**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF **[XXX]**

UNITED STATES OF AMERICA	)	
ex rel. **[RELATOR]**,	)	
	)	
Plaintiff,	)	
	)	Civil No. **[XXX]**
v.	)	
	)	
[DEFENDANT],	)	
	)	
Defendant.	)	

ORDER

The United States having declined to intervene in this action pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(4)(B), the Court rules as follows:

IT IS ORDERED that,

1. the complaint be unsealed and served upon the defendant by the relator;

2. all other contents of the Court's file in this action remain under seal and not be made public or served upon the defendant, except for this Order and The Government's Notice of Election to Decline Intervention, which the relator will serve upon the defendant only after service of the complaint;

3. the seal be lifted as to all other matters occurring in this action after the date of this Order;

4. the parties shall serve all pleadings and motions filed in this action, including supporting memoranda, upon the United States, as provided for in 31 U.S.C. § 3730(c)(3). The United States may order any deposition transcripts and is entitled to intervene in this action, for good cause, at any time;

5. all orders of this Court shall be sent to the United States; and that

6. should the relator or the defendant propose that this action be dismissed, settled, or otherwise discontinued, the Court will solicit the written consent of the United States before ruling or granting its approval.

IT IS SO ORDERED,

This _____ day of _____, 2003.

_____
United States District Judge

U.S. Department of Justice

Civil Division

MFH:XXX:XXXxxx
46-XX-XXXX

Tel. (202) XXX-XXXX

Washington, D.C. 20530

[date]

[Counsel for relator and defendant]

Re: U.S. ex rel. **[relator]** v. **[defendant]**
[docket no. and court]

Dear **Mr./Ms. [ ]**:

As you should be aware, the United States has declined to intervene in this case. I thought it would be helpful to remind you of certain provisions in the False Claims Act and to advise you of certain policy considerations that may assist you in litigating or settling this case. While the United States is not a litigant to the underlying action, the United States remains the real party in interest, entitled to the majority of any damages and penalties recovered on its behalf. 31 U.S.C. 3730(d). Therefore, please note the following:

1. Decision to decline intervention

Our decision to decline should not be construed as a statement about the merits of the case. Indeed, the Government retains the right to intervene at a later date upon a showing of good cause. 31 U.S.C. § 3730(c)(3).

2. Discovery

The United States is a third party for discovery purposes, and any discovery requests should comply with Federal Rule of Civil Procedure 45. Documents should be sought pursuant to a

subpoena *duces tecum*. In most cases, if you wish to question a government employee, you will have to do so by deposition. (Please note that you also may have to comply with the agency's "Touhy regulations." See, for example, 32 C.F.R. § 97.6 (Department of Defense).) The Government will object to requests for admissions or answers to interrogatories. Of course, the Government also may assert any appropriate privileges.

3. Service of pleadings

When the Government submitted its notice of declination, it invoked its statutory right, 31 U.S.C. § 3730(c)(3), to receive copies of all pleadings filed by the litigants. Accordingly, please be sure to send a copy of all documents filed with the Court to me.

4. Amended Complaint

If an amended complaint is filed that differs substantively from the original complaint, it should be filed under seal and should not be served upon the defendant, pursuant to the False Claims Act's provisions on initiating actions, 31 U.S.C. § 3730(b)(2). Such an amended complaint would initiate a new sixty-day seal period as to the new matters raised in the amended complaint, subject to extensions, during which the United States would conduct an investigation and elect whether to intervene in and proceed with the action. Substantive amendments to an original complaint that would trigger a new sixty-day investigatory period include any new allegations of fraud or the addition of defendants not named in the complaint.

5. Settlement

The parties can dismiss this action only with the consent of the Department of Justice. 31 U.S.C. § 3730(b)(1). Thus, a settlement of this case requires the consent of this office. Accordingly, we recommend that once the subject of settlement is raised, the parties should notify Government counsel and keep the Government informed as discussions progress.

With regard to settlement, we have the following comments:

a. The Government will not agree to dismissal with prejudice of False Claims Act liability (or other potential Government actions) unless the Government is receiving a recovery.

b. The Government will review the reasonableness of all proposed settlement amounts. Many false claims actions include a count for wrongful employment discrimination pursuant to 31 U.S.C. § 3730(h). Where a settlement addresses both damages to the Government and to the relator, we are careful to ensure that the Government is receiving its fair share of the total settlement amount.

c. 31 U.S.C. § 3730(d)(2) provides that if False Claims Act liability is found, the defendant shall be directly liable to the relator for reasonable expenses and attorney fees and costs. If a settlement is to address this issue, the defendant and relator should agree on the amount and provide for payment directly from the defendant to the relator. The Government will review this amount to ensure that it is reasonable.

d. The False Claims Act provides that in a declined qui tam case, the relator shall receive 25 to 30 percent of the proceeds of the action. 31 U.S.C. § 3730(d)(2). (Under certain circumstances, the award may be less than 25 percent. 31 U.S.C. § 3730(d)(3).) The agreement on a percentage is a matter to be addressed by the Government and the relator - or the court if agreement cannot be reached. Agreement with the government on the relator's share can be part of the settlement agreement with the defendant or the Government and the relator can deal with this issue separately. When we agree on the proper relator's share of any settlement proceeds, the relator must agree to release all claims against the United States arising from the filing of the qui tam. Payment of damages must be made to the Government. If defendant's payments to the government are to be over time, payment of the relator's share also will have to be over time.

e. The Government has several strict requirements regarding the contents of its False Claims Act settlement agreements. We can send you sample copies of settlement agreements if you request. Generally, note the following:

1. Our releases are narrow. A relator may only negotiate to release False Claims Act claims. The relator has no authority with respect to any other causes of action the government might have against the defendant. We will release the defendant only for civil monetary liability for the specific allegations of the complaint.

2. The agreement must contain language that (1) the settlement does not release the defendant from claims arising from the Internal Revenue Code; (2) the settlement does not release the defendant from suspension or debarment action; (3) the defendant may not charge back to the Government directly or indirectly any of the costs or expenses of the litigation. Depending on the type of case, other mandatory language may be required.

I hope that providing you with these guidelines will facilitate any negotiations and help avoid an agreement between

the parties that the United States cannot support. If you have any questions, you may call me at the above number.

Very truly yours,

MICHAEL F. HERTZ
Director
Commercial Litigation Branch
Civil Division

POST-HEARING RESPONSES FROM MR. GUY A. LEWIS

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 4, 2004

The Honorable Chris Cannon
Chairman
Subcommittee on Commercial and
Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Enclosed please find responses to questions posed to Mr. Guy Lewis, Director of the Executive Office for United States Attorneys, following Mr. Lewis' appearance before the Subcommittee on March 9, 2004. The subject of the Subcommittee's hearing was the reauthorization of the activities of the Department of Justice.

