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HEARING ON SMITHSONIAN INSTITUTION BUSINESS VENTURES

HEARING

BEFORE THE

COMMITTEE ON HOUSE ADMINISTRATION HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

HEARING HELD IN WASHINGTON, DC, MAY 25, 2006

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SMITHSONIAN INSTITUTION BUSINESS VENTURES

THURSDAY, MAY 25, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOUSE ADMINISTRATION,
Washington, DC.

The committee met, pursuant to call, at 12:25 p.m., in room 1310, Longworth House Office Building, Hon. Vernon J. Ehlers (chairman of the committee) presiding.

Present: Representatives Ehlers, Ney, Doolittle, Miller, Millender-McDonald, Brady and Lofgren.

Staff Present: Peter Sloan, Professional Staff; Bryan Dorsey, Professional Staff; George Hadijski, Director, Office of Member Services; George Shevlin, Minority Staff Director; Matt Pinkus, Minority Professional Staff; Charles Howell, Minority Chief Counsel; and Janelle Hu, Minority Professional Staff.

The CHAIRMAN. Good afternoon. The Committee on House Administration will come to order. I want to thank everyone for being here, but particularly those who are planning to offer testimony. We unfortunately, as frequently happens, have had a conflict with votes. We had a vote call just as we were about to begin this session, and that explains the delay in getting started. We have other votes that are expected to be called approximately at 2:30 to 3:00, somewhere in that time frame. It would be wonderful if everyone could be concise and lucid so that we could finish before then. I wouldn't put any bets on it, but at least it gives us a goal to shoot for.

Today this committee convenes a very important oversight hearing on the operations and investments of the Smithsonian Institution, as well as the role that Smithsonian Business Ventures serves in furthering the Institution's mission as an establishment for the increase and diffusion of knowledge.

The goal of our hearing is to allow the Smithsonian to provide an overview of their current status and bring transparency to the operations of the business venture. This will include discussion of the recent creation of a new joint venture between the Smithsonian Institution and CBS Showtime Networks called Smithsonian Networks, and the launch of its first product, Smithsonian On Demand.

The Smithsonian Institution is a treasured part of the American cultural landscape. Last year alone, 24 million visitors experienced the objects, artworks, and specimens housed within its walls, which contains more than 136 million items. That exceeds the amount of stuff I have in my basement, although my wife might dispute that.

It is the duty of this committee to ensure that this jewel of American culture be preserved and that its policies and procedures serve the public trust, something, incidentally, which it has done very well for many, many years.

For those students, visitors, and others who are unable to visit the Institution in person, to view its vast archive programming created by independent producers has served as an essential tool in furthering education about the many artifacts that are part of the Smithsonian. There has been considerable concern expressed by those in the educational and creative communities regarding the potential risks involved with curtailing use of the Smithsonian collections by filmmakers, rival networks, journalists, and scholars, as proposed in the Smithsonian On Demand venture, and the committee looks forward to hearing from our panelists on these issues.

Today's hearing will focus on several areas of concern to the committee. First, my staff has made strenuous efforts over the past several weeks to obtain a copy of the contract that Smithsonian Business Ventures entered into with CBS Showtime.

I would like to thank Secretary Small for providing a copy of the contract in the past several days; however, large portions of the contract were redacted in the version that was submitted, making it difficult to gain a complete picture of its substance. My understanding is that the Smithsonian cited a confidentiality clause as the reason for redactions that were made to the contract before it was submitted. For Republican institutions such as the Smithsonian, the contents of this contract are essential in preserving the appropriate level of transparency that the public expects and deserves.

After you provided the redacted copy of the contract and at your invitation, my staff has met with your staff to discuss the content of the redacted portions. This discussion raised additional concerns, and my staff requested an unredacted copy of the contract so that this committee may better understand its contents.

Thank you, Secretary Small, for now making the full text of this contract available in keeping with your role as a steward of this institution on behalf of the American public. We will honor your request to keep it confidential while we review the agreement.

Our second objective today is to better understand your management philosophy in the operations of Smithsonian Business Ventures and to bring clarity and transparency to the process used by the Smithsonian in entering into this contract with CBS Showtime. I am very interested to learn more about the genesis of this partnership, and why a deal of this magnitude was not thoroughly vetted with the Smithsonian's authorizing and appropriating committees prior to the venture being ratified by the Smithsonian's Board of Regents.

Finally, and most importantly, this committee must insist on behalf of the millions of Americans who not only visit the Smithsonian each year but who also enjoy programming based on its contents, that this institution must put the needs of the public above its own need to explore new sources of revenue when those income sources limit the public's access to the Nation's attic. We must take whatever steps are necessary to ensure that no filmmaker, scholar, or any other individual whose goal is to use and foster educational

awareness of the Smithsonian is inhibited in making use of the resources contained within the institution.

To address the growing concerns surrounding the Smithsonian Business Ventures, and particularly the new joint venture between the Smithsonian Institution and CBS Showtime Networks, the committee will call upon several distinguished experts from the Smithsonian to provide insight into these issues.

To provide additional perspective, the committee is also pleased to welcome several witnesses from the educational and creative community to provide their testimony. Our first witness today is Lawrence M. Small, secretary of the Smithsonian Institution. Secretary Small, we welcome you and thank you for being with us today. We look forward to your overview of Smithsonian operations as they stand today, and expect you will conceptually address your guiding philosophy behind Smithsonian Business Ventures and its operations.

Our second panel of witnesses today includes Carl Malamud, senior fellow and chief technology officer from the Center for American Progress; Margaret Drain, former executive producer, vice president of national programming for WGBH in Boston; and Emily Sheketoff, associate executive director for the American Library Association. Welcome to our distinguished second of panel of witnesses as well.

Finally, on our third panel today we have Alice Maroni, chief financial officer of the Smithsonian Institution, John Huerta, general counsel of the Smithsonian Institution, and Gary M. Beer, chief executive officer of the Smithsonian Business Ventures.

While we will not be requesting or hearing testimony from them today, I asked them to appear before the committee to answer member questions. I welcome you all to our third panel, and I thank each of you for being with us today.

At this time, I would like to recognize the Ranking Member, Ms. Millender-McDonald from California, for any opening remarks she may have.

Ms. MILLENDER-MCDONALD. Thank you, Mr. Chairman. Thank you. It is good to see you again, Mr. Secretary.

I am pleased that you have called this oversight hearing, Mr. Chairman, because it provides the Smithsonian with an opportunity to inform us about where the Smithsonian is today and where it is going in the future.

The House Appropriations Committee cut the Smithsonian's budget by $20 million last week, and I would be very interested in hearing what impact that cut will have on the operations of this critical institution and to hear from the Secretary as to what caused these cuts.

The Smithsonian is a public trust which houses the Nation's cultural and historic treasures. It operates as a trust entity for the people of the United States, and, as such, has a special place in the heart of all Americans. The Congress has allowed it to occupy a place of honor on the National Mall, and it is a beacon for scientists, scholars, families, and donors. Therefore, the public trust should never be breached.

I think this hearing will provide a long overdue opportunity for the American people to meet the person who heads their national

trust and to begin to understand the complex nature of the institution. With the availability of public funds being drained away from other national priorities and reduced revenues, the Smithsonian is inevitably and negatively affected. I am very appreciative of the Smithsonian, and I look forward to its continued viability and expansion.

There are many things to be preserved and displayed which have yet to be fully realized, and the Smithsonian is the place where that can occur to the benefit of the Nation.

While the budget cut has gotten the Smithsonian's attention, I want to say that I have not taken a position on the Smithsonian On Demand contract itself, nor on the laudable ambitions behind it, which is to increase public awareness about the Smithsonian's collections and to increase the Smithsonian's ability to utilize its trust funds.

However, I am deeply concerned as to the lack of transparency to the process and to this contract. Congress only received a copy of this contract, a couple of days ago; and we must examine the contract fully and receive the views of the public and/or outside experts. I will again make sure that the confidentiality of this contract is not breached by this Member.

This hearing, the first in the 109th Congress on this subject or any other Smithsonian issue, will begin this process today. I would hope that the issue of the budget cuts would resolve itself as the appropriations process moves forward in the Senate and in conference. But that will depend in part on how responsive the Smithsonian is to us today, Mr. Chairman, and in the future, to the concerns which have been raised.

I am particularly interested in hearing the institution's justifications of the increased salaries paid out of the trust fund moneys to personnel in the Smithsonian Business Ventures, as well as to the secretary of the Smithsonian and other high officials of the institution. Some of these may well be justified, but for comparative purposes, looking at salaries at Federal agencies funded entirely from Federal funds, this could have a negative appearance.

Mr. Chairman, frequent oversight provide a way to address the inevitable differences which arise among visitors, public users of the Smithsonian collections, the Institution, and the Congress. It could help avert the impulse to take counterproductive actions and provides an avenue to redress grievances. It really falls within the legislative and policy jurisdictions of our Committee on House Administration, and I would like our committee to be the court of first resort whenever possible, Mr. Chairman.

Therefore, I look forward to hearing more about these new ventures which the Smithsonian has undertaken, its new financial needs, and how we can help to ensure that it continues its important function as the Nation's attic.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you.

I am now pleased to recognize the gentleman from Ohio, Mr. Ney, for his statement.

Mr. NEY. Thank you, Mr. Chairman. And thank you for holding an important hearing. And welcome to the secretary. In the inter-

est of time, without objection, I will just put my statement in the record.

The CHAIRMAN. Without objection, so ordered.

[The information follows:]

Mr. Chairman, thank you for calling this important Oversight Hearing on the Smithsonian Business Ventures.

As you know, in 1829, English scientist James Smithson donated his fortune to the people of the United States for the purpose of creating an institution for the "increase and diffusion of knowledge."

In 1846, an Act of Congress officially established the Smithsonian Institution as a trust, to be administered by a Board of Regents and a Secretary of the Smithsonian.

Today, the Smithsonian has grown into one of our nation's true treasures, with over 142 million items and artifacts.

The Institution will receive a fiscal year 2007 federal appropriation of over $600 million, and it includes seventeen museums, four research centers, the National Zoo, and various educational and traveling exhibit services, which are operated by nearly 6,000 employees.

A structure as enormous as this carries enormous challenges for its Administrators. They are faced with issues pulling the Institution in all directions.

I am sympathetic to these challenges, having participated in numerous hearings regarding the Smithsonian Institution.

That being said, I am very interested to hear Secretary Small's vision for managing the Institution's collections, and his ideas to ensure that restrictions are not placed on the public's access to these collections at today's hearing.

Mr. Chairman, thank you again for calling this important Hearing.

The CHAIRMAN. Next we turn to the gentleman from Pennsylvania, Mr. Brady. He has no opening statement. Thank you.

At this time, then, we will commence with testimony from our first witness, Secretary Lawrence Small. Mr. Small.

STATEMENT OF LAWRENCE M. SMALL, SECRETARY, THE SMITHSONIAN INSTITUTION

Mr. SMALL. Mr. Chairman, thank you very much for this opportunity to testify. With 19 museums and galleries, 9 research centers, the National Zoo, and 136 million objects, as you pointed out, in our collections, the Smithsonian is the world's largest provider of museum experiences. It connects Americans to their cultural heritage, and it also acts as an international leader in scientific research and exploration. Last year, the Smithsonian attracted more than 24 million visitors and reached 150 million more people through its magazines and Web sites.

The Smithsonian is unique in status and structure. It is not a Federal agency. It is not in the Executive Branch. It is an independent trust entity, established as such by Congress 160 years ago in 1846. And that was done to ensure that scholarly research and exploration would be unaffected by changing political climates. In fact, Congress was satisfied enough with the public-private nature of the Smithsonian structure to make the National Gallery of Art, the Kennedy Center for the Performing Arts, and the Woodrow Wilson International Center for Scholars legally part of the Smithsonian when they were established. And they continue as such today, although, as you know, they receive separate appropriations from Congress and have independent governance. The support of the administration, the support of Congress and the private sector, is crucial for all four institutions, and we are more than grateful for it.

The Smithsonian relies on Federal funds for roughly 75 percent of its budget. In addition, the Smithsonian has nonFederal funds, which we refer to as trust funds, which include contributions from private sector sources and earnings from Smithsonian Business Ventures, which we call SBV.

The Smithsonian has had museum shops, it has had restaurants, movie theaters, and a study tour travel business for decades. Its highly regarded Smithsonian magazine, which I know all of you are familiar with, is now 35 years old.

Smithsonian Business Ventures was established in 1998, when the institution's board of regents authorized the creation of a distinct operating division that would bring together the Smithsonian's diverse business activities and have them managed professionally by a team of experienced executives reporting to a board of directors and the secretary.

In fiscal year 2005, Smithsonian Business Ventures contributed $30 million to the institution, and from 2000 to 2005 a cumulative total of $155 million. And these are funds that are used for activities, that are not paid for by taxpayer dollars. And so while the Smithsonian Business Ventures contributes less than 4 percent of the total annual budget, it is really a critical contribution, because the unrestricted funds that it provides aren't earmarked for special

projects as are most philanthropic gifts, and it fills really vital funding needs that would otherwise not be met.

SBV's contributions to the Smithsonian accounts for nearly half of the institution's total unrestricted funds. And these are dollars that help pay for programs such as the largest traveling museum exhibition service in the world, the relationships that the Smithsonian has with 143 affiliate museums around the United States in 39 States, hundreds of lectures and trips and seminars every year, and the Annual Folk Life Festival on the Mall, which attracts more than 1 million people, and many, many education programs which reach millions of students and teachers.

Now, the Smithsonian has long sought to do on television what it was able to do in print so successfully with this magazine, the Smithsonian magazine. This was established 35 years ago. It reaches millions and millions of people who would not otherwise have had their lives affected and touched by the fascinating content of the Smithsonian. And to that end, and with the full support of the board of regents, the Smithsonian concluded an agreement in early 2006 with CBS Showtime to create a new cable TV offering called Smithsonian on Demand. This is targeted at a market vastly larger than the Smithsonian's total number of annual visitors.

Smithsonian simply doesn't have the resources, doesn't have the expertise to do something like this alone. Smithsonian on Demand will allow the Institution, for the first time and in its own voice, to connect with millions of people nationwide, most of whom will visit the Smithsonian rarely, if at all. The new arrangement involves very minor change to the way the Smithsonian interacts with its many constituencies' access to the collections, to the archives, to the libraries, for research remains completely unchanged. Researchers, teachers, journalists continue to have full access to the Smithsonian for news and public affairs and academic and scholarly purposes. The Smithsonian is totally committed to keeping Congress up to date and informed as the progress of this exciting and innovative service takes place. We look forward to discussing with you this new means of communication that represents a really major step forward in permitting the Smithsonian to touch the lives of millions of Americans through the use of 21st century technology. Thank you.

[The statement of Mr. Small follows:]

Committee on House Administration
U.S. House of Representatives
Hearing on Smithsonian Business Ventures
Testimony of Lawrence M. Small
Secretary of the Smithsonian Institution
May 25, 2006

The Smithsonian Institution is the world's largest and most respected provider of museum experiences, supported by authoritative scholarship, that connects Americans to their cultural heritage and also acts as an international leader in scientific research and exploration. With 19 museums and galleries, numerous research centers, the National Zoo, and 136.5 million objects in its vast and priceless collections, there is nothing quite like it on the planet. Last year, the Smithsonian attracted more than 24 million visitors, a 24% increase over fiscal year 2004, and its magazines and Web sites were accessed in excess of 150 million times.

The Smithsonian is not a federal agency; it's not in the Executive Branch; it's a unique independent trust entity and was established as such by Congress in 1846, after years of debate, to ensure that scholarly research and exploration would be unaffected by changing political climates. The Smithsonian is governed by its Board of Regents, members include the Chief Justice of the United States, the Vice President of the United States, three members of the Senate, three members of the House of Representatives, and nine citizens. The Chief Justice of the United States has traditionally served as chancellor of the Smithsonian.

The Smithsonian relies on federal funds for roughly 75% of its budget; this includes direct congressional appropriations and also federal grants and contracts. The Smithsonian Institution's federal budget contains two accounts: Salaries and Expenses, for the ongoing operations of the Smithsonian, and the Facilities Capital account for the Institution's physical infrastructure. Unfortunately, today the Smithsonian is an institution with a severely deteriorated infrastructure, outdated technology, and many aged, outmoded exhibitions.

Although progress has been made, the April 2005 report of the Government Accountability Office (GAO) makes it clear that the Institution has a well-documented and compelling need for dramatic increases in facilities revitalization and maintenance funding. The GAO indicates that $255 million per year for the next 9 years, or a total of $2.3 billion, is needed to fix and maintain the Institution's facilities. To eradicate its facilities revitalization and maintenance backlog over the next decade, the Smithsonian would need an increase in its annual federal appropriation in excess of $100 million more than the current level. Additional federal support is necessary because private sector funds aren't forthcoming for the mundane, yet essential, maintenance tasks of fixing leaky roofs, rusted beams, crumbling stone, and ancient, inefficient heating and cooling systems in buildings that have been maintained with federal funds for a century plus.

In addition to the federal contribution, the Smithsonian has trust funds, which include contributions from private sources, for example, endowments; donations from individuals, corporations and foundations; and memberships—in total, the Smithsonian has raised roughly $1 billion from the private sector since 2000. Among other things, those funds helped to build the National Museum of the American Indian on the national mall, the National Air and Space Museum's Steven F. Udvar-Hazy Center near Dulles Airport in Virginia, the National Museum of American History's Hall of Transportation, and the National Museum of Natural History's Hall of Mammals. Trust funds also include net revenues from the Smithsonian's magazines, mail-order catalog, product development, entertainment, shops and restaurants, and concessions, which are collectively known internally by the organizational name "Smithsonian Business Ventures" or "SBV."

Unrestricted funds are all the more important today because, with various pressures on the federal budget, the Smithsonian is well aware that it must do all that it can to raise funds from other sources in order to revitalize current exhibitions, create new exhibitions, build new museums and continue the national outreach and education programs that serve millions of Americans across the country wherever they live.

Such programs include the Smithsonian Institution Traveling Exhibition Service, the largest traveling exhibition service in the world, which reaches nearly five million people across the country every year; our Smithsonian Affiliations Program, which lends some of our 136.5 million objects to museums large and small across the nation, and now has 143 affiliate museums in 39 states, Washington, D.C., Panama, and Puerto Rico; the Smithsonian Associates, which offers hundreds of lectures, trips and seminars every year; our Folklife Festival, which reaches a million people every year on the National Mall; and our many education resources, which reach millions of students and teachers every year. You don't have to live in the nation's capital to take advantage of what we have to offer.

In 1968, Secretary S. Dillon Ripley established Smithsonian Museum Shops. In 1970, *Smithsonian* magazine was launched, initially funded by an anonymous gift; its earnings were used to fund trust positions and to add to the Smithsonian endowment. In 1973, the Business Management Office was created in the Financial Services group to oversee the various Smithsonian business activities.

When Secretary Michael Heyman became Secretary of the Smithsonian in 1994, he believed business practices could be improved, modernized and expanded. In 1998, the Board of Regents formed an *ad hoc* committee on business, chaired by former Senator Howard Baker, to evaluate and offer recommendations on the Institution's business structure and practices, and potential for future growth. The committee studied similar organizations such as the National Geographic Society, Minnesota Public Radio and the Harvard Management Company, which all dealt with "similar goals in environments dominated by programmatic missions." These organizations also created a centralized business entity to operate in support of the parent organization. The study found that no other non-profit organization was able to expand its business without doing so.

In 1998, the Regents authorized Secretary Heyman to establish a distinct operating division of the Institution, Smithsonian Business Ventures (SBV), which would report to the Secretary and an outside board to oversee SBV activities. In 1999, Secretary Heyman recruited Gary Beer to be the founding Chief Executive Officer of SBV. Beer had been the co-founder, with Robert Redford, of the highly successful group of media and retailing ventures established under the "Sundance" brand.

SBV brought together under one division a number of existing business activities and, in recent years, SBV has launched several new businesses. The commercial businesses run by SBV include: museum retail stores, restaurants and IMAX theaters; magazine publishing (*Smithsonian,* and *Air & Space* magazines, and the popular visitor's guide *My Smithsonian*); catalogue and Internet sales of Smithsonian products; licensing of the Smithsonian brand for specific products manufactured and sold by third parties; book publishing with partner HarperCollins; educational group travel through Smithsonian Journeys; and television programming (Smithsonian On Demand) with partner CBS/Showtime Inc.

In fiscal year 2005 (ending Sept. 30), SBV operations contributed $30 million to the Institution, and, from 2000 to 2005, a cumulative total of $155 million. These are funds used for exhibitions, programs and activities not funded by federal taxpayer dollars. Although SBV contributes less than 4 percent of the Smithsonian's total annual budget, it is critical to the Institution because the unrestricted funds it produces are not earmarked for specific projects, as are most philanthropic gifts, and it fills vital funding needs that otherwise would not be met. SBV's contribution to the Smithsonian accounts for nearly one-half of the Institution's total unrestricted trust funds each year.

For many years the Smithsonian had sought to establish a presence on television to showcase the Institution's vast resources, collections, exhibitions, archives and curatorial expertise to further its mission, the "increase and diffusion of knowledge." With the full support of its Board of Regents, Smithsonian staff pursued discussions with several large media organizations and negotiated an agreement in 2006 with CBS/Showtime Networks Inc. to create a new company called Smithsonian Networks, which will produce a new cable TV offering known as "Smithsonian on Demand." The Smithsonian did not have the resources or expertise necessary to enter the world of television production itself.

Smithsonian Networks will allow the Institution, for the first time and in its own voice, to share its national collections and research with millions of people nationwide. If the new partnership is successful, the earnings it generates will go to support exhibitions and a wide range of public activities for which the Smithsonian does not receive federal funding.

While creating a new approach to communicate with what is expected be millions more people than the Smithsonian currently reaches involves a certain degree of complexity, the Institution has succeeded in creating an arrangement that will result in immaterial change to the way it has interacted in the past with its many constituencies.

The agreement affects only proposals to film Smithsonian resources for commercial distribution and broadcast where that proposed use is more than incidental. Consequently, the terms of the new agreement affect only a narrow set of programs and are not a bar to other legitimate commercial filmmakers who have the right to reasonable access to the collections and staff of the Smithsonian. In fact, an analysis of approximately 900 media contracts signed between 2000 and 2005 shows the overwhelming use of Smithsonian resources is for academic, curriculum-based, or scholarly purposes, which are outside the scope of the agreement and will continue as they have in the past, or for incidental use in commercial films, which is permitted under the agreement. Only 17 agreements, fewer than 2 percent, appear to have involved more than incidental use of Smithsonian resources.

Access to the national collections and to the expertise of our curators is a fundamental part of the Smithsonian's 160-year-old mission. Access to Smithsonian collections, archives and libraries for research remains unchanged. Researchers, teachers, and journalists continue to have full access for news and public affairs, academic, and scholarly purposes. And the Smithsonian is committed to keeping the Congress up to date and informed as to the progress of this exciting new service to the American people, as well as other innovations we may develop which harness 21st-century technology.

The Smithsonian plays a valuable role in our nation's civic, scientific, and cultural life. What the Smithsonian does for everyone it touches, whether through visits to museums, time spent reading *Smithsonian* magazine, surfing Web sites, or participating in Smithsonian lectures and tours, is reconnect people to their heritage, to invite people to understand how this nation has grown to be so astonishingly vital. The Smithsonian tells the story of what it means to be an American. Everyone at the Smithsonian takes that charge quite seriously, and is honored to do so.

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The CHAIRMAN. Thank you very much for your testimony. And the telephone reminded me that I neglected to mention the rules of this committee: No cell phones allowed to be on. So if you have a cell phone, please turn it off, whether you are a member, member of the audience, or member of the media. Thank you.

I appreciate your testimony. Just to kick off the questions, and I am sure there will be many questions, but what is the mission of the SBV? I assume you have that in writing in some fashion or as a part of your documents. And what strategies are employed to meet the goals of the mission?

Mr. SMALL. The mission is to represent what I think you could call the best quality operations for the type of thing that each one of its businesses does against other people who do the same sort of thing. So, for example, the mission of the magazine is to be one of the great general interest magazines in the United States, and it consistently is viewed as doing that, and has a terrific reputation and, as I said, is read by about 7 or 8 million people a month.

The mission of our restaurants and our museum shops is to be the best restaurants and museum shops in the museum world. Each one of these businesses is simply designed to be the best it can possibly be, to provide, first of all, an extension of the mission of the institution, which has always been since 1846 the increase in diffusion of knowledge. So the magazine is meant to reach out to millions of people who would otherwise not be able to come and visit the museums.

The shops and restaurants are an extension of the visitor experience of the Smithsonian. So in each case, it is to be the best in class for the type of market that it is to serve, and obviously to raise funds for the Institution to supplement the Federal funding that we get.

The CHAIRMAN. Now, is this the only means of raising outside funds that you use?

Mr. SMALL. No, sir. We also have an endowment which amounts to a little over $800 million, and it generates about $35 million to $36 million a year for the institution. We also raise money from the private sector. Over the last 6 years we have raised $1 billion in private sector philanthropy. So there are definitely other sources that contribute nonFederal funds to the Smithsonian.

The CHAIRMAN. So in other words, the development in fund-raising is within your bailiwick.

Mr. SMALL. Certainly.

The CHAIRMAN. But enterprises which are trying to raise money through selling goods, providing services and so forth, is that all under SBV, or does the museum operate some of those as well?

Mr. SMALL. The vast preponderance of what you might call commercial-type activity, publication of the magazine, the restaurants, shops, theaters, all of that is under Smithsonian Business Ventures. The raising of funds through philanthropy is not.

The CHAIRMAN. And why did you see the need to start the Smithsonian Business Ventures? This is going back a long ways, but what do they do that you can't do yourself, just with internal staff if you had decided to?

Mr. SMALL. First of all, all of the members of the Smithsonian Business Ventures staff are, in fact, internal staff. Smithsonian

Business Ventures is just a name to indicate an operating division of the Smithsonian Institution. It is not separate from the Smithsonian Institution.

The reason it was formed is that back in 1998, the board of regents felt that there had to be a more organized professional approach to dealing with so many museum shops, such a successful magazine, so many restaurants, all of these diverse activities. They asked former Senate Majority Leader Howard Baker, who was a member of the board of regents at the time, to chair a committee to look at the issue, help find some outside consultants as to what to do. And the committee went and looked at other institutions that are large and complex—universities, hospitals, things of that nature—and they found that where the most successful model appeared was where these institutions had pulled together their activities that were in the business world and had them run by professional business managers. And so the board of regents in 1998 decided to form Smithsonian Business Ventures.

The CHAIRMAN. And this is a separately chartered organization, or simply operates within the framework of the Smithsonian overall?

Mr. SMALL. The latter. It simply operates within the framework of the Smithsonian. It is not a separate legal entity.

The CHAIRMAN. And does the executive director then report to you, or to the board of regents?

Mr. SMALL. Reports to me.

The CHAIRMAN. And through you to the board of regents?

Mr. SMALL. Absolutely.

The CHAIRMAN. So every aspect of their operations is subject to control by the board of regents?

Mr. SMALL. That is correct.

The CHAIRMAN. And what care is taken to make certain that the mission of the Smithsonian Business Ventures matches the mission of the Smithsonian as a whole? Does the motivation of profit or raising money in some way cause them to divert from your central mission of providing information, knowledge, imparting knowledge, and so forth?

Mr. SMALL. Mission is paramount in the Smithsonian, has been for 160 years. It is what drives us. Everything done by Smithsonian Business Ventures is completely under the governance of the board of regents, and we are no less interested in mission there than we are in any of our museums. So anything we do, whether it be the publication of the magazines, the type of merchandise that we sell, any type of partnerships that we enter into, all have mission first and foremost.

The CHAIRMAN. I see that my time has expired, and I would like to abide by the time rules, just as any member has to. So I am pleased to recognize the Ranking Member.

Ms. MILLENDER-MCDONALD. Thank you so much. And, again, thank you for your testimony, Mr. Small.

In looking at this, first of all, my first inclination in reviewing all of this material that I received was a 30-year contract given to you, and how often—and maybe, Mr. Chairman, you might be able to answer this when does Congress review this contract? How often do we come back to review just where you are, where you are pur-

porting to go, what are you doing, some of those business ventures that you have entered into?

Mr. SMALL. You mean with the committee itself?

Ms. MILLENDER-MCDONALD. Well, there is a 30-year contract that I am reading here. And I was just concerned as to how often is that contract reviewed by either this committee or other relevant committees? Why was 30 years chosen as the length of this contract?

Mr. SMALL. I understand, Congresswoman. First of all, I think it is a good point to make, because 30 years is an unusual amount of time.

Ms. MILLENDER-MCDONALD. It seems to me, also.

Mr. SMALL. Yes. Relative to the kind of things that we have done in the past in the Smithsonian. On the other hand, as we have gotten more and more into the world of learning about television—because the whole idea of this is to do for the Smithsonian in the 21st century what the magazine did in the 20th century, communicate with so many people. We have discovered that building a TV channel, a cable TV channel, building a film library are all long-term propositions; that they take at least 7 to 10 years to get established; and that long-term contracts are not unusual in the television industry.

So as we have learned more and more about this, we have come to see that it is not something that you can do overnight. It takes a long time to build up the film library, it takes a long time to build up the number of users of the network. So while it is different from what we have done in the past, we understood that it is not unusual.

Ms. MILLENDER-MCDONALD. And there is a possibility that it is not unusual, as you said, given the television industry. But there is one thing that tends to put you apart from all of this, and that is that you do get Federal funds, and you get 75 percent of Federal funds. And those funds are really the people's money.

Given all of that, then it would appear to me that we would have some sense of accountability, if you will, if nothing else, as to where you are along this continuum of 30 years to see whether or not there is something that we need to do to enhance the budget of the Smithsonian. And so that in and of itself is a deep concern of mine, that there is a 30-year contract, irrespective of what you are saying that you have to do all of these things and it takes time. And I can understand that. But when there is this proviso that you have said, while it is not a Federal agency, you do get Federal funds, and those funds really represent the people's money. And doing that, then we have to have some accountability ourselves, and so therefore we should have that accountability as well in your new-found venture of the Smithsonian Demand on Review.

Mr. SMALL. Smithsonian on Demand.

Ms. MILLENDER-MCDONALD. What is the percentage of ownership the Smithsonian actually has in this Smithsonian network as a minority partner?

Mr. SMALL. Ten percent.

Ms. MILLENDER-MCDONALD. Would such an equity arrangement be considered unusual?

Mr. SMALL. I think that it is—since the Smithsonian is not investing any money in this, we think it is a terrific arrangement.

Ms. MILLENDER-MCDONALD. So you think it is a terrific arrangement, and you do not see this as an unusual percentage?

Mr. SMALL. No. We think it is a wonderful percentage. Unusually good; let us put it that way.

Ms. MILLENDER-MCDONALD. Well, I suppose that is something that is yet to be determined. But let me go further on this. In your statement, you have said that given the GAO assessment of the buildings and the age of the buildings and all of those factors, that GAO has assessed that there is a critical need for you to have a total of $2.3 billion that is needed to maintain all the facilities. And yet in your statement you are suggesting that you need to come back to the Federal Government, perhaps the appropriators, to look for in excess of $100 million beyond that amount.

Why would the appropriators want to do this when they have seen, as some perceive, an arrogance, and certainly the inability of your wanting to cooperate with them on questions and issues that they have raised about this business venture that you have ventured into? That is one question.

The other question is you have outlined all of your different ventures and all of that. What sets you apart from them in terms of where you are today from what they have, where they have been?

Mr. SMALL. First of all, I would say that I believe that Smithsonian on Demand is completely consistent with the other outreach activities of the Smithsonian in the past, and it is really a diffusion of knowledge-focused activity. It is focused on getting the Smithsonian's treasures and stories, objects, out to the American people in the most effective way possible.

One of the things we are aware of, and I am totally sensitive to what you are saying, Congresswoman, is that Congress was surprised by the blowup about Smithsonian Business Ventures. We were surprised. We were completely shocked by it. Our board was shocked by it. Because the way this—about Smithsonian on Demand. Because the way Smithsonian on Demand is actually structured, it actually represents almost no change, minimal change to the way the Smithsonian operates, where people come to the Smithsonian, with professors, with filmmakers, with all sorts of different constituents.

Because it involved so little change, we did not foresee at all that there would be any hue and cry and that people would interpret Smithsonian on Demand the way they seem to have, which they believe it has some restricted access.

So we apologize for the tremendous hullabaloo that has been created for Members of Congress because we didn't expect it. And then when the time came to react to it, since this contract has a confidentiality clause that is designed to protect the business information in it that could hurt the venture competitively if it were made public, just because competitors would see it, we had to go back to the partner in it and say, since we are bound by this confidentiality clause and Congress wants to see the document, can we provide the document to Congress? And it has taken us this long to be able to get that permission.

Ms. MILLENDER-MCDONALD. But, Dr. Small, wouldn't you think that because this was a venture unlike any other venture—you know, we had magazines, business offices and all of these things open up which you outlined—this is something unusual? It seems that you were putting the Smithsonian on sale, as Members of Congress have seen it. But you did not have the sensitivity to come to Congress before this. And then when Congress heard it, it was in the media. And that is what is perplexing, confusing, and insensitive to Members of Congress.

Mr. SMALL. I completely understand what you are saying. From our point of view, the way we thought it through—and obviously in the blinding light of hindsight, we would try to do it differently. The way we thought it through is we, the Smithsonian, has been doing television programming and working with filmmakers for years and years and years. Their ability to access the Smithsonian, the ability to work with the Smithsonian is hardly changed by this at all. So we did not think that there was going to be any big uproar, because we saw it as minimal change.

The reason we didn't come to Congress is we didn't see that there was anything that involved any significant change in any big way. And so now that we have seen that it has been turned into what you might call an issue, where some people believe that access is restricted, although——

Ms. MILLENDER-MCDONALD. We really do believe that, yes.

Mr. SMALL. The fact is, it is not. And the same people can access the Smithsonian the same way they always have. The Smithsonian can do just about everything it did before we did this arrangement. But it has been twisted in some people's minds into something that is dramatically different than the way we have operated for 160 years, and it is not.

And so understanding that, I am sorry that it has created problems for members who have been papered with all sorts of correspondence. But the fact is we did not estimate it would blow up, our board did not estimate it would blow up because we didn't see it as a big change. That it has blown up, obviously we want to communicate with everybody as best we can to alleviate their concerns, to explain what is going on. The issue of confidentiality, we simply had to get our partner to go along with it, and they have.

Ms. MILLENDER-MCDONALD. Well, I thank you, Mr. Chairman. I just want to say this. Smithsonian on Demand, becomes problematic for Members of Congress. Smithsonian on Demand, I think that is one of the problems.

The CHAIRMAN. The gentlewoman's time has expired. I am pleased to recognize the gentleman from Ohio, Mr. Ney.

Mr. NEY. Thank you, Mr. Chairman.

And Secretary, as you know, the Congress, appropriate jurisdiction committees, get an executive summary when it comes to House Administration, Transportation, and Appropriations. As I understand probably within that executive summary and from what you said about not knowing the magnitude of the reaction on this, and not thinking it would have a huge reaction. But those executive summaries that come to these committees sometimes will not have a lot of detailed information in them is what happens.

Now, I am not saying that by any stretch of the imagination it was intentional or anything. I know from the past in looking at these executive summaries, they are executive summaries. Of course, the Congress is represented on the board of regents. And I think in this case on this contract, there was an executive subcommittee, wasn't there?

Mr. SMALL. The board of regents reviewed this contract in great depth.

Mr. NEY. And it was an executive subcommittee. So at the end of the day, probably the issue we can look at is what can be done to increase communication between the Congress, I think, and the private end with the SBV.

Mr. SMALL. I couldn't agree more. There is no question here that we have to do a better job in working with Congress on communication.

There was no desire at any point in time in the Smithsonian to keep this secret from Congress, because all the minutes of the meetings of the Smithsonian Regents, where this was talked about in detail, were, in fact, sent to our committees of jurisdiction.

But we didn't call up the committees of jurisdiction and say, Look at the minutes of this; pay particular attention to it. They just were sent up routinely.

And now that we have seen what has happened on this, we want to work very, very aggressively with all of the committees that work with us to make sure people are up to date.

Mr. NEY. Because I think the argument that won't hunt here—as we say, That dog won't hunt. I think that argument won't hunt here in the Congress that, well, the SBV is a separate entity, because although the Smithsonian is and should be unique—I would say that—but the SBV may make a decision that comes back somehow to get into the realm of public accessibility which then is the taxpayer dollar.

So, yeah, I think maybe the way to look at this is, what can be done with communication, when issues in fact will have some type of effect on—even if they are decided by a different arm, would have an effect.

Mr. SMALL. I agree.

Mr. NEY. Thank you.

The CHAIRMAN. I am pleased to recognize the gentleman from Pennsylvania, Mr. Brady.

Mr. BRADY. Thank you, Mr. Chairman. I also have a problem with a 30-year contract. I have a problem with a 30-year anything. I mean, it is an awfully long time. But you said that the reason is because it is going to take 7 to 10 years for them to get ready to offer anything.

Mr. SMALL. No. No. We expect that by the end of this calendar year there will be programming. I said it takes 7 to 10 years to really build up the brand within the world of television, so that it has lots of people who are subscribers to it and it establishes its presence in the marketplace.

Mr. BRADY. So you are giving them a 30-year contract; we are allowing them on our time to build up their business?

Mr. SMALL. We and they, because we are part of it. We are partners.

Mr. BRADY. And also I understand if a film maker, a private film maker would have to offer on demand, they would have to offer—they have first right of refusal?

Mr. SMALL. No, that is not true; that is one of the things that has been a misunderstanding.

We have the ability to do virtually almost everything that we did in the past. We actually took a look at, over the last 5 years, 350 contracts that we entered into to allow film makers to work with us; and out of the total, the ones that would even come up for a look by this particular partnership ends up being less than 5 percent of the whole amount. So virtually everything that we did in the past, we would have done automatically.

And then we have the ability to work with independent film makers outside of Smithsonian on Demand as well. So this is a misinterpretation that has gotten into the public arena.

Mr. BRADY. But if I am a film maker and I want to make a film and you don't agree, or the demand people, Showtime, don't agree, you could stop that from happening?

Mr. SMALL. If you are a commercial film maker and you have come to the Smithsonian at any time in the past, the first place you go is to the museum that you would want to work with. That museum has always made a decision whether it wants to work on that project with that film maker. And that has to do with, is that particular topic a priority for the museum? It has to do with whether the curators are free to work on it.

So the first thing that the museums have always done is decide whether they want to do it or not. So the answer to the question is that if some film maker comes to a Smithsonian museum and says they want to make a movie, it is up to the museum first to say, do they want to make the movie, and it always has been.

Mr. BRADY. But now you add to the equation, Showtime, and now they make a decision.

Mr. SMALL. No. Then what happens is, let's assume the museum says, do they want to work on the project with the film maker. The museum then has the option of saying, this is something that could be of interest to Smithsonian on Demand, or it is something that we might want to do independent of it. And so it could go in either direction; and that will then depend on the circumstances.

But it doesn't automatically have to go to Showtime, with Showtime saying—excuse me, with Smithsonian on Demand, with them making the decision. It is the museum's decision which way it should go.

Mr. BRADY. But isn't Showtime a part of that decision?

Showtime is not a part of any of the decisions?

Mr. SMALL. No, the arrangement that we have made is that the Smithsonian will decide what it will do with whom. And it has the option to do a certain number of things independently during the year, during any given year, without being involved with Smithsonian on Demand. And then it expects to do the bulk of this, because Smithsonian on Demand is going to invest tens of millions of dollars every year in programming with independent film makers in this venture, so the Smithsonian will be doing much more than it has ever done in the past. So much more is going to get done.

Mr. BRADY. My concern is real simple. An independent film maker wants to produce or have a film put on TV. And you are telling me that Showtime has no say in that at all? They could just keep on coming in and doing what they have been doing when Showtime wasn't in the 30-year?

I am worrying about stifling these people for 30 years, and maybe Showtime doesn't want the competition. I don't understand that.

Mr. SMALL. Let me be very specific. We looked at 300—all the cases that we have worked on with film makers over the last 5 years, there are 350 cases; what we saw in the 350 cases is that in all but 17, the use of Smithsonian's objects, curators, facilities was virtually insignificant. So they automatically would just do what we did before.

When we got to the 17 cases, we found—we saw that in those cases, the Smithsonian occupied a significant amount of time in that particular show. Let's say there was an hour show; it could be 20 or 30 minutes of the time. In those particular cases what the museum would then say is, that is significant enough so that we may ask you, film maker, if you could like to talk to Smithsonian on Demand about working with them on the project; or the museum could say, this is something we think we would like to do with you independently. And we have the option, under this agreement, to be able to do a number of those independently.

The vast preponderance of people who have worked with us in the past will be able to do exactly the same thing they have always done.

Mr. BRADY. But if I don't subscribe to Showtime. I can't watch it.

Mr. SMALL. If you don't subscribe to Smithsonian on Demand, then you would not be able to see its programs. But you don't have to pay anything to Smithsonian on Demand. Smithsonian on Demand will be offered through the cable package that you can sign up.

Mr. BRADY. The cable package?

Mr. SMALL. Not Showtime.

Mr. BRADY. That I don't sign up to.

Mr. SMALL. All you have to do is, it will come automatically with the cable package. It is not something where people are going to pay for it specifically. And you don't have to sign up for Showtime to get it.

Mr. BRADY. Okay. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. The gentleman's time has expired.

The gentlewoman from Michigan.

Mrs. MILLER. Thank you, Mr. Chairman.

I apologize. I was late getting to today's hearing. Secretary Small, I tried to read through your comments here, but I didn't hear your testimony. You just mentioned that you would not have—let me follow up on what you just said—to pay separately for this service—that it would be a part of your cable package.

Is that in the 30-year contract?

Mr. SMALL. I believe. Let me just double-check.

Mrs. MILLER. You will never have to pay separately for it for 30 years?

Mr. BEER. The agreement has a number of different provisions.

The CHAIRMAN. I am sorry. You will have to——

Mr. SMALL. This is Gary Beer, the Chief Executive of Smithsonian Business Ventures.

The CHAIRMAN. You will have to come to the table and identify yourself.

Mr. BEER. Excuse me. I have never testified at a hearing before. Could I have the question repeated?

Mr. SMALL. If the contract specifies——

Ms. MILLENDER-MCDONALD. Your name, sir?

Mr. BEER. My name is Gary Beer. I am the Chief Executive Officer of Smithsonian Business Ventures.

Mrs. MILLER. Mr. Beer, my question is this. Secretary Small just testified that there would be no difference in cost to get Smithsonian on Demand. It would be a part of your normal cable package, there would be no additional cost, like HBO or Showtime or any of the pay channels.

Is that for 30 years, people are going to be guaranteed that there will be no additional cost? Is that part of the contract?

Mr. BEER. No, it isn't. There is nothing in the contract that can guarantee what a cable operator or satellite distributor or a wireless operator or anyone else in the future may do.

The current offering is conceived as an offering that is commercial-free and available to all subscribers of digital cable. And that will, in the end, depend upon what the customer—and in this case, it is a programming service, and that programming is made available initially to cable operators. So what will happen in the future will depend on what happens in the marketplace and what happens with individual distributors.

Mrs. MILLER. Things change over the years. In 30 years a lot of things will change. His testimony is contrary to what you had originally said, Secretary.

Let me ask you, do you—either the Secretary or Mr. Beer—do you have any background in television or film making, you, yourself, for instance?

Mr. SMALL. Yes. No, I don't. Well, I have some in that for many years I was in the financial services industry, and was a banker to people in the media business. I was also on the board of directors of Paramount Communications, which own Paramount Studios and Simon & Shuster books.

Gary Beer, the Chief Executive of Smithsonian Business Ventures, was the founding partner, with Robert Redford of Sundance Industries, which was in the business of film making and various publications and things of that nature. So he has extensive experience in it.

Mrs. MILLER. And you were involved in negotiating the 30-year contract, as was Mr. Beer then? Who actually negotiated the contract?

Mr. SMALL. Mr. Beer.

Mrs. MILLER. One of your comments you said a little bit earlier, Secretary, was that the Smithsonian had been doing similar things for years, that you were somewhat surprised by the brouhaha that

has erupted over all of these kinds of things, and that it is not dramatically different from—what we are talking about today from what you have been doing for decades, I suppose.

Could you give me some examples of other 30-year contracts? For instance, could you give me an example of a contract that has been around 30 years that is now expiring or close to expiring, all similar kinds of things what you have done here?

Mr. SMALL. No, I can't. As I indicated, this is definitely unusual for us—before when I made my comments—there is no question about it. Because we have never attempted to build a presence on digital cable TV before, because it hasn't existed.

What I meant is that we have been—relative to the issue of access and use of the Smithsonian's collections, we have been doing film projects with people for years and years and years, and in no case is there any issue of the venture, this business partnership, having any right of first refusal. In no case does this partnership decide what gets done, and in no case do we require any film maker to go to this. So I was being responsive to that.

The 30-year contract is definitely something that is more similar to what is done in the media industry, and we have never done anything like that before. But we did a lot of checking to see whether it was reasonable, and the feedback we got from professionals was "yes."

Mrs. MILLER. Just because I am not familiar with this—if it is similar to what is done in the media industry, could you give me an example of a similar contract in the media industry that runs for 30 years? Can you enlighten me on that?

Mr. SMALL. No, I don't know a particular contract. I just know it does take a long time to build up a cable TV channel. I mean, we have seen that in the course of our lives, to build a film library and a lot of subscribers to a service is not something you can do quickly. And remember, that the partner here is investing tens of millions of dollars. And so the likelihood that you could get people to invest tens of millions of dollars a year and keep spending money on programming without having them have the confidence that they were going to enter into something where a film library would build and many millions of subscribers would be built up is logical.

I mean, I don't think anybody would invest money in a short-term contract, knowing that it is going to take a long time to succeed.

Mrs. MILLER. Well, everybody doesn't make money, I don't think in the film industry.

But with that, I see my time has expired. Mr. Chairman, thank you.

The CHAIRMAN. The gentlewoman's time has expired.

Let's pursue some of the things that were just discussed before. For one thing, you mentioned that the Smithsonian Board of Regents had reviewed the contract in great depth, but I understand that only the executive committee was shown the full text of the contract and that the full board was not; is that correct?

Mr. SMALL. What we provided to both the executive committee and the full board were what I would call fairly detailed descriptions of the provisions of the contract. But given that it is, I think,

over 110 pages long, there are no contracts in the Smithsonian that long that the board would go over in detail. But anything that was an important provision was attached to our minutes, was presented in the board books to them.

But, no, we did not have them read the entire contract. I am not aware of any other contract that the Board of Regents has ever read in any detail either.

The CHAIRMAN. Okay. But the summary you distributed, I am sure, would be available for us to look at.

Mr. SMALL. Certainly.

The CHAIRMAN. Thank you.

Another issue regarding the questions asked by Mr. Brady and Mrs. Miller. I understand you make a distinction between "access" and "use," that "access" will continue as it has, but the "use" is something that would go under the contract and possibly would require reimbursement.

Is that a fair description?

Mr. SMALL. As I said, the access is unimpeded. It is the same access everybody else has ever had. Use simply involves the situations where commercial—the use is related to commercial film making, where people come to the Smithsonian to enter into a commercial film venture, where they want to use the Smithsonian for a business purpose, for the making of a film documentary to sell or to put onto broadcast television. So it only affects those situations.

And as I indicated, the contract has more than enough flexibility for us to allow ourselves to work with commercial film makers just as we have in the past.

The CHAIRMAN. But if you choose not to work with them as you have in the past, they would work through Showtime?

Mr. SMALL. They don't have to. At no time do we say to anybody: You must deal with Smithsonian on Demand.

We can say, Smithsonian on Demand exists and it plans to invest tens of millions of dollars with independent film makers that have not been put into the market before.

So I am sure there will be lots of independent film makers that will go to Smithsonian on Demand, but if they don't wish to, they don't have to. And if they wish to consider working with the museum on a project that the museum wants to do with them, as I say, we have the flexibility to do a certain number of programs every year outside of Smithsonian on Demand. And of course, if the use of the Smithsonian is just completely incidental and not significant, they can do the project just as they have in the past, which represents 95 percent of what goes on with the Smithsonian anyway.

The CHAIRMAN. But if they do it within the context of Smithsonian on Demand, or Showtime, then they must reimburse?

Mr. SMALL. No, they don't reimburse; there is no reimbursement. It just means that Smithsonian on Demand would be putting in the money to pay for the production, and work with the film maker on how that production would take shape if they chose to work with Smithsonian on Demand.

The CHAIRMAN. But presumably then the money would go to Smithsonian on Demand.

Mr. SMALL. The film maker is obviously going to get paid for doing the film. And so part of the arrangements the film maker would make if he or she chose to work with Smithsonian on Demand would be whatever their financial arrangement was.

Once it is produced, the revenues that accrue from having added that particular film to the library of Smithsonian on Demand and the programs that would be available ultimately should produce revenue to go to Smithsonian on Demand.

That is why they are producing the movie, so that they can actually develop enough programs to put on the channel so that people have access to them. And then the cable TV operators who would have this service in their packages would pay Smithsonian on Demand.

The CHAIRMAN. Yes. And what amount of that money goes to your business ventures and, thence, to you?

Mr. SMALL. As I indicated before, we have part ownership in the partnership; and then there is a minimum fee that Smithsonian on Demand, Showtime networks has to pay—Smithsonian networks, excuse me, has to pay to the Smithsonian every year. So there is a minimum fee that has to be paid. And then there is a percentage of the total revenue, and if that is higher than the minimum fee, then we would get that percentage.

The CHAIRMAN. And I am just trying to get a picture of the contract.

It is fully open and free for anyone who wants to come in. You talked about "access" versus "use." I want to make sure that "use" is fully open to anyone.

Now, who sets the fee that someone would have to pay as part of this project?

Mr. SMALL. The fee that someone—I don't believe I understand the question.

The CHAIRMAN. Well, you have signed a contract with Showtime?

Mr. SMALL. Right.

The CHAIRMAN. And presumably they have some control over who is going to be allowed to work with them, participate with them.

Mr. SMALL. No. The Smithsonian decides—the independent film maker is aware that this partnership exists. This partnership exists to invest money into making films that are related to the Smithsonian that are like the kinds of articles that you see in Smithsonian Magazine, the kind of things that appeal to people who are interested in history, art, culture and science.

When a film maker comes to Smithsonian and goes to one of our museums and says, I would like to do a film working with you about a particular topic, it could be about an art collection. It could be about an airplane. It could be about an object of American history.

The first thing the museum has to decide is whether it wants to work on that project. That has always been the case, before there was any Smithsonian on Demand; and so that is step one.

Step two is for the film maker then to decide, is this something, given that the museum wants to work on it, that I would like to work on? Is this something that involves significant use of the Smithsonian artifacts, premises, curators?

So the museum has to make a judgment, is this significant or not significant? If it is not significant and it is just a passing photograph of an object, a sentence or two from a curator, then the film maker operates the way he or she always did. If it is significant, such as a large amount of time or a very important point made in the film, then the film maker has to decide, do I go work with Smithsonian Business Ventures, or is the museum willing to do this outside of Smithsonian Business—not Smithsonian Business Ventures, Smithsonian on Demand willing to do this outside of that?

And the museums have the option of doing several productions a year outside of Smithsonian Business Ventures.

The CHAIRMAN. And how much is several?

Mr. SMALL. Six of those. And we—as I said, over the last 5 years, we only had 17 productions that we thought could be viewed as significant. And we could have done 30 under this agreement.

The CHAIRMAN. And what happens if you receive more than six requests? Then it is automatically——

Mr. SMALL. Not receive the request, but what happens if we wanted to work on more of those; then we would run out of that option. But you then have the option of the film maker saying, all right, but I still want to work with you, but let us reduce the amount of interview time or film time or the importance of the Smithsonian part of it down to something that is nonincidental, not significant.

But in no case are they forced to work with anybody.

The CHAIRMAN. Well, my time has expired, so I now recognize the ranking member, Ms. Millender-McDonald.

Ms. MILLENDER-MCDONALD. Thank you, Mr. Chairman.