We hope that this information is helpful. Please do not hesitate to call upon us if we may be of additional assistance in connection with this or any other matter.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Melvin L. Watt
Ranking Minority Member

QUESTIONS FOR THE RECORD

GUY A. LEWIS, DIRECTOR
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

BEFORE THE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ADMINISTRATIVE AND COMMERCIAL LAW
UNITED STATES HOUSE OF REPRESENTATIVES

MARCH 9, 2004

1) There has been discussion in the past of increasing resources for United States Attorneys by relocating manpower from divisions located here in Washington to the field. What is the current position of the Department with respect to any efforts that might be taken to do so?

It is my understanding that the Department is currently studying this issue and has not yet made a final decision.

2) There is considerable controversy regarding the conviction obtained by the United States Attorney in Detroit of three individuals for terrorism-related offenses. The judge in that case is currently reviewing classified secret documents to determine whether those convictions should be vacated because of prosecutorial misconduct. Mr Craig Morford, an AUSA from Cleveland, has been appointed as Special United States Attorney in the case, while the Detroit prosecutor whose actions are being questioned was removed from the case and has subsequently sued the Attorney General alleging retaliation by DOJ.

a. What is the current status of this matter?

The Defendants' post-trial motions in the first case referenced in the question have been submitted to the Court for decision. The second case referenced in the question is being defended by the Department's Civil Division and is at the initial pleading stage.

b. One source quoted in the media has indicated that a decision by the judge could take many months. Is this an accurate prediction from you viewpoint?

I am unable to judge whether this prediction is accurate.

c. Unrelated to this case, what procedures are in place to discipline USAs or AUSAs for prosecutorial misconduct and have they proven effective?

Allegations of prosecutorial misconduct on the part of United States Attorneys or Assistant United States Attorneys are reviewed by the Department's Office of Professional Responsibility ("OPR"). Once OPR completes its review in a particular case, it submits a report, including a recommendation for disciplinary action, if appropriate, to the Executive Office for United States Attorneys' ("EOUSA") General Counsel for review and enforcement. If a finding of misconduct involves a Presidentially appointed United States Attorney (as opposed to an Assistant United States Attorney), OPR's report is submitted to the Director of EOUSA and to the Office of the Deputy Attorney General ("ODAG") for review. If the department sustains an adverse OPR finding against a United States Attorney, and determines that formal discipline or removal is appropriate, a recommendation is forwarded to the President for action. The Department believes that these procedures have proven to be effective.

3) Another aspect of prosecutorial misconduct can be misconduct "alleged" by members of the defense bar as a tactical weapon against United States Attorneys. This was, in essence, the gist of a concern expressed by the Department of Justice during consideration of the so-called McDade law.

a. Have there been instances that have borne out the Department's concern?

From my perspective as Director of EOUSA, I am unable to cite any such specific instances.

b. Beyond targeting individual prosecutors, have you witnessed an impact on the conduct of investigations themselves?

The Department remains concerned about the McDade law's potential negative impact on investigations and prosecutions. While it is difficult to quantify or precisely describe the potential negative impact of the McDade law, I understand that is has significantly hampered a number of investigations and prosecutions.

c. If this were occurring, it would in itself make a strong case for amending the McDade law, but if not are there other problems with McDade that prompt you to urge its repeal or amendment?

Please see my response to question 3b above.

4) Within the past year, at least two high-profile prosecutions were dismissed by trial judges before reaching the jury, the prosecution of officials of the Salt Lake City Olympic

Organizing Committee in Utah and that of K-Mart officials in Michigan. This raises serious questions about the Department's choice of prosecutorial targets. What specific steps have you taken to improve the quality of cases brought by the Department of Justice and what review has been undertaken to determine what led to these high-profile dismissals?

First, it is important to note that the Department of Justice successfully prosecutes thousands of cases every year. Occasionally, due to changed circumstances, such as witness unavailability or other evidentiary problems, charges are dismissed before or during trial. The Department strongly believes that the pursuit of justice requires that cases be reevaluated and dismissed if the circumstances warrant.

As for the Salt Lake City case referenced in the question, that case was prosecuted by the Fraud Section of the Department's Criminal Division, not by the U.S. Attorney for the District of Utah. Nevertheless, it is my understanding that the case presented unique and very difficult questions of law, and that after careful evaluation of the issues presented, the Department believed the case to be meritorious when it was indicted and eventually tried. Indeed, following an initial dismissal by the trial judge, the Court of Appeals reinstated the case. Unfortunately, a subsequent dismissal by the same trial judge was not appealable.

The Michigan case referenced in the question was prosecuted by the U.S. Attorney for the Eastern District of Michigan. The charges were dismissed only after significant and unexpected evidentiary problems arose after the case was indicted.

As explained above, the Department is always willing to reconsider charges when changed circumstances dictate that the pursuit of justice so requires. The two cases discussed above are clearly not typical of the thousands of cases prosecuted by the U.S. Attorneys and other litigating components within the Department of Justice. The overwhelming majority of cases prosecuted by the Department are "quality" cases as evidenced by the very high conviction rate versus the very infrequent situation in which a case is dismissed or results in an acquittal.

5) There is now in place a statute, the so-called Hyde Amendment, to compensate acquitted defendants in some instances of unwarranted prosecution.

1) How has the existence of that statute, and the liability it presents to the government, affected the prosecutorial decision?

I do not believe that the Hyde Amendment has significantly affected prosecutorial decision making. As stated above, every United States Attorney's Office makes prosecutorial decisions based on the relevant facts and applicable law, in accordance with Department guidelines.

2) While I expect you to respond that prosecutions are only initiated on the basis of evidence that warrant them, are there particular types of cases, white-collar crime

for instance, that present special circumstances which makes the existence of the Hyde Amendment a factor to be considered in deciding whether to initiate a prosecution?

No.

6) Over the past 15 years, the number of post-sentencing motions filed by incarcerated defendants seems to be a roller-coaster ride with an ascent to a high in 1997, a slow descent to 2001 and then again a sharp increase, followed by a sharp decline in 2002. Nonetheless, as noted by the United States' Attorneys Statistical Report for 2002, the level is far higher than it was in 1988 when the Sentencing Guidelines went into effect. While presumably there are more incarcerated defendants, is there an explanation beyond that and, whatever the explanation, what has the effect been upon allocation of resources?

The Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), resulted in the filing of a large number of post-sentencing motions, and may be one possible explanation. As for the issue of resources, we strive to ensure that resources are allocated appropriately given the unique needs of each United States Attorney's Office. The Apprendi decision has not significantly affected this allocation of resources.

7) The same Statistical Report indicates a steady increase in Criminal and Civil Asset Forfeiture judgements but a sharp decline, despite a recent increase from the low point, in collections. The sharpest declines in collections occurred in 1998 and 2000.

a. Does this decline represent a lack of commitment by the Department to forfeiture collection, a de-emphasis on drug prosecutions where one might expect more collectible assets, or is there an explanation relating to the reallocation of resources and priorities that is not readily apparent?