And, Mr. Secretary, it seems like you, too, are having some problems in explaining this. It is quite convoluted, and if you are having problems, you can imagine what we are having problems up here with as well.

You spoke about the fact that in addition to your contract with the Showtime folks, you can do other projects with other film makers. So you can go outside of Showtime On Demand and do that, and given that you do that, then whatever profit sharing that comes about—I mean, there is a profit here. You are saying that you receive the profit over a certain fee or above a certain fee.

What are—all of this, what are you talking about?

Mr. SMALL. What I said was, we are partners with CBS Showtime and Smithsonian on Demand, the first offering of this partnership. We own a percentage of that partnership, as I indicated before. And then we get a percentage of the revenues paid to us, and with a minimum every year, so that we are guaranteed a minimum amount of money paid to the Smithsonian every year. If we—that is, if we are doing films through Smithsonian on Demand.

If we are working with an independent film maker independently, how much we would get out of that venture would have to be negotiated with that independent film maker.

Ms. MILLENDER-MCDONALD. All right. So this whole percentage that I initially asked you about, the Smithsonian networks, are we

in the ball park of your going outside of this box of Showtime, and this is your network that gives you the 10 percent?

Tell me, how does all of this work?

Mr. SMALL. Smithsonian Networks is simply the name of the partnership with CBS Showtime, and its first offering to the public is called Smithsonian on Demand, which is just the same thing as video on demand.

Ms. MILLENDER-MCDONALD. So it is one and the same. So Smithsonian Networks is really one and the same as Smithsonian on Demand?

Mr. SMALL. Smithsonian on Demand is the first set of programs developed by the company, Smithsonian Networks. So the partnership we have with CBS Showtime is called Smithsonian Networks. The first project that they are doing is to create a series of Smithsonian programs on digital cable that is called Smithsonian on Demand.

Ms. MILLENDER-MCDONALD. One of my concerns is your profit sharing in your contract with Showtime.

But the one thing that I want to get back to is that on this contract, there are so many provisions in this contract, believe me, Mr. Small, that it is not small at all trying to get into it. If Showtime, at any time, wants to cut and switch, I mean, if they want to terminate the contract with you, they have the ability to do that.

Mr. SMALL. There are conditions in the contract under which they can terminate, and there are conditions in the contract under which we can terminate.

Ms. MILLENDER-MCDONALD. All right. So that is what I want to get to because if this program, if your Smithsonian on Demand is not profitable and is not sustainable, then they certainly will not want to keep with you, and they are going to cut and switch. They are going to leave. They will pull out.

But when and how can you pull out of this contract? Do you have the same clause? Do you have the same time frame that Showtime has in pulling out of this contract? And what will be the liability to Smithsonian if that is the case?

Mr. SMALL. From a liability standpoint, since the Smithsonian is not investing any money in it, we certainly wouldn't lose any money. We have—the partnership has to perform at certain levels during its life, and if it doesn't perform, if it isn't as successful as these performance levels call for, which is in the contract provided to you, then the Smithsonian can say it is not successful and can terminate its arrangement.

Ms. MILLENDER-MCDONALD. And these outside groups that you enter into and work with, in addition to the Showtime, that would not enter into this contract at all in terms of liability or any profit sharing or anything like that?

Mr. SMALL. Totally independent of it. Totally different from it.

Ms. MILLENDER-MCDONALD. And so you can, it seems, with—now, again, I haven't gone through this entire contract because I just got it the day before yesterday. But it seems that the provisions that I have seen, that Showtime can get out of the contract in 2 or 3 years.

And you are saying that you can also?

Mr. SMALL. There are different criteria in the contract. It is fairly detailed as to which party can do what. But in our case, our ability to get out is dependent on the partnership being successful. If the partnership is successful, then we don't have the right to terminate the contract. If it is not successful in meeting the specific targets that it has, then we do.

Ms. MILLENDER-MCDONALD. And that is where I have difficulty here, because if you are not meeting your obligation side of it, meaning successful, and then, you know, you define what is success—we will have to define that, and I am sure it is in the contract.

Mr. SMALL. It is if the partnership isn't successful; and that is the reason, if it weren't successful, then we obviously wouldn't want to continue it. So we have the ability to get out of it if it doesn't hit a prescribed amount of growth. That is the important thing.

Ms. MILLENDER-MCDONALD. And you will not—there will be no liability on your part if you should want to get out of it if it is not successful?

Mr. SMALL. No liability as long as we were to leave it meeting the terms that we agreed to in the contract.

Ms. MILLENDER-MCDONALD. But if you do not meet those terms then there is a certain amount of liability.

Mr. SMALL. If the partnership did not perform as it was supposed to and hit these particular target levels, and we decided to leave the partnership, that would be fine.

If we left it and the partnership did hit those levels, then we would breach the contract.

Ms. MILLENDER-MCDONALD. And it is those levels that I need to know, how are they defined. What are those target levels? It is in the contract, I hope.

Mr. SMALL. Absolutely.

Ms. MILLENDER-MCDONALD. You would not know them offhand right now?

Mr. SMALL. They were one of the provisions that we have asked you to, it is a business-sensitive position, a competitive one. You have it, and we would be glad to brief you on it.

Ms. MILLENDER-MCDONALD. I understand. And we can talk with you in my office or your office on those provisions.

Mr. SMALL. Absolutely.

Ms. MILLENDER-MCDONALD. Mr. Chairman, I know the time is up, but I will come back again then, all right?

The CHAIRMAN. The gentlewoman's time has expired.

Ms. MILLENDER-MCDONALD. I understand, for the moment.

The CHAIRMAN. Mrs. Miller has no further questions.

Mr. Brady.

Mr. BRADY. Again, thank you, Mr. Chairman. You said there is a minimum guarantee. Do we know that figure?

Mr. SMALL. It starts out at $500,000 a year.

Mr. BRADY. $500,000 a year. You have to make $500,000 a year?

Mr. SMALL. It has to pay us 500,000.

Mr. BRADY. You have to be paid only $500,000 a year?

Mr. SMALL. That is the minimum.

Mr. BRADY. Minimum. I guess you have no idea, but is there any projection what it may be?

Mr. SMALL. If you took the minimum over the life of the 30 years and all we got paid was the minimum, it would amount to $99 million.

Mr. BRADY. But you are basing it on only the minimum. You don't think you are going to make anything more than the minimum?

I can't believe Showtime's going into a venture like this to make $500,000 a year.

Mr. SMALL. That is the minimum that has to be paid to the Smithsonian, not make——

Mr. BRADY. I understand that. But you are using the minimum over 30 years.

Mr. SMALL. You asked me about the minimum. I am saying that that is the minimum amount.

Mr. BRADY. That is the only guarantee you have from this contract?

Mr. SMALL. That is correct. The minimum is the guarantee. We obviously believe it will do better.

Mr. BRADY. How about PBS? Could they come in and do an archive, use your archives to put on a show?

Mr. SMALL. PBS has the same access that they have ever had to the Smithsonian, and PBS would go through the exact same procedure that I described before.

They would visit with the museum. The museum first has the right to say, do we want to work with them on the project? If the museum says, yes, we do, then they have to determine whether the use they want to make of the Smithsonian is significant or not. If it isn't significant, just go ahead and do the project. That has been the vast preponderance of the cases we have had in the past.

Mr. BRADY. I can't get past that. I can't get past your telling me that PBS has the same access, although you have a 30-year contract with another cable company, with the cable company with Direct cable; and you are telling me that they are not sitting at the table saying, "No, don't do this with PBS. We want to do it and make money on it."

Are they having any say at all, Showtime, in this 30-year contract, that they can't—could they veto PBS? They can't do that?

Mr. SMALL. No. They don't get involved in that. It is the Smithsonian that decides what projects it wants to do. And the fact is that the——

Mr. BRADY. Does the Smithsonian then have the right to say who they want to give that project to? They would rather give it to Showtime or they would rather let PBS do it for nothing?

Mr. SMALL. The Smithsonian has always decided, does it want to work on a given project or not. The film maker can say, I don't want to go to Showtime, and that is fine; they don't have to go to Showtime.

And the museum could say, "You don't have to go to Showtime; we want to do it with you."

The most important thing, first, is, are they going to do anything that is going to involve a significant use of Smithsonian resources.

And 95 percent of what we do doesn't. So all of that is going to stay the same.

Mr. BRADY. I don't understand that. You have got a public broadcasting system that is going to put a show on the air for nothing. And it is going to be a good show; people are going to watch it.

And then you have got Showtime coming, who is going to make a profit and you are going to make a profit from a good show. And I can't believe that you are going to let PBS have the same access that you will with Showtime doing it. And if you are going to make money, and you want to increase your $500,000, which seems like a very little bit amount of money to me to go into a 30-year contract, and you are going to tell me that you are going to have them—they are going to have a level playing field, the people that don't have digital cable be able to watch this show will have a level playing field, as opposed to Showtime thinking they have got a good show coming on you—something is clicking, whatever, maybe aeronautics, who knows, space or something might happen.

That is just a problem that I don't——

Mr. SMALL. What I am saying is that having looked at everything we have done with PBS and others in the past, the vast —

Mr. BRADY. But that is changing now.

Mr. SMALL. It is changing. But the fact is that there aren't people, including PBS, who are coming to the Smithsonian and saying we want to invest millions of dollars doing programs with you. It just hasn't happened in any significant way and there is no reason to believe that it would happen.

What I am saying is that the vast majority of what we have done in the past continues the same, and that we have the flexibility to do projects just like that, and an amount of flexibility that is far greater than anything we ever did in the past like that.

So I understand that this has been raised as a polemical topic that people are having difficulty coming to peace with, but the facts show that almost everything that we have done in the past we can continue to do and that there is a great deal of flexibility to work with independent film makers on projects outside of this venture, although we think that the independent film makers are going to knock down the door to the venture because they are going to be spending so much money with independent film makers.

Mr. BRADY. But isn't PBS now considered a competitor?

Mr. SMALL. PBS is in the mass market of television.

Mr. BRADY. I know. But are they considered a competitor?

Mr. SMALL. Anybody who puts anything on television is a competitor.

Mr. BRADY. Do you want to give them an equal playing field to go to a competitor that is not going to give you any revenue, as opposed to going to Showtime that is going to give you revenue that the people have to pay for. That is my point.

Mr. SMALL. My point is that we have—there are, in many cases, instances where we might want to work with somebody outside of the venture, and we have the flexibility to do that.

Mr. BRADY. Thank you, Mr. Chairman.

The CHAIRMAN. I would like to follow up on a few of the points that were just mentioned.

You said several times, a decision will be made, what is significant and what isn't. At one point I thought you were saying that Smithsonian on Demand would make that decision. Another time you said that you would make that decision.

Mr. SMALL. If I misspoke, then I apologize for misspeaking.

The decision as to what is significant or not significant is always made by the Smithsonian Institution.

The CHAIRMAN. All right.

Then the other item of clarity that I need—or clarification, rather—is, you mentioned that there would be no problem if someone wants to work with you, that is fine; if they decide they want to work through the other entity, that is fine.

But aren't you limited to six times per year saying, we want you to work with us?

Mr. SMALL. That is correct. But that is vastly in excess of anything that has ever happened in the past. The number of cases where people come and say, we want to make a film—that is, where the Smithsonian is a big presence in the film—is less than 5 percent of the history that we have had over the last 5 years with 350 cases.

The CHAIRMAN. How many projects per year would that be?

Mr. SMALL. It was 17 total projects for the 5 years, so let's call it 3½. So we have right now almost double the capacity.

The CHAIRMAN. All right. I think I have no further questions. Well, yes, I do. Just two quick ones.

And that is, I am just surprised that limiting access to collections did not pop into your mind or your staffs' mind as something that should be reviewed.

Mr. SMALL. But we are not limiting access. There is no limitation on access.

The CHAIRMAN. I am sorry, limiting use.

It just seems to me that you would recognize this is something that you should have at least notified the committees of jurisdiction, this committee and the Appropriations Committee, and notified us, rather than simply providing a summary of the board minutes.

And I think there is, it is an axiom of politics, touch base, always touch base. So that is just a bit of advice.

Would it not be prudent to have the Inspector General of the Smithsonian reviewing contracts for you before those are entered into?

Mr. SMALL. There is certainly nothing wrong with it. I really don't know of—whether the Inspector General would have the experience and background and legal capacity to go through contracts like this. The Inspector General can look at anything the Inspector General wants to at any time at the Smithsonian.

The CHAIRMAN. I recognize that. I am just suggesting that this might be a good practice to have them review ahead of time and benefit from their advice.

I have no further questions. But I see Mr. Doolittle has arrived. Do you have any questions of Mr. Small?

Mr. DOOLITTLE. No, not at this point.

Ms. MILLENDER-MCDONALD. Mr. Chairman, just a couple more questions and I will be finished.

The CHAIRMAN. Yes. I recognize the gentlewoman from California.

Ms. MILLENDER-MCDONALD. Thank you very much.

Mr. Secretary, you have been most patient. Thank you so much. Just a couple more questions here.

One is, you said that there is no limitation to access of any kind. And yet I have been told that material on the Smithsonian Web site has been pulled down because of concerns that it might conflict with Smithsonian on Demand.

Is there a truth—is this a true assessment of that, or what?

Mr. SMALL. We had on our Web site a little window on the Web site that was called Smithsonian TV.

Ms. MILLENDER-MCDONALD. What is it, TE?

Mr. SMALL. TV, as in television. Smithsonian.TV. And it is a series of film clips about the Smithsonian. The format of it was the format—the way it looked on the Web site, the list of things to click on, looked like Video on Demand. If you have access to video on demand at home, it had a look like that.

We felt that that would be confusing to the public as we launched—this is all the Smithsonian's own stuff. As we launched this new service, we didn't want to confuse the public.

So we have taken that down because we can now, we can put it all back up on our different Web sites, but we did not want to confuse the public with just the format. The content is the same. We can show all the material. We just didn't want to provide a confusing situation where the public wouldn't recognize that this was different from Smithsonian on Demand.

Ms. MILLENDER-MCDONALD. Okay. So there is no limitation on access?

Mr. SMALL. No, that is not a problem.

Ms. MILLENDER-MCDONALD. The other thing, in reading the Regents' meeting minutes that was provided to us, there is reference to risks involved in the new venture. One of them is called "restrictions on Smithsonian Internet activities." Can you respond to that?

Mr. SMALL. Actually, I——

Ms. MILLENDER-MCDONALD. Well, it goes on, and it goes on to say that because the service will be offered to cable and broadband Internet subscribers, there will also be restrictions on the aggregation of general-interest audiovisual programs on the Smithsonian Web site. So it gets back to this same notion that I am talking about.

Mr. SMALL. I think what this simply says is that if the world of digital cable TV continues to homogenize with the world of the Internet, then essentially you have the same applicability as—on the Internet as you would have on cable TV, because so much of TV now is migrating onto the Internet. So it just says that the world of the Internet and TV are coming together.

Ms. MILLENDER-MCDONALD. And this risk that they are talking about, involved in this new venture, maybe you would want to talk to me about that in a separate meeting.

Mr. SMALL. Certainly.

Ms. MILLENDER-MCDONALD. The last one that I want to speak about is your small and disadvantaged businesses, and if you have—are you still about the business of ensuring that we have full

representation of minorities and women in 69 percent of your contracts in high positions, focused on your top 200 positions?

Mr. SMALL. We are completely committed to it but we are not anywhere near where we ought to be. We all know that.

Ms. MILLENDER-MCDONALD. I understand that. That is why I asked my question.

Mr. SMALL. We know that, and we know where in the Institution we have to improve. And we are working; that has my complete commitment.

Ms. MILLENDER-MCDONALD. Can you, perhaps, a couple of months down the road, give me a report as to where you are on it?

Mr. SMALL. Very delighted to do it.

Ms. MILLENDER-MCDONALD. Thank you for your time.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Brady, do you have anything further?

Mr. Doolittle, any questions?

Mr. DOOLITTLE. Well, Mr. Chairman, having just come in, this may have been asked and answered, but was the question asked as to why the contract wasn't competitively bid, or how is it that Showtime got an exclusive?

Mr. SMALL. That question wasn't asked and so I am happy to respond to it, Congressman. Thank you.

The Smithsonian Business—none of the funds involved here in the Smithsonian Business Ventures are Federal funds, so Smithsonian Business Ventures doesn't follow the specific Federal guidelines.

On the other hand, how this was done was very similar to the Federal contracting procedure, in that Smithsonian Business Ventures first came up with a model of what they thought they would like to do in digital cable television.

They went out and they talked to about 10 different entities that are involved in a big way in the business. Out of that emerged, first, one that said they were quite interested and were willing to invest in it. We almost had a deal with them. The others had said, no, they weren't interested in doing it.

When that deal fell through, then CBS Showtime came up and said they were interested in doing it and then they worked on the negotiating process.

So it is similar to the Federal contracting process, but in business ventures, they just—they don't follow that specifically and never have.

Mr. DOOLITTLE. Is there any guarantee that the revenue raised by that contract will go to operations and maintenance?

Mr. SMALL. It will go—generally speaking, the money that comes from private-sector activities in the Smithsonian goes into programming, like the Traveling Exhibition Service, the work that we do with courses and lectures, the work that we do all across the country with different museums. We don't make enough money in those areas to even make a dent in maintenance.

Now, we have raised a lot of private-sector money for physical facilities—the new Air and Space Museum, $300 million of private sector money. There is over $100 million of private-sector money in

the American Indian Museum. There is going to be close to $140 million in the new Patent Office building, the Donald W. Reynolds Center for American Art and Portraiture.

Mr. SMALL. But what we found is private sector donors particularly won't give money for building maintenance where buildings have been maintained by the government for years. As to the Smithsonian Business Ventures monies, with a $2.3 billion backlog, there is just not enough to make a dent in the maintenance.

Mr. DOOLITTLE. Is the new Air and Space Museum in the Udvar Hazy Center out there at Dulles?

Mr. SMALL. Yes.

Mr. DOOLITTLE. Well, I first heard this discussed in the Appropriations Committee at some length. And, you know, I personally don't have a problem with you trying to, through the use of creative partnerships with private business, that is not the problem. I think it was a surprise that this had gone on, and I think it was a pretty unanimous feeling on both sides of the aisle that we shouldn't have been surprised.

Mr. SMALL. We agree.

Mr. DOOLITTLE. Thank you.

The CHAIRMAN. Thank you. And I thank you, Mr. Secretary, for your time and your testimony. We appreciate it.

And I would like to invite our second panel of witnesses to step forward, Mr. Malamud, Ms. Drain, and Ms. Sheketoff, to provide their testimony. And we will put up name plates for you in just a moment.

Thank you very much for being here, and we look forward to hearing your testimony. As you know, the rules generally provide you 5 minutes to give your testimony. If your written testimony is longer than that, we will enter it into the record, and you could just summarize it.

STATEMENTS OF CARL MALAMUD, SENIOR FELLOW AND CHIEF TECHNOLOGY OFFICER, CENTER FOR AMERICAN PROGRESS; MARGARET DRAIN, FORMER EXECUTIVE PRODUCER, VICE PRESIDENT OF NATIONAL PROGRAMMING, WGBH; AND EMILY SHEKETOFF, ASSOCIATE EXECUTIVE DIRECTOR, AMERICAN LIBRARY ASSOCIATION

The CHAIRMAN. I am pleased to recognize you, Mr. Malamud, to provide your testimony.

STATEMENT OF CARL MALAMUD

Mr. MALAMUD. Thank you, Mr. Chairman, Ranking Member Millender-McDonald, and distinguished members of the committee.

Mr. Chairman, as you so eloquently stated, the Smithsonian is really a treasured part of our national landscape, it is a jewel of the American culture. And I am here as a firm supporter of the Smithsonian, but I am also here as a perplexed and troubled supporter of the Smithsonian trying to understand how the recent actions to promote the increase and diffusion of knowledge among men, and I should add, among women although not part of the charter.

I think I would like to begin by briefly touching on the Showtime contract, because I think it illustrates some of the broader issues at the Smithsonian Institution.

The Showtime contract may have been many years in the making, but it was a surprise to me and it was evidently a surprise to filmmakers and many other members of the public, and this contract has been shrouded in a veil of secrecy that I just don't understand. There are some pieces that we know and pieces that we don't know. There is an unspecified revenue stream, we learned a little bit about that. There is a sole source procurement; a nondisclosure agreement, and it appears, at least for a while, pertained to Members of Congress. And the list of clauses go on and on. But three aspects of this really struck me. One is a 30-year term.

If you look back 30 years in 1976 and ask what would a 30-year contract that was signed then look like, 30 years ago there were 200 computers on the Internet. Ted Turner had just begun beaming up to the satellite for WTBS. Brian Lamb had not yet started C–SPAN, he was 3 years away from that. And the latest hot technology in Japan was a fax machine, and it was just beginning to occur in the United States. I think if we had signed a 30-year contract in 1976, it would have turned out to be a bad contract, and I am afraid that a 30-year contract today might have the same effect.

The second clause that is troubling is the right of first refusal. And I understand the Smithsonian is able to grant six exceptions in which films are made in other places. But one has to ask whether Ken Burns, for example, should be forced to apply to the Showtime Smithsonian joint venture instead of going to PBS to make his films. And one has to look at the six exceptions that they are granted. Mr. Brady brought up space as a possible topic. As you know, 2008 is the 50th anniversary of the U.S. space program. One has to ask, would not it be a good thing if 10 different networks all featured the Smithsonian and the U.S. space program? And could the Smithsonian do that if that kind of an excitement was raised?

The third thing is the noncompete clause, which appears to be applying to the Web sites of the Smithsonian Institution. As was discussed earlier Smithsonian.TV was taken off the Web, and my understanding from phone calls from quite a few staff members at the Smithsonian is that the Web masters are going to be placed under fairly severe restrictions on how much video and audio they can place on their Web sites. Now, I don't know if this is true or not, but if it is, this will certainly limit access to Smithsonian archives by the public. And instead of limiting access, I believe that the Smithsonian should be taking steps to vastly increase the amount of those resources available for the public to use over the Internet.

The Smithsonian deal appears to be—the Showtime deal appears to be part of a pattern of several business deals, which at least leave me perplexed and asking questions. The Harper Collins book deal, for example, has led to the delisting of Smithsonian books as one of the leading historical publishers. And that is troubling when a reputable historical association feels that the situation is so bad that they delist an august publication like Smithsonian books.

I think it all comes down to transparency. And it could be that the Showtime deal is the right deal, but I think if the public had been involved more and there had been a process of public hearings and deliberation and disclosure, it might be a little easier to live with.

There are four steps that the committee might wish to consider at this point, and these are simply suggestions. One possibility is a staff investigation into these contracts, into the Showtime deal and the Harper Collins, looking at them to see whether they are, in fact, appropriate for an instrumentality of the United States, and looking to see whether or not a termination for convenience of the government might be in order.

The second step is to look at some of the transparency provisions of our laws that apply to various agencies. Now, the Smithsonian is a unique entity, but it is an agency for many purposes, for purposes of building, for purposes of a variety of actions. It might be appropriate to consider extending the definition of agency to include the FOIA, Sunshine, Privacy, and possibly even the CFO acts.

Two additional steps, and then I will conclude. The third step is public hearings either by the Congress or potentially a blue ribbon commission that looks at this question of business models, looks at the questions of the balance of revenue generation and public access, and tries to do a deliberate public process that looks at all the different options available. These hearings are not an inconvenience. Hearings are really how we learn what the options are that are available. And I am convinced that the Smithsonian, had they held public hearings, might have had other options in front of them.

And then the last point, and this is, I know, a sensitive point, but I do believe the Smithsonian is in need of money and it needs that money in order to fund its operations and its staff. And I understand that with the recent Appropriations Committee actions, there were some suggestions of steps that the Smithsonian might take to regain the full trust of the Congress. And if, in fact, those steps are taken and the distinguished Members of Congress feel that the issues of transparency have been addressed, I think restoring those $20 million would be very important. That is equivalent to about 300 staff positions. And in many cases, the Smithsonian, the curators and the archivists are, in fact, vastly understaffed.

One might also consider investing some money into putting more of the archives on line for the public to use without restriction.

Thank you, Mr. Chairman.

The CHAIRMAN. And thank you.

[The statement of Mr. Malamud follows:]

Hearing on Smithsonian Institution Business Ventures

May 25, 2006

Committee on House Administration
United States House of Representatives

Testimony of
Carl Malamud (carl@media.org)
Senior Fellow/Chief Technology Officer
Center for American Progress

This testimony is viewable at
http://public.resource.org/smithsonian.html

Mr. Chairman, Representative Millender-McDonald, Distinguished Members of the Committee,

Thank you for your kind invitation to appear before you today.

On March 9, Smithsonian Business Ventures announced a joint venture with Showtime to create "Smithsonian on Demand." The announcement has sparked a firestorm of controversy and concern. The debate has been so fierce that the Washington Post has devoted 10 news articles, an editorial, and a comic to the subject. The most popular blog, BoingBoing.Net, has featured numerous posts on the subject. Letters of protest have been sent to Secretary Small from hundreds of distinguished filmmakers, historians, archivists, media professionals, librarians, and concerned citizens.

The reaction of the Smithsonian Institution to this outpouring of concern has been to insist the public is misinformed. Secretary Small, in an April 28 letter to the Chairs of the Smithsonian Advisory Boards, says "what the press fails to appreciate is the new approach will further the Smithsonian's mission and reach millions of people beyond our walls." In an April 5, 2006 press release, the Institution's Office of Public Affairs cited "erroneous claims" that "need to be clarified."

The public and the press are not "misinformed," but they *are* being poorly informed by the Smithsonian Institution. But, that is only part of the problem at the Smithsonian. Smithsonian Business Ventures has failed to consult enough with the distinguished curators, archivists, webmasters, scientists, and others who make up the professional staff of the Smithsonian Institution. Smithsonian Business Ventures has also failed to consult with the public. The result has been a series of bad business decisions, decisions that are contrary to the mission of the Institution to further the "increase and diffusion of

knowledge among men." (20 USC 3).

I will not dwell in this testimony on the continuing accounting problems within Smithsonian Business Ventures. The Washington Post reported on April 19, 2006 that after numerous complaints by individual museums that they weren't receiving their fair share of store profits, the accounting problem has reached the level of an audit by the Office of the Inspector General, an audit that is also examining executive salaries and bonuses.

Excess salaries and accounting issues are signs of trouble in any business or institution. In the case of the Smithsonian Institution, there are also other signs. There has been a pattern of bad contracts and a culture of secrecy.

The Showtime Contract

I would like to begin by discussing the contract with Showtime. The contract has not been released because it is "proprietary." We know that if a filmmaker wishes to make a film that has "non-incidental" access to the archives or the staff, a treatment (script) must be submitted to the new joint venture for a right of first refusal. It is unclear who makes the decision on what "incidental" or "non-incidental" is and it appears that there are no firm criteria for such a determination.

The Smithsonian has called this right of first refusal an opportunity for young filmmakers. An unspecified investment will be made in commissioning new films, the Smithsonian will receive an unspecified flat fee, and might perhaps receive a share of profits. The Smithsonian has an unspecified equity stake in the new venture, the bylaws, articles, and composition of the board of directors of which are still unclear.

This deal is supposed to be good for the genre, but even if it were, communication has been lacking as those who practice the genre of documentary filmmaking appear universally outraged.

No matter how you spin it, this contract is anti-competitive. If a filmmaker gets a grant from the National Endowment for the Humanities or the National Endowment for the Arts, one of the clauses in those grant prohibit commercial distribution. These clauses are not unusual in foundation grants and other sources of funding. This is a catch-22 for young filmmakers: if their film uses resources from the Smithsonian, many of the usual funding vehicles would not be compatible with the new access policies.

The Secretary has said that this issue is really only about commercial filmmakers, such as Ken Burns. Does the Smithsonian owe Mr. Burns a living? Of course not. But, every network has a different style of programming. Perhaps Mr. Burns prefers PBS? Is it the place of an instrumentality of the United States to require Mr. Burns to spurn PBS and make his films with Showtime?

One can imagine the difficulty of such a clause not only for filmmakers but for Smithsonian staff. Many of the events put together at the Smithsonian are blockbusters that could easily excite interest from a large number of filmmakers. Will an event curator be precluded from trying to find multiple partners interested in creating films for a single event?

These facts are troubling, but two more facts are even more troubling:

- The contract appears to have a term of 30 years. In this Internet era, even 3-year distribution contracts can be considered long.
- The Smithsonian Institution considers audio and video on public web sites run by the Institution to "compete" with the contract and are reportedly ordering webmasters to strip all public websites of significant amounts of content.

The fact that the contract has a term of 30 years was only recently disclosed, and only after intense questioning by the press. A 30-year contract is an awfully long time to be locking up resources that belong to the American people.

To see what a contract like this means, think back 30 years to 1976. In 1976, the Internet had less than 200 computers. Ted Turner had just begun his experiment of beaming WTBS programming up to a satellite and offering his programming on cable television. C-SPAN was a gleam in Brian Lamb's eye and he wouldn't get his new station running until 3 years later. The fax machine was just becoming popular in Japan and many people thought this device might just catch on in the United States and become the medium of choice for the delivery of content.

If the Smithsonian Institution had signed a 30-year contract in 1976, it is unlikely that the contract would have taken into account the rapidly changing world of media. Bluntly put, it is likely that a 30-year contract signed in 1976 would have been a bad contract.

It doesn't take an oracle to see that the 30-year contract signed in 2006 might be equally bad. The contract is for cable-on-demand and none of the announcements mention the Internet as a distribution vehicle. Cable-on-demand is an interesting service, but in today's world of dramatically decreasing costs for producing videos and an in-progress revolution in distribution channels, does such a contract make any business sense?

Even more troubling than the 30-year term is the non-compete provision. The Institution has stressed that this contract will not impede access. But, such statements are disingenuous since public access is being limited already as a direct result of the contract.

Shortly after the contract was signed, Smithsonian webmasters were told to take down Smithsonian.TV, a beautiful site that once provided a portal to rich media resources throughout the Smithsonian. The reason staff were given for this take down notice from the Castle? The site apparently violated the non-compete provisions of the Showtime contract.

Smithsonian webmasters are reportedly being advised that they will be placed under strict guidelines on how much audio and video they will be permitted to place on any site, a guideline that may very well lead to taking a huge amount of content off of the Smithsonian's public web sites.

Repairing the Institution

There are a series of steps that can be taken to reinstitute the public trust in the Institution. None of these steps are radical, but taken together they help make the public, the primary stakeholders in the Institution, an integral part of the process. The result will be better information flowing to decision-makers at the Smithsonian, better decisions, and buy-in by the general public. These steps include:

1. A staff investigation into the legality of the Showtime and other contracts.

2. Changing the definition of "agency" to include the Smithsonian Institution.
3. Public hearings on the implications of different business models for the financial health and overall mission of the Institution.
4. A modest infusion of new funding directed towards making resources available on the Internet for the public to freely use.

A Staff Investigation

The Showtime contract is only one of several troubling ventures the Smithsonian has embarked upon in the last few years. A previous contract with Harper Collins was so troublesome that the prestigious Society of American Historians has de-listed Smithsonian Books as a publisher-member because of a failure to adhere to "the society's objectives of promoting good historical writing." Sixteen other publishers maintain these high standards and remain members.

The Showtime contract has clearly had a dramatic effect on access. Content is being stripped from public web sites. Filmmakers have onerous new provisions to meet before they are granted access. Even internal filmmakers who work at the Smithsonian have had their work limited.

Are contracts such as these appropriate for a public trust? No open and fair procurement process was conducted. The term of the contracts seems unreasonably long. The financial terms have not been disclosed. The non-compete provisions are troubling. Contract provisions prohibit disclosure of the terms. And, the criteria for determining who falls under the "non-incidental" criteria are vague and arbitrary.

It would not be inappropriate for a Committee of the House of Representatives to conduct a staff investigation into all such contracts, investigating if they are compatible with the charter of the Institution. If such contracts are not compatible, they may be terminated for the convenience of the government. Such a staff investigation could also be used to shed light on other operational issues, such as what appear to be excessively high rates of executive compensation and procurement policies that do not appear to meet the high standards expected of government.

Clarifying the Definition of Agency

A second step that might be considered is to clearly specify that certain Acts of Congress apply to the Institution:

1. The Freedom of Information Act (5 U.S.C. 552) specifies a set of procedures by which information will be provided to the public. Although the Smithsonian Institution declares that it subscribes to the "intent and spirit of the act" (Smithsonian Directive 600), my own recent experience filing a FOIA request with the Institution demonstrates that this adherence is symbolic at best. The Institution has, as of this date, failed to meet the procedural requirements of FOIA. Because judicial opinions have declared that the Institution is not an agency for purposes of the FOIA (Dong v. Smithsonian, 125 F.3d 877), explicit legislative action would be required.
2. Explicitly defining the term "agency" to include the Smithsonian Institution would also be appropriate in reference to the Privacy Act of 1974 (5 USC 522a).

3. One of the more frustrating aspects of the operation of the Smithsonian Institution from the point of view of concerned members of the public is the closed nature of deliberations. For example, while the Regents are responsible for approving Smithsonian Institution actions, the minutes of those meetings are not available to the public. Extending the definition of agency as specified in the Government in the Sunshine Act (5 USC 552b) would provide significantly more transparency of operations.
4. Because financial matters are at the heart of the recent controversies, extension of the Financial Management Improvement Act of 1996 and the Chief Financial Officers (CFO) Act of 1990 to include the Smithsonian as a "CFO Act Agency" would provide a guarantee that the Institute will be able to "generate reliable, useful, and timely information with which to make fully informed decisions and to ensure accountability on an on-going basis" (GAO-05-20).

Public Hearings

The third step that could be undertaken are a set of hearings on the proper balance of the public interest and the revenue generating needs of the Institution. Many members of the public believe firmly that one reason the Smithsonian has made a series of bad business decisions is because the staff has made these decisions without public input. Public input is not a nuisance, it is the way we learn what alternatives are available.

In an April 27, 2006 letter to the Secretary, the Chairman and Ranking Member of the Subcommittee of the Interior of the Committee on Appropriations stated "The Committee believes that the Regents should charge the Secretary with organizing a formal public process, including an opportunity for public testimony." However, in the May 9 response from the Regents, Roger W. Sant, Chairman of the Executive Committee, stated:

"Both your letter of April 27 and your statutory language of May 4 refer to a public process for discussion of proposals that would affect the public's access to Smithsonian resources. The Institution fully recognizes its obligation to work with Congress and in particular its committees of jurisdiction to keep them informed of our opportunities and challenges."

This answer recognized the need to work with Congress, but appears to dismiss the suggestion of involving the public. But, a public trust cannot function without the public. If the Smithsonian Institution is reluctant to hold hearings, the Congress might wish to consider alternatives, such as holding the hearings in Congress, or creating a blue-ribbon commission to report back to the Congress and the Board of Regents after taking public testimony and conducting an investigation of the current operations of the Smithsonian and alternative business models available.

Funding of the Institution

The fourth step is to recognize that the root of the issue at hand is inadequate funding for the largest museum complex in the world. Simply put, there is not enough money and the Institution does not receive adequate support.

Given the recent actions of the Smithsonian Institution and the very real financial pressures on all of the government, simply increasing the budget may appear to fly in the

face of financial realities. However, a directed infusion of funds with the specific purpose of placing more of the archives on the Internet for the public to use without restriction would have a dramatic impact on staff morale and on the perception and visibility of the Institution by the general public. Putting more information on-line will make the Institution more visible and that, in turn, will help the Institution raise funds.

For the Benefit of Mankind

In conclusion, I would like to call the Committee's attention to the words of Secretary Joseph Henry. In his first annual report in 1847, as the first Secretary of the Institution, after concluding a lengthy public process in which the American people and the Congress had formally decided to accept the initial bequest, Mr. Henry said:

"The bequest is for the benefit of mankind. The Government of the United States is merely a trustee."

Over the years, the bequest of James Smithson has been joined by many other contributions by the federal government and by a multitude of generous deeds of gift by citizens. These contributions to the collections were made with the intent that the archives would be available, without unreasonable restrictions, to the American people.

There are another set of contributions we should not forget, the contributions of the staff of the Smithsonian Institution. These staff take care of 24 million visitors every year, maintain numerous web sites, not to mention running 19 museums and galleries, a zoo, and numerous research facilities.

Over the last few years, the "intent and spirit" of those contributions—by Joseph Henry, by James Smithson, by a multitude of other benefactors, and by the staff who have dedicated, in many cases, decades of public service—has not been properly recognized.

One can only imagine what Joseph Henry or James Smithson would think of the contract with Showtime to restrict access to the collections, but it does not take a leap of imagination to conclude they would not be happy.

Once again, I would like to thank the distinguished members of the committee for the invitation to appear before you today and I would be happy answer any questions you may have.

The CHAIRMAN. Next we are pleased to call on Margaret Drain, former executive producer, vice president of national programming at WGBH.

STATEMENT OF MARGARET DRAIN

Ms. DRAIN. Thank you, Mr. Chairman, and members of the committee. Good afternoon. I am the vice president for national programming at WGBH, the public television station in Boston, and I appreciate the opportunity to speak with you.

At WGBH, we produce much of the programming that is seen on PBS, including the science history NOVA, the history documentary series American Experience, Drama on Masterpiece Theater and Mystery, Investigative Reporting on Frontline, and the ever popular Antiques Road Show. We also produce some of the best-known children series, including Zoom, Arthur, and Between the Lions.

Our mission to deliver educational programming that is free and available to all Americans depends on our ability to gain access to a wide range of materials. That means documents, archival material, and artifacts from museums and institutions throughout the country. For two series in particular, NOVA, the science series, and American Experience For History, open access is their life blood. For them, the Smithsonian collections are critical, and over the years, we have benefited enormously from such use, from the full spectrum of Smithsonian museums, 19 in all, and even the zoo.

The Smithsonian's venture with Showtime raises the specter that our access may now be curtailed. If so, we may not be able to produce the programs that rely on key materials that are only available in the Smithsonian collection. I say may not, because we do not still understand the full terms of the contract.

It is unclear to us how public television is defined in this new arrangement. Are we a commercial broadcaster? Are we a noncommercial broadcaster? Are we scholarly? Are we academic? What are we? And we do not have a sense of what "incidental use" is. If you are doing a program that has ten stills, five of which come from the Smithsonian, is that significant use?

And I have to say in aside, the 30-year deal, the length of the term is, in my mind, unprecedented in this day of an ever changing television environment. What we do know is that for those of us producing for PBS, we take seriously our role as public educators. Access is important not to satisfy the personal ambitions of a producer, but to address the public interest.

To help you understand what is at stake, I would like to offer some examples of existing programs that we would currently not be able to produce. Some of these may fall into this 5 percent that the Secretary talked about earlier.

In the area of science, there is Mystery of the First Americans, a NOVA program which relied on substantial contributions from the Smithsonian and also on one of its prominent anthropologists. The Wright Brothers Flying Machine, another NOVA show, simply could not have been made without the involvement of the senior curator of aeronautics at the National Air and Space Museum, a relationship that may be off limits to us under the Showtime deal.

There are several other shows. An award-winning hour documentary that was produced for American Experience called

Tupperware, a distinctly American story about innovation and free enterprise, absolutely would not be possible to make for PBS given what we now understand to be the terms of the Showtime deal. And I believe the same is true for Lost in the Grand Canyon, the story of John Wesley Powell's exploration of the Colorado River.

But these are projects in the past. Let me tell you what concerns me is what we have going in the future. We are now embarking on a five-part series on the history of native Americans called We Shall Remain. This is an ambitious series that we hope will be a national broadcast event. We made contact with the National Museum of American Indians just days before the Showtime deal was announced. The curators and staff were enthusiastic about working with us, but uncertainties swirling around the Showtime deal put a brake on those discussions about how we could work together. If this is unresolved, it would be a missed opportunity for all because of the prominence in stature of the Museum of Native American Scholarship.

And what happens when NOVA goes ahead with plans for a special series on the history of aviation? Would they be denied access to the Smithsonian's Tom Crouch, our Nation's foremost expert on aviation? Will the full story only be allowed to appear on Smithsonian on Demand, leaving NOVA's version to be compromised like a science textbook missing facts? Will the public not be able to see the story without paying for a cable channel?

Let us remember the number of viewers who will tune in to Smithsonian on Demand is a fraction of those who can see these programs free on public television, thousands as opposed to millions.

What you should also understand is that PBS programs are not just television shows. Television is now the first port of entry. We provide a long tail of material, educational outreach, Web streaming, teachers' guides, AV use in the school, video on demand, even iPods.

Once created, our content lives indefinitely in digital form, continuing to deliver public service value years after the initial broadcast. Every program we produce has a teacher's guide. Hundreds of thousands of teachers throughout the country use it every single year. The exclusivity suggested by the Showtime deal flies in the face of our educational mission, of ensuring that original educationally enriched material is available to teachers, students, and the public on multiple platforms. If Showtime's goal over 30 years is to own the material on those platforms, that is even a bigger threat.

As someone who has spent a great deal of time in my professional life working in the nonprofit world, I am sympathetic to the financial difficulties the Smithsonian Institution faces. The stewardship of nonprofit institutions like WGBH, whose mission is to educate the public or, in the case of the Smithsonian, "for the increase and diffusion of knowledge," grows more and more difficult in a time when Federal dollars are tight and money from commercial interests is within our grasp.

I am not a purist. I understand that nonprofits must generate some revenue or we will perish. However, if in the process we dilute the mission, we do so at our peril. The public knows and trusts

the Smithsonian. It regards it as a repository of our collective pass. Once lost, that trust built over 160 years will never be regained. Thank you very much.

The CHAIRMAN. And thank you.

[The statement of Ms. Drain follows:]

Testimony of
Margaret Drain
Vice President, National Programming
WGBH Boston

Committee on House Administration
May 25, 2006

Thank you Mr. Chairman...members of the Subcommittee...Good afternoon. My name is Margaret Drain. I am the Vice President for National Programming at WGBH, the public television station in Boston. I appreciate the opportunity to speak with you about the value and importance of the Smithsonian museums for the work we do.

At WGBH we produce much of the programming that is seen on PBS, including the science series NOVA, the history documentary series American Experience, drama on Masterpiece Theatre and Mystery, investigative reporting on Frontline and the popular Antiques Roadshow. We also produce some of the best-known children's series, including Arthur, Zoom and Between the Lions, and accompanying websites for all these programs.

Our mission, to deliver educational programming that is free and available to all Americans, depends on our ability to gain access to a wide range of materials. And because of our role as a major documentary producer for PBS, that means documents, archival material and artifacts from museums and institutions throughout the country. For two series in particular, NOVA for science and American Experience for history, this access is their lifeblood. For them, access to the Smithsonian collections is critical. Over the years we have benefited enormously from access to the Smithsonian Museums. Our projects have taken us inside the Air and Space Museum, the Museum of American History, the Museum of the American Indian, the Museum of Natural History, the National Portrait Gallery, the Smithsonian American Art Museum and the National Gallery of Art.

The Smithsonian's venture with Showtime raises the specter that our access to these public institutions may now be curtailed. If so, we may not be able to produce the programs that rely on key materials that are only available in the Smithsonian collection. I say "may not" because we do not understand the terms of the deal. It is unclear to us how public television is defined in this new arrangement; and we do not have a sense of what "incidental" use is. What we do know is that the resources of the Smithsonian should not be made exclusive to anyone.

For those of us producing for PBS, we take seriously our role as public educators. We recognize that our programs serve as a conduit for the American public to the resources of the Smithsonian. Very few citizens have the opportunity to visit, much less delve into these extraordinary collections. Our access is important not to satisfy the personal interest of a producer, but to address the public interest. To help you understand what's at stake, I'd like to offer several examples of programs that we would not be able to produce without materials from the Smithsonian.

In the area of science there's *Mystery of the First Americans*, which relied on substantial contributions from the Smithsonian and one of its prominent anthropologists. For another NOVA program, *America's Stone Age Explorers* we did several days of filming within the Natural History Museum. And *The Wright Brothers Flying Machine* simply could not have been made without the involvement of the senior curator of aeronautics at the National Air and Space Museum.

There are a host of American history documentaries that have drawn heavily on the Smithsonian collections, including *America's Great Transatlantic Cable*; *They Made America*, a four part series on innovation; *Victory in the Pacific*; a biography of Ulysses S. Grant; Ric Burns' seminal history of *New York*, and, the award-winning *Tupperware*, a distinctly American story which simply would not be possible to make, given what we understand to be the terms of the Showtime deal. The same is true for *Lost in the Grand Canyon*, the story of John Wesley Powell's exploration of the Colorado River.

But those are projects in the past. My concern is with the future. We are now embarking on a five-part series on the history of Native Americans called *We Shall Remain*. We made contact with the Smithsonian just days before the Showtime deal was announced. While curators and staff said they

would love to work with us, they were not able to strike the formal relationship that we wanted. It will be a great loss to audiences, educators and students if we are not able to partner with the museum and tie into the many communities of interest we could mutually reach with the educational materials for this program.

And, what happens when NOVA goes ahead with plans for a special series on the history of aviation– will they be denied the access they need to the Smithsonian's Tom Crouch, our nation's foremost expert on aviation? Will the full story only be allowed to appear on Showtime On Demand, leaving NOVA's version of that period of history to be compromised, like a science textbook missing essential facts? Will the public not be able to see the story without paying their cable bill?

Let's remember that those who can tune in to Showtime On Demand is a fraction of those who can see these programs on public television; thousands – and that's being generous - as compared with millions.

What you should understand is that these programs are not just television shows. Television is just the first port of entry. We provide a long tail of material---educational outreach, web streaming, access to teachers guides on the web, AV use in schools. Our shows are used extensively throughout the country by students, teachers and parents as primary educational tools.

For the third year in a row, the nation's educators have chosen PBS as the top source of video in the classroom, according to an independent study. In fact, PBS is educators' favorite among all major TV providers, and WGBH productions rank at the top of teachers' lists.

Every program WGBH produces for PBS has a free, downloadable teachers' guide on the web. Right now, our teachers' guides are used by tens of thousands of teachers throughout the country every single year.

The exclusivity suggested by the Showtime deal flies in the face of ensuring that original, educationally rich material is available to teachers, students and the widest possible public.

As someone who has spent a great deal of my professional life working in the nonprofit world, I am sympathetic to the financial difficulties the Smithsonian Institution faces. The stewardship of non-profit institutions

like WGBH whose mission is to educate the public, or in the case of the Smithsonian, "for the increase and diffusion of knowledge", grows more and more difficult in a time when federal dollars are tight and money from commercial interests is within our grasp.

I am not a purist. I understand that nonprofits must generate some revenue or they will perish. However, if in the process, we dilute the mission, we do so at our peril. The public knows and trusts the Smithsonian. Once lost, that trust, built over one hundred and sixty years, can never be regained.

The CHAIRMAN. Next we turn to Ms. Emily Sheketoff, associate executive director of American Library Association.

STATEMENT OF EMILY SHEKETOFF

Ms. SHEKETOFF. Good afternoon, Mr. Chairman. I would like to thank the committee for inviting me to testify today on behalf of the American Library Association. I am here to express our deep concern over the recently announced agreement between the Smithsonian and Showtime. ALA's concerns are based on the information about the agreement from news articles because we, as most members of the public, don't know what is specifically in this agreement.

The American Library Association is committed to ensuring access to information for all, and that is why we are so concerned about this agreement. We understand the financial constraints faced by the Smithsonian and other cultural trusts. Solutions must be found, but those solutions do not lie in a series of exclusive and in this case largely exclusionary business agreement with the private company.

The Smithsonian, while it has business-like needs and concerns, is not a business. It is a taxpayer supported through appropriations of Federal funds and tax benefited status as a 501(C)(3) organization, and it is the guardian of our cultural heritage. Indeed, the bequest of James Smithson came with a stipulation which the U.S. Congress accepted: The Smithsonian Institution was to be an establishment for the increase and diffusion of knowledge.

Moreover, many of the collections given to the Smithsonian have been placed in the Institution's hands in trust, to be maintained and made accessible to the public. This is not, therefore, simply a matter from where the revenue derives; it is a matter of public accountability and public confidence. Maximum feasible transparency in the arrangements for these collections is an essential component for that trust. It appears that access to the collections and archives of the Smithsonian will not be limited, but use will, including the ability to utilize the professional skills and expertise of the Institution's curators, scientists, and other staff.

As librarians, we see this agreement with Showtime as analogous to a library signing an agreement with some publisher that would allow library patrons to come in and look at the books and other resources in the library, but not take those books off the shelves to check them out and not be able to talk to the librarians for assistance and information.

ALA is also concerned that this contract with Showtime and other contracts in the works may severely impede the ability of the Smithsonian Institution to digitize the collections it houses coherently and systemically either for preservation or for public access and use. While such an undertaking could reasonably be taken with private companies, the underlying materials and the data files created must remain in the exclusive control of the Institution. We understand that the Smithsonian's practice has been to retain control, but we would appreciate assurance that the contract with Showtime or any future contracts do not violate this fundamental principle.

Last year, the Smithsonian's Business Ventures unit announced an exclusive publishing partnership with Harper Collins publishers to create a line of high-quality Smithsonian-branded reference and adult nonfiction books. It was announced that Harper Collins would also be the exclusive distributor of the Smithsonian books backlist. That contract has not been made public, either, so we do not know how exclusionary is. We have no evidence that any prospective author has had to clear his use of materials in the Institution or discussions with Smithsonian curators or scientists, so we believe that the Harper Collins agreement is not as exclusionary as the Showtime arrangement appears to be. However, the Harper Collins agreement does seem to have laid the groundwork for this current venture with Showtime. Sole source contracting is particularly inappropriate for the Nation's cultural stewards.

The preeminent standing of the Smithsonian in our society requires that such substantial changes in how Americans can gain access to its collections and use those collections must only occur after extensive public discussion and review. We urge Congress to require that the Smithsonian Ventures null this contract because it was awarded before there was the requisite public discussion. And we also ask that other agreements be examined in public before they are made to protect the public's access to the Institution's collections, archives, and, most importantly, the professional staff of the Smithsonian Institution. Thank you very much.

[The statement of Ms. Sheketoff follows:]

TESTIMONY BEFORE THE COMMITTEE ON HOUSE ADMINISTRATION

EMILY SHEKETOFF

EXECUTIVE DIRECTOR, WASHINGTON OFFICE, AMERICAN LIBRARY ASSOCIATION

1615 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20009-2520
MAY 25, 2006

Chairman Ehlers, Representative Millender-McDonald, and Members of the Committee, thank you for inviting me to testify today on behalf of the American Library Association (ALA). I am here to express our deep concern over the recently announced agreement between the Smithsonian Institution's Business Ventures Unit and Showtime Networks for the creation of "Smithsonian Networks." ALA's concerns are based on the information about the agreement from press releases and news articles, because the details of the contractual agreement have not been provided, as yet, to the public.

The American Library Association is the oldest and largest library association in the world with some 65,000 members, primarily school, public, academic and some special librarians, but also trustees, publishers, and friends of libraries. The Association's mission is to provide leadership for the development, promotion and improvement of library and information services and the profession of librarianship in order to enhance learning and ensure access to information for all.

We understand the financial constraints faced by the Smithsonian Institution and other cultural trusts. Solutions must be found, but those solutions do not lie in a series of exclusive and, in this case largely exclusionary, business agreements with private companies. The Smithsonian Institution, while it has business-like needs and concerns, is not a business. It is taxpayer-supported (through direct appropriations of federal funds and through its tax-benefited status as a 501(c)(3) organization) and is the guardian of our cultural heritage. Indeed, the bequest of James Smithson came with a stipulation, which

the U.S. Congress accepted: the Smithsonian Institution was to be "an Establishment for the increase and diffusion of knowledge."

Moreover, many of the collections given to the Smithsonian have been placed in the Institution's hands in trust, to be maintained and made accessible to the public. This is not, therefore, simply a matter of from where the revenue derives. It is a matter of public accountability and public confidence: maximum feasible transparency in the arrangements for these collections is an essential component of that trust.

From what we understand of this contract, *access* to the collections and archives of the Smithsonian will not be limited, but *use* will, including the ability to utilize the professional skills and expertise of the Institution's curators, scientists and other staff. As librarians, we see this agreement with Showtime as analogous to a library signing an agreement with some publisher that would allow patrons to come in and *look* at the books and other resources of the library, but not to take them off the shelf, to check them out – or to talk with the librarians for assistance and information!