The Department of Justice remains firmly committed to the pursuit of judicial forfeiture actions and drug prosecutions. The United States Attorneys' Offices have not reallocated resources away from asset forfeiture, but have continued to dedicate a consistent amount of resources to this type of case during the years in question.

The impression that there has been a decline in forfeiture collection is incorrect. Collection amounts can vary significantly from year to year due to a few large dollar cases. During the last eight fiscal years, the United States Attorneys' Offices have averaged approximately $367 million in recoveries per year. This includes recoveries of more than $500 million in both FY 1997 and FY 1999. The extraordinary amount recovered in FY 1997 was a result of several large forfeiture cases that were successfully resolved in the Eastern District of Virginia, which reported $226,990,325 in forfeiture collections that year alone. Similarly, in FY 1999, the Southern District of Florida alone

reported $242,909,453 in forfeiture collections. In FY 2003 when no district reported such a significant recovery, the United States Attorneys' Offices collected approximately $342 million in forfeitures, which closely approximates the average over the last several years.

b. Since there has been an increase in judgements, it would not seem that enactment of the Civil Asset Forfeiture Reform Act has been a significant factor in this decline, is that correct?

The Civil Asset Forfeiture Reform Act of 2000 (CAFRA), which became effective on August 23, 2000, did temporarily affect asset forfeiture recoveries. Asset forfeiture recoveries dropped in FY 2001 as the United States Attorneys' Offices adapted to the changes in the law brought about by CAFRA. Since that time, however, recoveries have returned to pre-CAFRA levels. The United States Attorneys' Offices recovered over $322 million in FY 2002 and approximately $342 million in FY 2003.

8) The Statistical Report of United States Attorneys for FY 2002 seems also to highlight what might seem a curious anomaly. There appears to have been a steady increase from 1993 on of criminal cases filed, yet a fairly steady decrease in the number of defendants disposed of by trial. While this was most pronounced during the previous Administration, the trends seems to have continued to a lesser extent. Presumably, it could be explained by more guilty pleas or more dismissals. A rise in dismissals would not seem to be a positive development, but then again a rise in guilty pleas might indicate that charges were being brought that did not reflect the seriousness of the actual conduct.

a. Which is it and why?

The decrease in the number of cases disposed of by trial appears to be due to an increase in the number of guilty pleas during this period. This conclusion is supported by the fact that the number of dismissals, as a percentage of the number of defendants terminated, has decreased steadily since FY 1992 (from 10.9 percent in FY 1992 to 6.6 percent in FY 2003).

b. Is there another explanation that is not readily apparent?

I do not believe so.

POST-HEARING RESPONSES FROM MR. LAWRENCE A. FRIEDMAN

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 5, 2004

The Honorable Chris Cannon
Chairman
Subcommittee on Commercial and
Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Enclosed please find responses to questions posed to Mr. Lawrence Friedman, Director of the Executive Office for United States Trustees, following Mr. Friedman's appearance before the Subcommittee on March 9, 2004. The subject of the Subcommittee's hearing was the reauthorization of the activities of the Department of Justice.

We hope that this information is helpful. Please do not hesitate to call upon us if we may be of additional assistance in connection with this or any other matter.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Melvin L. Watt
Ranking Minority Member

RESPONSES TO QUESTIONS FROM THE HONORABLE CHRIS CANNON, CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW OF THE HOUSE COMMITTEE ON THE JUDICIARY

REAUTHORIZATION OF THE DEPARTMENT OF JUSTICE

MR. LAWRENCE FRIEDMAN
DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES

March 9, 2004

1. **Please explain the purpose of the United States Trustee (UST) Program's Annual Report of Significant Accomplishments. How many copies are printed and to whom are they distributed? What is the cost of publication and distribution? Do other components in the Department of Justice publish similar reports? How does the cost of publication and distribution of the UST Program's Annual Report of Significant Accomplishments compare with similar reports, if any, published by other components in the Department of Justice?**

The purpose of the Annual Report of Significant Accomplishments (hereafter "the Report") is to provide information about the nationwide activities of the United States Trustee Program. The Report contains information about the Program's mission, organization, and responsibilities; civil and criminal enforcement activities; trustee oversight responsibilities; training and outreach; and information technology developments.

A portable document format (pdf) copy of the Report is posted on the Program's public Internet site. Hard copies of the Report were distributed to Program employees, bankruptcy judges, United States Attorneys, chapter 7 and chapter 13 trustees, Department of Justice component heads, various trade publications and organizations, and Members of Congress with interests in bankruptcy. At the discretion of the regional offices, copies were distributed to others with interests and responsibilities in bankruptcy, including FBI agents working with white collar fraud; local law enforcement officers; bankruptcy fraud working groups; visiting foreign delegations; and participants and attendees at speeches, training sessions, and career fairs.

The cost of producing and distributing 6,000 copies of the FY 2002 Annual Report was $17,525. To distribute the Report, the Program sent multiple copies in bulk to the regional offices, with instructions for further distribution to the appropriate persons. The Report was published through the Government Printing Office, which charged its standard rates for in-house design services and obtained publishing services through competitive bidding. The Program has no information with regard to the publications of any other component of the Department of Justice.

2. On page two of your written testimony, you state that "more than $500 million in debts not discharged in chapter 7, fines and other remedies" resulted from the UST Program's formal and informal civil enforcement efforts. Please provide a detailed explanation of how this monetary figure was derived.

The Program tracks nine items that reflect the financial impact of various United States Trustees formal and informal actions. The financial categories and amounts for FY 2003 are as follows.

TYPE OF ACTION	POTENTIAL FINANCIAL IMPACT
§ 707(b) Actions – Substantial Abuse	$192,542,212
§ 727 Actions – Objections to Discharge	$406,111,718
§ 110 Actions – Fines Imposed Fees Recovered	$445,553 $195,520
§ 329 – Actions to Disgorge Fees	$4,781,574
Attorney Sanctions	$371,359
§ 330 Fee Requests (Chapters 7 & 11)	$36,064,009
§§ 326 and 330 Trustee Fees	$3,960,607
Debtor ID – Objection to Discharge	$146,330
TOTAL ALL CATEGORIES	**$644,618,882**
Note: Of the total for all categories, $250,794,493 (or 39 percent) is the amount not discharged in seven large cases (each in excess of $10 million) as a result of successful objections to discharge.	

3. Of the 1,400 substantial abuse motions that were either granted or resulted in voluntary conversion to Chapter 13 during FY 2002, as described on page 8 of the UST Program's Annual Report of Significant Accomplishments FY 2002 (Annual Report), how many were actually granted?

In FY 2002, the United States Trustee Program filed approximately 2,750 motions to dismiss for substantial abuse. During that same period of time, United States Trustees reported that approximately 1,400 motions were either granted after a hearing or as the result of voluntary dismissal or conversion by the debtor. Because both results are captured in the Significant Accomplishments Reporting System as "Motion Granted," the number of motions granted by a bankruptcy court cannot be determined.