ALA is also concerned that this contract with Showtime Networks, and other contracts in the works, may severely impede the ability of the Institution to digitize the collections it houses coherently and systematically, either for preservation or for public access and use. While such an undertaking could reasonably be taken *with* private companies, the underlying materials and the data files created must remain in the exclusive control of the Institution. We understand that the Smithsonian's practice has been to retain control, but we would appreciate assurance that the contract with Showtime Networks – or any future contract – does not violate this fundamental principle.

Last year, the Smithsonian Institution's Business Ventures Unit announced an exclusive publishing partnership with HarperCollins Publishers to create a line of high quality, Smithsonian-branded, reference and adult nonfiction books. It was announced that HarperCollins would also be the exclusive distributor of the Smithsonian Books' backlist. That contract has not been made public, so we do not know how exclusionary it is. We

have no evidence that any prospective author has had to clear her or his use of materials in the Institution or discussions with Smithsonian curators or scientists, so we believe that the HarperCollins agreement is not as exclusionary as the Showtime arrangement appears to be. However, the HarperCollins agreement does seem to have laid the groundwork for this current venture with Showtime Networks. Sole-source contracting is particularly inappropriate for the nation's cultural stewards.

The preeminent standing of the Smithsonian in our society requires that such substantial changes in how Americans can gain access to its collections and use those collections must only occur after extensive public discussion and review. We urge Congress to require that the Smithsonian Institution annul the contract between Smithsonian Business Ventures and Showtime Networks, because it was awarded without requisite public discussion, and we urge you to require the disclosure of the terms of the contracts with Showtime Networks, HarperCollins Publishers, and any other agreements, the details of which are unknown to the public, that limit access to or use of the collections, archives, and the professional staff of the Smithsonian Institution.

Thank you. I will be happy to answer any questions you might have.

The CHAIRMAN. And thank you all for your testimony. I recognize myself for 5 minutes for questions.

The first one. The Smithsonian makes the argument, as you have heard, that the length of the contract is appropriate given the nature of time required for a TV channel to garner loyal ardent viewers and thus become self-sustaining. Given this fact, is this a reasonable approach for the length of this contract? In other words, what is your viewpoint of that argument? And I will turn to you, Ms. Drain, as being someone in the television business who can appropriately answer that.

Ms. DRAIN. Thank you. I am no lawyer, but I would say it does take time to launch a channel, especially an on demand channel. So I think his explanation, the Secretary's explanation is a reasonable one. I do think a 30-year term is unprecedented. I have never heard of anything—of a contract lasting 30 years, particularly in the day and age we are in right now where everything is changing so rapidly. You know, 5 years ago, we didn't have Web sites. One year ago, we didn't even know what podcasting was. You know, it is just changing so quickly. And I think right now one needs flexibility and—more than anything else, when you negotiate a contract. Our contract with WGBH for certain shows with PBS lasts 2 years. That gives us maximum flexibility.

The CHAIRMAN. And what is a typical length of time for a contract with the, let us say, the Washington Nationals and their TV programming?

Ms. DRAIN. I don't know the answer to that. I would suspect maybe 10 years or 5 years.

The CHAIRMAN. I am not sure it is even a valid comparison, but I think it is important to look at other contracts like that.

The Smithsonian also comments that, because of this new joint venture, only a fraction of the producers wishing to make use of the collection for commercial purposes will be denied access, and that this was a necessary trade-off to reach millions of individuals who would not otherwise be able to see the collections.

I would appreciate comments on that from anyone on the panel.

Ms. SHEKETOFF. Well, Mr. Chairman, that is a very admirable idea, to try and reach more and more Americans. And maybe this is one step. But we have the Internet, we have podcasting, we have—the Smithsonian had a Smithsonian TV on Demand. So there are many ways that they can broaden their reach. And we are hopeful that this contract is not going to restrict any of those. As my colleague mentioned, there is new technology being developed every day that will be of tremendous use to the Smithsonian broadcasting its collection, interesting more and more people in the artifacts that it has.

And we don't know how restrictive this contract is going to be to keep those artifacts, those pictures, that video, that sound off of the Internet and being able to go into people's homes, letting people use it for their own genealogical examinations as they pursue other interests that they have. So we really need to make sure that because they are the public's trust, because they keep America's Attic, that all the artifacts in that attic are available to the public so that they can use them not only for commercial purposes, but for purposes that we don't understand today that in 5 years we will

want to use, and that other commercial entities in 5 years or 10 years might want to use. This 30-year restriction should be very troubling to you.

The CHAIRMAN. If I may paraphrase your response. It is that the intent may be admirable, but the devil may be in the details. Since you haven't seen the details, you are worried the devil might be there.

Ms. SHEKETOFF. Very much so, sir.

The CHAIRMAN. Thank you. Mr. Malamud, would you like to respond?

Mr. MALAMUD. Yes. I think if you are trading off access to 20 million people on a cable system and as a result you are limiting access to several hundred million Americans on the Internet and reducing the amount of information placed on the Net, that is not a good thing. One of the important points is that filmmaking is changing dramatically. In the old model of filmmaking, it took $100,000 or $500,000 or $1 million to produce something, and this old industrial style of filmmaking sometimes required large investments. On the Internet, there are people that place their videos on line in places like YouTube and Google Video, and 10 or 20 million people download those videos. I think it is important that we look at filmmaking as something that in the future, every American might be doing, and one of the first places they are going to want to look to make those films are the archives of the Smithsonian. Putting them on line, making the staff available, I think, is the most important thing they should be looking at.

The CHAIRMAN. Are you in some way saying that a contract, if it is to be done, of this sort should not only be for TV but also should include the Internet and any possible uses of that?

Mr. MALAMUD. Absolutely, Mr. Chairman. I believe that that is where a lot of distribution channels are moving these days. I have been broadcasting radio on the Internet since 1993, and I have seen that medium grow by leaps and bounds. And today it is really amazing how that market for films and documentaries are changing. More documentaries are being produced today than ever before.

Ms. DRAIN. May I just add one thing?

The CHAIRMAN. Ms. Drain.

Ms. DRAIN. The deal seems to also fly in the face of what is happening right now, where open content are the two key words. Everybody is under pressure more and more to give our content away as freely as possible on as many platforms as possible. Exclusivity is a word of the past. And this is what the users want. They want access on every platform that is available to them, and they want access and the ability to use this material also. So restricting its use once again flying in the face of where most media companies are going these days.

The CHAIRMAN. Thank you very much. My time has expired. I yield to Ms. Millender-McDonald.

Ms. MILLENDER-MCDONALD. Thank you, Mr. Chairman. Mr. Chairman, before I get started with the witnesses here, the second panel, I would like to ask unanimous consent that I place in the record a testimony from a Patricia Aufderheide, professor and director of the Center For Social Media and Social Communications

for American University. And also Linda Kerber, president of the American Historical Association. May Brekbeck, professor at the liberal arts and sciences from the University of Iowa. They had wanted to come but was told that they could not testify. So, unanimous consent that we place this in the record.

The CHAIRMAN. Without objection, so ordered.

[The information follows:]

[for the record]

TESTIMONY

Patricia Aufderheide, Professor and Director

Center for Social Media, School of Communication, American University

I teach in the School of Communication at American University, where we teach aspiring professionals about the importance of media for a healthy, democratic public culture. I also run our Center for Social Media, which puts a focus on media designed to promote democracy and civil society. I have recently worked with many documentary filmmakers in creating a Documentary Filmmakers' Statement of Best Practices in Fair Use, which strengthens the crucial balance of rights within copyright. My comments here are my own and do not represent the University.

In principle and in practice, the Smithsonian/Showtime controversy has alarmed many film teachers and filmmakers.

The issue of principle: The Smithsonian needs to make its materials available to the public equitably. The Smithsonian controls unique, irreplaceable resources to tell the nation's histories, to explore cultural heritage, the natural world and the progress of science; these stories can and should be told in many different ways. Stories that assert and reassert our contested understandings of who we are and what we can do will be crafted from that material. Without that material, those stories will be diminished – if they can be told at all. Morever, the majority of the Smithsonian's budget comes from

American taxpayers, who deserve both accountability and equitable access to use of the materials, not merely the opportunity to consult them. Freedom of expression and the public's right to know cannot take a back seat to corporate interests of the Smithsonian's partners, or the Smithsonian's concerns to supplement its income.

Issues of practice: The Smithsonian/Showtime deal continues to be murky in essential details. This leads to suspicion, rumor and confusion. It also makes it impossible to judge the potential consequences of the Smithsonian's partnership. The Smithsonian's silence has raised questions that deserve answers. For instance:

- What criteria are used to judge "incidental" use? Who decides? Can the criteria change on a case-by-case basis? Are the criteria based on Showtime's interests? The Smithsonian's? the public's?
- How long does this contract last? What are the Smithsonian's obligations as Showtime adjusts to changes in the marketplace? Under what conditions could the arrangement be rescinded? This is a tumultuous, unpredictable period in media. Showtime's current plans could soon look sadly obsolete--even within months. Showtime's corporate parent CBS could easily reshuffle its deck.
- What kinds of non-compete clauses exist in this contract? How might the contract terms limit the Smithsonian's own ability to generate public media? Could Showtime's interests be put ahead of public accessibility? Does the contract, for instance, limit how much video the Smithsonian can make available and easily accessible on its websites?

- What penalties for Smithsonian violation of the agreement has Showtime exacted? What implications do these have for public access to information?
- Has the Showtime contract had a chilling effect on filmmakers' projects, and on potential donors? For instance, what has been the experience of curators and other gatekeepers in the last two months, as compared with earlier?

The Smithsonian needs dependable public support, through taxpayer resources, to go along with a strong accountability and public access policy. Penalizing the Smithsonian's hardworking professionals for poor management judgment with budget cuts will also punish the public that needs the Smithsonian's services and programs. The Smithsonian moreover needs taxpayer support to extend its immensely useful resources into the digital realm, where filmmakers both professional and amateur can use them as the elements of new stories about our astoundingly diverse American culture and heritage. Digital platforms now provide the opportunity for the Smithsonian to provide unparalleled access to at least some materials--and certainly to indices of its materials and databases--to the general public.

Finally, the policy of open access can also lead to unimagined new business opportunities, both for the Smithsonian and for others. The example of the Prelinger Archive, which provides much material unencumbered by copyright freely to the public, is a valuable one. The Archive's policy of permitting free use of a low-resolution version, while charging for access to a higher-resolution version of the same material, has resulted in higher profits than ever before. The example of the Vanderbilt Television Archives is

also instructive. After Google Video incorporated Vanderbilt's index and database, orders for its videos multiplied.

We are at the beginning of an era in which America's history and the stories of our physical world can be told by many, many more of America's people, for new networks and previously unrecognized communities, on new platforms and media. Do-it-yourself producers who are today pouring content into Youtube, Google Video and Yahoo Video are only the harbingers of a more participatory media era. Professional filmmakers today need access on an equitable basis to the Smithsonian's holdings. Their needs are those, eventually, of all of us.

Thank you.

[for the record]

May 25, 2006

TESTIMONY

Committee on House Administration

Linda K. Kerber, President
American Historical Association
May Brodbeck Professor in the Liberal Arts & Sciences
The University of Iowa

Mr. Chairman:

Thank you for allowing me to testify this afternoon on the contractual arrangement between the Smithsonian Institution and Showtime Network. It is an issue that historians consider of vital importance to our nation's cultural heritage.

I come before you today as someone who is concerned about these issues as a historian of the United States and professor of history at the University of Iowa. I also write in my capacity as President of the American Historical Association. The AHA is the leading organization of professional historians in the United States, chartered by Congress in 1889 to work "in the interest of American history and of history in America." For more than a century we have counted the Smithsonian Institution as a close ally in that effort. Our relationship with the Smithsonian dates back to that 1889 charter, which directed that the Institution would serve as the Association's publisher. So it is with extraordinary regret that we now find ourselves at odds.

We consider the Smithsonian Institution to be a great public trust, representing a vital connection between our nation's past and the present. The Smithsonian is public not just in the sense that it derives much of its funding from the American taxpayer, but also because it receives most of the items in its collections from Americans of all walks of life. These Americans donated materials believing that the public would have free and equal access forever. The promise of exclusivity in the Showtime contract, we believe violates that trust; it places the Institution's high standing with the American people and the historical profession at risk.

In his exchanges with me over the past month, Secretary Lawrence Small asserts that we do not understand the arrangement, but quite frankly, in both his public statements and written correspondence he has done very little to clarify its terms. He insists that academics will be able to use these collections, and that the only people at risk are those engaged in commercial ventures. But this misses the point. The American Historical Association supports access for *everyone* seeking to create and disseminate history. The

Smithsonian cannot say the materials of history are there for some and not for others. It is the Institution's obligation to fulfill its trust with all of those who have contributed to the collections. Neither can the Smithsonian benefit one commercial interest over all others and maintain its status as a great public institution.

Our primary concern is to see the elimination of the exclusivity provision in the agreement with Showtime. Through the years the AHA has articulated standards and best practices for the work of professional historians—whether they are working as filmmakers, curators, or academics. These have been developed and promoted in union with professional societies of archivists, curators, and other scholars and represent our highest ideals. Fundamental to those standards is the need for open access to the materials of history, the ability to follow the evidence wherever it might lead, and the opportunity to disseminate freely the results of those findings. By setting limits on access based on the financial plight of the Smithsonian and the financial interest of Showtime, rather than the public good of all Americans, the contractual relationship with Showtime is fundamentally at odds with those ideals.

I sincerely hope that if it has not already done so this Committee will obtain a copy of the contract, and will carefully review the terms, financial benefits and duration of the agreement. It is our perception that in this instance the Regents of the Smithsonian have failed to serve faithfully in their active oversight role. Consequently, we here call on Congress to put safeguards in place to assure that the Smithsonian cannot enter into this kind of arrangement in the future. If the public is going to continue to place its trust in the Smithsonian and offer up its treasures, stakeholders need to be consulted through open and honest discussion.

Finally, I have to note that among the root causes of the troubling aspects of the Showtime agreement is the years of inadequate funding from successive administrations and Congress. The National Trust for Historic Preservation recently added the Smithsonian's Arts and Industries Building on the National Mall to its list of most endangered sites. This history attests to the Smithsonian's truly desperate need for funds.

While we take issue with aspects of the Showtime contract, we also recognize the precariousness of the Smithsonian's financial situation. Like the National Archives and units of the National Park System, the Smithsonian belongs to the people of the United States. As the steward of such a vital public trust, the Congress has an obligation to provide the core funding necessary to sustain the Institution's, services, buildings, and the priceless artifacts they contain. The Smithsonian's Business Ventures division needs the close scrutiny of Congress and the American people. Proprietary agreements should always be framed as public documents.

I thank you again, Mr. Chairman, for allowing me this opportunity to write on behalf of the history community. I hope my comments have been constructive, and would be pleased to answer any questions the Committee might have.

Ms. MILLENDER-MCDONALD. Thank you, Mr. Chairman.

Mr. Malamud and Ms. Drain, both of you have said in your testimony that—Mr. Malamud first, you say that the Smithsonian Webmasters are reportedly being advised that they will be placed under strict guidelines on how much audio and video they will be permitted to place on any site, a guideline that may very well lead to taking a huge amount of content off of the Smithsonian public Web site. That is what you say in your testimony.

And Ms. Drain has said that: We are now embarking upon a five-part series of the history of the Native Americans called We Shall Remain. We made contact with the Smithsonian just days before the Showtime deal was announced. And while curators and staff said that while they would love to work with us, they were not able to strike the formal relationship that we wanted because it is a possibility of the restrictions.

Now, you both heard from the Secretary when I raised the question with him as to whether there would be limits on access, and he said no, that there was this once, and he went on to describe what and reasons why, but this material will still be available.

Since then, I have gotten from my staff a visual of what used to be at the Smithsonian and what is now being seen on the Smithsonian Web site, clear indication that some of this material is being taken off. I will not ask the Secretary to come forth, but I will be raising this question again with the Secretary because of what we have just received from staff 5 minutes ago.

I would also like to say to you that when you ask if we can investigate this 30-year contract, I am not sure whether we can do that. But what the appropriators have asked now, that GAO reports what they perceive and define as this contract, and will be reporting back to the appropriators in 10 days, at which time we will get that report here in the Committee on House Administration.

I also will remind you that both the Senate and the conference will be seeing the same bill where the House appropriators did restrict or reduce the budget for the Smithsonian. They, too, are concerned. So you do have another opportunity to see just where this goes in terms of the exclusive contract that was partnered into, if you will, by the Smithsonian. We too were shocked with all of this and were not privy to this until just recently.

I am also struck by the fact that it is possibly the other witness who says—yes, it is—Miss Sheketoff, that it was announced that Harper Collins would also be an exclusive distributor of the Smithsonian book list.

As a former educator myself—and now my grandchildren use this Smithsonian Web site—I would be deeply, deeply hurt if some of this educational material, some of the other things that you have cited in your testimony be taken from the Web site. We are creatures of and supporters of this Web site. I mean, we go to that Web site. We get materials from that Web site. The Smithsonian has been part of our family. It comes into our homes and it comes into millions of homes. And I will say to you, as we have to the Secretary who has sat here—and that is good that he has to hear your testimony—that we will be coming back to him. I don't need to raise questions with you. You have given us a great testimony on your thoughts and your concerns. And the only thing that I will tell

you is that I will very carefully now get the report from the GAO, talk to my counterparts on the Senate side, and then observe the Smithsonian Web sites to see whether or not we can continue to have this very valuable, or invaluable, material that is educational to the people of this country. And I thank the three of you for coming today.

Thank you, Mr. Chairman.

The CHAIRMAN. The gentlewoman's time has expired. I recognize the gentleman from Philadelphia.

Mr. BRADY. Thank you, Mr. Chairman.

Mr. Malamud, you said that you didn't appreciate or you didn't think it was the right way to have this bidded; it would have been much better for competitive bidding to have taken place rather than just an exclusive. I mean, I want you to agree with me because I think that you are, but isn't it on a noncompetitive bid, it is an exclusive bid to Showtime; and then you are telling them that you have this bid for 30 years. And if something were to not go right, they would be locked in for a 30-year bid. I mean, have never really heard that before.

Mr. MALAMUD. I work on the Internet, sir, and 30 years is an unheard time span for us. Even 3 years is farther than we can predict.

I think if in the long run after extensive public hearings this was the best option available, the only option, maybe this would have been easier to stomach. But without those public hearings, without that deliberative process, without that input from other people on options—and that includes the staff of the Smithsonian, many of whom have very good ideas on how to exploit their resources in a way that balances the public trust with revenue generation. I think without that public process, this contract is hard to understand, sir.

Mr. BRADY. I appreciate that. And, Ms. Drain, you said that—you don't have to apologize for not being an attorney, because that doesn't put you in any bad stead with me, for sure. But in your experience, Showtime puts a show on, Show on Demand, and they don't do—well, they do a good job, but there is more—time goes on, more things to be added to it. It can be more depth, it could be more detailed. Would they then have an exclusive right to that show and not let anybody else like a PBS to expand on it?

Ms. DRAIN. You mean once the show is made?

Mr. BRADY. Yeah.

Ms. DRAIN. I don't know what the terms of the deal are. So in these days, what Showtime could conceivably do in the future is negotiate with PBS to license the show on PBS at some future date.

Mr. BRADY. Would they have an exclusive right to that show and you would have no way to expand on it? If you saw a better way.

Ms. DRAIN. They would have exclusive right to that show. And I raise the question of whether they have exclusive to the material in that show to exploit on all these different platforms.

Mr. BRADY. And that would exclude you or PBS and people without On Demand or without Internet, you know, that that would exclude you from trying to expand on it?

Ms. DRAIN. It could. Yes.

Mr. BRADY. And one more for Ms. Sheketoff. You said that you were negotiating with the Smithsonian prior to this contract being——

Ms. DRAIN. No. That is me. We were negotiating with the Museum of Native Americans to strike some kind of an arrangement, a cooperative arrangement. And then the deal was announced, and the staff, because of the uncertainties swirling around the deal decided just put a brake on those discussions until we could figure out what the terms of the Showtime deal were, and whether we could partner in some way. And I have to say that the curators there are really supportive of our project, and we have nothing but the greatest of admiration for them. So we are hoping that we can continue our conversations. We just don't know.

Mr. BRADY. So you were kind of denied access and use.

Ms. DRAIN. Well, we weren't denied access. We were put on hold. We are in limbo right now. So we haven't really been denied access or use yet.

Mr. BRADY. Well, if you are in limbo, you have no access.

Ms. DRAIN. Well, we are quite ready for access. The point of the production is still in the—we are in pre-production right now, so this is the critical period that we want—this is when you start hammering out these agreements and arrangements that you have with all of the partners to produce this Native American series. We have a lot of our partners in place, and we are still working with the museum.

Mr. BRADY. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. And I might observe, since limbo no longer exists, you may actually be in purgatory. We will deal with that later.

Next, it is my pleasure to welcome to the committee and to yield time, 5 minutes to the gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. And my apologies for being late. I think that Mr. Malamud and others will be happy to know that the Judiciary Committee did report the neutrality bill out, and that is where I was all morning.

I have had a chance to read through the testimony even though I didn't get to listen to it, and I just have a couple of observations.

First, while the Smithsonian is in a unique legal structure, America thinks of it as our stuff. You know, it is America's attic. And so I do think that—and I would guess that the powers that be at the Smithsonian might agree that it was probably a mistake not to be more inclusive with the people's House in terms of sharing the elements of the contract and the like because there is a great deal of anxiety, obviously, as we hear from the testimony of what that deal is.

I understand—I have not had a chance to read the contract yet, and so I am not going to say what the contract says because I haven't read it. And I understand that it was just received, the unredacted version yesterday, and it is quite lengthy.

I do understand the need to bring private resources in to the Smithsonian. I think that is really a product of our lack of funding of the Smithsonian. So I hope that as we move forward—and there will probably be other hearings, I would assume. I don't know what the chairman and ranking member have in mind. But even if it is

just in the Appropriations Committee, this should be a reminder of why we need to appropriate sufficient funds to the Smithsonian so they can do their maintenance work, so they can maintain their collections, and so that it can continue to be free to the American people.

One of the things I am so proud of is that when Americans, or anybody for that matter, come to this wonderful capitol, they can go into any museum for free, they can appreciate American culture and history for free, and just enjoy that richness. And what we want to make sure is that on a noncommercial basis, which we have had testimony that the contract preserves that, and I hope it is true, that that can also continue through emerging technologies, not only noncommercial TV, but the Internet and on and on.

So I don't have a lot of questions at this point except that I will, I hope to be able to read the contract myself, and certainly the GAO analysis of it. And I hope that when we see all the details, that we will, hopefully, will have an opportunity to celebrate more than we are today, because I think hopefully we have the same goal of the sharing of American culture on a nondiscriminatory and free basis. And I thank the gentleman for yielding.

The CHAIRMAN. And I thank you for the comments.

I want to thank the panel for being here. We thank you for your testimony. It has been very enlightening. And we will now recognize the next panel. Thank you for your testimony.

And I am pleased to invite the final panel of witnesses: Ms. Maroni, Mr. Huerta, and Mr. Beer, to take their places at the table.

While they are doing so, let me just give everyone some word on the schedule so that you will know what is happening here. We are scheduled to have our next round of votes close to 3:00, and there will be a series of four votes which will take at least 45 minutes. So my goal is to wrap this up before we have to leave to vote. And in addition to that, there are other meetings immediately after the votes. So everyone can plan on that. We will try to finish at 3:00 at the very latest.

STATEMENTS OF ALICE MARONI, CHIEF FINANCIAL OFFICER, SMITHSONIAN INSTITUTION; GARY BEER, CHIEF EXECUTIVE OFFICE, SMITHSONIAN BUSINESS VENTURES; AND JOHN HUERTA, GENERAL COUNSEL SMITHSONIAN INSTITUTION

The CHAIRMAN. Now, this panel will be a bit unusual because usually we have witnesses give testimony. In this case, we have not asked you for any testimony. You are just present for questions. And I would like to introduce Alice C. Maroni, Chief Financial Officer of the Smithsonian Institution, Gary M. Beer, Chief Executive Officer of Smithsonian Business Ventures, and John Huerta, General Counsel of the Smithsonian Institution. And we will first ask questions of Ms. Maroni. And I yield myself 5 minutes for this.

Have the financial figures upon which the SBV executive compensation is based been audited? And, if so, what was the number of revenue items for each line of business that the auditors tested to ensure revenues were accurately reported?

Ms. MARONI. Mr. Chairman, I think it would be more appropriate for me to refer that question to the Deputy Secretary or to the CEO of Smithsonian Business Ventures.

The CHAIRMAN. Mr. Beer.

Mr. BEER. Well, the audit of the Smithsonian Institution includes Smithsonian Business Ventures because we are not a separate entity. So whatever the revenues are that we deliver by each of our businesses are provided as part of the general audit. They are identified from each of the operating entities as well as all the extraordinary items that may occur in a given year, and they are part of the auditor's annual finding.

The CHAIRMAN. And you are audited annually then.

Mr. BEER. The Institution is audited, and we are part of their audit.

Ms. MARONI. I thought you were asking a different question.

The CHAIRMAN. Another question for you, Ms. Maroni. The Secretary testified that the SBV has earned $155 million in net revenue for the Smithsonian since the year 2000. How much of the $155 million was already being generated by existing retail and other businesses operated by the Smithsonian before the SBV was created? And what portion of these revenues constitute new or increased revenue attributed to SBV's management of these activities?

Ms. MARONI. Mr. Chairman, we don't have a simple way of doing that analysis. It is very evident to everyone that, as a consequence of the creation of SBV, that the Institution receives considerably more funding in unrestricted net gain back to the Institution. To be able to parse through what was previously received, it would not be an apples-to-apples comparison because of the number of additional businesses that have been added as well as the expanded services, new museums. So that analysis does not exist as you have described it.

The CHAIRMAN. But if you are audited every year, I assume that would be available.

Ms. MARONI. I can look at back and look at overall business activities, and would be happy to provide that to you.