It should also be noted that these figures represent a "snapshot in time" and, therefore, it should not be assumed that motions that were not reported as granted were denied. Many of the motions that were filed during FY 2002 remained pending at the end of the reporting period.

4. On page 10 of the Annual Report, it states that the UST Program obtained discharge denials in 308 cases during FY 2002. During that same period, approximately 1 million Chapter 7 cases were filed. Please explain the significance of these statistics.

In FY 2002, United States Trustees filed 524 actions seeking denial or revocation of a debtor's discharge. Discharges were denied in 308 cases, or 93.6 percent of the cases that were resolved in FY 2002 either by judicial determination or by the debtor's voluntary waiver of discharge after the action was filed. Discharges were granted in 21 cases. (As with § 707(b), the number of § 727 actions filed and decided during FY 2002 may not match because some were filed before the reporting period and some were decided afterward.)

Unlike motions to dismiss, actions under § 727 can be filed by any party in interest. By law, United States Trustees may file complaints seeking denial or revocation of discharge under § 727 only to address egregious actions such as destroying, mutilating, or concealing property to hinder or defraud a creditor or trustee; knowingly making a false oath; or refusing to obey a court order. As a matter of practice, many § 727 actions are taken by parties in interest other than the United States Trustee. Accordingly, the total number of § 727 actions taken in FY 2002 is far higher than the actions reported by United States Trustees.

5. On page 4 of your written statement, you describe the UST Program's Debtor Audit Pilot Project. What has been the overall cost of the Project to date? What is the approximate cost to audit a Chapter 7 consumer bankruptcy case pursuant to this Project?

The total estimated cost of the Debtor Audit Pilot Project is $2.7 to $3.2 million. The cost of an audit depends upon its complexity. For pilot purposes, audits are classified as either random or targeted, based on how the case is selected. The average cost of a random audit is $624, and the average cost of a targeted audit is $1,773.

6. What is the total and breakdown cost associated with the National Bankruptcy Training Institute (as described on pages 7 through 8 of your written testimony) for the four most recent fiscal years for which this information is available?

Essentially all national training sponsored by the United States Trustee Program is presented at its National Bankruptcy Training Institute (NBTI), which is part of the Department's National Advocacy Center (NAC) in Columbia, South Carolina. The NBTI has three permanent staff and offers courses in four major categories: civil and criminal enforcement, litigation,

business and finance, and management and administration. Over the past four fiscal years (FY 2000 to FY 2003), the Program has held 51 classes and trained 2,196 students. The costs by fiscal year are broken out below.

	FY 2000	FY 2001	FY 2002	FY 2003
Facilities Rental	$2,700.00	$3,600.00	$2,700.00	$2,600.00
Salaries & Benefits *	130,486.59	134,996.55	348,795.40	365,162.93
Supplies & Equipment	15,632.21	41,093.20	17,889.03	91,776.64
Student Travel	473,464.14	484,411.34	858,856.33	573,514.76
Speaker Fees	28,243.89	37,945.07	48,667.95	77,448.55
TOTAL	$650,526.83	$702,046.16	$1,276,908.71	$1,110,502.88

** FY 2002 was the first year that the NBTI had three full-time staff.*

7. During fiscal years 2002 and 2003, did the UST Program use for any predominantly internal training or conference meeting a facility that required payment to a private entity for use of such facility? If so, please provide an explanation of why the facility was chosen, its location, and a breakdown of any expenditures incurred in excess of the cost of conducting the training or meeting at a comparable government facility that would not have required such payment.

As noted in our response to Question number 6, essentially all national training sponsored by the Program is presented at its National Bankruptcy Training Institute, which is part of the Department's National Advocacy Center (NAC) in Columbia, South Carolina. The only educational program held at a commercial facility in recent years has been the Program's national Managers' Conference. This is principally due to the lack of capacity at the NAC. Approximately 140 persons participate in the Managers' Conference over four days. In addition to rooms for lodging, the Program utilizes a large number of meeting rooms for plenary and break-out sessions. To accommodate the conference, it is likely that the NAC would be unable to hold any other programs for United States Attorney staff or for local prosecutors.

As a nationwide program where travel is necessary for at least a portion of the staff attending every conference meeting, it is not always practical or cost effective to use the NAC. The NAC has specially designed technologies, courtrooms, and other features tailored to advocacy training that are not required for meetings and conferences. When the U.S. Trustee Program utilizes private facilities for conferences, it requires a total cost comparison (including air fare and hotel) of at least three potential locations. In choosing a site, the Program also considers geographic diversity, so that meetings are held in numerous United States Trustee regions.

The Program maintains its commitment to training at the NAC without regard to the fact that, in many instances, use of the NAC may cost more than training at other facilities. Cost savings from using the NAC are derived largely from lower than commercial rental rates for meeting rooms and audiovisual equipment. The cost of lodging to the Federal government is also marginally lower at the NAC. These savings often are offset, however, by the higher air fares to Columbia, SC. The nationwide average air fare for USTP students going to Columbia is approximately $500. In addition, travel to Columbia is often cumbersome. Due to flight schedules, a lawyer in Los Angeles may require three full days out of the office to attend a one day meeting in Columbia. By contrast, that Los Angeles traveler may save at least one work day of travel time and $200 in lower air fare by traveling to Chicago rather than to Columbia. The Program considers the above-described factors in determining whether to hold meetings at the NAC.

The Program generally has not held meetings at other Federal facilities because of the additional travel time and cost involved in separating meeting and lodging locations, as well as the fact that savings are often realized by renting meeting rooms in the same hotel where staff are lodged. It should also be noted that most Federal facilities charge fees for the use of space.

Payments to commercial facilities in FY 2002 and FY 2003 included the following.

United States Trustee Meetings:

- April 10-11, 2002, Dallas, TX (UST Region 6). A payment of $225/day for meeting space was made to the Adolphus Hotel for a total of $450. The individual room rate for participants was the government rate of $89/night.

- September 26, 2002, Chicago, IL (UST Region 11). A payment of $400/day for meeting space was made to the Westin O'Hare for a total of $400. The individual room rate for participants was the government rate of $155/night.

- May 20-21, 2003, Indianapolis, IN (UST Region 10). A payment of $250/day for meeting space was made to the Westin Hotel for a total of $500. The individual room rate for the participants was the government rate of $70/night.

- September 24-25, 2003, San Diego, CA (UST Region 15). A payment of $220/day for meeting space was made to the Westgate Hotel for a total of $440. The individual room rate for participants was the government rate of $99/night.

- January 28-29, 2004, Albuquerque, NM (UST Region 20). A payment of $150/day for meeting space was made to the Hyatt Hotel for a total of $300. The individual room rate for participants was $68/night, below the government rate of $72/night. In addition, the Hotel offered the Program a $1,000 rebate toward the total expenditures associated with the meeting.