The CHAIRMAN. It would be very interesting to see how that changed during the transition from no SBV to SBV. We would appreciate it if you would do that.

Questions for Mr. Beer. How many employees does SBV have at this point? And what is the ratio of SBV employees to executives? Has this number increased or decreased in relation to increasing executive compensation?

Mr. BEER. Congressman, I do have that number. I would have to look for it, and I will in a moment, maybe on the next question. I can tell you we have about 488 employees, and I can tell you that we looked at that ratio of senior executives against the entire employee base and it has not materially changed in the last three years for which I saw the data this morning, but I will have to flip through to give you the actual breakdown.

The CHAIRMAN. That is fine. And whatever information you can't provide immediately today, for any of you, we will keep the record open for five days for you to respond. We also, by the way, expect

to submit questions in writing to any of the witnesses today giving you the opportunity to respond in detail to any of these issues.

Another question, Mr. Beer, is, and I think I know what your answer is but I am going to ask you to justify it as well. Does the Smithsonian's mission match the mission of the SBV? And can the motivation of profit cause those in the SBV to neglect the Smithsonian's primary objective of increasing the diffusion of knowledge? What happens there? What is the interaction? I would appreciate your perception of that.

Mr. BEER. Well, I am very glad to answer that question, Congressman. I consider the mission of Smithsonian Business Ventures not apart from the Institution. We are there to serve that mission. That is why we are here. I took this position to maximize revenues that could be available to support mission activities. These are all funds that are earned from various different business operations or business activities that then flow to the Institution.

The idea that the Smithsonian Business Ventures may have an independent mission is one that I don't think any of us would subscribe to. Our job is to maximize revenue or profitability, but only if it is an activity that one would commonly believe was mission appropriate or helped to extend the mission. If you were to look at some of the material that was provided as from the early days of the inception of Smithsonian Business Ventures, I think that you would clearly see that intent in the various mandates provided by the then-Board of Regents and the Secretary.

The CHAIRMAN. The final question for you, Mr. Beer, is the incentive payments to SBV management for reaching performance goals, how do you establish these goals? When did you start establishing these goals? How do you ensure the goals are challenging and that they are achieved? Who establishes? Just give me some general background on that, please.

Mr. BEER. The incentive program for setting goals and as part of an annual compensation practice was one of the central tenets that was established by the Regents in 1998. My initial arrangement provided for both a base salary and an annual incentive target. Those targets are performance-based. They are set annually based on a budgeted goal for profitability or net gain, financial net gain as we call it at the Institution. And each year, those goals are set as growth goals or improvement in those.

And the way in which they are set first begins with the overall compensation to an executive. They are capped so that our overall compensation philosophy is to be at mid market or the median of the market for comparable jobs in both the nonprofit sector and the private sector. And within that, a target of the total compensation is for incentive pay or performance if you were to achieve the goal. If you don't achieve the goal, you don't receive it.

Those targets are basically budgeted targets each year. The Smithsonian Business Ventures has an advisory board they have outside directors of industry experts and a compensation committee. They make recommendations to the Secretary; the Secretary then makes recommendations to the board of regents compensation committee, and is approved as part of their recommendations along with the budget.

The CHAIRMAN. Thank you.

I also have some questions for you, Mr. Huerta, but my time has expired so I turn to the ranking member.

Ms. MILLENDER-MCDONALD. Thank you so much. Mr. Chairman, you have heard now from the first panel, our Secretary, and the second panel, and you know that the 30-year contract has been and is troublesome to us. However, I think a lot of that could have been avoided if we had just heard and had this information up front as opposed to hearing it vis-a-vis the media. Not that we are that pleased with the 30-year contract, but that is something that you guys have done. So I am very pleased to have you before us today.

The one thing I would like to ask each of you, how long have you been in your respective positions—your Chief Financial Officer, Ms. Maroni; Mr. Beer, how long have you been with—I am sure that is short lived—with the SBV? But you may have been there prior to that. And Mr. Huerta, the General Counsel. How long have you guys each been there?

Ms. MARONI. Almost 6 years.

Ms. MILLENDER-MCDONALD. Six years with you. All right. Mr. Beer.

Mr. BEER. Just 6½ years.

Ms. MILLENDER-MCDONALD. 6½ years. And Mr. Huerta?

Mr. HUERTA. It will be 11 years.

Ms. MILLENDER-MCDONALD. So the venture, the SBV venture that we have gone into here now, certainly you have seen other secretaries who have gone into different business ventures prior to this one. This one is pretty ambitious, it seems. And that is okay, because everything tends to be more ambitious now than they were years ago. How do you feel this, though, differs from the profitability of these other ventures that took place under other secretaries? Do you think this one would be a—how does one look at this in terms of measurements as to its profitability?

Mr. HUERTA. Well, I served under Secretary Hayman as well as Secretary Small. And Secretary Hayman was very frustrated with the income that was generated from the exiting, we called them auxiliary activities, but they are essentially the museum stores, the restaurant concessions, the Imax theater, the magazine, Smithsonian books, the whole list of things. We were losing a lot of money, around $8 million a year, on just the Smithsonian books. When I joined the Smithsonian, the Regents were extremely concerned about it. They did a number of steps to try and stem the flow of money. They weren't able to do that. And that is what led them actually to create this subcommittee, the regents led by former Senator Baker, that eventually led to—after a year of study they went to outside consultants that led to the formation of Smithsonian Business Ventures initially with an outside consultant, and then they hired Mr. Beer. So that is the background on this.

This particular agreement is off the——

Ms. MILLENDER-MCDONALD. More ambitious than these others.

Mr. HUERTA. It is more ambitious than anything else. It is closest to the magazine, although at the time they formed the magazine 35 years ago, I don't think they dreamed it would ever be as successful as it has turned out. It has really been a first-class American product that we are very proud of. And it is our hope for

the Smithsonian digital cable programming, that it will be just as successful or even more successful in the future.

Ms. MILLENDER-MCDONALD. You are really the Smithsonian side of things.

Ms. MARONI. I haven't served under another Secretary.

Ms. MILLENDER-MCDONALD. Mr. Beer. This one should reach levels much higher than the others, of the ventures, business ventures?

Mr. BEER. I think this is certainly an ambitious undertaking. I think that it is probably important just to frame a couple of things about its early initiation and why we embarked on it. The Smithsonian Magazine has been a very big success for the Institution, for all the programs that we do, and in the consumer marketplace for 35 years. The idea that the Smithsonian needed to have the same type of presence in the marketplace as the magazine, in television and new media seemed to me when I got here and seemed to the regents, because new media and television is listed as one of the things that the regents hoped that we could do in the future as new business or a new tack. And we agreed, and we put together a business plan and attempted to go out and to do that.

I think that if you look at where all of our earnings come from, the Smithsonian Magazine has sustained itself with over 2 million paid subscribers and has returned over $350 million to the Institution in its 35-year history. We don't know what this is going to be, but we do know that it has scale. And that is why we built the performance benchmarks into it. We knew that we couldn't risk the Institution's own money or put itself at risk. And so there are lots of other things that go into that. But we think this one has scale. It is really very difficult to say in something that is this new.

Ms. MILLENDER-MCDONALD. I suppose so. But it sounds so fabulous, it sounds so ambitious. It just seems to be something that has been embarked upon that has never been embarked upon before. So you just tend to think, with all of this, you are just going to reach different heights. We just don't want to exclude the public from those Web sites that we have come to love and to know. And we just want to make sure that when you do well, that you also remember us who bring you into our living rooms and our dens every night or every so often to get the material that you have that is invaluable.

The last thing that I want to say, Mr. Chairman, is that this perhaps is something you cannot give me now. But I would like to know just how much funds come in from your endowment, from individuals, from corporations, foundations, and how much is membership and how much money is drawn from that. I am sure those questions you cannot give me today, but if you can get those to me, Ms. Maroni.

Ms. MARONI. I will submit something that gives you all of those numbers.

Ms. MILLENDER-MCDONALD. I would appreciate that.

Thank you, Mr. Chairman.

The CHAIRMAN. The gentlewoman's time has expired. The gentleman from Pennsylvania, any questions?

Mr. BRADY. Just real briefly.

We have a 30-year contract with Showtime. How does Showtime get to be the—how does Showtime get to get that contract? It wasn't put out to bid. Was it offered to HBO, Starz? Was it offered to any other cable providers? Anybody.

Mr. BEER. Let me give you the history on it. We, that is Smithsonian Business Ventures' management with involvement of our boards and our regents, created a business model for how we might create a Smithsonian channel. That means that we would have programming created and a distribution means to do it. We then went out and looked at who were the potential media players. We went to ten of the top media companies in the world. And Starz Encore was one of them, and in fact, out of that ten, Liberty Media, Starz Encore expressed a serious interest, and we had a very definitive negotiation in the end that fell apart.

About 6 months after that, Showtime networks, which had seen some of the initial work that we had done, came forward and said that they wanted to look at it closely, and we did, and as we got through it, it was clear that they wanted to enter a serious negotiation, which we brought back to the regions comparing it against the offer that we had had with Starz Encore and some of the other elements that had been produced in the course of our conversations and discussions with the other eight players, and we chose to then begin a definitive negotiation process with Showtime.

Mr. BRADY. But other cable providers did have an opportunity to, I guess not bid, but to just try to offer.

Mr. BEER. Absolutely, Congressman. We spoke to a variety of different types of media companies because what we were looking for were three things, one, someone who could make the financial commitment, and as the Secretary said, it is tens of millions of dollars up front and a continuing investment. Secondly, someone who had the technical capability because the institution doesn't. And then the third, which really became the toughest was finding a company that was willing to actually respect and embrace the nature of the mission and programs and the activities of the institution because it was so important to us that these programs and this distribution or this channel, if you will, would allow us to tell our story. So we didn't have a lot of bidders, but we certainly went out into the marketplace.

Mr. BRADY. Okay. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. The gentlewoman from California.

Ms. LOFGREN. Thank you, Mr. Chairman. I guess one question I have is what other ventures are being considered for the content that the Smithsonian has and private for-profit partners? Can you tell us of anything that is being contemplated or in the works?

Mr. BEER. Congresswoman, I believe that in the material we provided to the committee, we actually showed you sort of an overview of a 10-year, a 5-year look back, and a 5-year look forward. So basically, a planning document, if you will, that the regions reviewed called 2010. The two biggest initiatives that we have had on the books for years are a copublishing partner that would allow us to extend the presence of our authors and our content in a variety of trade books, and the television cable channel.

There aren't any other major initiatives currently on the books for that type of activity. And I can assure you to the extent that

we have any other ideas we will be here as soon as we get them. But right now, in getting these integrated in all of the work that needs to be done, the HarperCollins program is only a year old and we actually have a hundred titles in the marketplace being produced.

And I would like to just make one correction. There is nothing exclusive about our backlist distribution, and there is nothing exclusive with respect to content written by our authors in the HarperCollins program. I can understand how perhaps the other witness may have assumed that, because of some of the conversation about this. But it is very different.

Ms. LOFGREN. So I gather then that prospectively, if you were considering an exclusive partnership arrangement with a for-profit partner, you would want to have a more open process and dialogue with potentially the Congress and the public before proceeding.

Mr. BEER. My role in the institution is the operations of the business.

Ms. LOFGREN. It is not fair to ask you that.

Mr. BEER. Listening to the dialog so far, it is clear that this is a very—any media business is a complex business. And I have made a bunch of notes to myself, just some additional documents, I think, the staff, would be useful for the staff to fully understand what was the nature of the enterprise so that it is a complex, long document, and if you want to really boil it down to what it is, it is hard to read a contract. So I think I would clearly welcome whatever involvement with the staff and the members that the Secretary and the Deputy Secretary wanted us to have.

Ms. LOFGREN. I would just say, I mean, as I said earlier, I hope to read the contract over the break so that I will be more knowledgeable than I am currently as to the video deal. But I would hope that as we move forward, for example, you could do an exclusive contract with some content to an Internet portal. I think it would be a mistake to do anything exclusive, although I would welcome anything that is non exclusive, just to get our info out. And that is just an opinion I would share with you. So with that, Mr. Chairman, I yield back.

The CHAIRMAN. The gentlelady yields back. And I apologize to the gentleman from California, Mr. Doolittle, for not recognizing him in order. I am pleased to recognize him now.

Mr. DOOLITTLE. Thank you, Mr. Chairman. Just a brief question of Mr. Beer. What is the nature of the communication between the business unit of the Smithsonian and the Smithsonian Institution itself? How do you relate in terms of those two organizations? I know you are a subunit of it, I guess.

Mr. BEER. Well, I am glad you mentioned the question, Mr. Doolittle. The Secretary spoke about it before you got here. We are actually not a separate unit. I was hired by Secretary Michael Heyman and a subcommittee of the Board of Regents that served as the selection panel in 1999. I report directly to the Secretary. All of us at Smithsonian Business Ventures are employees of the trust. The trust, in my mind, is, the trust and the SBV are the same. We are part of the central administration. We have a division. And if you were to look at the organizational chart of the in-

stitution, we are just a division as other divisions are under the management of the institution, the Secretary and his staff.

Mr. DOOLITTLE. I was just, I am not trying to beat a dead horse here. But you know, every year the Smithsonian comes and meets with the members of the—I mean, they send some representatives to meet with the members of the—I assume they do it with the Senate as well, but the House Interior Appropriations Subcommittee. And it seems like with a 30-year contract of this nature that that might have been on their agenda to mention to us, and they did not do so.

Mr. BEER. Again, I don't want to speak for the Secretary and the Deputy Secretary, but I have sat in enough meetings over the last few weeks that I think I would share that we think that the idea that a 30-year agreement really relates to the nature of the structure of it. It is both an equity joint venture as well as a licensing term. It is an unusual thing for the Smithsonian to do. It is not an unusual thing for a nonprofit and it is not unusual for the WGBHs and other buyers and sellers of television programming to do. I think that there are——

Mr. DOOLITTLE. But may I just interrupt and say that since this hadn't been done before by the Smithsonian, I mean surely this stood out in your mind as something that was new, different, important. I mean that is exactly the type of thing, especially that if you thought it might be at all controversial that you would want to mention.

Mr. BEER. Congressman, I think that we missed the fact that it was going to be controversial, but we completely agree with you.

Mr. DOOLITTLE. Okay.

Ms. LOFGREN. Mr. Doolittle, would you yield?

Mr. DOOLITTLE. I will be happy to yield.

Ms. LOFGREN. Just for a quick question that I forgot to ask before I yielded back my time. Congressman Honda, our colleague from California, mentioned that he has, I guess, been working with a nonprofit group that is attempting to provide free WIFI service throughout the mall and in the vicinity of the Smithsonian Institute, and has run into roadblocks in that regard. I guess it has now been reevaluated. Do you know anything about that? Is there anything that would preclude——

Mr. BEER. This agreement would not. But I couldn't speak to this.

Mr. HUERTA. I believe the Deputy Secretary could address that. I am not knowledgeable about the details of it.

Ms. BURKE. If I may, Mr. Chairman. Yes, in fact, I have. I am Sheila Burke, Deputy Secretary.

The CHAIRMAN. Would you identify yourself for the record.

Ms. BURKE. I am Sheila Burke, the Deputy Secretary and chief operating officer of the Institution. We have, in fact, for a period of time, been in negotiations and have now signed a contract and intend to, in fact, provide free WIFI access throughout the Smithsonian Institution and into our garden areas. This is something, you are absolutely correct, Congresswoman, that has been of a great deal of interest to a great many people and we are, in fact, now ready to, in fact, go forward and provide that service in our institution.

Ms. LOFGREN. That is great news. And I would just note that with that, you can do, I know the San Jose Museum of Art is now doing podcast tours so that it has really worked out very well. And this will facilitate that. And I thank you for answering the question and also for facilitating that. And I thank you, Mr. Doolittle, for yielding.

The CHAIRMAN. Do you have any further questions?

Mr. DOOLITTLE. No further questions.

The CHAIRMAN. The gentleman has no further questions. I want to just pursue this one moment. You said when you say service will go into the garden areas, are you referring to the entire mall?

Ms. BURKE. I am sorry sir. I didn't hear the question.

The CHAIRMAN. When you say it is going into the garden areas, are you referring to the entire mall or just——

Ms. BURKE. No, sir. In fact, I was corrected. Apparently the contract is in process, not yet signed. It will be within the Smithsonian confines, so the garden areas surrounding the Smithsonian Institution, not fully out to the mall, sir.

The CHAIRMAN. Is there not a proposal to also provide service in the entire mall?

Ms. BURKE. There have been discussions of that nature about posting essentially an antennae on our buildings, similar to apparently an exercise that took place up here, although not on the Capitol buildings but apparently on building in proximity. The decision was to try and do something that essentially allowed it to be internal to our buildings and to the area surrounding our buildings and to place the antennae on our buildings for those purposes, but not to do the wider community. Again, it was a discussion that took place over a long period of time.

The CHAIRMAN. All right. I believe there are some Members of Congress who want to pursue that with you. But that is not our jurisdiction.

Ms. BURKE. I am happy to, sir.

The CHAIRMAN. That is not our purpose right here today. We have approached the witching hour. I would like to wrap up. But I see the ranking member has one burning question.

Ms. MILLENDER-MCDONALD. Just one burning question. Mr. Beer, you said that you guys are part of the general structure of the Smithsonian. But do you not have a Board of Directors that is directly tied in with the SBV? And if so, are they advisory in nature? How do we make up this board?

Mr. BEER. The board is in fact advisory. We have 11 members I believe by our bylaws there is a proscribed number of outside directors to come from various fields of industry akin to those that we are in. And then there are several internal directors.

Ms. MILLENDER-MCDONALD. You report to them though, and not to the——

Mr. BEER. No. They are just advisors. And actually the bylaws provide that they advise the Secretary of the Smithsonian and the CEO. And they have a—they are very engaged. They work very hard. They give us their recommendations and all their opinions. They have, but they have no authority other than as advisors.

Ms. MILLENDER-MCDONALD. Thank you.

The CHAIRMAN. We have approached the witching hour. I would just like to make a few concluding comments. Obviously, the contract has been a real center of attention and I think there is considerable nervousness about the 30-year term. As someone commented to me, the only common document in the United States that has a 30-year term is a mortgage on a home and when it is finished, you actually own the home. And so that may not be a good comparison to what you have proposed here.

Also, you heard the word over and over, "transparency." The Congress is a public institution. We represent the public. We expect all entities receiving funds from the Congress to recognize their public obligation to be transparent so there is clear accounting of the funds that are used and expended, not just taxpayer money, but all money used by an institution funded primarily by taxpayers. And I just want to make sure that is clearly engraved on your minds at this point.

The final point. I would like to thank all the witnesses for being here. I think this has been very beneficial for all of us on both sides to hear the testimony, hear the questions and hear the responses. So I appreciate your assistance. I would also like to make clear that we will leave the record open and members having additional questions may, will submit them in writing, and we would ask for your response within 5 days at that point.

Having said that, a few final formalities. I ask unanimous consent that members and witnesses have seven legislative days to submit material into the record and further statements and materials to be entered into the appropriate place in the record. Without objection, so ordered. And also, I ask unanimous consent that staff be authorized to make technical and conforming changes on all matters considered by the committee at today's hearing. Without objection, so ordered. And with that I hereby declare the hearing adjourned.

Committee on House Administration
Smithsonian Institution Oversight Hearing
May 28, 2006

Questions for the Record

Smithsonian Institution

1. How has the recent resignation of the Inspector General impacted that office's investigations into Smithsonian Business Ventures operations and compensation packages?

   The investigation has not been impeded. On June 7, within days of the Inspector General's resignation, an interim IG was appointed so that the important work of the OIG would continue uninterrupted. The interim IG had served as Counsel to the IG and Assistant Inspector General for Investigations. A vacancy announcement was issued to the general public on June 7 and a search committee was formed on June 9. The vacancy announcement closed on July 10 and we will announce a new IG as soon as possible.

2. Have any donors (monetary or museum materials) reduced their giving as a result of the deal?

   The Institution has not experienced any reductions in monetary or in-kind donations as a result of the Showtime contract.

3. Secretary Small mentioned the list of 17 films from the last five years that would have been deemed to use "more than and incidental amount" of Smithsonian materials in his testimony. What are those films? How was that determination made?

   The 'list of 17' is attached as Appendix 1. These films were selected from a longer list of film and television projects involving the Smithsonian and/or its content since 2000. While the evaluation of current proposals includes a consideration of both the proposed running time of Smithsonian content and a consideration of the Smithsonian content in the context of the film, the *ex post facto* basis for determining whether these films included a "more than incidental amount" of Smithsonian content was simply whether the proposed running time of Smithsonian content in the program was more than 15% of the total running time of the program.

4. Does the Smithsonian have the authority to enter into agreements that give them an equity interest in a venture?

   The Board of Regents as trustees of the Smithsonian Institution trust, has the same authorities and powers that all trustees have in prudently safeguarding the assets of the trust and furthering the mission of the trust. The Board of Regents has from its early beginnings prudently invested gifts and other earnings in its endowment in which the Smithsonian Institution holds equity interest in business ventures. The endowment, approximately $814 million, includes some bonds but primarily consists of equity investments in private capital. As with any trust, when the Smithsonian Institution is either gifted with or invests in real estate, it also holds an equity interest in private property.

   The Regents also have an obligation to carry out the mission of the Institution for the "increase and diffusion of knowledge." One of the Regents' earliest activities (1848) was to publish books about the research of the Institution. Much later, the Smithsonian Institution entered into a mission-driven, income producing activity known as "Smithsonian Publications" which published trade books and earned significant revenues for the Institution. Also, Smithsonian Magazine has been a successful business enterprise of the Institution for over 35 years. The development of a digital video channel has been long sought by the Board of Regents, and has finally come to fruition. The major stumbling block for the Smithsonian was that it didn't have the capital or the expertise to compete in the digital cable market, which unlike the publishing business, requires hundreds of millions of dollars of investment. Partnering with Showtime in creating a joint venture (Smithsonian Networks), is a natural step in fulfilling the Smithsonian's mission, given today's technology. The fact that the Regents were able to acquire a minor equity interest in a venture in which they have not put forth any capital to advance the mission of the Institution is a significant accomplishment that will redound to the Institution and to the American public who benefit from the Institution's fulfillment of its mission.

5. Some expenses at the Smithsonian are paid from appropriated funds. Some are traditionally paid through trust funds, some of which are unrestricted and can be used for anything, and some of which are restricted because they are donor gifts for specific purposes, or for other reasons. This bifurcation of funds has apparently always been the case. Has the Smithsonian considered another way to manage these accounts?

   As a general rule, Smithsonian uses Federal funds to sustain and maintain the Institution including the care of our buildings and collections. The Institution receives restricted Trust funds as directed by our donors for

enhancements of exhibits and programs and new program initiatives because these are the kinds of things donors traditionally have been interested in supporting. Smithsonian Institution uses unrestricted Trust funds to support the use of restricted funds by paying the fund raising and Trust fund management costs and to cover a portion of the Institution's administrative costs such as rent, financial, human resources, accounting, contracting, and legal services. Unrestricted funds are also used to cover much of the salary and supporting staff costs of the Institution's senior leadership. In addition, some unrestricted funds are used for important activities, such as the Cooper-Hewitt National Design Museum, Affiliations, and the Smithsonian Associates programs and a portion of the Smithsonian Institution Traveling Exhibition Service.

A change in how the funds are applied will not increase the total amount of funds available. Since the current approach gives the Institution the best chance to raise private funds and uses the unrestricted Trust funds to support the raising and use of private funds, it does seem to be the optimal model for the Institution.

6. The difference between these types of funds, and the way they are used, is one of the most confusing elements in our oversight of the Smithsonian. For example, you could conceivably use trust funds to add to the available resources for projects which have not received adequate Federal funds, such as maintenance and repair of facilities at the National Zoo. That would of course, eliminate those trust funds' availability for other, unrestricted uses, such as paying salaries to high-ranking Smithsonian staff and SBV staff which exceed those of high-ranking Federal government officials, such as the president of the United States. This example is used because it is part of the perception problem the Smithsonian faces. However, if you cannot get enough Federal funds, why not use more trust funds for items that have traditionally been paid by Federal funds?

   We believe that our fund application strategy optimizes our chances of raising private funds to supplement the Federal funds. This has led directly to our successes with the Udvar-Hazy Center, the National Museum of the American Indian, and the Patent Office Building. Government agencies would have to seek Federal appropriations for the total costs of these projects. The Smithsonian Institution, as the following table shows, was/is able to raise 62% of the funds for these important facilities.

(Dollars in Millions)

Facility	Projected Total Cost	Federal Funding	Private Funding
Museum of the American Indian	$219	$119	$100
Udvar Hazy Center	311	22	289
Patent Office Building	298	174	124
Total	$828	$315	$513

The Institution is not stopping or slowing down after these successes. In giving Smithsonian Institution a mandate to create the National Museum of African American History and Culture, Congress has told us to raise half of the money to build it, and we will. We are also trying to raise 40% of what is needed to rehabilitate and modernize the elephant area at the National Zoo and 60% of the funds to revitalize and improve the Central core and Star Spangled Banner exhibit at the National Museum of American History. These are just a few examples of what we are doing to ease the burden on Federal appropriations.

The Smithsonian does pay a small number of staff at rates above the Federal pay scale. However, the compensation of these individuals is thoroughly reviewed by a committee of the Board of Regents and the full Board, and the pay is in line with what people earn in similar positions in comparable complex organizations, including museums, non-profit organizations, universities, and industry. It is the Board's belief that this level of compensation is necessary to attract and retain the type of leadership that leads to the fund raising success described earlier.

7. What impact do you estimate that the $20 million cut and the salary restrictions in the House passed version of the FY 2007 Interior appropriations bill will have on the Smithsonian Institution operations?

A $20 million cut as proposed by the House could require the elimination of upwards of 300 positions. This would do great damage to a staff that has already shrunk, except for new museums, by 23% since 1993. It would severely worsen the Institution's already strained ability to produce world class science and museum experiences. Traveling exhibits would be curtailed, Folklife performances would be reduced, and exhibitions would be closed. In addition, such a reduction would impact the Smithsonian abilities

to maintain its buildings, which in turn, would accelerate the deterioration of the Institution's facilities. The Institution has already seen a historic building on the National Mall close because its roof is unsafe.