Managers' Conference:

- November 18-22, 2002, Santa Monica, CA (UST Region 16). A payment averaging $875/day for up to 7 meeting rooms was made to the Fairmont Hotel for a total of $3,500. The individual room rate for the approximately 140 participants was the government rate of $109/day.

8. Please provide the number and description of trustee enforcement actions (e.g., embezzlement, mismanagement, or other improper activity) that the UST Program has brought in each of the last five years.

CHAPTER 7 TRUSTEE ENFORCEMENT ACTIONS (OCTOBER 1, 1998 TO JUNE 30, 2002)					
	FY 1999	**FY 2000**	**FY 2001**	**10/1/01 to 6/30/02**	**Total**
Motions to Remove from Cases	7	32	10	6	55
Suspension from Case Rotation	27	38	30	20	115
Resignation	34	31	51	16	132
Motions to Compel Final Reports	120	119	164	44	447
Objections to Trustee Fees & Compensation	1,061	806	896	586	3,349
Motions to Surcharge/Disgorge Trustee Fees	30	16	6	9	61
Referrals to States Licensing Authorities	2	1	1	4	8
Since July 2002, this data is no longer captured in the Program's automated, integrated reporting system, except for objections to trustee fees.					

CHAPTERS 12 AND 13 TRUSTEE ENFORCEMENT ACTIONS (OCTOBER 1, 1998 TO SEPTEMBER 30, 2003)						
	FY 1999	**FY 2000**	**FY 2001**	**FY 2002**	**FY 2003**	**Total**
Motions to Remove from Cases	0	0	0	0	0	0
Suspension from Case Assignments	2	0	0	0	1	3
Termination from Case Assignments	0	1	0	1	0	2

The following chart presents the number of convictions of trustees or trustee employees obtained by United States Attorneys in the last five fiscal years; the number of referrals where the United States Attorney declined to prosecute; and the number of referrals currently pending that were made in the last five fiscal years. Of the 12 convictions, one was of a trustee and the remainder were of trustee employees. Eight of the convictions were in the chapter 13 area; the remaining are divided between chapter 7 and chapter 11. Of the three pending referrals, two involve allegations of impropriety by trustees.

ALL CHAPTERS: TRUSTEE & TRUSTEE EMPLOYEE EMBEZZLEMENT ACTIONS (OCTOBER 1, 1998 TO MARCH 19, 2004) *							
	FY 1999	**FY 2000**	**FY 2001**	**FY 2002**	**FY 2003**	**FY 2004 (to date)**	**Total**
Referrals Resulting in Conviction	3	1	2	2	3	1	12
Referrals: Prosecution Declined	2	0	0	0	0	0	2
Referrals: Pending	0	1	0	0	2	0	3
** Note: Fiscal year dates (used dates of conviction or declination; if pending, used referral dates.)*							

9. Has the UST Program's refocused emphasis on dismissing Chapter 7 cases for substantial abuse taken resources away from other UST Program priorities, such as detecting criminal fraud and abuse?

No. We anticipate that the Program's National Civil Enforcement Initiative will have the important derivative benefit of increasing the number of opportunities to identify and pursue criminal fraud and abuse investigations, where appropriate. Cases involving criminal fraud typically involve conduct that subjects the wrongdoer to civil remedies, in addition to criminal sanctions. Therefore, resources employed toward the Program's civil enforcement efforts are equally effective in detecting instances of criminal fraud and abuse. The Program has been able to accomplish this refocused emphasis by implementing streamlined procedures in administrative areas such as private trustee oversight.

j. Does the UST Program currently screen every Chapter 7 case for substantial abuse? If not, why not?

The vast majority of Program field offices (more than 85 percent) report that they screen every chapter 7 petition as an element of their comprehensive effort to detect possible fraud and abuse. All offices randomly review chapter 7 petitions and/or receive referrals from trustees who

investigate the financial affairs of debtors in each chapter 7 case assigned to them. In addition to potential "substantial abuse," petition screening frequently detects other forms of fraud and abuse.

Individual offices organize their resources in accordance with local needs and priorities. Substantial abuse has been identified as a civil enforcement priority in the majority, but not all, of the 95 Program field offices. Some offices, for example, focus more heavily on petition preparers than substantial abuse. In those offices where substantial abuse is a priority, petition screening is typically the first step in identifying cases warranting further attention.

11. Are there any statutory or procedural revisions that would make the UST Program's work easier or more efficient?

The U.S. Trustee Program appreciates the Committee's willingness to consider statutory or procedural changes that would make the Program's work more efficient. The Program currently has no proposals to offer. The Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States meets twice a year, and the Program participates in the dialogue at these meetings.

12. What cost-saving measures has the UST Program instituted in the past year?

During fiscal years 2003 and 2004, appropriations levels were below the Program's "current services" levels. For FY 2004, our appropriated level of $166.1 million is $3 million below our current services level of $169.1 million. As a result, the Program has had to look at ways to absorb mandatory cost increases associated with rent, the annual cost-of-living pay raises, and other inflationary costs. We have absorbed these shortfalls by carefully managing staffing vacancies; delaying construction and relocation projects associated with lease expirations; cancelling training conferences for Program managers and administrative officers; delaying the acquisition of new or expanded administrative hearing rooms associated with bankruptcy filing increases; and reducing funding for one-time purchases of automation equipment, advertising, equipment rentals, furniture, filing systems, contracts for temporary services, and several other miscellaneous budget categories. Over the years, the Program has looked for creative means of saving costs. For example, 12 of our 21 regions share an administrative officer position with another region. These sharing arrangements have facilitated completion of the administrative workload, while holding down the costs of salaries and benefits.

13. How does the National Civil Enforcement Initiative deal with fraud and abuse committed by and against debtors?

The National Civil Enforcement Initiative provides a balanced approach to achieve twin goals: redress debtor misconduct and protect consumer debtors against attorneys and non-attorneys who prey upon those in dire financial straits.

The primary focus in addressing debtor misconduct has been seeking case dismissal for "substantial abuse" or "cause," and the denial of discharge for more egregious misconduct such as the concealment of assets. In the consumer protection area, the Program has, among other things, sought fines, disgorgement, and injunctive relief against bankruptcy petition preparers (BPPs) and the disgorgement of fees against attorneys. Other actions taken by United States Trustees, or by the private trustees who are overseen by the Program, include the following examples: objecting to claims filed by creditors who chronically or willfully fail to demonstrate that they are entitled to payment in the amount or priority asserted in the proof of claim; seeking to avoid a lien and bringing actions for the failure to timely release liens; taking actions to address violations of the automatic stay and challenging improper reaffirmation agreements; and pursuing violations of the Truth in Lending Act, the Homeowners Equity Protection Act, and the Federal Credit Reporting Act.

RESPONSES TO QUESTIONS FROM THE HONORABLE JERROLD NADLER, MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW OF THE HOUSE COMMITTEE ON THE JUDICIARY

1. How many of the 41,000 civil enforcement actions taken in FY 2003 were "informal." What kinds of activities are considered "informal" civil enforcement actions?

During FY 2003, United States Trustees initiated 31,999 informal civil enforcement actions pursuant to §§ 707, 727, 329, and 110 of the Bankruptcy Code. These include written or verbal communications by the United States Trustee to a debtor, attorney, or bankruptcy petition preparer about possible violations of any of these sections, either directly or through a third party such as the case trustee, which requires a response.

2. How many of the 41,000 civil enforcement actions taken in FY 2003 were "formal." What kinds of activities are considered "formal" civil enforcement actions?

During FY 2003, United States Trustees initiated 9,941 formal civil enforcement actions pursuant to §§ 707, 727, 329, and 110 of the Bankruptcy Code. These actions involve a motion or complaint filed in the bankruptcy court.

3. How many § 707(b) letters were sent in FY 2002. How many were sent in FY 2003?

The United States Trustee Program does not collect data on § 707(b) letters that are sent.

4. On average, how much time is spent reviewing a file before a § 707(b) letter is sent?

The Program's professional time records do not reflect the amount of time taken by staff in reviewing files that result in a § 707(b) letter.

5. How many § 707(b) motions were filed in FY 2002 and how many were filed in FY 2003?

In FY 2003, United States Trustees filed 3,980 Motions to Dismiss for substantial abuse pursuant to § 707(b). This represents a 44.6 percent increase over the 2,752 motions filed during FY 2002, and more than double the 1,950 motions filed during FY 2001.

6. How many § 707(b) motions resulted in voluntary conversion to chapter 13 in FY 2002 and how many in FY 2003?

Under the Significant Accomplishments Reporting System, both motions granted by the court after hearing and voluntary dismissals or conversions by the debtor are reported as "Motion Granted." Accordingly, the number of voluntary conversions by the debtor after a motion has been filed cannot be determined.

7. Of the cases converted to chapter 13 in response to a civil enforcement action, how many have been confirmed and how many of those confirmed are still active chapter 13 cases? What is the average % plan payment to unsecured creditors in the converted chapter 13 cases that have been confirmed?

The Program does not track cases converted to chapter 13 in response to civil enforcement actions or collect data on the average percent plan payment to unsecured creditors in converted chapter 13 cases that have been confirmed.

8. How many § 707(b) motions resulted in voluntary dismissal of chapter 7 cases in FY 2002 and how many in FY 2003?

Under the Significant Accomplishments Reporting System, both motions granted by the court after hearing and voluntary dismissals or conversions by the debtor are reported as "Motion Granted."

During FY 2002, there were 1,396 motions granted by court order, or the debtor agreed to the conversion or dismissal of the case. During FY 2003, there were 2,434 substantial abuse motions granted by court order, or the debtor agreed to the conversion or dismissal of the case. (Please note that the number of motions granted and denied may not equal the number filed since

many motions filed during the fiscal year were still pending at the end of the reporting period. Additionally, in some instances, motions were withdrawn.)

9. How many § 707(b) motions were granted by formal court order in FY 2002 and how many in FY 2003?

See response to #8 above.

10. How many § 707(b) were denied by formal court order in FY 2002 and how many in FY 2003?

During FY 2002, there were172 motions under § 707(b) that were denied by court order. During FY 2003, there were 159 motions denied.

11. It was stated that $500 million amount in debts were not discharged as a result of formal and informal civil enforcement actions taken in FY 2003 - how was this amount calculated? Was the figure determined by using the actual amount of debt at issue in the cases where action was taken or was it based on some average amount of unsecured debt in chapter 7 no-asset cases. If an average amount was used, what is that amount?

The debts not discharged in chapter 7 during FY 2003 as a result of United States Trustee actions under §§ 707 and 727 of the Bankruptcy Code are actual amounts of general unsecured debt reported by debtors on Schedule F. This includes debts in cases where the United States Trustee prevailed on motions or complaints, as well as cases in which United States Trustee inquiries resulted in voluntary dismissals, conversions, or waivers of discharge. Prior to FY 2003, the financial impact of § 707(b) activity was an estimate computed by multiplying the average general unsecured debts of the nearly 6,000 cases in our chapter 7 research database ($42,406) by the number of cases in which the United States Trustee prevailed on a § 707(b) motion.

12. Of the $500 million in debts that were not discharged as a result of the formal and informal civil enforcement actions taken in FY 2003, has there been any attempt to determine how much of this debt has been or will be discharged in subsequent converted chapter 13 cases.

No. The Program does not track this information.

13. Provide all underlying data in support of the $500 million amount of nondischarged debt and for all the results of the National Civil Enforcement Initiative (NCEI).

The Program tracks nine items that reflect the financial impact of various United States Trustee formal and informal actions. It includes debts not discharged in chapter 7, fines, and other remedies. The financial categories and amounts for FY 2003 are as follows.

TYPE OF ACTION	POTENTIAL FINANCIAL IMPACT
§ 707(b) Actions – Substantial Abuse	$192,542,212
§ 727 Actions – Objections to Discharge	$406,111,718
§ 110 Actions – Fines Imposed Fees Recovered	$445,553 $195,520
§ 329 – Actions to Disgorge Fees	$4,781,574
Attorney Sanctions	$371,359
§ 330 Fee Requests (Chapters 7 & 11)	$36,064,009
§§ 326 and 330 Trustee Fees	$3,960,607
Debtor ID – Objection to Discharge	$146,330
TOTAL ALL CATEGORIES	**$644,618,882**
Note: Of the total for all categories, $250,794,493 (or 39 percent) is the amount not discharged in seven large cases (each in excess of $10 million) as a result of successful objections to discharge.	

The underlying data for the Civil Enforcement Initiative for FY 2003 are set forth below.

SIGNIFICANT ACCOMPLISHMENTS – FISCAL YEAR 2003	
707(a) ACTIVITY	
Motions Filed	4,243
Inquiries	4830
Inquiries with Success	3,031
707(b) ACTIVITY	
Motions Filed	3,980
Inquiries	22,239
Inquiries with Success	5,383
Unsecured Debt Not Discharged	$192,542,212

727 DISCHARGEABILITY ACTIONS	
Complaints Filed	877
Inquiries	2,426
Inquiries with Success	565
Unsecured Debt Not Discharged	$406,111,718
ACTIONS UNDER 110	
Motions/Complaints Filed	841
Fines Imposed	$445,553
Fees Recovered	$195,520
Injunctions Issued	254
Inquiries	2,404
Inquiries with Success	560
327 & 1103 EMPLOYMENT OF PROFESSIONALS	
Objections Filed	1,062
Inquiries	1,664
Inquires with Success	1,414
329 FEE DISGORGEMENTS	
Motions Filed	898
Inquiries	1,265
Inquiries with Success	457
Fees Disgorged	$4,781,574
OTHER ATTORNEY MISCONDUCT	
Motions/Complaints for Sanctions	214
Amount of Sanctions Imposed	$371,359
Referred to State Bar	37
Disciplinary Actions Issued	44
Inquiries	571
Inquiries with Success	229

14. Has there been any calculation of the amount of assets that would have been administered in the chapter 7 cases that did not proceed under chapter 7 due to United States Trustee actions? If so, what is that amount?