Based on the 2005 actual salaries and bonuses of Smithsonian employees, the proposed salary restriction contained in the House bill would have required a reduction in the salary of four Trust-funded employees.

8. How much of the authority of the Board of Regents can be delegated to its Executive Committee and/or the Secretary?

The Executive Committee has been delegated all of the legal authority of the Board of Regents, within certain limitations, and that the Secretary has been delegated all of the authority of a Chief Executive Officer in carrying out the policy and procedures of the Board of Regents, and may accordingly re-delegate his authority.

The Executive Committee was created in the original charter of the Smithsonian Institution at 20 U.S.C. § 44 ("The Board of Regents shall elect from its members an Executive Committee consisting of three members.") The Bylaws of the Board of Regents provides, at § 3.01, "The Executive Committee shall have and may exercise all powers of the Board of Regents when the Board of Regents is not in session, except those expressly reserved to itself by the Board of Regents, provided that all such meetings shall be reported to the Board of Regents when next the Board meets."

The office of "Secretary" of the Smithsonian Institution was also created in the original charter of the Smithsonian Institution at 20 U.S.C. § 44 (The Board of Regents shall elect "a suitable person Secretary of the institution. . . ." Section 46 of the Charter provides for the Duties of the Secretary as follows: "The Secretary. . . shall take charge of the building and property of the institution, and shall, under their direction . . . discharge the duties of librarian and of keeper of the museum, and may with the consent of the Board of Regents, employ assistants."

The Bylaws of the Board of Regents provides, at § 5.02,

> **The Secretary, who shall be elected in accordance with the Charter, shall serve as the chief executive officer of the Institution. The Secretary shall be responsible for carrying into effect the policies and programs approved by the Board of Regents and those provided for in applicable laws and regulations. All employees of the Institution shall perform their duties under the Secretary's general direction. The Secretary shall provide for maintaining the Institution's official records, including the**

proceedings of the Board of Regents, the Executive Committee, and other standing and select committees of the Board. In accordance with applicable statutes and the policies established by the Board of Regents, the Secretary may employ assistants and shall prescribe and document the Institution's organization structure, operating policies and procedures, and delegations of authority. (See also 20 U.S.C. §§ 44 and 46.)

9. In the document "Smithsonian Institution FY 2005 Goals and Accomplishments Report" provided to this Committee, it includes various boxes listing "FY 2005 Goals" with "Actual Performance." Item 8 lists a goal of continued improvement in the Smithsonian's diversity efforts and in the percentage of women and minorities. But the "Actual Performance" box admits that these efforts have come up short ("...a sufficient number of Small and Disadvantaged Businesses were not identified for projects funded with the remaining 69% of contract award dollars to meet the lofty goals established by the SBA for the Smithsonian." Please explain why you characterize these goals as "lofty," and why your results fall far short of the SBA's goals.

   The Smithsonian Institution FY 2005 Goal of 50% contract award dollars for small business was deemed "lofty" because it was significantly higher than the SBA government-wide goal of 23%. That notwithstanding, the Smithsonian Institution did exceed the government-wide goal with 24% of its contracts awarded to small businesses. Prior to FY 2004, the Smithsonian Institution awarded very few high dollar construction contracts, and the Smithsonian Institution actually exceeded the government-wide goal by awarding upwards of 50% of its contracts to small businesses. Based on those successes, the Smithsonian Institution agreed with SBA to continue to set its small business goal at the 50% level. Unfortunately, the impact of a number of large construction projects awarded during the fiscal year was not factored into the small business goal at the time the goal was established. All other procurement preference goals were exceeded except for the service-disabled veteran-owned businesses goal (SDVOSB). Meetings were held with the President of the Association of Service Disabled Veteran-owned Businesses and efforts to access the organization's database were made in an attempt to find projects which SDVOSB could perform. However, clearly we need to do better in the veterans' category.

10. What is the current status of the site selected for construction of the new African-American Museum? Has the Smithsonian formally assumed control of the site? Have any unexpected problems arisen? What is the next step in the process? Is the process of fund-raising, design and construction likely to take longer than originally estimated?

Since January when the Monument site was selected, the Smithsonian Institution has moved forward with solicitations for the preparation of an Environmental Impact Statement (EIS), and will select a contractor this summer.

Notwithstanding communications with the Department of the Interior seeking a time certain for transfer of the property, the Smithsonian Institution has not formally assumed control of the site. In January, after the Board of Regents selected the site, Roger Sant, Chair of the Executive Committee of the Board of Regents, wrote to the Secretary of the Interior to request an administrative transfer of the Site. Similarly, last month Secretary Small wrote the Secretary of the Interior to urge transfer of the Monument Site within one year. We have not yet received a response to this inquiry.

The Smithsonian and the National Capital Planning Commission will produce a NEPA Environmental Impact Statement (EIS), which will initially invite public comment to determine important environmental concerns, and later at other stages in the process, develop a reasonable range of alternatives; examine the affected environment and analyze impacts on the environment by each alternative; identify a preferred alternative; develop plans for minimization or mitigations of significant effects; and publish the findings. Running parallel and coordinated with the NEPA process, the Smithsonian will develop National Historic Preservation Act historic preservation and archaeological study reports. Work has not yet begun on the design for the building, awaiting these reports

The NMAAHC Council is engaged and we are hiring senior staff for the Museum and it is expected that with appropriate levels of support, we are on schedule. We also have interest from 2-3 corporations and foundations regarding multimillion dollar gifts.

11. Are there written and public guidelines for the process of gaining access to collections and curators? Is there an appeal process when access is denied?

To carry out its mission, the Smithsonian promotes access to its collections and associated information through research opportunities, traditional and electronic exhibitions, educational programs and publications, reference systems, loan and exchange of collections, and electronic information services. Physical and intellectual access to the collections must be balanced against preservation and protection concerns. Access to collections and collections information may be restricted due to resource limitations, security, object availability, intellectual property rights, applicable restrictions, preservation constraints, and intended use.

In accordance with the Smithsonian's collections management policy (SD-600), each Smithsonian unit possessing collections is required to establish and implement an approved collections management policy tailored to the specific scope and nature of its collections. Unit policies and procedures establish written guidelines for the care and management of collections, including access and use. Each unit establishes authority and assigns responsibility to authorize, monitor, and document access, including appropriate evaluation criteria and procedures for permitting responsible access and use of the collections.

In those rare cases where access is denied based on criteria in unit policies and procedures, it is not uncommon for Smithsonian staff to continue discussion with requesters in order to find a way to meet their needs. While there is no SI-wide appeal process per se, there are numerous avenues through which a requester's needs can be addressed. It is a key Smithsonian goal to provide open access to its collections consistent with its stewardship responsibilities. Toward that end, Smithsonian is currently developing a best practices manual regarding collections management which will include guidelines for collections access and use. However, collections policies for museums will always reflect the specific requirements of their respective collections and disciplines. That manual will be completed in early fall.

12. Under the agreement, the joint venture can remove items from the Smithsonian collections. What restrictions will be placed on the length of time it can borrow collection items? Has the Smithsonian assessed the potential impact on the public and on researchers from allowing Showtime to remove collection items from Smithsonian premises?

The Smithsonian considered the potential impact to Smithsonian collection items in drafting provisions governing this subject. The provisions which govern removal of items from the Smithsonian collections were developed to mirror existing Smithsonian standards and practices for loaning of collection objects. Requests are considered on a case-by-case basis.

Section 4.2.3 of the Trademark License Agreement is the most relevant section: "The Company may remove a Collection Item from the Smithsonian Institution premises only in a manner consistent with the regular collection management policies and practices of the individual Smithsonian Institution units with responsibility for the specific Collection Item. The Smithsonian Institution unit policies relating to the removal of Collection Items from Smithsonian Institution premises consider, among other things, the value, uniqueness, and historical or scientific importance of the Collection Item; <u>the impact of the absence of the Collection Item on the public and on researchers;</u> and physical condition and stability of the Collection Item; any Third-Party Restrictions related to the Collection Item; and environmental

and security requirements related to the Collection Item. Any grant of permission to the Company by the Smithsonian Institution to remove a Collection Item will be subject to the Company's agreement to appropriate conditions for such a removal, including but not limited to such written documentation as the Smithsonian Institution determines is necessary for the protection of the Collection Item." (Emphasis supplied.)

13. Should collection items become damaged when removed by the joint venture, the Smithsonian will have to collect the cost of damages or loss of value from the joint venture. As a partner in the joint venture, will the Smithsonian have to cover a portion of the cost of the damages? Will the cost of such damages paid by the joint venture reduce the earnings the Smithsonian would receive from the programming agreement?

    If a collection object is damaged while Smithsonian Networks is using it, the Smithsonian's recovery would be covered by the insurance that the venture is obligated to carry, which specifically includes (but is not limited to) third party property insurance (Section 17). Any recovery outside of insurance would be paid by Smithsonian Networks. Smithsonian Networks is a separate legal entity, and obligations of Smithsonian Networks are not obligations of the Smithsonian. Since the Smithsonian's license fee from Smithsonian Networks is based on gross revenues, the expenses of Smithsonian Networks do not affect that license fee. Significant losses could theoretically impact the economic value of Smithsonian's equity ownership in the joint venture entity. However, given the standards that apply to permitting collection objects to leave the Smithsonian, it's highly unlikely that the Smithsonian would permit Smithsonian Networks to remove any object of significant value from the Institution (see Question #12).

14. The Smithsonian should ensure that proper governance is in place by requiring the highest level of integrity of the Smithsonian Business Venture Compensation Committee members. Who are members of the SBV Compensation Committee and are they independent of SBV and SI management in terms of prior personal or business relationships? If not, describe the relationships and how the Committee provides independent oversight and avoids conflicts of interest.

    The SBV Compensation Committee is a subcommittee of the SBV Board of Directors, and is an advisory committee that does not have any formal authority; rather, it issues recommendations to the Secretary of the Smithsonian on the compensation of the CEO and senior executives of SBV. The Secretary then provides his recommendations to the Committee on Compensation and Human Resources of the Smithsonian Board of Regents, which then reviews its conclusions with the full Board of Regents.

The current members of the SBV Compensation Committee are Ronald Ruskin (Chairman of the Committee), Adolfo Marzol, and Donald Steiner. All members of the committee are independent directors who maintain no employment relationship or other contractual relationship with the Smithsonian other than their board membership. They are highly experienced and respected in their fields and serve the Institution on a voluntary basis without compensation or special benefits of any kind. Donald Steiner is a professional and personal acquaintance of the SBV CEO from his former position, and Adolfo Marzol is a former colleague of the Smithsonian's Secretary.

The Smithsonian has formal conflict of interest and ethics guidelines under which it operates and which the SBV advisory board also follows. In the case of the SBV Board's Compensation Committee, Donald Steiner has recused himself from advising on the CEO's compensation package to avoid the appearance of any bias.

15. Why was the Smithsonian on Demand programming approached as a business venture rather than a matter of public access programming? If the purpose of the television venture was to expand the reach of the collections to millions of people, would not public access programming provide for the widest distribution?

The Smithsonian does not have finished video programs that could be made available via public access channels. Historically, and in connection with the process that led to the formation of Smithsonian on Demand, the Institution explored a variety of different approaches to developing programming and establishing an ongoing presence in television media. The final approach was based on three primary criteria:

Capability – The Smithsonian recognized early in the process of assessing this opportunity that it did not possess crucial assets and capabilities necessary for the success of the initiative, including produced programming or TV program production expertise. The enterprise requires creation of programming as well as exhibition of such programs. Further, the Smithsonian's lack of experience in marketing and distribution of programming was a significant factor. Partnering with a private entity that possessed these skills and capabilities, and that already was successfully distributing programming in an increasingly complex marketplace, was considered vital to the success of the initiative.

Funding – In order to create a self-sustaining operation that does not rely on ongoing fundraising from sponsors or Institutional or public funding, and given the willingness in the business community to fund the programming

and invest the operating costs, a self-funded joint venture was deemed to be the most attractive approach.

Mission Support- The enterprise was always conceived in a spirit similar to that of Smithsonian Magazine - an offering from the Smithsonian that generates revenues from consumers, rather than one that is underwritten by public support, or is a detraction from other Smithsonian financial priorities.

16. Since Smithsonian Business Ventures is legally part of the Smithsonian, any financial commitments made by SBV or liabilities incurred must be borne by the Smithsonian, which receives 75 percent of its funding from the Federal government.
    - If the joint venture incurs losses, what would be the Smithsonian's share of those losses, and would federal appropriations be used to pay for liabilities incurred by the joint venture?
    - What is the Smithsonian's liability in the event of a breach of the programming and trademark license agreement? Will the money for any damages come from U.S. taxpayers?

    Smithsonian did not make any financial commitments to the joint venture as part of the formation of the venture. Showtime has committed to funding the venture, both from an investment and operating 'loss' basis.

    Historically, the Smithsonian Institution has never sought federal appropriations for damages from breach of contract claims arising from SBV business activities. If the Smithsonian Institution breached the program and trademark license agreement, it is fully the Smithsonian Institution's intention to fund that liability out of its trust funds. The Smithsonian Institution has notified Showtime that the only funds that would be available to satisfy any claims payable by the Smithsonian Institution are the Trust funds, which are not federally funded and are maintained separate and apart from any federal appropriations.

17. The Secretary testified that Smithsonian Business Ventures has earned $155 million in net revenue for the Smithsonian since 2000. How much of the $155 million was already being generated by existing retail and other businesses operated by the Smithsonian before the creation of SBV? What portion of these revenues constitute "new" or "increased" revenue attributed to SBV's management of these activities? For the last 5 years provide the incremental revenue or increases in profit margin associated with SBV's efforts compared to total compensation for SBV executives.

    SBV was established in FY 1998. In the three years leading up to the formation of SBV, the Institution's business activities generated an average of $197 million in revenues per year and net gains of $14.4 million, for a net

margin of 7.3 percent. In the three most recent years, FY 2003 through FY 2005, the Institution's business activities generated an average of $199 million in revenue and net gains of $22.5 million, for a net margin of 11.3%. Total revenues increased by 1 percent over this time period, despite significant decreases in advertising sales associated with the *Smithsonian* magazine, the average net gain increased by 56 percent (from $14.4 million to $22.5 million), and net margins improved from 7.3 percent to 11.3 percent (+55 percent). Another key productivity indicator is net gain generated per visitor. Before SBV, the average net gain per Smithsonian visitor was $0.53. Since establishment of SBV, the average net gain per visitor has increased to $0.99, up nearly 86 percent.

Although the composition of Smithsonian business activities has changed over the past decade, which makes pre-SBV and post-SBV comparisons complex, a key factor in improved Smithsonian net gains and other business performance improvements is the decision to transfer management of the Institution's commercial book publishing activity to SBV at the end of FY 2004. During the FY 1995 through FY 1997 time period, SI Press lost a cumulative amount of nearly $15 million, and in FY 2003 and FY 2004 lost another $4 million. In FY 2005, SBV's first full year managing the commercial press business, their publishing group broke even.

All figures are based on the Smithsonian's audited financial statements, except for The Smithsonian Associates (TSA) financials which have been adjusted as follows: In FY 1995 and FY 1996 TSA data has been adjusted to exclude the contributing membership program, which ceased being reported as a Smithsonian business activity after FY 1996. In FY 2003 through FY 2005, TSA net gains have been adjusted to reflect the approximate $1.3 million annual subsidy its business activities received from the Institution to support operations. From 2001 to 2005, executive compensation increased nominally as a % of revenue from .8% to 1.2% or an average for the period of 1.1%.

18. In 2003, Smithsonian Business Ventures initially proposed a joint venture with another media company for video programming. When this venture was discussed with the SBV Board in 2003, the Board was told that the Smithsonian Institution would be an equity owner in the venture, but would not invest in the equity creation. How have these terms changed from what was presented to the Board in 2003 to what was ultimately agreed to with Showtime?

Both the 2003 joint venture proposal and the deal finalized with Showtime in 2005 called for SI to receive an equity stake in the joint venture, without investing money to receive it. Under the terms of the deal finalized with Showtime, the initial equity stake received as well as the additional equity

interest that the Smithsonian has the option to purchase in the future are higher than the original 2003 proposal.

While elements of the two deals are materially different and the negotiations related to the 2003 proposal never were concluded, the overall economic benefit to the Smithsonian of the terms of the 2005 agreements reached with Showtime compares very favorably with terms of the 2003 joint venture proposal.

19. Did the Smithsonian consider whether the joint venture might negatively affect its relationships with large media companies who are or might become donors to the Institution?

    Yes. During negotiations, a review was conducted of media sponsorships over the last 10 years. Senior Smithsonian management officials, the central Development (fundraising) office, and museum directors were consulted to understand potential impacts to existing and potential future donors. This feedback influenced negotiations and the terms of the final agreements (e.g., ability to produce an annual number of television specials ("one-offs") outside of Smithsonian on Demand). Ultimately, the net assessment was that while some relationships might be impacted, the mission and economic benefits of the joint venture and the accommodations for existing relationships that were carved out in the agreements outweighed and neutralized these potential impacts.

Smithsonian Business Ventures

20. Who are the 11 advisors to the Smithsonian Business Ventures? What is their expertise in cable, television production, film finance & distribution, and new media distribution? Were there attorneys specializing in entertainment law the SI consulted in the crafting of the joint venture agreement? If so, who? And if not, why not? How will SBV and SI executives financially benefit from the joint venture?

    The current SBV advisory board members are:

    Smithsonian members: Sheila Burke (Deputy Secretary), Gary Beer (SBV CEO), John Dailey (Director, National Air and Space Museum), and Alice Maroni (CFO)

    Outside members: Adolfo Marzol, Frank Daniels, Jr., Ronald Ruskin, Donald Steiner, Anthony Welters, and Deborah Widener

Outside board members are recruited for their general business knowledge and experience as well as their experience in the primary existing businesses of SBV. None of the existing board members would be described as an expert in the fields highlighted above, though many have experience that extends more broadly into the media industry.

Dow Lohnes & Albertson, a leading communications law firm based in Washington D.C., served as primary outside counsel to Smithsonian's Office of the General Counsel in the negotiation of the agreements. Additionally, the law firm of Weissmann, Wolff, Bergman, Coleman, Grodin & Evall LLP, based in Los Angeles, CA, and specializing in entertainment law was consulted during the negotiation of certain provisions of the agreements, and the Washington, DC office of Morgan, Lewis and Bockius provided tax-exempt organization tax advice.

There is no direct financial benefit from the joint venture for any SBV or Smithsonian Institution executives. Several of the SBV executives have annual incentive compensation plans that would include revenues earned from the venture in a given year. License fee income actually received from the joint venture in any year would be included in the calculation to determine whether those executives have met their income goals and earned their incentive compensation. The amount of incremental incentive compensation of SBV executives from venture revenue would be nominal.

21. In a rapidly changing, unpredictable media landscape, where 30 year deals are uncommon, why did Smithsonian Business Ventures choose to sign a contract for 30 years? Why was this length of time chosen? What was the proposed length of the contract during the Smithsonian's earlier negotiations with other media companies before it dealt with Showtime?

    It takes many years to build consumer businesses of scale. Cable channels typically take more than 7 years to achieve awareness and broad distribution. Showtime is making a substantial equity investment in the venture and in programming, and the Smithsonian is interested in maximizing the value of its equity ownership as well.

    Both parties have the right to terminate the agreement if the business goals of the enterprise are not met. The 30-year term, while long for a Smithsonian contract, is reasonable and appropriate in light of these considerations.

22. What degree of power does the Board of Smithsonian Business Ventures have? Is it mostly advisory? What criteria are used in selecting the Board members?

The Board of SBV is an advisory board and does not maintain any formal authority to direct the activities of SBV. It historically acted in an oversight capacity and typically makes recommendations to the Secretary of the Smithsonian and the SBV CEO, and from time to time to the Smithsonian's Board of Regents.

The bylaws of the Board and the criteria used to select board members are attached as Appendix 2.

23. Does the agreement with the joint venture adhere to Smithsonian procurement policies? Does SBV follow different procurement rules than the non-profit federal side of the Smithsonian, and if so, why?

Because the agreement with the joint venture was negotiated and awarded by Smithsonian Business Ventures, it followed SBV's procurement practices for non-SBV Smithsonian contracts.

SBV uses commercial business practices in its contracting and procurement, while supporting the Institution's educational mission. SBV is committed to obtaining the best deal at the greatest value for the Institution, which requires that SBV ordinarily compete its business among a select group of qualified vendors rather than a general solicitation to all bidders. SBV's procurement process is consistent with the specialized services and merchandise for which SBV seeks contractors. SBV must be operationally agile to secure quality services and competitive pricing and compete in the marketplace.

The Office of General Counsel provides legal support to SBV in negotiated revenue-producing contracts or other sophisticated transactions. SBV uses the Smithsonian's Office of Contracting to process standard licensing agreements. SBV utilizes standard commercial procurement processes for the purchase of merchandise intended for resale and other consumables. High value and high profile business activities are reviewed by the SBV Board of Directors and approved by the Smithsonian's senior leadership.

24. Have the financial figures upon which SBV executive compensation is based been audited? If so, what was the number of revenue items for each line of business that the auditors tested to ensure revenues were accurately reported?

SBV is an operating unit within the Smithsonian Institution, not a separate entity. The Smithsonian's overall financial statements are audited annually by KPMG. The specific financial figures that form the basis for SBV

executive compensation are not explicitly audited but may be included in the overall testing conducted by the Smithsonian's third-party auditors.

Showtime Networks/Smithsonian Institution Joint Venture

25. For what distribution mediums is the contract for? Just cable? What about satellite? What about new mediums (podcasting, itunes, cell phone viewing, other mediums not yet known)? What ownership (and profit participation) does the Smithsonian have in web, cell phone, iPod, and other new media forms of distribution aside from sharing revenues in the joint venture cable channel?

    Smithsonian Networks (SN) is a collection of authoritative Smithsonian-branded video programming based primarily on or derived from the collections and on-going work of the Smithsonian. SN intends to distribute its programming via multiple distribution platforms, starting with Smithsonian On Demand. Smithsonian On Demand is a "video-on-demand" distribution platform offered by cable system operators. Eventually, SN intends to make its video programming available to consumers by means of other existing and emerging distribution technologies (DVD/Home video, internet, cell phones, etc). These new offerings will be undertaken as the market demands and as new business models emerge. SN was originally structured to evolve into a variety of distribution platforms, and the organizational structure will not require further revision as technology evolves over the term of the contract.

    The Smithsonian Institution's participation in the joint venture's revenue stream through licensing fees and its ownership interest in the venture is the same regardless of distribution methodology.

26. If future donors contractually specify that their collections be open to anyone and everyone's use, or even be digitized and placed online to facilitate access, how will the joint venture respond given that receipt of the donated material by Smithsonian Institution will entail honoring the terms of that contract?

    The agreements specifically highlight that the joint venture's use of Smithsonian content is subject to restrictions imposed by third parties ("Third-Party Restrictions") which may be associated with the donation, which may limit the joint venture's ability to use the content. The joint venture's use of Smithsonian collections is non-exclusive. The only relevant restrictions relate to the Smithsonian's active participation in the development and distribution of TV programs.

27. Under the 30-year terms of the contract, how will the Smithsonian Institution handle changes in ownership of Showtime? What guarantees do the American people have that the contents of America's attic, and the shows made from this

material, will not be controlled by a multinational conglomerate based in some other nation?

Regardless of any future owner of Showtime Networks, the Smithsonian retains complete control over its collections, and the right to approve all programs of Smithsonian Networks for factual accuracy and consistency with the reputation and integrity of the Institution. The Smithsonian does not have any rights over the ownership of its joint venture partner, Showtime Networks, Inc.

28. Once the joint venture makes a program is it owned by the Smithsonian Institution or is it owned by the joint venture? Does this mean that no other program can be made on that subject by outside filmmakers?

    Programs financed and produced by the joint venture are owned by the joint venture. The Smithsonian is a part owner of the joint venture, and therefore, is indirectly a part owner in the copyright. In addition, the Smithsonian has a license from the joint venture to use the programming created by the joint venture at Smithsonian locations.

    Copyright in the programming protects against the reproduction of that programming by third parties. But neither the ownership by the joint venture in the copyright of the programs nor the non-compete clause puts a subject "off limits" to independent filmmakers.

29. What is the definition of "commercial" that is in the contract? Is PBS considered a "commercial" entity according to the agreement? If PBS is included as a commercial broadcaster, what is the justification?

    The term "commercial" is used to identify video programming distributors that are competitive with the joint venture from the perspective of the consumer marketplace (which includes PBS), regardless of their corporate structure. A "Commercial Distributor" is "any exhibitor or distributor of programs that is not a local access channel, educational institution, governmental entity, scientific organization, or research organization."

30. What is the nature of Smithsonian's participation in the archive that will be created by this endeavor? What access will the public have to these films? Will the archive also include related materials, e.g., interviews, outtakes, web material, games, etc?

    Through its ownership in the joint venture, the Smithsonian Institution will be a part owner of the archive or film library created by the joint venture.

The Smithsonian Institution also has the right to display the films or excerpts of the films within its museums and otherwise on its premises, which would include the possibility of integrating them into exhibits. The films/programs will be distributed commercially by the joint venture.

The joint venture's archive will consist primarily of finished programs, but may in some cases include examples of related materials described above.

31. What is the nature of the contracts with producers? Will these be work for hire contracts?

    The joint venture anticipates that the majority of programs developed and produced for Smithsonian Networks will be structured as work-for-hire contracts. However, it also anticipates entering into co-production agreements as well.

32. Does the joint venture contract compel Smithsonian staff to withhold or grant their knowledge and assistance based on Showtime's consideration and terms?

    Smithsonian staff is available to Smithsonian Networks for activities related to the joint venture only to the extent that such participation is not unduly disruptive to the normal course of Smithsonian research and museum activities. (Access Agreement, 2.5.1). The joint venture does not compel Smithsonian staff to participate.

33. Since the Smithsonian name is being used by the joint venture, what quality controls are in place to ensure that the programming will be of high integrity and quality? What happens if Smithsonian experts disagree with the historical interpretation/presentation of the materials?