The Program does not collect asset information regarding cases that might have been administered under chapter 7 but were not due to United States Trustee actions.

15. Describe the automated Significant Accomplishments Reporting System. What are the categories of civil enforcement activities that are tracked or reported on the System? Do private trustees use the System? Provide copies of any reports generated under the System.

The Significant Accomplishments Reporting System (SARS) is an automated, web-based data collection system that allows Program employees in the field offices to record work as it is performed. The System was designed to collect approximately 100 civil, criminal, and administrative data elements. As information is entered into the automated system by Program personnel in each field office, it is transmitted to a central data base where it is made available in "real time" both to field office and Executive Office personnel. Semi-annual reports are generated by the Executive Office and, after the information is reviewed and verified, official statistics are released.

SARS is used solely by Program employees for internal tracking and management purposes. The categories tracked in SARS are: 707(a)–Dismissal for Cause; 707(b)–Dismissal for Substantial Abuse; 727–Discharge; 110–Petition Preparers; 327–Employment of Professionals; 1103–Employment of Professionals; 329–Fee Disgorgements; Other Actions for Attorney Misconduct; Criminal Enforcement; 1112(b)–Conversion or Dismissal; 1125–Disclosure Statements; 1129–Confirmation of Plans; 326–Trustee Fees; 330–Professional Fee Requests; 1104–Appointment of Trustee or Examiner; and Debtor Identification.

The following internal reports can be generated: Count of Actions Report; List of Actions by Case Report; Cases by Attorney/Staff Report; Actions by Attorney/Staff Report; Significant Legal and Other Significant Actions Report; and List of Removed (Archived) Actions by Case Report.

16. The FY 2002 Annual report states that the "mini-pilot" for the debtor audits was tested and that 24 audits were conducted. Provide any reports or evaluations of these audits and the "mini-pilot." What were the specific findings of errors in these cases? If the audits resulted in the discovery of undisclosed assets, what amount of these assets were ultimately distributed to creditors?

No public report on the mini-pilot has been prepared. Additionally, no audit reports were issued for the 24 individual audits that were conducted by United States Trustee staff. Following are examples of significant errors found during the debtor audits.

1. The audit procedures disclosed that a debtor was allegedly using several aliases and multiple social security numbers. Ultimately, the bankruptcy court denied the discharge of the debtor on the complaint of the United States Trustee under 11 U.S.C. § 727(a)(4)(A) for having made a false oath. The debtor failed to disclose in his Voluntary Petition the use of several aliases, as well as his use of at least three other Social Security numbers. In addition, he also failed to disclose his ownership and management interest in a limited partnership which still had an active

website at the time of the filing. Upon investigation, the United States Trustee determined that the debtor had led a lavish lifestyle using alias names, including leasing a town home in Los Angeles, CA, for in excess of $4,000 per month, while at the same time only reporting $7,800 annual income to the Internal Revenue Service. As a result of these false oaths, the debtor failed to obtain the discharge of $272,500 in unsecured obligations.

2. A debtor undervalued real property by $100,000. The debtor converted to chapter 13, preventing the discharge of $226,000 in unsecured debt.

3. A debtor failed to report $65,000 in income from sources other than employment during the two years prior to filing. Additional errors included understated disposable income of $800 and unreported transfers of $40,000.

4. Audits of an additional seven cases disclosed the following material misstatements: an unreported checking account, an unreported business lease, misstated number of dependents, Schedule I and J errors and omissions (yielding $200 to $300 in disposable income), an unreported source of income immediately prior to filing ($14,000), unreported transfers to a debtor's mother ($8,900), unreported payments to creditors within 90 days of filing ($22,000), and unreported prior businesses.

17. Provide any preliminary reports or evaluations of the FY 2003 Debtor Audit Pilot Project. Describe the audit procedures. What is the cost to the program of the contracts with the six accounting and investigative firms?

As of March 26, 2004, the Debtor Audit Pilot Project is about two-thirds complete. As of March 15, 2004, 58,727 petitions have been reviewed by Program staff and 1,270 cases have been assigned for audit. It is anticipated that between 1,400 to 1,500 audits will be conducted.

Audit reports have been received for 520 cases (about 1/3 of the total number of audits to be conducted). As of March 15, 2004, fifteen of these cases converted to chapter 13, resulted in the denial of discharge, or have been dismissed, resulting in unsecured debt not immediately discharged in chapter 7 totaling $1,585,452. No action was deemed warranted in 141 of the cases due to the nature of the material misstatements and the circumstances of the debtor. The disposition of the remaining 364 audits is pending.

Over 900 material misstatements have been reported in 407 audits. Forty-nine (49) audits found no material misstatements. Sixty-four (64) audits could not be completed, either because the debtor could not provide sufficient records or the debtor and/or debtor's attorney did not cooperate.

A debtor audit consists of comparisons and tests of selected items on the debtor's originally filed Schedules A, B, D, F, G, I, and J; the Statement of Financial Affairs; additional documents requested from the debtor specifically for the audit; as well as searches for unreported assets and

verification of market values using commercially and publicly available databases. The debtors are asked to complete a questionnaire and to provide documentation that supports the information provided in their bankruptcy filings. Debtors provide copies of records in their possession, and are not asked to secure copies of documents from third parties (such as banks and credit card companies). Based on the results so far, about 90 percent of the debtors have provided some or all of the requested documentation.

The total estimated cost of the Debtor Audit Pilot Project is $2.7 to $3.2 million.

18. What percentage of total program resources were allocated to the NCEI in FY 2002 and FY 2003?

All Assistant United States Trustees, attorneys, analysts, and paralegals submit professional time records quarterly. Two of the categories on the time reporting form relate to certain civil enforcement duties, including substantial abuse under § 707(b), petition preparers, reaffirmations, and other bankruptcy system abuses. During FY 2001, the time reports indicated that Program personnel spent 5.0 percent of their time on these duties. During FY 2002, this increased to 8.8 percent, and in FY 2003 it further increased to 17.9 percent of total time worked.

These figures significantly understate the percent of staff time spent on civil enforcement duties. These figures reflect time exclusively devoted to civil enforcement, rather than preliminary screening and evaluations, review, and other actions that are necessary to identify, investigate, and prosecute civil enforcement claims. Further, because clerical staff do not submit professional time records, any time devoted by clerical staff to civil enforcement is not included.

19. How many formal and informal actions were taken against petition preparers in each fiscal year from FY 1995 through FY 2003?

The United States Trustee Program has kept statistics on actions concerning petition preparers since FY 2001. During FY 2001, the United States Trustee Program filed 819 motions and complaints and initiated 705 informal actions pursuant to § 110. In FY 2002, the United States Trustee Program filed 1,157 motions and complaints and initiated 3,245 inquiries. During FY 2003, the United States Trustee Program filed 841 motions and complaints and initiated 2,404 inquiries.

20. How many formal and informal actions were taken against private trustees in each fiscal year from FY 1995 through FY 2003?

CHAPTER 7 TRUSTEE ENFORCEMENT ACTIONS (OCTOBER 1, 1994 TO JUNE 30, 2002)									
	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	10/1/01 to 6/30/02	Total
Motions to Remove from Cases	57	25	18	27	7	32	10	6	182
Suspension from Case Rotation	58	46	49	15	27	38	30	20	283
Resignation	46	151	100	128	34	31	51	16	557
Motions to Compel Final Reports	369	459	381	138	120	119	164	44	1,794
Objections to Trustee Fees & Compensation	1,930	1,684	1,668	1,498	1,061	806	896	586	10,129
Motions to Surcharge/Disgorge Trustee Fees	63	88	50	21	30	16	6	9	283
Referrals to States Licensing Authorities	2	4	3	1	2	1	1	4	18
Since July 2002, this data is no longer captured in the Program's automated, integrated reporting system, except for objections to trustee fees.									

CHAPTER 12 AND 13 TRUSTEE ENFORCEMENT ACTIONS (OCTOBER 1, 1994 TO SEPTEMBER 30, 2003)										
	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	Total
Motions to Remove from Cases	2	0	0	0	0	0	0	0	0	2
Suspension from Case Assignments	0	0	0	0	2	0	0	0	1	3
Termination from Case Assignments	3	0	0	1	0	1	0	1	0	6

The following chart presents the number of convictions of trustees or trustee employees obtained by United States Attorneys in the last nine fiscal years; the number of referrals where the United States Attorney declined to prosecute; and the number of referrals currently pending that were made in the last nine fiscal years. Of the 32 convictions, twelve were of trustees, and the remainder were of trustee employees. Sixteen of the convictions were in the chapter 7 area, ten in chapter 13, five in chapter 11, and one in chapter 12. Of the three pending referrals, two involve allegations of impropriety by trustees.

ALL CHAPTERS: TRUSTEE AND TRUSTEE EMPLOYEE EMBEZZLEMENT ACTIONS (OCTOBER 1, 1994 TO MARCH 19, 2004)											
	FY 1995	**FY 1996**	**FY 1997**	**FY 1998**	**FY 1999**	**FY 2000**	**FY 2001**	**FY 2002**	**FY 2003**	**FY 2004 (to date)**	**Total**
Referrals Resulting in Conviction	6	5	7	2	3	1	2	2	3	1	32
Referrals: Prosecution Declined	2	2	5	5	2	0	0	0	0	0	16
Referrals: Pending	0	0	0	0	0	1	0	0	2	0	3

21. A number of judges have found it improper for creditors (often buyers of large numbers of credit card accounts) to file proofs of claim without documentation required by Rule 3001. In view of the EOUST's concern about sloppy practice and poor documentation, and the fact that there are apparently tens of thousands of these claims, maybe more, has the EOUST taken any action on this issue?

The civil enforcement effort includes actions to address and remedy improper creditor conduct in the context of filed proofs of claim. A number of actions are taken by private case trustees, who are appointed and overseen by the United States Trustees, during the course of their administration of cases. Although generally such actions are taken by debtor's counsel or the case trustee, the United States Trustee occasionally is the most appropriate party to take the action. Recent examples of actions taken by private trustees or the United States Trustees have included objections to claims filed by creditors who chronically or willfully fail to demonstrate that they are entitled to payment in the amount or priority asserted in the proof of claim filed with the court.

22. Several recent reported decisions have sanctioned mortgage lenders and servicers for filing groundless stay relief motions and submitting inflated claims in chapter 13 cases based on mortgage overcharges. See, e.g., In re Gorshtein, 285 B.R. 118 (Bankr.S.D.N.Y. 2002); In re Riser, 289 B.R. 201 (Bankr.M.D.Fla. 2003). Given the significant harm to consumer debtors and unsecured creditors, what action has the EOUST taken to combat this problem?

Such actions are most likely to arise during the chapter 13 trustees conduct of the case. Recent actions by trustees in this regard include: (a) objecting to claims filed by creditors who chronically or willfully fail to demonstrate that they are entitled to payment in the amount or priority asserted in the proof of claim filed with the court; (b) seeking lien avoidance, and actions for failure to timely release liens or to address efforts to obtain post-petition perfection of security interests; (c) addressing violations of the automatic stay; and (d) pursuing violations of the Truth in Lending Act, the Homeowners Equity Protection Act, and the Federal Credit Reporting Act

23. There have also been reports of frivolous motions for relief being filed by secured creditors in chapter 7 cases, sometimes just prior to the lifting the stay at case closure, simply to generate recoverable legal fees - has the EOUST made any investigation of this matter?

We have not conducted a review regarding a pattern of possible frivolous motions for relief filed by secured creditors in chapter 7 cases. The Program would be willing to review reports the Subcommittee has received on such activities.

24. What is the EOUST position on minimal asset cases? Is there some minimum asset amount that may be potentially recovered before an action is initiated? Is the EOUST doing anything to ensure that trustees are not administering cases solely to generate money for themselves and their attorneys?

The Program encourages trustees to administer chapter 7 asset cases that will result in a meaningful return to unsecured creditors. Often the smaller cases are administered without the necessity of employing bankruptcy professionals, returning 50 to 60 percent of the amount collected to unsecured creditors. The Program does not have a minimum threshold for the administration of a case as an asset case. Through the Program's biennial chapter 7 trustee performance review process, Program staff monitor each trustee's distribution statistics, particularly with respect to the trustee's efforts to maximize the return to unsecured creditors. Trustees are admonished, and may not be reappointed to the panel, if they administer cases primarily for the benefit of themselves and their attorneys.

25. What amount of money has been saved for consumer bankruptcy debtors through actions of the United States Trustee program involving creditor abuses in FY 2002 and FY 2003?

The Program does not collect this data.

26. How many applications for compensation by professionals have been challenged by the United States Trustee program in FY 2002 and FY 2003? What was the outcome of these challenges? How much money was preserved for the benefit of the estates as a result of any successful challenges?

In FY 2002, the United States Trustee Program filed 3,303 motions and objections and made 4,867 inquiries concerning professional fees under §§ 326, 329, and 330 of the Bankruptcy Code. These actions resulted in the court ordered reduction or voluntary withdrawal of $57,815,250 in requested fees. During FY 2003, the United States Trustee Program filed 2,684 motions and objections and made 3,857 inquiries, resulting in the court ordered reduction or voluntary withdrawal of $44,806,190 in professional fees. Each year the United States Trustee Program was successful in approximately 91 percent of the matters that were decided by a bankruptcy judge.