    The Smithsonian has two opportunities to approve all programming—at the rough cut stage and the final cut stage (Access, 2.6.4). The Smithsonian has the right to approve every program for:

    (i) Factual, historical, and scientific accuracy,
    (ii) Consistency with the high standards, quality, and image of the Smithsonian, including its reputation in the fields of science, history, and culture (TLA, 2.2).

    The Smithsonian is developing Institutional procedures and processes to assure that programming is consistent with these standards.

34. What are the requirements for limiting posting video on the Internet? Will this prevent Smithsonian from posting new video?

    See answer to 42.

35. Will the joint venture be required to pay for the Smithsonian resources used to make the films, or is this "included" in the minimum payments Showtime makes to the Smithsonian?

    There are many contract provisions which specifically address this question. Generally, however, in consideration for the license fees, ownership rights, and other benefits, the Smithsonian has granted the joint venture rights to (i) use its trademarks in the operation of its business and (ii) access and use Smithsonian content in the development and production of video programming for distribution by the joint venture.

    These rights of access and use will be managed at the Smithsonian by "Smithsonian Institution Coordinators," whose salaries and other direct costs will be paid for by the joint venture. Additionally, any direct out-of-pocket costs incurred by the Smithsonian in providing access to and use of Smithsonian content (e.g. staff overtime, security, transportation) and facilitating production of programs will be reimbursed by the joint venture independent of license fees.

36. Have any filmmakers been denied access to materials or use of their product? Have any filmmakers ideas been submitted for review to Showtime/Smithsonian on demand? If so, were the filmmakers notified that their requests had gone to Showtime (or Smithsonian on demand) for review?

    To date, out of 22 filming requests received between March 1, and July 11, 2006, only one was declined as a result of lack of interest by the Museum as well as the terms of the agreement. To date, two outside producers' ideas have been submitted to Smithsonian on Demand after the ideas were submitted to the Smithsonian. In each case, the producer agreed in advance that the film script would be provided to Smithsonian on Demand.

37. What is the definition of "incidental use" that will be used to determine whether filmmakers can use artifacts, archival materials, and Smithsonian experts in their films? Who will decide? How will those people be chosen? What appeals mechanism will be in place for filmmakers who are denied use? Does the joint venture have the ability to appeal the decision to grant use to Smithsonian collections?

"Incidental" is not a defined term in the contract. This approach, which is desirable from the Smithsonian's perspective, requires interpretation based on the context of the individual program in which the Smithsonian content will be used. Webster's Dictionary defines incidental as "of a minor, casual, or subordinate nature," and Webster's Dictionary of Law defines incidental as "subordinate or secondary in importance or position."

Since it's the Smithsonian's responsibility to comply with the non-compete clause, it's the Smithsonian's right to determine if a proposed use is incidental. The contract does not require the Smithsonian to go to Smithsonian Networks and ask for approval of each potential incidental use or even to notify Smithsonian Networks if incidental uses are authorized. Therefore, the joint venture does not have the right to appeal the Smithsonian's use of its collections, because it is not a party to the determination.

Since 2001, Smithsonian policy has required and continues to require that filming requests be directed to each museum's Public Information Officer for processing. If the Public Information Officer determines that a request is otherwise appropriate, including that the requested curator is interested and available, the Public Information Officer will refer the request to a committee in the central Office of Public Affairs. That committee, established by the Deputy Secretary to assure that such requests are treated similarly across the Institution, includes staff of the Office of Public Affairs and Public Information Officers. Assuming that the filming request is not for an academic program, for a program to be distribution by a non-commercial distributor, or does not fall within any other specific exception to the non-compete clause (in which case the use would proceed without further analysis), the committee will consider whether the proposed use is incidental in the context of the program proposed. The committee will solicit assistance from curators and other staff knowledgeable in the subject matter area in making this determination. If the Smithsonian determines that a proposed use of Smithsonian content is more than incidental, the committee also might talk with the requestor to determine whether the amount of Smithsonian content proposed to be used might be reduced so that it would fall within the parameters of "incidental."

38. Are there penalties applied to the Smithsonian for actions that Showtime deems inappropriate? What are the penalties? What kinds of infractions will incur penalties?

As is the case with any contract, if either the Smithsonian or Smithsonian Networks materially breaches a term of the agreements, the other party has the right to demand that the breach be cured and, if the breach is not cured, sue the other party for actual damages and/or terminate the agreement. The

"penalties" associated with breaches are not at the discretion or determination of Showtime. In the case of the non-compete clause, the Smithsonian Institution and Smithsonian Networks agreed to a pre-determined "daily rate" for liquidated damages in the event Smithsonian refuses to cure a continuing breach of those provisions, if the harm to Smithsonian Networks caused by the breach is material, and if Smithsonian Networks is unable to obtain an injunction against any third party involved in the breaching action.

39. Secretary Small mentioned that the two parties to the contract have different conditions under which they can terminate the deal. What are those conditions? The Secretary also said that if the partnership is successful, the Smithsonian "can't get out of the deal." What are the targets that define "success"?

    The answers to these questions are captured in the attached Appendix 3 which addresses Benchmarks and Termination Rights associated with the agreements.

40. Have some broadcasters have been grandfathered in and given exceptions? Do the limitations in the contract apply to all broadcasters?

    "Non-commercial distributors" (e.g., local access channels, NASA's television station, C-Span) are not competitive with the joint venture and so there is no limitation on use of Smithsonian resources for filming for distribution by these distributors.

    Individual broadcasters/distributors are not grandfathered under the terms of the agreements; pre-existing television projects or productions are (e.g., Broadcaster X is not grandfathered, but Project Y produced for broadcast on Broadcaster X is grandfathered). Programs produced prior to the effective date of the agreements are grandfathered under the terms of the agreements. Additionally, there is a short list, approximately 10-15 projects, for which there was a contract prior to the effective date but for which access to Smithsonian resources had not taken place by the effective date, which are grandfathered and can continue.

    Limitations in the contract apply generally to the type of program or programming being produced rather than to the individual broadcasters/distributors. For example, there is no limitation on the use of Smithsonian resources for news and public affairs filming, or for filming for academic and curriculum-based projects, or for film projects intended for a scholarly audience, regardless of distributor/broadcaster.

In addition, the Smithsonian has the ability to agree to the production of a limited number of programs which may be first exhibited each year on any outlet.

41. Digital cable may be the wave of the future, but at the moment most Americans probably have less advanced and less expensive means of cable access. If TV cable subscribers do not have digital cable—and most currently do not, how can they access Smithsonian programming which would be produced under the contract? Will they be left out?

    See answer to question #25. It is the venture's intent to make programming available by means of a variety of distribution platforms and technologies over time (including satellite, DVD/Home Video, linear cable, Internet, cell phones, etc.). It is also expected that individual programs will be sold to broadcasters and for other markets after it has shown on Smithsonian on Demand.

42. In Regents meeting minutes provided to the Committee, there is a reference to "risks" involved with the new venture. One of them is called "Restrictions on Smithsonian Internet Activities" and goes on to say "because the service will be offered to cable and broadband internet subscribers, there will also be restrictions on the aggregation of general interest audiovisual programs on Smithsonian's websites that might be viewed as competitive with the Service. However, academic, scholarly and curriculum-based content will not be restricted, nor would web content created for museum exhibits and interactive visits online." So what exactly has been removed?

    The Smithsonian Institution and Smithsonian Networks agreed that there is a quantity of audiovisual programming that, when aggregated on a single webpage, is so similar to video on demand that it would be competitive with Smithsonian Networks. But that aggregation limitation (no more than 10 programs totaling no more than 60 minutes on a webpage, or one program of more than 60 minutes on a webpage) does not include academic, curriculum-based, or scholarly programs, or virtual exhibitions or online exhibition tours.

    The limitation applies to HOW video programming is presented, not to WHETHER it is presented. Smithsonian websites can contain myriad video programs, just not presented in a "video on demand" format. Smithsonian.tv, a video on demand offering on the Smithsonian website, has been disabled in its current form, and a committee of Smithsonian website experts is reviewing where else on the Smithsonian website that content might be posted.

APPENDICES

- **Appendix 1: The list of 17 films (Question #3)**
- **Appendix 2: The Bylaws of the Board and the criteria used to select Board Members (Question #22)**
- **Appendix 3: Benchmarks and Termination Rights (Question #39)**

APPENDIX 1

PROGRAMS REPRESENTING MORE THAN INCIDENTAL USE OF SI CONTENT (2000 – 2005)

1. "Giant Panda" Specials – 2001, 2005
   Two 60-mins specials with NZP (one aired 2001; one 2005) on giant pandas done in conjunction with media sponsorship with Animal Planet/Discovery.

2. "Total Zoo" – 2001
   13-episode series with NZP included in 30 minutes of various 60-mins episodes of series done in conjunction with media sponsorship with Animal Planet/Discovery.

3. "Piano Grand!" Special – 2001
   A program celebrating the anniversary of the grand piano; interviews and taped performance as full 60-mins program co-produced with Smithsonian Productions and Maryland Public Television, distributed during PBS pledge-drive.

4. "Behind Closed Doors with Joan Lunden" – 2001
   A program taking a behind-the-scenes look at the preservation work done at NASM's Garber Facility as 30 minutes of overall 60-mins program on A&E.

5. "Standard Deviants" – 2001
   A program on Dinosaur Hall and Fossil Lab at NMNH as 20 minutes of overall 60-mins show for PBS.

6. "Canela Indians" – 2001
   License of 52 minutes of archival footage on the Canela Indians for use by Discovery; total amount of footage included in overall program unknown.

7. "The Great Museums of the World" – 2002
   A program showcasing various Smithsonian museums as a 60-mins episode of multi-episode series on Discovery.

8. "Vikings" – 2002
   A program about Vikings with an interview of NMNH scientist for 10 minutes of overall 40-mins program on The History Channel, shown again on PBS.

9. "Stoneage Columbus" – 2002
   A program incorporating approximately 25 minutes of overall 50-mins show for BBC; content used from NMNH unknown.

10. "Billy Mitchell and the First World Flight" – 2004
    A program about the aviation pioneer, Billy Mitchell; interviews with various curators and collection items at NASM totaling 20 minutes of overall 90-mins show on The History Channel.

11. "Ghosts of the Hunley" – 2004
    A program on the mysteries of the Hunley, including interviews with NHMN scientist Doug and his research as 10 minutes of 43-mins show on National Geographic.

12. "Kandula Elephant" – 2004
    A program following the science and research on Kandula, the elephant, at NZP as part of research funding by Discovery.

13. "Michaela's Wild Challenge Series 2" – 2004
    Inclusion of STRI scientific research on bats, bees, and the Harpy Eagle as one 30-mins episode in 13-episode series for Discovery UK.

14. "Microworld of 2 Acres" – 2004
    Followed NMNH scientist as he uncovered bugs in his backyard as 20 minutes of a 60-mins show for NHK.

15. "Unsolved Mystery" – 2004
    A program on various unsolved mysteries, which included interview with Jeff Post and the Hope Diamond as 15-20 minutes of 52-60-mins show on Discovery.

16. "Save Our History" – 2005
    Followed NASM's restoration work on Saturn V in Texas as 20 minutes of 60-mins episode for 4-part series on The History Channel.

17. "Written in Bone" – In development; to be aired 2007
    A program to be produced following NMNH scientist's discoveries in Jamestown as part of exhibit funding by The History Channel.

APPENDIX 2

AMENDMENTS TO THE BYLAWS OF SMITHSONIAN ADVISORY BOARDS

Requests for Bylaw revisions have been received from the following:

Smithsonian Business Ventures Board of Directors

Changes to the Bylaws of the Smithsonian Business Ventures Board of Directors are suggested to increase the size of the Board by one member and, in addition, to include the positions of Smithsonian Institution Deputy Secretary and Chief Operating Officer and Chief Financial Officer of the Smithsonian on the Board.

SMITHSONIAN BUSINESS VENTURES BOARD OF DIRECTORS

The following motion is suggested:

> **VOTED** that the Board of Regents approves the proposed revisions to the Bylaws of the Smithsonian Business Ventures Board of Directors.

BYLAWS OF THE
SMITHSONIAN BUSINESS VENTURES
BOARD OF DIRECTORS

Preamble

In September of 1998, the Board of Regents of the Smithsonian Institution authorized the Secretary of the Smithsonian ("Secretary") to reorganize the various business activities within the Smithsonian into a centralized business entity, Smithsonian Business Ventures ("SBV"). The purpose of the reorganization is to reinvigorate the Smithsonian business activities with an aggressive entrepreneurial spirit and culture. The Board of Regents authorized the establishment of a Board of Directors for SBV ("SBV Board"), to be composed of individuals with top management skills and experience, to provide advice and recommendations to the Board of Regents and Secretary concerning the operation of SBV. Smithsonian business activities to be included within the purview of SBV are within the discretion of the Secretary. Direct management of SBV will be the responsibility of the SBV Chief Executive Officer ("CEO"), who is appointed by and reports to the Secretary. All revenue derived from the activities of SBV shall be used for support of the mission of the Smithsonian Institution.

Role of the SBV Board

The SBV Board will serve similar functions as are generally performed by the boards of for-profit corporations, especially those with intense interest in preserving and promoting the long term image of their brand names. The Regents envision that this will be a working board, involved in the overall management of the venture to add value to guide, advise, and support its CEO. The SBV Board's core duty is to ensure that all appropriate plans and policies are in place to maximize the financial value of the assets under its stewardship to support the overall mission of the Institution and to evaluate the performance of the CEO. Direct management of the entity will be the responsibility of the CEO.

ARTICLE I

Purpose and Functions

The SBV Board shall provide advice, guidance, and recommendations to the Smithsonian Board of Regents, Secretary, and CEO of SBV concerning the operation of SBV, and provide general counsel on the performance and activities of SBV. The SBV Board acts solely within the authority granted to it by the Smithsonian Board of Regents and the Secretary. The CEO must consult with and seek the recommendations of the SBV Board concerning the specific functions set forth in these Bylaws, and may consult with and seek recommendations of the SBV Board on any other matters within the purview of SBV. Specific functions of the SBV Board include, but are not limited to:

(a) Provide advice and recommendations to the Secretary concerning the recruitment, selection, performance, and compensation of the CEO;

(b) Provide substantive advice to the CEO on policy issues, especially strategy development, industry standard business deals, new initiatives, culture changes, capital spending, and other long-term commitments;

(c) Review and advise the CEO and the Secretary on major external relationships, including joint ventures, corporate sponsorships, licensing, and affiliate programs;

(d) Make introductions for the CEO to qualified "outsiders" who could help achieve the mission of the venture;

(e) Provide advice and recommendations concerning the annual and long-term business plans of SBV;

(f) Provide advice and recommendations concerning SBV capital spending;

(g) Provide marketplace perspective to the Secretary on any matters involving perceived tradeoffs between commercial and traditional approaches to accomplishing the overall mission of the Institution; and

(h) Provide advice to the CEO on the selection, performance, and compensation of senior officers of SBV.

ARTICLE II

Directors

Section 1. Number, Composition and Qualification of Directors. The authorized number of directors shall be not less than six (6) nor more than twelve (12). The exact number of authorized directors shall be six (6) initially, and once the CEO is hired, in consultation with him or her, the number shall increase to nine and may increase to twelve (12) until changed by a bylaw amending this section. The CEO, the Deputy Secretary and Chief Operating Officer of the Smithsonian, the Chief Financial Officer of the Smithsonian, and one other Smithsonian staff representative, such as a museum director, designated by the Secretary shall be appointed to the SBV Board. The remaining directors shall be non-Smithsonian personnel with relevant business experience in some of the following areas: brand management of intellectual property/licensing; direct marketing; advertising; media; finance; retailing; startups and turnarounds; organizational development and human resources.

Section 2. Appointment and Term of Office of Directors. All directors shall be appointed by the Board of Regents. The Board of Regents shall initially appoint the directors for a two-year term (e.g. until the year 2001). Prior to the conclusion of the initial two-year term, the directors shall draw lots numbered one through the actual number of directors. The first three directors (numbers 1 through 3) shall serve an additional one-year term (until 2002). The second three directors (numbers 4 through 6) shall serve an additional two-year term (until 2003). The last three directors (7 through 9) shall serve an additional three-year term (until 2004). Thereafter directors shall be appointed for three-year staggered terms. Directors who, in the opinion of the Board of Regents, have rendered exemplary service to SBV may be appointed to subsequent three-year terms.

As the SBV Board is expanded, the Regents shall stagger the terms of additional director positions as they, in their discretion, deem appropriate.

Section 3. Vacancies. A vacancy in the SBV Board shall be deemed to exist (a) if a director dies, resigns, or is removed by the Board of Regents; (b) if a director is convicted of a felony or declared of unsound mind by an order of court; (c) if the authorized number of directors is increased by the Board of Regents; or (d) if fewer than the authorized number of directors have been appointed by the Board of Regents.

Any director may resign effective on giving written notice to the chair of the SBV Board of Directors or the Secretary of the Smithsonian. If the resignation is effective prior to the next meeting of the Board of Regents, the Executive Committee of the Board of Regents may appoint a successor to take office when the resignation becomes effective.

The SBV Board will recruit new members to the SBV Board through its nominating committee. The SBV Board and the CEO may make recommendations for director positions to the Secretary. The Secretary shall consult with the CEO and the SBV Board prior to making a recommendation to the Board of Regents. Vacancies on the SBV Board may be filled only by approval of the Board of Regents based upon the recommendation of the Secretary, who will give great weight to the recommendations of the SBV Board.

The Board of Regents may appoint a director at any time to fill a vacancy on the SBV Board.

The term of office of a director appointed to fill a vacancy shall run until the expiration of the seat to which he or she is appointed.

Section 4. Fees and Compensation of Directors. Directors and members of committees of the SBV Board serve without compensation, but may be reimbursed for necessary travel and other actual expenses incurred in connection with service on the SBV Board or its committees, in accordance with generally applicable Smithsonian policies. This section shall not be construed to preclude any internal director (such as the Under Secretary, a museum director or the CEO) from receiving compensation for their services as employees of the Smithsonian.

ARTICLE III

MEETINGS

Section 1. Place of Meetings; Telephone Meetings. Regular meetings of the SBV Board may be held at any place within or outside the District of Columbia as designated from time to time by the SBV Board. In the absence of a designation, regular meetings shall be held at the principal executive office of SBV. Special meetings of the SBV Board shall be held at any place within or outside the District of Columbia designated in the notice of the time, date and place of the meeting, or if the notice does not state a place, or if there is no notice, at the principal executive office of the SBV. Any meeting, regular or special, may be held by telephone conference, digital video conferencing or similar communication equipment, provided that all directors participating can hear one another.

Section 2. Annual Meeting. The SBV Board shall hold its annual meeting in September at the date, time, and place designated by the SBV Board.

Section 3. Regular Meetings. Regular meetings of the SBV Board shall be held from time to time without call at times, dates and places to be fixed by the SBV Board. Regular meetings will be scheduled at least one month in advance. The SBV Board expects to have four (4) such regular meetings annually, but the number may be adjusted according to need.

Section 4. Special Meetings. Special meetings of the SBV Board may be called for any purpose or purposes at any time by the chair of the SBV Board, the CEO, or any three directors.

Special meetings shall be held on one-week notice by mail or forty-eight hours notice delivered personally or by telephone, facsimile or telegraph. Oral notice given personally or by telephone may be transmitted either to the director or to a person at the director's office who can reasonably be expected to communicate it promptly to the director. Written notice, if used, shall be addressed to each director at the address shown on the SBV Board records. The notice need not specify the purpose of the meeting, nor need it specify the place if the meeting is to be held at the principal executive office of the SBV.

Section 5. Quorum. A majority of the actual number of appointed directors shall constitute a quorum for the transaction of business, except to adjourn as provided in Section 7 of this Article III. Every act or decision done or made by a majority of the directors present at a meeting duly held at which a quorum is present shall be regarded as the act of the SBV Board. A meeting at which a quorum is initially present may continue to transact business, notwithstanding the withdrawal of directors, if any action taken is approved by at least a majority of the required quorum for that meeting.

Section 6. Waiver of Notice. Notice of a meeting, although otherwise required, need not be given to any director who (a) either before or after the meeting signs a waiver of notice or a consent to holding the meeting without being given notice, (b) signs an approval of the minutes of the meeting, or (c) attends the meeting without protesting the lack of notice before or at the beginning of the meeting. Waivers of notice or consents need not specify the purpose of the meeting. All waivers, consents, and approvals of the minutes shall be filed with the SBV Board records or made a part of the minutes of the meeting.

Section 7. Adjournment to another Time or Place. Whether or not a quorum is present, a majority of the directors present may adjourn any meeting to another time or place.

Section 8. Notice of Adjourned Meeting. Notice of the time and place of resuming a meeting that has been adjourned need not be given unless the adjournment is for more than 24 hours, in which case notice shall be given, before the time set for resuming the adjourned meeting, to the directors who were not present at the time of the adjournment. Notice need not be given in any case to directors who were present at the time of adjournment.

Section 9. Action without a Meeting. Any action required or permitted to be taken by the SBV Board may be taken without a meeting, if a majority of the total number of eligible directors shall individually or collectively consent in writing to such action. Any written consent to such action may be given by electronic facsimile, and approval of such action by written consent shall have the same force and effect as a vote of the SBV Board. All written consents shall be filed with the minutes of the proceedings of the SBV Board.

Section 10. Minutes. The CEO will ensure that minutes of all meetings of the SBV Board and its committees are taken and kept at the principal executive office of SBV.

ARTICLE IV

COMMITTEES

Section 1. Executive and Other Committees of the SBV Board. The SBV Board may, by resolution adopted by a majority of directors, designate an executive committee or one or more other committees, each consisting of two or more directors. The chairman of the SBV Board shall appoint the members of each committee and designate a committee chair. Individuals who are not directors of the SBV Board may be appointed to committees in a non-voting capacity.

Section 2. NOMINATING COMMITTEE. There shall be a nominating committee that will nominate candidates to fill vacancies on the SBV Board. Nominees will be considered by the full SBV Board for recommendation to the Secretary for appointment by the Board of Regents. The chairman of the SBV Board shall be the chairman of the nominating committee and shall appoint two or more directors to the committee. The CEO shall be a voting member of the nominating committee.

ARTICLE V

OFFICERS

Section 1. Officers. The officers of the SBV Board shall be a chair and one or more vice-chairs. Officers of the SBV Board shall be elected at the annual meeting by majority vote of the SBV Board to serve for a term of one year. Officers may be elected for no more than two consecutive one-year terms.

Section 2. Chair. The SBV Board Chair shall preside, if present, at board meetings and shall exercise and perform such other powers and duties as may be assigned from time to time by the SBV Board within the scope of its authority.

Section 3. Vice Chairs. If desired, one or more Vice Chairs may be elected by the SBV Board. In the absence or disability of the SBV Board Chair, the Chair's duties and responsibilities shall be carried out by the highest ranking available Vice Chair if Vice Chairs are ranked, or, if not, by a Vice Chair designated by the Secretary. When so acting, a Vice Chair shall have all the powers and duties of the Chair. Vice Chairs shall have such other powers and duties as may be assigned from time to time by the SBV Board within the scope of its authority.

ARTICLE VI

INDEMNIFICATION OF DIRECTORS, OFFICERS, EMPLOYEES, AND OTHER AGENTS

Members of the SBV Board, members of committees of the SBV Board, advisory bodies to the SBV Board, officers and employees of SBV will be indemnified for any and all liabilities and reasonable expenses incurred in connection with any claim, action, suit, or proceeding arising from present or past service of SBV, in accordance with any indemnification resolution adopted from time to time by the Board of Regents. Directors will be provided with copies of the indemnification policy upon selection for the SBV Board and will be promptly informed of any changes to that policy.

ARTICLE VII

DISCLOSURE

A director of the SBV Board has a duty of loyalty to Smithsonian Business Ventures and shall disclose in writing to the Chair of the SBV Board any financial transaction or business dealing with the Smithsonian Institution or SBV in which such director has a direct or indirect involvement. If the disposition of any matter that comes before the SBV Board would be likely to materially affect a financial or other interest of a director of the SBV Board or his or her immediate family, such director shall inform the presiding officer and abstain from participation in discussion or decision on that matter. Directors are otherwise exempt from filing the Smithsonian Financial Disclosure statement.

ARTICLE VIII

AMENDMENTS

Bylaws of the SBV Board are subject to the approval of the Board of Regents. The SBV Board may by simple majority vote recommend to the Board of Regents the adoption, amendment, or repeal of its bylaws.

APPENDIX 3

SMITHSONIAN ON DEMAND
Benchmarks and Termination Rights

Smithsonian
SI has the right to terminate if the Smithsonian Networks venture is not successful. Success is defined as follows:

Year 1	Performance benchmark: Launch service by June 30, 2007
Year 5	Programming benchmark: Smithsonian Networks invests at least $25 million in programming during the course of years 1-5.
Year 11	Revenue benchmark: Smithsonian Networks generates average of $50 million in revenue during years 10, 11, and 12.

If Year 1, 5, or 11 year benchmarks are not met, SI has the right to terminate the agreement.

Showtime/Smithsonian Networks

Year 1	Early termination right: Showtime has the right to terminate the agreement creating the joint venture (the LLC Agreement) for Showtime's convenience at the end of the first year, provided the venture has made a good faith effort to succeed, as demonstrated by 1) Showtime contributes at least $4 million to Smithsonian Networks, AND 2) Smithsonian Networks spends at least $3 million of that on programming (of which at least $2.1 million must be for original productions vs. acquired), AND 3) Smithsonian Networks pays SI the first year minimum license fee under the Trademark License Agreement of $500K, AND 4) Smithsonian Networks makes sales presentations on SOD to 3 of the 5 largest cable operators. If Showtime and/or Smithsonian Networks fail to commit these resources, Smithsonian Networks must continue to pay license fees and has no "no fault" right to terminate until year 5.
Year 5	Periodic termination right: Showtime has the right to terminate Trademark License Agreement every 5 years at its election.

Either party

Showtime, Smithsonian Networks, and SI each have the right to terminate if the other party breaches an agreement to which it is a party, and in general the termination of one agreement is the basis for the termination of the other agreements. In addition, the Smithsonian and Showtime may agree to terminate the LLC Agreement.

All termination provisions contain requirements for notice, varying from 30 to 90 days depending on the provision in question.

[Whereupon, at 3:01 p.m., the committee was adjourned.]